THE IDEOLOGY OF GENUS & THE GHOST OF HEIDEGGER®

Maria Grahn-Farley∗

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* Maria Grahn-Farley, Visiting Scholar, Boston College Department of Sociology (2003-2004). Andrew W. Mellon Post-doctoral Fellow, University of California Humanities Research Institute’s Sawyer Seminar Program on Redress in Social Thought, Law, and Literature (2002–2003). Visiting Adjunct Professor, Golden Gate University School of Law (2001–2002). Former member of the National Board of Rädda Barnen (Save the Children, Sweden). LL.M., Gothenburg University School of Economics and Commercial Law, Sweden. This Article has its origin in a talk presented at Duke University in the Fall of 2002. I want to thank Samuel R. Miller, Esq., Professor Lisa Yoneyama of the University of California at San Diego and Professor Judith Jackson Fossett of the University of Southern California for comments on previous drafts of this article. I want to thank Kathryn R. Schwartzstein and Andrew B. Smith for their research assistance. I want to thank the Boston College Department of Sociology for their hospitality. I also want to thank John C. Knapp, the Editor-in-Chief of the Brooklyn Journal of International Law, for his excellent editorial work. Finally, I want to thank my husband Anthony Paul Farley for his encouragement and support.
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SUMMARY

Homophobia is the end station on the line that runs through racism and sexism. If one follows the internal logics of the ideologies of racism and sexism to their end, one arrives at homophobia and the question of reproduction. This relationship between racism, sexism and homophobia does not mean that a person opposed to racism cannot be homophobic or sexist. It does not mean that a person opposed to sexism cannot be racist or homophobic. And it does not mean that a person opposed to homophobia cannot be both racist and sexist. The internal logic of the Ideology of Genus is a logic that finds its expression in racism, and sexism, and meets its point of implosion in the ideology of homophobia.¹

The way that racism, sexism and homophobia are interlinked will be revealed to the reader who completes the journey through this Article. This Article follows three tracks that are each haunted by a fascist past and present. The first track follows the haunting spirit of the National Socialist Party in the work of Martin Heidegger.² Heidegger is chosen as the repre-

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¹ The word genus in a Heideggerian sense has the meaning of a class that can be subdivided into species. MARTIN HEIDEGGER, BEING & TIME 22 (H. 3) (John Macquarrie & Edward Robinson trans., 1962) [hereinafter HEIDEGGER, BEING & TIME]. For the convenience of readers with other editions, citations to Heidegger's Being & Time will include the page number in the Macquarrie & Robinson translation first, followed by the page numbers from the eighth (1957) German edition, marked "H" in parentheses.

² Heidegger's philosophy has come to symbolize a spiritualization of a Nazi ideology. See JACQUES DERRIDA, OF SPIRIT: HEIDEGGER AND THE QUESTION 39 (Geoffrey Bennington & Rachel Bowlby, trans., U. of Chicago Press 1989) (1987) [hereinafter DERRIDA, OF SPIRIT]. Heidegger himself explained his endorsement of the Nazi party, stating that it fulfilled the central theme of his own philosophy around the concept of historicity. See Thomas Sheehan, Reading a Life: Heidegger and Hard Times [hereinafter Sheehan], in THE CAMBRIDGE COMPANION TO HEIDEGGER 70, 85–86, 92 (Charles B. Guignon ed., 1993). The concept of historicity leads to the understanding that everything and everyone ought to be understood in their historical context. Historicity implies that history is embedded within the thing itself. See Dorothea Frede, The Question of Being: Heidegger's Project [hereinafter Frede], in THE CAMBRIDGE COMPANION TO HEIDEGGER, supra at 42, 43, 64. For a general introduction to Heidegger as a philosopher and as a member of the National Socialist Party, see Charles Guignon, Introduction, THE CAMBRIDGE COMPANION TO HEIDEGGER, supra at 1–41.
sentative of National Socialism in philosophy because he is one of the most influential intellectuals in contemporary thinking and also embraced National Socialism without apology, even upon his deathbed in 1976. The second track is the examination of the presence of Heidegger’s ghost in the contemporary debate over the right of same-sex couples to adopt. The Swedish national debate over same-sex couples and adoption serves as an illustrative case study of the presence of the fascist ghost in the most unexpected arenas of civic life. The third track is the fable of the ghosts or spirits that haunted Heidegger himself. These are the Wesen of the Germanic folklore culture in which Heidegger was raised and lived. This Article will argue


4. This Article is not about the racial and economic implications of members of one group or one part of the world adopting children from another group or another part of the world. For a discussion of the relationships between race, racism and the economic ability to adopt children and their implications for children and society, see Ruth-Arlene W. Howe, Redefining the Transracial Adoption Controversy, 2 Duke J. Gender L. & Pol’y 131 (1995); Zanita E. Fenton, In a World Not Their Own: The Adoption of Black Children, 10 Harv. Black Letter L. J. 39 (1993).

5. It is possible to argue that Heidegger’s compulsion to categorize can be traced back to Aristotle and his doctrine of categories. See Frede, supra note 2, at 44–45; Sheehan, supra note 2, at 80–81. I have chosen to trace Heidegger’s categorizations and his fear of mis-categorization not to Aristotle but to a rural Germanic folklore belief in essences. I do not refer to philosophical anthropology, which has been attached to Heidegger’s interest in “Man.” Heidegger himself rejected the connection between his work and philosophical anthropology. See Spiegelberg, supra note 3, at 351. Instead of looking at Heidegger’s search for Man, I am looking at his fear of the Other. I trace Heidegger’s care for the correct classifications of the Essential to the folklore beliefs in Wesen.

What Heidegger calls Wesen has been translated into English as “essesces.” In German rural culture, Wesen is the generic term for the spirits that exist in the world, but occupy another dimension. They include elves, leprechauns and trolls. These Wesen are the spirits that haunted Heidegger and compelled him to search for Dasein, or the Human. Within the German rural culture there are more specific Wesens, some very local and others more widespread. Many of those Wesen masquerade as humans to seduce a human to enter their world, often by putting a spell on him or by appearing in front of
that the German folkloric belief in Wesen, such as elves, leprechauns, and trolls, was central to Heidegger’s concept of Dasein and his fear of the Other. The author’s method is to treat these as beliefs and not as mere metaphors. The three parallel tracks of this Article serve the author’s intention to show that fascism is an ideology that is very much alive and present today.

I. PURPOSE

The purpose of this Article is to show that the ghost of fascism is still haunting present-day social and legal discourse.
One way in which the ghost of fascism shows itself is in the rupture caused by the debate over same-sex couples and adoption. This debate reveals that under the surface of post-fascist society lurks the ghost of fascism.

II. ORGANIZATION OF THE ARTICLE

The format of this Article itself serves as a structure through which the Ideology of Genus is shown. The text tells the story in the form of a case study of the national debate in Sweden over same-sex couples’ right to adopt children. The footnotes tell the story of the Ghost of Heidegger and the culture in which the debate over same-sex couples and adoption can become as heated and emotional as it has in Europe and the United States. The stories can be read separately or in concert because they are ideologically related in both form and substance.

III. INTRODUCTION

The belief in genus is the belief that the world can be subdivided into different categories, or genera, and that those categories are based on kinships within each category. The belief that the interactions between categories have to be controlled for there to be order in the world spiritualizes categorization itself, at which point it becomes the Ideology of Genus. This form of compulsive categorization of the world, justified by reference to a higher world order is a spiritualization of a compulsion: the spiritualization of categorization.

8. See HEIDEGGER, BEING & Time, supra note 1, at 22 (H. 3).
9. National Socialism under the spell of Heidegger followed a spiritualization of categorization. This Article is written from the perspective of a spiritualization of categorization itself. See Jamaica Kincaid, In History, 20 CALLALOO 1–7 (1997). Kincaid connects the categorization mania of Christopher Columbus when he arrived in the New World with that of Carl von Linné (1707–1778), when he arrived in the New World of Lappland, Sweden. The compulsion to categorize preceded the two New Worlds. It was the discovery of the two New Worlds that made categorization possible in the Heideggerian sense of constituting and being constituted through categorization.
10. The compulsion to categorize is conditioned upon the ability to do so. This is also how the Ideology of Genus is an ideology dependent on social hierarchy. See generally GARGI BHATTACHARYYA, TALES OF DARK-SKINNED WOMEN: RACE, GENDER AND GLOBAL CULTURE 71–72 (1998).
IV. QUESTION & ANSWER

In the Spring of 2002 the Riksdag, the Swedish Parliament, was both the sender and the receiver of the question: Should it be possible for same-sex couples to adopt children? The Parliament, the legislative branch of the state, created with their question-answer routine a legitimacy to legislate. This circular process of legitimacy is made possible by its artificial separation of the body that asks and the body that answers. The answer that came back was, yes, same-sex couples should be able to adopt children.

11. The Swedish language does not have a comparable term to “same-sex.” The term “homosexual couple” is used to communicate the same meaning. The term “homosexual” in the context of the Swedish national debate is not necessarily a way of referring to a person’s sexual identity but rather to a construction of a couple.


13. Bennington describes this process of legitimating and separating as fundamental to the concept of citizenship:

The citizen does not pre-exist the sending of this letter, but is created by it: ‘sovereign’ and ‘subject’ are Rousseau’s names for the sender and the addressee of the legislative letter, and ‘citizen’ the name which implies that the structure of the law allows the identity of sender and addressee to be asserted…The citizen sends himself the law, and in this sending names himself as citizen….


What does it mean to question, or rather to formulate and then ask the question: *Should same-sex couples legally be able to adopt children?* It is not possible to ask the question without also leaving room for an answer. The question also determines the range of the answers that it is possible to give. To make this into a question is to act unethically, to essentially question someone’s humanity. It is to make the question of adoption an ethical question within a highly unethical and unquestioned questioning of humanity itself. In this case it was the Parliament committing an act of “outing,” without having to take the responsibility for the act because it was disguised in the form of a question-answer routine.

More broadly, to question who may adopt is to question who is really (or fully) human, and to question this is to begin a dis-

Interestingly, after the United States Supreme Court struck down state laws that had made sex between people of the same sex a crime in Lawrence v. Texas, 123 S.Ct. 2472 (2003), conservatives immediately began calling for legislation defining marriage as exclusively between a man and a woman. See, e.g., Cyber News Service, *Conservatives Pledge to Defeat Supporters of Same-Sex Marriage* (Oct. 03, 2003), available at http://www.cnsnews.com/ViewCulture.asp?Page=\Culture\archive\200310\CUL20031003b.html. The question allowed Justice Scalia to answer in dissent:

> Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as Scoutmasters for their children, as teachers in their children’s schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive.

*Id.* at 2488 (Scalia, J., dissenting). President Bush also responded by saying, “I believe marriage is between a man and a woman, and I think we ought to codify that one way or another. And we’ve got lawyers looking for the best way to do that.” CNN.com, *Bush Wants Marriage Reserved for Heterosexuals* (July 31, 2003), available at http://www.cnn.com/2003/ALLPOLITICS/07/30/bush.gay.marriage.

15. According to Heidegger, both the question and the answer are sprung out of the same moment. Heidegger writes, “[E]very inquiry is a seeking [Suchen]. Every seeking gets guided beforehand by what is sought.” *Heidegger, Being & Time*, supra note 1, at 24 (H. 5).

16. The use of the word “outing” has a double meaning in this Article. It refers to “coming out of the closet,” meaning to become public about being gay or lesbian. It also relates to the literal meaning of something being “aired.” *See* The American Heritage Dictionary 882 (2d ed. 1985).

17. The German word *verstellen* is translated as “to disguise” in the English translation of Heidegger’s *Being & Time*. *See* HEIDEGGER, BEING & TIME, supra note 1, at 60 (H. 36).
course about ethics in the space of the unethical. The moment that the question of someone’s humanity is asked, a space for a definition of the non-human is also created.\textsuperscript{18} This space or void calls out to be populated by those who do not qualify as humans, all those whose humanity has been denied by the senders and the receivers of the question that created the space for the non-human.\textsuperscript{19} To question someone’s humanity by locating the question inside the “law-room” also raises the question of the ethics of law.\textsuperscript{20}

The pretext for the debate about same-sex couples and adoption was two-fold: it was about children and it was about being granted entrance. This Article will argue that it was not about children and it was not about entrance. Instead of being about children, it was about a fear of contamination. Instead of being about entrance, it was about containment.

This Article takes Sweden as its starting point, but it addresses a wider cultural span, namely a Germanic cultural fear of contamination.\textsuperscript{21} As expressed by Heidegger, this fear of contamination, leads to an obligation to show oneself clearly.\textsuperscript{22}

\begin{itemize}
\item \textsuperscript{18} When a question is given space, that is, a pause is made for an answer to be given, the question gives the direction of the answer. See Heidegger, \textit{Being & Time}, supra note 1, at 27 (H. 7).
\item \textsuperscript{19} See Bennington, \textit{Postal Politics}, supra note 13, at 248–49.
\item \textsuperscript{20} In Swedish, the closed legal space of a legal paragraph within a code is called a \textit{Lagrum}, which literally means “law-room.” It is within this law room that the legal drama regarding the question of same-sex couples and adoption is being played out, at the same time that the political drama is being played out in the Swedish Parliament. For a discussion on how the confinement of the politically undesired takes place in law through the law room, see generally Maria Grahn-Farley, \textit{The Law Room: Hyperrealist Jurisprudence & Postmodern Politics}, 36 New Eng. L. Rev. 29 (2001) [hereinafter Grahn-Farley, \textit{The Law Room}].
\item \textsuperscript{21} Sweden belongs not only to the Germanic language family but it also belongs to a Germanic cultural \textit{Geschlecht}. This Article does not refer to Germanic culture as a geographical definition but as an intellectual project — one that is highly political and ideological. Parts of Germany were under Swedish rule between 1648 and 1721 and Sweden is still strongly influenced by a Germanic culture. For a comment on the Germanic influences on Nordic legislation and legal tradition, see Kevät Nousiainen & Johanna Niemikiesiläinen, \textit{Introductory Remarks on Nordic Law and Gender Identities}, in \textit{Responsible Selves, Women in the Nordic Legal Culture} 1, 18 (Kevät Nousiainen et al. eds., 2001).
\item \textsuperscript{22} Heidegger’s use of symptom and disease to understand masking and identity is neither random nor careless. For Heidegger it is evil for things to
V. GHOST

This is the story of a Ghost. A Ghost that everyone thought was forever gone, or gone forever. Lately there have been ru-

appear to be what they are not. Contamination, for Heidegger, comes from being close to something that appears to be something that it is not. Thus, it is bad simply for something to not be what it seems to be:

[P]henomena are the totality of what lies in the light of day or can be brought to the light – what the Greeks sometimes identified simply with entities. Now an entity can show itself from itself [von ihm selbst her] in many ways, depending in each case on the kind of access we have to it.

Heidegger, Being & Time, supra note 1, at 51 (H. 29). Heidegger draws a comparison between the symptoms of a disease [Krankheitserscheinungen] and the entity that shows itself; the symptoms are not the disease, nor is the entity that shows itself its essence. The symptoms guide the doctor to an understanding of the disease, even if the disease itself cannot be seen. The symptoms are just the appearance of the disease itself. See Heidegger, Being & Time, supra note 1, at 52 (H. 29).

23. This Article searches for an answer to the question that was never asked, or what Derrida calls the book that was never written, by Heidegger. The book that was never written would have given an answer to the question of “Was heisst der Geist?” Derrida, Of Spirit, supra note 2, at 14. This question is really two: What is called a spirit? And what does spirit call up? At the core of Heideggerian thought is the notion that embodiment shapes the world-in-which-you-are, as well as who you are through that world. This core is expressed in the double entendre, “Was heist der Geist?” Id.


24. On the relationship between Heidegger and the Spirit, Derrida remarked:

[If] the thinking of Geist and of the difference between geistig and geistlich is neither thematic nor athematic and if its modality thus requires another category, then it is not only inscribed in contexts with a high political content, as I have just said rapidly and rather conventionally. It perhaps decides as to the very meaning of the political as such.

Derrida, Of Spirit, supra note 2, at 6. Bennington comments on the relationship between Heidegger and Derrida, as it is expressed in Derrida’s Of Spirit, by describing Derrida as the Ghost of Heidegger. See Bennington, Spirit’s, supra note 7, at 196–97.

25. After the Second World War, people never really bothered to figure out which of the two interpretations of the invisibility of the Ghost was correct. It
mors that the Ghost or its spirit had returned to haunt the European national elections. In the Spring of 2002 more than did not matter as long as no one had to run into the Ghost. Western Europe after the War thought that democracy had won and that this victory was to be permanent. This was confirmed with the fall of the Berlin Wall. Yet, as Bauman suggests, democracy is a circle of translation between the private sphere of one’s life as an individual and the public spheres of one’s life within a society.

Democracy is a ‘circle of translation.’ When translation stops, democracy ends. Democracy cannot, without betraying its nature, recognize any translation as final and no longer open to negotiation. You can tell a democratic society by its never fully quelled suspicion that its job is unfinished: that it is not yet democratic enough.


26. Jacques Derrida suggests that the very fact that Heidegger is not connected to, or interpreted as writing about, the spirit as a central theme in his work causes suspicion. Derrida argues that:

Because this suspicion appears absurd, because it carries in it something intolerable, and perhaps too because it moves towards the most worrying places in Heidegger’s itinerary, discourses, and history, people avoid in their turn speaking of spirit in a work which nonetheless lets itself be magnetized, from its first to its last word, by that very thing.

DERRIDA, OF SPIRIT, supra note 2, at 3. Derrida continues by observing that this is the very problem with the Ghost, or the spirit, of the work of Heidegger. Id. at 5. Derrida argues that, in a way, Heidegger “spiritualizes National Socialism.” Id. at 39. James Bernauer connects the “spiritualization” of Nazism to a wider spiritual search in Germany at the time. James Bernauer, Sexuality in the War against Jews: Perspectives from the Work of Michel Foucault, in CONTEMPORARY PORTRAYALS OF AUSCHWITZ, 211, 214 (Alan Rosenberg, James R. Watson & Detlef Linke eds., 2000).

27. A ghost is haunting Europe today, the ghost of fascism. The European elections have been haunted by fascist political success. The Swedish Evening Press, AFTONBLADET, writes that the French election in April 2002 was a disgrace to the democratic system. Jean-Marie Le Pen, the well-known French fascist, convicted of promoting Hitler propaganda, qualified for the presidential election. Jean-Marie Le Pen är ett anfrätt gammalt lik [Jean-Marie Le Pen is an old eroded corps], AFTONBLADET, Monday, Apr. 22, 2002. One of Le Pen’s better known positions is his definition of the Holocaust as a “detail of history.” Shock Success for French Far Right, BBC NEWS WORLD EDITION, Apr. 22, 2002, available at http://news.bbc.co.uk/2/hi/europe/1942612.stm.

In 2001, “Right-wing billionaire Silvio Berlusconi [was] elected prime minister of Italy, a post he held briefly in 1994.” Online NewsHour, Winning Italian Style: The Italian Election, ONLINE NEWHOUR, May 15, 2001, available at http://pbs.org/newshour/bb/europe/jan-june01/italy_5-15html. The biggest fear about Berlusconi is that he now controls 90 percent of Italy’s media. He
a few people found themselves staring straight into the eyes of the Ghost. The European national elections all followed the same trend toward an increased support for nationalist right-wing political parties. Heidegger, at a similar moment in another time and in another place, decided to embrace the National Socialist spirit of Germany in 1933. Moments like these both inspire and force people to make life choices. The choice himself owns the three largest television stations, and as Prime Minister he controls the state-owned media as well. Id.


The EU even imposed political sanctions on Austria for including the fascist political Freedom Party in the coalition ruling government. EU Mission Hold Talk in Austria, BBC NEWS July 28, 2000, available at http://news.bbc.co.uk/1/hi/world/europe/855893.stm.

Every major European city has seen angry male Neo-Nazi youth marching up and down the streets. The Swedish extremist right-wing party Sverige Demokraterna, the Swedish Democrats, gained 76,300 votes in the National Election of 2002. The fear is that they will gain 15% in the next National Election. This party is mostly supported by the youth and retired, older people. Their most important message is to “keep Sweden Swedish.” See, I Sveriges Namn [In the Name of Sweden], DAGENS NYHETER, Sep. 28, 2002, available at http://www.dn.se/DNet/road/Classic/article/0/jsp/print.jsp?&a=59907. Their anger is primarily directed against immigrants, but they also have a deeply-rooted sexist ideology. Id.

28. Id.
29. Heidegger found himself embraced by and at the same time embracing Nazism around the time of the Nazi Party revolution of 1933.

[F]ollowing the burning of the Reichstag building on February 27, 1933, Hitler got the Parliament to suspend the German Constitution and replace it with a permanent state of emergency, under which fundamental civil liberties such as freedom of speech and assembly and privacy of the mails were canceled. Within a week of that (March 7) Hitler arrested all eighty-one of the Communist deputies who had been duly elected to the Reichstag the day before and confined them to the newly opened concentration camps. On March 23, the Reichstag passed the Enabling Act, giving Hitler plenipotentiary lawmaking powers, and with that the Nazi dictatorship was born. Sheehan, supra note 2, at 84–85.

30. Heidegger joined the National Socialist German Workers Party on the symbolic date of May 1st (the Worker's Day and a socialist holiday). The next day, Hitler arrested hundreds of labor leaders and threw them into concentra-
was either to break free from the spell of the Ghost by ceasing to believe in it, or to remain under its spell, to forever run from it and thus to be forever haunted.\footnote{Instead of breaking free from the spell of the Ghost, Heidegger broke free from Edmund Husserl, his Jewish mentor and the person whose position at Freiburg University he inherited. See Sheehan, supra note 2, at 85. For an argument that Heidegger was not that involved in the enforcement of the anti-Semitic laws and regulations at the University that caused the suspension of Husserl and other Jewish professors in 1936, see SPIEGELBERG, supra note 3, at 346.} Ghosts are immortal.\footnote{Ghosts do not deteriorate; their inner being remains the same. This ability to \textit{verfallen} is, according to Heidegger, a determining characteristic of \textit{Dasein}'s Being. See HEIDEGGER, BEING \& TIME, supra note 1, 172 (H. 134).} The only way to get rid of a Ghost is to not believe in it. To not believe in a Ghost is to end the story before it begins.\footnote{There was another example of “separate and almost equal” in 2000 when the Netherlands changed its laws from registered partnership to marriage, so that there would be no differences between married couples, different-sex or same-sex. However, an exception to this equality was made regard-}

VI. \textbf{REGISTERED PARTNERSHIP}

In 1994 Sweden became one of the first countries in the world to adopt laws giving same-sex couples the possibility of legally formalizing their relationships.\footnote{Lag om registrerat partnerskap [Law on Registered Partnership], \textit{S.F.S. 1994:1117} (June 23, 1994), effective Jan. 1, 1995 (Swed.) [hereinafter Registered Partnership Law].} The registered partnership was intended to give to same-sex couples the same legal status given to different-sex couples who decide to legally formalize their relationships through marriage.\footnote{\textit{Id.}, at Kap. 3:1.} This “separate but equal” legislative system included a major exception to the principle of equality: the right to adopt children was excluded for same-sex couples.\footnote{\textit{Id.}, at Kap. 3:2.} There are always exceptions to the rule “separate but equal.” Without the exceptions it is only equal and not separate.\footnote{There was another example of “separate and almost equal” in 2000 when the Netherlands changed its laws from registered partnership to marriage, so that there would be no differences between married couples, different-sex or same-sex. However, an exception to this equality was made regard-}
"Separate but equal" is one method of oppressing what has been made different through the Ideology of Genus. Assimilation is another such method, but there the difference is masquerading in the similar. 38

In Swedish law there are four main forms of recognized coexistence between two individuals living intimately with each other. In the first two instances, people can live together without taking any legal steps to formalize their relationship. The property of different-sex couples living together under conditions similar to married couples is regulated by Lag om sambors gemensamma hem [Law on Cohabitant’s Common Households]. 39 This law regulates different-sex couples and their collective property within the relationship and in case of a separation. The other law regulating the property of same-sex couples living together under conditions similar to married couples is Lag om homosexuella sambor [Law on Same-Sex Cohabitants]. 40 This law regulates same-sex couples and their collective property within the relationship and in case of separation. Both of these relationships are less regulated and have fewer consequences than a relationship formalized through law.

The legal means through which people living together formalize their relationship is, for different-sex couples, marriage. 41 For same-sex couples it is registered partnership. 42 The most contested difference between the legal situations of couples that have married and couples that have registered their partner-

38. Heidegger argues that the concept of equality is only needed when it is not the same, because when something is the same, only one is needed; the same is then the same with itself. See MARTIN HEIDEGGER, IDENTITY AND DIFFERENCE 26 (Joan Stambaugh trans., U. of Chicago Press 2002) (1957) [hereinafter HEIDEGGER, IDENTITY AND DIFFERENCE].


40. Lag om homosexuella sambor [Law on Same-Sex Cohabitants], S.F.S. 1987: 813 (June 18, 1987), effective Jan. 1, 1988 (Swed.) [hereinafter Same-Sex Cohabitants Law].


42. Registered Partnership Law, supra note 34, at Kap. 1:8.
ships has been the fact that married couples can adopt children but registered partners cannot.

VII. CHILDREN

It is well established in domestic and international law that the best interest of the child should be of paramount importance in all decisions concerning that child. Sweden is a party to the UN Convention on the Rights of the Child. Almost all adoptions in Sweden are international adoptions, except the ones that occur when a biological parent re-marries and the new partner adopts the child as his or her own. This is why the question of adoption in Sweden is both international and domestic.

The Swedish Parliament voted on the 5th of June 2002 to change the law and allow same-sex couples that register their

43. According to International Child Rights, “the best interest of the child” shall be taken into consideration in government decisions regarding the national budget. See France, IRCO, CRC/C/15/Add. 20, para. 19 (Fr.); Paraguay, IRCO, CRC/C/15/Add.27, para. 9, 16 (Para.) as cited in UNICEF, IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD (1998) [hereinafter HANDBOOK]. The “best interest of the child” shall also be taken into consideration in legislation regarding discrimination. See Mexico IRCO, CRC/C/15/Add.13, para. 7 (Mex.), as cited in HANDBOOK at 41. The principle shall also be part of domestic law and possible to invoke before a court. See Indonesia IRCO, CRC/C/15/Add. 7, para. 18, Denmark IRCO, CRC/C/15/Add. 33, para. 24 (Den.); Canada IRCO, CRC/C/15/Add. 37, para. 11 (Can.); Sri-Lanka IRCO, CRC/C/15/Add. 40, para. 25 (Sri Lanka); Germany IRCO, CRC/C/15/Add. 43, para. 16 (F.R.G.), as cited in HANDBOOK, supra, at 43.


46. The Netherlands decided to deal with the international aspect of adoption by excluding international adoption as a possibility for same-sex couples. See Patterson, supra note 14, at 301.
partnership to adopt children. The change could not enter into force before February 1, 2003, because Sweden was a party to the European Convention on the Adoption of Children and that Convention does not allow same-sex couples to adopt children. On July 3, 2002, Sweden withdrew from the sections of the convention regulating adoption, making it possible for the new law to enter into force. The debate that took place in the Swedish Parliament on the 5th of June was the most intense debate of that spring. All major children's rights organizations in the country advised against allowing same-sex couples that had registered their partnership to adopt. They argued that the debate had taken place from only the adults' perspective and had excluded the best interests of the children. The organizations also argued that there is no adult's right to have children; there is only a child's right to have parents.

What is in the best interests of the child is a valid and legitimate concern; however, this Article argues that the center of

47. Partnerskap och adoption [Partnership and Adoption], Snabbprotokoll 2001/02: 120, 10 June 5, 2001, Lagutskottetsbetänkande 2001/02: LU 27; Partnerskap och adoption m.m. (prop. 2001/02: 123); Motion 2000/01: Ju724. [hereinafter Partnership and Adoption Debate].


50. New Homosexual Adoption Law, supra note 48.


52. Christel Anderberg (Moderaterna [Conservative Party]), Partnership and Adoption Debate, supra note 47, at Anf. 22. Anderberg argued that all the following child rights organizations and institutions were against changing the law to allow same-sex couples to adopt children: The Child Rights Ombudsman, The National Committee for International Adoptions (Statens nämnd för internationella adoptionsfrågor), The Swedish Medical Association (Svenska Läkaresällskapet), The Swedish Psychology Association (Sveriges Psykologförbund), The Forum for Adopted (Forum för Adopterade), Adoption center (Adoptioncenter), The National Association for Children’s Rights in Society (BRIS), and Save the Children, Sweden, (Rädda Barnen). Id.

53. Christel Anderberg (Moderaterna [Conservative Party]), Partnership and Adoption Debate, supra note 47, at Anf. 22.
the heated debate was not concern for children, despite all claims to the contrary.\footnote{Marianne Carlström (Socialdemokratiskapartiet [Social Democratic Party]), argued for a change of the present law prohibiting same-sex couples from adopting. She pointed out that there is no way to know how children in same-sex families will fare in the long term because there is not enough research in the area. Marianne Carlström (Socialdemokratiskapartiet [Social Democratic Party]), Partnership and Adoption Debate, supra note 47, at Anf. 39. She also pointed out that in the United Kingdom the question of same-sex couples was welcomed as alleviating the shortage of parents for orphans. Id.}{54} On the surface, both sides used the same child-centered foundation for their argument: children have a right to parents, but adults have no right to children.\footnote{Tanja Lineborg, (Vänsterpartiet [Leftist Party]), as well as Alf Svensson (Kristdemokraterna [Christian Democrats]), used the same argument and arrived at opposite conclusions. They both stated that a children’s perspective only gives children rights to parents but does not give adults rights to children. See Partnership and Adoption Debate, supra note 47, at Anf. 21, 27. For Lineborg this meant that same-sex couples should be able to adopt children. For Svensson, however, the same argument meant that same-sex couples should not be able to adopt children. Id.}{55} But on a deeper level, the debate was not about the best interest of children. First of all, children were never asked about what would have been best for them.\footnote{Kia Andersson (Miljöpartiet [Environmental Party]), who argued for a change of the law, positioned the debate as one not about the best interests of children, but about which lifestyles and life choices society wanted to value. She asked: “What has the free love and the free sexual act between two adult people to do with a person’s qualities, emotions and organized conditions to be able to care for a child?” Kia Andersson (Miljöpartiet [Environmental Party]), Partnership and Adoption Debate, supra note 47, at Anf. 53.}{56} This in itself violates the UN Convention on the Rights of the Child,\footnote{CRC, supra note 44.}{57} which states that the child should be heard in matters concerning the child.\footnote{CRC, supra note 44, at art. 12.}{58} Secondly, though many children lived in families with same-sex parents, the opposition to same-sex couples’ legal ability to adopt children only recognized children that were living in families with different-sex parents. In one way, the argument against granting same-sex parents the ability to be legally recognized as parents was contrary to their own argument that a child has a right to parents. The argument itself denied the children living in same-sex families the legal and social recogni-
tion of their caretakers as their parents.\footnote{Ulf Nilsson (Folkpartiet [Liberal Party]), argued that it would be unfair and contrary to the principles of a liberal party, which is supposed to be open-minded to difference, to limit the opportunities for children without parents to be adopted by new parents, and that an exclusion of same-sex couples from the adoption market would be unfair to those children who need new parents. Ulf Nilsson (Folkpartiet [Liberal Party]), Partnership and Adoption Debate, supra note 47, at Anf. 46.} If there was total agreement on the appropriateness of applying a child’s perspective, then from where did the fundamental disagreement stem?

The argument in this article is that this debate was never about the children. The debate was about the fear of contamination and the need for containment, both of which arise from extreme adherence to the Ideology of Genus.

VIII. FEAR

The debate about revising the prohibition against the adoption of children by same-sex couples awoke unusually strong emotions in Swedish people. There was something about this issue that brought to the surface the most heated passions of the people. The whole array of established institutions — from child rights organizations and administrative branches to the National Parliament — experienced the furiously breaking waves of emotions. Considering the Parliament’s reputation for being dispassionate and almost dull, it was startling that it became so animated over the issue of adoption for same-sex couples.\footnote{The author herself attended many meetings in the Swedish Parliament as a member of the National Board of Rädda Barnen (Save the Children, Sweden). Rädda Barnen is the largest non-governmental child rights organization in the world. Rädda Barnen has 100,000 members in Sweden, a country of 9 million people. The author can agree, in part, that the Parliament deserves its reputation for being rather dull.} The fact that the debate took place in the Parliament, the most public of all spaces in the Kingdom of Sweden, might have had a determining influence on the outcome of the adoption debate.\footnote{Derrida reminds us that Nazism did not come from some external empty space outside of the responsibilities of a society: Nazism was not born in the desert. We all know this, but it has to be constantly recalled. And even if, far from any desert, it had grown like a mushroom in the silence of a European forest, it would have} The Parliament finally voted to rescind the law and allow same-sex couples to adopt.
The risk of contamination increases with intimacy. This is a fundamental concern of the nationalist right wing. Most often done so in the shadow of big trees, in the shelter of their silence or their indifference but in the same soil.

DERRIDA, OF SPIRIT, supra note 2, at 109. Bauman emphasizes the constant negotiation and re-negotiation that must take place in the public between the public and the private, between power and politics and law. He argues that democracy today is under a two-fold threat because it is not open to the negotiation of the translation between the public and the private. He states, “There is no such thing in sight as a global democracy.” BAUMAN, supra note 25, at 203. The public space of the agora where the private and the public meet to negotiate has lost its importance. Id. at 204–05. “The agora has been deserted.” Id. at 205. Instead of negotiating the private and the public, the private is brought into the public, not as a negotiation or re-negotiation, but only for a public display of the private. This is when the private is only paraded in the public without any discussion about the way the public also plays a role in the private that has been displayed. Id.

One example of the private being displayed in the public without a re-negotiation or negotiation between the private and the public are the talk shows that display young mothers’ claims that some man is the father of their child. This is a frequent theme in the day-time talk shows. The private conflict between the mother and the man whom she claims to be the father of her child, a child for whom he does not show the proper amount of care in forms of child support and play-time, is displayed in the public without a discussion of universal healthcare or poverty. Such a discussion would introduce to the public and inform the audience as to why the private argument is so focused on the right to child support. The public space of public negotiation and re-negotiation is exactly what Heidegger feared the most:

Distantiality, averageness, and leveling down, as ways of Being for the “they”, constitute what we know as publicness [die Öffentlichkeit]. “Publicness” proximally controls every way in which the world and Dasein get interpreted, and it is always right...By publicness everything gets obscured, and what has thus been covered up gets passed off as something familiar and accessible to everyone.

HEIDEGGER, BEING & TIME, supra note 1, at 165 (H. 127). This ‘publicness’ has consequences for Dasein:

In utilizing the public means of transport and in making use of information services such as the newspaper, every Other is like the next. This Being-with-one-another dissolves one’s own Dasein completely into the kind of Being of the Others...

Id. at 164 (H. 126).

62. 198 members of Parliament voted to change the law so that registered same-sex couples would be eligible to be adoptive parents, thirty eight voted against a law change, and seventy one abstained. Riksdagen said ja till homoadoption [The Parliament Said Yes to Same-sex Adoption], DAGENS NYHETER, June 5, 2002, available at http://www.dn.se/DNet/road/Classic/article/0/jsp/print.jsp?&a=24805.
it is expressed as a fear of losing the cultural heritage, the national spirit, the true national Geschlecht. This fear of contamination is not limited to racism; it can be seen in the discourse against women entering male-dominated work places. The closet is central to homophobia. Heidegger expresses the risks of contamination as a general concern whenever the Human is interacting with the non-human spirits. The contamination of the Self risks that the Self might become the Other. The Other is itself determined by its place of being in the social hierarchy. The believers of the Ghost know deep down in their

63. Heidegger was afraid that closeness to others would lead to contamination and the loss of one's authenticity. For example, “This Being-with-one-another dissolves one's own Dasein completely into the kind of being of 'the Others', in such a way, indeed, that the Others, as distinguishable and explicit, vanish more and more.” HEIDEGGER, BEING & TIME, supra note 1, at 164 (H. 126). Luce Irigaray, in her “philosophy of the caress,” notes that this way of thinking is a general trend among male thinkers when expressing their desire for the Other. LUCE IRIGARAY, TO BE TWO 20–24 (Monique M. Rhodes & Marco F. Cocito-Monoc trans., 2001) [hereinafter IRIGARAY, TO BE TWO]. Irigaray writes, “In their desire for the other, male philosophers generally evoke sight and touch. Thus, like their hand, their gaze grasps, denudes and captures.” Id. at 20. According to Irigaray, Sartre escapes his desire for the Other by throwing himself forward towards an impossible future, a future where he ends up in nothingness. Id. at 30.

Derrida notes that Heidegger fails in his effort to save, or to escape from having to be saved from, this extreme form of desire. Heidegger's desire is a force that can only be traced to a non-Christian space of time. This non-Christian force is, for Heidegger, a purity worth saving even when one knows of its evil. See DERRIDA, OF SPIRIT, supra note 2, at 10.

64. One of the markers of the Ideology of Genus is the belief that one is what one does, and that what one does is determined by one's environment, and that one's environment, in turn, is determined by who one is. One example of this thinking is as follows: a person that has to beg for money to survive is, in essence, a beggar. And if he is a beggar, his environment will always make him a beggar because he is a beggar. Another form of this argument is that a person who is held as a slave is also essentially a slave and therefore will always remain a slave and no social order or society or non-slave is responsible for the enslavement of an already enslaved slave. Heidegger describes this process:

The ontologically relevant result of our analysis of Being-with is the insight that the 'subject character' of one's own Dasein and that of Others is to be defined existentially — that is, in terms of certain ways in which one may be. In that which we concern ourselves environmentally the Others are encountered as what they are; they are what they do [sie sind das, was sie betreiben].

HEIDEGGER, BEING & TIME, supra note 1, at 163 (H. 126).
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fearful frozen hearts that the danger of being co-opted, invaded, even seduced, by the spirit of the mob\(^65\) cannot be avoided through a merely optical difference.\(^66\) The optical difference is only the symptom of difference; the real difference is to be found in what the mob is doing. "The [mob] is what it does."\(^67\) The risk of losing the Self by being swallowed by, submerged into, or lost in the mob, or even succumbing to the practice of the mob that surrounds the Self, is unavoidable.\(^68\) The mob shows itself\(^69\) as Human, but it is fundamentally different; there is no way for the Self to see the difference by only observing its physical features. One has to observe its behavior to be able to know. For the Ideologist of Genus, the closet is essential for life. The homophobe in the Ideology of Genus has nothing against same-sex couples as long as the closet contains the relationship. The risk of contamination comes with walking out of the closet.\(^70\) The

\(^{65}\) Derrida refers to Heidegger's use of the term \textit{das Böse} when talking about the risk of contamination. DERRIDA, OF SPIRIT, supra note 2, at 10. A colloquial meaning of \textit{das Böse} in the Swedish dialect from Gothenburg is "mob." This connects to the non-Christian, to the beginning before the original, when \textit{das Böse} is at the same time evil but also the spirituality of the Germanic (Swedish) \textit{Geschlecht}. DERRIDA, OF SPIRIT, supra note 2, at 10. Derrida interprets Heidegger's use of the word "Evil" as meaning essentially spiritual. Id. at 29.

\(^{66}\) The Ideology of Genus is based on a belief that there is a connection between biology as manifested in physical features upon peoples' bodies and who they are. See generally Grahn-Farley, \textit{The Law Room}, supra note 20, at 29; Anthony Paul Farley, \textit{Black Body as Fetish Object}, 76 OR. L. REV. 457 (1997). For example, because most prostitutes are believed to be women, within the Ideology of Genus it is concluded that women are prostitutes. See Grahn-Farley, \textit{The Law Room}, supra note 20, at 31, 32.

\(^{67}\) The essence of the mob is summarized by Heidegger as, "\textit{sie sind das, was sie betreiben} [they are what they do]." HEIDEGGER, BEING & TIME, supra note 1, at 163 (H. 126).

\(^{68}\) The unavoidability that comes with the price of existing as a genus is described by Judith Butler. She writes about how internalized subordination creates a passionate attachment to its subordination, in a move of turning on itself. JUDITH BUTLER, THE PSYCHIC LIFE OF POWER 9 (1997) [hereinafter BUTLER, THE PSYCHIC LIFE OF POWER].

\(^{69}\) Time is both what reveals the being of an entity (see Frede, supra note 2, at 64) and what veils the masquerade of masking itself. "A Being of entity can be so 'covered up' that it becomes forgotten and no question arises about it or about its meaning." HEIDEGGER, BEING & TIME, supra note 1, at 59 (H. 36).

\(^{70}\) For the Ideology of Genus, "closeting" is not an effect of homophobia; it is a necessity for the maintenance of homophobia.
mob masquerades as the Self — the Self as I, the I am, the I am Human. The mob lies about who it is. It masquerades as Human.\textsuperscript{71} The difference comes from inside, and the difference is not optical.\textsuperscript{72} The result of this contamination is a dictatorship.

Of course, the “they” is as little present-at-hand as \textit{Dasein} itself. The more openly the “they” behaves, the harder it is to grasp, and the slicker it is, but the less is it nothing at all. If we ‘see’ it antico-ontologically with unprejudiced eyes, it reveals itself as the ‘Realest subject’ of everydayness. And even if it is not accessible like a stone that is present-at-hand, this is not in the least decisive as to its kind of Being. One may neither decree prematurely that this “they” is ‘really’ nothing, nor profess the opinion that one can interpret this phenomenon ontologically by somehow ‘explaining’ it as what results from taking the Being-present-at-hand-together of several subjects and then fitting them together. On the contrary, in working out concepts of Being one must direct one’s course by these phenomena, which cannot be pushed aside.

\textbf{HEIDEGGER, BEING & TIME, supra note 1, at 166 (H. 128).}

\textsuperscript{71} The act of “coming out” becomes in this sense a fundamental threat to the Ideology of Genus because although “coming out” appears to be an unmasking, it is in the very act of “coming out” that the masking begins.

\textbf{HEIDEGGER, BEING & TIME, supra note 1, at 53 (H. 30).}

\textsuperscript{72} Without closeting, the risk of crossing is itself masked.

It itself \textit{is} not; its Being has been taken away by the Others. \textit{Dasein’s} everyday possibilities of Being are for the Others to dispose of as they please. These Others, moreover, are not \textit{definite} Others. On the contrary, any Other can represent them. What is decisive is just that inconspicuous domination by Others which has already been taken over unawares from \textit{Dasein} as Being-with. One belongs to the Others oneself and enhances their power.

\textbf{HEIDEGGER, BEING & TIME, supra note 1, at 164 (H. 126).}

Judith Butler raises a similar concern but from the perspective of the \textit{one at question}:

If the subject is produced through foreclosure, then the subject is produced by the condition from which it is, by definition, separated and differentiated. Desire will aim at unraveling the subject, but be thwarted by precisely the subject in whose name it operates. A vexation of desire, one that proves crucial to subjection, implies that for the subject to persist, the subject must be threatened with dissolu-
under the rule of the mob. For Heidegger, the mob is evil because of its ability to contaminate and because it is contaminated.

The fear of contamination is made into an ideology. An extreme expression of this ideology is the Holocaust; another expression of this ideology is today’s xenophobia. Yet another expression emerged in the form of the heated Swedish debate about same-sex couples and adoption. The adoption debate led people to the end of the road of the ideological contamination. People were forced to follow the road to its end, in hopes of finding a way out. Instead of finding a way out, they ended up running into a wall, and when they turned around their own ideology was staring back at them. What they saw was the Ghost of fascism coming back from the past. A Ghost that they thought had died with the war. They had forgotten that Ghosts do not die. As it turned out, they had not seen the Ghost for some years, but this was only because they always had kept a few steps ahead.

A subject turned against itself (its desire) appears, on this model, to be a condition of the persistence of the subject. BUTLER, THE PSYCHIC LIFE OF POWER, supra note 68, at 9. Luce Irigaray has a different interpretation of desire and sexuality than what Heidegger and Butler describe. Irigaray emphasizes that the function of sexuality is a “relationship-to.” She advocates the use of “perception as a means of acceding to the Other as other.” LUCE IRIGARAY, TO BE TWO, supra note 63, at 22. And this makes it possible to both be a subject that is respected and is respecting the Other as a subject. Id.

73. Time itself is a major factor in the risk of contamination. The “outing” is only momentary. The “being out” appears through time to be the same as never having been closeted. See, e.g., HEIDEGGER, BEING & TIME, supra note 1, at 164 (H. 126) (“In this inconspicuousness and unascertainability, the real dictatorship of the “they” is unfolded.”). See also the use of “mob” in relationship to das Böse, supra note 65.

74. One form of this ideology is Nazism, a sub-set of fascism.

75. For a general reading about European fascism, see Grahn-Farley, A Ghost, supra note 23, at 170.

76. The Swedish Parliament does not have any extremist right-wing party, but this might change with the next election. See In the Name of Sweden, supra note 27.
IX. FALLEN TIME

The argument is that the people and Parliament did not become this passionate because of their deep-rooted concern for the children of the world. The argument is not that people did not care deeply about the children of the world; it is that the issue of adoption touched a point of Swedish consciousness that was not concerned with the care of children. It was the fear of contamination that forced to the surface a whole array of passions. The passions were forced to the surface, triggered by an ideology that has not been allowed to range freely since World War II. This outburst of passion was not rooted in a desire to take care of children, but in the fear and horror experienced when the Self’s ideology is staring back at the Self, and when what the Self sees is the Ghost returning from the past. Confronted with such horror, the Self falls into time.

The UN named Sweden the most sex-equal country in the world in 1995. This does not mean, however, that there is no sexism within Sweden, just as the fact that Sweden has liberal immigration policies does not mean that Sweden does not have racism. The fact that Sweden has one of the most progressive statutes acknowledging same-sex relationships does not mean that Sweden does not have homophobia. Racism, sexism, and homophobia are all dependent on the non-occurrence of time. 

“Being equal” constitutes in this sense a temporally-based threat to the Ideology of Genus of “being out.”

77. Derrida writes about Heidegger’s Fallen as indeed a fall, a fall from one time to the other. He explains: “I dare not say from time to time or now and then [de temps en temps ou de temps à autre]. The falls it causes are not from spirit [de l’esprit] into time. But from time into time, one time into another.” DERRIDA, OF SPIRIT, supra note 2, at 28. It is the fall of one spirit into another. Id. at 30.


79. Time both reveals and masks Genus. See HEIDEGGER, BEING & TIME, supra note 1, at 60–64 (H. 36), 163–64 (H. 126). See also Frede, supra note 2, at 64 (commenting on Heidegger’s relationship to time).

80. In the Ideology of Genus, history functions as the masquerade of time. History makes time a one-way street. Through history, time can only go one way.

“Historicality” stands for the state of Being that is constitutive for Dasein’s ‘historizing’ as such; only on the basis of such ‘historizing’ is anything like ‘world-history’ possible or can anything belong histori-
equal” is just momentary and will be forgotten. When the moment of becoming equal has been forgotten, “being equal” will then appear as the same as never having been un-equal. Never having been un-equal will appear to be the same as never having been “closeted.”

X. GENUS

The ideology that was staring back at the Swedish people was the Ideology of Genus. It is built on the presumption that everything and everyone can be assigned a place and a category within a world system and that the meaning of an entity depends on its relationship to others. This means that the category that normally would be thought of as “people” can be subdivided into sub-categories of which the highest level is the Human, or Dasein. An Ideology of Genus has four main elements, but only one purpose. The four elements are:

...
• The belief that groups that seem natural to society are biologically natural groups.  

• The belief that people can be subdivided according to natural categories, and that this belief shapes our understanding of the world.

• The belief that the world is an inherently dangerous place, where the survival of the Self is based on the submission of the Others. (This also makes it an ideology of hierarchy).

86. The Ideology of Genus, or the compulsion to categorize, has an inherent contradiction or tension that finds its expression in the concept of reproduction. It is in the “naturalness” of reproduction that the system of genus begins its own masquerade.

[T]he sexed division of humanity is regarded as leading to and constituting two heterogeneous groups. The fantasy implies that men make men and women make women. In the case of the sexes, emphasis is more and more placed on intra-group homogeneity: men with men, women with women, in their quasi-speciation.

COLETTE GUILLAUMIN, Race and Nature: The System of Marks, in RACISM, SEXISM, POWER AND IDEOLOGY 133, 137 (1995) [hereinafter GUILLAUMIN]. Heidegger’s re-reading of Greek philosophy lead him to the conclusion that those categories, or entities, are natural. Sheehan, supra note 2, at 81.

The social idea of natural group rests on the ideological postulation that there is a closed unit, endo-determined [determined from within], hereditary and dissimilar to other social units. This unit, always empirically social, is supposed to reproduce itself and within itself. All this rests on the clever finding that whites bear whites and blacks bear blacks, that the former are the masters and the latter the slaves, that the masters bear masters and the slaves slaves, etc., and that nothing can happen, and that nothing does happen, to trouble this impeccable logic.

GUILLAUMIN, supra note 86, at 136.

David Cruz gives a constitutional argument for a disestablishing of sex and gender. See David B. Cruz, Disestablishing sex and Gender, 90 CAL. L. REV. 997 (2002).

For an examination of the psychological and physiological violence directed toward people that white supremacy categorizes as non-white, see Anthony Paul Farley, The Black Body as Fetish Object, 76 OR. L. REV. 457 (1997).

87. GUILLAUMIN, supra note 86, at 136.

88. For Heidegger’s fear of being ruled by the Others, see HEIDEGGER, BEING & TIME, supra note 1, at 164 (H. 126).
The fear of not qualifying for humanity. 89

The purpose of an Ideology of Genus is to confirm that the Self is human and to prevent non-humans from contaminating the Self with non-humanity. 91 One element that makes a human qualify in the world as a human is to know how and where to place each object that the Self encounters in the world. 92 Humanity is based on knowing which genus to assign to each object encountered in the world. It is this very ability that qualifies one for humanity in an Ideology of Genus. Humans have the ability to both belong to a genus within the world system and at the same time to assign identities to everything and everyone. 93 According to the Ideology of Genus, it is this capac-

89. Derrida notes Heidegger’s relationship between the speech and the handwritten. The hand is important because it becomes the symbol of the opposition between the Human and the animal. DERRIDA, OF SPIRIT, supra note 2, at 11. The question of the relationship between the thing, the animal and the Human begins and ends with the question of Dasein. Dasein is Human because it is able to claim its assigned position as the master of the assigning.

The hand is the symbolic difference (the mark of difference), but it is the ability that is the difference, an ability that comes with the non-Christian force (geistige Kraft). Id. at 39. A force that is measured in ability to have, a force that is measured in wealth. The thing does not have anything.

The stone is poor; it is because it is poor it is a stone. An animal has but does not have much; an animal is getting by but is not rich. It is because the animal has some part of something that it is higher than a stone and a thing. The Human is wealthy; the Human is human because it is rich.”

Id. at 11–12, 52–55. “[T]he stone is without world (weltlos), the animal is poor in the world (weltarm), man is world-forming (weltbildend).” Id. at 11–12, 21.

For a further exploration of the relationship between wealth and category, see DERRIDA, OF SPIRIT, supra note 2, at 52 (about the stone), at 55 (about the animal). Regarding the importance of containing the animal, see DERRIDA, OF SPIRIT, supra note 2, at 54.

90. It is out of this combination of the awareness of the self and of the world in which the self exists that the meaning of Dasein, the specific being of human beings grows. See Frede, supra note 2, at 55; SPIEGELBERG, supra note 3, at 348–49.

91. HEIDEGGER, BEING & TIME, supra note 1, at 51–53 (H. 129). This is also why every genus has to be approached with a “method of suspicion.” See Frede, supra note 2, at 54.

92. This is also called “Object-givenness.” See Frede, supra note 2, at 48–49.

93. “Dasein also possesses – as constitutive for its understanding of existence – an understanding of the Being of all entities...providing the ontico-
ity to both be assigned and to have the ability to assign that qualifies the Self for humanity. To fail to assign and be assigned genus is the same as failing to achieve humanity.

XI. SIMILAR IS DIFFERENT

It is easy to presume that an Ideology of Genus would be occupied mostly with difference. The Ideology of Genus is not concerned with what is different; things that really are different are not a concern for the Ideology of Genus. The concern for the Ideology of Genus is the same, meaning identical with itself. The concern of the Ideology of Genus is with what cannot be permitted to remain the same. Instead of treating it as the same, the Ideology of Genus treats it as similar to. A similarity is what seems to be the same, but is not the same: while appearing the same, it is not. It is the similar masquerading as the same. Within an Ideology of Genus, similarity constitutes the biggest threat to the Self because of the risk of contamination, because it can mix. One does not need laws that segregate and prohibit mixing when there is difference. When there is difference, mixing cannot happen. Laws that segregate and prohibit mixing are only needed when mixing is possible. Mix-

ontological condition for the possibility of any ontologies.” Heidegger, Being & Time, supra note 1, at 34 (H. 14).
95. The Ideology of Genus is not against the stone or the animal as long as they do not “come out” or “become equal.”

Indeed it is even possible for an entity to show itself as something which in itself it is not. When it shows itself in this way, it ‘looks like something or other’...This kind of showing-itself is what we call “seeming”...[Phenomenon] signifies that which looks like something, that which is ‘semblant’, ‘semblance’...means something good which looks like, but ‘in actuality’ is not, what it gives itself out to be. Heidegger, Being & Time, supra note 1, at 51 (H. 29).
96. For a general discussion on the process of making the same into a “natural” difference, see Guillaumin, supra note 86, at 141–42.
97. See Heidegger, Being & Time, supra note 1, at 51 (H. 29).
98. This method of differentiating between similarities begins with the Self as the only referential point. Frede, supra note 2, at 63. It is a project that makes every Other into one’s own personal project. Id. This in combination with the fear of contamination becomes an Ideology of Genus. Heidegger, Being & Time, supra note 1, at 164 (H. 126).
Biology plays a central role in the Ideology of Genus. It is through biology that genus is believed to be transmitted through time. It is through biology that notions of race and sex are explained as “natural” concepts. Questioning ends at the beginning of nature.

The Ideology of Genus is clearest in its claimed “biological” categorization of race and sex, as if it is biology that makes women wear skirts and men trousers. The social construction of a relationship between cause and effect is central to the Ideology of Genus. An example of the construction of a relationship between cause and effect can be seen in the biological connection and, later, disconnection in the argument made in the Swedish Parliament against granting same-sex couples the ability to legally adopt children. A fair summary of Alf Svensson’s comment in the Parliament is that every child in the world is conceived by a biological woman and a biological man and it is this biological origin that has to be protected. Because it is not biologically possible for two biological men or two biological women to conceive a child, they could not be allowed to adopt.

To use biology in the discourse of adoption is to disconnect cause and effect. Adoption itself is a manifestation of the non-biological nature of childrearing.

Questions about who and what is Human are also questions about who and what is non-Human. This is why biology is so important in the Ideology of Genus. It is through biology and history that race and gender are explained; it is through biology and history that genus is traced. To claim that biology defines genus is to believe that men give birth to men, women give birth to women, people of color give birth to people of color, and

99. This is why it is important to observe Time when observing Being. See Heidegger, Being & Time, supra note 1, at 62–63 (H. 38). “A Genus carries its time with him. It is like the snail who carries its home.” Guillaumin, supra note 86, at 136.

100. Alf Svensson (Kristdemokraterna [Christian Democrats]), Partnership and Adoption Debate, supra note 47, at Anf. 27.

that people without color give birth to people without color.\footnote{102}{Guillaumin, supra note 86, at 136.}

According to the Ideology of Genus, the biological definition of race and sex which assigns each a genus must also assign same-sex couples either a genus of their own or the genus of their sex. Either way, it is when biology is used to justify why same-sex couples cannot adopt children that the Ideology of Genus runs into its own dead end. This is because, according to the Ideology of Genus, the “natural” conclusion seems to be that same-sex couples, absolutely should be able to adopt children.

Either genus can reproduce within its own category or it cannot. If it can reproduce within its own category, then men would give birth to men, women to women, persons without color to persons without color and persons with color to person with color. However, if genus cannot reproduce inside of its own category, then biology cannot be used as a reason for separate treatment, and the Ideology of Genus cannot use biology as a justification for the containment of same-sex couples. The Ideologist of Genus might claim that different genera must be separated and kept apart because they are biologically different. However, in that case same-sex couples should be encouraged to reproduce within their own genus through adoption. If one believed in the biological explanation of the natural that the Ideology of Genus provides, one would not be able to explain why the two “different” genus categories of “man” and “woman” are both needed to produce a child. Indeed, if the Ideology of Genus is believed, one could not even explain why it is possible for the two “different” genus categories of “person of color” and “person without color” to conceive a child.\footnote{103}{Indeed, the Ideology of Genus can be seen in all of its absurdity in American laws that forbid interracial sex, marriage, and families. The Ideologists of Genus argued that black and white people should not “mix” and also that they could not mix, as a matter of biology. See Brief for Appellee at 42, Loving v. Virginia, 388 U.S. 1 (1967) (“On the biological phase there is authority for the conclusion that the crossing of the primary races leads gradually to retrogression and to eventual extinction of the resultant type unless it is fortified by reunion with the parent stock (W.A. Dixon, M.D., Journal of the American Medical Association, Vol. 20, p. 1 (1893))”). The fact that different “races” can and do “mix” and that a “white” for example can give birth to a “black” or that a “black,” as is seen in passing, can give birth to a “white,” was addressed by the Ideologists of Genus by displacing the dire results of such mixing onto the future.}
If same-sex couples are truly of a different genera — such that their biological difference justifies different treatment from different-sex couples — then their reproduction through legal adoption of children should be encouraged and not discouraged. The alternative would be to believe in the explanation of the “natural” provided by the Ideology of Genus. That explanation, that mixing across genus is unnatural, fails to account for any reproduction. The explanation cannot account for the fact that the genus “man” is unable to reproduce within its own genus and the genus “woman” is also unable to reproduce within its own genus. The genus “man” and the genus “woman” must unnaturally mix across genus to reproduce. The fact is that there is no difference of genus. Because there is no real difference of genus there is a fear, a fear of the same, a fear of contamination, a fear that the Ideology of Genus attempts to contain through the lie of difference.

The question of same-sex couples’ legal eligibility to adopt children is manifested in the moment that the Ideology of Genus stares back at itself. It is at this moment that the Ideologist of Genus must decide to either stop believing or to continue running forever.

The fear of contamination is the underlying argument in this biological discourse. The fear was that non-same-sex children, (children of humans, children of a biological woman and a biological man) would be contaminated by same-sex parents and become same-sexes. This fear was expressed in the deep concern shown over the extra-vulnerable identities of adopted children. 104

XII. ABILITY

What does it mean when one group is able to assign identities to Others and the Self according to a social hierarchy? 105

104. See Alf Svensson (Kristdemokraterna [Christian Democrats]), Partnership and Adoption Debate, supra note 47, at Anf. 27.

105. Within the Ideology of Genus, hierarchy is not only a fact but also an obligation. It is through hierarchy that the Human takes and occupies its rightful place as the assigner and the designer of all the Others. This is an obligation towards all other Humans. DERRIDA, OF SPIRIT, supra note 2, at 19–20.
can assign identities to Others and the Self? The Human is open to Being and the Being is open to the Human. A Human is someone that is assigned a genus, that of Dasein, and at the same time assigns genus to the Self. The meaning of being Human is the ability to assign genus to Others. This relationship between being assigned and also being the one who assigns makes hierarchy itself essential for the possibility of Human existence. With hierarchy as an essential part of the Human,

106. In its original language, Heidegger uses the term Das Man; John Macquarrie & Edward Robinson have translated this as “the They.” The use of “the They” disrupts the flow of the text too much and does not communicate the German meaning of Das Man and the risk of contamination through kinship.

The German word Man can be used to mean I, You (individually), You (collectively), We, They, and People. The word Man, originates with I and the ability for the I to know its surroundings, and generalize the I into also meaning everyone and all. The use of the word Man connotes more than a Pro Nome, it also indicates the power of a specific position. I decided to use the word mob, to indicate the distance that Heidegger communicates with his use of Das preceding Man. Das Man can be interpreted as a relationship in the sense of kinship. But one wants it to be known that one only acknowledge their presence because of the kinship; in every other aspect one distances oneself from what they represent.

107. Jean-Paul Sartre identifies a person who never changes, who only is what the person has always been, as a person controlled by fear, and most of all, by passion. “Only a strong emotional bias can give a lightning like certainty; it alone can hold reason in leash; it alone can remain impervious to experience and last for a whole lifetime.” JEAN-PAUL SARTRE, ANTI-SEMITE AND JEW 19 (George J. Becker, trans., Schocken Books 1948) (1946) [hereinafter SARTRE, ANTI-SEMITE AND JEW]. In contrast, Martin Heidegger believed that, “In its factual Being, any Dasein is as it already was, and it is ‘what’ it already was. It is its past, whether explicit or not.” HEIDEGGER, BEING & TIME, supra note 1, at 41 (H. 20).

108. “Dasein has grown up both into and in a traditional way of interpreting itself: in terms of this it understands itself proximally and, within a certain range, constantly.” HEIDEGGER, BEING & TIME, supra note 1, at 41 (H. 20).

109. What is Heidegger’s biggest fear is Sartre’s biggest hope. “[T]he principle underlying anti-Semitism is that the concrete possession of a particular object gives as if by magic the meaning of that object.” SARTRE, ANTI-SEMITE AND JEW, supra note 107, at 24. Sartre continues:

[The anti-Semite flees responsibility as he flees his own consciousness, and choosing for his personality the permanence of rock, he chooses for his morality a scale of petrified values. Whatever he does, he knows that he will remain at the top of the ladder; whatever the Jew does, he will never get any higher than the first rung.]
access to power becomes a determining factor when Humanity is assigned, or not assigned, or seen. Only what the Human has recognized can be assigned, therefore existence itself is based on having been “touched” by the Human.

XIII. LAID DOWN IN LAW

There is a relationship between biology and law. It is the law that constructs the causality between the biological and the social. Same-sex couples are raising children whether the law

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Id. at 27. Jean-Paul Sartre’s view of possession and property is quite different than that of Martin Heidegger.

In each case Dasein is its possibility, and it ‘has’ this possibility, but not just as a property [eigenschaftlich], as something present-at-hand would. And because Dasein is in each case essentially its own possibility, it can, in its very Being, ‘choose’ itself and win itself.

HEIDEGGER, BEING & TIME, supra note 1, at 68 (H. 43).

110. Charles Taylor points out the role of the body and its culture in the Heideggerian shaping of the world. What he means is that the way one is in-the-world also is dependent on the body, its culture and form of life. Charles Taylor, Engaged Agency and Background in Heidegger, in THE CAMBRIDGE COMPANION TO HEIDEGGER, supra note 2, at 317, 318–19.

Judith Butler has expressed similar observations without attributing them to a Heideggerian view. “In other words, within subjection the price of existence is subordination.” BUTLER, THE PSYCHIC LIFE OF POWER, supra note 68, at 20.

111. In contrast, Jean-Paul Sartre argued that it is this very ability and willingness to be contaminated that is ethical. “But there are people who are attracted by the durability of a stone.” SARTRE, ANTI-SEMIT AND JEW, supra note 107, at 18. The symbolic meaning of the hand is not only to write but also to touch. The touch of a hand is the touch of a soul, while touch itself can only constitute spirit as not being a stone.

If the chair could touch the wall, this would presuppose that the wall is the sort of thing ‘for’ which a chair would be encounterable. An entity present-at-hand within the world can be touched by another entity only if by its very nature the latter entity has Being-in as its own kind of being—only if, with its Being-there [Da-sein], something like the world is already revealed to it, so that from out of that world another entity can manifest itself in touching, and thus become accessible in its Being-present-at-hand. When two entities are present-at-hand within the world, and furthermore are worldless in themselves, they can never ‘touch’ each other, nor can either of them ‘be’ ‘along-side’ the other.

HEIDEGGER, BEING & TIME, supra note 1, at 81 (H. 51).

112. GUILLAUMIN, supra note 86, at 147–149. See also Grahn-Farley, The Law Room, supra note 20.
recognizes their relationships as relationships between children and parents or not. It is only the law that can uphold the biological claim that same-sex couples cannot be parents.\footnote{Registered Partnership Law, \textit{supra} note 34, at Kap. 3:4.}

If it were not for the law, the biological argument would not have validity. Without a law that makes it impossible for same-sex couples to be parents, same-sex couples would be parents. Same-sex couples are \textit{de facto} parents; it is only \textit{de jure} that they are not.\footnote{Tanja Linderborg, \textit{(Vänsterpartiet [Leftist Party]) Partnership and Adoption Debate, \textit{supra} note 47.} Linderborg made the point to the Swedish Parliament that there are already children being raised by same-sex couples and to not allow for same-sex couples to adopt children is to deny these children their rights to parents. \textit{Id.}} This is how the law functions as an intermediary between biological and social cause and effect. This, according to an Ideology of Genus, can be explained by the fact that the law is the agent that makes the belief in categorization correspond to the lived experiences of those who are categorized.\footnote{Taylor, \textit{supra} note 110, at 317, 318–19. Taylor describes the construction of a relationship between cause and effect as follows: “Here is a ‘world shaped’ by embodiment in the sense that the way of experiencing or ‘living’ the world is essentially that of an agent with this kind of body.” \textit{Id.} at 318.}

Within the Ideology of Genus it is not biologically possible for same-sex couples to be parents, even if it is socially possible. It is here that the agent of the law makes the biological assumption a social reality.\footnote{The way that the category, or the genus that has been assigned, also determines the lived experience of everyday life is illustrated by Taylor: “We point out how the nature of this which this experience is described as thus given their sense only in relation to this form of embodiment.” \textit{Id.} at 319.}

This is also where the power of inhumanity is executed through law. Law is the tool through which same-sex couples are un-seen as parents, and with that also un-made as parents. It is by being “touched” by law that the relationship between same-sex couples and the children in their care can become elevated into a human relationship.\footnote{Heidegger, \textit{Being & Time, \textit{supra} note 1, at 81–82 (H. 55).}

117. \textit{Id.}}

It is by being designated “untouchable” by law that the relationships between same-sex couples and their children are un-done.\footnote{\textit{Id.}}

The way we shape a legal right or a legal prohibition is also the way that we have decided to lay our values down within a
It is an invitation to a discussion, a discourse that ultimately is about defining and specifying the relationships between children and their caretakers, or between two adults in their role as caretakers of children. The way that we ask the question will also determine the answer. The way a question is asked has two meanings: (1) What was the question asked about? and (2) How was the question asked? When the question is, “Can same-sex couples be parents?,” it is not a question of whether same-sex couples can be parents. There is no doubt that same-sex couples can be parents; they are parents. Then what is the question about? It is a question about genus. It is a question about who and what is Human. Within the Ideology of Genus there are certain experiences of life that go specifically with being human. Can the genus of same-sex couples be parents when being parents means being Human? To ask such a question is to ask if same-sex couples are Humans, or qualify as caretakers of Humans.

119. The spiritualization of ‘values’ through law is illustrated by Pierre Schlag:

Values are like little divinities. Like God, they serve as grounds or unquestioned origins. Like God, their invocation demands worship, reverence, and self-abnegation. Like God, they provide comfort and compensation for an otherwise degraded reality. Like God, they enable the widespread belief in a hopeful, eschatological trajectory for law, politics, and Human existence.


120. The discourse about rights and reason serves as masking the power relationship between the oppressed and its oppressor. “It masquerades the question ‘Was heisst Dasein’?”

The anti-Semites have a right to play with discourse for, by giving ridiculous reasons, they discredit the seriousness of their interlocutors. They delight in acting in bad faith, since they seek not to persuade by sound arguments but to intimidate and disconcert.

SARTRE, ANTI-SEMIT AND JEW, supra note 106, at 20.

121. Taylor, supra note 110, at 317, 319. Taylor argues that it is only a Human that can truly know what it feels like to be Human. Id. at 319. He argues that it might be possible for Others “to work out some descriptions that were roughly extensionally equivalent.” Id.

To ask such a question is to ask a question that is unethical. The question itself begins in the space of the unethical.

The way the question is asked also matters. It is significant that the question of whether same-sex couples could be parents was asked through the law. To question someone’s humanity through the law is to take the inside of someone’s body and drag it into the open in the name of the law. 123 It is to have what is perceived to be the soul made into an argument, just to become the object of a discourse. 124

Judgments about the humanity of a person are not about truth but about preferred attachments to arguments laid down for discourse. When the question about one’s humanity is made

123. The French sociologist Colette Guillaumin connects the relationship between might and power in her observation: “The law is the expression of the ideological/practical techniques of the system of domination.” See GUILLAUMIN, supra note 86, at 140.

The Scandinavian Realist Alf Ross makes the connection between cause and effect through the agency of the law. His argument builds on the premise that a law is only a law when it is applied according to the nature of the genus to which it is applicable. The proof that the presumed genus is manifested in the law is that the law works. This way of arguing moves the legal discourse out from the room of power discourse into the room of a belief in biological categorization:

According to the definition a directive is a norm only if it corresponds to certain social facts ... [T]o say that a norm ‘exists’ means, then, that these facts exist; and to this extent the adequacy of the definition is secured with regard to that use of ‘norm’ which requires that norms exist, and that statements to this effect form part of the description of society.

ALF ROSS, DIRECTIVES AND NORMS § 21 (Ted Honderich & Bernard Williams eds., Routledge & Kegan Paul Ltd. 1968). The Scandinavian Realist school of thought is still haunted by its Nazi past. Taylor in his comment on Heidegger makes the observation that each genus can only know itself and exist according to its class. This position also determines the experiences of the World in which one lives. See Taylor, supra note 110, at 317, 319.

124. See Peter Goodrich, Officium Poetae, 23 LIVERPOOL LAW REVIEW 139, 147 (2001). Peter Goodrich writes about “[t]he attraction of the poem, of language that pleases and potentially persuades by going beyond what can be consciously formulated, lies in an aspiration to move authentically outside the self.”

The argument in this Article is that the law is about the inauthentic and when the law is about asking whom and what is Human, the person at whom the question is aimed is not the Self, but the Other. See also W. E. B. DU BOIS, THE SOULS OF BLACK FOLK: ESSAYS AND SKETCHES (1903).
through the law it also means that one’s inside, one’s soul, has been assigned non-humanity.

XIV. CONTAINMENT

The law-room that prohibits same-sex couples from adopting children is a law-room designed to contain. It is designed to prevent contamination. The thing that is contentious is not the different but the similar. The law-room that contains same-sex couples by preventing them from adopting children is a law-room protecting the genus Human from becoming non-Human through contamination. The law-room serves the purpose of protecting the Human from being un-done through contamination. The Ideology of Genus breaks down in the very moment that it is justified and constituted by biology. The question of same-sex couples and adoption is the point where the two parallels actually meet. The first line of argument is the importance of mixing genera for the sake of reproduction. The second line of argument is the importance of separating genera from each other in order to prevent contamination. According to the Ideology of Genus, it is not possible to biologically justify the eligibility of same-sex couples to be adoptive parents. This is because biologically there is a risk of the contamination of the child that is not biologically “same-sex” through a close relationship with same-sex parents. At the same time, the child itself is a result of a genus-mixing between a man and a woman. This cross-genus mixing produces through a logical leap the pure genus, the human child. The pure human child must be protected from becoming contaminated with the impurity of the humanly impossible, same-sex parents.

126. For a discussion on the fear of embodiment of diseases connected to genus, see generally Anthony Paul Farley, Thirteen Stories, 15 TOURO L. REV. 543 (1999).
127. HEIDEGGER, BEING & TIME, supra note 1, at 51–53 (H. 29).
128. Id.
129. Christel Anderberg (Moderaterna [Conservative Party]), Partnership and Adoption Debate, supra note 47, at Anf. 51. Anderberg argued that research had shown that children that had blood relationships to one of the parents and were adopted by the other parent in a same-sex relationship suffered from “certain” problems. There is no available research on same-sex couples and international adoption, but Anderberg guessed that, considering
A law-room that prohibits same-sex couples from adopting is a law-room that in an Ideology of Genus is internally contradictory to its own ideology.

XV. END STATION

Homophobia is the logical end station of racism and sexism within the Ideology of Genus. Homophobia is the wall at the end of the road. Homophobia is what forces one to turn around and either confront what one sees or continue to run.

The debate over the question of registered same-sex couples’ right to adopt was the wall that forced the Swedish people to confront their Ideology of Genus, or keep running. Different members of the Swedish Parliament made different choices, as was demonstrated in the debate in the Parliament.130

The Ideology of Genus in the homophobic state is cornered by his or her own use of biology. For a person who believes in the Ideology of Genus, race and sex can at least be optically detected.131 The person living in a same-sex relationship, however, is invisible to the eye. It is only by seeing the internal, the essential of genus, that the correct genus can be assigned to the person living within a same-sex relationship. Law here cannot contain before a meeting is possible. Law, in this instance, is limited to containing behavior and not physical features. When it comes to the genus of the same-sex, it is only knowledge that can help to assign since there are no physical features to imagine-into-existence.132 Further, such knowledge can only be obtained by intimacy. And such intimacy also increases the risk of contamination; the homophobe is here cornered by the homophobe’s own homophobia. Humanity is at risk: either by contamination or by misclassification. Failure in assigning the cor-

the complete lack of blood relationship to either parent, the children’s identity problems would be even more severe. Id.

130. See Partnership and Adoption Debate, supra note 47.

131. For a general reading on the relationship between the optical and the assigning of racial genus, see Devon W. Carbado, (E)racing the Fourth Amendment, 100 Mich. L. Rev. 946 (2002); Cheryl I. Harris, Whiteness as Property, 106 Harv. L. Rev. 1709 (1993); Robert Westley, First-Time Encounters: “Passing” Revisited and Demystification as a Critical Practice, 18 Yale L. & Pol’y Rev. 297 (2000).

rect genus is also a sign that the Self is not being Human, because the Human knows the genus of every Other. The risk of misclassification and contamination set aside, a third threat, internal to the Ideology of Genus, occurs when reading same-sex couples as meaning the same within the meaning of the Ideology of Genus. Such reading de-sexualizes the hierarchy of genus itself. If desire between the two as the same is possible, meaning two people as relating “to” each other without feeling the need of dominating or being dominated, hierarchy itself loses its primary purpose, which is to control the outcome of desire. This desire can lead to an uncontrolled mixing between genera. Further, same-sex couples’ interpersonal love and desire towards each other (as the same) not only threatens the purpose of hierarchy but also the purpose of sexuality: a sexuality that can no longer be challenged through hierarchy can no longer be controlled. The existence of same-sex couples with the ability to legally adopt not only questions the status of sexualized hierarchy as necessary between subjects, it also questions sexuality as such. It challenges sexuality to actually be a meeting of minds. Desire cannot hide behind the biological purpose of reproduction; it has to take responsibility for what it is, a meeting of minds.

XVI. HUMAN

The Human has to be the presumed. Humanity has to be the unproved. Humanity is that which is to be believed without proof. The human has to be the non-defined; the human has to be the unspecified. Every project that is about defining the

133. HEIDEGGER, BEING & TIME, supra note 1, at 34–35 (H. 14).
134. For the position that the same-sex couple has liberated itself from the dependency on “equal” or “similar” in its interaction between twos, see HEIDEGGER, IDENTITY AND DIFFERENCE, supra note 38, at 25–27. Heidegger argues that the same only needs one, the self with itself. Id.
135. See id.
136. Irigaray calls it a “horizontal transcendence.” IRIGARAY, TO BE TWO, supra note 63, at 18. Desire comes from this irreducible alterity. Id.
137. This is similar to what Freud discusses as “the zero of sexual tensions” according to Irigaray. IRIGARAY, TO BE TWO, supra note 63, at 41.
human is an inhuman project, and every inhuman project is fundamentally unethical.138

Every definition of the Human is also a definition of the non-human.139 The question in the debate over same-sex couples’ eligibility to adopt children was whether same-sex couples could be parents. The meaning of that question is that same-sex couples are not constituted by two Humans. Non-humanity was presumed and humanity was what had to be proven. That is what it means when the question is whether same-sex couples can be allowed to be intimate with the Human, intimate in the sense of being caretakers of a Human child. The law-room itself was the proof of the presumed non-humanity. The need for a law-room that contains is the proof that non-humanity was what was presumed.

In this debate, Human was defined as the ability to biologically conceive a Human child as a couple, or at least to be able to appear as the conceivers of a Human child. At the same time that the Human was defined through biology in the Swedish Parliament, the non-Human was also defined.

The definition of the Human is a project that is without ethics. This is also why the debate in the Swedish Parliament in the Spring of 2002 was an unethical debate. It was unethical because it was about qualifying for humanity. In this debate both sides argued about the Human, and one side argued that same-sex couples did not qualify for the definition of Human, in the sense that they could not qualify as the genus “parents.” They were held to not qualify as members of the genus that could be mixed with the offspring of Humans. To not qualify for the definition of Human is to be non-Human, and to enter any such debate is to participate in an inhuman project.

This is also why a debate like the one that took place in the Swedish Parliament sends chills down the spine, because it is a debate in the Spirit of the Ghost of the Second World War. So many thought the Ghost was gone only because it had not been

139. “Thus Dasein has turned out to be, more than any other entity, the one which must first be interrogated ontologically.” HEIDEGGER, BEING & TIME, supra note 1, at 34 (H. 14).
seen for some time, not because it had no believers. It’s reappearance proved such believers still exist.

XVII. CURE

The only cure for the fear of contamination is to not believe in Ghosts. It is to prefer the belief in the Human to the fear of the Ghost. The only way the homophobe can find a cure for the fear of contamination is to abandon the project of classification and the Ideology of Genus. It is about conquering the fear instead of conquering each other. It is about, as Irigaray says, a “philosophy of caress” and about “loving to you” instead of loving you. It is about creating the space for a meeting between minds in the “to” where both are the Other to each other.

XVIII. CONCLUSION

The debate in the Parliament on the topic of same-sex couples and adoption was based on an Ideology of Genus. The Ideology of Genus was the unspoken undercurrent of the whole adoption debate. This is also why the question of adoption became so sensitive; it targeted the question of reproduction within the Ideology of Genus. The Swedish debate was haunted by the spiritualization of categorization. The Ghost of Heidegger resurfaced with the question of who, among people, belonged to the category of the Human. The people in question were same-sex couples. Control over reproduction is one of the cornerstones of male hegemony. The Ideology of Genus begins and ends with a categorization of people according to a hierarchy.

140. IRIGARAY, TO BE TWO, supra note 63, at 24.
141. Id. at 19.
142. Tasso Stafilidis (Vänsterpartiet [Leftist Party]) pointed out that the question was about allowing children of same-sex parents the same protection as children with different-sex parents. Tasso Stafilidis (Vänsterpartiet [Leftist Party]), Partnership and Adoption Debate, supra note 47, at Anf. 68.
144. See HEIDEGGER, BEING & TIME, supra note 1, at 164 (H. 126) (commenting on the danger of falling under the rule of the Other).
This hierarchy is believed to be natural and needed for the Human to be a possibility. 145

The question of same-sex couples' eligibility to adopt children became the wall against which the Ideologist of Genus was confronted with his own internal contradictions.

There was an implosion. It was deemed necessary, on the one hand, to treat same-sex couples as a genus separate from the genus of different-sex couples. And, on the other hand, it was also deemed necessary to treat same-sex couples as the result of a combination of two of the same genera (a combination of same-sex), in contrast to different-sex couples, which were treated as the result of a combination of two different genera (a combination of different sex). These incompatible necessities imploded when placed within the context of reproduction. What could not be resolved within the Ideology of Genus was whether reproduction happens through a combination of genera or within each individual genus.

The question of adoption as a form of reproduction therefore became crucial in deciding which route within the Ideology of Genus to follow. The genus child becomes itself a complicated genus connected to the question of reproduction of genus. The reproduction of genus became in this debate a question of containment and separation of different genera, namely same-sex couples from different-sex couples, and their offspring, children.

The underlying current of the whole debate was that different-sex couples' offspring, namely children, had to be shielded from the environment of same-sex couples so that they would not be contaminated by and seduced into becoming same-sex as well.

One key question was whether an entity constructed out of two could be an entity without an internal hierarchy of genus, such as man-over-woman. This leads to the question of the sexualization of hierarchy itself.

The whole debate over same-sex couples' ability to legally adopt children became a threat to the notion that hierarchy is necessary between two different genera to prevent contamination of the primary genus, the man, as the symbol of humanity.

In the end, it became a questioning of and a threat to the status of male hegemony as a necessary part of the natural or-
der. In that sense, the Ideology of Genus has taken it upon itself to uphold male hegemony in the defense of the Human.

The author has not argued that male hegemony is a specific Germanic phenomenon. The author has argued that the way that male hegemony was defended in the Swedish Parliament followed an Ideology of Genus with roots in a Germanic cultural heritage of and belief in Wesen.

The author has argued that when the internal logic of the Ideology of Genus is followed, homophobia is the end station of racism and sexism. The motivating force towards the end station of homophobia is supplied by the question of reproduction within the Ideology of Genus. The connection between racism, sexism and homophobia has been shown to follow three parallel tracks, all of which, in the end, are reflections of the same underlying ideology, the Ideology of Genus. The three tracks have been, the story of the spirits of the National Socialist Party, embodied in Martin Heidegger, the presence of the Ghost of Heidegger in the same-sex couples’ adoption debate and, finally, that the fable of the spirits, the Wesen of the Germanic culture that haunt Heidegger, is central to his work. The spiritualization of the categorization of humans into different genera, and the use of the legal system to prevent those entities from mixing, is the Ideology of Genus.
OUT OF THE BLACK-BOX? THE INTERNATIONAL OBLIGATION OF STATE ORGANS

Ward Ferdinandusse∗

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∗ LL.M., Ph.D. Candidate, Amsterdam Center for International Law, University of Amsterdam. Visiting Researcher, Hauser Global Law School Program, New York University (Spring 2003). I owe thanks to many people for useful comments, suggestions and information, including my colleagues in Amsterdam, in particular André Nollkaemper, as well as Warda Henning, Benedict Kingsbury, Martti Koskenniemi, Mattias Kumm, Patrick McFadden, Cesare Romano, Mason Weisz, Ekow Yankah and the participants in New York University’s JSD Colloquium. I also thank the Brooklyn Journal of International Law’s staff and gratefully acknowledge the financial support of the Fulbright Foundation, the Netherlands Organization for Scientific Research and the Amsterdam University Fund. This Article was written in the context of the ACIL’s research project: Interactions between International Law and National Law. Contact: ferdinandusse@jur.uva.nl or www.jur.uva.nl/acil.

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I. INTRODUCTION

Do international legal obligations only bind States, as monolithic entities, or do they also oblige their State organs? This distinction poses an important question because, inter alia, a sense of direct obligation can lead State organs to respect international norms and, thus, may increase international law’s effectiveness worldwide. While many international law scholars assume that international obligations bind the State, but not its organs, an increasing amount of case law from international courts now challenges this assumption.

On March 3, 1999, the International Court of Justice (“ICJ”) indicated provisional measures against the United States (“U.S.”) at the request of Germany, to halt the pending execution of Walter LaGrand in Arizona. After explicitly noting that “the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the [U.S.],” the Court indicated inter alia that “(a) The [U.S.] should take all measures at its disposal to ensure that Walter LaGrand is not...
executed pending the final decision in these proceedings” and “(b) the [U.S.] Government...should transmit this Order to the Governor of the State of Arizona.”

The ICJ’s finding in *LaGrand* stands at odds with the dominant view in international law, which envisages the State as a black-box. Under this theory, international law can insert its demands in the box, requiring certain results to come out of it; however, it cannot determine how these results are reached within the box. Thus, under black-box theory, the State must ensure that its organs comply with its international obligations. Accordingly, the ICJ would have had to limit its findings to address U.S. obligations instead of also determining the Governor of Arizona’s responsibilities. Indeed, the ICJ normally only pronounces on States’ international obligations, not State organs.

Like *LaGrand*, many other cases exist that contradict black-box theory and assume that State organs directly hold obligations under international law, independent of any national reception. In fact, a rich line of national case law exists in this respect. This Article will provide an overview of relevant in-
ternational case law and will argue that international courts’ (recent) involvement strengthens the challenge to black-box theory. In addition, this Article will argue that this challenge is both evidence and a consequence of the changing character of international law. The concept of State organ obligation will improve compliance with international law, but will also make international law’s deficiencies a more pressing problem.

The question of whether international obligations directly bind State organs has practical relevance in a multitude of ways. First, this issue may influence national authorities’ will-

See also Miscellaneous (Bangalore Principles 4 and 7), reported in 14 COMMONWEALTH L. BULL. 1196, 1197 (1988). According to the Bangalore principles:

[T]here is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law — whether constitutional, statute or common law — is uncertain or incomplete….It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes — whether or not they have been incorporated into domestic law — for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.

Id.
ingness to comply with international law, either directly or indirectly, through public pressure." That this matter can be one of life or death was demonstrated when the Governor of Texas announced that he did not feel legally obliged to obey the ICJ's February 5, 2003 Order to stay the execution of two Mexican prisoners on death-row in Texas. Second, international courts' determinations that State organs should heed the call of international law, regardless of national implementation, can also provide inspiring examples for litigation in U.S. courts, especially in human rights cases. Third, international law's effect on State organs also underlies many practical issues regarding national legal orders in general. For example, to what extent should courts defer to the executive branch in determining whether treaties are self-executing? Is the *male captus bene detentus* principle viable? The suggestion that *jus cogens* norms may bind national courts, in defiance of the normal implementation framework, forms a particular example of State organ obligation that challenges black-box theory.

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11. See infra note 130.


13. See Paul Mitchell, *English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction After Alvarez-Machain*, 29 CORNELL INT'L L.J. 383, 392 (1996) ("[A]s a matter of international law domestic courts must ensure that a state's international legal obligations are carried out. Accordingly, courts are under a duty to stay proceedings against a fugitive who has been brought before them in violation of international law. The existence of this duty is the central issue....").

14. See, e.g., *U.S. v. Matta-Ballesteros*, 71 F.3d 754, 764 n.5 (9th Cir. 1995) ("Kidnapping also does not qualify as a *jus cogens* norm, such that its commission would be justiciable in our courts even absent a domestic law."); *Comm. of United States Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 935 (D.C. Cir. 1988). The Court explained:

When our government's two political branches, acting together, contravene an international legal norm, does this court have any authority to remedy the violation? The answer is "no" if the type of international obligation that Congress and the President violate is either a treaty or a rule of customary international law. If, on the other hand,
This Article’s primary agenda, however, is not simply to show exceptions to black-box theory, but to challenge its accuracy as the default rule in international law. It is well known and increasingly recognized that there are certain phenomena in the reception of international law for which the theory cannot account. Nevertheless, despite all of its shortcomings, the black-box theory remains pervasive in theory and practice, as this Article will demonstrate later. Scholars tend to treat divergent phenomena as proverbial exceptions that confirm the rule, instead of evidence that the theory requires revision. This Article will focus on how international law discourse still considers State organ obligation as a predominantly alien concept and will show how the theory may change from the rule to the exception.

This Article will move from a high level of generality to a more specific discussion of the issues involved. First, the Article will provide a concise exposition of black-box theory and its acceptance in practice, taking a top-down perspective of international law that does not concern itself with specific international obligations (e.g., treaty or custom) or the State organs involved (e.g., parts of a federation or of an internal separation of powers in legislative, executive and judicial organs). Accordingly, while this Article will focus mostly on courts, the Congress and the President violate a peremptory norm (or jus cogens), the domestic legal consequences are unclear.


15. See McFadden, supra note 8, at 46–47.

16. Cf. THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 125 (James Crawford ed., 2002) [hereinafter ILC ARTICLES ON STATE RESPONSIBILITY] (Article 12 states: “There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.”).

17. See id. at 94. As Article 94 states:

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

Id.
term “State organ” should be understood in a broad sense and in principle can include any entity or actor exercising State authority, be it a state in a union, province, city, agency, organ or official.\(^{18}\) As this Article will explain shortly, the black-box theory is deeply embedded in international law. Therefore, it is important to first challenge the categorical assertion that international obligations cannot bind State organs directly before refining our understanding of the concept. While perhaps a rather abstract approach, this type of analysis provides a clear overview of the black-box theory’s broad grip on international obligations of all sorts. In a similar manner, this Article will then set out the arguments against black-box theory using a broad overview of divergent case law.

The analytical section will then become more specific as it will focus in on the different causes, problems and consequences of State organ obligation. Clearly, whether a particular international obligation binds a particular State organ will depend largely on its source (e.g., treaty or decision of an international court), character (e.g., positive or negative obligation, obligation of result or obligation of conduct), content and wording. Similarly, important differences exist, for example, between territorial units and courts. Moreover, international obligations do not bind all State organs. This Article’s focus, however, is on issues relevant to different State organs’ obligations, including federalism and the democratic legitimacy of the international obligations involved, and its focus will be thus limited.

Part II will shortly dwell on the black-box theory’s current status, the practical relevance of State organ obligation, and the limited relevance of the non-self-executing character of certain treaty provisions. After an exposé of relevant case law in Part III, this Article will provide an analysis in Part IV that is divided into three sections. The first section will focus on the material changes in international law and their consequences for black-box theory. The second section will lay out its own reading of the model of State organ obligation that may replace the black-box theory. The third will then address some policy considerations, including issues of federalism, separation of powers

\(^{18}\) Arguably, private actors or entities exercising authority on behalf of the State (such as private corporations running prisons) could be considered to have similar obligations under international law as State organs.
and democratic legitimacy. Finally, Part V concludes this Article’s analysis of black-box theory, explaining that the trend towards State organ obligation is real, developing and important.

II. BLACK-BOX THEORY IN INTERNATIONAL LAW

The black-box theory has a long history in international legal scholarship, and is undoubtedly the dominant theory at this time. Academia has taught generations of lawyers that international law binds the State, but not its organs. Most academics consider exceptions possible, but only by State choice, not because of international law’s normative power. For example, States can choose to “open the box” by virtue of a general reference to international law in their nation’s constitution. As a


The doctrine that the international legal order has to be clearly distinguished from the legal order of States has led to the concept that the validity of international law on the municipal plane is always based on the authority of the State and that it is therefore necessary to transform the norms of international law into internal law in order to make them binding on State organs (courts or administrative agencies) or also possibly on individuals.

Id. Descriptions of this debate can be found in any textbook. See also Andrzej Wasilkowski, Monism and Dualism at Present, in THEORY OF INTERNATIONAL LAW AT THE Threshold OF THE 21ST CENTURY: ESSAYS IN HONOUR OF KRYSTOF SKUBISZEWSKI 323–36 (Jerzy Makarczyk ed., 1996).

20. See, e.g., Gerald Fitzmaurice, The General Principles of International Law Considered From the Standpoint of The Rule of Law, 92 REC DES COURS (La Haye) 5, 77 (1957 II) (“The truth is, that the concept of the State or nation as an indivisible entity possessing its own separate personality, is a necessary initial hypothesis, which has to be made before it is possible to speak significantly of international law at all, and which is implied by the very term ‘international.’”).

21. See Rainey v. United States, 232 U.S. 310, 316 (1914) (“Treaties are contracts between nations, and by the Constitution are made the law of the land.”). As Gerald Fitzmaurice notes:
result, State organs may find themselves bound by international obligations. However, such obligations of individual organs are left to the discretion of the State, and are revocable at all times. From the standpoint of international law under black-box theory, State organs are simply invisible.

Surely, the black-box theory is not undisputed. It has received strong opposition from eminent scholars like Hersch Lauterpacht. Among contemporary scholars, the black-box theory has drawn fierce and principled critiques, more nu-

[Fitzmaurice, supra note 20, at 90–91.

22. See, e.g., Francis G. Jacobs, Introduction, in THE EFFECT OF TREATIES IN DOMESTIC LAW xxiii, xxiv (Francis G. Jacobs & Shelley Roberts eds., 1987). Francis Jacobs elaborates on the notion of State discretion as follows:

[The government, régime, head of State, etc. are merely organs of the State and are not the State itself, they are the agents of the State for carrying out its international obligations. These are not vested in them as organs, but in the State they represent, though, under the State’s constitution, the responsibility for carrying out the State’s obligations may attach to them.

Fitzmaurice, supra note 20, at 90–91.

22. See, e.g., Francis G. Jacobs, Introduction, in THE EFFECT OF TREATIES IN DOMESTIC LAW xxiii, xxiv (Francis G. Jacobs & Shelley Roberts eds., 1987). Francis Jacobs elaborates on the notion of State discretion as follows:

[The effect of international law generally, and of treaties in particular, within the legal order of a State will always depend on a rule of domestic law. The fundamental principle is that the application of treaties is governed by domestic constitutional law. It is true that domestic law may, under certain conditions, require or permit the application of treaties, which are binding on the State, even if they have not been incorporated into domestic law. But this application of treaties “as such” is prescribed by a rule of domestic constitutional law. It is not a situation reached by the application of a rule of international law, since such a rule, to have effect, itself depends upon recognition by domestic law.

Id.

23. NOLKAEMPER, supra note 4, at 7.

24. INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT: VOL. I — THE GENERAL WORKS 280 (Elihu Lauterpacht ed., 1970) (“To say that the State — and the State only — is the subject of international duties is to say...that international duties bind no one; it is to interpose a screen of irresponsibility between the rule of international law and the agency expected to give effect to it.”).

25. See, e.g., Conforti, Notes, supra note 9, at 18 and 21–23. Conforti explains:

In all my contributions on the integration of public international law into the domestic legal orders I have always argued that international rules...should be treated on the same footing as unilateral municipal law....The old opinion that international rules had only states as their addresses, that only diplomats were to deal with them, and
anced “problematization,”26 as well as simple denials without elaboration.27 Moreover, scholars have widely acknowledged that the theory has never been able to fully account for the complex and divergent practice of domestic implementation of international law.28 For example, the international obligation of States to refrain from defeating the object and purpose of a treaty before its entry into force would have to bind State organs directly in order to gain meaningful force.29 A moderating role of national law is hardly feasible in this respect, as the obligation serves a preliminary and temporary role — one meant to precede the treaty’s operation and implementation through national law.30

that international law was a subject to be studied in the Faculties of Political Science rather than in the Law Faculties, is completely abandoned more or less in all countries....Are state officials bound by the “international” interpretation of an international rule? It is clear that the interpretation embodied in binding international decisions is binding with regard to the specific case brought before the international body.  

Id. Pierre Pescatore, Conclusion, in THE EFFECT OF TREATIES IN DOMESTIC LAW 281–82 (Francis G. Jacobs & Shelley Roberts eds. 1987) [hereinafter Pescatore, Conclusion] (arguing that requiring the transformation of international obligations allows states to abstain from internal execution and deprives treaties from their contractual and international character; as a result “incorporation procedures and methods based on ‘transformation’ are...by their very essence incompatible with good faith in international relations.”).


27. See, e.g., Karl Zemanek, The Legal Foundation of The International System: General Course on Public International Law, 266 REC DES COURS (LA HAYE) 9, 191 (1998) (“[l]n theory, Parliaments as State organs are bound to interpret international treaties in accordance with the rules embodied in the [Vienna Convention on the Law of Treaties.]”); see also Danilenko, supra note 9, at 54 (“Although international norms bind all branches of government, domestic courts probably constitute the most important organs for the implementation of international norms at the domestic level.”).

28. See supra notes 9, 16.


But despite these caveats, black-box theory still reigns as the all-pervasive theory in international law. International scholars accept the black-box theory as the default rule, which cannot easily be set aside. Leading textbooks, while not insensitive to the changes in international law, still advance the position, explicitly or implicitly, that it is up to the State to determine the binding force of international obligations on its organs.  

Most scholars understand even the fact that customary interna-

31. See, e.g., ANTONIO CASSESE, INTERNATIONAL LAW 168 (2001). Antonio Cassese specifically points out that:

States consider...the translation of international commands into domestic legal standards [as a] part and parcel of their sovereignty, and are unwilling to surrender it to international control. National self-interest stands in the way of a sensible regulation of this crucial area. As a consequence each State decides, on its own, how to make international law binding on State agencies and individuals and what status and rank to assign to it in the hierarchy of municipal sources of law.

Id.; LOUIS HENKIN, INTERNATIONAL LAW: CASES AND MATERIALS 149, 153 (West Publishing Co. 1993)

The international obligation is upon the state, not upon any particular branch, institution, or individual member of its government....Since a state's responsibility to give effect to international obligations does not fall upon any particular institution of its government, international law does not require that domestic courts apply and give effect to international obligations.

Id.; L. OPPENHEIM ET AL., OPPENHEIM'S INTERNATIONAL LAW 85 (Sir Robert Jennings ed., 9th ed. Longman Group UK Lmtd. 1992) (“The obligation is the obligation of the state, and the failure of an organ of the state, such as a Parliament or a court, to give effect to the international obligations of the state cannot be invoked by it as a justification for failure to meet its international obligations.”); ALFRED VERDROSS & BRUNNO SIMMA, UNIVERSELLES VÖLKERRECHT: THEORIE UND PRAXIS 539–40 (Duncker & Humblot eds., 1984) (“[International law] überträgt seine Durchführung den verpflichteten Staaten, die es durch ihre Organen zur Anwendung zu bringen haben....Bezweckt eine Völkerrechtsnorm Rechtswirkungen im innerstaatlichen Bereich, so muß ihr Inhalt in die innerstaatliche Rechtsordnung eingeführt (‘inkorporiert’) werden, um durch die staatlichen Organe erfüllt werden zu können.” (“International law delegates its effectuation to the obliged States, which are to execute it through their organs....If a norm of international law has the purpose of taking legal effect within the State, its content must be introduced (incorporated) in the national legal order to enable State organs to comply with it.”)).

See also IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 31–56 (Clarendon Press, Oxford 1998) (“In principle decisions by organs of international organizations are not binding on national courts without the cooperation of the internal legal system.”).
tional law becomes binding on State organs from the moment of its conception in most, if not all, countries to result from a permissive rule of national law and not from the normative force of the customary law itself.\textsuperscript{32}

The acceptance of black-box theory permeates doctrine and practice, both national\textsuperscript{33} and international.\textsuperscript{34} It is evidenced ex-

\begin{quote}
32. See \textsc{Cassee}, \textit{supra} note 31, at 172. However, the fact that courts in a great many States apply customary international law without a corresponding provision in national law seems to argue for State organ obligation rather than black-box theory. Indeed, the famous statements in \textit{The Paquete Habana} and the history of the application of international law in the U.S. support that view. See \textit{The Paquete Habana}, 175 U.S. 677, 700, 708 (1900). In \textit{The Paquete Habana}, the U.S. Supreme Court noted that:

International law is part of [U.S.] law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations....This rule of international law is one which prize courts administering the law of nations are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter.


33. See, e.g., \textsc{McFadden}, \textit{supra} note 8, at 45 (“Black-box theory made an early appearance in American jurisprudence and has remained a common feature of judicial reasoning to this day.”).

34. See, e.g., \textsc{Ballantyne, Davidson and McIntyre v. Canada}, HRC Communications Nos. 359/1989 and 385/1989, views adopted on March 13, 1993, 47th Session (1993), \textit{cited in Higgins, The Concept, supra} note 9, at 548. In \textsc{Ballantyne}, the applicants complained to the Human Rights Committee that a prohibition by the province of Quebec to use the English language in advertising violated their rights under the International Covenant on Civil and Political Rights (“ICCPR”). While finding a violation of Article 19, the Committee did not find a violation of Article 27 (minority rights):

As to Article 27, the Committee observes that this provision refers to minorities in States; this refers, as do all references to the “State” or to “States” in the provisions of the Covenant, to ratifying States.... Accordingly, the minorities referred to in Article 27 are minorities within such a State, and not minorities within any province. A group may constitute a majority in a province but still be a minority in a State and thus entitled to the benefits of Article 27. English speaking citizens of Canada cannot be considered a linguistic minority.
licitly in treaty practice, for example, by federalism clauses that limit the obligations to the central State. Various treaties contain provisions that, similar to a federalism clause, assume a lack of obligation on the part of (certain) State organs. Likewise, many scholars consider that international law does not govern international agreements between State organs, such as those between states in a union or provinces. It is especially

The authors therefore have no claim under Article 27 of the Covenant.

Id. at para. 11.2. Thus, the Committee adopted a narrow reading of the word State in the ICCPR, which excludes their constituent parts, such as a province like Quebec. Accordingly, the Committee called on Canada to remedy the violation of Article 19 “by an appropriate amendment of the law.” Id. at para. 13. The Committee addressed Canada even though it was clear that such an amendment would have to be passed by the provincial government of Quebec.

35. See, e.g., Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, art. 34, 1037 U.N.T.S. 152, 161.


Authorities competent to receive information:

(a) Information supplied by Europol under this Agreement shall be available to competent U.S. federal authorities for use in accordance with this Agreement.

(b) Such information shall also be available for use by competent U.S. state or local authorities provided that they agree to observe the provisions of this Agreement, in particular Article 5, paragraph 1.

Id.

37. See Eyal Benvenisti, Domestic Politics and International Resources: What Role For International Law?, in The Role of Law in International Politics: Essays in International Relations and International Law 109, 126 (Michael Byers ed. 2000). As Eyal Benvenisti explains:

Current doctrine seems to suggest that [sub-State] agreements will not be governed by international law, but rather by one or a number of national laws. This doctrine is derived from two principles: first, the principle of unity of action of the State at the international level; and second, the lack of legal personality of sub-State entities in the international sphere.

Id. However, a clear contrary practice exists in this regard. Hong Kong, a special administrative region of the People’s Republic of China, participates in “more than forty international organizations and associations” and is party to hundreds of treaties, both bilateral and multilateral. RODA MUSHKAT, ONE
telling that even initiatives for reform that aim at more effective adjudication of international law at the national level are often drafted presuming black-box theory.38

Thus, we learn to see the State as a walled town. International law can lay siege to the town from the outside, forcing the...
State to bring about certain results; however, it cannot control how these results will be accomplished or who will act within the walled town. Even detailed international obligations that specify the means and organs through which desired results are to be achieved do not impose themselves directly on the designated organs, but rather oblige the State to put those specific organs to work. In the absence of such delegation to specific organs by the State, the “town walls” serve to blockade international law’s reach.

In order to fully comprehend the relevance of State organ obligation, it is necessary to clearly distinguish between international obligations and related questions, such as the obligation’s rank in the national legal order and its international enforcement through State responsibility. Treating these questions as one all-encompassing topic obscures the fundamental importance of the obligation itself, even though it often seems logical to discuss legal obligation in conjunction with enforcement. For example, one can argue that as long as the State remains the relevant unit for the ultimate enforcement of international obligations, which takes place at the international level, the question of whether State organs have parallel obligations to that of the State proves irrelevant. What does it matter whether the Governor of Arizona has an international obligation if it is the U.S. that will appear before the ICJ in case of a breach?

Similarly, it is often assumed that the effect of international obligations on organs within a State is only relevant if the in-

39. See Fitzmaurice, supra note 20, at 68–69 (“[W]hen it is said that international law in a number of ways prescribes what States must do or not do in their own territory, this does not mean that international law has, as such, direct and immediate application in State territory.”). Cf. Lord Denning MR in Blackburn v. Attorney-General, 1 W.L.R. 1037 (C.A. 1971) (“Even if a treaty is signed, it is elementary that these courts take no notice of treaties as such. We take no notice of treaties until they are embodied in laws enacted by Parliament, and then only to the extent that Parliament tells us.”).


41. Part IV.B. of this Article will revisit the relationship between State organ obligation and State responsibility.
ternational norms can trump national law. In fact, Professor John Rogers, in his analysis of U.S. case law, states that U.S. courts and judges do not apply public international law ipso facto, specifically noting that:

In the statutory interpretation context, even [in] the most extreme application of the Rule of Interpretation,...the court [has been] careful to state that the Congress [can] legislate in contravention of international treaty obligations of the [U.S.], if only the words of Congress were clear enough....The universal assumption is thus incontrovertibly “dualist” in the sense that in [U.S.] courts, public international law is [U.S.] law only if something in [U.S.] law makes it so.  

This analysis of international law’s application in the U.S. clearly steps too far. The fact that congressional legislation can override treaty law in the U.S. is not an argument against the binding power of treaties on the courts under international law. It is merely a limitation of the practical effect of a treaty’s bindingness. After all, courts, as State organs, will generally follow the instructions of national law in resolving conflicts between national and international rules. Lack of supremacy, nevertheless, fails to render the question of State organs’ international obligations as superfluous.

Rather, a “sanctionist” perspective on international law develops by connecting the question of obligation to enforcement or hierarchy. Such an analysis concentrates the discussion on cases where international obligations are breached or conflict with national law (or both). This type of analysis, however, only portrays a part of the story. Often, States simply comply with international obligations, discarding the need for external enforcement. Similarly, international obligations can be effective without directly confronting national law. In LaGrand, it was open to both the Governor of Arizona and the U.S. Supreme

43. Id.
44. For example, when Courts apply and interpret national law in conformity with international law. See, e.g., infra note 321.
45. In fact, the U.S. acknowledged this point in the case’s final proceedings before the ICJ. See LaGrand, 2001 I.C.J. 104, para. 95.
Court, under national law, to grant a stay of the execution and, thus, ensure compliance with the Order of the ICJ. A sufficient sense of obligation under international law might well have compelled them to do so.

Some commentators mainly focus on the necessity of an internationalist attitude of State organs, discarding international law’s bindingness as a theoretical issue that is of little effect for everyday practice. Although the importance of State organs’ cooperative attitude is beyond doubt, a far-reaching relativization of the bindingness of international obligations on State organs is misplaced and counter-productive. Certainly it is overly optimistic to first imprint lawyers during their education with the idea that international law has no place of its own within the State and then expect them to vigorously uphold (unincorporated) international obligations during the rest of their careers. Relativizing the formal status of international obligations...
tions is not likely to convince nationalist skeptics that they should pay more attention to international law in practice.\footnote{See Helfer & Slaughter, supra note 9, at 304–07. Cf. Jochen A. Frowein, The Implementation and Promotion of International Law through National Courts, in International Law as a Language for International Relations 85, 92–93 (United Nations Publ., 1996) [hereinafter Frowein, The Implementation] ("The slogan, 'international law forms part of the law of the land,' first used by British judges very early on, has certainly had an enormous impact on the general attitude of lawyers in the countries which have adopted the rule.").}

Breaking away from the sanctionist perspective exposes the importance of the question of State organ obligation. The binding nature of these obligations is an important factor in the internalization, and thus effectuation of the law.\footnote{See generally Harold Hongju Koh, Why Do Nations Obey International Law?, 106 YALE L.J. 2599 (1997).} It can also be an effective argument in bringing public pressure on State organs to comply with international obligations in concrete cases.\footnote{State organs, when breaching international law, regularly deny the binding force of the obligation, thereby recognizing it as a relevant factor. See, e.g., LaGrand, 2001 I.C.J. 104, at para. 33 (referring to the behavior of various U.S. organs); Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248, 258 (Request for the Indication of Provisional Measures) (Apr. 9) [hereinafter Breard] (involving issues similar to LaGrand, the execution of a foreign national in the U.S. despite provisional measures of the I.C.J.); infra Part III.A.1.}

This question takes on further significance where the central government has no formal power to compel an organ to comply with international law, as may be the case with courts and states in a union. A telling example is found in the 1972 judgment of the European Court of Human Rights ("ECHR") in \textit{Tyrer v. United Kingdom}.\footnote{Tyrer v. United Kingdom, 2 Eur. Ct. H.R. 1 (ser. A) (1978), cited, along with similar cases, in Higgins, The Concept, supra note 9, at 550.} In this case, the ECHR held the United Kingdom in breach of Article 3 of the European Convention for the practice of judicial corporal punishment on the Isle of Man.\footnote{Id. at para. 39.} Nevertheless, the Manx legislature refused to alter its law on judicial corporal punishment, and the United Kingdom’s government could neither compel nor persuade it.\footnote{Id. at paras. 13–15.} Eventually, a change in the Isle of Man High Court's case law led to a vol-
untary abrogation of the practice of corporal punishment. In a case like this, it is crucial that the State organ recognizes the international obligation, as the Isle of Man Court did when the legislature would not. Otherwise, the State would need to change either its internal structure or its international obligations. This Article will revisit the practical effects of State organ obligation in more detail in Part IV.B.

Finally, the oft-debated question of the self-executing character of treaty provisions requires some comment at the outset. Limiting the domestic validity of treaties to those that are self-executing is essentially an avoidance doctrine under national law, allowing the courts to ignore certain international norms. Some treaty provisions are surely imprecise or incomplete, but no rule of international law requires States to exclude these provisions from their national legal order altogether. Courts can very well apply all treaty provisions, and hold that non-self-executing provisions are domestically valid law, but too imprecise or incomplete to govern a specific case.

Therefore, the mere fact that a treaty provision is labeled as a non-self-executing obligation under national law will in principle not prevent it from placing an international duty on State organs. At best, it may be indicative of a lack of precision or completeness, which precludes the provision from imposing such a duty. On the other hand, as may be inferred from our discussion of hierarchy above, a national rule prohibiting the application of non-self-executing provisions may well prevent courts from giving effect to their international obligations. In this regard, the matter of self-execution is no different than any other avoidance doctrine in national law, such as the “political question” doctrine, the act of state doctrine or restrictions on the standing of individuals.

56. See Higgins, The Concept, supra note 9, at 550.
57. The existence of declarations on the non-self-executing character of entire treaties and the fact that international judges and arbitrators regularly apply provisions that national courts deem non-self-executing evidence the national origin of the non-self-executing label.
58. See Danilenko, supra note 9, at 65 (stating that the Russian Constitutional Court does not distinguish between self-executing and non-self-executing treaties).
59. Obviously, this problem will lead to a breach of the international obligation.
III. DIVERGING PRACTICE: DECLINE OF BLACK-BOX THEORY?

Now that we have outlined the black-box theory and its acceptance in practice, we turn to the case law that challenges the view that State organs have no international obligations unless they are imposed by domestic law. This section starts with an inquiry of the ICJ and then proceeds to examine the practice of other international bodies.

A. The International Court of Justice

Because international law predominantly focuses on States as the relevant units, international courts are generally set-up to deal with States as unitary entities and not with their specific organs. The principal function of the ICJ, like its predecessor, the Permanent Court of Justice, is to resolve disputes between States. The obligation to comply with ICJ judgments is placed upon the parties participating in the proceedings. While it is clear that this obligation binds the State as an entity, there is no consensus as to whether it obligates State organs. Professor Shabtai Rosenne states that it “follows from the fact that the decision is binding upon the State as such that it is binding upon all the organs of the State.” Others believe that the obligation to comply is incumbent only upon the State as an entity, and that its organs “are not directly obliged by virtue of the judgment unless a direct obligation is provided for in the constitutional law of the State concerned.”

60. Several courts now allow for the participation of individuals in addition to States. Partly as a consequence of this development, Courts, especially in Europe, have been able to force a direct relationship with State organs, although participation of State organs was not envisaged in the legal framework of these courts.


63. See Sarita Ordóñez & David M. Reilly, Effect of the Jurisprudence of the International Court of Justice on National Courts, in DECISIONS, supra note 9, at 335.


65. THE CHARTER OF THE UNITED NATIONS, A COMMENTARY 1176 (Bruno Simma ed. 2002). See generally Mohammed Bedjaoui, The Reception by Na-
The question of State organ compliance also remains unresolved in practice. The duty of specific State organs to comply with ICJ judgments has received little treatment, and, in the U.S., generally negative treatment. The Court itself has seldom, if ever, commented specifically on the position and obligations of State organs. Recently, however, that situation has changed.

1. *LaGrand*

In order to fully understand the proceedings before the ICJ in *LaGrand*, it is necessary to examine the case’s background. In the U.S., Arizona prosecuted and sentenced to death two German nationals, the brothers Karl and Walter LaGrand, without notifying them of their right to consular assistance under the Vienna Convention on Consular Relations. In recent years, the U.S. has persistently violated this duty of notice. This pattern of violations has drawn protests from several countries, especially in death penalty cases, and resulted in the issuance of an Advisory Opinion by the Inter-American Court of Human Rights.

Shortly before *LaGrand*, the ICJ ordered provisional measures against the U.S. at the request of Paraguay in the case of Angel Breard, who had been sentenced to death in Virginia without receiving the notification required under the Vienna Convention. The Order required the U.S. to “take all meas-

ures at its disposal to ensure that Angel Francisco Breard [would] not [be] executed pending the final decision” of the Court. While this Order addressed the U.S. without any further specification, in a separate opinion, the Court’s President recognized “the serious difficulties which [the order imposed] on the authorities of the [U.S.] and Virginia.” As in all prior cases similar to Breard, the U.S. insisted that an apology to the country of nationality was an appropriate and sufficient remedy for its violation of the Vienna Convention. As a result, Virginia carried out the execution as planned on April 14, 1998. In the process leading up to the execution, various U.S. organs explicitly recognized the ICJ’s Order, but justified their decision not to adhere to it by referring to its alleged lack of binding power, either for the U.S. generally or for them specifically. Paraguay initially indicated that it would pursue its case against the U.S. before the ICJ after the execution, but later revoked its application.

Less than a year after Breard’s execution and just weeks after Karl LaGrand’s execution, the ICJ issued provisional measures at the request of Germany to stop the execution of Walter LaGrand. The U.S. position in Breard obviously influenced the ICJ’s handling of the LaGrand case, as is reflected in the Court’s issuance of provisional measures. In fact, Germany had asked the Court for no more than an Order that was identical to the Court’s Order in Breard, requiring the U.S. to take all

72. Id.
73. Id. at 259 (separate declaration of President Schwebel).

[E]ven if parties to a case before the ICJ are required to heed an order of that court indicating provisional measures, the ICJ’s order in this case does not require this Court to stop Breard’s execution. That order states that the United States “should” take all measures “at its disposal” to ensure that Breard is not executed....[T]he “measures at [the Government’s] disposal” are a matter of domestic United States law.

Id. (citing to an amicus brief by those departments to the Supreme Court).
measures at its disposal to prevent the upcoming execution. The Court, however, went further and issued an Order with the following provisional measures:

(a) The United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this order;

(b) The Government of the United States of America should transmit this Order to the Governor of the State of Arizona.

Section (a) of the Order follows the same pattern as the Court’s Order in Breard, as Germany had requested. The specific order in section (b), however, added sua sponte, reflects the ICJ’s lack of success in the Breard case. The meaning of the operative paragraph is somewhat facially ambiguous. It is not immediately clear whether the Court intends to directly oblige the Governor of Arizona, or if it wishes to only oblige the U.S. government to inform the Governor of the Order without attaching a corresponding obligation. Yet, the former interpretation seems the only plausible one when read in conjunction with the Order’s preceding comments in paragraph 28, where the Court spells out the Governor’s obligation:

Whereas the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be; whereas the United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings; whereas, according to the information available to the Court, implementation of the measures indicated in the present Order falls within the jurisdiction of the Governor of Arizona; whereas the Government of the United States is consequently under the obligation to transmit the present Order to the said Governor; whereas the Governor of Arizona is under

76. Judge Buergenthal considered Germany’s request for an Order identical to Breard to be a breach of Germany’s obligation of elementary fairness toward the U.S. because Germany had acted with the knowledge that the U.S. interpreted Breard as non-binding. See LaGrand, 2001 I.C.J. 104 (dissenting opinion Judge Buergenthal).

77. LaGrand, 1999 I.C.J. at 10.
the obligation to act in conformity with the international undertakings of the United States....

As it is highly unlikely that the Court would pronounce on the Governor of Arizona’s obligations under the U.S. laws, especially without further elaboration, it seems the Governor’s obligation to act in conformity with the U.S.’ international undertakings must be one under international law. That the Court addressed the U.S. government and not the Governor directly can be explained as a procedural matter, stemming from the federal government’s position as the legal representative of the State and its organs.

Nevertheless, as in Breard, U.S. officials disregarded the Court’s provisional measures. Arizona carried out the second execution as planned on March 3, 1999, the same day the ICJ issued its Order. Germany pursued the case, and on June 27, 2001, the ICJ delivered its final judgment. Although again in ambiguous language, the Court’s ruling seems to support the view that the Governor was bound by the U.S.’ obligation to “take all measures at its disposal.” After the Court determined, for the first time, that provisional measures indeed do create legal obligations, the Court reviewed whether the U.S. had complied with its obligations under the March 3, 1999 Order. No dispute arose over the second provisional measure, as the U.S. government had transmitted the Order to Arizona’s Governor. Instead, the question was whether the U.S. had taken “all measures at its disposal” to prevent the execution, as the first provisional measure required.

The U.S. argued that it had done all it could by transmitting the Order to Arizona’s Governor and informing the ICJ of this action. Due to the extraordinary short time between the Court’s Order and the execution, as well as the U.S.’ legal character as a “federal republic of divided powers,” the U.S. alleged

78. Id. at 16 (para. 28) (emphasis added).
79. Cf. I.C.J. STAT. art. 44(1) (“For the service of all notices upon persons other than the agents, counsel, and advocates, the Court shall apply direct to the government of the state upon whose territory the notice has to be served.”).
81. Id. at para. 32.
82. Id. at paras. 109–10.
83. Id. at para. 111.
that no other steps were possible.\textsuperscript{84} The U.S. took the classic black-box position, interpreting the Court’s order as binding on the State entity, the federal government, but not on the various U.S. organs involved in the case. Because of complex separation of powers issues and a lack of time, the State was unable to “translate” its obligation to the relevant State organs in this case.

The Court had a different perspective. It specifically described the steps that various U.S. organs took in the case. The Court explicitly noted that both the Governor of Arizona and the U.S. Supreme Court had declined to use their authority to grant a stay of execution,\textsuperscript{85} and then concluded:

The review of the above steps taken by the authorities of the United States with regard to the Order of the International Court of Justice of 3 March 1999 indicates that the various competent United States authorities failed to take all the steps they could have taken to give effect to the Court’s Order. The Order did not require the United States to exercise powers it did not have; but it did impose the obligation to “take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings....” The Court finds that the United States did not discharge this obligation.\textsuperscript{86}

Thus, it seems that the Court considered both the Governor and the U.S. Supreme Court to be bound by the U.S. international obligations in this case.\textsuperscript{87} Otherwise, the Court would not have analyzed their conduct regarding U.S. compliance with its obligation to “take all measures at its disposal.”\textsuperscript{88} Instead, the

\textsuperscript{84} Id. at para. 95.
\textsuperscript{85} Id. at paras. 113–14.
\textsuperscript{86} Id. at para. 115.
\textsuperscript{87} Compare Higgins, The Concept, supra note 9, at 555 (commenting on the identical order in Breed: “The relevant powers were dispersed both within the federal structures and between federal institutions and the State of Virginia. Hence it was for ‘the United States’ to take ‘all measures at its disposal.’”) with Jochen A. Frowein, Provisional Measures by the International Court of Justice — The LaGrand Case, 62 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht [Journal of Foreign Public and International Law] 55, 59 (2002) (“This part of the judgment is difficult to read without implying that the United States is limited to the Federal Government, and the Federal Government has limited powers.”).
\textsuperscript{88} LaGrand, 2001 I.C.J. 104, at para. 32.
Court would have focused entirely on the question of whether time had prevented the U.S. government from taking additional measures.

2. Cumaraswamy

Less than two months after ordering provisional measures in LaGrand, on April 29, 1999, the ICJ issued an Advisory Opinion in a dispute between the United Nations (“UN”) and Malaysia regarding the immunity of the UN’s Special Rapporteur on the Independence of Judges and Lawyers in the Malaysian Courts’ civil proceedings. 89 Several Malaysian companies had sued the Rapporteur, Mr. Cumaraswamy, due to certain allegedly defamatory comments that he had made in a magazine interview. 90 Despite multiple interventions by the UN Secretary-General, the Malaysian courts had refused in several instances to grant Mr. Cumaraswamy immunity from legal process pursuant to Article VI section 22(b) of the Convention on the Privileges and Immunities of the UN. 91 The UN Economic and Social Council then requested an Advisory Opinion from the Court pursuant to Article 30 of the Convention, in accordance with Article 96 of the UN Charter and Article 65 of the ICJ Statute. The Council asked the Court to determine, in short: (1) whether Mr. Cumaraswamy enjoyed immunity under the circumstances described; and (2) Malaysia’s legal obligations in this case. 92

In its opinion, the ICJ let no doubt exist about its position regarding State organs. It found inter alia:

(1)(a)….That the Government of Malaysia had the obligation to inform the Malaysian courts of the finding of the Secretary-General that Dato’ Param Cumaraswamy was entitled to immunity from legal process;…

90. See Dato’ Para Cumaraswamy v. MBF Capital BHD & Anor (Court of Appeal, Kuala Lumpur 1997) 3 MLJ 824.
91. See id. at 837.
(2)(a)....That the Malaysian courts had the obligation to deal with the question of immunity from legal process as a preliminary issue to be expeditiously decided in limine litis;...

(4) That the Government of Malaysia had the obligation to communicate this advisory opinion to the Malaysian courts, in order that Malaysia's international obligations be given effect and Dato' Param Cumaraswamy's immunity be respected....

Thus, the Court unambiguously held that the obligations under the Convention were not only those of the State of Malaysia, but also of the State organs involved, namely the Malaysian Courts.

The only Judge to vote against these three paragraphs was Judge Koroma. He did not categorically rule out State organs' international obligations, but he also could not derive such an obligation from the particular facts of the case. Judge Oda joined Judge Koroma in his dissent on the Malaysian government's obligations. Judge Oda wholeheartedly embraced the finding of an obligation of the Malaysian courts, but deemed the findings on the government's obligations unwarranted.

The Malaysian High Court subsequently decided that the ICJ's Advisory Opinion had to be respected in this case, treating Malaysia's international obligations as decisive for the outcome. The High Court emphasized that international obligations voluntarily undertaken cannot easily be ignored. It con-

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93. Id. at 89 (para. 67).
94. Id. at 111 (para. 1 of Judge Koroma's separate opinion).
95. See id. at 121 (para. 28).
96. Id. at 106 (para. 20) (separate opinion of Judge Oda).
97. Id. at 107 (paras. 23–26).
99. Cumaraswamy, 121 I.L.R. at 468, 470. The Court explained:

Whilst the Malaysian courts including the Appellate Court had decided that the issue of immunity as claimed by the defendant was a matter to be decided by this court during the course of the trial, the Government of Malaysia and the United Nations by consent agreed to
considered itself bound by the ICJ’s interpretation in this case, emphasizing that the judiciary is “one of the three organs that ensures good governance.” The decision’s language clearly displays the idea that State organs have the duty to respect the international obligations of their State, regardless of the “translation” of those obligations into national law.

Overall, the ICJ clearly embraced the concept of State organ obligation in this case, in more explicit terms than in *LaGrand*. Both cases, however, squarely contradict the black-box theory.

3. Analysis: New Substance or New Formulation?

At this point, an important question arises — how do we read these recent ICJ cases? Does the Court’s discussion of State organs constitute a radical break in its jurisprudence, abandoning the black-box theory for a model of State penetration? Are these cases truly exceptions that are simply not representative

refer this question of Param’s immunity for an advisory opinion to the [ICJ]....

....

Whilst the Malaysian courts had made a decision (in the Appeal Court) binding on its citizens, the Malaysian Government had voluntarily acceded to be bound by the advisory opinion of the ICJ....

....

It is also a fact that both the United Nations and Malaysia had agreed to accept the opinion given by the ICJ “as decisive by the parties.” This is a serious consequence which parties had willingly entered into and it is therefore a matter of grave concern for this court to be called upon to rule otherwise.

*Id.*

100. *Id.* at 471. The Court also noted:

It is clear therefore that whilst the judiciary being one of the three organs that ensures good governance, had agreed to stay execution on its own order by awaiting the advisory opinion, it must have been moved to do so because of the voluntariness of the executive in agreeing to abide by the decision of the ICJ in respect of the defendant’s immunity....

....

[The Court is] bound to give binding effect to the advisory opinion in this case.

*Id.*
of the Court’s case law? Or is there nothing substantially new in these cases? Does the Court only explicitly express in these cases what its earlier judgments silently assumed all along: that obligations of the State are obligations of its organs?

Judging by the text of these decisions, one could think that the last view proves more plausible. In the numerous separate and dissenting opinions of both LaGrand and Cumaraswamy, many of the Judges explicitly discuss and endorse State organ obligations without feeling the need for elaborate justifications. None of the Judges take issue with the concept of State organ obligation, not even the dissenters. More importantly, none of the Judges treat the discussion of State organs as a novelty.

That the ICJ detailed the obligations of State organs in LaGrand and Cumaraswamy, whereas it normally goes to lengths to refrain from any interference with the internal organization of the States involved, could be explained by the particular circumstances of these cases. In both instances, there were clear indications that the States involved (and their organs) would use any room left by the Court’s judgment to avoid giving effect to the Court’s ruling. In LaGrand, the Court remembered the recent unwillingness of the different U.S. actors in Breard to give effect to its Order. Moreover, the U.S. was a repeat offender where it concerned consular aid to foreign prisoners. In Cumaraswamy, the different Malaysian courts’ decisions showed a decided lack of interest for the UN Secretary-General’s opinion, creating the very dispute in question.101 It was not immediately clear that the national courts would treat the ICJ’s judgment as more authoritative or as just another international communication that did not need to be obeyed.

Thus, in both cases, the Court might have felt compelled to spell out what it otherwise would have left implicit, for fear of a lack of good faith interpretation of the judgment by the parties involved.102 This interpretation finds some support in a com-

102. Cf. Higgins, The Concept, supra note 9, at 556. Higgins elaborates:

Nor had the Court been unaware of the events within the United States that had followed its provisional measures in the Breard case. Accordingly, it decided to use some new language, in the attempt to speak across the miles directly to more of those relevant elements comprising “the state” which was the ratifying party under the Vienna Convention, and over which the Court thus had jurisdiction.
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parison with the ICJ’s later case law. In the Case Concerning the Arrest
Warrant of April 11, 2000, Democratic Republic of the Congo v. Belgium,
the Court again gave judgment in more familiar terms. It found that the
arrest warrant’s issue and circulation against the Congolese Minister of
Foreign Affairs “constituted violations of a legal obligation of the King-
dom of Belgium,” and “that the Kingdom of Belgium must, by means of
its own choosing, cancel the arrest warrant of [April 11, 2000] and so
inform the authorities to whom that warrant was circulated.”

Like Cumaraswamy, this case involved the violation of immu-
nity under international law by national courts. A Belgian
magistrate issued the disputed arrest warrant. Similar to the
Court’s treatment of the issues in Cumaraswamy, the ICJ could
have addressed the obligations of Belgian judicial organs
directly, as it had already identified the relevant actors. One
cannot explain the difference in the Court’s approach in the two
cases by comparing the complaining parties’ litigation strate-
gies, because both the United Nations Economic and Social
Council (“ECOSOC”) (in Cumaraswamy) and Congo only
addressed the obligations of the State and not specific State or-
gans. The fact that the Court on its own initiative discussed
State organs in LaGrand and Cumaraswamy while it addressed
the similar case of Congo v. Belgium only in very general terms,
might have been prompted by the fact that unlike the U.S. and
Malaysia in the first two cases, Belgium had displayed no ten-
dency whatsoever to disregard international law. Accordingly,
these three cases could be seen as consistent rather than in-
compatible, differing primarily in their degree of explicitness.

A more realistic view, on the other hand, may be that the ICJ
has taken two particularly amenable cases to introduce the un-

Id. (emphasis added).
103. Case Concerning the Arrest Warrant of 11 April 2000 (Democratic
Republic of the Congo v. Belgium), 2002 I.C.J. 121, at paras. 18, 43, 59
ket/iCOBE/icobejudgment/icobe_ijudgment_20020214.PDF (last visited Sept.
9, 2003).
104. Id. at paras. 75–78.
105. Id. at para. 1.
106. Id. at para. 13.
107. Id. at paras. 11, 13.
precedent concept of State organ obligation in the Court’s case law, and thereby took a conscious new step to strengthen international law. Both cases involved fields of law where the black-box theory is historically least accepted — consular law and immunity from legal process. Both cases also involved human rights concerns, the field of law where there is the strongest challenge to black-box theory. Moreover, in both cases, the violating State enjoyed little to no sympathy from the international community, and there was considerable support for a strong affirmation of the obligations involved. These factors minimized the risk of broad opposition to the Court’s judgments and made LaGrand and Cumaraswamy suitable testing-grounds for a shift in the ICJ’s case law and a more forceful reading of international obligations.

Finally, a traditional view would be that the circumstances described here led the Court to overstep its authority and that these cases are mere exceptions that do not represent the Court’s jurisprudence. However, the ICJ’s reasoning in LaGrand and Cumaraswamy is rather determined and too explicit to be merely incidental. Moreover, the Court’s rulings in these cases are in line with similar developments in other courts, which this Article will further elaborate. But before doing so, the next section turns to a pending case before the ICJ that may very well prove to be the next step in “piercing the State veil.”


The international law of human rights is substantially different from traditional international law....The fact that it is the executive branch of government that represents the state in accepting obligations under the [human rights] treaty, does not exempt the legislative and judicial branches from performing those obligations. It can hardly be argued that the legislature and the judiciary of a state party to a human rights treaty are free to ignore or decide not to give effect to, its provisions. The commitment is made by ‘the state,’ which, in this context, must mean all three branches of government.

Id.

4. Avena and Other Mexican Nationals: The Next Step?

The Vienna Convention on Consular Relations did not stay off the ICJ docket for long. While the U.S. federal government had started an extensive program to improve compliance with the Convention prior to *LaGrand*, many contest the effects of that program. Moreover, the review of Convention violations has generally been limited to consideration in the clemency process both in existing and new cases. U.S. courts have continued to deny remedies for these violations.\(^{110}\) Criticism of the U.S.’ limited response to *LaGrand* has been broad and sharp.\(^{111}\)

On January 9, 2003, Mexico was, after Paraguay and Germany, the third country in five years to institute proceedings against the U.S. before the ICJ for alleged violations of the Vienna Convention on Consular Relations.\(^{112}\) Mexico’s submission concerns the cases of Carlos Avena and fifty-three other Mexican nationals on death-row in the U.S.\(^{113}\) Drawing heavily on *Breard* and *LaGrand* and raising similar questions, the Avena case will likely bring the question of State organ obligation back to the ICJ. Mexico asked the Court to declare, *inter alia*:

That the United States is under an international legal obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against the 54 Mexican nationals on death row or any other Mexican national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power’s functions are international or internal in character.…\(^{114}\)

Mexico also requested the Court to indicate provisional measures to prevent all executions while the case was pending. Referring to the U.S. record on this subject, Mexico asked for a

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\(^{112}\) *Avena*, 2003 I.C.J. 128.

\(^{113}\) *Id.* at para. 1.

\(^{114}\) *Id.* at para. 281.
swift and forceful order.\textsuperscript{115} The application requested the Court to indicate \textit{inter alia} that the U.S. government “take all measures necessary to ensure that no Mexican national be executed” pending final judgment.\textsuperscript{116}

The requested phrase “all measures necessary” would be a significant departure from the Orders in \textit{Breard} and \textit{LaGrand}, both of which required the U.S. to take “all measures at its disposal.”\textsuperscript{117} Moreover, the Court had itself formulated the less demanding language in the \textit{Beard} case,\textsuperscript{118} while Paraguay had made an identical request for an indication of “all measures necessary.”\textsuperscript{119} Opposing the requested departure from the Court’s earlier, more lenient orders, the U.S. vigorously contested Mexico’s application. The U.S. noted that: “the relationship between the [U.S.] federal government and its states is one of great sensitivity, marked by the deference to the states in certain areas, including the administration of criminal law.”\textsuperscript{120}

In addition, the U.S. stated that Mexico’s request entailed an obligation directly implicating the federal relationship, which deviated from the Court’s holdings in \textit{Breard} and \textit{LaGrand}, as Mexico’s request tested the “limit of federal authority.”\textsuperscript{121} Thus, the U.S. implied that U.S. federal authorities could not execute Mexico’s provisional measures, while the constituent states that could execute them were not concerned by the proceedings before the ICJ.\textsuperscript{122}

The Court was not convinced by these objections. On February 5, 2003, the ICJ indicated provisional measures against the U.S. even broader than those Mexico had requested. While its


\textsuperscript{116} \textit{Avena}, Order, supra note 115, at para. 18(a).

\textsuperscript{117} Cf. \textit{Note: Too Sovereign But Not Sovereign Enough: Are U.S. States Beyond The Reach of The Law of Nations?}, 116 HARV. L. REV. 2654, 2671 (2003) (arguing that the difference in language “bespeaks a court emboldened by its own prior holding that its provisional measures are binding.”).

\textsuperscript{118} \textit{Breard}, 1998 I.C.J. at 258 (para. 41).

\textsuperscript{119} \textit{Id.} at 251–52 (para. 9).

\textsuperscript{120} \textit{Avena}, Verbatim, supra note 115, at para. 3.43.

\textsuperscript{121} \textit{Id.} at para. 3.44.

applicability is limited to only three of the more than fifty cases, the Order puts stringent demands on U.S. authorities. The Court unanimously\(^\text{123}\) indicated that:

\begin{enumerate}[a)]
  \item The United States of America shall take all measures necessary to ensure that Mr. César Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera are not executed pending final judgment in these proceedings;
  \item The Government of the United States of America shall inform the Court of all measures taken in implementation of this Order.\(^\text{124}\)
\end{enumerate}

The Court not only adopted Mexico’s formulation of “all means necessary,”\(^\text{125}\) but also addressed the obligation to take those measures not just to the U.S. government, as Mexico had requested, but to the U.S. as a whole.\(^\text{126}\) At first glance, it seems a classic black-box formulation to address the State rather than the government. However, it could well prove to be more intrusive if this formulation is interpreted to address not only federal, but also state authorities. The Court’s choice of wording leaves open the possibility that all U.S. organs involved in these types of cases, including governors and courts, are under the obligation to prevent the executions. This conclusion forms the logical consequence of applying the Court’s reasoning in *LaGrand* to this Order (i.e., that U.S. authorities such as governors are “under the obligation to act in conformity with the international undertakings” of the U.S.).\(^\text{127}\) The Court also mentioned Mexico’s submission that “[a]s a matter of international

\(^{123}\) Judge Oda, however, appended a declaration, which is in effect a dissenting opinion. The consular relations cases apparently brought out an irresistible urge in Judge Oda to vote out of humanitarian concerns in favour of Orders which he found legally unsound, while simultaneously pointing out the perceived errors in those Orders in dissenting opinions disguised as declarations. *See Avena*, 2003 I.C.J. 128, Declaration of Judge Oda, (Feb. 5) (stating that there is no dispute to be adjudicated); *LaGrand*, 1999 I.C.J. at 18 (Judge Oda explained: “I voted in favour of the Court’s Order with great hesitation as I considered that the request for indication of provision measures of protection submitted by Germany to the Court should have been dismissed.”); *Breard*, 1998 I.C.J. at 260 (Judge Oda’s statement was almost identical to his statement in *LaGrand*).

\(^{124}\) *Avena*, Order, supra note 115, at paras. 59(1)(a–b).

\(^{125}\) *Avena*, Verbatim, supra note 115, at para. 3.44.

\(^{126}\) *Avena*, Order, supra note 115, at para. 59(1)(a).

\(^{127}\) *LaGrand*, 1999 I.C.J. at 16 (para. 28).
law, both the [U.S.] and its constituent political subdivisions have an obligation to abide by the international legal obligations of the [U.S.],” but did not comment on it.  

As it seems unlikely that the U.S. will radically change its course in this matter, considerable chances exist that the final judgment in *Avena* will bring more clarity to the exact scope of the ICJ’s Order.  

In an initial reaction, the Governor of Texas already indicated that orders from American courts are the only ones Texas will follow, as “according to [his] reading of the law and the treaty,…no authority [exists] for the [U.S.] federal government or th[e] World Court to prohibit Texas from exercising the laws passed by [its] legislature.”

**B. Other International Courts**

The ICJ is not alone in its efforts to speak directly to relevant actors within the State. In fact, it is only taking the first cautious steps on a path where other international courts have made considerable progress. The most prominent example is the law of the European Community. Even if the differentembeddings and political realities of the various international courts do not allow for easy predictions by comparison, it is certainly illuminating to see how other international courts have pierced the State veil to reach the State organs behind it.

It should be kept in mind that the constituting treaties of most international courts consider States in similar terms as the ICJ. In terms of input, the direct participation of individuals and the referral procedure for national courts constitute important differences between some of the other international courts discussed here and in the ICJ. Nonetheless, the underlying treaties envisage a relationship between these courts and their State parties as unitary actors.  

Thus, in terms of output, other international courts deal with State organs in a legal framework that is largely comparable to that of the ICJ.

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This Section will now, in a necessarily anecdotal manner, discuss how the European Court of Justice, the European Court of Human Rights, the Inter-American Court of Human Rights, the International Criminal Tribunal for the former Yugoslavia and the World Trade Organization (“WTO”) have dealt with the international obligations of State organs.

1. The European Court of Justice

The case law of the European Court of Justice (“ECJ”) is undoubtedly the most far-reaching and inspiring in its treatment of State organs. This Article will only offer some cursory comments on its relevance since the ECJ’s piercing of the State veil is so well known.\[132\]

First, the ECJ played a pivotal role in transforming the European legal order from a traditional international law model to a model of direct obligation of State organs.\[133\] While today European law undoubtedly forms a distinct legal order,\[134\] at its conception this order had more similarities than differences with international law.\[135\]

Second, the ECJ applies and interprets both European and international law as directly affecting State organs. Under certain circumstances, the ECJ applies treaties between the Euro-
pean Community and third parties, the European Convention of Human Rights, and other sources of international law. Both its historical development and concurrent application of European and international law make the ECJ’s case law relevant when assessing the black-box theory.

Third, the direct obligation of national courts has not only stimulated compliance with ECJ rulings, it has also brought about innovations in European law. The refusal of certain national courts, in particular the German Constitutional Court, in the Solange cases, to recognize the supremacy of European Union law in the absence of human rights guarantees, prompted the development of human rights in European law. State organ obligation in international law may likewise stimulate the dialogue between national and international actors, and, if only through exceptional cases of disobedience, enhance the quality of international law.

2. The European Court of Human Rights

The binding force of the judgments of the European Court of Human Rights (“ECHR”) is established in Article 46 (formerly

137. See, e.g., Xavier Groussot, UK Immigration Law under Attack and the Direct Application of Article 8 ECHR by the ECJ, 3 Non-State Actors and International Law (forthcoming 2003) (on file with author).
Article 53) of the European Convention of Human Rights, which declares, “the High Contracting Parties undertake to abide by the final judgment of the ECHR in any case to which they are parties.” Many commentators now interpret decisions of the ECHR as bearing directly on State organs. Judge Martens characterized those obligated by his decisions as “all institutions of the respondent State: the legislature, the executive and the judiciary,” and he particularly stressed that then Article 53 could “imply an obligation on the judiciary” as well. Others have noted more cautiously that the Court is in the process of abandoning a policy of “institution neutrality,” and is increasingly focusing on the compliance of State parties’ courts with the European Convention, rather than on compliance by States as entities.

A pivotal case in this development is that of Vermeire v. Belgium from 1991. It revisited the different inheritance rights of legitimate and illegitimate children in Belgium, which the Court, in a 1979 case, had declared discriminatory and in violation of the Convention. While the Belgian legislature had acknowledged the problem and started revising the relevant law even prior to the 1979 judgment, that process was still underway when the case of Mrs. Vermeire came up years later.
Faced with the discriminatory law on the one hand and the European Court’s condemnation of that law on the other, the Brussels Court of First Instance decided to grant Mrs. Vermeire, an illegitimate child, the same inheritance rights as legitimate children in contravention of the law. The Brussels court reached this result by finding that:

[T]he prohibition on discrimination between legitimate and illegitimate children as regards inheritance rights [was] formulated in the [1979 ECHR] judgment sufficiently clearly and precisely to allow a domestic court to apply it directly in the cases brought before it.

Thus, the Brussels court refused to wait for the “translation” of the ECHR judgment into national legislation, and simply complied with Belgium’s international obligation.

However, this reasoning was quashed on appeal and cassation, and Mrs. Vermeire was denied a right of inheritance. The Brussels Court of Appeal addressed the effects of the European Convention and commented that:

[I]n so far as Article 8 [ECHR] entails negative obligations prohibiting arbitrary interference by the State in the private or family life of persons residing within its territory, it lays down a rule which is sufficiently precise and comprehensive and is directly applicable, but this is not the case in so far as Article 8 [ECHR] imposes a positive obligation on the Belgian State to create a legal status in conformity with the principles stated in the said provision of the Convention;...given that on this point the Belgian State has various means to choose from for fulfilling this obligation, the provision is no longer sufficiently precise and comprehensive and must be interpreted as an obligation to act, responsibility for which is on the legislature, not the judiciary.

Contrary to the court of first instance, the Brussels Court of Appeal felt it could not live up to the international obligation in question, because the legislature had not yet “translated” the international norm into national law. However, the argument that the provision was not sufficiently precise is a curious one.

149. Id. at para. 10.
150. Id.
151. Id. at para. 11.
152. Id. at para. 11.
While there may have been different ways to achieve the ECHR provision’s desired result, the ultimate goal was clear and could have been reached by the Court of Appeals, just as the Brussels Court of First Instance had initially ruled.

The European Court did not agree with the Court of Appeal’s reasoning. It dismissed the Belgian government’s argument that the 1979 judgment obliged the Belgian State, but not the Belgian courts. The Court held in particular that:

It cannot be seen what could have prevented the Brussels Court of Appeal and the Court of Cassation from complying with the findings of the Marckx judgment, as the Court of First Instance had done. There was nothing imprecise or incomplete about the rule which prohibited discrimination against Astrid Vermeire compared with her cousins Francine and Michel, on the grounds of the “illegitimate” nature of the kinship between her and the deceased....The freedom of choice allowed to a State as to the means of fulfilling its obligation under Article 53 [(now Article 46 ECHR)] cannot allow it to suspend the application of the Convention while waiting for such a reform to be completed...

Thus, the Court required national courts to enforce their State’s obligations under the European Convention, regardless of their reception in national law. This demand on national courts was implicitly affirmed in a subsequent case where the ECHR characterized the Andorran Tribunal de Corts as “a court not bound by the Convention,” because it is neither French nor Spanish, thereby implying that the courts of contracting parties are bound. The ECHR effectively established an “autonomous direct effect” of the European Convention, which to this day requires national courts to act not only as

153. *Id.* at para. 24.
154. *Id.* at para. 25.
155. *Id.* at paras. 25–26.
156. See Polakiewicz, *supra* note 146, at 189.
157. Drozd and Janousek v. France and Spain, 240 Eur. Ct. H.R. (ser. A) paras. 96, 110 (1992). See also Joint Dissenting Opinion of Judges Mac-Donald, Bernhardt, Pekkanen and Wildhaber (“It is to be regretted that the Convention is not applicable in the territory of Andorra, and that the organs of that entity are not bound by it”); Joint Dissenting Opinion of Judges Pettiti, Valticos and Lopes Rocha, Approved by Judges Walsh and Spielmann (rhetorically addressing the obligations of French officials).
State organs, but also as organs of the Convention.  

This type of judicial action has led several commentators to liken the piercing of the State veil by the ECHR to the practice of the ECJ.  

The case law of the ECHR thus represents a particular example of the “breaking of the black-box.”

3. The Inter-American Court of Human Rights

The Inter-American Court of Human Rights (“IACHR”) oversees compliance with the American Convention of Human Rights by those States that have accepted its jurisdiction. The Inter-American system is, like its counterparts on other continents, designed to deal with States as relevant units. Compliance with the IACHR’s judgments is an obligation of the

159. Id. at 103; see also Helfer & Slaughter, supra note 9, at 297–98.
160. See Polakiewicz, supra note 146, at 189.
162. See id. art. 2. Article 2 on domestic legal effects states:

Where the exercise of any of the rights or freedoms referred to in Article I is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

Id. See also id. art. 28. Article 28 states:

1. Where a State Party is constituted as a federal state, the national government of such State Party shall implement all the provisions of the Convention over whose subject matter it exercises legislative and judicial jurisdiction.

2. With respect to the provisions over whose subject matter the constituent units of the federal state have jurisdiction, the national government shall immediately take suitable measures, in accordance with its constitution and its laws, to the end that the competent authorities of the constituent units may adopt appropriate provisions for the fulfilment of this Convention.

3. Whenever two or more States Parties agree to form a federation or other type of association, they shall take care that the resulting federal or other compact contains the provisions necessary for continuing and rendering effective the standards of this Convention in the new state that is organized.

Id.
State as an entity, with the notable exception of the stipulation of compensatory damages, for which a form of direct effect is established. While Article 63(1) of the Convention allows the IACHR to determine what specific steps are necessary to remedy a violation, such a determination is to be addressed to and implemented by the State.

This State-centric approach is reflected in a 1994 Advisory Opinion prompted by an initiative of the Peruvian legislature to broaden the application of the death penalty in contravention of the Convention. The two-pronged question posed to the IACHR by the Inter-American Commission inquired into the legal effects of a law that manifestly violates the Convention, insofar as the international obligations of the State are concerned, and “the duties and responsibilities of the agents or officials” of the State when the enforcement of such a law would manifestly violate the Convention. Thus, faced with an unorthodox invitation to go beyond black-box theory, the IACHR declined and gave little more than a formulation of truisms. The IACHR unanimously found:

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163. See id. art. 68 at 160. Article 68 of the Convention states:

1. The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.

2. That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state.

Id. See also Thomas Buergenthal, The Inter-American Court of Human Rights, 76 Am. J. Int’l L. 231, 240 (1982).

164. See American Convention on Human Rights, 1144 U.N.T.S. 143, at art. 63(1). Article 63(1) reads:

If the Court finds that there has been a violation of a right of freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

Id.


166. Id. at para. 1.
(1) That the promulgation of a law in manifest conflict with the obligations assumed by a State upon ratifying or acceding to the Convention is a violation of that treaty. Furthermore, if such violation affects the protected rights and freedoms of specific individuals, it gives rise to international responsibility for the State in question.

(2) That the enforcement by agents or officials of a State of a law that manifestly violates the Convention gives rise to international responsibility for the State in question. If the enforcement of the law as such constitutes an international crime, it will also subject the agents or officials who execute that law to international responsibility.167

In reaching its conclusion, the IACHR indicated that it considered itself subject to strict limits on the interference with the domestic legal orders of the State parties to the Convention:

In exercising its advisory jurisdiction, the Court is not empowered to interpret or define the scope of the validity of the domestic laws of the States parties, but only to address their compatibility with the Convention or other treaties concerning the protection of human rights in the American States....In the event of a supposed violation of the international obligations assumed by the State parties resulting from a possible conflict between the provisions of their domestic law and those contained in the Convention, the former will be evaluated by the Court in contentious cases as simple facts or expressions of intent which can only be addressed as they relate to the conventions or treaties concerned....The [first] question refers only to the legal effects of the law under international law. It is not appropriate for the Court to rule on its domestic legal effect within the state concerned. That determination is within the exclusive jurisdiction of the national courts and should be decided in accordance with their laws.168

Thus, the Court stuck to a classic black-box position. It spoke of the State’s international obligations as an entity, but found that domestic consequences of any violations were outside of its competence. Of course, any international ruling on the domes-

167. Id. at paras. 50, 57. The fact that the promulgation of a conflicting law alone amounts to a violation is not surprising, since Article 2 of the IACHR establishes the general obligation for all State parties to adapt their internal laws to the Convention.
168. Id. at paras. 22, 34.
tic legal effect of a law would have to directly address the relevant State organs, such as courts, to be meaningful. The IACHR, therefore, could not look into the box.

But, in 2001, the IACHR crossed these boundaries in the *Barrios Altos* case, which focused on certain amnesty laws in Peru.\(^{169}\) In 1991, six members of the Peruvian army attacked a group of civilians in a neighborhood in Lima known as Barrios Altos, killing fifteen civilians. Two amnesty laws then subsequently deterred investigation and prosecution of the matter.\(^{171}\) Proceedings were initiated on behalf of the victims, first before the Inter-American Commission and then before the IACHR.\(^{172}\) When the Fujimori government collapsed in 2000, Peru fundamentally changed its stance in the proceedings. It recognized its international responsibility in the case and declared its willingness to reach a friendly settlement with the petitioners, which could subsequently be approved by the Court under Article 52.2 of the Rules of Procedure.\(^{173}\) The Court subsequently set out to determine the legal effects of the State's acquiescence, as well as appropriate reparations.

The Commission's delegate asked the Court *inter alia* to declare the incompatibility of the amnesty laws with the American Convention and the State's obligation to annul the amnesty laws.\(^{174}\) The Court, however, went beyond the language of these requests and found that:

Owing to the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, the said laws lack legal effect and may not continue to obstruct the investigation of the grounds on which this case is based or the identification and punishment of those responsible, nor can they


\(^{170}\) *See* Barrios Altos, Judgment, *supra* note 169, at para. 2.

\(^{171}\) *Id.* at paras. 4–19.

\(^{172}\) *Id.* at paras. 7, 19.

\(^{173}\) *Id.* at paras. 37–39.

\(^{174}\) *Id.* at para. 36.
have the same or a similar impact with regard to other cases that have occurred in Peru, where the rights established in the American Convention have been violated.\footnote{175}{Id. at para. 44.}

Therefore, the Court decided unanimously that Amnesty Laws No. 26479 and No. 26492 were “incompatible with the American Convention on Human Rights and, consequently, lack[ed] legal effect.”\footnote{176}{Id. at para. 51(4).} This finding begs the question — in what sense did the Amnesty laws lack legal effect? Was it on the international plane or within the Peruvian legal order? The former interpretation would be peculiar since national laws are not normally said to have “legal effects” on the international plane. As the Court acknowledged in its 1994 Advisory Opinion, national laws can merely be determinative of relevant facts.\footnote{177}{See German Interests in Polish Upper Silesia (F.R.G. v. Pol), 1926 P.C.I.J. (ser. A) No. 7, at 19 (May 25) (“From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.”).} The latter interpretation would be no less peculiar, since it would mean that the Court would strike down a national law directly, instead of obliging the State to do so.

The IACHR’s judgment is rather ambiguous in this regard, as demonstrated in the separate opinions attached by three of the Court’s judges. Judge De Roux stated that “[a]s a consequence of the manifest incompatibility between self-amnesty laws and the American Convention on Human Rights, the State of Peru must abrogate these laws so that they do not continue to represent an obstacle” to the required prosecutions.\footnote{178}{Barrios Altos, Judgment, supra note 169, at para. 42. (separate opinion Judge de Roux).} Thus, he interpreted the lack of legal effect as not automatically extending to the Peruvian legal order. Meanwhile, Judge Cançado Trindade observed that self-amnesty laws have “no legal validity at all in the light of the norms of international human rights law,” but also that “the State has the obligation to cease the situation that violates fundamental human rights (by promptly abrogat-
ing such laws),” thereby bringing no greater clarity to the question. Finally, Judge Ramirez stated unequivocally that:

[T]his incompatibility signifies that those laws are null and void, because they are at odds with the State’s international commitments. Therefore, they cannot produce the legal effects inherent in laws promulgated normally and which are compatible with the international and constitutional provisions that engage the State of Peru. The incompatibility determines the invalidity of the act, which signifies that the said act cannot produce legal effects.  

Thus, contrary to Judge De Roux’s opinion, Judge Ramirez interpreted the law’s lack of legal effect as directly extending to the Peruvian legal order, while Judge Trindade’s opinion is ambiguous in this regard.  

While the judges themselves seemed divided on the precise scope of their holding, the judgment certainly can be read as an incursion into the Peruvian legal order, striking down the amnesty laws directly. It is noteworthy that the operative paragraph contains no further pronouncement on the obligations of Peru with regard to the laws. If the lack of legal effect were restricted to the international plane, then surely the Court would have ordered the State to abrogate the laws, just as it decided that “the State of Peru should investigate the facts... and punish those responsible.” Instead, the Court simply declared that the laws lacked legal effect.

Even taking into account the acquiescence of Peru, the Court’s ruling undoubtedly surpasses the normal functioning of an international human rights tribunal in determining the validity of a national law within the nation’s own legal order. The Court’s determination also exceeds the limits the Court itself formulated in its 1994 Advisory Opinion by requiring the obedience of the relevant Peruvian State organs.

179. *Id.* at para. 11 (concurring opinion of Judge Cançado Trindade) (emphasis added).
180. *Id.* at para. 15 (concurring opinion of Judge Ramirez).
Just weeks after the judgment of the Inter-American Court, the Peruvian Supreme Court decided to give effect to the judgment, “which resulted in the reopening of the Barrios Altos case at the national level and the rendering of the amnesty laws without effect.” While the Court referred to the authorization in Peruvian law to execute international court judgments, it also relied on the Vienna Convention of the Law of Treaties in language that pointed to a broader obligation of State organs under international law:

That Peru is a party to the Vienna Convention on the Law of Treaties, which establishes by its twenty-seventh article that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty,” in the spirit of which, the Consejo Supremo de Justicia Militar, as an integral part of the Peruvian State, must comply with the international ruling in accordance with its terms and in such manner as to implement the decision it contains in its entirety, vesting it with full effect and eliminating any obstacle presented by substantive or procedural internal law that might stand in the way of its due execution and full performance.  

183. Cerna, supra note 181, at 92. See Peruvian Supreme Court, Judgments of June 1, 2001 and June 4, 2001 (on file with author).


Las sentencias expedidas por los Tribunales Internacionales, constituidos según Tratados de los que es parte el Perú, son transcritas por el Ministerio de Relaciones Exteriores al Presidente de la Corte Suprema, quien las remite a la Sala en que se agotó la jurisdicción interna y dispone la ejecución de la sentencia supranacional por el Juez Especializado o Mixto competente.

[The decisions handed down by the international tribunals, constituted pursuant to the treaties to which Peru is a party, are communicated by the Ministry of External Relations to the President of the Supreme Court, who forwards them to the court where domestic jurisdiction was exhausted and orders the implementation of the supra national decision by relevant specialized or mixed-competent judge.]

Id.

185. Peruvian Supreme Court Judgment of June 4, 2001, unofficial translation by Mason Weisz [hereinafter Peruvian Supreme Court Judgment]. The original text reads as follows:
Much like the Malaysian High Court in *Cumaraswamy*, the Peruvian Supreme Court displayed its conviction that courts, like other State organs, have an independent duty to comply with international law as it noted that the courts are “an integral part of the Peruvian State,” making them equally responsible for the nation’s international obligations.

When Peru later disputed the applicability of the nullification of amnesty laws to similar cases, the Inter-American Court in interpreting the judgment clarified that “the effects of the decision in the judgment on the merits of the Barrios Altos Cases were general in nature.” The direct interaction with State organs in the *Barrios Altos* case is not unique in the recent case law of the IACHR. In the *Ivcher Bronstein* case, the Court held that “both the jurisdictional organs and those of any other nature that exercise functions of a substantially jurisdictional nature” are obligated to respect the guarantee of due process. The Court formulated a similar due process obligation of all State organs involved in jurisdictional matters in the *Constitutional Court Case*. In the *Cantos Case*, the Court established

Que, el Perú es parte de la Convención de Viena sobre Derecho de los Tratados, la misma que establece en su artículo veintisiete que “no se puede invocar disposiciones de derecho interno como justificación del incumplimiento de un Tratado,” en tal sentido, el Consejo Supremo de Justicia Militar, como parte integrante del Estado Peruano, debe dar cumplimiento a la sentencia internacional en sus propios términos y de modo que haga efectiva en todos sus extremos la decisión que ella contiene, otorgándole plenitud de efectos y levantado todo obstáculo de derecho material y procesal propio del derecho interno que impida su debida ejecución y su cumplimiento en forma integral.


186. See supra Part III.A.ii.
187. Peruvian Supreme Court Judgment, supra note 185.
188. See *Barrios Altos*, Judgment, supra note 169, at para. 18.
189. *Ivcher Bronstein* Case (Baruch Ivcher Bronstein v. Peru), Merits, Inter-Am. Ct. H.R. (Ser C) No. 74, para. 104 (Feb. 6, 2001) (“[T]he Court believes that both the jurisdictional organs and those of any other nature that exercise functions of a substantially jurisdictional nature have the obligation to adopt just decisions based on full respect for the guarantee of due process established in Article 8 of the American Convention.”).
190. Id.
a violation of the obligation of the judicial authorities involved to safeguard the right of access to the court system. In the Trujillo Oroza case, the respondent State itself indicated that it would welcome a similar intervention in the national legal order as in Barrios Altos. To overcome the obstacle of a statute of limitations that prevented the required criminal proceedings, Bolivia suggested a judgment of the IACHR that would “amend or modify the decision of domestic courts.” However, this proved unnecessary since the Constitutional Court of Bolivia set aside the statute of limitations before the IACHR could do so. In Hilaire, the Court found that Trinidad and Tobago’s Advisory Committee on the Power of Pardon “must resubmit the victim’s case to the executive authority competent to render a decision regarding that mercy procedure.” Finally, the obligation to adopt decisions that are in consonance with the guarantees of due legal process in the terms of Article 8 of the American Convention.

193. The Court observed that:

[[I]n the case sub judice, [the] application of the filing fee and...professional fees strictly according to the letter of the law meant that exorbitant amounts were charged, with the effect of obstructing Mr. Cantos’ access to the court....The judicial authorities should have taken appropriate steps to prevent this situation from materializing and [should have] ensure[d] effective access to the court and effective observance and exercise of the right to judicial guarantees and judicial protection.

Id.
195. Id.
196. Id. at para. 93(a). Bolivia asserted that: “[I]t ha[d] no objection to those guilty of th[e] crime being tried...[nor] to the Court declaring some type of legal solution so that a judgment of the Inter-American Court [could] amend or modify the decision of [the] domestic courts.” Id.
197. Id. at par. 107–108.
198. Hilaire, Constantine and Benjamin et al. Case (Hilaire v. Trinidad and Tobago), Merits, Inter-Am. Ct. H.R. (Series C) No. 92, para. 214 (June 21, 2002).
199. But see id. at para. 223(10) (Court unanimously declares that, “the State should submit before the competent authority and by means of the Advisory Committee on the Power of Pardon ... the review of the cases.”).
State organs, including courts, have directly referred to and obeyed the IACHR’s orders in numerous cases.  

4. The International Criminal Tribunal for the former Yugoslavia

A traditional voice on the concept of State organ obligation exists in the case law of the International Criminal Tribunal for the former Yugoslavia (“ICTY”). The case to be discussed resulted from an order addressed to both Croatia and its Defense Minister to cooperate in certain matters regarding the case against Timohir Blaskic. Croatia challenged the authority of the Tribunal to issue such a *subpoena duces tecum* in general, and to a State official in particular. On July 18, 1997, the Trial Chamber dismissed Croatia’s objections in a decision that is very much in line with the developments in other courts just described. The Trial Chamber noted that Article 18(2) of the ICTY Statute gave the prosecutor “express authority to deal with State ‘authorities’ in particular, rather than the State as an abstract entity.” The Tribunal reasoned that “States must always act through their officials and thus the authority to issue binding orders to States by necessary implication carries the authority to issue such orders to their officials.”


203. *Id.* at para. 157.

204. Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 18(2), May 25, 1993, 32 I.L.M. 1159, 1183 (1993) (“The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.”).

205. *Blaskic*, Objection, supra note 201, at para. 67 (“[E]xpress authority to deal with State ‘authorities’ in particular, rather than the State as an abstract entity, and demonstrates that the International Tribunal is not required to proceed through designated State channels, but can approach those officials who are most directly responsible for compliance.”).

206. *Id.* at para. 69.
same vein, the Tribunal considered that a State can only act through its officials and, therefore, their obligations must correspond to those of the State. 207

While the decision concluded that “there is a clear obligation on both States and their officials to comply fully” with the Tribunal’s subpoenas,208 the Trial Chamber was not entirely unaware of the difficulties surrounding their holding. The decision discussed at length the difficulties that could arise if a State prohibited its officials from complying with orders of the Tribunal, concluding that in such circumstances, it may not be proper for the Tribunal to hold the official to her obligations. 209

Moreover, the decision ended with a remarkable description of the Tribunal’s goals, as if the Trial Chamber felt it needed to supplement its legal reasoning with an appeal to effectiveness. 210

Nevertheless, the ICTY Appeals Chamber was not impressed with the Blaskic holding and drastically reversed course just months later. 211 It found that Article 18(2) allowed the Prosecu-

207. Id. at para. 91. As the Tribunal specifically noted:

[A] State has a duty to comply, a government official to whom a sub-
poena duces tecum is issued in his official capacity has a correspond-
ing duty to comply. Indeed, it would be anomalous to consider that
his duty is less than that of the State from which he receives his au-
thority, since a State may only act through its competent officials.

208. Id. at para. 150.
209. Id. at paras. 92–96.
210. Id. at para. 154. The Tribunal explained that:

The International Tribunal was established to aid in the restoration
and maintenance of peace in the former Yugoslavia. As a criminal
court, its primary obligation is to provide a fair and expeditious trial
and to guarantee the rights of the accused. This adjudicatory process
strengthens the rule of law, a fundamental principle shared by all
members of the international community. If effective, this may con-
tribute to reconciliation, which is a precondition for lasting peace.
Thus, the Trial Chamber cannot endorse the contention that States
and government officials have no obligation to comply with orders of
the International Tribunal.

211. Judgment on the Request of the Republic of Croatia for Review of the
Decision of Trial Chamber II of July 18, 1997, Prosecutor v. Blaskic, Case No.
IT–95–14, Appeals Chamber, International Criminal Tribunal for the Former
tor to seek the assistance of a particular State official, but did not imply a corresponding international obligation for that official to cooperate, stating instead that such an obligation “is only incumbent upon the State.”

In more general terms, the ICTY Appeals Chamber found that international law protects the internal organization of the State, including the right to instruct its organs, noting:

> [B]oth under general international law and the Statute itself, Judges or Trial Chambers cannot address binding orders to State officials....[I]t is indubitable that States, being the addressees of obligation[s of result], have some choice or leeway in identifying the persons responsible for, and the method of, its fulfillment. It is for each such State to determine the internal organs competent to carry out the order. It follows that if a Judge or a Chamber intends to order the production of documents, the seizure of evidence, the arrest of suspects etc., being acts involving action by a State, its organs or officials, they must turn to the relevant State.

Therefore, the Appeals Chamber held that the Tribunal could address binding orders to States as well as private individuals, but not to State officials.

Much can be said to qualify the Tribunal’s holding. The case predates the ICJ’s decisions in *LaGrand* and *Cumaraswamy*, and thus could not take into account the clear determination of

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212. *Id.* at para. 42.
213. *Id.* at para. 41. The Tribunal specifically stated:

> It is well known that customary international law protects the internal organization of each sovereign State: it leaves it to each sovereign State to determine its internal structure and in particular to designate the individuals acting as State agents or organs. Each sovereign State has the right to issue instructions to its organs, both those operating at the internal level and those operating in the field of international relations, and also to provide for sanctions or other remedies in case of non-compliance with those instructions. The corollary of this exclusive power is that each State is entitled to claim that acts or transactions performed by one of its organs in its official capacity be attributed to the State, so that the individual organ may not be held accountable for those acts or transactions.

*Id.*
214. *Id.* at para. 43.
State organ obligation in those cases. The question of whether officials can be subpoenaed is much more complex than the inquiry of their obligations under international law. First, directly addressing officials leaves the State uninformed and consequently unable to respond; a distinction from the ICJ decisions where the obligations of the State organs were communicated to the central government. Second, subpoenas are ultimately enforced by criminal sanctions, making them more intrusive than normal obligations under international law. Finally, it is significant that the Appeals Chamber noted that exceptions exist to the rule that customary international law protects the internal organization of States. Yet, in light of the categorical language of the decision, and the holding that clearly sets State organs apart from States and individuals, it should be acknowledged that the ICTY ultimately declined to pierce the State veil and adhered closely to black-box theory.

In a later case, the Court was slightly less determined. When Slobodan Milosevic challenged the validity of his arrest and extradition to the ICTY, the Trial Chamber was asked to declare his transfer unlawful. According to the amici curiae in the case, the transfer lacked a basis in Serbian law, and the international obligation to transfer Milosevic lay with the Federal Republic of Yugoslavia, and not with its constituent part, the Republic of Serbia. The Trial Chamber followed the amici in accepting that the obligation to cooperate with the Tribunal under Article 29 of the Statute was that of the Federal Republic of Yugoslavia, and not the Republic of Serbia. Nevertheless, it found that Rule 58, which in turn refers to Article 29, applied and that the transfer was made in accordance with the statute’s provisions. The ruling, therefore, implied that the obligation of the State (the Federal Republic of Yugoslavia) was also the

215. Id. at para. 41. See also GAJA, supra note 19, at 4.
217. Id. at 669.
219. Id. at para. 43.
220. Id. at para. 46.
obligation of its constituent part (Serbia). Furthermore, the President of the Tribunal later praised “the resolve of the authorities of Serbia to comply with its international obligations arising out of Security Council resolution 827 and Article 29 of the Statute of the International Tribunal.”

5. Dispute Settlement in the WTO

The WTO operates within a classic black-box framework. The General Agreement on Tariffs and Trade (“GATT”) of 1947 contains a federal clause in Article XXIV(12) which reads:

Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories.

This provision reflects the fact that the obligations under the GATT of 1947 were limited to the State, and did not extend to its territorial organs. As the U.S. pointed out in the Preparatory Committee:

[I]t is necessary to distinguish between central or federal governments, which undertake these obligations in a firm way, and local authorities, which are not strictly bound, so to speak, by the provisions of the Agreement, depending of course upon the constitutional procedure of the country concerned.

However, the meaning of Article XXIV(12) turned out to be slightly more complicated than expected. Many found the interpretation of the GATT of 1947 as requiring nothing more than reasonable efforts in cases under the control of its territorial organs, regardless of outcome, as unsatisfactory, because it undermined treaty effectiveness. Consequently, the unadopted 1985 Panel report on “Canada — Measures Affecting

224. Id.
the Sale of Gold Coins” rejected this interpretation. According to the panel, Article XXIV(12) did not limit the applicability of the treaty provisions; rather, it merely limited the obligation of States to secure their implementation. This reading was also adopted in the 1992 Panel report on “Canada — Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies.” The import of Article XXIV(12) was further reduced when the panel in “United States — Measures Affecting Alcoholic and Malt Beverages” (1992) concluded that based on the drafting history, the Article was designed to apply only to those measures of territorial organs which the central government is powerless to control. Thus, where the State has no constitutional authority to force its territorial organs to comply with its GATT obligations, Article XXIV(12) releases the State from the strict obligation to secure compliance, but requires the State to make a reasonable effort to do so and imposes State responsibility for any breach. This interpretation was clarified in the Understanding on the Interpretation of Article XXIV of the GATT of 1994 that was adopted during the Uruguay rounds of the Multicultural Trade Negotiations.

In WTO instruments and disputes, a firm distinction exists between the central State and its territorial organs. The WTO

226. Id. at paras. 53–64.
227. Canada: Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies, Feb. 18, 1992, GATT B.I.S.D. (39th Supp.) at 86–87 (1993) (“[T]he provisions of the General Agreement were applicable to measures by regional and local governments and authorities notwithstanding Article XXIV:12. This followed clearly from the obligation set out in this provision ‘to ensure observance of the provisions of this Agreement’ by such governments and authorities because a provision could only be ‘observed’ by a government or authority if it was applicable to it.”).
229. See Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 para. 13, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 14, 1994, LEGAL INSTRUMENTS — RESULTS OF THE URUGUAY ROUND, vol. 1 (1994), 33 I.L.M. 1125, 1163 (1994) ("Each member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory.").
addresses all obligations to the State, which is responsible for any breach, even where it is constitutionally powerless to control its organs. Therefore, the WTO practice firmly adheres to black-box theory.

IV. ANALYSIS

The case law presented above forms a diverse collection, involving different courts, different fields of law, and contentious judgments as well as advisory opinions. For the more recent decisions, it remains to be seen whether they will go down in the legal annals as exceptions or innovations. Still, analyzing those cases together sensitizes scholars to the fact that even the decisions that are exceptional in the case law of their courts fit a pattern of similar judicial thinking that can be found both in national and international courts.

While the cases described do not amount to evidence of a wholesale rejection of black-box theory in international law, they do represent a growing challenge to the notion that international obligations bind only the State as an entity and not its organs. As noted, this occurrence is not a new phenomenon. However, the breadth of this trend and the authority of the international courts involved might now create a critical mass that will endure and eventually reverse the rule and exception regarding State organ obligation under international law. For particular categories of obligations and fields of law, for example human rights, the black-box theory may already be outdated.

231. See supra note 9.
232. See CASSESE, supra note 32, at 181; Bedjaoui, supra note 65, at 23. Bedjaoui may be overly optimistic in stating that:

It is no longer conceivable that a national court should require authority to execute an international judicial decision....[T]he barrier between international law and municipal law has collapsed in whole sectors of activity. The development of universal or regional organizations, and the appearance of certain elements of supranationality, have occasioned a more widespread osmosis of international decisions into the national legal order. It therefore comes as no surprise that,
The prospects for change are fuelled by material changes in international law that should be expected to develop rather than regress. In this section, we will first analyze how material changes in international law underlie the trend towards State organ obligation. Second, we will set forth an alternative model to black-box theory on the basis of the cases described. This analysis should be understood as just that: a view of the alternative to black-box theory among many possible others. Finally, we will briefly address some of the policy considerations involved.

A. Background: Change in Public International Law

That the character of international law has changed profoundly in the last century is a truism repeated to the point of becoming meaningless.\footnote{For an early account, see Wolfgang Friedmann, The Changing Structure of International Law ivii (Columbia University Press, 1964).} Still, this development is crucial for our understanding of the challenge to black-box theory and its prospects. The ICJ and other courts’ attempts to pierce the State veil are both evidence and consequences of this change. This Article will paint the picture of international law’s development only in broad strokes, focusing on four specific points of change: (1) the emergence of non-State subjects of international law; (2) international law’s growing regulatory power; (3) the increased emphasis on the multilateral formulation of general rules; and, (4) international law’s ever-growing accessibility and precision. While these points are strongly interconnected and partly overlapping, they provide an accurate portrayal of the legal transformation behind the cases relevant to this Article’s analysis.

First, current international law includes many subjects besides the State. This change in itself places pressure on a conceptual framework that was shaped by the legal interactions of States alone.\footnote{See Thomas Buergenthal, The Advisory Practice of the Inter-American Human Rights Court, 79 Am. J. Int’l L. 1, 20 (1985) (“A legal system developed over centuries to regulate relations between states must make consider-}
ganizations now have limited capacities to act on the international plane. These entities are also affected, directly or indirectly, more often than ever before by international law.  

Second, international law now regulates many subject matters previously under the exclusive control of the national legislator. International law has come a long way from being “the minimal law necessary to enable state-societies to act as closed systems internally and to act as territory-owners in relation to each other.” The oft-described move from a law of coexistence to a law of cooperation has led to a vast expansion of topics covered by international law. The domaine réservé is today more a relic than reality.

able conceptual adjustments to accommodate the extension of its normative reach to individuals.” [hereinafter Buergenthal, The Advisory Practice].

235. See Pescatore, Conclusion, supra note 25, at 274. As Pescatore explains:

International treaties in our time, with few exceptions, are of concern not only to the states as such...they have a direct bearing on the rights and interests of individuals, physical or corporate....In contrast it is rather difficult to find treaties the effects of which could be contained entirely on the level of pure interstate relations....We may thus take as a premise that, for the great majority of international treaties in our time, the way in which these treaties are executed and implemented by the contracting states in their internal order is of primary concern.

Id.


237. PHILIP ALLOTT, EUNOMIA: NEW ORDER FOR A NEW WORLD 324 (Oxford University Press 1990).

Third, international law is increasingly legislative and less a set of bilateral contractual relations between States. This change can be witnessed not only in the content of treaties, but also in their form. The multilateral formulation of general rules has become a pivotal part of modern international law, ending the dominance of concrete, bilateral arrangements between States. The increased importance of multilateral treaties is a relatively recent phenomenon.

Fourth, and closely connected to the other changes, international law has become increasingly accessible and specific. The proliferation rate of treaties in the last century puts any Petri dish to shame. Treaties have grown in number, but also in precision, formulating both the desired results and how these results are to be achieved. No longer is it a rarity for a treaty provision to specify the actions to be taken by legislative, executive and/or judicial organs.

These changes bring forth a growing rapprochment between national and international law. Professor Phillip Allott states that the convergence of subjects, topics and form leads to “the internationalizing of the national, the nationalizing of the international, and the universalizing of value,” as well as the negating of “the structural duality” between national and interna-

239. This process has a long history. See Philip Allott, *The Concept of International Law*, 10 EUR. J. INT’L L. 31, 43 (1999) ("As international society began to increase rapidly in complexity and density from, say, 1815, treaties began to perform a social function closely analogous to legislation in national legal systems.").


241. Id.

242. Id. See also infra notes 246, 247.

243. See Louis B. Sohn, *Unratified Treaties as a Source of Customary International Law*, in REALISM IN LAW-MAKING: ESSAYS ON INTERNATIONAL LAW IN HONOUR OF WILLEM RIPHAGEN 231, 231 n.1 (Adriaan Bos & Hugo Sibesz eds., 1986) (stating that since 1945 more treaties have been adopted than in the 3000 years before).

tional law. In many respects, modern international law resembles national law more than it does the international law of a century ago. A pertinent example is the law underlying the Consular Relations cases before the ICJ. International law regarding the assistance of consular officers to their nationals abroad has developed considerably in the last two centuries. Before the drafting of the Vienna Convention on Consular Relations, the subject of consular assistance was generally included in bilateral treaties in far less detail, if it was included at all. The 1923 Treaty on Friendship includes an elaborate provision regarding Commerce and Consular Rights between the U.S. and Germany. Article 11 of the Treaty reads:

Consular officers, nationals of the State by which they are appointed, may, within their respective consular districts, address the authorities, National, State, Provincial or Municipal, for the purpose of protecting their countrymen in the enjoyment of their rights accruing by treaty or otherwise. Complaint may be made for the infraction of those rights. Failure upon the part of the proper authorities to grant redress or to accord protection may justify interposition through the diplomatic channel, and in the absence of a diplomatic representative, a consul general or the consular officer stationed at the capital may apply directly to the government of the country.

This provision allows for consular assistance in very general terms, envisaging nationals as objects rather than subjects of the law, and specifically determines that any resulting differences should be resolved through the bilateral diplomatic channel. In comparison, the Vienna Convention moves consular as-

245. Philip Allott, The Emerging Universal Legal System 33 (2002); see also Gaja, supra note 19.
246. See Yoo, supra note 236, at 1958 (“International agreements are becoming more like the permanent statutes and regulations that characterize the domestic legal system, and less like mutually convenient, and temporary, compacts to undertake state action.”). Cf. Frowein, The Implementation, supra note 50, at 85–86 (noting that while the international and national legal systems remain separate, there is now an “interdependence of these legal orders...probably even more in the day-to-day practice of international as well as of State organs, including national courts....”).
249. Id. at art. XXI.
sistance to an entirely different level. While the Convention includes a similar clause on consular communication with the authorities,\textsuperscript{250} Article 36 addresses consular assistance in great detail.\textsuperscript{251} The differences in specificity and language are unmistakable. Consular assistance to detained nationals is now addressed in detail and established as a right, not only for the consular officer, but also for the detained individual.\textsuperscript{252} In fact,


\textsuperscript{251} Id. at art. 36. Article 36 states:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
   
   (a) [C]onsular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
   
   (b) [I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;
   
   (c) [C]onsular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

\textit{Id.}

the competent authorities of a receiving State now hold a corresponding duty to inform both the detainee and the consular post. As a result, this provision bears greater similarity to national law providing rights for detained individuals than to the more contractual language of the old bilateral treaties. While national courts are generally reluctant to attach far-reaching consequences to this development, it is undisputable that a similar line of Consular Relations cases could not have come before the ICJ on the basis of older treaty provisions such as Article 11 of the 1923 treaty.

The growing similarities and intertwinement of national and international law makes their separation increasingly untenable. Pressure grows on actors in both fields to overcome formal barriers and to interact more effectively. Courts are particularly affected by the evolution of treaties from mere contracts between nations towards statute-like law, since, as the U.S. Supreme Court stated in *Marbury v. Madison*, “[i]t is emphatically the province and duty of the judicial department to say what the law is.”

Moreover, courts frequently feel the additional pressure to provide the only realistic chance of enforcement of the law in question. If they do not uphold the international rules, often-

and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States.


254. For an extensive, but ultimately negative comparison with Miranda rights see *United States v. Lombera-Camorlinga*, 206 F.3d 882, 883–84 (9th Cir. 2000) (*en banc*).

255. *See, e.g.*, Bishop, *supra* note 69, at 13, 43 (Part II and Part IV).

256. *Cf.* Helfer & Slaughter, *supra* note 9, at 388. The authors note that:

In democracies in which individuals are mobilized in support of the judgment of a supranational tribunal, compliance with that judgment becomes less a question of ceding sovereignty than of responding to constituent pressure. The State is no longer an interlocking set of government institutions in its domestic affairs, with sovereignty lodged in the people, and a unitary entity in its foreign relations, with sovereignty a fundamental attribute of its statehood. Instead, its internal and external face begin to mirror one another, as sovereignty becomes inextricably interwoven with accountability.


times, as in Breard and LaGrand, no one else will. After all, international law fits the traditional framework of self-help less everyday as individuals and international organizations are in principle incapable of taking any effective measures themselves to vindicate their rights, and States are increasingly constrained in their capacity to react independently to violations of international law. Although national courts continue to let international obligations pass unvindicated in the majority of their decisions, the urge to give effect to otherwise unenforceable law can be observed where courts challenge barriers to their ability to give effect to international law.

Of particular importance is the notion that international law is no longer inter-State law. The monopoly of the State has been broken by the emergence of other subjects of international law, most importantly individuals. This development threatens the rule that international norms are ipso facto to be addressed to States only. One possible response is “the idea that traditional inter-State law needs to be subsumed within a broader process in which old distinctions between public and private international law and between municipal and international law

258. See Benvenisti, Judges and Foreign Affairs, supra note 9, at 424. Cf. CONFORTI, INTERNATIONAL LAW, supra note 9, at 4–5 (The “proliferation of international legal norms over the last forty years, however, has not led either to corresponding developments in international judicial decisionmaking or to corresponding procedures for the coercive enforcement of international rules.”).

259. For example, States are constrained by free trade regulations, which inhibit economic countermeasures, and stricter rules on resorting to armed force.

260. See, for example, the dissenting opinion of Lord Nicholls in Briggs v. Baptiste [2000] 2 A.C. 40, 55. Lord Nicholls stated that he could not accept that the courts of Trinidad and Tobago were “powerless to act” in order to prevent Brigg’s execution, exclaiming that:

By acceding to the [American Convention on Human Rights] Trinidad intended to confer benefits on its citizens. The benefits were intended to be real, not illusory. The Inter-American system of human rights was not intended to be a hollow sham, or, for those under sentence of death, a cruel charade.

Id. Appeal taken from Trinidad & Tobago & The Appeal to Effectiveness, in Blashic, Objection, supra note 201, at para. 154.

261. See PASQUALUCCI, supra note 108, at 327.

are being steadily eroded. If international law can look into the black-box to deal with individuals, then an inability to do the same with State organs is not self-evident. In short, the material changes in international law will only be effective if they are accompanied by adequate procedural responses. Since these changes provide the driving force behind the challenge to black-box theory, the pressure to “break the black-box” can be expected to increase further over time. Piercing the State veil may well prove to be an enduring adaptation of the procedural framework of international law, leading to greater efficacy of international norms.

B. An Emerging Alternative Model: State Organ Obligation

Our precursory reading of the alternative model of State organ obligation that may replace black-box theory can be summed up in five interrelated points: (1) international obligations oblige States as well as their organs; (2) States retain the international responsibility for international law violations in order to efficiently enforce international legal obligations; (3) the State retains a high level of control over the fulfillment of its international obligations; (4) a distinction should be made

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264. See GAJA, supra note 19, at 7 (“Should one accept the view that international law confers rights and obligations on individuals, it seems reasonable to hold that international law may also impose obligations on specific State organs.”).


Despite the pervasive mutation in the international system, the state is not about to “whither away.” Yet, because of this mutation, one may question the continued functionality of the rule that a state is free, subject only to the broad international “good faith” standard, to choose the ways and means of implementing a treaty to which it is a party, and specifically to determine whether a treaty should or should not directly apply in its internal legal order. Unfettered discretion in the hands of national political institutions is particularly problematic in the case of treaties aimed at granting rights to, and imposing obligations upon, individuals.

Id. See also Simma, supra note 240, at 325.
between State organs’ positive and negative obligations; and (5) an alternative model needs to incorporate the reality that in case of conflicts State organs will generally continue to abide by national law at the State level rather than follow their international obligations.

First, the international obligations of State organs exist parallel to those of the State, not in isolation.\(^{266}\) As a general rule, we can paraphrase the ICJ in *LaGrand* and say that organs are bound under international law to comply with the international undertakings of their States, whatever form they take.\(^{267}\)

Second, international responsibility for a violation of international obligations must in principle still be invoked against the State as an entity. The fact that many international obligations can be fulfilled by different State organs, which oftentimes depend on each other to do so, makes it generally unfeasible to invoke the international responsibility of a specific organ. Neither Germany nor the U.S. would benefit if Germany was to invoke the responsibility of the U.S. government, the Governor of Arizona and the U.S. Supreme Court separately before the ICJ in a case like *LaGrand*.\(^{268}\) Separate international responsibility seems desirable only when a violation can be attributed exclusively to one organ in limited circumstances. For example, it may be desirable when the organ in question is unwilling to remedy the violation and cannot be forced to comply by its central government, as in the case of the Manx legislature in *Tyrer*,\(^{269}\) or in specific consent-based regimes.\(^{270}\)

\(^{266}\) Cf. Fitzmaurice, *supra* note 20, at 88 (“It is only by treating the State as one indivisible entity, and the discharge of the international obligations concerned as being incumbent on that entity as such, and not merely on particular individuals or organs, that the supremacy of international law can be assured — the atomization of the personality of State is necessarily fatal to this.”).

\(^{267}\) See *LaGrand*, 2001 I.C.J. 104, at para. 32.

\(^{268}\) But see Peter J. Spiro, *Federalism and International Law: A Third Account*, in *PROCEEDINGS OF THE 93RD ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW* 246, 247 (noting that: “[S]ubnational responsibility would...lead the states to respect international obligations within the sphere of their authorities.”).

\(^{269}\) See *supra* Part II.

\(^{270}\) Cf. Art. 25 (1) and (3) Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (allowing subdivisions to participate in arbitration in their own right with consent of their State).
That State responsibility remains unaltered does not preclude the invocation of State organ responsibility on the national plane. Where the responsibility of organs for their obligations under national law can be invoked, be it by individuals or by other organs, there is no reason why the same could not be done for their international obligations.

Third, the State, represented by the executive and the legislature, retains a high level of control over the fulfillment of its international obligations, for example, by implementing and enforcing legislation. The fact that State organs are bound by the international obligations of their State does not mean that they are deaf to national instructions on how to fulfill those obligations. The freedom of implementation remains largely intact, especially for less detailed obligations.

That the State normally preserves its controlling role is clearly shown in the final judgment in LaGrand. While the circumstances surrounding the LaGrand brothers’ executions warranted the pronouncement of the Governor of Arizona’s obligation to halt the second execution, the ICJ recognized the freedom of the U.S. to determine how to remedy possible future violations. The ICJ did not name any specific U.S. organs, but imposed a duty on the U.S. to allow review and reconsideration of future convictions in violation of the Consular Treaty by a means of its own choosing. Similarly, the state’s preservation of control was a determining factor in the Subpoena decision of the ICTY Appeals Chamber.

Fourth, a distinction must be made between positive and negative obligations of State organs, as attempted by the Brus-
sels Court of Appeals in *Vermeire*. As shown in the comments of the ECHR on that decision, however, the line is not easily drawn. Contrary to the common understanding of these categories, it is submitted here that the proper distinction in the context of State organ obligation is not between action and restraint from action, but between the implementation of an international obligation in general and the prevention of a specific, imminent violation of international law.

The latter, negative obligation must apply to all organs, regardless of the wording or content of the international norm. Whenever a State organ is confronted with an imminent violation of international law in the normal conduct of its duties, it has an international obligation to prevent that violation by whatever action or omission lies within its authority. Thus, the governors involved in *Breard*, *LaGrand* and *Avena* became the subject of negative international obligations that would otherwise not concern them because it was in their power to prevent an imminent violation.

On the other hand, the positive obligation to take general steps for implementation is more limited and depends on the specific content and language of the norm. The obligation must be specific enough to determine both the steps to be taken, and the organs that are to take them. In order to determine whether these requirements are met, a factual determination is necessary in each specific case, taking into account the position of the organs involved and the context of the international obli-

280. Id. at para. 26.
282. Cf. id. at 39 (“It is axiomatic that a treaty, made between States, is binding upon each State as a whole, upon each one of its organs. This is implicit in the lapidary formulation of the *pacta sunt servanda* rule in article 26 of the Vienna Conventions.”); Christian Tomuschat, What is a “Breach” of the European Convention on Human Rights?, in THE DYNAMICS OF THE PROTECTION OF HUMAN RIGHTS IN EUROPE, 315, 320 (R. Lawson et al. eds., 1994) [hereinafter Tomuschat, What is a “Breach” of the E.C.H.R.?].
283. The IACHR, for example, has given numerous orders that are so specific that they effectively result in direct communication between the Court and certain State organs. See, e.g., “La Nacion” Newspaper case, Provisional Measures, 26 August 2002, paras. 2–3 (Costa Rican court asking the IACHR for clarification of an order to suspend a judgment). See also PASQUALUCCI, supra note 108, at 250–53.
Generally, positive obligations can be derived more often from obligations of conduct than from obligations of result, but positive obligations cannot simply be equated to obligations of conduct.

The fact that a norm can be carried out by more than one organ does not preclude positive obligations, although it does make a resulting positive obligation less feasible. A specific enough norm may create simultaneous positive obligations, allowing different State organs to achieve the same result. The action of one disposes of the obligations of the other. In such cases, the time that has elapsed since the introduction of the international obligation and the inaction of the other organs involved may be taken into account in assessing the existence of positive obligations, as demonstrated by the Argentinean case of Ekmekdjian v. Sofovich.

Article 14(1) of the American Convention of Human Rights establishes a right of reply to offensive public statements. Argentina ratified the Convention in 1984, but subsequently failed to regulate the right of reply in its domestic law. In 1988, the Argentinean Supreme Court ruled that it could not enforce the Convention in the absence of implementing law,
since the phrase “under such conditions as the law may estab-
lish” made Article 14 a non-self-executing provision.289
In the 1992, the Supreme Court of Argentina reversed course
in the landmark decision of Ekmekdjian v. Sofovich and found
that Article 14(1) was directly enforceable under Argentinean
law.290 In reaching this conclusion, the Court relied on an Advi-
sory Opinion of the Inter-American Court,291 the American Con-
vention, the Vienna Convention on the Law of Treaties and the
Argentinean Constitution.292 The Court’s reasoning was rather
unorthodox.293 The Court determined that the adoption of a law
that conflicted with treaty obligations would infringe on the
executive’s treaty power and was, therefore, unconstitutional.294
The Court departed from the then prevailing “last in time” rule
and held that treaties override ordinary national laws.295 Since
the Vienna Convention on the Law of Treaties ranked higher
than national law, the provision in Article 27 that “a party may
not invoke the provisions of its internal law as justification for
its failure to perform a treaty” effectively required all State or-
gans “to accord normative priority to treaties and imposed on
them the obligation to emit the necessary regulations to ensure
that treaty provisions be fully implemented.”296

289. See id. (The 1988 case is Ekmekdjian v. Neustadt, Supreme Court of
Argentina, Case No. E. 60. XXII, Judgment of December 1, 1988).
290. Id.
291. Id. at 696.
292. See id. at 697–99; see also Ekmekdjian, supra note 286, at paras. 17–
21.
293. See Burgenthal, International Tribunals, supra note 9, at 697.
294. See id. at 698.
295. Id. at 697.
296. Id. at 698. See also Ekmekdjian, supra note 286, at para. 19. The Su-
preme Court of Argentina explained:

Que la necesaria aplicación del art. 27 de la Convención de Viena im-
pone a los órganos del Estado argentino asignar primacía al tratado
ante un eventual conflicto con cualquier norma interna contraria o
con la omisión de dictar disposiciones que, en sus efectos, equivalgan
al incumplimiento del tratado internacional en los términos del citado
art. 27.

[That the necessary application of article 27 of the Vienna Conven-
tion places an obligation upon the organs of the Argentine State to
give primacy to the treaty in the event that a conflict arises with any
contrary provision of domestic law or in the event it has omitted to
enact provisions and that such omission, in its effects, is tantamount
While relying in part on the Constitution, the Supreme Court stated, in broad language, that international law imposes extensive obligations on State organs. The Court ruled that Article 2 of the American Convention, requiring States’ parties to adopt “such legislative or other measures as may be necessary,” includes appropriate judicial decrees as a means to give effect to the rights and freedoms in the Convention. The Court, therefore, found itself under the obligation to remedy the inaction of the legislature and regulate the right of reply through such decrees.

In Ekmekdjian, the right of reply was to be exercised “under such conditions as the law may establish.” This rule seemed to give rise to a positive obligation on the legislature (and possibly the judiciary branch) to establish a legal regime that allowed for the right of reply, and a negative obligation on all other organs to prevent specific violations of this right. In its 1988 decision, the Argentinean Supreme Court deferred to the

to non-observance of the international treaty under the terms set out in article 27.

Id. at para. 20.

297. See Buergenthal, International Tribunals, supra note 9, at 698.
298. See id. at 696–97.
299. See id. at 697–98. See also Ekmekdjian, supra note 286, paras. 20, 22. In more general terms, the Court held that:

Que en el mismo orden de ideas, debe tenerse presente que cuando la Nación ratifica un tratado que firmó con otro Estado, se obliga internacionalmente a que sus órganos administrativos y jurisdiccionales lo apliquen a los supuestos que ese tratado contempla, siempre que contenga descripciones lo suficientemente concretas de tales supuestos de hechos que hagan posible su aplicación inmediata. Una norma es operativa cuando está dirigida a una situación de la realidad en la que puede operar inmediatamente, sin necesidad de instituciones que deba establecer el Congreso.

[It should be borne in mind that when the Nation ratifies a treaty, which it has signed with another State, it is making an international commitment that its administrative and jurisdictional bodies will apply that treaty to the cases covered thereby, provided that it contains sufficiently specific descriptions of such cases to permit its immediate application. A rule is effective when it addresses an actual situation within which it can operate directly, without the need for institutions which have to be established by Congress.]

Id. at para. 20.

300. Ekmekdjian, supra note 286, at paras. 21–22.
301. See Buergenthal, International Tribunals, supra note 9, at 697–98.
legislature to establish a legal regime. However, when in 1992 the legal regime had still not been enacted, the Court found that the inaction of the legislature prompted a positive obligation on the Court to regulate the right of reply. Thus, the time elapsed, together with the failure of the legislature, strengthened the positive obligation of the Court to formulate a legal regime for the right of reply, also forming a logical corollary of the negative obligation of the Court to prevent a violation of the right in that specific case.

Fifth, the international obligations of State organs will not trump national law at the State level, at least not in the foreseeable future. In case of conflict, national courts and other organs generally will continue to follow national rules on the hierarchy of national and international law. Of course, the familiar rule that national law cannot excuse the violation of an international obligation will apply, and favoring national law over international obligations will result in State responsibility on the international plane.

The lack of supremacy primarily serves as a practical prediction. States will resist the move from black-box theory to State organ obligation more vehemently when it is coupled with the automatic supremacy of international law on the national plane. State organs will be hesitant to disregard the national law that instituted them and provides the most direct means of accountability.

302. See supra note 296.
303. Id. at 698.
304. Id. at 695–98.
305. As stated earlier, obligation and rank should be treated as two different issues. See supra Part II.
306. Id. Cf. Alford, supra note 48, at 736 (“If a statute admits of only one interpretation, courts must give effect to that interpretation, whether or not it violates a pre-existing international obligation.”).
307. See, e.g., HENKIN, supra note 31, at 150 (describing the U.S. refusal to follow international law when it is “inconsistent with the U.S. Constitution.”).
308. See Reid v. Covert, 354 U.S. 1, 16 (“[N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.”). Cf. John H. Jackson, Status of Treaties in Domestic Legal Systems: A Policy Analysis, 86 Am. J. Int’l L. 310, 333 (1992) (“[C]ourts will often strive to seek a ‘way out’ from the rigidities and other policy problems they face when a...[direct application and higher status] rule exists in a legal system.”).
However, many scholars will also value the lack of supremacy of international norms on the national plane as an important check on the making and application of international law. After all, the shortcomings of international law are well-known. Principal among them are a claimed lack of legitimacy, democratic or otherwise, and a lack of accountability of the actors that apply them. These problems raise doubts regarding the desirability of an automatic superior status for the international obligations of State organs. Moreover, withholding superior status might lead to closer interaction between national and international courts. This interaction can induce development and improvement of international law, as was demonstrated when the European national courts refused to uphold European law due to its lack of attention to human rights.

At the same time, a lack of supremacy clearly diminishes the effects of State organ obligation. If international law developed to a more perfect state, supremacy would certainly be desirable. Until that time, a balance must be found between conflicting interests. Organs will generally follow the commands of national law when it conflicts with international obligations, and occasionally will disregard national laws to favor international law. The development of a limited class of international obligations that do require supremacy on the national plane may develop, such as *jus cogens* norms. Again, this theory is one of several different possible scenarios. The likelihood and desirability of separate or parallel obligations of the State and its organs, the possible international responsibility of organs and the rank of their international obligations on the national plane are up for discussion and may change over time. Also, there are various open questions that will have to be determined in practice. Where do we draw the line between positive and negative obligations? To what extent should organs heed international obligations that do not immediately touch upon their daily routine?

310. See Kālin, *supra* note 236, at 119. See also Turley, *supra* note 256, at 204–05.
312. See *supra* Part III.B.1.
313. For examples of different State systems, see Jackson, *supra* note 308.
State organs themselves will answer many of these questions. Understanding the full potential of the model of State organ obligation requires a change of perspective in approaching the addressees of international obligations. To return to our analogy of the walled town: the question normally posed is whether international law is allowed to look over the walls into the town. An equally valid and more constructive question is whether the organs inside the town are required or even allowed to ignore what is going on outside the town walls.\footnote{314} This perspective warrants a bottom-up, rather than a top-down approach. In other words, the issue is whether the model of State organ obligation provides a workable structure in practice for the organs themselves, not whether it can be imposed in full detail upon them.

When given the chance, State organs, especially courts, are often willing to look over the town walls and uphold international obligations. This phenomenon is evidenced by the experience in the European Union and the fact that courts all over the world already interpret national law in conformity with international law.\footnote{315} As argued earlier in this article, State organ obligation may play an important role in further promoting that willingness. This assertion is especially relevant with regard to judges, who are trained to distinguish binding norms from non-binding ones.\footnote{316}

More important, breaking the black-box effectively removes the barriers in many cases where organs already want to heed the call of international law. It reverses the current presump-

\footnote{314. Cf. Buergenthal, \textit{International Tribunals}, supra note 9, at 698 (commenting on \textit{Ekmekjian} that since the Argentine Supreme Court “knew what Argentina’s international obligations were, it thought it only proper to give effect to them.”).}

\footnote{315. See Gerrit Betlem & André Nollkaemper, \textit{Giving Effect to Public International Law and European Community Law before Domestic Courts: A Comparative Analysis of the Practice of Consistent Interpretation}, 14 \textit{EURO. J. OF INT’L L.} 569, 574–75 (2003); Benvenisti, \textit{Judges and Foreign Affairs}, supra note 9, at 428.}

\footnote{316. Dieter Grimm, \textit{Constitutional Adjudication and Democracy}, 33 \textit{ISR. L. REV.} 193, 205 (1999) (stating “judges are bound to the prescribed norms, and their task is to discover the content of these norms and to apply them.”). Cf. Finzer v. Barry, 798 F.2d 1450, 1460 (D.C. Cir. 1986) (“It would be quite improper for the judiciary to disregard international obligations that are inseparable from our nationhood.”).}
tion of non-validity of international obligations for State organs. Accordingly, the burden of proof shifts in favor of the application of international law. State organs must ask themselves not whether the State empowers them to obey international law, but whether the State prevents them from doing so. This development has three important effects.

First, even without supremacy, State organ obligation ensures the execution of international law where there is no conflict with national law, which, as noted, is often.

State organs continuously exercise discretion in the performance of their duties. Some of the highest national courts have discretion regarding whether or not they will review a case, while all courts exercise discretion from time to time when interpreting national law or filling a gap in the law. The executive branch and legislatures’ freedom to act is even more apparent. National law frequently instructs State organs to act in an equitable manner, giving them discretion that is to be applied in a reasonable way.

As Lord Scarman implied in Attorney-General v. British Broadcasting Corporation, many violations of international obligations may be prevented if State organs are bound by international law in exercising their discretion.

317. See supra Part II.
318. For example, in the U.S., the Supreme Court has the ultimate ability to grant certiorari to hear a case.
319. See generally Attorney General v. British Broadcasting Corporation, 3 All E.R. 161 (H.L. 1980) (analyzing the case at hand in an equitable manner and noting the court’s discretion in such matters).
320. Id.
321. Id. at 177–78 (noting that where a court had to decide a “question of legal policy,” it had to regard and uphold the United Kingdom’s international obligations under the Convention as interpreted by the European Court of Human Rights). See also Lord Butler-Sloss in Derbyshire County Council v. Times Newspapers Limited, 1 Q.B. 770, 830 (1992). In Derbyshire County Council, the Court explained:

[T]he principles governing the duty of the English court to take account of article 10 [ECHR] appear to be as follows: where the law is clear and unambiguous, either stated as the common law or enacted by Parliament, recourse to article 10 is unnecessary and inappropriate. Consequently, the law of libel in respect of individuals does not require the court to consider the Convention. But where there is an ambiguity, or the law is otherwise unclear or so far undeclared by an appellate court, the English court is not only entitled but...obliged to consider the implications of article 10.
Second, State organ obligation eliminates many violations of international law that are caused by negligence rather than an intent to breach. States regularly fail to implement their obligations not because they oppose them, but because they are not aware of all of the steps to be taken, their legislative process is too slow, or simply because they have other priorities. When international obligations address State organs directly, the unintended absence of a national “trigger” no longer precludes their execution. Of course, State organs can still be negligent, but when each organ itself is addressed by international law, chances increase that failure to respect the law by one organ will be remedied by others.

Third, in cases where States do want to preclude the execution of their international obligations, they will have to act. State organs, especially courts, often lack the political agenda of the central government that determines the course of action of the State. While this problem sometimes works to the detriment of international law, (for example, in the Consular Relations cases); on other occasions, it makes specific organs more vigilant than their State in the treatment of international obligations, (for example, as demonstrated in the Pinochet case). Under the black-box theory, States can simply ignore inconvenient international obligations, knowing that their courts and officials will do the same. Under a model of State organ obligation, States will have to issue explicit instructions to their organs in order to prevent the application of a given international norm. This scenario facilitates both the determination of violations of international law and their redress on the international plane.

C. Policy Considerations

From the standpoint of international law the concept of State organ obligation provides a welcome opportunity to improve
compliance, but its impact on the national legal order raises profound questions.\textsuperscript{325} Some of these are flaws of international law itself, like the lack of democratic legitimacy, accountability, precision and completeness.

An additional factor that may raise doubts as to whether it is desirable to have State organs directly obligated to obey international judgments is the possibility of error in those judgments. Such an error may result either from the present imperfect and unsystematic state of international adjudication or the distance between international adjudicators and local situations, and cannot generally, in the absence of correctional mechanisms, be easily remedied.\textsuperscript{326}

Additionally, some may protest that the concept of State organ obligation threatens State autonomy. The black-box theory is generally supported with reference to the sovereign equality of States and the autonomy they need to represent their interests on the international plane.\textsuperscript{327} The direct obligation of State organs is thought to infringe on the State’s right to execute international obligations in the way it deems most suitable.\textsuperscript{328} As


\textsuperscript{327} See Blaskic, Review, supra note 211, at para. 41.

\textsuperscript{328} See McFadden, supra note 8, at 47. McFadden concludes that:

[The] black-box theory makes a great deal of sense, from a global perspective, because it recognizes both the fact and legitimacy of states having organized themselves in different ways. It would be an unwarranted interference in domestic affairs, as well as impractical, to require that specific institutions carry out international obligations.
a reaction to this threat to State autonomy, States may be more reluctant to enact international law.\textsuperscript{329}

Finally, there is the distorting effect of State organ obligation on the internal relationship between the organs in matters of federalism and the separation of powers. This distortion may allow the executive to overstep its authority, for example by imposing undue obligations on courts via treaties.\textsuperscript{330} In the same vein, the balance of powers between the federal government and the states may be disrupted. Therefore, mediation by the legislature might be required to prevent organs that make or apply international law from asserting an unwarranted dominance over others.

All these concerns are mitigated to a great extent by the rather conservative reading of State organ obligation introduced earlier in this Article. The fallout from the breaking of the black-box will be limited, because the State will retain vast control over the implementation of its obligations.\textsuperscript{331} Nonethe-

\textit{Id.} McFadden also proceeds to point out that the black-box theory's application is flawed when applied to the internal organization of the U.S. It is to be noted, however, that his rejection of the theory rests largely on the specific constitutional structure of the U.S. and not on the normative force of international law itself. \textit{Id.} Therefore, in the specific case of the U.S., McFadden argues that the State-created exceptions defeat the rule, but does not render the black-box theory obsolete in general. \textit{Id.}


\begin{quote}
Giving effect to international law where a country has formally ratified a relevant treaty, does no more than give substance to the act which the executive government has taken. The knowledge that the judicial use of international law in this way is now becoming more frequent may have the beneficial consequence of discouraging ratification where there is no serious intention to accept, for the nation, the principles contained in the treaty.
\end{quote}

\textit{Id.}

330. Or vice versa; \textit{see} Rogers, \textit{supra} note 42, at 215 (“To say that the courts have an additional body of “higher law” to apply, to be found in the whole amorphous body of customary international law, is to inject an enormously distorting overdose of additional power into the Judicial Branch.”).

331. \textit{See}, e.g., Grootboom, 1999 (3) BCLR 277; \textit{see also} Jackson, \textit{supra} note 308, at 334–38 (explaining various approaches to limit the automatic supremacy of international law).
less, concerns about sovereignty and supremacy are real, as demonstrated by the strong reaction of the Australian legislature to the famous Teoh case.\footnote{332} The Australian High Court’s holding in Teoh, which stated that unincorporated treaties can give rise to legitimate expectations of individuals that administrative decisionmakers will respect the treaty, provoked a fierce debate on the place of international law in the national legal order. The opposition of the Australian legislature to the doctrine of legitimate expectations reflected serious concerns about national control over the domestic effects of international law and the proper balance between the different branches of government.\footnote{333} While these problems cannot properly be discussed within the limits of this Article, two observations seem pertinent.

First, none of these problems is the immediate result of a move towards State organ obligation. They are existing problems that play out sharper in a model of direct, rather than indirect obligation. For the flaws in the law itself, this is obvious. The autonomy of States in implementing their international obligations is limited because States have consciously chosen to restrict their autonomy by enacting treaties that formulate specific demands for their implementation. Moreover, international law not only prescribes how the internal organization of a State is to be used for the implementation of specific obligations, it is also in the process of formulating more general demands on the State in shaping its internal organization.\footnote{334}

Likewise, the tension between federalism and an effective approach to international law\footnote{335} results from the material devel-
opments in the law rather than from a direct form of obligation. The traditional divisions of powers, whether federal or among different branches of the central government, do not go well with "the internationalising of the national and the nation-alising of the international." The growing content of international law has brought more power to the central government, in particular to the executive, than just the administration of foreign affairs.

Second, while providing some concrete alleviation of these problems, the indirect model of obligation also perpetuates them by removing an incentive for more structural change. Whether black-box theory is more harmful than helpful is a legitimate question, even taking into account the very problems it is believed to mitigate. The remedy of black-box theory is largely a placebo effect. We are oddly comforted by the idea that imperfect international law passes through the hands of the legislature before it becomes "real law" in our daily lives. As long as international law is "outside" the State, and dependent on our own lawmakers to get in, its imperfections are considered less troubling.

However, this sense of security is misleading. In practice, the role of implementing legislation is too constrained to remedy serious flaws that result from the drafting or application of international law. There is too much pressure and too little


338. But see Rogers, *supra* note 42, at 33 ("[T]he conduct of foreign affairs is conducted by the political branches in our system, and international law practice is in reality a part of the conduct of foreign affairs.").

339. See Kälin, *supra* note 236, at 123 ("While the legislature is involved in the treaty process, its members have no influence on the content of treaty law. Rather, the role of democratic decisionmaking is reduced to saying ‘yes’ or ‘no’ to a text negotiated by the executive."). See also Peter J. Spiro, *Treaties, Executive Agreements and Constitutional Method*, 79 Tex. L. Rev. 961, 1003 (2001). Spiro concludes from the problems of legislating on existing international obligations that:

[B]ecause the domestic effectiveness of trade agreements will always depend on implementing legislation, the House should be included in
leeway for the legislature to significantly curb the increased treaty-making power of the executive branch, especially since the power of the executive branch is broader than just the drafting of the treaty text that subsequently passes through the hands of the legislature. As for content, a meaningful departure from the international obligation to be implemented will quickly lead to a violation on the international level. Of course, a rubber-stamping policy that leaves no substantial choice, even when implemented by the greatest democracies, does little to further the legitimacy of international obligations.

The problems under discussion require structural adjustments — either in the making of international law or in the manner States deal with international law. The material changes in international law have prompted the first steps towards such adjustments, but not much more. Federal States, for example, have established or enhanced the participation of their state governments in international relations in various ways. However, these changes have primarily been gradual and not the adequate rethinking of the appropriate division of powers needed to fit the new reality that international law can no longer simply be equated to foreign affairs. An important factor in this lack of fundamental change is the air of protection decisionmaking before an international obligation is perfected. That is, the House should not be presented with an international fait-accompli, which would limit its discretion as a political if not a constitutional matter to consider the obligation before it is entered into, and before its rejection would result in a breach with possibly serious costs for the nation.

Id.


341. See Kälin, supra note 236, at 127–28 (describing the participation in treaty-making of sub-State governments in European countries). See also supra, note 37 on the role of sub-State entities in treaty-making.

342. See Kirby, The Road From Bangalore, supra note 325 (“Federal constitutions must themselves adapt to the world in which the federal state now finds itself. This, indisputably, is a world of increasing interrelationships in matters of economics and of human rights. Judges, no more than legislatures and governments, can ignore this reality.”). Cf. Swaine, supra note 122, at 533 (“The legal trappings of global affairs, including the principle of good faith, should not be ignored...attention must be paid to their implications for the international function of federal government.”).
that emanates from the idea that international law only takes effect within a State through a permissive rule of national law. 343

States are probably more willing to confront the flaws in international law and structural adjustments in their division of authority with respect to international law when the effects of that law appear more directly. A cautious, gradual move towards State organ obligation may, therefore, be a welcome catalyst to a more vigorous approach to existing problems rather than a source of new tensions between international law and national actors.

V. CONCLUSION

The international obligations of State organs form a peculiar topic of academic debate. Everyone agrees that “the State” is bound by its international obligations, but the unison ends with this meaningless abstraction. While some scholars insist that organs, as part of the State, are bound by international obligations, other scholars are equally emphatic in their denial of State organ obligation. The latter are undoubtedly in the majority. Both in theory and in practice, the State is still predominantly treated as a black-box, which shields its organs from the reach of international law.

We have, however, brought together a diverse set of judgments from international courts that challenge the black-box view of international law. While not a new phenomenon, the speed of this change is increasing. The involvement of different international courts, in addition to domestic courts, represents a further step away from black-box theory. The material changes in international law, which fuel the drift away from black-box theory, make it likely that this trend will continue.

We have laid out a rather conservative model of State organ obligation that may change places with black-box theory and become rule rather than exception. Many aspects of State organ obligation, such as separate international responsibility for State organs and the relationship between international and national obligations of State organs, warrant further discussion and may develop over time. Also, further refinement of the con-

343. See HENKIN, supra note 31, at 153.
cept of State organ obligation requires that a distinction be
made between different forms of obligation and different State
organs. This Article has taken a rather broad approach to State
organ obligation in order to give a wide-ranging overview of
relevant developments.

Eventually, direct obligation of State organs under interna-
tional law will improve compliance with international law. Di-
rect obligation also has its drawbacks, but these could well
prove to be a blessing in disguise by providing a stronger impe-
tus for States to remedy deficiencies both in international law
and their handling of it. In any case, the trend towards State
organ obligation is real, relevant and deserves further atten-
tion.
AVOIDING A DEATH DANCE: ADDING STEPS TO THE INTERNATIONAL LAW ON THE USE OF FORCE TO IMPROVE THE SEARCH FOR ALTERNATIVES TO FORCE AND PREVENT LIKELY HARMS

Brian J. Foley

I. INTRODUCTION

The world seems engaged in a death dance. In the past two years we have seen a massive terrorist attack that targeted New York City and Washington, D.C., and a response by the United States that included invading Afghanistan and toppling its government. A year and a half later, the U.S. invaded Iraq and toppled its government, based on the argument

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* Visiting Associate Professor of Law, Touro College, Jacob D. Fuchsborg Law Center. J.D., Boalt Hall School of Law, University of California, Berkeley, A.B., Dartmouth College. I developed these ideas in a paper presented at the International Symposium on Terrorism and Human Rights, sponsored by the Cairo Institute for Human Rights Studies, Cairo, Egypt, January 26–28, 2002; in a draft of this paper to the Faculty of the Rutgers School of Law, Camden, on September 30, 2002; and in a paper presented at the conference, US Nuclear Policy and Counterproliferation, sponsored by the Center for Defense Information and Physicians for Social Responsibility, Washington, D.C., February 26, 2003. I thank the sponsors of and participants at those conferences as well as the Rutgers Law Faculty, especially Ari Afilalo, Kim Ferzan, Ann Freedman, Ann Marie Iannone, Darren Latham, Michael Livingston, Ruth Anne Robbins, Rand Rosenblatt and Ray Solomon. Many thanks also go to the editors and staff of the Brooklyn Journal of International Law, who saw the need for reform of the laws of war and issued a Call for Papers on this subject. I also thank Touro Law Center and Widener University School of Law for their support of this project, and Touro Law student Annette Thompson, who helped with research. I especially thank the following for their review of drafts and earlier versions of this Article, and their encouragement of these ideas: Kevin Boyle, Roger Clark, Gail Davidson, Bill Foley, S.J., M.D., Stephen Friedman, Judith Gardam, Sean Kealy, Charles Knight, Michael Mandel, Harold Piety, Tamara Piety, John Quigley, Andy Strauss, and most of all, M.G. Piety.

that Iraq posed a direct threat to neighboring nations and an indirect threat to distant nations, since its government could potentially supply terrorists with nuclear, biological and chemical weapons.\(^2\)

The wars against Afghanistan and Iraq were either violations of international law or represented a modification of that law through state practice, thereby making it easier for all nations to resort to the use of force.\(^3\) Such a modification may be necessary or logical. The world appears increasingly dangerous, given the possibility that terrorist organizations might repeat the horrific level of destruction visited upon the U.S. on September 11, 2001, or perhaps inflict even greater damage with more destructive weapons. On the other hand, if violence begets violence, then we may not be moving toward a peaceful future but dancing toward the precipice of an abyss of lawlessness and violence. We cannot know for certain whether we are setting the stage for a more violent or more peaceful world. However, the presumption in the United Nations Charter and the customary law of self-defense is against using force.\(^4\)

International law controls the resort to and use of force, by either the UN or a single nation. The precise nature of this control, however, is vague. This Article implicitly argues for an understanding of these laws as a three-step process, a clarification that would be a “reform” in and of itself. The three steps are: (1) whether the situation to be addressed falls within the category of situations where force is one of the allowable responses; if so, (2) whether force is a necessary response, that is,

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whether meaningful alternatives to force exist; and, (3) whether the force used as a response complies with the norms of military necessity, proportionality and discrimination. Steps One and Two can be described as concerns of the *jus ad bellum* (the law governing the decision of whether to use force). Step Three contains concerns of the *jus in bello* (the law regulating how force is actually used and how hostilities are conducted).

This Article proposes to modify the laws concerning the use of force by focusing on Steps Two and Three, because these steps can serve, *prospectively*, to prevent the automatic and undisciplined use of force in response to a crisis or attack. That is, once decisionmakers have identified a serious problem that might be addressed with force (Step One), they still must decide whether to use force, as opposed to other means. Step Two, which limits force to when it is “necessary,” implies that a search for alternatives is required. Yet the law provides little guidance for such a prospective search. This Article suggests ways that it can. Of course, it is difficult to “legislate” how many options a decisionmaker must consider, how thoroughly a decisionmaker must consider them, and whether the decisionmaker has to think up any options outside of traditional ones. Nevertheless, to “legislate” such a thinking process is the subject of this Article.

Step Three (*jus in bello*), which controls how force is actually used, such as denoting which weapons and targets are legal and declaring how civilians and prisoners of war are to be treated during hostilities, protects against many of the harms that can result. This Article argues, however, that much of this protection comes too late — after the shooting starts. Indeed, some of the “protection” comes only after hostilities end, in the form of war crimes tribunals. Such tribunals do little for those killed, maimed, orphaned, widowed or psychologically damaged by the use of force and do nothing to prevent those damages prospec-


tively. There may be a deterrent effect, but prosecution for war crimes is perhaps the exception rather than the rule, and prosecution is selective. Last, enforcement of the *jus in bello* is often left in the hands of the combatants. Prospective consideration of *jus in bello* concerns, before the shooting starts, in the way this Article suggests, could increase international control over and participation in these protections.

This Article explores how such prospective guidance can be implemented at the UN as well as on the national level. This Article also explores how, even without a formal change to the UN Charter, change could occur as a result of practices and recommended interactions between the Security Council, General Assembly, International Court of Justice (“ICJ”), non-governmental organizations (“NGO”), and national leaders.

A. Proactive, “Reforming Attitude” is Necessary for Change

Three phenomena have prevented significant reform of the laws of war, especially the *jus ad bellum*: (1) the belief that nations’ resort to war is incapable of regulation; (2) the lack of an enforcement mechanism in international law; and, (3) the doctrines of custom and state practice, which are descriptive tools for determining what the law is. A detailed study of these subjects is beyond the scope of this Article, but a brief discussion shows why proactive reform of the laws should be considered now. The first, the belief that war cannot be regulated, can be dismissed readily. Wars are created by human beings, with identifiable causes, and as such can be regulated. Wars do not usually erupt like fistfights but require planning. Second, under a robust enforcement mechanism, such as an international court system (or, in the case of the UN, a highly active Security Council), the legality of particular actions would be clarified.


9. Christine Gray, *International Law and the Use of Force* 11–12 (2000). After reviewing a draft of this Article, Judith Gardam opined that many of the changes I propose would likely have come about if there were an enforcement mechanism in international law.
Leaders could look to the law as a guide to avoid negative consequences. Indeed, international law on the use of force would likely develop in the same way that law has developed over time in the Anglo-American common law system, adapting to changed conditions. In such a system, optimistic, would-be reformers might choose not to reform at all, but to wait, believing that, over time, the law will change and even improve. However, one probably waits in vain for such change where there is no enforcement mechanism. For example, in the past two years, the United States has invaded two countries, and the Security Council, the organ of the UN charged with primary responsibility for the use of force, has made no pronouncement on the legality of these wars, despite meeting shortly after each incident and issuing Resolutions concerning, inter alia, humanitarian aid and provisional government.10 Similarly, the Security Council has not remarked on several other uses of force since 1945, including the Vietnam War and the Soviet invasion of Afghanistan; only after seven years did the Council respond to the Iraq-Iran War of 1980–88.11

Instead, the determination of legality has been left to commentators. This is where the third impediment to reform arises. Commentators often focus on whether the particular use of force constitutes state practice or customary law. A pattern has emerged where a nation uses force, and scholars comment post facto on whether such use of force was legal.12 Be-

11. PETER MALANCZUK, AKERHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW 391 (1997). The Security Council is not required to act in any instance, which has led critics to complain of its “notorious selectiveness.” Id. at 427.
cause state practice and custom are a source of international law, commentators will often conclude that the exercise of force was legal. The dangers inherent in such a system are obvious. A nation that is, so to speak, entrepreneurial in using force could thus make each use of force sufficiently different from the previous one, and as such, the legality of the action would always be indeterminate at the time. For example, the country could attack country A for harboring terrorists; attack country B for building weapons of mass destruction; attack country C for repressing its populace; attack country D for encouraging and assisting rebels or terrorists in a neighboring nation; attack country E for spreading deadly industrial pollution to neighboring countries; and so on. Of course, there may be roadblocks along the way to make this slope less slippery, but the potential for such entrepreneurialism nevertheless exists.

Notwithstanding the doctrines described above, there has, of course, been reform in international law. But notably, the major reforms have been proactive. Such was the case with the

A few of these commentators seem prepared to treat any US action as a precedent creating new legal justification for the use of force...The lack of effective action against the USA as a sanction confirms them in this view. But the vast majority of other states remain firmly attached to a narrow conception of self-defence.

Id.; DINSTEIN, supra note 8, at 92–97 (noting that the law does not change so easily, and that there are indeed instances where the law is simply broken instead of refashioned). Concerning the doctrine of custom and state practice, and how it affects the law, see MALANCZUK, supra note 11, at 39–48. The seeming illogic of law-breaking as a source of international law is expressed in a comment by former U.S. Attorney General William P. Barr, who opined, “Well, as I understand it, what you're saying is the only way to change international law is to break it.” John R. Bolton, Is There Really “Law” in International Affairs?, 10 TRANSNAT’L L. & CONTEMP. PROBS. 1, 6 (2000).
creation of the UN and the International Criminal Court, both of which have been called “paradigm-shifting.” Regarding the use of force, proactivity and a normative approach are crucial because, as explained above, without them change appears possible only if nations actually go ahead and use force. Moreover, proactive reform is necessary given that these laws seek to prevent violence, bloodshed, and misery — “the scourge of war,” as the UN Charter Preamble states.

B. This Proposal Fills a Gap in the Scholarship

This Article fills a gap in the scholarship regarding how Steps Two and Three of the law on the use of force can be applied to limit the use of force and the damage that results. There is already significant scholarship with respect to Step One, namely the categorization of situations or events to which force is a legal response. Several commentators argue that the categories of “threat to” or “breach of international peace and security,” “aggression,” and “armed attack” should be more precisely defined, or expanded, to include, inter alia, humanitarian intervention, anticipatory self-defense, and responses to terrorism. Indeed, a fairly recent proposal to change the jus ad bellum focuses on categorizing which uses of force should be legal and which should be illegal, essentially collapsing what this Article argues should be a three-step process into a single step. Step Two has been the subject of commentary that seeks to water down the requirement of a search for alternatives to force, precisely the opposite of what this Article argues; this commentary will be addressed infra, in Section III(A)(3). The jus in bello, the subject of Step Three, has been the focus of intense reform


and scholarly commentary since World War II. Yet, the problem in timing as described above persists. The potential of the *jus ad bellum* to prevent harm to the interests governed by the *jus in bello* has been recognized, but precisely how it can do so has not been explored. Its potential remains unfulfilled.

Moreover, this Article comes at a time when a broader recognition is forming within the UN that the law on the use of force needs reform. The most prominent recent call for reform has come from UN Secretary General Kofi Annan, who said that the recent U.S.-U.K. war against Iraq, waged without UN approval or control, should occasion reconsideration of the rules on the use of force.

There are several reforms that can be made to international law concerning the use of force: the composition of the Security Council could be changed to reflect current realities; the veto power enjoyed by the Security Council’s Permanent Five Mem-


19. See Judith Gardam, *Legal Restraints on Security Council Military Enforcement Action*, 17 MICH. J. INT’L L. 285, 301–02 (1996) [hereinafter Gardam, *Legal Restraints*] (questioning the separation of the *jus ad bellum* and the *jus in bello* and stating, “It is becoming increasingly apparent, however, that to rely on the *jus in bello* to provide real protection to the civilian population in times of armed conflict is a failure to acknowledge the far greater potential of the *jus ad bellum* to achieve this goal.”).


bers could be eliminated, and war crimes could be defined more clearly, perhaps in the new International Criminal Court. Many such changes would be welcomed and should be explored. This Article, however, focuses instead on how the law can be modified so that it may prospectively guide decisionmakers to resort to force less often, by requiring decisionmakers to devise and consider alternatives to force, and by requiring decisionmakers proactively to consider the particular harms that a proposed use of force could cause, and to devise ways to avoid or limit these harms.

II. LEGAL BACKGROUND: UNDERSTANDING THE LAW ON THE USE OF FORCE (JUS AD BELLUM AND JUS IN BELLO) AS A THREE-STEP PROCESS

International law can be read as detailing a three-step process regarding the use of force: (1) the conflict must fall within one of the categories in which force may be used; (2) there must be a search for alternatives to force; and, (3) any use of force must be disciplined and limited. Indeed, much of the reform for which this Article argues is merely heuristic: recognizing these three steps can help decisionmakers take a prospective, considered and creative approach to determining whether force should be authorized. What follows is a reading of the UN Charter, customary law of self-defense, and agreements such as the Geneva Conventions that reveals this three-step framework.

A. Step One: Does the Problem to be Solved Fall Within a Category Where Force May be a Permissible Response?

Chapter VII of the UN Charter outlines the Security Council’s approach to using force, and it can be read as requiring a thinking process. First, the Security Council must “determine the existence of any threat to the peace, breach of the peace, or act of aggression.” Such threats or breaches are undefined by the Charter and, presumably, the Security Council has discre-

22. MALANZUK, supra note 11, at 376-77, (noting the unwillingness of permanent members to relinquish their power). Id. at 430 (discussing possibility of reforming UN structure).
tion in making such a determination.\textsuperscript{24} Indeed, it has been argued that the Security Council has no limits in this regard.\textsuperscript{25} However, this discretion should not be seen as unbounded, given that the Security Council is required to “act in accordance with the Purposes and Principles of the United Nations.”\textsuperscript{26}

Thus, Step One is a categorical one: the Security Council must ask if the event or crisis is a “breach of” or threat to international peace and security,” an “act of aggression,” or an “armed attack.” In some cases the categories are clear. For example, a military invasion of a country would be a “breach of international peace and security” and an “armed attack.”\textsuperscript{27} On the other hand, the leader of one nation burning the flag of another nation, and shouting insults at that other nation on television, would not fall within such a category, and, as such, would not occasion the legal use of force as a response. And then there are gray areas. Is it an “armed attack” when foreign men steer civilian passenger planes into a military headquarters and two privately owned skyscrapers?\textsuperscript{28} Is the possession of chemical or nuclear weapons a “threat to international peace and security”?\textsuperscript{29} Is a government’s repression of its own populace,\textsuperscript{30} or widespread ethnic massacres during a civil war,\textsuperscript{31} or

\begin{footnotesize}

\begin{enumerate}

\item \textsuperscript{24} See id.; O’Connell, \textit{Lawful Self-Defense}, \textit{supra} note 4, at 905; Schmitt, \textit{Bellum}, \textit{supra} note 18, at 1070.

\item \textsuperscript{25} \textsuperscript{D}INSTEIN, \textit{supra} note 8, at 282 (Security Council has “carte blanche” in this regard).

\item \textsuperscript{26} U.N. \textit{CHARTER} art. 24, para. 2.


\item \textsuperscript{28} Beard, \textit{America’s New War}, \textit{supra} note 4, at 567 (arguing that September 11 attacks were “armed attacks” despite that relevant Security Council resolutions [1368 and 1373] did not use that term but instead called the attacks “terrorist attacks”).


\item \textsuperscript{30} Such as the situation in Kosovo in 1999, where the Security Council did not act.

\item \textsuperscript{31} See, e.g., S.C. Res. 918, U.N. SCOR, 3377th mtg., U.N. Doc. S/RES/918 (1994) (declaring the situation in Rwanda “a threat to peace and security in the region”).

\end{enumerate}
\end{footnotesize}
the military coup of a democratically elected government\textsuperscript{32} a “threat to or breach of international peace and security”? It has been suggested that these gray areas are increasingly seen in black and white, that is, that the Security Council has broadly interpreted its mandate to act under Chapter VII and found many of these gray area situations permitting the use of force in response.\textsuperscript{33}

On the other hand, an individual nation is afforded no such discretion to use force.\textsuperscript{34} Nations are required to “confer on the Security Council primary responsibility for the maintenance of international peace and security.”\textsuperscript{35} Nations are required to settle their disputes “by peaceful means in such a manner that international peace and security, and justice, are not endangered,”\textsuperscript{36} and are explicitly required to “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.”\textsuperscript{37}

There is one, limited exception to this rule: self-defense, when a nation may defend itself individually or collectively, “if an armed attack occurs.”\textsuperscript{38} However, the nation may defend itself only “until the Security Council has taken measures necessary to maintain international peace and security.”\textsuperscript{39} The nation acting in self-defense must act within strict confines. It may not ignore the authority of the Security Council.\textsuperscript{40} The nation must

\begin{itemize}
  \item \textsuperscript{32} M ALANCZUK, \textit{supra} note 11, at 407 (discussing 1994 Security Council authorization of force to remove the military junta that had overthrown the democratically elected President Aristide of Haiti, but without specific determination that there had been a breach to international peace and security).
  \item \textsuperscript{33} For a listing of instances that the Security Council has deemed a breach or threat of international peace and security, see Michael Schmitt, \textit{The Sixteenth Waldemar A. Solf Lecture in International Law: Bellum Americanum Revisited: U.S. Security Strategy and the Jus ad Bellum}, 176 MIL. L. REV. 364, 405–07 (2003) (arguing that the Security Council’s discretion to label situations a threat and fashion an appropriate response has been exercised quite creatively) [hereinafter Schmitt, \textit{Bellum Americanum Revisited}].
  \item \textsuperscript{34} U.N. \textit{CHARTER} art. 33, para. 1; \textit{id.} at art. 2, para. 3–4.
  \item \textsuperscript{35} \textit{id.} art. 24, para. 1.
  \item \textsuperscript{36} \textit{id.} art. 2, para. 3.
  \item \textsuperscript{37} \textit{id.} art. 2, para. 4.
  \item \textsuperscript{38} \textit{id.} art. 51.
  \item \textsuperscript{39} \textit{id.}
  \item \textsuperscript{40} \textit{id.}
\end{itemize}
immediately report the measures being taken to the Security Council. Still, the nation itself is often the entity that must determine whether an “armed attack” has occurred such that the nation may defend itself, presumably with force. Usually, this determination is not difficult.

Further discussion of Step One (determining whether an event falls within a category where force is a permissible response) is beyond the scope of this Article. Perhaps, it would be counterproductive to attempt to limit the Security Council’s ability to address a problem or crisis, because the Security Council has a wide range of possible solutions, not limited to military force, to bring to bear on some of the most pressing crises of the day.

B. Step Two: Is Force Necessary? The Search for Alternatives

Once inside a category where force is a permissible response, alternatives to force must be explored.

41. *Id.*

42. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27), at para. 195. (“In case of individual self-defense, the exercise of this right is subject to the State concerned having been the victim of an armed attack... There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attack...”). *But see* Gray, *supra* note 9, at 96 (noting “there are disagreements as to what constitutes an armed attack...[because] of cross-border activity by irregular forces...[and] of the special characteristics of particular weapons”).

43. THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 44 (2002) (The Security Council’s expansive view of threats to or breaches of international peace and security to include crises that are arguably national, not international, has not come about fraudulently or cynically. Rather, the meaning of ‘threat to the peace, breach of the peace, and act of aggression’ is gradually being redefined experientially and situationally ... the global system is responding, tentatively and flexibly, through *ad hoc* actions rather than by systematic implementation, to new facts and threats that are redefining the threshold of what is seen to constitute a threat to peace, requiring a powerful collective response. *Id.*
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1. The UN Charter Requires the Security Council to Search for Alternatives to Force

Throughout the UN Charter articles that address the use of force by the Security Council, such force is limited to when it is “necessary.” The structure of the Charter as it pertains to the Security Council presents a number of hurdles which must be overcome before force can be used.

Article 41 states that, in dealing with threats to peace and security:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.  

The following Article 42 states:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea or land forces of Members of the United Nations.

Article 42 requires careful, thorough consideration of — if not actual attempts to implement — the means set forth in Article 41, which can be broadly described as both economic and political sanctions. Military forces can be used “as may be necessary,” but those uses should at first be non-violent, for example “demonstrations” and/or “blockade[s].” Of course, blockades might need to be enforced with occasional, limited violence, and longstanding and comprehensive blockades can wreak enormous damage, perhaps greater damage in some cases than that caused by the use of armed force. See Joy Gordon, Cool War: Economic Sanctions as a Weapon of Mass Destruction, HARPER’S MAGAZINE, Nov. 2002, at 43 (describing effects of UN sanctions on Iraq after the Gulf War and stating that 500,000 Iraqi children under age five are estimated to have died as a result). See also Max Rodenbeck, The Occupation, 50 N. Y. REV. OF BOOKS 14 n.2, Aug. 14, 2003 (“The very lowest of many estimates of child deaths between 1990 and 2000, caused
pears to fall under the perhaps euphemistic “other operations,” as defined in Article 42.

Chapter VI, “The Pacific Settlement of Disputes,” supports the argument that the Security Council must try peaceful means before resorting to force, at least when dealing with cognizable, international disputes.47 “The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a resolution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”48 The Security Council “shall, when it deems necessary, call upon the parties to settle their dispute by such means.”49 Under this Chapter, the Security Council is also able to investigate international disputes at its own behest,50 and nations themselves may bring disputes to the Security Council.51 However, the text of the Charter is unclear regarding whether these steps, and specifically the dispute resolution steps set forth in Chapter VI, must occur before the consideration of military force in Chapter VII. Still, it seems reasonable to assume that they must occur first, given that many disputes could be resolved in this manner.52 Nevertheless, the Charter’s suggestion of particular methods of peaceful dispute resolution adds weight to the ar-

by the rise in mortality rates from pre-Gulf War levels, is 100,000”) (citing Iraq Sanctions: Humanitarian Implications and Options for the Future, GLOBAL POLICY FORUM (New York), Aug. 6, 2002)).

47. U.N. CHARTER Ch. VI. Indeed, the UN Charter’s drafters’ placing this chapter before Chapter VII, which governs the use of force, adds weight to this argument.
48. U.N. CHARTER art. 33, para. 1.
49. U.N. CHARTER art. 33, para. 2.
50. See U.N. CHARTER art. 34.
51. U.N. CHARTER art. 35.
52. That the Chapter VI methods are to be tried before force is authorized is set forth in a pronouncement by the President of the Security Council on May 13, 2003 that,

The Security Council reiterates its commitment to make a wider and effective use of the procedures and means enshrined in the provisions of the Charter of the United Nations on the pacific settlement of disputes, particularly Articles 33–38 (Chapter VI), as one of the essential components of its work to promote and maintain international peace and security.

gument that a meaningful search for alternatives is a required step.


The Charter provides no specific guidance on what measures a nation under armed attack may take. For that, nations turn to the customary rule of self-defense, known as the Caroline Rule: “There must be a ‘necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation’ and the action taken must not be ‘unreasonable or excessive,’ and it must be ‘limited by that necessity, and kept clearly within it.’” Thus, force is authorized only where there are no alternatives. Implicit in the Caroline rule is the notion that, if possible, a decisionmaker would have to try any cognizable alternatives unless “they clearly would be futile.”

As part of the basic core of self-defence all states agree that self-defence must be necessary and proportionate...irrespective of the status of the Caroline incident as a precedent, necessity and proportionality have played a crucial role in state justification of the use of force in self-defence and in international response.

53. MALANZUK, supra note 11, at 314 (quoting Daniel Webster) (emphasis added). This rule was penned by U.S. Secretary of State Daniel Webster in an exchange of diplomatic papers concerning an 1837 incident where British forces crossed the border from Canada and destroyed the Caroline, an American ship, in a New York port, because it was being used to assist Canadian rebels against Great Britain. The rule is widely regarded as the “classic” rule on self-defense in international law. Id. Of course, there is some controversy over whether the Caroline standard is truly customary international law. For a good summary of this discussion, see Michael C. Bonafede, Here, There, and Everywhere: Assessing the Proportionality Doctrine and U.S. Uses of Force in Response to Terrorism After the September 11 Attacks, 88 CORNELL L. REV. 155, 167 n.57 (2002) (concluding that the Caroline rule is the customary standard). See also GRAY, supra note 9, at 105–06.

54. Dinstein, supra note 8, at 202.
55. Id. (quoting Schachter, supra note 16, at 1635).
56. Id.
C. Step Three: Can the Harms Caused by the Use of Force be Prevented or Limited?

Once resorted to, force must be used in accordance with the norms of customary international humanitarian law of war, also known as the *jus in bello*. These norms consist of necessity, proportionality, and discrimination and apply to the Security Council, nations acting under its authorization, and nations acting in self-defense.

The term “necessity” here means military necessity, that is, force required to accomplish a reasonable military goal. “Proportionality” limits belligerents in the means that they may use and the extent of the damage which they may cause. “Discrimination” requires distinguishing between combatants and civilians in target selection. These rules apply regardless of the legality of the war itself. The *jus in bello* is concerned with limiting the harms of war, and covers issues such as protecting civilians, protecting the environment, protecting cultural...
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treasures,\textsuperscript{66} protecting prisoners-of-war\textsuperscript{67} and prohibiting certain
types of weapons.\textsuperscript{68}

III. LEGAL REFORM OF STEP TWO (SEARCH FOR ALTERNATIVES
to FORCE) AND STEP THREE (PREVENTING AND LIMITING
HARM)

Steps Two and Three fail to guide decisionmakers in the
search for alternatives to force and ways to prevent or limit the
harms of force. This section shows how the law fails to guide
such consideration and then proposes specific ways that the law
could be reformed so that it would provide such guidance, first
in Step Two and then in Step Three.

A. Reforming Step Two, the Search for Alternatives to Force

This section shows the lack of guidance for the Security
Council and individual nations in seeking alternatives to force.
It then addresses how current practice and scholarship appear
to be limiting, if not eliminating, this required search. The sec-
tion concludes by offering a set of specific methods that deci-
sionmakers can use to carry out the search for alternatives to
force.

1. Problem: Lack of Guidance for Security Council’s
Search for Alternatives

Based on the discussion above, this much is clear: the UN
Charter limits the use of force to instances where it is necessary
and encourages the use of pacific means to settle disputes; such
settlements can include participation by Member Nations, the
Security Council, the UN General Assembly and the ICJ.\textsuperscript{69} Yet, questions linger: Must all of the methods of dispute settlement
enumerated in Article 33 be tried? If so, are they the only ones
that must be tried? How vigorously must they be tried? How

\textsuperscript{66} See, e.g., id. art. 53.
\textsuperscript{67} See, e.g., Protocol I, supra note 62, art. 44; Geneva Convention Relating
to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75
\textsuperscript{68} See, e.g., Convention on the Prohibition of the Development, Production,
and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on
\textsuperscript{69} See generally U.N. CHARTER Ch. VI, “Pacific Settlement of Disputes.”
thoroughly must a search for alternatives to force be conducted? What standard applies to this search and the decision of whether to apply its results, a “reasonable person” standard (itself often vague, as lawyers know well), or something else? These questions are unanswered in the law of war; indeed, they are not even explicitly posed. Yet, these questions go to the heart of the thinking process about when force may be used, a thinking process that the law should guide.

The Security Council decides when force is necessary, but there are no formal rules, procedures or proceedings to guide the search for other means, or to determine after the fact whether other means could have been used. If the Security Council delegates control over armed forces to a nation, or coalition of nations, what level of oversight must it maintain? Must the nations to whom the use of force has been delegated continue to search for alternatives to combat? The law provides


71. Nor are these issues addressed fully in the Just War standard, which permits force only as a “last resort.” National Council of Catholic Bishops, The Harvest of Justice Is Sown in Peace 5–6 (1993) (“Last Resort: force may be used only after all peaceful alternatives have been seriously tried and exhausted.”). That force may be used only as a “last resort” is akin to the international law concept of necessity. Michael J. Matheson, Conference, Just War and Humanitarian Intervention: Comment on the Grotius Lecture By Professor Jean Bethke Elshtain, 17 AM. U. INT’L L. REV. 27–28 (2001). Notably, there is a lack of clarity over how a decisionmaker determines when force is a “last resort.” See George Weigel, The Just War Tradition and the World After September 11, Pope John XXIII Lecture, 51 CATH. U. L. REV. 689, 712–13 (2002) (arguing that “last resort” must not be read “mechanistically” to require trying, and coming to the end of, a series of non-violent options before force may be used but instead that force is permitted, “where there is plausible reason to believe that non-military actions are unavailable or unavailing”). There appears to be little guidance for the search for non-violent actions, a lack that carries into at least one recent proposal to change Just War theory. See, e.g., Peter S. Temes, The Just War: An American Reflection on the Morality of War in Our Time 168 (2003) (declaring that the “principle of last resort is pointedly not among the criteria that I suggest we reaffirm...[because] what nations do instead of war — blockades, propaganda campaigns, and restrictions on trade — often create terrible harm among an enemy nation's civilians while leaving the military and political leadership intact.”). Temes’ argument ignores the possibility of options beyond his description of “what nations do instead of war.”

little guidance and thus misses an opportunity to protect against the harms that arise from the use of armed force.  


The same questions regarding the Security Council’s determination of necessity arise when individual nations consider using force in self-defense. What “other means” must be tried, and how diligently must decisionmakers try them? If nations must try non-violent means unless they would prove futile, how is such futility proved? Self-defense requires that the nation has no time to do anything other than use force. This is understandable if an attack is in progress, but can the assertion be made that after suffering an armed attack, a nation may exercise the right to defend itself from further possible attacks? Can this nation then take weeks or months to plan its military campaign? Can a nation that has not been attacked use force in anticipation of an attack? To what degree must other options be tried first?

Furthermore, when a single nation acts unilaterally, the need for control over the use of force seems greater than when the Security Council uses force, because the search for solutions is likely truncated by lack of input and perspective. The decision-making group in such cases is likely small and in many ways homogeneous, and there is a risk that it might engage in “groupthink.” After an attack, decisionmakers might be un-

73. Of course, the Security Council itself can bolster its procedures to ensure that force is used only as a last resort. Notably, in the Resolution the Security Council issued concerning Iraq on November 8, 2002, the Council stated that should Iraq fail to comply with the new demands for weapons inspections, the Council would convene to decide what measures to take; there would be no automatic use of force. S.C. Res. 1441, U.N. SCOR, 57th Sess., 4644th mtg., U.N. Doc. S/RES/1441, at para. 12 (2002).

74. See supra note 55.

75. See Bonafede, supra note 53, at 170.

76. MALANCZUK, supra note 11, at 311–14 (describing the controversy over anticipatory self-defense).

77. See Bonafede, supra note 53, at 170 (noting “considerable dispute” over how long this right to use force in self-defense lasts).

78. MALANCZUK, supra note 11, at 311–14. See supra note 76.

79. RICHARD L. JOHANNESEN, ETHICS IN HUMAN COMMUNICATION 154 (5th ed. 2002) (‘‘Groupthink’ is the collective label used by social psychologist Ir-
able to convene or communicate with one another, or unable to think clearly if the attack was surprising or shocking. The decisionmakers may be influenced by political concerns, such as public demands for revenge, or the fear that if they take a quiet, behind-the-scenes approach, they will appear indecisive or passive.

3. Problem — and a Brief Comment: The Required Search for Alternatives is Not Carried Out in Practice, and Some Commentators Argue for its Elimination

Step Two (the search for alternatives to force), appears to be skipped in practice. For example, the U.S.-led coalition waged the 1991 Gulf War under authority of Security Council Resolution 678, which authorized “all necessary means” to eject Iraqi troops from Kuwait. Force was used, but there was never an explicit finding by the Security Council that military force was necessary. It has been noted that the inclusion of the phrase “all necessary means” in the resolution was understood to authorize the use of force. Arguably, this eliding of a search for alternatives violated Article 42, but the fact remains that nei-

81. Quigley, New Order, supra note 12, at 23–24.
82. GRAY, supra note 9, at 153 (“It is clear from the Security Council debates that this formula was understood to mean the use of force.”); Quigley, New Order, supra note 12, at 3–4 n.14 (same, citing worldwide news accounts of deliberations).
83. Quigley, New Order, supra note 12, at 23–24.

In failing to call for military force in explicit terms, the Council played loose with the Article 42 requirement of an express finding of the need for military force...For the state that is the object of such action, the consequences can obviously be devastating. If the Council is to take such action, it must address it directly and decide explicitly that it is necessary. It may not conceal such a momentous decision in metaphorical language. Stipulating that states might take ‘all necessary means’ is too imprecise an authorization for war.

Id. But see DINSTEIN, supra note 8, at 291, 295 (arguing that the 1991 Gulf War was authorized as collective self-defense under Article 51 and that Article 42 has never been invoked by the Security Council). Nevertheless, if the coali-
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er that article nor the rest of the UN Charter is clear on how express the finding of “necessity” must be, how the Security Council is to arrive at this finding, or how the Council is to show that the finding was made.84 Indeed, there is a danger that the word “necessary” may be taking on a talismanic role, devoid of its usual meaning. That is, the Security Council’s conclusion that a state may take “all necessary means” may be seen as approval for using force — rather than requiring the search for and exhaustion of alternatives implied by the word “necessary.”85

Some international law commentators have suggested eliminating the requirement that force be used only when “necessary” in the struggle against terrorism, to give nations, especially the U.S., an expanded right to use force internationally.86

tion was acting under Article 51, its use of force would be limited by necessity and proportionality. See supra Part II.B.2.

84. Malaysia complained that Resolution 678 contained no requirement that the Security Council actually permit force. Quigley, New Order, supra note 12, at 24–25.

85. GRAY, supra note 9, at 153 (discussing use of “necessary” in Resolution 678 and noting, “The same (or similar) euphemistic formula has been used in almost all of the subsequent [Security Council] resolutions authorizing the use of force by states.”).

86. Beard, America’s New War, supra note 4, at 585–86 (2002). Beard simply skips over any requirement of necessity and dismisses the Caroline rule — stated supra, at Part II.B.2 — by saying, “some writers are fond of citing [the Caroline rule].” Beard also adds that “[s]uch a strict and self-defeating version of necessity expansively based on the Caroline test does not appear to be consistent with the right of self-defense under customary international law and has been vigorously opposed by a number of writers, particularly in the context of fighting terrorism.” Id. See also, Alberto Coll, The Legal and Moral Adequacy of Military Responses to Terrorism, 81 AM. SOC’Y INT’L L. 297, 302 (1987) (arguing that the Caroline standard should not apply to terrorist threats); Sean D. Murphy, Terrorism and the Concept of ‘Armed Attack’ in Article 51 of the U.N. Charter, 43 HARV. INT’L L.J. 41, 50 n.57 (2002) (“Addressing the customary international law constraints relating to necessity and proportionality is outside the scope of this Essay.”). But the Author appears to extinguish the requirement of necessity when asking,

Can the United States possibly be expected not to respond to the source of such actions through resort to proportionate military force? While the desire to minimize the trans-boundary use of military force is central to contemporary world order, international rules that preclude a state from responding forcibly to extraordinary threats to its fundamental security interests — indeed, perhaps when ‘the very survival of a State would be at stake’ — are destined not to endure.
To allow for this expansion is illogical, because the goal for which force is used should not alone dictate whether force can be used. One terrorist target might be dealt with more effectively with force than another. For example, force might be effective against a terrorist training camp, yet ineffective, or even counterproductive, if used against a nation where terrorists are known to live among unwitting or subjugated civilians, or among civilians who share their political views. So legalizing the use of force against “terrorists” or “terrorism” is inappropriate, because not only might force be unnecessary, but it could actually exacerbate the situation by breeding more terrorism. Terrorists might fight back, but not against the soldiers who are destroying their camps. They (or their allies, family or friends) might plant bombs in the capital of the country that dispatched troops to destroy the camps.87 In any given case, there may well be other, more effective, and less destructive, options.88

Id. Advisory Opinion 95, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 266 (July 8); William V. O’Brien, Reprisals, Deterrence and Self-Defense in Counterterror Operations, 30 Va. J. Int’l L. 421, 471 (1990) (arguing that with the advent of terrorism, particularly in the context of Israel’s war with the Palestinian Liberation Organization, the “interpretation of necessity is very different from that in a singular incident along the U.S.-Canadian border”); Abraham D. Sofaer, Terrorism, the Law, and the National Defense, 126 Mil. L. Rev. 89, 96–97 (1989) (Caroline rule “exaggerates the test of necessity in a situation where the issue was dicta... [and] when war was still a permissible option for states that had actually been attacked”).

87. The efficacy of military force against terrorism has been questioned, recently by UN Secretary General Kofi Annan. World Leaders Meet in NY for Counterterrorism Conference, CHANNEL NEWSASIA, Sept. 23, 2003.

We delude ourselves if we think that military force alone can defeat terrorism. It may sometimes be necessary to use force to counter terrorist groups but we need to do much more than that if terrorism is to be stopped. Terrorists thrive on despair. They may gain recruits or supporters where peaceful and legitimate ways of redressing a grievance do not exist.

Id. Also, it appears that the U.S. military action in Afghanistan has not succeeded in defeating or meaningfully weakening Al Qaeda. See e.g., Faye Bowers, Al Qaeda May be Rebuilding, CHRISTIAN SCIENCE MONITOR, May 5, 2003, LEXIS-NEXIS Library; David Johnston, C.I.A. Puts Risk of Terror Strike at 9/11 Levels, N.Y. TIMES, Oct. 18, 2002, at A1.

rization risks that decisionmakers will focus on the wrong questions, diverting inquiry from alternatives to using force or the effectiveness of using force. For example, instead of asking, “Are the people we want to kill ‘terrorists’?,” decisionmakers should ask, “How can we accomplish this goal (e.g., defeating terrorists, preventing genocide, etc.) without using force?” The latter question may well lead to different, and better, answers.

Indeed, the arguments that legal strictures on use of force should be loosened to deal with terrorism show why these strictures need to be kept tight, especially during crises, where emotions can outrun common sense and clear thinking.

There is no foundation in law, either, for loosening the necessity requirement in dealing with terrorism. Notably, there is no agreed-upon definition of terrorism in international law. Therefore, to allow nations to use force against terrorists would place too much discretion in the hands of national leaders in an area of law that seeks to limit such discretion; under the UN Charter, nations pledge to place primary control over the use of force in the Security Council. It would not necessarily reduce terrorism, but it would almost certainly result in an overall increase in the use of force, and its attendant miseries, which would contravene the UN Charter values of peace and security.

Furthermore, eliminating the necessity requirement here


90. U.N. CHARTER art. 24, para. 1. It is likely that ignoring necessity as a legal requirement could simply be aggressive “lawyering” on behalf of the U.S. This explanation cannot be readily dismissed when the commentators are U.S. government officials. For example, Jack Beard, when he wrote his article cited supra note 4, was Associate Deputy General Counsel (International Affairs), U.S. Department of Defense; Abraham D. Sofaer, cited supra note 86, was a Legal Adviser to the U.S. Department of State from 1985–1990; and Alberto R. Coll, cited supra note 86, was Secretary of the Navy Senior Research Fellow, U.S. Naval War College.

91. See U.N. CHARTER pmbl. See also W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT’L L. 279 (1985). Professor Reisman sees the danger that such categorization poses for UN Charter values. He lists nine categories where there appears to be “varying support for unilateral uses of force,” but cautions, “[m]erely locating an individual use of force in a particular category does not mean that it is lawful.” *Id.* at 281–82. Professor Reisman suggests using as a guiding principle the question, “Will a particular use of force, whatever its justification otherwise, enhance or
is an avoidance of law, in the sense of due process, as such action appears partially grounded in a desire to punish terrorists.\textsuperscript{92} Whenever possible, terrorists should be dealt with through the existing legal system, national or international.\textsuperscript{93}

This categorical approach ultimately amounts to an attempt to use the ends to justify the means.\textsuperscript{94} And, in the international law concerning the use of force, the means matter. If a goal can be accomplished without the use of force, then force should not be used. The inquiry into non-violent means is thus a crucial component of this area of law, and the law should give more, not less, guidance for it. It is to such a reform that this Article now turns.

4. A Solution: Requiring Decisionmakers to Engage in Thinking Techniques that Can Improve the Search for Alternatives to Force

The interest of this Article lies in the thinking and questioning that go to the heart of the decision-making process regarding the necessity of force in a particular instance, questions that can lead to reasonable alternatives to force and prevent its use in the first place. As a norm, some search for alternatives must be undertaken, and that search must be conducted with creativity and with a good faith effort to avoid the use of force, not to seek justification for it.

An initial difficulty is defining “good faith” and “creativity” in this instance. This difficulty can be overcome, at least in part, by recognizing that the search for other means is obligatory, and that it is the embodiment of the purposes and principles of the UN Charter to avoid war.\textsuperscript{95} The difficulty may also be over-
come by requiring strict adherence to the capabilities and tools that already exist in the UN to help resolve disputes. These tools could also be improved, and disciplines and practices such as conflict resolution, conflict prevention and preventive diplomacy could be made the rule instead of the exception. These tools can work, if tried.

Another improvement would be to require decisionmakers to follow specific guidelines or answer specific questions that help them find and consider alternatives, as well as requiring decisionmakers to explain why particular alternatives were not, or are not being, tried. In the UN Security Council, for example, committees could be formed to seek alternatives to the use of force, perhaps in consultation with appropriate experts. Such committees could be required to conduct this search before any actual use of force is authorized. In times of peace, such committees could be encouraged to address hypothetical crises for the purpose of creating documents, studies, or commentary to the laws of war that would provide examples that can be turned to, examined, and perhaps applied in times of conflict.

The Security Council should “judicialize” its decisionmaking, i.e., show the thinking behind its conclusions regarding the use of force. The Security Council could be required to prepare a document on the necessity of the use of force in a particular instance. Legitimate use of force may be proven by show-

96. For a clear explanation of this and other methods, see Keith Suter, Alternative To War: The Peaceful Settlement Of International Disputes (1st ed. 1986).
98. See Malanczuk, supra note 11, at 430 (“In the final analysis, the effectiveness of the United Nations depends on the willingness of member states to cooperate, and no amount of changes in the structure of the United Nations will guarantee its effectiveness” without cooperation.).
99. I am grateful to Professor Kevin Boyle of the University of Essex for using this term to describe my presentation of this idea at the International Symposium on Terrorism and Human Rights, sponsored by the Cairo Institute for Human Rights Studies, Cairo, Egypt, January 26–28, 2002. At that time Professor Boyle was serving as Senior Adviser to the UN High Commissioner on Human Rights.
100. The Security Council is not required to act in any instance. Malanczuk, supra note 11, at 427. Nor is it required to give any basis for its
ing that there were no reasonable alternatives, and that force actually would be effective in achieving the desired outcome or goal.\textsuperscript{101} Such a document could be styled as findings of fact and conclusions of law, as used in the U.S. legal system. This “opinion” could be required for all uses of force within and without formal Security Council control, such as where the Security Council authorizes a coalition of member nations to use force, as in the 1991 Gulf War,\textsuperscript{102} where the Security Council has not participated at all, as in the 1999 NATO air strikes in the former Yugoslavia,\textsuperscript{103} where the Security Council has not authorized force, as in the 2003 invasion of Iraq;\textsuperscript{104} or, where a nation acts under a claim of self-defense, as in the U.S.-led invasion of Afghanistan in 2001.\textsuperscript{105} Such a document could be required even after the fact, if time constraints made it impossible or unduly burdensome to write it before force was used. This process would provide at least some oversight and create examples for future reference.

Added to all of the tasks of the Security Council or other decisionmakers could be the encouragement or even requirement to reasoning in a particular situation, as it is a political, not a judicial, body. DINSTEIN, supra note 8, at 207, 282, 304–08.

101. Effectiveness is part of the determination of necessity. Lobel, supra note 12, at 554.


Authoriz[ing] Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991, fully implements, as set forth in paragraph 1 above, the foregoing resolutions, to use all necessary means to uphold and implement resolution 660 [requiring Iraqi forces to withdraw from Kuwait] and all subsequent relevant resolutions and to restore international peace and security in the area.

Id.

103. White, supra note 12, at 41–42.

104. Although the Security Council did not authorize the U.S.-U.K. invasion of Iraq, the Security Council has not made an authoritative statement or passed a resolution declaring whether the invasion violated the UN Charter or other international law.

AVOIDING A DEATH DANCE

use “creative problem solving,” a method of problem-solving where one defines the problem, generates a wide variety of possible solutions and then, using reason and experience, chooses the best among them. The characteristic of competent problem-solving (as well as critical thinking) is asking the right questions. For example, in generating solutions, one might repeatedly ask, “What else might we do here?” To guide that inquiry, one might also ask, “How can we see this problem as an opportunity to address the needs of a wide spectrum of people and constituencies?” To generate answers, one would use an array of thinking techniques and methods, both traditional and innovative, all of which can be taught and learned. It may be difficult to come up with alternatives to force, but it is possible, especially if many people with relevant and broad experience are included in the process.

Creative problem solving is an evolving intellectual discipline that requires lawyers to define problems so as to permit the broadest possible array of solutions, both legal and non-legal. Creative problem solving seeks many points of view, and systematically examines problems for their relational implications at the individual, institutional and societal levels. It seeks a caring approach and solutions that are imaginative or transformative in nature.

Creative Problem Solving Offers Hope…and Solutions, RESISPA: THE MAGAZINE OF CALIFORNIA WESTERN SCHOOL OF LAW, at 2 (Winter 1999) (quoting Janeen Kerper, Professor and Academic Director, McGill Center for Creative Problem Solving, California Western School of Law, San Diego, California). The following is a step-by-step description of creative problem solving from a workbook that teaches the process: Exploring the Problem; Establishing Goals; Generating Ideas; Choosing the Solution; Implementing the Solution; Evaluating the Solution. ROBERT A. HARRIS, CREATIVE PROBLEM SOLVING: A STEP-BY-STEP APPROACH (2002).

Creative Problem Solving…

See generally e.g., JAMES L. ADAMS, CONCEPTUAL BLOCKBUSTING: A GUIDE TO BETTER IDEAS 1–3 (1985 3d ed.); EDWARD DE BONO, DE BONO’S THINKING COURSE (1985). These are but two of some of the outstanding leaders, and books, in the field. The Security Council could be trained to use such techniques. Such training is in fact regularly provided by consultants to high level management of large corporations and other institutions, particularly elite ones. See Jay Cocks, Let’s Get Crazy!: Creativity is the Buzz Word as Companies Try to Spark Daring New Ideas, TIME, June 11, 1990, at 40.
The following are examples of questions that decisionmakers could be required to ask and answer when they are considering whether the use of force is necessary:

Defining the problem:

(1) What is the threat or harm to be limited?

(2) What is/are the precise goal(s), and what value(s) are sought to be achieved and vindicated?

Process:

(3) What cognitive techniques or methods can we use to find possible solutions?

(4) Who outside of the decision-making group should be involved in this search for alternatives?

(5) What facts are needed?

(6) What are some possible solutions? Will they work? Why/why not?

Effectiveness:

(7) What are the best ways to achieve the goal and vindicate the value? (Attitude is important. For example, the question is not, “Can we use force?” but, “Must we resort to force, and how can we avoid using force?”

(8) What are the short term costs and benefits of each possible solution? Are there ways to increase benefits and limit costs? Will our goal be met in the short run? The short term can be broken into specific terms: one week, one month, two months, etc.

(9) What are the long term costs and benefits of each possible solution? Are there ways to increase benefits and limit costs? Will our goal be met in the long run? The long term can be broken into specific terms: six months, one year, two years, etc.

(10) What is the likely response by the target nation? Will the nation fight back? If it fights back, will it respond with force — conventional or “asymmetrical,” i.e., terrorism? Is the target allied with other forces that might fight back regardless of the response by the target, thus increasing overall violence?

Of course, these questions can be refined, but should serve as starting points for reform. Some of these questions may be unanswerable to a reasonable degree of certainty in some situa-
avoiding a death dance


tions. Finding answers will be more likely if the Security Council’s ability to conduct fact-finding in given instances is improved. Before discussing further how to implement this set of questions into the Security Council’s decision-making process, this Article turns to reforming Step Three.

B. Reforming Step Three, Limiting Harm

1. Problem: Bad Timing — Step Three Fails to Protect Against Likely Harms

There is a temporal gap between the *jus ad bellum*, the law on *when* a nation or the UN may resort to force, and the *jus in bello*, the law on *how* a nation or the UN may use force, that is, how it may conduct a war. In other words, Steps One and Two are taken before force is used, and Step Three is not taken until force is being used. This gap can be deadly. Military strategies, weapons and tactics are often developed and implemented before a decision has been reached as to whether they are legal (in the *jus in bello*). Moreover, the legality and practical effects of new developments in weapons or strategy are not considered as part of the decision of whether to authorize force. For example, Resolution 678 authorized Member Nations to use “all necessary means” to eject Iraqi troops from Kuwait in the 1991 Gulf War. The Security Council appears to have been unaware of the coalition’s plans to target civilian water purification plants and the electrical grid in Iraq, argua-


111. Gardam, *Noncombatant Immunity*, supra note 94, at 836 (“This is not unusual for the law of armed conflict, where its provisions always lag behind new developments in warfare. As soon as one method of warfare is regulated, another is revealed.”); Schmitt, *Bellum Americanum Revisited*, supra note 33, at 418–19 (2003) (considering “cyber operations” as an example of a rapidly evolving technology which may be used militarily although the legality of such practices is yet to be determined).

112. U.N. CHARTER arts. 39–42.

bly an attack on Iraqi civilians violating the *jus in bello*.\textsuperscript{114} The Security Council may also have been unaware of the likely extent of civilian casualties.\textsuperscript{115} Planners believed that 2,000 would perish,\textsuperscript{116} when by some counts, many times that number were killed.\textsuperscript{117} After the war, the Security Council was silent about the extent of this destruction in Iraq, which was arguably not “necessary” to the process of ejecting Iraqi troops from Kuwait.\textsuperscript{118}

The law concerning the decision to use force also neglects to address other, non-military harms that can occur as a result of war planning.\textsuperscript{119} For example, knowledge that the U.S. would attack Afghanistan after September 11, 2001 led many Afghans to flee to the mountains where they lived in refugee camps and risked starvation.\textsuperscript{120} Additionally, in preparation for that war, U.S. officials cut deals with various nations for fly-over and basing rights; some of these nations, such as Uzbekistan, Turkmenistan and Tajikistan, were already notorious

\begin{itemize}
\item \textsuperscript{114} See, e.g., Quigley, *New Order*, supra note 12, at 19 n.112 (1992) (arguing that these attacks violated Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, which prohibits “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”). See also Gardam, *Proportionality and Force*, supra note 5, at 404 (“[m]any of the decisions involving the application of proportionality would have been taken at the planning stage of the campaign” in the Gulf War).

\item \textsuperscript{115} Quigley, *New Order*, supra note 12, at 19 (arguing that “the damage to civilian objectives as assessed by the UN team was too extensive to be excused as inevitable damages incidental to lawful targeting”).

\item \textsuperscript{116} Id. at 19 n.112 (citing BOB WOODWARD, *THE COMMANDERS* 341 (1991)).

\item \textsuperscript{117} The number of Iraqi civilians killed in the Gulf War is notoriously hard to pin down. Estimates of the number of civilians killed ranged from 5,000 – 15,000 during the war, and 4,000–6,000 afterward, from lack of medical care for wounds or malnutrition. George Lopez, *The Gulf War: Not so Clean*, 47 BULLETIN OF THE ATOMIC SCIENTISTS 7 (Sept. 1991). CNN.com, in its “Gulf War Facts,” notes simply that “[a]ccording to Baghdad, civilian casualties numbered more than 35,000,” at http://www.cnn.com/SPECIALS/2001/gulfwar/facts/gulfwar/ (last visited Aug. 20, 2003).


\item \textsuperscript{119} U.N. CHARTER arts. 39–42.

\item \textsuperscript{120} Mass Migration from Afghanistan, S. F. CHRONICLE, Sept. 25, 2001, at A1 (“A U.N. official called the mass migration within Afghanistan and across its borders ‘the worst humanitarian crisis in the world.’”).
\end{itemize}
abusers of human rights.\textsuperscript{121} In some cases the presence of U.S. and other foreign troops exacerbated the risk of protests and resistance among citizens, which led leaders to further repress their populaces.\textsuperscript{122} The law of war should address such consequences of war-planning.

Another limitation of the \textit{jus in bello} is that, in general, these rules are enforced by the belligerents themselves, as there is generally no third party to referee the fighting. International control, if any, comes later, in the form of war crimes tribunals.\textsuperscript{123} However, such tribunals are rare, and those who commit war crimes often go unpunished.\textsuperscript{124} Prosecution is also selective. For example, it is unlikely that there will be international tribunals to try U.S. soldiers for alleged war crimes in Afghanistan or Iraq.\textsuperscript{125} Indeed, U.S. leaders fought against the efforts of other nations to include U.S. military personnel and political leaders under the jurisdiction of a new, permanent international tribunal, the International Criminal Court, which came into effect on July 1, 2002 and which has jurisdiction over war crimes and crimes against humanity.\textsuperscript{126}

\begin{footnotes}
\item[121] America’s Central Asian Allies, \textit{N.Y. Times} (editorial), Oct. 2, 2001, at A24. These are rights that the UN Security Council can simply require, but for which a nation acting unilaterally must negotiate. \textit{U.N. Charter} art. 43, para. 1.
\item[123] Bassiouni, \textit{supra} note 7, at 9, 18 (arguing that this post hoc justice can have a deterrent effect, which can help “the pursuit of peace”).
\item[124] \textit{Id.} at 11.
\item[125] For example, no international tribunal has been formed concerning an alleged atrocity that may have involved U.S. and Northern Alliance soldiers. Babak Dehghanpisheh et al., \textit{The Death Convoy of Afghanistan}, \textit{Newsweek}, Aug. 26, 2002, at 20. An international forum is not only important to vindicate the rights of victims, but it is also important to vindicate soldiers, and their sponsoring nation, who may have been wrongly accused of a war crime.
\item[126] For a sometimes humorous account of the U.S. antipathy toward the ICC, see Lauren Comiteau, \textit{The International Criminal Court: In Dutch with America}, \textit{Chic. Trib.}, July 22, 2002, at C1.
\end{footnotes}
Finally, because international control over war-planning is lacking, there is a risk in the case of self-defense that national leaders will be ill-equipped to decide whether to apply force, because they lack both perspective and information. For example, according to an ICJ opinion, the proportionality requirement for self-defense may be interpreted to permit the use of nuclear weapons “in an extreme circumstance of self-defense, in which the very survival of a State would be at stake.”

But how “extreme” must the circumstances be? That is, what would count as threatening “the very survival of a State”? There is a risk that national leaders might overcompensate in the fog and stress of an attack.

2. A Solution: Requiring Decisionmakers to Consider Likely Harms, and Ways to Prevent or Limit Them, as Part of the Determination of Whether to Authorize Force

How decisionmakers intend to use force should be considered in determining whether they may legally use force. One possible reform is for the Security Council to consider the proposed military strategy as part of its decision of whether to authorize force. The Security Council should explore specific ways to avoid or limit the likely harms that will result from the plan and then require such protective measures. This is primarily a change in timing. Instead of maintaining the separation of *jus ad bellum* and *jus in bello* concerns, international law should seek to develop a more fluid approach. This approach would be more realistic, given that some of the harms that the *jus in bello* seeks to prevent may have already occurred before the *jus in bello* is addressed, as described in the previous section.

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128. See BROWNLIE, supra note 70, at 436 (“There is...great agreement and community of interest behind the proposition that, in the era of nuclear and thermonuclear armament, self-help involves intolerable risks.”).
129. Secrecy of plans should not be a concern: the Security Council is capable of meeting in secret, if necessary. O’Connell, Lawful Self-Defense, supra note 4, at 908 n.117.
130. See supra Part III.B.1. Notably, the Independent International Commission on Kosovo, in its proposed principles for assessing the legitimacy of humanitarian interventions, suggests that the principles may be “applied
The following are some questions that decisionmakers should be required to ask in determining whether force can be used legally. These questions address harms that result directly and immediately from the decision to use force, falling within the gap between the *jus ad bellum* and the *jus in bello*:

**General:**

(1) What are the likely civilian casualties, and can they be limited?

(2) What are the likely military casualties on both sides, and can they be limited? This criterion should recognize that combatants are often conscripts.

(3) Will there be a meaningful chance for soldiers to surrender before any opening salvos?

**Weaponry:**

(4) What are the short term and long term medical effects of the weapons being used? Will weapons create danger in the conflict theater long after hostilities end, as is the case with depleted uranium and unexploded cluster bombs and land mines?

“Conflict contagion”:  

(5) What is the likelihood that a proposed conflict will escalate? That it will exacerbate existing conflicts or spark new ones?

**Human rights:**

either before an intervention in order to determine whether force should be used, or [afterward] to assess whether an intervention was justifiable.” INDEPENDENT INT’L COMMISSION ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INT’L RESPONSE, LESSONS LEARNED 193 (Oxford University Press 2000). One such principle is that “[t]here must be even stricter adherence to the laws of war and international humanitarian law than in standard military operations. This applies to all aspects of the military operation, including any post cease-fire occupation.” Id. at 195. Such a heightened adherence to these laws is in keeping with the rationale behind intervention, which is to protect a civilian population. That said, it can certainly be argued that civilian populations should be shown such concern whatever the reason force is used.

(6) Will the use of force have a negative effect on human rights of people in combatant and neighboring nations? Is there likely to be repression by these governments?

(7) Will the conflict touch off humanitarian crises such as refugees and starvation? Will the destruction of military or “dual use” civilian/military targets (such as electrical grids and water treatment plants) also affect the lives of civilians?

Economics:

(8) How will the conflict affect the economies of various nations, and of the world? What will the effect be on world markets, such as stock exchanges or oil markets?

International peace and security:

(9) Will the government of the targeted nation be changed as a result of the use of force against it? What kind of government will replace it? What will be the resulting effects on international peace, security, and human rights?

(10) With respect to rebuilding conflict zones, what types of weaponry will be used? Will dangers from these weapons persist for civilians and builders after the war? Will important infrastructure be targeted? Is there a rebuilding plan? Will the war result in chaos, creating humanitarian disasters or an environment conducive to terrorism?

Development and respect for international law:

(11) What precedent will the use of force in this case yield?

(12) Balancing of harms: How will these harms be balanced against the goal that the use of force meant to achieve?

A dynamic could come into play: by being forced to consider in advance the likely harms and costs associated with the use of force, and, where possible, to make these considerations public, planners proposing to use force could see that option as less and less attractive. There might be increased public pressure on leaders to avoid these costs and, ultimately, to avoid the use of force.\footnote{Indeed, national laws requiring leaders to consider these costs could be proposed. See infra Part IV.E.}

This Article now turns to implementing the recommended reforms of Steps Two and Three.
IV. BEYOND LEGAL REFORM: IMPLEMENTING THESE PROPOSALS THROUGH IMPROVED PRACTICES

One way to make these changes part of international law would be to include the series of questions set forth above in the UN Charter, perhaps as commentary or in an appendix. Of course, such a change might be difficult to effect. Nevertheless, there are ways to implement these proposals through less formal changes in practice. For example, political pressure could lead the Security Council to articulate its decision concerning the use of force. Such pressure can also be enhanced by initiatives from other entities such as the General Assembly, ICJ, NGOs, scholars in universities and think tanks, and the public. Also, changes in U.S. and other nations’ laws can help protect some of the interests that this Article seeks to protect under international law.

A. Rethinking Security Council Practice

There are many ways as a practical matter that the Security Council could improve its search for alternatives to force as well as its consideration of ways to prevent or limit harms likely to result from any use of force. It could voluntarily adopt the process and questions set forth above. As part of this process, the Security Council could continue its trend of working with outside experts, which could help it find alternatives to force. In various other matters, the Security Council encourages such participation. For example, since 1995, the NGO Working Group on the Security Council, a group of about 30 representatives from NGOs such as Amnesty International, CARE, and Oxfam, has endeavored to build informal relationships with members of the Security Council. This involvement is a step

133. See, e.g., GRENVILLE CLARK & LOUIS B. SOHN, WORLD PEACE THROUGH WORLD LAW (Harvard University 1958) (proposing a revised UN Charter, which would include detailed commentary and “annexes”).

134. See supra Parts III.A.4. and III.B.2.

135. NGO Working Group on the Security Council Information Statement, at http://www.globalpolicy.org/security/ngowkgrp/statements/current.htm (last visited Sept. 2, 2003) (noting that “Council members have found that NGOs can provide exceedingly valuable field information from their contacts in crisis areas, helping to improve their delegations’ awareness of the issues and contributing to the Council’s policy-making process. In many cases, NGOs may even be directly involved in UN field programs.”). Information about the NGO
in the right direction. With the weight and eyes of the world upon it, the Security Council should welcome such input.

Yet, that grave weight also encourages secrecy, which can hamper another way to improve the Security Council's consideration of alternatives to force and of ways to prevent the likely harms that force can cause: transparency. Much of the work of the Security Council already takes place behind closed doors, especially among the Permanent Five Members (China, France, Russia, the U.K. and the U.S.). Greater transparency would likely encourage the inquiry and debate that can lead to better ideas. Transparency and openness can discipline decision-making by encouraging those involved to adhere to principles of reason and equity. As groups such as Human Rights Watch suggest, it is easier to ignore human rights when no one is looking. Thus, the time has come to reform current Security Council and UN rules and practice to encourage inclusiveness and openness when possible.

As pointed out above, the Security Council could be required to produce a document discussing alternatives to force and evaluating the likelihood of success of each alternative. Thus, the range of the search could be seen, and specious, tendentious arguments exposed. Such attention should be required because few decisions are graver or more worthy of discussion.


136. MALANZUK, supra note 11, at 376–77 (noting the "lack of transparency of the decisionmaking by the P5...or P3 (the Western powers which often hold meetings in secret, following which only the formal votes become part of the public record)").


138. Of course, if it is being led in creative problem solving exercises, privacy might be required, as some of these exercises promote a wide-ranging search for answers that permits introduction of possibly silly or outlandish ideas as a way of arriving at practical ideas. See e.g., Adams, supra note 108, at 134–37 (describing group “brainstorming” exercise and its requirement to come up with many “wild” ideas).

139. See BROWNLIE, supra note 70, at 436 (“In attempting to provide effective legal controls the jurist must concentrate on the immediate source of danger — the use of force — and characterize the conditions in which it is prohibited in such a way that states can only give justifications for their illegal acts in terms of considerable implausibility.”).
than whether to unleash a modern war-making machine, which produces death, refugees and other crises.

B. Rethinking General Assembly Practice

If the Security Council will not conduct an inquiry regarding the necessity of using force and ways to limit the attendant harms in a given case, then the General Assembly should do so instead. The Security Council has “primary” but not exclusive responsibility for matters concerning international peace and security. If the Security Council fails to act, the General Assembly may thus exercise a secondary authority, making non-binding recommendations to nations. There is nothing to stop the General Assembly from working with experts, activists and scholars to find alternatives to force in impending conflicts, which could pressure the Security Council to justify its decisions. The General Assembly could produce a “brief” or “opinion” as described above to make sure that the questions set forth above are asked and answered. In addition, the General Assembly could proactively initiate UN focus on looming problems that could, if left to fester, endanger international peace and security.

C. Rethinking International Court of Justice Practice

A more active use of the ICJ by UN member nations has the potential to provide guidance for the development of the jus ad bellum. Member nations could initiate claims for damages in

141. See Schachter, supra note 16, at 1622.

The General Assembly, which may decide important questions by a two-thirds majority, has on occasion adopted decisions that involve judgments on the use of force. These decisions are not binding under the Charter. That does not mean that they lack ‘authority,’ for at least in some cases such resolutions will be regarded as expressing the ‘general will’ of the international community and as persuasive evidence of legal obligation. Id. See generally Schachter, Alf Ross Memorial Lecture: The Crisis of Legitimation in the United Nations, 50 NORDISK TIDSSKRIFT FOR INT‘L. RET. 3 (1981).
142. See supra Parts III.A.4. and IV.A.
143. See supra Parts III.A.4. and III.B.2.
144. U.N. CHARTER art. 92.
the ICJ concerning particular, actual uses of force. Non-combatant nations that are indirectly affected by a particular use of force (such as by suffering economic or environmental damage) could develop legal theories on which to base claims for damages. Such actions would help create legal doctrines and potentially prevent future uses of force.\textsuperscript{145} Individuals, businesses and other entities that are not entitled to bring cases under ICJ jurisdiction could file similar claims in other courts with international jurisdiction. Also, it remains to be seen how practice before the new International Criminal Court will take shape, but prosecution for war crimes — especially of leaders who violate the \textit{jus ad bellum} — could be a promising way to clarify and develop this law.

The ICJ offers the potential for prospective guidance, too. The General Assembly or qualified UN organizations could flex their muscles under Article 96\textsuperscript{146} to request that the ICJ issue an advisory opinion in certain instances.\textsuperscript{147} Indeed, the ICJ has shown that it can conduct thorough inquiries concerning the legality of the use of force.\textsuperscript{148} In advisory opinions, questions can be framed more broadly than the question a particular member nation may pose in the context of an actual claim for damages. For example, in 1996, the ICJ issued an advisory opinion in response to a General Assembly request, which the ICJ framed as follows: “Is the threat or use of nuclear weapons in any circumstance permitted under international law?”\textsuperscript{149} The advantage of

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\item[145.] GRAY, supra note 9, at 11–12 (noting the potential of the International Court of Justice to clarify the laws on “this sensitive subject matter of the use of force” as states increasingly bring claims before it).
\item[146.] U.N. CHARTER art. 96, para. 1.
\item[147.] The General Assembly may “authorize other UN organs or specialized agencies to request advisory opinions on ‘legal questions arising within the scope of their activities.’” Advisory opinions are not legally binding but nonetheless have substantial persuasive value.” JEFFERY L. DUNOFF, ET. AL., INTERNATIONAL LAW: NORMS ACTORS, PROCESS 69 (2002). See also, U.N. CHARTER art. 96.
\item[149.] Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons 1996 I.C.J. 226, 228 (July 8). This question was originally, “Is the threat or use of nuclear weapons in any circumstance permitted under international law? [Est-il permis en droit international de recourir a la menace ou a l’emploi d’armes nucleaire en toute circonstance?]” UN GA Res. 49/75K (Dec. 15, 1994). This question was not novel: The General Assembly passed a reso-
\end{enumerate}
\end{footnotesize}
the advisory opinion here is obvious: no nation had to wait to be attacked by nuclear weapons before raising the question. Perhaps similar questions could be framed by the General Assembly regarding what could be considered, in light of September 11, pressing international legal issues: whether the use of military force to topple the governments of “terrorist nations” is legal, and under what circumstances would it be legal to use force in response to terrorist attacks? Obviously, great care would be needed to frame such a question, but seeking an advisory opinion is a viable way of challenging the increased and increasing readiness of various nations to use (and perhaps abuse) force in this way. A similar question could be framed regarding under what circumstances the use of force would be a legitimate method of countering the proliferation of weapons of mass destruction.

One can also imagine a country that feared an attack, perhaps a preemptive strike to destroy actual or alleged weapons of mass destruction, asking the ICJ for a provisional ruling on the legality of such an attack. Even if the ICJ ultimately re-

lution in 1961 declaring nuclear weapons illegal, and the request for the advisory opinion from the ICJ was originally brought in 1993 by the WHO. See MALANCZUK, supra note 11, at 346–50.


151. The ICJ entertained and ultimately rejected a claim by Libya for provisional measures to prevent a feared attack or embargo by the U.S. for refusing to extradite two Libyan nationals suspected of bombing Pan Am Flight 103 over Lockerbie, Scotland on December 21, 1989, which killed over 250 people. Libya claimed that it was exercising its rights pursuant to the 1971 Montreal Convention on terrorism against aircraft. Between the time of Libya’s filing for provisional measures and the Court’s decision, the Security Council set forth a Resolution requiring extradition. The Court rejected Libya’s request for provisional measures and held that in this instance the Security Council Resolution had to be followed, but added that it was “not at this stage called upon to determine definitively the legal effect of Security Council resolution 748 (1992).” Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.), 1992 I.C.J. 114, 126–27 (Apr. 14). As such, the case leaves open the possibility of a sort of “judicial review” of Security
jected such a move, the nation fearing attack could benefit from making its case in this forum so that alternatives and likely harms might be considered, which in turn might erode international support for the attack.

D. Rethinking Practices of NGOs, Scholars, and the Public to Promote Better Thinking About Using Force and to Pressure Decisionmakers to do the Same

In lieu of, or in addition to, these efforts by UN organs, interested experts, activists and scholars should step up their own efforts to generate and publish alternatives to using force, and generate popular support by showing the common benefits that will accrue to all nations. Such ideas should be published widely, including in times of peace, because once an attack occurs or a crisis unfolds, individuals who oppose military action are often asked, “If you oppose war, then what do you suggest instead?” and, “Are you saying we should do nothing?” A population responding to an attack (and fearing further attacks) is, understandably, not in a calm and deliberative mood. The law must take this reality into account. Ideally, leaders and experts would be able to point to concrete alternatives to war that could likely prove less costly and more effective in achieving the desired goal in a time of crisis.¹⁵²

Ultimately, one way or another, governments respond to their people. If problems are capable of solutions less costly than war, and those solutions are published widely, reasonable pub­lics would demand that they be tried. Shining light on the decision-making process, challenging decisionmakers to be smarter and more creative, and publicly judging them on these qualities

¹⁵². Few alternatives to force were published after the September 11 attacks. For a comprehensive explanation of the problems with Operation Enduring Freedom and its ineffectiveness in defeating the threat of Al Qaeda, as well as an alternative approach, see CARL CONETTA, COMMONWEALTH INSTITUTE PROJECT ON DEFENSE ALTERNATIVES RESEARCH MONOGRAPH 6, STRANGE VICTORY: A CRITICAL APPRAISAL OF OPERATION ENDURING FREEDOM AND THE AFGHANISTAN WAR (Cambridge, MA, Jan. 30, 2002), available at http://www.comw.org/pda/0201strangevic.pdf.

E. Rethinking National Law to Limit Nations’ Resort to Force

A nation’s people are the ones who must fight, be killed and maimed, and suffer from the wars initiated by their leaders, so it is the people who must be persuaded to support a war. One possibility of limiting the use of force thus rests with the people of particular nations.\footnote{Democratic Accountability, supra note 153, at 65.}

Legally requiring national leaders to justify any conclusion that force is necessary and to show how they will limit likely harms and costs would be a giant step in limiting the recourse to military force. Currently, these matters are not part of the public discourse.\footnote{See Ruth Wedgewood, Implementing Limitations on the Use of Force: The Doctrines of Necessity and Proportionality, 86 Am. Soc’y Int’l L. Proc. 39, 58 (1992).} Reformers, however, could propose a law, entitled, “The Responsible Use of Military Force in International Affairs” (RUMFIA), codifying this idea and making it a part of the public discourse. Politicians could rally around this proposal as a way of protecting U.S. servicemen and women.

Proportionality and necessity have been segregated from American public policy debate, cabined as technical military doctrines to be handled by the war colleges and Pentagon staff. My claim here today is that proportionality and necessity belong at the center of civilian debate on the use of force in foreign affairs.

Id.
citizens, and people in other countries, and of fostering international stability. There may be popular support for such a measure. A large, worldwide, antiwar movement sprang up in opposition to the U.S. war against Iraq during its planning stages. Even if such support could not succeed in passing RUMFIA, a movement’s merely drafting it and campaigning for its adoption would focus public attention on these issues. For example, most U.S. citizens are probably unaware of the extent of death and damage caused by the 1991 Gulf War or the invasions of Afghanistan and Iraq. As more accurate and timely information about the actual effects of war becomes readily available, a movement to ensure that the decision to use force includes consideration of these harms could gain popular support.

The recent debate over whether to go to war against Iraq exemplifies the need for more national focus on alternatives to war and the precise harms that could result from waging war. At the end of July and the beginning of August 2002, the Senate

156. See id., at 59 (comments by Professor Ruth Wedgwood: “Strategic proportionality asks that civilian casualties be weighed against the justification for using force in the first place.”).


158. For an example of the ideological sparring in the U.S. media concerning the numbers of civilians killed in U.S. military actions, see John Leo, The Truth About Casualties, U.S. NEWS & WORLD REPORT, Mar. 31, 2003, at 3 (expressing skepticism that the number of dead in Iraq would turn out as high as initial reports: “In a number-obsessed society, focusing relentlessly on the deaths of innocents — and inflating the numbers, if necessary — is a conventional way of undermining support for war.”). The corollary would appear to obtain as well: underreporting the deaths of innocents is a conventional way of creating and maintaining support for war. Regarding U.S. media coverage of the war against Afghanistan, see Neil Hickey, A Time of Testing: Special Report, COLUM. JOURNALISM REV. Jan.-Feb. 2002, at 40 (calling Pentagon’s rules limiting journalists as “toughest ever”); Michael Massing, Grief Without Portraits, THE NATION, Feb. 4, 2002, at 6 (discussing lack of media reporting on non-U.S. casualties of war); Patrick McCormick, See No Evil: While Movie Wars are Raging on Screens Across the Nation, Uncle Sam has Managed to Keep Both Media and Citizens in the Dark About the Ugly Reality of Our Real-Life War on Terror, U.S. CATHOLIC, July 1, 2002, at 46. The failure of the media to highlight the horrors of war is by no means a new phenomenon, nor is it limited to U.S. media, as the previous citations may appear to suggest. See generally PHILLIP KNIGHTLY, THE FIRST CASUALTY: THE WAR CORRESPONDENT AS HERO AND MYTH-MAKER FROM THE CRIMEA TO KOSOVO (2000).
Committee on Foreign Relations held hearings on the need for a war against Iraq. These hearings, however, considered only a few of the likely harms set forth above. There was little or no focus on likely civilian casualties, casualties among conscripted Iraqi soldiers, or human rights deprivations that could result in other nations if their leaders supported the war against the wishes of their populaces or insurgent factions. There was no meaningful discussion of possible alternatives to the use of force and violence. Finally, the Congressional debate that led to the resolution allowing President Bush to use of force to invade Iraq did not highlight these concerns.

In addition, a movement to pass such a law could have a beneficial effect on U.S. international relations. This movement, and any resulting law, could enhance American moral authority, arguably the real source of power, whether national or international.

Likewise, people in other nations could seek to limit their own governments’ use of force, and their own governments’ support for other nations’ military actions. For example, citizens of democratic nations, especially those on the Security Council, could demand laws to prohibit their governments’ support for other nations’ military ventures unless the questions set forth above in Section III or similar questions are answered satisfactorily.

These issues could also be aired through court challenges to the national authority to wage war. For example, five weeks before the U.S. and U.K. invaded Iraq in 2003, a motion for a preliminary injunction was filed in the U.S. District Court for the District of Massachusetts by members of the House of Representatives, military personnel, parents of military personnel, citizens of democratic nations, especially those on the Security Council, could demand laws to prohibit their governments’ support for other nations’ military ventures unless the questions set forth above in Section III or similar questions are answered satisfactorily.

These issues could also be aired through court challenges to the national authority to wage war. For example, five weeks before the U.S. and U.K. invaded Iraq in 2003, a motion for a preliminary injunction was filed in the U.S. District Court for the District of Massachusetts by members of the House of Representatives, military personnel, parents of military personnel,


160. Id.

161. See id.


164. See supra Parts III.A.4 and III.B.2.
and others to stop President Bush from initiating war. The court denied the motion, and the U.S. Court of Appeals for the First Circuit affirmed, holding that it was beyond the court’s powers to decide the issue at that time, because it was not clear that there was any dispute between President Bush and Congress, or that either governmental branch had done or was about to do anything in violation of their constitutional duties or other laws. Similarly, in the U.K., the Campaign for Nuclear Disarmament sued the British government in British courts, arguing that the court should interpret UN Security Council Resolution 1441 as not permitting the U.K. (or other nations) to use force against Iraq, and as requiring an additional Security Council Resolution before force could be used. A court dismissed the suit on December 17, 2002, reasoning that interpreting a Security Council resolution fell outside the court’s jurisdiction.

These lawsuits, despite failing, brought increased attention to the issue of a government’s war-making abilities and, in the long run, could play a part in forcing governments to use these powers in strict accordance with the law.

V. CONCLUSION

This Article has been concerned with a very particular reform to the international law on the use of force: developing it to guide decisionmakers, prospectively, to find alternatives to force, and to find ways to prevent or limit the harms that are likely from a proposed use of force. The law on the use of force, perhaps more than any other area of law, must provide prospective guidance, because harms caused by the use of military force cannot be undone. Those killed cannot be “un-killed,” the dismembered cannot be “re-membered,” widows cannot be “un-widowed,” and orphans cannot be “un-orphaned”; indeed, there are no such words in the English language. The use of force, regardless of any noble intentions, causes severe harm and dis-

166. Id. at 137–41, 143–44.
168. Id.
order. State-sponsored violence is thus a measure that must be used sparingly, and with great discipline and restraint.

This Article poses questions for decisionmakers to consider before permitting the use of force. These questions should improve the search for alternatives to force and guide decision-makers to find solutions that avoid or limit the harms caused by the use of force. At times, the answers to these questions may lead to the conclusion that force is the best and most effective option. Nevertheless it is hoped that such instances will be rare, rarer than they are today. This Article also raises questions regarding the clarity of international law on the use of force, and about the attitudes and rigor that decisionmakers should bring to the task of determining whether to use force in a given instance. This Article has answered these questions normatively, by prescribing proposals for reform.

Beyond question is the fact that international law on the use of force will not, on its own, develop into a tool for the sort of guidance proposed in this Article. There is no enforcement mechanism, and the emphasis of scholars on state practice and custom will often make pronouncements on legality late-coming and debatable, perhaps endlessly so. Moreover, those pronouncements may be ill-suited to prevent future uses of force, because circumstances may differ, making any “precedent” inapplicable. Indeed, a nation that is entrepreneurial in the use of force, and capable of using force without fear of suffering damaging responses, can offer various justifications for using force, each different from those that came before. International law scholars would trail behind, trying to make sense of the destruction, to determine whether, after all, the action was legal, while remaining impotent to prevent future damage or to influence state practice.

Thus, it is necessary to approach the law of war, and especially the jus ad bellum, proactively, with a reformer’s attitude. International law is nascent, a work-in-progress. As such, the opportunity exists for scholars not merely to describe state practice but also to import the best ideas they can find from other legal systems, or create themselves, to build a body of law that is fair and sensible, and capable of preventing all but the most necessary and limited uses of force. Future generations will thank us.
STRIKING THE BALANCE: NATIONAL SECURITY VS. CIVIL LIBERTIES

Robert N. Davis*

I. INTRODUCTION

A merican national security law has come full circle. Between 1945 and 1978, the intelligence community and the executive branch used the national security legal structure to monitor organizations and intrude on the civil liberties of American citizens. Critics argued that the executive branch abused its intelligence collection power during the Cold War in the name of national security. The Foreign Intelligence Surveillance Act (“FISA”) was passed in 1978 after findings that intelligence agencies had abused the privacy rights of Americans. FISA was an attempt to provide greater protection of civil liberties by erecting a wall between intelligence collection and law enforcement. Civil liberties organizations now argue, however, that the wall is being eroded by the passage of the Uniting and Strengthening America by Providing Appropriate

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* Professor of Law, Stetson University College of Law. Professor Davis teaches international security law and policy, is a member of the ABA Standing Committee on Law and National Security and is an active member in the United States Navy Reserves. Professor Davis would like to acknowledge the excellent research assistance of third-year law student, Sarah Stork.


Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA Patriot Act").

The USA Patriot Act was passed in the wake of the terrorist attacks of September 11, 2001. Deliberations over the USA Patriot Act included five weeks of intense, round-the-clock negotiations by members of Congress, and congressional oversight committees. The House vote on the Act was three hundred fifty-six for and sixty-six against, and the Senate vote was ninety-eight for and one against. The Act was signed into law on October 26, 2001, over a month after the terrorist attack.

The USA Patriot Act was adopted as an effort to strengthen national security but some believe it overreaches by sacrificing civil liberties for the benefit of national security.

The passage of FISA was a reaction to executive branch abuses of civil liberties which were made possible by the non-regulation of surveillance for national security purposes. During this period, the executive branch spied on organized crime.


figures, citizens suspected of having communist ties, and Americans who led radical causes. The terrorist attacks of September 11, 2001 led to a flurry of legislative activity, attempting to enhance national security. The legislation enacted to enhance the structure of the nation’s security provisions included, *inter alia*, the Aviation and Transportation Security Act, and the Homeland Defense Department Act. The USA Patriot Act, initiated by Attorney General John Ashcroft, amended over 15 federal statutes. The Attorney General has recently spent time defending the USA Patriot Act against those who argue that civil liberties are at risk because the Act’s provisions have provided such expansive law enforcement powers to the executive branch. These critics argue that the USA Patriot Act encroaches on the privacy rights of Americans in the name of national security by allowing law enforcement to conduct intrusive surveillance of emails, telephone conversations, business and library records, and computer use.

The political climate at the time FISA was adopted was very much like the political climate surrounding the passage of the USA Patriot Act in that the safety of the nation and the constitutional rights of citizens were in conflict. However, it is possible for national security legislation to protect civil liberties, while achieving its national security objectives. In theory, the balance must be struck in a manner that preserves the peace and security of the nation while at the same time preserving the constitutional rights and civil liberties of all Americans. In order to achieve the appropriate balance between national secu-

rity and civil liberties, creative legislative and security initiatives must be pursued and anyone who abuses these new measures, including individual law enforcement officers or the executive branch itself, must be held accountable.

National security and civil liberty interests are not mutually exclusive. We can and must balance both interests appropriately because, in the final analysis, if we cannot secure our nation, civil liberties will mean very little.

History demonstrates that when the nation is in extremis, laws bend. Several examples prove this point. President Lincoln ordered a blockade of the southern ports and suspended the right of habeas corpus during the Civil War.\textsuperscript{21} During World War II, the U.S. ordered the internment of Japanese Americans on the West Coast.\textsuperscript{22} Most recently, during the war on terrorism, several American citizens were indefinitely detained by the military as “enemy combatants.”\textsuperscript{23} Precedent supports the government. During World War II, the federal courts upheld the government’s right to hold captured Nazi spies as unlawful enemy combatants.\textsuperscript{24} The Latin maxim, inter arma silent leges is often invoked to explain the government’s tendency toward self-preservation during national emergency. The phrase means “in times of war, the laws are silent.”\textsuperscript{25} Yet, the laws are not silent, nor should they be. The laws will probably be interpreted to support the government’s tendency toward self-preservation when a “threat to the nation’s security is real,” but they should never be silent altogether.\textsuperscript{26}

The USA Patriot Act is not perfect; no piece of legislation is. However, it is an effort to fix our structure in a way that is intended to make us all safe. The Act contains sunset provisions and will probably need future amendment.\textsuperscript{27} The USA Patriot

\textsuperscript{21} See \textit{Ex parte} Milligan, 71 U.S. 2 (1866); see generally William H. Rehnquist, \textit{All the Laws But One: Civil Liberties in Wartime} (1998).
\textsuperscript{22} See generally Korematsu v. United States, 324 U.S. 885 (1945).
\textsuperscript{24} \textit{Ex parte} Quirin v. Cox, 317 U.S. 1, 26 (1942).
\textsuperscript{26} Id.
\textsuperscript{27} Currently, work is being done to amend the USA Patriot Act. See Electronic Frontier Foundation, Draft USA Patriot Act II, at http://www.eff.org/Censorship/Terrorism_militias/patriot2draft.html (last visited Feb. 10, 2003) [hereinafter Draft USA Patriot Act II].
Act is not the answer to terrorism—it is only one of the tools that we will use to prosecute the global war against terrorism. It is in the process of winning that war that we will protect the freedoms that we all cherish.

This Article will begin with a history of U.S. intelligence gathering. It will discuss four of the key documents that created the National Security Agency (“NSA”) and provide for its intelligence gathering authority. These key documents are The National Security Act of 1947 (“The National Security Act”), \(^{28}\) the “Truman Memorandum,” \(^{29}\) Executive Order 12,333 \(^{30}\) and FISA.

This Article will then discuss the impact of national security legislation on Fourth Amendment Rights by surveying litigation under FISA, and will also discuss the anticipated effects of the USA Patriot Act. \(^{31}\) It will compare the history of FISA and the circumstances surrounding its passage with the circumstances leading to the adoption of the USA Patriot Act and will analyze the two Acts’ impact on intelligence collection and information sharing with law enforcement agencies.

This Article will conclude by suggesting that the appropriate balance between civil liberties and national security is achieved only when a nation is free from internal and external threats. However, the nation’s security ultimately must be a priority, and a condition precedent toward securing civil liberties. When the nation is secure, its people are secure and when a nation is under attack, civil liberties become secondary to national security.

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II. THE HISTORY OF INTELLIGENCE GATHERING

A. The National Security Act of 1947

After the conclusion of World War II, the President and Congress reorganized the U.S. defense establishment.\(^\text{32}\) The goal of enacting The National Security Act was to provide a comprehensive program for the future security of the U.S.\(^\text{33}\)

The National Security Act created the Department of Defense ("DOD") to replace the War Department with the Departments of the Army, Navy and Air Force.\(^\text{34}\) Additionally, this Act established the National Security Council ("NSC"),\(^\text{35}\) restructured the


In enacting this legislation, it is the intent of Congress to provide a comprehensive program for the future security of the United States; to provide for the establishment of integrated policies and procedures for the departments, agencies, and functions of the Government relating to the national security; to provide a Department of Defense, including the three military Departments of the Army, the Navy (including naval aviation and the United States Marine Corps), and the Air Force under the direction, authority, and control of the Secretary of Defense; to provide that each military department shall be separately organized under its own Secretary and shall function under the direction, authority, and control of the Secretary of Defense; to provide for their unified direction under civilian control of the Secretary of Defense but not to merge these departments or services; to provide for the establishment of unified or specified combatant commands, and a clear and direct line of command to such commands; to eliminate unnecessary duplication in the Department of Defense, and particularly in the field of research and engineering by vesting its overall direction and control in the Secretary of Defense; to provide more effective, efficient, and economical administration in the Department of Defense; to provide for the unified strategic direction of the combatant forces, for their operation under unified command, and for their integration into an efficient team of land, naval, and air forces but not to establish a single Chief of Staff over the armed forces nor an overall armed forces general staff.

\(^{34}\) The Foreign Intelligence Surveillance Act, 50 U.S.C. § 401 (1994).

\(^{35}\) Id. § 402. The National Security Council was established by the National Security Act of 1947 to advise the President regarding domestic, for-
intelligence community, authorized certain agencies within DOD to provide assistance to law enforcement agencies, and restricted intelligence sharing with the United Nations.\(^{36}\) The Secretary of Defense was also given responsibility, through the NSA, for the “continued operation of an effective unified organization for the conduct of signals intelligence activities. . . .”\(^{37}\)

**B. The Truman Memorandum of 1954: The Birth of the National Security Agency**

The NSA “coordinates, directs, and performs highly specialized activities to protect U.S. information systems and produce foreign intelligence information.”\(^{38}\) It performs electronic surveillance, that is, communications listening or monitoring, to collect foreign intelligence information for the intelligence community, the military and government policymakers.\(^{39}\) This highly specialized mission protects information systems of the U.S. and produces information about other countries.\(^{40}\) The NSA works with the intelligence community, to keep decision makers informed and the country secure.\(^{41}\)

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\(^{36}\) Id. §§ 401–404(g) (2000).

\(^{37}\) Id. §§ 403–405 (2000).


\(^{40}\) See NSA Website, supra note 38. Just two examples of the kinds of intelligence provided by the NSA is its Signals Intelligence (SIGNIT) and its Information Systems security (INFOSEC) mission. Both of these programs have become increasingly significant.

Historically, the NSA operated in secrecy.42 Little was known about its mission or structure and much less about its operating budget.43 Indeed, one scholar has described the birth of the NSA as shrouded in silence.44 Much more information about the NSA is now available as a result of provisions contained in Executive Order 12,958,45 which requires the declassification of all permanently classified documents 25 years or older.46 As a result of this Executive Order, the NSA began a declassification effort known as Opendoor.47 At its founding, the perception and reality of the NSA was that it was a unique top secret agency. That perception and reality remain true today, though the NSA is no longer cloaked in the impenetrable layers of secrecy that accompanied its birth.

44. See BAMFORD, supra note 42, at 1. James Bamford describes the birth of the NSA in the following manner:

At 12:01 on the morning of November 4, 1952, a new federal agency was born. Unlike other such bureaucratic births, however, this one arrived in silence. No news coverage, no congressional debate, no press announcement, not even the whisper of a rumor. Nor could any mention of the new organization be found in The Government Organization Manual or the Federal Register or the Congressional Record. Equally invisible were the new agency’s director, its numerous buildings, and its ten thousand employees. Eleven days earlier, on October 24, President Harry S. Truman scratched his signature on the bottom of a seven-page presidential memorandum addressed to secretary of State Dean G. Acheson and Secretary of Defense Robert A. Lovett. Classified top secret and stamped with a code word that was itself classified, the order directed the establishment of an agency to be known as the National Security Agency. It was the birth certificate for America’s newest and most secret agency, so secret in fact that only a handful in the government would be permitted to know of its existence. Even the date set for its birth was most likely designed for maximum secrecy: should any hint of its creation leak out, it would surely be swallowed up in the other news of the day—the presidential election of 1952.

Id.
46. Id. at 19,832.
The NSA was not established by a statute, but rather by a presidential memorandum ("The Truman Memorandum") addressed to the Secretary of State and Secretary of Defense regarding communications intelligence activities. In his memorandum, President Truman recognized that "communications intelligence ("COMINT") activities of the U.S. are a national responsibility." It further provides that the NSA’s mission "shall be to provide an effective, unified organization and control of the communications intelligence activities of the U.S. conducted against foreign governments, to provide for integrated operational policies and procedures pertaining thereto." Pursuant to the memorandum, the NSA, in performing its COMINT mission, "stands outside the framework of other general intelligence activities." It is this description of the NSA's COMINT activities that helped create the perception that the NSA was once shielded from scrutiny and that enabled the NSA to claim that it had a unique mission. Thus, historically the NSA maintained that "no existing statutes control, limit, or define the signals intelligence activities of NSA." The NSA’s General Counsel also asserted that the Fourth Amendment of the United States Constitution did not apply to the NSA when

49. B AMFORD, supra note 42, at 1.
50. Id.
51. Truman Memorandum, supra note 29. The Truman Memorandum provides:

The special nature of COMINT activities requires that they be treated in all respects as being outside the framework of other or general intelligence activities. Orders, directives, policies, or recommendations of any authority of the Executive Branch relating to the collection, production, security, handling, dissemination, or utilization of intelligence, and/or classified material, shall not be applicable to COMINT activities, unless specifically so stated and issued by competent departmental or agency authority represented on the Board. Other National Security Council Intelligence Directive to the Director of Central Intelligence and related implementing directives issued by the Director of Central Intelligence shall be construed as non-applicable to COMINT activities, unless the National Security Council has made its directive specifically applicable to COMINT.

Id.
52. Church Report Book Three, supra note 1, at 736.
it intercepted international communications by American citizens. 53

In 1976 Congress established a Committee to begin investigating the NSA for possible abuse of authority. 54 The Committee, led by Senator Frank Church, produced a final report that suggested that the NSA had violated the Constitutional rights of Americans. 55 The Committee pointed to the use of watch lists and the interception of other communications as evidence of the NSA abusing its authority. 56 It further uncovered that the NSA had intercepted millions of telegraphs and messages over the course of thirty years. 57 Two surveillance programs which were cited by the Committee were Operation Shamrock and Operation Minaret. 58 Operation Shamrock was described by the Church Committee report in the following manner:

From August 1945 until May 1975, NSA received copies of millions of international telegrams sent to, from, or transiting the United States. Codenamed Operation Shamrock, this was the largest governmental interception program affecting Americans, dwarfing CIA’s mail opening program by comparison. Of the messages provided to NSA by the three major international telegraph companies, it is estimated that in later years approximately 150,000 per month were reviewed by NSA analysts. NSA states that the original purpose of the program was to obtain the enciphered telegrams of certain foreign targets. Nevertheless, NSA had access to virtually all the international telegrams of Americans carried by RCA Global and ITT World Communications (footnote omitted). Once obtained, these telegrams were available for analysis and dissemination according to NSA’s selection criteria, which included the watch lists. 59

53. Id.
56. Church Report Book Three, supra note 1, at 739.
57. Id. at 740.
58. Id. at 739–40.
59. Id. at 740.
Project Minaret was the codename given to the watch list program. The Church Committee report described Project Minaret in the following manner:

From the early 1960s until 1973, NSA intercepted and disseminated international communications of selected American citizens and groups on the basis of lists of names supplied by other Government agencies. In 1967, as part of a general concern within the intelligence community over civil disturbances and peace demonstrations, NSA responded to Defense Department requests by expanding its watch list program. Watch lists came to include the names of individuals, groups, and organizations involved in domestic antiwar and civil rights activities in an attempt to discover if there was “foreign influence” on them (footnote omitted).

In 1969, NSA formalized the watch list program under the codename Minaret. The program applied not only to alleged foreign influence on domestic dissent, but also to American groups and individuals whose activities “may result in civil disturbances or otherwise subvert the national security of the U.S.” (footnote omitted) At the same time, NSA instructed its personnel to “restrict the knowledge” that NSA was collecting such information and to keep its name off the disseminated “product.”

These activities, among others, created concerns that the NSA was routinely invading the privacy of American citizens. Privacy concerns resulted in new legislation affecting U.S. intelligence agencies that constrained domestic surveillance activities. Executive Order 12,333 and FISA were two such attempts to reign in some of the NSA’s questionable tactics.

60. Id. at 739.
61. Id. at 739. In August 1973, NSA’s new director, General Lew Allen, Jr., suspended the dissemination of messages under the program pending recertification of agency requirements. Id.
62. See Ruppe, supra note 55.
63. Id. Congressional Hearings in the 1970s “revealed the NSA had been engaging in serious abuses of U.S. citizens’ Fourth Amendment rights. . . . Following the hearings, Congress in 1978 passed the Foreign Intelligence Surveillance Act, restricting to a large extent the spy agency’s ability to collect information on Americans.” Id.
C. Executive Order 12,333

Executive Order 12,33366 was issued by President Reagan on December 4, 1981.67 The preamble for Executive Order 12,333 provides that intelligence collection is essential to the national security of the U.S.68 Pursuant to the order, the NSA is authorized to collect, process and disseminate SIGINT information for national foreign intelligence and counterintelligence purposes to support U.S. military operations.69 No other government agency is authorized to engage in signals intelligence activities unless authorized by the Secretary of Defense.70 The NSA, however, is only authorized to collect electronic communications for foreign intelligence purposes and may only disseminate this information to authorized government recipients.71

Part 1 of Executive Order 12,333, titled Goals, Direction, Duties, and Responsibilities with Respect to the National Intelligence Effort,72 requires that the U.S. intelligence effort provide the President and the NSC information to protect the U.S. against national security threats and to conduct and develop foreign defense and economic policy.73 Part I only authorizes collection that is consistent with the law and mindful of the constitutional rights of United States persons.74

Part 2, Conduct of Intelligence Activities, strives to achieve a “balance between the acquisition of essential information and protection of individual interests,”75 by providing that such collection “will be pursued in a vigorous, innovative and responsible manner that is consistent with the Constitution and appli-

67. Id. at 200.
68. Id.
69. Id. at 208.
70. Id.
71. Id.
72. Id. at 201.
73. Id.
74. Id. at 208.
75. Id. at 210.
cable law and respectful of the principles upon which the U.S. was founded.\textsuperscript{76}

Executive Order 12,333 is intended to “enhance human and technical collection techniques, especially those undertaken abroad...”\textsuperscript{77} in order to acquire foreign intelligence and to counter international terrorism and espionage conducted by foreign powers.\textsuperscript{78} Section 2.3, Collection of Information, specifically limits the ability to perform intelligence collection on United States persons.\textsuperscript{79} It specifies the types of information that could be the subject of collection efforts. For example, information may be collected on a U.S. person only with the consent of the person involved.\textsuperscript{80} Commercial information that constitutes foreign intelligence or counterintelligence may be collected.\textsuperscript{81} Collection efforts may also include information needed to protect the safety of people or organizations, sources or methods, and incidentally obtained information that indicates a violation of law.\textsuperscript{82}

Collection efforts by intelligence agencies are restricted by Section 2.4, Collection Techniques, which requires “use [of the] least intrusive collection techniques feasible within the U.S. or

\textsuperscript{76} Id.
\textsuperscript{77} Id. at 210.
\textsuperscript{78} Id. Pursuant to Section 2.5, to carry out this mission, intelligence agencies must be authorized by the Attorney General to conduct warrantless physical searches of property to obtain foreign intelligence and counterintelligence information. Pursuant to Section 3.4(d), foreign intelligence is defined as: “information relating to the capabilities, intentions and activities of foreign powers, organizations or persons, but not including counterintelligence except for information on international terrorist activities.” Section 3.4(a) defines counterintelligence as: “information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted for or on behalf of foreign powers, organizations or persons, or international terrorist activities, but not including personnel, physical, document or communications security programs.” Id.
\textsuperscript{79} Exec. Order No. 12,333, 3 C.F.R. 200, 211 (1982), reprinted in 50 U.S.C. § 401 (2000). Section 2.3 provides that: “Agencies within the Intelligence Community are authorized to collect, retain or disseminate information concerning United States persons only in accordance with procedures established by the head of the agency concerned and approved by the Attorney General, consistent with the authorities provided by Part 1 of this Order.” Id.
\textsuperscript{80} Id. at 211.
\textsuperscript{81} Id.
\textsuperscript{82} Id. at 203, 211.
directed against United States persons abroad." Section 2.4 specifically forbids the Central Intelligence Agency ("CIA") to conduct electronic surveillance within the U.S., unconsented physical searches in the U.S. by agencies other than the Federal Bureau of Investigation ("FBI"), and physical surveillance of Americans in the U.S. These general proscriptions provide exceptions for limited purposes.

Section 2.5 requires the Attorney General’s approval before collection efforts can be directed “within the United States or against a United States person abroad, of any technique for which a warrant would be required if undertaken for law enforcement purposes.” In such a case, the Attorney General must determine in each case that there is probable cause to believe that the technique is directed against a foreign power or its agent. The NSA must convince the Attorney General that the person is an agent of a foreign power, a spy, a terrorist, a saboteur or someone who will provide assistance to such individuals or organizations.

83. Id. at 212.
84. Id.
85. Id. The exception is that the CIA may not engage in domestic electronic surveillance generally, however, it may do so for the purposes of training, testing, or conducting countermeasures to foreign surveillance.
86. Id.
87. Id.
88. Id. at 214. Lt. Gen. Michael Hayden described the NSA’s intelligence collection efforts as follows:

NSA’s collection of foreign intelligence from foreign individuals and entities is designed to minimize the incidental, or unintentional, collection of communications to, from, or about U.S. persons. When NSA does acquire information about a U.S. person, NSA’s reporting does not disclose that person’s identity, and NSA will only do so upon a specific request that meets the standard derived from statute and imposed by Executive Order regulation...that is, the information is necessary to understand a particular piece of foreign intelligence or assess its importance. Similarly, no identities of U.S. persons may be disseminated (that is, transmitted to another Government department or agency) by NSA unless doing so is necessary to understand a particular piece of foreign intelligence or assess its importance. For example, if NSA intercepted a communication indicating that a terrorist was about to harm a U.S. person, the name of the U.S. person would be retained and disseminated to appropriate law enforcement officials.

Hayden Statement, supra note 39, at 6.
Another significant feature of Executive Order 12,333 is the legislative oversight it creates. Section 3.1, Congressional Oversight, requires the intelligence agencies to “cooperate with ...Congress in the conduct of its responsibilities for oversight of intelligence activities.” Judicial oversight is also a part of Executive Order 12,333. Section 2.5 references FISA which requires the Foreign Intelligence Surveillance Court to issue court orders for electronic surveillance directed against foreign powers or their agents.

Executive Order 11,905, issued by President Ford in 1976, and Executive Order 12,036, issued by President Carter in 1978, further limited intelligence gathering methods. Both prohibited the intelligence agencies from conducting warrantless domestic physical searches unless appropriate executive branch approval was obtained.

Thus, Executive Orders 12,333, 11,905 and 12,036 contained a common thread. They were all intended to stop the earlier abuses by intelligence agencies. To that end, these executive orders limited intelligence gathering methods, restricted collection efforts, required attorney general approval and provided for legislative oversight.

D. Key Provisions of FISA

FISA was passed by the 95th Congress in 1978 and signed into law by President Carter. FISA was the product of compromises between the executive and legislative branches in

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90. Id.
91. Id. at 212.
96. Id.
their effort to address abuses in the intelligence agencies revealed by the Church Committee Investigation.\textsuperscript{98} FISA was also an attempt to balance the claimed inherent national security authority of the executive branch with the Fourth Amendment’s prohibition on unreasonable searches and seizures.\textsuperscript{99} The NSA’s administrative and legal process for conducting electronic surveillance is largely governed by Executive Order 12,333\textsuperscript{100} and FISA.

FISA is a complex statute that has been criticized for lacking “due process and accountability.”\textsuperscript{101} FISA provides the procedures for obtaining electronic surveillance authorization without a court order.\textsuperscript{102} Section 1802 authorizes the President, through the Attorney General, to permit electronic surveillance to acquire foreign intelligence information for a period of up to one year without a court order.\textsuperscript{103} The Attorney General must certify that (1) the electronic surveillance is “solely directed” at communications “between or among foreign powers,”\textsuperscript{104} (2) there is no “substantial likelihood” that the surveillance will involve a U.S. person;\textsuperscript{105} and, (3) that minimization procedures are in effect.\textsuperscript{106} Fourth Amendment challenges to this provision have

\textsuperscript{98} See generally Church Report Book Three, supra note 1, at 31.

\textsuperscript{99} U.S. CONST. amend. IV. This amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

\textit{Id.} See also In re Kevork, 788 F.2d 566, 569 (9th Cir. 1986) (citing, S. REP. NO. 604 and holding that the purpose of FISA was to strike a balance between the need for surveillance and the protection of civil liberties).

\textsuperscript{100} See supra Part II.C.


\textsuperscript{102} Foreign Intelligence Surveillance Act, 50 U.S.C. § 1802 (1994).

\textsuperscript{103} Id. § 1802(a)(1).

\textsuperscript{104} Id. § 1802(a)(1)(A)(i).

\textsuperscript{105} Id. § 1802(a)(1)(B).

\textsuperscript{106} Id. § 1802(a)(1)(C). Under Section 1801(h)

(b) “Minimization procedures” with respect to electronic surveillance, means
been unsuccessful.\textsuperscript{107} In United States v. Pelton,\textsuperscript{108} the United States Court of Appeals for the Fourth Circuit held that FISA did not violate the Fourth Amendment because the statutory safeguards provided “sufficient protection” of individual rights when balanced against the government’s interest in gathering foreign intelligence which is of “paramount importance to national security.”\textsuperscript{109}

\begin{enumerate}
\item specific procedures, which shall be adopted by the Attorney General, that are reasonably designed in light of the purpose and technique of the particular surveillance, to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information;
\item procedures that require that nonpublicly available information, which is not foreign intelligence information, as defined in subsection (e)(1) of this section, shall not be disseminated in a manner that identifies any United States person, without such person’s consent, unless such person’s identity is necessary to understand foreign intelligence information or assess its importance;
\item notwithstanding paragraphs (1) and (2), procedures that allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes; and
\item notwithstanding paragraphs (1), (2), and (3), with respect to any electronic surveillance approved pursuant to section 1802(a) of this title, procedures that require that no contents of any communication to which a United States person is a party shall be disclosed, disseminated, or used for any purpose or retained for longer than twenty-four hours unless a court order under section 1805 of this title is obtained or unless the Attorney General determines that the information indicates a threat of death or serious bodily harm to any person.
\end{enumerate}

\textit{Id.}  \textsuperscript{107} Robinson, \textit{supra} note 101, at 67.
\textsuperscript{109} \textit{Id.} at 1074–75. \textit{See also} United States v. Megahey, 553 F. Supp. 1180, 1192 (E.D.N.Y. 1982) (holding that electronic surveillance of home phone number does not violate Fifth Amendment rights provided object of surveillance is foreign intelligence, even if criminal prosecution may follow). \textit{See} United States v. Johnson, 952 F.2d 565, 572 (1st Cir. 1991) (holding that FISA
FISA also created the Foreign Intelligence Surveillance Court (“FISA Court”), frequently referred to as the “secret court” because it conducts proceedings under specified security rules in a secure room in the Department of Justice (“DOJ”). The FISA Court is comprised of seven district court judges designated by the Chief Justice of the United States Supreme Court. The FISA Court’s jurisdiction includes hearing applications for and issuing orders approving or denying electronic surveillance within the U.S. Section 1803 also establishes a Court of Review (“FISA Review Court”) consisting of three district court or appellate court judges also designated by the Chief Justice. The FISA Review Court has jurisdiction to review the denial of surveillance applications. FISA Court proceedings are required to be conducted expeditiously and the record of the proceedings “shall be maintained under security measures established by the Chief Justice[,] in consultation with the Attorney General, and the Director of Central Intelligence.”

Requirements for applications for electronic surveillance orders are detailed in Section 1804. These requirements include, *inter alia*, disclosure of the identity of the federal officer submitting the request and a “statement of the facts and circumstances relied upon by the applicant to justify his belief that — the target of the electronic surveillance is a foreign power or an agent of a foreign power.” This section also requires the federal officer to provide a description of the information sought, a statement of the proposed minimization procedures, a

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111. See Robinson, supra note 101, at 51.
113. Id.
114. Id. § 1803(b).
115. Id.
116. Id. § 1803(c).
117. Id. § 1804.
118. Id. § 1804(a)(1)-(4). See United States v. Squillacote, 221 F.3d 542, 553 (4th Cir. 2000), (citing United States v. Pelton, 835 F.2d 1067, 1075 (4th Cir. 1987) (requiring a statement of reasons to believe that the target of the surveillance is a foreign power or agent of a foreign power, and certification by an executive branch official that the information sought is foreign intelligence information and cannot be obtained by other means). Id.
statement of facts concerning previous applications made involving the same people, facilities or places, and a statement of the time period for which the electronic surveillance will be maintained.  

Particular findings are required before the FISA Court can issue a surveillance order. Necessary findings include facts submitted by the applicant that there is probable cause to believe the target is a foreign power or agent of a foreign power. In addition, minimization procedures must meet the requirements of the definition found in Section 1804(h). In determining whether probable cause exists to issue a surveillance order, judges may also consider past, current and future activities of the target. Section 1805 requires that an order approving electronic surveillance identify the target, describe the location of each facility, describe the type of information sought, indicate whether physical entry will be used, and the period of time of the electronic surveillance. It also requires that minimization procedures be followed and the applicant compensate the carrier, landlord, or other person furnishing aid to the surveillance effort. The duration of a surveillance order is for a period “necessary to achieve its purpose, or ninety days, whichever is less.” However, electronic surveillance against a foreign power target may be for up to one year. An order may be extended on the same basis as the original order upon a new application and new findings.  

In U.S. v. Squillacote, the United States Court of Appeals for the Fourth Circuit held that where the target of electronic

120. Id. § 1805(b).
121. Id. § 1805(a)(3)(A). (“No United States person may be considered an agent of a foreign power solely based on the exercise of activities protected under the First Amendment of the United States Constitution....”).
122. Id. § 1805(a)(4).
125. Id § 1805(b)(2)(A),(D).
126. Id. § 1805(d)(1).
127. Id.
128. Id. § 1805(d)(2).
surveillance is a “United States person”\textsuperscript{130} as defined by FISA, surveillance may be authorized “only if the FISA judge concludes that there is ‘probable cause to believe that the target of the surveillance is a foreign power or agent of a foreign power, that proposed minimization procedures are sufficient, [and] that the certifications required have been made...”\textsuperscript{131} However, the United States Court of Appeals for the District of Columbia has held that nonresident aliens who are in the U.S. on visitor or student visas do not qualify as “United States persons” under FISA.\textsuperscript{132}

FISA restricts the use of information acquired from electronic surveillance concerning any United States person.\textsuperscript{133} Acquired information may only be used and disclosed by federal employees without the consent of the United States person when minimization procedures are adhered to.\textsuperscript{134} No privileged information acquired will lose its privileged status.\textsuperscript{135} Additionally, federal officers may use acquired information only for lawful purposes.\textsuperscript{136} If the government intends to use information acquired by electronic surveillance in any proceeding, it must so notify the affected person and the court prior to trial or hearing that it intends to disclose such information.\textsuperscript{137} “Any person against whom evidence is obtained or derived from an electronic surveillance...may move to suppress the evidence obtained or derived...on the grounds that...it was unlawfully acquired; or

\begin{itemize}
  \item \textsuperscript{130} Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801(i) (1994) defines “United States person” as:
  \begin{itemize}
    \item a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of the Title 8(1), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section.
  \end{itemize}

  \textit{Id.}
  \item \textsuperscript{131} Squillacote, 221 F.3d at 553.
  \item \textsuperscript{132} ACLU Foundation of Southern California v. Barr, 952 F.2d 457, 464 (D.C. Cir. 1991).
  \item \textsuperscript{133} Foreign Intelligence Surveillance Act, 50 U.S.C. § 1806(a) (1994).
  \item \textit{Id.}
  \item \textsuperscript{134} \textit{Id.}
  \item \textsuperscript{135} \textit{Id.}
  \item \textsuperscript{136} \textit{Id.}
  \item \textsuperscript{137} \textit{Id.} § 1806(c).
\end{itemize}
the surveillance was not made in conformity with an order of authorization or approval.\textsuperscript{138} The district court, upon notice by the government or an aggrieved individual, will conduct an \textit{in camera} and \textit{ex parte} review of the application, and order any other material relating to the surveillance to determine whether the surveillance was lawfully authorized and conducted.\textsuperscript{139} If the surveillance was not lawfully authorized and conducted the district court must suppress the evidence obtained.\textsuperscript{140} “If the Court determines that the surveillance was lawfully authorized and conducted, it shall deny the motion” to suppress unless due process requires discovery and disclosure.\textsuperscript{141}

In \textit{U.S. v. Hamide}, the United States Court of Appeals for the Ninth Circuit held that \textit{in camera} and \textit{ex parte} review under FISA was adequate to ensure that a factual record was sufficiently developed to allow eventual appellate review.\textsuperscript{142}

Finally, FISA requires the Attorney General to file a report to the Administrative Office of the United States Court and Congress regarding the number of applications for electronic surveillance orders and extensions approved, modified or denied.\textsuperscript{143} The Attorney General is also required to “fully inform” the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence on a semiannual basis, concerning all electronic surveillance.\textsuperscript{144} FISA imposes criminal sanctions for intentional violations of electronic surveillance procedures\textsuperscript{145} and creates a cause of action for damages for certain individuals\textsuperscript{146} who have been subjected to electronic surveillance or about whom such information has been disclosed.\textsuperscript{147}

\begin{flushright}
\begin{itemize}
  \item 138. \textit{Id.} \textit{§} 1806(e).
  \item 139. \textit{Id.} \textit{§} 1806(f).
  \item 140. \textit{Id.} \textit{§} 1806(g).
  \item 141. \textit{Id.}
  \item 142. \textit{United States v. Hamide}, 914 F.2d 1147, 1152 (9th Cir. 1990).
  \item 143. The Foreign Intelligence Surveillance Act, 50 U.S.C \textit{§}1807 (1994).
  \item 144. \textit{Id.} \textit{§} 1808.
  \item 145. \textit{Id.} \textit{§} 1809. This section makes intentional violation a crime punishable by a fine of not more than $10,000 or imprisonment for not more than five years, or both. \textit{Id.}
  \item 146. Excluding foreign powers or agents of a foreign power. 50 U.S.C. \textit{§} 1810 (1994).
  \item 147. \textit{Id.} \textit{§} 1810. This section creates a cause of action against any person who committed the violation for actual damages, punitive damages, reasonable attorney’s fees and other costs reasonably incurred.
\end{itemize}
\end{flushright}
III. THE IMPACT OF NATIONAL SECURITY LEGISLATION ON 4TH AMENDMENT RIGHTS

Before a search warrant can be issued, the Fourth Amendment to the Constitution requires that law enforcement have reasonable grounds to believe that the law is being violated.\textsuperscript{148} This requirement helps to limit the focus and targets of criminal investigations, control overzealous law enforcement officers and protect innocent civilians.\textsuperscript{149} FISA does not contain this criminal standard of probable cause.\textsuperscript{150} Instead, FISA contains a “foreign intelligence standard” of probable cause which requires a showing that the target may be an agent of a foreign government and the place or facility to be searched is being used in furtherance of espionage or terrorist activities.\textsuperscript{151} Thus, the criminal standard that requires probable cause for a search warrant and the foreign intelligence standard are very different, in that they require different showings.

A. FISA Jurisprudence

The tension that exists between the need of the executive branch to conduct foreign intelligence surveillance for national security reasons and the right of citizens to be free from unreasonable searches and seizures is due to the difference between executive authority under Article II of the United States Constitution and individual rights under the Fourth Amendment.\textsuperscript{152} Electronic surveillance in particular has not been easily categorized in constitutional jurisprudence.\textsuperscript{153} As early as \textit{Olmstead v. United States},\textsuperscript{154} a sharply divided Supreme Court had trouble viewing telephone conversations obtained through wiretaps as the equivalent of tangible items subject to seizure.\textsuperscript{155} Thus, the

\begin{itemize}
\item[148] See Dumbra v. United States, 268 U.S. 435, 441 (1925).
\item[151] Id.
\item[152] U.S. Const. art. II; U.S. Const. amend. IV.
\item[153] See Olmstead v. United States, 277 U.S. 438, 458–66 (1928) (reviewing the “chief cases” where the Supreme Court has confronted and addressed similar Fourth Amendment claims as well as common law rules).
\item[154] Id.
\item[155] Id. at 466.
\end{itemize}
telephone conversation in *Olmstead* was admissible in a criminal trial and not subject to the Fourth Amendment’s unreasonable search and seizure prohibition.\(^{156}\) This decision served to encourage the executive branch’s use of electronic surveillance.\(^{157}\) The Federal Communications Act of 1934 ("FCA")\(^{158}\) and the Supreme Court’s decision in *Nardone v. United States*,\(^ {159}\) interpreting the FCA, sought to restrain the use of electronic surveillance.\(^{160}\) World War II, however, elevated the importance of electronic surveillance and the executive branch’s use of electronic surveillance did not wane with the end of the war.\(^{161}\)

The Supreme Court overruled *Olmstead*, in *Katz v. United States*,\(^ {162}\) and introduced the concept of individual privacy expectations.\(^ {163}\) In *Katz*, the court discussed the importance of surveillance activities linked to national security interests, and thus set the stage for FISA.\(^ {164}\) After the *Katz* decision, Congress passed the Omnibus Crime Control and Safe Streets Act of 1968.\(^ {165}\) This Act established procedures for obtaining a warrant and expressly indicated that it was not intended to interfere with the executive authority of the President.\(^ {166}\) By now, the

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Neither the cases we have cited nor any of the many federal decisions brought to our attention hold the Fourth Amendment to have been violated as against a defendant, unless there has been an official search and seizure of his person or such a seizure of his papers or his tangible material effects or an actual physical invasion of his house ‘or curtilage’ for the purpose of making a seizure. We think, therefore, that the wire tapping here disclosed did not amount to a search or seizure within the meaning of the Fourth Amendment.

*Id.*

156. *Id.*


161. *Id.* at 798.


164. *Id.*


166. See comments to 18 U.S.C.A. § 2510 (West 2003). Under Part 2, entitled “Construction”: “In enacting this Chapter, Congress refrained from at-
President claimed inherent powers under Article II to conduct warrantless electronic surveillance for national security purposes.\textsuperscript{167} The United States Supreme Court in \textit{United States v. United States District Court for the Eastern District of Michigan},\textsuperscript{168} on facts not involving foreign intelligence surveillance, however, held that the Fourth Amendment required prior judicial approval for domestic electronic surveillance.\textsuperscript{169} Thus, the scope of the executive branch’s power to conduct warrantless electronic surveillance when acting in the interests of national security remained very much undecided.\textsuperscript{170} The lower courts struggled with the issue of the legality of warrantless electronic surveillance for national security purposes.\textsuperscript{171} Later Congress, in light of the issues raised by the Church Committee, was more receptive to “the need to regulate electronic surveillance for national security purposes.”\textsuperscript{172}

In \textit{United States District Court for the Eastern District of Michigan}, the Supreme Court challenged Congress to develop tempting to convey to the President any power which he did not already possess, and in providing that nothing therein contained should be deemed to limit constitutional powers of the President, Congress did not use language appropriate for grant of power.” \textit{Id.}


\textsuperscript{168} \textit{Id.}

\textsuperscript{169} \textit{Id.} at 320 (finding a case has not “been made for the requested departure from Fourth Amendment standards”). \textit{Id.}

\textsuperscript{170} \textit{Id.} at 321–22. (noting the narrow scope of its decision and states “[w]e have not addressed, and express no opinion as to the issues which may be involved with respect to activities of foreign powers or their agents”). \textit{Id.}

\textsuperscript{171} At the time, five federal courts considered the issue of warrantless electronic surveillance. Of the five, four United States Courts of Appeals were willing to recognize a foreign intelligence exception. \textit{See}  United States v. Brown, 484 F.2d 418, 426 (5th Cir. 1973), \textit{cert denied}, 415 U.S. 960 (1974); United States v. Butenko, 494 F.2d 593, 606 (3d Cir. 1974), \textit{cert denied}, 419 U.S. 881 (1974); United States v. Buck, 548 F.2d 871, 875 (9th Cir. 1977), \textit{cert denied}, 434 U.S. 890 (1977); and United States v. Truong, 629 F.2d 908, 913 (4th Cir. 1980). In Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975) the Court of Appeals for the District of Columbia Circuit was the only court to “cast fundamental doubt” on the constitutional basis for warrantless electronic surveillance. However, this case did not involve a foreign power or agent of a foreign power. Nevertheless, the Court of Appeals expressed its belief that all warrantless electronic surveillance would be unreasonable unless exigencies could justify the constitutional invasion. \textit{Id.}

\textsuperscript{172} Cinquegrana, \textit{supra} note 157, at 807.
national security standards for electronic surveillance that differed from the law enforcement standards in the Omnibus Crime Control and Safe Streets Act of 1968.\textsuperscript{173} Congress and the courts were uncertain regarding the scope of executive branch authority in the area of national security and foreign surveillance.\textsuperscript{174} Executive branch practice coupled with ambiguity regarding an appropriate judicial role, if any, in restricting electronic surveillance, required Congress to address issues of separation of powers.\textsuperscript{175} The Church Committee’s investigation revealed abuses by the intelligence agencies in violation of individual privacy interests.\textsuperscript{176} These abuses of executive discretion were attributable to unsettled case law and lack of congressional or judicial standards.\textsuperscript{177} As a result of its investigation, the Church Committee recommended that Congress develop legislation to restrict electronic surveillance for intelligence purposes.\textsuperscript{178} The Committee suggested that electronic surveillance within the U.S. be restricted to the FBI, pursuant to a judicial warrant.\textsuperscript{179}

Congress questioned whether it was appropriate to involve Article III judges in the approval process for electronic surveillance for national security purposes.\textsuperscript{180} The Congressional Research Service\textsuperscript{181} addressed this concern in a memorandum that concluded that surveillance approval is a case or controversy as that term is used in Article III, and judicial supervision was appropriate in this area because of the government and privacy interests at stake.\textsuperscript{182}

\textsuperscript{173} United States District Court for the Eastern District of Michigan, 407 U.S. at 322–23.
\textsuperscript{174} Id. at 322.
\textsuperscript{175} Id. at 322–24.
\textsuperscript{176} Church Report Book Three, \textit{supra} note 1, at 735.
\textsuperscript{177} See Cinquegrana, \textit{supra} note 157, at 807; Church Report Book Two, \textit{supra} note 54, at 186–87.
\textsuperscript{178} See generally Church Report Book Two, \textit{supra} note 54.
\textsuperscript{179} Church Report Book Two at 297, 299; \textit{see also} Cinquegrana, \textit{supra} note 157, at 807.
\textsuperscript{180} Cinquegrana, \textit{supra} note 157, at 808 n. 81.
\textsuperscript{181} The Congressional Research Service serves Congress throughout the legislative process by providing comprehensive and reliable legislative research and analysis.
\textsuperscript{182} Cinquegrana, \textit{supra} note 157, at 808.
The constitutional issues that were debated before FISA was enacted continue to be the subject of debate.\textsuperscript{183} Does Congress have the authority to limit the executive authority in the area of electronic surveillance for foreign/domestic intelligence collection? Is warrantless electronic surveillance for foreign intelligence collection compatible with the Fourth Amendment? Does Article III permit the FISA Court to conduct a hearing \textit{in camera} and \textit{ex parte}?\textsuperscript{184} In \textit{United States v. Duggan},\textsuperscript{185} the United States Court of Appeals for the Second Circuit had occasion to examine these constitutional issues and concluded that the procedures in FISA adequately balanced the individual’s Fourth Amendment rights with the need to obtain foreign intelligence information.\textsuperscript{186}

Before FISA was enacted, courts that addressed the issue of the warrant requirement in the context of national security surveillance concluded that the President had inherent power to conduct warrantless electronic surveillance to collect foreign intelligence information.\textsuperscript{187} The prevailing view was that electronic surveillance for foreign intelligence purposes constituted an exception to the Fourth Amendment’s warrant require-

\textsuperscript{183} Id. at 816.

\textsuperscript{184} These constitutional questions are now magnified in light of the events that took place on the morning of September 11, 2001 in New York City and Washington, D.C. In one of the worst terrorist attacks in the history of the civilized world, the twin towers of the World Trade Center in New York were leveled as hijacked commercial airliners were flown into the towers and exploded. The Pentagon also came under attack when another hijacked commercial airliner plowed into it approximately one hour later. See Serge Schmemann, \textit{U.S. Attacked; President Vows to Exact Punishment for ‘Evil’}, N.Y. Times, Sept. 12, 2001, at A1.

\textsuperscript{185} United States v. Duggan, 743 F.2d 59 (2d Cir. 1984).

\textsuperscript{186} Id. at 73. The defendants in \textit{Duggan} were agents of the Provisional Irish Republican Army who sought to acquire explosives, weapons, ammunition, and remote-controlled detonation devices from the United States to be exported to Northern Ireland for use in terrorist activities. The defendants moved to suppress evidence from FISA surveillance. They argued, \textit{inter alia}, that FISA surveillance was so broad that it violated due process, separation of powers, and equal protection to aliens. Id.

ment. While the Supreme Court declined to address this issue in *United States v. United States District Court for the Eastern District of Michigan*, it made clear that Fourth Amendment warrant requirements may change when different governmental interests, like national security, are at stake.\(^{189}\)

FISA was again challenged in the 1985 case of *In re Kevork*.\(^{190}\) In *Kevork*, the Supreme Court of Ontario, Canada “issued an order for a commission to take evidence of eight witnesses in Los Angeles, California.”\(^{191}\) These witnesses had overheard conversations of the defendants pursuant to orders issued by the FISA Court.\(^{192}\) The purpose of the commission was to gather evidence in a pending criminal prosecution in Canada.\(^{193}\) A

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> [W]e do not hold that the same type of standards and procedures prescribed by Title III are necessarily applicable to this case. We recognize that domestic security surveillance may involve different policy and practical considerations from the surveillance of “ordinary crime.” The gathering of security intelligence is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance operations against many types of crime specified in Title III. Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government’s preparedness for some possible future crisis or emergency. Thus, the focus of domestic surveillance may be less precise than that directed against more conventional types of crime.

Given these potential distinctions between Title III criminal surveillances and those involving the domestic security, Congress may wish to consider protective standards for the latter which differ from those already prescribed for specified crimes in Title III. Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of government for intelligence information and the protected rights of our citizens. The warrant application may vary according to the governmental interest to be pursued and the nature of citizen’s rights requiring protection.

_Id._ at 322–23.


191. _Id._ at 1004.

192. _Id._ at 1005.

193. _Id._
United States District Court judge and a justice from the Supreme Court of Ontario were appointed as commissioners to obtain the evidence requested. The information sought involved private communications between some of the defendants regarding a conspiracy to murder a Turkish diplomat which the FBI intercepted. The conversations were overheard through microphones and a telephone tap installed in the home of a non-party. The defendants moved to block the Commission from receiving the testimony and evidence by attacking the constitutionality of FISA. Because the defendants’ motion to suppress evidence involved the bona fides of the Commission receiving evidence obtained through an order issued under FISA, a United States District Court judge considered the defendants’ motion.

The defendants argued that FISA was unconstitutional and violated the Fourth Amendment because its orders were not search warrants and did not meet probable cause requirements. They also argued that FISA was vague because it “contains no real limits regarding who or what may be a proper surveillance target.” The defendants also contended that FISA violated Article III of the Constitution because the FISA Court was not a proper Article III court. Finally they argued that it improperly delegated judicial power to the executive branch.

The court held that FISA did not violate the Fourth Amendment because the Fourth Amendment is flexible and different standards may be applied to meet other governmental interests such as foreign intelligence collection. The court also concluded that the defendants’ argument that FISA was vague was without merit, holding that FISA set out reasonable standards which must be met before anyone can become the target of for-
eign intelligence surveillance.\footnote{204} Regarding the defendants’ contention that FISA violated Article III, the court concluded that there was substantial precedent for specialized courts such as the FISA Court.\footnote{205}

At the time FISA was debated and passed, Congress was aware of the abuses of domestic national security surveillance and of the legal uncertainty of whether the executive branch had inherent authority to execute warrantless electronic surveillance for foreign intelligence collection.\footnote{206} Thus, FISA was passed in order “to settle the unresolved question of the applicability of the Fourth Amendment warrant requirement to electronic surveillance for foreign intelligence purposes, and to ‘remove any doubt as to the lawfulness of such surveillance.’”\footnote{207}

The court concluded that FISA contained well-defined procedures that permitted a FISA Court judge to authorize electronic

\footnote{204} See id. at 1010–12. The court continued: “As the legislative history makes clear, FISA was enacted to ‘reconcile national intelligence and counterintelligence needs with constitutional principles in a way that is consistent with both national security and individual rights.’” Id.

\footnote{205} Id. at 1014.

\footnote{206} Id. at 1011. The court noted that when electronic surveillance is used for intelligence purposes rather than for detecting crimes, different protections may be applied and still be consistent with the Fourth Amendment. The Court stressed that Congress was aware of this aspect citing United States v. United States District Court for the Eastern District of Michigan when it passed FISA. Id. See also SELECT COMMITTEE ON INTELLIGENCE, S. REP. NO. 95–701, (1978), reprinted in 1978 U.S.C.C.A.N. 3973. The Report provided:

> The departures here from conventional Fourth Amendment doctrine have, therefore, been given close scrutiny to ensure that the procedures established in FISA are reasonable in relation to legitimate foreign counterintelligence requirements and the protected rights of individuals. Their reasonableness depends, in part, upon an assessment of the difficulties of investigating activities planned, directed, and supported from abroad by foreign intelligence services and foreign-based terrorist groups. The differences between ordinary criminal investigations to gather evidence of specific crimes and foreign counterintelligence investigations to uncover and monitor clandestine activities have been taken into account. Other factors include the international responsibilities of the United States, the duties of the Federal Government to the States in matters involving foreign terrorism, and the need to maintain the secrecy of lawful counterintelligence sources and methods.

> Id. at 3983.

surveillance for foreign intelligence purposes without violating the privacy rights of United States citizens. FISA represents a Congressional effort to provide a constitutional structure to foreign intelligence collection that is consistent with the Fourth Amendment. Though the United States Supreme Court has declined to rule on the constitutionality of FISA, the Act has withstood substantial judicial scrutiny.

B. The 1994 Amendments to FISA and their Application to Physical Searches

While FISA was enacted to provide a clear means of authorizing electronic surveillance activities for national security purposes it was unclear whether or not FISA also applied to physical searches. At the time of its passage in 1978, FISA only addressed procedures applicable to electronic searches not physical searches. It would take almost twenty-years before Congress amended FISA and clarified the procedures applicable for physical searches for foreign intelligence purposes.

Shortly after the 1994 amendments were passed, President Clinton signed Executive Order 12,949, which recognized that FISA, as amended, now clearly applied to physical searches. Thus, the debate that had occurred regarding whether FISA was intended to apply to electronic surveillance and physical searches ended with the passage of the 1994 FISA amendments and Executive Order 12,949.

The conduct of physical searches under FISA is governed by Sections 1821-1829. These provisions mirror those applicable to electronic surveillance. Physical search is defined by statute to mean:

208. Id. at 1010.
209. See id. at 1014.
211. Id. at 821–22.
213. Id. §§ 1821–1829.
216. Id.
218. Id. §§ 1801–1811.
any physical intrusion within the United States into premises or property...in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes...but does not include (A) “electronic surveillance”... or the (B) acquisition by the United States Government of foreign intelligence information from...means other than electronic surveillance...219

FISA authorizes the President through the Attorney General to approve physical searches without a court order to acquire foreign intelligence information for periods of up to one year.220 The Attorney General must certify that the physical search is directed at property under the control of a foreign power, that there is no substantial likelihood that the search will involve the premises of a United States person, and that minimization procedures are in place.221 Compensation must be paid for the use of any facilities or assistance necessary to accomplish the physical search.222

The FISA Court has jurisdiction to expeditiously hear applications for and grant orders approving physical searches for the purposes of obtaining foreign intelligence information.223 The FISA Review Court, established under Section 1803, has jurisdiction to review the denial of any application for physical searches made under FISA.224 An application for a physical search order must, inter alia, (1) be made by a federal officer; (2) describe the target of the search in detail and; (3) identify the property targeted as containing foreign intelligence information that is owned or controlled by a foreign power or agent.225 If a FISA Court judge decides to issue an order for a physical search, the order must contain findings that there exists probable cause to believe that the target is a foreign power or agent, that the premises is owned, used or possessed by a foreign power and that minimization procedures are in place.226

In determining probable cause, a FISA Court judge may con-

219. Id. § 1821(5).
220. Id. § 1822(a)(1).
221. Id.
222. Id. § 1822(a)(4)(A)–(B).
223. Id. § 1822(c), (e).
224. Id. § 1822(d).
225. Id. § 1823(a)(1), (2), (3).
226. Id. § 1824(a).
sider past, current and future activities of the target. Physical search orders approved under Section 1824 are for the time period necessary to achieve its purpose or for forty-five days, whichever is less, and the orders may be extended for up to one year. Emergency orders are authorized under Section 1824(d). Information obtained from a physical search concerning a United States person may be disclosed and used by federal officers without the consent of the United States person only in accordance with required minimization procedures.

If the federal government intends to use information obtained from the physical search in any proceeding, the government must notify the target of the search. The target may then submit a motion to suppress on the grounds that the information was unlawfully acquired or the search was not in compliance with the order. The District Court hearing the matter must conduct an in camera and ex parte review if the Attorney General argues that disclosure would harm the national security of the U.S. Congressional oversight and criminal and civil sanctions are also applicable to the physical search provisions. FISA authorizes the use of pen registers and trap and trace devices for foreign intelligence collection and international terrorism investigations. FISA also authorizes the FBI to have access to business records related to an investigation and to gather information on foreign intelligence or on international terrorism.

227. Id. § 1824(b).
228. Id. § 1824(c).
229. Id. § 1824(d).
230. Id. § 1825(a).
231. Id. § 1825(d), (f).
232. Id. § 1825(d), (f).
233. Id. § 1825(g).
234. Id. §§ 1826–1828.
235. Foreign Intelligence Surveillance Act, 50 U.S.C.A. § 1842 (West 2003) (amending scattered sections of 50 U.S.C. (1994)). Pen registers are devices which record or decode electronic impulses which identify numbers transmitted on the telephone line. Trap and trace devices capture incoming impulses and identify the originating number. Id.
236. See id. § 1862.
The application of FISA to physical searches has been a subject of debate for over ten years. The first constitutional challenge to the physical search provisions of FISA was in United States v. Nicholson. In a wide-ranging but very brief opinion dismissing defendant’s motion to suppress evidence, the court applied pre-1994 FISA law to FISA as amended, in the context of the new physical search authority. The defendant, Harold Nicholson, was charged with attempted espionage, espionage, and conspiracy to commit espionage in violation of the Espionage Act. During the investigation that led to the defendant’s arrest, his “home, office, car, safe deposit box, and personal effects were subject to electronic surveillance and physical searches conducted under FISA.” The defendant sought the suppression of the evidence obtained from the electronic surveillance and physical searches contending, inter alia, that FISA procedures violate due process, equal protection, separation of powers, the political question doctrine, and the Fourth Amendment.

The issue in United States v. Nicholson was whether the 1994 FISA amendments permitting physical searches for foreign intelligence collection were constitutional. The defendant argued that physical searches were more intrusive than electronic searches and must be reviewed under a more stringent constitutional standard than that applied to electronic surveillance. The United States District Court for the Eastern District of Virginia held, that consistent with prior precedent, “...Fourth Amendment.

239. See generally id.
240. Id. at 590.
241. Id.
242. Id. at 591 n.6.
243. The court in setting up the question to be addressed noted that although he was bound by United States v. Pelton, 835 F.2d 1067, 1074–75 (4th Cir. 1987), cert. denied, 486 U.S. 1010 (1988) (holding that the provisions of FISA are a reasonable accommodation between the governments need for intelligence information and the citizens right to privacy),“this Court addresses the narrow issue of physical searches under FISA as a matter of first impression.” Nicholson, 955 F. Supp. at 590–91.
244. Id. at 591 n.6.
Amendment jurisprudence regards physical entry and electronic surveillance on an even plane, with each subject to the reasonableness requirement of the Fourth Amendment.\(^{245}\) The court concluded that the physical searches in Nicholson were constitutionally indistinguishable from authorized electronic surveillance which had been unanimously upheld by all federal courts deciding the issue.\(^{246}\)

The defendant also argued that the *ex parte* and *in camera* review authorized by FISA violated the due process clause of the Fifth Amendment\(^{247}\) and the right to counsel clause of the Sixth Amendment of the Constitution.\(^{248}\) The court, based on prior case law found that FISA did not violate the Fifth or Sixth Amendments by authorizing *ex parte* and *in camera* review.\(^{249}\) The court was not persuaded by the defendant’s Fifth Amendment equal protection clause argument that FISA is based on

\(^{245}\) *Id.*

\(^{246}\) *Id.*

\(^{247}\) U.S. CONST. amend. V. Amendment V of the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

*Id.*

\(^{248}\) Nicholson, 955 F. Supp. at 590. Amendment VI of the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend.VI.

\(^{249}\) Nicholson, 955 F. Supp. at 592 (citing United States v. Belfield, 692 F.2d 141 (D.C. Cir. 1982) rejecting the argument that FISA violated the Fifth and Sixth Amendments).
invidious distinctions between agents of foreign powers as opposed to agents of domestic powers.\textsuperscript{250}

In addition, the court held that FISA surveillance sanctioned by Article III judges did not violate the separation of powers doctrine.\textsuperscript{251} The defendant argued that asking Article III judges to adjudicate search requests violated the separation of powers doctrine by allowing the judicial branch to interfere with executive branch authority.\textsuperscript{252} The court followed an unbroken line of case law that consistently held that an Article III judge is properly acting in his judicial capacity when sitting on the FISA Court.\textsuperscript{253} The defendant also argued that the surveillance and search violated the political question doctrine and had an impermissible chilling effect on First Amendment free speech.\textsuperscript{254} The district court found these claims without merit citing \textit{United States v. Duggan}\textsuperscript{255} and \textit{ACLU v. Barr}.\textsuperscript{256} Regarding the defendant’s First Amendment concern, the court noted that FISA explicitly provides that the exercise of free speech cannot be the sole basis for considering a United States person a foreign power or agent of a foreign power.\textsuperscript{257} Thus, in the first case to test the constitutionality of the 1994 FISA amendments regarding physical searches, the district court applied pre-amendment FISA federal law to uphold the constitutional validity of the physical search provisions. There are several implica-

\begin{footnotesize}
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\item \textbf{250.} \textit{Id.} at 592. The court held:

[T]his Court holds that FISA does not violate any fundamental constitutionally-protected rights of surveillance subjects. Accordingly, this Court subjects FISA to rationality review and again adopts the reasoning of the Second Circuit in \textit{Duggan}, holding that disparate treatment of foreign and domestic groups is rationally related to the “Act’s purposes of attempting to protect the United States against various types of acts of foreign powers and to acquire information necessary to the national defense or the conduct of foreign affairs.” Accordingly, FISA does not violate the Equal Protection Clause.

\textit{Id.}

\item \textbf{251.} \textit{Id.} at 592–93.

\item \textbf{252.} \textit{Id.} at 592.

\item \textbf{253.} \textit{Id.} at 593.

\item \textbf{254.} \textit{Id.}

\item \textbf{255.} See \textit{United States v. Duggan}, 743 F.2d 59, 74 (2d Cir. 1984).

\item \textbf{256.} \textit{Nicholson}, 955 F. Supp. at 593. See \textit{American Civil Liberties Union v. Barr}, 952 F.2d 457, 464 n.5 (9th Cir. 1991).

\end{enumerate}
\end{footnotesize}
tions to this holding. First, the court signaled that it would not draw a Fourth Amendment intrusiveness distinction between physical searches and electronic surveillance. The court was not persuaded by the defendant’s argument that physical searches of a residence are more intrusive than electronic surveillance. Second, this was the first court to hold that the FISA physical search provisions satisfy the requirements of the Fourth Amendment. Third, and most significantly, the court found physical searches and electronic searches to be “on an even plane” and to be subject to the same reasonableness requirement of the Fourth Amendment. Fourth, the court followed prior precedent involving electronic surveillance and applied that precedent to physical searches in holding the physical search provisions of FISA were a reasonable accommodation between the government’s need for intelligence information and the citizen’s right to privacy.

Therefore, in a very significant decision involving the applicability of the Fourth Amendment to physical searches under FISA, the court denied Nicholson’s motion to suppress evidence. While the legislative history of FISA demonstrates a clear congressional intent to restrain intelligence collection activities that were too intrusive, the court held that the physical search provisions under the Act were not intrusive and struck the appropriate balance between the government’s interest in acquiring intelligence and protecting the rights of citizens.

More recently, in United States v. Usama Bin-Laden, the United States District Court for the Southern District of New York held that there is an exception to the warrant requirement for searches conducted abroad for foreign intelligence collection targeting foreign powers or their agents. The district court also concluded that this exception applied to the physical search of an American citizen's home in a foreign country when there was probable cause to believe that the citizen was an agent of a foreign power and the purpose of the physical search was un-

259. Id. at 590 (quoting United States v. Pelton, 835 F.2d 1067 (4th Cir. 1987)).
261. Id. at 277.
dertaken primarily for the purpose of foreign intelligence collection.\(^\text{262}\) The defendants in Bin-Laden were charged with offenses arising out of their participation in the international terrorist organization known as Al Qaeda.\(^\text{263}\) These charges arose out of the defendant’s involvement in the August 1998 bombings of the U.S. Embassies in Nairobi, Kenya and Dar es Salaam, Tanzania.\(^\text{264}\) El Hage, an American citizen and one of the defendants, sought the suppression of evidence seized from the physical search and electronic surveillance.\(^\text{265}\)

The U.S. intelligence community identified several telephone numbers which were being used by people associated with Al Qaeda.\(^\text{266}\) Several telephone numbers led directly to El-Hage.\(^\text{267}\) Based on this information, the Attorney General authorized the collection of intelligence specifically targeting El-Hage.\(^\text{268}\) In August of 1997, American and Kenyan officials conducted a search of the defendant’s residence in Kenya and seized many items.\(^\text{269}\) Defendant El-Hage and others sought suppression of the evidence which was seized during the warrantless search of his home in Kenya.\(^\text{270}\) He also sought suppression of evidence derived from the electronic surveillance of several telephone lines, including his cellular phone.\(^\text{271}\) In response to defendant’s motion to suppress, the government argued that the searches were primarily for the purpose of foreign intelligence collection and not subject to the warrant requirement of the Fourth Amendment.\(^\text{272}\)

Thus, the Bin-Laden case raised significant issues of first impression.\(^\text{273}\) Among these was the applicability of the Fourth Amendment to searches conducted abroad for foreign intelligence purposes targeting United States persons believed to be agents

\(^{262}\) Id. at 285.
\(^{263}\) Id. at 268.
\(^{264}\) Id.
\(^{265}\) Id.
\(^{266}\) Id.
\(^{267}\) Id. at 269.
\(^{268}\) Id.
\(^{269}\) Id.
\(^{270}\) Id.
\(^{271}\) Id.
\(^{272}\) Id. at 270.
\(^{273}\) Id.
of a foreign power. The court analyzed the cases finding an exception to the warrant requirement for foreign intelligence collection and concluded that the basis for the exception rested in the constitutional grant to the executive branch of power over foreign affairs. The court also noted that “[w]arrantless foreign intelligence collection has been an established practice of the executive branch for decades.” Citing United States v. Butenko, the court observed that in some circumstances the imposition of a warrant requirement may be a disabling burden on the executive branch. Thus, in finding an exception to the warrant requirement to conduct physical searches of American citizens abroad who are targets of foreign intelligence collection, the court, quoting United States v. Truong reasoned that “[a] warrant requirement would add a procedural hurdle that would reduce the flexibility of executive foreign intelligence initiatives [and] in some cases delay executive response to foreign intelligence threats.”

In recognizing the legitimacy of a warrant exception the court concluded that the power of the executive branch to conduct foreign intelligence collection would be significantly frustrated.
by the imposition of a warrant requirement.\textsuperscript{281} Therefore, the court adopted the foreign intelligence exception to the warrant requirement for searches targeting foreign powers or their agents, which are conducted abroad.\textsuperscript{282} The court went on to make it clear that this warrant exception applies to a foreign power or an agent of a foreign power and that the duration continues for as long as the primary purpose of the search is for foreign intelligence collection.\textsuperscript{283} Thus, the defendant's motion to suppress evidence from the physical search of his Kenya residence and electronic surveillance was denied.\textsuperscript{284}

While the United States Supreme Court has not addressed the issue of warrantless physical searches in the context of FISA, every federal court that has considered the issue has concluded, consistent with the jurisprudence before the 1994 FISA amendments, that the Fourth Amendment warrant requirements are flexible depending on the interests of the government at stake.\textsuperscript{285} Where the governmental interests involve national security and the targets of the physical searches and electronic surveillance are for the purposes of foreign intelligence collection, then an exception to the usual warrant requirement is justified based on the expansive power of the executive branch in foreign affairs.

Through FISA, the Congress and the courts have struck the appropriate balance between individual privacy and governmental interests. They have narrowly set out the circumstances under which a surveillance order can be issued and limited the dissemination of collected information that falls outside of the general purpose of the authorized surveillance. For example, warrantless searches are only authorized in the narrowest of circumstances and for a limited time period against specific targets.\textsuperscript{286} To the extent that a United States person is in-

\begin{itemize}
\item \textsuperscript{281} Bin Laden, 126 F. Supp. 2d at 277.
\item \textsuperscript{282} Id.
\item \textsuperscript{283} Id. at 278.
\item \textsuperscript{284} Id. at 288. Cf. United States v. Squillacote, 221 F.3d 542, 555 (4th Cir. 2000) (holding that FISA surveillance was supported by probable cause and agents did not exceed scope of search warrant for defendant's residence).
\item \textsuperscript{285} See generally Brown & Cinquegrana, supra note 237, at 108–09, 114.
\item \textsuperscript{286} Foreign Intelligence Surveillance Act, 50 U.S.C. § 1822 (1994).
\end{itemize}
involved without his or her consent, minimization procedures must be followed.\textsuperscript{287}

\section*{C. The Anticipated Effects of the USA Patriot Act}

1. The Effect of The USA Patriot Act on Civil Liberties

The national security interests of the U.S. government have dramatically changed because of the terrorist attacks of September 11, 2001.\textsuperscript{288} In response to the terrorist attacks, Congress has passed several statutes that have been criticized as invading individual privacy for the sake of national security.\textsuperscript{289} How far can the United States government go to protect national security? May it significantly intrude on individual privacy rights? The USA Patriot Act makes significant amendments to over fifteen statutes including FISA, Title III of the Omnibus Crime Control and Safe Streets Act of 1968,\textsuperscript{290} and the International Economic Emergency Powers Act.\textsuperscript{291}

The USA Patriot Act introduced “sweeping changes”\textsuperscript{292} to the landscape of national security law by amending the following statutes:

- The wiretap statute (Title III of the Omnibus Crime Control and Safe Streets Act)\textsuperscript{293}
- The Electronic Communications Privacy Act\textsuperscript{294}
- The Computer Fraud and Abuse Act\textsuperscript{295}

\textsuperscript{287} Id.
\textsuperscript{288} David E. Sanger & Steven Weisman, 	extit{Bush's Aides Envision New Influence in Region}, N.Y. TIMES, Apr. 10, 2003, at B11.
\textsuperscript{289} Seth Rosenfeld, 9-11-01; Looking Back, Looking Ahead; A Nation Remembers; Patriot Act's Scope, Secrecy Ensnare Innocent, Critics Say, S.F. CHRON., Sept. 8, 2002, at A1.
\textsuperscript{292} Electronic Privacy Information Center, The USA Patriot Act \textit{supra} note 15.
• The Foreign Intelligence Surveillance Act\textsuperscript{296}
• The Pen Register and Trap and Trace Statute\textsuperscript{297}
• Money Laundering Control Act\textsuperscript{298}
• Bank Secrecy Act\textsuperscript{299}
• Right to Financial Privacy Act\textsuperscript{300}
• Fair Credit Reporting Act\textsuperscript{301}

The Congressional Research Service Report for Congress on the USA Patriot Act summarizes the statute generally, stating that it:

Give[s] federal law enforcement and intelligence officers greater authority (at least temporarily) to gather and share evidence from wire and electronic surveillance; amend[s] federal money laundering laws, particularly those involving overseas financial activities; create[s] new federal crimes, increases the penalties for existing federal crimes, and adjusts existing federal criminal procedure, particularly with respect to acts of terrorism; modify[es] immigration law [by] increasing the ability of federal authorities to prevent foreign terrorists from entering the U.S., to detain foreign terrorist suspects, to deport foreign terrorists, and to mitigate the adverse immigration consequences for the foreign victims of September 11; authorize[es] appropriations to enhance the capacity of immigra-

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The implementation of the USA Patriot Act has met a cool reception by many because of the potential for law enforcement abuse. This concern is captured succinctly by former Clinton White House Chief of Staff John Podesta’s observations on the Act upon its adoption:

The events of September 11 convinced...overwhelming majorities in Congress that law enforcement and national security officials need new legal tools to fight terrorism. But we should not forget what gave rise to the original opposition—many aspects of the bill increase the opportunity for law enforcement and the intelligence community to return to an era where they monitored and sometimes harassed individuals who were merely exercising their First Amendment rights. Nothing that occurred on September 11 mandates that we return to such an era.

Mr. Podesta’s concerns echo the proposition made at the beginning of this Article that the national security legal regime has come full circle. The same concerns that fueled the passage of FISA—overzealous law enforcement and intelligence collection abuse by the executive branch—are now the exact concerns levied at The USA Patriot Act’s enforcement. These concerns may lead to significant changes to the USA Patriot Act currently being considered in the draft amendments titled USA Patriot Act II.

Mr. Podesta is not alone in his concern about the enforcement of the USA Patriot Act. Elliot Mincberg, Legal Director for People for the American Way has been very critical of Attorney General Ashcroft and the DOJ.

304. See Draft USA Patriot Act II, supra note 27.
enforcement powers in areas that are totally unrelated to terrorism.\textsuperscript{306}

Senator Russ Feingold, (D-Wisconsin) was the only Senator to vote against the Act.\textsuperscript{307} He was particularly concerned about the Act’s impact on civil liberties. He said:

Now here’s where my cautions in the aftermath of the terrorist attacks and my concerns over the reach of the anti-terrorism bill come together. To the extent that the expansive new immigration powers that the bill grants to the Attorney General are subject to abuse, who do we think is most likely to bear the brunt of the abuse? It won’t be immigrants from Ireland, it won’t be immigrants from El Salvador or Nicaragua it won’t even be immigrants from Haiti or Africa. It will be immigrants from Arab, Muslim and South Asian countries. In the wake of these terrible events our [sic] government has been given vast new powers and they may fall most heavily on a minority of our population who already feel particularly acutely the pain of this disaster.\textsuperscript{308}

The concerns about protection of civil liberties have become more pronounced recently in light of the DOJ’s report to Congress in September 2003, citing more than a dozen cases not directly related to terrorism that used the USA Patriot Act’s tools to gather evidence.\textsuperscript{309} Many believe the USA Patriot Act gives the government too much authority to intrude on individual privacy.\textsuperscript{310} Anthony Romero, Executive Director of the American Civil Liberties Union, said, “Once the American public understands that many of the powers granted to the federal government apply to much more than just terrorism, I think the opposition will gain momentum.”\textsuperscript{311} Senator Patrick J. Leahy of

\begin{itemize}
\item \textsuperscript{306} Id.
\item \textsuperscript{307} Electronic Privacy Information Center, The USA Patriot Act, supra note 15.
\item \textsuperscript{309} Report to Congress on Implementation of § 1001 of the USA Patriot Act (as required by § 1001(3) of Pub. L 107–56) (July 17, 2003), available at http://www.usdoj.gov/oig/special/03-07/index.htm; see also Lichtblau, supra note 305, at A1.
\item \textsuperscript{310} Lichtblau, supra note 306, at A1, A21.
\item \textsuperscript{311} Id. at A21.
\end{itemize}
Vermont, the ranking Democrat on the Judiciary Committee, said,

the government is taking shortcuts around the criminal laws’
...we did not intend for the government to shed the traditional
tools of criminal investigation, such as grand jury subpoenas
governed by well established precedent and wiretaps strictly
monitored by federal judges. 312

In contrast, the DOJ, maintains that it is using the expanded
powers of the USA Patriot Act to fight terrorists. 313 Attorney
General Ashcroft tried to defend the USA Patriot Act in Sep-
tember 2003 saying, “We have used these tools 314 to prevent ter-
rorists from unleashing more death and destruction on our
soil.” 315 Thus, the tension between the USA Patriot Act and civil
liberties has reached a boiling point and may ultimately only be
resolved by the judiciary.

2. The Effect of the USA Patriot Act on the Division Between
the Intelligence and Law Enforcement Community

The USA Patriot Act also appears to erode the division be-
tween the intelligence and law enforcement communities. 316 The
USA Patriot Act amended FISA to authorize consultation
among federal law enforcement officers regarding information
acquired from electronic surveillance or physical searches for
terrorism and related investigations or protective measures. 317
The FBI is now allowed to request telephone and transactional

312. Id. (quoting Senator Leahy).
313. Id.
314. The Act provides enhanced surveillance procedures, such as, permitting
the seizure of voice mail messages under a warrant; extending the scope
of subpoenas for records of electronic communications to include the length of
service utilized, temporary assigned network addresses, and the means and
source of payment; providing district courts authority to allow a delay of re-
quired notice to the target of the warrant of the execution of a warrant if im-
mediate notice may have an adverse result; and increasing the duration of
FISA surveillance of a non-United States person who is an agent of a foreign
power. See USA Patriot Act, Pub L. 107–56 §§ 209, 210, 213, 115 Stat. 272,
283 (to be codified at 50 U.S.C. § 401(a)).
316. See id. USA Patriot Act, Pub L. 107–56, § 504, 115 Stat. 272, 283 (to be
codified at 50 U.S.C. § 401(a)).
codified at 50 U.S.C. § 401(a)).
records, financial records, and consumer reports in any investigation to protect against international terrorism or clandestine intelligence activities, as long as the investigation is not conducted solely on the basis of activities protected by the First Amendment.\footnote{Id. \S 505, 365–66.} Section 216 amends the federal criminal code to permit a court, upon application by a United States Attorney, to issue an \textit{ex parte} order authorizing the installation and use of a pen register or trap and trace devices anywhere within the U.S.\footnote{Id. \S 216, 288–90.} The order would apply to any person or entity providing wire or electronic communication service in the U.S whose assistance may facilitate execution of an order.\footnote{Id.}

Section 403 of the USA Patriot Act also raises individual privacy concerns.\footnote{Id. \S 403, 343–45.} It amends the Immigration and Nationality Act\footnote{Immigration and Nationality Act, 8 U.S.C. \S1105 (1952).} to require the Attorney General and the FBI to provide the Department of State and the Immigration and Naturalization Service (“INS”) with access to specified criminal history extracts to determine if an applicant for a visa has a criminal history.\footnote{USA Patriot Act, Public Law No. 107–56, \S 403, 115 Stat. 272, 343–45.} Section 403 also directs the Attorney General and the Secretary of State to develop technology standards to identify visa applicants.\footnote{Id. \S 403, 344.} This new technology will be the basis for an electronic system of law enforcement and intelligence sharing available to consular, law enforcement, intelligence and federal border inspection personnel.\footnote{Id. \S 414, 353–54.} The USA Patriot Act further amends the Immigration and Nationality Act to broaden the scope of aliens ineligible for admission and to allow for the deportation of aliens due to terrorist activities.\footnote{Id. \S 411, 345–50.} Section 414 requires that the Attorney General and Secretary of State implement an integrated entry and exit data system for airports, seaports, and land border ports of entry, with all deliberate speed.\footnote{Id. \S 414, 353–54.} These amendments are additional examples of the dis-
integration of the wall between intelligence collection and law enforcement.

The metaphorical “wall” referred to is the wall between the intelligence community and law enforcement that evolved through judicial interpretations of FISA.\textsuperscript{328} The wall concept is based on judicial assumptions linked to the statutory minimization procedures of FISA.\textsuperscript{329} These minimization procedures were designed to restrict the use of foreign intelligence material collected during electronic surveillance.\textsuperscript{330} The DOJ explains the development of the wall best in its report to Congress:

The wall between intelligence and law enforcement resulted from perceived differences between legal authorities that permit the Federal Bureau of Investigation (FBI) to engage in electronic surveillance in the course of its foreign counterintelligence function, on the one hand, and its law enforcement function on the other. These perceived differences created an artificial dichotomy between intelligence gathering and law enforcement, and FISA and Title III (which authorizes electronic surveillance in criminal cases).

As enacted in 1978, FISA required that “the purpose of electronic surveillance is to obtain foreign intelligence information,” a term that was (and still is) defined to include information necessary to the ability of the United States to “protect” against espionage or international terrorism. [citations omitted] Courts interpreted “the purpose” to mean “the primary purpose,” and they interpreted “foreign intelligence informa-

\textsuperscript{328} In re Sealed Case No. 02–001, 310 F.3d 717, 720 (Foreign Intel. Surv. Rev. Ct. 2002).
\textsuperscript{329} Id. at 721.
\textsuperscript{330} Id. The FISA Review Court concluded that by minimizing retention,

Congress intended that “information acquired, which is not necessary for obtaining[,] producing, or disseminating foreign intelligence information, be destroyed where feasible.” [citation omitted]. Furthermore, “[e]ven with respect to information needed for an approved purpose, dissemination should be restricted to those officials with a need for such information.” [citation omitted] The minimization procedures allow, however, the retention and dissemination of non foreign intelligence information which is evidence of ordinary crimes for preventative or prosecutorial purposes. [citation omitted] Therefore, if through interceptions or searches, evidence of “a serious crime totally unrelated to intelligence matters” is incidentally acquired, the evidence is “not...required to be destroyed.”

\textit{Id.} at 713.
tion” to include information necessary to the ability of the United States to protect against espionage or international terrorism using methods other than law enforcement. Thus, according to this judicial interpretation of FISA, that statute could be used only if the primary purpose of surveillance or a search was the protection of national security using non-law enforcement methods; gathering evidence to support the prosecution of a foreign spy or terrorist could be a significant purpose of the surveillance or search, but only if that prosecutorial purpose was clearly secondary to the non-law enforcement purpose. As a practical matter, courts determined the government’s purpose for using FISA by examining the degree of coordination between intelligence and law enforcement officials: the more information and advice exchanged between these officials, the more likely courts would be to find that the primary purpose of the surveillance or search was law enforcement, not intelligence gathering. This legal structure created what the [FISA Review Court] termed “perverse organizational incentives,” expressly discouraging coordination in the fight against terrorism.331

In order to better obtain untainted FISA surveillance orders, the DOJ issued written guidelines in July 1995 that explained the necessity of maintaining limited contact between “[d]epartment personnel involved in foreign intelligence collection and those involved in law enforcement.”332 Thus, intelligence information could be “shared with prosecutors and criminal investigators only where that information established that a crime has been, is being, or will be committed.”333 When these requirements were met, “intelligence officials could seek approval to ‘throw information over the wall.’”334 The decisions regarding when to share information, however, rested entirely with intelligence officials, probably those least able to make an informed decision regarding what evidence is pertinent to a criminal case.335

332. Id. at 14.
333. Id.
334. Id.
335. Id. The DOJ described the wall arrangement in the following manner:
Thus, the wall was effective in preventing cooperation and coordination between intelligence and law enforcement, precisely the opposite of what is necessary in order to respond to quickly developing events involving terrorist activities within and outside of the U.S. Before the USA Patriot Act, the wall “often precluded effective and vital information sharing between the intelligence community and law enforcement.”\(^{336}\) The wall was the result of a judicial belief that it could approve applications for electronic surveillance as long as the government’s objective was not “primarily” directed toward criminal prosecution of foreign agents.\(^{337}\)

The Attorney General addressed this “wall” problem and others through provisions of the USA Patriot Act.\(^{338}\) The Act made two significant changes to FISA. First, Section 218 removed the “primary purpose” language and replaced it with “a significant purpose” standard, permitting the use of FISA when “a significant purpose of the search or surveillance was foreign intelligence.”\(^{339}\) Second, the USA Patriot Act made it clear in Section 504(a) that “coordination between intelligence and criminal

This policy proved to be wholly unworkable, as it entrusted the decision whether to share information with those who were not best positioned to apply the applicable standards. Only the law enforcement agents and prosecutors pursuing a particular criminal investigation can determine what evidence is pertinent to their case. In contrast, intelligence officials, who focus on the development of foreign intelligence for national security purposes rather than collecting and reviewing information for a particular criminal investigation, rarely consider the potential evidentiary value of a particular piece of information, unless such information self-evidently proves that a crime has been or may be committed. Thus, as a matter both of perceived legal imperative and of Department culture, it was impossible to permit full coordination between intelligence and law-enforcement personnel and to combine foreign intelligence and law enforcement information into a seamless body of knowledge. Indeed, law enforcement and intelligence personnel could not speak openly to each other and share information beyond the piecemeal sharing envisioned by the previously existing rules. As a result, sharing under these guidelines was relatively rare and generally not meaningful.

\(^{336}\) Id. at 13.  
\(^{337}\) Id. at 13–14.  
\(^{338}\) Id. at 14–15.  
\(^{339}\) Id. at 15.
personnel was not the grounds for denying a FISA application.\textsuperscript{340} Moreover, after the “enactment of the USA Patriot Act, the [Justice] Department promulgated new procedures...that expressly authorized — and indeed required — coordination between intelligence and law enforcement.”\textsuperscript{341} The legality of these new procedures became the subject of a FISA Court opinion which rejected them in part on May 17, 2002.\textsuperscript{342} However, the new procedures were later approved by the FISA Review Court on November 18, 2002.\textsuperscript{343}

The FISA Review Court held that the wall imposed by the various agencies as a result of judicial interpretation was not legally required, thus clearing the way for more information sharing between law enforcement and intelligence authorities.\textsuperscript{344}

In the first constitutional test of the USA Patriot Act’s amendment to FISA, the FISA Review Court considered the issue of whether the FISA Court decision imposing certain requirements and limitations on the grant of a FISA Court surveillance order, was consistent with the statutory requirements as amended by the USA Patriot Act.\textsuperscript{345}

This case involved the request by the Attorney General for the FISA Court to “vacate the minimization and ‘wall’ procedures in all cases now or ever before the Court, including the Court’s adoption of the Attorney General’s July 1995 intelligence sharing procedures, which are not consistent with new intelligence sharing procedures.”\textsuperscript{346} The FISA Court, though it granted the requested surveillance order, imposed restrictions which the government contends are not required by FISA. The FISA Court required that the DOJ maintain the wall between law enforcement and intelligence collection, notwithstanding the USA Patriot Act amendments and the Attorney General’s

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id.
\item Id. See In re All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611 (Foreign Intel. Surv. Ct. 2002).
\item DOJ Report, supra note 331, at 15; In re Sealed Case, 310 F.3d 717.
\item In re Sealed Case, 310 F.3d at 720.
\item Id. at 719–20.
\item In re All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d at 613.
\end{enumerate}
\end{footnotesize}
new procedures expressly authorizing coordination between intelligence and law enforcement.\textsuperscript{347}

Apparently, the FISA Court was concerned that the DOJ had misinterpreted the USA Patriot Act to provide more consultative authority than it thought FISA allowed. Accordingly, the court fashioned a “chaperone requirement,”\textsuperscript{348} which provided that the Office of Intelligence Policy and Review (“OIPR”) be invited to all consultative meetings between the FBI and the Criminal Division of the DOJ in order to coordinate efforts against international terrorism.\textsuperscript{349}

The FISA Review Court did not agree with the FISA Court’s interpretation of FISA. The FISA Review Court observed that the FISA Court’s interpretation was based on an erroneous “assumption that FISA constructed a barrier between counterintelligence/intelligence officials and law enforcement...”\textsuperscript{350} However, the FISA Review Court held that the language of the statute did not support the assumption.\textsuperscript{351} It agreed with the gov-

\textsuperscript{347} Id. at 625. The FISA Court modified the minimization procedures requested by the government as follows:

Notwithstanding the foregoing, law enforcement officials shall not make recommendations to intelligence officials concerning the initiation, operation, continuation or expansion of FISA searches or surveillances. Additionally, the FBI and the Criminal Division shall ensure that law enforcement officials do not direct or control the use of the FISA procedures to enhance criminal prosecution, and that advice intended to preserve the option of a criminal prosecution does not inadvertently result in the Criminal Division’s directing or controlling the investigation using FISA searches and surveillances toward law enforcement objectives.

\textit{Id.} at 625. The court further held:

These modifications are intended to bring the minimization procedures into accord with the language used in the FISA, and reinstate the bright line used in the 1995 procedures, on which the Court has relied. The purpose of minimization procedures as defined in the Act, is not to amend the statute, but to protect the privacy of Americans in these highly intrusive surveillances and searches, “consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information.

\textit{Id.}.

\textsuperscript{348} In re Sealed Case, 310 F.3d at 720.

\textsuperscript{349} Id. at 721.

\textsuperscript{350} Id.

\textsuperscript{351} Id.
ernment’s argument that the judicially imposed wall was neither supported by the statute nor its legislative history.\textsuperscript{352} Moreover, the court also agreed with the government’s alternative argument that even if the “primary purpose test” was a legitimate construction of FISA prior to the passage of the USA Patriot Act, it was no longer a legitimate construction in light of the amendments to FISA.\textsuperscript{353} Furthermore, the “significant purpose” language should now eliminate any doubt that the USA Patriot Act intended to allow information sharing whether or not the purpose was intelligence collection or criminal prosecution.\textsuperscript{354}

The FISA Review Court noted that “it does not seem that FISA, at least as originally enacted, even contemplated that the FISA Court would inquire into the government’s purpose in seeking foreign intelligence information.”\textsuperscript{355} The FISA Review Court noted that Congress required a certification of purpose under Section 1804 in order to prevent the practice of targeting a foreign power when the purpose of the surveillance was to collect information on an individual “for other than foreign intelligence purposes.”\textsuperscript{356} However, Congress placed no restriction on the government’s use of collected foreign intelligence information to prosecute foreign intelligence crimes.\textsuperscript{357} Both the House and Senate made it clear that prosecution was a way to address foreign intelligence crimes.

Thus, the FISA Review Court concluded that the FISA Court incorrectly continued to rely on the wall concept based on a misinterpretation of the statute and the minimization procedures. Moreover, the FISA Review Court held that the FISA Court continued its erroneous interpretation despite the passage of the USA Patriot Act which amended FISA to change “the pur-

\begin{itemize}
  \item[352.] \textit{Id.} at 723.
  \item[353.] \textit{Id.} at 734.
  \item[354.] \textit{Id.} at 734–35.
  \item[355.] \textit{Id.} at 723. The FISA Review Court relied on sections 1804 and 1805 governing the standards a FISA court judge is to use in granting or denying a surveillance order. The Court concluded that nothing in the law required the court to inquire into the government’s purpose in seeking foreign intelligence information. \textit{Id.}
  \item[356.] \textit{Id.} at 725.
  \item[357.] \textit{Id.}
  \item[358.] \textit{Id.}
\end{itemize}
pose’ language in 1804(a)(7)(B) to ‘a significant purpose.’” The USA Patriot Act amendments to FISA “expressly sanctioned consultation and coordination between intelligence and law enforcement officials.” Despite this express provision, the FISA Court relied upon the Attorney General’s 1995 procedures as minimization procedures and continued to interpret FISA to require the wall. Now armed with the new USA Patriot Act amendments, the Attorney General interpreted FISA much differently by approving “new Intelligence Sharing Procedures.” The Attorney General’s new 2002 procedures “superseded prior procedures and were designed to permit the complete exchange of information and advice between intelligence and law enforcement officials.” These new procedures “eliminated the ‘direction and control’ test and allowed the exchange of advice between the FBI, OIPR, and the Criminal Division regarding ‘the initiation, operation, continuation, or expansion of FISA searches or surveillance.’” Notwithstanding the Attorney General’s position on the new procedures, the FISA Court ordered the adoption of the 2002 procedures “with modifications, as minimization procedures to apply in all cases.”

In light of the legislative history, the FISA Review Court concluded that there was no basis for the FISA Court to rely on the statute “to limit criminal prosecutors’ ability to advise FBI intelligence officials on the initiation, operation, continuation, or

359. *Id.* at 728–29.
360. *Id.* at 729.
361. *Id.* at 730.
362. *Id.* at 729.
363. *Id.*
364. *Id.*
365. *Id.* The FISA Review Court held:

Essentially, the FISA court took portions of the Attorney General’s augmented 1995 procedures—adopted to deal with the primary purpose standard—and imposed them generically as minimization procedures. In doing so, the FISA court erred. It did not provide any constitutional basis for its action—we think there is none—and misconstrued the main statutory provision on which it relied. The court mistakenly categorized the augmented 1995 Procedures as FISA minimization procedures and then compelled the government to utilize a modified version of those procedures in a way that is clearly inconsistent with the statutory purpose.

*Id.* at 730. The FISA Review Court went on to discuss the statutory definition of the minimization procedures and their purpose. See *id.* at 731.
expansion of FISA surveillances to obtain foreign intelligence information, even if such information includes evidence of a foreign intelligence crime.\textsuperscript{366}

The conclusion reached by the FISA Review Court is supported by the government’s actions seeking amendment to FISA through the USA Patriot Act. The government, in order to avoid the “primary purpose” requirement imposed by the courts sought an amendment to section 1804(a)(7)(B) which would only require “a purpose” rather than the “primary purpose” language.\textsuperscript{367} Congress settled on the language “a significant purpose” so as not to give the government too much latitude.\textsuperscript{368} Congress understood that, with this language, it was relaxing the “requirement that the government show that its primary purpose [in seeking the surveillance] was other than criminal prosecution.”\textsuperscript{369}

While no committee reports accompanied the USA Patriot Act, floor statements in the Senate demonstrate congressional intent.\textsuperscript{370} Senator Patrick J. Leahy, Senate Judiciary Chairman said “[t]his bill... break[s] down traditional barriers between law enforcement and foreign intelligence. This is not done just to combat international terrorism, but for any criminal investigation that overlaps a broad definition of ‘foreign intelligence.’”\textsuperscript{371} The FISA Review Court also cited a statement made on the floor by Senator Feinstein, a supporter of the USA Patriot Act.\textsuperscript{372}

\textsuperscript{366} Id. at 731.
\textsuperscript{367} Id. at 732.
\textsuperscript{368} Id.
\textsuperscript{369} Id.
\textsuperscript{370} Id.
\textsuperscript{371} Id.
\textsuperscript{372} Recognizing that the ultimate object of the USA Patriot Act was to make it easier to collect foreign intelligence information under FISA, Senator Feinstein said:

Rather than forcing law enforcement to decide which purpose is primary — law enforcement or foreign intelligence gathering, this bill strikes a new balance. It will now require that a “significant” purpose of the investigation must be foreign intelligence gathering to proceed with surveillance under FISA. The effect of this provision will be to make it easier for law enforcement to obtain a FISA search or surveillance warrant for those cases where the subject of the surveillance is both a potential source of valuable intelligence and the
Congress was well aware that the USA Patriot Act would break down barriers between intelligence collection and law enforcement. Senator Feingold expressed concern that the “significant purpose” amendment may be used to abuse Fourth Amendment protections. However, the balance between national security and civil liberties was struck by Congress in the amendments to FISA. For those who were concerned that the amendments gave the government too much power, Senator Leahy suggested that “it will be up to the courts to determine how far law enforcement agencies may use FISA for criminal investigation and prosecution beyond the scope of the statutory definition of foreign intelligence information.”

Thus, the FISA Review Court correctly concluded that the USA Patriot Act amendments to FISA,

by using the word “significant,” eliminated any justification for the FISA Court to balance the relative weight the government places on criminal prosecution as compared to other counterintelligence responses. If the certification of the application’s purpose articulates a broader objective than criminal prosecution—such as stopping an ongoing conspiracy—and includes other potential non-prosecutorial responses, the government meets the statutory test.

The FISA Review Court further clarified its point by noting, “of course, if the court concluded that the government’s sole objective was merely to gain evidence of past criminal conduct—even foreign intelligence crimes—to punish the agent rather than halt ongoing espionage or terrorist activity, the application should be denied.”

potential target of a criminal prosecution. Many of the individuals involved in supporting the September 11 attacks may well fall into both of these categories.

Id. at 733 (citing 147 CONG. REC. S10591 (Oct. 11, 2003)).
373. See In re Sealed Case, 310 F.3d at 733.
374. Id.
375. Id.
376. Id. at 735.
377. Id. The FISA Review Court added that “ordinary crimes may be inextricably intertwined with foreign intelligence crimes.” For example, international terrorists may rob banks in order to finance the purchase of weapons of mass destruction. Evidence of the bank robbery should fall under the intelligence collection umbrella. However, the point is that the FISA process was not intended to be used solely as a “device to investigate wholly unrelated
3. The Effect on Individual Privacy Concerns

Armed with the USA Patriot Act, the DOJ, FBI and the intelligence agencies began combating global terrorism. The USA Patriot Act contains enhanced immigration provisions which, among other things, expands the “terrorism-related grounds” for deportation and permits the Attorney General to detain alien terrorist suspects for certain time periods.\(^{378}\) As of January 11, 2002, the DOJ reported the detentions of 725 people.\(^{379}\) The DOJ released the number of people being detained around the U.S, but did not release the names, arrest or custody information of the detained.\(^{380}\) Only the nationality, date of arrest, legal charge, and date of charging document were released.\(^{381}\) In response, advocacy groups including the American Civil Liberties Union (“ACLU”) and the American-Arab Anti-Discrimination Committee have filed lawsuits against the government, demanding information about the detainees and requesting they be provided with lawyers.\(^{382}\) These advocacy groups have alleged that in more than a dozen instances, thirty days had passed between the arrest of a detainee and the actual filing of a charge.\(^{383}\) The ACLU and other advocacy groups are concerned that the detainees are being denied access to lawyers.\(^{384}\) Detainees are only allowed visits if the person knows the name and alien number of the person.\(^{385}\) However, the DOJ will not release this information.\(^{386}\) Therefore, some immigration lawyers are concerned that many of those detained in the terrorism investigation that are not represented by counsel will

ordinary crimes.” If the law is abused by those charged with its enforcement, they can and should be held accountable. \(\text{Id. at 736.}\)


\(^{380}\) \textit{Id.}

\(^{381}\) \textit{Id.}

\(^{382}\) \textit{Id.}

\(^{383}\) \textit{Id.}

\(^{384}\) \textit{Id.}

\(^{385}\) \textit{Id.}

\(^{386}\) \textit{Id.}
agree to deportation as the quickest way to get out of jail.\textsuperscript{387} One of the few ways immigration lawyers can help those detained is by giving “know your rights” presentations in jail.\textsuperscript{388}

In its review of the USA Patriot Act, the ACLU criticized the Act as compromising Fourth Amendment protections. The ACLU argued that the Act eviscerated the probable cause requirement of the Fourth Amendment,\textsuperscript{389} limited judicial oversight of telephone and internet surveillance,\textsuperscript{390} put the CIA back in the business of spying on Americans,\textsuperscript{391} and allowed for detention and deportation of people engaging in innocent associational activity.\textsuperscript{392}

The ACLU argues that the USA Patriot Act limits judicial oversight of electronic surveillance by changing current law.\textsuperscript{393} The ACLU contends that the low hurdle required to get telephone numbers traced during an ongoing criminal investigation is now imported, through the USA Patriot Act, to internet communications which involve more content than just telephone numbers alone.\textsuperscript{394} Under current law, in order to obtain a pen register or trap and trace order, a law enforcement officer need only certify that the information sought is “relevant to an ongoing criminal investigation.”\textsuperscript{395} The order requires a “tele-

\begin{align*}
\textsuperscript{387} & \text{Id.} \\
\textsuperscript{388} & \text{Id.} \\
\textsuperscript{389} & \text{ACLU Freedom Network, How the USA Patriot Act Enables Law Enforcement to Use Intelligence Authorities to Circumvent the Privacy Protections Afforded in Criminal Cases (Oct. 23, 2001), at http://archive.aclu.org/congress/1102301i.html [hereinafter Circumventing Privacy Protections].} \\
\textsuperscript{390} & \text{ACLU Freedom Network, How the USA Patriot Act Limits Judicial Oversight of Telephone and Internet Surveillance (Oct. 23, 2001), at http://archive.aclu.org/congress/1102301g.html [hereinafter Judicial Oversight].} \\
\textsuperscript{391} & \text{ACLU Freedom Network, How the USA Patriot Act Puts the CIA Back in the Business of Spying on Americans (Oct. 23, 2001), at http://archive.aclu.org/congress/1102301g.html [hereinafter Business of Spying on Americans].} \\
\textsuperscript{392} & \text{ACLU Freedom Network, How the USA Patriot Act Allows for Detention and Deportation of People Engaging in Innocent Associational Activity (Oct. 23, 2001), at http://archive.aclu.org/congress/1102301h.html [hereinafter Detention and Deportation of People].} \\
\textsuperscript{393} & \text{American Civil Liberties Union, Surveillance Under the USA Patriot Act, (Oct. 23, 2001), at http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12263&c=206.} \\
\textsuperscript{394} & \text{Nancy Chang, The USA Patriot Act: What’s So Patriotic About Trampling on The Bill of Rights, Center for Constitutional Rights, at 5 http://www.ccr-ny.org/vz/Whatsnews/USA_Patriot_Act.pdf (last visited Oct. 7, 2003).} \\
\textsuperscript{395} & \text{Judicial Oversight, supra note 390.}
\end{align*}
phone company to reveal the ‘numbers dialed’ to and from a particular telephone.”396 Under Section 216 of the USA Patriot Act, the judge has no discretion and “must grant the order upon receiving the certification.”397 “Section 216 of the USA Patriot Act...extend[s] this low threshold of proof to internet communications...”398 These communications reveal more content than simply the numbers dialed to or from a telephone.399 Unlike with telephone calls, the email address cannot always be easily separated from the content of the message.400

The ACLU also criticizes the USA Patriot Act for putting the CIA back in the business of spying on American citizens.401 This concern is based on the fact that the FBI, CIA and NSA spied on student activists and others who opposed the war in Vietnam during the 1960s and 1970s.402 FISA was passed in response to this abuse of power.403 The USA Patriot Act “permits wide sharing of sensitive information gathered in criminal investigations by law enforcement agencies with intelligence agencies including the CIA, and the NSA, and other federal agencies including the INS, Secret Service and Department of Defense.”404 The ACLU fears that the USA Patriot Act gives the government a dangerously enhanced role in domestic intelligence gathering against U.S citizens,405 a role that is “contrary to the statutory prohibition in the CIA charter barring it from engaging” in domestic security operations.406

Additionally, the ACLU contends that the Act allows for the deportation of people who engage in innocent First Amendment associational activity.407 Current law under the Immigration and Nationality Act (“INA”),408 permits the Secretary of State to

396. Id.
397. Id.
398. Id.
399. Id.
400. Id.
401. Business of Spying on Americans, supra note 391.
402. Id.
403. Id.
404. Id.
405. Id.
406. Id. See also 50 U.S.C. § 403(3)(d)(1).
407. Detention and Deportation of People, supra note 392.
designate foreign groups with various procedural safeguards. The ACLU contends that the USA Patriot Act creates a high risk of deporting innocent people for innocent associational activity with political groups that the government identifies as terrorist organizations. Moreover, the ACLU argues that the Act puts the burden on the immigrant to prove that he did not know that his assistance would further terrorist activity. The ACLU contends that this raises the specter of punishing innocent people for association with unpopular causes and is reminiscent of McCarthyism.

While the ACLU’s concerns are valid, they do not accurately reflect the intent of the legislative provisions or their operation. The USA Patriot Act enhances the ability of our intelligence and law enforcement communities to detect and prevent terrorist attacks.

Before the USA Patriot Act was adopted, local courts could only authorize wiretaps within the jurisdiction of the court. Search warrants issued for email communications could not extend beyond the jurisdiction of the court issuing it. For example, if a court in Tampa ordered a search warrant on Wile E. Boutilier, the warrant could only extend to objects located within Tampa's jurisdiction.

409. Detention and Deportation of People, supra note 392.
410. Id. The ACLU states:

Under this new power, the Secretary of State could designate any group that has ever engaged in violent activity a “terrorist organization”—whether it be Operation Rescue, Greenpeace, or People for the Ethical Treatment of Animals. The designation would render the group's non-citizen members inadmissible to the United States, and would make payment of membership dues a deportable offense. Under the [Act], people can be deported regardless of whether they knew of the designation and regardless of whether their assistance had anything to do with the group's alleged terrorist activity.

Id. See also Immigration and Nationality Act, 8 U.S.C.A. §§ 1101–1537. (West 2003).
411. Detention and Deportation of People, supra note 392.
412. Id.
413. Id.
415. See id.
Hacker, and during the course of the investigation a new email account is discovered on an internet service provider in San Francisco, law enforcement had no right to search that email account without obtaining an additional search warrant for that jurisdiction.416 The USA Patriot Act changed these limitations by giving the courts permission to compel assistance from any communications provider in the U.S whose assistance is appropriate to further an investigation.417 This allows federal investigators authority to execute the same search warrant on any downstream communication provider, regardless of the state in which it is operating.

Before the USA Patriot Act, the use of voice communications in email created a quandary for law enforcement because voice communications were protected by much more restrictive wiretap orders.418 Law enforcement officers, even with a subpoena, could acquire a limited amount of information from an internet service provider.419 Moreover, the Cable Act420 set out an extremely restrictive set of rules governing law enforcement access to records held by local cable companies.421 After adoption of the USA Patriot Act, law enforcement can obtain voice mail and other stored voice communications once a search warrant has been authorized.422 The Act significantly expands the data that can be obtained from an internet service provider.423 The Cable Act has also been amended to allow law enforcement to subpoena customer records without notification to the customer.424

Moreover, Sections 214 and 215 of the USA Patriot Act had the impact of liberalizing the use of pen register and trap and trace devices in addition to allowing law enforcement to require

416. See id.
418. Id.
419. Id.
421. Electronic Privacy Information Center, The USA Patriot Act, supra note 15.
422. Id.
423. Judicial Oversight, supra note 390.
424. Electronic Information Privacy Center, USA Patriot Act, supra note 15.
the production of any tangible things relevant to an international terrorism investigation.425

Thus, the USA Patriot Act, through sweeping changes to existing law, removed many of the restraints on law enforcement that impeded investigation and apprehension of international terrorists. Significantly, the USA Patriot Act contains a sunset provision which operates to expire many of the “amendments enhancing surveillance authority on December 31, 2005.”426 Congress understood the concerns regarding enhanced government authority contained in the USA Patriot Act and provided for a reasonable amount of time within which to test the Act’s application.427 Congress is currently reviewing a draft USA Patriot Act II consistent with its commitment to monitor the implementation of the current Act.428 Therefore, while the ACLU argues that any encroachment on the rights of citizens is cause for concern, the legislative efforts embodied in the USA Patriot Act are reasonable responses to the threat of terrorism.

IV. RECOMMENDATIONS

As a nation we are on the right track in combating terrorism. The legislative efforts of Congress are reasonable responses to an attack on the principles of freedom and self-determination. However, we will make mistakes as we address issues that we have not confronted before. A few observations illustrate this point. First, the nation is undergoing profound changes regarding personal and national security and in terms of its organizational and operational structure. The administration has undertaken a review of the FBI, CIA, NSA and established a Department of Homeland Security. Second, this country is on the cutting edge of the law. We are confronting novel legal issues that we have never directly addressed before in the context of a war against terrorism. Third, we are fighting a “war” that is unlike any war that we have ever fought before. We have no

425. Id. See also Circumventing Privacy Protections, supra note 389.
426. Electronic Information Privacy Center, USA Patriot Act, supra note 15.
427. Id.
enemy government and a global battlefield. In essence, the issues that we face are law shaping events.

We are shaping the law as the issues are presented, and under such circumstances there will be considerable disagreement over the appropriate course of action to take. The following recommendations nonetheless seem reasonable:

- Review the implementation of the USA Patriot Act and other laws to ensure that civil liberties are not undermined.
- Aggressively prosecute any violation of civil liberties or misuse of the laws passed to fight the war against terrorism.
- Place a sunset provision in all legislation passed in response to the war on terrorism and focus on those provisions that provide expanded powers to the U.S. Government.
- Ensure that the next wave of legislation goes through the full legislative process including full committee hearings and debate.
- Use the current Patriot Act to inform the development of USA Patriot Act II.
- Integrate the findings of the DOJ Report submitted to Congress in September 2003 regarding the implementation of USA Patriot Act I.
- Study the DOJ report, and make any abuses identified by it the focal point for amendments, revisions and new legislation.

V. CONCLUSION

The events of September 11th are hopefully the most horrific events many of us will ever have to live through. The administration declared that the terrorists responsible have committed an act of war. The President advised the men and women in uniform to “get ready.” Indeed, the war against terrorism di-

rected initially at Afghanistan, Al Qaeda and the Taliban government has been successful. The Taliban are no longer in power and some of Al Qaeda have been captured or killed. These terrorist attacks provide the best explanation for why the Fourth Amendment must be flexible when the government is engaged in foreign intelligence collection efforts. The United States Congress has passed a resolution authorizing the President to use

all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.431

Additionally, as a result of the terrorist attacks, President Bush declared the U.S. to be in a state of national emergency pursuant to the National Emergencies Act,432 and by Executive Order authorized the Secretary of Defense to order up members of the Ready Reserve of the Armed Forces to respond to the continuing and immediate threat of further terrorist attacks.433 President Bush indicated that the war against terrorism will not stop in Afghanistan, but will seek to destroy terrorists and those who support them wherever they may be.434 Thus, the U.S. took the war on terrorism to Iraq, removed Saddam Hussein and his regime, and is now helping the Iraqi people to assume responsibility for their own future.435

More rigorous security measures are being implemented at the airports and Congress is now considering whether certain

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restrictions in place against assassinations should be lifted. America has changed. R. James Woolsey, the former director of CIA said that “Washington has absolutely undergone a sea change in thinking . . . .” Congressional leaders and those who oversee the national intelligence agencies are discussing ways to allow the intelligence agencies to combat terrorism more aggressively. Congressional intelligence oversight committee leadership and former directors of the CIA now say Congress should consider easing some of the restrictions that have been placed on the intelligence agencies. The terrorist attacks have provided a catalyst for change in the attitude of political leadership. The attitude now is reflected in comments like those of Senator Richard C. Shelby, Republican from Alabama and vice chairman of the Senate Intelligence Committee, who says, “we have got to be a hell of a lot more aggressive.” Former President George H. W. Bush, who served as director of the CIA under President Ford also commented about the “need to free up the intelligence system from some of its constraints.”

Thus, we have perhaps come full circle. This Article began with a review of the report of the Church Committee investigation and concerns of executive branch and intelligence agency abuse that led to the passage of FISA and implementation of Executive Order 12,333. These legislative and executive measures were meant to constrain the activities of the intelligence agencies and provide clear guidance on the constitutional limits of foreign and domestic surveillance. Today, because of the terrorist attacks the intelligence agencies will once again become a focal point as the U.S. searches for answers to the questions of why the intelligence community was not able to prevent attacks. It is possible, indeed likely that legislative solutions will be proposed to now untie the hands of the intelligence community in ways that may make it better able to combat terrorism.

438. Id.
439. Id.
440. Id.
441. Id.
These are precisely the questions that were debated as the USA Patriot Act was considered and ultimately passed into law. Some suggest that the USA Patriot Act is the most dangerous kind of law, a law that was passed in the heat of emotion and in reaction to a terrible tragedy. Once again, the question of striking the balance between national security and the Fourth Amendment will be center stage. However, now the context is not domestic surveillance of individuals, organizations and watch lists, but rather terrorism.

The appropriate balance between protecting the nation and civil liberties has been reached through the Congressional legislative efforts in its attempt to make it easier to combat terrorism. The genius of democratic society is that, though the system is not perfect, it does work. The constitutional checks and balances operate well to curtail overzealous executive, legislative or judicial activity regardless of the catalyst for overzealousness. As the Fourth Amendment cases have held, the purpose of the criminal law is to punish and deter crime. However, the purpose of intelligence collection is “stop or frustrate the immediate criminal activity.” The cases reviewed in this Article have found that the Congress struck an appropriate balance between national security and Fourth Amendment privacy concerns.

In the final analysis, it becomes very difficult to preserve civil liberties if the survival of the nation is in the balance. Without a secure nation, civil liberty becomes a function of those in control of the government. Thus, by preserving the nation we are better able to preserve freedom.

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442. In re Sealed Case No. 02–001, 310 F.3d at 744 (Foreign Intel. Surv. Ct. 2002).
MOBILE KILLER APPLICATIONS IN SOUTH KOREA & RECOMMENDATIONS FOR U.S. POLICYMAKERS

Junseong An*

I. INTRODUCTION

The Republic of Korea (“S. Korea”) is known as a pioneer in broadband development and proliferation. This is due to its wide and efficient deployment and diffusion of broadband and mobile applications.1 As of the end of 2001, twenty-nine million South Koreans (“S. Koreans”) were mobile subscribers.2 This figure represents more than 56% of the country’s telephone subscribers, and a mobile penetration of nearly 61%.3 In fact, with close to 60% of mobile phones outfitted with Internet browsers, S. Korea has one of the most rapidly growing mobile penetration rates in the world.4

There are two reasons why S. Korea has been so successful in expanding its mobile communications industry. First, the coun-

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1. INT’L TELECOMM. UNION, ITU INTERNET REPORTS: INTERNET FOR A MOBILE GENERATION, 4TH ED., at 103, U.N. Pub. No. 326-02 (2002) [hereinafter ITU INTERNET REPORT] (noting that “[a]s of the end of February, just over half of the 16 million households in Korea had broadband access”). The study also notes that “[w]hile most of the world has been discussing broadband access, Korea has been installing it.” Id. at 103 box 5.2.

2. Id.

3. Id. Penetration is “[a] measurement of access to telecommunications, normally calculated by dividing the number of subscribers to a particular service by the population and multiplying by 100.” Id. at xii.

4. Id. (noting that S. Korea “has one of the fastest-growing mobile penetration rates in the Asia-Pacific region”). “However, according to some analysts, actual mobile Internet use may be lower than these figures suggest, owing to underdeveloped content, high charges and slow download speeds.” Id.

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* Junseong An is an M.A. candidate in the Telecommunications program at George Washington University in Washington, DC. In June 2000, An received his LL.M. degree in Information Technology and Privacy Law at the John Marshall Law School in Chicago. He also received a J.D. and a B.A. in Telecommunications from Michigan State University. Special thanks to Dr. Christopher H. Sterling, Breck Blalock, Kelly Cameron, Honggil Choi, Donald Friedman, Xin Gou, Tae-Yul Kim, Tai-Hyun Kim, Kijoo Lee, Patricia Paoletta, Robert Pepper, Yasuhiko Taniwaki, and Hung-Hsiang Wang. The author is responsible for the accuracy of all citations to Korean language sources.

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try successfully develops and deploys novel mobile applications. Some of S. Korea’s mobile applications have earned the title “killer applications” because their financial return justifies the exorbitant expense that was required to develop, license and deploy them.\(^5\) This Article will discuss three killer applications: mobile gift certificates, Mobile Coin (“M-coin”), and Color Ring, each of which successfully reached critical mass and increased “network externalities."\(^6\)

Second, South Korean (“S. Korean”) socio-cultural norms also affect the country’s rapid growth of mobile communications and technology. This Article will discuss three such factors that help drive mobile penetration: *Hangul*, *Nunchee*, and *Balli-Balli.*\(^7\)

Although these socio-cultural conditions, unique to S. Korea, do not exist in the U.S., according to the International Telecommunications Union (“ITU”), S. Korea may serve as a good indicator to forecast market growth in the United States (“U.S.”).\(^8\) Thus, the recent influx in demand for mobile services and technology in S. Korea may be a sign of things to come in the U.S.

Part II of this Article discusses the market growth of online and mobile gift certificates. It then examines a micro payment system, originally designed for vending machine purchases in 2000,\(^9\) and how this system eventually became the *de facto* standard for mobile commerce in S. Korea. Finally, it discusses dial-back tone service, also known as Color Ring, which typifies the successful personalization of mobile service in S. Korea.

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6. JEFFREY H. ROHLFS, BANDWAGON EFFECTS IN HIGH–TECHNOLOGY INDUSTRIES 8 (2001) [hereinafter *ROHLFS*]. (Network externalities “apply to products and services that use telecommunications networks. As the set of users expands, each user benefits from being able to communicate with more [people] who have become users of the product or service.”).

7. *See infra* part III.A.


9. ITU INTERNET REPORT, supra note 1, at 135.

10. *Id.* at 29.
Part III discusses the cultural, manufacturing, marketing and regulatory differences between S. Korea and the U.S. in an effort to understand how the S. Koreans create a “killer environment”\textsuperscript{11} for their mobile industry. Part IV of this Article makes policy recommendations to U.S. telecommunications policymakers, including Congress, the Federal Communications Commission (“FCC”), and the National Telecommunications and Information Agency (“NTIA”) in redefining their respective jurisdictions over the wireless Internet and streamlining the current spectrum allocation procedure to achieve “allocative efficiency.”\textsuperscript{12}

II. MOBILE KILLER APPLICATIONS IN S. KOREA

In 1984, the first mobile service in S. Korea was offered for car phones.\textsuperscript{13} Unlike the explosive deployment rate for broadband services,\textsuperscript{14} it took almost eighteen years to achieve thirty-three million mobile phone users by April 2002.\textsuperscript{15} Despite the significant differences in their deployment rates, both broadband access and mobile phones are widely considered essential elements of the S. Korean lifestyle\textsuperscript{16} and work pattern.\textsuperscript{17} According to the Ministry of Information and Communications (“MIC”), the mobile market growth was due to a confluence of factors, including the introduction of a competitive market sys-

\textsuperscript{11} Attributes of Services for UMTS, supra note 5, at 21 (describing a killer environment as a place in which it is easy to create new services and experiment with unusual applications, to learn more about customers and to give users the wide range of choices that will encourage them use their UMTS mobile device for everything from paying for bus, train, and air tickets to downloading music video clips and short movies).


\textsuperscript{14} ITU INTERNET REPORT, supra note 1, at 103 box 5.2.

\textsuperscript{15} Ryu, supra note 13.

\textsuperscript{16} Id.

\textsuperscript{17} ITU INTERNET REPORT, supra note 1, at 127.
tem, continuously improving quality, reduction in the telecommunications pricing scheme, and mobile device subsidy.\footnote{18}{Ryu, supra note 13.}

Both broadband and mobile access create a greater consumer demand by “interlinking,”\footnote{19}{ROHLFS, supra note 6, at 9, 56–57.} or progressively shifting Internet traffic to the wireless platform. This enhanced interconnectability has helped forty-eight million S. Koreans create a new mobile-based information technology ("IT") paradigm in which many e-business models have migrated successfully into mobile platforms such as the online gift certificate.

A. Mobile Gift Certificate

The online gift certificate was first introduced in the S. Korean Market in April of 2000,\footnote{20}{Online Shangpumkwon Jalagayo [Online Gift Certificate Market Explosion], HANKOOK DAILY, Apr. 30, 2002, at http://www.hankooki.com/netInfo/200204/n20020430172125n0020.htm (last visited Sept. 25, 2003) [hereinafter Online Gift Certificate]. See infra Table 1, which shows various online gift certificate services offered in S. Korea.} and in 2002, the overall market was estimated to be $5 billion.\footnote{21}{Minjung Hahn, Tongshin Gupchedo Sangpumkwon Shijang Nundeok [Telecom Service Providers Entering Into Gift Certificate Market], NAVER FIN. NEWS, Oct. 9, 2002, at http://news.naver.com/news_read.php?oldid=2002100900000164046&s=4,191&e=96,327.} There are two types of online gift certificates in the S. Korean market: paper certificates and email certificates.\footnote{22}{Online Gift Certificate, supra note 20.} The former are the functional equivalent of paper gift certificates that can be downloaded and printed before finalizing a purchase.\footnote{23}{Id.} The latter provide enhanced capabilities, such as email payment methods that enable the recipients to finalize their purchases by email confirmation without any paper printouts.\footnote{24}{Id.} Due to the strong mobile infrastructure, the gift certificate model gradually came to the mobile platform in 2001, with an initial market of $77 million ($100 billion Won).\footnote{25}{Id.}
In November of 2001, SK Telecom (“SKT”) launched NEMO, the first mobile financial service in S. Korea. NEMO services are particularly convenient because users can transfer money to each other by dialing the recipients’ mobile numbers. Thus, SKT serves as a “financial intermediary” in the mobile financial transaction.

In November of 2002, SKT expanded its mobile payment services to include more than ten personal information services, including credit card, digital cash, transportation cards and personal identification cards. This mobile payment method is considered more secure than a credit card because users must verify their passwords each time they finalize a purchase. However, in order for subscribers to use these enhanced mobile payment services, they must purchase new mobile phones with built-in memory chips and infrared data transmission capacity.

Recent technical trends show that the mobile phone has evolved from a mere wireless voice communications device to a multimedia mobile data communications device that acts like both a universal remote control and an internet protocol ad-
dress at once. Additionally, such technical developments gradually changed the conventional frameworks of financial structures in S. Korea.

B. M-coin Payment

S. Korean mobile operators use a “walled garden” content model under which a content provider (“CP”) receives 90% of its overall revenues. Despite this CP-friendly revenue sharing scheme, the mobile commerce industry already faced difficulties in its content commercialization. Absent profitable business models, it is difficult for any CP to invest in the development of additional mobile applications. Despite the overestimated expectations of business-to-business transactions (“B2B”), business-to-consumer transactions (“B2C”) became

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36. For example, the prepaid mobile payment system is an attractive alternative to mobile service providers because it can generate incidental revenues from interest and unused gift certificates as some recipients inattentively will fail to use them. Hahn, *supra* note 21.

37. ITU INTERNET REPORT, *supra* note 1, at 55 (noting that a walled garden is a content business model in S. Korea where content providers and service providers split revenues in a ratio of 90:10).


40. *Id.* at 45.

41. *See id.*

42. *See id.*


the driving force behind the successful mobile content commercialization in S. Korea. 45

In August 2000, Wow-coin first began using micro payment services to maximize the company’s low-profit margins from e-business sites. 46 Micro payment services increased the company’s revenue because it now could charge users who otherwise were unwilling to pay credit card transaction fees for nominal payments. 47

M-coin is a mobile credit payment system that enables subscribers to make cashless purchases. 48 The M-coin system functions via a three-step process. 49 First, the mobile phone subscriber logs on to the wireless Internet site and selects the M-coin category. 50 Next, the user provides his or her national identification number and mobile phone number as user verification. 51 Finally, after the micro payment company approves the combination, it sends a password to the subscriber’s mobile phone using a text messaging service that enables the user to send short messages via mobile telephone, known as Short Message Service (“SMS”). 52 In 2002, more than 80% of S. Korean e-transactions, including mobile cartoons, movies and games, were processed via M-coin. 53 In 2001, the total market for M-coin was $77 million (100 billion Won). 54 Clearly, M-coin plays a critical role in the successful commercialization and migration of B2C e-business to a mobile platform.

45. Despite the B2B e-marketplace slowdown, it was the B2C mobile micro payment that introduced a profitable mobile commerce business model. This was the case because it was critical to the delivery of communications content and services. ITU INTERNET REPORT, supra note 1, at 35.


47. Id.

48. Innovative Thinking, supra note 46.

49. Id.

50. Id.

51. Id.

52. SMS is “[a] service available on digital networks, typically enabling messages within up to 160 characters to be sent or received via the message center of a network operator to a subscriber’s mobile phone.” ITU INTERNET REPORT, supra note 1, at xiii.

53. Id.

54. Id.
Micro payment systems, like NEMO and M-coin, are economically significant in two respects. First, the micro payment system itself promotes demand for SMS, increasing the economy of scale in the mobile industry. Second, the micro payment system allows mobile service providers to generate additional revenues. The mobile service providers act as “financial intermediaries” where the mobile service provider automatically includes surcharges on the subscribers’ monthly bills in exchange for the users’ exemption from making separate payments.

This market success is based on two key factors: widespread mobile payment infrastructure and successful e-business commercialization. Additionally, third generation (“3G”) wireless technology subscribers also have a significant impact on mobile payment market growth. Mobile content business uses four major applications that contribute to the growth of the micro payment market: ring tone, downloads, characters and mobile games.

C. Color Ring (Ring-Back Tone Services)

Like ring tone download services, “Ring-Back Tone Service” is a mobile “rich calls” service unique to the S. Korean mar-

55. See generally Attributes of Services for UMTS, supra note 5, at 26–30.
56. See id. at 30.
57. Id. at 21, 27.
58. Innovative Thinking, supra note 46.
MOBILE KILLER APPLICATIONS

ket. Both are examples of a “manufacturer’s ‘club’” designed by device manufacturers to create a direct relationships with end-users. However, there are some inherent differences between ring tone downloads and ring-back tone services. While the former is a simple electrical replacement of mechanical ring tones, the latter is an advanced service, which enhances the user’s experience by allowing subscribers to personalize their ring-back tones based on incoming telephone numbers via caller identification (“Caller ID”) service and calling times.

On April 14, 2002, SKT introduced Color Ring service into the S. Korean market. Color Ring enables subscribers to download more than seven thousand, five-hundred different sounds, including Korean pop songs. In October 2002, three million users subscribed to the Color Ring service. In addition, Color Ring service is extremely inexpensive, costing the consumer 90 cents per month and an additional 10 cents for each thirty second update. This low-cost pricing scheme interacts well with the micro payment systems because the low prices attract more


64. Nokia Press Release, supra note 63.

65. ITU INTERNET REPORT, supra note 1, at 49. A manufacturer’s “club” is a marketing approach in which manufacturers attempt to create a direct relationship with end-users. Id.


68. Id. Using Color Ring, subscribers can distinguish themselves by replacing monotonous ring-back tones with their preprogrammed sounds to entertain for calling parties. Attributes of Services for UMTS, supra note 5, at 25.

69. Id.

70. Id.

71. Id. See also Attributes of Services for UMTS, supra note 5, at 28.
marginal users who otherwise would not incur monthly charges in excess of their reservation prices.

Inspired by SKT’s success, the two remaining S. Korean service providers joined the dial-back tone market. On July 1, 2002, LG Telecom (“LGT”) introduced a similar service called Feel Ring, which uses the pop song, “Feelings” as its default ring-back tone. As of the end of 2001, LGT had over 400,000 subscribers. Korea Telecom Freetel (“KTF”) finally entered into the ring-back tone market on October 1, 2002 with its “2Ring” service, which provides the same sounds both to incoming and outgoing calls.

III. S. KOREAN MOBILE MARKET ANALYSIS

This Part focuses on the role of culture, manufacturing capabilities, market segmentation and telecommunications regulations in the S. Korean mobile market. In 2002, S. Korea had three major mobile service providers: SKT, KTF, and LGT, each of which benefited from S. Korea’s unique socio-cultural environment. To better understand S. Korean telecommunications regulations, this Part first reviews certain aspects of its local culture.

A. Cultural Factors

Before one can understand the S. Korean mobile market, it is important to understand how and why S. Korea has differentiated itself from the rest of the world. One factor is the culture

72. Tak, supra note 67.
74. Tak, supra note 67.
75. Id.
77. KTF Yangbanghang Tonghwa Yeongyulum Service [KTF Introduced Bi-directional Dial Back Tone Services], JOINS NEWS, Sep. 29, 2002, at http://www.joins.com/it/200209/29/200209291419357632500051005113.html. See also infra Table 2.
78. See infra Table 3 (showing the market shares and growth rates of the three major mobile service providers in S. Korea as of Sept. 2002).
79. See ITU INTERNET REPORT, supra note 1, at 103 box 5.2.
of S. Korea, and in particular, three cultural characteristics of Koreans: Hangul, Nunchee, and Balli-Balli, each of which is unique to the Korean culture.

1. Hangul

Use of the native Korean language, Hangul, in telecommunications provides this market with a unique competitive advantage.\(^80\) Unlike ideographic Chinese characters, Hangul was designed specifically to be easy to learn and user-friendly.\(^81\) Hangul consonants correspond to the speech organs and its vowels represent the round heaven, the flat Earth, and the upright human.\(^82\)

In mobile applications, Hangul’s simplicity plays a significant role in the success of S. Korean telecommunications due to the language’s high level of local reference and the availability of handsets with the Hangul alphabet.\(^83\) Moreover, it lends itself well to the mobile environment where the terminals have smaller display screens and limited keypad functions.\(^84\)

2. Nunchee

S. Korea has a strong tradition of peer pressure, known as Nunchee. The Korean concept of community of interest generally creates interpersonal rapport among citizens through feelings of sociological security, oneness, and consensus.\(^85\) Interest-
ingly, *Nunchee* is a substantial factor in making S. Koreans “early adopters.”

S. Koreans embrace new products and services more easily because they tend to compare their personal electronic devices with each other. Peer pressure increases mobile phone replacement cycles, which, in turn, promotes higher sales revenues for device manufacturers. Thus, manufacturers are more willing to invest in development and deployment of new devices. *Nunchee* is most prevalent in the teenage market, the leading market driver in S. Korea.

3. Balli-Balli

*Balli-Balli* is a Korean expression, literally translated as “quickly, quickly.” Many Koreans, both the North and the South, consider themselves Mongolian descendents and, accordingly, accept the typical nomadic cultural characteristics. Unlike an agricultural people, nomadic tribes are early adopters. As such, *Balli-Balli* influences trends within the IT industry. For example, according to the 2002 U.S. Wireless Mobile Phone Evaluation Study conducted by J.D. Power & Associates, while the average U.S. subscriber replaces his or her mobile phone every eighteen months, the average S. Korean replaces his or her mobile phone every seven months. This significantly faster replacement rate generates higher sales revenues for mobile phone manufacturers. Over time, greater

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86. *Id.*
87. *Id.*
88. *Id. at 114.*
89. *Id.*
90. ITU INTERNET REPORT, supra note 1, at 131.
96. *See id.*
consumer demand encourages manufacturers both to invest in further research and development at home, and to enter into the global market with new models, like color phones.\textsuperscript{97}

\textbf{B. Manufacturing Capabilities}

\textbf{1. The Color Phone Era}

Historically, wireless service providers subsidized their subscribers’ mobile phone purchases as a means of competing in the S. Korean market.\textsuperscript{98} In April 2002, the MIC banned this practice.\textsuperscript{99} This anti-subsidization regulation negatively impacted the domestic demand pattern, immediately decreasing the monthly growth rate to historic lows.\textsuperscript{100} On October 11, 2002, the Korean Assembly introduced Bill No. 161797, which added anti-subsidy provisions to the Telecommunications Business Act (“TBA”).\textsuperscript{101}

The introduction of mobile phones with color displays was the driving force behind increased demand for mobile phone sales. End-users disposed of otherwise current black-and-white phones to purchase the state-of-the-art multimedia mobile devices with Internet access.\textsuperscript{102} The advent of color display phones rejuvenated the saturated S. Korea mobile market.\textsuperscript{103} Due to this high market saturation, the main issues became how to stimulate the domestic mobile phone manufacturers, including the Korean conglomerates, Samsung Electronics and LG Electronics (“LGE”), to meet the demand for new handsets.\textsuperscript{104} In ad-

\begin{itemize}
\item \textsuperscript{97} \textit{Id.}
\item \textsuperscript{99} \textit{Id.}
\item \textsuperscript{100} \textit{Id.} (noting that the growth rate dipped in May 2002).
\item \textsuperscript{103} ITU INTERNET REPORT, supra note 1, at 46.
\item \textsuperscript{104} \textit{Id.} at 104.
\end{itemize}
dition to existing users, both dominant manufacturers have offered new products with both enhanced features and color screens, thus taking part in the global trend towards competing with PDA manufacturers. This, in turn, results in the creation of products that are better suited for multimedia viewing and delivery.\footnote{105}

In the first quarter of 2002, color display mobile phones exceeded 50\% of S. Korea’s total mobile phone market.\footnote{106} Thus, the mobile telephone industry is evolving from a text and black-and-white generation to a graphics and color generation.\footnote{107} In order to provide graphics and motion picture services, the display for mobile devices became larger and lighter.\footnote{108} Accordingly, Samsung Electronics,\footnote{109} LGE,\footnote{110} and Motorola\footnote{111} are focusing on further development and production of high-definition color phones, both because the average revenue per user\footnote{112} for mobile data from subscribers to the new generation CDMA x1 is more than twice that of the previous model users, and because four-fifths of color phone subscribers use mobile data facilities.\footnote{113} Likewise, the introduction of color handsets in September 2001 has played a key role in increasing the level of mobile data demand in S. Korea.\footnote{114}
2. Creative Destruction

In addition, the color phone competition gave rise to “creative destruction.” LGE rapidly destroyed the then-existing market structure by introducing color phones into the Korean market, taking the “first-mover advantage,” thus narrowing the gap between it and Samsung Electronics, the dominant domestic manufacturer. Moreover, LGE benefited from its own vertical integration because LGE was the only domestic mobile service provider in S. Korea with manufacturing capabilities. This vertical integration plays a crucial role in allowing LGE to secure shares of the future market through “complementary bandwagon effects.”

Moreover, there has been a significant shift in the market trend. Due to the emergence of the market presumption that color phone manufacturability is the most important factor for corporate survival in the domestic mobile market race, the number of manufacturers that do not market color phone prod-

115. ROHLFS, supra note 6, at 39 (noting that creative destruction has been defined as the process whereby a new technology firm usurps an existing firms' market share to enter effectively into the market).
116. Id. at 38. The first mover advantage exists where the initial producer has a “head start in moving down the learning curve to reduce costs and improve service quality. These competitive advantages often allow firms to earn large profits.” Id. LGE introduced the first 65,000 color phones in January 2002. Id.
117. Color War, supra note 102.
120. ROHLFS, supra note 6, at 8–9. Complimentary bandwagon effects as the concept whereby a product’s value derives, at least in part, from use of competitively supplied complementary products. For example, as more consumers purchase a hardware product, software vendors have greater incentives to produce software for that product. As the vendors respond to those incentives, purchasers of the hardware benefit from greater availability of software.

Id.
ucts has declined. The market success of color phone brands also has had a significant impact on online content (like online cartoons) since the color function improved the display quality for many wireless Internet subscribers in S. Korea.

C. Subscriber Membership System

Market segmentation is the practice of breaking down markets by certain traits, usually by social groupings or other demographics. Segments primarily divide along age and gender lines because there is a discernable difference in mobile Internet usage in terms of income and gender. In addition, both the physical limitations of the mobile phone’s small display and slow Internet speeds encourage mobile service providers to focus on more targeted uses.

Profiling services and strategic alliances are two trends within segmentation that should be emphasized. A profiling service is an ongoing process that enables mobile service providers to centralize customer databases on multiple platforms. In so doing, the service providers use profiling servers, which store the end-users’ profiles when the users have multiple access to content on the Internet, thus replacing the current e-commerce cookie structure across multiple access devices.

121. Color War, supra note 102.
123. Attributes of Services for UMTS, supra note 5, at 1.
124. Id. This practice sets as its ultimate, if unachievable, goal the creation of “segments of one,” at which point, “a marketer can target each individual on a one-to-one basis and has the greatest opportunity to take the potential customer through the buying cycle: Awareness, Interest, Decision, Action.” Id. This S. Korean practice of market segmentation also may lead to a global trend. ITU INTERNET REPORT, supra note 1, at 105.
125. Id.
126. Id. at 46.
127. Attributes of Services for UMTS, supra note 5, at 6–11.
129. Joe Barrett & Tomi T. Ahonen, Intro to Services for UMTS – The Future Starts Here, in SERVICES FOR UMTS: CREATING KILLER APPLICATIONS IN 3G,
Second, manufacturers and service providers have developed strategic alliances that are directed at certain market segments. For example, KTF and Samsung Electronics formed an alliance to service the female market. KTF provides Drama Plans to its subscribers while Samsung Electronics provides them with complementary Drama Color Phones. This complementary bandwagon effect enables the S. Korean mobile industry to cope effectively with the recent market saturation at home by introducing a variety of telephones with new designs and functions.

1. Age-Specific Market Segmentation

As the domestic mobile market moves closer to market saturation, the main issue shifts from an analysis of quantitative market patterns to an analysis of mobile Internet user patterns because Internet use has become more important than mere access to the Internet. Accordingly, the major mobile service providers have begun to focus on niche markets defined by segmentation. Initially, mobile service providers segmented the mobile market based on the age group of their subscribers.

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131. Id. (noting that drama plans target women by providing them free access to women's personal services, like beauty salons).

132. Samsung Jeonja, Yeosungeyonjung Culehwaedaejon Chulshi [Samsung Electronics Introduces Pro-Female Color Mobile Phone], JOINs.COM, Aug. 19, 2002, at http://www.joins.com/it/200208/19/200208191047341072500051005113.html [hereinafter Pro-Female Color Mobile Phone].

133. Byun, supra note 130.


136. White Paper, supra note 43, at 311. See infra Table 4 (showing age-specific services offered by three mobile service providers in S. Korea).
Then, in order to generate higher revenues, they employed an age-specific marketing strategy to appeal to the differing needs of users within their respective age groups.\footnote{137 White Paper, supra note 43, at 311. While the younger generations tend to prefer games, chatting, and entertainment contents, the older generations want financial information, sports, and weather forecasts. \textit{Id.} at 310. Like in other countries, teenagers are the market demand drivers in S. Korea. ITU INTERNET REPORT, supra note 1, at 131.}

Due to its “connectedness”\footnote{138 ITU INTERNET REPORT, supra note 1, at 131. Connectedness is the joining and linking of websites and people through mobile technology. \textit{Id.}} and intrusiveness, the mobile Internet gradually changed the lifestyle of S. Koreans. For example, teenagers have proven to be the most avid users of the mobile Internet, as evidenced by the fact that one-third of their overall phone bills are spent on mobile data.\footnote{139 \textit{Id.}} Due to high mobile data use by teenagers, the market for cartoon animation, known as Avatar, has emerged.\footnote{140 \textit{Id.}} Originally, Avatar was designed “to represent the user when entering chat rooms or sending messages,”\footnote{141 \textit{Id.}} but it gradually evolved into a mobile culture exemplified by programs such as the Avatar Mobile Dating Simulations Game, which imitates blind dates using graphic images and chatting on the mobile Internet.\footnote{142 Ushik Jung, \textit{Mobile “Yanaegame Chunsangyeonbun” Service Gaeshi [Mobile Dating Simulation Game Services Introduced], DIGITAL CHOSUN, Nov. 11, 2001, at http://www.chosun.com/w21data/html/news/200111/200111190364.html [hereinafter Mobile Dating Simulation Game].}} In order to facilitate the use of Avatar for teenagers who typically do not have stable income sources, e-business sites provide a deferred payment system.\footnote{143 Young Jin Kim, \textit{Gongjeonwe: Chongseoyeon Hwudaejeonhwa Gyuljae Bumodongyu Yichseoya Jeegup [Fair Trade Commission: Teenagers Required Parental Consent For Deferred Payment], DIGITAL CHOSUN, July 1, 2002, at http://www.chosun.com/w21data/html/news/200207/200207010212.html [hereinafter Teenagers Required Parental Consent].} However, due to recent misuses, the S. Korean Fair Trade Commission\footnote{144 Mobile Dating Simulation Game, supra note 142.} prohibited further use of any deferred payment arrangements with teenagers without express parental consent. Additionally, parents, at their discretion, have the
ability to establish credit limits on their children’s monthly usage.\textsuperscript{145}

The question arose as to whether price-conscious and less loyal teenagers would continue to use mobile data applications as they reached adulthood.\textsuperscript{146} Recently, the ITU attempted to answer this question using a parallel comparison study with the video game market, where the teenage groups have continued to play video games as they reached adulthood.\textsuperscript{147} Like the ITU, S. Korean operators have targeted the teen and pre-teen markets on the theory that while wireline broadband services have widespread, age-neutral acceptance, wireless Internet services are popular only among younger generations\textsuperscript{148} who desire any new products and services.\textsuperscript{149} In part, the trend results from advertisers’ marketing strategies, which overlook other segments of the population, like the senior citizen class.\textsuperscript{150}

Recently, however, mobile service providers have begun to pay closer attention to the senior citizen class because it remains a sizable niche market, and the gap between it and other age groups has increased.\textsuperscript{151} Mobile service providers have created “Silver Plans” that discount incoming rates and limit outgoing calls for seniors.\textsuperscript{152} On the hardware side, LGE provides Silver Phones that are designed specifically for senior citizens with larger keypads and easy-to-read screens.\textsuperscript{153}

\textsuperscript{145} Teenagers Required Parental Consent, supra note 143.
\textsuperscript{146} ITU INTERNET REPORT, supra note 1, at 131.
\textsuperscript{147} Id.
\textsuperscript{150} Id. The senior class group comprises people over fifty. See White Paper, supra note 43, at 26.
\textsuperscript{151} See White Paper, supra note 43, at 26, 31.
\textsuperscript{153} See, e.g. ITU INTERNET REPORT, supra note 1, at 132. Also, in May 2002, telecommunications service providers agreed to extend a thirty percent discount rate on wireless data services for disabled and low-income groups.
2. Gender-specific Market Segmentation

In order to take advantage of recent market analysis indicating that women comprise a niche market, S. Korean mobile providers marketed new service plans for female subscribers. In February 2000, KTF launched its Drama service, which now serves over 750,000 subscribers.

As part of their plan to target the female demographic, mobile service providers also offer off-line customer benefits, such as KTF’s Drama House, which allows its subscribers and a guest to use its beauty salon and Internet café services free of charge. In conjunction with KTF’s offer, Samsung Electronics provides Drama Color Phones designed for savvy female subscribers. As the base-product supplier, Samsung Electronics profits by introducing a complimentary product, like Drama Color Phones, to KTF, its corresponding mobile service provider. This exemplifies Rohlf’s concept of successful supply coordination designed to induce complementary mobile services.

D. Korean Telecommunications Regulations

1. Calling-party-pays & Per-minute-based Billing System

There are two significant regulatory differences between the U.S. and the S. Korean billing structure. The first is the S. Korean calling-party-pays (or “CPP”) method in which mobile service providers only charge calling parties, while the fixed line user must pay a premium to contact a mobile user. Mobile Phone Consumer Rights to Be Bolstered: The government has unveiled a list of measures aimed at promoting the rights of mobile phone users, KOREA TIMES, May 13, 2002.

154. See White Paper, supra note 43, at 106 (noting that while female groups have higher annual growth rates than their male counterparts, their overall Internet usage rate is still lower).
155. Byun, supra note 130. See infra Table 5.
156. Id.
157. Pro-Female Color Mobile Phone, supra note 132.
158. Byun, supra note 130.
159. ROHLFS, supra note 6, at 47 (explaining that supply coordination occurs when base-product suppliers design their products to “work well with the product designs of the complementary products”).
160. ITU INTERNET REPORT, supra note 1, at 42.
161. Id.
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Unlike the receiving-party-pays ("RPP") system used in the U.S., CPP shifts the entire financial burden of the mobile call from receiving parties to calling parties on the home network, increasing reachability and improving overall mobile traffic since CPP users do not carry any financial burden in receiving incoming calls. The second is the S. Korean per-minute-based billing ("PMBB") system for local fixed line telephony calls. Unlike the flat rate system used in the U.S., PMBB gradually decreases dialup Internet access and migrates voice communications from fixed lines to a mobile platform. PMBB did not stunt early mobile growth, in part, because mobile subscribers are not penalized for receiving calls.

Due to the RPP unlimited local call environment, U.S. mobile operators have not been as profitable as their S. Korean counterparts. Such market conditions will not improve significantly unless they start levying above-cost termination charges on fixed-line operators. Despite the differences between the U.S. and S. Korean systems, however, S. Korea adopted many regulatory concepts directly from the U.S., but then developed its own regulatory requirements for issues specific to wireless communication, such as mobile privacy.

2. Mobile Privacy

Given the prevalence of mobile and broadband access in S. Korea, it is not surprising that communications privacy invasion is a concern. Under the current CPP billing system, mobile phone subscribers are vulnerable to intrusion by commercial advertisers or "spammers," which has financial consequences. For instance, if a caller inadvertently calls back a commercial

162. Id.
163. Intro to Services for UMTS, supra note 129, at 1, 14.
164. ITU INTERNET REPORT, supra note 1, at 42.
165. Id. at 81.
166. Id. at 42.
167. Id.
168. Id.
169. Id. at 42.
171. ITU INTERNET REPORT, supra note 1, at 93. "Spam mail is mail that is unsolicited by receivers, and that is typically sent for the purpose of advertising the services of the sender." Id.
number via the user’s Caller ID service, the caller will incur additional charges for such unsolicited mobile advertising.\textsuperscript{172}

The legal basis for communications privacy derives directly from Article 18 of the S. Korean Constitution.\textsuperscript{173} Notably, it comes before Article 21, which confers Freedom of Speech.\textsuperscript{174} Such constitutional priority plays a pivotal role in advancing the adoption of new technology-based privacy laws, such as anti-spamming law.\textsuperscript{175}

In order to protect the stability of Internet communication,\textsuperscript{176} the MIC revised its Ministerial Order No. 117 entitled “The Act on Promotion of Utilization of Information and Communications Network,” which regulates commercial information transfers.\textsuperscript{177} Now every unsolicited commercial advertiser is required to identify its email content as an advertisement in the subject line\textsuperscript{178} and provide the sender’s name and contact information,\textsuperscript{179} as well as either its telephone number or email address in the body of each email.\textsuperscript{180} Advertisers also must allow recipients to opt-out of their group email lists.\textsuperscript{181}

However, Ministerial Order No. 117 does not protect mobile communications privacy because the Order applies only to traditional email transfers.\textsuperscript{182} Therefore, on November 8, 2002, the S. Korean Assembly passed Bill No. 161975\textsuperscript{183} to extend its anti-

\textsuperscript{172} ITU INTERNET REPORT, supra note 1, at 93.
\textsuperscript{174} Id. art. 21(1).
\textsuperscript{175} Jeongbotongshinmang Yiyongchokjeenmik Jeongbobohodungye Kwonhanbupyul [Act on the Promotion of Utilization of Information and Communications Networks], Law No. 6797, art. 50(1)(2) (S.Korea) [hereinafter Korean Communications Networks Act].
\textsuperscript{176} Id. art. 45(1).
\textsuperscript{177} Id. art. 50(1–2). Among other things, the purpose of the Act is to promote the utilization of information and communications networks by preventing a spam overload from unknown sources. Id.
\textsuperscript{178} Jeongbotongshinmang Yiyongchokjeenmik Jeongbobohodungye Kwonhanbupyul Shihangyoung, Ministerial Order No. 117, art. 11 § 2 (S. Korea) [hereinafter Ministerial Order No. 117].
\textsuperscript{179} Ministerial Order No. 117, art. 11 § 1.
\textsuperscript{180} Id.
\textsuperscript{181} Telecomm. Bus. Act, supra note 66, art. 50(2)4.
\textsuperscript{182} See generally Ministerial Order No. 117.
\textsuperscript{183} Jeongbotongshinmang Yiyongchokjeenmik Jeongbobohodungye Kwanhanbupyuljoong Gaejungbupyulan, S. Korea Assembly, Bill No. 161957 (Nov.
spamming laws to mobile phone, facsimile, and telephone advertisements.\textsuperscript{184} The recent amendment keeps the current industry-friendly opt-out format, and adds to it a toll-free opt-out call in-service and an automatic filtering service.\textsuperscript{186} Additionally, the amendment imposes criminal penalties of up to two years of imprisonment on advertisers who send harmful materials to juveniles.\textsuperscript{187}

3. Legislative Efforts on Digital Opportunities

Under Ministerial Order No. 111 to the TBA, “universal services”\textsuperscript{188} comprise three categories: wireline telephone services, emergency telephone services, and free telephone services for disabled and low-income individuals.\textsuperscript{189} In order to promote social welfare, the TBA provides free telephone services, including local and long-distance, directory assistance, personal mobile and paging for disadvantaged groups.\textsuperscript{190} S. Korea’s universal service\textsuperscript{191} widens its consumer base and promotes greater supply and demand for new mobile services by increasing telecommunications use throughout the country.


184. As for telephone and mobile phone advertisements, the senders are required to identify their messages as advertisements before starting any communications. Ministerial Order No. 117, art. 11, § 1.


186. ITU INTERNET REPORT, supra note 1, at 93 (describing filtering as the systematic deletion method based on specific senders or specific words by email servers or terminals). Filtering is a systematic deletion method based on specific senders or specific words by email servers or terminals. Jeongbotongshin: Hwudaejeonhwa Spam Moonja Message-edo Gyataeryo [Penalties Extend to Mobile Phone Spamming], DONGA NEWS, July 29, 2002, at http://www.donga.com/fbin/output?f=k_s&code=k__&n=200207290035&curlist=0.


189. Jeonggitongshinsayup Shihangkyuchik, Ministerial Order No. 111, art. 2–2 § 1 (S. Korea).

190. Id.

information telecommunications services\textsuperscript{192} via information telecommunications networks,\textsuperscript{193} broadly evaluating economic, regional, physical, or social conditions.\textsuperscript{194} The ADDS contains two significant provisions: tax incentives and a mandatory IT education program.\textsuperscript{195} In an effort to narrow the digital gap among the social classes, the ADDS provides special tax exemptions to companies that provide free telecommunications equipment or services to those who otherwise might not have access to them.\textsuperscript{196} The ADDS also mandates that both national and local governments provide IT education and facilities to those who are either disabled, low-income, over the age of 60 or fulltime homemakers.\textsuperscript{197} Furthermore, the National Assembly passed Bill No. 161659 to lift value-added taxes on IT devices, including mobile phones, and software for the disabled, all of which will reduce the retail price of IT products by 10%.\textsuperscript{198} In sum, these policies create more digital opportunities, expand the mobile demand base, and externalize the overall mobile network.

IV. RECOMMENDATIONS TO U.S. POLICYMAKERS

Due to cultural and regulatory differences, it is difficult to predict the applicability of the S. Korean telecommunications policy to the current U.S. situation. However, historical studies indicate that wireless platforms popular in S. Korea inevitably will enter the U.S. market.\textsuperscript{199} Nonetheless, this Article focuses on how various U.S. policymakers can improve the current

\textsuperscript{192} Jeongbokyukcha Haesoeh Kwonhan Bupyul [Act on Digital Divide Solution], Law No. 6356, art. 2 § 1(b) (S. Korea) [hereinafter Korean Digital Divide Act].
\textsuperscript{194} Korean Digital Divide Act, supra note 193, art. 2 § 1(b).
\textsuperscript{196} Korean Digital Divide Act, supra note 193, art. 14.
\textsuperscript{197} Id. art. 11.
\textsuperscript{199} ITU INTERNET REPORT, supra note 1, at 103.
regulatory framework so that it promotes further supply and demand in the mobile industry.

In January 2003, the General Accounting Office ("GAO") released its second spectrum report entitled "Comprehensive Review of U.S. Spectrum Management with Broad Stakeholder Involvement Is Needed." In its report, the GAO explicitly recommends that the FCC Chairman and the Assistant Secretary of the NTIA, in consultation with other agencies and congressional committees, make a plan to establish an independent commission with wide representation from a variety of stakeholders in determining whether spectrum management reform is necessary.

Under the current bifurcated structure between the FCC and the NTIA, with each spectrum manager serving different constituencies, it is difficult to resolve conflicts among spectrum users. Technical difficulties have been exacerbated in several respects. First, wireless competition has grown dramatically nationwide, with 94% of the U.S. population currently living in counties with three or more mobile service providers. However, with 90% of current frequencies concentrated in 1% of the available spectrum, there is severe overcrowding and inefficient use of available space. Moreover, despite the recent recommendations that the 90 MHz spectrum be allocated for 3G wireless service, the FCC forecasts that additional spectrum allocation would be necessary to implement 3G services fully.

200. GAO TelEComm. REPORT, supra note 12, at 17.
201. See id. at 44–45. The GAO suggests several areas that potentially require reform, including the current lack of coordinated national spectrum strategy, lack of comprehensive reviews of frequency assignments, and the potential need to implement incentive programs to encourage conservation of the spectrum. See U.S. GEN. ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, BETTER COORDINATION AND ENHANCED ACCOUNTABILITY NEEDED TO IMPROVE SPECTRUM MANAGEMENT, at 34–35, GAO–02–906, (Sept. 2002), available at http://www.gao.gov/new.items/d0296.pdf (last visited Oct. 4, 2002) [herein after GAO COORDINATION & ACCOUNTABILITY REPORT].
202. GAO COORDINATION & ACCOUNTABILITY REPORT, supra note 201, at 5.
203. Id. at 11.
204. See GAO TelEComm. REPORT, supra note 12, at 6.
205. See GAO COORDINATION & ACCOUNTABILITY REPORT, supra note 201, at 13–14. Spectrum allocation is

a means of apportioning frequencies among various types of wireless services and uses to prevent radio interference...[S]pectrum alloca-
The following discussion considers how to reform the current U.S. regulatory structure to achieve allocative efficiency, and makes recommendations to the three respective policymakers: Congress, the FCC and the NTIA.

A. Legislature

1. Spectrum Allocation

One of the most important mobile communications policy issues in the U.S. is the 3G licensing process. Licensing plays a fundamental role in the mobile market since the radio spectrum is a limited natural resource. Ironically, while licensing procedures may facilitate mobile business development, they also can become an absolute barrier to market entry. This is exemplified by licensees’ technical ability to prevent others from entering and competing within the spectrum ranges under the color of their licenses.

According to the ITU, the three major types of spectrum allocation systems are auction, comparative selection and hybrid selection. While 3G deployment in the U.S. is still at the embryonic stage, now is the appropriate time for Congress to create legislation designating the appropriate spectrum allocation method. Perhaps the hybrid allocation model, similar to that used in Hong Kong, is the best alternative for the current U.S. market. Hong Kong has adopted only the auction method for allocation in the commercial sector. Hong Kong also is unique in that it uses a royalty-based auction that allows bidders to make an offer based on the percentage of future revenues (i.e. a

Id. at 5.
207. ITU INTERNET REPORT, supra note 1, at 70.
208. Id.
209. Id.
210. See generally GAO TELECOMM. REPORT, supra note 12.
211. Comparative selection provides competing applicants a quasi-judicial (i.e., hearing) in which to argue why their request for licensing should be granted rather than other applicants’ requests. Id. at 8.
royalty rate, rather than a total fixed cash price). While the government can generate additional revenues for the 3G spectrum from an auction, it also can avoid increasing administrative burdens on policymakers, including the FCC and the NTIA, during the initial comparative selection process. Such legislative clarity can help foster a killer environment for future mobile applications.

2. Structural Reform — Joint Committee on Information Service

Moreover, procedurally, Congress should reorganize its subcommittees with respect to the Internet and communications. Unlike the House of Representatives, where telecommunications and the Internet are managed under the same subcommittee, there is ambiguity regarding the Senate’s jurisdiction over wireless Internet applications. While the Senate’s Communications Subcommittee (“Communications Subcommittee”) has jurisdiction over spectrum allocations, the FCC Science, Technology, and Space Subcommittee (“Science Subcommittee”) has jurisdiction over the Internet. Although both subcommittees are under the Commerce, Science and Transportation Commit-

212. JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 239 (2002). Id. at 26, 28. Hong Kong, People’s Republic of China, is a semi-autonomous region of southern China. In 1997, the territory that makes up Hong Kong was returned to China after almost one hundred years of British rule. Hong Kong, PRC has a free-market economy and is the financial and banking center of East Asia. Id.


214. In the House of Representatives, telecommunications and the Internet are under the jurisdiction of the Subcommittee on Telecommunications and the Internet, which is a subcommittee within the House Committee on Energy and Commerce. See Subcommittee on Telecommunications and the Internet, House Committee on Energy and Commerce, at http://energy commerce.house.gov/108/subcommittees/T elecommunications_and_the_Internet.htm (last visited Oct. 2, 2003). The Subcommittee on Telecommunications and the Internet has jurisdiction over “[i]nterstate and foreign telecommunications, including, but not limited to all telecommunication and information transmission by broadcast, radio, wire, microwave, satellite, or other mode.” Id.

tee, jurisdiction over the Internet is split into two different subcommittees, which may have different policies on the same issue. Such structural inconsistency makes the legislative process less efficient.

Congress also could improve its structural form. First, the Senate should transfer exclusive legislative power over the Internet from its Science Subcommittee to its Communications Subcommittee. Second, Congress should create a joint committee on information services, covering multi-platform Internet, which supervises and oversees \(^{216}\) the overall spectrum policy of the NTIA and the FCC. \(^{217}\)

Congress’ procedural ambiguity also makes it difficult for the FCC to implement communications policies on the Internet. The FCC has classified the Internet as information services \(^{218}\) under Title I to avoid any regulatory inconsistency. \(^{219}\) In the absence of any further legislative guidance, the FCC can de-regulate wireless Internet as “information service” under its ancillary jurisdiction. \(^{220}\)

**B. Federal Communications Commission**

1. Ancillary Jurisdiction

The FCC was established by the Communications Act of 1934 (“1934 Act”), which expressly delegates regulatory powers to the

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217. See GAO TELECOMM. REPORT, supra note 12, at 40.

218. Information service is defined in the U.S. Code as:

the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.


219. Id.

FCC under the Commerce Clause of the U.S. Constitution. The 1934 Act provides two different legal bases for FCC jurisdiction: general jurisdiction and ancillary jurisdiction. The FCC’s general jurisdiction to regulate communications is derived from Section 2(a) of the 1934 Act, which explicitly applies to all interstate and foreign communications by wire or radio. The 1934 Act also gives discretion to the FCC in choosing jurisdictional bases and regulatory tools, including ancillary jurisdiction. Most notably, Section 4(i) gives the FCC the ancillary authority to make any consistent rules and regulations so long as such changes are necessary for the FCC’s regulatory functions, including Title III Radio communication.

In the mobile service context, the definition of radio communication includes communications incidental thereto. Therefore, another legal basis for the FCC’s ancillary jurisdiction over mobile Internet services could be the FCC’s classification of mobile Internet usage as incidental transmissions. In so doing, the FCC can deregulate multi-platform communications uniformly via the Internet.

Even if the FCC cannot classify mobile Internet statutorily as an unregulated information service, the FCC can exercise its ancillary jurisdiction to define mobile Internet communications as an “advanced telecommunications capability,” enabling it to

221. See U.S. Const. art. I, § 8, cl. 3. (Congress shall have the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”).
225. See The Communications Act of 1934, 47 U.S.C. § 154 (i). Title III Radio communication refers to the special provisions relating to the licensing of the radio spectrum. These provisions begin at 47 U.S.C. § 301.
226. See Id. at § 153(27) (describing mobile service, inter alia, as “a radio service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves”).
227. Id. at § 153(33) (describing radio communication, inter alia, as “the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds”).
228. Id.
229. Id.
promote efficient deployment of mobile technologies throughout the U.S.\textsuperscript{231} Furthermore, considering the rapid technological convergence of wireline and wireless technologies, the FCC should take proactive measures to prepare a comprehensive guideline for Internet access in the multi-platform broadband context to expedite the creation of its wireless Internet infrastructure.

2. Interoperability Requirement

Like the FCC’s multi-platform approach to its broadband policy, the FCC should implement a technology-neutral policy for 3G development and deployment because such policy would foster competition in the mobile market. Absent further legislative clarity, the FCC should interpret the 1934 Act to promote interoperability\textsuperscript{232} among current wireless technologies, including CDMA and Global System for Mobile Communications ("GSM"),\textsuperscript{233} to maximize the development and deployment of the overall wireless infrastructure.

Section 157, entitled “New Technologies and Services,” places the burden on challenging parties to prove that the new technology or service is not consistent with public interest.\textsuperscript{234} Since interoperability would further international cooperation among different 3G platforms and would afford the general public greater spillover benefits,\textsuperscript{235} the FCC should promote the multi-platform approach and recommend the private telecommunications sector adopt a universal mobile platform with higher interoperability among different mobile providers. The FCC also

\textsuperscript{231} Id.
\textsuperscript{233} GSM is “a digital cellular phone technology based on [time division multiple access, or] TDMA....Developed in the 1980s, GSM was first deployed in seven European countries in 1992.” Currently, it is used worldwide but has different spectrum: while it is operating in the 900MHz and 1.8GHz bands in Europe, the U.S. GSM providers use the 1.9GHz PCS band. GSM, \textit{TechEncyclopedia}, The Computer Language Company, at http://www.techweb.com/encyclopedia/defineterm?term=GSM&x=10&y=8 (last visited Oct. 7, 2003).
\textsuperscript{235} See generally ROHLFS, supra note 6, at 13–18.
should publish a white paper on the significance of market feasibility tests on the aforementioned interoperability requirement.

C. The NTIA

Since the enactment of the Radio Act of 1927, the U.S. has retained its seventy-six-year-old “command and control” approach to spectrum allocation, but with a spectrum management system divided between the NTIA and the FCC. While the NTIA is responsible for spectrum use by the federal government, the FCC is responsible for nonfederal use. Under the current divided authority approach, there are two inherent difficulties in effectively managing spectrum use. First, there is no single governmental entity that has ultimate decision-making power with regard to spectrum use. Thus implementing the divided spectrum management system depends significantly upon the coordination and cooperation between the FCC and the NTIA. Second, Section 305 of Title 47 is unclear because it does not show explicitly how to delineate boundaries between the two agencies’ respective jurisdictions.

As new “spectrum-dependent technologies” create more demand for the limited spectrum, the NTIA continues to face the


237. See GAO TELECOMM. REPORT, supra note 12, at 9. Under this policy, the government primarily dictates how the spectrum is used. Id.

238. GAO COORDINATION & ACCOUNTABILITY REPORT, supra note 201, at 2–3.

239. Id.

240. Id.

241. Id. at 3.


243. GAO COORDINATION & ACCOUNTABILITY REPORT, supra note 201, at 1 (“The radio frequency spectrum is the medium that enables wireless communications of all kinds, such as mobile phone and paging services, radio and television broadcasting, radar, and satellite-based services”).
two main problems of accountability and efficient use of spectrum.\textsuperscript{244} To improve these problems, the Office of Science and Technology Policy (“OSTP”)\textsuperscript{245} should assume limited jurisdiction over spectrum allocation and formulate a national spectrum strategy.\textsuperscript{246} Additionally, the NTIA, which conducts oversight activities to encourage accountability and spectrum efficiency,\textsuperscript{247} should continue performing such functions.

1. Redemption of Spectrum Authority

In September 2002, the GAO released its first spectrum report, entitled “Telecommunications: Better Coordination and Enhanced Accountability Needed to Improve Spectrum Management.”\textsuperscript{248} In its report, the GAO suggested that the NTIA faced two main administrative problems: staffing and resource shortages.\textsuperscript{249} In order to alleviate the administrative burden on the NTIA, spectrum decisions should be transferred to another government agency that can serve as a neutral third party.\textsuperscript{250}

Among several suggested agencies,\textsuperscript{251} the OSTP is the best alternative. Because the Office of Telecommunications Policy (“OTP”), a predecessor to the OSTP, originally had jurisdiction over spectrum allocation prior to the formation of the NTIA in 1978,\textsuperscript{252} the shifting of authority should be considered as a mere redemption of spectrum allocation power to the OSTP. Moreover, the OSTP is in a better position to manage spectrum allocation than either of the NTIA, which is an umbrella agency under the Commerce Department, or the FCC, which is an independent regulatory agency. This is so because the OSTP’s

\textsuperscript{244} See generally \textit{id.} at 4.
\textsuperscript{245} See generally Official Site for the Office of Science and Technology, \textit{at} http://www.ostp.gov (last visited Aug. 6, 2003).
\textsuperscript{246} For a definition of national spectrum strategy, see \textit{id.} at 3.
\textsuperscript{247} \textit{Id.} at 4.
\textsuperscript{248} GAO COORDINATION & ACCOUNTABILITY REPORT, \textit{supra} note 201, at 2–3.
\textsuperscript{249} \textit{Id.} at 4.
\textsuperscript{250} \textit{See id.} at 14.
\textsuperscript{251} \textit{Id.}
status under the Executive branch can coordinate interagency disputes more effectively and unify the current federal-nonfederal dichotomy system. However, such a power shift should not affect current interagency efforts between the NTIA and the FCC, like the “One Spectrum Team” approach because this proposal is limited to spectrum allocation authority.

2. Frequency Assignment Review Programs

Unlike the FCC, the NTIA, as a federal spectrum manager, must maximize the promotion of efficient and cost-effective use of the federal spectrum. Due to the shortage of staff and resources, the NTIA is not in a position to make an exhaustive assessment of frequency requests or frequency reviews.

To alleviate excessive burdens on the NTIA, the OSTP should assume limited jurisdiction over spectrum allocation. After removing the administrative burden on spectrum allocations, the NTIA should refocus its frequency assignment review on narrowbanding and trunking. First, the NTIA should enforce more spectrum efficient technologies such as narrowbanding, which is significant because its reduction frees up spectrum availability for future mobile uses, like 3G services. Likewise, the NTIA should continue to require all federal users to

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253. For a description of the One Spectrum Team Approach, see GAO COORDINATION & ACCOUNTABILITY REPORT, supra note 201, at 18.
255. GAO COORDINATION & ACCOUNTABILITY REPORT, supra note 201, at 25.
256. Id. at 26. A frequency request is a federal agency’s application to the NTIA requesting a frequency assignment. Id.
257. Id. at 29. Frequency review is the NTIA’s monitoring program over the federal agencies’ respective needs for frequency assignments. The NTIA performs one review every five years. Id. at 27.
258. A frequency assignment review is used to assess whether an agency’s frequency assignments are necessary to meet the agency’s needs. Id. at 27–28.
259. Narrowbanding “is a technique for reducing the amount of spectrum (bandwidth) needed to transmit a radio signal, thereby freeing up spectrum to meet future growth.” Id. at 31.
260. Id. at 32. Trunking allows conservation of spectrum, but does so “by enabling users to share a common set of voice radio channels rather than have their own dedicated channels that may not be heavily used at all times.” Id. at 32.
261. Id. at 31.
upgrade their existing mobile system by 2008.\textsuperscript{262} Moreover, responsibilities resulting from harmful interference should be placed with those agencies that fail to meet the narrowbanding deadline.\textsuperscript{263} In the meantime, the NTIA should provide trunking as an interim solution for the aforementioned federal agencies prior to a \textit{de jure} narrowbanding regime.

V. CONCLUSION

S. Korea is a market leader in broadband and mobile applications.\textsuperscript{264} The country’s success is the result of two important factors: effective development and deployment of killer applications and favorable socio-cultural norms. Despite the fact that the U.S. cannot mirror S. Korea’s unique cultural conditions, the country’s success, nonetheless, may predict imminent market growth in the U.S.\textsuperscript{265}

However, in anticipation of this potential influx, U.S. policy-makers should improve telecommunications infrastructure in order to take full advantage of this potential boon. First, Congress should designate only one spectrum allocation method. Specifically, Congress should consider the hybrid allocation model because it will enable the government to generate extra revenues for the 3G spectrum from an auction, while avoiding increasing administrative burdens on policymakers like the FCC and the NTIA. Second, Congress should structurally reform its Internet and Communications subcommittees. Transferring legislative power over the Internet from its Science Subcommittee to its Communications Subcommittee, and creating a joint committee on information services to oversee NTIA and FCC spectrum policy would improve legislative policy.

Third, the FCC should exercise its ancillary jurisdiction to promote efficient deployment of mobile technologies throughout the country. The FCC also should prepare a comprehensive guideline for Internet access to expedite the creation of its wireless Internet infrastructure.

Finally, to improve accountability and efficient spectrum use, the OSTP should assume limited jurisdiction over spectrum

\textsuperscript{262} \textit{Id.}
\textsuperscript{263} \textit{Id.}
\textsuperscript{264} ITU INTERNET REPORT, \textit{supra} note 1, at 103.
\textsuperscript{265} See generally \textit{id.} at 135.
allocation and formulate a national spectrum strategy. The OSTP also should assume limited jurisdiction over spectrum allocation from the NTIA. In turn, this would free the NTIA to refocus its frequency assignment review on narrowbanding and trunking. By enacting these reforms, the U.S. will be better positioned to take advantage of the impending mobile Internet expansion.
APPENDIX I

Table 1. Online Gift Certificate Services in S. Korea

<table>
<thead>
<tr>
<th>Names</th>
<th>Service Areas</th>
<th>URLs</th>
<th>Target</th>
<th>Pricing</th>
</tr>
</thead>
<tbody>
<tr>
<td>Happy Money Cultural Gift Certificate</td>
<td>movie tickets, books, music</td>
<td><a href="http://www.happymoney.co.kr">www.happymoney.co.kr</a></td>
<td>teenagers</td>
<td>$3.35 $7.70</td>
</tr>
<tr>
<td>Happy 21</td>
<td>restaurants</td>
<td><a href="http://www.happiandc.co.kr">www.happiandc.co.kr</a></td>
<td>diners</td>
<td>$3.30 – $7.70</td>
</tr>
<tr>
<td>Hair Gift Certificate</td>
<td>400 hair salons</td>
<td><a href="http://www.dohari.co.kr">www.dohari.co.kr</a></td>
<td>Women</td>
<td>N/A</td>
</tr>
<tr>
<td>Sports Gift Certificate</td>
<td>340 sports shops: skiing, swimming, golfing, and bowling tickets</td>
<td><a href="http://www.ssbb.co.kr">www.ssbb.co.kr</a></td>
<td>sports fans</td>
<td>N/A</td>
</tr>
<tr>
<td>Arrange Marriage</td>
<td>set up meetings for singles</td>
<td><a href="http://www.darksclub.com">www.darksclub.com</a></td>
<td>singles</td>
<td>3 times: $269 6 times: $423 Internet chatting: $23</td>
</tr>
<tr>
<td>Insurance</td>
<td>ski, golf, new baby, marriage, PC, couple</td>
<td><a href="http://www.insdream.com">www.insdream.com</a></td>
<td>everyone</td>
<td>$33: ski &amp; golf $77: baby, marriage, PC, &amp; couple</td>
</tr>
<tr>
<td>Tutor</td>
<td>40,000 nationwide tutor database</td>
<td><a href="http://www.jinsoledu.com">www.jinsoledu.com</a></td>
<td>students</td>
<td>N/A</td>
</tr>
<tr>
<td>Health Care</td>
<td>354 pharmacies, glasses shops</td>
<td><a href="http://www.healthticket.co.kr">www.healthticket.co.kr</a></td>
<td>everyone</td>
<td>N/A</td>
</tr>
<tr>
<td>On/off</td>
<td>Online/offline shopping mall</td>
<td><a href="http://www.gift.daum.net">www.gift.daum.net</a> <a href="http://www.cj39.com">www.cj39.com</a> <a href="http://www.lgeshop.com">www.lgeshop.com</a></td>
<td>everyone</td>
<td>N/A</td>
</tr>
</tbody>
</table>

Table 2. Ring-Back Tone Service Comparison

<table>
<thead>
<tr>
<th></th>
<th>SKT</th>
<th>LGT</th>
<th>KTF</th>
</tr>
</thead>
<tbody>
<tr>
<td>Start Date</td>
<td>4/14/2002</td>
<td>7/1/2002</td>
<td>10/1/2002</td>
</tr>
<tr>
<td>Delay</td>
<td>0</td>
<td>6 weeks</td>
<td>22 weeks</td>
</tr>
<tr>
<td>Service Names</td>
<td>Color Ring</td>
<td>Feel Ring, R2U</td>
<td>2Ring, MP3 Ring Tone</td>
</tr>
<tr>
<td>User Base</td>
<td>3 Million</td>
<td>400,000</td>
<td>N/A</td>
</tr>
<tr>
<td>Content Providers</td>
<td>Witt Com (<a href="http://www.iplusm.com">www.iplusm.com</a>)</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Revenues</td>
<td>1.5 Billion Won</td>
<td>N/A</td>
<td>N/A</td>
</tr>
</tbody>
</table>

Source: Joins News (Aug. 21, 2002).

Table 3. S. Korean Mobile & 3G Service Providers

<table>
<thead>
<tr>
<th></th>
<th>SKT</th>
<th>KTF</th>
<th>LGT</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Subscribers</td>
<td>16,996,539</td>
<td>10,378,238</td>
<td>4,705,467</td>
<td>32,080,244</td>
</tr>
<tr>
<td>Market Shares</td>
<td>53%</td>
<td>32.3%</td>
<td>14.7%</td>
<td>100%</td>
</tr>
<tr>
<td>Monthly Growth Rates</td>
<td>1.2%</td>
<td>2.5%</td>
<td>6.8%</td>
<td>2.4%</td>
</tr>
<tr>
<td>CDMA 2000 1x</td>
<td>8,517,000</td>
<td>4,084,000</td>
<td>1,425,000</td>
<td>14,026,000</td>
</tr>
<tr>
<td>CDMA 2000 1x monthly growth</td>
<td>6.9%</td>
<td>15.2%</td>
<td>21.1%</td>
<td>100%</td>
</tr>
<tr>
<td>CDMA 2000 1x %</td>
<td>50.11%</td>
<td>39.35%</td>
<td>30.28%</td>
<td>39.91%</td>
</tr>
</tbody>
</table>

Source: MIC (Sept. 2002).

267. See generally Jeongchakjaryo, [MIC Policy Data], at http://www.mic.go.kr/jsp/mic_d/d700-0002-1.jsp?code=H&m_code=c100-0635-1.
Table 4. Subscriber Membership Chart

<table>
<thead>
<tr>
<th></th>
<th>SKT</th>
<th>KTF</th>
<th>LGT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prefix</td>
<td>011, 017</td>
<td>019</td>
<td>016, 018</td>
</tr>
<tr>
<td>Age</td>
<td>TTL Ting (13–17)</td>
<td>Bikie (13–18)</td>
<td>Khai Holeman (10’s)</td>
</tr>
<tr>
<td></td>
<td>TTL (18–23)</td>
<td>Main (25–35)</td>
<td>Khai (20’s)</td>
</tr>
<tr>
<td></td>
<td>UTO (25–35)</td>
<td>Na (early 20s)</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Angel Eye (kids/seniors)</td>
<td></td>
</tr>
<tr>
<td>All</td>
<td>Leaders Club</td>
<td>KTF Members Club</td>
<td>LG Family Club</td>
</tr>
<tr>
<td>Others</td>
<td>Biz (business)</td>
<td>Drama (women)</td>
<td>M-Plus Card (LG card, BC card, Kookmin card)</td>
</tr>
<tr>
<td></td>
<td>Khai Holeman (10’s)</td>
<td>K.merce (wireless/wired)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Khai (20’s)</td>
<td>Fimm (IMT-2000)</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Source: Donga.com.

Table 5. Pro-Female Membership Plan Chart

<table>
<thead>
<tr>
<th></th>
<th>SKT</th>
<th>KTF</th>
<th>LGT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Service Plans</td>
<td>CARA</td>
<td>Drama</td>
<td>I-Woman Khai Girl</td>
</tr>
<tr>
<td>Discount Benefits</td>
<td>Family discount</td>
<td>10-20% off Skin care Restaurant Cultural classes</td>
<td>Discounted flat rate Free 30 minutes Family member discount 45% for three lines</td>
</tr>
<tr>
<td>Off-line Benefits</td>
<td>Global Elite Service (free English conversation w/ foreigners)</td>
<td>Drama House (free Internet café)</td>
<td>N/A Hairstyle, Makeup &amp; Clothing</td>
</tr>
<tr>
<td>Goals</td>
<td>Upgrade women’s family lifestyle</td>
<td>Create a comfortable rest area for females</td>
<td>N/A 20’s w/ interest in beauty</td>
</tr>
</tbody>
</table>

Source: Joins News (Sept. 24 2002).

268. Byun, supra note 130.
Table 6. 65K Color Phone Market Share

<table>
<thead>
<tr>
<th></th>
<th>Market Shares</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>LG Electronics</td>
<td>50%</td>
<td>550,000</td>
</tr>
<tr>
<td>Samsung Electronics</td>
<td>45%</td>
<td>N/A</td>
</tr>
<tr>
<td>Motorola</td>
<td>5%</td>
<td>60,000</td>
</tr>
</tbody>
</table>

APPENDIX II

CARRIER-SPECIFIC FREQUENCY ALLOCATION IN S. KOREA

Table 1. Mobile Frequency Allocation

a. Analog

<table>
<thead>
<tr>
<th>Ch</th>
<th>Frequency (MHz)</th>
<th>Emission Type</th>
<th>Power</th>
<th>Coverage</th>
<th>Operators</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Mobile 824–835 MHz Band</td>
<td>Base 869–880 MHz Band 366 CHs</td>
<td>40K09F9X</td>
<td>Below 20W</td>
<td>Nationwide SK Telecom</td>
</tr>
</tbody>
</table>

Source: Central Radio Monitoring Office (CRMO), MIC

b. Digital

<table>
<thead>
<tr>
<th>Ch</th>
<th>Frequency (MHz)</th>
<th>Emission Type</th>
<th>Power</th>
<th>Coverage</th>
<th>Operators</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Mobile</td>
<td>Base</td>
<td>1M32G7W</td>
<td>Below 20W</td>
<td>Nationwide SK Telecom</td>
</tr>
<tr>
<td>1</td>
<td>824.640</td>
<td>869.640</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>825.870</td>
<td>870.870</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>827.100</td>
<td>872.100</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>828.330</td>
<td>873.330</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>829.560</td>
<td>874.560</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>830.790</td>
<td>875.790</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>832.020</td>
<td>877.020</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>833.250</td>
<td>878.250</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>9</td>
<td>834.480</td>
<td>879.480</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>10</td>
<td>835.890</td>
<td>880.890</td>
<td>1M32G7W</td>
<td>Below 20W</td>
<td></td>
</tr>
<tr>
<td>11</td>
<td>837.120</td>
<td>882.120</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>12</td>
<td>838.350</td>
<td>883.350</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>13</td>
<td>839.580</td>
<td>884.580</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>14</td>
<td>840.810</td>
<td>885.810</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>15</td>
<td>842.040</td>
<td>887.040</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>16</td>
<td>843.270</td>
<td>888.270</td>
<td></td>
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<td></td>
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<tr>
<td>17</td>
<td>844.500</td>
<td>889.500</td>
<td></td>
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<td></td>
</tr>
<tr>
<td>18</td>
<td>845.910</td>
<td>890.910</td>
<td>1M32G7W</td>
<td>Below 20W</td>
<td></td>
</tr>
<tr>
<td>19</td>
<td>847.140</td>
<td>892.140</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>20</td>
<td>848.370</td>
<td>893.370</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Source: Central Radio Monitoring Office (CRMO), MIC
### Table 2. PCS Frequency Allocation

<table>
<thead>
<tr>
<th>Ch</th>
<th>Frequency</th>
<th>Emission Type</th>
<th>Power</th>
<th>Coverage</th>
<th>Operators</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Mobile (MHz)</td>
<td></td>
<td>Base (MHz)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>1751.25</td>
<td>1841.25</td>
<td>1M32G7W</td>
<td>Below 20W</td>
<td>KTF</td>
</tr>
<tr>
<td>2</td>
<td>1752.50</td>
<td>1842.50</td>
<td>1M32G7W</td>
<td>Below 20W</td>
<td>KTF</td>
</tr>
<tr>
<td>3</td>
<td>1753.75</td>
<td>1843.75</td>
<td>1M32G7W</td>
<td>Below 20W</td>
<td>KTF</td>
</tr>
<tr>
<td>4</td>
<td>1755.00</td>
<td>1845.00</td>
<td>1M32G7W</td>
<td>Below 20W</td>
<td>KTF</td>
</tr>
<tr>
<td>5</td>
<td>1756.25</td>
<td>1846.25</td>
<td>1M32G7W</td>
<td>Below 20W</td>
<td>KTF</td>
</tr>
<tr>
<td>6</td>
<td>1757.50</td>
<td>1847.50</td>
<td>1M32G7W</td>
<td>Below 20W</td>
<td>KTF</td>
</tr>
<tr>
<td>7</td>
<td>1758.75</td>
<td>1848.75</td>
<td>1M32G7W</td>
<td>Below 20W</td>
<td>KTF</td>
</tr>
<tr>
<td>8</td>
<td>1761.25</td>
<td>1851.25</td>
<td>1M32G7W</td>
<td>Below 20W</td>
<td>KT.COM</td>
</tr>
<tr>
<td>9</td>
<td>1762.50</td>
<td>1852.50</td>
<td>1M32G7W</td>
<td>Below 20W</td>
<td>KT.COM</td>
</tr>
<tr>
<td>10</td>
<td>1763.75</td>
<td>1853.75</td>
<td>1M32G7W</td>
<td>Below 20W</td>
<td>KT.COM</td>
</tr>
<tr>
<td>11</td>
<td>1765.00</td>
<td>1855.00</td>
<td>1M32G7W</td>
<td>Below 20W</td>
<td>KT.COM</td>
</tr>
<tr>
<td>12</td>
<td>1766.25</td>
<td>1856.25</td>
<td>1M32G7W</td>
<td>Below 20W</td>
<td>KT.COM</td>
</tr>
<tr>
<td>13</td>
<td>1767.50</td>
<td>1857.50</td>
<td>1M32G7W</td>
<td>Below 20W</td>
<td>KT.COM</td>
</tr>
<tr>
<td>14</td>
<td>1768.75</td>
<td>1858.75</td>
<td>1M32G7W</td>
<td>Below 20W</td>
<td>KT.COM</td>
</tr>
<tr>
<td>15</td>
<td>1771.25</td>
<td>1861.25</td>
<td>1M32G7W</td>
<td>Below 20W</td>
<td>LG Telecom</td>
</tr>
<tr>
<td>16</td>
<td>1772.50</td>
<td>1862.50</td>
<td>1M32G7W</td>
<td>Below 20W</td>
<td>LG Telecom</td>
</tr>
<tr>
<td>17</td>
<td>1773.75</td>
<td>1863.75</td>
<td>1M32G7W</td>
<td>Below 20W</td>
<td>LG Telecom</td>
</tr>
<tr>
<td>18</td>
<td>1775.00</td>
<td>1865.00</td>
<td>1M32G7W</td>
<td>Below 20W</td>
<td>LG Telecom</td>
</tr>
<tr>
<td>19</td>
<td>1776.25</td>
<td>1866.25</td>
<td>1M32G7W</td>
<td>Below 20W</td>
<td>LG Telecom</td>
</tr>
<tr>
<td>20</td>
<td>1777.50</td>
<td>1867.50</td>
<td>1M32G7W</td>
<td>Below 20W</td>
<td>LG Telecom</td>
</tr>
<tr>
<td>21</td>
<td>1778.75</td>
<td>1868.75</td>
<td>1M32G7W</td>
<td>Below 20W</td>
<td>LG Telecom</td>
</tr>
</tbody>
</table>

Source: Central Radio Monitoring Office (CRMO), MIC

### Table 3. IMT-2000 Frequency Allocation

<table>
<thead>
<tr>
<th>Band</th>
<th>Frequency (MHz)</th>
<th>Types</th>
<th>Carriers</th>
<th>Homepages</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>1920-1940 MHz/2110-2130MHz</td>
<td>CDMA 2000</td>
<td>LG Telecom (IMT-2000 Grand Consortium)</td>
<td><a href="http://www.lgtelecom.co.kr">www.lgtelecom.co.kr</a></td>
</tr>
<tr>
<td>2</td>
<td>1940-1960MHz/2130-2150MHz</td>
<td>W-CDMA</td>
<td>SK-IMT</td>
<td><a href="http://www.sktelecom.com">www.sktelecom.com</a></td>
</tr>
</tbody>
</table>

Source: Central Radio Monitoring Office (CRMO), MIC
Table 4. Telecom Service Frequency Allocation

<table>
<thead>
<tr>
<th>Service Types</th>
<th>Frequency (MHz)</th>
<th>Emission Type</th>
<th>Power</th>
<th>Channels</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mobile Phone</td>
<td>Base: 869–894, Mobile: 824–849</td>
<td>40KOF9X 1M32G7W</td>
<td>20W</td>
<td>832ch/20ch</td>
</tr>
<tr>
<td></td>
<td>Base: 851–899, Mobile: 806–821</td>
<td>16KOF(G)</td>
<td>75W</td>
<td>Personal: 200ch, Business: 400ch</td>
</tr>
<tr>
<td></td>
<td>Base: 389.5–399.5, Mobile: 371.5–381.5</td>
<td>16KOF(G) OR 8K5OF(G)</td>
<td>75W</td>
<td>Personal: 400ch, Business: 200ch</td>
</tr>
<tr>
<td>PCS</td>
<td>Base: 1840–1870, Mobile: 1750–1780</td>
<td>1M32G7W</td>
<td>Below 20W</td>
<td>30ch</td>
</tr>
<tr>
<td>Radio Paging</td>
<td>162.43–164.33 (28), 167.25–169.15 (27), 322–328.6 (264)</td>
<td>16KOF(G)</td>
<td>Below 70W, Below 150W</td>
<td>317ch</td>
</tr>
<tr>
<td>WACS</td>
<td>910–914</td>
<td>80KOF9X</td>
<td>Below 10mW</td>
<td>40ch</td>
</tr>
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Source: Central Radio Monitoring Office (CRMO), MIC
NOTES

U.S. VS. INTERNATIONAL STOCK OPTION DISCLOSURE REFORM: THE INTERNATIONAL COMMUNITY LEADS WHERE THE U.S. COMMUNITY FAILED

“The point, ladies and gentlemen, is that greed, for lack of a better word, is good.”

Gordon Gekko

I. INTRODUCTION

Disclosure requirements for compensatory stock options were established in the United States (“U.S.”) in 1973. At that time, companies granted stock options almost exclusively to their corporate executives, and did so sparingly. However, since that time, corporations have expanded their use of compensatory stock options, which they now use as an employment compensation mechanism for many, if not all firm em-

1. WALL STREET (20th Century Fox 1987).
3. The Accounting Principles Board (“APB”) was established by the American Institute of Certified Public Accountants in 1959 as a successor to the Committee on Accounting Procedure, established in 1939, and as a precursor to the Federal Accounting Standards Bureau (“FASB”), established in 1973. Financial Accounting Standards, QuickMBA, at http://www.quickmba.com/accounting/fin/standards/ (last visited Sept. 23, 2003) [hereinafter Financial Accounting Standards]. The APB issued thirty-one opinions and four statements, which formed the basis of the FASB’s Generally Accepted Accounting Principles (“GAAP”), the accounting standard followed in the U.S. Id.
ployees, and which account for an increasing percentage of each employee’s annual compensation package. This Note argues that U.S. accounting rules do not capture accurately corporate operating expenses on financial statements, thus, have failed to evolve accordingly.

The U.S. accounting standard-setting body, the Federal Accounting Standards Board (“FASB”), understood that its accounting standard created a loophole which, almost without exception, every U.S. company used. Although a company was required to charge employment compensation as an expense on its balance sheet, reducing the amount of profit it reflected, a company could issue stock options as part of its employment compensation without recognizing a compensation expense on its financial statement. The FASB studied this disclosure loophole and drafted a revised procedure that, as this Note posits in Part III.B., would have closed the option disclosure loophole. However, Congress, in order to cater to big business interests, effectively overruled the FASB, and disclosure requirements remained largely unchanged.

Since that time, an international group of accounting regulation agencies, which include the FASB, known as the International Accounting Standards Board (“IASB”), studied this disclosure issue. The IASB recognized the need for new disclosure regulations and prepared its own preliminary standard, which it made available to the public for comment through March 7, 2003. The IASB claims that its proposed standard

5. Id.
7. Id.
8. Id.
10. See supra Part IV.A.
will provide investors with clearer disclosure than either the U.S. standard or other standards adopted internationally.\textsuperscript{13}

Part II of this Note explains how compensatory stock options function as corporate securities. It then analyzes how and why companies issue compensatory stock options as part of executive compensation packages. Part III first discusses the original U.S. stock option accounting standard and the rationale behind it. Second, it examines the subsequent proposed changes to that standard, which ultimately were rejected. Finally, it considers the political melee that ensued, leading to the rejection of the FASB’s proposed changes, and discusses the standard that was adopted.

Part IV sets forth the history of the international accounting standard-setting bodies, and then examines the international response to the stock option disclosure controversy. This Part also outlines the international option disclosure regulation currently being considered. Finally, Part V contends that compensatory stock options should be recognized as an expense on corporate financial statements in order to improve disclosure. It also advocates, among other things, that such a standard should be set by an international, rather than a national, standard-setting body.

II. STOCK OPTIONS AS A CORPORATE SECURITY

A stock option is a contract between the corporation and the holder ("grantee") that awards the grantee the right to purchase a certain number of shares of the company’s underlying stock at a stated price per share (typically known as either the “exercise price” or “strike price” or “grant price”).\textsuperscript{14} This right usually


vests over time, making the option exercisable at a future date.\textsuperscript{15} Both the exercise price and the underlying number of shares granted can be determined either at the date of grant ("grant date") or at some point after the grant date.\textsuperscript{16} The grantee, in turn, can exercise her option to purchase shares of the underlying stock at some point after the option vests or partially vests and before it expires.\textsuperscript{17} The grantee, likely, will choose to exercise her option when the price per share of the underlying stock exceeds the option's exercise price, at which point she either may retain the stock or sell it and realize a cash profit.\textsuperscript{18}

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\textsuperscript{15} Schwartz, \textit{supra} note 14, at 14.
\textsuperscript{16} Id.
\textsuperscript{17} There are three basic exercise methods: (1) cash exercise, in which the grantee pays the exercise price, together with the requisite transactional fees and withholding taxes; (2) cashless exercise, in which the grantee uses a portion of her options to purchase shares of stock, which the grantee simultaneously sells to pay the transaction fees, exercise cost and withholding taxes (if any) and (3) swap, in which the grantee uses company stock that she already owns to cover the exercise cost, and the grantee will pay transaction fees and withholding taxes, if applicable. The company provides for its exercise method(s) in its stock option plan. \textit{Stock Option Basics}, Charles Schwab, at http://www.schwab.com/SchwabNOW/SNLibrary/SNLib123/SN123Article/0,5637,872%7C4816,00.html (last visited Sept. 23, 2003). Additionally, a relatively new exercise method, the "West Coast Option" or "Reverse Vesting Option," allows the grantee to exercise unvested options and receive it's underlying stock, subject to a repurchase right by the company, which right will lapse according to the option's vesting schedule. Pamela B. Greene, Memorandum Regarding Early Exercise of Unvested Options, 1 (Jan. 31, 2002) (unpublished corporate form document produced by Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.) (on file with author).
\textsuperscript{18} In deciding whether to exercise a stock option, the grantee should take account of several personal investment and tax considerations, including impact on capital gains taxes and on estate taxes. Sonja Lepkowski, \textit{Compensation Stock Options}, THE CPA J., Sept. 2000, at sub-heading When to Exercise Options et. seq., at http://www.luca.com/cpajournal/2000/0900/dept/d95600a.htm. When the market price of the underlying stock is below the exercise price, the option is deemed "under water." \textit{Bottom Line: Treat Options as an Expense}, MERCURY NEWS, May 30, 2002, at Definitions, at http://www.bayarea.com/mld/m Merceruynews/news/opinion/3364740.htm [hereinafter \textit{Bottom Line}]. Although under water options typically are not exercisable (because the grantee could purchase the same number of shares on the open market for less than the grantee's exercise price), the under water options still have value because the stock price can rebound before the option expires. \textit{Id.} When an option's exercise price equals the market price of the underlying stock, the option is deemed "at the money." At the money, Investorwords.com, at http://www.investorwords.com/cgi-bin/getword.cgi?319 (last visited Sept. 23,
Compensatory stock options are stock options granted to employees and consultants in payment of services rendered to the issuing company. Typically, companies issue them as part of an employment compensation package. Moreover, compensatory stock options usually are issued subject to a plan that has been adopted by the issuing company’s board of directors and stockholders. The plan sets forth the purposes, parameters and requirements of the company’s compensatory stock program.

There are two types of compensatory stock options: the first is a statutory or “incentive” stock option (“ISO”), and the second is a non-statutory or “nonqualified” stock option (“NSO”). Both are so named to signify their respective tax treatment under the Internal Revenue Code of 1986, as amended (“Code”). As one author notes, “[t]he basic distinctions between these two types of options are how the gain from the option is taxed and what formal requirements the options must have. Generally, while the incentive stock option is more tax-favored, the nonqualified stock option is more flexible.”

When the market price exceeds the exercise price, the option is deemed “in the money.” In the money, Investorwords.com, at http://www.Investorwords.com/cgi-bin/getword.cgi?2580&inn%20the%20money (last visited Sept. 23, 2003).

24. Id. The tax treatment in the Code refers to that of the grantee. Generally, ISO’s have a more favorable tax treatment under the Code than NSOs. NSOs are regulated by § 83 of the Code and ISOs are regulated by § 421 and § 422 of the Code. Id. For more information regarding tax treatment of stock options and other stock-based executive compensation, see id. at 15–24. See Scott P. Spector, Significant Issues Relating to Stock-Based Compensation for Executives, 503 PLL/TAX 745 (2001).
A. Two Types of Compensatory Stock Options: ISOs and NSOs

ISOs were created by Congress as an instrument through which companies could attract and retain qualified personnel, particularly senior management. The “incentive” in the ISO refers to a tax incentive provided in the Code to the grantee. For a stock option to be deemed an ISO, it must meet several requirements set forth in the Code. First, an ISO must be granted pursuant to an incentive stock plan, which must be approved by the company’s stockholders within twelve months of the plan’s adoption by the Board of Directors. An ISO can be granted only to an employee of the company issuing the option, and the employee cannot transfer the ISO to a third party. Further, the option’s exercise price must equal or exceed the fair market value of the underlying stock on the grant date, and it “must be exercisable within ten years” of the grant date. Finally, as of the grant date, the employee must own less than 10% of the company’s voting stock.

26. Id.

The legislative history of section 422 [of the Code] states that the retention of employees was one of Congress’ purposes in creating the ISO. Further evidence of Congress’ intent is the requirement that the person exercising the option must be an employee of the employer granting the option “at all times during the period beginning on the date of the granting of the option and ending on the day [three] months before the date of such exercise.” This provision works in tandem with another section 422 requirement — if the employee exercises the option within two years of the granting, then she will no longer qualify for the favored tax treatment. Therefore, the employee would want to remain employed at least two years by the corporation, so that any gain from the exercise she receives will not be taxed as income.

Id. at 149.

27. Id. at 147.


29. Id.

30. Id.

31. Id.

32. Id. If at the time of the grant, the grantee owns more than 10% “of the total combined voting power of all classes of stock” of the issuing company, or one of its parents, subsidiaries or affiliates, as defined in § 424 of the Code, the option’s grant price must equal at least 110% of the fair market value per share as of the grant date. Anne Bruno & Pamela B. Greene, Plan Description for Employee, Director and Consultant Stock Option Plan, 5 (Nov. 30, 2001)
The “incentive” supplied in the Code refers to the fact that an ISO grant can provide the grantee with better tax treatment than an NSO grant. Under an ISO grant, the grantee is not taxed when she exercises her option, but when she disposes of the option’s underlying stock. Therefore, the grantee will not be forced to pay the Internal Revenue Service (“IRS”) for the income received until she actually realizes a cash profit from the stock sale. Additionally, the ISO holder may qualify to receive preferential capital gains tax treatment. However, to reap this tax benefit, the ISO grantee must hold the option for two years prior to exercising it. Additionally, the grantee then must hold the underlying stock for at least one year before selling it.

Unlike an ISO, an NSO is not subject to such rigorous statutory requirements, and thus, provides the company with greater flexibility. Companies can grant NSOs to employees, consultants and others without being restricted by the option’s conditions or expiration date, at an option price above or below the fair market value of the underlying stock. Under an NSO grant, the grantee is taxed when she exercises her option. Although the purpose of an ISO is to provide the grantee prefer-

(unpublished corporate form document produced by Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.) (on file with author). For all of the requirements to be deemed an ISO, see I.R.C. § 422.

34. Id. at 16.
35. See generally id. at 20–21.
36. Id.
38. Id. Pursuant to the Taxpayer Relief Act of 1997, under an ISO grant, the grantee will receive beneficial (long-term capital gains) tax treatment if she holds the underlying stock for more than twelve months after she exercises her option. Otherwise, the grantee will be taxed at the same rate as an NSO grantee. Schwartz, supra note 14, at 16.
40. Wood, supra note 28, at 959.
41. Schwartz, supra note 14, at 16. The grantee must pay income tax on the increased value of the option, which is the difference between the value of the shares at exercise and the option’s exercise price. Interestingly, the issuing company can take a tax deduction on the same amount that the employee is taxed. Bruno & Greene, supra note 32, at 14–15. Such compensation income of grantees may be subject to withholding taxes, and a deduction may then be allowable to the company in an amount equal to the grantee’s compensation income. Id.
ential tax treatment, due to the ISO's holding requirements, most ISO grantees never actually receive its tax benefit. Thus, the benefit of an ISO grant to its employees is often a perceived tax benefit, rather than an actual tax benefit.

B. Stock Option Rationale: Why Companies Issue Them as Executive Compensation

Granting stock options as part of an executive compensation package became increasingly popular in the 1990s during the explosion of high technology start-up companies. By the late 1990s, “more than eighty percent of the largest [U.S.] companies use[d] equity-based compensation to link executives to long-term corporate performance. The long-term variable component of such pay comprise[d] sixty percent of the typical CEO’s gross annual compensation.” The theoretical rationale for this phenomenon is fourfold.

First, agency theorists argue that by linking a significant percentage of an executive’s compensation to the price per share of the of the company’s stock, “it will encourage the executive to increase the firm’s profitability to achieve higher stock prices.” Thus, the executive will gain or lose personally, along with the stockholders.

Second, this link also aligns executives’ willingness to take risks with that of the company’s stockholders. Corporate executives are typically risk-averse. However, if a CEO’s financial success is tied to that of her company, she will be more likely to take greater risks so that her decisions will make

42. See id.
43. See Roberta S. Karmel, Securities Regulation the Fuss Over Stock Options, N.Y. L.J. 3 (June 20, 2002). “Equity-based compensation, and particularly stock options, helped to fuel the stock market bubble of the 1990s. Corporate executives were motivated to focus on stock market prices rather than long-term profitability.” Id.
44. See Ellis, supra note 4, at 412–13.
46. Johnson, supra note 14, at 148. For a discussion of this insight from the Agency-Cost Model and its potential shortcomings in describing actual practice, see Ellis, supra note 4, at 405–17.
47. See Johnson, supra note 14, at 148–49.
48. Id.
higher gains for the company’s stockholders, and for herself, under a “nothing ventured, nothing gained” philosophy.49

Third, companies grant stock options to retain management.50 By establishing both a vesting period (typically over a number of years) and a requirement that the employee remain employed by the company in order to exercise her stock options, the company encourages the employee to be invested in her job.51 As a corporate retention policy, the employee will weigh the additional cost of losing her unvested options before deciding to leave her job.52

Finally, companies grant stock options as an inexpensive, yet effective incentive to attract talented management whom, particularly at start-up companies, they could not afford to compensate in cash.53 Although start-up companies rarely have sufficient capital to attract qualified management with cash compensation, stock options can create potentially lucrative compensation packages due to the high growth potential of high-technology, start-up companies.54

III. HISTORY OF U.S. ACCOUNTING PROCEDURE

A. Opinion No. 25, Accounting for Stock Issued to Employees

Although under accounting rules, including the GAAP,55 employee compensation is treated as a corporate expense,56 Accounting Principles Board Opinion No. 25, Accounting for Stock Issued to Employees (“Opinion No. 25”)57 carves out “a rather broad exemption from compensation accounting for certain broad-based plans.”58 Opinion No. 25 sets forth regulations and

49. Id.
50. Id. at 149. See Christine I. Wiedman & Daniel J. Goldberg, Accounting for Stock-Based Compensation: As Easy as SFAS 123?, IVEY BUS. J., July/Aug. 2001, 6, at 6–9.
51. Johnson, supra note 14, at 149.
52. Id.
53. Id. at 149–50. See Wiedman and Goldberg, supra note 50.
55. For a definition of GAAP, see supra note 3.
56. See generally Rouse & Barton, supra note 6.
58. Summary of Recent Accounting Literature Interpreting APB Opinion No. 25, Accounting for Stock Issued to Employees, Ernst & Young, para. 13, at http://www.ey.com/global/Content.nsf/US/AABS_-_Assurance__Articles__Inter
accounting procedures for stock-based compensation given to employees. Specifically, if a company adopts a broad-based employee stock option plan that meets certain requirements set forth in the Code, the company can avoid recognizing a compensation expense in its financial statement when it grants options to its employees under that plan, even though it must recognize such an expense for its employees’ salaries. The rationale behind this carve-out is that although, technically, all employee stock option grants compensate employee grantees, the granting company adopts its compensatory stock plan to increase its capital account (by paying less cash compensation to its employees in salaries and bonuses), to promote employee ownership of the company, or to align employee and corporate interests (by linking the employee’s compensation to the company’s long-term financial success).

When applying Opinion No. 25, the “compensation cost” or “expense” of a stock option is measured by its intrinsic value, which is the difference between a stock’s market price and its exercise price on the measurement date. The measurement date, “is the first date on which both (1) the number of shares that an individual employee is entitled to receive and (2) the... [exercise] price, if any, are known.” Moreover, the plan’s expense “generally is recognized over the equity award’s vesting period. Compensation [cost or] expense associated with

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59. See generally Terry Grant & Conrad S. Ciccotello, The Stock Options Accounting Subterfuge, STRATEGIC FIN. MAG., Apr. 2002, at 37, 41 [hereinafter, Subterfuge].

60. Id. at para. 13. For a list of criteria, see id. at paras. 14–17. Compensatory stock options affect corporate financial statements in 3 ways: (1) as options are exercised, the number of shares issued and outstanding increases, diluting the per share price; (2) the cash payment of the exercise price to the company generally is reflected in the annual report under the section entitled “Cash Flows from Financing Activities;” and (3) the company receives a tax deduction upon each exercise of a compensatory stock option. Tilson, supra note 20, at para. 2.

61. Ernst & Young Summary, supra note 58, at para. 13.


63. Ernst & Young Summary, supra note 58, at para. 18.
awards that immediately are vested or attributable to past services is recognized when granted."

From 1972 until 1993, Opinion No. 25 governed disclosure of compensatory stock options in profit and loss statements. Among other things, Opinion No. 25 provided that a stock option plan could be categorized either as compensatory or non-compensatory. Under a compensatory plan, the company can grant either a fixed or variable award.

A stock option grant is fixed if both the number of underlying shares an employee can purchase and the exercise price are determined at the grant date. Under a fixed grant, because the employee's equity-based compensation is pre-determined, so long as her option continues to vest (i.e. as long as the grantee keeps her job), she will be able to exercise her stock option regardless of her actual employment performance. Assuming the company's stock increases in value from the grant date, the employee will be able to exercise her option and realize a profit.

Conversely, a stock option grant is variable if either the number of underlying shares an employee can purchase or the exercise price is determinable only after the grant date. For example, under a variable stock option grant, the number of shares granted to an employee could be contingent on realizing a performance target (such as going public, achieving a certain level of efficiency or improving a certain technology) or the stock market price maintaining a certain price per share. Because a variable grant can be tailored to the accomplishment of a specific employee, it is commonly known as a “performance-based” option grant.

When the grant’s measurement date and grant date occur simultaneously, the compensation cost is determinable or “fixed”
at the grant date, and thus, the issuance is a fixed stock option grant. Therefore, when a company grants a fixed stock option at an exercise price that is equal to the market price of the underlying stock on the grant date, the company does not recognize any compensation expense on its financial statement. However, when a company grants a variable stock option, it must estimate and accrue the option’s expense from the period between the grant date and the ultimate measurement date.

Due to the tax implications of Opinion No. 25, fixed option grants are more favorable than variable grants because fixed grant compensatory stock options have no intrinsic value when granted. Thus, the company incurs no expense. Furthermore, although a variable option grant can be exercised only if the stated target is met, making it less valuable to the grantee than a fixed option grant, the variable grant is more expensive for the issuing company than the fixed grant because the variable grant likely will cause a compensation expense to be charged to the company. As commentators Rouse and Barton point out, the preferred tax treatment given to the fixed option grant “seems counterintuitive.” Accordingly, the FASB began studying stock compensation in an effort to resolve these discrepancies.

B. SFAS 123 Accounting for Stock-Based Compensation

1. The Draft Proposal

Opinion No. 25 inadvertently encouraged companies to issue fixed compensatory stock options with an exercise price equal to the market price on the grant date, thereby intentionally creating a grant with no intrinsic value. After years of debate over the growing need for clarity or “transparency” of compensatory stock options on financial statements, and in light of the increased use of fixed stock options as compensation for senior

74. Id. at para. 19; Rouse & Barton, supra note 6, at 68.
75. Ernst & Young Summary, supra note 58, at para. 20.
76. Accounting Changes, supra note 62, at 72.
77. Rouse & Barton, supra note 6, at 68.
78. Id.
79. Id.
80. Id.
81. Id.
executives, the FASB reversed its opinion on the compensatory stock option carve-out for employees and directors.\textsuperscript{82} The FASB stated publicly that all compensatory stock option grants should be accounted for as an expense to the issuing company.\textsuperscript{83} In reaching this conclusion, the FASB recognized that because compensatory stock options were being used regularly as a significant percentage of senior executives’ compensation packages, increased corporate disclosure was needed to provide investors with the requisite information to make sound investment decisions.\textsuperscript{84}

In 1993, the FASB issued its Exposure Draft of SFAS 123 Accounting for Stock-Based Compensation (“FASB Exposure Draft”) to close the loophole created by Opinion No. 25.\textsuperscript{85} The FASB Exposure Draft required companies to recognize all grants of compensatory stock options as expenses in their income statements.\textsuperscript{86} Moreover, the FASB Exposure Draft required the expense to be measured using the fair value of the option’s underlying stock at the grant date, instead of its intrinsic value as required by Opinion No. 25.\textsuperscript{87} The FASB adopted the fair value method because, although the intrinsic value method would be much easier to calculate, it believed that fair value better represented an option’s true value. Under the fair value method,

compensation cost is measured at the grant date and is recognized over the service period (typically the vesting period).

\textsuperscript{82} Alan Levinsohn, \textit{Stock-Option Accounting Battle Resumes After Seven-Year Détente}, \textit{Strategic Fin.}, June 2002, at 63. \\
\textsuperscript{83} Id. The FASB based its opinion on the fact that compensatory stock options are issued to employees as compensation for services rendered to the company. \textit{Id.} Christine A. Botosan and Marlene A. Plumlee, in their study on the effects of stock option expense, studied one hundred companies named by Fortune Magazine as “America’s Fastest-Growing Companies” and found that: (1) for a majority of its sample companies, the impact of stock option expense is material; (2) within the next three to five years, stock option expense would “become even more economically significant” and (3) there is a segment of the corporate population that currently is not in compliance with SFAS 123. Christine A. Botosan & Marlene A. Plumlee, \textit{Stock Option Expense: The Sword of Damocles Revealed}, \textit{Accounting Horizons}, Dec. 2001, at 312, 325. \\
\textsuperscript{84} Rouse & Barton, supra note 6, at 68. \\
\textsuperscript{85} \textit{Subterfuge}, supra note 59, at 41. \\
\textsuperscript{86} \textit{Id.} \\
\textsuperscript{87} \textit{FASB Issues Proposal on Stock Option Compensation}, \textit{J. of Accountancy}, Sept. 1993, at 23.
Fair value is determined using an option pricing model (such as Black-Scholes or a binomial pricing mode) that takes into account the grant date, the exercise price, the expected life of the option, the current price of the underlying stock, its expected volatility, expected dividends on the stock, and the risk-free interest rate over the expected life of the option.\footnote{88}

By requiring companies to use the fair value method instead of the intrinsic value method, the FASB Exposure Draft required companies to capture on the income statements the increase in value that option grantees would recognize over their option’s vesting period.\footnote{89}

2. The Proposal as Adopted

Public response to the FASB Exposure Draft was unambiguous and overwhelmingly negative.\footnote{90} The U.S. business commu-

\footnote{88. Wiedman & Goldberg, supra note 50, at 6. Additionally, under the GAAP, “most exchange transactions” are stated based on the clearer of the fair value of the consideration given or of the item received. However, Opinion No. 25 used the intrinsic value method instead of fair value because it was generally accepted that the underlying stock value was too difficult or tenuous to calculate. Rouse & Barton, supra note 6, at 69. For a description and analysis of the binomial pricing mode, see Stefan Winter, Tax and accounting implications of sequential stock options grants, Research Report 2001–1, University of Wuerzburg, Faculty of Business and Economics, Chair of Business Administration, Personnel, and Organization, at 7–8 (Mar. 2001). An option pricing model is a mathematical formula used to determine the theoretical fair value of an option. Option Pricing Models, at sub-heading Option pricing models, Australian Stock Exchange, at http://www.asx.com.au/markets/I4/PricingModels_AM4.shtml (last visited Sept. 23, 2003). The two most widely used option pricing models are the Black-Scholes option pricing model and the binomial option pricing model. The binomial pricing model was developed by Cox, Ross and Rubinstein and published in 1979. Id. at The binomial pricing model. For a summary of the binomial model, see id. The Black-Scholes formula was develop by economists Fischer Black and Myron Scholes in 1973. In 1997, Black, who had died in 1995, and Scholes were awarded the Nobel Price in Economics for their options-pricing model. Bottom Line, supra note 18. For a description of both of the Black-Scholes Pricing Model and Binomial Model, see Option Pricing Models and the “Greeks”, Peter Hoadley's Options Strategy Analysis Tools, at http://www.hoadley.net/options/BS.htm#Binomial (last visited Sept. 23, 2003).}

\footnote{89. Rouse & Barton, supra note 6, at 69.}

\footnote{90. Botosan & Plumlee, supra note 83, at 313. For example, Thomas M. Foster, Vice President and Controller of Phelps-Dodge Corp. said, “Like most accountants, I think the FASB’s efforts are a waste of time. It shouldn’t try to develop noncash charges that essentially don’t provide financial statement
nity came out in force to renounce the FASB Exposure Draft as detrimental to industry and to the economy for the same reason that the FASB saw the need to act: expensing compensatory stock options could reduce the profit reflected on a company’s financial statement by a significant percentage and, in turn, force a change in the manner and degree of compensation to employees and senior executives.91

Opposition to the FASB Exposure Draft was threefold. Companies argued that the new measure was extremely subjective,92 accountants argued that the theories behind the technical changes were too difficult to comprehend,93 and both agreed that the FASB Exposure Draft would have an adverse impact on small, start-up companies.94 In one prominent complaint, the American Institute of Certified Public Accountants (“AICPA”) users with any useful information.” Lieberman Legislation, supra note 9, at 16. The FASB received over one thousand, seven hundred comment letters on the FASB Exposure Draft, many of them before the draft was released to the public. Botosan & Plumelee, supra note 83.

91. Rouse & Barton, supra note 6, at 70. For example, had America Online, Inc. applied the FASB Exposure Draft rules in 1992, it would have reduced AOL’s earnings of 40 cents per share by at least 25%. Roula Khalif, If It Ain’t Broke..., FORBES, Apr. 12, 1993, at 100. Had the FASB Exposure Draft measure been applied in 2000, Cisco Systems, Inc.’s earnings would have been reduced by 40% and WorldCom, Inc.’s earnings would have been reduced by 14%. Geoffrey Colvin, Losing the Good Fight, FORTUNE, Apr. 15, 2002, at 75. Colvin also points out that Cisco’s per share price is down 79%, and WorldCom’s per share price is down 84%, after which he asks whether reporting lower earnings “would have been a bad thing.” Id. In 2001, application of the FASB Exposure Draft would have reduced the Standard & Poor’s 500-stock index earnings-per-share in excess of 24%. Duncan Hughes, Now the Fed Enters Standards Battle, ACCOUNTANCYAGE.COM, July 25, 2002, para. 10, at http://www.accountancyage.com/ Analysis/1130141.

92. Khalif, supra note 91.

93. Rouse & Barton, supra note 6, at 70. “Opponents to recognition of stock-based compensation expense also believe that the value of employee stock options cannot be measured reliably because existing option value estimation technology is not suitable for employee options, which have unique characteristics, and estimation of option values requires exercise of substantial management discretion.” David Aboody, Mary E. Barth and Ron Kasznik, SFAS 123 Stock-Based Compensation Expense and Equity Market Values, July 2001, at 2.

94. Accounting Changes, supra note 62, at 73–77. For an example and analysis on how the FASB Exposure Draft would affect small versus large companies, see id. at 37–39. See also Lyn Perlmutt, Hanging Tough on Stock Options, INSTITUT’L INVESTOR, Nov. 1994, at 172.
submitted a public response letter to the FASB Exposure Draft claiming, among other things, that the amended disclosure policies would not provide any additional transparency to the investing public and that the disclosure policy provided for in Opinion No. 25 continued to produce reliable results.\textsuperscript{95}

Furthermore, in response to the public outcry from individuals and organizations lobbying for business interests, both the U.S. Senate and the House of Representatives entered the debate. Several members of Congress supported a “Sense of Congress Resolution” against the FASB Exposure Draft.\textsuperscript{96} Additionally, Senator Joseph Lieberman of Connecticut introduced S. 1175, the Equity Expansion Act of 1993,\textsuperscript{97} a bill that would require the Securities and Exchange Commission (“SEC”) to overrule the FASB Exposure Draft, effectively revoking the FASB’s rule-making authority.\textsuperscript{96} Although S. 1175 never came to a vote on the Senate floor,\textsuperscript{99} the bill had sufficient support to pass.\textsuperscript{100}

\begin{itemize}
  \item \textsuperscript{95} AsSEC Comments on FASB's Stock Option Proposal, \textit{J. OF ACCOUNTANCY}, Mar. 1994, 9. Walter Schueltze, then the SEC’s chief accountant, in his address to the American Institute of Certified Public Accountants (“AICPA”), noted that initially, most major accounting firms backed expensing stock options, and that he found the recent reversal troubling. Schueltze pointed out that the change of heart, “left members of the public with the impression [that] the switch was in response to a fear of losing clients or other forms of retaliation.” Schultze Wary over CPA Independence on Stock Option Proposal, \textit{J. OF ACCOUNTANCY}, Mar. 1994, 9.
  \item \textsuperscript{97} Equity Expansion Act of 1993, S. 1175, 103d Cong. (1993).
  \item \textsuperscript{98} \textit{Lieberman Legislation, supra} note 9, at 15. Lieberman argued that the FASB Exposure Draft, if adopted, would be detrimental as a matter of public policy. \textit{Id.} Lieberman was joined by members of both political parties in condemning the FASB Exposure Draft and promoting S. 1175. \textit{Id.}
  \item \textsuperscript{99} The bill never came to a vote because the FASB caved into political pressure and revised the FASB Exposure Draft to remove the expensing requirement. \textit{See} Hinchman, \textit{supra} note 96.
  \item \textsuperscript{100} \textit{Id.} More than 60 Senators supported S. 1175. \textit{Id.} Representative Nancy Johnson of Connecticut and Representative Lewis Payne of Virginia submitted H.R. 2759, a companion bill to S. 1175. \textit{Lieberman Legislation, supra} note 9, at 15.
\end{itemize}
However, a small but distinguished minority supported, and continue to support, the principles set forth in the FASB Exposure Draft. During the initial controversy, Senator Carl Levin of Michigan and Representative John Bryant of Texas vocally opposed S. 1175. Additionally, as far back as 1985, Warren Buffet, CEO and Chairman of the Board of Directors of Berkshire Hathaway Inc., made clear his position that compensatory stock options should be expensed. He explained that, among other things, “it is both silly and cynical to say that an important item of cost should not be recognized simply because it can’t be quantified with pinpoint precision.”

101. Senator Carl Levin and Representative John Bryant sent a letter to their fellow members of Congress urging them to support the FASB Exposure Draft. Their letter said, “[i]t is time to bring stock options under the rules of ordinary compensation.” Lieberman Legislation, supra note 9, at 15–16. Senator Levin also stated that “[c]ompensatory stock options are the only kind of compensation that companies can deduct from their taxes as an expense but don’t have to include in their books as an expense.” Perlmuth, supra note 94.


It seems to me that the realities of stock options can be summarized quite simply: If options aren't a form of compensation, what are they? If compensation isn't an expense, what is it? And, if expenses
The FASB claimed to be beyond the sway of political pressure, yet it appears that in fear of losing its autonomy and authority, the FASB succumbed to it, nonetheless. When SFAS 123 was adopted in October 1995 in its final form, it did not require companies to recognize options as expenses in their financial statements. Instead, it permitted companies to choose between recognition of options as an expense on financial statements and disclosure of such options in footnotes. Moreover, SFAS 123 does not require calculation and disclosure of “the annual charge for stock option expense” by using “the total fair value of options granted during the year. Instead, firms amortize the total fair value over the period(s) in which the related services are rendered.”

shouldn’t go into the calculation of earnings, where in the world should they go?

Id.

105. Diana Willis, FASB Project Manager, stated that although the FASB would take the controversy into account, “[p]olitics is not a factor in the board’s deliberations.” Perlmuth, supra note 94. But see Hinchman, supra note 96 (noting that Dennis Beresford, former Chairman of the FASB, admitted that the FASB’s decision not to require companies to expense compensatory stock options was heavily influenced by it’s fear of congressional intervention). James Lensing, former Vice Chairman of the FASB, stated that the FASB had not changed its opinion of the need for companies to expense compensatory stock options, but the FASB’s concern over being overruled by Congress forced the FASB to abandon its policy. Id.

106. Botosan & Plumlee, supra note 83.


108. Botosan & Plumlee, supra note 83. See SFAS No. 123, para 11. From 1995 until the aftermath of Enron and WorldCom, almost without exception, companies opted for footnote disclosure over expense recognition. Id. at 312. For a description of the Enron and WorldCom accounting troubles, see infra notes 132 and 133, respectively.


110. Id. at 313. See SFAS No. 123, para. 30. SFAS 123 encourages [companies] to recognize [options’] expense in reported net income, but allows them to continue using the intrinsic value method prescribed by [Opinion No.] 25 for recognition purposes. [Companies] using [Opinion No.] 25 must provide footnote disclosures of pro forma net income and earnings per share computed using the fair value method.

Id. at para. 11. For a summary of SFAS No. 123, see Financial Accounting Standards Board Summary of Statement No. 123, at http://www.fasb.org
IV. INTERNATIONAL ACCOUNTING COMMUNITY REACTION

A. History and Composition of the International Accounting Standards Board

Since the inception of the International Accounting Standards Committee (“IASC”) in 1973, the international community has had its own accounting standard-setting body.\(^{111}\) In the early 1990s, the IASC focused much of its attention on internal restructuring to create a more comprehensive international standard-setting body. In 1993, an interim group known as G4+1 formed in order to continue reviewing accounting issues and to set standards for use by the international community while the IASC was in the process of restructuring.\(^{112}\) Recently, the IASC restructured its membership, revised its constitution,\(^{113}\) and in 2001, took the form of the International Accounting Standards Board ("IASB"),\(^{114}\) at which time, G4+1 disbanded.\(^{115}\) The IASB is a London-based, privately-funded, independent body, the goal of which is to create a universal, comprehensible and enforceable set of accounting standards.\(^{116}\)

\(^{111}\) See IASC Chronology, supra note 11. The state accountancy agencies of Australia, Canada, France, Germany, Japan, Mexico, the Netherlands, the United Kingdom, Ireland, and the U.S. formed the IASC. Id. Over the next twenty-five years, states continued to join the IASC as it created a set of accounting standards to be used universally. These standards have become widely used outside the U.S. See generally id. However, the U.S. never adopted the IASC standards. Instead, it continues to follow the GAAP set by the FASB.

\(^{112}\) G4+1 is an association of the accounting standards-setting bodies of each of Australia, Canada, New Zealand, the United Kingdom, and the U.S. IASC Involvement with G4+1 Projects, IAS Plus, Deloitte Touche Tohmatsu, Para. 1, at http://www.iasplus.com/agenda/g4.htm (last visited Nov. 7, 2002). The IASC contributed to G4+1 projects, in its capacity as an observer. Id. at para. 3. For a summary of G4+1’s objectives and goals, see G4+1, Financial Accounting Standards Board, at http://www.fasb.org /IASC/G4+1.shtml (last visited Nov. 7, 2002).

\(^{113}\) IASC Chronology, supra note 11, at sub-heading 2000.

\(^{114}\) Id. at sub-heading 2001.

\(^{115}\) Since the IASB was ready to begin formally, G4+1 agreed to disband at its January 30, 2001 meeting. IASC Involvement with G4+1 Projects, supra note 112, at para. 1.

Before it disbanded, G4+1 reviewed compensatory stock option disclosure policies and published its findings in *Accounting for Share-Based Payments* ("G4+1 Study"). Among other things, the study concluded that companies should recognize an expense in their financial statements for all transactions for goods and services with employees and suppliers in consideration for stock options, "with a corresponding charge to the income statement when those goods or services are consumed." It also determined that the expense should be calculated using the fair value of the option's underlying stock, which should be calculated using an option pricing model (such as Black-Scholes or the binomial method). Further, it specified that the measurement date should be the vesting date (and not the grant date), and the vesting date should be the date the option becomes unconditionally exercisable.

### B. IASB Decides to Expense Compensatory Stock Options

In an effort to hold itself out as a truly independent standard-setting organization and to slay the toughest dragons first, the

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118. *Id.*

119. *Id.* at para. 1.

120. See [*supra* note 88].

121. D&T on G4+1, [*supra* note 117], at paras. 1–2.


IASB agreed to pick up where G4+1 left off in creating an international, definitive set of accounting standards to deal with disclosure of compensatory stock options. In September 2001, the IASB adopted the G4+1 Study, incorporating it into its own summary (“IASB Summary”), in which it reviewed the project’s history and the findings of G4+1. The IASB Summary made preliminary determinations on disclosure requirements for stock-based compensation in financial statements, which it solidified in its exposure draft, released on November 7, 2002 (“IASB Exposure Draft”). As part of its analysis, the IASB noted that while few countries had an accounting standard for share-based payments, without exception, those countries that had considered the issue concluded that compensatory stock options should be expensed.

Urban notes that some politicians and accountants believe that the FASB, “relies too much on specific rules, which allow companies to violate the spirit of accounting standards and still comply with GAAP.” Id. Kimberly Crook of the IASB has stated that the although the FASB deems expensing stock options the appropriate disclosure method, such disclosure is not compulsory in the U.S., “because the Americans have made this a political issue, not an accounting question.” Reid, supra note 116.

126. IASB Summary, supra note 13.
127. See IASB Exposure Draft, supra note 12.
128. Id. at 1. As part of its review, the IASB considered each of the G4+1’s draft policy entitled “Accounting for Share-Based Payment,” the German Accounting Standards Committee’s draft accounting standard entitled “Accounting for Share Option Plans and Similar Compensation Arrangements,” the Danish Institute of State Authorized Public Accountants’ Discussion Paper entitled “Accounting Treatment of Share-Based Payment,” SFAS 123 and the Canadian Accounting Standards Board’s accounting standard entitled “Stock-based Compensation and Other Stock-based Payments.” Id. at 1–2. For a summary of each analysis, see id.
Therefore, it is not surprising that the IASB, like its predecessors, plans to require companies to recognize compensatory stock options as an expense on their financial statements, which will be measured using the fair value of an option’s underlying stock as of the grant date. The IASB also proposed that all companies, both public and private, be required to calculate the expense of their compensatory stock options using the fair value method.

129. IASB Exposure Draft, supra note 12, at 19. IASB Summary, supra note 13, at 4. For a detailed analysis of the IASB Summary, see IASB Technical Agenda Project Share-Based Payment, IAS Plus, Deloitte Touche Tohmatsu, at http://www.iasplus.com/agenda/share.htm (last visited Sept. 23, 2003) [hereinafter Technical Agenda]. The IASB reviewed the disclosure approach adopted by SFAS 123, but rejected it as an inadequate alternative for recognition. Id. at sub-heading Recognition vs. disclosure.

130. IASB Exposure Draft, supra note 12, at 16; IASB Summary, supra note 13, at 4. See Technical Agenda, supra note 129, at sub-heading Fundamental Decisions. Before adopting the grant date as the measurement date, the IASB considered using each of the grant date, service date ("the date at which the employee performs the services necessary to become unconditionally entitled to an option"), vesting date and exercise date. Id. at sub-heading Measurement date. The IASB also met with Myron Scholes, the Nobel Prize winning co-drafter of the Black-Scholes valuation method, after which the IASB agreed with Scholes that, “it is possible to reliably estimate [sic] the fair value of share options.” Id. at sub-heading Reliable measurement. However, the IASB does not plan to require companies to use a particular valuation method. Id. at sub-heading Valuation method.

131. IASB Exposure Draft, supra note 12, at 16. Technical Agenda, supra note 129, at sub-heading Fundamental Decisions. By choosing the fair value measurement base, the IASB rejected each of the historical cost, intrinsic value and minimum value bases. Id. at sub-heading Measurement bases.
C. Reaction to the IASB’s Plan to Require Expensing Stock Options

In the wake of corporate accounting scandals like Enron and WorldCom that consumed international attention beginning in 2001, and in anticipation of the IASB’s proposed option disclosure requirements, public debate again has turned to corporate transparency and the expensing of compensatory stock options. Unlike in the early 1990s, public response appears to be more balanced. While U.S. companies generally continue to hold their ground by insisting that an expensing requirement would damage corporate financials severely and impact employee compensation choices, both national and international support for the IASB plan has grown.

132. Enron, Inc. is a Houston-based energy trading company, which filed for bankruptcy protection after disclosing, among other things, that over the last five years, it falsely reported its earnings. Oliver Willis, EnronGate, at http://www.oliverwillis.com/enrongate/ (last visited Nov. 7, 2002). For continuing updates on the Enron scandal, along with a link to all public documents filed in connection with the ongoing investigations and suits, see FindLaw Special Coverage Enron, Findlaw.com, at http://news.findlaw.com/legalnews/lit/enron/ (last visited Sept. 23, 2003); See Stephanie J. Burke, The Collapse of Enron: A Bibliography of Online Legal, Government and Legislative Resources, at http://www.llrx.com/features/enron.htm (last visited Sept. 23, 2003). But see Public Comment Letter from the International Employee Stock Option Coalition (“IESOC”) to David Tweedie, IASB Chairman (Dec. 31, 2001) (in which the IESOC calls for the IASB to adopt the SFAS 123 model), at http://www.americanbenefitscouncil.org/issues/other/iesoc_1214.pdf [hereinafter IESOC Comment Letter]. However, the IESOC is largely comprised of U.S. corporations and organizations. For a complete list of its members, see id.

133. WorldCom Corp. is a Clinton, Mississippi–based long-distance telecommunications company that was forced by the SEC to restate downwardly its financials. The SEC filed fraud charges against the company after an internal audit proved “that almost $4 billion of expenses in 2001 and $797 million in the first quarter of 2002 were wrongly listed on company books as capital expenses, thus not reflected in its earnings results.” MSNBC News, SEC Files Fraud Charges Against WorldCom (June 26, 2002), at http://stacks.msnbc.com/news/772330.asp?cp1=1#BODY. See Jake Ulick, WorldCom’s Financial Bomb, CNNMONEY, June 26, 2002, at http://money.cnn.com/2002/06/25/news/worldcom/.

134. AIMR, the Association for Investment Management and Research, is an international, non-profit, professional society of fifty-eight thousand investment professionals, headquartered in Charlottesville, Virginia, with offices in Hong Kong and London. Analysts Association AIMR Wants FASB to Follow IASB Plan to Require Companies to Expense Stock Option Costs, July
Once again, particularly in the U.S., debate over expensing has amplified. This time, proponents of expensing include the notable addition of PricewaterhouseCoopers Chief Executive Officer, Samuel DiPiazza, Jr.\(^{135}\) DiPiazza favors the adoption of international principles that will “mak[e] financial reporting more relevant to investors.”

U.S. lawmakers, again, have attempted to legislate a resolution to stock option expensing. There has been an onslaught of bills submitted to the House and Senate.\(^{137}\) Most notably, Sena-

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\(^{136}\) Id. at 17–18. DiPiazza’s belief in a global standard in lieu of GAAP, in part, stems from the fact that, “the current U.S. GAAP begins with a principle but then moves to dozens and dozens of rules and exceptions, all designed to appease somebody out there in the market.” \textit{Id.} at 18.

\(^{137}\) A small sampling of current bills introduced into Congress in 2002 regarding stock options include: (1) Prevention of Stock Option Abuse Act, S. 2822, 107th Cong. (2002); (2) To amend the Internal Revenue Code of 1986 to clarify the treatment of incentive stock options and employee stock purchase plans, H.R. 2695, 107th Cong. (2001), (which would exclude ISO’s and employee stock purchase plans from being considered as wages); (3) Stock Option Fairness and Accountability Act, S. 2760, 107th Cong. (2002); (4) Workplace Employee Stock Option Act of 2002, H.R. 5242, 107th Cong.
tors Levin and McCain, together with Senators Fitzgerald, Durbin and Dayton, re-introduced S. 1940 entitled “Ending the Double Standards for Stock Options Act,” which initially was introduced in 1997, but has gained wide exposure since February 2002. Under current U.S. regulations, companies can treat stock options as an expense on tax returns, but refrain from treating them as an expense on their financial statements. If passed, the Act would require companies to treat stock options uniformly in both their profit and loss statements and their tax returns. Thus, if a company claims a tax deduction for a stock option expense on its tax return, it also must disclose the same expense in its financial statement. However, the bill does not require that companies unilaterally expense stock options or dictate the accounting method by which companies must expense their options. By tying the company’s corporate tax deduction directly to the amount expensed on the company’s financial statement, the bill seeks to achieve


140. Id.

141. Id.

142. Id. at para. 8.

consistent, fair disclosure. In April 2002, President Bush implicitly rejected S. 1940 by publicly supporting the continuance of FASB 123, signaling that he is likely to veto it if passed.

It is worth noting that the bill’s sponsors framed their argument in the context of the Enron scandal. Both Senators Levin and McCain point out that between 1996 and 2000, Enron issued close to $600 million in compensatory stock options, for which it earned $600 million in tax deductions. Levin and McCain argue that the crux of the Enron debacle is that the company received the benefit of a $600 million tax deduction without disclosing the burden of $600 million in lost profits. Had Enron also reported the $600 million as an expense on its books, it would have disclosed the $600 million in lost profits.

144. McCain Press Release, supra note 138, at para. 7. In his press release, McCain stated,

[n]o other type of compensation gets treated as an expense for tax purposes, without also being treated as an expense on the company books. This double standard is exactly the kind of inequitable corporate benefit that makes the American people irate and must be eliminated. If companies do not want to fully disclose [sic] on their books how much they are compensating their employees, then they should not be able to claim a tax benefit for it.

Id. See Press Release, Senator Carl Levin of Michigan, Summary of Levin-McCain-Fitzgerald-Durbin-Dayton Ending the Double Standard for Stock Options Act (Feb. 13, 2002) [hereinafter Levin Press Release]. This year, former SEC Chairman, Arthur Levitt, stated that one of his great regrets while serving as Chairman was failing to require that stock options be treated as an expense on corporate financial statements. NASP on S. 1940, supra note 138, at para. 3.

145. Levinsohn, supra note 82, at 64. President Bush stated, “I think once options are in the money, they ought to be calculated in the dilution, that they ought to be dilutive in their earnings-per-share calculations.” Id.

146. McCain Press Release, supra note 139; Levin Press Release, supra note 144. For a description of the Enron scandal, see supra note 132.

147. McCain Press Release, supra note 138, at para. 3. McCain stated,

[t]he latest scandals involving the collapse of Enron highlight the problem of misleading annual statements and financial statements...[C]urrent rules allow companies such as Enron to disclose as little as possible. And this prevents investors, Wall Street analysts, corporate executives and auditors from properly understanding the bottom line of corporations.


148. See Levin Press Release, supra note 144.
financial statements, its reported profits would have been reduced by one-third.\textsuperscript{149} Had Enron’s profit margin been cut by one-third, its stock price also would have deflated,\textsuperscript{150} perhaps reflecting a more accurate price per share.

Reaction to S. 1940 from the high technology business community largely continues to be negative. Many technology organizations have taken an active stand against the bill\textsuperscript{151} and continue to support SFAS 123.\textsuperscript{152} On the other hand, in light of the myriad of recent accounting scandals, and in an effort to rebuild investor confidence, major corporations voluntarily have begun to expense stock options.\textsuperscript{153} However, many corporations still insist that, currently, no valuation method accurately captures the cost of stock options.\textsuperscript{154}

Therefore, the FASB recently agreed to amend SFAS 123 to make it easier for companies to adopt expensing methods and to

\begin{itemize}
  \item Id. at para. 1.
  \item See id.
  \item The American Electronics Association (“AeA”) actively campaigned against S. 1940, and rejects the idea that stock option expensing had anything to do with the collapse of Enron. For a summary of its argument, see AeA on S. 1940, supra note 143. The Information Technology Association of America (“ITAA”) also rejects both S. 1940 and the Enron implications made by Levin and McCain. Harris Miller, An Enron ‘Elixir’ Would Try to Cure What Doesn’t Ail Us, May 1, 2002, at http://www.itaa.org/news/view/ViewPoint.cfm?ID=22. Alan Reynolds, a senior fellow with the Cato Institute (http://www.cato.org) also rejects both the bill and the Enron connection. See Reynolds, supra note 138.
  \item AeA on S. 1940, supra note 143, at para. 5. While opposition to S. 1940 has intensified in 2002, in 1997 in a letter to the Senate Finance Committee Chairman, the AICPA, rejected the bill. For a summary of AICPA’s objections, see Laffie, supra note 138.
  \item The Wall Street Journal, in its online list of companies that have chosen to expense, printed this warning:
    \begin{quote}
      Calculations come from the companies’ data and use the Black-Scholes formula, which links the value of an option to such variables as the current share price, the exercise price, expected volatility in share prices and expected dividends. This formula doesn’t give an accurate picture of the cost of stock options.
    \end{quote}
    Hughes, supra note 91, at sub-heading Not Ideal.
\end{itemize}
provide clearer, more regular disclosure. On October 4, 2002, the FASB released an exposure draft of its proposed amendment to SFAS 123. The three-pronged proposed amendment would (1) provide three transition methods for companies who chose to adopt SFAS 123’s expensing option, (2) require clearer disclosure of the accounting methods used, and (3) require additional disclosures in each company’s interim financial statements. Currently, disclosure is required only in annual financial statements.

V. TOWARDS AN EFFECTIVE DISCLOSURE STANDARD

A. Regulatory Issue v. Political Issue

The method of disclosure of option expense on financial statements should be determined based on standards that promote and protect accuracy and clarity, since the point of such disclosure is to provide the investing public with sufficient information to make well-informed investment decisions. In the U.S., the FASB has promulgated the GAAP since the SEC charged it with this task in 1973. Congress, by threatening to legislate around the FASB’s proposed amendments to the GAAP, turned this regulatory issue into a political one. Legislators who sided with the business community, like Senator Joseph Lieberman, effectively thwarted useful accounting reform. In so doing, Congress exacerbated the growing option disclosure problem. Since that time, the stock market over-inflated, and legislators, through their politically-motivated decisions on accounting reform, created an environment in which accounting disasters like Enron and WorldCom were possible.

156. FASB Exposure Draft, supra note 155, at ii.
157. Id.
158. Rouse & Barton, supra note 6, at 68.
159. See Financial Accounting Standards, supra note 3.
160. Hinchman, supra note 96. See Lieberman Legislation, supra note 9, at 15.
161. See generally id.
Ironically, in an attempt to preserve its regulatory role, the FASB chose to abandon this important regulatory reform. However, in so doing, it succumbed to the will of Congress, and lost its political independence.\(^\text{162}\) By their very nature, accounting standards should be relatively static, changing only to clarify disclosure for investors. As business trends change, accounting standards also should be modified to reflect such change. This is precisely what the FASB intended when it adopted the FASB Exposure Draft.\(^\text{163}\) The fact that Congress was willing to overrule the FASB to placate business interest groups shows that the U.S. accounting body has lost its power. That the FASB yielded to pressure from Congress is evidence that it is not an independent body.\(^\text{164}\) In order to provide and ensure accurate disclosure for the investing public, disclosure standards must be purely regulatory, safe from the influence of political pressure. An argument can be made that if the U.S. adopts an international standard, it will cede authority over its own system. However, as both the corporate community and the investing public become more global in scope, the U.S. accounting system must as well.

**B. National v. International Standard**

Since the business community has become increasingly global, with foreign companies registered on U.S. exchanges and vice versa and foreign investors investing in global markets, the need for a universal set of accounting standards has increased. But because stock option disclosure rules vary from country to country, it has become impossible for investors to compare corporate balance sheets and determine profit margins. Although investors should be able to compare financial statements on a line-by-line basis to evaluate their investment, in reality, they are comparing apples and oranges because they are looking at numbers derived from different accounting methods.

To alleviate this confusion, the global accounting community should adopt one set of standards, which all countries should agree to follow. The IASB was created by the international

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164. See generally *id*. 
community to accomplish this goal. Finalizing and adopting the IASB Exposure Draft is a step in the right direction.

C. Fair Value v. Intrinsic Value & Pricing Models

As the FASB understood when it prepared the FASB Exposure Draft, Opinion No. 25’s policy of using an option’s intrinsic value to determine its expense provides a strong incentive for companies to issue at the money, fixed stock options, which have no compensation cost under GAAP. By avoiding this expense on their financial statements, companies give away something of value for free. While an at the money grant arguably can be deemed cost-free to the issuer as of the grant date, because it accrues value before it is exercised, it also has value on the grant date.

When Opinion No. 25 was drafted, it provided an important incentive to businesses, enabling them to recruit and retain qualified personnel, and to adopt broad-based plans under which options are granted to all of its employees, and not just its executives. However, through the successful implementation of Opinion No. 25, coupled with its inadvertent tax break, it provides for fixed, at the money grants. Such options have become a substantial percentage of corporate compensation and now have a significant effect on the corporate balance sheet.

Proponents of the intrinsic value method argue that determining an option’s fair value is too difficult to accomplish and too inaccurate to be relied on, when in fact, neither is the case. Both the Black-Scholes and the binomial pricing models provide accountants with manageable formulas to ascertain the option’s fair value. Moreover, while it is true that an option’s fair value necessarily is an estimated value, fair value provides a

165. See IASB Mission Statement, supra note 116.
166. Ernst & Young Summary, supra note 58, at para. 20.
167. See id. at para. 13.
168. See id.
170. Rouse & Barton, supra note 6, at 68; See Ernst & Young Summary, supra note 58, at para. 13.
171. See Ellis, supra note 4, at 412–13.
172. Rouse & Barton, supra note 6, at 69.
173. See D&T on G4+1, supra note 117, at paras. 1–2.
174. Wiedman & Goldberg, supra note 50, at 6.
considerably more accurate valuation of an option’s cost to the company than the intrinsic value method, which typically provides no expense charge. Adoption of the intrinsic value method discourages companies from granting performance-based options that are better tailored to an individual employee’s accomplishments, and significantly inflates corporate profits on financial statements. In order to provide accurate disclosure of profits and expenses on the financial statement, intrinsic value should be discarded in determining an option’s expense to the issuing corporation. Rather, the fair value method should be used, employing either the Black-Scholes or the binomial pricing models. The IASB wisely adopted the fair value approach because it more accurately reflects the true value of the compensatory stock option’s cost to the company.

While the IASB Exposure Draft provides a clearer, more manageable valuation method, it also should pick one pricing model to determine fair value, like the Black-Scholes pricing model or the binomial model. Although both standards calculate an option’s fair value, when companies use different models, investors cannot compare financial option expense accurately because each model provides a slightly different end result. Given the primary importance of consistency and accuracy, one standard should be applied, and the choice of standard should be taken away from companies.

VI. CONCLUSION

When the Accounting Principles Board drafted Opinion No. 25 in 1973, it was a rational accounting rule that encouraged companies, which traditionally granted compensatory stock options only to senior executives, to share the wealth with all of their employees, and provided small companies with an incentive tool to attract qualified executives whom they otherwise could not afford to hire. However, as compensatory stock op-

176. See *Accounting Changes*, supra note 62, at 72.
177. See *Colvin*, supra note 91, at 75.
179. See *id*.
181. *Id.* at 149.
tions became widely used and had a greater impact on the profit margins in financial statements,\textsuperscript{182} accounting standard regulators should have revised the rules so that financial statements would have continued to reflect corporate operating expenses accurately. When the FASB attempted to effect this need to provide clear disclosure on corporate balance sheets, and provide transparency for investors, it was shut down by both the business community and by the U.S. Congress.\textsuperscript{183} However, it is clear that neither the disclosure exemption adopted by Opinion No. 25, nor the voluntary disclosure policy set forth in SFAS 123 is sufficient to provide investors with the transparency they require and deserve when making investment decisions.\textsuperscript{184} As it stands, the U.S. disclosure standard, even with the FASB's proposed amendments, deprives investors of adequate disclosure necessary to evaluate the relative attractiveness of their investments.\textsuperscript{185}

On the other hand, the IASB, not beholden to any particular interest group, nor under the sole influence of any one political regime, has created a new standard, which comports with the internationally-recognized belief that stock options must be expensed in a manner that accurately reflects their true cost to companies.\textsuperscript{186} The IASB Exposure Draft is a better standard than SFAS 123 because it properly treats compensatory stock options as an expense, and because the IASB is truly independent and international. Thus, the IASB is in a better position to promulgate unbiased accounting regulations. Once finalized, the FASB should adopt it in lieu of SFAS 123.

\textit{Ellen J. Grossman\textsuperscript{*}}

\textsuperscript{182} Ellis, \textit{supra} note 4, at 412–13.
\textsuperscript{183} Lieberman Legislation, \textit{supra} note 9, at 15.
\textsuperscript{184} See Rouse & Barton, \textit{supra} note 6.
\textsuperscript{185} See 1992 Annual Letter, \textit{supra} note 104.
\textsuperscript{186} See \textit{Survey on Accounting for Stock Options}, \textit{supra} note 134.

\textsuperscript{*} The author wishes to thank everyone who provided assistance in the preparation of this Note, especially Pamela B. Greene, Esq., Professor Dana Brakman Reiser and Tiffany M. Lenz. The author dedicates this Note to the memory of her grandparents, Dorothy and Henry Fradkin, and her father, Jerry Grossman who believed in her. The author also dedicates this Note to her mother and step-father, Sheila and Bill Cizmar, who provided love and support throughout her legal education.
CONTRACTING TO EXPAND THE SCOPE OF REVIEW OF FOREIGN ARBITRAL AWARDS: AN AMERICAN PERSPECTIVE

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INTRODUCTION

In recent years, commercial arbitration has become the instrument of choice for participants in international trade seeking “a workable mechanism for swift resolution of day–to–day disputes.” The reason for this development lies in more than the fact that arbitration presents parties with a viable alternative to the typically expensive, lengthy, and complex litigation proceedings. Since arbitration is always the result of an agreement, the parties also benefit from wide latitude in setting the ground rules of the decision–making process. As a result, the dispute resolution process, as well as the arbitrator’s decision, can be tailored to the wishes of both parties, increasing their confidence in the impartiality of the decision–maker and of the expected outcome. Secondly, arbitrators are generally experts in the field and thus inspire a great deal of confidence as effective and impartial decision–makers. Finally, as a result of the widespread accession of United Nations (“UN”) member states to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”), in most cases international arbitral awards are much easier to enforce across international jurisdictional lines.

Realizing that arbitration brought relief to overcrowded judicial dockets, the Supreme Court of the United States (“Supreme Court”) has embraced arbitration as a valid alternative to judicial resolution of disputes, but not “without regard to the wishes of the contracting parties.” Rather, in offering its endorsement, the Supreme Court has relied upon principles of contract law to prevent state and federal interference with the arbitral process. However arbitral awards still need judicial sanction in order to

5. See Mastrobuono, 514 U.S. at 57.
be enforced. The latter step of the process can be a source of extensive dispute in cases involving enforcement of foreign awards.

One of the most important issues that has recently arisen in reviewing arbitral awards is to what extent parties can rely on freedom of contract to expand the scope of judicial review beyond the provisions of the Federal Arbitration Act (the “FAA”), which incorporates the New York Convention. As a result of the lack of guidance from the Supreme Court, the circuits which have considered the issue have arrived at diametrically opposed conclusions. However, these decisions share a common methodology in arriving at their results. All circuits have recognized that any resolution of this proposition necessitates a balancing act between two sets of competing interests: the integrity of the judicial or arbitral institution, pitted against the freedom of contracting parties to tailor a private dispute resolution system to their particular needs. This Note, in weighing the same concerns, will attempt to illustrate why several circuits that have allowed for expanded review of arbitral awards, have reached the correct result. In support of this argument, this Note will...


7. 9 U.S.C. §§ 1 et seq. (1994). The scope of this Note is restricted to the issue of expansion of judicial review. While many of the same arguments can be advanced in support of restricting judicial review, a discussion of that issue necessarily implicates several additional problems, which are not addressed here. One commentator has correctly noted that “as a matter of logic, it is difficult to see why parties may agree to expand judicial review but not to eliminate it. Assuming an arms–length transaction, there is no reason why the parties should not be allowed to put themselves entirely at the mercy of private arbitrators. ... If the strong federal policy in favor of arbitration requires enforcement of private agreements to expand judicial review, it would seem to apply a fortiori to agreements restricting or eliminating judicial review.” James B. Hamlin, Contractual Alteration of the Scope of Judicial Review – The US Experience, 15 J. INT’L ARB. 47, 56 (1998).

8. In favor of expansion of review, see LaPine Technology Corp. v. Kyocera Corp., 130 F.3d 884 (9th Cir. 1997); Gateway Technologies, Inc. v. MCI Telecommunications Corp., 64 F.3d 993 (5th Cir. 1995). Opposed to expansion of review, see Bowen v. Amoco Pipeline Co., 254 F.3d 925 (10th Cir. 2001); Chicago Typographical Union No. 16 v. Chicago Sun–Times, Inc., 935 F.2d 1501 (7th Cir. 1991), and, most recently, LaPine Technology Corp., v. Kyocera Corp., 2003 WL 22025130 (9th Cir. 2003).
discuss both the public policy considerations at play in this debate, and the available Supreme Court and circuit court decisions.

Part I of this Note discusses the FAA and the New York Convention, and the public policy considerations they encompass. Part II will present a synopsis of the decisions in which federal appellate courts have addressed expansion of judicial review in the domestic setting, and the justifications they offered in reaching their respective outcomes. First, this part will present the views of the circuits that have adopted the institutional integrity viewpoint and concluded that expansion of judicial review is intolerable based on its impact on the role of the courts in resolving disputes. Second, this paper will present a synopsis of the decisions where courts focusing on freedom of contract principles have chosen to defer to the wishes of the parties and enforce agreements for expanded review. Part III will provide a brief summary of the conclusions reached by some foreign jurisdictions in addressing the issue of expanded judicial review. Part IV will then present an analysis of the arguments advanced by the institutional integrity and freedom of contract advocates, address the public policy interests raised by the issue of expanded review, and discuss their application to the issue of federal court jurisdiction. Finally, this Note will examine the international implications of expanded review and offer some conclusions as to the likely future developments regarding expanded judicial review of arbitral awards.

I. STATUTORY BACKGROUND: THE FEDERAL ARBITRATION ACT AND THE NEW YORK CONVENTION

In discussing the issue of expanded review of arbitral awards, an analysis of the underlying statutes is a *sine qua non* prerequisite of any complete examination. Such an analysis is warranted for several reasons. First, the substantive law in this area is statutory. Secondly, the legislative, rather than common law, origin of the current law on arbitration is of particular significance because it provides evidence of the difference in objectives pursued by the Federal Arbitration Act and the New York Convention. While the FAA and New York Convention were both enacted to eliminate judicial reluctance toward arbitration by guaranteeing the enforceability of agreements to arbitrate, the New York Convention also had an additional objec-
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tive, namely the unification of the world–wide enforcement
standards for international arbitral awards. Since the New
York Convention takes precedence when applied to the en-
forcement of international arbitral awards, U.S. courts must
keep in mind both the objectives of the FAA and the New York
Convention.

A. The Federal Arbitration Act

1. Legislative History

The Federal Arbitration Act was enacted in 1925, and it con-
stituted the entire arbitration law of the U.S. until the ratifi-
cation of the New York Convention. Chapter I still constitutes
the law affecting U.S. domestic arbitration, i.e. arbitration cases
involving U.S. interstate commerce, where the arbitration was
conducted under domestic law, or the award was made in the
U.S. As discussed in detail below, the New York Convention
governs in arbitrations deemed to be “foreign” pursuant to the
statute, and Chapter I of the FAA acts merely as a gap–filler.

2. Public Policy Considerations

One of the main motivations of Congress in enacting the FAA
was to reverse the long–standing reluctance of U.S. courts to
accept arbitration as a legitimate form of dispute resolution,
and to rectify the failure of state statutes to mandate enforce-
ment of arbitration agreements. It was also enacted “to make
arbitration a more viable option to parties weary of the ever–
increasing cost and delays of litigation.” Thus, there is ample

purposes of this part, the designation “FAA” will refer strictly to Sections 1–16
of Title IX of the U.S. Code, rather than the current format of Title IX, which
incorporates the New York Convention (in Chapter II) and the Inter–
American Convention on International Commercial Arbitration (in Chapter
III). For a full discussion of the reasons for this distinction, see infra Part
IV.C.
11. See THOMAS H. OEHMKE, COMMERCIAL ARBITRATION 3A:04 (rev’d ed.
2002).
12. See Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265,
evidence, that the FAA reflected a heavy pro–arbitration bias on the part of Congress from its very inception.\footnote{Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983).} Furthermore, it is also clear that this bias applied with particular force in the realm of international commerce, a point addressed in detail later in this Note.\footnote{See H.R. Rep. No. 1181, 91st Cong., 2nd Sess. (1970); See also Allied–Bruce Terminix, 513 U.S. at 265.}

However, the FAA accomplished more than simply establishing a universally recognized right to arbitration. The Act amounts to “a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”\footnote{See Moses H. Cone Mem’l Hosp., 460 U.S. at 24.} Furthermore, the strong pro–arbitration language in the statute was interpreted by the Supreme Court to evince congressional intent that “as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”\footnote{Id.} The Supreme Court’s decision in \textit{Allied–Bruce}, in which the court upheld the position that the FAA extends to the full reach of Congress’ powers under the Commerce Clause, best illustrates the reason for this very expansive and highly deferential view toward arbitration.\footnote{See Allied–Bruce Terminix, 513 U.S. at 274. The Court reached this conclusion by examining the language of the statute (“involving” commerce), and finding it to be the functional equivalent of “affecting.” The Court continued by stating that when used in the phrase “affecting commerce,” this word or its equivalents evince “a congressional intent to exercise its Commerce Clause power to the full.” Id.}

In defining the nature of arbitration under the FAA, the Supreme Court has repeatedly emphasized that arbitration is a creature of contract.\footnote{See AT&T Tech., Inc. v. Communications Workers of America, 475 U.S. 643, 648 (1986); see also United Steelworkers v. American Mfg. Co., 363 U.S. 564, 570 (1960).} In recognizing the contractual nature of arbitration, the Supreme Court noted that the wishes of the parties must be respected even if at times the terms of the underlying contract may work against some of the specific benefits

\begin{itemize}
\item \footnote{Id.}
\item \footnote{See Allied–Bruce Terminix, 513 U.S. at 274. The Court reached this conclusion by examining the language of the statute (“involving” commerce), and finding it to be the functional equivalent of “affecting.” The Court continued by stating that when used in the phrase “affecting commerce,” this word or its equivalents evince “a congressional intent to exercise its Commerce Clause power to the full.” Id.}
\item \footnote{See AT&T Tech., Inc. v. Communications Workers of America, 475 U.S. 643, 648 (1986); see also United Steelworkers v. American Mfg. Co., 363 U.S. 564, 570 (1960).}
\end{itemize}
which arbitration grants. In the Court’s opinion, “the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties’ wishes, ... but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms.

B. The New York Convention

Identical concerns regarding the viability of arbitration and the enforcement of arbitral agreements and awards eventually surfaced in the international context. In these cases, however, matters were further complicated by the reluctance of parties to entrust the resolution of disputes to the judicial systems of their business partners’ home countries because of potential bias and lack of familiarity with foreign judicial systems. However, a fair and effective system of dispute resolution became a paramount need with increased international economic expansion and globalization of the world economies.

In order to achieve this end, several international conventions were drafted during the twentieth century. The first such document was the Geneva Protocol on Arbitration Clauses of 1923, followed by the Geneva Convention of 1927. While these treaties were laudable first attempts at uniform rules of enforcement, they still contained serious deficiencies, such as provisions placing the burden of proof on the party seeking enforcement of the arbitral award. Furthermore, the Convention


22. The two treaties referenced above failed to effectively meet the demands of international commerce, and were thus unsuitable for the purposes desired by private actors. For example, the Geneva Convention in Article I required signatory countries applying local rules to enforce awards made in other signatory countries. However, the Geneva Convention did not apply to the enforcement of awards made in non–signatory countries, thus impeding the international enforceability of arbitral awards. The New York Convention cured this defect in Article I(1) by extending its application to all awards foreign to the jurisdiction where enforcement of the award was sought. However, the reservation in Article I(3) of the New York Convention allows countries to reserve the right, upon ratification of the Convention, to only apply
of 1927 lacked the expected impact on international dispute settlement because neither the United States nor the Soviet Union ratified it. The New York Convention followed in 1958, bringing some much-needed improvements. To date, one hundred and thirty-three countries, including the United States, have ratified the New York Convention. The New York Convention was designed to make enforcement of arbitral awards almost automatic; to a large extent, it has accomplished its goal.

1. Legislative History

The treaties in place before the New York Convention did not effectively mandate enforcement at the international level. In 1953, in order to remedy this situation, the International Chamber of Commerce submitted to the Secretary General of the UN a report and a preliminary draft convention to replace the previous treaties. The proposal was reviewed and revised by an ad-hoc committee of the UN Economic and Social Council. Additional revisions were made pursuant to the comments submitted by member governments of the UN, non-member governments and interested international organizations. Finally, a conference on the subject was convened in New York. Working parties established at this conference made further amendment proposals, and the conference resulted in the Convention in its current form. The U.S. Congress ratified the New

the Convention to awards rendered “in the territory of another Contracting State.” Given the widespread ratification of the New York Convention, however, this point has become largely moot. Also, the Geneva Convention contained the requirement of double exequatur, which restricted a party from seeking enforcement of the award in another jurisdiction until the award was confirmed in the country of origin. For a full discussion of the problem of double exequatur see Kenneth R. Davis, Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 37 TEX. INT’L L.J. 1, 54–55 (2002).


York Convention in 1970, and included it in the FAA in the same year by enacting Chapter II of Title Nine of the U.S. Code.  

2. Public Policy Considerations

The purpose of the New York Convention was “to encourage the recognition and enforcement of commercial arbitration agreements in international contracts, and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.” The tenets of the Convention constituted a major improvement over existing treaties.

Chapter II of Title Nine implements the New York Convention, and provides as follows: Section 201 provides that the New York Convention “shall be enforced in United States courts in accordance with this chapter.” Section 203, in contrast with Chapter I of the FAA, confers subject matter jurisdiction on the federal courts for proceedings where parties seek enforcement or review of arbitral awards under the New York Convention. Section 207 adopts the grounds for refusal or deferral of enforcement of awards from the Convention into the FAA. Finally, Section 208 establishes the relationship between the New York Convention and the former parts of the FAA. Thus, pursuant to principles of statutory interpretation, in cases where arbitral awards are sought to be enforced pursuant to the New York Convention (FAA Chapter II) or the Inter-American Con-

27. See Scherk, 417 U.S. at 520 n15.
30. 9 U.S.C. § 203 (1994). In relevant part, this section provides that “An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States ... shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.” See infra Part IV.C. for a further discussion of the issue of jurisdiction.
31. Provides that “the court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [New York] Convention.” 9 U.S.C. § 207 (1994).
32. “Chapter I applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.” 9 U.S.C. § 208 (1994).
The New York Convention also contains some potentially inconvenient provisions, but, as the widespread ratification of the Convention indicates, these provisions have not raised significant hurdles. Two potential problems arise from the reservations allowed to signatory states by Article I(3). First, the so-called “reciprocity reservation” allows signatory states to declare that they will apply the Convention only to awards rendered in the territory of another contracting state. This reservation initially increased the degree of uncertainty regarding the enforcement of arbitral awards rendered in non-signatory countries. Given the widespread ratification of the Convention, however, this restriction has become almost entirely moot. Secondly, the Convention allowed states to declare that they would only apply the Convention to “differences arising out of legal relationships, whether contractual or not, which are considered commercial under the national law of the State making such declaration.” This provision subjected the enforceability of foreign arbitral awards to a measure of domestic review in the country where enforcement is sought, by subjecting these awards to the domestic interpretation of the concept of “commerce.”

The most attractive feature of the Convention lies in Article V, which lists the exclusive grounds for refusing recognition and enforcement of arbitral awards. The grounds presented in Article V are generally very clear, and provide a valuable framework for actors in international commerce to structure their agreement so as to avoid denial of enforcement. In relevant part, Article V provides:

33. See Thomas H. Oehmke, Commercial Arbitration 3A:04 (rev'd ed. 2002). (Referring to the principle of statutory interpretation stating that “the specific controls the general.”).
34. The United States has ratified the Convention but has maintained both reservations. See UNCITRAL web site at http://www.uncitral.org/en-index.htm for a complete list of reservations maintained by all signatory states.
36. See supra note 24.
1. Recognition and enforcement of the award may be refused...only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

The importance of the Article V provisions lies in their precision and their ability to restrict judicial interference to a limited number of scenarios. Thus, paragraph one addresses potential grounds for review with regard to procedural problems. In al-
allowing the losing party minimal recourse against enforcement of awards, this paragraph limits the grounds for review to a very narrow, defined set of circumstances. Paragraph two, especially its latter provision, seems to expand the scope of possibilities for invalidation, and works against the precision of the previous paragraph. This dichotomy is not as strong as it might appear, however. In the United States, for instance, in keeping with the pro-enforcement bias of the Convention, the language of paragraph (2)(b) was interpreted to apply only to cases jeopardizing “the forum state’s most basic notions of morality and justice,” a very rigorous standard. 38

In contrast to the preceding two Geneva conventions, under the New York Convention the party advocating denial of enforcement bears the burden of proof. 39 Furthermore, the language of the Convention does not require that enforcement be denied if sufficient proof is presented. Rather, it is permissive, granting the reviewing judge leeway to proceed with enforcement in spite of the proof presented. 40 Neither the New York Convention nor the FAA contemplate situations in which parties contract to expand the scope of judicial review of arbitral awards. Because of this omission the national courts have addressed this problem with mixed results, as the following section will illustrate. Unfortunately, as a result of the lack of statutory guidance or Supreme Court direction, the outcomes have not been as uniform in the U.S. domestic arena as one might hope. The federal appellate courts have reached different results based on differing levels of emphasis placed on institutional integrity and the parties’ freedom of contract.

38. See Parsons & Whittemore Overseas Co. v. Société Generale de L’Industrie du Papier (RAKTA), 508 F.2d 969, 974 (2nd Cir. 1974).
40. See New York Convention, supra note 3, art. V (The chapeau of Article V(1) provides that “Recognition and enforcement may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where recognition and enforcement is sought, proof....” (emphasis added)).
II. FEDERAL APPELLATE COURT DECISIONS AND UNDERLYING CONSIDERATIONS

The tension that permeates the issue of expanded review of arbitral awards is evident from the sheer volume of scholarly articles that address the topic. Furthermore, the disparity in the decisions on this issue among the various districts speaks loudly as to the validity of both points of view in this debate. Given the lack of Supreme Court guidance, reasonable minds may disagree as to the legality of such expanded review. Nevertheless, this Note will contend that contractual expansion of judicial review is not only warranted, but indeed mandated, by the nature of the arbitral process and its underlying policy objectives. The following sections will illustrate why the only outcome consistent with long-standing public policy in the field of arbitration is the one allowing such expanded review.

Several circuits have ruled on the issue of the legality of expanded judicial review of domestic arbitral awards in recent years, and have arrived at opposing conclusions. The decisions of the various circuits have polarized around two main trains of thought. The first is illustrated by decisions of the Seventh and Tenth Circuits, which have refused to allow expanded judicial review out of concern for the integrity of the judicial system.


42. See supra note 8.

43. Bowen v. Amoco Pipeline Co., 254 F.3d 925 (10th Cir. 2001); Chicago Typographical Union No. 16 v. Chicago Sun–Times, 935 F.2d 1501 (7th Cir. 1991).
The second viewpoint is exemplified by decisions of the Fifth and Ninth Circuits, which have taken a freedom of contract approach and have chosen to move away from a restrictive interpretation of statutory language, allowing expanded review of arbitration agreements.\(^44\)

In illustrating the arguments made by the various circuits, this paper will dissect the *LaPine I* decision of the Ninth Circuit Court of Appeals in late 1997.\(^45\) This case provides an excellent example of the polarization of the various circuits, because the decision of the United States District Court for the Northern District of California (the “Northern District of California”) in *La Pine Technology Corporation v. Kyocera Corporation*\(^46\) aptly presents the arguments against expanded review, while the decision of the *LaPine I* panel illustrates the freedom of contract approach.

**A. The Institutional Integrity Model**

1. Underlying Considerations

According to the institutional integrity viewpoint, expanded judicial review is impermissible because it intrudes into the court’s role as designated by statute. The arguments raised by the scholars and the various courts in supporting this view, once cleansed of rhetorical discourse and fact–specific twists, can be summarized as follows:

Institutional integrity advocates consider the role of the courts in reviewing arbitral awards immutable and strictly defined. They argue that Congress, by passing Title Nine of the U.S. Code, has provided a clear set of boundaries for the courts in reviewing both domestic and international arbitral awards. Therefore, if parties were allowed to ignore the statutes and draft their own rules as to judicial review, the role of the courts and the arbitration process would be negatively impacted in several significant ways.

\(^44\) LaPine Technology Corp. v. Kyocera Corp., 130 F.3d 884 (9th Cir. 1997); Gateway Technologies, Inc. v. MCI Telecommunications Corp., 64 F.3d 993 (5th Cir. 1995).

\(^45\) *LaPine Tech.*, 130 F.3d 884.

First, the courts would be asked to perform a review based on a standard agreed to by the parties, with which the reviewing courts may or may not be familiar. Thus, requiring the courts to apply differing standards of review in every dispute would undermine the expected predictability of outcomes in award enforcement proceedings. Such a scenario, it is argued, would give rise to concerns regarding potential injustice due to the differing interpretations which the various courts might give to standards of review fashioned by agreement between the parties to the dispute. This concern was aptly expressed by Judge Kozinski in his concurring opinion in the *LaPine I* decision.

Secondly, the advantageous nature of arbitration would be damaged if the courts were to allow the parties to set the boundaries of judicial review by agreement. In performing this expanded review, courts would unnecessarily extend the duration, scope and expense of reaching a resolution to the dispute presented. Such a process would diminish the qualities which make arbitration of disputes attractive, and significantly reduce the value of arbitration as an effective means of extra–judicial dispute resolution.

Finally, the argument presented holds that expanded review would violate specific statutory provisions of the FAA. Such a course of action would impermissibly substitute the will of parties to the arbitration in place of the will of the legislature, as expressed in the FAA. Specifically, the institutional integrity advocates hold that the grounds for review mentioned in the FAA are the exclusive grounds available to a reviewing court in examining arbitral awards, and that congressional intent in this matter was to specifically preclude any review under differing, more expansive, standards. These arguments were adopted by several federal appellate courts and were discussed in detail by the Northern District of California opinion in the *LaPine* case.

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48. *LaPine Tech.*, 130 F.3d at 891.
2. The Northern District of California Decision in
LaPine Tech. v. Kyocera

LaPine Technology Corporation ("LaPine") was formed in 1984 in order to design, market and share computer disk drives.\(^{52}\) Since it did not have the necessary facilities to manufacture these drives, LaPine entered into an agreement with Prudential Trade (a partnership the general partner of which was an affiliate of Prudential--Bache Trade Corporation) and Kyocera Corporation ("Kyocera").\(^{53}\) The contemplated transaction structure provided that Kyocera, acting as LaPine’s licensee, would manufacture the drives, and that financing for production would be provided by Prudential Trade.\(^{54}\) Subsequent agreements were completed in 1985, outlining the structure of the transaction: LaPine would order the drives from Kyocera pursuant to a negotiated quantity and delivery schedule. Another subsidiary of Prudential Trade would then purchase the product from Kyocera and resell it at a markup to Prudential Trade, which would finally sell it to LaPine on credit.

In January 1986, LaPine, Kyocera and Prudential Trade, through its subsidiary KK PB Trade Corporation, ("KK Trade"), agreed to certain actions to be taken by the parties in 1986.\(^{55}\) However, later that year Kyocera experienced severe production problems. LaPine was in turn plagued by management problems, and failed to make payments to Prudential Trade, but still requested that Prudential Trade make payments to Kyocera for product delivered by Kyocera. Kyocera requested assurances that it would be paid for goods manufactured and shipped by it.\(^{56}\) Due to the impasse, a reorganization of LaPine became imperative in order to continue the production and sale of the disk drives, and several formulae were contemplated by the parties.\(^{57}\)

The agreed upon solution provided for a “merger” by which LaPine would become the wholly owned subsidiary of a newly formed LaPine Holding Company ("LaPine Holding").

\(^{52}\) Id. at 699.
\(^{53}\) Id.
\(^{54}\) Id.
\(^{55}\) Id. at 700.
\(^{56}\) Id.
\(^{57}\) Id.
thirds of LaPine Holding’s voting stock would be owned by Prudential Trade and one third by Kyocera, in exchange for additional capital contributions by Prudential Trade and Kyocera.\textsuperscript{58} An agreement detailing these arrangements was executed by all the parties on December 18, 1996.\textsuperscript{59} This Definitive Agreement provided that the parties bound themselves to present executed copies of various other, more specific, agreements, such as the Amended Trading Agreement, by the closing date.\textsuperscript{60} However, after signing the Definitive Agreement, Kyocera declined to sign the Amended Trading Agreement, which provided for a direct sale of the products from Kyocera to LaPine, without the intervening sales to KK Trade and Prudential Trade, and notified its business partners of its refusal.\textsuperscript{61} On December 29, 1986, the closing date, counsel for LaPine and Prudential Trade notified Kyocera of its breach of the Definitive Agreement by reason of its failure to execute the Amended Trading Agreement.\textsuperscript{62} In May 1987, LaPine sued in the Northern District of California, in an attempt to compel Kyocera to continue supplying drives under the terms of the Definitive Agreement. Pursuant to the section of the Definitive Agreement regarding dispute resolution, Kyocera moved to compel arbitration, and the district court granted the motion in September 2, 1987.\textsuperscript{63} The dispute was submitted to arbitration before a panel of the International Chamber of Commerce, which found in favor of LaPine.\textsuperscript{64} After the issuance of the arbitral award, LaPine moved to confirm the award under Chapter I of the FAA, the domestic arbi-

\textsuperscript{58} Id.

\textsuperscript{59} The agreement (known as the Definitive Agreement) was executed by all parties, including Kyocera, and then filed with the California Corporations Commissioner in order to comply with California law regarding corporate reorganizations. Id.

\textsuperscript{60} Id. at 701.

\textsuperscript{61} Kyocera’s counsel advised other parties that Kyocera would not sign the Amended Trading Agreement at a meeting on December 17 and 18, 1986. Id.

\textsuperscript{62} Id.

\textsuperscript{63} Id. Section 8.10(b) of the Definitive Agreement provided that “the arbitration shall be conducted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce (“ICC”) and the Federal Arbitration Act, 9 U.S.C. sections 1 et seq.” Id.

\textsuperscript{64} LaPine Tech., 909 F.Supp at 698.
In turn Kyocera moved to vacate, modify and correct the award. The crux of the dispute was contained in Section 8.10(d) of the Definitive Agreement, stating the role of the arbitrators and that of the federal court of first instance:

The arbitrators shall issue a written award which shall state the bases of the award and include detailed findings of fact and conclusions of law. The United States District Court for the Northern District of California may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) based upon any of the grounds referred to in the Federal Arbitration Act, (ii) where the arbitrator's findings of fact are not supported by substantial evidence, or (iii) where the arbitrator's conclusions of law are erroneous.

The significance of this paragraph as the bone of contention between these parties is plainly visible from the text of the agreement, as subsections (ii) and (iii) include grounds of review above and beyond those customary under the FAA. Section (ii) explicitly asks the federal district court to review the arbitral award in light of the evidence presented. Such review can pose significant problems, since arbitration proceedings rarely produce a record of the proceedings. Furthermore, the evidentiary and disclosure rules of arbitral processes are tailored to the needs of the parties, and constitute a far cry from the rigors of litigation. Thus, a review of the factual support of the arbitral award invites extensive debate over the veracity and comprehensiveness of the facts presented. Moreover, the “supported by substantial evidence” standard agreed to by the parties is sufficiently vague to allow for a wide range of approaches by the reviewing court. Section (iii) invites judicial review of the arbitrator's conclusions of law. This process can also be difficult and likely to give rise to extensive debate, because in most

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65. 9 U.S.C. §§ 1–16 (1994). It is unclear to this author why LaPine did not opt to seek enforcement of the award under the New York Convention, since the award in this case clearly qualified as “foreign” within the meaning of the statute.
66. Id.
68. Id.
cases arbitrators do not render opinions detailing their interpretation and application of the law.\textsuperscript{69} Furthermore, arbitrators are not always obligated to follow the law very closely in rendering a decision, but rather are granted wide powers to decide the dispute before them in accordance with general principles of fairness, equity and justice.\textsuperscript{70} Thus, the combined language of these provisions in fact almost mandated de novo review by the Northern District of California.

In deciding the case, the court discussed several issues, but acknowledged that the central issue of the case was the validity of the scope of review clause. In support of its pro-enforcement position, Kyocera made several arguments based on previous decisions on the subject. However, the Northern District of California was not persuaded, and chose to follow the language of Seventh Circuit opinion in Chicago Typographical, and to take a restrictive institutional integrity approach to the case.\textsuperscript{71}

In Chicago Typographical, the union representing the composing-room employees of both the Chicago Sun-Times (the “Sun-Times”) and the Chicago Tribune (the “Tribune”) had signed a collective bargaining agreement with the Tribune.\textsuperscript{72} In reliance on a clause in its own agreement with the union which entitled the Sun-Times to any concessions the union granted the Tribune, the Sun-Times subsequently changed some of the terms and conditions of employment in its composing room.\textsuperscript{73} The matter was submitted to arbitration by the union, with a mixed result.\textsuperscript{74} In early 1990 the union filed suit in federal district court challenging the arbitral award, based on Section 301 of the Taft-Hartley Act, creating federal jurisdiction over suits to enforce labor contracts.\textsuperscript{75} The district court upheld the arbitral award, and the union appealed to the Seventh Circuit.

Judge Posner began his discussion on behalf of the Seventh Circuit by stating that the role of the courts was not “to review the soundness of arbitration awards, [because] agreement to

\textsuperscript{69} See Chicago Typographical, 935 F.2d at 1506.
\textsuperscript{70} See GARNETT ET AL., supra note 67, at 26.
\textsuperscript{71} Chicago Typographical, 935 F.2d 1501.
\textsuperscript{72} Id. at 1503.
\textsuperscript{73} Id.
\textsuperscript{74} Id. The arbitrator found that some of the changes were authorized by the “most favored nation” clause, and that some were not. Id.
\textsuperscript{75} Id.
submit a dispute ... to arbitration is a contractual commitment to abide by the arbitrator’s interpretation.” Thus, the court recognized the possibility that parties could resort to an appellate arbitration panel to review an arbitrator’s award. But the Seventh Circuit then went on to categorically deny the possibility of federal judicial review of that award, by stating: “they [the parties] cannot contract for judicial review of that award: federal jurisdiction cannot be created by contract.” In support of its holding, the opinion went on to state that the court was not allowed to “substitute its own interpretation even if convinced that the arbitrator’s interpretation was not only wrong, but plainly wrong.” Judge Posner further explained that in–depth scrutiny of arbitrator opinions would be detrimental, because it might discourage arbitrators from writing opinions at all. The court reasoned that while arbitrators were not required to write opinions, the practice of doing so was very beneficial, as “writing disciplines thought,” and therefore the courts should not “create disincentives for their doing so.” This, however, is as far as the Seventh Circuit opinion went in, undoubtedly obliquely, speaking to the issue of expanded review of arbitral awards.

First, it is important to note that the entire discussion mentioned above is dicta, as expanded judicial review was not an issue before the Seventh Circuit in that instance, and therefore the precedential value of the opinion is limited. As the LaPine I panel later correctly noted, there was no indication that the parties had bestowed appellate jurisdiction upon the Seventh Circuit, nor had they asked the reviewing court to utilize some unfamiliar standard of review. Second, in cases involving international arbitration awards, the federal courts undoubtedly have subject matter jurisdiction by explicit statutory authoriza-

76. Id. at 1504–05.
77. Id. at 1505.
78. Id.
79. Id.
80. Id. at 1506.
81. Id.
83. LaPine Tech., 130 F.3d at 889–90.
tion.\textsuperscript{84} Third, the Chicago Typographical decision failed to address the issue squarely, since neither of the parties in this case asked the court to expand the scope of its involvement. Nevertheless, relying on the reasoning in the Seventh Circuit dicta, the Northern District of California held that where federal jurisdiction was clearly established, and the guidelines for review were provided by statute, the extent of review could not be altered by contractual understandings among the parties.

Since the Northern District of California decision in \textit{LaPine}, the Tenth Circuit Court of Appeals has also addressed the issue of expanded review of arbitral awards in \textit{Bowen v. Amoco Pipeline Company}, and has also refused to uphold expanded review, becoming the first federal court of appeals to explicitly do so.\textsuperscript{85} In 1998 the Bowens filed suit against Amoco in tort and breach of contract. Amoco’s pipeline, which extended over the Bowens’ property pursuant to an easement agreement, had been found to be leaking by an investigation of the Oklahoma Corporate Commission. Amoco moved to compel arbitration pursuant to the easement agreement which had been executed by both parties’ predecessors in interest. The Bowens and Amoco agreed to arbitration, provided that the scope of judicial review of the arbitral award would be enlarged.\textsuperscript{86} Specifically, the reviewing court had the power to review the award “on the grounds that the award was not supported by the evidence.”\textsuperscript{87} The arbitrator found for the Bowens, and they filed a motion for confirmation of the award.\textsuperscript{88} Amoco simultaneously filed a motion to vacate the award, as well as a notice of appeal of the arbitration award pursuant to the modified arbitration rules.\textsuperscript{89} The lower court refused to apply the expanded review of the arbitration clause, and confirmed the award.\textsuperscript{90}

In a unanimous decision, the Tenth Circuit affirmed the decision of the lower court.\textsuperscript{91} The appellate court offered only a curt

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\textit{See infra}, Part IV.C. \\
\textit{Bowen v. Amoco Pipeline Co.}, 254 F.3d 925 (10th Cir. 2001). \\
\textit{Id.} at 930. \\
\textit{Id.} \\
\textit{Id.} \\
\textit{Id.} \\
\textit{Id.} \\
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\textit{Id.} \\
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nod to the decisions of the Fourth,\textsuperscript{92} Fifth and Ninth Circuits, and chose to disregard their holdings.\textsuperscript{93} The Tenth Circuit disagreed with these courts, stating that the Supreme Court language they invoked did not specifically address the issue of parties’ interference with the judicial process. Specifically, the Tenth Circuit looked to the underlying policy of the FAA, and held that the widespread support for arbitration was a result of the fact that it provided an expeditious and cheap method of dispute resolution. Thus, the opinion stressed the speed and cost–effectiveness of arbitration and found that these attributes must trump any agreement of the parties which would diminish them. As mentioned above, however, the Ninth Circuit subsequently reversed the decision of the Northern District of California in \textit{LaPine I}, and instead emphasized the freedom of contract approach.

\textbf{B. The Freedom of Contract Model}

1. Underlying Considerations

Freedom of contract proponents view this dilemma of expanded review from a slightly different perspective. In their opinion, the foremost feature which attracts parties to arbitration as an option for effective dispute resolution is not the expeditiousness and cost–effectiveness of the process, but rather the ability to have the dispute resolved within a framework which the parties themselves can establish by agreement, and the ability to have their wishes enforced by the courts. Thus, although speed of resolution and significant reduction in expenses are significant advantages, they lose their luster if imposed paternalistically by a rigid judicial system and an inflexible legislature. In other words, substituting the formalistic, procedure–laden system of in–court litigation with another structure of dispute resolution which, while somewhat cheaper and faster, still takes the decision–making ability away from the parties with regard to key issues, is contrary to the fundamental pre-

\textsuperscript{92} In an unpublished opinion, the Fourth Circuit court joined the Fifth Circuit, concluding that the district court should have applied the expanded standard of review agreed to by the parties. \textit{See} Syncor Int’l Corp. v. McLeod, 120 F.3d 262, (4th Cir. 1997).

\textsuperscript{93} \textit{Bowen}, 254 F.3d at 933.
cepts of arbitration. After all, arbitration, along with other alternative dispute resolution methods, was intended to allow parties to circumvent the strictures of litigation by designing a resolution process fitted to their specific needs. While the judicial system can not be circumvented entirely, because awards still need judicial sanction in order to be enforced, the exposure to potential unexpected results at the review level was minimized by the legislature through enactment of the FAA, and by the international community by enactment of the New York Convention. However, proponents of the freedom of contract model argue that there is no indication that these documents were intended to thwart the wishes of the parties to arbitration to do so.

2. The Ninth Circuit Decision in *LaPine* I

Subsequent to the district court decision, Kyocera appealed to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit reached a decision on the matter in December 1997. The three-judge panel was divided on the outcome of the case, with each of the judges on the panel submitting an opinion. The opinions of Judges Fernandez, Kozinski and Mayer will be discussed in turn.

The majority opinion, written by Judge Fernandez, identified the major issue of the case: “Is federal court review of an arbitration agreement necessarily limited to the grounds set forth in the FAA or can the court apply greater scrutiny, if the parties have so agreed?” The majority agreed with Kyocera in finding that parties could, by agreement, stipulate to expand judicial review of arbitration decisions. In reaching this conclusion, the court departed from the rule it had announced in *Todd Shipyards*, which held that in the absence of contractual terms with respect to judicial review, a federal court could vacate or modify arbitral awards only if the respective award ex-

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95. *See LaPine Tech.*, 130 F.3d 884.
96. *Id.*
97. As will be pointed out, the deciding vote of Judge Kozinski offered only reserved support to the majority position.
98. *LaPine Tech.*, 130 F.3d at 887.
99. *Id.* at 888.
hibited a manifest disregard for the law, was completely irrational, or otherwise fell within one of the grounds enumerated in 9 U.S.C. §§ 10 or 11.  

The deciding factor in the Ninth Circuit’s opinion was the Supreme Court’s Volt Info. Sciences decision. In Volt, in an opinion by Chief Justice Rehnquist, the Supreme Court had reiterated “the FAA’s primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms.” In deferring to congressional intent, the Supreme Court held that the FAA does not prevent enforcement of agreements to arbitrate under rules different from those set out in the FAA. In further defining the approach which courts should adopt in reviewing arbitration agreements, the Court stated that “arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.”

Judge Fernandez then addressed, but explicitly declined to follow, the Seventh Circuit’s Chicago Typographical opinion, arguing that the Seventh Circuit had not explained “what had evoked that pronouncement, nor did it further explain the reasoning behind it.” The majority explained that the Chicago Typographical opinion had not indicated that the parties in the

100. See Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1060 (9th Cir. 1991). Beside the “manifest disregard” and “completely irrational” standard, the FAA also allows vacatur of an award procured by corruption, fraud or undue means, where there was evident partiality or corruption in the arbitrators, where the arbitrators were guilty of misconduct in refusing to postpone hearings, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, and, finally, where the arbitrators exceeded their powers or used them so imperfectly so that a mutual, final and definite award was not rendered on the subject matter. See Federal Arbitration Act, 9 U.S.C. § 10 (1924). Furthermore, the FAA allows federal courts to modify or correct an award where there was evident material miscalculation or an evident material mistake in a description of a person or thing, where the arbitrators awarded on matter not submitted to them, or where the award is imperfect in of form not affecting the controversy. See Federal Arbitration Act, 9 U.S.C. § 11 (1924).


102. Id. at 478.

103. Id.

104. Id. at 479.

105. La Pine Tech., 130 F. 3d at 889–90.
action had intended to bestow “appellate jurisdiction” on that court, nor had that opinion indicated that the parties had asked the court to utilize some “exotic” standard of review. In light of these considerations, the Ninth Circuit opted to treat the “cryptic assertion” of the Seventh Circuit as dicta. Instead, the majority chose to follow the prescription of the Supreme Court, holding that there is an “established principle that the FAA is a regulation of commerce rather than a limitation on or conferral of federal court jurisdiction.”

In reaching its decision, the LaPine I majority also relied on the precedent set by the Fifth Circuit in Gateway Technologies v. MCI Telecommunications Corp. In Gateway the Fifth Circuit had held that the provisions of the FAA could be superseded by terms of the contract because the contractual provisions arose from the agreement of the parties. MCI had won a bid for a contract with the Virginia Department of Corrections, which it then subcontracted to Gateway. The contract with Gateway called for dispute resolution by arbitration, stipulating, however, that “errors of law shall be subject to appeal.” Pursuant to a dispute over the design of the system, the contract with Gateway was terminated, and arbitral proceedings ensued. The arbitrator found MCI to have breached the contract. Gateway moved to confirm the award, and MCI moved to vacate the district court decision confirming the award. The Fifth Circuit also relied on the Supreme Court decision in Volt in approving of the enlarged scope of judicial review embodied in the parties’ agreement. The court held that “because these parties contractually agreed to expand judicial review, their contractual provision supplements the FAA’s default standard of review and allows for de novo review of issues of law.” The court also explicitly stated that it would uphold ex-

106. *Id.*
107. *Id.*
108. See *Allied–Bruce Terminix*, 513 U.S. at 269.
109. See *Gateway Tech., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993 (5th Cir., 1995).
110. *Id.* at 996–97.
111. *Id.*
112. *Id.* (discussing Art. 9 of the contract between Gateway and MCI).
113. *Id.*
114. *Id.*
115. *Id.* at 997.
panded judicial review even if doing so would in effect “sacrifice the simplicity, informality and expedition of arbitration on the altar of appellate review.” 116 The Fifth Circuit concluded that the intent of the parties trumps, because “federal arbitration policy demands that the court conduct its review according to the terms of the arbitration agreement.” 117

Finally, in addressing the loss of efficiency argument with respect to enlarged judicial review, the Ninth Circuit cited arguments which the Southern District of New York had found to be persuasive in a previous case. 118 In Fils, the Southern District had discussed the efficiency issue, and concluded that even with the enlarged review the resulting inquiry is “far less searching and time–consuming than a full trial” and therefore approved of expanded judicial review of arbitration awards in spite of the loss of speed and cost–effectiveness. 119

The La Pine I dissent adopted and reiterated the arguments of the Seventh Circuit in Chicago Typographical in refusing expansion of judicial review. 120 Judge Mayer’s opinion recognized that parties were free to contractually agree to the procedures to be followed during the arbitration process. However, he insisted, the appellants had cited no authority explicitly authorizing them to dictate how an Article III court was to review an arbitration decision. 121 Consequently, if the parties wished more expansive scrutiny than granted under the FAA, they could agree to appellate review of an arbitration decision by another arbitration panel. 122 They could not, however, stipulate by agreement to expanded judicial review of their initial arbitration award. 123

Judge Kozinski, the third judge sitting on the LaPine I panel, was somewhat reserved in his concurrence with the majority opinion, and found the question presented was not one that

116. Id.
117. Id.
119. Id. at 244.
120. LaPine Tech., 130 F.3d at 891.
121. Id.
122. Id.
123. Id.
could elicit an easy answer. He accurately noted that the quoted Supreme Court cases failed to address the specific issue at the center of the dispute. His objection was specifically addressed to the “different work” which the federal courts could be required to perform under the text of such an agreement for expanded review, work that might not be authorized by Congress. Nevertheless, Judge Kozinski joined the majority opinion, because the standard of review stipulated by the parties’ agreement was identical to the one used by federal courts in appeals from administrative agencies or bankruptcy court decisions. In the judge’s opinion, given the strong policy favoring enforcement of agreements to arbitrate, Congress would probably approve of the court’s decision. And while this did not constitute “express congressional authorization ..., given the Arbitration Act’s policy, it’s probably enough.”

Pursuant to the LaPine I decision, the case was remanded to the Northern District of California. The Northern District confirmed the award of the arbitration panel, and Kyocera Corporation appealed, without disputing the issue of expanded review. On re–appeal, the Ninth Circuit affirmed the judgment of the lower court, as well as the award of damages. However, in an interesting twist, a majority of the non–recused regular active judges of the Ninth Circuit Court of Appeals recently voted to re–hear the case en banc, and pursuant to the rules of the

124. Id. (Kozinski J., concurring) (stating that he found the issue before the court “closer than most”).
125. Id.
126. Id.
127. Id. In Judge Kozinski’s words:

Nevertheless I conclude that we must enforce the arbitration agreement according to its terms. The review ... is no different from that performed by the district courts in appeals from administrative agencies and bankruptcy courts ... . I would call the case differently if the agreement provided that the district judge would review the award by flipping a coin or studying the entrails of a dead fowl.

Id.
128. Id.
129. Id.
an order to that effect was entered by Chief Judge Mary M. Schroeder.\textsuperscript{132} Prior to the \emph{en banc} hearing the Ninth Circuit received additional briefing on the issue of whether private parties may contractually bind a federal court to apply a less deferential standard of review than the standard specified in the FAA.\textsuperscript{133} On August 29, 2003, the Ninth Circuit issued a decision, reversing the three–judge panel decision in \textit{LaPine I}. Although Kyocera set forth over twenty–five grounds to vacate or correct the decision of the arbitral panel, and explicitly declined to address expanded review, the Ninth Circuit considered the issue of expanded review as dispositive of the case. In raising the issue \textit{sua sponte}, the court held that Congress, through the FAA, had provided the exclusive grounds of review of arbitral decisions. The arguments raised by the Ninth Circuit in support of its reversal, are identical to those raised by Judge Posner in \textit{Chicago Typographical}, and state that while parties may dictate the rules regarding the arbitration proceedings themselves, they may not establish the ground rules of judicial review. Thus, the Ninth Circuit recently aligned itself with the Seventh, Eighth and Tenth circuits in denying expanded review, without raising any new arguments in support of its position.

The ultimate outcome of the case is irrelevant for purposes of this Note, because the arguments made by the majority in \textit{LaPine I} remain just as valid, and until the Supreme Court addresses the issue, the problem remains unresolved. The outcome is of some importance to practitioners, however, because the circuits have reached different conclusions on this issue, and thus identical proceedings would yield different outcomes depending on the circuit in which they were brought.

III. RESPONSES OF FOREIGN JURISDICTIONS

The views of foreign jurisdictions on the issue of expanded judicial review do not necessarily carry a lot of weight in U.S.


\textsuperscript{132} Kyocera Corp. v. Prudential-Bache Trade Services, Inc. \textit{et al.}, 314 F.3d 1003 (2002).

\textsuperscript{133} Kyocera Corporation v. Prudential–Bache Trade Services, Inc., \textit{et al.}, 2003 WL 22025130, at 5 (9th Cir. 2003).
courts. However, it is important to observe how various countries, some with a legal system very similar to our own, have chosen to resolve this issue, given the above mentioned goal of the Convention, namely uniformity in enforcement of foreign arbitral awards.

A. UNCITRAL Model Law

Before delving into an analysis of the various legislative frameworks of other major actors in the field of international commercial arbitration, it is important to take a brief look at the United Nations Commission on International Trade Law’s (UNCITRAL) Model Law on International Commercial Arbitration (the “Model Law”). The reason for this preliminary examination is that the Model Law has served as a blueprint for many of the legislative acts which created the modern national arbitration frameworks, and in some cases, the Model Law has simply been adopted by the respective nations. Article 5 reflects one of the most important objectives of the Model Law, limiting the interference of national courts in the arbitral process, by specifically holding that courts could intervene only in specific circumstances. The language of Article 5 seems to unequivocally prohibit interference by the courts in situations not specifically listed in its provisions, and also seems to exclude any residual powers which the courts may have had. Further clarifying the standards of review, Articles 34 and 36 of the Model Law provide the list of criteria for review of arbitral determinations, largely based on Article V of the New York Convention. The intent to specifically curtail the involvement of the courts is further confirmed by the legislative history of

134. See Scherk, 417 U.S. at 520 n.15.
137. See Model Law, supra note 135, art. 5.
138. Id. (stating “In matters governed by this Law, no court shall intervene except where so provided in this Law.”).
139. See Model Law, supra note 135, art. 34 and 36 (Art. 34 states that an application to set aside is the only recourse against an arbitral award and Art. 36 lists the exclusive grounds for refusing recognition or enforcement).
Articles 34 and 36, which reveals that after extensive debate of additional proposals, the drafters agreed to limit the grounds of review to only those mentioned in the New York Convention.\footnote{140}

Thus, it would seem that under the UNCITRAL Model Law contractually expanded judicial review would not be available, given the very restrictive language of Articles 5, 34 and 36. However, the Model Law is not binding, rather it only constitutes a guide for national legislation, and one which has been adopted by countries around the world with varying degrees of alteration.\footnote{141} One alternative to the Model Law is provided by the English Arbitration Act of 1996.

\textbf{B. United Kingdom}

The United Kingdom ("U.K.") is one of the foremost centers of international commercial arbitration, and has a long-standing tradition of accepting arbitration as a valid means of dispute resolution, dating back to as early as the 17\textsuperscript{th} century.\footnote{142} The current arbitration law framework in the U.K. was established by the entry into force of the Arbitration Act of 1996 (the "Arbitration Act").\footnote{143} The Arbitration Act aligned the country's legislation with the modern standards in arbitration law, and while it did not derive from the UNCITRAL Model Law, the influences of the Model Law are certainly visible. The Arbitration Act generally establishes the same regime for both domestic and international awards, but maintains certain specific provisions pertaining solely to recognition and enforcement of foreign arbitral awards.\footnote{144} Specifically, Section 1 of the Arbitration Act lays out the "founding principles" pertaining to the construction of Part I of the law, and states that in matters covered by Part I, the court should not intervene except as provided within the Part.\footnote{145} In this respect, Section 1 of the Arbitration Act strongly

\footnote{140. See Raghavan, supra note 136, at 125–26 (citing HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, 912–15 (1989)).}

\footnote{141. Id at 125 n.87, 126 n.92 (discussing changes made by Australia, Singapore, New Zealand, Egypt, Hong Kong, etc.).}

\footnote{142. HANS SMIT & VRATISLAV PECHOTA, NATIONAL ARBITRATION LAWS, UK A–1 (2002).}

\footnote{143. Id. at UK A–2.}

\footnote{144. Id.}

\footnote{145. Raghavan, supra note 136, at 131.}
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resembles Article 5 of the Model Law. Article 103 of the Arbitration Act covers awards sought to be enforced pursuant to the New York Convention.\(^\text{146}\) Under this section, recognition or enforcement of these awards may not be refused except in a specified number of cases, based largely on the grounds set forth by the New York Convention, and which are considered to be exhaustive.\(^\text{147}\)

However, one major departure from the Model Law is embodied in Section 69 of the Arbitration Act. This section allows the parties to arbitration to bring an appeal on questions of law arising from an arbitration award.\(^\text{148}\) If, however, the parties agree otherwise, this right to appeal is precluded, and a challenge may be raised only under the grounds specifically listed in Section 68 of the Arbitration Act.\(^\text{149}\) Thus, under English Law, the parties to the arbitration can agree prior to the dispute whether the English courts will have the power to review the arbitral award on issues of law. In this respect, England’s Arbitration Act has parted in a significant way with the precepts of the Model Law. Thus, nowadays England offers parties to arbitration the possibility to expand judicial review beyond the grounds listed in the New York Convention, provided enforcement is not sought under the New York Convention, but rather under Articles 68 and 69 of the Arbitration Act.

C. France

The host nation of the International Chamber of Commerce, France, plays a leading role in the development and advancement of international commercial arbitration. Furthermore, the French legal system tends to be very similar to the U.S. system with respect to the approach to international arbitration. Like the U.S., France shares a policy of favoring arbitration, has extensive case law on enforcement of arbitral awards, and gives great deference to party autonomy in the arbitration process.\(^\text{150}\)

\(^{146}\) Id. at 133.

\(^{147}\) Id.


\(^{149}\) Id.

However, unlike courts in the United States, French courts have not thus far been asked to decide whether to give effect to arbitration agreements expanding ulterior judicial review.\(^{151}\)

In spite of this situation, scholars have argued that even if presented with the issue, the French courts would most likely decline enforcement of such an agreement.\(^{152}\) The main reason for this assertion lies in the nature of the French provisions governing judicial review of such awards. The Decree of 1980 reformed the provisions regarding French domestic arbitration and became part of the New Code of Civil Procedure (“NCPC”) through the addition of Articles 1442 to 1491.\(^{153}\) The Decree of 1981 completed the picture by adding Articles 1492 to 1507 to the NCPC, provisions specifically applicable to international arbitration.\(^{154}\) Overall, these reforms have had a positive impact on French arbitration law. Since the enactment of the new NCPC provisions, the Paris Court of Appeals has developed a liberal stance toward arbitration agreements, arbitral procedure, the substance of awards made abroad, and towards the removal of international arbitrations from the effects of choice of law rules and national legal systems, within the limits of international public policy.\(^{155}\)

Both decrees contain very specific provisions for setting aside arbitral awards, listed in NCPC Articles 1484 and 1502 respectively, and make it abundantly clear that the setting aside of an arbitral award is available only in those cases.\(^{156}\) Thus, should parties invoke any other grounds,\(^{157}\) the reviewing court will simply not take those grounds into consideration because, quite

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151. *Id.* at 218.
152. *Id.*
157. *See Société GL Outillage c/ Soc. Stankaimport, CA de Paris 1e civ., July 10, 1992, REV. ARB. 1994, 142*, note P. Level (Paris Court of Appeal refused to take into account the lack of jurisdiction of the Paris court); *Southern Pacific Properties Ltd. c/ Republique Arabe d’Egypte, Cass. 1e civ., Jan. 6, 1987, REV. ARB. 1987, 468* (Cour de Cassation held that the mission of the Court of Appeals was to examine the grounds enumerated in Article 1502 of the NCPC).
literally, they are not “on the list.”

Nevertheless, as mentioned above, this proposition has not yet been tested in the context of a pre-dispute agreement to expand judicial review. However, a recent decision of the Cour de Cassation on a similar issue seems to indicate that should the situation arise, the French courts would decline to grant the desired expanded review. In *Soc. Buzicchelli Holding v. Hennion*, the French high court held that the freedom of contract of the parties does not grant them the power to create a means of recourse, which is not available under French law applicable to international awards.

### D. Germany

The recent reform of the German Code of Civil Procedure (“ZPO”) was long in the making since no major revisions of the ZPO had been undertaken since 1879. The changes enacted in 1997 reformed German arbitration law completely. The new Book X of the ZPO is essentially based on the 1985 UNCITRAL Model Law on International Commercial Arbitration, and does not distinguish, in principle, between domestic and international arbitration. Unlike the Model Law, however, the new law is not restricted to “commercial” arbitration, but instead governs all arbitrations.

Similar to the French NCPC, the German statute provides a definite and exclusive list of grounds on which an award may be challenged. Thus, in Germany as in France, expanded review of arbitral decisions is probably not available even if parties had contracted for it.

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159. *Id.*
162. *Id.*
164. *Id.* at GER B(2)–15 (translation of ZPO Chapter VII, Sections 1059 (2) and (3)).
E. Belgium

In order to accommodate and encourage the development of international arbitration in Belgium, in 1985 this country revised Article 1717 of its Code Judiciaire. The revision constitutes a major development in the area of international arbitration, due to its rather drastic character. Specifically, paragraph 4 of Article 1717 completely denies Belgian courts the authority to review international awards where the parties are non-Belgian, even if the situs of the arbitration was Belgium. As a result, non-Belgian parties to international arbitration can no longer bring set-aside proceedings, even where there is clear evidence that the arbitrator or the arbitral tribunal acted fraudulently or ultra vires. This provision is clearly revolutionary, and has in effect turned Belgium into an “arbitration nirvana” for those who are most interested in finality when submitting disputes to arbitration.

However, while the Code Judiciaire now precludes the use of judicial review as a sword in setting aside a foreign award, it still allows for its use as a shield to defend against enforcement. This situation raises the question of whether the New York Convention is applicable to foreign awards not subject to review at the seat of arbitration. It has been argued that such awards have an “anational” character, and therefore the Convention does not apply. If that were the case, there would be no reason why courts would refuse to implement the scope of judicial review desired by the parties. The reason for the previous assertion is the fact that the Convention contemplates judi-

165. See Okeke, supra note 6, at 44.
166. Id.
169. Id. at 45.
170. Id.
172. Okeke, supra note 6, at 45.
cial review of the award at the arbitral situs, but does not mandate such a review. 173
Thus, an arbitral award is binding under the New York Convention even if review is precluded at the situs of the arbitration. 174 Some commentators have argued that, while limiting the scope of review may be a desirable method of ensuring the finality of the arbitral process, eliminating review altogether, as in this case, may be a troublesome proposition. 175 The fear expressed is that such provisions may transform the arbitration process into an arbitrary proposition, thus deterring business actors from opting for it as a means of effective dispute resolution. 176 The statute forces parties to seek judicial review during enforcement proceedings, which generally happen in the country of one of the parties, thus raising the possibility of bias and subverting one of the main advantages of international arbitration, neutrality of the forum. 177 By completely precluding the power of its courts to review the types of awards described above, Belgium has effectively barred any possibility of expanded judicial review. The most troubling aspect of preclusion of judicial review at situs of arbitration is that it does not result from the choice of the parties to the arbitration, but rather it is imposed by the legislature.

F. Switzerland

Similar to the U.K. and France, Switzerland is a very popular situs for arbitration proceedings because Swiss law grants the parties “almost complete autonomy in selecting arbitrators, choosing applicable law, and determining rules for the arbitral procedure.” 178 With respect to judicial review of foreign arbitral awards, Switzerland adopted legislation that is different from the laws applicable to its domestic disputes, when it enacted

173. See New York Convention, supra note 3, Art. V(1)(e); Neumann, supra note 168, at 448. See also Sever, supra note 167, at 1661, 1690.
175. Okeke, supra note 6, at 45.
176. Id.
177. Id.
178. SMIT & PECHOTA, supra note 142, at SWI A–1.
Chapter 12 of the Swiss Private International Law Act, entitled “International Arbitration.” The provisions enacted in Chapter 12 are very similar to previously mentioned legislative frameworks, but are of a more moderate vintage. Article 190 lists the exclusive grounds for non-recognition of an award. However, Article 192 of the same law expressly allows parties to agree whether or not to exclude any means of recourse against the award, or to limit their recourse to one of the grounds of Article 190. It is important to mention that Article 192 applies only to instances where none of the parties to the arbitration has its domicile, residence, or principal place of business in Switzerland.

Thus, Article 190 of the Swiss law seems similar to the French law on judicial review of awards, allowing it only in a limited and specific number of situations. The provisions of Article 192, granting parties the option of foreclosing review almost entirely, seems to reflect a policy similar to the one advanced by the Belgian parliament. Thus, while a more restrictive form of review is available to parties to arbitration under Swiss law, expansion of judicial review is also seemingly unavailable.

IV. ANALYSIS

The validity of contractual expansion of judicial review remains to be settled by the United States Supreme Court, if and when the Court chooses to address it. In the meantime, this Note has attempted to illustrate the results achieved by the various U.S. districts and several foreign jurisdictions in reviewing the issue. The U.S. cases present the two main trains of thought. The first, the so-called institutional integrity approach, is illustrated by the Seventh, Eighth, Tenth, and Ninth Circuit decisions, which categorically deny parties to arbitration the ability to contractually influence court review of arbitration awards. The two main arguments advanced in support of this proposition, as illustrated above, are the concerns regarding subject matter jurisdiction, as a practical matter, and the integrity of the judicial process, as a policy argument. The second

179. Id. at SWI B(1)–1.
180. Franc, supra note 150, at 221.
181. Id. at 222.
school of thought on the issue, and the one this author believes to be more consistent with the pro–arbitration legislative bias, is the freedom of contract model. This approach is reflected in the decisions of the Third, Fourth and Fifth Circuits, and embraces expanded review when it reflects the will of the parties. This section will first discuss the debate between the two models adopted by the courts, and analyze the competing public policy interests at play. This section will subsequently review the often–advanced debate over the jurisdiction of federal courts. Finally, this section will turn to the international implications of expanded review, and offer some conclusions.

A. Institutional Integrity vs. Freedom of Contract

1. The Institutional Integrity Argument

The Institutional Integrity Argument is perhaps the argument most often advanced in supporting a denial of expanded judicial review. It comes as no surprise that institutional integrity and freedom of contract collide quite frequently when analyzing contractual provisions allowing for expanded judicial review. After all, the two models emphasize completely different aspects of arbitrated disputes, and, again not surprisingly, arrive at diametrically opposed conclusions. Thus, a pre–dispute arbitration agreement providing for expanded judicial review would likely be enforced according to its terms in the Third,\textsuperscript{182} Fourth,\textsuperscript{183} Fifth\textsuperscript{184} Circuits, but would be denied the same treatment if enforcement was sought in the Ninth,\textsuperscript{185} Seventh,\textsuperscript{186} Eighth\textsuperscript{187} and Tenth Circuits.\textsuperscript{188} As for the remaining Circuits, the outcome is truly unpredictable.\textsuperscript{189}

\begin{itemize}
  \item \textsuperscript{182} Roadway Packaging Sys. v. Kayser, 257 F.3d 287 (3d Cir. 2001).
  \item \textsuperscript{183} Syncor Intl Corp. v. McLeland, 120 F.3d 262, 1997 WL 452245 (4th Cir. 1997).
  \item \textsuperscript{184} Gateway Tech., Inc. v. MCI Telecomm. Corp., 64 F.3d 993 (5th Cir. 1995).
  \item \textsuperscript{185} LaPine Technology Corp. v. Kyocera Corp., 2003 WL 22025130 (9th Cir. 2003).
  \item \textsuperscript{186} Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc., 935 F.2d 1501 (7th Cir. 1991).
  \item \textsuperscript{188} Bowen v. Amoco Pipeline Co., 254 F.3d 925 (10th Cir. 2001).
  \item \textsuperscript{189} See Hamlin, supra note 148, at 54.
\end{itemize}
The argument regarding arbitral and institutional integrity has been advanced with vigor by a number of scholars and while its tenets are admittedly nebulous, the key element seems to be freedom of the adjudicatory forum from external forces that may affect the authority of the adjudicator and the impartiality of the process. With respect to arbitral institutions, the argument is the need to shield against undue interference by the judiciary. In the case of the courts, institutional integrity presumably dictates that the courts “neither be captured by majoritarian forces nor by the whims of particular litigants, who are ill-positioned to protect the interests of the federal judiciary.” The arguments in favor of denying expanded review based on this precept can effectively be reduced to a select few, which will be discussed in turn.

First, scholars and practitioners who embrace this viewpoint have argued that a distinction must be drawn between the parties’ ability to influence the arbitral process, and their ability to prescribe the conduct of reviewing courts. In other words, the freedom of parties to set the ground rules in arbitration does not extend beyond the arbitral process itself. The proponents of this argument rely on the absence of any specific language to the contrary in the Supreme Court cases discussing arbitration, as well as on the particularity with which the statutes describe judicial scope of review. Specifically, they discuss the fact that the extensive freedom to shape arbitral procedure has never been held to explicitly apply to the ulterior judicial review. Rather, they claim that the limited judicial review provided by statute is an indication of the defined and limited role the courts are intended to play in the arbitration arena, notwithstanding any contrary understanding of the parties.

191. Id. at 279 (citing Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 681 (7th Cir. 1983)).
192. Id. at 279 (citing Commodity Futures Trading Comm’n v. Schor, 478 U.S. 833, 850 (1986)).
193. See UHC Management, 148 F.3d at 997 (1997); Bowen, 254 F.3d at 934; LaPine Tech., 130 F.3d at 891; Chicago Typogr., 935 F.2d at 1504.
However, the statutes are just as susceptible to interpretation as default rules, which can be replaced or eliminated by private agreements of the parties.\textsuperscript{195} The latter interpretation can be derived from the same statutory and common law scheme on which the proponents of the judicial integrity model rely. The absence of any specific statutory or case language to the contrary opens the door just as widely for a “default rules” approach.\textsuperscript{196} When approached through this prism, the statutory scheme creates a rebuttable presumption, susceptible to change, and which “grants the ultimate power of decision-making to the parties.”\textsuperscript{197} In support of this interpretation, one might turn, as Professor Rau has, to the similar provision in the English Arbitration Act, which allows parties to appeal questions of law without leave of the court, if they have so agreed.\textsuperscript{198} When examined from a purely domestic viewpoint, this issue is clearly not resolved by the statute because there is no explicit language on the issue in the FAA. Consequently, the underlying policy objectives of the statute must be taken into account in suggesting a solution. This is precisely what Professor Cole did, and her conclusion finds the default rule scheme to be the preferable alternative, due to the significance of the pro-arbitration freedom of contract policy.\textsuperscript{199} In her Article, Professor Cole holds that the legislature likely intended to simply codify what they perceived to be the consensus regarding judicial review at the time, without contemplating that parties might be interested in expanding review.\textsuperscript{200} Thus, the statute does not address expansion of judicial review at all, and arguments both in favor of and against expanded review have been founded on this apparent loophole. However, as Prof. Cole rightly points out, the default rule approach which would allow parties a greater degree of

\textsuperscript{195} This opinion was adopted by the Fifth Circuit in Gateway Tech., Inc. v. MCI Telecomm. Corp., 64 F.3d 993 (5th Cir. 1995).
\textsuperscript{196} Alan S. Rau, Contracting Out of the Arbitration Act, 8 AM. REV. INT'L ARB. 225, 231 (1997).
\textsuperscript{197} Id.
\textsuperscript{198} Id at n.33.
\textsuperscript{199} Sarah R. Cole, Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution, 51 HASTINGS L.J. 1199, 1258 (2000) (stating that interpreting the statute as a default scheme is preferable “given the importance of freedom of contract and the presumption in favor of finding that the FAA creates a set of default rules.”).
\textsuperscript{200} Id. at 1254.
authority in setting the terms of the arbitration, seems to be more in tune with the past and current policies regarding arbitration.

Second, proponents of the institutional integrity argument advance the notion that expanded judicial review would in fact be a wasteful allocation of judicial resources. As one commentator stated, the extent to which a court reviews a decision made by an adjudicatory body is a function of a judgment as to the extent to which judicial resources should be made available for this purpose.\footnote{201} In making this decision, Professor Smit continues, the body politic considers the interests of the parties with respect to the type of review they wish to have. Ultimately, however, the decision is up to the body politic not the parties, and an agreement by the parties on that question is irrelevant because the parties have no authority to determine how public resources are to be spent.\footnote{202} While the rationale behind this argument is conceptually very elegant, the argument still does not resolve the issue, because it departs from a flawed premise. The premise for Professor Smit’s argument is the assumption that society or the body politic have a choice in the matter, and can therefore opt not to allocate judicial resources. Upon closer scrutiny, this premise turns out to be unfounded.

It is, in this author’s opinion, beyond argument that parties have a right to resort to the judicial system to resolve their civil disputes. It is equally clear that this right entitles them to either pursue an action in the court system in the form of litigation, or, where the option is available,\footnote{203} to circumvent the judicial system and engage in arbitration in order to resolve their disputes. Furthermore, it has been conceded by institutional integrity advocates that arbitration, even in a form which permits expanded review, saves judicial resources, because the burden on the reviewing court is much smaller than that of a

\footnote{201}{See Smit, supra note 49, at 150.}
\footnote{202}{Id.}
\footnote{203}{There are hardly any areas of the law where arbitration is not available as a means of adjudication. See Kenneth M. Curtin, Judicial Review of Arbitral Awards, 55 Disp. Resol. J. 57 (2001) (discussing cases in which the Supreme Court has sanctioned arbitration as a means of dispute resolution where the subject matter of the dispute implicated fundamental issues of public policy, such as securities violations, RICO claims, anti–trust causes of action, employment discrimination and civil rights cases.)}
In sum, since recourse to the civil courts is a matter of right, and arbitration, even with expanded judicial review, serves to conserve judicial resources, it follows that individuals are entitled to engage in such arbitration because by their actions they would impose a lesser burden on judicial resources.

Third, proponents of the institutional integrity model argue that expanded judicial review would work against some of the very attributes making arbitration a viable and desirable alternative to litigation, namely finality, speed and cost-effectiveness. Consequently they propose that upon expanding judicial review arbitration will become merely a form of first instance adjudication. The wide opportunity for review will be abused by the parties, the argument continues, and one-step adjudications will be transformed into four-step adjudications.

The possibility that expanded review will have the effect of prolonging proceedings in the manner described above can not be disputed in good faith. However, proponents of this argument fail to address one detail which, in this case, completely changes the perspective, namely that the parties have agreed to this expanded form of judicial review. Therefore, the argument that the arbitral process is no longer as advantageous does not withstand scrutiny. Clearly, all parties to an arbitration who have even a modicum of sophistication realize that the effect of expanding judicial review is to potentially prolong the dispute resolution process. However, the extension of these proceedings is but one factor in the wide array of considerations parties take into account at the time of negotiating the agreement, and thus their choice to forego a speedy and final arbitration should not be underestimated or dismissed as perfunctory by outsiders unfamiliar with all aspects of the dispute. A further argument could be made that the lack of court deference to the parties’ wishes might, while preserving the finality and efficiency of ar-

204. Bowen, 254 F.3d at 936 n.6 (“We recognize, of course, that even under expanded standards of review, arbitration reduces the burden on the district courts....Reviewing an arbitration award is certainly less work than hearing the entire case pursuant to diversity or federal question jurisdiction.”).


206. Id. (discussing the possibility that awards would be reviewed by courts of first instance, then subjected to review by appellate courts, and finally by the courts of highest instance).
bitration, cause an even greater disservice to the institution of arbitration. The Supreme Court has clearly recognized that when engaging in arbitration the parties give up some of the security of in–court procedures in favor of a dispute resolution process tailored to their desires.\textsuperscript{207} Efficiency and finality are the byproducts of such tailor–made processes. It stands to reason that such degrees of finality and efficiency are desirable effects only if the parties actually want them to occur. If parties do not desire this, they should be able to opt for a more elaborate process. If the courts preclude their ability to opt for a process with more extensive judicial review, parties might think twice before relinquishing the procedural safeguards of litigation. Since the promotion of arbitration is clearly established federal policy, it is easy to recognize how court imposition of strict review standards might violate the interests promoted by this policy.

Finally, some commentators have argued that expanded review is socially undesirable. They argue that arbitration implies decision making by arbitrators specifically selected for their expertise in a particular field, in a manner which might not necessarily meet with approval in the lower courts because arbitrators are free to stray from the rigors of the law in rendering awards.\textsuperscript{208} In other words, having experts decide arbitrable disputes is of paramount importance to society, and their ability to fashion creative solutions which best address the presented problems in the interest of the common good should not be limited by the constraints of applicable law.\textsuperscript{209} This proposition is largely true, but with one important distinction. It is indisputable that the arbitration process gives experts a needed voice, and that having them render decisions advances the state of the law for all of us. However, if courts are reduced to the function of merely enforcing or denying arbitral awards, without an op-

\textsuperscript{207} See First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995) (stating that parties have the right to a judicial decision on the merits, but “where the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right’s practical value”). See also Mitsubishi Motors Corp., 473 U.S. at 628 (holding that when agreeing to arbitrate, a party “trades the procedures and opportunity for review of the courtroom for the simplicity, informality and expedition of arbitration”).

\textsuperscript{208} See Smit, supra note 49, at 151–52.

\textsuperscript{209} Id. at 152.
portunity to discuss the reasoning for the arbitral decision, the advancement of the law is stalled, as arbitral decisions carry no precedential value. Thus, expansion of judicial review gives the courts of first instance the opportunity to establish a record, and to include the reasoning of expert arbitrators into the body of the law in the form of written decisions. This procedure better advances the state of the law and facilitates the necessary beneficial input from experts in the field.

2. Freedom of Contract

The Freedom of Contract, or party autonomy, viewpoint is a lot more concise by comparison, and much more direct. It maintains the ability of participants in arbitration proceedings to negotiate and agree upon the manner in which these proceedings will unfold, setting the time, place, procedure, etc. Proponents of this approach further hold that an integral part of the parties’ ability to determine the structure and form of the dispute resolution process is the scope of judicial review. Thus, the argument goes, without a mutually agreeable judicial review of the arbitral decision, the power to define the arbitral process is meaningless.

This argument flows naturally, given the unequivocally contractual nature of the arbitration process. As one commentator noted, “heightened judicial oversight of arbitration awards finds support in the philosophical underpinnings of contract law.”

210. See GARNETT ET AL., supra note 67, at 14 n.31.
Confidentiality...has had a negative impact on the development of standardization of commercial practices. Confidentiality prevents the dissemination of rulings and reasons, and because arbitration awards do not lead to any official precedent or newly established legal principle, it may remove a highly valued feature underlying commercial relationships, namely certainty and consistency.

Id.

211. LEONARD RISKIN & JAMES WESTERBROOK, DISPUTE RESOLUTION AND LAWYERS 228 (2d ed. 1998) (“Arbitration is a contractual process. With few exceptions, parties arbitrate because they have agreed to do so, either in a contract entered into before the dispute arose or in an ad hoc agreement after the dispute arose.”).

212. See Davis, supra note 94, at 130.
to enter into contracts is derived from the individual’s fundamental right to own property.\(^{213}\) It stands to reason that without the freedom to dispose of property in the way one sees fit, the right to property ownership itself becomes meaningless.\(^{214}\) In a society which holds the right to property ownership in such high regard, it is difficult to find a reason to justify the interference of the government, even in its incarnation as the judicial branch, with the express will of the owner in disposing of his or her property. At a very basic level, the expression of individual desires as to the disposition of property takes the form of freely negotiated agreements among property owners.\(^{215}\) Thus, inasmuch as arbitration is fundamentally a creature of contract, and contracts are the result of property ownership rights, the conclusion can be drawn that property ownership rights give rise to the arbitral resolution of disputes. This conclusion is not necessarily novel, but its application to the issue of expanded judicial review has some significant implications.

Since it is the right to freely dispose of property that gives rise to agreements to arbitrate, it becomes increasingly difficult to argue that the judicial branch should refuse to give due course to some of these wishes, i.e., expanded judicial review. Nevertheless, some argue that expanded review of arbitral

\(^{213}\) Id., citing Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685, 1715 (1976) (“the rationale for contract law is derivative from that of property ... [because] one who breaches deprives the promisee in a sense no less real than the thief”).

\(^{214}\) Id., citing John Locke, Two Theories of Government, 287 (Peter Laslett ed., 2d ed. 1967), reprinting John Locke, The Second Treatise of Government: An Essay Concerning the True Original, Extent, and End of Civil Government (3d ed. 1698). (“All Men are naturally in...a State of perfect Freedom, to...dispose of their Possessions as they see fit...Property rights are worthless unless the owner may dispose of his property without governmental interference. Otherwise, all free and voluntary Contracts cease, and are void, in the World...and all the Grants and Promises of man in power, are but Mockery and Collusion.”).

\(^{215}\) Id. at 130 n.435, (discussing the Kantian interpretation of societal Justice as an aggregate of free wills freely joined [in contract]: “Justice is therefore the aggregate of those conditions under which the will of one person can be conjoined with the will of another in accordance with a universal law of freedom”; Immanuel Kant, The Metaphysical Elements of Justice 34 (John Ladd trans., 1965) (1797)). See also Morris R. Cohen, The Basis of Contract, 46 Harv. L. Rev. 553, 559 (1933) (“free contract assures the greatest amount of liberty for all”).
awards alters the very features that confer upon arbitration its most fundamental advantages: expeditiousness, cost-effectiveness, etc. The reasoning behind this assertion is that the limited, statutorily prescribed, judicial review is what assures the binding nature and unequivocal enforcement of arbitral awards. Hence, subjecting these awards to the scrutiny of the courts would undermine the character of the awards, thus negating the advantages of the entire arbitration process, and transforming it into an imperfect precursor to extended litigation. These worries, however, are sorely misplaced.

First, the previously narrow scope of review has not prevented litigators from challenging arbitral awards with gusto.\textsuperscript{216} Thus, the argument that the current review of arbitral decisions preserves the expeditiousness of arbitration is significantly flawed. Second, because arbitration is a contractual endeavor, the courts would do more to promote arbitration if they were to heed the parties’ instructions as expressed in their contracts, rather than impose a heavy-handed reading of the applicable statutes. This way, parties could be assured that not only the arbitral tribunal, but also the reviewing courts, would take their concerns into account and heed their directives. This outcome would encourage more parties to submit their disputes to arbitration, lightening the case load of the courts. Third, those who argue that the benefits of arbitration ought to be protected in spite of the desires of those who would submit to arbitration, make a fundamental mistake as to the character of arbitration itself. It is true that expeditiousness and cost-effectiveness are significant attractive features of arbitration.\textsuperscript{217} However, most parties submit to arbitration in order to resolve disputes according to their wishes in an extra-judicial framework.\textsuperscript{218} Speed and

\begin{footnotesize}
\textsuperscript{217} See Davis, supra note 94, at 51.
\textsuperscript{218} Id.
\end{footnotesize}

The central element of arbitration is the intention of the parties as expressed in the arbitration agreement. The agreement determines the process. Informality may flow from the agreement, but it need not, for the parties may insist to adhere to arcane rules of evidence or on wearing powdered wigs during the hearing. Privacy may flow from the agreement, but it need not, for the parties may broadcast the proceedings on public access television.
lesser costs are the effects of choosing private tribunals, but they are not necessarily ends in themselves. They are desirable attributes, to be sure, but their desirability does not fundamentally carry the load of the argument against expanded review. Also, expanded review does not completely do away with the speed of arbitration, but instead lessens the distance on the expeditiousness spectrum, between full–blown litigation and non–reviewable arbitration. Furthermore, other important advantages of arbitration, such as confidentiality of the proceedings, remain in force even if expanded review is allowed. Thus, in this author’s opinion, while expanded review may somewhat prolong the dispute resolution process, it confers other significant advantages upon the parties, such as increased certainty that awards would conform with the applicable law and principles of justice and equity.

Yet another advantage may be that such review could force arbitrators to approach their positions as decision-makers with more seriousness, and to weigh the matters to be decided more carefully, because they would be fully aware of the specter of judicial review. These advantages are not negligible to participants in international commerce. Therefore, if the courts forced parties to choose between two very narrow alternatives, full–blown litigation, or arbitration with almost no judicial review, it would likely cause great harm to the arbitral institution. After all, the more the dispute resolution processes reflect the wishes of the parties, the more likely the parties are to choose them over litigation. Finally, it is worth reiterating that expanded review exists in such scenarios because it represents the express wish of the parties to the arbitration agreement. Thus, as a matter of common sense, denying parties the opportunity to have their wishes respected would do more to push the arbitration process towards the rigorous and inflexible nature of litigation, instead of the expanded review which the parties desire.

Another interesting point is raised by the arguments of some institutional integrity advocates who point to the tradition of limited review expressed in U.S. statutes and international convention as proof positive of the desirability of denying expanded review. As Professor Rau aptly notes, this argument merely begs the question to be asked of any long–standing tra–

_Id._
dition which potentially impedes development and achievement of the greater good, why? The answer Professor Rau cites to this question is that the legislature had intended to “insulate from parochial or intrusive judicial review awards that the parties intended in the usual sense to be binding.” However, this is not the end of the inquiry, and the question must be asked again why? The logical answer is that the “primary impetus... was precisely to encourage resort to arbitration by creating a safe harbor for the results of a contractually-agreed process.” Following the argument to its logical endpoint, the result is clear: the rationale for restricted review falls apart when the parties to arbitration want to do away with this protection of the statute and opt for expanded review. The public policy considerations expressed by the Supreme Court in connection with expanded review support the freedom of contract approach.

B. Public Policy Debate

The importance of the policy favoring enforcement of arbitration clauses, especially in international arbitration, was unequivocally reaffirmed by the Supreme Court in the Mitsubishi Motors vs. Soler Chrysler–Plymouth decision. In that decision

220. Id.
221. Id.
222. Id.
223. In the words of Justice Blackmun,

the Court had relied on its previous language to reiterate the pro–arbitration bias to be applied by the U.S. courts in reviewing arbitral awards. In Bremen v. Zapata Off–Shore Co. the Court stated that “the expansion of American business and industry will hardly be encouraged, if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.”

This strong bias, reaffirmed in the Mitsubishi case, was reiterated by the Supreme Court in its decision in Vimar Seguros, where the Court announced that “if the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting domestic legislation in such manner as to violate international agreements.”

The Court went on to warn U.S. courts that skepticism regarding the competence of foreign arbitrators “must give way to contemporary principles of international comity and commercial practice.”

Justice Stevens’ dissent in Vimar Seguros brought up an interesting point, namely that submitting disputes to independent and separate fora for dispute resolution might result in a lack of uniformity which could interfere with international trade by increasing the level of uncertainty. While this is a valid concern, most important for the purpose of our discussion is the fact that the Supreme Court, in a seven to one decision overwhelmingly chose to ignore the concerns raised by Justice Stevens in favor of a liberal, freedom of contract approach to arbitration. The Court clearly opted to disregard potential uncertainty as to the outcome of disputes in favor of the certainty that the parties’ wishes, as expressed in the freely negotiated terms of the contract, would be respected by national courts. The lesson to be drawn is that in reviewing arbitral awards the terms of the contract should take precedence over any considerations of expeditiousness, judicial economy, or any other advantages which arbitration in its purest form might bring to the gamut of methods of dispute resolution. Thus, judging by the language in the Supreme Court’s previous decisions, if the

226. Id.
227. Id. at 542.
Court were to address the issue in the future, it would most likely endorse expanded judicial review of arbitral awards.

It is important to note that the appellate court cases discussed above all involved domestic arbitrations, or awards sought to be enforced under the domestic federal arbitration law. Thus, in none of these cases have the courts had the opportunity to consider the implications of expanded judicial review on an award sought to be enforced under the New York Convention. Nevertheless, the domestic decisions provide us with important clues as to the potential outcomes of such cases. The current domestic arbitration law reflects a very strong pro-arbitration bias on the part of the legislature and the federal courts. This bias applies with particular force in the international context. Therefore, it is reasonable to assume that in situations involving international awards, the U.S. courts would be even more likely to respect the wishes of the parties, as expressed in freely negotiated arbitration agreements.

C. Jurisdiction

One of the main arguments of the Seventh Circuit in *Chicago Typographical*, and of institutional integrity advocates in general, in opposing expanded review is the viewpoint that the agreement of the parties attempted to create federal jurisdiction. Presumably, what the Seventh Circuit meant by “jurisdiction” in *Chicago Typographical* was not the classical interpretation given to the expression by the federal courts, because the Seventh Circuit had clearly recognized that federal subject matter jurisdiction existed in that case due to federal question. Rather, what Judge Posner likely meant was that the parties could not contract to enlarge the scope of review set forth by the statute within the exclusive parameters of the court’s jurisdiction to review arbitral awards. In Judge Posner’s opinion, such a course of action was legally unacceptable because “federal courts do not review the soundness of arbitration

230. *Id.* at 1503. (“The basis of federal jurisdiction was section 301 of the Taft–Hartley Act, 29 U.S.C. § 185, which creates federal jurisdiction over suits to enforce labor contracts. There is no doubt of the applicability of section 301.”).
awards, [and] an agreement to submit a dispute...to arbitration is a contractual commitment to abide by the arbitrator’s interpretation.”

It is clearly the case that an alternative source of subject matter jurisdiction is always necessary in cases where parties seek to enforce domestic awards under Chapter I of the FAA. There is ample precedent on the issue, which indicates that Chapter I of Title Nine of the U.S. Code does not by itself act as a source of federal subject matter jurisdiction. This issue was resolved by a footnote in the United States Supreme Court decision in Moses H. Cone Memorial Hospital v. Mercury Construction Corporation. The Moses holding has not been revisited by the Court, and therefore constitutes valid precedent. It is also undisputed that a federal court would have subject matter jurisdiction to decide a dispute if the parties can establish that federal question jurisdiction arises. However, as the Second Circuit noted, “simply raising a federal issue in a complaint will not automatically confer federal question jurisdiction.”

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231. Id. at 1504–05.
232. See Moses H. Cone Mem'l Hosp. v. Mercury Construction Corp., 460 U.S. 1, 25 n.32 (1983). In relevant part, the footnote provides:

The Arbitration Act is something of an anomaly in the field of federal court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal question jurisdiction under 28 U.S.C. 1331 [granting jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States] or otherwise. Section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute; hence, there must be diversity of citizenship or some other independent basis for federal jurisdiction before the order can issue.

Id.


234. Federal jurisdiction exists where a well–pleaded complaint “establishes either that federal law creates the cause of action or that the plaintiff’s right to relief necessarily depends on resolution of a substantial question of federal law.” Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 27–28 (1983).

235. See Perpetual Securities, 290 F.3d at 136.
Nevertheless, while Chapter I of Title Nine does not create subject matter jurisdiction, the situation is quite different in the case of international awards sought to be enforced under the New York Convention. With respect to foreign arbitral awards, the New York Convention is the law applicable to the review and enforcement of foreign arbitral awards. Thus, the New York Convention constitutes the definitive document with respect to the enforcement of foreign arbitral awards, and plays an important role in the jurisdiction analysis because the New York Convention, as enacted by Chapter II of Title Nine, explicitly confers subject matter jurisdiction on the federal courts.

In relevant part, Section 203 provides that “an action or proceeding falling under the [New York] Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States...shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.” Section 202 explains the issue further, defining which actions or awards fall under the New York Convention:

An arbitration agreement or arbitral award arising out of a legal relationship...which is considered as commercial...falls under the Convention. An agreement...which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad,

236. It is important when discussing the lack of federal court subject matter jurisdiction under the FAA, that the reader only consider Chapter I of Title Nine of the United States Code. See 9 U.S.C. §§ 1–16. Although at times the “FAA” designation has often been applied to all of Title Nine, federal appellate courts have generally used the designation to refer only to Chapter I of that title. (See e.g. International Insurance Company v. Caja Nacional de Ahorro y Seguro, 293 F.3d 392, 395 (7th Cir. 2002); Beiser v. Weyler, et. al., 284 F.3d 665, 666 (5th Cir. 2002); Daihatsu Motor Co. Ltd. v. Terrain Vehicles, Inc. 13 F.3d 196, 198 (7th Cir. 1993). But see Jain v. Mere, 51 F.3d 686, 688–689 (7th Cir. 1995) (referring to Convention implementing legislation as “Chapter 2” of the FAA); Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469, 478, n.13 (9th Cir. 1991)). Therefore, for purposes of this Note's discussion of subject matter jurisdiction, this author will assume that the “FAA” denomination refers only to Chapter I of Title Nine. See 9 U.S.C. §§ 1–16 (1994).
or has some other reasonable relation with one or more foreign states.\textsuperscript{239}

Finally, Section 208 establishes the relationship between Chapter I of Title Nine and the New York Convention, namely that Chapter I provides the gap-filler provisions in case the respective issue is not covered by the Convention.\textsuperscript{240} Pursuant to the clear statutory language, the existence of federal subject matter jurisdiction in arbitrations involving the New York Convention has been recognized by the federal courts.\textsuperscript{241} Hence, while in arbitrations applying U.S. law and involving only U.S. parties, the FAA or state arbitration statutes may apply, all other arbitral awards can be enforced pursuant to the New York Convention, thus conferring subject matter jurisdiction on the federal courts. Thus, when it comes to awards rendered or sought to be enforced under the New York Convention, the explicit grant of subject matter jurisdiction in Title Nine of the U.S. Code resolves the issue of subject matter jurisdiction conclusively.

However, this explicit grant of subject matter jurisdiction does not do away with the objection that expanded review attempts to impermissibly enlarge the role of the courts. Like Chapter I of Title Nine, the New York Convention also contains a specific list of reasons for which the courts can vacate or modify awards, in Article V.\textsuperscript{242} Thus, if the parties were to contract for expanded review, the jurisdiction of the courts would, in the view of judicial integrity advocates, be confined only to the pro-


\textsuperscript{240} See 9 U.S.C. § 208 (1994). (“Chapter I applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the [New York] Convention as ratified by the United States.”).


\textsuperscript{242} See supra, Part I.B.2.
visions of Article V. In response, freedom of contract proponents could present the same arguments as in the domestic debate with regard to expanded review, illustrated in Part II of this paper. In cases where the New York Convention is involved, the argument of freedom of contract proponents is strengthened further by the various U.S. Supreme Court decisions which emphasize the strong policy in favor of enforcement of arbitral agreements in the international context. \(^{243}\) The previously discussed cases have illustrated the way some of the federal circuits are likely to respond to a request to expand judicial review in the domestic setting. However, it stands to reason that when asked to do the same in a context involving the New York Convention, these courts would grant wider deference to the desires of the parties.

**D. International Implications**

Undoubtedly, in the near future U.S. courts will be asked to decide whether expansion of judicial review is a viable option in cases involving enforcement under the New York Convention. Similar concerns might arise in cases where American parties seek enforcement of international awards in other jurisdictions, pursuant to the New York Convention. Interestingly enough, however, it seems that many jurisdictions have not yet had to deal with the question at all. \(^{244}\) However, given the legislative framework in place in many of these jurisdictions, it seems likely that even when presented with the issue, many would likely deny the parties’ request for expanded judicial review. In this regard, it seems that the courts of the U.S., U.K., and the few other jurisdictions which permit expanded review for domestic arbitrations, have reached a paradoxical impasse. In granting wide deference to the parties’ freedom of contract, they would seem to have arrived at a result that is inimical to the underlying purpose of the New York Convention, which had attempted to achieve of a high level of homogeneity in the enforcement of foreign arbitral awards. \(^{245}\)

In this regard, institutional integrity advocates would most likely argue that such a result would only add to the confusion

\(^{243}\) See supra, Part IV.B.

\(^{244}\) See supra, Part IV.B.

and reticence of international commercial actors to engage in arbitration.\textsuperscript{246} However, this conclusion would be superficial for several reasons. The New York Convention was adopted during a time when international arbitration was developing rapidly but independently in the various jurisdictions, and thus uniformity in enforcement was of paramount importance if arbitration was to function effectively over jurisdictional lines. Furthermore, at the time many of the jurisdictions were still very reticent toward enforcement of foreign arbitral awards, and therefore a list of the acceptable grounds of review provided much needed clarity and restraint for the national courts. Since then, however, the situation has changed dramatically. International arbitration has become commonplace and the sophistication of international actors and their counsel has also increased significantly. Furthermore, national courts have become much more adept at recognizing and enforcing international awards. As a result, the uniformity of procedures, which was of paramount importance in the years preceding the adoption of the New York Convention, is no longer a cardinal consideration, because courts all over the world have come to respect the institution of arbitration as a viable and just means of dispute resolutions.

The New York Convention’s fundamental goal was the promotion of arbitration as a viable means of resolution of international disputes. Yet the Convention may potentially diminish the willingness of parties to submit to arbitration if its provisions are enforced without due regard to the primary impetus of decisions to arbitrate — freedom of contract. It is therefore very important that the New York Convention remain in place as a default framework with respect to international arbitration, as a safeguard against potential attempts by governments or courts to encroach on the arbitral process. However, in situations where the parties explicitly agree to circumscribe the precepts of the Convention and stipulate for expanded review, there is no reason why the courts should decline heeding their wishes.

\textsuperscript{246} See Vimar, 515 U.S. at 542.
CONCLUSION

It is uncertain whether the Supreme Court will resolve the debate over expanded review in the near future. However, when presented with the issue the Supreme Court will most likely support the freedom of contract viewpoint and allow for expanded judicial review. In the past the Supreme Court has recognized the importance of the public policy protecting the provisions of agreements to arbitrate, and has therefore granted parties wide deference in establishing the ground rules for arbitration. This policy is further enhanced in the sphere of international commerce by the Supreme Court’s respectful stance towards the needs of international commerce, and of the general principles of comity among nations. Therefore, it stands to reason that the only outcome consistent with the Court’s prior decisions and the policy interests at play in the debate surrounding international arbitration would be reached by granting the express wishes of the contracting parties and endorsing expanded judicial review.

Dan C. Hulea∗

∗ Dan Hulea is a 2003 graduate of Brooklyn Law School. The author would like to thank Brooklyn Law School Professor Claire Kelly for her invaluable support and advice throughout the writing process. The author would also like to thank Judge Delissa Ridgway of the U.S. Court of International Trade for suggesting the topic of this note, for reviewing an earlier draft of the note, and for providing many helpful insights along the way.
THE BOUNDARIES OF THE ILO:
A LABOR RIGHTS ARGUMENT FOR INSTITUTIONAL COOPERATION

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INTRODUCTION

A simplistic though not inaccurate historical view of the economic theories of the Twentieth Century discloses a pendulum-like movement between free-market and regulatory extremes.¹ As the century began, the Industrial Revolution had fostered confidence that open markets and global trade would bring prosperity to all nations. The consequent laissez faire approach to economics spread quickly. Less than two decades later, enthusiasm abated as the United States sunk into the Great Depression and bread-lines and poverty grew in Europe. Heavy state regulation such as the New Deal and more overtly socialist programs abroad were enlisted to bring this excess back in check. Wider and deeper regulation mounted for most of the middle decades of the century. Inevitably, this trend also lost its momentum as hyper-inflation and stagflation crippled the American economy and Communist regimes worldwide began to collapse. Encouraged by what is now known as the Information Revolution and globalization, the pendulum swung back yet again, into the free market euphoria of the “booming” 1990s.

Today, as that “boom” seems more like a bubble and its legacy is marked with scandal and fraud, there are calls for greater corporate governance and economic regulation. As we look abroad for the root causes of terrorism, hatred and ignorance, we find entire populations unemployed, uneducated and disenfranchised, changed mostly for the worse by the unregulated forces of globalization. History suggests we may be beginning a swing back towards centralized regulation and economic governance. Yet, we now find ourselves in a truly global economy, where the size and power of regulated entities often allows them to influence, choose among, and even control would-be regulators. Consequently, we are forced to ask today: who can regulate a global economy, and how?

¹ For the following historical narrative, I rely on DANIEL YERGIN & JOSEPH STANISLAW, COMMANDING HEIGHTS: THE BATTLE FOR THE WORLD ECONOMY (1998) and the related Public Broadcast Systems television broadcast, transcripts, interviews, and resources, which are available at http://www.pbs.org/wgbh/commandingheights/lo.htm.
The difficulty of regulating a global economy has been nowhere more evident than in the attempt to enforce international labor rights. The International Labor Organization ("ILO"), a specialized agency of the United Nations ("UN") created for the purpose, has proven largely ineffective in enforcing compliance with even the core universal standards it has delineated. Recently there have been mounting calls to find other means to enforce compliance. Perhaps loudest have been those that wish to see economic sanctions and/or benefits "linked" to compliance. In such a regime, compliance with the ILO standards would be rewarded with benefits offered through the International Monetary Fund ("IMF"), World Trade Organization ("WTO") or bilateral agreements, and violations punished with sanctions through the same.

Proposals for such linkage systems are various, and are accompanied by arguments just as varied in opposition. It is the purpose of this Note to offer a labor rights-based argument for the necessity of cooperation among international regulatory institutions, be it through such linkage systems or other means. While there has been much scholarship addressing the issue from the trade perspective, little has been offered from the labor perspective. I will argue that because any right is only


3. See, e.g., Symposium: The Boundaries of the WTO, 96 AM. J. INT’L L. 1 (2002). I will refer later to several papers delivered at this recent symposium which dealt with the question of linkage. See infra Part IV.B


5. See, e.g., Symposium, supra note 3.
meaningful as balanced against other rights and interests, the legal, social and economic framework necessary for protecting labor rights is as properly a subject for economic and human rights institutions as it is for labor institutions. This framework by definition exceeds the boundaries and capacities of the ILO, and so the assistance of other institutions must be enlisted. Further, proposals to link economic benefits, human rights and labor protections on the regulatory plane may not seem so radical when it is observed that they are already inextricably intertwined in the lives of those they effect.

Part I will discuss briefly what labor rights are, both in concept and content. Giving an overview of the history of labor rights and labor rights institutions in the United States and at international law, I will demonstrate that labor rights occupy a unique position at the nexus of economic interest and human rights. Due to this position, a government’s obligations to protect labor rights will necessarily involve providing more than just labor-specific regulations.

In Part II, I will first show how the United States has attempted to strike balances between labor rights and other rights, particularly those that have been used to obstruct the exercise of labor rights. While international law has, at least in principle, struck this balance in a manner more favorable to workers than it is in the United States, its lack of effective compliance mechanisms renders this ambitious stance ineffective (and perhaps even insulting to those workers who look to it for protection). The difference between the “positive” and “negative” obligations the ILO imposes on governments shows the root of this difficulty. For the ILO to effectively enforce these standards, it will have to deal with a variety of domestic labor and legal situations without the balancing test found in the American system. I will use the extreme example of Export Process Zones (“EPZs”) to demonstrate these difficulties.

In Part III, I will give an overview of the history and purpose of EPZs. I will argue that, though the labor conditions in EPZs strikingly resemble those conditions present when the United States Supreme Court (“Supreme Court”) carved back the property rights of employers to protect labor rights, many foreign legal systems offer no means by which this balance can be struck. However, when EPZs are reintegrated into domestic social and legal frameworks, and employers and employees are put in the same position vis-à-vis the government, labor and
human rights conditions tend to improve. I will argue that this
trend is promising because it demonstrates that by approaching
labor, human and economic rights and interests as inextricably
related, conditions which foster prosperity and the protection of
these rights thrive more easily.

In Part IV, I will incorporate the observations of the first
three Parts into the debate on linkage systems. I will argue
that the international regulatory community must recognize
that the “positive” obligations the ILO impose upon govern-
ments by necessity encompass issues not purely labor-oriented.
Violations of these obligations should be treated as violations of
international human rights and/or international trade regula-
tions, but should not be, as they currently are, treated as nei-
ther. Without cooperation with other international institutions,
that is, without some form of linkage, the problems facing the
ILO will not easily be overcome.

In conclusion, I will argue that respect for labor rights, which
do uncomfortably straddle the generic categories of economic
and human rights, involves respect for human rights, but also
bears directly upon economic privilege. To see the three as in-
extricable may be the only way to secure them all, and it is in-
cumbent upon the international community to recognize this.

I. LABOR RIGHTS – DEFINITIONS AND ORIGINS

A. Labor Rights Defined

The very assertion of such a thing as a labor right creates a
difficulty in categorization: it is unclear whether labor rights
are more properly considered economic or human rights. At
first glance, labor does appear to be an intrinsically economic
activity. Labor costs and conditions are intimately linked both
with an employer’s revenues and an employee’s individual, fa-
milial and communal welfare. In this context, labor is a legiti-
mate economic issue and consequently a reasonable subject of
trade laws, regulations and treaties. Further, put alongside

Office of International Economic Affairs, Bureau of International Labor Af-
the freedom from torture, slavery and summary execution, one would not easily recognize labor as a fundamental human right, if a human right at all. These other freedoms seem much more basic and fundamental than the right to organize or collectively bargain for employment contracts. As has been observed in a slightly different context, “[w]ithout adequate conditions for the use of freedom, what is the value of freedom? First things come first: there are situations...in which boots are superior to the works of Shakespeare.”

Put otherwise, labor rights will mean little to peoples whose lives and well-being are daily put in jeopardy.

Still, the Universal Declaration of Human Rights does declare that “[e]veryone has the right to form and to join trade unions for the protection of his interests.” We need not follow it to its conclusion to agree with the insight of Marxist economic theory that labor is not just another commodity. In fact, the United States Congress agreed in 1914 and explicitly exempted labor from anti-trust laws because “[t]he labor of a human being is not a commodity or article of commerce.” Instead, labor is the means by which individuals define themselves, provide for themselves and their families, and contribute to and create their communities. Consequently, it should be a consideration before, not among, purely economic factors. Thus, labor, constitutive of human identity, dignity and self-reliance, seems properly protected as a human right.

However, considering labor a human right completely separated from economic considerations is not without its disadvantages. Perhaps the greatest challenge to international human rights is to find a balance between the needs of individuals and the economic interests of nations.

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rights today is the lack of effective enforcement and compliance mechanisms.\textsuperscript{13} Various mechanisms for enforcing labor rights on their own have been proposed, but none have thus far proven effective.\textsuperscript{14} The most prominent proposal has been to “tie” or “link” respect for labor rights (and human rights in general) to economic carrots and sticks.\textsuperscript{15} Supporters argue that labor and human rights violators will be more likely to remedy their violations and comply in the future if their economic well-being is at stake.\textsuperscript{16} The voices in support of such regimes continue to multiply in force and number, but not without equal opposition.\textsuperscript{17}

Therefore, considering labor rights as only a matter of economic interest or as strictly a human rights issue both seem untrue to what is actually at stake when individuals assert them. It is both economic and human well-being that is secured or put in jeopardy when workers’ labor rights are enforced or violated. It is perhaps more accurate, then, to consider labor rights as occupying an area of convergence between economic interest and human rights, a unique category unto themselves.\textsuperscript{18} Rather than a difficulty, this uncomfortable status may in fact point up a valuable lesson: economic and human rights policies are inextricably connected, and to ignore this is to perpetuate a fallacy that continues to have devastating effects on the devel-


\textsuperscript{14} See Van Wezel Stone, \textit{supra} note 2.


\textsuperscript{16} Taylor, \textit{supra} note 2.


\textsuperscript{18} The interdependence of economic interest and human rights has not gone unnoticed. See \textit{Declaration Concerning the Aims and Purposes of the International Labour Organisation}, Oct. 9, 1946, art. III, 62 Stat. 3554, 15 U.N.T.S. 104 (“\textit{A}ll human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.”).
oping world. Only by seeing labor as the engine of both social and economic prosperity does one properly understand the responsibilities one bears in shaping labor policies.

B. Labor Rights as Legal Protections

Several lists have been proposed to clearly enumerate the specific rights and liberties that occupy this area of convergence. To whom these rights extend, against whose intervention they guarantee protection, and the types of activities they cover are all subjects of debate in domestic and international law. However, it would be fair to name the following as a fairly uncontroversial list of rights, even if disputes remain as to their scope and application:

1. The Freedom of Association
2. The Right to Organize
3. The Right to Collective Bargaining
4. The Right to Equal Opportunity and Treatment

Each of these rights is explicitly recognized by the ILO Charter and Mandate. In the United States, some of these rights are granted explicitly in the National Labor Relations Act ("NLRA"), while others are derived from basic rights granted elsewhere.

19. For a discussion of various justifications of labor rights and labor unions, see Peter Levine, The Legitimacy of Labor Unions, 8 Hofstra Lab. & Emp. L.J. 529 (Spring 2001).

Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Id.

23. For example, the Freedom of Association is derived from the First Amendment to the United States Constitution, U.S. CONST. amend. I; the
1. Labor Rights in the United States

Nothing explicitly resembling a labor right is to be found anywhere in the United States Constitution or the Bill of Rights. Instead, the beginning of the labor movement and the federalization of labor rights in the United States can be traced to the passage of the Clayton Act of 1914. The Clayton Act, responding to worker’s protests and unrest, exempted labor unions from the Sherman Anti-trust Act’s prohibition of monopolies and trusts. Yet, it was not until President Wilson’s War Labor Board that the federal government officially recognized the “right of workers to organize in trade unions and to bargain collectively through chosen representatives.” Though lacking enforcement provisions, subsequent Depression Era and New Deal governmental initiatives addressed labor issues and added protections by curbing the power of the courts to issue injunctions and restraining orders against strikers. Finally, on July 5, 1935, Senator Robert F. Wagner’s NLRA was signed into law, creating the first enforceable guarantee of labor rights in the United States.


24. It has been argued that labor rights, though today accepted at the international level as human rights, were never considered as such in the United States, and that American labor policy has and continues to suffer because of it. See, e.g., James A. Gross, Human Rights Perspective on the United States Labor Relations Law: A Violation of the Right of Freedom of Association, 3 EMPLOYEE RTS. & EMP. POL’Y J. 65 (1999).


29. The First Sixty Years, supra note 27.
“race to the bottom.” At the beginning of the century, labor standards varied substantially from state to state in the United States. States which kept their labor standards low were more attractive to employers, and to compete states actually began to lower their standards. Labor began to organize and put pressure on state governments to improve working conditions. This pressure was quickly neutralized when employers threatened or actually did move to states with lower standards. The economic interest of employers in the United States kept down and even lowered the abysmal labor conditions of employees, which further deteriorated their social conditions and living standards generally. This “race to the bottom” persisted until the NLRA and the Fair Labor Standards Act of 1938 were passed, federalizing labor standards. The pressure organized labor had kept on the federal government combined with a growing uneasiness about free-market economics generally to end the race to the bottom by raising the permitted bottom nationwide. Of course, the grant of these rights did not end organized labor’s struggle in the United States; as we shall see in the next section, many disputes, in and out of court, were to follow.

2. International Labor Rights

Perhaps one of the oldest continuously existing international organizations, the ILO was founded in 1919 under the Treaty of Versailles and became the first specialized agency of the UN in 1946. In its Declaration of Fundamental Principles and Rights at Work, the ILO explicitly sets forth many of the basic labor rights delineated above: “freedom of association, the right to organize, collective bargaining, abolition of forced labor, and

30. Van Wezel Stone, supra note 2, at 992.
32. Id.
33. For a stark depiction of these effects, which would undoubtedly be considered today as mass human rights violations if nothing else, see UPTON SINCLAIR, THE JUNGLE (1905).
36. The ILO Mandate, supra note 21.
equality of opportunity and treatment.” However, its history has shown that violations are not easily remedied.

Complaints may be brought to the ILO through three mechanisms. A member state (and, importantly, not an individual) may bring a complaint under the ILO’s Article 26 Complaint Procedure if it feels another member state has failed to comply with the ILO Constitution. A commission is then formed and, if a violation is found, a report is issued to the offending state recommending it conform its practices to the ILO Constitution and relevant provisions. Theoretically, when an offending member state refuses to comply, the complaining member state may then refer the matter to the International Court of Justice, though this has never happened. In fact, in its ninety-three years only six complaints brought under Article 26 have resulted in the commission issuing a report.

The second mechanism for lodging complaints is through the ILO’s Fact-Finding and Conciliation Commission on Freedom of Association (“FFCC”) and Committee on Freedom of Association (“CFA”). The FFCC operates in a similar manner to the Article 26 provisions, but only receives complaints relating to freedom of association violations which have been referred to it by the ILO’s Governing Body or the UN, not by individuals. Further, complaints will not be considered without the violating state’s consent.

37. Id.
38. For example, even violations of the prohibition on the worst forms of child labor cannot form the basis for suits in violation of the “law of nations,” as provided for in the Alien Tort Claims Act, 28 U.S.C. § 1350 (1994). These standards are neither the subject of treaties, nor so widely accepted so as to be considered customary law. The prohibition on forced labor is an exception. However, plaintiffs have successfully sued under the Alien Tort Claims Act for labor-related violations involving forced labor along with torture, murder and rape. See, e.g., Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997); Nat’l Coalition Gov’t of the Union of Burma v. Unocal, Inc., 176 F.R.D. 329 (C.D. Cal. 1997).
40. Id.
41. Id.
42. Id.
Finally, the CFA allows individuals and non-governmental organizations ("NGOs") such as trade unions to bring complaints against member states for violating their freedom of association. Complaints may be brought to the CFA regardless of whether the offending member state has ratified the specific convention allegedly violated. If a violation is found, a recommendation is issued to the member state outlining what measures should be taken to conform its practices to the standards promulgated by the ILO. Although the CFA may "follow up" to see if recommendations have been enacted (and this only when the underlying convention has been ratified by the offending member state), the ILO lacks any enforcement mechanism to enforce compliance. Instead, recommendations sit "on the books" for decades as the member state continues to violate the ILO Constitution and disregard the committee’s findings.

Under the ILO Constitution, every member state is obligated both to respect the rights delineated in the ILO charter and subsequent conventions in its own operations and to ensure that employers in its jurisdiction respect them. These obliga-

43. Id.
44. E.g., CFA Case No. 1523, Complaint Against the Government of the United States Presented by the United Food and Commercial Workers International Union (UFCW), The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the International Federation of Commercial, Clerical, Professional and Technical Employees (FIET), ILO Report No. 284 (Vol. LXXV, 1992, Series B, No. 3). This recommendation was issued in November of 1999 and the United States to this day has not even addressed how compliance might be brought about. For a further discussion see Gross, supra note 24 (describing other United States labor laws which violate ILO standards). See also HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKER’S FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS (Aug. 2000); Testimony of Kenneth Roth, Executive Director, Human Rights Watch before the Senate Committee on Health, Education, Labor, and Pensions (June 20, 2002). I will return to CFA Case 1523 infra Part II.B regarding the balancing necessary between labor and property rights.
45. See, e.g., Convention Concerning Freedom of Association and Protection of the Right to Organise, Convention Number 87 (1948), art. 11 ("Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organize."). See also CFA Case No. 1512, Complaint Against the Government of Guatemala Presented by The International Confederation of Free Trade Unions (ICFTU) and the Latin American Central of Workers (CLAT) 3.10.1989 ILO
tions could be considered “negative” and “positive”: the former obligate the state to refrain from taking any official actions or passing or maintaining any laws that would violate ILO standards; the latter obligate the state to intervene in the activities of those within its jurisdiction to ensure that they also comply. Unfortunately, violations of both types are too commonly found by the ILO.46 While some governments are cited for direct violations of their negative obligations (e.g., carrying out illegal arrests and detentions of union-organizers, or maintaining laws excluding workers from mandatory protections47), violations of positive obligations often involve failures to secure protections not readily recognized as labor-related, but which are nonetheless necessary for the full exercise of labor rights (e.g., failure to investigate or adjudicate death threats by non-governmental individuals, or to provide due process for complaints48).

Report No. 275 (Vol. LXXIII, 1990, Series B, No. 3) at para. 398. In this case, the CFA held that:

[F]acts imputable to individuals do bring into play the State’s responsibility owing to the State’s obligation to prevent violations of human rights. Consequently, governments should endeavour to meet their obligations regarding the respect of individual rights and freedoms, as well as their obligation to guarantee the right to life of trade unionists.

Id. I will use the terms “positive” and “negative” to denote these two obligations throughout.

46. Compare id. at para. 394 (reminding government of Guatemala that the competent government authorities must recognize a local trade union), with CFA Case No. 1233, Complaint Against the Government of El Salvador Presented by The World Federation of Trade Union (WFTU) and the International Confederation of Free Trade Unions (ICFTU) 27.9.1983, ILO Report No. 233 (Vol. LXVII, 1984, Series B, No. 1), Interim Report (1983) at para. 682 (reminding government of El Salvador that its responsibility is not only to respect human and labor rights in its own operations, but that “freedom of association can only be exercised in conditions in which fundamental human rights, and in particular those relating to human life and personal safety, are fully respected and guaranteed”).

47. See, e.g., CFA Case No. 1826, Complaint Against the Government of the Philippines, Presented by The Trade Union Congress of the Philippines (TUCP) 27.3.1995 ILO Report No. 302 (Vol. LXXIX, 1996, Series B, No. 1) (Illegal arrest and detention of trade union leaders; harassment, threats and acts of intimidation against trade union members by government officials and management in order to stop union activities).

48. See, e.g., CFA Case No. 1512, supra note 45, at para. 398.
Importantly, positive obligations impose upon governments responsibilities that are not limited to the workers and employers in their jurisdiction. For example, putting an end to illegal arrests and summary executions of union organizers requires reforming the domestic police and judicial systems, something beyond simple labor law. Yet, expanded positive obligations are what the ILO must require to secure worker's rights. It is also a glaring indication that labor rights are part of — and depend on — a broader base of protections, including human and social rights for workers.

As another example, the freedom of association is perhaps the most essential right given to workers because it allows for the fulfillment and exercise of all others labor rights. Indeed, the ability to keep workers from associating with one another and/or labor organizers has proven to be one of the most effective methods used by employers to keep their workers from organizing. Such practices stand as absolute obstacles to the

49. See, e.g., CFA Case No. 1233, supra note 46.
50. Id.
51. It could be argued that the freedom from forced labor is even more fundamental than the freedom of association or any of the other freedoms listed above. However, this freedom is a ‘freedom from’ or negative freedom, that is, a guarantee to be free from the actions of others. The other freedoms are ‘freedoms to’ or positive freedoms, that is, freedoms to be exercised by their possessors. See Berlin, supra note 8. This distinction is admittedly less than air-tight. However, forced labor, akin to slavery and other crimes against humanity, is increasingly accepted as prohibited by customary international law, allowing for violations to be actionable under the Alien Torts Claim Act in the United States and other “law of nations” jurisdictional provisions. See e.g., Doe, 963 F. Supp. 880. Since the prohibition of forced labor has become at least in that manner “enforceable,” I will concentrate on the other, positive liberties collected under the heading of labor rights.
52. See, e.g., CFA Case No. 2090, Complaint Against the Government of Belarus by The Belarus Automobile and Agricultural Machinery Workers’ Union (AAMWU), the Agricultural Sector Workers’ Union (ASWU), the Radio and Electronics Workers’ Union (REWU), the Congress of Democratic Trade Unions (CDTU), the Federation of Trade Unions of Belarus (FPB), the Belarusian Free Trade Union (BFTU), the International Confederation of Free Trade Unions (ICFTU) and the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers’ Associations (IUF) 16.6.2000 ILO Report No. 324 (Vol. LXXXIV, 2001, Series B, No. 1) (2000) at para. 205 (alleging government authorities interfered with trade union activities and elections, including denying access to the workplace to officers of the branch union).
improvement of labor conditions if ignored or enforced by the government. Yet, these types of violations abound. In response, the ILO is faced with the impossible situation of asking these governments to comply with internationally recognized labor rights when it is aware that the offending nation often has not the social, legal or economic infrastructure to do so. The respect of these rights is made impossible because there are no other relative rights or interests against which they could be balanced, and it is simply outside the ILO’s ability to require their creation.

It is thus unsurprising that the ILO, though designated as the sole international organ responsible for the area, has had such difficulty in securing the basic labor rights to which it claims all workers are entitled. Enforcement devices other than the linkage systems which form the substance of this discussion have been equally ineffective in enforcing these standards. While litigation brought by aggrieved parties under various municipal provisions has been somewhat effective in remedying those particular transgressions for which there is jurisdiction, it cannot be a viable means of broad-based regulation. Such ad hoc litigation only applies to certain, limited types of breaches and is not pervasive enough to be a deterrent or incentive for governments to respect labor standards. A “bottom-up” approach has also been proposed in the form of international unionization of the labor forces under a particular international corporation or within a particular industry. This approach faces obstacles as well. For instance, workers are often kept in isolated areas, cordoned off by barbed wire and armed guards, making it impossible for union organizers to

53. Id.


56. See Van Wezel Stone, supra note 2, at 1007–08.
physically reach them, much less assist in organizing them into collective bargaining units.\(^{57}\)

The need for an enforceable system of international labor standards has become all the more dire in the increasingly competitive global labor market.\(^{58}\) Like that which arose in the early part of the twentieth century among the various states in the United States, there is fear that a new “race to the bottom” will begin (if it has not started already), now involving competition between nations in the global labor market.\(^{59}\) Particularly since the advent of EPZs, host counties — usually those considered “developing” — have used their cheap and plentiful labor resources to attract foreign investors, usually from developed countries. This has created a competitive market among countries that is governed by the same incentives to lower labor standards as were found in the United States at the beginning of the Twentieth Century.\(^{60}\) Those concerned with this development have looked to the ILO for a global analogue to the federal government to set out and enforce standards for all nations, thus raising the bottom worldwide. However, stark differences exist among the legal systems found in the United States and in the states the ILO often finds in breach of its

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60. EMPLOYMENT, LABOUR AND SOCIAL AFFAIRS COMMITTEE, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, LABOUR MARKET AND SOCIAL POLICY- OCCASIONAL PAPER NO. 43: INTERNATIONAL TRADE AND CORE LABOUR STANDARDS: A SURVEY OF THE RECENT LITERATURE 21–24 (2000), available at http://www.olis.oecd.org/olis/2000doc.nsf/c5ce8fafa41835d64e125685d005300b0/c12569270623b74e125696e0056ca76/$FILE/00083851.DOC. See also ILO, DECENT WORK RESEARCH PROGRAMME, THE EFFECTS OF CORE WORKERS RIGHTS ON LABOUR COSTS AND FOREIGN DIRECT INVESTMENT: EVALUATING THE “CONVENTIONAL WISDOM” (2001) (arguing that even if, as some studies suggest, countries with lower labor standards have not in fact attracted more foreign direct investment than those with higher labor standards, the perception among countries competing in the global labor market that they do is enough to warrant fears of a “race to the bottom”).
standards. To understand the difference will be to understand why the ILO alone is insufficient to secure these rights.

II. BALANCING LABOR AND OTHER RIGHTS: DIFFICULTIES HERE AND ABROAD

The ability to weigh competing interests asserted by employers and employees has proven essential to the effective enforcement of labor rights. Inherent in striking that balance is the recognition of the interdependence of these interests. However, the governments of developing countries tend to be more sympathetic (if not in a symbiotic relationship) with employers. Even where there is some semblance of governmental impartiality, the just balance between the two is not an uncontroversial issue. Observing how this essential balance has been struck in the United States, the problems facing other nations (and facing the ILO in addressing their violations) become apparent.

A. Balancing Labor and Other Rights in the United States: Babcock and Lechmere

As explored above, in the United States, labor rights are not direct constitutional protections, but are the product of economic and political pressures, and thus have often been trumped by other, longer-established rights. Ten years after the passage of the NLRA and the creation of the National Labor Relations Board (“NLRB”), the Supreme Court was asked to consider whether employers could prohibit their employees from distributing and receiving unionizing information to one another on the employer’s property. In Republic Aviation Corp. v. NLRB, the Supreme Court held that the employees’ right to self-organize, as guaranteed under the NLRA, was more essential than the employer’s right to control the use of his property. The Court affirmed the Board’s decision that the employer’s prohibition of the distribution of union information on its premises constituted an “unreasonable impediment on the freedom of communication essential to the exercise of its employees’ right

61. See supra Part I.B.
63. Id. at 801.
to self-organization." However, the Court made clear that this decision applied only to the exercise of rights by employees.

In 1956, the Supreme Court was asked to strike a similar balance, this time between an employer’s right to exclude non-employees from its property and an employee’s freedom of association. *NLRB v. Babcock & Wilcox Co.* combined several factually similar NLRB cases for appeal on this question. In the case actually involving Babcock & Wilcox Co. (Babcock), the United Steelworkers of America, CIO (USA) had been trying to organize employees that worked at a factory, owned by their employer, on an isolated one hundred acre tract of land. Almost all of the employees drove to work and parked in a company lot next to the fenced-in plant area. The parking lot could be reached only by a one hundred yard-long driveway connecting it to a public highway. This driveway was mostly on company-owned land, except where it crossed a thirty-one foot-wide public right-of-way adjoining the highway. Union organizers had been attempting to distribute literature from this right-of-way. Babcock had claimed the unconditional right to exclude all non-employees from its property, including these non-employee organizers.

The Supreme Court observed that, “[o]rganization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other.” Neither property nor organizational rights are to be considered complete or absolute, and one will have to yield to the other. The Court went on to find that while “[n]o restriction may be placed on the employees’ right to discuss self-organization among themselves…no such obligation is owed nonemployee organizers.” Instead, “an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of commu-
nication will enable it to reach the employees with its message.”

The Court reached this decision by maintaining a distinction between the rights given to employees and the rights given to non-employee organizers. Though it recognized that “the right to exclude from property has been required to yield to the extent needed to permit the communication of information on the right to organize” in circumstances in which “the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with them through the usual channels,” it did not find the situation at bar to be such a case. The Court’s decision thus constituted a victory for employers, allowing them to prohibit union organizers except in the most extreme circumstances.

The “alternative channels of communication” test pronounced by the Court remained in effect for over fifty years before the Supreme Court revisited the issue. In 1992, the Supreme Court was again asked to determine whether an employer could exclude non-employee union organizers from its property in *Lechmere, Inc., v. NLRB.* The question in this case was the nature of the circumstances required for the application of the *Babcock* exception. In *Lechmere,* the location of the work site and employees’ living arrangements were less remote than those in *Babcock:* the worksite was a retail store on a major highway and the workers lived in a nearby metropolitan area. The case could easily have been decided upon the rule enunciated in *Babcock.* Yet, Justice Thomas, writing for the majority, seized upon the occasion to unnecessarily narrow the ruling in *Babcock* to apply only,

where the location of a plant and living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them. Classic examples include logging camps, mining camps, and mountain resort hotels … where employees, by virtue of their employment, are

71. *Id.* at 112.
72. *Id.* at 113.
74. *Id.* at 529.
75. *Id.* at 529, 540.
isolated from the ordinary flow of information that characterizes our society.\textsuperscript{76}

The Court thus pared back an already narrow rule to apply only to the most truly remote employment locations. The Court struck the balance such that an employer's property right trumps the right of employees to learn from and be reached by non-employee organizers unless it is absolutely impossible to reach them otherwise. This sacrifice of labor rights to property rights has not gone unnoticed.\textsuperscript{77} Indeed, in his dissenting opinion Justice White notes that

If employees are entitled to learn from others the advantages of self-organization, it is singularly unpersuasive to suggest that the union has sufficient access for this purpose by being able to hold up signs from a public grassy strip adjacent to the highway leading to the parking lot.\textsuperscript{78}

Non-employee organizers have proven indispensable because, unlike employees, they do not depend on the employer for their livelihood and are unafraid to take the initial steps toward organizing. However, for their activities to be fruitful, they must have access to the workers in person, not just the ability to communicate or publish to them from afar. It is not an issue of freedom of speech or press, but of freedom of association, and it is, after all, the association that is essential.\textsuperscript{79}

Nonetheless, the Babcock exception, as narrowed in Lechmere, remains the law of the United States. While in substance there is plenty which could be criticized,\textsuperscript{80} these cases are important for this discussion for a number of other reasons. First, the Court's analysis in each finds labor rights as spheres of non-interference, enmeshed in a legal framework occupied by other competing rights and interests, such as the employer's property

\textsuperscript{76} Id. at 539.

\textsuperscript{77} See, e.g., Gross, supra note 24, at 94.

\textsuperscript{78} Lechmere, 502 U.S. at 534 (White, J., dissenting).

\textsuperscript{79} Property rights and freedom of speech have found themselves in conflict in areas other than labor rights disputes. See, e.g., Pruneyard v. Robins, 447 U.S. 74 (1980).

\textsuperscript{80} The purpose of this paper is not to critique U.S. labor policy, though this can certainly be done with respect to the Lechmere decision and other policies. See generally Gross, supra note 24. See also Michael J. Wishnie, Immigrant Workers and the Domestic Enforcement of International Labor Rights, 4 U. PA. J. LAB. & EMP. L. 529 (2002).
right to exclude. The claimants of these rights and interests stand in the same relation to the Court. The only question is what should be done when the two rights are incompatible, when the exercise of one frustrates or denies the exercise of the other. The Court attempts to resolve the conflict by allowing the exercise of one except when it would make the exercise of the other impossible, not merely inconvenient or inefficient.

This rather simple and familiar analysis utterly depends on the availability of other rights, namely property rights, to be scaled back in accommodation of the competing labor rights. As such, this balancing explicitly recognizes the interdependence of these rights. Yet this recognition is not easily found outside of the United States. Without it, international labor regulation remains hamstrung.

B. Balancing Labor and Other Rights at International Law: ILO Complaints

In 1992 the United Food and Commercial Workers (“UFCW”) and the AFL-CIO filed a claim against the government of the United States with the ILO’s CFA, charging, among other complaints, that the Lechmere decision would have “a devastating impact on freedom of association rights for workers in the United States” and that it had “struck down all recent NLRB precedents which maintained a balance between organisational rights provided for in section 7 of the NLRA and property interests.”81 The UFCW argued that the Supreme Court had “declared that private property will assume absolute priority over rights of freedom of association, whenever union organisers are involved.”82 After considering the matter, the CFA agreed with the UFCW and issued a recommendation which included a request that the United States “guarantee access of trade union representatives to workplaces, with due respect for the rights of property and management, so that trade unions can communicate with workers, in order to apprise them of the potential advantages of unionization.”83

81. CFA Case No. 1523, supra note 44, at 36, 40.
82. Id.
83. Id. at 55. The United States has taken no steps to adopt these recommendations, nor, as noted supra I.C, does the ILO have any enforcement mechanism.
While in this case the CFA’s language resembles the Supreme Court’s balancing approach (just tipping the balance in the other direction), this has more to do with the domestic law of the United States than the jurisprudence of the ILO. In its recommendations, the CFA “requests the Government to guarantee access of trade union representatives to workplaces.” The CFA thus appeals to the government’s positive obligations under the ILO Convention and relevant charters “to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.” This type of appeal is possible because there exists in the United States the legal framework which would allow the enactment of these reforms. For example, had the Supreme Court held the other way in Lechmere, or had Congress subsequently enacted legislation bringing the labor laws of the United States into compliance with the ILO, such measures would not have enlarged worker’s labor rights per se, but instead would have curtailed employer’s property rights. This takes for granted what cannot be in other nations, namely, that a system of property rights exists which allows the government, in discharging its positive obligations, to ensure the employer’s compliance.

III. THE CHALLENGE OF EXPORT PROCESSING ZONES

In answering complaints against governments with various rights regimes, the type of balancing test used in Babcock and Lechmere is usually not available or useful to the ILO. It would be beyond the scope of the present discussion to explore the varied private property regimes and legal systems in effect in the many countries the ILO has found to be in violation of freedom of association principles. However, it is informative to examine how the ILO has dealt with an extreme case, EPZs. In such remote situations, often found around mines, plantations, and textile and electronics factories, it seems even the narrowed Lechmere rule would apply. In many of these situations, the entire worksite and surrounding area is separated from the rest

84. CFA Case No. 1523, supra note 44, at 40 (emphasis added).
of the community. Yet, not only are there no local union organizers to reach the workers, but unions from other nations are kept out, often forcibly, by the employer and/or the government. How the ILO has attempted to deal with such extreme situations will therefore be instructive as to why the ILO has been ineffective (on its own) in bringing such violating countries into compliance with its standards.

A. A Brief History and Definition of EPZs

The first EPZ is often traced to a tax- and custom-free zone created around the airport in Shannon, Ireland in 1959. In the 1970s, EPZs began springing up in every corner of the globe. An EPZ can be defined as “a clearly delineated industrial estate which constitutes a free trade enclave in the customs and trade regime of a country, and where foreign manufacturing firms producing mainly for export benefit from a certain number of fiscal and financial incentives.” Most often EPZs are strictly separated from the rest of the host country, surrounded by fences, barbwire and/or armed guards. Non-employees are strictly excluded from the property. By keeping the EPZ separated from the rest of the nation, the government of the host country can control (and restrict) “osmosis between the EPZs and the host nation.”

86. ILO, Sectoral Activities Programme, Tripartite Meeting on Labour Practices in the Footwear, Leather, Textiles and Clothing Industries, Geneva, 16-20 Oct. 2000, Note on the Proceedings para. 28, available at http://www.ilo.org/public/english/dialogue/sector/techmeet/mlfin00/mlfin.htm (noting that because EPZs were traditionally set up “outside the purview of national laws and practices the result was a second class ‘country’ within a country”).
87. Of course the question then arises whether an ideal but unenforceable policy is better than an imperfect but enforceable one.
89. Id.
91. Id. at 65; MADANI, supra note 57, at 64.
92. Id.
93. Id.
also chokes off the potential benefit that might flow from the EPZ back to the host nation (often referred to as “backward linkage”\(^94\)) and keeps the laws of the host nation from extending to the EPZ.\(^95\)

**B. One Unfulfilled Promise of EPZs: “Backward Linkage”**

As conceived by the IMF, World Bank, ILO and other international financial organizations, EPZs have several long- and short-term goals.\(^96\) First, in the short-term, EPZs are supposed to bring jobs to countries long mired in poverty and unemployment.\(^97\) It is clear that most EPZs have proven extremely effective in achieving this short term goal.\(^98\) Even though valid criticisms may be voiced regarding the type of jobs gained, their effect on other industries in the host country, and the conditions of employment at those jobs, it is beyond dispute that employment rates in host countries have risen remarkably since they introduced the EPZ.\(^99\)

Second, in the short- and, hopefully, long-term, EPZs are designed to bring foreign direct investment to countries with historically little trade activity and improve their participation in exchange and export agreements.\(^100\) In the main, EPZs have been so successful in achieving this goal that candidates for office in countries facing low foreign investment often campaign with promises to create EPZs if elected.\(^101\)

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95. MADANI, supra note 57, at 43–50.

96. SPECIAL ACTION PROGRAMME ON SOCIAL AND LABOUR ISSUES IN EXPORT PROCESSING ZONES, LABOUR LAW AND LABOUR RELATIONS BRANCH, ILO, SPECIAL ACTION PROGRAMME ON SOCIAL AND LABOUR ISSUES IN EXPORT PROCESSING ZONES [hereinafter ISSUES IN EXPORT PROCESSING ZONES], WHY SET UP AN EPZ?, at http://www.ilo.org/public/english/dialogue/govlab/legrel/tc/epz/setup.htm (last visited on Sept. 27, 2003) (Setting out these three main and other related objectives for EPZs).

97. Id.

98. But see MADANI, supra note 57, at 34 (noting that while highly successful in creating jobs in some host countries, EPZs have often exacerbated unemployment rates in host countries by forcing out other would-be employers).

99. Id. at 35.

100. Id. at 34.

101. Id.
Finally, this influx of trade and investment is meant to “foster linkages between foreign and local enterprises and industries”\textsuperscript{102} and stimulate the economies of developing countries by having the benefits of the export-specific industries flow back into the rest of the economy.\textsuperscript{103} Unfortunately, EPZs have thus far failed remarkably in achieving this long-term goal.\textsuperscript{104}

Various reasons have been given as to why there has been such minimal backward linkage. First, the types of products manufactured in EPZs are generally to be sold in highly industrialized markets and so “bear little if any relation to the needs or requirements of the people of the host country.”\textsuperscript{105} Aside from the products not being desirable (or legal) in domestic markets, the skills learned by the workers in the EPZ are also unlikely to be transferable to non-EPZ employment. Second, the work done in EPZs generally does not rely on materials found in the host country.\textsuperscript{106} There is therefore little opportunity for the EPZs to spin off support industries and markets.\textsuperscript{107} Third, most EPZs have remained fenced-off enclaves with little physical connection to the host country, keeping the infrastructure supporting the EPZ from reaching or benefiting the host country.\textsuperscript{108} Fourth, the governments of the EPZ host countries, typically the only entities that can take advantage of opportunities for fostering backward linkages, have not done so.\textsuperscript{109}

\textsuperscript{103} MADANI, supra note 57, at 30–34.
\textsuperscript{104} Gordon, supra note 88, at 69.
\textsuperscript{105} The Realization of Economic, Social and Cultural Rights, supra note 54, at para. 59.
\textsuperscript{106} MADANI, supra note 57, at 64.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} ISSUES IN EXPORT PROCESSING ZONES, ARE THEY EFFECTIVE?, available at http://www.ilo.org/public/english/dialogue/govlab/legrel/tc/epz/effectiv.htm (last visited Oct. 1, 2003). The ILO provides the following anecdote to illustrate the role government can play in fostering backward linkages.

For example, hard disc manufacturers in one country we visited cannot find a local dry cleaner capable of washing the overalls used in clean rooms, and they are therefore forced to fly the overalls to Singapore to be cleaned to the required specifications. There should be an agency which identifies such potential links and assists local en-
Perhaps the greatest obstacle to effective backward linkage is also the greatest financial incentive that attracts foreign producers to EPZs: cheap wage labor. Many EPZs are used primarily for their labor, such as when United States corporations ship component parts to EPZs only for them to be assembled and returned. Competition among EPZs has thus centered on labor costs, keeping labor standards low and working conditions, more often than not, abysmal. Pollution, hazardous conditions and “catastrophic industrial accidents” are commonplace. Long hours result in “burn-out” at an early age. This, coupled with a decrease in alternative domestic employers, results in a general downturn in the overall quality of life for employees.

These labor conditions are present even where the laws or regulations of the host country prohibit such conditions outside the EPZ. Indeed, EPZs run by governments are often explicitly exempt from these regulations, and even when they are not, the working standards inside the EPZ rarely conform to those required by the domestic law. Employers either ignore complaints of violations or do not have sufficient resources or personnel to address them. Denial of freedom of association and union participation is often even advertised to would-be manufacturers to attract their business. Where the law does not explicitly forbid freedom of association, the physical isolation of enterprises to procure the technology and skills required to supply zone investors.

Id.

110. Gordon, supra note 88, at 71. See also, CFA Case No. 1480, Complaint Against The Government of Malaysia Presented by the International Confederation of Free Trade Unions (ICFTU), and the Malaysian Trades Union Congress (MTUC), 72 ILO Report No: 265 (Vol. LXXII, 1989, Series B, No.2) at para. 585 (noting that government’s sudden decision not to allow for a union in the electronics sector was probably taken under pressure from foreign investors in that sector).

111. Id. See also The Realization of Economic, Social and Cultural Rights, supra note 54, at para. 61.

112. Id. at paras. 53, 108.

113. Id.

114. Gordon, supra note 88, at 73 (citing INDUSTRY DEVELOPMENT DIVISION, WORLD BANK, EXPORT PROCESSING ZONES (1992)).


116. Id.

117. Id.
the EPZ precludes non-employee union organizers from reaching the employees.\textsuperscript{118} EPZ employers also refuse to hire employees that are known to be union organizers,\textsuperscript{119} and deny non-employee organizers access to the EPZ area.\textsuperscript{120} Thus, \textit{de jure} or \textit{de facto}, the laws of the host nation do not reach into the EPZ. Inevitably, when labor rights are denied on economic grounds, other human rights violations are not unusual.\textsuperscript{121}

\subsection*{C. Labor and Property Rights in EPZs}

Traditionally EPZs have been entirely owned, operated, and controlled by the host government.\textsuperscript{122} This has meant that the property status of the territory of the EPZ has remained rather ambiguous. The land is considered government or public land, outside of private interest, and the government retains complete and unconditional control. The land is then rented by the government to manufacturers that wish to set up operations there.\textsuperscript{123} Offering such services relieves foreign investors of the burden of having to “master the intricacies of the local real estate and construction markets, if they exist.”\textsuperscript{124} However the physical area has consequently remained something of a no-man’s land, where the normal rights and responsibilities that attend property ownership do not necessarily apply. Instead, through the conditions of their leases with the government, EPZ developers may be exempted from many of those regulations

\textsuperscript{118} \textit{Id.} at 75.
\textsuperscript{119} The Realization of Economic, Social and Cultural Rights, \textit{supra} note 54, at para. 65.
\textsuperscript{121} \textit{See, e.g.,} \textit{Anti-Union Repression Still on the Rise Worldwide,} ICFTU Online, (June 18, 2002), at http://www.icftu.org/displaydocument.asp?Index=991216 167&Language=EN&Printout=Yes (reporting anti-union crack-downs in various EPZs involving illegal and brutal arrests, imprisonment and even murder).
\textsuperscript{122} \textit{Id.} at 67.
\textsuperscript{123} \textit{See, e.g.,} Export Processing Zones Act, (ACT No. XXXVI OF 1980) as modified up to Dec. 1994, § 7(a) (Bangl.), \textit{available at} http://natlex.ilo.org/txt/E94BGD01.htm.
that would apply to host country property owners and few (if any) responsibilities vis-à-vis their workers.

Once workers enter the EPZ, it is not exactly that they are stripped of their protections — indeed, the ILO Convention extends its protections to all peoples, even if their government has not ratified the treaty. Rather, these protections become meaningless against the absolute rights of their employer. With the employer in such a close, practically symbiotic relationship with the government, the employee is put in an impossible position. In such a situation, how can the ILO demand that labor rights be respected where there is no legal system to protect them?

Let us return briefly to Justice Reed’s observation in Babcock that “[o]rganization rights are granted to workers by the same authority, the national government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other.”

125. For example, in Bangladesh and Pakistan, local EPZ legislation explicitly exempts employers in EPZs from labor protections and prohibits the exercise of rights (e.g., to organize) granted to workers in the host country. Servais, supra note 54 at 47; Export Processing Zones Authority Ordinance, § 4 (1980) (Pak.) (PAK-1980-L-50073) (prohibiting strikes in the EPZ); Bangladesh Export Processing Zones Authority Act, § 11(a)(f), (ACT No. XXXVI OF 1980) (1980) (Bangl.) (exempting EPZ employers from, among other laws, The Industrial Relations Ordinance, 1969 (XXIII of 1969)).


128. See, e.g., CFA Case No. 1289, Complaint Presented by the Employees’ Union of Esperanza Del Peru S.A. — Clinica San Borja Against the Government of Peru, ILO Report No. 238, (Vol. LXVIII, 1985, Series B, No.1) (alleging police intervention on the pretext of protecting the property of the undertaking, in order to intimidate the workers); CFA Case No. 1300, Complaint Presented by the World Federation of Trade Unions Against the Government of Costa Rica, ILO Report No:238, (Vol. LXVIII, 1985, Series B, No.1) (alleging orders were given to the police to guarantee the continuation of work, ensuring the safety of workers who did not wish to join the strike and protecting the property of the Banana Company of Costa Rica).

129. Babcock, 351 U.S at 112.
that the property owner and worker, along with their respective rights, should stand in the same relation to the government. A court is then able to balance their rights against one another. Yet in EPZs, the worker's right of association stands in a void, unbalanced and unbalanceable. This continues to be the situation, at least in government-controlled EPZs.

D. Private EPZ Ownership: Toward Integration and Rights Systems

Time and experience have begun to show that governments are inefficient EPZ managers. Government-controlled zones, which tend to be strictly closed off from the host country, have seen the least amount of backward linkage. Further, when governments both manage the EPZ and look for incentives to compete with other EPZ hosts, they are more likely to agree to ban union activity, lower the minimum wage, or make other concessions to investors that are not in the best interests of their workers.

Spurred by international and domestic pressure to improve their efficiency (and labor conditions), many countries have begun to privatize their EPZ operations. Some countries have delegated the management of the EPZ to a government commission which may then designate any land, public or private, an EPZ. The commission may then assign an EPZ developer to sell or lease the land to private or public firms. While some have argued that governments should take an entirely hands-off approach, a consensus has formed that governments should keep intervention to a minimum, that is, stay only as involved as is necessary to maintain an efficient and stable design, provide the legal framework and bureaucracy necessary to encourage private investment, and ensure compliance.

Perhaps the greatest advantage to privatizing an EPZ is that it no longer remains an enclave separate and apart from the

130. Madani, supra note 57, at 66.
131. Id. at 67.
132. Id.
133. Id.
134. Export Processing Zone Act, Ch. 232B(6) (Belize).
rest of the host country. As it is opened to private industry, the EPZ area retains the customs and duty exemptions that make it attractive to foreign investments, but becomes reintegrated into the host country’s legal, economic and social systems, increasing opportunities for backward linkages.\footnote{137}

Reintegration opens many opportunities for the host country, such as providing the services that improved labor conditions will require.\footnote{138} As a recent World Bank report on EPZs in Africa notes, “[i]n Panama, in the Dominican Republic, and in Tangiers, EPZ management is private and has responded well in terms of providing the requisite facilities and services.”\footnote{139} In contrast “[i]n Africa, where public sector management has a poor track record in providing facilities and services, it would be prudent to insist upon private management for EPZs — either by concessioning the development and management of the EPZ or, at least, by contracting out its management.”\footnote{140}

Ironically, while many advocates for better conditions and rights within EPZs come at the problem from a socialist tact,\footnote{141} some persuasive arguments have been made that a strong regime of property rights may be essential not only to improve labor conditions but to open opportunities for greater democratization, wealth distribution and prosperity in general.\footnote{142} For example, the Peruvian economist Hernando De Soto has argued that property rights systems are necessary preconditions for capital markets to work.\footnote{143} By allowing individuals to lay claim

\footnote{137. Id. at 77.}
\footnote{138. For example, the Mauritius EPZ has begun to offer day care for the children of workers, provided by citizens of the host country. Day Care Centers in Mauritius, World Bank, at http://www.worldbank.org/children/af arica/kampala/epzmaur.html (last visited Sept. 27, 2003). Such programs provide backward linkages both in terms of improving the conditions of the workers and providing for parasitic employment opportunities for the host country’s other citizens.}
\footnote{139. Watson, supra note 124.}
\footnote{140. Id.}
\footnote{143. Id.}
to intangible financial titles (credit, securities, mortgages, etc.) a robust property system gives the traditionally disenfranchised a way to improve their conditions without requiring a substantial initial asset base.\footnote{144} Unfortunately, countries in the developing world rarely have such systems. Instead, the state owns and controls most if not all property, and the people in such states have few opportunities to grow or develop; the transitory nature of the verb “developing” as applied to such nations is rendered suspect where the possibility of making that transition is foreclosed.\footnote{145}

To bring De Soto’s argument to bear on the problem at hand, when EPZs remain owned and controlled by governments, the government dispossesses both EPZ workers and other citizens of their rights. Privatizing EPZs in a sense democratizes them by fostering responsible property regimes, social programs, worker’s protections and other reforms. Early evidence gives reason to be hopeful. Privatization of EPZs “shows a positive link between freedom of association and better economic stability and productivity by improving the motivation of workers” and promotes “sustainable distribution of income and wealth.”\footnote{146} Where governments, instead of cordonning off the EPZ zone with soldiers and barbed wire, provide the physical and social infrastructure needed to make the zone more efficient and competitive, worker’s conditions inside (and the social conditions outside the EPZ) improve.

This provides hope, at least, that privatization will extend the legal regimes of the host country to the EPZ just as the economic benefits of the EPZ extend to the host country. Reintegrated EPZs would thus place workers and employers in the same relationship to the government. This would benefit the workers in terms of improved conditions, the host country through better distribution of wealth, and would be done without removing the economic benefits for employers.

\footnote{144} \textsc{Hernando De Soto, The Other Path: The Invisible Revolution in The Third World} 12 (June Abbott trans., Harper & Row, 1989).
\footnote{145} \textsc{Id.} at 244–45.
IV. THE BOUNDARIES OF THE ILO: INSTITUTIONAL LIMITS

The variety of factors at play in the success of reintegrating EPZs (themselves a heterogeneous bunch) into their host countries (which are equally diverse in their legal, social and economic situations) precludes, at least in this context, making sharp conclusions about the total effects of EPZ reintegration. However, in the sort of laboratory EPZs provide, we see labor rights abused when removed from social and legal systems, and protected when reintegrated. The ILO’s experience with EPZ violators demonstrates that workers suffer when their governments do not balance their labor rights against the competing rights of their employers. Having no power over the interests which infringe labor rights, the ILO is unable to remedy these violations.

A. The Negative and Positive Obligations

Though at first glance they appear to be the most troubling cases, those countries which explicitly allow for labor rights violations in their EPZs are perhaps the easiest to address in terms of legal obligations. For example, Pakistan had, since the CFA began issuing recommendations in 1983, maintained laws explicitly exempting EPZs from the labor protections extended to workers in the host country. Unionizing and striking were banned in its EPZs, all of which were government-owned undertakings. In one of its many recommendations the ILO remanded the Pakistani government, reminding them that “Article 2 of Convention No. 87…provides that workers without distinction whatsoever shall have the right to establish organisations of their own choosing.” The ILO requested that the government amend its laws to include EPZ workers in their labor protections and refrain from such activities as would be inconsistent with what we have called its “negative” obligations. However, Pakistan continued to ignore the ILO’s demands.

148. Id. at para. 84.
149. Id. at para. 92.
150. CFA Case No. 1726, Complaint against the Government of Pakistan presented by the International Federation of Building and Wood Workers...
After years of violations and repeated ILO declarations that it "deplore[d] that the Government violated its obligations arising from Conventions Nos. 87 and 98," in 2000, the ILO finally threatened to request the World Bank and IMF to suspend assistance to Pakistan if it continued to maintain laws that denied freedom of association to workers in EPZ and other industries. While there are no direct accounts of the effect this warning had on the government's policy position, it is probably no coincidence that shortly thereafter Pakistan announced to the ILO that it would redraft its laws concerning EPZs to allow unionizing and otherwise take action to conform their laws to the relevant ILO resolutions. This then appears to be one case where linkage, or at least the threat of linkage, did in fact work to force a chronic violator to comply. Of course, it may well be that Pakistan amended its laws without any intention to enforce them, and merely turned their de jure violations into de facto violations.

More difficult than these negative obligation cases are those involving a government's derogations from their positive obligations to ensure that domestic employers comply with its laws. In such cases the ILO must do more than simply request the nation to revise its laws; indeed the host country may already be in de jure compliance. While the liable party is still the government, it is less clear what actions it should take in order to "ensure that..."
For instance, a 2001 complaint against the government of Nicaragua alleged that employers in the Chentex EPZ had dismissed employees who were attempting to form a union. Further, when remaining employees engaged in a protest against these dismissals, they too were fired. Here the problem was not the relevant legislation, which appears to have been in compliance with the ILO standards. Instead, there was a systematic derogation of the government’s positive obligation to protect against violations. In this case the ILO’s recommendation read in part:

(b) The Committee requests the Government to ensure that trade union rights can be freely exercised at CHENTEX Garments S.A. without the workers being subject to reprisals for their legitimate trade union activities.

(c) The Committee is bound to emphasize the importance of the principle that both employers and trade unions bargain in good faith and make every effort to reach an agreement. In accordance with this principle, the Committee reminds the Government that appropriate measures should be taken to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers’ organizations and workers’ organizations, with a view to the regulation of the terms and conditions of employment by means of collective agreements.

The language used by the Committee here points up in vivid detail the problems facing the ILO in enforcing compliance with positive obligations. First, were the government to comply with the request in paragraph (b), what actions would it have to take? It would seem to require government supervision of the employment practices in the EPZ, probably involving a police presence, certainly guarantees of due process for employees measures to ensure that the rights of the [Union]... are restored to them without delay.

156. CFA Case Nos. 2092, 2101, Complaints against the Government of Nicaragua presented by the “José Benito Escobar” Trade Union Confederation of Workers (CST) and the International Textile, Garment and Leather Workers’ Federation (ITGLWF) ILO Report No. 324, (Vol. LXXXIV, 2001, Series B, No. 1).
157. Id.
158. Id.
159. Id. at para. 733(c).
when such freedom is denied, and other legal reforms. These actions are clearly outside the scope of what is considered “labor law,” and move into the realm of human rights law.

Indeed, several of the union-organizing employees that were terminated in the Chentex EPZ have subsequently filed suit in the United States against their former employer for violating “universally recognized labor rights.” In their complaint, the employees allege that Chentex and — through their negligence — the government of Nicaragua, have violated customary international human rights law. It is important to note that they have alleged human rights violations, not labor violations per se. They argue that certain labor rights have in fact gained such universal acceptance as to be considered human rights at customary international law. It is yet to be seen if they will prevail in their argument, but essential here is that, in an attempt to enforce what the ILO has been unable to, the employees have been forced to enlist other areas of international law, particularly human rights law.

Regarding paragraph (c), what would it look like to ensure that EPZ operators or employers “bargain in good faith?” The lack or laxity of labor regulation in the EPZ was most likely one reason the employer was initially attracted to setting up operations there. In addition, the economic trade interests aligned against the workers are staggering. For instance, it has subsequently been disclosed that the United States Military had been placing large orders for clothing manufactured at the Chentex EPZ even as United States diplomats denounced the violations. Further, the operator of the Chentex EPZ is a Taiwanese company and the Taiwanese government has provided massive economic assistance to the Nicaraguan government since

161. At customary international law, the actions of non-state actors are imputable to the government as well. See, e.g., Valasquez Rodriguez Case, 4 Inter-Am. C.H.R. (ser. C) No. 4, (1988) (judgment), at para. 166. The government thus has what we have called a positive obligation to prevent and redress human rights violations that take place within its jurisdiction.
162. Tercero, supra note 160.
the EPZ was set up.\textsuperscript{164} With these powers aligned against the workers, it is hard to imagine there being any bargaining in good faith without additional pressure from the workers’ side, calculated to neutralize the imbalance. It is clear the ILO is without the means to apply such pressure. This case then serves as a perfect illustration of the intricate web that domestic human rights, labor rights and economic structures form. It is simply outside the competency of the ILO to ensure that reforms in economic and human rights policy are made, though they are necessary to guarantee compliance with its standards.

**B. The Linkage Debate: What is “Trade-Related?”**

At a recent symposium several scholars gathered to discuss whether creating linkage regimes was a legitimate use of the WTO.\textsuperscript{165} While there were disagreements on many issues, one recurrent question was what types of issues are proper for the WTO to consider, that is, what issues are “trade-related.”\textsuperscript{166} Some argued for a strict definition, basically limiting its scope to those matters it already handles.\textsuperscript{167} Others saw room for a more open definition but did not think the WTO’s resources were capable of handling more than the issues arising under the current narrow definition.\textsuperscript{168} Still others argued that linkage, though perhaps not in any formalized system as proposed for the WTO, already exists, and it is for the international community to find adequate institutional responses to accommodate it.\textsuperscript{169} This later argument proceeded from the observation that there are at present international institutions dedicated to specific issues at international law, and linkage questions arise only where an issue falls between the explicit jurisdictions of these institutions.\textsuperscript{170}

\textsuperscript{164} Id.
\textsuperscript{165} Symposium, supra note 3.
\textsuperscript{169} Trachtman, supra note 166, at 92.
\textsuperscript{170} Id. at 80.
This is an accurate description of the situation in which we have found international labor rights. On the one hand, when violations are due to the broader economic policies of the offending government and its financial relationships with employers, as in the Chentex EPZ, compliance with labor standards would require reforms that simply exceed labor issues. Companies and host countries have an economic interest in keeping labor prices down, and exert considerable (and usually unchecked) pressure to ensure that they are. On the other hand, when violations are due to, or at least exacerbated by, the inadequacy of the legal and social structures in the offending state, compliance would require governmental reform that also exceeds simple labor issues and involves human rights protections that are properly the subject of international human rights law. In the latter case, compliance is no less of a problem. However, only in the former case are there carrots and sticks available to encourage the reforms necessary for labor compliance. It is not simply because these remedial mechanisms are available that trade becomes a necessary partner in enforcing compliance; it is also because, as we saw in the Chentex EPZ case, trade and economic pressure, if not harnessed and used as forces to ensure labor compliance, risk becoming forces against compliance.

Further, the question of what is trade-related only appears from the WTO side of the debate: Is the WTO a proper venue for linkages? Indeed, there are a variety of other linkage systems available, including IMF, World Bank, and bilateral conditions. The question from the labor rights perspective is not whether the WTO or any of these other particular institutions is competent, or has proper jurisdiction over labor rights; it is whether the ILO alone has the institutional jurisdiction and competency over all the conditions necessary to ensure the effective protection of its own labor standards.

CONCLUSION

Labor rights, when enforceable and meaningful, exist in a web of other rights, interests and protections. The ILO cannot ensure that these other rights or interests are balanced against labor rights, but will surely fail in its own purpose when they

171. See, e.g., Collingsworth, supra note 13.
172. See Leebron, supra note 4.
are not. A lesson comes from our initial observation that labor rights sit uncomfortably between human and economic rights and interests: true economic progress and development requires the betterment of non-economic conditions. International regulatory institutions must learn this lesson if the benefits of globalization are to be distributed amongst all affected. This means that international institutions, though specialized in particular areas, must cooperate with one another to address the equally important areas where their particular concerns conflict. Instead, the tendency has been for institutions to narrowly define their areas of concern, and the resulting gaps have been exactly where violations are rampant.

The balancing approach used in the United States carves back the rights of others which would otherwise interfere with the exercise of labor rights. At international law, the ILO is competent, in fact, was formed to decide when a labor right is being infringed by another; but in practice, it is not competent to, and does not have the power to, carve back that other, infringing right. These infringing rights are most often economic ones, such as property rights and trade interests. It follows that for international labor rights to be protected, the ILO must be able to work with the institutions who regulate these infringing rights. Therefore, the question is not whether there should be linkage between labor (or other human) rights and economic privilege, but whether the international regulatory community at large, including the ILO, will recognize the interconnection that already exists in practice, and accordingly create suitable mechanisms to regulate that interconnection.
The era of globalization is still young, and there is reason to be hopeful that through better cooperation, the ILO will find the partnerships it needs to secure labor rights, and further economic and social conditions globally.

John C. Knapp*
THE ECONOMIC AND MONETARY UNION: A STANDARDS OR RULES-BASED INSTITUTION?

I. INTRODUCTION

Europe’s introduction of the euro into the Economic and Monetary Union (“EMU”) may represent the boldest economic achievement of the last century. The magnitude of this venture, though economic in nature, also has vital significance in Europe’s plan to become an ever-larger international political leader. The euro zone consists of approximately two hundred ninety million people — a population comparable to that of the United States. The EMU also makes up more than 21% of the world Gross Domestic Product (“GDP”). In 2000, the EMU was responsible for 14.7% and 13% of the world’s exports and imports respectively. These statistics invite the assertion that the European Union (“EU”) today shares several characteristics with other influential societies of the past that have successfully introduced new currencies. The EMU may very well be on a path for continued future success; however, despite the promising facts mentioned here, the EU still faces numerous challenges including, the task of continuously reevaluating the rules

1. Robert Mundell, Making the Euro Work, WALL ST. J., Apr. 30 1998, available at 1998 WL-WSJ 3492150 (“Throughout history the world economy has seen a succession of important currencies that have attained the status of international currencies...[T]hese currencies have been associated with great powers in their ascendancy. That was the case with the shekels, darics, drachmas, denarii, dinars, ducats, deniers, thalers, livres, pounds and dollars.”).


3. Id.

4. Id.

5. Id.

6. Mundell, supra note 1. Common factors which contributed to the success of currencies in the past were: size of the transaction domain, a stable monetary policy, the power of the central state and the fallback value of the currency. Id. The author also lists the absence of arbitrary exchange restrictions as a factor, but discounts it as inapplicable in his discussion on the EU. Id.
which comprise the EMU. Even in the wake of the recent success of the euro, the EU may soon find that the very rules which form the EMU could result in harsh economic and political conflicts within the EU or worse yet — the eventual undoing of the EMU.

This Note will consider the alternative implementation methods of the EMU policies by considering the Stability and Growth Pact — one rule which has recently forced the EU to face several difficult questions about its chosen methods of legislation. The discussion will focus on whether the EU should have taken a standard or rules-based approach in the creation of the new Stability and Growth Pact, as well as the future development and implementation of the Pact and other EMU laws. Part II will introduce the European Union and its governing bodies. Part III will outline the legislation, background and present status of the Stability and Growth Pact. Part IV will discuss the arguments for and against having a regime that is either standards or rules-based and go on to consider several theories which have further explored the standards and rules debate. Part V will attempt to classify the Pact as either a standard or a rule and discuss the two alternatives of jurisprudence with regard to implementing the requirements of the Pact. This Note will conclude by considering what lies in store for the EMU and whether a rules or standards-based approach will be the more suitable path to choose in future instances.

II. THE EUROPEAN UNION

The EU came into existence upon the implementation of the Maastricht Treaty on European Union in 1993.8 It is a treaty-based organization that directs economic and political cooperation among fifteen European nations, though the “fundamental” goal was to create an increasingly stronger union among the


8. GUIDE, supra note 2, at ch. 1. However, the process of integration began in the 1950s by six countries — Belgium, France, Germany, Italy, Luxembourg, and the Netherlands — as a post-war Western Europe took necessary steps in rebuilding its economy. Id. The six nations also pursued integration of both military and political resources. Id. Such efforts failed and unification, at the time, was continued on the economic front alone. Id.
nations of Europe. Through these efforts, the European Union has brought economic prosperity to Western Europe and helped bring stability to Central and Eastern Europe. In dealing with the monumental task of uniting Europe, the EU has five governing bodies: (1) European Commission (“Commission”); (2) Council of the European Union; (3) European Parliament; (4) European Court of Justice; and (5) European Court of Auditors. Additionally, the EU also created the European Central Bank (ECB) following the establishment of the EMU.

The Commission drives EU policy by proposing legislation, bearing administrative responsibilities, and ensuring that the treaties are properly implemented. It also holds investigative powers and can take legal action against persons, companies, or Member States that violate EU rules. The Commission consists of commissioners who act in the EU’s interest independently of the national governments, which make up the EU. The Council of the European Union, the EU’s legislative body, establishes EU laws based on proposals submitted by the Commission — the proposals and the subsequent laws must balance national and EU interests. The Council of the European Union consists of ministers from each Member State. Different ministers participate depending on the subject matter of a particular discussion. For example, the ministers of the Economic and Finance (“ECOFIN”) Council discuss economic and finan-

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9. Id.
10. Id.
11. GUIDE, supra note 2, at ch. 2. Furthermore, a European Council consisting of the heads of state and government of each Member State along with the Commission president holds summits twice a year in order to provide strategy and political direction for the EU as a whole. Id.
12. Id. at ch. 3; Lembergen & Wachenfeld, supra note 7, at 9.
13. GUIDE, supra note 2, at ch. 2.
15. GUIDE, supra note 2, at ch. 2.
16. Id. In theory, the commissioners act in the interest of the EU alone, despite the fact that the governments of the Member States nominate them. Id.
17. Id.; EUROPA, supra note 14.
18. GUIDE, supra note 2, at ch. 2.
19. Id. See also EUROPA, supra note 14. The Council, the EU’s main decision-making body, is also referred to as the Council of Ministers. Id.
cial affairs. The European Parliament can question both the Commission and the Council and has veto power over legislation enacted by the Council. The Parliament is the EU’s public forum as it is comprised of six hundred twenty-six members elected in EU-wide elections for five-year terms. The European Court of Justice is the EU’s “Supreme Court.” Lastly, the European Court of Auditors oversees the financial management of the EU budget.

Through these governing bodies, the EU initiated the process of establishing the “single market” of the EMU in 1990. Though the introduction of the euro is the most noticeable result of the single market, it is actually the third (and final) stage of the transition into the EMU. The first stage of the process, which began on July 1, 1990, consisted of lifting restrictions on the movement of capital across national borders within the EMU. The second stage, which started in January 1994, concerned setting up the European Monetary Institute in Frankfurt, which set the stage for the ECB.

The ECB now assists in the management of the euro by implementing monetary policy for the whole EMU. The ECB, also based in Frankfurt, took over the fiscal duties of setting the interest rates in Europe from the national central banks of the Member States on June 1, 1998.
national central banks of the Member States acting as agents to the ECB, will make up the European System of Central Banks (ESCB).\textsuperscript{31} The function of the ECB is vital to the stability of the EMU and the performance of the euro since, “no currency has ever survived as an important international currency with a sustained high rate of inflation.”\textsuperscript{32} Thus, the ECB’s sole responsibility is to keep prices stable.\textsuperscript{33}

However, the responsibility for the future of the euro does not totally fall upon the shoulders of the ECB. In order to ensure economic stability within the EU the Member States must also uphold certain fiscal standards. The nations must continue to practice economic discipline, or conflicts stemming from the stark economic differences among the many Member States will arise.\textsuperscript{34} The European Union encourages this level of discipline through two mechanisms. First, the EU will refuse liability for the financial obligations of Member States, and, second, the Member States have agreed to the restrictions of the Stability and Growth Pact.\textsuperscript{35}

III. THE STABILITY AND GROWTH PACT

A. The “Pact”

The EU developed the Stability and Growth Pact in order to foster consistent economic policies and to ensure budget discipline throughout the EMU\textsuperscript{36} by requiring each Member State to

\begin{itemize}
\item \textsuperscript{31} Lembergen & Wachenfeld, supra note 7, at 9.
\item \textsuperscript{32} Mundell, supra note 1.
\item \textsuperscript{33} Aalund, supra note 30; see also Mundell, supra note 1 (“The ECB will have the same problems of monetary management as the Federal Reserve System in the U.S.”). But see Aalund, supra note 30 (“The ECB isn’t a duplicate of the U.S.’s Fed. One of the most important differences between the two is their mandates. Unlike the newly formed ECB, the Fed’s goal is to balance the objectives of price stability with those of employment and economic growth.”); see also Lembergen & Wachenfeld, supra note 7, at 9.
\item \textsuperscript{34} Lembergen & Wachenfeld, supra note 7, at 31.
\item \textsuperscript{35} Id.
\item \textsuperscript{36} Id.
\end{itemize}
keep its budget deficit at a minimal level. The Stability and Growth Pact consists of one Resolution and two Regulations from the European Council. The main component of the Pact, Council Resolution 97/C236/01 on the Stability and Growth Pact, requires that Member States keep their “medium term budgetary position close to balance or in surplus.” More specifically, each Member State must keep fiscal deficits below 3% of GDP. Failure to abide by this standard will trigger sanctions imposed by the EU. At first glance, it may seem that the Pact forces Member States to take action to correct their budgetary positions in case of an excessive deficit. However, the EU ultimately intended the Stability and Growth Pact to serve as a deterrent to induce Member States to avoid an excessive deficit in the first place.

Council Regulation 1466/97 of July 7, 1997 addresses the “strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies” of Member States as contained in Article 103 of the EC Treaty. The regulation improves the surveillance of the Member States’ economic and monetary positions by ensuring the flow of information from Member States to the Commission and Council. Essentially, the regulation outlines the rules concerning the content, submission, examination, and monitoring of each

43. Lembergen & Wachenfeld, supra note 7, at 31–32; Meyers & Levie, supra note 41, at *8; Goebel, supra note 42, at *38.
44. Lembergen & Wachenfeld, supra note 7, at 32; SMITS, supra note 38, at 87.
45. Goebel, supra note 38, at *42.
Member States’ “stability program.” The regulation requires that each Member State's stability program contain: “(1) medium-term targets for its public finances (which should include a budgetary position 'close to balance or in surplus'); (2) the underlying economic assumptions and the sensitivity of the projected budgetary and debt positions to changes in such assumptions; and (3) budgetary and other economic policy measures for achieving those targets.” The ECOFIN Council will review each Member State's stability program, thereby providing the EU with an opportunity for early detection of significant deviations from medium-term targets. Such deviations could lead to excessive budget deficits for Member States which, in turn, could eventually upset continued price stability within the EMU. The regulation provides the ECOFIN Council with the opportunity to issue early warnings when it detects any such divergences.

The second regulation, Council Regulation 1467/97 of July 7, 1997, concerns “speeding up and clarifying the implementation of the excessive deficit procedure” as contained in Article 104C of the EC Treaty. The regulation provides a clear method for proposing and implementing prompt corrective actions within a year of the reporting of the excessive deficit. Upon reviewing the economic position of a Member State, the European Com-

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46. Lembergen & Wachenfeld, supra note 7, at 32. Member States not participating in the EMU must submit “convergence programs” which are similar to stability programs and subject to similar review by the EU. Id.
48. Goebel, supra note 42, at *38; SMITS, supra note 38, at 87.
49. Meyers & Levie, supra note 41, at *8; see SMITS, supra note 38, at 87 (“[The council] can either endorse [the program] or make a recommendation that the program should be strengthened.”).
50. Lembergen & Wachenfeld, supra note 7, at 32.
51. Meyers & Levie, supra note 41, at *8.
52. Id. (citing Council Regulation 1467/97 of 7 July 1997 Speeding Up and Clarifying the Implementation of Excessive Deficit Procedure, 1997 O.J. (L209) 6); SMITS, supra note 38, at 88.
53. Lembergen & Wachenfeld, supra note 7, at 32; SMITS, supra note 38, at 88.
54. Lembergen & Wachenfeld, supra note 7, at 32; Goebel supra note 42, at *39; Meyers & Levie, supra note 41, at *8; SMITS, supra note 38, at 88.
mission will report to the Council of Ministers if an excessive budget deficit exists. The Council of Ministers will then make prompt recommendations for corrective measures to the Member State with deadlines for implementing these proposals. If the Member State fails to take timely and adequate corrective action, the Council may impose sanctions. Sanctions would require that the Member State make an initial non-interest bearing deposit of .2 to .5% of GDP and a variable component of 10% of the excess deficit. Until the Member State adequately corrects its budgetary position, it must make yearly deposits equal to 10% of the excess deficit over the 3% reference value from the preceding year. The deposits shall, as a rule, be forfeited and converted into a non-recoverable fine, if the Council decides that the excess deficit has not been corrected within two years. The Council, however, may excuse an excessive deficit, if one occurs as a result of a “severe economic downturn.”

55. Lembergen & Wachenfeld, supra note 7, at 32.
56. Goebel, supra note 42, at *39.
57. Lembergen & Wachenfeld, supra note 7, at 32; see also Catch 2002 — Strains on the EU’s Stability Pact, THE ECONOMIST, Sept. 21, 2002, available at 2002 WL 7247543 [hereinafter Catch 2002]; SMITS, supra note 38, at 88 (“Within four months of its decision that an excessive deficit exists, the Council would decide whether effective action had been taken to remedy the situation ... The period of time between the reporting date and the decision to impose sanctions is not to exceed ten months.”).
58. Lembergen & Wachenfeld, supra note 7, at 32; Goebel, supra note 42, at *39.
59. Meyers & Levie, supra note 41, at *8; see also Catch 2002, supra note 57; SMITS, supra note 38, at 89.
60. Meyers & Levie, supra note 41, at *8; SMITS, supra note 38, at 89 n.304.
61. Goebel, supra note 42, at *39; Meyers & Levie, supra note 41, at *8; see also Catch 2002, supra note 57; SMITS, supra note 38, at 89 n.304.
62. Meyers & Levie, supra note 41, at *8. A severe economic downturn is defined as a Member State experiencing an “annual fall of real GDP of at least 2%,” or if the Member State provides evidence that an annual reduction in GDP of less than 2% is “nonetheless sufficiently exceptional in character.” Goebel, supra note 42, at *8. It has been agreed that Member States should not invoke this last clause unless sufficiently severe cases occur during a drop of real GDP of .75% or more. Meyers & Levie, supra note 41, at *8.
B. The History of the Pact

The German Minister of Finance initially proposed the Stability and Growth Pact in 1995. During the preparations of the European Commission and the European Monetary Institute, which took place between 1995 and 1997, in anticipation of the EMU, German representatives fought for strict standards requiring Member States to maintain budget discipline upon joining the monetary union and to keep their respective deficits low.

The Germans believed that monetary stability could not be achieved without rigid spending discipline. Germany feared that weak budgetary rules combined with the historic liberal fiscal policies of several of their fellow Member States, would severely impact the value of the euro. Germany reasoned that weak budgetary rules would tempt Member States to borrow and spend at the expense of the other Member States thereby increasing interest rates, sparking inflation and undermining the new EMU currency. Moreover, default by a Member State

63. Goebel, supra note 42, at *63 n.265; see also SMITS, supra note 38, at 84.
64. Goebel, supra note 42, at *38.
66. SMITS, supra note 38, at 84; James Graff, Loosening the Ties That Bind: Europe's Big Economies Can't Keep Their Deficits Down, So Brussels is Changing the Rules, TIME INT'L, Oct. 7, 2002, at 56.
68. Maastricht Follies, supra note 65; see also Gambling on the Euro: Europe's Monetary Union is Neither Bound to Succeed Nor Doomed to Fail. Leadership, Circumstances and Luck Will Combine to Decide Its Fate, THE ECONOMIST, Jan. 2, 1999, available at 1999 WL 7361239 [hereinafter Gambling on the Euro] (“The concern was that chronic overborrowers would become even more fiscally irresponsible once they had adopted the euro, because
could result in a political catastrophe for the EMU in terms of the credibility of the euro. Members would have the luxury of setting fiscal policy with the mindset of “when the chips are down the union will act as lender of last resort,” which would further reduce the need for fiscal adjustment. The Germans felt that this “free rider” problem brought with it the probability of both a reduction of currency and default in the monetary union making additional centralized control essential.

Of course, not everyone felt the same way. For example, many other Member States pushed for a more liberal resolution to the issue of inflation and stability within the EMU. Representatives of several Member States were fearful that since they would no longer have independent monetary or exchange-rate policies leaving their countries with only fiscal policy as one of a few ways to counter a recession. The Pact interferes with a Member State’s automatic stabilizers. Due to the re-

they would no longer face the financial-market sanction of higher interest rates and (in the end) a depreciating currency.”); Trust or Mistrust Thy Euro Neighbour?, THE ECONOMIST, July 21, 2001, available at 2001 WL 7319878 [hereinafter Trust or Mistrust].

69. Mundell, supra note 1.

70. Id.; see also Trust or Mistrust, supra note 68. One additional consideration was the possibility of a trend starting and three or four countries running a lax fiscal policy as opposed to one or two obviously aggregating the problem. Id.

71. Mundell, supra note 1 (“...hence, the Stability and Growth Pact”); see also Gambling on the Euro, supra note 68 (“Moreover this overborrowing would henceforth be at least partly at the expense of Germany and the other euro countries, because they would bear some of the cost of default, if it came to that.”).

72. Goebel, supra note 42, at *38. France was the strongest proponent for a more liberal “Pact.” Id. See also Jennie James, We’re Off to See the Wizard: Critics Say the European Central Bank Should Use Its Powers to Lift Europe Out of Its Slump. The Bank Says That’s Not Its Job. Who’s Behind the Curtain, Anyway?, TIME INT’L, Oct. 7, 2002, at 58 (“The U.S. Federal Reserve doesn’t have an inflation target, which gives it leeway in pursuing its dual mandate of price stability and maximum employment.”). The Fed’s reported unofficial goal of inflation is below 3%, while the ECB’s is 2% — inherited from Germany’s Bundesbank. Id.

73. Maastricht Follies, supra note 65; see also Gambling on the Euro, supra note 68 (“In the meantime it rules out counter-cyclical fiscal policy or the sort that will often be necessary, and for which there is no longer any plausible national substitute.”).

requirement that their deficits do not exceed 3% of GDP, as tax revenues decline and deficits naturally increase during a recession, the Pact forces the governments of Member States to tighten spending when government spending is most needed. 75

Members also saw the need for a less strict agreement for reasons somewhat removed from the Pact itself. Since the Maastricht treaty provides that the ECB cannot bail out Member States, the market would attach a risk premium to lending to a heavily indebted government. 76 Third parties would hesitate before lending to those governments with high debt creating a market effect that would most likely serve as an incentive to national governments to keep their debts lower in order to remain competitive with their neighbors for foreign investments. 77 Additionally, these members pointed out that the theory behind the EMU was that the “balance-of-payments among its members will be automatic” as it is between regions within a single country. 78 A government whose country has an excessive budgetary deficit will begin to spend less money in order to reduce its deficit. 79 While these events take place in one country, a government whose country is in a period of recession will spend more money, invariably raising its deficit and thereby creating a balancing effect. 80 The situation, many European nations feel, reduces the need for further centralized control. 81

The debate on the Pact resulted in a compromise. As outlined above, the compromise called for extensive surveillance on the fiscal conditions of Member States in order to foresee serious budgetary problems and a range of possible sanctions to be im-

75. Re-engineering the Euro, supra note 74.
77. Gambling on the Euro, supra note 68; see also Mundell, supra note 1 (“A monetary union removes a major source of macroeconomic instability by barring central bank financing of fiscal deficits. [As] governments will no longer be able to run up large public debts and force the central bank to inflate their burden away, it [is a move toward] fiscal prudence.”).
78. Mundell, supra note 1.
79. Id.
80. Id.
81. Id.
plemented should budgetary deficits exceed prescribed limits.\textsuperscript{82} Though the Pact is strict, Members now have the opportunity to implement corrective measures thereby preempting the need for such sanctions.\textsuperscript{83} The Pact also shelters the EU from short-term internal political pressures and fortifies the independence of the ECB.\textsuperscript{84} However, the real tests on the viability of the Pact and the strength of the EMU prompted by social and economic expectations of the participating governments and their people seem to be at the EU’s doorstep.\textsuperscript{85}

\section*{C. The European Union Under the Pact}

The novelty of the Pact understandably spurred uncertainty as to how strictly the European Commission would construe the rules embodying the Pact. Also uncertain was whether or not the Commission would require any Member State to pay a fine, should it fail to meet its obligations under the pact. These uncertainties gave rise to speculation that countries could allow their budget deficits to exceed 3\%, if they agreed to compensate for the lapse during a later (more prosperous) economic period.\textsuperscript{86} However, in the latter part of 2001, in the midst of a global economic slowdown, the Commission issued a pronouncement which quelled much of the speculation of the Member States, as it provided insight into how strictly the Commission would construe the provisions of the Pact.\textsuperscript{87} The Commission warned the eleven countries, then part of the euro zone, not to allow their budget deficits to exceed 3\%.\textsuperscript{88} The director general of the Commission’s Economic and Financial Affairs directorate, at the time, further stated that the Commission would take a hard stance against Member States that did not abide by the budgetary restrictions of the Pact.\textsuperscript{89}

True to the statements of the Commission and the director general of the Economic and Financial Affairs directorate, in

\begin{thebibliography}{99}
\bibitem{82} Goebel, \textit{supra} note 42, at *38.
\bibitem{83} Id.
\bibitem{84} Herdegen, \textit{supra} note 65, at 554.
\bibitem{85} Id.
\bibitem{87} Id.
\bibitem{88} Id.
\bibitem{89} Id.
\end{thebibliography}
January 2002, in the midst of much concern over the future credibility of the euro, the European Commission issued a report in which both Germany and Portugal received admonishments for their growing deficits. The deficits at the time were 2.7% and 2.2% GDP respectively. The commissioner responsible for monetary and economic affairs reported that several Member States had not met their targets as outlined in their budgetary plans required by the Stability and Growth Pact. The Commission asked for more control by Member States over government spending and pointed to Germany and Portugal because their deficits were dangerously approaching the 3% GDP limit. The European Union finance ministers issued formal warnings to the two nations upon the recommendation of the European Commission.

On February 12, 2002, the European Union’s finance ministers declined to issue a further formal warning against Germany in exchange for the government’s commitments to take unspecified “discretionary measures” in order to bring its budget “close to balance” by 2004. The compromise accomplished two goals by allowing Germany’s chancellor to preserve his integrity while also protecting the financial discipline of the euro zone. Although the European Central Bank Chief, Wim Duisenberg said, “the compromise worked in the end,” the decision may have represented a setback for the European Commission in terms of its authority under the Pact.

90. Brandon Mitchener, EU Commission Warns Countries on Big Deficits, WALL ST. J., Jan. 31, 2002, available at 2002 WL-WSJ 3384521. At the time, the euro had fallen about 15% against the dollar since its inception in 1999. Id.
92. Mitchener, supra note 89.
93. Id.
94. Sesit, supra note 91. The Commission did not want global confidence in the euro to weaken (initially Germany’s fear) with the perception that slower economic times would invariably intensify government spending. Mitchener, supra note 90.
95. Paul Hofheinz & Christopher Rhoads, EU and Germany Reach Deal on Deficit, WALL ST. J., Feb. 13, 2002, available at 2002 WL-WSJ 3385880. The “discretionary measures” would possibly include cuts in spending or higher taxes. Id.
96. Id.
97. Id.
vides that the Commission may recommend that the Council of the European Union issue warnings to Member States when their budget deficits approach 3% GDP — only in this instance, the recommendation went unheeded. Furthermore, the Bundesbank Vice President Juergen Stark said the European Union’s decision against issuing a warning to Germany may have hurt Europe’s “budget credibility” — an opinion to which Bank of America’s then current chief economist for Europe agreed.

Later in the year, another Member State’s financial activity drew similar concerns from the rest of the EU. The French government, in hopes of inciting an economic growth spurt, cut income taxes by 5%. The concern was that the move would further hinder France from keeping its budget deficit below the 3% ceiling, since their deficit had been growing at a rapid rate and was projected to reach 3.2%. The French managed a small diversion from the negative attention by stating that they could still keep their deficits below the 3% limit of the Pact through surpluses in local authority finances and other areas.

By August 2002, Germany’s deficit was at 2.8% and by September Germany announced that its budget was 3.5% in the first half of the year and was ever closer to breaching the limits of the Pact. Similarly, Portugal admitted to a budgetary deficit of over 4%, and concern for France and Italy’s budget deficits

98. Id.
99. Paul Hofheinz & Christopher Rhoads, EU Cuts Estimate of Annual Growth to a Paltry 0.9%: Recovery is Not Expected to Begin Until Early 2003; U.S. Exports Could Be Hit, WALL ST. J., Sept. 9, 2002, available at 2002 WL-WSJ 3405460; see also Rules for the Euro, supra note 67. If the EU govern-ments’ finance ministers reject the Commission’s recommendation that Germany should be formally warned, “the whole stability pact would begin to unravel.” Id.
101. Id.
102. Id.
103. The Case for Co-operating, supra note 40.
104. Hofheinz & Rhoads, supra note 99. Germany’s budget was 3.7% in the second half of 2001 which means the country’s deficit was, in fact, over the limit for a twelve-month period. Id. However, a reprimand and fines occur only when the 3% limit is violated for a full fiscal year. Id.
grew as well.\textsuperscript{105} By the end of September, the four countries, — which include the three largest economies in Europe — were off their budgetary targets.\textsuperscript{106} Although the European Commission acknowledged that the region’s economic downturn played a role in the countries’ budgetary woes, the Commission also blamed the countries’ “lack of fiscal prudence” during better economic times.\textsuperscript{107} Sirkka Hamalainen, a member of the ECB’s executive board, asserted that “governments didn’t realize or didn’t accept fully, that during the good times it’s very important to build buffers.”\textsuperscript{108}

Despite the ongoing finger pointing, in light of the probability that an economic recovery would not begin at least until the following year,\textsuperscript{109} and due to the state of the budgets of these four countries, the European Commission agreed to extend the deadline of having budgets “close to balance” by 2004 to 2006.\textsuperscript{110} Still, adding to the surprise of many doubters (including several economists) Wim Duisenberg insisted that current interest

\textsuperscript{105} The Case for Co-operating, supra note 40. Concern for France’s budget grows despite the French Prime Minister’s assurance that his country’s budget deficit would not exceed the 3\% limit. Hofheinz & Rhoads, supra note 99. Italy, the third largest economy in the EMU, had also been causing concern throughout the year due to its large deficits. Germany Breaks With Debt Policy: A Wall Street Journal News Roundup, WALL ST. J., Oct. 15, 2002, available at 2002 WL-WSJ 3408813.


\textsuperscript{107} David I. Oyama, EU Commission to Extend Target On Budget Deficits, WALL ST. J., Sept. 25, 2002, available at 2002 WL-WS 3406974 [hereinafter Oyama, Commission to Extend Target]. Germany, France and Italy are also blamed for continuing protectionist practices for domestic industries thereby applying “yesterday’s remedies to current problems.” Re-engineering the Euro, supra note 74. Some say these giants should note their smaller brothers who have enjoyed faster economic growth while still successfully abiding by the Pact’s budgetary requirements — all while practicing policies of liberalization, opened economies, reformed labor markets and welcomed competition. Id.

\textsuperscript{108} James, supra note 72.

\textsuperscript{109} Hofheinz & Rhoads, supra note 99. The European Commission also cut its forecast for euro-area economic growth for the year by half a percentage point to 0.9\%. Id.

\textsuperscript{110} James, supra note 72; Oyama, Commission to Extend Target, supra note 107; Catch 2002, supra note 57. Governments of the European Union are supposed to have their budgets in balance by 2004 as a condition under the Stability and Growth Pact. Id.
rates (established by the ECB) would promote price stability over time.\textsuperscript{111} It seemed the Pact that aimed to protect the large economies from the small economies is now protecting the smaller countries from the larger countries with past records of stability.\textsuperscript{112} The events lend evidence to the claim that the Pact had indeed gone “awry.”\textsuperscript{113}

Clearly the Pact needs reform.\textsuperscript{114} Though Germany had initially feared the effects of excessive inflation on the euro, recession now plagues the EMU.\textsuperscript{115} It seems that the Pact, written to combat inflation, has worsened the economic slowdowns in Germany, Portugal, France and Italy.\textsuperscript{116} Interest rates were higher than if monetary policy had been set by each country on its own, and, as a result, the economies were squeezed.\textsuperscript{117} The Pact forces governments to tighten fiscal policy at precisely the time when spending is needed the most.\textsuperscript{118} For these reasons, the voices of skeptics of the Pact could again be heard chiding the strict budgetary requirements.\textsuperscript{119} A UBS Warburg economist in London has referred to the Pact as a “busted flush.”\textsuperscript{120} The European Commission’s very own president has been quoted as calling the Pact “stupid,” and some economists have

\begin{itemize}
  \item \textsuperscript{111} James, supra note 72.
  \item \textsuperscript{112} Graff, supra note 66. Representatives from smaller countries have gone as far as to claim that the Pact has created a “two-class” system with the larger states not having to abide by the same budgetary restrictions as the smaller states. \textit{Id}. The fact that Portugal has undergone formal sanctioning does nothing to quell the vehement nature which exists throughout several other members in the EMU since Portugal is understandably considered one of the “smaller” guys. \textit{Id}.
  \item \textsuperscript{113} \textit{Id}.
  \item \textsuperscript{114} \textit{Re-engineering the Euro}, supra note 74.
  \item \textsuperscript{115} \textit{Double-dip in Germany? — Europe’s Slowing Economies}, \textsc{The Economist}, Aug. 24, 2002, available at 2002 WL 7247193.
  \item \textsuperscript{116} \textit{Id}.
  \item \textsuperscript{117} \textit{Id}.
  \item \textsuperscript{118} \textit{Id}.
  \item \textsuperscript{119} \textit{Re-engineering the Euro}, supra note 74; Hofheinz & Rhoads, supra note 99. At the time, economists proposed allowing budget deficits to exceed the 3% limit and instead to focus on the “structural deficit” which is “based on spending policies unaffected by economic changes.” \textit{Id}. Others suggest removing budgetary restrictions and replacing them with “a commitment to keep official borrowing within agreed limits.” \textit{Id}. Many economists had gone as far as to suggest that Europe would be better off without the pact and the sooner it is gone the better. \textit{Rules for the Euro}, supra note 67.
  \item \textsuperscript{120} Graff, supra note 66.
\end{itemize}
supported the view that “rules that force countries to cut spending, even as their economies slow, are indeed stupid, if not positively dangerous.”

The German author of the Pact, however, still touts the agreement as a good thing for the EMU. Though the question whether the Pact has actually been harmful or helpful to the EMU thus far still lingers, the far more important question is how much and what type of reform is needed to provide the EMU with a better tool for the future.

IV. STANDARDS VS. RULES

The existence of rules and standards within a legal system and the distinctions in the methods of jurisprudence that each provide has been the subject of debate by legal theorists for several decades. The obvious difference in the employment of either rules or standards by a rule-making body is that rules


122. Graff, supra note 66. Germany’s Finance Minister, Theo Waigel — often considered the godfather of the Stability Pact — who pushed for an agreement explicitly outlining deficit limits, retorts, “only because of [the Pact] has a culture of stability emerged in Europe.” Id. He believes that the Pact has forced European governments to pay strict attention to keeping their budgets balanced and without it the EMU would be much worse off. Id.

123. Ronald Dworkin initially developed his “interpretive theory of law” in The Model of Rules, 35 U. CHI. L. REV. 14 (1967), as an alternative to the theory of legal positivism, a system of rules which H.L.A. Hart set forth in THE CONCEPT OF LAW (1961). Though Hart’s positivism viewed law as consisting of only rules and, if no rule is available for a particular situation, judicial discretion, Dworkin’s response provided that the law really had both rules and more general principles (standards) at its disposal as dispute solving resources. Brian Bix asserts:

While there are reasons to conclude that Dworkin had overstated the differences between his view of the law and that of H.L.A. Hart, and also that he made out the line between rules and principles to be clearer than it (sometimes) is in practice, what remains is the insight that a purely rule-based approach to the nature of law or the nature of judicial reasoning would be problematic.

BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 8, 82 (2d ed. 1999); see also Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 HARV. L. REV. 1685 (1976). Although the CLS analysis between rules and standards often questions the very existence of a distinction of the two forms, for purposes of this paper, the discussion assumes that a viable distinction does exist.
are more specifically stated than standards. The difference in specificity between rules and standards affects the degree by which a decision-making body may employ its own discretion during the decision process. In theory, a rule, which commonly represents an underlying policy, should eliminate the need for judicial discretion in the decision-making process. Conversely, a standard allows the decision-making body to employ its own discretion in formulating its decision in order to achieve the underlying policies. The use of either standards or rules by a legislative body can result in various legal outcomes depending on the amount of discretion the decision-making body is at liberty to use.

Removing the use of discretion from the decision-making equation eliminates the opportunity for politics or biases to creep into the process. The absence of discretion also allows a greater level of predictability within the legal system. However, the removal of discretion can tie the hands of a decision-making body, leading to a result that is often over- or under-inclusive. Discretion can provide the judge with the latitude of applying the particular facts of a situation, thereby following the “spirit” of the standard and ensuring that justice is served. This section will explore these and other pros and cons of the varying levels of discretion which exist through the use of rules versus standards.

A. Rules

A rule is an attempt by a rule-making body to restate an underlying policy in “concrete terms.” One accepted definition of a rule is as follows:

124. See Theodore M. Benditt, Law As Rule And Principle: Problems Of Legal Philosophy 74 (1978). A common example of a rule is: “The maximum speed limit is 55 miles an hour,” whereas a standard is: “No one shall be permitted to profit from his own fraud, or to take advantage of his own wrong.” Id. See also Eva H. Hanks et al., Elements Of Law 486–88 (1994) (quoting Dworkin, supra note 123). Another example of a standard is: “Drivers may travel ‘no faster than is reasonable.’” Russell B. Korobkin, Behavior Analysis and Legal Form: Rules vs. Standards Revisited, 79 Or. L. Rev. 23 (2000).

125. Although the terms principles and policies represent two distinct ideas, the difference is not pertinent to this paper; “policies” will be used to stand for the underlying motivations behind the promulgation of rules.

A legal directive is “rule”-like when it binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts. Rules aim to confine the decisionmaker to facts, leaving irreducibly arbitrary and subjective value choices to be worked out elsewhere. A rule captures the background principle or policy in a form that from then on operates independently. A rule necessarily captures the background principle or policy incompletely and so produces errors of over- or under-inclusiveness. But the rule’s force as a rule is that decisionmakers follow it, even when direct application of the background principle or policy to the facts would produce a different result.\footnote{Hanks et al., supra note 124, at 45; see also Kathleen M. Sullivan, The Justices of Rules and Standards, 106 Harv. L. Rev. 22, 58 (1992).}

The attractiveness provided by the use of rules stems from their automatic nature,\footnote{Hart, Jr. & Sacks, supra note 126, at 139 (“In the narrow and technical sense in which the term is here used, a rule may be defined as a legal direction which requires for its application nothing more than a determination of the happening or non-happening of physical or mental events — that is, determinations of fact.”); see also Mark Kelman, A Guide To Critical Legal Studies 15 (1987); Alexander & Sherwin, supra note 126, at 158 (“A rule is formal and mechanical.”).} which allows for a high level of predictability. A common example of a rule is contained in New York’s per se law addressing the socially undesirable behavior of driving while intoxicated. In New York, a person is prohibited from driving when that person’s blood consists of .10% of alcohol (or higher).\footnote{N.Y. Vehicle and Traffic Law § 1192(2) (1996) (“Driving while intoxicated; per se. No person shall operate a motor vehicle while such person has .10 of one per centum or more by weight of alcohol in the person’s blood as shown by chemical analysis of such person’s blood, breath, urine or saliva.”).}

As in the above stated definition, when a situation arises which calls for a legal determination based on a particular rule, a judge merely recognizes certain “triggering facts” — in this case a Blood Alcohol Content (BAC) of .10% — and applies the appropriate rule for that particular situation in order to find the desired outcome. In theory, there is no inser-
tion by the judge of his own beliefs, and no risk of distortion of the rule or its background policies. There exists much predictability in such a process, since the judge need only analyze the facts, read the rule, and apply it.

This high level of predictability benefits parties and players throughout the legal process. First, rulemakers have greater certainty that decisionmakers and members of society will consistently interpret the rules which they promulgate thereby better serving the policies of the society. Greater predictability results in a more consistent legal system. Second, the use of rules affords decisionmakers the luxury of avoiding the political pressure and controversies that would otherwise arise from the voice of skeptics, since the simplicity and clarity of the rule's application decreases the opportunity to second-guess the decisionmaker. Furthermore, although a particular outcome may not be the desired result of the judge's constituents or serve his own political views, he will not be at liberty to impose his discretion beyond applying the particular rule to a set of facts. He thereby avoids the temptation of serving interests other

130. Sullivan, supra note 127, at 58 (“Rules force decisionmakers to dismiss personal and political biases when deciding a matter thereby allowing the rule itself as applied to the facts to determine the outcome.”).

131. ALEXANDER & SHERWIN, supra note 126, at 103 (“Rules work by restating moral principles in concrete terms, so as to reduce the uncertainty, error, and controversy that result when individuals follow their own unconstrained moral judgment.”).

132. Sullivan, supra note 127, at 62. Professor Kathleen M. Sullivan refers to this mechanical nature of rules which affords much predictability within the legal system as the “Fairness of Formal Equality.” Id. She goes on to say, “Rules reduce the danger of official arbitrariness or bias by preventing decisionmakers from factoring the parties' particular attractive or unattractive qualities into the decision-making calculus.” Id.


134. Whether or not it is a desired result to have decisionmakers totally unanswerable for the results of their decisions and to allow them to “wash their hands” of an outcome is mentioned further in this section. One view on this matter is that the judge may be inclined to “throw her hands up” after applying a rule that does not necessarily promote the policies of the society in a particular instance because the judge may feel she has no recourse in seeing that justice is done. Such an approach renders the judge virtually ineffective in promoting justice. This often leads to over- or under-inclusiveness.

135. HANKS ET AL., supra note 124, at 486 (“If the rule is valid, and if the facts set forth by the rule arise, then the outcome presented by the rule must stand.”).
than the policies of society. Lastly, members of society can foresee the repercussions of their actions as well as the outcome of a legal decision almost as easily as they can read the rule itself. Since members can easily determine what behavior is acceptable and unacceptable they will begin to have more trust and reliance in their legal system. Moreover, the predictability of the rule affords them the opportunity to plan their activities accordingly which allows the society to become more progressive. Thus, at first glance, the predictability made possible by the use of rules has several desirable results.

There are, however, drawbacks to the use of rules. The main problem with having a system of rules, which concerns most legal theorists, is the result of over- and under-inclusiveness. The general nature of rules allows similar treatment of dissimilar people or, conversely, dissimilar treatment of like cases. The outcome that often arises is one that the rule–maker did not foresee or want. For example, a strict rule will sometimes  

136. Kelman, supra note 128, at 41 (“Rules [ ] are designated to permit little discretion; they ensure that people will perceive that they are treated uniformly.”).
137. Korobkin, supra note 124, at 25. See also Richard A. Posner, Frontiers Of Legal Theory 220 (2001); Sullivan, supra note 127, at 123 n.259 (citing Frank H. Easterbrook, The Supreme Court, 1983 Term — Foreword: The Court and the Economic System, 98 Harv. L. Rev. 4, 10–11, 19–21 (1984) (“If a party knows that judges will not intervene to save her after the consequences of her choices become apparent, she will plan more carefully and greater productivity will result.”)).
138. Posner, supra note 137, at 220. Over- and under-inclusiveness refers to the “imperfect fit between the rule and circumstances, resulting in some outcomes that are erroneous from the standpoint of the substantive principle undergirding the rule.” Id. Kelman, supra note 128, at 40. “Rules are bad because they are under-inclusive as to purpose, over-inclusive as to purpose, or both.” See also Korobkin, supra note 124, at 36 (“[W]hatever the underlying policy goal of the legal pronouncement, rules will often permit some undesirable conduct and prohibit some desirable conduct.”); Bernard W. Bell, Dead Again: The Nondelegation Doctrine, The Rules/Standards Dilemma and The Line Item Veto, 44 Vill. L. Rev. 189, 199 (1999).
139. Sullivan, supra note 127, at 62. See also Bell, supra note 138, at 200 n.51.
140. Kelman, supra note 128, at 15. Alexander & Sherwin offer an example of under-inclusiveness and over-inclusiveness that explains the problem well. ALEXANDER & SHERWIN, supra note 126, at 103. Say the rule, “No talking in the library,” is established in order to promote study. The rule does not forbid leaf blowers in the courtyard no matter how much they disrupt studying in the library, because they are not “in the library.” They are in the courtyard.
fail to stop behavior which the law aims to prevent, because one particular detail of a given situation is not contemplated by the rule. Consider the rule of operating a motor vehicle while intoxicated. Suppose a bicyclist is riding a bicycle on public roads with a BAC above .10%. Such behavior can very well expose innocent people as well as the bicyclist to danger. However, the behavior is not covered under the law dealing with motor vehicles because a bicycle is man-powered. This detail will prevent law enforcement officials from prohibiting the type of behavior, which contradicts the underlying policy behind the rule — keeping citizens free from danger on public roadways. On the other hand, innocent persons may find that a rule does cover their behavior even though the underlying policy behind the rule does not target such behavior. Conversely, consider someone who is driving faster than fifty-five miles per hour in order to get his wife who is in labor or his child who is seriously hurt to a hospital. Although he is “speeding” as defined in the law, it is doubtful that the rulemakers intended to curtail such behavior — at least not to such an extreme extent.

There are other drawbacks to the use of rules. First, in providing legal direction, rulemakers cannot realistically conceive every set of circumstances which require a rule. In a rule

Nor does the rule allow three people, who are the only people in the library, to have an open study session within the library reading area. They are still “talking in the library.”

141. The scenario is an example of dissimilar treatment of like cases. Sullivan, supra note 127.

142. This is an example of similar treatment of dissimilar people.

143. Korobkin, supra note 124, at 36 (“By their very nature, that is, because rules are specified ex ante, even complex rules will sometimes fail to take account of all factual variations that might arise ex post, which might be relevant to optimal tailoring of legal boundaries.”); Bell, supra note 138, at 199 (“[R]ules either cover situations or people that do not pose the harm that the rule is intended to prevent, or they do not cover situations or people that the statute is intended to reach.”). H.L.A. HART, THE CONCEPT OF LAW 127 (1961) (“Sometimes the sphere to be legally controlled is recognized from the start as one in which the features of individual cases will vary so much...,that uniform rules to be applied from case to case without further official direction cannot usefully be framed by the legislature in advance.”). In fact, any promulgation of a successful rule is a considerable achievement for a legislature. See HART, JR. & SACKS, supra note 126, at 139 (“When a legal proposition functions successfully as a rule without the necessity of further elaboration, [ ] some rather remarkable things have happened. The [ ] situation bringing the rule into play has been accurately foreseen, and public policy with respect to it
based system, for every particular set of circumstances, a rule will either exist or it will not.\textsuperscript{144} If a rule does not exist, or it does not cover the particular circumstances close enough to apply a “cookie-cutter” answer, the judge must still come to a decision.\textsuperscript{145} This acknowledgement leads to the reality that a judge will invariably either “squeeze” a set of facts into a rule or use discretion to come to a decision, thereby leaving holes in the desired “mechanical” aspect of a system of rules.\textsuperscript{146} Second, the very fact that a judge may “wash [his] hands” of the results of applying a rule which a rule-making body has promulgated, without ever having contemplated the particular parties in question nor the accompanying set of facts, is an unsavory result in any sophisticated system of law. The judge undoubtedly has the best perception of whether an act needs punishment and which parties are innocent despite the outcome prescribed by the rule. A strict rule will often curtail the decision maker’s authority to see justice through. Third, members of society who are knowledgeable of the law may promote their own interests by skirting the line on the side of what is in fact legal but not necessarily in the interests of society.\textsuperscript{147} Though not a violation of the rule, the results do not promote the “spirit” of the law.\textsuperscript{148} Lastly, members who know and understand the law may also

\textsuperscript{144} BENDITT, \textit{supra} note 124, at 74. Rules act in an “all or nothing fashion.” \textit{Id.}

\textsuperscript{145} KELMAN, \textit{supra} note 128, at 44.

\textsuperscript{146} \textit{Id.} (“Rules inevitably have gaps and conflicts.”).

\textsuperscript{147} Korobkin, \textit{supra} note 124, at 59 n.37 (citing Kennedy, \textit{supra} note 123, at 1773 (“Rules inform bad men exactly what they can get away with.”)); Bell, \textit{supra} note 138, at 200 (“Precise rules allow evasion.”); see also KELMAN, \textit{supra} note 128, at 41 (“Rules are bad because they enable a person to ‘walk the line,’ to use the rules to his own advantage, counterpurposely.”).

\textsuperscript{148} KELMAN, \textit{supra} note 128, at 41 (“[U]njust outcomes will occur more often because people will actively attempt to arrange their affairs so that they are favored by the rules.”).
find it in their best interest to use their superior knowledge to take advantage of members who may not have either as high a level of understanding of the law and are therefore at a disadvantage in society.

B. Standards

A standard is a general directive that requires behavior in conformance with a society’s well-known principles or policies. A standard requires a decision-making body to determine whether an action conforms to the standard’s criteria. The following is one accepted definition of a standard:

A legal directive is “standard”-like when it tends to collapse decision-making back into the direct application of the background principle or policy to a fact situation. Standards allow for the decrease of errors of under- and over-inclusiveness by giving the decisionmaker more discretion than do rules. Standards allow the decisionmaker to take into account all relevant factors or the totality of the circumstances. Thus, the application of a standard in one case ties the decisionmaker’s hand in the next case less than does a rule — the more facts one may take into account, the more likely that some of them will be different the next time.

150. HANKS ET AL., supra note 124, at 45; Sullivan, supra note 127, at 58. See also HART, JR. & SACKS, supra note 126, at 139 (“A standard may be defined broadly as a legal direction which can be applied only by making, in addition to a finding of what happened or is happening in the particular situation, a qualitative appraisal of those happenings in terms of their probable consequences, moral justification, or other aspect of general human experience.”). Roscoe Pound calls attention to three characteristics of legal standards:

1) They all involve a certain moral judgment upon conduct. It is to be “fair,” or “conscientious,” or “reasonable,” or “prudent,” or “diligent.”

2) They do not call for exact legal knowledge exactly applied, but for common sense about common things or trained intuition about things outside of everyone’s experience.

3) They are not formulated absolutely and given an exact content, either by legislation or by judicial decision, but are relative to times and places and circumstances and are to be applied with reference to the facts of the case in hand.
The use of standards, therefore, unlike a rule, allows a judge to use his or her discretion during the decision-making process. The benefit is that the law no longer requires the judge to force a particular rule into a set of facts whether or not the outcome is the desired result of the underlying policy. An example of a standard is the New York law which prohibits people from driving “in an intoxicated condition.” Pursuant to this law, the judge may consider all of the relevant facts surrounding the situation in question (even beyond BAC) and make a determination according to the appropriate societal standard. Due to this use of discretion, standards are much more flexible than rules allowing judges to treat like cases alike and conversely, no longer forcing similar treatment of dissimilar people. Advocates who view the use of discretion as an acceptable

ROSOCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 118 (1922); Kennedy, supra note 123, at 1688 (providing examples of standards: good faith, due care, fairness, unconscionability, unjust enrichment, and reasonableness).

151. Sullivan, supra note 127, at 66. Professor Sullivan describes the process as “Fairness as Substantive Justice.” Id.

152. HANKS ET AL., supra note 124, at 486 (asserting that standards do not “set out legal consequences that follow automatically when the conditions provided are met.”); HART, JR. & SACKS, supra note 126, at 140 (“Unlike a rule, the application of a standard requires [ ] more than a determination [of mere] events. It requires a comparison of the quality or tendency of what happened in the particular instance with what is believed to be the quality or tendency of happenings in like situations.”). The process to determine whether a driver has driven “no faster than is reasonable” entails the adjudicator investigating “the range of relevant driving conditions and apply[ing] the background principle of reasonableness to the situation.” Korobkin, supra note 124, at 23.

153. N.Y. VEHICLE AND TRAFFIC LAW § 1192(3) (1996) (“Driving while intoxicated. No person shall operate a motor vehicle while in an intoxicated condition.”).

154. HANKS ET AL., supra note 124, at 486 (“[A standard] states a reason that argues in one direction, but does not necessitate a particular decision. ... [The] principle is one which officials must take into account, if it is relevant, as a consideration inclining in one direction or another.”). See also BIX, supra note 123, at 81; J.G. RIDDALL, JURISPRUDENCE 95 (1991).

155. BIX, supra note 123, at 81 (“In contrast to rules, [standards] do not act in an all-or-nothing fashion: that is, they can apply to a case without being dispositive.”); ALEXANDER & SHERWIN, supra note 126, at 158 (proposing that standards “are flexible, context-sensitive legal norms that require evaluative judgments in their application”).

156. Sullivan, supra note 127, at 66.
method of judicial decision-making, see the application of standards as providing a greater opportunity to promote justice.\textsuperscript{157}

There are other benefits to the application of standards and the increased use of discretion. First, the acceptance of judicial discretion and the flexibility that comes with it also allow the rule-making body to rely more on the ability of the decision-making body to make just decisions. This, in turn, relieves the rule-making body from the task of developing an intricate body of rules \textit{ex ante} — before the behavior takes place — to fit countless sets of possible circumstances.\textsuperscript{158} The task of addressing the countless varying situations falls on the decision-making body who must now interpret some common sense societal standard \textit{post ante} — after the behavior takes place — and apply it to a particular set of facts. Under the driving “in an intoxicated condition” standard, the decisionmaker may look toward imposing penalties against those drivers whose BAC was not above .10%, but nevertheless placed people’s lives in danger while operating a motor vehicle after drinking alcohol.\textsuperscript{159} Second, standards provide the desired result of requiring a decisionmaker to accept his responsibility and his decisions.\textsuperscript{160} Standards negate the possibility of the decisionmaker “washing his hands” of the result because “there was nothing he could do.” With standards, the decisionmaker faces much more pressure to consider all the circumstances. In short, standards “af-

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\item \textsuperscript{157} Korobkin, \textit{supra} note 124, at 37 (“If standards are applied precisely, no desirable behavior will be sanctioned and no undesirable behavior will avoid sanction.”). Of course, there is an underlying contradiction in the arguments for the use of a rule or standard when considering discretion. Proponents of rules do not want discretion playing a role in the decision-making process. Proponents of discretion see it as a necessity in the process. The discrepancy is resolved by understanding that the bias towards a rule or standard lies in whether the person believes discretion is a good thing or an evil thing.
\item \textsuperscript{158} Hart, Jr. & Sacks, \textit{supra} note 126, at 140 (“Even more obviously than the [ ] rule, the standard involves a postponement of decision until the matter can be judged from the perspective of the point of application. Indeed, [it] avoids [ ] the imprisonment of general judgment in any precise verbal formula.”).
\item \textsuperscript{159} The decisionmaker can promote a society’s underlying policies to the extent that the rulemakers originally intended. In this case, the judge can provide safety to those people using public streets even though an intoxicated driver may not have exceeded the legal limit for BAC.
\item \textsuperscript{160} Sullivan, \textit{supra} note 127, at 67.
\end{itemize}
firm rather than deny...[the] responsibility” of decisionmakers to promote justice through their use of discretion.

Although the use of standards and the addition of judicial discretion bring a decrease in predictability, such a situation may promote desired results in terms of members of society following a general policy itself. People will not know the exact line between what is legal and what is illegal, due both to the addition of judicial discretion and the vague nature of standards themselves. They will not be able to intentionally keep their actions narrowly within the confines of a rule in order to further their own interests. They will therefore have to act according to the intended purpose of the standard or risk acting in a manner which a judge may interpret as unacceptable under their society's standards. Also, people will no longer possess the tools to exploit the less informed. Everyone must act within the confines of the standard that their society deems appropriate, instead of one party having the advantage of knowledge of a line clearly defined by law.

However, the lack of clarity surrounding standards may, of course, lead to undesirable behavior. Some people may fail to act in a cautious manner and stray too far into the gray area of the standard which leads to illegal behavior. Also, rulemakers may find that persons who wish to conform to the standards of their society and behave in a legal manner may be unable to interpret exactly what those standards are. Unintentional

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161. Id. (quoting Frank I. Michelman, The Supreme Court, 1985 Term — Foreword: Traces of Self-Government, 100 HARV. L. REV. 4, 34 (1986)).
162. HART, JR. & SACKS, supra note 126, at 140. The meaning of standards such as “reckless,” “generally fair and equitable,” and “due care” depends upon the feeling for the particular type of situation of the individual standard-applier. Different appliers may apply them differently. The standard thus represents a much looser form of control than the rule. Id.
163. ALEXANDER & SHERWIN, supra note 126, at 29. Standards “contain vague or controversial moral or evaluative terms in their formulations. Persons attempting to conform to standards must be able to resolve for themselves the application of these vague or controversial moral and evaluative terms.” Id.
165. Sullivan, supra note 127, at 66.
166. Korobkin, supra note 124, at 37.
167. ALEXANDER & SHERWIN, supra note 126, at 29 (“The standards do not improve their ability to determine what they need to determine.”); KELMAN,
illegal behavior would become a problem or legal behavior may be foreborn.\textsuperscript{168} As a result of the lack of clarity, people may also have less ability to plan their actions\textsuperscript{169} due to fear of breaking the law. The lack of clarity would, in effect, force people to act in an overly cautious manner by curtailing their behavior\textsuperscript{170} thereby stunting the growth of society. Caused by a lack of clarity within the law, these are obviously not the desired results of an effective legal system.\textsuperscript{171}

Finally, the decrease in the clarity of the laws which embody the legal system can also result in a threat to the application of justice itself.\textsuperscript{172} With the decreased clarity of the law, judges would have a greater opportunity to inject their own biases or politics into the decision-making process. The judge’s decisions may change on a case-by-case basis, pursuant to the judge’s whim\textsuperscript{173} through a manipulation of the law, thereby resulting in the dissimilar treatment of similar people.\textsuperscript{174} Furthermore, even if a judge’s own biases do not effect the decision-making process, the politics of the society may prove to be a compelling force

\textsuperscript{supra} note 128, at 43 (“Standards are bad because they give people no clear warning about the consequences of their behavior.”).

\textsuperscript{168} Korobkin, \textit{supra} note 124, at 37; see also id. at 59 n.41 (citing Robert E. King & Cass R. Sunstein, \textit{Doing Without Speed Limits}, 79 B.U. L. REV. 155, 164–67 (1999) (“Montana’s ‘reasonable and prudent’ speeding law increased unreasonable and imprudent driving because of lack of clarity.”)). If parties require a higher authority to interpret standards because they cannot resolve for themselves the applications of the moral principles that they subscribe to, then the parties will not be helped by these standards. ALEXANDER & SHERWIN, \textit{supra} note 126, at 29.

\textsuperscript{169} KELMAN, \textit{supra} note 128, at 43.

\textsuperscript{170} Korobkin, \textit{supra} note 124, at 38; Sullivan, \textit{supra} note 127, at 123 n.257 (citing \textit{Bagett v. Biltitt}, 377 U.S. 360, 372 (1964) (“Those…sensitive to the perils posed by … indefinite language, avoid the risk…only by restricting their conduct to that which is unquestionably safe.”)).

\textsuperscript{171} Korobkin, \textit{supra} note 124, at 33 (“If precisely drawn law encourages socially desirable behavior and discourages socially undesirable behavior.”).

\textsuperscript{172} POSNER, \textit{supra} note 137, at 220 (“[Uncertainty] may invite judicial corruption, whether financial or political, by making it difficult for outsiders to determine whether a judicial decision is in accordance with the law.”); see also KELMAN, \textit{supra} note 128, at 41 (“Standards are bad because they are subject to arbitrary and/or prejudicial enforcement.”).

\textsuperscript{173} Korobkin, \textit{supra} note 124, at 38; see also KELMAN, \textit{supra} note 128, at 62 (discussing the fear of a judges whim, “A reliance on standards is premised on the hope of moral dialogue and ultimate consensus.”).

\textsuperscript{174} Bell, \textit{supra} note 138, at 201.
upon the judge's interpretation and application of the standard. Surmounting political pressure, either from those in power who put the judge on the bench or even from constituents, may force the judge to make a decision one way or another whether or not that discretion is the just one. In such a situation, whether or not discretion allows justice to prevail becomes a formidable question.

C. Theories Applying the Rules vs. Standards Debate

1. Crystals and Mud

Property law has always had a basis of clearly defined and well-known doctrines, or rules. However, these rules often find themselves transformed into less distinct rules, or even standards, through exceptions and other forms of judicial discretion. Therefore, just as is common in other areas of law, within property law at any given time we will find both rules and standards. In her presentation of the structural and practical differences between rules and standards in property law Professor Carol M. Rose argues:

rules (crystals) will better order arms-length transactions among players in the marketplace, whereas standards (mud) will better order transactions among players known to each other through repeat or customary interchange. In other words, [the theory calls for] individualism (rules or crystals) for the market [and] altruism (standards or mud) for the mercantile family or clan.

As stated above, the result of the differences between rules and standards is that the use of each of these legal directives becomes advantageous in markedly distinct scenarios. Rules are better suited in a marketplace setting where parties do not deal with each other regularly and may not ever deal with each other again. In that instance, the advantage is the availability

176. Id. at 578. In fact, it is a circular process which continues with legislatures shoring up the now “muddied” rules with new more precise rules — and the process continues. Id.
177. Sullivan, supra note 127, at 123 n.283 (discussing Rose, supra note 175).
of clear guidelines that allow people to protect themselves from the trickery of others. Standards are seen as a better fit in a family or clan-like group. In such an organization, parties that deal with each other on a regular basis, thereby building relationships, can take advantage of more fluid guidelines by which to interact. People develop a sense of whom they can trust, and therefore take business or social risks, and whom they cannot trust, and therefore either choose to not deal with the other party at all or deal under a heightened sense of cautiousness.

2. Vices and Virtues

Professor Pierre J. Schlag identifies what he refers to as “perhaps the most common understanding of the rules v. standards dialectic,” which are the virtues and vices that come with selecting either a rule or standard as a form of legal order. When certainty, uniformity, stability, and security are required, rules are more prudent; when flexibility, individualization, open-endedness, and dynamism are important, standards are thought to be the more suitable choice. The determining factor when deciding whether to implement rules or standards becomes which of these competing virtues are most desirable for a particular circumstance.

Professor Schlag also lists the objectives that a legal directive can serve: deterrence, allocation, communication, delegation, and inducement. When attempting to promote these possible objectives by creating a particular law, however, the entity crafting the legal directive should not ignore competing objectives which are often also desired. To state two, the competing objective of delegation is control; that of deterrence is empowerment. So, for example, when a legal directive is promulgated to promote delegation, the rule-making body must be mindful of not relinquishing all control, thereby foiling any sense of a hierarchal system. Likewise, when a directive is

179. Id.
180. Id. at 401.
181. Id.
182. Id. at 402.
183. Schlag, supra note 178, at 402.
promulgated to deter behavior, the rule-making body must also allow members of the society enough freedom to act, so that growth continues and the society is not stifled.

3. Costs

a. Frequency of Occurrence

The decision behind the promulgation of rules and standards also presents several economic questions. Promulgating rules is often more costly ex ante than standards, whereas standards are more costly to apply ex post. Rules require information and discussion in order to determine what conduct is permissible. Standards require decisionmakers to undertake a determination of the legal issues as well as the facts. Thus, the decision to utilize rules or standards often depends on the resources needed to effectuate each.

Professor Lisa Kaplow asserts that the answer to the question of whether to promulgate rules for a particular set of circumstances or to allow standards to provide the direction to a society and its legal decision-making body often lies in a determination of the frequency of the occurrence. When conduct is frequent, it is prudent to formulate a rule to provide direction on the acceptable kind of conduct. The cost of the promulgating such a rule is justified since it will save resources in the long run due to the repetitiveness of the adjudicating process. When conduct is infrequent, allowing a judge to apply a standard to an uncommon situation is often the more economic and therefore the more appropriate approach. Society will apply fewer resources to those particular circumstances in the aggregate.

184. Kaplow, supra note 133, at 557.
185. Id. at 559; Korobkin, supra note 124, at 32.
186. Kaplow, supra note 133, at 559; Korobkin, supra note 124, at 32.
187. Kaplow, supra note 133, at 621 (“The central factor influencing the desirability of rules and standards is the frequency with which a law will govern conduct.”).
188. Korobkin, supra note 124, at 33 (“In such circumstances, the cost of matching a set of facts to a legal consequence is borne only once, when the rule is promulgated, and the cost is then amortized over a large number of transactions.”).
because devising the standard will require few resources and the infrequency of the conduct will ensure that the costs of applying the standard do not become excessive. Once the rule-making body decides whether the conduct in question occurs frequently, it can then decide to utilize a rule or rely on a standard.

b. Homogeneity and Behavior Deterred

Closely related to the question of the frequency that a conflict will arise and the cost of promulgating legal directives is the characteristic of homogeneity. When factual circumstances are homogeneous, rules tend to work well, because a single line denoting acceptable and unacceptable behavior addresses many situations well and will work in its intended manner more often than not. However, when events are heterogeneous with numerous factors leading up to a particular behavior, rules will often have over- and under-inclusive results exposing the shortcomings and unfairness of a rigid legal system. Thus standards are often more appropriate when dealing with varying sets of circumstances, because a standard allows a decision-maker to keep in mind many more factors when deciding a matter.

V. THE RULES AND STANDARDS DEBATE APPLIED TO THE STABILITY AND GROWTH PACT

As stated, the purpose of this Note is to offer some insight on the EMU by asking the question of which legal form, either rule or standard, would most likely provide a stable (and prosper-

189. Id. (“Standards will be relatively desirable when a type of dispute arises infrequently, because the larger initial investment in rule promulgation will be amortized over fewer disputes, and, conversely case-by-case analysis of the problem will not result in an excessive duplication of effort.”).

190. Cost may not be the EU’s primary concern of whether to promulgate rules or standards. It may not even be a concern of the EU at all. However, like the analogy highlighting the differences of a mercantile and a clan, taking the frequency of an occurrence into consideration also provides helpful insights for the EU relating to the implementation of rules and standards.

191. Korobkin, supra note 124, at 37.

192. Bell, supra note 138, at 226 n.47 (noting REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 49–50 (1975) (“Universal enforcement of rigid rules can lead to anarchic and disruptive results.”)).
ous) future for the EMU. The Stability and Growth Pact, the vehicle for the analysis of rules and standards, places several requirements on the subscribing Member States. This Note will determine whether the provisions in our example, the Stability and Growth Pact, are rules or standards. The Note will initially consider each legal directive individually; though, it will later concentrate on the most relevant provisions of the Pact in continuing the analysis of the pros and cons of each provision. In considering the rules versus standards debate as applied to the Stability and Growth Pact this Note will offer conclusions as to which may better serve the goals of the EMU.

A. The Stability and Growth Pact – Rule or Standard

The section of the Pact describing the sanctions that the ECOFIN Counsel will impose is the Pact’s most standard-like section. The sanctions require that the Member States make an initial non-interest bearing deposit of .2 to .5% of the country’s GDP.\(^\text{193}\) The Pact does not mention exactly what criteria the ECOFIN Council will use to determine whether a Member State will pay .2% or .5% or some variable in between. Most likely, the Council will consider the severity of the violation (how far the Member States budget exceeds the 3% budgetary limit) and the surrounding circumstances of the violation in terms of the economic situation within the country. This sequence of events exemplifies the definition of a standard in that the decisionmaker will be able to consider all applicable facts\(^\text{194}\) when deciding the party’s fate.

The central element of the Stability and Growth Pact generally requires members to keep their budgets “close to balance or in surplus.” This wording allows for wide interpretation. Within the first three years of the Pact’s existence, the requirement has been interpreted to mean that Member States should “avoid excessive budget deficit during a cyclical downturn.” The directive seems standard–like in that it would avoid over- and under-inclusiveness by allowing more discretion than would a rule.\(^\text{195}\) In this case, European Commission should be

\(^{193}\) Meyers & Levine, supra note 41, at *8.

\(^{194}\) Hanks et al., supra note 124, at 486–88.

\(^{195}\) Id.
able to consider all applicable facts\textsuperscript{196} when considering a Member State’s budgetary position. However, the directive becomes more rule-like as one considers the requirements which underlie the “excessive budget deficit” standard. In order for Member States to “avoid an excessive budget” they must keep their budget deficits below the 3% limit for a given year. The limit has developed into a prerequisite for a member’s budget to be “close to balance or in surplus.”\textsuperscript{197} This strictly interpreted limit leads to the conclusion that the directive is actually more rule-like upon its application.

Council Regulation 1466/97 dealing with the surveillance of the budgetary positions and the economic policies\textsuperscript{198} of Member States is most certainly rule-like in its nature. A legal directive is rule-like when it binds a decisionmaker to respond to a case in a determinate way due to the presence of surrounding triggering facts.\textsuperscript{199} This Regulation is a rule in that it carefully delineates the requirements for submitting each member’s stability program. As stated previously, the Regulation outlines the rules concerning the content, submission, examination, and monitoring of those programs.\textsuperscript{200} The Regulation leaves little question to how a Member State must report its financial performance and plans and what should be included in them. If Member States do not follow the prescribed method of reporting, the ECOFIN Counsel could easily find a violation by quickly referring to these rules.

Council Regulation 1467/97 concerning the speed and clarification of the implementation of the excessive deficit procedure is also rule-like in nature. As previously mentioned, the regulation provides a clear method for prompt corrective actions by the ECOFIN Council within a carefully pre-determined timetable.\textsuperscript{201} The regulation outlines the times by which the Council must submit recommendations to a Member State as well as periods by which the Member State’s government must act upon those recommendations. Again, should the Member State not follow the recommendations by the Council in a sufficient or

\begin{thebibliography}{99}
\bibitem{196} Id.
\bibitem{197} Frandsen, \textit{supra} note 39.
\bibitem{198} Lembergen & Wachenfeld, \textit{supra} note 7, at 31–32.
\bibitem{199} HANKS ET AL., \textit{supra} note 124, at 486–88.
\bibitem{200} Lembergen & Wachenfeld, \textit{supra} note 7, at 32.
\bibitem{201} Id.
\end{thebibliography}
timely manner, the violation will easily reveal itself against the backdrop of these clearly defined rules.

B. Should the Pact Consist of Rules or Standards?

For purposes of the analysis on whether standards or rules are more suitable to the EMU, this Note will concentrate on the more substantive requirements of the Stability and Growth Pact concerning the deficit limit provision (a rule) and the sanctioning provision (a standard). These provisions deal with a Member State’s financial performance under the Pact and the Council’s required response, respectively.

1. Keeping Budget Deficits Close to Balance

As mentioned previously, Professor Goebel has identified the objective of the Pact as deterrence. As shown by applying Professor Schlag’s “vices and virtues” theory to Professor Goebel’s view, if the “virtue” of deterrence is the goal, legislatures should act cautiously in order to sufficiently provide members of their society with the freedom to continue to act productively. Legislatures should not stop socially or economically desirable conduct. While they must not deter certain conduct, they must do so in a way that empowers the parties within their domain to perform other desired conduct.

The Pact will surely deter Member States from allowing budget deficits from growing excessively. The reason for keeping budget deficits lower is to bring stability and credibility to the newly introduced euro. To the prudent mind, rules seem to be the answer for a legal system which requires certainty, stability, and security. Rules provide the clarity needed for sta-

202. The two regulations supporting the Council Resolution outlining the budgetary limits are more procedural than substantive in nature in that they outline the reporting requirements of the Member State and the time constraints of both the ECOFIN Council and the Member States. They provide the European Commission and the ECOFIN Council great oversight as to a country’s financial performance. They also provide clear and executable goals both for the Member States in relation to the reporting process under the Pact as well as for the Council in proposing corrections in case of a violation. Thus, although procedural in nature, the regulations are surely important in regard to the Pact’s effectiveness and overall success.

203. Goebel, supra note 42, at *4.

204. Mundell, supra note 1.
bility, which is undoubtedly a large (likely the underlying) reason why the EU decided to promulgate such clear rules for the Pact.\textsuperscript{205}

However, the EU will most certainly have to take other factors into consideration. This is a European Monetary “Union,” which now consists of twelve different nations with twelve very different economies, cultures and governments.\textsuperscript{206} According to Professor Schlag, the EU should allow for some degree of flexibility and individualization so that the economies of the Member States and the European economy do not stagnate while boasting the euro. Therefore, open-endedness and dynamism should also play a part in the EMU’s legal order. While keeping the euro stable by deterring excessive deficits, the Pact should also provide for empowerment in order to allow the governments to accept some level of risk and the ability to maneuver within their economies in order to spur growth.\textsuperscript{207}

According to the current limit on budget deficits under the Pact, Member States will most likely try to keep their deficits well below 3\% in order not to receive a warning from the ECOFIN Counsel as Germany did early this year when its budget deficit was at 2.7\%.\textsuperscript{208} But this type of deterrence, in fact, may stifle economies when they have opportunities to grow or further hinder them when they have come upon times of recession as we see occurring in Germany today. If this is the effect that the Pact has, it is lacking the type of empowerment Professor Schlag calls for in his analysis.\textsuperscript{209} The EU could grant

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205. Lembergen & Wachenfeld, supra note 7, at 31.
207. Schlag, supra note 178, at 402.
208. Sesit, supra note 91.
209. However, the costs in question deal with whether or not the deterring of behavior by an over-inclusive rule will be a great loss to society. There may always exist the situation where deterrence of certain behavior is not a dire consequence. See Sullivan, supra note 127, at 63 (“A utilitarian argument for rules reflects the judgment that the gains they elicit from the ‘industrious and rational’ will exceed the losses from the antisocial exploitation of bright lines.”); Kennedy, supra note 123, at 1689 (“If we adopt a rule, it is because of a judgment that this kind of arbitrariness is less serious than the arbitrariness and uncertainty that would result from empowering the official to apply the standard of “free will” directly to the facts of each case.”).
\end{footnotesize}
the Member States of the EMU the empowerment needed to run their complex economies by either promulgating a less strict rule (for example, a 4 or 5 percent budget deficit ceiling) or possibly a “reasonableness”\textsuperscript{210} standard.

Professor Rose’s “crystals and mud” analysis of rules and standards seems to lead the EU down a similar path towards more standard-like directives. Rose asserts that rules are more suited to a market setting where parties do not deal with each other regularly, while standards are a better fit in a family or clan-like group where parties do deal with each other on a regular basis.\textsuperscript{211} There are obviously differences between property law, to which Professor Rose applied the rules vs. standards debate, and international monetary law, which governs the EMU. However, recognizing the different dynamics, which exist within the “marketplace” and the “clan,” as presented by Professor Rose, poses interesting insights into the analysis of the EU and its Pact. To say that the Members States of EU have had differences in the past is an understatement; however, the Members are undoubtedly not “strangers” in any sense of the word. To the contrary, they more closely represent members of a “mercantile family” or “clan,” and the EU (once referred to as the European “Community”) surely embodies the “customary” interchange, which exists within such entities — especially on an economic level. The purpose behind forming the EU was to create a customs union where barriers to trade where eliminated thus producing a region where cross-border trade is commonplace.\textsuperscript{212} Though there have been political differences the nations which make up the EU and people who live within those nations deal with their continental neighbors on a regular basis (be it for business or social purposes) and have done so for centuries. Due to the effect of globalization on the world economy, if the EU desires to continue to have a leadership role on the global stage, its members must continue to turn to each other and provide market share and other financial

\textsuperscript{210} Pound, \textit{supra} note 150.

\textsuperscript{211} Sullivan, \textit{supra} note 127, at 123 n.283.

support to their neighbors. This reliance on each other is a fact of the EU’s existence today, and it is unlikely to change in the near or distant future.

The fact that the European continent is a region built inherently on international relationships, which the formation of the EU has strengthened, leads to an additional point under Professor Rose’s theory. Of course a Member State may, in fair dealing, try to get the “best deal” for itself from these “family” type circumstances. However, in drawing an analogy to a marketplace setting, it is unlikely that one nation will intentionally “scheme” to break an EU treatise and run away with the “loot,” as the situation may occur in a marketplace. Rather, due to proximity and practicality the Member State will have to remain within the “family” of states and most likely make reparations to the other members for its violations. The most likely scenario is that a Member State would not risk alienation from its neighboring states by deliberately or even negligently breaking an EU law, because the next day, that Member State would still have to turn to its fellow members for the same market share and financial support. The risk of alienation from its neighbors is great and likely to pose serious consequences to consider before undertaking such actions. Therefore, Member States, as part of a larger economic family, should not need the added protection that rules afford.

213. Although the goal of the Pact is to promote economic stability within the region (as well as to bring stability to the euro) the ultimate goal is to achieve prominence on the world economic stage. The EU wants the euro to become an international currency. Europeans want foreign investors to invest in their countries. Of course, such interchanges can no longer be likened to a “family” relationship. The continuance and growth of the euro by foreigners as well as foreign investment within the EU surely represent more closely the situation present in a marketplace setting where parties are dealing at arms-length with each other, possibly never to deal with each other again (at least for a long time). Such a scenario seems to call for the use of rules in order to ensure fair dealing on both sides of the transaction. Nevertheless, the situation does not affect the interaction between the members of the EU. The World Trade Organization promulgates international trade laws to be followed by its members in order to promote fair dealing. However, the EU still has the responsibility of prescribing laws within its borders in order to regulate the economic performance of its own Member States, and in so doing, it has the luxury of implementing standards due to their interdependent relations with each other.
Under Professor Rose’s description of the “crystals and mud” theory, it seems that the best form of legislation for such a close-knit organization is the standard.\textsuperscript{214} A mud, or a standards-based regime takes into consideration ongoing interaction between parties over time (as is present in the EU) more than a rules-based regime. Crystals or rules as the medium for contact between strangers are “hardhearted and mean spirited [in that] they glorify the attitude of self-centeredness and ‘me first.’”\textsuperscript{215} To the contrary, Member States must work together over time in order to complement and assist one another in building each other’s economies. While one nation is in recession another may be in a state of inflation. In another three or four years, the tide may turn and the Members may find themselves on the opposite side of the scale looking at the very problems that its neighbor had just faced. The situation should allow Member States greater ability to deal with each other’s shortcomings together.

The imprudence of initially attempting to devise a rule \textit{ex ante} for eleven (or more) nations with different and changing economies offers further support for the use of standards in the EMU. A rule promulgated \textit{ex ante} would lead to less cooperative dialogue between nations, more finger pointing, as well as more nations looking out for themselves.\textsuperscript{216} Considering that the very point of establishing the EU was to foster a climate of cooperation, it is evident that finger pointing is not the goal of the Pact. A “reasonable budget deficit” in light of a Member State’s economic situation may have been a more manageable solution and, in fact, a solution tailored more to an organization whose members rely so heavily on each other. Thus, Member State’s lasting relationships and future common goals could allow them to follow a standards-based regime without getting into a spitting contest. In fact, a standard-like directive may promote

\textsuperscript{214} KELMAN, supra note 128, at 16 (“The rule form is said to express the substantive ideals of those committed to self–reliance and individualism…. The willingness to resort to the standard form is said to correspond to the embrace of substantive altruism.”).

\textsuperscript{215} Rose, supra note 175, at 605.

\textsuperscript{216} Id. at 607 (“To adopt a rhetoric of crystal rules, then, seems to be a way of denying the necessary dialog character of human interactions and acting as if we can compel human behavior by a perfect specification of unchanging rights and obligations.”).
even greater cooperation between Member States as an out-
growth of the need to work together and understand each oth-
ers’ economic circumstances — or else risk failure. As contin-
ued application of standards often leads to clearly defined direc-
tives, the EU could eventually set more stringent rules that are
proven suitable to its Members’ needs once the ECOFIN Coun-
sel and the Member States have tested the viability of the sta-
bility programs and the standards underlying the Pact. There-
fore, the crystals and mud theory lends to the idea that the EU
should have relied more heavily on standards for the substan-
tive parts of the Pact.

However, looking at the situation through a costs and fre-
cuency analysis leads to quite contrary views. As long as the
Stability and Growth Pact aims to regulate the Member States
within the EMU, the task of balancing budgets will always be a
concern of nations within the EU. Moreover, as long as the
EMU is a functioning institution, the ECOFIN Counsel will
continuously be evaluating at least twelve stability programs
(and three convergence programs for the non-participating EU
countries). The rule approach will allow the Counsel to evalu-
ate each Member State each year without having to establish
new law each time a unique situation arises. It must merely
monitor the budgets in order to determine whether or not a na-
tion has kept its budget close to balance and begin the sanction-
ing process when the facts tell them otherwise. In this regard
the EU was correct in promulgating the Pact as a specifically
delineated rule.

When considering the costs of promulgating a rule or a stan-
dard, however, the EU should also have taken into account the
homogeneity factor, as well as the differences of the nations
comprising the EMU. The EU has already witnessed several of
its Members States flirting with violations of the 3% budget
deficit limit and there will undoubtedly be more. For example,
Portugal has already broken the 3% budget deficit limit and
Germany is coming dangerously close to doing the same. With
so many different business practices and economic systems

217. See KELMAN, supra note 128, at 62 (“A reliance on standards is prem-
ised on the hope of moral dialogue and ultimate consensus.”).

218. Furthermore, they can do all of this without allowing politics or na-
tional biases to interfere with the evaluation process.
within the EMU, the chances are low that even two states which break the deficit limit will do so for exactly the same reasons. Thus, taking the complex factors of politics, culture, and even economics into account the Member States of the EMU are indeed not homogeneous. Some of these nations which fail to keep their budget deficits below 3% GDP may surely deserve to pay sanctions for frivolous spending and relying on their neighbors, while other Members may not deserve to pay sanctions upon consideration of their underlying economic circumstances. This rule–like provision may very well call for the imposition of sanctions in an over-inclusive and undeserved manner.

This point leads us to some of the basic reasons behind employing a rule or standard, which the EU most likely considered as well. First, as the budget deficit provision of the Pact is a rule, it is also predictable. As we have seen with Portugal and Germany, the European Commission can easily determine when a Member State is not abiding by the pact and not keeping its budget close to balance because their deficits are close to 3% GDP. When Portugal and Germany received their initial warnings about their budgetary performance, there was little talk about politics or biases from the ECOFIN Counsel. As it stands, the Pact leaves little room for politics or biases. Lastly, since the two nations knew that they had exceeded the budgetary limits, they could not be surprised about receiving the warnings. Moreover, Portugal and Germany have not been able to keep their deficits below 3% GDP, but other Member States, knowing exactly what the limit is, have been able to keep their budgets low by planning accordingly.

As long as Member States plan to (and do) keep their budgets well below the 3% ceiling, the rule will seem effective. However, when members begin breaching the 3% ceiling, which is the present state of affairs, the Pact virtually ties the hands of the European Commission and the ECOFIN Counsel, for it leaves little discretion to its decisionmakers. The two bodies will not have the liberty to look into the underlying circumstances in order to determine the reasons for the spending. Once the Member State has breached the 3% ceiling, the Commission and the Counsel will have to abide by the process prescribed by the Pact and require the nation to pay sanctions or render the Pact insignificant. The preciseness of the rule may also lead to less than desirable behavior on the part of the
members of the EMU. Member States may begin to “plan” to keep their budgets below 3% limit — just not so far below the limit. If many members begin to flirt with the 3% ceiling simultaneously, the consequences could prove drastic for the EMU. Nations may begin to feel that a warning is harmless as long as they do not venture into the realm where sanctions are imposed. Conversely, a nation that is struggling to keep its economy afloat will find that a mere warning is of small consequences. If a nation is struggling and on the verge of a major recession, the nation’s political and economic leader will have to make a choice between allowing their economy to slide further into recession or complying with the Pact and facing large sanctions.

Requiring Member States to abide by a standard such as “reasonable budget deficit” would help to avoid this situation. The Commission and Counsel would be able to look at the nation’s stability program and use discretion to determine whether the problem emerged through the lack of frugality within the nation’s decisionmakers or through unavoidable economic cycles. The EU could avoid over- and under-inclusiveness much more readily. The two bodies would no longer have to allow the “similar treatment of dissimilar [nations].” Furthermore, there would be no clear line for Member States to skirt. Member States would have to act within the “spirit” of the Pact. Nations would not have to keep their budgets “close to balance” merely by keeping their deficits below 3% GDP. The Commission and Counsel would have the tools and the authority to determine whether a nation is clearly abusing its right to keep a deficit when that nation has no dire need to keep a deficit, whether or not the nation is below the 3% limit.

The lack of a definitive interpretation of the Pact, however, could very well lead to the problems of uncertainty described in Part IV. Nations could delve into the gray area of what is a “reasonable budget deficit” and try to show that they do in fact have a reasonable deficit given their country’s circumstances. Such a situation could lead to a heated dialogue between Member States and the EU possibly causing ever increasing political consequences. Other members, without clearer guidance, would lose the ability to make sufficient economic plans for the fu-

ture. Nations would tend to be even more cautious with their budgets than they would have with a clearly defined deficit ceiling. This would stunt productivity and harm the economy. Lastly, the European Commission and the ECOFIN Counsel may also begin making decisions based on political pressure or personal biases.

Obviously, the pros and cons of using standards or rules are extremely intertwined and difficult to divide. Perhaps the best way to answer the rules or standards question is to consider some of the recent developments of the Pact. Given that the Pact is already three years old and has been through several of its own cycles of “ups” and “downs,” the luxury of hindsight exists. On September 9, 2002, the German government stated that its country would honor its budgetary promises and comply with the Pact. At the same time, the French Prime Minister claimed that there was growth in his country’s economy which would allow the government to keep its deficit below the 3% limit. If these promises had become reality, even in the face of hard economic times and surmounting political pressure, praise would have fallen upon the authors of the Pact for their foresight and conviction in sticking by their rule. In his book, A Guide to Critical Legal Studies, Professor Mark Kelman asserts a point that is of particular interest in light of those recent budgetary promises by members of the EMU. In a section titled, “General Arguments for Rules and for Standards,” Professor Kelman states that if legislatures promulgate rules in order to promote a certain type of behavior (or to deter another type of behavior), members of society will eventually conform to the rule and act in the prescribed manner. In this situation, rules, as Professor Kelman expresses, are “dynamically stabilizing.”

Members may initially “toe the line” set by the rule or even vio-

220. Hofheinz & Rhoads, supra note 99.
222. KELMAN, supra note 128.
223. KELMAN, supra note 128, at 44 (“If decision makers are willing to put up with disquieting results in particular cases, people will gradually learn to comply with the rules.”). Professor Kelman also reveals that some consider rules “dynamically destabilizing” when people begin to “walk the line” and when the rules grow to accommodate exceptions. Id. In these instances, rules fail to promote a society’s policies, either because they are so clear, or because they become difficult to interpret. Id.
late the rule to see how serious the rule will be enforced and interpreted. In this instance the theory is based on how firmly the factions interpreting and enforcing the rule stand. Once the legislature promulgates the rule, even an austere rule, if the rule is both enforced and interpreted strictly, in time, the members of the society will follow the rule.\footnote{224} In turn, people will learn to comply with the rules rather than break the law,\footnote{225} thereby eventually achieving the policy makers’ intended result. If the EU stands by the Pact and its Members subsequently abide by its strict provisions Professor Kelman’s theory will certainly prove to be a formula for success — at least with the Stability and Growth Pact.\footnote{226}

However, the promises that the Members States make and whether they can perform according to those promises are entirely different. In fact, when Germany made its pronouncement that its deficit was 3.5%, analysts argued that it was improbable that Germany could bounce back from its recent economic downturn and recover enough to ensure that its budget deficit would remain above 3% GDP for the year.\footnote{227} Moreover, on September 25, 2002, the European Commission announced that it would allow the EU’s 15 Member States until 2006 to bring their budgets closer to balance.\footnote{228} The decision came as a result of the likelihood that France, Germany, Italy, and Portugal will each not meet their budget-deficit commitments as promised.\footnote{229}

Despite the empty promises of the Member States, their inability to meet the requirements of the Pact clearly shows that the initial rule lacked the flexibility required for the complexity of the EU’s goal and the diversity of the EU itself. First, if a rule-making body finds itself needing to promulgate another new rule because the initial rule was not sufficient, the situa-

\footnote{224} Id. 
\footnote{225} Id. 
\footnote{226} It is unlikely that every country in the EMU will have a balanced budget despite the recent economic forecasts. However, eight out of the eleven are sure to have a balanced budget which shows that the provisions are realistic and can be followed. Oyama, Commission to Extend Target, supra note 107. 
\footnote{227} Hofheinz & Rhoads, supra note 99 (“To assume that the economy will improve enough in the second half to bring the deficit in line is unrealistic.”). 
\footnote{228} James, supra note 72; Oyama, Commission to Extend Target, supra note 107. 
\footnote{229} Id.
tion negates any cost benefit and efficiency reasons that the rule-making body relied upon when it decided what type of directive to promulgate in the first place. Second, the benefits of predictability, avoidance of political pressure, and the ability to plan are also curtailed. Although the decision to establish a new date to achieve a balance budget seemed necessary in order to help several members of the EMU, it is not difficult to see why the other Member States who have been able to abide by their plans to keep their budget deficits below 3% GDP and meet the initial balanced budget date in 2004 are wondering why they were working so hard to comply with this agreement. Those countries which remain in compliance are understandably upset, which means that not only will the situation lead to questions about the “stability” of the EMU, but it will cause internal political conflict as well. Still, the main point to be taken could simply be that the EU should not have tried to promulgate a strict rule to undertake such a new and enormous venture.

2. Imposing Sanctions

Lastly, the fact that the EU imported more flexibility into the provision of the Stability and Growth Pact dealing with sanctions, shows that it recognized the need to establish a standard-like directive for such an unpredictable situation. Of course, any possibility of sanctions which a Member State may have to sustain will prove to be a substantial burden especially to a nation who is hurt economically. However, the flexibility provided by the 2%–5% range of the sanction provision, can remove some of the sting caused by the harshness of an inflexible rule. As stated earlier, factors which allow the ECOFIN Counsel to de-

230. Graff, supra note 66. Finance Ministers from those countries “that have crimped and clawed to get their budgets in line” were not pleased to put it politely. Id.
231. Reforming the EU’s Stability Pact?, supra note 121.

The fact is [ ] that there never has been a currency union between sovereign nations on this scale before, so no one can be certain what kind of fiscal rules will work best. ‘Learning by doing’ is an excellent idea in a kindergarten. But it is a slightly alarming was of running the European economy.

Id.
232. Though it may not be enough flexibility.
termine the severity of the violation will most likely weigh in the final decision of how large to make the sanctions. Like a judge who is sentencing a defendant, the Counsel will undoubtedly consider many factors when applying the punishment. The standard allows those sanctions to be levied in a measured degree and affords the EU the latitude to deal with the economic differences between member states. As the provision is a standard-like directive, promulgated to deal with numerous situations, it should prove to be an effective provision of the Pact in deterring large deficits.

VI. CONCLUSION

Ultimately, the main priority of the EU in employing the Stability and Growth Pact is the stability of the euro. As rules are often necessary to provide government interests their proper force, the EU may have been correct to utilize rules to seek their objectives. With the use of standards and more fact-specific decisions, the likelihood increases that the decision-maker would have found (possibly valid) sympathetic reasons for growing deficits that outweigh the EU’s long-term interests, thereby creating political pressures. The EU surely considered these very implications when formulating the rule-like provisions of the Pact. However, the reality is that a diverse group of nations is trying for the first time to conduct its economic affairs under one currency and one economy after several hundreds of years of acting under separate currencies and economies. Although a rule may have seemed to be the correct solution when considering the desired result, the underlying circumstances in the case of the EMU may not allow for the successful implementation of such a “rule.”

Paul de Grauwe, an economics professor and prior candidate to join European Central Bank, has long held that “a rigid system of target numbers was a poor way to guide budgetary policy.” Some economists have proposed that the EU allow its members to exceed the 3% deficit when the economic situation

233. Graff, supra note 66. Mr. de Grauwe had been quoted as asking, “Why should people believe that 3% is some magic number?...No other country has such a rule.” Id. De Grauwe also sums up the present effect of the Pact in that although it is a defensive mechanism meant to guard against inflations, it is a dangerous tool in time of deflation. Id.
in their countries calls for such measures by the government.\footnote{Hofheinz & Rhoads, supra note 99.}

These economists suggest that the EU focus instead on the “structural deficit, which is based on spending policies unaffected by economic changes.”\footnote{Id.} That way, the ECOFIN Counsel can judge the Member State based on the prudence of a government’s management of its economy and not on the economic situation which the government finds itself. Others have proposed raising the deficit limit from 3 to 5% GDP.\footnote{Reforming the EU’s Stability Pact?, supra note 121.} Still others have gone as far as to say the EU should eliminate the deficit limit and replace it with a “commitment to keep official borrowing within agreed limits.”\footnote{Hofheinz & Rhoads, supra note 99.} The answer to whether or not the EU decides to transform the Pact into a more flexible standard-based law\footnote{Re-engineering the Euro, supra note 74 (“At the very least, the stability pact should be redefined in terms of the fiscal balance adjusted over the economic cycle. That would give governments more room to respond to a slump.”).} lies a few years away, because the EU cannot amend the Pact until 2005.\footnote{Restoring Europe’s Smile, The Economist, Oct. 26, 2002, available at 2002 WL 7247929 (“Europe will rub along with the pact and semi-comply, destroying many jobs, albeit not as many as strict obedience would destroy.”).} Abandoning the rules now would only risk international mockery.\footnote{Id.}

In promulgating the Stability and Growth Pact, the EU may have given too much weight to the opinion of its international partners. The concern was that if the Pact was too flexible, the world would take neither the EMU nor the euro seriously. The EU may have been looking more outwardly than it should have, when its initial focus should have been to devise an internal solution. The EU should not have worried about the world’s initial opinion of the euro and of the Pact. No other entity coerced the EU into this undertaking. The Member States themselves chose to form the EMU. The EU flourished due to the success of open trading. However, the EU as a whole knew its only recourse to remain relevant in the global marketplace was for its members to turn again to each other in order to form an
ever tighter economic relationship.\textsuperscript{241} In doing so, the members should have based their goal of establishing a new currency on that relationship, while recognizing their differences to devise a standard-based regime which could deal with those differences while effectively stabilizing the euro. Instead, it seems the EU was attempting to back itself into a good situation. It was trying to capture the world’s confidence in the EMU and the euro by promulgating a strict Pact.\textsuperscript{242} It should have devised a more workable standard that would have ensured the continued economic stability of the region while the Member States worked together in order to achieve that stability.\textsuperscript{243} Such a result would have undoubtedly captured the world’s confidence.

Still, the root cause behind the strictness of the Pact and the fear of instability was the ongoing distrust that the members of the EU have for each other and their inability to lay their differences aside.\textsuperscript{244} It is ironic that the Pact is, itself, supposed to be a “political totem.”\textsuperscript{245} It aims to show the rest of the world that the nations of the EMU will not cheat on one another.\textsuperscript{246} The result, however, has lead to what the EU has been trying to avoid all along — a mockery. This group of nations mutually and amicably decided to form an economic union to preserve and promote their own economic future. That some Member States which fought so hard for a tighter union would not trust their neighbors (as well as the EU’s own abilities to govern) enough to allow a standard-based regime to compensate for ob-

\textsuperscript{241} That relationship thus far has been an economic relationship. However, even the initial motive behind creating an economic relationship and therefore interdependence in Europe developed shortly after World War II to prevent war between European nations. Looking towards the future, the limits (or possibilities) for further political unification within the EU lie only in the present ambitions of each Member States representatives. “A common foreign policy... is a cherished goal.” \textit{Id}.
\textsuperscript{242} \textit{Re-engineering the Euro}, supra note 74 (“The central charge increasingly made against the euro and all its works is that the institutions and policy instruments agreed upon in Maastricht a decade ago were all intended to bear down upon an inflationary threat that no longer exists.”).
\textsuperscript{243} Though the use of standards would generally lead to some degree of uncertainty, this does not necessarily mean that a lack of stability will inevitably follow.
\textsuperscript{244} \textit{Reforming the EU’s Stability Pact?}, supra note 121.
\textsuperscript{245} \textit{Id}.
\textsuperscript{246} \textit{Id}. 
vious and unavoidable economic differences is itself a puzzling notion.

In short, in devising the Stability and Growth Pact, the EU should have relied on its own ability to perform as a “Union” instead of promulgating a rule in order to force its members to conform with the requirements of the EMU. The differences between the Member States, which comprise the EMU, make it difficult to devise one rule that will suit eleven or more nations. Of course the rules and standards debate will lead a legal theorist (and maybe an economic strategist) down many paths that will arguably provide a similar number of pros and cons for each side. Furthermore, competing theories discussing the rules and standards debate, from the standpoint of costs to the standpoint of deterrence, lead to varying results. However, the fact remains that when considering the advantages and disadvantages of using rules or standards, the EU should do so while remembering that it has the luxury of the ongoing relationships which its members have built with each other over many years247 as well as mutual reliance (which each state has chosen to promote) on each other’s economies. In promulgating internal directives for the members of the EMU, these nations may want to consider the use of a more flexible standard,248 and the reliance on their long–term relationships, before they turn to more rigid rules. That way, not only will the EU win the confidence of the world in its endeavors such as the establishment of the euro, but it will also command the world’s admiration in its ability to work together.

Paul Libretta

247. Restoring Europe’s Smile, supra note 239 (“Politics will still be messy, [but] politics should be messy.”).
248. Id. (“A strong, explicit and enforceable principle of subsidiarity is the core of the constitution we would like to see.”).

* B.S. 1994, United States Military Academy; J.D. 2003, Brooklyn Law School. I dedicate this Note to my parents, Bernadette and Michael Libretta, and thank them for their unending support. I would also like to thank Professor Claire R. Kelly of Brooklyn Law School for offering her guidance and expertise throughout this process and Justine M. Urbaites, my friend and colleague, for her invaluable editing assistance during an earlier draft of this note.
A HISTORICAL PERSPECTIVE OF THE
SHARIA PROJECT & A CROSS-
CULTURAL AND SELF-
DETERMINATION APPROACH TO
RESOLVING THE SHARIA PROJECT IN
NIGERIA

I. INTRODUCTION

The end of colonialism in numerous former colonial countries has brought rapid changes in the understanding and expansion of international human rights law. African nations have been particularly affected by the international community's post-colonial attempts to implement international human rights law and standards into these newly formed nations' domestic legal structures. Nigeria is a model example of such an African nation. Nigeria has persistently amended its national constitution, underlying domestic legal structure and international relationships to comply with international law and to respond to the international community's allegations of international human rights violations. For example, in an attempt to pacify the international human rights community, Nigeria has signed numerous human rights conventions. Also, following

3. Nigeria is a party to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, Convention on the Rights of the Child (signed but not yet ratified the Optional Protocol to the CRC as of Dec. 2002), Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”) (signed but not yet ratified the Protocol to CEDAW as of Dec. 2002), the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention Relating to the Status of Refugees and Protocol, the Rome Statute of the International Criminal Court and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. AMNESTY INTERNATIONAL
years of military dictatorship, Nigeria recently formed a newly
democratic elected government.¹

Despite the post-colonial Nigerian government’s attempts to
create a unified democratic federal government in support of
human rights, dissidence continues to grow within its internal
borders.⁵ Since the presidential election of General Olusegun
Obasanjo in 1999, twelve states in Nigeria’s Northern region
have questioned the validity of the Nigerian federal government
by adopting and extending Sharia⁶ into their penal codes.⁷ The
current political problems, associated with the adoption and
expansion of Sharia, developed into the Sharia Project — as it
has come to be known among legal scholars — when Zamfara
State enacted the Sharia Courts (Administration of Justice and
Certain Consequential Changes) Law of 1999.⁸ Subsequently,

REPORT 2003, SELECTED INTERNATIONAL HUMAN RIGHTS TREATIES (Dec. 31,

news.bbc.co.uk/1/hi/world/africa/280552.stm. General Olusegun Obasanjo won
the first democratic presidential election on March 1, 1999, following 15 years
of military rule. Id.

5. A.B. Mahmoud, The Sharia Project in Northern Nigeria and Govern-
ance in a Federal Nigeria, 1 (Mar. 8–10, 2002) (unpublished paper to the con-
ference on “Globalization, State Capacity, and Self-Determination in Muslim
Contexts,” organized by the Centre for Global International and Regional
Studies, University of California Santa Cruz)(on file with author). “Any as-
sumptions about the settled nature of Nigeria’s constitutional and legal order
have now been upturned by the events of October 1999 in Zamfara State
which triggered a wave of criminal justice reforms across the predominantly
Muslim States of Northern Nigeria.” Id.

6. Sharia, or Islamic law, is a religious set of principles based on the four
pillars of Islam: Qu’ran (Islamic Holy text), the Sunna (teachings of the
Prophet Mohammed), the Ulama (religious scholars) and the Qiyas (case law).
Ismene Zarifis, Rights of Religious Minorities in Nigeria, 10 HUM. RTS. BR. 22,
22 (2002).

7. M. Ozonnia Ojielo, Human Rights and Sharia’h Justice in Nigeria, 9
are Zamfara State, Niger State, Kano State, Katsina State, Borno State, Yobe
State, Kebbi State, Bauchi State, Kaduna State, Sokoto State, Jigawa State
and Gombe State. Mobolaji E. Aluko, The Unfizzled Sharia Vector in the Nige-
ria, Dawudo.com (Mar. 18, 2002), at http://Dawodu.com (last visited Sept. 2,
2003) [hereinafter Aluko, The Unfizzled Sharia Vector].

8. Ojielo, supra note 7, at 137.

Under this law, the application of Shari’a law in Zamfara State was
extended to cover certain Shari’a crimes and punishments (such as
eleven other Northern states followed suit. The expansion of Sharia into the penal law created uproar within Nigeria and the international community. In particular, two fairly recent events have brought the Sharia Project to the front lines of the international community: the adultery case of a Nigerian Muslim woman, Amina Lawal, and the riots caused by the Miss World Competition. In fact, the Sharia Project has become so devastating to the peace and unification of the Nigerian Federal Republic that it has been referred to as “tragic” by internationally respected Nigerian author Chinua Achebe.

amputation, stoning to death and flogging) that were not included in the current penal code as drafted after independence. New higher and upper courts were created by this law, which also expanded the jurisdiction of the courts to include civil as well as criminal matters.

9. Id. at 138; Aluko, The Unfizzled Sharia Vector, supra note 7.
10. See, e.g., Mahmoud, supra note 5; Ojielo, supra note 7; Madhavi Sunder, Piercing the Veil, 112 YALE L.J. 1399 (April 2003); BBC World News, Nigeria’s stoning appeal case fails (Nov. 22, 2002), at http://news.bbc.co.uk/1/hi/world/Africa/2202111.stm.
11. BBC World News, Nigeria woman fights stoning (July 8, 2002), at http://news.bbc.co.uk/1/hi/world/Africa/2115278.stm. Ms. Amina Lawal is a woman from the Northern Nigerian State of Katsina, who conceived a child outside of marriage — allegedly two years after her divorce from her husband. She was sentenced to death by stoning for this alleged crime by the Katsina State Sharia Court of Appeals. Her sentence has been overturned, and her case will be discussed further in Section III of this Note. Id.
12. BBC World News, Muslims Condemn Nigerian Fatwa (Nov. 29, 2002), at http://news.bbc.co.uk/2/hi/Africa/2525573.stm. Disapproval and boycotting by Nigerian Muslims over the presence of the Miss World Competition in Nigeria resulted when ThisDay newspaper writer Isioma Daniel said in an article that Prophet Mohammed may have approved of the competition and would have likely chosen a wife from the competitors. The comment infuriated Nigerian Muslims resulting in massive riots in the Northern region of Kaduna. A religious fatwa for death was also ordered by a Zamfara State official against the writer. The Nigerian government, though, refused to allow the fatwa against Ms. Daniel to be carried out and called off the Miss World Competition due to the violence and controversy surrounding the event. Id.

We have dug ourselves into Sharia; into a situation where we have become a laughing stock of the world, because we are discussing things like stoning women to death in the 21st century....Religious differences have not just been introduced. Muslims and others have al-
This Note will discuss the Sharia Project in the context of the Nigerian Federal Republic. It will attempt to clarify the roots of the Sharia Project and present some possible legal approaches to resolving the current international human rights problem resulting from the Sharia Project. Specifically, this Note will attempt to answer the question, “Is there an international response to Nigeria’s human rights violations?” Part II of this Note will discuss in detail the complicated and highly contentious political and social history of Nigeria. In particular, this section will discuss the transformation of Nigeria from a pre-colonial conglomerate of ethnic kingdoms and states to its current unified Federalist form. Finally, Part II will briefly outline the origins and sources of Nigerian Law — including the Nigerian Penal Code, the federal and state court systems, and the Nigerian Constitution. Part III will discuss the Amina Lawal case and present a more thorough understanding of Sharia. This section will also describe the Sharia Project and its origins.

Part IV will discuss the numerous constitutional and international arguments supporting and condemning the Sharia Project. Specifically, this section will look at the numerous Nigerian constitutional provisions and international treaties relevant to understanding and explaining the Sharia Project. Part V will outline the numerous possible international and Islamic legal approaches to resolving the Sharia Project. This Part will look primarily at some of the major international and Islamic theories behind the interpretation of international law and discuss a cross-cultural and self-determination approach to resolving the Sharia Project. Part VI will conclude by summarizing and attempting to reconcile the various arguments and solutions presented in this Note.

ways been there, but somehow they didn’t wipe each other out...What is happening today is that some people are using these differences to promote their ambition and this is an abuse of politics...that’s why the selfishness of the elite stands so clear[y].

Id.
II. HISTORICAL BACKGROUND

A. Introduction

The modern Nigerian State came into existence with the end of British colonial rule in 1960. The modern Nigerian legal system is based upon the English common law, statutory law, Islamic law, and customary law. Today, Nigeria is structured as a Federal Republic (Federalist model). The Federalism model resulted from the political elite’s attempts to reconcile the multi-ethnicity and self-determination problems that plagued Nigeria following the end of colonial rule and the start of independence. Initially, Federalism found widespread support among Nigeria’s diverse ethnic and religious communities. These communities viewed Federalism as the only viable option if Nigeria was to attain independence as a single unit. However, the recent problems surrounding the Sharia Project have Nigerians questioning the Federalism model.

In addition to the conflict surrounding the Sharia Project, the history of pre-colonial Niger and the post-colonial Nigerian Republic has been tumultuous and complicated, following the nation through a multitude of geographic, political, and governmental changes. These changes and Nigerian history are essential to understanding the roots of the Sharia Project.

16. Mutua, supra note 1, at 1156.
17. Id.
18. Id.
19. Id.
20. Mobalaji E. Aluko, Trouble in the Nigerian House of Othman Dan Bello, Aug. 28, 2002, at http://www.onlinenigeria.com/articles/ad.asp?blurb=36 (last visited Oct. 2, 2003) [hereinafter Aluko, Trouble in the Nigerian House]. In the forty-one years Nigeria has been independent; it has spent twenty-nine of those years under military rule. The last twelve years have seen major internal “fractionalization.” Id.
B. Pre-British and British-Raj Eras

1. Pre-British

Prior to 1500, Nigeria consisted of numerous states, identified today by the existence of various ancient city-states and ethnic kingdoms. The period between the 16th and the 19th centuries saw increasing turmoil between several ethnic factions. The turning point, though, for modern Nigeria and the Islamic North came primarily in the 1800s. This period saw the expansion of Islam, resulting from Usman dan Fodio’s holy war and the slow colonial conquest of Nigeria by the British Empire.

2. British-Raj Era

The British gained control over the majority of present-day Nigeria by 1862. Prior to 1900, despite British influence, Ni-

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21. History of Nigeria, Country Reports Website, supra note 14. Examples of these ancient city-states and ethnic kingdoms are the Yoruba Kingdoms, Ebo Kingdoms, Hausa cities, Nupe, Kanem and various cities around Lake Chad. Id.
22. Id.
23. Id.

In the 1790s a Fulani reformer, Usman dan Fodio, encouraged the Hausa people to revolt against their kings whom he accused of being little more than pagans. He led Hausa and Fulani troops in holy war (jihad) which swept through the Hausa States and Yorubaland to the South and established a Theocratic Empire based in Sokoto (northwest Nigeria), that lasted until it was defeated by the British at the turn of the 20th century.

Id. (emphasis added).

First, the Islamic holy war of Usman dan Fodio set the stage for the establishment of the Islamic empire in present-day Nigeria, as well as a large portion of East and West Africa. Second, between 1807 and the 1860's the British Empire de-legalized the Atlantic slave trade, resulting in the empire's greater intervention in the markets and government of Southern Nigeria. The empire's intervention coupled with the expansion of Usman dan Fodio's movement helped lead to the colonial conquest of Nigeria in the 19th century.

Id.
geria maintained a conglomerate of distinct ethnic and tribal states and territories that were simply overseen by the British Empire. But, on January 1, 1900, the British managed to impose a complete stronghold over the various territories. In 1914, the British Empire, under Sir Lord Frederick Lugard, finally formed a single unit, called Niger, by uniting the northern territories, southern territories and the colony of Lagos.

The period between 1944 and 1959 was also an intense era marked by political agitation and struggle for independence by ethnic Nigerians. In 1954 Nigeria became a federation of four regions. Under this federation, the government structure continued the three-tiered government model used during the early years of British rule. Also, between 1951 and 1959, the Nigerian government showed increased deference to, and shared power with, local politicians.

C. Post-Colonialism

Nigeria gained independence from Great Britain on October 1, 1960, and formally became a republic on October 1, 1963. In January 1966, the Nigerian military staged a coup and displaced the civilian government. The military government then created individual states in 1967, following a failed attempt at

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28. Id.
29. Madza, supra note 26, at 21. Sir Lord Frederick Lugard was the Governor General who oversaw the formation of the Niger State under the British Empire. Id.
30. Id.
32. Madza, supra note 26, at 21. “Nigeria became a federation in 1954. The country was divided into the Northern, Eastern, Western, and later, Midwestern regions.” Id.
33. Id. at 21.
34. Aluko, Trouble in the Nigerian House, supra note 20. This sharing of power was established through a series of Constitutions including the Richards Constitution of 1944, the MacPherson Constitution of 1951, the Lyttleton Constitution of 1954 and the Willinks Minority Commission report of 1957. Id.
35. Id. Upon gaining independence, Nigeria became a Federation under a parliamentary system of law, a prime minister, a ceremonial governor-general and regional governors. This government structure was formed under the Queen of England, who stood as the ceremonial Head of State. Id.
36. Id.
creating a Westminster Model\textsuperscript{37} of government.\textsuperscript{38} The creation of the states was a landmark decision for the Nigerian government as it attempted to reunite and strengthen a slowly disintegrating nation, resulting from years of political instability.\textsuperscript{39} Thirteen years of military rule ended with the adoption of the 1979 Nigerian Federal Constitution ("1979 Constitution") on October 1, 1979.\textsuperscript{40} By the time the 1979 Constitution was adopted, Nigeria had grown into nineteen different states.\textsuperscript{41} Nevertheless, the initial peace and structure established by the 1979 Constitution came to a halt with another military coup, this time lasting four years.\textsuperscript{42} Between 1979 and 1999 Nigeria went through numerous changes, including a slow increase in the number of states, eventually totaling thirty-six by 1999 (the current number), and constantly changing government heads.\textsuperscript{43}

On May 29, 1999, Chief Olusegun Obasanjo won his first presidential term in the nation's first democratic elections.\textsuperscript{44}

\textsuperscript{37} The Westminster Model of government is the type of parliamentary structure found in Great Britain, Canada and Australia. The Westminster Model is considered a "responsible government": a political system where the executive government, the Cabinet and the Ministry are drawn from, and accountable to, the legislative branch. The model varies from country to country. Westminster System, Australian Politics, at http://www.australianpolitics.com/democracy/terms/Westminster-system.shtml (last visited Oct. 2, 2003).

\textsuperscript{38} Madza, supra note 26, at 21. The Westminster Model failed because it was too homogeneous a system for such a diverse nation as Nigeria. Id.

\textsuperscript{39} Id.

\textsuperscript{40} Id. The 1979 Nigerian Federal Constitution was modeled after the United States Constitution and set up a similar legislative system with a Senate and a House of Representatives at the federal and state levels. Id.

\textsuperscript{41} Aluko, Trouble in the Nigerian House, supra note 20.

\textsuperscript{42} Id.

\textsuperscript{43} Id. President Shaghari (Oct. 1979–Dec. 1983) was displaced by a military coup, following a reign by Buhari for eighteen months, who was also subsequently displaced by another military coup. Babangida followed and stepped down in 1993. Shonoken then rose to power but was displaced again by a coup after only 81 days in office. Finally, Abdusalami Abubakar followed Shonoken's rule until the first democratic elections saw Chief Olusegun Obasanjo win the Presidency in 1999. Id.


Chief Obasanjo was elected as the first civilian president of Nigeria in 1999, after 16 years of dictatorial military rule ending with the death of General Sani Abacha in 1998, and the assumption of the of-
Obasanjo won as the result of overwhelming support from two of Nigeria’s main ethnic groups, the Hausa-Fulanis and the Ibos.\textsuperscript{45} Since Obasanjo’s election, Nigeria has gone through another period of great internal strife and displeasure with the Obasanjo government. Specifically, Nigerians who voted Obasanjo into office are disenchanted with his government and have accused him of corruption and favoritism.\textsuperscript{46} As this Note will discuss, the internal displeasure with Obasanjo’s government is one of the major reasons for the secession of various Northern states from the 1999 Federal Nigerian Constitution (“1999 Constitution”) and the adoption of Sharia penal law.\textsuperscript{47}

\textbf{D. The Common Law in Nigeria}

The British introduced the common law in Nigeria on January 1, 1900 through the Foreign Jurisdiction Act of 1830. This Act allowed the Governor General to make laws for the colonies and to enact the Interpretation Act, which permitted existing laws in England on January 1, 1900 to apply to Nigeria.\textsuperscript{48} Prior to the emergence of Head of State by General Abdulsalami Abubakar, Obasanjo himself was the first military man to have handed power peacefully to a civilian elected president in 1979, having served as military Head of State from 1976-79.\textsuperscript{Id.}

Obasanjo recently won a second term in the April 19, 2003 presidential elections with sixty percent of the votes. The 2003 elections were the first civilian-run presidential elections since the end of military rule. The elections results were contested heavily by opposition parties and EU observers cited “serious irregularities” in the voting. Nevertheless, Obasanjo is still the current Nigerian President.\textsuperscript{BBC, Timeline: Nigeria (N.D.), at http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/1/hi/world/africa/country_profiles/1067695.stm (last visited Oct. 2, 2003).}

\textsuperscript{45.} Onyeani, \textit{supra} note 44. The Hausa-Fulani have historically controlled the North, the Ibo the East, and the Yoruba the West. These three groups are the three major ethnic groups in Nigeria. There have been constant power struggles between the three groups since independence.\textsuperscript{Mutua, \textit{supra} note 1, at 1156. Oddly enough, Obasanjo’s own ethnic group, the Yorubas voted overwhelmingly against him.\textsuperscript{Onyeani, \textit{supra} note 44.}

\textsuperscript{46.} Onyeani, \textit{supra} note 44.

\textsuperscript{47.} Aluko, \textit{Trouble in the Nigerian House, supra} note 20. “Thus it has been asserted that the official introduction of expanded forms of Sharia Islamic law into twelve far Northern (Muslim) States since Obasanjo’s commencement as president is mere ‘political Sharia’ — a reaction and counter-weight to Obasanjo’s government’s actions.”\textsuperscript{Id.}

\textsuperscript{48.} Madza, \textit{supra} note 26, at 21. The Interpretation Act is also referred to as the Common Law Application Law. The Act allowed names, locations,
to independence, other English acts were enacted that applied directly to the Nigerian State. 49

Post-independence, due to populous uproar over the culturally divergent English laws, the regions enacted numerous acts that reflected the various indigenous values of the regions over the English laws. 50 Despite these acts, some English laws remain in effect today. 51 However, the most effective period of post-independence Nigerian law-reform was between 1970 and 1979. 52 It was during this period that some of the most long-standing and essential laws were enacted. 53

E. The Penal law in Nigeria

Currently, Nigeria has two separate criminal codes: the Northern Nigerian Penal Code and the Southern Nigerian Criminal Code. 54 Although the two separate codes are similar in content, the Northern Penal Code reflects the Islamic values of the predominantly Muslim North, while the Southern Criminal Code reflects the colonial Christian values of the predominantly Christian population in the South. 55 The distinction between the Northern and Southern criminal codes was created when Southern Nigeria became self-governing in 1956 and Northern Nigeria became self-governing in 1959. 56 In particular, the predominantly Muslim North wanted to adopt a penal code that more closely reflected their Islamic values. 57 But, the British did not completely accept Northern Nigeria’s self-governing counties, and office and penalties to be changed. Numerous Nigerian regions adopted and incorporated the Act into their local laws. Id.

49. Id. at 21.
50. Id.
51. Id.
52. Madza, supra note 26, at 21.
53. Id. For example, the National Youth Service Act of 1973, the Land Reform Act of 1972, the Marriage Act of 1968 and the Companies Act. Id.
55. Id. CRLP REPORT, supra note 15, at 78.
56. Madza, supra note 26, at 21. Northern Nigeria was uncomfortable with the clashing of their customary laws with the British common law and as a result Northern Nigeria declared self-governing status and passed Islamic legislation. Id.
57. Id.
status or their desire to adopt such a penal code.\textsuperscript{58} They felt that a nation-wide adoption of an Islamic penal code would alienate the large non-Muslim Nigerian community.\textsuperscript{59} As a result, the British enacted a separate modified penal code for the North, which remained in effect until the creation of the individual states in 1967.\textsuperscript{60} Currently, each Nigerian state has its own penal laws but the Northern states reflect some common similarities with the original pre-1967 penal code, while the Southern states reflect some common similarities with the British Criminal Code.\textsuperscript{61}

\textbf{F. The Nigerian Courts}

Prior to independence, the Privy Council of the British House of Lords heard appellate cases from the West African Court.\textsuperscript{62} The Nigerian Federal Court system has three levels of courts. The highest level is the Federal Supreme Court of Nigeria. Post independence, but prior to Nigeria gaining republican status, the Federal Supreme Court of Nigeria heard appellate cases.\textsuperscript{63} Immediately following its change to republican status, the Federal Supreme Court of Nigeria became the Supreme Court of Nigeria.\textsuperscript{64} The Supreme Court has original and exclusive jurisdiction over disputes between states and between the states and the federal government.\textsuperscript{65} Most importantly, this Court is the final arbiter in determining the constitutionality of any laws or executive orders passed by the individual states or the federal government.\textsuperscript{66} The Court has a maximum of fifteen justices, three of whom must be learned in both Islamic law and customary law.\textsuperscript{67} The intermediate courts are the Federal High

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{58} Id.
\item \textsuperscript{59} Id.
\item \textsuperscript{60} Id. The Northern Penal Code differs from the Southern Criminal Code in numerous ways. For example, adultery is a crime in the North punishable by death or lashings, while it is only a tort in the South. Also, murder has a much broader definition in the Criminal Code then in the Penal Code. \textit{Id.}
\item \textsuperscript{61} Id.
\item \textsuperscript{62} Id.
\item \textsuperscript{63} Madza, \textit{supra} note 26, at 23.
\item \textsuperscript{64} Id. at 23.
\item \textsuperscript{65} Id.
\item \textsuperscript{66} Id.
\item \textsuperscript{67} Id.
\end{itemize}
\end{footnotesize}
Courts\textsuperscript{68} and the State High Courts are the lowest courts.\textsuperscript{69} State High Courts have unlimited jurisdiction over all civil matters, but they do not have supervisory or appellate jurisdiction over Sharia Courts.\textsuperscript{70}

Separate from the federal government court system, some states adopted the Sharia Court of Appeals and the Customary Court of Appeals.\textsuperscript{71} The Sharia Court of Appeals was established during the 1978 Constituent Assembly.\textsuperscript{72} In this complicated legal structure, Islamic and customary laws are given full status within the recognized federal and state judiciary systems.\textsuperscript{73} The Nigerian court system also has a Federal and State Judiciary Commission that supports both the state and national court levels.\textsuperscript{74}

The Sharia Court of Appeals has created chaos within the Nigerian court system. Until recently, the Sharia Court of Appeals only had appellate jurisdiction over civil matters.\textsuperscript{75} On October 27, 1999, the Sharia Project developed into the political problem it is today.\textsuperscript{76} The problem began when the Northern state of Zamfara extended Sharia to not only encompass civil law matters but penal law matters as well.\textsuperscript{77} Eleven other Northern states followed suit.\textsuperscript{78} Sharia advocates argue that

\begin{itemize}
  \item \textsuperscript{69} Id.
  \item \textsuperscript{70} Id.
  \item \textsuperscript{71} Id.
  \item \textsuperscript{73} Id.
  \item \textsuperscript{74} Id. The purpose of the Commission is to advise on matters relating to judicial qualifications and judicial conduct. \textit{Id.}
  \item \textsuperscript{75} Ibrahim, supra note 72, at 8–9.
  \item \textsuperscript{76} Id. at 9.
  \item \textsuperscript{77} Id.
  \item \textsuperscript{78} See supra note 7 for a list of Northern Nigerian States that have adopted Sharia thus far.
\end{itemize}
the Sharia Project is permissible because the 1999 Constitution left the establishment of Sharia courts and customary courts open to the desire of the states.\textsuperscript{79} Currently, there is no legal theory under Nigerian national law or international human rights law for overturning a religious court's holding, except by the prescribed court methods.\textsuperscript{80}

\textbf{G. The Nigerian Constitution}

The Nigerian Constitution has an extensive history of instability and evolution. Nigeria has had nine different constitutions since the inception of the first Nigerian Constitution in 1922.\textsuperscript{81} The most recent version of the Nigerian Constitution was created in 1999.\textsuperscript{82} The 1999 Constitution, which is based on the 1979 Constitution,\textsuperscript{83} came into existence shortly after the election of President Obasanjo’s first term on May 29, 1999.\textsuperscript{84} The 1979 Constitution is of great social\textsuperscript{85} and political importance to the modern structure of the Nigerian Republic because it was the first time a new presidential style Federal Constitution was adopted by the Nigerian Republic.\textsuperscript{86} The 1999 version went even further than the 1979 Constitution by expanding the federal powers of Nigeria through the addition of five major sections: Separation of Powers, Federalism, Bill of Rights, Party

\textsuperscript{79} NIG. CONST. (Constitution of the Federal Republic of Nigeria, 1999) §§ 275–77. Sharia advocates’ constitutional arguments will be discussed later in Part IV.A of this Note.

\textsuperscript{80} Sunder, supra note 10, at 1405.


\textsuperscript{82} NIG. CONST. (Constitution of the Federal Republic of Nigeria, 1999).

\textsuperscript{83} Butler, supra note 68, at 733. The 1979 Nigerian Constitution, adopted on October 1, 1979, is considered by some scholars to be the most definitive statement of the goals of democratic nationhood, national unity in human diversity, and commitment to Civil and Human Rights since the United States Constitution and Declaration of Independence. \textit{Id.}


\textsuperscript{85} Butler, supra note 68, at 745. “Nigeria pursues the unification of the nation (through the 1979 Constitution) by making all types of racial, ethnic, religious, sexual, or regional discrimination unconstitutional.” \textit{Id.}

\textsuperscript{86} Nigeria Index, Institut für öffentliches Recht-Aktuell, supra note 84.
System, and Secularism. The addition of these five sections has created dissent in Nigeria and uproar in the Sharia Project.

III. THE AMINA LAWAL CASE, SHARIA, AND THE SHARIA PROJECT

A. Amina Lawal Case

The Amina Lawal case created a huge controversy in the international human rights community. The case represents the types of human rights violations that the expansion of Sharia in Northern Nigeria can generate, and the types of violations the Nigerian federal government wishes to deter. Ms. Lawal is a woman from the Northern state of Katsina. A local Sharia court sentenced Amina to death by stoning for allegedly committing adultery. The official charges read to the accused by the Bakori Sharia court read, “Amina admitted that she had committed adultery with Yahaya, which had resulted in the birth of the baby.” Yahaya denied the adultery accusation and stated that there were no witnesses to prove he had committed adultery. Instead, he accused Ms. Lawal of making a false accusation. The court then simply asked Yahaya to swear on the Qu’ran that he was not guilty, which he did, and then the court passed a guilty judgment on Ms. Lawal and discharged Yahaya. The court passed a guilty judgment on Ms. Lawal based on the following evidence:

Her confession of Zina is implied through the birth of a child out of wedlock, the evidence of the baby presented by the

88. Katsina is one of the Northern states that has extended the scope of Sharia. See supra note 7.
89. Legal Memorandum from Aliyu Musa Yauri & Hauwa Ibrahim, The Case of Ms. Lawal Lawal Kurami: Sentenced to Death by Stoning for Adultery (reporting on the decision of The Sharia Court in Bakori to the Upper Sharia Court in Funtua, Katsina State) (on file with author) [hereinafter Legal Memo]. Ms. Lawal was sentenced on March 22, 2002 by the Sharia court in Bakori. Id.
90. Id. Yahaya was the man accused of committing adultery with Ms. Lawal. Yahaya only admitted that he had been courting Ms. Lawal for marriage. Id.
91. Id.
92. Id.
93. Id. The court passed a guilty judgment on February 20, 2002. Id.
prosecution, the charge against her which is contrary to the Suratul Bani Ismaila Verse 32 of the Holy Qu’ran where Allah (SWT) said, “And come not near unto adultery. Lo! It is an abomination and an evil way.”

On March 22, 2002, the judge sentenced Ms. Lawal to death by stoning — based upon passages from the book Al-Risala, the Hadith of Arba’una, and Section 125(b) of the Katsina State Laws. The judge then stated that Ms. Lawal would be scheduled for execution after she had weaned her child. Following an appeal by Ms. Lawal, the Sharia Appellate Court of Funtua affirmed the lower court’s decision on August 19, 2002. The case was then appealed to the Katsina State Sharia Court of Appeals.

In the interim, the Nigerian government received intense pressure from various international human rights organizations and foreign governments. Both Italy and Brazil had even offered asylum to Ms. Lawal. Despite the international pressure, Nigerian Justice Minister Kanu Agabi declared that Nigerian law did not allow the federal government to interfere with

94. Id. Zina is unlawful sexual intercourse. See infra n.117.
95. Id.

[T]he book Al-Risala reads: “Whoever being of complete faculties commits the offence of zina should be stoned until he/she dies.” Furthermore, he cited the Hadith of Arba-una which was narrated by Ibn Masud on page 70 verse 14 where the Prophet is said to have said: “The blood of a Muslim can only shed validly in 3 circumstances: 1) a married person, male or female, (or who was once married) who commits adultery.”

Id. A hadith is the narration about the life of the Prophet and about the behaviors and practices he approved. Sunna and Hadith, USC Website, at http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah (last visited Oct. 2, 2003).
96. Id.
98. Id.
100. Id.
the Islamic court’s ruling, unless an appeal reached the Federal Supreme Court in Abuja.¹⁰¹

Following a great amount of international pressure and numerous appeals, the Katsina State Sharia Court of Appeals finally overturned the lower court’s conviction of Ms. Lawal in a four to one decision on September 25, 2003.¹⁰² The ruling was a relief for both Ms. Lawal and the Nigerian government. The ruling relieved President Obasanjo from having to overrule a negative decision by the Sharia court on constitutional grounds, which would have further antagonized the Muslim North.¹⁰³

The court overturned the lower court’s decision largely based on procedural and substantive irregularities, finding that: ¹⁰⁴ (1) the lower court had been wrong in not allowing Ms. Lawal’s retraction of her earlier confession of guilt; (2) Ms. Lawal’s first confession of guilt was invalid because it was uttered only once, instead of four times as required by Islamic law; (3) the first trial was invalid because only one judge presided over the case instead of the requisite three; (4) the police who arrested Ms. Lawal produced no witnesses to the fornication; and (5) the court found validity in defense counsel’s “sleeping embryo theor[y].”¹⁰⁵ Arguably, from a human rights perspective, the grounds for her final not guilty judgment were as questionable as the grounds for her initial conviction, albeit the final result was more just. Despite the positive outcome of Ms. Lawal’s Case, Sharia still exists as means of criminal enforcement in Northern Nigeria, and the Sharia Project is far from resolved.

¹⁰³. Id.
¹⁰⁴. Id.
¹⁰⁵. Id. The sleeping embryo theory is a theory which states that under certain interpretations of Sharia, an embryo can be in gestation for up to five years, which means that Amina’s baby could have been fathered by Amina’s former husband. Id.
B. Sharia and the Sharia Project in Nigeria

1. Sharia

“Islam rightly means submission to the will of God.”

Sharia is the law of Islam.

Since 1978, Sharia has been a major actor in the struggle for civil and political rights in Nigeria.

Nigerians are predominately of the Sunni tradition of Islam, and practice a specific school of Islamic law known as the Maliki school of thought.

The Maliki School of Islamic jurisprudence

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106. Ojielo, supra note 7, at 143.
108. Ibrahim, supra note 72, at 8.
109. See Ojielo, supra note 7, at 132.

The Sunni tradition, which today comprises approximately 85-90 percent of all Muslims, differs from Shia tradition, which comprises the remainder of the Muslim world. The distinction between the two traditions essentially derives from different approaches to governance. The Sunni believe, based on specific provisions of the Qu’ran and the Sunna, that the Muslim people are to be governed by consensus (ijma’) through an elected Head of State, the khalifa, according to democratic principles. The Shia, however, believe that the leader of Islam, whom they refer to as the imam rather than the khalifa, must be a descendant of the Prophet. The concept is the basis for a hereditary hierarchy in the Shia tradition.


The Maliki school of thought was founded by Abd Allah Malik ibn Anas (ca. 715-95), a leading jurist from Medina. Malik ibn Anas is said to have particularly regarded as important the old pre-form of legal school of Medina as the “city of the prophet” and the legal discourse of the local jurists. The Maliki school which emerged as a countercurrent to the Hanifite school spread mainly to North Africa — Tunisia, Algeria and Morocco — Spain and to several areas in West Africa as well as Central Africa. Today, the Maliki school may also be found in Upper Egypt, Mauritania, Nigeria, West Africa, Kuwait and Bahrain. Apart from the four sources of jurisprudence as established by ash-Shafii, the Maliki school of law additionally recognizes legal decisions based on judgments more conducive to the public interest.

provides that a person is presumed guilty until proven innocent.\textsuperscript{110}

Sharia is a set of religious principles based upon four sacred Islamic pillars of law and practice: "Qu’ran (Islamic holy text), the Sunna (teachings of the Prophet Mohammed, the Ulama (religious scholars), and the Qiyas (case law)."\textsuperscript{111} It is a guide by which Muslims and Muslim societies resolve disputes, and by which they can live their lives according to the word of Allah.\textsuperscript{112} It prescribes guidelines and rules for most every-day activities, from marriage to prayers to dress to crime.\textsuperscript{113} Sharia does not distinguish between "the religious and the secular, between the legal, ethical, and moral questions or between the public and private aspects of a Muslim's life."\textsuperscript{114} This lack of distinction is the crux of the problem surrounding the Sharia Project.

Sharia penal law provides a detailed set of principles, crimes, and penalties for offenders.\textsuperscript{115} For example, under Article 150 of Zamfara State's Sharia penal code, alcohol consumption mandates caning and imprisonment, and Article 127 mandates one hundred lashes for adultery if unmarried and imprisonment or death by stoning if married.\textsuperscript{116} Specifically, Sharia penal law falls under three separate categories of offenses and punishments: (1) Hudud (Qu’ranic offenses and punishments);\textsuperscript{117} (2) the law of homicide and hurt,\textsuperscript{118} and (3) Ta’zir, Siyasa\textsuperscript{119} (other

\textsuperscript{110} Ojielo, supra note 7, at 143.
\textsuperscript{111} Zarifis, supra note 6, at 22.
\textsuperscript{112} Id.
\textsuperscript{113} Khan, Nothing Is Written, supra note 107, at 277.
\textsuperscript{114} Id. at 277.
\textsuperscript{115} Zarifis, supra note 6, at 22.
\textsuperscript{116} Id.
\textsuperscript{117} DR. RUUD PETERS, EUROPEAN COMMISSION, THE REINTRODUCTION OF ISLAMIC PENAL LAW IN NORTHERN NIGERIA 8 (Sept. 2001) (A Study Conducted on Behalf of the European Commission with the assistance of Maarten Bar-ends, Lagos) (on file with author). The Qu’ranic offenses are crimes mentioned in the Qu’ran. Under Sharia, these offenses have fixed penalties, referred to as the Hudud collectively, or Hadd punishment, singularly. Id. The Qu’ranic offenses include unlawful sexual intercourse or zina, theft or sariqa, robbery or hiraba, drinking of alcohol or shrub al-khamr, and false accusation of unlawful sexual intercourse or qadf. Id.
\textsuperscript{118} Id. These offenses are only punishable if the victim or his “avengers” demand that the offender is punished. Under these offenses, if homicide or hurt is done intentionally, then the punishment is equal retaliation—“an eye for an eye.” If it is an unintentional crime or if the victims or heirs are willing
crimes that are punishable at the judge’s discretion). The Qu’ranic offenses have garnered the most attention from the international community, particularly the offense of unlawful sexual intercourse (zina), theft (sariqa), robbery (hiraba), drinking of alcohol (shrub al-khamr), and false accusation of unlawful sexual intercourse (qadf). As stated earlier, the punishment for zina, the crime at issue in the Ms. Lawal Lawal case, is stoning to death for persons who are or have ever contracted a valid marriage. For persons “who have never contracted a valid marriage, the punishment is one hundred lashes, and in addition, banishment for men.”

2. The Sharia Project

a. Background

The rise and expansion of Sharia in many Islamic countries and communities is considered by scholars to be a method of regaining Muslim cultural identity. The Sharia Project, in Nigeria, is considered by many scholars to be the Muslim North’s attempt at regaining its cultural identity; however, some Christians believe that the Sharia Project is political, not a spiritual or religious movement, and aims to marginalize to forgo the punishment, then the punishment is the payment of a diya or blood price. Id.

119. Id. These offenses are deemed sinful or undesirable by Islamic criminal code and the offenses and punishments are usually left to the discretion of the judge and possibly legislators. Id.
120. Id.
121. Id.
122. Id.
123. Id.
124. Khan, Nothing Is Written, supra note 107, at 299.

For the vast majority of Muslims, the resurgence of Islam is a resurgence of cultural identity, formal religious observance, family values, and morality. The establishment of an Islamic society is seen as requiring a personal and social transformation that is a prerequisite for true Islamic government. Effective change is to come from below through a gradual social transformation brought about by implementation of Islamic law.

Id.
Christians. Other reasons and arguments supporting and denouncing the Sharia Project are discussed later in this section.

The same issues surrounding the Sharia Project today were also the root of the most contentious debate during the 1978 Constituent Assembly. One of the primary contentions among various members of Nigeria’s Christian and Muslim communities covered during the debate concerned the proposed establishment of a Sharia Court of Appeal. The final compromise between the two groups resulted in the creation of a Sharia Court of Appeal with limited jurisdiction to civil law. However, the Sharia Project has created tension between Christians and Muslims groups again. There has been continuous opposition by Christians since Zamfara State first adopted Sharia law. For example, on February 21, 2000, in Kaduna State, a Christian anti-Sharia demonstration led to a major battle between Christians and pro-Sharia Muslims resulting in “massive killings of people on both sides, the destruction of religious buildings, general arson and the destruction of property.” The “Kaduna Conflict” led to widespread insecurity among Christian minority groups in the affected states and resulted in

126. Ibrahim, supra note 72, at 8.
127. Id. Christians viewed the establishment of the Sharia Court of Appeals as the first step toward the establishment of an Islamic State, while Muslims argued that the establishment of the Court was a natural extension of the establishment of the lower Sharia Courts, of which Muslims had been demanding the creation for a long time. Id.
128. Id. at 8–9.
129. Id. at 9.
130. BBC World News, Fifth Nigerian State Extends Sharia Law, supra note 125.
131. Ibrahim, supra note 72, at 9.

The scale of massacres and destruction was very high and thousands of people were reported to have been slaughtered like rams. People were said to have organized the killing of their neighbors simply because they belonged to a different religious order. This phenomenon led to a major religious re-structuring of the town with people congregating in areas where their religious faith had a majority of inhabitants.

Id.
members of both religious groups calling for the partition of Nigeria.\textsuperscript{132}

The Sharia Project culminated with the gathering of the National Council of State on February 29, 2000.\textsuperscript{133} The National Council directed that the Sharia laws enacted by the Northern states be retracted and that their legal systems return to the status quo ante.\textsuperscript{134} This decision was not met with much support and riots between Christians and Muslims resumed in increasing numbers in the Northern states.\textsuperscript{135} Finally, in April 2000, a committee of various Northern governors met to resolve the continuing riots and the Sharia Project.\textsuperscript{136} The committee announced: “We have resolved to uphold the whole North as one indivisible entity within the Federation of Nigeria.”\textsuperscript{137}

b. North vs. South: The Rise of the Sharia Project

The Sharia Project did not arise out of a vacuum. There exists a long history of struggle for Muslim self-identity within post-colonial Nigeria and the Nigerian political structure. Ben Nwabeuze,\textsuperscript{138} a professor of constitutional law and member of the 1978–79 Constituent Assembly, has argued that the Sharia Project is not just a debate over law, but a debate over the very nature of Nigeria.\textsuperscript{139} Defining what exactly the “very nature” of


133. Ibrahim, supra note 72, at 9–10. The National Council of State is a federal organization composed of the Head of State, former Heads of State, and State Governors. Id.

134. Id.

135. Id. at 10 ("Two members of the Council and former Heads of State, Shehu Shagari and Mohammadu Buhari, denied that such a decision had been taken and contended that Muslims were not ready to compromise on the Sharia.").

136. Id. The Governors set up a joint Muslim–Christian Committee in hopes of aligning the Sharia law with the Penal Code and in hopes of countering threats to the unity of the North and Nigeria as a whole. Id.

137. Id.

138. Ibrahim, supra note 72, at 10.

139. Id.
Nigeria means has, in fact, helped bolster the Sharia Project. The various arguments defining and explaining the Sharia Project and the “very nature” of Nigeria are described below.

For example, the reintroduction of Sharia penal law is justified by Muslims on religious grounds. Muslims believe that in order to be a good Muslim, one must live one’s life according to Islamic law, which supposes that religion, law, and the rituals of daily life are inseparably intertwined.

In addition, many Muslims welcome the extension of Sharia as a way to eliminate a wide range of social crimes and corruption, which are believed to be a product of globalization. In response to globalization’s effect on religion, as in the context of the Sharia Project, one

The distinction between civil and penal law has an important bearing on the issue of state enforcement. In civil law, the state, through its judicial arm, the courts, merely imposes its machinery as an impartial disinterested arbiter between parties in a dispute; it lacks the power to initiate the process of adjudication, and must wait until it is moved by one of the disputants. So the enforcement through the courts of the civil aspects of Sharia does not involve the support, promotion or sponsorship by the State of the Moslem religion in preference to other religions. In criminal law however, the position is entirely different. The state invokes its coercive power to arrest and detain an alleged offender, to initiate a criminal charge against him in court, and to see to the effective prosecution of the charge. Thus, as complainant, initiator of the criminal process and prosecutor, the state is an interested party. Accordingly, the enforcement by the state of the Sharia penal law under the Qu’ran involves the use of its machinery to aid, support and sponsor the Islamic religion in preference to other religions. (Quoted from The Post Express, April 13th, 2001).

Id.

140. Peters, supra note 117, at 15.
141. Id.
142. See id. See also Ibrahim, supra note 72, at 4–5.

The Sharia under this paradigm the [Sharia Project] becomes a form of Northern resistance — not to Southern Nigeria, but to the forces of globalization and to their westernizing consequences. Even the policy of the privatization of public enterprises is probably an aspect of the new globalizing ideology. Privatization in Nigeria may either lead to new transnational corporations establishing their roots or to private Southern entrepreneurs outsmarting Northerners and deepening the economic divide between the North and the South (quote[d] [in] the Weekly Trust, May 18th, 2001).

Ibrahim, supra note 72, at 18–19.
Nigerian scholar states, “[r]eligion today is a product of modernity as well as a response to it.”

Second, corruption has been an open wound for Nigeria. Nigeria is considered one of the most corrupt countries in the world. For example, former military dictator Sani Abacha allegedly stole approximately five billion dollars from the Nigerian treasury. The public has been, and continues to be, insistent on finding answers to such allegations, as for corruption. As a result, some Nigerians believe that former leaders such as Abacha are attempting to divert the public’s attention from their own past crimes by attempting to destabilize Nigeria through the Sharia Project, instead of providing truthful answers.

Third, political disaffection and a history of political monopoly by the North are also considered root causes of the expansion of Sharia. Since 1960, eight of the twelve heads of the Nigerian federal government originated from the North. These eight Northern heads governed Nigeria through thirty-six of the forty-one years of its independence. Furthermore, seven of these twelve heads of State have been Muslims, covering thirty-one of the forty-one years. But, the current federal government is headed by a southerner, Obasanjo, and many Nigerians believe that the North’s unhappiness with his presidency has resulted in the North’s attempt to regain power in Nigeria via the Sharia Project. This history of the Muslim North’s political monopoly though underlies the South’s and

143. Id. at 5.
144. Id. at 6.
145. Id. at 7.
146. Id. at 8.
147. Id. at 9.
149. Id. at 10.
150. Id. at 11.
151. Id. at 12.
152. Id. The current President is a Southerner and a Christian. See infra Part II.C.
non-Muslims’ apprehension and revolt over the *Sharia* Project.  

Specifically, the alleged “power shift” in 1999 is offered as support for the North’s adoption of *Sharia*.  

As a result of the North’s political monopoly, the people of Southern Nigeria called for the federal seat of power to shift from the North to the South in 1999.  

By chance, the realization of the Southern people’s call for power coincided with the democratic presidential elections of May 1999.  

In order to ease the growing political tensions between the North and the South, the political majority in the North created a “political pact” to not contest the presidency so that a Southerner could become president.  

However, the attempts to ease tensions were unsuccessful. The conservative southern Yoruba political elite felt that Obasanjo did not reflect the political ideals of the South, and that he was merely the North’s puppet.  

As Alex Ekwueme, former Vice-President during the Second Republic has argued (Guardian 26/1/99), the term was invented as an alternative to the concepts of zoning and rotation which had dominated the National Constitutional Conference of 1994-95. Section 229 of the 1995 Draft Constitution had stipulated that the Presidency should be rotated between the North and the South, Gubernatorial power rotated between the three Senatorial districts in each state and the Chairmanship of local governments between three zones to be created in each of them. These constitutional proposals were, however, completely discredited when it became clear that General Abacha had no intention of vacating power. He was planning and plotting to continue as “elected President.” Since he was from the Muslim North, the implication was that the zoning was therefore going to start from the North, the region that had monopolized power for a long time. The concept of power shift arose, therefore, to remove the ambiguity associated with zoning and rotation. The idea was to focus on what was presented as the essential issue of a Southerner taking over power.  

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Id.

153. Id.

154. Ibrahim, supra note 72, at 19. The term “power shift” was coined first by the Southwestern Press in Nigeria. Id.

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Id.

155. Id.

156. Id.

157. Id. at 20. The pact allocated the presidency to the Yoruba of the southwest, who presented two candidates, of which Obasanjo was the winner. Id.

158. Ibrahim, supra note 72, at 20.
Obasanjo’s power ultimately led to the creation of a Yoruba militia group called the Odua Peoples Congress (“OPC”).\textsuperscript{159} The OPC increased attacks on ethnic minority groups in Yorubaland, including Hausa Muslim settlers.\textsuperscript{160}

Obasanjo, through his “modernization policies,” infuriated the South and exacerbated the conflict by frustrating the North’s political agendas.\textsuperscript{161} The policies included the elimination of various political posts, which had been held predominantly by Northern Muslims.\textsuperscript{162} As a result, these “modernization policies” were seen as an “elimination policy” and attack on the Muslim North.\textsuperscript{163} In addition to Obasanjo’s “modernization policies,” his own overt, conservative Christian beliefs have made the more radical Muslims groups in Nigeria suspicious of his political actions, seeing them as policies intended to eliminate the Islamic stronghold in Nigeria.\textsuperscript{164} As a result, some Sharia opponents have argued that the North’s adoption and expansion of Sharia is merely “political Sharia”—a reaction and “counterweight” to Obasanjo’s modernization policies.\textsuperscript{165}

Fourth, religious sectarianism is also considered an important factor fostering the Sharia Project. The population of Nigeria is approximately one hundred twelve million; a little more than fifty percent of this population is Muslim and located in Northern Nigeria.\textsuperscript{166} The majority of this Muslim population adheres to the Sunni tradition, rather than the Shiite tradition.\textsuperscript{167} Nevertheless, over the past few years, a “radical set of

\textsuperscript{159} Id.
\textsuperscript{160} Id.
\textsuperscript{161} Id.
\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} Ibrahim, supra note 72, at 20–23; Aluko, \textit{Trouble in the Nigerian House}, supra note 20.
\textsuperscript{165} Aluko, \textit{Trouble in the Nigerian House}, supra note 20.
\textsuperscript{166} See id.; see also CRLP REPORT, supra note 15, at 75.
\textsuperscript{167} Mahmoud, supra note 5, at 10–12. The Sunni and Shi’i (Shiite) distinction of Islam arose after the death of the Prophet Mohammed. The Shiites declared Ali, Mohammed’s son-in-law, the successor of Mohammed, while Mohammed’s wife Aisha appointed another caliph to head the Sunni sect. Shi’ism began as a political movement and its adherents believed that an Imam, or religious leader, cannot be chosen by the community as Aisha chose for the Sunni. Instead, the Imam would rise to power by virtue of his inherited dignity and righteousness. Alison E. Graves, \textit{Women in Iran: Obstacles to}
fundamentalist movements” (Shiite movements) and groups have developed in Nigeria. These fundamentalist groups are pushing aggressively for the Islamicization of the North because they are impatient with the allegedly corrupt status quo of Northern state power. Thus, the Sharia Project also can be viewed as the result of sectarian competition between the Sunni and the Shiite traditions.

Fifth, the Sharia Project’s success has also been attributed to the North’s socio-economic disenfranchisement from the economic and developmental benefits afforded to the South. The unemployment rate in Nigeria is approximately twenty percent, a number that is considered dramatically understated. Unemployment and underemployment has created an environment for socio-economic disenfranchisement in Nigeria, and particularly in the North. One socio-economic factor underlying Northern socio-economic disenfranchisement has been education. For many Muslims, there is a noticeable disparity between the qualities of education offered in the North versus the South. The South’s educational systems are predominantly based in the Western tradition whereas the North’s are based in the Qu’ranic tradition. Many Nigerians believe that a Western education does not guarantee employment, but without Western education, employment is unlikely — thus those educated under the Qu’ranic tradition consider themselves at a disadvantage. In addition to the disparity in education, the uneven distribution of wealth between the wealthy oil producing Southern states and the poorer Northern states has created

168. See Mahmoud, supra note 5, at 10–12. Two groups that have pushed for the Islamization of the North include Yan Izalah and Maitatsine. The Yan Izalah, in particular, along with other groups such as the Council of Ulama, are championing the campaign to fully Islamicize the Nigerian North. Aluko, Trouble in the Nigerian House, supra note 20; Mahmoud, supra note 5, at 10–12.
169. Id.
170. Id.
172. Id.
173. Id.
174. Id.
175. Id.
further socio-economic disenfranchisement — particularly because Northern states believe that the Southern states are using their monopoly of the oil industry to control the Nigerian Republic and the Muslim population. All of these issues are considered to be relevant reasons underlying the Sharia Project’s success.

IV. CONSTITUTIONAL AND INTERNATIONAL ARGUMENTS

A. Constitutional Arguments

1. Introduction

The major provisions of the Constitution at issue are Section 38, Section 10, Section 4 and Sections 275–77. Section 38 guarantees freedom of religion, Section 10 prohibits a state religion, and Sections 4 and 277 allow the states to establish Sharia courts and expand the jurisdiction of the Sharia Court


177. NIG. CONST. (Constitution of the Federal Republic of Nigeria, 1999) §38. Section 38 of the 1999 Nigerian Constitution reads:

(1) Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.

(2) No person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if such instruction, ceremony or observance relates to a religion other than his own, or religion not approved by his parent or guardian.

(3) No religious community or denomination shall be prevented from providing religious instruction for pupils of that community or denomination in any place of education maintained wholly by that community or denomination.

(4) Nothing in this section shall entitle any person to form, take part in the activity or be a member of a secret society.

Id.

178. Id. Section 10 states: “The Government of the Federation or of a State shall not adopt any religion as state religion.” Id.

179. Mahmoud, supra note 5, at 13.
The interpretation of these sections is greatly contested in the Sharia Project.

2. Sections 10, 38, and 275–77: Sharia and State Religion

Section 10 of the 1999 Nigerian Constitution reads: “The Government of the Federation or of a State shall not adopt any religion as state religion.” This is understood to mean that neither the legislative nor executive powers of the Federation or the States may “aid, advance, foster, promote or sponsor a religion.” Sharia advocates though counter that Section 10 does not mean secularism, as the term is never actually used anywhere in the Constitution. Furthermore, advocates argue that Sharia has always been, and continues to be, an integral part of the Northern legal system, since pre-independence, and as a result, the adoption of Sharia does not amount to a state religion, and further Sharia applies only to Muslims, not non-Muslims.

Advocates further point to Section 38 of the 1999 Constitution, which expressly advocates freedom of religion (allowing Muslims the right to practice their religion, which means living according to the law of Sharia), and Sections 275–77, which empower the states to establish Sharia Courts.

In particular, advocates argue that Sections 275–77 expressly allow the creation of Sharia courts, including a Sharia Court of Appeals, which gives the court jurisdiction over personal (civil) matters, and declare that the jurisdiction is “in addition to such other jurisdiction as may be conferred upon it by the law of the state.” So how can an express constitutional allowance for Sharia Court jurisdictional expansion make the extension, adoption, and adjudication of Sharia penal law be a violation of the Constitution?

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181. Id. at § 10.
182. PETERS, supra note 117, at 32.
183. Ibrahim, supra note 72, at 12–13.
184. PETERS, supra note 117, at 32.
Sharia opponents argue that adopting and enforcing any religious penal law amounts to adopting a state religion, which is forbidden by Section 10 of the Constitution. Specifically, opponents argue that recognition of Muslim personal (civil) law is sufficient for Muslims to live according to Islam, and as a result the elimination of Sharia penal law is not a violation of Muslim’s freedom of religion, particularly since the Muslim North has lived without Sharia penal law for a significant period of time prior to 1999. Opponents further argue that since extension of Sharia into the penal law would require an intensive involvement of the State, it is in fact an adoption of a state religion within the context of the Constitution. While the State acts as a “disinterested arbiter” between parties in civil disputes, the State invokes its “coercive powers” in criminal matters; as a result, state expansion and enforcement of Sharia prejudices other religions in favor of Islam and requires the State to integrate and enforce religious law outside the confines of a secular state. Opponents also see the extension of Sharia into the penal law as creating a slippery slope, in that, once one state is permitted to extend Sharia, other states will follow. The slippery slope argument holds some power, exemplified by the fact that, to date, eleven states have followed Zamfara in adopting and extending Sharia, ultimately resulting in the slow dissolution of the 1999 Constitution. As a result, some scholars argue that opposition to the extension of Sharia is vital to hindering the rapid Islamicization of Nigeria and subsequent deviation from the arguably secular Constitution.

3. Section 4: State Legislative Powers

Section 4 of the 1999 Constitution is also of importance in understanding the Sharia Project. Section 4 divides the legislative powers of Nigeria between the Federation and the states. This allocation of powers is described in detail in the 1999 Con-

187. Peters, supra note 117, at 32; Mahmoud, supra note 5, at 13.
188. Peters, supra note 117, at 32.
189. Id.
190. Ibrahim, supra note 72, at 11.
191. See generally Ibrahim, supra note 72; Mahmoud, supra note 5; Peters, supra note 117.
192. Mahmoud, supra note 5, at 20.
193. Peters, supra note 117, at 32.
stitution's appended Executive Legislative List and the Concurrent Legislative List.\textsuperscript{194} The Executive Legislative List details sixty-eight subjects that fall within federal legislative power, while the Concurrent Legislative List details subjects that fall under both the federal and state legislative powers.\textsuperscript{195} Matters that do not fall under either list are left to the states' legislative powers.\textsuperscript{196} Neither list mentions penal law, prompting advocates to argue that the states have the legislative power to adopt or extend Sharia penal law.\textsuperscript{197}

Opponents counter that while the penal law in general is not detailed in the Legislative List, the Executive Legislative List does discuss and detail the subjects of evidence, police, and prisons as federal matters, therefore, the states may not address these topics.\textsuperscript{198} If the laws of evidence, police, and prisons are federal subjects, how can states justifiably and fairly try criminal cases or impose criminal sanctions? They cannot, because the Sharia Penal Codes, as the Hadd offenses, not only contain numerous evidentiary provisions,\textsuperscript{199} but they also exhibit the numerous inconsistencies and differences that exist between the Islamic law of evidence and the current common law Evidence Act.\textsuperscript{200} Dr. Ruud Peters, professor at the University of Amsterdam, describes this dilemma perfectly:

Since the hadd offenses in particular are subject to strict rules of proof, the constitutional position regarding evidence is an obstacle to the strict application of these rules, for the fed-
eral law of evidence admits more forms of legal proof in criminal matters than only confession and the testimony of two (for unlawful intercourse, four) adult Muslim males of good moral reputation. Application of the federal rules would make the application of corporal punishment for these offenses much easier.\footnote{201}

Thus, the essence of the Sharia penal code is frustrated.

Finally, advocates argue that the Constitution does not direct the states to enact legislation based upon specific sources beyond the agreement of the people and members, through a democratic process, and as represented by the state legislature.\footnote{202} Thus, the Northern states argue that the imposition and extension of Sharia has been by the support of the people in accordance with a democratic process, and with the support of their state legislatures.\footnote{203} But, in reality, it is known that no state governors engaged in any dialogue or held consultations with their citizens concerning the desirability of the adoption or extension of Sharia.\footnote{204}

4. Due Process and Equal Protection Issues

Equal protection is another integral problem with the Sharia Project. The application of two concurrent penal codes, the Sharia Penal Code and the Federal Penal Code, go to the heart of equal protection of the law. Specifically, this situation overtly counters the equal protection of the law advocated by the Constitution.\footnote{205} This basically means that citizens of the same territory face different punishments for the same crimes. For example, in the case of the Hudud, Muslims are subjected to extreme criminal punishments, such as stoning to death, for the same crimes for which non-Muslims are barely punished.\footnote{206} This disparity has created insecurity and opposition in the non-Muslim population and resentment in the Muslim population.\footnote{207}

\footnote{201. Peters, supra note 117, at 34.}
\footnote{202. Mahmoud, supra note 5, at 14.}
\footnote{203. Ojielo, supra note 7, at 158.}
\footnote{204. Id.}
\footnote{205. Mahmoud, supra note 5, at 15.}
\footnote{206. Id.}
\footnote{207. Grand hypocrisy of Sharia application and the politics of religious power play, Nigeria Today Online (Aug. 23, 2002), at http://waado.org/Ni}
In addition, as discussed earlier, the Maliki School of Jurisprudence, practiced in the North, dictates that an individual is guilty until proven innocent.\footnote{Ojielo, supra note 7, at 143.} This standard directly counters the due process required under Article 36 of the 1999 Constitution which states, “[e]very person who is charged with a criminal offense shall be presumed to be innocent until he is proven guilty.”\footnote{NIG. CONST. (Constitution of the Federal Republic of Nigeria, 1999) §36.} Furthermore, under state and federal legislation, courts cannot enforce customary laws that are “repugnant to natural justice, equity and good conscience,” “incompatible either directly or by implication with any law...in force,” or “contrary to public policy.”\footnote{CRLP REPORT, supra note 15, at 77, citing Kaniye S.A. Ebeku, The Legal Status of Nigerian Children Born by a Widow: Chinweze v. Masi Revisited, 38 J. AFR. L. 46, 57 (1994).} These statutory, legislative and policy factors bolster the argument that the Sharia Project is in contradiction to the notion of equal protection and due process. The specifics of the reasons underlying this notion are discussed more in detail below.

Many Northern states, such as Zamfara and Kano, have attempted to alleviate non-Muslim concerns.\footnote{Mahmoud, supra note 5, at 15.} The various Northern governments have stated that the code does not apply to non-Muslims and therefore will not be enforced against non-Muslims.\footnote{Id.} But this also means that non-Muslims have no legal standing to challenge the constitutionality of the code in the Sharia courts, thus limiting their voice in the matter.\footnote{Id.} Opponents also argue that, although non-Muslims are not prosecuted in Sharia courts, they still have to live in the Sharia States where their “public life, culture, and social ethos” are greatly affected by the Sharia laws, particularly when dealing with enforcement issues, and where their civil, political, and constitutional rights are hindered greatly as a result.\footnote{Id. For example, Sharia outlaws the sale of alcohol, gambling, and other such practices, which other religions do not outlaw. Therefore, non-Muslims living in the Sharia States would not be able to purchase alcohol if they desired to do so. Similar problems exist with police enforcement. Often

\begin{figure}
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Adequate police and judicial enforcement also create equal protection problem and due process problems. A.B. Mahmoud, a Nigerian scholar, argues that it “appears problematic and almost an illusion for states to assume the possibility of far reaching reforms of their criminal justice systems under the present federal structure in which they neither have autonomous judicial institutions nor independent mechanisms for the enforcement of their own laws.”

Specifically, Mahmoud asserts that the judicial systems are organized so that eventually the state courts merge into the Federal Appellate Court system, making every decision of the lowest court reviewable by the highest court in the country. In reality this means that Sharia court holdings do not garner much weight since they can be overturned by the Federal Appellate Court, so the impact and purpose of the Sharia Project itself is diminished.

Similar problems with police enforcement and the prison system exist in the application of the Sharia Project. Nigeria currently has one national police force and one prison system. The federal authorities control both the police and prison systems. Furthermore, the police and prison employees come from a variety of religious, ethnic, and cultural backgrounds. As a result, the extreme diversity of the police and prison employees make it difficult to implement uniform enforcement of laws, because “the difficulties in enforcing unfamiliar laws in respect of which they receive no particular training and have no particular sympathies, even discounting outright hostility, are clearly enormous.” A greater concern, though, is the ability of the police are not prudent or discriminatory in their actions. Specifically, there have been numerous incidents where non-Muslims have been subjected to Sharia punishments because the police in the Sharia States have not bothered to determine the identity of the alleged offender.

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215. Id. at 14.
216. Id.
217. Mahmoud, supra note 5, at 14.
218. Id.
219. Id.
220. Id.
221. Id.
222. Id. For example, there have been numerous incidents of non-Muslim offenders being subjected to Sharia punishments because the police have failed to recognize the persons as non-Muslims, or have even failed to inquire into these people’s identities. Id.
the Nigerian government to accommodate and enforce such “different notions of crime and punishment,” particularly punishments which are seen by the international community as degrading and apparent human rights violations.\footnote{Mahmoud, supra note 5, at 15.}

Another enforcement problem is the wide discretion used by the police in choosing a proper venue for prosecution. The police are the first in the chain of prosecution, and the local police are known to choose the venue for prosecution arbitrarily and in a biased manner.\footnote{Id.} For example, the police will often favor Muslim offenders by arraigning them before non-Muslim courts for offences that would have garnered harsher punishments in the Sharia courts.\footnote{Id.} As a result, there is unequal protection of offenders even within the Muslim community. The Muslim aid groups or Hisbah also create equal protection enforcement problems in the North.\footnote{Id.} Hisbah’s arbitrary use of prosecutorial power is problematic to fair notions of equal protection and due process. Specifically, the Hisbah are allowed to prosecute based upon their notion of what constitutes a violation of Sharia moral norms, but not on what “is” a Sharia violation — which can lead to arbitrary and capricious detention and persecution of innocent individuals.\footnote{Id.} Most dangerous is the fact that the Hisbah often do not discriminate between Muslims and Non-Muslims.\footnote{Mahmoud, supra note 5, at 15.} These are such grave Sharia Project problems that even some advocates of Sharia reform appreciate these Constitutional and legal inconsistencies.\footnote{Id. at 16–17 (emphasis added).}

\footnote{Under the current arrangement...the overwhelming legislative and executive authority of the Federal Government has confined the states to narrow limits...Sharia which relies on state legislation, is constitutionally excluded from many areas of societal life especially in the area of economic policy, secondly the exclusive legislative power of the federation over some vital areas...like the law of evidence means that even where the Sharia applies as the substantive law, it may be subjected to adjectival rules that prevent realizing its potential. Dr Tabiue also draws attention to the fact that Sharia courts}
The current dual legal system in the North has resulted in the abuse of the criminal justice system, the fostering of Islamic fundamentalism, and has assisted in furthering the disintegration of Nigerian national unity. Until these issues are resolved, the Sharia Project will continue to create an array of equal protection and due process problems.

B. International law

1. Relevant International Law

One of the major arguments in opposition to Sharia has been that numerous Sharia laws violate international human rights law. Nigeria is a Member State of the United Nations. As a Member State, Article 1, Section 3 of the United Nations Charter requires Member States to act together to promote and encourage “respect for human rights and for fundamental freedoms.” Nigeria is also a party to the International Covenant on Civil and Political Rights (“ICCPR”), the African Charter on Human and Peoples’ Rights (“ACHPR”), the Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), and the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”). The Sharia Project and Sharia criminal sanctions sit in direct contravention to the human rights standards set forth in these treaties.

which operate only at state level, lack independent power to interpret and apply Islamic laws. All their decisions are subject to appeal to federal courts where English legal concepts, legal methods, and legal procedures dominate. He further poses the question how far can “its (federal government) police force be relied upon to enforce Sharia laws...a police force (that is) manned by people of various faiths and background[s].”

Id.

230. Such as the biased treatment of women and the alleged cruelty of the Hudud punishments as stoning.


232. U.N. CHARTER art.1, para. 3.

233. Zarifis, supra note 6, at 23.
In addition, Article 14 of the Vienna Convention on the Law of Treaties (“VCLT”) states that once a state (nation) has become a party to these international treaties, the state (nation) has the obligation to carry out its international obligations and can not invoke its domestic law as justification for non-compliance with the treaty.\textsuperscript{234} Under the VCLT, the Federal Nigerian government has the ultimate responsibility of ensuring that the principles set forth in these treaties are carried out in good-faith to their fullest potential.\textsuperscript{235} Thus, it can be argued that, the Nigerian federal government’s failure to control and restrict the Sharia Project is a violation of the VCLT and international law; particularly since state-imposed Sharia may “not be invoked as a reason for non-implementation of Nigeria’s international human rights obligations.”\textsuperscript{236}

Furthermore, Nigeria is also obligated to abide by these international treaties domestically. Nigeria frequently uses the method of incorporation to implement international treaties domestically.\textsuperscript{237} Nigeria incorporates and enforces the treaty provisions domestically through an act of Parliament \textit{en banc}.\textsuperscript{238} As a result, all fundamental rights supported by the human rights treaties that were signed or acceded to by Nigeria are applicable throughout Nigeria.\textsuperscript{239} For example, Nigeria has signed, ratified, and incorporated into domestic law the ACHPR.\textsuperscript{240} Therefore Nigerian courts can invoke its provisions in interpreting relevant domestic legislation.\textsuperscript{241}

The international community has also argued that the Universal Declaration of Human Rights (“UDHR”) is international customary law, and as a result sets human rights standards for all states including Nigeria.\textsuperscript{242} Thus, under Article 5 of the

\begin{itemize}
\item \textsuperscript{235} Zarifis, \textit{supra} note 6, at 23.
\item \textsuperscript{236} \textit{Id}.
\item \textsuperscript{237} Okeke, \textit{supra} note 2, at 342.
\item \textsuperscript{238} \textit{Id}.
\item \textsuperscript{239} \textit{Id}.
\item \textsuperscript{240} \textit{Id}.
\item \textsuperscript{241} \textit{Id}.
\end{itemize}
UDHR, which prohibits torture and cruel and inhuman treatment, the imposition of Sharia punishments, such as stoning and amputation, violate the UDHR. However, most African and Asian countries argue that the UDHR does not fairly represent these countries and their belief systems because most African and Asian countries did not participate in the formulation of the UDHR, as they were still under colonial rule during this time.

Lastly, Sharia infringes upon numerous legal rights and religious practices accorded to religious minorities. For example, Article 27 of the ICCPR “protects religious minorities from being denied the right to practice their religions ‘in community with the other members of their group.’” For example, the disparate standards surrounding the rules of evidence, rights of appeal, and legal representation applied to Muslims as opposed to non-Muslims, discussed in Part IV.A, inherently discriminate against non-Muslims and infringe upon the right of non-Muslims to freely practice their religion. Sharia not only violates the rights of non-Muslim minorities but also precludes Muslim opponents of the Sharia Project, whose opposition isolates them from the majority Sharia supporters, from being heard by a constitutionally mandated court, if desired. As a result, they are forced to practice Islam according to the rules of the Muslim State, and denied the civil and political rights provided by the secular federal government and international human rights standards and treaties.

Sharia also violates Article 6 of the ICCPR, which protects the right to life. The Hadd punishment of stoning to death, such as in zina cases, is a clear violation of this article. The UN Human Rights Commission has interpreted the ICCPR to permit the death penalty “only for intentional offenses that

244. Boulanger, supra note 242.
245. Zarifis, supra note 6, at 23.
246. Id.
247. Id.
248. Id.
249. Id.
250. Id.
cause lethal or extremely grave consequences, stating that ‘when the death penalty is applied by a state party for the most serious crimes…it must be carried out in such a way as to cause the least possible physical and mental suffering.’251 The punishment of stoning to death clearly violates both of these principles when imposed to punish adultery. First, adultery does not fall under “most serious crime,” and second execution by stoning is not a method that causes “the least possible physical and mental suffering.”252 Furthermore, the Hadd punishments of stoning, flogging, and amputation for offenses of theft, alcohol consumption, robbery, adultery, and rape violate Article 7 of the ICCPR, which prohibits torture or cruel, inhumane or degrading punishment.253 CAT further supports this assertion.254 In addition to these international human rights treaties, Article 34 of the 1999 Constitution also states that no person shall be subjected to torture or to inhuman or degrading punishments.255

Although Nigeria is a signatory to these various human rights treaties and has enacted numerous equal protection domestic policies, discrimination, specifically directed against women, persists — resulting from the extension of Sharia. One such discriminatory tactic was seen shortly after Zamfara State adopted Sharia law, when officials released a directive ordering all single and divorced women to get married or lose their jobs.256 This directive was adopted despite the enactment of the 2000 National Policy on Women in Nigeria257 and is clearly contrary to Article 11 of CEDAW, which requires countries to protect women’s right to work, ensure that women have equal training and employment opportunities, receive equal pay for

251. Zarifis, supra note 6, at 23.
252. Id. at 24.
256. CRLP REPORT, supra note 15, at 84.
257. Id. The Policy on Women proscribes that all “labour laws shall be renewed to include more and better protective measures for women workers...which include ensuring employers provide paid maternity to working mothers, whether single or married.” Id.
work of equal value and have access to the same benefits, compensatory schemes and allowances, especially in relation to retirement and incapacity to work, as men. In addition to CEDAW, Article 42 of the 1999 Constitution embodies the principle that all persons are equal under the law. Thus, certain provisions of the Sharia Penal Codes, such as the requirements for proof of zina, violate both Article 42 and CEDAW.

Sharia and the Sharia Project have been and continue to be a constant point of controversy in the international community. The first step in recognizing the complexity of the controversy is in understanding the importance of Sharia for Muslims. To Muslims, Sharia is not just a way of life — it is an expression of divine truth. Consequently, any Muslim who lives in an Islamic State and does not follow Sharia is not only subject to legal reprobation, but also to spiritual damnation. The importance to Muslims of extending Sharia within the Muslim majority North is therefore understandable. Nevertheless, the conflicting philosophical and spiritual notions of human rights and freedom between international human rights law and Sharia continue to haunt the international community and Nigeria.

2. Reconciling International Human Rights and Sharia

Majid Khadduri who is a leading scholar in Islamic law identifies individual freedom, dignity, brotherhood, equality without prejudice, respect for the honor, reputation, and family of each individual, as well as, the right to be presumed innocent as the “most important human rights principles in Islam.” Although these principles seem to agree with international human rights

259. PETERS, supra note 117, at 37.
260. Id. at 38.
262. Id.
263. Id. at 78 (“While Western countries may suggest that the countries applying traditional or conservative Islamic law have no regard for human rights, the Islamic world asserts itself as a champion of the human rights provided for by God, in the Sharia.”).
264. Id. at 78.
standards, the underlying philosophy of Islam that all human acts are subject to God's will, versus the Western notion of free will, actually contravene international law in the application of Sharia. The most controversial tension between Islamic law and international law concerns the unequal treatment of women under Islamic law.

Sharia advocates argue that Islam actually empowers women by giving them a “special rank” in the Islamic order. Islamic reformers have responded, in support of Sharia, to the international community by employing a cultural relativist approach. But, even within the scope of cultural relativism, there are varying degrees of conformity to international law. For example, modern Islamic reformers have attempted to legitimize Sharia by advocating a liberal interpretative approach. Further, by employing a historical perspective, the reformers argue that the contentious gender provisions of the Qu'ran were made to protect women in case of marriage dissolution. However, Western critics argue that the provisions reflect “unfounded gender inequity.”

Islamic countries, including Nigeria, have also justified their actions, such as the advancement of the Sharia Project, to the international community, by adopting a defensive attitude toward the Western world. These advocates argue that the international community has disproportionately targeted Islam

265. Id.
266. Id. One such tension is that Sharia allegedly gives husbands the right to chastise their wives for “disobedience” which includes a “light beating.” Id. at 79. Proponents argue that Sharia makes special provisions for women to provide them with financial security and stability, which they were historically unable to achieve by themselves. Specifically, Muslims point to Qu'ranic provisions which state “Men have qawarma [guardianship and authority] over women because they [men] spend their property in supporting them [women].” Id.
267. Khan, Islamic Human Rights, supra note 261, at 79. For example, strict relativists view the world in relative terms while moderate relativists recognize the need for some minimal standards; finally universalists value western concepts of rights. Id. at 80. “These reformers argue that the sources of Sharia law should be examined from a strictly historical perspective, and that much of the literal interpretation of Qu'ranic scripture should be contextualized, and in some cases abandoned.” Id.
268. Id. at 79.
269. Id.
270. Id. at 80.
271. Id.
272. Id.
ternational community has disproportionately targeted Islam for human rights violations, and as a result, the media has un-
fairly responded to the resurgence of Islam by also pushing Is-
lam to the forefront of international human rights. They ar-
274. *Id.*

275. *Id.* at 82.

276. *Id.* at 75.

277. *Id.* at 82.

278. *Id.*

V. POSSIBLE APPROACHES TO RESOLVING THE SHARIA PROJECT

A. Traditional Approaches

The federal Nigerian government’s attempts to resolve the
debate by itself, thus far, have been fruitless, leaving Nigeria
with the only option of relying upon international law. How-
ever, as discussed above, one of the major problems underlying

This has allowed the West to suppress the Islamic revivalist move-
ment and the rise of radical Islamic fundamentalism by rallying the
international human rights community, which itself is largely
grounded in Western rights and values, to assert its abhorrence for
the human rights violations taking place in parts of the Islamic
world. Because human rights in these Islamic countries are rooted
in Islamic theology but are also tempered by political and economic
relations with the West, the West has used this means to assert its
power in the international community, and to protect its secular,
socio-democratic power structure.
the *Sharia* Project is the inability to reconcile *Sharia* with both Nigerian domestic law and international law. The international community and *Sharia* advocates, though, have offered numerous theoretical approaches to resolving and legitimizing the *Sharia* Project.\footnote{Khan, *Islamic Human Rights*, supra note 261, at 79.}

A few approaches offered by international legal scholars consist of a cultural relativist approach, divided further into strict and moderate cultural relativism, a universalist approach and a feminist approach.\footnote{Kimberly Younce Schooley, *Cultural Sovereignty, Islam, and Human Rights — Toward a Communitarian Revision*, 25 CUMB. L. REV. 651, 713 (1994).} Many Muslim scholars offer similar approaches, but with an Islamic perspective: the cultural relativist approach, the contemporary and liberal interpretative approach, and an Islamic universalist approach.\footnote{Khan, *Islamic Human Rights*, supra note 261, at 79–81.}

Both international and Muslim cultural relativists believe that it is difficult, if not impossible, to establish universal human rights standards that apply equally to all cultures.\footnote{Id. at 79. This assertion is premised on the notion that there are too many and too diverse cultural traditions, political structures, and levels of development in the world to establish universal human rights norms. Id.} Strict cultural relativists recognize the contravention of international human rights by *Sharia*, but offer no tangible solution to this problem.\footnote{Schooley, supra note 280, at 713.} Instead, they denounce universal standards for the protection of cultural values.\footnote{Id.} Moderate cultural relativists acknowledge the problem, such as the *Sharia* Project, and attempt to resolve the problem by incorporating universal norms into pre-existing cultural norms.\footnote{Id.} International universalists reject cultural diversity in favor of universal human rights standards.\footnote{Id.} Finally, international feminist theorists either, deconstruct all possible solutions to the problem, such as the *Sharia* Project, advocate liberal individual autonomy, or create new “female rights” that work toward a change and resolution in policy.\footnote{Id.}
As briefly described in Part IV.B.2 of this Note, unlike the international community, modern Islamic reformers argue for a liberal interpretative approach.\(^{288}\) This approach is consistent with the moderate relativist approach, arguing that Sharia law sources should be examined from a strictly historical perspective.\(^{289}\) Modern Islamic reformers also believe that much of the literal interpretation of Qu’ranic scripture should be contextualized, and in some cases, abandoned.\(^{290}\) Finally, some Muslims attempt to legitimize and support Sharia’s contravention with Islamic human rights by asserting their belief that Islamic law is in fact universal.\(^{291}\) These supporters argue that God is the sovereign ruler of the universe, therefore, “to break the law is a transgression against both society and God, a crime and a sin; the guilty are subject to punishment in this life and the next.”\(^{292}\) These Islamic universalists also argue that Islam does in fact protect human rights, but according to its own set of values.\(^{293}\) While these various scholarly approaches are relevant and necessary to the dialogue surrounding the Sharia Project and Islamic law’s role in international human rights, they have nevertheless failed to achieve universal support from either the Muslim or international communities.

**B. A Cross-Cultural Approach**

The highly respected Islamic scholar Abdullahi Ahmed An-Na’im offers an alternative international legal approach that has seen some support from both Muslims and the international community. An-Na’im “maintain[s] that the lack of insufficiency of cultural legitimacy of human rights standards is one of the main underlying causes of violations of those standards.”\(^{294}\)


\(^{289}\) Id. at 80.

\(^{290}\) Id.

\(^{291}\) Id. at 81.

\(^{292}\) Id.

\(^{293}\) Id.

An-Na‘im argues that the first step to protecting human rights standards and to resolving human rights violations is to address the multitude of political, economic, cultural, and social factors underlying state actions. This Note has discussed the various socio-economic and cultural factors that have helped initiate and support the rise of the *Sharia* Project. The next step to resolving conflicts similar to the *Sharia* Project is to formulate or recognize a possible international legal approach applicable to the conflict. An-Na‘im has offered the international legal community such an approach: a “cross-cultural approach.”

An-Na‘im’s cross-cultural approach focuses on a policy of discourse, legitimization of values, and understanding between societies. This approach advocates and focuses on the individuals’ right to safeguard their personal integrity and human dignity against excessive or harsh punishments imposed by their own governments, such as the *Hadd* punishments for adultery. At the same time, imposing external moral standards upon an alleged human rights violator is also counter-productive and likely to be unsuccessful. Thus, for example,

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295. *Id.* at 19.
296. See *supra* Parts II–IV.
297. Cross-Cultural Approach, *supra* note 294, at 19. (“I argue that internal and cross-cultural legitimacy for human rights standards needs to be developed, while I advance some tentative ideas to implement this approach.”). For the purpose of this discussion, An-Na‘im defines cultures as:

> [P]rovid[ing] both the individual and the community with the values and interests to be pursued in life, as well as the legitimate means for pursuing them. It stipulates the norms and values that contribute to people’s perception of their self-interest and the goals and methods of individual and collective struggles for power within a society and between societies. As such, culture is a primary force in the socialization of individuals and a major determinant of the consciousness and experience of the community. The impact of culture on human behavior is often underestimated precisely because it is so powerful and deeply embedded in our self-identity and consciousness.

*Id.* at 23.
298. *Id.* at 37–38.
299. *Id.* at 20, 38.

Even though outsiders may sympathize with and wish to support the dominated and oppressed groups or classes, their claiming to know what is the valid view of culture of that society will not accomplish this effectively. Such a claim would not help the groups the outsiders
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An-Na‘im argues that “[g]reater consensus on international standards for the protection of the individual against cruel, inhuman, or degrading treatment or punishment can be achieved through internal cultural discourse and cross-cultural dialogue.”

The cross-cultural approach primarily relies on the notion that “[p]eople are more likely to observe normative propositions if they believe them to be sanctioned by their own cultural traditions, observance of human rights standards can be improved through the enhancement of the cultural legitimacy of those standards.”

Therefore, in the Sharia Project instance, the North, the South, the federal Nigerian government, and international scholars and legislators would need to engage in a dialogue about the contentions and disparities between Sharia and international human rights standards. Specifically, in the case of the Hadd punishments for adultery, the international community and Sharia opponents would first need to analyze and understand the zina laws from the perspective of Sharia advocates and argue their invalidity, under international law, via a Qu‘ranic reinterpretation of the relevant Sharia laws and the Qu‘ran itself. For example, this may be possible by allowing Sharia opponents within the Muslim community (internal community) to redefine their own identity and rights by highlighting inconsistent provisions in the Qu‘ran relating to zina.

This approach, though, first requires the international community and domestic communities in situations of internal strife, such as those in Nigeria, to recognize that despite a diversity of cultural practice and tradition, societies share certain fundamental values and interests that could be articulated into a common “culture” of universal human rights.

Most importantly, An-Na‘im does not suggest that this approach is an “all

wish to support because it portrays them as agents of an alien culture, thereby frustrating their efforts to attain legitimacy for their view of the values and norms of their society.

Id. at 20.

300. Id. at 38. An-Na‘im argues that people of diverse cultural backgrounds can agree upon differing meanings, scope and methods of international human rights standard through “internal reinterpretation of, and a cross-cultural dialogue about, the meaning and implications of basic human rights values and norms.” Id. at 21.


302. Id. at 21.
or nothing” approach; rather, he suggests that while total agreement is unrealistic in many cases, significant agreement about certain issues is possible.\textsuperscript{303} The true object of a cross-cultural dialogue is therefore to agree on a body of beliefs to guide action in support of human rights, despite disagreement over the justification, interpretation and application of those beliefs.\textsuperscript{304}

An-Na’im offers an example of this approach by comparing the international community’s interpretation of Article 7 of the ICCPR, which states, “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,” with the Islamic law interpretation of the article.\textsuperscript{305} The interpretation of Article 7, by Sharia advocates can be starkly different from the international community’s interpretation of this Article.\textsuperscript{306} For example, Sharia offenses are classified into three main categories: hudud,\textsuperscript{307} jinayat,\textsuperscript{308} and ta’zir.\textsuperscript{309} Sharia requires states, in pursuing conviction for these offenses, to ensure decent standards of living and secure social and economic justice for Muslims before enforcing the punishments.\textsuperscript{310} Sharia also requires strict standards of proof and provides narrow definitions of these offenses, making a wide range of defenses

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{303} Id. at 39.
\item \textsuperscript{304} Id. at 29.
\item \textsuperscript{305} Id.
\item \textsuperscript{306} Id. at 33.
\item \textsuperscript{307} Id. Hudud are a limited group of offenses which are strictly defined and punished by express terms of the Qu’ran and/or Sunna, including offenses such as theft — punished by amputation of the right hand, and fornication — punished by a whipping of 100 lashes for an unmarried offender or stoning to death for a married offender. Id.
\item \textsuperscript{308} Id. Jinayat are homicide or causing bodily injury, punishable by exact retribution (eye for an eye) or payment of monetary compensation. Id.
\item \textsuperscript{309} Id. Ta’zir are offenses created and punished by the ruler in exercising his power to protect public and private interests. Id.
\item \textsuperscript{310} Cross-Cultural Approach, supra note 294, at 34.
\end{enumerate}
\end{footnotesize}
available to the accused. With this understanding, the basic question in applying a cross-cultural approach to international law and Sharia is one of interpretation and application of universally accepted human rights.

In the Sharia situation, most Muslims would accept that humans have the right not to be subjected to cruel, inhuman, or degrading treatment or punishment, however the Islamic interpretation of this human right differs from the international standard. An-Na’im argues that from a secular and humanist view, Sharia punishments are cruel and inhuman. However, for many Muslims, under at least one interpretation of Islam, the matter of punishment is settled by the will of God and expressed by the Qu’ran, which is not open for interpretation or question. This is because Muslims believe that religious life does not end with this life but extends to the next life, so it is believed that a religiously sanctioned punishment in this life will absolve an offender from a greater or harsher punishment in the next life. For this reason “in Muslim societies, human judgment regarding the appropriateness or cruelty of a punishment decreed by God is simply out of the question.” As a result, An-Na’im suggests that steps can be taken, in approaching a cross-cultural perspective to Sharia.

[T]here is room for developing stronger general social and economic prerequisites and stricter procedural requirements for the enforcement of the punishment. Islamic religious texts emphasize extreme caution in inflicting any criminal punishment. The Prophet said that if there is any doubt (shubha), the Qu’ranic punishments should not be imposed. He also said that it is better to err on the side of refraining from imposing the punishment than to err on the side of imposing it in a doubtful case. Although these directives have already been incorporated into definitions of the offenses and the applicable

311. Id.
312. Id. at 35.
313. Id.
314. Id.
315. Id.
317. Id at 36. It is also believed that harsh punishments are necessary to reform and rehabilitate the thief, as well as to protect society and individuals by deterring potential offenders. Id.
318. Id. at 36.
rules of evidence and procedure, it is still possible to develop a broader concept of *shubha* to include, for example, psychological disorders as a defense against criminal responsibility. For instance, kleptomania may be taken as *shubha* barring punishment for theft. Economic need may also be a defense against a charge of theft.519

Ultimately, as stated earlier, under a cross-cultural approach, external societies would not impose their morals upon Islamic societies but engage in a dialogue with Islamic societies to work toward a mutual understanding or agreement upon the various mechanisms underlying *Sharia* application. This dialogue would focus primarily on a reinterpretation and redefining of *Sharia* law, values, and customs, and a reconciliation of these factors with international human rights through discourse.

C. Self-Determination as an Approach to Dispute Resolution in the Post-Colonial African State.

The last few decades of the twentieth century saw a sharp increase in the number of new states, resulting from the end of the Cold War, the demise of European communism, and decolonization.320 It is becoming increasingly apparent that the principles leading up to the decolonization of African states have backfired upon the continent and the international community at large.321 The current rise of political corruption, unbridled militaries, ethnic conflicts, refugee flows, and economic misery in Africa can be seen as rooted in the creation of the post-colonial borders.322

Numerous legal scholars, such as Dr. Makau wa Mutua,323 argue that “the foreign imposition of artificial states and their continued entrapment within the concepts of statehood and sovereignty are sure to occasion the extinction of Africa unless those sacred cows are set aside for now to disassemble African

319. *Id.*
321. *Id.* at 1113–14.
322. *Id.* at 1114–15.
323. Dr. Mutua is co-director of the Human Rights Center at the State University of New York at Buffalo. At the time he wrote this Article “Why Redraw the Map of Africa: A Moral and Legal Inquiry” he was Associate Director of the Human Rights Program at Harvard Law School. Mutua, *supra* note 1, at 1113.
States and reconfigure them. These scholars argue for self-determination for the post-colonial African States, as a possible solution to internal disputes, such as the Sharia Project. This is the case for Nigeria. The rise of ethnic tension in Nigeria, resulting from the Sharia Project, has led many political leaders in the Muslim North to ask for secession and to call for self-determination.

One of the major arguments in favor of self-determination, in Nigeria and throughout Africa, is that while all of these African States subscribe to international law, none of these states participated in the creation of the law prior to decolonization. Another argument is that numerous pre-existing ethno-political communities and traditional African States were combined by force or through treaties to create the new post-colonial states.

These post-colonial boundaries were often drawn arbitrarily and driven by pressures of competition between European powers, European trading companies, and Christian missionaries. This coercive environment resulted in the elimination of sovereignty for many pre-colonial ethnic communities and kingdoms, including in Nigeria. As a result of these colonial and post-colonial policies, questions of internal self-determination are on the rise again in present-day Africa. Specifically, numerous ethnic communities and kingdoms of post-colonial Africa are struggling to regain their pre-colonial sovereignty, as the Muslim North is trying to do currently in Nigeria.

The argument for self-determination in the post-colonial African context is supported by Article 20 of the African Charter.
which deals with the right of peoples to self-determination. The wording of Article 20 allows for the right to internal and external self-determination. The scholars El-Obeid and Atua further argue that self-determination within the context of the African States should provide a wide array of possibilities, including the protection of a group’s right to secede. They also argue that the rights of the people should not be interpreted as rights of the state, which are too often translated into the rights of the leaders. Instead, it is the peoples’ rights and voices that should rise above those of their leaders and the arbitrary boundaries dictated by external societies, such as the international community. If correctly acknowledged and applied, this reconstructed right might be a viable solution for resolving the Sharia Project in Nigeria.

VI. CONCLUSION: RESOLUTION

A long troubled political and economic history has led to a religious civil war of sorts in Nigeria. The Sharia Project is a complicated controversy that not only implicates domestic religious strife but also international human rights conflict. The question of what can be done, can only be answered by Nigeria and the international community taking a step back and trying to understand the underlying beliefs and principles of Islamic society and Sharia from an insiders perspective. Foremost, the Sharia Project can not be resolved by taking a specific hard-line approach, whether a universalist or a strict cultural relativist approach. For example, the recent religious riots over the Miss World Competition show that religious freedom in a “secular” federalist state is not a simple concept and is not easily resolved by taking an extremist approach. If anything, strict adherents of universalist or cultural relativist approaches have been the roots of the problem in Nigeria. It is therefore important to recognize that religious freedom in post-colonial states, such as Nigeria, is not just about Sharia or international law, but a reconciliation of the two ideologies.

333. Obaid, supra note 330, at 842.
334. Id. at 843.
335. Id. at 841.
336. Id. at 838.
An-Na’im offers a workable approach to reconciling the internal debate in Nigeria as well as the external struggle between international law and Sharia. An-Na’im argues for positive changes in the post-colonial Islamic world by advocating an engaging dialogue between external societies and Islamic societies. The objective is that such a dialogue would foster a mutual understanding or agreement on the various mechanisms underlying Sharia in international law, and, hopefully, within Nigeria. He further advocates an internal legitimization of human rights standards, through a reinterpretation and reformulation of cultural standards via internal discourse. Specifically, by the creation of a “common culture” through the recognition of fundamental values and interests, countries such as Nigeria may be able to reconcile the dichotomy between the Sharia Project and international human rights standards.

Nevertheless, the first step toward reconciliation is through cultural discourse and dialogue. A cross-cultural approach presupposes rational societies and the ability of rational societies to engage in such a dialogue. Practically, this supposition may render a pure cross-cultural approach at least minimally ineffective in such volatile post-colonial Islamic States as Nigeria; particularly since external societies, as the Nigerian Christian and international communities, have thus far failed to show great potential for dialogue and understanding.

337. See generally Cross-Cultural Approach, supra note 294.
However, there is another possibility for resolving the *Sharia* Project. The application of a cross-cultural approach combined with a greater allowance and reformulation of the notion of internal self-determination might just advance the *Sharia* Project toward a peaceful resolution.

*Pavani Thagirisa*¹

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* B.A., Wellesley College (1999); J.D. Brooklyn Law School (expected 2004). I am thankful to my parents, Sivaparvati and Anjaneyulu Thagirisa, and my brother, Anil, for their continued support and love throughout my academic career. I would also like to thank my best friend John Ellis, without whose optimism and inspiration I could not have completed this paper. I am grateful as well to Professor Claire Kelly and the staff of the Brooklyn Journal of International Law for their invaluable editorial assistance. The author is solely responsible for the opinions expressed in this Note.