THE MORAL POLITICS OF SOCIAL CONTROL: POLITICAL CULTURE AND ORDINARY CRIME IN CUBA

Deborah M. Weissman & Marsha Weissman

[Y]our ideals are too high . . . . An idea that is so high that it is beyond reach of the real is not very useful . . . . What you need here among the Cubans is a desire to make money, to found great enterprises, and to carry on the prosperity of this beautiful island, and the young Cubans ought, most of them, to begin in business . . . . The right of property and the motive for accumulation, next to the right of liberty, is the basis of all modern, successful civilization, and until you have a community of political influence and control which is affected by the conserving influences of property and property ownership, successful popular government is impossible. ¹

[T]he moral factors, the factors of conscience, the cultural factors are irreplaceable under socialism. We should not think, even for a minute, that we are going to solve with money those problems that only the conscience can resolve. What we should do is use material incentives intelligently and combine them with moral stimuli, use them as reinforcers. We should not believe for an instant that now we can manage today’s man, the socialist man, by virtue of material incentives exclusively, because material incentives do not have the attraction here that they have under capitalism where everything depends—life and death—upon the money in one’s pocket. ²

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¹. William Howard Taft, Provisional Governor of Cuba, Address at the Opening Exercises of the National University of Habana (Oct. 1, 1906).

². Fidel Castro, Cuban Prime Minister, Address at the Closing Ceremony of the 13th Congress of the Central Organization of Cuban Workers (Nov. 16, 1973).
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INTRODUCTION

The Cuban revolution has been described as “the longest running social experiment” in history—one not well-received in the United States. The U.S. government responded to the revolution first with suspicion and then with hostility. Initially, the United States was most concerned by the close geographical proximity of a Soviet Union-allied socialist government, as well as the possibility of Cuban influence in Latin America. In the post-Cold War years, journalists and pundits focused their commentary on Cuba’s lack of democratic political institutions, human rights violations, and a pathological obsession with the Castro brothers. Even though the current administration has acknowledged the failure of U.S. policy with respect to Cuba, no substantive changes have been announced. As a result, the narrative of Cuba in the United States continues to dwell almost exclusively on political repression and economic failure.

The Cuban revolution, however, is a complex process—one that defies facile explanations. Subscribing to the perspective offered by social scientists who urge “a more nuanced view” of Cuba, we undertake an examination of a specific facet of the Cuban revolution in this Article: the Cuban approach to ordinary crime. While other scholars have addressed Cuba’s criminal justice system by focusing on formal legal substance, procedural matters, and socialist legality, this Article provides an alternative opportunity to examine commonly held views about socialist governance. Perhaps more importantly, it provides insights into the
ways in which political culture and social controls interact to produce a coherent and generally successful policy response to crime. In fact, Cuban methods have resulted in noteworthy developments within a socialist system that has to do as much with traditions of political culture as it does with Marxist ideology. That Cuba has succeeded in reducing reliance on formal penal sanctions and lowered crime rates invites comparison with the United States, where strategies of community controls as an alternative to incarceration have met with less success.

This Article focuses on social controls designed to regulate two types of criminal behavior related to family structures, households, and neighborhoods: domestic violence between intimate partners and juvenile delinquency. These types of complex social deviances may be categorized as “ordinary crime,” as distinguished from “political crime” or crimes of a political nature. These are contentious terms, of course, the boundaries of which are often difficult to establish within the realm of nation states and in international legal fora. That ordinary crimes may be considered political, and political crimes may be considered ordinary, suggests that these terms are often malleable and lend themselves to easy manipulation. This is as true in Cuba as it is in the United States and elsewhere. Furthermore, many feminist scholars have focused on the


10. The authors use the term “domestic violence”—a less than ideal term—as opposed to “gender violence” because of this Article’s focus on violence between intimate partners within the family, and to distinguish such violence from violence against women outside of the home or family.

11. Rachel Monaghan & Suzanne McLaughlin, Informal Justice in the City, 10 SPACE & POLITY 171, 172 (2006) (noting, for example, the different categories used by paramilitaries in Northern Ireland for purposes of punishment).


political nature of crimes of domestic violence while scholars of racism have called attention to the political dimensions of youth and crime in the criminal justice system.

With these caveats in mind, this Article examines the participatory networks through which Cubans exercise and experience social control over ordinary crime. Part I examines notions of public morality, the historical antecedents of Cuban political culture, and the relevance of these topics to ordinary crime control—all from a sociolegal perspective—in order to argue that values associated with Cuban liberation processes in the nineteenth century affected the current formation of commonly-shared ideals and the development of social consensus. These nineteenth century values incorporated an ethic based on the proposition of the perfectability of human beings through participation in organizations and civic associations, which provided the rationale for convocation: to make common cause, to share common purpose, and to develop consciousness of solidarity.

Part II reviews Cuban theories of social control, detailing how mass organizations and civil society associations act to influence a culture of citizen responsibility in the realm of crime prevention and how these entities facilitate the exercise of that responsibility. This discussion will demonstrate how organizational processes promote community solidarity and, thus, provide the moral basis for neighborhood involvement in and mitigation of the day-to-day conditions that often contribute to disaffection and deviance.

Next, Part III serves as a case study that demonstrates how a culture of civic responsibility shapes citizens’ identifications of, and responses to domestic violence and juvenile delinquency. The effort to achieve gender equality serves as the framework in which Cubans address the problems of violence against women, efforts that cannot be separated from crime control strategies. Similarly, the exalted social status of youth in Cuban culture shapes the approach to juvenile crime. This Part examines both informal and formal legal responses to domestic violence and juvenile delinquency, both of which are shaped by values that eschew criminal sanctions as a useful response.

15. Our research, as well as that of others who have examined the Cuban criminal justice system, confirms the validity of a working differentiation between ordinary crimes (common crimes that include such offenses as murder, robbery, assault, theft, and those studied here) and political crime (crimes that are perceived to be threats to national security). See sources cited supra note 8.

16. See infra Part II(B)(2).
Finally, in order to emphasize the significance of political culture as a determinant of social controls, Part IV draws comparisons between crime control measures in Cuba and the United States. While imposition of state sanctions has been the dominant approach to crime in the United States, this discussion will focus on Alternatives to Incarceration (“ATI”)—U.S. community-based initiatives that incorporate many premises and practices similar to Cuban participatory mechanisms of crime control. This is to illustrate that the success of such programs hinges on political culture. In the United States, ATI programs function within the shadow of a carceral state marked by decades of declining social capital. We argue that this backdrop explains why Cuba can rely on community norms to control crime more effectively than the United States.

The fieldwork for this Article was completed over a period of five years (from 2002 to 2007), during which one or both of the authors traveled to Cuba.17 We met with academics, members of the Ministry of Justice, diplomats, members of prevention commissions, government and private lawyers (including prosecutors and defense attorneys), physicians, nurses, social workers, high school students, members of the Cuban Federation for Women, and members of the Committees for the Defense of the Revolution. We attended meetings and assemblies, visited health clinics and schools, and observed daily life in Havana as well as other parts of Cuba.

I. THE DETERMINANTS OF CUBAN SOCIAL CONTROL

The determinants of social control in Cuba have their origins in early nineteenth century philosophies, which were carried forward and deepened with urgency from Cuba’s successive wars for independence from Spain to the revolution of 1959. This Part describes this historical trajectory and the resulting development of a particular political culture steeped in notions of shared social duty and moral obligations and realized through the imperative of collective participation. Civic virtue is expressed through collective endeavors, including efforts toward improving the wellbeing of those whose behavior stands outside norms of respectability. It is this feature of Cuban political culture that informs and influences participatory mechanisms deployed in crime control.

17. Because of the adverse impact of U.S.-Cuban intergovernmental relations on sociological research, we identify, for the most part, the profession, position, or discipline of the persons with whom we met, and the date when and location where we met them. For more on the impact of the U.S.-Cuban relations on scholarly research, see Jorge I. Domínguez, Revolution and Its Aftermath in Cuba, 43 Latin Am. Res. Rev. 225, 226, 238–39 (2008).
A. Moralism as Political Culture

Scholars have given justifiable attention to the antecedents of the Cuban revolution as a culmination of a historical process with roots in the nineteenth century. Writing about the larger meaning of the Cuban revolutionary tradition, historian Louis A. Pérez, Jr. observed that “the power of the past [gives] purpose to the present.” 18 This statement serves as a guide to understanding much about contemporary Cuba. The experiences of the wars for independence from Spain in the nineteenth century and the repeated mobilizations against the United States in the twentieth century broadly inform the project of revolution after 1959.

Among the pre-revolutionary ideals that influenced the revolution was the belief in an integrated social order based on virtue, personal transformation, and sacrifice for nation (patria). 19 During the nineteenth century, a particular ethos of moralism developed and served as the cultural matrix from which Cuban identity was formed. 20 Philosopher Félix Varela—whose early nineteenth century writings have been described as the “bible of Cuban identity”—preached an “emancipatory moralism” and insisted that morality in Cuba would be measured by willingness to be “useful to the fatherland.” 21 Sixty years later, José Martí addressed the moral meanings of national independence, calling for a fundamental ethical change and transformation of Cuban political culture. “It is to the substance of these matters that we are going, rather than to the forms,” said Marti. “It is a case of changing a nation’s soul, [its] entire way of thinking and acting, and not just [its] external clothes.” 22 Marti’s invocation of a “moral republic” emanated from what has been described as a “missionary impulse” of historic dimensions that emphasized social just-

20. See sources cited id.
tice and redemption for the benefit of all Cubans. The ideal of a moral republic, based on an ethic of honor, dignity, and decorum, seized hold of the Cuban imagination. This ideal endured as a sentiment to which subsequent generations subscribed, and it shaped the discursive framework in which Cuban political culture developed.

With the triumph of the revolution, Cubans moved purposefully to establish a society in accordance with nineteenth century ideals of self-sacrifice, collective duty, and civic participation. Indeed, Cuban scholars have described the revolution as the “resurrection of political and moral charisma” and an “ethical regeneration” derived from a “pre-existing moralistic movement that denounced and fought against selfish interests.” Such idealism is the lens through which historic cultural concepts of social duty and moral responsibility have provided the normative context of political change.

All political systems are shaped, to varying degrees, by historically-determined ethical paradigms. In the United States, early foundational concerns focused on conceptions of republicanism and the proposition of civic virtue as individual initiative over State intervention. Patriotism is celebrated as freedom of the individual. In contrast, the Cuban revolution drew upon a tradition of civic virtue as a collective effort to achieve collective redemption in which the State intervened as a matter of moral duty to guarantee social justice. The revolution’s commitment to fulfilling basic needs, for example, drew explicitly upon notions of moralism as inspiration for the radical transformation of society.


24. Valdés, supra note 19, at 214.


made frequent references to the virtues of personal sacrifice for the benefit of the collective good in order to encourage Cubans to undertake volunteer work, routinely offering reminders that personal worth is derived from service, not self-interest.\footnote{Valdés, supra note 25; Castro General Assembly Speech, supra note 27; Castro Literacy Campaign Speech, supra note 27; Castro Aviation Day Speech, supra note 27.}

His exhortations resonated precisely because they drew upon a legacy derived from the nineteenth-century liberation project. Appeals not only to Marxism but to morality with antecedents in the nineteenth century must be understood as motivating the shaping of contemporary Cuba, and, as demonstrated below, appeals to morality permeate Cuban approaches to ordinary crime.\footnote{Valdés, supra note 19, at 213.}

B. Moralism Actualized: Participation as Moral Social Conduct

Cuban traditions of moralism are more than a theoretical construct; moralism must function to achieve a purpose. Values are practiced as part of daily life in the form of citizen participation and social organization. Participatory mechanisms are the means by which Cubans exercise their “place-bound source of self-identification” (that is, consciousness of being Cuban, or, 


Programs to build housing, schools, and medical facilities, improve transportation, and develop agriculture require volunteers working in mass organizations.\footnote{Sandor Halebsky & John M. Kirk, Introduction, in CUBA: TWENTY-FIVE YEARS OF REVOLUTION, 1959 TO 1984 at 3, 7–8 (Sandor Halebsky & John M. Kirk eds., 1985); Hernández & Dilla, supra note 26, at 42.}

That most Cubans have been involved in some sort of campaign to implement Cuban-style socioeconomic development suggests that means have served as ends, and that the realization of the goals of any particular campaign acted to expand citizen participation in the revolution.\footnote{BENGLESDORF, supra note 30, at 86; see also On Celebrating the Cuban Revolution, LAT. AMER. PERSP., Jan 2009, at 5, 11 (2009) (noting the high rate of Cuban participation in mass organizations).}
deed, some scholars have insisted that the larger significance of the Cuban revolution has been its ability to continually mobilize the populace through mass organizations. As one Cuban political scientist has written, citizen collaboration functions as the Cuban form of democracy, that is, “a system on which power is constructed and legitimated by citizen representation and participation.” Popular participation has been “both motive and motor” of the revolutionary effort, as well as the measure of historic traditions of morality and revolutionary citizenship.

Cuban society therefore can be best understood as the interdependent relationship between consciousness and cultural practices manifested as popular participation. Participatory mechanisms serve as the means by which individuals often gain access to resources and in turn become invested in relationships of interdependencies and mutual obligations. These mechanisms serve as the networks where repeated cooperative interactions enhance personal connections and neighborliness and through which the fabric of social trust is woven. With respect to the focus of this Article, these participatory structures serve as the foundations of social control, mediating between ecological conditions, community disorder, and crime.

II. THE MACHINERY OF SOCIAL CONTROL

This Part examines the specific ways Cuban participatory structures affect social controls. It begins with an overview of approaches to social controls—these approaches being the comprehensive strategies used to deter behaviors deemed pernicious to stability and order. Social con-

33. Bengelsdorf, supra note 30, at 85; Fagen, supra note 30, at 1–2; see also infra Part II(B)(1).
35. Fagen, supra note 30, at 7.
38. Stanley Cohen, Visions of Social Control 1 (1985); see also John R. Sutton, Rethinking Social Control, 21 L. & Soc. Inquiry 943 (1996) (reviewing The New Institutionalism in Organizational Analysis (Walter W. Powell & Paul J. DiMaggio eds., 1991)) (“In the contemporary sociolegal literature, few concepts are invoked more frequently, and with less clarity of meaning and purpose, than that of social control.”).
Social controls include formal and informal strategies that emerge from local communities, government, or the market. As a means of governance, they possess “the capacity of a social unit to regulate itself according to desired principles—to realize collective, as opposed to forced, goals.”

Cuban participatory organizations, and, particularly, their micro-level practices, create the means for social control and influence the processes for responding to crime. Participation in Cuban mass and local organizations both fosters an awareness of the conditions that often cause crime and builds community relationships essential to social control mechanisms.

A. Social Controls and Ordinary Crime in Cuba

The control of crime is a basic function of a well-ordered society. Although there are a number of theories that seek to explain criminal behavior, two concepts stand as organizing principles. The first approach—often referred to as Individual or Rational Choice Theory—proposes that deviant behavior is a function of individual choice. This perspective suggests criminals make rational choices among alternative courses of action (i.e., “crime is a decision not a disease”). The second approach posits that deviant behavior is socially structured and that poor people

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42. James S. Coleman, *Social Capital in the Creation of Human Capital*, 94 Am. J. Soc. S. 95, 102–04 (1988) (describing social capital as interpersonal relationships and institutional linkages through which obligations and expectations are facilitated, norms and sanctions developed, and where people make use of each other’s skills and knowledge).


and racial minorities are more likely to be identified as criminals because of the state of powerlessness and the socioeconomic disadvantages they suffer.\textsuperscript{45} Under this approach, crime is the direct and indirect result of social conditions, including historical circumstances, political conditions, and economic forces.\textsuperscript{46}

Rational Choice Theory is associated with a course of action less tolerant of crime and more punitive toward acts defined as criminal. In this theory, the purpose of social controls is to isolate and sanction those individuals who will not and/or cannot control their own conduct, and to subject such individuals to strict controls.\textsuperscript{47} Rational Choice Theory also minimizes responsibility or obligation on the part of society in general for the actions of criminals.\textsuperscript{48}

In contrast, the social structure theory adopts the social control response that David Garland has called a “broader solidarity project.”\textsuperscript{49} This theory focuses on the macro political conditions and economic concerns, and the development of a social agenda that focuses on poverty prevention, economic assistance, and distribution of services.\textsuperscript{50} The circumstances of communities in which offenders reside are central points of consideration and interest.\textsuperscript{51}

The Cuban approach to social control of crime follows the structural approach. It is based on the premise that ordinary crime is the result of particular social conditions and is therefore responsive to solutions mediated through mass and local organizations.\textsuperscript{52} Cuban jurists approach ordinary crime—especially domestic violence and juvenile delinquency—in the context of political, social, and economic conditions, and they draw on structural-based theoretical foundations for guidance.\textsuperscript{53} They

\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} GARLAND, supra note 44, at 198.
\textsuperscript{48} Id.
\textsuperscript{49} Id. at 199.
\textsuperscript{50} Id.; see also Jeffrey Fagan & Tracey L. Meares, Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities, 6 OHIO ST. J. CRIM. L. 173 (2008).
\textsuperscript{51} Ahmed A. White, Capitalism, Social Marginality, and the Rule of Law’s Uncertain Fate in Modern Society, 37 ARIZ. ST. L.J. 759 (2005) (describing this approach as a function of the social welfare system that mitigates unemployment and poverty).
\textsuperscript{52} Of course, Cuba’s consideration of the social causes of crime is not unique. See GARLAND, supra note 44, at 188 (describing an approach used for much of the 20th century in the United States and Great Britain).
\textsuperscript{53} See Caridad Navarrete Calderón, Early Preventing Work in Groups of Prevention of the Popular Councils 3 (2002) (noting a consensus about the inefficiencies of formal penal system controls) (on file with author); Euclides Catá Guilarte, Cuban Social Policy and Disadvantaged Social Groups, in SOCIAL WORK IN CUBA AND SWEDEN 93, 101
believe the proper response to these structural problems is to improve the human condition ("lucha por la formación de un hombre mejor") through distribution of services by way of egalitarian initiatives.54 At the same time, criminologists draw on theories of collectively enacted social agency whereby individual participation is central to achieving the shared public goal of crime prevention.

Individuals who transgress well-settled norms are often provided a range of services as a front-line response.55 Criminologists proceed from the premise that experts, in collaboration with the community, are duty-bound to promote human values within each individual, including those with criminal predilections.56 Criminals are recognized as possessing both strengths and weaknesses—they might threaten the social order, but with some intervention, they may become productive members of society.57 To this end, Cubans have established prevention commissions at both the national and local levels that implement strategies to deter criminal behavior and thereby lessen the need to exclude from society those who manifest criminal tendencies.58

Cuban criminologists have been more concerned with examining crime as an outgrowth of poverty and market forces than with contemplating deterrence.59 Cuba’s Penal Code, amended in 1979 for the first time in forty years, eliminated those penal norms that “no longer correspond


54. García Cueto, supra note 53.
57. Patricia Grogg, Crime and Counterrevolution, CUBA UPDATE, NOV. 1991, at 30, 31 (1991) (quoting Dr. Fernando Barral, noted Cuban psychiatrist and professor of criminology, who observed that Cuba’s concern with economic crime does not relate to private property, but with the “economic principle of socialist distribution”) (on file with author); Interview with sociologist in Havana, Cuba (Oct. 15, 2005).
59. See generally Bondeson, supra note 36, at 194 (observing that countries that emphasize a welfare model are likely to have less stringent penal systems); Grogg, supra note 57.
with the reality of [Cuban] economic, social and political development."

Raúl Gómez Treto, senior advisor to the Cuban Ministry of Justice and President of the Cuban Society for Civil and Family Law, described the 1979 amendments as a paradigm shift that "depenalized" certain crimes—particularly those related to juveniles and families—and re-designated them as antisocial actions committed as a consequence of economic need or lack of education.

Other reforms demonstrate that Cubans have reconsidered the efficacy of criminalization and punishment toward deterrence of ordinary crime. By the early 1980s, Cuba had again moved purposefully to decriminalize a number of offenses by changing the character of criminal laws and reducing the use of detention. Cuba later eliminated an additional host of petty offenses and codes of conduct from the Penal Code, while the penalties for other offenses were reduced from imprisonment to fines and education programs.

Cuban criminologists tend to approach crime control from pragmatic and humanitarian perspectives. Professor Caridad Navarette Calderón, one of Cuba’s foremost criminologists, describes her research as “humanistic social projects” and emphasizes the need to embed problem-solving skills in communities rather than impose punitive responses via formal criminal justice institutions. Her research aims to shift the social

60. DEBRA EVENSON, REVOLUTION IN THE BALANCE 148 (1994).
62. MARJORIE S. ZATZ, PRODUCING LEGALITY: LAW AND SOCIALISM IN CUBA 71 (1994); Mary Lamey, Mariela Castro Speaks out for Cuba’s Gay Minority, THE GAZETTE (Montreal), July 29, 2006, at A7 (noting the decriminalization of sodomy). Other matters, such as nonpayment of rent, while not a criminal matter, were removed from the courts. See Robert Cantor, New Laws for a New Society, CUBA RESOURCE NEWSL., Dec. 1973, at 3, 3.
meanings of crime, encourage mutual aid, and improve the distribution of goods and services in order to ameliorate conditions commonly associated with crime and deviance.65

Policymakers now subscribe to this belief in community mediation as social control and encourage its exercise in multiple spheres—particularly by the popular organizations assigned to civic tasks—as a form of preventative intervention.66

B. Participatory Mechanisms as a Means of Social Control

1. Overview of Cuban Organizations

The Cuban revolution established four principal mass organizations, all of which function within the framework of the Cuban approach to social controls as a means of mobilizing the public to carry out centrally determined objectives. They include the Committees for the Defense of the Revolution (“CDR”), the Federation of Cuban Women (“FMC”), the Confederation of Cuban Workers (“CTC”), and the National Organization of Small Agriculturists (“ANAP”).67 Since the revolution, the CDRs have provided vigilance against counter-revolutionary activity and crime in neighborhoods and work places.68 The FMC’s initial objective was to
incorporate women into the realm of productive labor.\textsuperscript{69} Currently, the FMC establishes programs to assist women and families with many facets of day-to-day life, including health concerns, family violence, gender discrimination, educational programs, and employment issues.\textsuperscript{70} The CTC, described as “representative of the entire working class of Cuba,” works to further Cuba’s post-1959 political, social, and economic agenda, often through legislative proposals and initiatives.\textsuperscript{71} The ANAP sought to incorporate peasants and small farmers into the efforts to fulfill the objectives of the revolutionary project.\textsuperscript{72}

While much has been written about these organizations elsewhere, the relevant part for purposes of understanding the Cuban approach to ordinary crime is the door-to-door and block-by-block processes by which these organizations operate.\textsuperscript{73} In order to carry out their overall mission and their individual tasks, they have created an infrastructure that also serves as the foundation for social controls and crime prevention.

In addition to these mass organizations, over 2,000 local civic associations have emerged across the island over the past fifteen years, largely in response to the post-Soviet economic crisis.\textsuperscript{74} These civic associations include neighborhood development associations, religious groups, and fraternal, cultural, and sports organizations.\textsuperscript{75} They have obtained official support due to their commitment to national norms and their ability to respond to crisis situations and fulfill various critical needs that are left


\textsuperscript{71} Rabkin, supra note 68, at 264. The CTC was actually established prior to the revolution but came under the control of the Cuban government after 1959. \textit{Id.;} see also Peter Roman, \textit{Representative Government in Socialist Cuba}, LATIN AM. PERSP., Winter 1993, at 7, 19.

\textsuperscript{72} Pérez, Jr., CUBA, supra note 30, at 330.

\textsuperscript{73} See infra Part II(B)(2).


\textsuperscript{75} Dilla & Oxhorn, supra note 74, at 16–20.
Local organizations have become the sites of debates, particularly debates as to what are the most efficient means of resolving problems caused by shortages and the decline in general day-to-day living conditions. As neighborhood projects, they incorporate vulnerable populations into community self-help endeavors and social service initiatives. Many of the local organizations function as social science laboratories.

Mass and local organizations function at all levels of society: within the family and inside households, in neighborhoods and at workplaces. These organizations encourage a dynamic process of citizen-to-citizen involvement and address the conditions that contribute to crime. It is out of these very structures that the logic of social controls and crime in Cuba emerges. The focus is on fixing the broken window rather than criminalizing the window breaker.

2. Social Capital and Crime Prevention through Distribution of Public Goods

Most Cuban organizations were designed to facilitate cooperative action associated with improving the quality of day-to-day life of individuals and communities. As such, they contribute to the development of social capital—the means by which individuals and groups obtain material and social benefits through network connections and participation in civic organizations. Social capital not only yields a broad range of resources for use and exchange by citizen participants, but has also been

76. Id.; Gray & Kapcia, supra note 7, at 11, 12 (noting that groups outside of formal structures do not challenge the government and describing the 1993 Association Act, which made it easier for groups to register as NGOs).
78. See infra notes 83–85, 89, 99–101 and accompanying text.
79. Interview with the Department of Sociology of the University of Havana in Havana, Cuba (Nov. 14, 2007) (discussing projects led by university researchers with students and community residents to explore and experiment with solutions to neighborhood problems, many of which bear on crime and criminal behavior).
demonstrated to reduce rates of crime by creating community trust and investing in social welfare through the distribution of public goods.82

The mass organizations’ core projects clearly demonstrate these phenomena. The functions to which Cuban organizations dedicate themselves—including economic development, housing construction and repairs, and improvement of employment and workplace conditions—directly develop social capital through network exchanges and citizen cooperation.83 The CDRs, the FMC, the ANAP, and the CTC engage citizens in the type of efforts that promote social welfare and improve living conditions, such as: literacy campaigns, door-to-door book distributions, provision of daycare services, child development initiatives, school attendance programs, and educational programs for workers and farmers.84


84. Bengelsdorf, supra note 30, at 85; Fagen, supra note 30, at 88; Domínguez, supra note 83, at 261, 268 (noting, for example, the 95% rate of attendance in schools); Gail Lindenberg, The Labor Union in the Cuban Workplace, Latin Am. Persp., Winter 1993, at 28, 28–30; Smith & Padula, supra note 69, at 178. The CDRs developed “exemplary parenthood,” in which parents maintain active involvement in schools, and both parents and children conform to school regulations. DEBRA EVENSON, WORKERS IN CUBA: Unions and Labor Relations 14 (2002) (describing worker programs to evaluate the strengths and weaknesses of their worksites); Margo Kirk, Early Childhood Education in Revolutionary Cuba During the Special Period, in A Contemporary Cuba Reader: Reinventing the Revolution 302, 305 (Philip Brenner et al. eds., 2008) (noting that the burdens of raising families fall to community); Marifeli Pérez-Stable, Socialism and Democracy: Some Thoughts After 30 Years of Revolution in Cuba, in TRANSFORMATION AND STRUGGLE: CUBA Faces the 1990s, at 21, 26–29 (Sandor Halebsky & John M. Kirk eds., 1990); Andrew Zimbalist, Cuban Economic Planning: Organization and Performance, in Cuba: Twenty-Five Years of Revolution, 1959 to 1984, at 213, 220 (Sandor Halebsky & John M. Kirk eds., 1985); see also Eliza Barclay, Greening Cuba, Envir. Mag., May–June 2004, at 18; OXFAM AMERICA, CUBA: Going Against the Grain, Chap. II, at 4, Chap. III, at 8–9 (2001), available at http://www.oxfamamerica.org/publications/
Similarly, local groups such as the Neighborhood Transformation Workshops (Talleres de Transformación Integral del Barrio) assist with the distribution of health care services, workplace safety protections, and vaccination programs. They undertake public works projects to improve street lighting and other physical conditions of neighborhoods. They foster a sense of inclusion in community projects and enhance the processes of cooperative problem-solving. These organizations—both mass and local—address poor living conditions, lack of day-to-day resources, limited education, and diminished economic opportunities, all of which are readily associated with crime. They bear directly on the conditions that, when left unaddressed, often give way to community disrepair, family despair, and deviance. To the extent that Cuban organizations succeed in their goals, they also confer legitimacy on governmental initiatives and, thus, contribute to compliance with social and legal norms.

3. Collective Supervision and the Complexities of Categorizing Deviance

Participatory structures function in two additional and related ways as a means of crime prevention via social control. First, they collectively supervise residents in cities and in rural areas throughout the island, often in ways that are directly related to crime control. Indeed, crime prevention is a matter of specific concern to most organizations. Citizens often prefer to turn to the CDRs to remedy wrongs and resolve local disputes...
rather than seek formal legal relief through the courts.90 The Talleres have become sites for intervention in family dysfunction and violence.91

Similarly, for matters relating to ordinary crime, workers turn to the CTC in lieu of formal legal charges.92 For example, one of the most serious problems presented to the CTC has been that of workplace theft. During Cuba’s Special Period,93 theft of state property increased, creating a significant burden on Cuba’s fragile economy that provoked an outcry for the imposition of harsh penalties.94 After consideration and debate, the CTC assumed a preventative approach that focused on reducing opportunities for pilfering and counseling workers, whose rehabilitation was considered more important than punishment.95

Even when not specifically addressing crime, mass organizations serve as sites where knowledge about crime and deviance is gained and from which responses are formulated.96 CDR volunteers have direct contact with residents, and are each responsible for a given neighborhood.97 They rely on retired residents who are frequently at home and who take note of suspected criminal activity in their neighborhoods so that they may intervene before serious problems develop.98 The FMC has maintained what scholars have termed a “ubiquitous presence” in neighborhoods; organizers go door-to-door visiting homes to fulfill their tasks and conduct studies and surveys.99 They are uniquely positioned to identify

90. DOMÍNGUEZ, supra note 83, at 265 (noting that CDR activities related to vigilance have been redirected to ordinary crime); Debra Evenson, The Changing Role of Law in Revolutionary Cuba, in TRANSFORMATION AND STRUGGLE: CUBA FACES THE 1990S 53, 56 (Sandor Halebsky & John M. Kirk eds., 1990).
92. Evenson, supra note 90, at 56; Mark H. Kruger, Community-Based Crime Control in Cuba, 10 CONTEMP. JUST. REV. 101, 108 (2007) (noting that union assemblies have become the sites for determining the best ways to deal with crime in the workplace).
94. Evenson, supra note 90, at 69.
95. Id.
96. See GARLAND, supra note 44, at 205.
97. FAGEN, supra note 30, at 92; PÉREZ, JR., CUBA, supra note 30, at 330.
98. Kruger, supra note 92, at 108; see also infra notes 332–33 and accompanying text (contrasting neighborhood watch programs in the United States with the Cuban system).
community problems and gain knowledge of household dynamics.100 The Talleres rely on a social work case-management model and make use of the block-by-block infrastructure already put in place by the CDRs in order to provide services.101 They have also established research and evaluation teams to observe and report on neighborhood conditions.102 These day-to-day encounters combine to form the participatory mechanisms by which Cubans collectively supervise one another from within groups of law-abiding individuals acting in bounded solidarity to preserve order and protect the vulnerable.103

The second explanation for how participatory structures facilitate crime prevention is that it becomes a more difficult proposition to exclude individuals for deviant behavior in societies where members share deep commitments to sustaining communities and assume obligations for mutual wellbeing. John Braithwaite has described this mutual caretaking as a social corollary to such communal social structures.104 In this context, “[T]he complex experience that people have of each other makes it more difficult to squeeze the identities of offenders into crude master categories of deviance.”105 Other scholars refer to the dynamic of “linked fate” as a phenomenon of empathy among community members that affects responses to crime.106

These dynamics describe circumstances in Cuba, where organizational processes bring individuals into close proximity to one another for purposes of solidarity and support. Members engage with neighbors and coworkers, and identify with each other’s daily problems, particularly the very circumstances that may give rise to disaffection and deviance.107

102. Colantonio & Potter, supra note 85, at 88; Pérez Montalvo, supra note 101.
103. Kruger, supra note 92, at 101; see also Alejandro Portes & Julia Sensenbrenner, Embeddedness and Immigration: Notes on the Social Determinants of Economic Action, 98 AM. J. SOC. 1320, 1324 (1993) (describing sources of social capital and principled group-oriented behavior); Kapcia, supra note 55, at 32 (describing the process of enlisting the older population that comprise the Asociación de Combatientes de la Revolución to guard against crime in their neighborhoods).
104. JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 97 (1989).
105. Id.
107. Miren Uriarte, Rediscovering Lo Local: The Potential and the Limits of Local Development in Havana, in THE CHANGING DYNAMIC OF CUBAN CIVIL SOCIETY 90, 110
When community members identify deviant behavior, they are more likely to seek services than to punish.

The methods by which the CTC carries out its functions provide an example of the phenomenon of linked fate. CTC members collaborate to establish wages and set material incentives. In determining allocations, they consider not only worker productivity but also individual needs. Through these deliberations, co-workers gain knowledge of family composition, living conditions, health, and other hardships and circumstances. A similar process takes place through ANAP’s deliberative processes, by which decisions are made as to how to allocate resources to support individual families.

These mutual dependencies act to reduce the traditional monopolistic control exercised by formal criminal justice systems over criminal behavior. Because of the commonplace nature of civic participation in matters related to neighborhood wellbeing, the boundaries of participation are defined only vaguely and readily yield to intervention on behalf of individuals and families in lieu of resort to formal criminal justice mechanisms.

This is not to suggest that these organizations always function constructively. Surveillance is at times an intrusive practice, one used as a mechanism of intimidation. It not infrequently passes into the realm of harassment. The CDRs have carried out repressive acts, such as denouncing and detaining suspected counter-revolutionaries. Neighbors have informed on one another, often resulting in unwarranted accusations. The mass organizations have also suffered from corruption, offic-
sciousness, and bureaucratic stagnation. Moreover, the success of these organizations has varied from neighborhood to neighborhood and has been hampered by the scarcity of material resources and local political leadership. But in matters related to the facets of everyday life, these organizations have been generally successful in controlling crime. They do so by improving living and working conditions, and fostering the necessary circumstances for the development among ordinary Cubans of empathetic relationships that impede the imposition of categorical stigma on those who exhibit deviant behavior.

III. ORDINARY CRIME: DOMESTIC VIOLENCE AND JUVENILE DELINQUENCY

A review of the Cuban approach to domestic violence and juvenile delinquency serves as a case study of the ways political culture and social controls interact to produce a coherent and generally successful policy response to crime.

Cubans have focused on promoting norms of gender equality and social solidarity as the principal means to deter violence against women. Cuban criminologists proceed from two assumptions—(1) education can change gender norms that contribute to domestic violence and (2) attention to the material needs of households supports an environment conducive to stable, violence-free families.

Similarly, the dominant response to juvenile delinquency in Cuba has focused not on punishment but on prevention strategies that privilege the delivery of services to children, families, and communities. Cubans have been careful to avoid stigmatizing youth who exhibit deviant behavior. Instead, they emphasize social work methodologies as a means to attend

114. Fagen, supra note 30, at 100.

115. Colantonio & Potter, supra note 85, at 94–95.

116. Santana, supra note 100, at 262; see also Braithwaite, supra note 104, at 88; Jill Hamberg, Cuban Housing Policy, in Transformation and Struggle: Cuba Faces the 1990s, at 235, 246 (Sandor Halebsky & John M. Kirk eds., 1990).


to family dynamics, child-rearing, and community activities that nurture and teach social values.\footnote{119}

In both instances, formal legal responses eschew punitive crime control measures\footnote{120)—Cuba’s laws mandate prevention rather than punishment and are thus constitutive of the informal processes that serve as the primary means to address domestic violence and juvenile crimes. They produce normative changes and incorporate potential perpetrators into dominant social structures as a way to prevent criminal activity.}

A. Domestic Violence

1. Gender Equality as a Framework\footnote{121}

Cuban criminologists who specialize in domestic violence have argued that eradicating gender-based violence first requires the transformation of relationships between men and women, with a focus on women’s equality.\footnote{122} An understanding of the Cuban approach to the former requires an examination of developments toward achieving the latter.

Among the many things that changed in Cuba after 1959 was the expanded presence and participation of women in public realms. New possibilities provided vast numbers of women with a new sense of purpose and significantly altered the gender determinants of daily life, at least during the early years. With the triumph of revolution, Cuba initiated a National Development Strategy to eliminate all forms of discrimination and to address women’s issues specifically.\footnote{123} The FMC established day

\footnote{119. Calderón, supra note 118, at 13.}

\footnote{120. See infra notes 166–68, 193–95, 198, 282–83 and accompanying text.}

\footnote{121. Much has been written elsewhere about demonstrable improvement of equality for women in Cuba. See generally Lois M. Smith & Alfred Padula, Sex and Revolution: Women in Socialist Cuba (1996); Margaret Randall, Women in Cuba: Twenty Years Later (1981); Berta Esperanza Hernández-Truyol, Building Bridges V—Cubans Without Borders: Mujeres Unidas Por Su Historia [Women United by their History], 55 FLA. L. REV. 225 (2003); Hernández-Truyol, supra note 65, at 672.}

\footnote{122. See infra notes 158, 166 and accompanying text.}

care centers, laundries, state-run cafeterias, and take-out restaurants as part of an effort to socialize domestic work. 124

State-run television has altered programming narratives in an effort to change depictions of socially constructed gender roles in the home. 125 Educators revised school texts and educational curricula to depict women as fully capable persons integrated into all levels of society. 126 Child development experts have introduced new children’s play activities to dismantle traditional roles assigned by sex. 127 Cubans have increasingly accepted same-sex relationships, gay marriage, and transgendered identities while grappling with the problematic masculine discourse associated with the revolution and traditions of machismo. 128

Legal reforms have also served as an expression of gender equality. Although lacking enforcement mechanisms, the 1975 Cuban Family Code required an equal division of housework and child care between husbands and wives. 129 The 1976 Constitution addressed women’s issues (particularly the problem of the double shift), established standards for marriage as an equal partnership, and proclaimed equal political, economic, and social rights as between husbands and wives, and men and


125. Gail Reed, The Media on Women: Caught Napping, CUBA UPDATE, Summer 1991, at 15, 17 (contrasting recent television productions that have featured strong women as central characters with a popular cartoon, “The Little Pumpkin,” which has typically reinforced traditional gender stereotypes but has recently made one of the primary caretaker figures male).


127. Id. at 118.


women, generally. Labor laws similarly extended rights and protections to women. Cuba has led by example with regard to international protocols and gender-based equality. It was the first country to sign the Convention to End Discrimination Against Women (“CEDAW”) and it subsequently signed the treaty’s optional protocol allowing individual complaints to proceed before international bodies for adjudication.

This is not to suggest that Cuban women have achieved full equality within Cuban society. However, efforts to integrate women into all levels of society and eliminate stereotypes through innovative and multi-institutional means have yielded significant achievements. Women’s progress in education, employment, and health has been described as “enviable.”

The U.N. Special Rapporteur on Violence Against Women found that the Cuban revolution has “put [Cuban women] in a better position statistically than most of their Latin American counterparts,” and the status of women in Cuba compares favorably with industrialized capitalist countries.

131. CEDAW Report, supra note 126, at 75.
136. Hernández-Truyol, supra note 65, at 672–73; see also Special Rapporteur’s Report, supra note 70, at 10.
137. Special Rapporteur’s Report, supra note 70, at 10, 68.
2. Domestic Violence Prevention and Intervention

In Cuba, as elsewhere, the complexity of domestic violence is understood as arising from structural social relationships that include discrimination, isolation, and poverty.139 The FMC anticipated that domestic violence would cease with changed material conditions.140 However, with the recognition of the persistence of violence against women, that viewpoint changed and the FMC urged greater attention to the issue.141 Activists argued that in order to fulfill the humanist social project, domestic violence had to be addressed not only because of its consequences for families, but because of the significance of nonviolence as a normative matter.142

a. Definitions and Determinants

Cubans generally adhere to the conventional definition of domestic violence as physical, emotional, and psychological violence committed within intimate relationships.143 However, social cohesion among neighbors and established norms of gender equality have influenced the way Cubans conceive of the problem, which has led to expansion of the definition beyond paradigmatic characterizations. For example, Cubans have described domestic violence as harms that occur in other types of relationships (not just between intimates). Respondents asked to identify domestic violence in a 1993 study included not only disputes between intimate couples, but also arguments between coworkers, as well as arguments between people while on shopping lines.144

Similarly, behaviors beyond the prototypical acts usually associated with gender-based violence are considered forms of domestic violence.145

139. Characterization of Women Assaulters, supra note 64, at 240–41. The FMC addresses domestic violence from the point of view that the social construction of gender roles contributes to the social and political problems that Cuban women continue to face. See CEDAW Report, supra note 126, at 40; Caroline Bettinger-López, Human Rights at Home: Domestic Violence as a Human Rights Violation, 40 COLUM. HUM. RTS. L. REV. 19, 67 (2008) (identifying the structural nature of domestic violence).
140. LUCIAK, supra note 128, at 35 (describing the FMC’s “triumphalist discourse”).
141. Id. at 35–36.
142. See Characterization of Women Assaulters, supra note 64, at 239 (implying that non-violence is of the highest values to which Cubans must aspire in their daily lives).
145. Edith, infra note 147.
In a 1995 study, women respondents identified the most common form of gender-based violence as the imbalance in workload between men and women.\textsuperscript{146} Some cited the transmission of the HIV virus as a form of gender-based violence.\textsuperscript{147} Others have identified “the silent treatment,” where one partner stops talking with the other, as a particularly Cuban form of intimate violence.\textsuperscript{148}

There is general consensus among FMC organizers and scholars about the political and economic determinants of domestic violence.\textsuperscript{149} Writing for the Center for Legal Research of the Ministry of Justice, Caridad Navarette Calderón argues that the sources of domestic violence range from meta-systems (e.g., the U.S. embargo and its attendant deprivations and stress) to micro-systems and personal traits (e.g., socially constructed norms relating to male dominance and female submission).\textsuperscript{150} A similar point of view was repeated in interviews with the U.N. Special Rapporteur on Violence Against Women, during which Cubans expressed disagreement with the U.N. focus on individual violence experienced as physical, sexual, or psychological violence. The Cubans argued instead that it was a matter of violence against women that Cuban women suffered from structural violence and economic exploitation largely as a result of U.S.-imposed economic sanctions.\textsuperscript{151}

Cuban experts rank socioeconomic conditions—particularly housing shortages, unemployment, low levels of education, poor health, and consequential substance abuse—among the primary risk factors for domestic violence.\textsuperscript{152} These experts point to poor communication skills and low

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\textsuperscript{146} Special Rapporteur’s Report, \textit{supra} note 70, at 28 (citing a study in Pinar del Rio). The authors were given the same response in an interview with a male attorney and his wife from Havana on March 10, 2007.


\textsuperscript{148} Interview with professor of law of the University of Havana in Havana, Cuba (Oct. 14, 2003); Interview with nurse at health clinic in Habana Vieja, Cuba (Oct. 12–13, 2005); Interview with male attorney from Havana and his wife in Havana, Cuba (March 12, 2007); see also Sara Más, \textit{Cuba: Ver Más Allá De Los Golpes [Cuba: See beyond the Shock]}, SEM LAC, Jan. 15, 2007, http://www.redsemlac.net/noticias/2007/070115.htm#Cuba:_Ver_m%C3%A1s_all%C3%A1_de_los_golpes.

\textsuperscript{149} See \textit{supra} note 143 and accompanying text.

\textsuperscript{150} Characterization of Women Assaulters, \textit{supra} note 64, at 239–41. Meta systems also encompass socially constructed norms relating to male dominance and female submission. \textit{Id.} at 241 (criticizing gender stereotypes of women as weak, sentimental, and suffering, and men as strong, intelligent, and powerful).

\textsuperscript{151} Special Rapporteur’s Report, \textit{supra} note 70, at 69.

\textsuperscript{152} Characterization of Women Assaulters, \textit{supra} note 64, at 240–41; Raquel Sierra, \textit{Cuba: Alcohol y Violencia, Dos Males De Alto Riesgo [Alcohol and Violence: Two High-}
self-esteem as personal contributing characteristics of a secondary nature. These explanations share the premise that the sources of domestic violence are found in the social environment of daily life, rather than in individual characteristics and behavior. They are the framework by which Cubans endeavor to prevent and respond to domestic violence.

b. Cuban Responses to Domestic Violence

Cubans formulate their responses to domestic violence by starting with the conviction that the political and economic determinants of such behaviors must be addressed in a manner consistent with the prevailing views about ordinary crime. First, experts and policymakers emphasize the need for research and policy initiatives to address the sources of domestic violence. Second, participatory organizations, particularly the FMC, summon their members to provide victims and perpetrators with a range of services. The third response involves legal action to promote the first two strategies by mandating research and prevention efforts. Legal strategies, of course, also operate within the formal criminal justice system, but these too are designed to maximize services and integrate the perpetrator into the community.

(1) Research and Policy Initiatives

Theoretical criminology has had a direct and profound influence on domestic violence responses in Cuba. The National Commission on Prevention and Social Attention (Comisiones de Prevención y Atención Social) (“CPAS”) was created in 1986 to study the social aspects of crime and deviance. CPAS established a number of national multi-
disciplinary research programs and working groups, including one on domestic violence.\textsuperscript{157} Much of the research currently focuses on gender norms and learned behaviors of men and women as the source of power imbalances that serve to legitimize domestic violence.\textsuperscript{158}

University departments have developed domestic violence research programs and frequently collaborate with international experts.\textsuperscript{159} Government offices, including the Attorney General’s Office (\textit{Oficina de Fiscalía General}), the Ministry of Public Health, and the Ministry of Justice’s Center for Legal Research, have undertaken domestic violence research initiatives.\textsuperscript{160} From 2002 to 2003, the Center for Psychological and Sociological Research (\textit{Centro de Investigaciones Psicológicas y Sociológicas}) (“CIPS”) undertook a lengthy study of intra-family violence, and in the process, created survey instruments and methodologies

\begin{footnotesize}
\textsuperscript{157} Special Rapporteur’s Report, \textit{supra} note 70, at 23 (noting the establishment in 1997 of the Working Group for the Prevention of and Attention to Interfamilial Violence); Uriarte, \textit{supra} note 74, at 120.


\textsuperscript{159} Special Rapporteur’s Report, \textit{supra} note 70, at ¶ 20 (noting that the Center on Women’s Studies examines domestic violence and engages with international experts). In the last 15 years, one of the Authors, Deborah Weissman, has received invitations and programs from the FMC to attend and present at various conferences examining violence against women.

for ongoing examination of the issue. There is a continual call for more research and better data collection across several fields of study. Over the past two decades, these studies have produced a new framework for approaching the gender determinants of aggression, submission, and workplace and household roles. As noted by the U.N. Special Rapporteur on Violence Against Women (in her review of developments in Cuba), CPAS has trained Cuban officials in matters relating to gender violence since the late 1990s. CPAS has also coordinated community organizations to conduct workshops and media campaigns to promote awareness and intervention in cases of domestic violence, with a focus on gender equality in spousal relationships. In 2006, CIPS developed curricular programs and training sessions for parents on the prevention of violent behavior within the family, including the disruption of gender-determined power dynamics. Government agencies treat domestic violence as a public health problem and urge families and communities to alter patterns of patriarchal culture.

Perhaps the most striking aspect of Cuban research findings is the absence of a call for more stringent application of criminal laws. Clotilde Proveyer Cervantes, one of Cuba’s most prominent experts in domestic violence, insists that legal sanctions must be the “last rung of the ladder”—that is, a last resort. Her view is that “criminal treatment is not the solution;” rather, the answer lies in “build[ing] other models of masculinity and femininity that are not conflicting.” Her statements

162. Characterization of Women Assaulters, supra note 64, at 254.
163. Hardy & Jiménez, supra note 117; Proveyer Cervantes, supra note 158; see also Marqués Dolz, supra note 143 (noting that those women who have leadership roles assume socially constructed styles reflective of masculine leadership—“women with mustaches”).
164. Special Rapporteur’s Report, supra note at 70, at 86.
165. Id.
166. Edith, supra note 147; cf. Fagan & Meares, supra note 50, at 196 (“In deterrence and crime control research, the structure of family life consistently ranks among the most salient forms of informal social control”).
169. Id. Proveyer Cervantes also argues that women should be empowered to see themselves as other than victim, an outcome rendered less likely if they resort to the courts. Proveyer Cervantes, supra note 91, at 211.
represent the prevailing viewpoint, which is derived from theoretical developments that reflect Cuban political culture.\textsuperscript{170}

(2) Controlling Domestic Violence through Participatory Mechanisms

As a result of Cuba’s political culture and the processes of the organizations described in Part II, domestic violence cases are not easily hidden from neighbors, health care professionals, or community social workers.\textsuperscript{171} Concepts of a cohesive Cuban society and the moral imperative of \textit{solidaridismo} encourage intervention in a number of ways in the household, the neighborhood, and the workplace.\textsuperscript{172} Maintaining functional families is a priority in the culture of Cuban organizations.\textsuperscript{173}

The FMC has established “Casas de Orientación de Familia” (Family Orientation Houses) for victims of domestic violence. Although they do not provide alternative housing for victims, the Casas offer counseling and services related to job training and employment.\textsuperscript{174} FMC activists have also made use of the performing arts, television, and radio to publicize the idea that gender roles are contributing factors of domestic violence, and to give a public voice to the victims and public attention to their suffering.\textsuperscript{175} The FMC also organizes self-help groups designed as alternatives to the formal legal system, specifically for male perpetrators.\textsuperscript{176} The Center for Sex Education has also encouraged Cuban citizens to reconsider socially constructed forms of masculinity that are a risk

\textsuperscript{170} See Edith, \textit{supra} note 147 (quoting a prominent film-maker who, after interviewing victims of domestic violence, found that resort to the law was impractical and less important than providing families with resources).

\textsuperscript{171} Special Rapporteur’s Report, \textit{supra} note 70, at 28; Interview with physician in Habana Vieja, Cuba (Dec. 23–24, 2002).

\textsuperscript{172} Kruger, \textit{supra} note 92, at 106; Interviews with nurse, social worker, and physician at health clinic in Habana Vieja, Cuba (Oct. 14, 2005).

\textsuperscript{173} Uriarte, \textit{supra} note 74, at 128. Even community groups that work in areas unrelated to gender violence incorporate into their realm of responsibility the identification and management family violence problems. Interview with three sociologists and two criminologists in Havana, Cuba (Mar. 9, 2007); Interview with the University of Havana Department of Sociology, \textit{supra} note 79.

\textsuperscript{174} Interviews with members at the Office of the Federation of Cuban Women in Havana, Cuba (Oct. 13, 2005). Members noted with concern the lack of domestic violence shelters due to Cuba’s housing crisis. \textit{Id.; see also} Special Rapporteur’s Report, \textit{supra} note 70, at ¶ 89, 91.

\textsuperscript{175} Special Rapporteur’s Report, \textit{supra} note 70, at 92.

\textsuperscript{176} Interview with three sociologists and two criminologists, \textit{supra} note 173; Sara Más, \textit{En Cuba, un Espacio para Creer} [\textit{In Cuba, Space to Grow}], CIMACNOTICIAS, Nov. 16, 2006, http://www.cimacnoticias.com/site/06111603-Violencia-qui-d-15587.0.html (describing a self-help group’s efforts to rethink domestic violence behavior, including having men who have been imprisoned use their experiences to teach other men).
factor for violence and have participated in projects to that end.\(^{177}\) Neighbors often intervene directly with abusers;\(^{178}\) according to one expert’s estimate, they do so in at least 90% of cases involving family violence.\(^{179}\) Furthermore, neighbors may bring perpetrators to FMC programs, and they frequently report abuse to family doctors, who rely on social workers to investigate and offer services.\(^{180}\)

Neighbors may also involve CDR officials, or even the police, at times. However, most individuals contact authorities for the purpose of encouraging the perpetrator to enter into an informal contract whereby he agrees to obtain help and change his behavior.\(^{181}\) Social sanctioning is not uncommon, and neighbors will keep watchful eyes on the home, particularly if they are concerned that the victim is not likely to come forth to complain.\(^{182}\)

c. Legal Responses

Formal legal responses are constitutive of the political culture of participation from which strategies of prevention and social control are derived. The very organizations and commissions that study and coordinate responses to violence were created by legislation.\(^{183}\) For example, CPAS, which studies crime, including domestic violence, was mandated by law.\(^{184}\) Affirmative legal obligations in the 1975 Constitution and the Family Code include gender equality as a means to address the determinants of gender violence.\(^{185}\) The People’s National Assembly Standing
Committee for Children, Young People and Equal Rights for Women is obligated by legislation to counsel, evaluate, research, study, and monitor matters related to domestic violence. Similarly, treaty obligations arising from CEDAW have inspired ongoing efforts relating to equal rights for women.

In the last decade, Cubans have given much attention to the implementation of formal criminal laws. Cuba has no specific crime of “domestic violence,” and this has caused concern and debate. Cuban experts recognize the privileged position that criminal sanctions hold in most countries with regard to violence against women. They have been pressed by international observers to create specific provisions in the Penal Code to define and punish domestic violence. Some Cuban experts advocate specific domestic violence legislation as well as the establishment of a Family Court with the expertise to handle such matters.

In fact, the National Assembly has added various provisions to the Penal Code that do address violence against women. In 1997, lawmakers amended the Code to increase punishment for trafficking in persons. Two years later, in response to the debates about the lack of a specific domestic violence law, the National Assembly added violence between intimates as an aggravating factor to relevant code sections. Criminologists have recommended additional legislation to address the

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186. CEDAW Report, supra note 126, at 41.
187. Press Release: Cuba Striving Hard, supra note 123 (noting that Cuba created a national action plan as follow-up to the Fourth World Conference on Women; the plan has the status of a decision of the Council of State).
189. See Dixie Edith, Cuba: Se Necesita Una Legislación Específica [Cuba: Specific Legislation is Needed], MUJERESHOY, Mar. 19, 2007, http://www.mujereshoy.com/secc_n/3649.shtml (noting one study where a majority of those interviewed thought that there should be a specific provision in the Penal Code related to domestic violence); Special Rapporteur’s Report, supra note 70, ¶ 25.
190. In the past fifteen years, judges and police have received domestic violence training. See Raquel Sierra, Cuba: Evitar El Peor Rostro De La Violencia [Cuba: Avoiding the Worst Face of Violence], SEMLAC, Apr. 24, 2006, http://www.redsemlac.net/noticias/2006/060424.htm (describing a forensic medical project to assist domestic violence victims in the event of prosecution). Lawyers from la Oficina Fiscalia have scheduled presentations in community settings about the criminal legal aspect of domestic violence. Interview with attorney, Office of the Fiscalia, supra note 178.
191. CEDAW Report, supra note 126, at 49 (referencing Decree-Law No. 175, July 17, 1997).
need for self-defense-related laws for female defendants who commit crimes against their attackers.193

Moreover, although Cubans reject the paradigm of criminal legal responses, such abusive actions are not without criminal penalties in some circumstances.194 However, in instances where a perpetrator is charged, prosecutors tend to view the criminal justice system as part of the “broader solidarity project,” wherein complainants are presumptively afforded credibility and respect and perpetrators are often viewed as in need of therapy and services.195 Prosecutors generally attempt to avoid imposing prison sentences in secure facilities, preferring instead to use reintegrative models. These models include what Cubans refer to as work camps or open prisons without cells, where defendants take classes and meet in groups, and may be required to report progress to the judge.196 They often recommend that perpetrators be diverted to workplace groups to discuss gender violence or to the programs offered by the Casas de Orientación.197

Certainly, some perpetrators are imprisoned.198 Convictions for rape and for physical assault carry sentences commensurate to the injury.199 However, prosecutors trained in matters relating to family violence indicate that there have been relatively few domestic violence prosecutions and fewer that result in imprisonment due to the preference for, and perceived success of, alternative measures.200

There is a particular idiom in Cuban criminology, one that invokes human dignity and reconcilability as premises of an approach to domestic violence.201 The Cuban socialist system of justice differentiates itself from the world at large by focusing on prevention.202 Domestic violence is treated as a problem reflecting cumulative social circumstances, not

194. Special Rapporteur’s Report, supra note 70, at 27, 37; Interview with attorney from Cienfuegos, Havana in Havana, Cuba (Oct. 11, 2005).
195. Interview with Provincial Level Jurist, supra note 179; Interview with nurse, social worker, and physician, supra note 172.
196. The descriptions offered resembled a liberal version of work release. Interview with attorney, Office of the Fiscalía, supra note 178. Interviewees also noted that the judges see their role as expressing support rather than threatening punishment. Id.
197. Id.
198. Special Rapporteur’s Report, supra note 70, at 37. This is especially true for rape. Id.
199. Interview with attorney, Office of the Fiscalía, supra note 178.
200. Id.
201. Interview with Caridad Navarrete Calderón in Havana, Cuba (Oct. 16, 2003).
202. Id.
solely as an act of the individual who commits it. The prevailing perception that domestic violence is caused by socioeconomic deprivation and culturally determined gender roles necessarily entails the view that individual punishment is unduly facile and often misplaced. Criminal sanctions remain subordinated to dominant approaches that rely on organizational networks whose members are well-situated to intervene in domestic violence matters.

This approach is not only consistent with Cuban political culture; it also appears to be successful. Available data, including a Bureau of Justice report, demonstrate that rates of domestic violence are lower in Cuba than in the United States or other parts of Latin America.

B. Juvenile Delinquency

1. Youth in Cuba: “If The Youth Fail, We All Fail”

The subject of juvenile delinquency must be considered in the context of the celebrated status accorded to youth in Cuba. Their importance has been recognized by scholars from within and without (and both on and

203. See generally Dixie Edith, Cuba: Agresión Sin Golpes [Cuba: Aggression without Blows], SEMLAC, Nov. 19, 2007, available at http://www.redsemlac.net/noticias/2007/071119.htm. One forensic medical specialist rejects considering violence not from the perspective of “quién es malo y quién bueno” (who is good and who is bad) because of the likelihood that the perpetrator was himself abused at an earlier point. Id.

204. Interview with Caridad Navarrete Calderón, in Havana, Cuba (Nov. 15, 2007); Proveyer Cervantes, supra note 168; Proveyer Cervantes, supra note 169; supra text accompanying notes 168–69.

205. In a study by the FMC, of the 25,239 individuals who sought help from one of the 185 offices throughout the country, only 1.9 percent of the cases related to intra-family violence, including abuse by parents toward children. CEDAW Report, supra note 126, at 164–65; see also RAY MICHALOWSKI, WORLD FACTBOOK OF CRIMINAL JUSTICE SYSTEMS: CUBA (1993) (noting that based on data for 1988, rape and domestic violence were less common in Cuba than in the United States and Latin America); Gastón A. Alzate, Cuba, in TEEN LIFE IN LATIN AMERICA AND THE CARIBBEAN 99, 111 (Cynthia Margarita Tompkins & Kristen Sternberg eds., 2004) (noting that rape “is almost unheard of in Cubá”) Cuba Solidarity Campaign, Women in Cuba, http://www.cuba-solidarity.org.uk/faq.asp (last visited Feb. 17, 2010) (noting low rates of physical violence against women); Anecdotal evidence also supports this view. Eileen Schnitger & Christina Romero, Not Feminist, But Not Bad: Cuba’s Surprisingly Pro-Woman Health System, WOMEN’S HEALTH ACTIVIST (National Women’s Health Network, Chico, CA), July/Aug. 2003, at 1, available at http://www.nwhn.org/newsletter/article1.cfm?newsletterarticles_id=325 (describing the experience of two American correspondents whose interview subjects said that sexual violence in Cuba is rare).

Young Cubans were active in the overthrow of Batista and have continued to participate in mass organizations and political institutions. As one writer observed, the Cuban revolution was “made largely by and for the young people of the island.”

Youth have benefitted from the revolution. Regional and international health and human rights institutions that measure the wellbeing of children have praised Cuba for the accomplishments of its health care system. Cuban health measures for children are not only better on average than those of all members of the Organization for Economic Cooperation and Development (“OECD”) and world averages generally, but they also surpass those of the high human development countries and are equal to or better than those of high-income OECD nations.

Education is the highest priority in Cuba. Cuban leaders consider education to be the foundational public good and the basis for achieving social justice and cultural development. The proportion of the national budget allocated for education is 13.5 percent, a significantly high figure, particularly for a small country. International observers have praised Cuban education programs at all levels, particularly the emphasis on ear-

207. Fagen, supra note 30, at 145.
208. Id. Organizations such as the Unión de Jóvenes Comunistas (UJC), the youth communist organization with its own press, Juventud Rebelde, reflect ongoing efforts to incorporate young people into Cuba’s political culture. Hernández & Dilla, supra note 26, at 45; see also María Isabel Domínguez, Cuban Youth: Aspirations, Social Perceptions, and Identity, in A CONTEMPORARY CUBA READER: REINVENTING THE REVOLUTION 292, 294–95 (Philip Brenner et al. eds., 2008). Youth participate in official governmental structures such as Poder Popular and the National Assembly, both of which include standing youth committees. Valdés, supra note 25, at 27, 38.
209. Fagen, supra note 30, at 145.
213. Id.
ly childhood development.\textsuperscript{215} The benefits of education have been widespread and, notwithstanding instances of persisting racial discrimination, schooling has been a significant factor in diminishing racial inequality.\textsuperscript{216} Researchers describe Cuban youth as generally possessing a strong sense of national identity and a self-image that comports with political and cultural values.\textsuperscript{217}

2. Cuban Approaches to Juvenile Delinquency

Cuba has maintained steady observation of youth development and delinquent behavior.\textsuperscript{218} Preoccupation with juvenile delinquency has increased since the economic crisis of the 1990s, when the number of children on the streets rose.\textsuperscript{219} The Cuban leadership, concerned with deteriorating conditions and the threat of increasing economic disparities, turned its attention to strengthening social and political bonds between youth and the state and incorporating youth as “stake-holders” in the revolutionary project.\textsuperscript{220} As conditions in Cuba have changed, so too have strategies for dealing with the youth populations considered most vulnerable.\textsuperscript{221} What has not changed, however, is Cuban refusal to link strategies for combating delinquency with criminal and correctional justice strategies.\textsuperscript{222}

\begin{itemize}
\item[216.] Alejandro de la Fuente, \textit{Recreating Racism, Race and Discrimination in Cuba’s Special Period}, in \textit{A CONTEMPORARY CUBA READER: REINVENTING THE REVOLUTION} 316, 317 (Philip Brenner et al. eds., 2008).
\item[217.] Dominguez, \textit{supra} note 208, at 296–97.
\item[220.] Cuba’s economy has shifted due to the dollarization of the economy, some privatization, and the impact of remittances. See Uriarte, \textit{supra} note 74, at 110, 115–20.
\item[221.] Id. at 123.
\end{itemize}
a. "Preventive Work, Not Repression"223

Preventive strategies have been the principal method of addressing the problem of juvenile delinquency, even as delinquency increased during the Special Period.224 The Ministry of Social Welfare coordinates prevention efforts, working with national and regional assemblies, ministries, and mass organizations to assist in delinquency prevention efforts.225 Government leaders use the state-run media to exhort citizens to help youths who exhibit troubling behavior, urging that such youths not be rejected.226

Research has been an integral facet of Cuban prevention strategies.227 As early as 1960, Cuba established the Center for the Evaluation, Analysis and Guidance of Minors to study problems of juvenile crime.228 In 1986, CPAS and the National Committee on Social Prevention and Child Care appointed experts to conduct research and make recommendations with regard to delinquency prevention.229 Similarly, the Ministries of the Interior and Education have established research centers to collaborate on approaches to juvenile crime.230

Educators also play an important role in delinquency prevention, putting to use the values of Cuban participatory culture. Indeed, educators train volunteers to work with children in school and during after-school activities.231 They emphasize humane education, affection, and nurturing.232 Sex education, principles of nonviolence, and public health

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223. Lutjens, supra note 58, at 62 (quoting Coronel Cecilia Andres, Head of the Commission for Attention to Minors).
224. Id.
225. Id. at 55, 58.
226. Id. at 62.
227. Interview with Calderón, supra note 201 (describing research as “humane and utopian” in purpose); see also Laura Sánchez Valdés et al., Applied Ethics in Mental Health in Cuba: Part I—Guiding Concepts and Values, 12 ETHICS & BEHAV. 223, 234 (2002) (noting humanism as an ethical value among professionals in the realm of psychology).
228. Gómez Treto, supra note 61, at 121; Mendoza Díaz, supra note 222.
230. Lutjens, supra note 58, at 58.
231. Kirk, supra note 84, at 305; Gasperini, supra note 215, at 13 (noting mechanisms that foster community participation in schools).
232. Sara Más, Violencia: Desterrar el Castigo [Violence: Exiling Punishment], SEMLAC, Apr. 13, 2006 (noting that experts oppose such methods and argue that such tactics fail to produce intellectual development).
issues (such as drug abuse) are part of the curriculum. Teachers stress students’ individual and collective responsibilities and cultivate a culture of cooperation and solidarity within their classrooms as a means to discourage criminal behavior. Punishment and threatening techniques are eschewed as ineffective and viewed as means by which violence is replicated.

The institutions and organizations described in Part II of this Article play the central role in delinquency prevention strategies. The CDRs recruit retirees to provide supervision and guidance for children exhibiting troubling behavior. Neighbors work with school personnel to identify truancy as well as its potential causes. Local prevention commissions meet with citizens to address concerns about antisocial youth and to strategize about additional supervisory measures, including the development of recreational and sports programs. CDR members seek solutions to the more common problems that affect children’s success in school, including economic strain within families. The Unión de Jóvenes Comunistas (“UJC”) has engaged in a media campaign to link family violence to social violence, crime, and delinquency.

The Talleres have also addressed youth delinquency in community development improvement projects. In an effort to incorporate youths into mainstream activities, workshops in the Havana neighborhood of Atares,
for example, offer disaffected youths the opportunity to participate in
building restoration projects while engaging them in decision-making
processes about larger community problems.\footnote{242} The Casa del Niño y la
Niña, a group started by a community development workshop that is
supported by various ministries and institutes, provides services for
children and families to improve the quality of life of children and ado-
lescents as part of prevention efforts.\footnote{243} Other organizations, such as the
Martin Luther King Center and the East Havana Cultural Centers, have
developed a number of youth programs. These programs include sporting
events, dance troupes that incorporate hip-hop, and other recreational
activities, all as a way to create constructive opportunities for youths to
participate and engage in change-making activities.\footnote{244}

Health care providers are principal players in delinquency prevention
efforts. They are integrated into the lives of families, and they regularly
conduct evaluations of families’ social situations for evidence of eco-
nomic or psychic strain that might impact the wellbeing of children.\footnote{245}
When signs of behavioral or substance abuse problems are noted, follow-
up services to ameliorate conditions are generally provided in the realm
of public health.\footnote{246}

These preventative approaches are based on the theory that delinquent
behavior is learned and can be unlearned without stigmatizing delinquent
youth.\footnote{247} They reflect models propounded by prominent delinquency
theorists who argue that a community’s ability to supervise youths
through informal and supportive networks is key to controlling delin-

\footnote{242} Marie Kennedy et al., Looking at Participatory Planning in Cuba . . . through an
plannersnetwork.org/publications/2003_summer/kennedy_lorna_tilly.htm; Interview with
the University of Havana Department of Sociology, supra note 79.

\footnote{243} Volunteer ESL Educators Helping Cuban Youth Learn English, http://www.
cubavolunteer.com (last visited Feb. 17, 2009).

\footnote{244} Kennedy et al., supra note 242, at 6; Uriarte, supra note 74, at 123 (describing
Cuban initiatives post-Special Period to develop cultural programs for youth as part of
delinquency prevention).

\footnote{245} Interview with physician in Habana Vieja, Cuba (Oct. 10, 2005); Stephanie
Hauge, Primary Care in Cuba, 23 EINSTEIN J. BIOL. MED. 37, 40–41 (2007) (describing
the daily terraros or home visits by health care professionals).

\footnote{246} Hauge, supra note 245, at 41; see also Examples of Social Work Programs, J.
work/sw06-examples.htm (describing the program at the Community Health Center in
the town of Regla, outside of Havana).

\footnote{247} Salas, supra note 218, at 54 (describing the Cuban approach as social-
psychological).
quency. Cubans have supported these differential initiatives, which target young people for support and services in a manner consistent with Cuba’s norms and values.

b. Socialization and Social Work: Cuba’s Social Work Brigades

Miren Uriarte has studied Cuba’s response to the economic crisis of the 1990s and has observed that social work strategies are the newest initiatives by which the government has attempted to transform itself to remain effective and efficient. Nowhere is this more apparent than Cuba’s establishment of the Social Work Student Brigades, a key objective of which is to confront the problems associated with juvenile delinquency.

Beginning in 2001, Cuba established new centers affiliated with universities across the island for three related purposes: (1) to train young people as social workers for the purpose of re-incorporating them into educational settings; (2) to provide apprenticeship opportunities with assurances of employment upon completion of a brigade program; and (3) to augment resources to address social and economic problems, particularly those that contribute to delinquency. These centers have recruited over 100,000 unemployed youths who had not finished their education. Youths who receive social work training—young men and women who were themselves in need of services and may be exhibiting criminal behavior—receive stipends while they engage in work-study programs. They are eligible to attend university upon beginning their social work and are guaranteed paid work upon completing their pro-

249. Uriarte, supra note 74, at 123.
251. Uriarte, supra note 74, at 122–23. Cuba has also emphasized university-level programs in social work in addition to the Brigade training for youth who may not be enrolled in university programs or who are otherwise unemployed. See Strug & Teague, supra note 250, at 2.
252. Kapcia, supra note 87, at 400–01 (observing that the Brigades targeted the problem of the neglect of young Cubans to reduce discontent and a rise in juvenile delinquency); Pérez Hernández, supra note 234; Uriarte, supra note 74, at 122–23.
254. Id.; Strug & Teague, supra note 250.
grams and returning to their communities. Between 2002 and 2007, 380,000 new jobs for youths were created in education, health care, social work, computer technology, and other fields.

Brigade students work with vulnerable populations, including other youths, the elderly, families of the incarcerated, and individuals with criminal histories.

Social work volunteers affiliated with the brigades identify minors engaged in antisocial acts and endeavor to manage their behavior through various social work strategies, including tutoring, placement in trade schools, and increased guidance and mentoring. They work on a one-to-one basis to distribute services and otherwise create supportive environments as a means to intervene in criminal activity. Indeed, the central focus of the brigades is delinquency prevention through nurturing instead of punishment.

As one Cuban social worker noted, Cubans support the social work brigades as a desirable alternative to “repressive and coercive patterns in social control,” and they reject strategies based on the theory “that all social maladaptation merits punishment, or that public security necessitates the separation of the socially maladapted from the social environment.” Social work brigades are perhaps the clearest example of a socio-educational model that provides a range of services—education, health, and cultural development services, among others—and encourages integration of troubled youth into Cuban society. Through the processes of social interaction around community problems, the social work brigades seek to inhibit problem behavior, incorporate youths into day-to-day life, and inculcate them with norms consistent with Cuban political culture.

c. Legal Responses

As noted above, Cuban policy makers have long been concerned with juvenile crime because of Cuba’s history of illiteracy, child mendicancy,
exploitation of child labor, and delinquency.\textsuperscript{263} Immediately upon assuming power, the Cuban government reformed the juvenile delinquency system. In 1959, the National Assembly passed laws for the purpose of reeducating and rehabilitating youths classified as delinquents.\textsuperscript{264} Trained personnel were assigned to evaluate the social history and circumstances of youths facing criminal charges.\textsuperscript{265} Subsequently, juvenile delinquency matters were assigned to an integrated system of care staffed by experts and linked to university research centers.\textsuperscript{266}

Legal reforms have emphasized the protection of children over criminal sanctions that punish youth crime, and have mandated prevention efforts as the principal means to address juvenile delinquency.\textsuperscript{267} In 1978, the National Assembly enacted the Children and Youth Code\textsuperscript{268} to protect the rights of children to education, health (including physical education), and other social services.\textsuperscript{269} In 1990, the Cuban government signed the Convention on the Rights of the Child\textsuperscript{270} and has since sought to implement it through media campaigns, curricular instruction, public sector planning, and mass dissemination of information regarding treaty obligations.\textsuperscript{271}

Cuba amended its Constitution in 1992 to codify the obligations of parents to “assist the defense of . . . [the] legitimate interests” of their

\begin{footnotesize}
263. Mendoza Díaz, supra note 222.
264. Lutjens, supra note 58, at 58.
265. Mendoza Díaz, supra note 222.
266. Id. (noting changes that took place from the 1960s through the 1980s).
267. Gómez Treto, supra note 61, at 121 (noting that CPAS, the main purpose of which is delinquency prevention, was established through legislation as part of a depenalization process).
\end{footnotesize}
children and to provide for the needs of youths in order to assure their proper development and wellbeing. More recently, Cuba amended its Criminal Code to protect children from sexual trafficking, pornography, and corruption of minors.

The state does, when appropriate, bring criminal charges against youths who commit crimes considered antisocial and dangerous. The minimum age for criminal responsibility in Cuba is sixteen—same as the voting age. Youths under sixteen may not make confessions without a parent or legal guardian present. Unlike criminal courts in the United States, there is no juvenile division in the Cuban criminal system; however, the Cuban criminal process is different for youths than for adults. For example, when charges are filed, a legal investigative team meets with an interdisciplinary group to examine the youth’s circumstances and to determine how best to intervene in family dynamics. Juveniles convicted between the ages sixteen and eighteen may not be imprisoned, but they may be confined to a boarding school or treatment facility.

Cuban legal scholars have acknowledged that there are still problems with respect to the administration of juvenile justice. Although there has been progress toward eliminating racial disparities in other realms, studies commissioned by the Attorney General’s office acknowledge the

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274. Lutjens, supra note 58, at 63 (noting the 1997 enactment).

275. Mendoza Díaz, supra note 222. Parents can also be taken to court for failure to fulfill their legal obligations to their children; however, this strategy is also “informed by the preventive strategy.” Lutjens, supra note 58, at 63.


277. Michalowski, supra note 205 (noting due process protections including the right not to incriminate oneself and the prohibition against conviction based on uncorroborated confessions).

278. Interview with Dr. Caridad Navarrete Calderón, supra note 64; Interview with the University of Havana Department of Sociology, supra note 79.

279. Interview with an attorney from Cuba’s Oficina de la Fiscalía in Havana, Cuba (Oct. 11, 2005). The attorney stated her preference for “cultural and educational approaches” over formal legal charges. Id.

280. Raucii, supra note 276, at 5; see also Mendoza Díaz, supra note 222 (noting that sanctions are more lenient when applied to juveniles and the “assistance centers” that might serve as placements for juvenile delinquents).
overrepresentation of black and mulatto youths in the criminal justice system.\footnote{De la Fuente, supra note 216, at 318–19 (noting that the data, while scant and impressionistic, nonetheless raises these concerns).} Some have advocated additional reforms to improve the administration of juvenile justice. For example, Dr. Ramón de la Cruz Ochoa, formerly Attorney General of Cuba and President of the Judiciary Commission of the National Assembly, has recommended further decriminalization of offenses.\footnote{Raucii, supra note 276, at 4 (urging shifts from a “repressive vision about crime”).} Other scholars have advocated increasing the minimum age for criminal responsibility to eighteen.\footnote{Interview with the University of Havana Department of Sociology, supra note 79.}

Cuban legal approaches to juvenile delinquency are perhaps best summed up by the Vice-Dean of the University of Havana’s law faculty. He has characterized the development of juvenile delinquency law reforms as an effort to strengthen the legal status of youths and to impose greater responsibility for their wellbeing, while limiting criminal justice intervention to “the bare minimum.”\footnote{Mendoza Díaz, supra note 222.} He has stressed that “the most significant characteristic of the Cuban model lies in the fact that responsibility for treatment, evaluation[,] and effectuation is outside the domain of social institutions linked to correctional centers.” He has also said:

A system for the care of minors with transgressive behavior depends upon a political will aimed at the elimination of causes and conditions that create a favorable milieu for delinquency within sectors of society. Nothing is solved by adopting new laws while maintaining unscathed the bases of inequality. For today’s Cuba, a main concern is the guarantee of a system that gives priority attention to youth and children while working towards the elimination of social conditions that facilitate the emergence of damaging behavior.\footnote{Id.}

Notwithstanding the need for improvement, crime (particularly juvenile crime) is again on the decline in Cuba.\footnote{Raucii, supra note 276, at 4 (noting an absence of gang-related crime).}

IV. POLITICAL CULTURE AND ORDINARY CRIME: SOME COMPARISONS BETWEEN THE UNITED STATES AND CUBA

The contrasts in the approaches to crime between Cuba and the United States are stark. For purposes of comparison, this Part describes some of the fundamental characteristics of the U.S. approach to crime (specifically, juvenile delinquency and domestic violence) and examines the weakening of U.S. social structures that relate to the formation of social capi-
tal and the impact of the demise of these structures on community crime control initiatives.

Contrasts between the United States and Cuba, however, do not tell the whole story. Progressive U.S. criminologists share many of the views of their Cuban counterparts; they agree that the sources of crime are found principally in political and economic structural relations. A number of these theorists propound the view that community networks can function to harness norms and activate informal social controls in lieu of formal sanctions.

These theories gave rise in the 1980s to community-based programs—often identified as Alternatives to Incarceration (“ATIs”). Many of these programs operate from the premise that there is a social context to individual behavior, and their facilitators therefore endeavor to develop relationships with families and foster community support systems. Although ATIs share some characteristics with the Cuban approach, they have not yet delivered on their promises. This Part concludes with a review of the similarities between the two systems in order demonstrate how historical traditions and political culture both shape the success or failure of progressive crime prevention and control strategies.

A. Paradigms of Modern U.S. Criminology

1. Fear and Loathing: The Carceral State

U.S. approaches to ordinary crime, including domestic violence and juvenile delinquency, must be considered in light of the overall frame-
work of U.S. criminology. The United States can best be described as a “prescriptive state”—one that relies primarily on state penal sanctions to enforce norms of behavior.291 The United States has the highest incarceration rate in the world.292 There are 2.3 million people currently in prisons and jails in the United States, a 500% increase since thirty years prior.293 Federal statutes have increased the numbers of crimes subject to the death penalty.294 New mandatory sentencing laws in all fifty states have resulted in the incarceration of people who previously would have received noncustodial sentences of probation.295 Some states have revived the chain gangs of the Reconstruction era.296 Crime discourse is punctuated by analogies to war, with the criminal depicted as an enemy to be isolated and defeated.297 Fear of crime has resulted in increased surveillance; people once characterized as disorderly are now viewed as potential criminals to be aggressively controlled, if not removed, from mainstream life.298

291. Amitai Etzioni, Law in Civil Society, Good Society, and the Prescriptive State, 75 Chi.-Kent L. Rev. 355, 359, 363 (2000) (describing the ways in which a “good society” operates to enforce its norms, in comparison to the “prescriptive state” that functions through coercion, using formal criminal laws as the mainstay of control).


296. Angela P. Harris, Criminal Justice as Environmental Justice, 1 J. Gender Race & Just. 1, 5–6 (1997).

297. See id. at 42.

298. Harcourt, supra note 80, at 298, 303–04.
This has been particularly true in regard to juveniles. Although early juvenile reformers rejected the criminal justice system as a means to eradicate delinquency, policies now emphasize punishment.\textsuperscript{299} Juvenile law scholars have demonstrated the ways that youths have been demonized in the United States; it makes for a stark comparison with the exalted position of Cuban youths.\textsuperscript{300} Media have portrayed youths as superpredators.\textsuperscript{301} Politicians decry youthful offenders as “a more malevolent breed of offender than their predecessors,” and claim that today’s youths require more stringent sanctions, notwithstanding data to the contrary.\textsuperscript{302}

In the last twenty-five years, juvenile incarceration in the United States has increased by 43%.\textsuperscript{303} Sentences for youths are increasingly more punitive.\textsuperscript{304} At least one state has spent more on prisons than on higher education.\textsuperscript{305} Despite guidelines limiting the use of pre-adjudication detention to ensure a juvenile’s appearance at trial or minimize the risk of re-offense prior to disposition, youths are frequently detained for purposes


\textsuperscript{302}. Birckhead, supra note 300, at 1488–89; Barbara Fedders et al., The Defense Attorney’s Perspective on Youth Violence, in SECURING OUR CHILDREN’S FUTURE: NEW APPROACHES TO JUVENILE JUSTICE AND YOUTH VIOLENCE 84, 88 (Gary S. Katzmann ed., 2002); see also Lizabeth N. De Vries, Comment, Guilt by Association: Proposition 21’s Gang Conspiracy Law Will Increase Youth Violence in California, 37 U.S.F. L. REV. 191, 197 n.26 (citing Violent Youth Predator Act of 1996: Hearings on H.R. 3565 Before the H. Subcomm. on Crime, 104th Cong.).


\textsuperscript{304}. John Muncie, The ‘Punitive Turn’ in Juvenile Justice: Culture of Control and Rights Compliance in Western Europe and the USA, 8 YOUTH JUST. 107, 108 (2008).

of punishment. Schools delegate their responsibilities for problem students to the criminal justice system. Police are now deployed to handle behaviors once addressed by school principals. Metal detectors and video cameras have transformed spaces of education into sites of high security. In contrast with the Cuban approach that incorporates a spirit of faith in community efforts, the “nothing works” mantra popularized in the U.S. in the 1980s moved the country toward the paradigm of incapacitation.

An emphasis on punishment has similarly shaped the strategies and informed the values of the U.S. legal system’s response to domestic violence. Feminist demands during the 1960s for legal parity of domestic violence with other crimes found a receptive environment in the law-and-order climate of the 1970s and 1980s.

In fact, recent research suggests that the sources of domestic violence are complex matters that cannot be readily resolved by the criminal justice system. These findings notwithstanding, policy makers continue to resort to law enforcement and prosecutorial strategies as the principal


307. Bazemore, supra note 299, at 562–63 (criticizing the role of the criminal justice system in truancy policy, despite its success, as it limits the roles of schools and families).


313. Id. at 387, 399–402, 411–23 (examining the ways that structural economic dislocation, outsourcing, and plant closings have contributed to de-stabilization of households and have produced increased rates of domestic violence).
Domestic violence strategies are primarily focused on individual transgressors and rely on idiosyncratic explanations for abusive behaviors. Crime policies based on “[s]ituation and context-critical” theories that consider historical, social, economic, and cultural circumstances have been largely ignored. In contrast with the Cuban approach, U.S. advocates have largely dismissed as inappropriate the efficacy of family and community systems as methods of intervention. Policy and legislative developments have resulted in higher rates of arrest for domestic assault as compared to non-domestic assault, including an increased rate of arrest of women.

These developments reflect a shift to “the carceral society,” characterized by an increase in disciplinary and monitoring strategies and the professionalization of punishment. Whereas the research of Cuban criminologists is framed as “humanistic projects,” criminology in the United States operates largely within a technocratic criminal justice system embedded in what David Garland identifies as “the culture of control.” Punishment has developed as the normative response of choice, even as it drains community resources. The paradigm of mass incarceration has thus served to create the largest prison population in the world, a development that has gone largely unchallenged within the dominant institutions that set policy and control crime responses. Indeed, one

314. Id. at 399.
315. Fagan & Browne, supra note 311, 239–40 (distinguishing between criminal justice theories that are valued in a jurisprudential setting).
316. See Donna Coker, Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking, 47 UCLA L. REV. 1, 46–47 (1999) (describing various informal social and community vigilance mechanisms that exist out of the mainstream).
319. Weissman, supra note 9, at 235–36.
320. One recent study found that corrections—including prisons, jails, probation and parole services—cost $60.3 billion for supervision of about 7 million adults and juveniles. These costs reflected an increase of 535 percent from 2001. JAMES AUSTIN & TONY FABELO, THE DIMINISHING RETURNS OF INCREASED INCARCERATION 8 (2004).
321. See Harcourt, supra note 80, at 369 (quoting Michel Foucault, who noted that the punishment paradigm has lowered the “threshold of tolerance to penalty.”); Liptak, supra note 292.
study found that rates of incarceration go up whether crime is decreasing or increasing.  

The increase in incarceration rates is due to a political culture that is driven more by zeal for punishment than social science data. As Jonathan Simon has noted, “crime has become a privileged rationale and rationality for governing.” The specter of crime often precipitates public outrage disproportionate to the actual danger posed by criminals.  

2. The Dissipation of Social Capital

An examination of civic participation in the United States reveals further differences between U.S. and Cuban approaches to ordinary crime. As in Cuba, the development of social capital through civic organizations, clubs, and neighborhood associations directly bears on rates of crime in the United States. Trusting relationships between neighbors, friendship networks, and civic engagement with a wide range of groups are all factors that act to mitigate criminal behavior. However, membership in these types of associations has declined since the early 1970s. In his groundbreaking study, *Bowling Alone*, Robert Putnam

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322. See Ryan S. King et al., *Incarceration and Crime: A Complex Relationship* 1, 3 (2005), available at http://www.sentencingproject.org/doc/publications/inc_iandc_complex.pdf. The authors found that between 1984 and 1991 crime rates increased by 17%, but incarceration rates rose even more—by 65%. Between 1991 and 1998, crime rates fell by 22% but incarceration rates continued to rise—by 47%. Id.

323. Garland, supra note 44, at 13 (noting that researchers and experts have lost influence in helping to shape criminal policies and laws).


326. See Sampson & Laub, supra note 82, at 140–41; supra note 82 and accompanying text.

327. Richard Rosenfeld et al., *Social Capital and Homicide*, 80 Soc. Forces 283, 290, 300 (2001); Fagan & Meares, supra note 50, at 187 (offering examples such as PTAs and programs for adolescents).

328. David Halpern, *Social Capital* 210 (2005). Halpern describes social organizations that have strengthened as “[s]elf help groups, checque-book-based social movements, and religious fundamentalist groups” as well as youth volunteerism. These organizations “involve low-cost, minimal wider social contact activities.” Id. at 211. In contrast, “the picture for cross-cutting, multi-faceted forms of social capital is almost universally of decline.” Id.
describes the dramatic decrease in citizen participation in community affairs and relational networks upon which norms of reciprocity are established. Theda Skocpol notes the shift to memberless associations that are professionally driven and managed.

The correlation between civic disengagement and the deterioration of civil society with high rates of incarceration is well-established. As incarceration rates increase, social capital further dissipates. Families are impacted by the imprisonment of (mostly) young men often at great distances from their homes. The negative effects of incarceration are often compounded by the social, economic, and legal stigmas associated with criminal records. These dynamics impact social cohesion and limit the capacity of communities to create associational networks. Simply stated, community residents confront reduced opportunities to build relationships and develop social capital.

Moreover, neighborhood groups that are created for the purpose of reducing crime but that function within a criminal justice framework that favors incarceration often inhibit the development of trusting relationships. For example, in most neighborhoods, crime watch programs serve as hotlines to the police and enlist residents to assist in criminal justice surveillance and arrest activities. In neighborhoods already disrupted by high rates of imprisonment, such organizations are more likely to decrease the willingness of residents to intervene in crime prevention activities. To be sure, in neighborhoods where young men, especially blacks and Latinos, are disproportionately incarcerated and removed from their communities, the very legitimacy of informal social controls is undermined.

332. Saegert & Winkel, supra note 81, at 220.
333. For a comparison with Cuban community groups that work within a framework of social solidarity, see supra notes 96–99.
334. Harris, supra note 296, at 33–34 (noting that there is nothing empowering about the U.S. model of community crime control); see also supra notes 66, 178–82, 240 and accompanying text (contrasting these sorts of approaches in Cuba).
The fact is that in the United States, state institutional mechanisms are more likely to be emphasized than social solidarity in crime prevention efforts. These circumstances create structural obstacles to progressive crime reform. It is within this context that progressive alternatives such as ATIs function.

3. ATIs: Arrested Development and Net-Widening

ATIs emerged in the 1980s in response to two factors: the alarming growth of prison populations and the promise of the effectiveness of supervision and treatment plans for criminals. Proponents envisioned ATIs as a means to break from imprisonment as the default response to lawbreaking. ATI programs typically include rehabilitation-oriented programming (notably drug treatment), new methods of accountability (such as restorative justice approaches and community service), and new methods of supervision (such as home confinement and electronic monitoring).

Notwithstanding the specific goal of ATIs of avoiding the use of incarceration, they remain inexorably implicated in the dominant paradigm of the criminal justice system and function within the legal constraints of mandatory sentences. The issue is not one of effectiveness. Recidivism rates for ATI participants are comparable or better than similarly situated incarcerated people. However, most individuals referred to ATIs face misdemeanor or low-level felonies and are not likely candidates for incarceration in the first place. Those who face the greatest risk of incarceration are typically considered ineligible for most ATIs.

338. For an overview of ATI programs, see Weissman, supra note 9, at 237–42.
339. Id. at 247.
ATIs further depend on a broad range of social services to assist with housing, education, health care, and mental health programs, without which the very premise of their efforts is compromised. But over the past two and half decades, public support for these types of social services has decreased.\textsuperscript{343} Without this support system, ATIs are unable to offer the full range of services upon which their clients depend. Drug treatment programs, for example, are in short supply, despite their promise in reducing crime and recidivism.\textsuperscript{344} Moreover, as noted above, the United States has suffered a decline in social capital network opportunities of the type upon which ATIs rely to function effectively within communities.\textsuperscript{345}

Despite their stated purposes, ATIs have in some instances actually contributed to increased incarceration.\textsuperscript{346} Many individuals who are enrolled in ATIs face heightened scrutiny and supervision for behaviors that would otherwise not be considered law-breaking.\textsuperscript{347} ATI clients are required to report to parole officers, refrain from contact with convicted felons, and remain employed or actively looking for work.\textsuperscript{348} These conditions may be an appropriate exchange for avoiding imprisonment. However, imposition of custodial sentences that would have otherwise been ordered is not the only consequence for violating these requirements. ATI participants are likely to be sentenced to even harsher penalties, often without due process protections, as additional punishment for failing to succeed in their programs.\textsuperscript{349}

ATIs have suffered significant setbacks in efforts to transform the dominant carceral culture. They function within a political culture that privileges the formal criminal justice system in general and incarceration in particular as a response to crime. In contrast with Cuban participatory mechanisms that promote civic responsibility for the redistribution of


\textsuperscript{345} See Fagan & Meares, supra note 50, at 226.

\textsuperscript{346} Weissman, supra note 9, at 246–47; see also Cohen, supra note 38, at 44, 49.

\textsuperscript{347} Cohen, supra note 38, at 44 (referring to denser nets in addition to widened nets).

\textsuperscript{348} Weissman, supra note 9, at 246.

\textsuperscript{349} See Joan Petersilia & Susan Turner, Intensive Probation and Parole, 20 Crime & Just. 281, 306–07 (1996). One study demonstrated that individuals in ATIs not only spend considerable time incarcerated for their underlying crimes, but may be incarcerated for behaviors unrelated to their criminal charges, including “violating treatment expectations, administrative convenience, missing a group meeting, sassing a teacher . . . .” Cohen, supra note 38, at 70, 71. This is particularly true for juveniles. Id.
public goods, ATIs have fewer moral resources to draw upon. In a larger sense, the comparison with the Cuban approach to crime serves to underscore the need to consider political culture; otherwise—good intentions notwithstanding—it may be impossible to develop progressive crime policies.  

In the end, ATIs may simply “redistribut[e] . . . penal power into a wider social space.”

CONCLUSION

The Cuban revolutionary project has entered its fiftieth year—time sufficient to reflect on efforts to deploy values embedded in political culture as the normative determinants of social relationships. It is the very nature of the Cuban political culture of morality and its “place-bound source of self-identification” that offer insight into the differences in social control that set Cuba apart from the United States. Cubans assume responsibility for crime “as an expression of a more responsible and participatory concept of life in a collectivity,” and as “an expression of a cultural pattern more sensitive to the social order.”

David Garland describes the social control mechanisms that inform U.S. criminal justice policies as a reflection of social and economic changes of late capitalism, such as the transformation from manufacturing to service, the increase in income inequality, and other consequences of globalization and the attending insecurity and deterioration of public goods. But Cuba, too, has undergone significant economic dislocation in the years following the collapse of the Soviet Union. It too has suffered widening inequalities as Soviet assistance and subsidized petroleum imports disappeared. But in Cuba’s appeal to political and cultural metavalues, moral purpose—having become a prominent facet of survival strategies, especially during the 1990s—has served to offset material adversity. By invoking an ethical political culture, realized through longstanding social practices of civic participation, Cubans have maintained social structures designed to inhibit conditions that give rise to crime and deviance while supporting the most vulnerable populations.

In contrast, in a society that “governs through crime,” both poverty and crime are characterized as the results of individual choices made by

350. Harcourt, supra note 80, at 373 (describing a particular approach to criminal justice based on reconcilability, love, and mutual support).
351. COHEN, supra note 38, at 76.
352. See supra note 30.
353. Hernández & Dilla, supra note 26, at 44.
354. GARLAND, supra note 44, at 3–6.
unworthy deviants, and this in turn justifies policies that undermine the efficacy of publicly supported prevention services and encourages the use of punitive responses. The success of progressive crime control strategies, such as ATIs, as meaningful alternatives to the carceral state, requires a fundamental political and cultural shift through which social and community relationships must be redefined and restructured. Such efforts, however, have been neither successful nor sustained. Ultimately, changes in U.S. approaches to ordinary crime necessitate a broad change in political culture.

As the opening epigraphs to this Article suggest, the contrast in political culture between the United States and Cuba is vast. In the United States, the state freely exercises its control in the sphere of punishment but is restrained from interfering with the distribution of material goods and services, whereas the Cuban state readily intervenes in the former while encouraging informal social controls in response to crime. For those who agree that values such as reciprocity, community, cooperation, and solidarity are essential to enlightened criminal justice policies, the Cuban approach holds promising relevance.

356. Id.
357. Hope, supra note 290, at 23.
HAS THE U.K. VIOLATED ITS INTERNATIONAL OBLIGATIONS BY FAILING TO INTRODUCE MANDATORY SEX EDUCATION IN SCHOOLS?

*Morgane Landel*

INTRODUCTION

It is not often that a nation finds itself in violation of its international treaty obligations regarding fundamental human rights as a result of systemic neglect or inaction at a national policy level. However, the United Kingdom’s (“U.K.’s”) failure to mandate sex education in its public schools may amount to such a violation. According to the World Health Organization (“WHO”), the United Kingdom has one of the highest rates of teenage pregnancy in the developed world. In 1999, having recognized the need to address this problem, the U.K. government ordered a report from the Social Exclusion Unit, a government department established in 1997 to make recommendations and develop strategies to reduce teenage pregnancy. After reviewing the report, the U.K. government decided to allocate sixty million pounds to carry out the Unit’s recommendations. In 2000, the government created an Independent Advisory Group on Teenage Pregnancy and identified three main goals to be achieved by 2010: (1) a fifty percent reduction in the number of citizens

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1. From 2000 to 2006, teenage pregnancy was estimated at a rate of 27 per 1,000 girls. This is more than twice the rate in Germany, 11 per 1,000 girls, and three times the rate in France, 8 per 1,000 girls. WORLD HEALTH ORGANIZATION [WHO], WORLD HEALTH STATISTICS 2008, at 98–103 (2008), available at http://www.who.int/whosis/whostat/EN_WHS08_Full.pdf.


under eighteen who become pregnant;\(^6\) (2) a “firm downward trend” in the number of citizens under sixteen who conceive; and (3) a sixty percent increase in the proportion of teenage parents who are able to mitigate the risk of social exclusion by continuing on with education, training, or employment.\(^7\) This new advisory group was to facilitate and monitor the government’s efforts toward achieving these goals by providing an annual progress report on teenage pregnancy.\(^8\)

The government defines “conception” as pregnancy that results in either one or more live births or a legal abortion.\(^9\) The latest government statistics show that from 1998 to 2006 the rate of conception among teenage girls age thirteen to eighteen fell, but only slightly.\(^10\) Even if the next annual statistics report—not yet published as of this writing—shows that teenage pregnancy continued to decline at the same rate until 2010, the government will still have failed to meet its targeted fifty percent reduction in conception by those under eighteen.\(^11\)

The Social Exclusion Unit’s original report identified three main causes of the high rate of teenage pregnancy: “low expectations,” “ignorance,” and “mixed messages.”\(^12\) First, children who live in impoverished or otherwise disadvantaged communities tend to have low expectations for themselves, specifically in relation to education and employment. Teens that have had emotionally and financially secure upbringings are more likely to pin their hopes for the future on education and are, therefore, likely to consider teenage pregnancy an obstacle to their life goals.

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\(^6\) This figure is calculated from the statistics compiled in 1998 as a starting point.


\(^10\) Id. For example, for those under eighteen, the rate for ages 15–17 has fallen in England from 46.6 per 1,000 girls to 40.4 per 1,000 girls, and from 8.8 per 1,000 girls to 7.7 per 1,000 girls for girls ages 13–15. Cf. id.

\(^11\) This Article will primarily focus on the situation in England because Scotland and Northern Ireland have complete autonomy in education and health policy, while Wales has some autonomy in those areas. This Article, however, will refer to the U.K. when referring to the government because England does not have a separate government and the U.K. parliament legislates on health and education in England. In addition, when the article refers to teenage pregnancy, it refers to teenagers under the age of 18.

\(^12\) SOCIAL EXCLUSION UNIT, supra note 3, at 7.

\(^13\) Id.
Meanwhile, those who do not view education as a necessity are more likely to consider teenage parenthood a legitimate and acceptable path.\textsuperscript{14} Of course, environment can increase the likelihood of teenage pregnancy in a number of ways. While it is perhaps unsurprising that conception rates in England’s most impoverished areas have been up to six times higher than in affluent areas,\textsuperscript{15} children who have experienced social seclusion or foster care also conceive at an above average rate, as do children whose parents conceived when one or both were teens.\textsuperscript{16}

The second cause identified in the Social Exclusion Unit’s report was “ignorance.” Children and teens ignorant of facts about pregnancy, sexually transmitted diseases, and intimate relationships are more likely to engage in unprotected sex.\textsuperscript{17} Finally, the third cause identified in the report, “mixed messages,” refers to the range of conflicting viewpoints children and teens are exposed to in regard to the appropriateness of sexual activity. While media bombard teens with explicitly sexual images and messages, accurate information about sex is swept under the rug.\textsuperscript{18} Needless to say, mixed messages are a part of a broader problem of limited availability of quality information for teens regarding sexual health.

The above trends also reflect a cultural disconnect. In the U.K., a vocal minority oppose abortion, sex education, and sexual health services for girls under sixteen.\textsuperscript{19} As a result, the government is hesitant to tackle these issues head on.\textsuperscript{20} Meanwhile, some school officials have made clear that they would like to avoid garnering for their respective schools any kind of reputation for providing “good” sex education—apparently, they fear unwelcome negative attention.\textsuperscript{21} Opponents of contraception and other sexual health services use the media to attack schools and health workers persistently.\textsuperscript{22}

\textsuperscript{14} Id. at 31.
\textsuperscript{15} Osmo Kontula, Reproductive Health Behaviour of Young Europeans: The Role of Education and Information 62 (2004).
\textsuperscript{16} Id. at 17.
\textsuperscript{17} Id. at 7. This article focuses on this cause as the key solving the apparent violations of human rights from the standpoint of England’s international treaty obligations. For England’s international legal obligations, see discussion infra Part II.
\textsuperscript{18} See Social Exclusion Unit, supra note 3, at 7.
\textsuperscript{19} Kontula, supra note 15, at 66.
\textsuperscript{20} Id.
\textsuperscript{21} See Social Exclusion Unit, supra note 3, at 40.
The issue of abortion is still hotly debated among various groups and U.K. politicians. In 2007, it was estimated that twenty-four percent of general medical practitioners in England would never refer a woman for an abortion on the grounds of conscientious objections. Studies further show that three in four teenage pregnancies in the U.K. are not planned, and only one in four teenagers use contraception. The difference between the number of sexually active teenagers and those that plan pregnancy implies a gap between the preferences of most sexually active teenagers and their ability to comprehend the consequences of having sex without using contraception. This implies a gap in information—in other words, a gap in education.

Pursuant to several international treaties, the U.K. has an obligation to take steps to empower women to make informed decisions about their own health. This is not to suggest that teenagers should not have children. However, the impact of teenage pregnancy often leads to lack of education and continued dependence on benefits, which our society considers to be undesirable. The presumption here is that teenage pregnancy does not occur as a result of informed choice but as a result of ignorance. The premise is not that teenage pregnancy should be eliminated but that it should be the result of informed choice. The U.K. must remedy this problem by ensuring access to adequate information through sex education. Teenage girls will then be able to make informed choices about pregnancy. Only then will the U.K. be on the path to compliance with its international obligations as set forth below.

Currently, England lacks a standard curriculum for sex education, and sex education is not mandatory in primary and secondary schools. In order to comply with its international treaty obligations, the U.K. must create a comprehensive and mandatory sex education program that

23. As recently as May 2008, the U.K. Parliament voted on several bills to lower the time period for access to abortion from 24 weeks, to 22, 20, 16, and 12 weeks. See MP’s Reject Cut in Abortion Limit, BBC News, May 21, 2008, http://news.bbc.co.uk/2/hi/uk_news/politics/7412118.stm. All were voted against, but the issue remains a contested one. Id.
enables all school children to make informed choices about their sexuality. This program must provide the biological facts of reproduction and provide practical information about sex, allowing children to make an informed choice about their sexuality. While practical remedies in the international sphere are beyond the scope of this Article, the success of such a program could be measured against subsequent changes in the rate of unplanned teenage pregnancies.

Part I of this Article looks at the problem of ignorance as a significant cause of the high teenage pregnancy rate in the U.K. and argues that sex education in schools is the proper primary remedy. Part II of this Article argues that the societal consequences of insufficient sex education—health risks and other social costs—violate the U.K.’s obligations under various international treaties. In sum, the U.K.’s failure to provide sufficient sex education harms its people, and the government must remedy this harm by establishing a standard sex education program. Only when all children and teens in the U.K. are capable of making informed choices about pregnancy will the U.K. then be on the path to compliance with its international obligations.

I. WHY TEENAGE PREGNANCY MATTERS

Teenage pregnancy is admittedly controversial. Of course, it must be correct that some teenagers are capable, both physically and mentally, of becoming parents and looking after their children. Still, the common Western view is that teenage parenthood is undesirable.28 The U.N. Economic and Social Council has articulated this view and has acknowledged that teenage pregnancy is a growing issue throughout the world due to “growing awareness that early . . . [pregnancy] poses a health risk for the mother and the child and may truncate . . . [the mother’s] educational career, and threaten her economic prospects, her earning capacity[,] and her overall well-being.”29 But the controversy goes beyond the economic prospects of teenage parents.

Teenage pregnancy leads to social exclusion and other disadvantages, and, ultimately, it is correlated with an increase in the likelihood that the teenager’s child will become a teenage parent him or herself in the long run.30 The Committee on the Elimination of Discrimination Against Women highlighted these problems in 1999 in its Concluding Observa-

28. See supra notes 29–30 and accompanying text.
tions to the U.K.,\textsuperscript{31} noting that early childbearing results in "lower educational achievement, higher levels of poverty[, and] greater reliance on social welfare."\textsuperscript{32} While there is a program in place called "Care2Learn" that provides teenage parents with welfare benefits so that they can return to school, these benefits cannot fully cover the costs of childcare, especially in London.\textsuperscript{33} "Care2Learn" is also only available to around 7,000 young parents, whereas the government’s own target has been to make it available to 10,000 young parents.\textsuperscript{34} If teenage mothers are unable to re-enter education or training after their pregnancy, they are unlikely to have access to well-paying jobs or be admitted to higher education and are thus more likely to continue to rely on the welfare system.

\textbf{A. Is Teenage Pregnancy a Human Rights Violation?}

It is difficult to consider teenage pregnancy a human rights violation since it involves the birth of a human being. The term, "human rights violation," as a label, carries a strong negative connotation that frustrates the inherent dignity of the newborn.\textsuperscript{35} However, this Article does not attribute such a label to the fact of birth itself. Instead, the violation occurs before the child is born; it is a violation on the part of the state, for failing to implement concrete measures to reduce the rate of teenage pregnancy. Most importantly, the state should provide adequate information to children and teens.

Teenage parents have the right to make informed choices about sexual health, and the government may have violated teens’ rights by rendering them unable to deal intelligently with pregnancy. This article, however, does not argue that if this were remedied, it would lead to a dramatic decrease in the number of teenage pregnancies. Instead, teenage pregnancy would be the result of an informed choice, by a teenage girl, possessing a full spectrum of appropriate information. Given the current statistics, it seems likely that the provision of information would however decrease the rate of teenage pregnancy. Arguably, the current institutional impediments to information flow are effectively violating the human rights of teenage girls if we presume the State may not obstruct and must actively

\begin{footnotesize}
\begin{enumerate}
\item Report of the Committee on the Elimination of Discrimination Against Women, \textit{supra} note 27.
\item \textit{Id}.
\item \textbf{TEENAGE PREGNANCY INDEPENDENT ADVISORY GROUP}, \textit{supra} note 22, at 31.
\item \textit{Id}.
\item See Tysiac v Poland, Eur. Ct. H.R. (2007), at ¶ 15 (Judge Borrego Borrego, dissenting), \textit{available at http://www.echr.coe.int/echr/Homepage_EN} ("[T]here is a polish child . . . whose right to be born contradicts the Convention.").
\end{enumerate}
\end{footnotesize}
promote informed decision-making among teenage girls with respect to sex and pregnancy.

B. Teenage Pregnancy in England: Is Abortion a Readily Available Solution?

A number of initiatives were launched as a result of the reports described above. For example, a month-long media campaign sought to encourage teenagers to take control of their lives and their choices, and to take responsibility for those choices. A national helpline called Sexwise now provides advice to teenagers on matters of sexual health. Teens have access to free contraception. Doctors or local sexual health clinics may now provide condoms to teenagers. The contraceptive methods, however, vary with local health services throughout England. As a result, in February 2008, the U.K. government announced new funding worth 26.8 million pounds to improve access to contraception. The Independent Advisory Group on Teenage Pregnancy has welcomed this new funding approach but has stressed nonetheless that some Primary Care Trusts, which are responsible for the allocation of resources within a particular area, have not yet set up a special service to deal with teenage pregnancy.

It is noteworthy that abortion is legal in England under the Abortion Act of 1967. An abortion, however, must be authorized by two medical practitioners, except in an emergency. For example, a doctor who makes the initial referral to the hospital and the doctor who performs the

37. Id. It is noteworthy, however, that some of the information being disseminated to children through the government’s own website www.ruthinking.org is inaccurate. See RUThinking.co.uk, Sex & the Law, http://www.ruthinking.co.uk/the-facts/search/articles/sex-and-the-law.aspx (last visited Feb. 24, 2010) (states that it is illegal for anyone under 16 to have sex or to have an abortion after 24 weeks). This reflects the government’s inexperience and lack of commitment to providing quality sexual health information to teenagers.
40. Id. at 12.
41. Id.
42. See TEENAGE PREGNANCY INDEPENDENT ADVISORY GROUP, supra note 22, at 9–10.
43. See generally Abortion Act, 1967, c.87 (Eng.).
abortion may authorize the procedure.\textsuperscript{45} In the first 24 weeks of pregnancy, the doctors must form an “opinion” in “good faith” that forgoing the abortion would cause injury to the fetus or to the mother’s mental or physical health.\textsuperscript{46} There are no time restrictions, however, if the doctors certify that the abortion is necessary to prevent a grave permanent injury or a life-threatening risk to the mother or the child.\textsuperscript{47} In practice, abortions are covered by the National Health Service, which means they are free.\textsuperscript{48} To be referred to a hospital for an abortion, a woman must first visit her local doctor or sexual health clinic.\textsuperscript{49} This, however, can take up to four to five weeks.\textsuperscript{50} The delay is problematic because teenagers may delay obtaining information in the first instance, which will further postpone the procedure. Furthermore, it is well-documented that having a late-term abortion may endanger the mother’s health.\textsuperscript{51} The 2006 statistics show that a majority of women had abortions in the first nine weeks of pregnancy.\textsuperscript{52}

Beyond the Abortion Act of 1967, there are no specific abortion-related legal provisions pertaining to those under eighteen. Generally, teenagers can obtain abortions without parental consent.\textsuperscript{53} In 2004, government guidelines stated that doctors should provide confidential advice on sexual health to anyone under sixteen, provided the person “understands the advice provided and its implications” and her “physical or mental health would otherwise be likely to suffer and so [the] provision of advice or treatment is in their best interest.”\textsuperscript{54} The doctor should breach the duty of confidentiality only in exceptional circumstance

\begin{itemize}
\item \textsuperscript{45} Id.
\item \textsuperscript{46} Abortion Act, 1967, c.87, § 1 (Eng.).
\item \textsuperscript{47} Id.
\item \textsuperscript{48} See National Health Service, supra note 44.
\item \textsuperscript{50} See id.
\item \textsuperscript{51} See id.
\item \textsuperscript{52} See MP’s Reject Cut in Abortion Limit, supra note 23 (over 50 percent of women in England and Wales had abortions in the first 9 weeks, just under 35 percent had abortions between 9 and 12 weeks, under 10 percent had abortions between 13 and 19 weeks, and under 3 percent had abortions after the 20th week).
\item \textsuperscript{53} Cf. Abortion Act, 1967, c.87 (Eng.).
\end{itemize}
where the health, safety, and welfare of the child are at serious risk. In
addition, the government recommends that doctors should try to persuade
teenagers to speak to their parents or other adults about sexual health
choices. Nevertheless, the doctors should provide sexual health services
in the teenager’s best interest even if the teens do not want to speak to
their parents. In 2006, the High Court held that parents do not have the
right to be informed of their children’s sexual health. The Court found
that the 2004 guidelines do not violate a parent’s right to respect for private
and family life. In sum, teens are able to obtain contraceptives or get abortions free of charge and in confidence—if they are aware of these
options and know where to go.

C. Why Sex Education is Necessary?

The benefits of sex education in schools are well documented. The
government has recognized that “effective sex and relationship education
is essential if young people are to make responsible and well-informed
decisions about their lives.” Comprehensive sex education in schools is
likely to help teenagers delay sexual activity while promoting the use of
contraception. The argument that sex education encourages teenage sex
has been discredited. Meanwhile, programs that promote abstinence
have not been shown to reduce the rate of teenage pregnancy.

Without sexual health education, teenagers make decisions without accurate information. For example, 75% of those under sixteen, and almost
50% of sixteen to nineteen-year-olds fear that if they visit a sexual health
clinic, the doctor will inform their parents of the reasons for the visit. Thus, they avoid the clinic. Another study found that less than half of the
relevant age group sampled is aware that emergency contraception is

55. Id. at 3.
56. Id.
57. Gillick v West Norfolk and Wisbech Area Health Auth., [1986] A.C. 112, 174
(H.L.) (appeal taken from Eng. (known as the Fraser Guidelines)).
58. The Queen v. Sec’y of State for Health (The Family Planning Association),
[2006] Q.B. 539, 559–68 (appeal taken from Eng.).
59. Id. This right is set forth in Article 8 of the European Convention on Human
Rights
60. See generally DEPARTMENT FOR EDUCATION AND EMPLOYMENT, SEX AND
61. DEPARTMENT FOR EDUCATION AND EMPLOYMENT, supra note 60, at 3.
62. See SOCIAL EXCLUSION UNIT, supra note 3, at 36.
63. KONTULA, supra note 15, at 75.
64. Tripp & Viner, supra note 30, at 590.
65. KONTULA, supra note 15, at 63.
available within the first 72 hours after intercourse. In fact, most teens do not even know that this measure is available over the counter to those over sixteen and, in some instances, to those under sixteen as well. If sex education explained the confidentiality requirement, teens would not make false assumptions about the implications of visiting their doctors; thus, they may be more willing to seek medical advice. In sum, sex education is necessary because a lack of knowledge about sexual health can prevent teens from seeking out doctors and, more generally, from making informed choices about sexual behavior and contraception.

D. The Current State of Sex Education in Schools

In England, education is mandatory only until age sixteen, so the following discussion is limited to that age group. The two issues of concern are that sex education is not mandatory and lacks a standard curriculum. Sexual and Relationship Education ("SRE") is taught as part of the Personal and Social Health Program ("PHSE"). PHSE is designed to provide pupils with information to make the right choices in relation to finances, health, drugs, alcohol, sex, and relationships. Under the Learning and Skills Act of 2000, which amended the Education Act of 1996, the principal and the school governing body are responsible for setting out the content of sex education. In doing so, the schools have a duty to consider governmental guidelines, if any are issued. The governmental guidelines must ensure that sex education is appropriate for the students in light of age and cultural and religious background. As a result, sex education policies vary from school to school.

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66. Tripp & Viner, supra note 30, at 592.
67. Id. at 590.
69. A 2007 survey carried out by the U.K. Youth Parliament found that 40 percent of children and teens ages 11 to 18 receiving sex education thought that it was poor or very poor and 33 percent thought it was average. U.K. YOUTH PARLIAMENT, SRE ARE YOU GETTING IT? 4 (2007), available at http://www.ukyouthparliament.org.uk/campaigns/sre/AreYouGettingIt.pdf.
71. Education Act, 1996, c. 56, § 404, amended by Learning and Skills Act, 2000, c. 21, § 148 (Eng.).
72. Id. at § 351.
73. Id. at § 403.
74. See SOCIAL EXCLUSION UNIT, supra note 3, at 39.
were not taught how to use a condom as part of sex education.\textsuperscript{75} This shows a discrepancy in what is being taught in schools. Other schools expressly decline to teach sex education.\textsuperscript{76} It is estimated that 10\% of primary schools (for children age five to eleven) do not have a sex education policy, and this means girls may get their first period without having any knowledge of what it is.\textsuperscript{77}

Voluntary participation in sex education is also a problem. A parent may opt out of sex education for her child as long as no part of it falls within the national curriculum.\textsuperscript{78} About 1\% of parents withdraw children from sex education.\textsuperscript{79} In practice, the only aspect of sex education included in the national curriculum, and thus mandatory in all schools, is the biological aspect of reproduction. It is taught to students age fourteen to sixteen, and includes lessons about hormonal contraception such as the pill or injections.\textsuperscript{80} It does not, however, include any discussion of non-hormonal contraception, such as condoms, or post-conception options, such as abortion.\textsuperscript{81}

Because SRE is not part of the national curriculum, it is not prioritized. As a result, training of teachers in SRE is voluntary; thus, training attracts teachers who are already responsive to the needs of the program. Also, SRE does not have a standard curriculum.\textsuperscript{82} At the same time, access to health services in schools is patchy and depends on individual teachers and nurses.\textsuperscript{83} The SRE program is underfunded and not automatically evaluated during inspections by the Office for Standards in Education, Children’s Services and Skills (“OFSTED”), which means that SRE is not monitored for content and effectiveness at the national level.\textsuperscript{84}

With a view toward remedying the deficiencies in sex education, the government issued guidelines in 2000 as to the proper approach to the topics that are central to SRE—particularly, avoidance of unwanted pregnancies and contraception use.\textsuperscript{85} The guidelines state that it is for the

\textsuperscript{75} U.K. YOUTH PARLIAMENT, supra note 69, at 4.
\textsuperscript{76} See SOCIAL EXCLUSION UNIT, supra note 3, at 36.
\textsuperscript{77} Id. at 37.
\textsuperscript{78} Education Act, 1996, c. 56, § 405. The national curriculum, which does not include SRE, consists of Math, English and Sciences, which are all statutory subjects. Id. at § 354.
\textsuperscript{79} See SOCIAL EXCLUSION UNIT, supra note 3, at 39.
\textsuperscript{80} Id. at 38.
\textsuperscript{81} Id.
\textsuperscript{82} Id. at 39.
\textsuperscript{83} Id.
\textsuperscript{84} See KONTULA, supra note 15, at 62, 65; SOCIAL EXCLUSION UNIT, supra note 3, at 39.
\textsuperscript{85} DEPARTMENT FOR EDUCATION AND EMPLOYMENT, supra note 60, at 5.
schools, in consultation with parents, to determine the content of sex education and that policies should be developed that “reflect the parents’ wishes and the community they serve.” The students’ views should be considered when setting policy for SRE, but not when setting its actual content. The guidelines, however, do not acknowledge the necessity of considering the students’ needs and interests. Most problematic, the guidelines fall short of requiring schools to provide any specific information. For example, in relation to abortion, the guidelines state that religious views should be respected, that schools are entitled to teach abortion in light of their religious convictions, and that SRE should enable students to consider the moral and personal issues involved in abortion. Clearly, the guidelines are not explicit about what needs to be covered to ensure that students have access to practical information about abortion. In fact, the guidelines’ preferred approach to reducing unwanted pregnancy is through “advice on contraception and delaying sexual activity.” A pregnant teenager, however, will need information about abortion if she is to make an informed choice about her pregnancy. In failing to address this aspect of the issue, the guidelines make a value judgment about the importance of delaying sexual activity. Meanwhile, the Sexual Offences Act 2003, which came into force on May 1, 2004, decriminalizes sexual activity between those under eighteen. While the U.K. government has relaxed legal constraints on teenage sex, it is failing to provide information on safe and responsible sex.

It is perhaps unsurprising then that the guidelines have not had the effect of reducing teenage pregnancy as per the government’s own target. As a result, in its last report, the Independent Advisory Group on Teenage Pregnancy recommended (for the fifth time) that sex education should be made a statutory subject. Making it a statutory subject would allow the U.K. government to create a standard national curriculum, to include the information necessary to ensure that children and teenagers are able to make informed choices about sex, and to force its implementation in schools. It would also prevent parents from withdrawing their

86. Id. at 4.
87. Id. at 4.
88. Id. at 7.
89. See generally id.
90. See generally id.
91. Id. at 16.
92. Id.
93. Sexual Offences Act, 2003, c. 42, § 9 (Eng.).
94. Id.
95. TEENAGE PREGNANCY INDEPENDENT ADVISORY GROUP, supra note 22, at 22.
96. Education Act, 1996, c. 56, § 354 (Eng.).
children from sex education classes and ensure that teachers are trained to teach the subjects covered; thus, increasing the program’s effectiveness and allowing OFSTED to monitor and evaluate their work. In short, it would ensure that all children receive quality standardized sexual health education.97

In October 2008, in response to a report by the Sex and Education Review Steering Group, the government indicated that “it is attracted to giving” PSHE statutory status, thereby improving the delivery of SRE in schools.98 It commissioned a further report to make recommendations as to how to incorporate SRE as a statutory subject. The report, however, must include information on how to “ensure that statutory programs of study” retain “sufficient flexibility for individual schools to tailor their PSHE and teaching to take account of their pupils’ and parents’ views and to reflect the ethos of the school.”99 On November 5, 2009, the government announced its plans to make PSHE part of the statutory curriculum by September 2011. However, the government reiterated its view that schools should be able to tailor their curriculum. It furthered recognized that a small minority of parents should be entitled to withdraw their children from select courses. The impact of making PHSE a statutory subject will be nullified if parents and schools are still able to impose their views on the content of sex education.100 The government’s commitment is, therefore, tempered by its intent to continue to allow schools to determine the content of sex education. Thus, mandatory sexual health education remains elusive in practice.

II. THE UNITED KINGDOM’S INTERNATIONAL OBLIGATIONS.

A. The International Covenant on Economic, Social and Cultural Rights (“ICESCR”)

On May 20, 1976, the U.K. ratified101 the ICESCR, pursuant to which it is obliged to “take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realizations of the

97. TEENAGE PREGNANCY INDEPENDENT ADVISORY GROUP, supra note 22, at 23.
tionships%20A4.pdf.
99. Id. at 5.
100. Press Release, Dep’t for Children, Sch. and Families, supra note 70.
members.gn.apc.org/LtrSecStateAsySe.pdf.
“Rights” enumerated in the covenant. Among the enumerated rights, is the right to health that is defined in Article 12 as the “right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” In order to achieve the full realization of this right, States must take steps necessary to the “healthy development of the child.” In General Comment 14, the Committee on Economic, Social and Cultural Rights (“CESCR”) further defined the right to health as inclusive of not only appropriate healthcare but also “the underlying determinants of health, such as . . . access to health-related education and information, including on sexual and reproductive health.” This also includes measures to improve sexual and reproductive health services, including “access to information as well as to resources necessary to act on that information.” The Special Rapporteur on Health states that traditional views about sexuality are damaging to adolescents’ sexual health and impede access to information about sexual health.

In addition, the right to health encompasses freedoms and entitlements. The freedoms include the “right to control one’s health and body, including sexual and reproductive freedoms.” The entitlements include availability of services, accessibility, acceptability, and quality health care. In the context of sex education, under the rubric of accessibility, the States are obligated to ensure the accessibility of information and the “right to seek, receive[,] and impart information.” Without access to information there can be no freedom to exercise the right to control one’s body because the withholding of information limits choices and options regarding one’s sexual health.

Further, the States’ obligations can be divided into three categories—the duties to respect, protect, and fulfill. Under the duty to respect, the
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The state should not limit access to contraception or other means of maintaining sexual health, including by “censoring, withholding[,] or intentionally misrepresenting health-related information, including sexual education.” The U.K. is failing in relation to this obligation because it is willfully allowing some schools to avoid teaching sex education, or to teach it without providing children with all the necessary information. In addition, allowing parents to withdraw their children from sex education limits their access to information.

Under the obligation to protect, a State must enact legislation or other measures to ensure “equal access to health care and health related services . . . . States should also ensure that third parties do not limit people’s access to health related information.” By allowing schools to determine the content of sex education, the U.K. is not ensuring that all children have equal access to information about sex. Lack of uniform curricula inevitably results in subpar sexual health education. In addition, the government is allowing parents to limit children’s access to information.

Further, the obligation to fulfill requires a State to take positive measures to help its citizens realize their right to health. This includes “supporting people in making informed choices about their health.” By not taking positive measures to ensure that all children have access to sex education, the U.K. is failing to fulfill its duty. The U.K. is effectively inhibiting teenagers’ access to the information they need in order to make informed choices about sexual behavior and pregnancy. In sum, the U.K. has to do more to comply with its three duties—to respect, protect, and fulfill—pursuant to its international obligations under the ICESCR.

The U.K. may also be violating its obligations under the ICESCR if it does not use the “maximum of its available resources for the realization of the right to health.” Initially, a State has a duty to ensure a minimum core standard to ensure the right to health. The minimum core includes basic healthcare, which the U.K. amply provides as healthcare is free and universal in England. The State’s duty regarding the right to health does not cease once it complies with its minimum core obligations. The State has a duty to proactively facilitate the people’s realization of the right to health. State parties “have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full rea-
lization of Article 12."\textsuperscript{119} This means that until the U.K. complies with its obligations under Article 12 as described above, the U.K. is in violation of the ICESCR.

Of course, a State agency could still try to argue that it does not have the means to comply with these obligations, but, in the case of the U.K., this argument is unlikely to resonate with the CESCR. In fact, CESCR has consistently stated in its reports regarding the U.K. that there is nothing preventing the U.K. from complying with its obligations under the ICESCR.\textsuperscript{120} In the U.K, the failure to address the teenage sexual health issue is not due to a lack of funds, but rather, a lack of political will. This is especially evident from the government’s newest proposal that has failed to prevent schools from deciding individually on the content of sex education; therefore, failing to ensure that all children receive adequate, and uniform sexual health education.\textsuperscript{121} The U.K. advisory group has repeatedly urged the government to make SRE a statutory subject,\textsuperscript{122} yet it has failed to do so. The newest proposals would make PHSE statutory but they would exclude SRE; meanwhile, the effectiveness of PHSE at this point is uncertain.\textsuperscript{123} Despite these new proposals, schools may still separately determine the content of their sex education.\textsuperscript{124} It, therefore, cannot be said that the U.K. is progressing expeditiously and effectively toward the full realization of the right to health.

Parallel to the obligations in relation to the right to health, the U.K. has a duty to “ensure the equal rights of all men and women to the enjoyment of all economic, social[,] and cultural rights.”\textsuperscript{125} Article 2(2) also provides for the enjoyment of these rights without discrimination on the basis of sex.\textsuperscript{126} The CESCR has interpreted this to mean that men and women must enjoy the rights in the ICESCR on a substantively equal basis and that existing laws must “alleviate, the inherent disadvantages

\begin{footnotesize}
\begin{enumerate}
\item[119.] Id.
\item[121.] U.K. YOUTH PARLIAMENT, supra note 69, at 7.
\item[122.] TEENAGE PREGNANCY INDEPENDENT ADVISORY GROUP, supra note 22, at 22.
\item[123.] Id.
\item[124.] Press Release, Dep’t for Children, Sch. and Families, supra note 70.
\item[125.] International Covenant on Economic, Social and Cultural Rights, supra note 102, at art. 3.
\item[126.] Id. at art 2(2).
\end{enumerate}
\end{footnotesize}
that particular groups experience.”127 The obligation of State parties, therefore, is to ensure that men and women enjoy equal rights under the ICESCR in practice.128

States’ Article 2(2) obligations are further divided into the duty to respect, protect, and fulfill.129 Regarding the duty to respect, a State must consider the impact of gender neutral laws and policies and “whether they could result in a negative impact on the ability of men and women to enjoy their human rights on a basis of equality.”130 Of course, pregnancy affects women differently than men. Women bear the burden of the physical impact. In addition, responsibility for nursing and early child rearing often lies with the woman.131 In relation to teenagers, it is generally the young mother who ends up the single parent, not the young father.132

Thus, the teenage mothers endure the greater share of a pregnancy’s consequences. Pregnancy will, for example, restrict a mother’s ability to go to school and limit her vocational options for the future. A study has shown that a 33-year-old woman who was a teenage mother is more likely to lack professional qualifications and rely on state benefits than a 33-year-old woman who was not.133 Accordingly, in failing to deal with the problem of teenage pregnancy through the introduction of mandatory sex education, the U.K. is discriminating against girls and women as they are predominantly affected by lack of information.

B. The Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”)

The U.K. ratified The Convention on the Elimination of All Forms of Discrimination Against Women (the “CEDAW”) on April 7, 1986.134 The U.K. acceded to the optional protocol on December 17, 2004, there-
by allowing individual petitions. Although the jurisprudence of the Committee on the Elimination of Discrimination Against Women (the “Committee on Discrimination”) does not speak to sex education, CEDAW protects the right to health, specifically, the right of “access to health care services, including those related to family planning.” In its General Recommendation 24, the Committee defines the right to health for women. While slightly different from those in the CESCR, the proposals found in General Recommendation 24 similarly separate the right into obligations to respect, protect, and fulfill. The obligation to respect “requires state parties to refrain from obstructing action taken by women in pursuit of their health goals.” By failing to confront schools that do not provide sex education, the U.K. is arguably obstructing girls and young women from accessing information to make decisions about their health.

The obligation to protect “requires state parties, their agents[,] and officials to take action to prevent and impose sanctions for violations of rights by private persons and organizations.” Although the examples given by the Committee on Discrimination relate to violence against women, it could be argued that a school without sex education is violating the right of women to make decisions about their health (as per the obligation to respect). Thus, to comply, the U.K. must implement a policy requiring such schools to provide sexual health education. In addition, the duty to fulfill is the duty “to take appropriate legislative, judicial, administrative, budgetary, economic[,] and other measures to the maximum extent of their available resources to ensure that women realize their right to health care.” If teenagers are not educated about available sexual health options, they are unable to make informed decisions about sexual health. Thus, by failing to legislate for mandatory sex education, the U.K. is preventing women from realizing their right to health.

The Committee on Discrimination also states that parties should “ensure the rights of female and male adolescents to sexual and reproductive health education by properly trained personnel in specially designed pro-

138. Id. at ¶ 24.
139. Id. at ¶ 14.
140. Id. at ¶ 15.
141. Id. at ¶ 17.
ograms that respect their right to privacy and confidentiality." Specific-
ically, the Committee on Discrimination recommends that states “priori-
ze the prevention of unwanted pregnancy through family planning and
sex education.” In its 1999 report to State parties, the Committee on
Discrimination voiced serious concerns about teenage pregnancy in the
U.K. and recommended that it be addressed through various measures,
including sex education. As noted above, the U.K. is not limited eco-
nomically. If anything, sexual health education is likely to lead to heal-
ther teens and fewer teenage pregnancies, which in turn lead to longterm
economic benefits. The U.K. domestic political climate is the only thing
that inhibits the government from introducing sexual health education.
Thus, by not making sexual health education mandatory, the U.K. is in
violation of CEDAW Article 12.
In addition, CEDAW prohibits discrimination in law, or actions that
have a discriminatory effect against women. Thus, member states are
required to take “all appropriate measures, including legislation, to en-
sure the full development and advancement of women, for the purpose of
guaranteeing them the exercise and enjoyment of human rights and fun-
damental freedoms on a basis of equality with men.” As noted above
regarding the ICESCR, the U.K. is in effect discriminating against girls
because, in practice, they are adversely affected by the U.K.’s failure to
make sex education mandatory. Girls, not boys, are getting pregnant and
suffering the adverse consequences of teenage pregnancy. The U.K.’s
sexual health policy is therefore discriminatory in practice against girls
because they are not given access to information they need to make deci-
sions about their sexual health. The choices girls make about sexuality
have a greater impact on them than choices made by boys because of the
possibility of pregnancy.

C. The Convention on the Rights of the Child (“CRC”)
The United Kingdom ratified the Convention on the Rights of the
Child (“CRC”) on December 16, 1991. Article 24 of the CRC recog-

142. Id. at ¶ 18.
143. Id. at ¶ 31.
144. See Comm. on the Elimination of Discrimination Against Women, Concluding
Observations of the Committee on the Elimination of Discrimination Against Women:
United Kingdom of Great Britain and Northern Ireland, ¶ 289, U.N. Doc. CEDAW/
C/UK/CO/6 (July 18, 2008).
146. Id. at art.3.
nizes the right of children to the highest attainable standard of health.\textsuperscript{148} This includes an obligation on the part of states to “take appropriate measures . . . to develop . . . family planning education and services.”\textsuperscript{149} Moreover, public and private actors must primarily consider the best interest of a child in setting policy objectives.\textsuperscript{150} According to Article 12, children should be consulted on matters that affect them, and their views should be “given due weight in accordance with the maturity and age of the child.”\textsuperscript{151} The primacy of a child’s rights is tempered by the State’s obligations to ensure that the protection and care given to a child “is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her . . . .”\textsuperscript{152} In addition, “State parties shall respect the responsibilities, rights[,] and duties of parents . . . to provide in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present convention.”\textsuperscript{153} Thus, teenage mothers enjoy the Article 12 protections.

The Committee on the Rights of the Child has reiterated the right of adolescents to access appropriate information “essential for their health and development and for their ability to participate meaningfully in society,”\textsuperscript{154} including “access to sexual and reproductive information, . . . on family planning and contraceptives, [and] the dangers of early pregnancy.”\textsuperscript{155} State parties are further urged to address issues surrounding cultural and other taboos about adolescent sexual activity.\textsuperscript{156} Finally, the Committee on the Rights of the Child has stated that adolescent girls “should have access to information on the harm that . . . early pregnancy can cause.”\textsuperscript{157}

The nature of the U.K.’s obligations under the CRC is different than under the other treaties. As noted above, the CRC recognizes the right to family planning education for children as a part of their right to health. Although parents retain some control over their children’s sexual health,
the notion of evolving capacity limits parental rights insofar as the control they exercise may be extinguished if the child has the capacity to make decisions on her own. Therefore, at some point, parents may no longer be allowed to exercise this control over their children. The age at which this happens clearly depends on the child. However, if the child is mature enough then she should be entitled to information even if her parents disagree. In fact, a teenager who is sexually active and requests information to prevent pregnancy is arguably more mature than one who does not seek the information.

The Committee on the Rights of the Child recognized this when it stated that adolescents should be allowed to express their opinions and have them be taken into consideration in relation to the right to health. In allowing parents to take children out of sex education and to determine with the school the content of sex education, the U.K. is violating the right of children to be consulted in these matters and to have their opinions heard. In 1995, the report from the Committee on the Rights of the Child to the U.K. government raised concerns about the right of a parent to take her child out of sex education without considering the child’s opinion. It suggested that more should be done to ensure the incorporation of the views of children in decision-making that affects them. In 2002, and again in 2008, the Committee on the Rights of the Child recommended that the State take further steps to reduce teenage pregnancy by making sex education part of the national curriculum. Echoing many others before it, the Committee expressed concern that children were not being consulted about educational matters that affect them. A 2007 survey showed that 73% of children age eleven to eight:

159. Id.
160. Id. at 182.
161. General Comment No. 4, supra at note 154, at ¶ 8.
163. Id. at ¶ 27.
teen wanted SRE to be taught to those under thirteen. This shows that children want SRE. By not ensuring that it is taught, the U.K. is violating its international obligations in relation to the right to health as well as its duty to take into account the best interests of the child and to give due weight to children’s views.

Furthermore, the U.K.’s above-mentioned obligations must be read in conjunction with Article 2, which says that states shall respect and ensure the rights set out in the CRC “without discrimination of any kind, irrespective of the child’s[,] or his or her parent’s or legal guardian’s[,] . . . religion[,] political [views][,] or other opinion.” This obligation is further laid out in Article 2(2), which says that member states “shall take all appropriate measures to ensure that the child is protected against all forms of discrimination . . . on the basis of the . . . expressed opinions, or beliefs of the child’s parents, legal guardians, or other individuals legally responsible for him or her . . . .” By allowing parents control over the attendance of their children in sex education and its curriculum, the U.K. is discriminating among children based on their parents’ views. Specifically, discrimination occurs when a child’s parents, for religious or other reasons, are allowed to decide that the child is not to have access to information that her peers have accessed.

In addition, discrimination occurs between children in different schools. As parents and schools are allowed to determine the sex education curriculum, children throughout England are given different information and some may get more complete and accurate information than others. This discriminates between children in different schools on the basis of their parents’ views. These two examples may lead to a situation where a teenager may want to access information about sex education because she is sexually active but is prevented from accessing it because of her parent’s beliefs. She will then be disadvantaged compared to other children who have been given access to better information. In sum, as long as the U.K. fails to implement mandatory sex education, it is in violation of its international obligations under all three treaties. It is necessary now to look at the U.K.’s other international obligations, as well as its domestic law to see if implementing mandatory sex education contradicts those obligations.

166. U.K. YOUTH PARLIAMENT, supra note 69, at 7.
167. Convention on the Rights of the Child, supra note 147, at art. 2(1).
168. Id. at art. 2(2).
170. See id.
D. European and National Law

The European Court of Human Rights ("the Court") has dealt with the issue of sex education under Article 2 of Protocol 1 ("P1-2") of the European Convention on Human Rights and Fundamental Freedoms as part of the right to education and not as part of the right to health.\footnote{Kjeldsen, Busk Madsen & Pedersen v. Denmark, 23 Eur. Ct. H.R. (ser. A) at 26 (1976).} Article 2 of P1-2 states, "[N]o person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the state shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."\footnote{Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Apr. 11, 1950, 213 U.N.T.S. 221, art. 2.}

The Court has held that parents’ rights under P1-2 must not conflict with the fundamental right of children to education.\footnote{Campbell & Cosans v. United Kingdom, 48 Eur. Ct. H.R. (ser. A) at 16 (1982).} Instead, the scope of the second sentence of P1-2 is to ensure that states convey information in "an objective, critical[,] and pluralistic manner."\footnote{Kjeldsen, 23 Eur. Ct. H.R. (ser. A) at 26.} P1-2 prevents a State from pursuing "an aim of indoctrination that might be viewed as not respecting the parents’ religious and philosophical convictions."\footnote{Id.}
The European Commission of Human Rights has further stated that "parents may not refuse the right to education of a child on the basis of their convictions."\footnote{Leuffen v Germany, App. No. 19844/92, Eur. Comm’n H.R., para. 1 (1992), available at http://www.echr.coe.int/echr/Homepage_EN.} The Court has also said that parents are not allowed to home school their children on the basis that they disagree with the content of the sex education curriculum due to their religious convictions,\footnote{Konrad v. Germany, Eur. Ct. H.R., para. 1 (2006), available at http://www.echr.coe.int/echr/Homepage_EN.} and that a school was entitled to teach sex education.\footnote{Alonso v. Spain, 2000-VI Eur. Ct. H.R. 477.}

There is no case law in the U.K. on the subject of sex education in schools and the rights of parents. There is, however, case law relating to corporal punishment. The House of Lords recently found that a statute prohibiting corporal punishment in schools was not in breach of P1-2.\footnote{The Queen v. Sec’y of State for Educ. & Employment, [2005] 2 A.C. 246 [H.L.] (appeal taken from Eng.) (U.K.).} Despite having to respect parents’ beliefs, Parliament was nonetheless entitled to decide that those beliefs validating institutional corporal pu-
nishment were not in the best interest of the children. In light of this jurisprudence, it is unlikely that European or U.K. courts would overturn the government’s introduction of mandatory sex education in schools, as it would likely be deemed to be in the best interest of the children.

CONCLUSION

In summary, if the U.K. continues to allow individual schools and parents to determine the content of sex education and to allow parents to exercise control over whether their children receive sexual health education, the government will continue to fail to fulfill its obligations under the ICESCR, CEDAW, and CRC. The U.K. should introduce mandatory and adequate sex education in schools. This is not to say that if the U.K. introduces such measures, it would immediately be in compliance with its obligations. However, the U.K. cannot comply with its international obligations regarding the right to health until it introduces sex education, as this may go some way toward alleviating the problem of teenage pregnancy. Furthermore, the U.K. is in violation of its obligations under all three treaties because the government effectively discriminates between boys and girls, and among children generally on the basis of their parents’ views.

As noted above, there are no reasons preventing the government from introducing mandatory sex education—the problem is one of political will. Introducing mandatory sex education would not require an overhaul of the education system. There is already a framework for teaching sexual health and relationship education within PHSE. What is required is the creation of a national curriculum for sexual health education that includes information about practical issues surrounding sexual health, including contraception, abortion, and prevention of sexually transmitted diseases. This would further entail training teachers in this particular

180. Id.
181. Even the most recent proposals do not go far enough in dealing with these issues because the fundamental problems of allowing individual schools to determine the content of sex education and allowing parents to remove their children out of sex education remain.
182. Press Release, Dep’t for Children, Sch. and Families, supra note 70.
subject and making this subject a part of the national inspection program to ensure that schools are teaching the topic in accordance with the proposed national curriculum. It would also require isolating parents from decisions regarding sexual health education curriculum and children’s participation in sex education. Without adequate information, children are unable to make informed choices about sexual health. And the right to health is fundamental.
PROTECTING THE PLAYGROUND: OPTIONS FOR CONFRONTING THE IRANIAN REGIME

Bryan P. Schwartz* & Christopher C. Donaldson**

INTRODUCTION

The situation facing the United States in its relations with the Iranian regime is reminiscent of schoolyard politics. Imagine you are the biggest and toughest kid on the playground. All the other kids respect you out of fear of your size and strength. Now imagine you learn that your best friend is cornered by a bully across the yard near the swings. The bully has threatened your friend with violence, and rumor has it that the bully has been trying—perhaps successfully—to acquire or construct powerful weapons to make good on that threat. There is a chance the bully may wipe your best friend and many others clear off the face of the playground. What do you do?

After years of hurling threats and physical abuse by proxy at Israel, Iran is now coming closer than ever to obtaining nuclear weapons. Some commentators believe the Iranians would use these weapons to get what they want, via threat or actual attack. Time is running out for the United States (and the rest of the kids on the playground) to take action to prevent a catastrophe.

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1. See discussion infra Part I.


An international body like the United Nations—or, an individual country like the United States—can choose to intervene diplomatically, economically, or militaristically, and can then choose from at least two different angles (positive or negative) from which to pursue any one of these approaches. All in all, there are at least six distinct courses of action worth considering.

In Part I of this Article, for background, we briefly explore the origins of the current global tensions Iran is fueling. In Part II, we discuss the various options available to the U.S. and its allies in dealing with Iran. Finally, in Part III, we offer suggestions as to which route is best given the current environment, and we argue that the lessons of World War II might beneficially inform the approach to Iran.

Ultimately, in laying out the available options, our primary hope is that the confrontation can be resolved effectively and without cost to human life. Also, we hope the forthcoming analysis may shed some light on similar problems in the future.

I. THE ISSUES

The current Iranian regime is problematic for two main reasons. First, they have actively supported terrorism both in the Middle East and in other areas of the world. Second, they have continued to press on with their nuclear program despite the United Nations’ resolutions expressing international consensus that they must end it. The current regime has taken the role of a bully, using force (violent and otherwise) to get what it wants regardless of the consequences for the rest of the world. It is this egocentrism and lack of concern for larger global society that worries observers and has led to the calls for action.

A. Terrorism

The current Iranian regime has a history of providing financial and ideological support to violent organizations. In Lebanon, the regime has funded Hezbollah since its inception. In Gaza, the regime provides

5. See discussion infra Part II.
6. See discussion infra Part II.
7. See discussion infra Part I.A.
8. See discussion infra Part I.B.
9. See discussion infra Part II.A–B.
support to both Hamas and Palestinian Islamic Jihad (“PIJ”). In support of these groups, the Iranian regime has had a direct or indirect hand in the deaths of thousands around the world.

In the early 1980s, Hezbollah was created by the Iranian Revolutionary Guard—the regime’s militant wing under the control of the Iranian Supreme Leader. Iran reportedly injects $120 million into Hezbollah annually and allegedly also provides periodic shipments of missiles. The fact that Iran has supported a group whose avowed goal is to destroy Israel has raised eyebrows around the world. Meanwhile, Hezbollah’s violence has reached other nations beyond Israel as well.

In 1983, as one of its first organized acts, Hezbollah orchestrated a truck bomb attack at the U.S. Marine barracks in Beirut that killed 241 people. Until September 11, 2001, Hezbollah had killed more Americans than any other terrorist group. In 1994, with Iranian funding, Hezbollah bombed the Jewish-Argentine Mutual Association building in Buenos Aires, Argentina, killing 85 and wounding 300 others. With Iran’s help, Hezbollah has spread its particular brand of violence to several corners of the globe.

But Hezbollah is not the only terrorist group that benefits from Iranian patronage. Hamas, before it became the ruling party of the Palestinian Authority, was receiving funding from Iran as well. And this funding increased when Hamas gained power. Iran also supplies rockets to

14. Id.
16. Levin, supra note 11.
18. See discussion infra Part I.A.
19. Levin, supra note 11.
20. Id.
Hamas, a group that believes, “In the face of the Jews’ usurpation of Palestine, it is compulsory that the banner of Jihad be raised.”

While Hamas does not have a history of violence as extensive as Hezbollah, Iran’s support for Hamas certainly raised substantial concern. Iran has also provided a bounty to the Gaza-based Palestinian Islamic Jihad group for the rockets they fired into Israel.

The link between all three of these terrorist organizations is their anti-Semitism. It is no secret that the Iranian regime wants to see the Israeli state removed from the Middle East. It is the regime’s avowed disdain for Israel that also drives global concern over its nuclear program. Although the Iranian regime consistently insists that it is only pursuing nuclear energy for civilian use, it has failed to convince the world of its peaceful intentions.

B. Nuclear Dispute

Iran’s civilian nuclear program began with the help of the United States in 1959, but the few installations that were in place by 1980 were heavily bombed during the Iran-Iraq war. Iran’s American-funded civilian nuclear program had been decimated by the time the fighting ended in 1988. After the war, the Iranian regime secretly began constructing a new nuclear program. While it was suspected that Iran was trying to

28. See supra text accompanying notes 22–27.
29. There are too many quotes about Israel being a “cancer” to cite.
33. See Alireza Jafarzadeh, *The Iran Threat: President Ahmadinejad and the Coming Nuclear Crisis* 158 (2007).
acquire nuclear weapons as early as the mid-1990s, their strides toward developing their own devices were kept secret. With the aid of nations such as Pakistan, China, and Russia, as well as the notorious black-market nuclear network of A.Q. Khan, Iran developed enough knowledge to master the process of uranium enrichment. By the turn of the millennium, Iran had come a long way in developing a dual-use program. Iran was mastering the technology necessary for building nuclear power generators, but with that ability came the knowledge needed to make nuclear weapons.

In 2002, the National Council of Resistance of Iran—an Iranian political opposition group that many accuse of being a terrorist organization—revealed these nuclear research activities to the world. The International Atomic Energy Agency ("IAEA") demanded inspection of the alleged nuclear research sites and discovered that Iran had been hiding significant amounts of undeclared nuclear materials. Since this revelation, there has been widespread concern about the Iranian regime’s motivations.

Attempting to assuage the concerns of the global community, the Iranian regime has denied that the program will have any military application. G. Ali Koshroo, Iran’s former Deputy Foreign Minister for Legal and International Affairs, has said that the Iranian regime believes that “the acquisition, development, and use of nuclear weapons [is] inhuman, immoral, illegal and against our basic principles. They have no place in Iran’s defense doctrine.”

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34. For example, President Clinton’s Letter to Congress on March 14, 1997, highlighted that Executive Order 12957 was issued “in response to actions and policies of the Government of Iran, including support for international terrorism, efforts to undermine the Middle East peace process, and the acquisition of weapons of mass destruction and the means to deliver them.” Letter from William Clinton, President of the United States, to U.S. Congress (Mar. 14, 1997), available at http://www.fas.org/news/iran/1997/wh97031701.htm.

35. See JAFARZADEH, supra note 33, at 158.


37. See JAFARZADEH, supra note 33, at 158.

38. See id.


40. Id. at 2.

41. This is evidenced by the United Nations Security Council Resolutions, infra Part II.C.

42. See infra text accompanying note 43.

43. BARNABY, supra note 31, at sec. 1.2.
Khamenei, has also issued a religious decree saying that the production and use of nuclear weapons are forbidden under Islam.\footnote{Leader’s Fatwa Forbids Nukes, IRAN DAILY, Aug. 11, 2005, http://www. irandaily.com/1384/2347/html/index.htm.} Despite these statements, however, doubts persist. These doubts are probably best captured by Abbas Maleki, former Iranian Deputy Foreign Minister, who said that Iran’s alleged need for peaceful nuclear power is “akin to raising cows in your house to provide you with your daily glass of milk.”\footnote{Sepehr Shahshahani, Note, Politics Under the Cover of Law: Can International Law Help Resolve the Iran Nuclear Crisis?, 25 B.U. INT’L L.J. 369, 417 (2007).} The United States, Israel, and the U.N. Security Council obviously believe that the Iranian regime is raising its cows for a more sinister purpose.

One of the reasons for these doubts is the Iranian regime’s lack of credibility.\footnote{See infra text accompanying note 47.} In 2003, a complex web of lies regarding the conversion activities of Iranian scientists at the Tehran Nuclear Research Center was finally untangled. Confronted with its conflicting statements, the regime was forced to admit that it had lied to the IAEA.\footnote{JAFARZADEH, supra note 33, at 158.} It has also been revealed that the regime made false statements about their uranium metal stocks,\footnote{See id. at 158–59.} the P-2 Centrifuge program,\footnote{See id. at 162.} the extent of the laser enrichment program,\footnote{See id. at 165–66.} and covert experiments involving reprocessed fuel.\footnote{See id. at 170.} It is quite understandable that, at this point, very little that the regime says about its program can be taken at face value.

To make matters worse, the Iranians have been going to great lengths to build hidden, underground facilities that are immune to conventional aerial attacks. The facilities at Natanz, for example, are buried beneath 23 meters of concrete and earth.\footnote{Whitney Raas & Austin Long, Osirak Redux? Assessing Israeli Capabilities to Destroy Iranian Nuclear Facilities, INT’L SECURITY, Spring 2007, at 7, 17 (2007).} Satellite imagery shows tunneling near some existing nuclear sites, leading some to believe that even more secret facilities are being built.\footnote{Philip Sherwell, Defiant Iran Insists There’s No Secret as Inspectors Invited to Qom Nuclear Site, TELEGRAPH.CO.UK, Sep. 26, 2009, http://www.telegraph.co.uk/news/worldnews/middleeast/iran/6235547/Defiant-Iran-insists-there’s-no-secret-as-inspectors-invited-to-Qom-nuclear-site.html.} Further, international inspectors have identified nuclear activities on military-controlled sites to which they
have been denied access for inspection.\(^{54}\) Given the amount of circumstantial evidence, the global community is finding it hard to believe that Iran’s intentions are peaceful. Some in Israel and the U.S. think that the Iranian regime is plotting a catastrophe.\(^{55}\) With its contempt for the Israeli state, its long-standing support for terrorism, and its undercover nuclear operations, such concerns certainly have an air of validity. Thus, the international community must find a way to confront Iran effectively.

II. THE OPTIONS IN CONTEXT

A. Diplomacy

Diplomacy remains a viable tool for persuading the Iranian regime to change its behavior. One positive diplomatic option is to entice the regime with an offer of regional power sharing in exchange for full engagement with the international community. A negative diplomatic option is to continue to try to delegitimize the Iranian regime. As will be argued below, neither of these options is particularly attractive. Given the history of Iran’s principled belligerence, other options must remain on the table.

President Ahmadinejad has caused a stir by making remarks that have been construed as denying the Holocaust.\(^{56}\) Most famously, President Ahmadinejad commented in 2005 about Israel being “wiped off the map.”\(^{57}\) For these remarks, he has received condemnation from the U.N.,\(^{58}\) mock indictments for genocide,\(^{59}\) and a criminal indictment \textit{in absentia} in Germany for Holocaust denial.\(^{60}\) These are not the only con-

\(^{54}\) DELPECH, supra note 2, at 10.
\(^{55}\) See generally id.
\(^{56}\) See Anti-Defamation League, supra note 32.
\(^{57}\) While translations may vary, his remarks were, at least, something to that effect. For possible alternative translations, see Ethan Bronner, \textit{Just How Far Did They Go, Those Words Against Israel?}, N.Y. TIMES, June 11, 2006, at 4.4.
troversial statements that the President has made, nor is this the only activity for which the Iranian regime has been the subject of criticism. In 1994, the Iranian regime funded an attack on the Jewish-Argentine Mutual Association building in Buenos Aires, which led the Argentinean authorities to indict various Iranian political figures.

The Iranian regime has consistently denied aiding the insurgencies in Iraq and Afghanistan despite evidence that they are doing just that. The regime has shown a desire to be a regional leader when the U.S. and its coalition forces withdraw from the area. This is consistent with Iranian philosophy regarding foreign relations; the traditional Islamic doctrine of *Dar al-Islam* says that lands once subjugated by Muslims should remain under Muslim control. The occupation of Iraq and Afghanistan disrupts this concept of the Islamic house. Of course, the Iranian regime would like to see itself playing a large role in ridding these areas of Western influence and bringing them back under Islamic control.

The Iranian constitution implicitly enshrines the traditional philosophy of *Dar al-Islam* by advocating the export of Islamic government throughout the world. In furtherance of this goal, Iran has meddled in the affairs of Palestine, Lebanon, Algeria, Sudan, Afghanistan, and elsewhere.

61. See Anti-Defamation League, *supra* note 32.
66. *Id.*
70. See Middle East Media Res. Inst., *Saudi Columnist in Scathing Criticism of Hizbullah and Syria: They are Trying to Destroy Lebanon Down to the Last Man*, June 14, 2007, http://memri.org/ bin/latestnews.cgi?ID=SD162007.
Yemen, Iraq, and Somalia, among other nations. The Iranian regime has tried desperately to elevate itself to the level of a regional power by spending money to create and then solve problems in countries based in traditional Muslim lands. The offer of a power-sharing structure in the region could perhaps prove an effective incentive for Iran to conform its behavior.

B. Economic Sanctions

The negative economic incentive is, of course, economic sanctions. Kofi Annan, the former Secretary-General of the U.N., has called economic sanctions “a necessary middle ground between war and words.” At the same time, there is no shortage of detractors who feel that sanctions do not work. Meanwhile, sanctions can produce tremendously negative humanitarian consequences not only for the citizens of the targeted state, but also for citizens of neighboring states. Even the state im-

posing sanctions can be negatively affected. At the very least, economic sanctions require careful implementation in order to avoid serious unintended effects.

Now consider the positive economic incentive: aid. This can take many forms, such as direct funding from national governments or the International Monetary Fund. Economic Aid can also be geared toward enabling a state to engage in self-help in the future—one example would be aiding Iran’s push to become a member of the World Trade Organization. By holding this carrot out for the regime, the world may be able to influence its behavior without imposing the negative consequences of sanctions.

Once upon a time, the U.S. had very cordial relations with Iran. These soured with the 1979 Islamic Revolution and the hostage crisis at the American Embassy in Tehran. In response to this turn of events, the U.S. created the Iranian Assets Control Regulations. These regulations instituted an asset freeze on the assets of the Iranian government in the U.S. and were subsequently expanded to include a full trade embargo. Upon the signing of the Algiers Accords in 1981, the trade embargo was lifted and most of the frozen assets were released. While these regulations still partially remain in place, they are of little practical effect for the relations between the two countries today.

In 1987, a second set of sanctions came into force. President Ronald Reagan issued an executive order prohibiting all imports of goods and services from Iran into the U.S. He did so “[t]o ensure that United States imports of Iranian goods and services will not contribute financial support to terrorism or to further aggressive actions against non-belligerent shipping.” Eventually, the Reagan Executive Order gave

82. See De Jonge Ondraat, supra note 80 at 335.
84. Id.
86. 31 C.F.R. § 535 (2009).
88. Id. at 4.
89. Id.
91. Id.
rise to the Iranian Transactions Regulations,\textsuperscript{92} which codified the U.S. embargo on trade in goods and services and are still in effect today.\textsuperscript{93} The Iranian Transactions Regulations, however, go further than the Reagan Executive Order as they prohibit not only the importation of Iranian goods and services, but also the exportation and re-exportation of U.S. goods, technology, and services to Iran.\textsuperscript{94}

In 1995, President Clinton’s Executive Orders 12957\textsuperscript{95} and 12959\textsuperscript{96} tightened the sanctions against Iran even further. This time, however, the sanctions did not focus on flows of goods, services, and technology. Rather, these two executive orders prohibited flows of money from the U.S. to Iran.\textsuperscript{97} In particular, they prohibited: new investments in Iranian property,\textsuperscript{98} the financing of imports of goods and services, the financing of exports of goods, services, and technology,\textsuperscript{99} and the financing, supervising, and managing of the development of petroleum resources located in Iran.\textsuperscript{100} All of these provisions were also later included in the Iranian Transactions Regulations.\textsuperscript{101} Violations of the Iranian Transactions Regulations could be criminally punished with up to $1 million in fines and, for natural persons, up to 20 years in jail.\textsuperscript{102}

Suspecting that the restrictions on its own citizens were not enough, the U.S. enacted the Iran and Libya Sanctions Act (“ILSA”) a year later in 1996.\textsuperscript{103} According to one American author, the act was “born out of frustration that our allies and friends were unwilling to restrict investment into Iran’s petroleum sector as did the U.S. in 1995.”\textsuperscript{104} The purpose of the ILSA was, in effect, to bar access to American markets—essentially, to create a secondary boycott—of non-U.S. companies that

\begin{footnotes}
\item\textsuperscript{92} 31 C.F.R. § 535 (1988).
\item\textsuperscript{93} In 2000, the \textit{Iranian Transactions Regulations} were eased slightly. They were amended to incorporate §560.534, which was added to allow Iranian carpets and certain food products to be imported into the United States. 31 C.F.R. § 560 (1995).
\item\textsuperscript{94} 31 C.F.R. §§ 560.201, 560.204, 560.205 (1995).
\item\textsuperscript{95} Exec. Order No. 12957, 60 Fed. Reg. 14615 (Mar. 15, 1995) [hereinafter Clinton Executive Order 12957].
\item\textsuperscript{96} Exec. Order No. 12959, 60 Fed. Reg. 24755 (May 6, 1995) [hereinafter Clinton Executive Order 12959].
\item\textsuperscript{97} See infra text accompanying notes 99–98.
\item\textsuperscript{98} Clinton Executive Order 12957, \textit{supra} note 95, at sec. 1(e).
\item\textsuperscript{99} \textit{Id.} at sec. 1(a)–1(b).
\item\textsuperscript{100} \textit{Id.}
\item\textsuperscript{101} Iranian Assets Control Regulations, 31 C.F.R. §§560.207–560.209.
\item\textsuperscript{102} \textit{U.S. Economic Sanctions: Iran,} \textit{supra} note 85, at 1.
\end{footnotes}
invest in Iranian petroleum development. While the ILSA sanctions have yet to be imposed on a foreign company, the threat has induced non-U.S. firms to join their American counterparts and avoid investments in Iran.

The economic sanctions imposed on Iran by the United States are heavy. They include embargoes on goods, services, technology, and investment flows. On the other hand, the sanctions are unilateral. Although the U.S. has used the ILSA to try to influence companies in other nations to comply with the sanctions, they have no jurisdiction aside from denying access to American markets. The price of U.S. sanctions may be steep for Iran, but in the end, the application of the sanctions is quite narrow.

By 2006, the U.N. Security Council had seen several IAEA reports expressing concern over Iran’s nuclear program and the Iranian regime’s lack of cooperation in providing information about it. In its Resolution 1696, the Security Council issued an ultimatum to the Iranian regime: either cease nuclear enrichment and reprocessing activities, and comply with the IAEA’s transparency procedures or become the target of U.N. sanctions. The resolution gave the Iranian regime one month to comply before sanctions would take effect. Needless to say, Iran refused.

On December 23, 2006, nearly four months after the deadline for compliance, the U.N. Security Council passed Resolution 1737, marking the first round of sanctions. Among other things, this resolution prohibited the supply, sale, or transfer of goods which could aid Iran’s nuclear program; prohibited the financing of the acquisition of such goods; limited Iran’s ability to export goods related to its nuclear activities or ballistic missiles; restricted the mobility of those named persons in-

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107. See discussion infra Part I.C.
108. Coleman & Graham, supra note 105, at 345.
110. Id. at ¶ 9.
111. Id. at ¶ 7.
113. Id. ¶ 3.
114. Id. ¶ 6.
115. Id. ¶ 7.
involved with Iran’s nuclear program; and also froze the assets of these persons and entities. These sanctions were subject to review after a period of 60 days. In the event that Iran did not comply with the Security Council’s demands, the U.N. reserved the right to toughen the sanctions in a further resolution.

When the Iranian regime failed to comply, the Security Council indeed toughened the sanctions. In Resolution 1747, the Security Council broadened the list of named persons and entities that were subject to the mobility and asset-freezing sanctions. In addition, the Security Council restricted Iran’s ability to sell and transfer arms, and called on U.N. member nations to restrict grants, financial assistance, and concessional loans to the Government of Iran except for humanitarian or development purposes. These sanctions were also subject to review after 60 days. Again, Iran failed to comply.

The third set of sanctions arrived with Resolution 1803. Once more, the Security Council expanded the list of persons and entities subject to the mobility and asset-freezing provisions. Furthermore, the Security Council called on “all states to exercise vigilance in entering into new commitments for public provided financial support for trade with Iran, including the granting of export credits, guarantees or insurance, to their nationals and entities,” and to “exercise vigilance over the activities in their territories with all banks domiciled in Iran . . . .” This round of sanctions, however, was given an expanded 90-day period before review.

To date, Iran has yet to comply with the Security Council’s demands. At the time of this writing, a fourth round of sanctions is being contem-
plated which would target the assets of the Iranian Revolutionary Guards.132 While the Security Council does not appear to be supportive of a strong fourth round of sanctions,133 other international organizations—particularly the G8 group of nations—appear poised to push for sanctions.134 Sanctions on the assets of the Revolutionary Guards will not be as strong as those that were previously contemplated against the Iranian oil sector135 (an embargo on refined petroleum products would be particularly painful for Iran, as 40% of the country’s domestic oil consumption is refined outside of the country);136 still, they are a step in the right direction.

In contrast to sanctions imposed by the United States, those imposed by the U.N. Security Council have very broad application. In theory, the prescribed measures are adhered to by all of the U.N. member-states. Meanwhile, the impact of U.S. sanctions is limited—the number of states joining the U.S. is limited even though the U.S. is broader in scope.137 If sanctions as serious as an embargo on petroleum exportation to Iran are to have an immediate effect, they must be adopted by the Security Council rather than unilaterally by the U.S.138

C. The Military Option

Many have urged the exercise of military options before Iran develops a nuclear weapon. A similar nuclear threat in 1981 resulted in the Israeli Air Force flying into Iraq and bombing the Osiraq nuclear reactor.139 The attack was quite successful in that it slowed down the Iraqi nuclear weapons program to the point where Iraq was no longer a nuclear threat to

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134. Clark, supra note 132.
136. DELPECH, supra note 2, at 103.
137. See supra notes 113–115, 123 and accompanying text.
Israel’s existence. Could a similar preemptive attack be launched against Iran? If yes, should it be launched? There are many difficulties in planning a strike on Iranian nuclear facilities. First, there is the sheer number of potential targets. In 2007, it was estimated that a strike inside Iran would present some 400 potential targets in order to have a relatively high certainty of success. Without hitting all of these targets, the Iranian nuclear program would be able to continue unfettered in some capacity until the destroyed facilities come back online.

Among the 400 potential targets, roughly 75 would require some sort of penetrating warhead. After witnessing Iraq’s experience with its Osiraq reactor, Iran took pains to hide its facilities both in underground installations and near heavily populated areas. The facility at Natanz, for example, is covered by nearly 23 meters of concrete and earth. Additionally, there is no guarantee that all of the 400 targets are still functioning facilities. Any type of bombing exercise would likely destroy facilities that are no longer affiliated with the nuclear program. In a heavily populated area, this is a serious concern. Further, even if all the facilities could be destroyed with minimal civilian casualties, the program might continue nonetheless. As Mohamed El Baradei, the head of the International Atomic Energy Agency, is fond of saying: “you cannot bomb knowledge.” Facilities can easily be rebuilt. Equipment can be repurchased and smuggled into the country through a variety of means regardless of the ongoing sanctions. It is the knowledge of the nuclear fuel cycle—knowledge that can survive any amount of bombing—that will keep the Iranian nuclear program alive. At this point, it seems as if it will only be a matter of time before Iran obtains the technological knowledge required to build a nuclear weapon.

140. Id. at 2.
142. See id.
143. See id.
144. Bagully, supra note 843 at 115.
145. Raas & Long, supra note 52, at 17–18.
147. If a preemptive strike is carried out, there is no doubt that the Iranian regime will translate its technological knowledge into a nuclear arsenal at the first opportunity. Such strikes also increase the likelihood that the regime will actually use those weapons, rather than simply hold them as threats. A preemptive strike could escalate the diplomatic standoff beyond the point that any amount of diplomacy could control it. Such a situation is not in anyone’s interest.
There is another option—a military strike after the Iranian regime has obtained the materials and knowledge required to build a nuclear bomb. This, of course, would have to take a much different form. During the Second World War, the British employed tripwires for the Germans and Italians when they finally decided that appeasement was no longer possible. On March 31, 1939, the British announced that any aggression against Polish independence would bring a military response from both the United Kingdom and France.\textsuperscript{148} This was followed by both governments issuing similar guarantees for the independence of Greece and Romania in April of 1939.\textsuperscript{149} Hitler was infuriated watching the British engage in what he called “the policy of encirclement.”\textsuperscript{150} Despite the guarantees, of course, Hitler went ahead with his plans to invade Poland on September 1, 1939, and started World War II.

In speaking about the British guarantees against Hitler’s aggressive plan, Lord Halifax said, “[I]t might still be possible to deter him from its execution if, as we had failed to do in 1914, we made it unmistakably clear that the particular acts of aggression which he was believed to have in mind would result in a general war.”\textsuperscript{151} Obviously, Hitler was not deterred. On the other hand, his aggression was finally unmasked and eventually his reign of terror was brought to an end. The tripwires may have encouraged the eruption of violence, but, in the end, they solved the underlying problem.

Tripwires may also be effective for the Iranian situation. Clearly, however, the hope is that they would prevent a war rather than start one. By having guidelines with a clear set of serious consequences, rational leaders would seek to confine their activities to avoid the tripwires.\textsuperscript{152} If the leaders of Iran choose to follow in the footsteps of Hitler and flagrantly violate the tripwire provisions, perhaps war is the only way to prevent them from committing atrocities against Israel. If the Iranian regime turns out to be as aggressive as Hitler was, it is probably in the world’s best interest to address the problem early on.

The positive side of military intervention is military aid, though it is not necessarily worth considering in this situation. Military aid serves its greatest purpose when the intervening party and the target regime share a mutual interest in resolving an ongoing dispute between the target regime


\textsuperscript{149} \textit{Id.} at 129.

\textsuperscript{150} \textit{Id.}

\textsuperscript{151} \textit{Id.} at 124.

\textsuperscript{152} Interview with Vali Nasr, supra note 64, at 13–15.
and a third party. 153 The Iranian regime’s only dispute in this case is with Israel. 154 Providing the Iranian regime with weapons in exchange for dropping their aggressive stance toward the Israelis is simply illogical. If military intervention is to take place, it can only be in the negative form in this situation.

II. SUGGESTIONS

A. Diplomacy

What was left of the Iranian regime’s credibility has vanished after the controversial 2009 Iranian Presidential election. The recent election fiasco 155 appears to have eroded a large portion of the regime’s power base. 156 The Iranian youth has become very disenchedt with Iran’s political system. 157 The recurrent demonstrations and clashes between the opposition and the regime’s security forces throughout Iran are growing increasingly violent. 158 Losing legitimacy and facing shrinking domestic support, the regime has been relegated to violence to suppress the opposition. It is said that domestic politics determine foreign policy. 159 Iran’s domestic “insurrection” should give pause to the U.S. as a lead negotiator. The U.S. simply does not know whether the regime will still be in power or be replaced. The regime itself is constrained in negotiations because of the domestic situation. Also, if the regime has its hands full dealing with the domestic situation, it is unlikely to launch aggression against anyone.


On the other hand, the regime has a habit of blaming others for its own problems. The protesters’ deaths following the election demonstrations were blamed on Britain and other Western countries. It is not outside the realm of possibility that the regime would use Israel as a distraction or scapegoat for its own internal problems. That being said, the regime seems to be aware of the potential ramifications of a preemptive attack. It would be sheer insanity to attempt any sort of violence without solidified domestic unity. Domestic turmoil and shattered credibility have left the regime politically weak and vulnerable. This situation continues to provide uncertainty with respect to plans for diplomatic engagement.

From the positive standpoint, regional power sharing also does not make much sense at the present. Given the domestic troubles currently facing the regime, Iran is in no position to assuage the civil unrest in Iraq and Afghanistan. If the regime is offered diplomatic engagement, there is no telling what lengths it may go to in order to quell the rebellious voices in the country. Further, the democratic governments of the West will not want to be seen holding hands with an unstable regime, particularly an authoritarian one. Given the current political environment in Iran, it is best to refrain from any sort of diplomatic measures altogether.

B. It’s the Economy, Afterall

The environment is optimal, however, for further economic measures—both positive and negative. With the current political unrest, the Iranian regime may be desperate to complete its nuclear quest and reestablish its legitimacy. If this is the case, it will sink as much money as is feasible into the program to finish it as quickly as possible. If sanctions are stepped up now, they will reduce the amount of money available for the nuclear program. If the government makes cuts to social programs, hospitals, and schools in order to redirect money toward nuclear science,


162. See, e.g., Hubertus Hoffman, Obama’s new Foreign Policy needs a Double Strategy of Power and Diplomacy, INTERNATIONAL ANALYST NETWORK, Nov. 23, 2008, http://www.analyst-network.com/article.php?art_id=2583 (“There are still many unstable authoritarian regimes and terrorists out there that must be contained with power, not paper. Washington must strengthen the understaffed U.S. Army and invest in new equipment and security.”).
the political unrest in the country will likely boil over. Stepping up sanctions now has the prospect of suffocating Iran’s nuclear program.

The population in Iran is young and growing increasingly desperate. If sanctions are upgraded and the regime does nothing to offset them, the ensuing unemployment and inflation will further antagonize the population. There will be a breaking point when the Iranian population will refuse to endure the country’s persisting economic problems. Such a breaking point was reached in 1979 when the Iranian people could no longer put up with the Shah’s economic mismanagement. The Iranians are a proud people, and, if the situation gets much worse, they will rise to the occasion. A strengthening of the sanctions in place could, at least theoretically, give them the final push that they need to overthrow the regime and install the democracy that the people have wanted for so long. Sanctions and selective military force proved effective in Libya because of the country’s domestic pressure at the time.

Positive economic measures might also have a drastic impact in the current environment. The regime is facing a great deal of adversity and is searching for some form of accomplishment to latch onto in order to recapture some of its legitimacy. If the global powers were to offer the regime increased trade or a place in the World Trade Organization, for example, in exchange for an end to their nuclear activities, the regime is unlikely to forgo an opportunity to increase its legitimacy and improve its economic plight. Of course, we must also keep in mind that the regime has been duplicitous in similar situations. If such an agreement were to be reached, there would have to be some serious—possibly military—consequences should the regime renege on the agreement and take the carrot while continuing its nuclear activities. In the event such an agreement does occur, the Iranian regime should be tied down with trip-wires to the greatest extent possible.

C. The Military Option

In the current environment, if an assault is to take place on Iran before it builds a nuclear weapon, the assault must either be in response to an

163. See Vakil, supra note 157, at 16.
165. But see Interview with Vali Nasr, supra note 64, at 7–8.
166. YEHUDIT RONEN, QADDAFI’S LIBYA IN WORLD POLITICS 42, 48 (2008).
168. See JAFARZADEH, supra note 33, at 158–70.
attack by Iran or be in accordance with a Security Council agreement.169 A Security Council agreement is highly unlikely, given the stances of Russia and China on the issue.170 If Israel, or the U.S., finds a pretext that is short of full blown aggression by Iran, international support would not be behind such a retributive attack.171 Thus, a preemptive attack on Iran is not, at this moment, militarily, politically, or legally feasible. Putting tripwires in place, however, remains an attractive option.172 But, with regard to the Iranian situation, what should the tripwires be? In keeping with the historical precedent, an attack or attempted attack on another country using nuclear material should be the first red line. Traditional attacks on other countries by Iran can be dealt with in the traditional fashion—treating the act as a causus belli and engaging in war. Relations between states have worked under this rule for countless years and there is no reason to change now.173

Iran usually does not engage in conventional warfare. They use proxies, such as Hezbollah or Hamas, to carry out aggression for them. The individual target countries of such attacks have done enough to deter them so far and have allies they can call on should the attacks get any worse. If Iran were to cross the threshold and ship nuclear material to these groups174—whether the materials are used or not—a tripwire should be activated and the international community should step in. While a dirty bomb may not be as destructive as a conventional terrorist attack, the psychological and economic effects on the target country would be devastating.175 Not only that, but dirty bomb attacks are unner-


171. For example, Israel may argue that Iran’s ongoing support of terror attacks against Israel constitutes a causus belli, and the U.S. could point to Iran’s naval activities in the Strait of Hormuz. See Barbara Starr, Iranian Boats ‘Harass’ U.S. Navy, Officials Say, CNN, Jan. 7 2008, available at http://www.cnn.com/2008/WORLD/meast/01/07/iran.us.navy/index.html.

172. Similar suggestions have been made by other scholars. See Interview by Fletcher Forum of World Affairs with Martin Indyk, This New Struggle for Power: Assessing American Foreign Policy in the Middle East, FLETCHER F. WORLD AFF., Winter 2007, at 51, 57.


174. For a discussion of Iran arming terrorists with “dirty bombs,” see Greenblum, supra note 154, at 81.

ingly simple to carry out.\textsuperscript{176} Therefore, the possession or use of dirty bombs should not be tolerated. The nuclear material is likely to be fingerprinted and traced back to Iran.\textsuperscript{177} If such material is used or is found in the possession of one of Iran’s proxies, the international community should step in to forcibly change the regime.

Evidence that Iran is enriching uranium beyond the needs of a civilian electricity generation program should be a second tripwire. To be used in a civilian electricity generation program, uranium need only be enriched to a level of 2% to 6%.\textsuperscript{178} To be used in a nuclear weapon, uranium is enriched to over 90%.\textsuperscript{179} This discrepancy leaves plenty of room for a line to be drawn as to an acceptable level of enrichment. If it were discovered that the Iranians were enriching uranium past a certain point—say, 20%, for example—that could be deemed a clear sign that there are military intentions for the program. Once such evidence is established, the international community should step in and put an end to Iran’s uranium enrichment. Unfortunately, given the regime’s secrecy regarding its program, such evidence will likely be difficult to discover.\textsuperscript{180}

As a final tripwire, Iran should not be allowed to manufacture, develop, purchase, or possess any nuclear-capable warheads. Accumulation of such weapons shows a lack of good faith on behalf of the Iranian regime. Even if the regime’s enrichment remains at the civilian level, the accumulation of warheads is a clear sign of a military intent. With the civilian technology already in place, it would only be a matter of months before weapons-grade uranium could be manufactured. If the warhead delivery mechanism is kept out of the Iranian regime’s hands, the civilian program presents less of a threat.

The point of the tripwires is to strike a compromise between the two positions. The Iranians say they only want peaceful electricity generation, but the U.N. Security Council is concerned that they want nuclear weapons.\textsuperscript{181} The aim of the tripwires is to allow for a peaceful legitimate civilian energy program while providing guarantees that the military po-


179. \textit{Id.} at 162.

180. See DELPECH, supra note 2, at 13–15.

181. See discussion supra Part II.C.
Potential of the program will not be realized. If the Iranian regime restricts its activities to accord with its claimed intentions, the conflict will dissipate and a war, which seems almost inevitable to some, will surely be avoided.

Ideally, these tripwires would be put in place by the U.N. Security Council as a supplement to economic measures. If the Iranian regime violates the terms of the tripwires, all of the nations within the international community will be free to respond in accordance with the previously agreed-upon consequences. There is the possibility, however, that either Russia or China will prevent such tripwires from being enacted. Political squabbling could remove the U.N. Security Council’s role as an option, but the U.N. should not be the only means of putting the tripwires in place. As an alternative, these tripwires could be enacted unilaterally by the United States and Israel. The message to the Iranian regime may not be as forceful as it would be if coming from the Security Council, but the measures could still be successful nonetheless. The key will be the enacting nation’s or organization’s ability to follow through with the outlined consequences.

CONCLUSION

In sum, there are three ways to approach the current problem with the Iranian regime: diplomatically, economically, or militarily. To date, the international community has taken diplomatic and economic positions and has only threatened military action. Given the current political environment in Iran, it is time to step up the economic approach and put military tripwire measures in place in the event that the economic steps prove ineffective. It is also time to consider providing the regime with some economic carrots to coax them out of their aggressive stance. Such incentives could provide the regime with a path that allows them to save face while acceding to global demands to halt their nuclear program. If something as mutually beneficial as increased trade can be given to the regime in exchange for more acceptable behavior, the option should certainly be canvassed.

On the other hand, there is always the threat that the regime will backtrack. Furthermore, other regimes may see this compromise as a green light to act like rogue states for a few years and hold global security hostage in exchange for economic benefits. To address both situations, any benefits package should be accompanied by as many restrictions and

182. See, e.g., Vakil, supra note 157.
183. Both nations have obstructed the passage of the three previous rounds of sanctions.
tripwires as possible. The regime needs to know that it cannot renege on
its commitments, and other regimes need to see that the regime has not
been completely enriched by its deviance from international norms.

As a broader point, this situation should act as a testing ground for me-
ths of dealing with state funders of terrorism in the post-9/11 world.
Whatever approach is taken by the United Nations, the United States,
and the global community at large, it should be analyzed for its possible
effectiveness in other situations. Of course, no two threats are the same.
Nor is it viable to devise a “one-size-fits-all” approach in an international
arena that is so diverse. General principles, however, should be transfer-
able among such situations. The foreign policy toolbox contains numer-
ous tools that should be deployed judiciously, each at the right time in
light of the specific context. However, one thing is certain: Iran is not the
only country that acts aggressively on the global playground. Also, Israel
is not the only victim. The rest of the kids on the playground must band
together to find a solution that will keep the aggressors at bay in the in-
terest of peace, order, and mutual wellbeing.
“Any people anywhere, being inclined and having the power, have the right to rise up, and shake off the existing government, and form a new one that suits them better. This is a most valuable—a most sacred right—a right, which we hope and believe, is to liberate the world.”

INTRODUCTION

On August 30, 1999, the people of East Timor prepared for a referendum on the country’s constitutional status in a fight for self-determination against a background of genocide, injustice, and betrayal. “[N]o place on earth was [as] defiled and abused by murderous forces, in collaboration with the ‘international community,’ as East Timor,” wrote one commentator. “We are dying as a people,” wrote the head of the Catholic Church in East Timor in a letter to the United Nations’ Secretary-General. At least one-third of East Timor’s population have died under the Indonesian occupation. Yet, in what has been described as “a showing of courage and determination, the people of East Timor turned..."
out in massive numbers to vote" on the future of the territory. 6 With such threats to a people’s fundamental rights, the question of when international law should deem a people’s declaration of independence a lawful act is critically important.

This Article will argue for a new method through which scholars, advocates, and other decision-makers can analyze the legitimacy of a population’s declaration of independence. The current approach to such an analysis—making self-determination the main focus of claims to secession—fails to consider the circumstances surrounding secession and, thereby, fails to properly balance the importance of state sovereignty with that of self-determination. 7 As an alternative, this Article develops an alternative method of analysis using a sliding scale inquiry with a novel concept: the “Political Liberty Triangle” paradigm. This new method seeks to improve the ability to assess the merits of secessionists’ claims and determine whether a group’s declaration of independence should be deemed lawful.

The Political Liberty Triangle represents a stable, independent state. It is formed by, and is focused on, the relative importance of the concepts of sovereignty, self-determination, and secession. They constitute the three points of inquiry in this analysis and are considered in light of the context and particular circumstances surrounding a group’s claim to independence. This method considers the validity of the claim for independence in light of factors such as the likelihood of a territory to become economically self-sufficient, the free will of a territory’s people, and the state’s behavior toward its people.

This alternative analysis uses a sliding scale inquiry in conjunction with the Political Liberty Triangle. The sliding scale measures the legitimacy of a territory’s independence relative to the extent of that territory’s continued dependence. Some relevant factors that can shift a territory toward either dependence or independence on the scale include: human rights violations, attempts at peaceful negotiations, will of the supermajority for independence, economic self-sufficiency, and international harmony. 8 The weight given to each of these non-exhaustive fac-

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8. See discussion infra Part II.B.1–5.
tors will change depending on the circumstances surrounding each claim for secession. This method applies a totality of the circumstances approach to claims of secession. Furthermore, because the considerations comprised in the Political Liberty Triangle also hinge on context-specific factors, the international community should look to the Political Liberty Triangle in light of the “totality of the circumstances” surrounding a claim to secession. Ultimately, this approach is designed to remedy the under-inclusiveness of past methodologies. By focusing on the circumstances surrounding a group’s claim to secession, the international community may answer the question that has been side-stepped for decades: When is secession legitimate?

To conceptualize the relationship between the Political Liberty Triangle and the sliding scale of independence, the latter can be seen as a tool for gauging the stability of the former. When sovereignty and self-determination are balanced in equilibrium, secession is not a legitimate act. As the scale slides farther toward independence, the triangle is implicitly buckling under disequilibrium. When the equilibrium is thrown off, the triangle crumbles and secession becomes necessary to restore the state’s political liberty triangle, although the final result is two political liberty triangles—one resurrected for the original state and one new triangle for the new state created from the seceded territory.

Part I of this Article provides some background on the traditional concepts of sovereignty and self-determination in order to explain their competing relation at opposite points of the political liberty triangle. Part II explains in greater detail the nature of the new prospective approach proposed in this Article and elaborates on the factors that should be considered in determining whether secession is legitimate. Finally, part III applies this new approach to East Timor’s and Kosovo’s past secession disputes as case studies, illustrating that while Kosovo’s 2008 declaration of independence was likely appropriate, a consideration of the totality of the circumstances renders it questionable whether East Timor should have been granted independence in 2002.9 Finally, this Article sets out a number of recommendations for transitioning away from the old paradigm’s focus on self-determination. These recommendations hinge on the notion that, while considerations of self-determination explain why secession might be justified, such considerations cannot alone indicate whether secession is actually justified in a particular instance. The Politi-

cal Liberty Triangle paradigm brings necessary analytical rigor to the latter inquiry.

I. THE FRAMEWORK OF THE POLITICAL LIBERTY TRIANGLE

The Political Liberty Triangle represents a stable, independent state and is conceptually formed by the notions of sovereignty, self-determination, and secession. International law norms equate self-determination and sovereignty as parallel interests. For example, the Charter of the United Nations states that one purpose of the U.N. is to respect the self-determination of peoples, and that the U.N. is based on the principle of sovereign equality of its members. Traditionally, claims of secession are based on violations of the right to self-determination within a sovereign state.

The following sections examine the relationship between sovereignty and self-determination in order to provide a more explicit understanding of the framework proposed herein. This framework is a building block of a methodology that supersedes the traditional approach to claims of secession.

A. Sovereignty and Territorial Integrity

State sovereignty relates to a state’s claim to, and exercise of, authority. In terms of its continuous development, it is not an “immutable principle decreed in fixed form once and for all time,” but rather a con-


11. U.N. Charter art. 1, para. 2 (providing that one of the purposes of the United Nations is “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace”).

12. U.N. Charter art. 2, para. 1 (providing “the principle of the sovereign equality of all its Members” as one of the organizing principles of the United Nations and its members).


14. See DAVID P. FORSYTHE, HUMAN RIGHTS IN INTERNATIONAL RELATIONS 20 (1st ed. 2000) (“[T]he idea of state sovereignty is a claim relating to proper exercise of public authority.”).
cept “whose meaning and scope are subject to re-evaluation” by the international community.\textsuperscript{15} As such, although sovereignty is traditionally associated with the idea of supreme authority, today, sovereignty must instead be evaluated in terms of sovereign equality, or equality among the states.\textsuperscript{16}

While during the Middle Ages, sovereignty was used to signify superiority, the term did not exist as it does today.\textsuperscript{17} Although people in the Middle Ages had “a very strong sense of that concrete thing, hierarchy; they lacked the idea of that abstract thing, sovereignty.”\textsuperscript{18} Sovereignty in today’s sense emerged as a consequence of the formation of the modern state. First, the royalty acquired \textit{plenitude potestatis}, or “the supreme power,” which meant that no authority was able to challenge them.\textsuperscript{19} That power was further strengthened when the royalty began asserting territorial autonomy of their kingdom.\textsuperscript{20} Second, the royalty began to use law as an instrument to further their power, contributing to the establishment of the concept of sovereignty.\textsuperscript{21} Relying on the Roman law maxims such as \textit{quod principi placuit legis habet vigorem} (“what pleases the prince has the force of law”), and \textit{si veut le roi, si veut la loi; car tel est notre plaisir} (“what the king wills, the law wills”) the law was utilized as an instrument of command.\textsuperscript{22}

\footnotesize{\textsuperscript{15} \textit{Id.}, (“[A] claim to [sovereignty is] to be evaluated by the rest of the international community. Thus state sovereignty is not some immutable principle decreed in fixed form once and for all time, but rather an argument about state authority whose meaning and scope are constantly subject to re-evaluation.”). For a collection of articles discussing sovereignty as a social construct that developed over time, see \textit{STATE SOVEREIGNTY AS SOCIAL CONSTRUCT} (Thomas J. Biersteker & Cynthia Weber eds., 1996); see also \textit{STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY} 3 (1999) (pointing out that “[s]ome analysts have argued that sovereignty is being eroded by one aspect of the contemporary international system, globalization”).


\textsuperscript{17} For an interesting discussion of the notion of sovereignty as developed in the Middle Ages, see, for example, Walter Ullman, \textit{The Development of the Medieval Idea of Sovereignty}, 64 Eng. Hist. Rev. 1 (1949) and J. W. McKenna, \textit{The Myth of Parliamentar-y Sovereignty in Late-Medieval England}, 94 Eng. Hist. Rev. 481 (1979).

\textsuperscript{18} \textit{BERTRAND DE JOUVENEL, SOVEREIGNTY: AN INQUIRY INTO THE POLITICAL GOOD} 171 (1957).


\textsuperscript{20} \textit{Id.}.

\textsuperscript{21} \textit{Id.}.

\textsuperscript{22} \textit{Id.} at 59.
Accordingly, sovereignty has traditionally been associated with supreme authority\textsuperscript{23} and has essentially been thought of as the concept of a state’s right to exercise certain powers with respect to its territory and citizens.\textsuperscript{24} Sovereignty can be characterized by three concepts: internal coherence, external independence, and supremacy of law.\textsuperscript{25} A sovereign state is characterized by internal coherence and supremacy of law since it has the power to make law that is “supreme and ultimate.”\textsuperscript{26} Additionally, a sovereign state is externally independent because a sovereign power obeys no external authority outside its own territory.\textsuperscript{27} Accordingly, states are only bound by those rules of law to which they have agreed to be bound, such as international treaties or customary international law.\textsuperscript{28}

Another relevant legal principle in our discussion of sovereignty is equality of states. This principle is based on the analogy of the status of men in natural law.\textsuperscript{29} In the words of Emer de Vattel, a representative of the natural law school of thought, “A dwarf is as much a man as a giant is; a small Republic is no less a sovereign State than the most powerful Kingdom.”\textsuperscript{30}

The Charter of the United Nations combines these two concepts of sovereignty and equality of states.\textsuperscript{31} The principle of sovereign equality

\begin{itemize}
  \item \textsuperscript{23} 1 Oppenheim’s International Law 122 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) (“Sovereignty is supreme authority . . . .”).
  \item \textsuperscript{24} John H. Jackson, Sovereignty, the WTO, and Changing Fundamentals of International Law 57 (2006) (Although “[t]he old ‘Westphalian’ concept in the context of a nation-state’s ‘right’ to monopolize certain exercises of power with respect to its territory and citizens is in many ways discredited,” the “main characteristics are still prized and harbored by those who maintain certain views, perhaps fairly characterized ‘realist,’ or who otherwise wish to avoid (sometimes with justification) interference in a national government’s decisions and activities by foreign or international powers and authorities.”).
  \item \textsuperscript{25} Loughlin, supra note 19, at 59.
  \item \textsuperscript{26} Id.
  \item \textsuperscript{27} Id.
  \item \textsuperscript{29} See Va. Bill of Rights of 1776, ¶ 1 (“All men are by nature equally free and independent and have certain inherent rights. . . .”); Thomas Hobbes, Leviathan 104 (The Liberal Arts Press, Inc., 1958) (1651) (“Nature has made men so equal in the faculties of body, and mind.”).
  \item \textsuperscript{30} Emer de Vattel, 1 Le Droit des Gens, ou Principes de Loi Naturelle, Appliqués a La Conduite et Aux Affaires des Nations et Souverains 11 (1758), translated in The Law of Nations, or the Principles of Natural Law, Applied to the Conduct and to the Affairs of Nations and of Sovereigns 7 (Charles G. Fenwick trans., The Carnegie Institution of Washington, 1916).
  \item \textsuperscript{31} See U.N. Charter art. 2, para. 1. For a discussion on sovereign equality and the United Nations, see Bardo Fassbender & Albert Blechman, Article 2(1), in 1 The
espoused in Article 2(1) of the U.N. Charter represents a profound change and a shift in the conceptual direction of the meaning of sovereignty. A report by the U.N. drafting subcommittee states:

The Subcommittee voted to keep the terminology, “sovereign equality,” on the assumption and understanding that it conveys the following: (1) that states are juridically equal; (2) that they enjoy the rights inherent in their full sovereignty; (3) that the personality of the state is respected, as well as its territorial integrity and political independence; (4) that the state should, under international order, comply faithfully with its international duties and obligations.

Sovereign equality was purposefully adopted as a new term to take precedence over the term “sovereignty.” Sovereignty was given the position of an attributive adjective modifying the noun equality. This was intended to highlight the new concept of sovereignty as establishing a better community discipline between individual states and mankind.

B. Self-determination

Self-determination is the ability of an individual or group to make choices free from the force of the institutional framework within which they live. The concept of self-determination is disputative in international law because it challenges core principles of the international legal system. In particular, it challenges the sovereignty and territorial integ-

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32. See U.N. Charter art. 2, para. 1; see also Fassbender & Blechman, supra note 31, at 87–88.
33. Report of Rapporteur of Subcommittee I/1/A to Committee I/1, Conference on International Organization, Doc. 723, June 1, 1945, in THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, SELECTED DOCUMENTS 483 (1946).
35. Id.
36. Christian Tomuschat, Obligations Arising for States Without or Against Their Will, 241 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 195, 292 (1993) (The two elements of sovereignty and equality provide for a “development towards greater community discipline” which is “driven by a global change in the perception of how the right balance between individual State interests and interests of mankind as a whole should be established.”).
37. ROBERT MCCORQUODALE, SELF-DETERMINATION IN INTERNATIONAL LAW xi (2000) (“Self-determination is primarily about the ability of an individual or a group to make choices free from the bounds of the institutional framework within which they live.”).
38. Id. (“One reason why self-determination is contentious in international law is that the concept challenges some of the core principles of the international legal system.”).
ity of states and interferes with matters that fall within the domestic jurisdiction of states.\textsuperscript{39}

Self-determination developed within the international legal system in the wake of the First World War.\textsuperscript{40} In 1918, U.S. President Woodrow Wilson, a key advocate of the right of the people to choose their own form of government,\textsuperscript{41} stated, “[P]eoples may now be dominated and governed only by their own consent. ‘Self-determination’ is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril.”\textsuperscript{42} President Wilson’s views of self-determination helped the concept become an accepted term of use in international relations.\textsuperscript{43}

The establishment of the United Nations advanced the development of the concept of self-determination; the U.N. Charter mentions the “principle” of self-determination twice\textsuperscript{44}—although, both references are made in the limited contexts of developing “peaceful and friendly relations among nations” and protecting the principle of “equal rights . . . of peoples.”\textsuperscript{45} However, it has been noted that the reference to “peoples” presumes a group beyond states and encompasses territories “whose peoples have not yet attained a full measure of self-government.”\textsuperscript{46}

After its inclusion in the U.N. Charter, self-determination quickly evolved from a principle to a right.\textsuperscript{47} The most significant document in

\begin{itemize}
\item \textsuperscript{39}Id. (“It [...] challenges the sovereignty of states and their territorial integrity, it interferes in matters within the domestic jurisdiction of states . . . .”).
\item \textsuperscript{40}Id. at xiii. (stating that self-determination developed in an international context during the immediate wake of the First World War).
\item \textsuperscript{41}SELF-DETERMINATION REPORT, supra note 13, at 3 (“Wilson distinguished between ‘internal’ and ‘external’ interpretations of self-determination; the former, referring to a people’s right to choose its own form of government without outside pressure, was of far greater concern to him.”).
\item \textsuperscript{42}President Woodrow Wilson, Address to the Joint Session of Congress: Analyzing German and Austrian Peace Utterances (Feb. 11, 1918).
\item \textsuperscript{43}MCCORQUODALE, supra note 37, at xiv (“The long-term effect of Wilson’s views was that self-determination, despite its vague content and dubious conceptual basis, became an accepted term of use in international relations.”).
\item \textsuperscript{44}U.N. Charter art. 1, para. 2; U.N. Charter art. 55.
\item \textsuperscript{45}See U.N. Charter art. 1, para. 2; U.N. Charter art. 55.
\item \textsuperscript{46}Hurst Hannum, Rethinking Self-Determination, 34 VA. J. INT’L L. 1, 11 (1993) (quoting Article 73 of the U.N. Charter).
\item \textsuperscript{47}See SELF-DETERMINATION REPORT, supra note 13, at 3 (“once [self-determination] was written into the Charter, it very quickly evolved from a principle to a right.”); Hannum, supra note 46, at 31.
\end{itemize}

[S]elf-determination has undoubtedly attained the status of a “right” in international law. Formal statements by governments, the adoption by consensus of numerous United Nations resolutions, and the fact that more than half of the
the promotion of the right to self-determination is the 1960 U.N. Declaration on the Granting of Independence to Colonial People (the “1960 U.N. Declaration”),[48] which makes it clear that all colonial territories have the right to independence.[49] The “push for decolonization in the 1960s . . . elevated self-determination to a right and brought to full light the need to contend with [the] humanistic components” of self-determination.[50]

However, given the trend in recent decades toward redefining self-determination to apply beyond decolonization—i.e., so as to include every group as having a right to independence—the 1960 U.N. Declaration may no longer offer sufficient guidance.[51] For example, Kosovo and East Timor achieved independence after long and bloody struggles for self-determination.[52] Currently, Chechnya is seeking its independence.

world’s states have accepted the right of self-determination through their adherence to one or both of the United Nations covenants on human rights would seem to confirm the existence of self-determination as a norm of international law.

*Hannum, supra* note 46, at 31.


49. *Hannum, supra* note 46, at 12 (With respect to the U.N. General Assembly’s 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, “[t]he thrust of the declaration is clear: all colonial territories have the right of independence.”).


52. See Dan Bilefsky, *In a Showdown, Kosovo Declares its Independence*, N.Y. TIMES, Feb. 18, 2008, at A1 (“The province of Kosovo declared independence from Serbia . . . , sending tens of thousands of ethnic Albanians streaming through the streets to celebrate what they hoped was the end of a long and bloody struggle for national self-determination.”); Barbara Crossette, *Annan Warns Indonesians That Inaction May Lead to Criminal Charges*, N.Y. TIMES, Sept. 11, 1999, at A6 (quoting former U.N. Secretary General Kofi Annan saying: “the people of East Timor are being terrorized and massacred because they exercised their right of self-determination.”).
from Russia, and Western Sahara is in a struggle for independence against Morocco.

The 1960 U.N. Declaration was a product of its time, promulgated amidst a trend toward freedom and independence in a large number of colonial territories. It did not, however, allow for secession because the territorial integrity of existing states was assumed. Consequently, it does not address current problems that the international community faces with respect to secession. Today, in light of a trend toward independence for any group, it is necessary to have a conceptual framework for balancing the territorial integrity of existing states with the right to self-determination.

This shift is further evidenced in international declarations and covenants created after the 1960 U.N. Declaration. For instance, the 1970 Declaration on Principles of International Law Concerning Friendly Relations (the “1970 Declaration”) states, “[T]he subjection of peoples to alien subjugation, domination[,] and exploitation constitutes a major obstacle to the promotion of international peace and security.” Furthermore, suggesting that a state erodes its claim to sovereignty when engaging in subjugation, domination, and exploitation, the 1970 Declaration imposes limits on a state’s sovereignty when the state fails to “represent the whole people belonging to the territory without distinction as to race, creed, or colour.” The International Covenant on Economic, Social and


55. Declaration on the Granting of Independence to Colonial Countries and Peoples, supra note 48, at 67 (“Welcoming the emergence in recent years of a large number of dependent territories into freedom and independence, and recognizing the increasingly powerful trend towards freedom in such territories which have not yet attained independence.”).

56. See id. at 68; SELF-DETERMINATION REPORT, supra note 13, at 4.


58. Id. at 124.

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-
Cultural Rights ("ICESCR") and the International Covenant on Civil and Political Rights ("ICCPR") also state that "all peoples have the right of self-determination." This includes the right to "freely determine their political status," and to "freely pursue their economic, social, and cultural development."

While scholars have written extensively on the right to self-determination—what it encompasses, and to whom it applies—no international agreement currently exists to precisely define the scope of the right and identify who may exercise the right. Furthermore, states have been slow to acknowledge the right beyond the colonial context. The reluctance of states to expand the scope of self-determination and the lack of international consensus make answering questions relating to and depending on self-determination especially difficult. Until the issue of scope and entitlement can be ascertained through international agreements or international norms, the legitimacy of secessions cannot be answered solely with self-determination.

C. Secession

Secession is "[t]he process or act of withdrawing," such as when a people withdraw from their central government. Secession is largely the result of a state’s failure to balance its right to territorial integrity with its people’s right to self-determination.

The concept of secession is inseparable from the concepts of self-determination and sovereignty, the latter concepts being parallels in international norms. The relationship between the corners of the Political Liberty Triangle becomes clear upon consideration of the following idea: when secession is intended, acceptance of one group’s claim to self-

determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory and without distinction as to race, creed, or colour.

Id.


63. See, e.g., U.N. Charter art. 1, para. 2; U.N. Charter art. 2, para. 1.
determination results in the denial of another group’s competing claim to territorial integrity.64

A balance is necessary between the right of the people to self-determination and the right of a state to maintain a territorial integrity in order to alleviate conflicting policy goals. If the international community favors a state’s territorial integrity over its people’s right to self-determination, the international community may potentially be complicit in limiting the freedom and liberty of that state’s people.65 Moreover, territorial integrity was not intended to preclude the right to self-determination.66 Alternatively, too broad a reading of the right to self-determination will compromise the territorial integrity of the state.67

It has been argued that secession is permissible under a number of circumstances. Namely, secession has been thought to be justified in extreme situations where “definite and substantial grievances” are present and “all other [means of resolving these grievances] have been exhausted or repudiated.”68 Among the prime considerations in evaluating a secessionist claim are the history, nature, and severity of the existing griev-

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64. Hannum, supra note 46, at 41 (“Where independence is the goal, acceptance of one group’s claim to self-determination necessarily implies denial of another group’s competing claim of territorial integrity.”).


66. Pius L. Okoronkwo, Self-Determination and the Legality of Biafra’s Secession Under International Law, 25 Loy. L.A. Int’l & Comp. L. Rev. 63, 80 (2002) (“The principle of territorial integrity, however, was not intended to preclude people within a sovereign state from exercising their right to self-determination through secession.”).

67. Lyle, supra note 65, at 707 (pointing out that “too broad a definition of self-determination makes it impossible to keep countries together.”).

68. Hannum, supra note 46, at 44–45 (citing Onyeonoro Kamanyi, Secession and the Right to Self-Determination: An OAU Dilemma, 12 J. Mod. Afr. Stud. 355, 359, 361 (1974)). Hurst Hannum discusses the four principal arguments in favor of the right to secede. The first argument, the liberal democratic theory, “holds that, since the legitimacy of any government must rest upon the consent of the governed, the governed have the inalienable right to withdraw that consent whenever they wish.” Id. at 43–44. The second argument emphasizes humanitarian or human rights concerns. Id. at 44–47. The third argument identifies a list of criteria that might be used in specific cases to evaluate secessionist claims, and seeks to balance “the internal merits of the claimants’ case [for secession] against the justifiable concerns of the international community expressed in its calculation of the disruptive consequences of the situation.” Id. at 47–48. Lastly, the fourth approach, a territorially based test, considers the following criteria: the immediacy and nature of the historical grievance of the secessionist group, the extent to which the group has kept its self-determination claim alive, and the extent to which the disputed territory has been settled by members of the dominant group. See id. at 48–49.
For example, scholars have argued that secession may be legally justified when gross violations of human rights, such as genocide, occur within a given state or territory.

Additionally, scholars weigh the expected impact on international harmony in ascertaining the legitimacy of a claim to secession. While states may freely recognize the independence of a given population, acceptance of a group’s declaration of independence by the greater international community increases the legitimacy of the right to secession. Moreover, the promotion of international harmony requires a balancing of the right to secession and the adverse effects on the given state. Accordingly, it has been noted that “the basic question is whether separation or unification would best promote security and facilitate effective shaping and sharing of power and of all the other values for most people.”

While a right to secession does not yet exist, it is an open question whether a right legitimizing secession under certain circumstances should be recognized. Because the legitimacy of any government rests “upon the consent of the governed, the governed should have the inalienable right to withdraw that consent whenever they wish.” This power to

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69. Id. at 48 (citing Lea Brilmayer, Secession and Self-Determination: A Territorial Interpretation, 16 Yale J. Int’l L. 177, 199–201 (1991)) (discussing the territorially based test for determining a right to secede).

70. Id. at 46 (discussing the humanitarian or human rights approach to determining a right to secede).

71. Id. at 47 (discussing the third approach to judging the right to secede); see supra note 68.


Although recognition of the newly created state by the international community as a requisite component in the legality of secession remains in dispute . . . in political terms its necessity is almost universally accepted. As membership in the UN General Assembly is the preeminent signifier of international recognition of statehood, the UN can leverage substantial power insofar as it confers legitimacy on newly created states.

Id.

73. Lung-Chu Chen, Self-Determination as a Human Right, in Toward World Order and Human Dignity: Essays in Honor of Myres S. McDougal 198, 210 (W. Michael Reisman & Burns H. Weston eds., 1976); see also Lee C. Buchheit, Secession: The Legitimacy of Self-Determination 238 (1978) (arguing that the “final decision regarding the legitimacy of a particular secessionist claim must result from the balancing of the internal merits of the claimants’ case for secession against the justifiable concerns of the international community expressed in its calculation of the disruptive consequences of the situation.”).

74. Hannum, supra note 46, at 43 (discussing the liberal democratic theory approach to determining right to secede); see supra note 68.
withdraw should arguably extend “not only to rejection of [a] particular government, but also to rejection of [an entire] state.”

II. A PARADIGM FOR THE AGES

After juxtaposing the Political Liberty Triangle approach with the traditional paradigm, the following sections explain the methodology—and, ultimately, the desirability—of the former, in order to support this Article’s call for a paradigm shift.

A. Rejection of the Traditional Paradigm of Self-Determination

While self-determination explains why a group may be entitled to secede, it does not guide the international community in determining whether an act of secession is lawful. Similar to a student of mathematics who is unable to use calculus without first understanding the fundamentals of algebra, the international community is unable to evaluate the legitimacy of a claim without the proper tools. While a student may recognize that a given problem can be solved using a particular calculus theorem, he or she will not be able to utilize the theorem without the requisite tools. Similarly, scholars may recognize that self-determination is a justification for secession, but they are unable to analyze the legitimacy of specific claims for secession because a sufficient framework does not yet exist.

If scholars—and, ultimately, members of the international legal community—possessed a more expansive analytical framework for looking at the legitimacy of secessionists’ claims, they could offer better collective judgments as to how to react. Some of the types of information most important to the decision-making process include: the occurrence of human rights violations; the occurrence of attempts at peaceful negotiation; clear expressions of the will of a supermajority to secede; indications that other rights violations are being perpetrated; and indications of whether the aggrieved population could be economically viable if secession were recognized as legitimate.

Because such information is essential to fully evaluate the question of legitimacy, the international community should no longer focus on self-determination to determine when an act of secession is lawful. Self-

75. Hannum, supra note 46, at 43.

76. Cf. STEPHEN R. COVEY, THE 8TH HABIT: FROM EFFECTIVENESS TO GREATNESS 117 (2004) (pointing out the calculus portion of the analogy—“you can’t do calculus until you understand algebra, and you can’t do algebra until you understand basic math”).
determination alone is not enough because it simply distinguishes legitimate claims from illegitimate claims.\textsuperscript{77}

\textbf{B. The Political Liberty Triangle Paradigm}

The international community must begin viewing secession in light of the totality of the circumstances. The extent of a people’s dependency on a given state body hinges on all factors relevant to the competing desires for self-determination or territorial integrity. Furthermore, determinations of the legitimacy of acts of secession should be made on a case-by-case basis because the circumstances arising in each case will be unique. This is why it is important to point out that the list of potentially relevant considerations (provided above and discussed in greater detail below) is not exhaustive. The weight to be given to any one factor or circumstance is not fixed; the gravity of any type of consideration will always depend on the context and the interplay of all other relevant factors and circumstances. For example, the economic viability of a territory may be given more weight than the exhaustion of peaceable negotiations where a territory is small and its population uneducated.

To further conceptualize this approach, it is best to think of these case-specific factors as lying at the heart of the Political Liberty Triangle. Remember that as the sliding scale shifts from dependence to independence on the basis of these case-specific factors, the triangle begins to crumble.

Many scholars have already written about many of the factors that will be examined in this Article, but the forthcoming discussion aims to build and improve upon the existing scholarship. For example, it has been argued that serious human rights violations alone are sufficient to justify secession.\textsuperscript{78} However, this Article argues that this is not a facially obvious conclusion—rather, evidence of such violations is but one of many factors that should be considered, in light, of course, of the surrounding circumstances of the territory.

Unsurprisingly, most academic work dealing with secession has focused on self-determination.\textsuperscript{79} If nothing else, this Article will hopefully encourage a shift in academic discourse away from the self-determination paradigm and toward a more meaningful, in depth analysis

\textsuperscript{77} W. Ofuatey-Kodie, The Principle of Self-Determination in International Law 162 (1977).

\textsuperscript{78} See Allen Buchanan, Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law 335 (2004); Okoronkwo, supra note 66, at 106 (stating secession is permissible when serious human rights violations are present).

of the kind advocated here. Unfortunately, “paradigms, like traditions, die hard,”80 and a flawed paradigm can live on for centuries even after a better one is advanced.81

1. Gross, Substantial, and Extensive Human Rights Violations

Human rights are those fundamental moral rights necessary for individuals to live with liberty and dignity; moreover, they are a means to a greater social end.82 The legal system identifies and codifies rights that are considered fundamental,83 and States ensure autonomy and equality for individuals by recognizing, applying, and protecting the fundamental legal rights of individuals.84

With the advent of international law, human rights have been internationalized and are no longer solely a matter of domestic jurisdiction.85 Today, states are held accountable to the international community for their human rights violations.86 When a state fails to recognize and apply fundamental rights appropriately, victimized groups may seek assistance from the international community,87 and recognition of the legitimacy of secession is always a potential remedy international actors can offer. In

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80. Covey, supra note 76, at 20.
81. Id.
82. Forsythe, supra note 14, at 3.
83. Id. (“[I]t is the legal system that tells us at any given point in time which rights are considered most fundamental in society. Even if human rights are thought to be inalienable . . . rights still have to be identified—that is, constructed—by human beings and codified into the legal system.”); see also Jack Donnelly, The Social Construction of International Human Rights, in HUMAN RIGHTS IN GLOBAL POLITICS 71–102 (Tim Dunne & Nicholas J. Wheeler eds., 1999).
85. Forsythe, supra note 14, at 4–5 (“Other developments also indicated the central point that human rights was no longer a matter necessarily or always within state domestic jurisdiction. . . . Human rights had been internationalized . . . .”).
86. Id. at 4 (“In principle, states were to answer to the international community for their treatment of individuals.”).
87. See Benyamin Neuberger, NATIONAL SELF-DETERMINATION IN POSTCOLONIAL AFRICA 71 (1986) (stating a group may defend themselves by seceding from an oppressive state); Onyeonoro S. Kamanu, Secession and the Right to Self-Determination: An OAU Dilemma, 12 J. MOD. AFR. STUD. 355, 362 (1974) (arguing that a group may defend themselves when they are subjected to human rights violations).
such circumstances, the possibility of secession is a source of protection.\footnote{88 See Hannum, supra note 46, at 45 (stating secession is a form of self-defense while discussing the humanitarian or human rights approach to determining the appropriateness of the right to secede); see supra note 68.}

Human rights violations may provide a compelling justification for secession.\footnote{89 See Buchanan, supra note 78, at 335; Karen Knop, Diversity and Self-Determination in International Law 262–63 (2002); Hurst Hannum, The Specter of Secession: Responding to Claims for Ethnic Self-Determination, FOREIGN AFFAIRS, Mar.–Apr. 1998, at 13, 16 (“There are two instances in which secession should be supported by the international community. The first occurs when massive, discriminatory human rights violations, approaching the scale of genocide, are being perpetrated. If there is no likelihood of a change in the attitude of the central government, or if the majority population supports the repression, secession may be the only effective remedy for the besieged group.”); Okoronkwo, supra note 66, at 106.} However, there is no general consensus as to what type or extent of violations are necessary to justify secession. For example, would it be sufficient to justify succession if there is a credible threat to the physical existence of an aggrieved population? What about extreme discrimination against a particular group such that it results in significant oppression?\footnote{90 See Hannum, supra note 46, at 45 (reviewing the second approach to determining the right to secede which emphasizes humanitarian and human rights concerns).} What about genocide? Surely genocide should be sufficient, right?

While genocide is illegal under customary international law,\footnote{91 See, e.g., Restatement (Third) of the Foreign Relations Law of the United States § 702 (1987) (“A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . genocide.”).} one single act of genocide against a population is probably insufficient to justify secession.\footnote{92 See Hannum, supra note 89, at 16 (conditioning the right to secession on the basis of “massive, discriminatory human rights violations, approaching the scale of genocide” upon “there [being] no likelihood of a change in the attitude of the central government” or “majority population support[ ] [of] the repression.”).} In such a situation, secession may not be the proper remedy. For instance, the Preamble of the Universal Declaration of Human Rights states that “if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, . . . human rights should be protected by the rule of law.”\footnote{93 Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (emphasis added). For a good discussion of the authority of the Universal Declaration of Human Rights since its enactment, see Tai-Heng Cheng, The Universal Declaration Rights at Sixty: Is It Still Right for the United States?, 41 CORNELL INT’L L.J. 251 (2008).} Additionally, long established
principles of sovereignty and territorial integrity signal that secession may not be the preferable remedy.\textsuperscript{94}

When human rights violations are gross, substantial, and extensive, however, secession may become a legitimate goal for an aggrieved population. As mentioned above, international agreements, such as the 1970 Declaration,\textsuperscript{95} the ICESCR,\textsuperscript{96} and the ICCPR,\textsuperscript{97} suggest that respect for state sovereignty ought not to prevent the international community from taking action in opposition to state actors who commit serious human rights violations on behalf of their states.\textsuperscript{98}

2. Attempted Peaceful Negotiated Settlements

There is a historical notion that violence rarely, if ever, produces viable and just outcomes.\textsuperscript{99} In order for a state’s Political Liberty Triangle to remain intact, a state should repudiate all forms of violence and pursue peaceful negotiated settlements. When a state uses violence and force on an aggrieved population as a method of settling problems, that state corrodes its right to sovereignty.\textsuperscript{100} Likewise, the aggrieved population should also not resort to violence as a means of achieving its goal of secession from the oppressive state.

The establishment of the United Nations in 1945 signaled a movement away from violence and toward institutions that would promote peaceful settlement of disputes.\textsuperscript{101} Article 33 of the U.N. Charter states that “[t]he parties to any dispute, the continuation of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other


\textsuperscript{95} Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, \textit{supra} note 57, at 121.

\textsuperscript{96} International Covenant on Economic, Social and Cultural Rights, \textit{supra} note 59.

\textsuperscript{97} International Covenant on Civil and Political Rights, \textit{supra} note 59.

\textsuperscript{98} See discussion \textit{supra} Part I.B.


\textsuperscript{100} Trebicka, \textit{supra} note 13, at 260 (“In the case of Kosovo, the exercise of self-determination would certainly lead to secession, thus violating the principle of territorial integrity of the sovereign, Serbia. In this case, I argue that emerging international law should favor the right to self-determination over sovereignty claims.”).

\textsuperscript{101} See U.N Charter art. 39–51 (forbids the threat or use of force in international relations).
peaceful means of their own choice.\footnote[102]{Furthermore, the U.N. Charter empowers the Security Council to resolve disputes that threaten international peace and security.\footnote[103]{While the U.N. Charter is only binding on member states,\footnote[104]{the international community as a whole should follow the trend toward peaceful solutions to promote global harmony.}} Peaceful negotiated settlements should be the result of real bargaining by legitimate representatives of the parties after an examination of all issues that constitute the heart of the conflict.\footnote[105]{No party should be coerced or pressured into accepting an agreement, and when negotiations cannot produce a solution that is genuinely acceptable to both parties, the United Nations Security Council should assist in resolving the conflicts. The risk of intervention by the Security Council should encourage parties to reach agreements and settle their disputes in a peaceful way.} \footnote[106]{Secession is not legitimate without the will of the people. Thus, majority support is often a very important element in weighing the legitimacy of secession. However, it is arguable that secession should be permissible whenever “reasonable demands for local self-government or minority rights have been arbitrarily rejected by a central government.”\footnote[107]{According to much existing scholarship, the apparent sentiment is that evidence of majority support among all aggrieved individuals might very well be sufficient for legitimate secession. To demand a more supermajority, e.g., would safeguard the rights of people with minority views that are not currently represented.} 3. The Will of the Supermajority

Secession is not legitimate without the will of the people. Thus, majority support is often a very important element in weighing the legitimacy of secession. However, it is arguable that secession should be permissible whenever “reasonable demands for local self-government or minority rights have been arbitrarily rejected by a central government.”\footnote[107]{In re Secession of Quebec, 1998] 2 S.C.R. 217, ¶ 87 (requiring the clear expression of the people’s will in a case of secession).} According to much existing scholarship, the apparent sentiment is that evidence of majority support among all aggrieved individuals might very well be sufficient for legitimate secession.\footnote[108]{See, e.g., Jonathan I. Charney, Commentary, Self-Determination: Chechnya, Kosovo, and East Timor, 34 Vand. J. Transnat’l L. 455, 464 (2001); Robert W. McGee, The Theory of Secession and Emerging Democracies: A Constitutional Solution, 28 Stan. J. Int’l L. 451, 466–67 (1992) (citing Frances Kendall & Leon Louw, After}
simple majority, however, is not sufficient. Rather, to be deemed the
“will of the people,” a claim should be a clear expression of a superma-
jority of the people. When a supermajority of all those who have been
arbitrarily rejected by the central government express a clear will for se-
cession, the territory may become one notch closer to independence on
the sliding scale.

A supermajority is necessary, in contrast to a majority, because of how
difficult it may be to gauge whether a mere majority of a population
within a territory actually wishes to secede. The requirement of superma-
jority support is likely to guarantee that secession is the direct wish of
the population within a territory. Furthermore, requiring a supermajority
minimizes the risk of harm to minority groups, which must be protected
when a population secedes from a state. Scholars have persuasively ar-
gued that the overall situation for minorities must not be worsened by
secession. Indeed, secession should leave minorities at least no worse
off than they were previously; meanwhile, secession might appear in-
creasingly legitimate, the greater the improvements to minorities’ cir-
cumstances in the new secessionist state.

The Supreme Court of Canada, addressing a claim of secession of the
Quebec province, decided that the right to self determination must “be
exercised by peoples within the framework of existing sovereign states
and consistently with the maintenance of the territorial integrity of those
states.” The Court, however, noted that there are extreme circums-
tances where a right to secession may arise. Of particular importance,
while recognizing that it may not be “an established international law
standard,” the Court stated that “when a people is blocked from the
meaningful exercise of its right to self-determination internally, it is en-
titled, as a last resort, to exercise it by secession.”

Especially relevant to this analysis, the Canadian Supreme Court also
discussed the relationship between the will of the majority and secession.
In order for an expression of a desire to secede to be legitimate, the Court
has said it would require “a clear expression by the people . . . of their

\textit{Apartheid: The Solution for South Africa} 116 (Institute for Contemp. Studies 1987)
(1986)) (associating the will of the majority of the group seeking secession with seces-
sion).

110. \textit{See} David Miller, \textit{Secession and the Principle of Nationality, in National Self-
Determination and Secession} 62, 72 (Margaret Moore ed., 1998).
111. Hannum, \textit{supra} note 89, at 17.
112. \textit{Id.}
113. \textit{Id.}
114. \textit{Id. at ¶ 135.}
115. \textit{Id. at ¶ 134.}
will to secede." The court indicated that a clear majority of the population’s vote on the question, free of ambiguity, would qualify as a clear expression. Accordingly, requiring the will of a supermajority to secede would provide an even clearer expression of the majority of the population.

4. Economic Viability

Within the framework set forth in this article, the ability of a territory to be self-sustaining should be a prerequisite to secession. Given the simple fact that a state’s future and security are so closely connected to its economic viability, it is surprising how little discussion of secession has focused on the economic viability of a territory. Perhaps this factor has been ignored by scholars and academics because Article 3 of the 1960 U.N. Declaration provides that “[i]nadequacy of political, economic, social[,] or educational preparedness should never serve as a pretext for delaying independence.” Declarations, however, are not binding. Additionally, in today’s world, globalization creates new economic challenges that were not known, and could not even be fathomed, at the time.

116. Id. at ¶ 87.
118. But see Declaration on the Granting of Independence to Colonial Countries and Peoples, supra note 48, at 67 (“Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.”).
120. Declaration on the Granting of Independence to Colonial Countries and Peoples, supra note 48 (emphasis added).
of the Declaration’s enactment in 1960. If a territory cannot survive as an economically viable state, then it should not legitimately secede, as it would likely fail as a state and become a burden on the international community.

An independent state must be able to build a strong, healthy, and self-sustaining economy to survive. Until its final status is resolved, however, a territory’s prospects for future economic development will be uncertain. Businesses will be reluctant to invest in a territory where independence has gone unrecognized, and international financial institutions will be unable to offer monetary assistance.122

Still, one may be able to determine a territory’s economic viability to an extent by looking at its size and assets. For instance, rich natural resources should indicate future self-sustainability. Additionally, a young population with a robust drive to succeed is more likely to contribute to a territory’s economic success. The amount of potential investment by the community, outsiders, and financial institutions will also lead to predictions about economic viability.

A great emphasis should be placed on the economic state of a territory in determining whether secession is appropriate. A territory that wishes to secede from an economically stable state should be self-sustainable and free from direction and assistance.

5. Promotion of International Harmony

A legitimate act of secession requires recognition from the international community.123 The formation of a state occurs, initially, as a matter of fact, and later, as a matter of international law.124 In other words, the formation of a state truly occurs upon recognition by the international community as a whole.125 While states are free to recognize any territory or population as an independent state, secession should not be considered

122. See The Balkans After the Independence of Kosovo and on the Eve of NATO Enlargement: Hearing Before the H. Comm. on Foreign Affairs, 110th Cong. 1 (2008) [hereinafter Kosovo Hearing] (statement of Rep. Howard L. Berman, Chairman, H. Comm. on Foreign Affairs) (noting, in regards to Kosovo, that “[a]s long as Kosovo’s final status remained unresolved, businesses were reluctant to invest there, and international financial institutions were unable to offer the needed monetary assistance).


125. See Watson, supra note 123.
a legal act without recognition by the larger international community,\textsuperscript{126} as this promotes international harmony.\textsuperscript{127} Among other factors and policy considerations, a state will ultimately weigh the legitimacy of secession as a basis for determining whether to grant recognition.\textsuperscript{128} When a majority of the international community recognizes a state’s independence, it is a statement of legality and legitimacy for the secessionist state.

This argument, of course, ignores the dissenting states’ wishes. At first blush, one may grapple with the idea of promoting international well-being when a portion of the international community will almost certainly object to the legality of the secessionist movement. However, each state will take into account the adverse significant affects on the state being seceded from in deciding whether to recognize the secessionist state’s independence. Accordingly, recognition from the greater of the two halves is likely to promote international harmony.

III. APPRAISING THE POLITICAL LIBERTY TRIANGLE PARADIGM

In 2002, East Timor achieved independence from Indonesia, and in 2008, Kosovo achieved its independence from Serbia.\textsuperscript{129} What follows is an appraisal of the methodology advocated in this Article as applied to East Timor’s and Kosovo’s previous secession claims. Using East Timor and Kosovo as case studies, the following sections will use the Political Liberty Triangle and the sliding scale of independence as tools for determining whether the conditions in East Timor and Kosovo reached the threshold of legitimate independence, and whether Indonesia’s and Ser-

\textsuperscript{126} In re Secession of Quebec, [1998] 2 S.C.R. 217, ¶ 155 (“The ultimate success of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition.”); see also Buchheit, supra note 73, at 238; Chen, supra note 73, at 210 (advocating that “[t]he recommended test in granting or rejecting a demand for self-determination is not whether a given situation is ‘colonial’ or ‘noncolonial,’ but whether granting or rejecting the demands of a group would move the situation closer to goal values of human dignity, considering in particular the aggregate value consequences on the group directly concerned and the larger communities affected.”).

\textsuperscript{127} Watson, supra note 123; see also Eisuke Suzuki, Self-Determination in International Law, 89 Yale L.J. 1247, 1258 (1980) (reviewing Lee C. Buchheit, Secession: The Legitimacy of Self-Determination (1978)) (discussing the community interest achieved in recognizing secessionist states after weighing the potential disruption in world harmony resulting from separation).

\textsuperscript{128} In re Secession of Quebec, [1998] 2 S.C.R. 217, ¶ 155: see also Watson, supra note 123, at 268 (stating states will likely base their decision to support the independence of Kosovo on realist political tactics).

\textsuperscript{129} See Bilefsky, supra note 52; supra note 9.
bia’s Political Liberty Triangles faltered to the point of rendering secession sufficiently legitimate.

The history behind East Timor and Kosovo is extensive and complicated. Because a complete discussion of the history of each state is beyond the scope of this Article, the analysis will focus only on the relevant factors and circumstances at the heart of the Political Liberty Triangle.

A. East Timor

On May 20, 2002, East Timor achieved its independence from Indonesia and became the first new sovereign state of the twenty-first century. Starting in the sixteenth century and continuing well into the twentieth century, East Timor was a Portuguese colony. It was not until 1975 that the Indonesian government took control of the territory when the Portuguese government departed. At that time, the United Nations denounced the Indonesian means of exerting control over East Timor and continued to recognize East Timor as a “non-self-governing territory” under Portuguese administration.


132. Abdullah, supra note 9; Akerman, supra note 9; Scarpello, supra note 9.


134. MARTIN, supra note 6, at 16 (“On 7 December 1975, Indonesia launched a naval, air, and land invasion of East Timor.”).


Extreme brutality and violence marked Indonesian rule over East Timor. The Commission for Reception, Truth and Reconciliation in East Timor reported a minimum of 102,800 conflict-related deaths between 1974 and 1999.137 This estimate is further supported by a comprehensive study commissioned by the Australian Parliament, which reported at least 200,000 East Timorese died under Indonesian occupation.138

On May 5, 1999, the negotiations over the final status of East Timor resulted in Indonesia and Portugal signing the Agreement Between the Republic of Indonesia and the Portuguese Republic on the Question of East Timor. The agreement allowed the United Nations to organize a popular consultation of the East Timorese through a “direct, secret, and universal ballot.”139 Under the agreement, if the East Timorese people rejected the autonomous framework, Indonesia would transfer its authority to the United Nations, and this would eventually lead to East Timor’s independence.140

While the status of East Timor was never clear until the popular consultation,141 nearly 79% voted to reject autonomous status in Indonesia on August 30, 1999.142 The consultation resulted in mass violence, including “murders, massacres, disappearances, forced expulsion, rape, sexual harassment of women, and destruction of property” perpetrated by pro-Indonesia militias.143 Peace was not restored in East Timor until the U.N. Security Council authorized the creation of the International Force for East Timor (“INTERFET”) to quell the violence brought on by the


138. Pilger, supra note 3, at ix ("According to a comprehensive study commissioned by the Australian Parliament, ‘at least’ 200,000 East Timorese, a third of the population, have died under the Indonesian occupation.”); see also MARTIN, supra note 6, at 17 ("Estimates of the number who died as a result of the conflict, including the famine and disease that accompanied the displacement of large parts of the population, range from tens of thousands, acknowledged by Indonesia itself, to as many as 200,000.”).


140. Id. at art. 6.


143. Singh, supra note 141, at 10.
consultation, but not long after that, East Timor finally won its hard-fought battle for self-government.

Did the international community achieve the proper result by granting East Timor its independence? At first blush, this sounds plausible. The people of East Timor suffered decades of violence, brutality, and extensive human rights violations. Then, while the popular consultation evinced East Timor’s willingness to engage in peaceful negotiations, the resulting violence indicated that secession represented the will of the supermajority. Meanwhile, East Timor’s independence likely promoted international harmony. When Indonesia took control of East Timor, the United Nations’ Security Council and General Assembly adopted resolutions recognizing the legitimacy of East Timor’s struggle for independence. Since member states of the United Nations are bound by U.N. resolutions and the United Nations represents a considerable majority of independent states in the world, the U.N.’s resolute disapproval of Indonesia’s occupation of East Timor arguably represented the view of the broader international community. At the time of Indonesia’s invasion in 1975, there were 144 member states of the United Nations. According to the U.S. Department of State, there are 194 independent states in the world.

Using the sliding scale approach, however, the lawfulness of East Timor’s secession is not as clear cut. Significantly, East Timor’s economic viability was in question at the time of secession. Commentators have pointed out, “[i]t was a belief that an independent East Timor was not economically viable that provided one of its justifications for incorporation into Indonesia.” East Timor is small, with few natural resources,

144. Id.
145. Abdullah, supra note 9; Akerman, supra note 9; Scarpello, supra note 9.
147. For representative functions of the United Nations and its members, see, for example, U.N. Charter art. 25.
150. See Roger S. Clark, The “Decolonization” of East Timor and the United Nations Norms on Self-Determination and Aggression, 7 YALE J. WORLD PUB. ORD. 2, 12 (1980); Jeremy Wagstaff, Independent East Timor Would Rely on Foreign Aid, WALL ST. J., Aug. 30, 1999, at A18 (“Economically, East Timor is unprepared for independence, making it likely that if it chooses to split from Indonesia, it could be dependent on foreign aid for years.”).
151. GUNN, supra note 130, at 23.
and sparsely populated. Furthermore, years of war have left most of its people uneducated. In 1999, East Timor’s was among the poorest economies in the world and its infrastructure had been neglected or destroyed over the decades during Portuguese and Indonesian rule. A territory with such deterioration in its economical abilities may not be able to accept the responsibilities of statehood in the international community.

East Timor does, however, have reasons to be optimistic. While economists have estimated that it could take 15 to 20 years before East Timor achieves levels of economic growth comparable to those of Indonesia, there is significant growth potential because the area is rich in oil and natural gas. Under the Timor Sea Treaty, which replaced the Timor Gap Treaty, East Timor is entitled to a share of the proceeds coming from petroleum found in the seabed area described in the agreement. Additionally, East Timor’s agricultural, coffee, marble-mining, coastal fishing, and tourism industries also provide potential sources of economic development.

Still, despite this potential, East Timor has yet to prove it can be economically viable. In 2008, East Timor’s success depended on interna-

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153. Lindsay Sobel, Rebuilding East Timor’s Economy, Mother Jones, Sept. 10, 1999 (on file with the Brooklyn Journal of International Law); Wagstaff, supra note 150 (“Half of [the citizens of East Timor] can’t read.”).


155. Wagstaff, supra note 150 (stating years of war have left land scarred and undeveloped).

156. Id. But see Sobel, supra note 153 (noting some hopeful signs with respect to East Timor’s economy, including potential for developing its natural resources).

157. Wagstaff, supra note 150 (“economists reckon it could take 15 to 20 years for East Timor to reach the levels of Indonesia.”).

158. Cheng, supra note 130, at 171.


160. Sobel, supra note 153.

161. Erica Tay, Singapore Ranked as World’s Easiest Place to Do Business; New Zealand Slips to Second Spot in World Bank Report of 175 Economies, The Straits Times (Sing.), Sept. 7, 2006 (“Among the 175 economies studied, troubled East Timor was second from the bottom. Only the Democratic Republic of Congo fared worse.”).
tional assistance, without which the area’s future would be bleak. It is debatable whether the people of East Timor are better off in a poor economy marked by starvation, high unemployment, and a high mortality rate than they would have been as a territory dependent on an economically self-sufficient state. As such, the circumstances surrounding East Timor’s declaration of independence may not have been enough to justify East Timor’s independence when considered under the more rigorous sliding scale approach.

B. Kosovo

In 1989, the Serbian government seized control of Kosovo and retained control for nearly twenty years until the Kosovo Assembly declared independence on February 17, 2008 in Pristina. Throughout the 1990s, Kosovo was technically an independent part of Serbia, but the occupation was marked by Serbia denying the people of Kosovo the right to participate in government life and committing rampant human rights abuses including beatings, arbitrary arrests, and torture.

In the late 1990s, a violent resistance emerged in Kosovo, and it was met with a vehement response by Serbian authorities. While the U.N. Security Council issued Chapter VII resolutions demanding a cease-fire and peaceful negotiations with international supervision, Serbia resisted efforts for peaceful settlements. As a result, the U.N. Security

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162. Anne-marie Evans, *East Timor’s Shaky Foundations Need Long-Term Support*, SOUTHWESTERN LAW REVIEW, June 10, 2006, at 16 (“If East Timor is left to its own devices, then with the current unrest, the future doesn’t look rosy. However, both Mr. Miller and Mr. Jones are optimistic, provided an international taskforce can guide East Timor through a few more years.”).


166. Oeter, *supra* note 164, at 1566.

167. Id. at 1590.

168. Id. at 1591.


Council adopted Resolution 1244 providing for U.N. administration of Kosovo.  

Resolution 1244 established the U.N. Interim Administration Mission in Kosovo to promote democratic self-government and “facilit[ate] a political process designed to determine Kosovo’s future status . . . .” The duties of the U.N. Interim Administration Mission in Kosovo (the “UNMIK”) also included performing civilian administrative functions, promoting human rights, coordinating humanitarian relief and the reconstruction of infrastructure, maintaining civil law and order, and assuring the safe return of refugees.

The U.N. appointed former President of Finland Martti Ahtisaari as Special Envoy to Kosovo to assist in determining Kosovo’s future status. In March 2007, Ahtisaari released the Comprehensive Proposal for the Kosovo Status Settlement, which called for “[i]ndependence with international supervision.” Serbia refused to accept the plan, and additional Russian resistance led to the plan’s demise, as the Security Council ultimately failed to adopt it. With frustration at its peak among the people of Kosovo, the members of the Kosovo Assembly took it upon themselves to officially announce the territory’s independence.

Even though the international community recognized that Kosovo’s Albanians were subjected to gross human rights violations, it consis-
tently upheld Serbia’s right to territorial integrity.\textsuperscript{180} It may have been this failure to balance Serbia’s interest in territorial integrity with Kosovo’s right to self-determination that led to Kosovo’s declaration of independence.

Furthermore, other relevant factors moved the sliding scale balance in favor of independence. From the time Serbia seized control of Kosovo, there was a clear expression of the supermajority’s preference. In a 1991 referendum held in Kosovo, the population overwhelmingly voted for independence from Serbia.\textsuperscript{181} There were also attempts at peaceful negotiations as well; Resolution 1160\textsuperscript{182} and the Ahtisaari Plan serve as examples of attempts at peaceful resolution of the crisis.\textsuperscript{183}

Currently, 62 out of 192 United Nations member states formally recognize Kosovo.\textsuperscript{184} While it may at first seem that the international community has failed to recognize Kosovo’s independence, this statistic is deceptive. The 62 countries that recognize Kosovo’s independence make up 71.7\% of the world’s total nominal GDP.\textsuperscript{185} Furthermore, 3 out of 5 U.N. Security Council Permanent Member States, 24 out of 28 NATO Member States, and 22 out of 27 European Union Member States recognize Kosovo.\textsuperscript{186} Arguably, international harmony is promoted by Kosovo’s independence because a large and influential percentage of the international community does in fact recognize Kosovo’s independence.

Plagued by high unemployment, a need for major infrastructure, and limited economic growth, Kosovo currently faces immense challenges for economic development.\textsuperscript{187} Kosovo must focus on building a strong, healthy, and self-sustaining economy for itself if it wishes to survive as an independent state. Fortunately, Kosovo has extensive assets, such as “rich mineral resources, a young and resilient population, and a robust

\begin{itemize}
  \item \textsuperscript{181} See \textit{Oeter, supra} note 164, at 1590–91; \textit{Kosovo Chronology, supra} note 131.
  \item \textsuperscript{182} S.C. Res. 1199, \textit{supra} note 169; S.C. Res. 1160, \textit{supra} note 169.
  \item \textsuperscript{183} Comprehensive Proposal for the Kosovo Status Settlement, \textit{supra} note 175.
  \item \textsuperscript{184} Who Recognized Kosovo as an Independent State? The Kosovar People Thank You!, http://www.kosovothanksyou.com/statistics/ (last visited Apr. 6, 2010).
  \item \textsuperscript{185} Id.
  \item \textsuperscript{186} Id.
  \item \textsuperscript{187} See \textit{Kosovo Hearing, supra} note 122, at 1 (statement of Rep. Howard L. Berman, Chairman, H. Comm. on Foreign Affairs) (Rep. Berman stated upon his return from his visit to Kosovo that he “was struck by the immense need for economic development.”).
\end{itemize}
drive to succeed.” Additionally, with the announcement of Kosovo’s final status, business will likely be less reluctant to invest there and international financial institutions, including the World Bank and International Monetary Fund, will be able to offer monetary assistance. Kosovo’s economy also improved with the arrival of the U.N. Interim Administration Mission (“UNMIK”) in Kosovo. Within a year of UNMIK’s arrival, Kosovo’s economy was described as “remarkably vibrant” by the Special Representative of the Secretary-General, Bernard Kouchner. Kosovo’s private enterprises surpassed 1998 pre-war production and employment levels, construction was deemed “booming,” and “winter wheat planting was at 80% of the historical average.” Ironically, this progress was attributed to several unusually bold administrative decisions made by Special Representative Kouchner, which arguably exceeded his mandate as set forth in Resolution 1244. Although much of this progress was hindered by the ongoing struggle over Kosovo’s final status, it does suggest that bold decisions by the leaders of Kosovo may lead to economic viability.

The challenges facing Kosovo will take years to overcome. For Kosovo to succeed, it must learn from other states that have gone through an economic transformation. The experience of post-Communist states in the 1990s may prove a helpful guide for Kosovo’s democratic transformation. For example, a democratic transformation requires a modernized

188. Id. at 2; see also Economic Initiative for Kosovo, Top 10 Reasons to Invest in Kosovo, available at http://www.eciks.org/english/publications/investing_in_kosovo/content/media/topten_web.pdf.
189. See Kosovo Hearing, supra note 122, at 21 (statement of the Hon. Daniel Fried, Asst. Sec’y, Bureau of European and Eurasian Affairs, U.S. Dep’t of State); Henry H. Perritt, Jr., Economic Sustainability and Final Status for Kosovo, 25 U. Pa. J. Int’l Econ. L. 259, 261 (2004) (stating that uncertainty over Kosovo’s final status is partly responsible for Kosovo’s slow economic progress); Nick Andrews & Bob Davis, Kosovo Wins Acceptance to IMF, WALL ST. J., May 6, 2009, at A8 (“Joining the IMF could give Kosovo important access to additional economic aid and reassure potential investors, the Kosovar government says. The government plans three major privatizations this year—a power-station project; the airport serving Pristina, the capital; and postal and telecoms company PTK—and it hopes to attract foreign investors. A U.S. official said the IMF imprimatur would make it easier for Kosovo to find government and private financing.”).
191. Id.
192. Id.
banking system including credit, financial regulators, and an insurance system. Furthermore, as the experience of post-communist countries shows, a flat tax reduces corruption, which in turn will increase the flow of money and investment into Kosovo. With bold decision-making and adherence to proven models, Kosovo may become a self-sustaining economy in the long term.

All in all, while the legitimacy of Kosovo’s declaration of independence was not clear-cut, it was certainly not an open-and-shut case if analyzed in light of the totality of the circumstances. While it is true that its people suffered grave human rights abuses under the Serbian regime, Kosovo resorted to violent resistance rather than peaceful settlement of its disputes. However, Kosovo’s expression of supermajority will for independence was present as early as 1992 during the referendum for independence. While bleak, the economic viability of Kosovo as an independent state is not out of the question. The transition period to full independent statehood will be difficult, but the circumstances surrounding its secession suggest that it has the potential and ability to become self-sufficient. Finally, while only 62 out of 192 U.N. Member States formally recognize Kosovo’s independence, those Members do represent 70.94% of the world’s total nominal GDP.

These circumstances surrounding Kosovo’s declaration may have indeed shifted the sliding scale of independence far enough that Serbia’s then-existing Political Liberty Triangle could no longer sustain itself and collapsed. As a result, Kosovo formed its own Political Liberty Triangle and Serbia’s Political Liberty Triangle repairs itself without Kosovo.

C. Reconciling East Timor with Kosovo

How does one reconcile independence for Kosovo under the Political Liberty Triangle paradigm, but not for East Timor? Both territories suffered from subjugation, exploitation, and domination. Gross, systematic, and extensive human rights violations marked both territories. There was also evidence of attempts at peaceful negotiations, violent resistance, and expressions by both supermajorities of their wills to secede. The economic instability present in East Timor at the time it seceded can also be seen in Kosovo at the time it seceded, and international harmony was promoted in both cases.

195. Id.
196. Id.
However, under the Political Liberty Triangle paradigm, Kosovo shifted on the sliding scale of independence to a much greater extent than East Timor largely because Kosovo was a “unique situation.”\textsuperscript{197} U.N. Security Council Resolution 1244 established the U.N. Interim Administration Mission in 1999 in Kosovo to promote democratic self-government and “facilit[ate] a political process designed to determine Kosovo’s future status.”\textsuperscript{198} The situation in Kosovo involved an unprecedented level of participation by the United Nations and NATO not present in East Timor’s circumstances.\textsuperscript{199} Additionally, since the breakup of the former Yugoslavia, Kosovo has had independent status even while under the control of Serbia—meanwhile, East Timor never possessed independent status. As such, Kosovo’s independence was the natural progression of Yugoslavia’s breakup, as all people in the former Yugoslavia were given their right to self-determination.\textsuperscript{200}

The circumstances surrounding secession in Kosovo and East Timor were important considerations that factored into an examination of the heart of the Political Liberty Triangle and may have justified secession for Kosovo, but not East Timor. Ultimately, all circumstances surrounding a state’s claim to secession are appropriate to analyze under the Political Liberty Triangle paradigm.

Returning for a moment to East Timor—one might question what alternative solutions to independence were available. While East Timor’s independence in 2002 is illegitimate under the Political Liberty Triangle, independence may in fact have shifted toward legitimacy within years had East Timor sought further peaceful negotiations and more U.N. involvement and continued to develop its economy. The purpose of the Political Liberty Triangle paradigm is to allow for secession only in unique situations, and the overarching aim of this new approach is to maintain a balance between sovereignty and self-determination. If lacking insistence on the necessity of that balance, any paradigm would be flawed.

\textsuperscript{197} Id. at 27.
\textsuperscript{198} Watson, supra note 123, at 273 (quoting S.C. Res. 1244, supra note 171).
\textsuperscript{199} U.S. GENERAL ACCOUNTING OFFICE, KOSOVO AIR OPERATION: NEED TO MAINTAIN ALLIANCE COHESION RESULTED IN DOCTRINAL DEPARTURES 3 (2001), available at http://www.gao.gov/new.items/d01784.pdf (characterizing NATO’s military campaign in the Federal Republic of Yugoslavia, which aimed to “compel President Milosevic to cease the violence in Kosovo and allow all refugees to return to their homes [and] restore peace throughout the Balkan region,” as “the largest combat operation in NATO’s 50-year history.”).
CONCLUSION

The power of an accurate paradigm is that it explains, and then it guides. Presently, the international community’s paradigm focuses on self-determination to determine the lawfulness of a claim to secession. This outdated approach explains why secession might be justified, but it does not explain how that conclusion is ultimately to be reached. The failure of this approach (with respect to its lack of guidance) may be attributed to the lack of any international norm that defines self-determination.

Alternatively, as this article has demonstrated through case studies of East Timor and Kosovo, the Political Liberty Triangle and the sliding scale of independence provide analytical guidance. This approach can be used to explain why a group will seek secession in the name of self-determination. More importantly, however, it has the potential of guiding scholars, advocates, and other decision-makers to a proper conclusion whenever the legitimacy of a claim to secession is in dispute.

Unfortunately, like old habits, paradigms die hard. Without an accurate paradigm, the confusion and complex issues that have evolved in regard to the doctrine of secession will not fade. It helps to think of a paradigm as a map. If a scholar’s “map” is inaccurate, the scholar will remain lost regardless of how long and hard the scholar searches for his or her destination. However, with an accurate map, scholars can reach their desired destinations with sufficiently rigorous and proper reasoning and analysis. The Political Liberty Triangle is the best heuristic “map” for answering the question: When is secession lawful?

201. Covey, supra note 76, at 20.
202. Id.
203. Id. at 19.
“THEY USE IT LIKE CANDY”: HOW THE PRESCRIPTION OF PSYCHOTROPIC DRUGS TO STATE-INVOLVED CHILDREN VIOLATES INTERNATIONAL LAW

Angela Olivia Burton

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“Psychotropic medications for young children should be used only when anticipated benefits outweigh risks. Parents should be fully informed and decisions made only after carefully weighing these factors. Children and adolescents must be closely monitored and frequently evaluated as the side effects common to some medications can be particularly difficult for children. At the same time, psychotropic medications can be lifesaving.”

“They use it like candy,” said Elnorris Stone, a 25-year-old [California Youth Authority] parolee from Oakland. “Anybody who’s considered hyper, who fights a lot, they prescribe it a lot. The medication fixes it.”

INTRODUCTION

There is widespread concern that children in the United States are being severely overmedicated with psychotropic drugs. Psychotropic drugs (also known as “psychoactive” or “psychiatric” drugs) act directly on the brain to affect behavior, emotion, or mood. Because they are toxic chemicals with great potential for addiction, abuse, and diversion into the illegal drug trade, many are designated as controlled substances and their medicinal uses are stringently regulated by the international community under the 1971 United Nations Convention on Psychotropic Substances (“1971 Convention”). In 1995, the International Narcotics Control Board (“INCB”), which monitors the implementation of the 1971 Convention, began to warn of an alarming increase in the prescription of psychotropic drugs to children in the United States. The


3. See Ronald T. Brown & Michael G. Sawyer, Medications for School-Age Children: Effects on Learning and Behavior 18 (1998); see also Rita Wicks-Nelson & Allen C. Israel, Behavior Disorders of Childhood 67 (3d ed. 1997) (“Medications that affect mood, thought processes, or overt behavior are known as psychotropic or psychoactive and thus the term psychopharmacological treatment is often employed.”).


INCB was especially concerned about the astronomical rise in pediatric prescriptions of methylphenidate (i.e., Ritalin), an amphetamine-type stimulant drug most commonly prescribed to children diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”). Because of its high

6. In a press release issued in conjunction with the publication of its 1996 report, the INCB stressed that methylphenidate was one of the first substances placed under international control in Schedule II of the 1971 Convention “due to its high abuse potential.” Press Release, United Nations Information Service, INCB Sees Continuing Risk in Stimulant Prescribed for Children (Mar. 4, 1997), available at http://www.incb.org/pdf/e/press/1996/e_bn_04.pdf [hereinafter Continuing Stimulant Risk]. In its 1995 Annual Report, the INCB pointed out that “3-5 per cent of all schoolchildren in the United States have reportedly been diagnosed as suffering from ADD [attention deficit disorder] and are treated with methylphenidate, frequently without the benefit of other forms of assistance recommended in treatment guidelines.” Int’l Narcotics Control Bd., Report of the International Narcotics Control Board for 1995, para. 91 (1995), available at http://www.incb.org/incb/annual_report_1995.html. The Board noted an increase in abuse of methylphenidate, mainly among “adolescents who illegally obtain the substance in tablet form from children undergoing treatment for ADD.” Id. The Board asked that U.S. authorities “carefully monitor future developments in the diagnosis of ADD in children and the extent to which methylphenidate and other stimulants (such as dexamfetamine and pemoline) are used in the treatment of ADD, in order to ensure that these substances are prescribed in accordance with sound medical practice as required under article 9, paragraph 2, of the 1971 Convention,” id. at para. 93, and urged all “Governments to exercise the utmost vigilance in order to prevent ‘overdiagnosing’ of ADD in children and medically unjustified treatment with methylphenidate and other stimulants.” Id. at para. 94.

potential for abuse, methylphenidate was one of the first substances placed under international control in the 1971 Convention’s Schedule II,\(^7\) which is reserved for drugs constituting a “substantial risk to public health,” while having only “little to moderate therapeutic usefulness.”\(^8\) Although agreeing with the notion that “with proper diagnosis, stimulants can be effective in treating [ADHD],”\(^9\) the INCB has consistently criticized the excessive pediatric prescription of internationally controlled stimulant drugs in the United States, and has suggested that the high rates indicate an unjustified tendency to suppress and control normal childhood behaviors that adults (teachers and parents) find problematic, rather than to treat legitimate medical conditions.\(^10\)

Concerns about overmedication are particularly pronounced with respect to children in state custody. State-involved children\(^11\) are prescribed psychotropic drugs at stunningly high rates, far higher than other
children in the general population. It has been estimated that about 8–10% of children (six to eight million) under the age of 18 in the United States are prescribed medications for what are classified as mental health problems. In comparison, recent reports indicate that, on any given day, up to 50% or more of children in some state foster care systems and juvenile prisons receive psychotropic medications.

Given their often traumatic and unstable life experiences, it is unsurprising that many state-involved children exhibit emotional, cognitive, and behavioral symptoms associated with various psychiatric diagnoses. Where drug treatment predominates over psychosocial and beha-

12. See, e.g., Utilization of Psychotropic Medication for Children in Foster Care: Hearing Before the Subcomm. on Income Security and Family Support of the H. Comm. On Ways & Means, 110th Cong., 2d sess. 6–14 (2008) (statement of Julie M. Zito, Professor of Pharmacy and Psychiatry, Pharmaceutical Health Services Research, University of Maryland) [hereinafter Zito Testimony] (noting that youth in foster care and disabled youth “have the greatest likelihood of receiving complex, poorly evidenced, high cost medication regimens.”); Zima R. Raghavan et al., Psychotropic Medication Use in a National Probability Sample of Children in the Child Welfare System, 15 J. CHILD & ADOLESCENT PSYCHOPHARMACOLOGY 97, 97 (2005) (concluding that “children in child welfare settings are receiving psychotropic medications at a rate between 2 and 3 times that of children treated in the community”); Julie M. Zito et al., Psychotropic Medication Patterns Among Youth in Foster Care, 121 PEDIATRICS 157 (2008) (concluding that psychotropic drug treatment is three to four times more common for youth in foster care who receive Medicaid as compared to other Medicaid-eligible youth) [hereinafter Psychotropic Medication Patterns]; Stacy Hagen & Laurie Orbeck, The Prescription of Psychotropic Medications in Foster Care Children: A Descriptive Study in St. Louis County—Executive Summary, http://www.d.umn.edu/sw/executive/hstacy.html (summarizing a 1998 study that concluded that 34.5% of children in foster care in St. Louis County, Minnesota were receiving psychotropic medication in comparison to 15% of children in the general population).


14. See infra Part II.

15. Michael W. Naylor et al., Psychotropic Medication Management for Youth in State Care: Consent, Oversight and Policy Considerations, CHILD WELFARE, Sept.–Oct. 2007, at 175. “With few exceptions, youth in foster care have been physically or sexually abused, neglected or both,” id. at 176, and “children in foster care . . . have many unique risk factors, including emotional and physical sequelae of abuse and neglect, disrupted attachment relationships, and placement disruptions, which can all have an effect on clinical presentation.” Id. at 178; see also AM. ACAD. OF CHILD AND ADOLESCENT PSYCHIATRY, AACAP POSITION STATEMENT ON OVERSIGHT OF PSYCHOTROPIC MEDICATION USE FOR CHILDREN IN STATE CUSTODY: A BEST PRINCIPLES GUIDELINE (2005), available at http://www.aacap.org/galleries/PracticeInformation/FosterCare_BestPrinciples_FINAL.pdf.
vioral interventions for children’s behavioral and mental health issues, and where some doctors prescribe multiple psychotropic drugs even to very young children without any evidence of their pediatric safety or effectiveness, these already vulnerable state-involved children are at particular risk for overmedication with psychotropic drugs.

Speaking precisely to this issue, the 1971 Convention establishes an international monitoring and control system to protect the public from dangers associated with psychotropic drugs. By signing that treaty, the United States and other signatory countries agreed to abide by provisions designed to protect the public—including children—from unwarranted exposure to these highly toxic and addictive drugs. Yet, as will be further illustrated, conditions and policies persist in the United States that violate the 1971 Convention and threaten the health, well-being, and, indeed, the very lives, of thousands of state-involved children.

While a primary emphasis of the 1971 Convention was the minimization of the substantial risks to the public health posed by unregulated and excessive availability of psychotropic drugs, the Convention recognizes that, when administered under strictly controlled conditions, the drugs may provide limited medical benefit. To ensure that they are used as

16. See, e.g., Encarnacion Pyle, Even Babies Getting Treated as Mentally Ill: Prescriptions on the Rise Even Though They Haven’t Been Tested on Children, COLUMBUS DISPATCH, Apr. 25, 2005, at A1, available at http://www.dispatch.com/live/contentbe/dispatch/2005/04/25/20050425-A1-00.html. The biggest public-health crisis facing the state and nation is the number of children with mental illness who fail to receive any care or treatment,” said Michael Hogan, director of the Ohio Department of Mental Health. Id. “It’s true children are more likely to get medication than counseling or other behavioral therapy if they go to their pediatrician or family doctor. But at the end of the day, meds are quite safe and effective.” Id.

17. Psychotropic Medication Patterns, supra note 12, at 162 (pointing out that although children in foster care, as a group, experience substantially more psychiatric disorders than non-foster care children, there is no basis for concluding that dispensing 3 or more “different psychotropic medication classes concomitantly to children in foster care represents a treatment advantage.”).

18. See Susan dosReis et al., Mental Health Services for Youths in Foster Care and Disabled Youths, 91 AM. J. PUB. HEALTH 1094 (2001).


20. 1971 Convention, supra note 4, preamble.
medicines only where the potential benefits clearly outweigh the potential public health risks, the 1971 Convention imposed a number of specific restrictions on the use of psychotropic drugs. First and foremost, their use is strictly limited to legitimate “medical and scientific purposes.”\textsuperscript{21} And, to prevent undue influence by commercial interests on the public’s perception and understanding of their risks and benefits, the Convention requires the United States government to prohibit advertising of psychotropic drugs to the general public “with due regard to its constitutional provisions.”\textsuperscript{22} To minimize improper use, psychotropic drug labels must indicate such “cautions and warnings . . . as in [the government’s] opinion are necessary for the safety of the user.”\textsuperscript{23} Further, the federal government must ensure that prescriptions for psychotropic drugs are issued “in accordance with sound medical practice and subject to such regulation . . . as will protect the public health and welfare.”\textsuperscript{24} In addition, the Convention provides that a government may adopt “more strict or severe measures of control” than those provided for in the 1971 Convention, “if in its opinion, such measures are desirable or necessary for the protection of the public health and welfare.”\textsuperscript{25} Despite these internationally agreed-upon safeguards, the United States government persists in its failure to comply with these important mandates, putting the health and safety of hundreds of thousands of children at risk from illegitimate exposure to psychotropic drugs.

The vast majority of psychotropic drugs are prescribed to children “off-label”—that is, without the benefit of the same rigorous, scientific, clinically-derived safety and efficacy data required by the Food and Drug Administration (“FDA”) in the United States for approval of drugs prescribed to adults.\textsuperscript{26} The resulting absence of child-specific warnings or cautions as required by the 1971 Convention leaves to physicians the risky business of dispensing highly toxic, brain-targeting chemicals to still-developing children, with little more than small scale, anecdotal evidence from short-term experiments for the safety and efficacy of such chemicals.\textsuperscript{27} The importance of regulatory approval and proper labeling

\textsuperscript{21} Id. at art. 5.
\textsuperscript{22} Id. at art. 10(2).
\textsuperscript{23} Id. at art. 10(1).
\textsuperscript{24} Id. at art. 9.
\textsuperscript{25} Id. at art. 23.
\textsuperscript{26} See Glenn R. Elliott & Kate Kelly, Medicating Young Minds: How to Know If Psychiatric Drugs Will Help or Hurt Your Child 22 (2006).
\textsuperscript{27} Id. Elliott and Kelly noted that doctors prescribe medication off-label because:

small experiments and anecdotal evidence says it works . . . if the medication seems to help, the clinician may publish what is called a case report, or simply
is underscored by the fact that even drugs that have been approved by the FDA can cause serious risks to children’s health and safety. For example, in 2005, the FDA withdrew approval for pemoline (marketed as Cylert), a stimulant drug listed in Schedule II of the 1971 Convention. Pemoline, which was commonly used to treat children diagnosed with attention deficit hyperactivity disorder (ADHD), was ordered off the markets after the FDA found evidence that “the overall risk of liver toxicity from Cylert and generic pemoline products outweighs the benefits of this drug.”

Another recent incident involved concerns about the safety of Adderall XR, another drug widely used for the treatment of ADHD in children. The main ingredient in Adderall XR is amphetamine, a Schedule II substance under the 1971 Convention. Approved by the FDA for use by children age six and older in 2001, it was removed from the market in 2005 by the Canadian government in the wake of 20 reports of sudden unexplained death (“SUD”) amongst children who had taken the drug. The Canadian government returned Adderall XR to the shelves a few

Id. at 23. To fill the gap left by the federal drug regulatory agency, the American Academy of Child and Adolescent Psychiatry advises physicians to “consider data from studies in adults in treating the target disorder and/or symptomatology, any clinical or anecdotal reports of use in child and adolescent patients, studies conducted outside the United States and the experience of colleagues.” American Academy of Child and Adolescent Psychiatry, Prescribing Psychoactive Medication for Children and Adolescents (2001), available at http://www.aacap.org/cs/root/policy_statements/prescribingPsychoactiveMedicationforChildrenandAdolescents.

28. For a description of scheduling of psychotropic substances under the 1971 Convention, see infra Part II.


months later with additional safety warnings. However, while it acknowledged the evidence of the sudden deaths, the FDA declined at that time to take any action, stating that it could not “conclude that recommended doses of Adderall can cause SUD,” but that it was “continuing to carefully evaluate these data.” Two years later, in 2007, the FDA directed manufacturers of all drugs approved for the treatment of ADHD to develop “Patient Medication Guides” as part of their product labeling to highlight for patients the potential for increased risk of heart-related problems such as sudden death, stroke, and heart attacks, as well as increased risk of adverse psychiatric symptoms such as “hearing voices, becoming suspicious for no reason, or becoming manic, even in patients who did not have previous psychiatric problems.”

Serious concerns have also arisen in recent years about the safety of psychotropic drugs that are not controlled under the 1971 Convention, but for which many of the same safety, efficacy, and effectiveness concerns exist. A recent example is the case of selective serotonin reuptake inhibitors (“SSRIs”), a class of antidepressants often prescribed to children for symptoms associated with depression and anxiety disorders, including drugs such as setraline hydrochloride (marketed as Zoloft), paroxetine (marketed as Paxil), and fluoxetine (marketed as Prozac, which currently is the only medication approved by the FDA for use in treating depression in children age eight and older). In 2003, amidst evidence of increased risk of suicidal thoughts and actions among children and adolescents treated with SSRIs, Britain’s FDA equivalent, the British Medicines and Healthcare Products Regulatory Agency, strongly recommended that physicians stop prescribing SSRIs (excluding Prozac) to children, citing evidence that that the drugs “may do more harm than good in the treatment of depression in under-18s.”

Although declining to

34. Id.
38. Vendatam, supra note 37; see also Goode, supra note 37.
recommend against pediatric use of SSRIs at that time, two years later
the FDA required that the labeling for all antidepressants include a
“black box” warning—the most serious warning placed on the labeling
of a prescription medication—about the increased risk of suicide to
children. 39 More recently, a 2008 study that analyzed data from clinical
trials found little evidence that the antidepressants studied were any more
effective than a placebo in alleviating depression. 40

In addition to their numerous safety risks, many of the touted benefits
of psychotropic drugs to children are often highly overstated. 41 Despite
the fact that stimulant drugs such as Ritalin (containing methylphenidate,
a 1971 Convention Schedule II drug) are among the most studied with
respect to their effects on children, “essentially nothing” was known until
recently “about the long-term benefits and problems of stimulant treat-

39. Press Release, U.S. Food & Drug Admin., FDA Launches a Multi-Pronged Strat-

tegy to Strengthen Safeguards for Children Treated with Antidepressant Medications (Oct.


2004 UCM108363.htm. An FDA report published in August 2009 and co-authored by Dr.

Marc Stone, a senior medical reviewer in the FDA’s Center for Drug Evaluation and

Research, confirmed that SSRIs increase the risk of suicidal thoughts or behavior in

children and adolescents, and extended the warnings to young adults aged 18–25. MARC

STONE ET AL., RISK OF SUICIDALITY IN CLINICAL TRIALS OF ANTIDEPRESSANTS IN ADULTS:

ANALYSIS OF PROPRIETARY DATA SUBMITTED TO US FOOD AND DRUG ADMINISTRATION 5

(2009), available at http://www.bmj.com/cgi/content/abstract/339/aug11_2/b2880.

40. Irving Kirsch et al., Initial Severity and Antidepressant Benefits: A Meta-Analysis

of Data Submitted to the Food and Drug Administration, 5 PLOS MEDICINE 260, 256–66

(2008), available at http://medicine.plosjournals.org/archive/1549-1676/5/2/pdf/10.1371_-

journal.pmed.0050045-L.pdf. But see Jeffrey A. Bridge et al., Clinical Response and Risk

for Reported Suicidal Ideation and Suicide Attempts in Pediatric Antidepressant Treatment:

A Meta-analysis of Randomized Controlled Trials, 297 J. AM. MED. ASS’N 1683, 1683 (2007) (suggesting that the benefits of antidepressant medications likely outweigh

their risks to children and adolescents diagnosed with major depression and anxiety dis-

orders).

41. See Zito Testimony, supra note 12, at 9 (“Post-marketing studies are particularly

important to identify and describe patient outcomes in terms of academic performance,

social development and avoidance of negative outcomes, e.g. crime, substance abuse and

school failure—in other words, beyond symptom control. In the current U.S. research

environment, most medication research focuses on symptom improvement in short-term

clinical trials which is necessary but not sufficient information to establish the role of

medication in community-based pediatric populations.”); see also WORKING GROUP ON

PSYCHOACTIVE MEDICATIONS FOR CHILDREN AND ADOLESCENTS, AM. PSYCHOLOGICAL

ASS’N, REPORT OF THE WORKING GROUP ON PSYCHOACTIVE MEDICATIONS FOR CHILDREN

AND ADOLESCENTS PSYCHOPHARMACOLOGICAL, PSYCHOSOCIAL, AND COMBINED INTER-

VENTIONS FOR CHILDHOOD DISORDERS: EVIDENCE BASE, CONTEXTUAL FACTORS, AND


that outcomes achieved in real-world community settings pale in comparison to those

obtained in evidence-based clinical trials for both psychotherapy and medication.”).
2010] "THEY USE IT LIKE CANDY" 463

ment for ADHD and how early treatment may affect adolescence and adulthood.42 This situation changed dramatically in February 2010 when the Government of Western Australia released the Raine ADHD Study, which analyzes longitudinal data collected on 2,868 children from birth through age 14 as part of the Western Australian Pregnancy Birth Cohort.43 Described as the first study to provide “a unique long-term view of a wide range of outcomes and their associations with the use of stimulant medication in the treatment of ADHD,” the project examines “the long-term social, emotional, school-based, growth, and cardiovascular outcomes associated with the use of stimulant medication in the treatment of ADHD.”44 Notably, children diagnosed with ADHD who had been treated with stimulants were found to be 10.5 times more likely to have been identified by a classroom teacher as performing below age-level, and had “significantly greater diastolic blood pressure than children who had never received medication.”45 While noting that limitations of the study “prevent any strong causal relationships from being identified, the authors suggested that the “lack of significant improvements in long-term social, emotional, and academic functioning associated with the use of stimulant medication” in the subject children indicates that further research is warranted “to better understand the suspected long-term social, emotional and educational benefits of stimulant medication in the treatment of ADHD.”46

The safety risks and overstatement problems described above are compounded by the fact that, in direct contravention of explicit provisions of the 1971 Convention, advertisements not only extoll the claimed virtues of various psychotropic drugs ubiquitous in the United States, they also frequently make false and/or misleading claims about the drugs47 while simultaneously downplaying significant and serious risks.48

42. ELLIOTT & KELLY, supra note 26, at 202–03.
44. Id. at 5.
45. Id. at 6.
46. Id. at 8 (emphasis added).
47. See CTR. FOR DRUG EVALUATION AND RESEARCH, U.S. FOOD & DRUG ADMIN., 2005 REPORT TO THE NATION: IMPROVING PUBLIC HEALTH THROUGH HUMAN DRUGS 45 (2005), available at http://www.fda.gov/downloads/AboutFDA/CentersOffices/CDER/WhatWeDo/UCM078935.pdf. In 2005, the Center for Drug Evaluation and Research (CDER) (a division of the Food and Drug Administration which monitors advertising of prescription drugs and issues regulatory action letters to companies), issued 60 letters to drug companies for “prescription drug promotions deemed to be false, misleading, lack-
Although others have addressed some of the vexing problems related to the use of psychotropic drugs in children, none has examined the obligations of the United States government under international law. This Article argues that the United States government has violated international law by failing to implement important mandates of the 1971 Convention, and this has significantly contributed to the unconscionable rise in unwarranted prescription and inappropriate administration of psychotropic drugs to children in state foster care systems and juvenile prisons in the U.S.

In Part I of this Article, I present a brief and grossly oversimplified explanation of the essential nature of psychotropic medications and how they interact with the human body. In Part II, I delineate the provisions

and terms of the 1971 Convention that serve as the primary international legal authority governing the manufacture, distribution, and use of psychotropic drugs. These provisions, which will be analyzed individually in subsequent sections of this Article, include: a prohibition of direct-to-consumer advertising of psychotropic drugs, a limitation on use (for “medical purposes” only), and a mandate that prescriptions be issued in accordance with sound medical practice. Also, though it has not yet been ratified in the U.S., I will briefly outline in this part some of the important human rights principles embodied in the United Nations Convention on the Rights of the Child to further illuminate the United States government’s positive law obligations to state-involved children under the 1971 Convention.

With that grounding, I will detail in Part III the shockingly high rates of psychotropic drug prescription to state-involved children. Throughout the country, on any given day, thousands of children in state custody are administered a variety of psychotropic drugs despite the known toxicities and addictive properties of these drugs. Ultimately, I will argue that the rise of this problematic trend is at least partially attributable to governmental policies instituted during the “Decade of the Brain,” a period in the 1990s when the National Institute of Mental Health shifted its research focus from psychosocial and behavioral interventions to an emphasis on drug treatment as the first-line response to children’s mental health problems.

In Part IV, I link the overmedication phenomenon to the United States’ failure to prohibit direct-to-consumer advertising of psychotropic drugs despite the 1971 Convention’s mandate and the nation’s failure to regulate the off-label prescription of these drugs to children in violation of the Convention’s “medical purposes” requirement. I argue that these governmental omissions are in direct violation of the 1971 Convention and are major contributors to the excessive and inappropriate medication of state-involved children.

In Part V, I address the argument that current practices in the United States run afoul of the 1971 Convention’s requirement that governments allow the use of psychotropic medications only for legitimate medical purposes. I argue that the United States government is in violation of the 1971 Convention for failing to prevent the use of psychotropic drugs as chemical restraints against state-involved children and for failing to ensure that state-involved children are not inappropriately prescribed psychotropic drugs to address arguably non-medical behaviors and conditions.
Finally, in Part VI, I draw on investigative research and government reports detailing substantial departures from generally accepted professional standards of diagnosis, monitoring, and follow-up in the administration of psychotropic drugs to children in state foster care systems and juvenile prisons, all to analyze how these egregious practices violate the 1971 Convention’s mandate that psychotropic drugs be administered in accordance with sound medical practice. Then, in conclusion, I call on the United States government to implement regulations and other appropriate measures to ensure compliance with its international legal obligation to protect state-involved children from non-medically-justified administration of psychotropic drugs.

I. SOME FACTS ABOUT PSYCHOTROPIC DRUGS

As a class, psychotropic drugs are toxic substances that act directly on the brain to “chemically alter mood, cognition, or behavior, their effect typically being achieved by altering the process of brain neurotransmission.” There are generally six classes of psychotropic medications: stimulants, antipsychotics, depressants, antidepressants, anxiolytics (anti-anxiety), and mood stabilizers. These drugs are prescribed to child-

51. THOMAS GRISSE, DOUBLE JEOPARDY: ADOLESCENT OFFENDERS WITH MENTAL DISORDERS 84 (2004); see also RITA WICKS-NELSON & ALLEN C. ISRAEL, supra note 3, at 67 (“Medications that affect mood, thought processes, or overt behavior are known as psychotropic or psychoactive and thus the term psychopharmacological treatment is often employed.”).

52. Stimulants such as dextroamphetamine (Adderall, Dexedrine) and methylphenidate (Ritalin, Concerta) are used primarily to treat Attention Deficit Hyperactivity Disorder (“ADHD”). BROWN & SAWYER, supra note 3, at 91; see also NAT’L INST. OF MENTAL HEALTH, TREATMENT OF CHILDREN WITH MENTAL DISORDERS (2009), available at http://www.nimh.nih.gov/publicat/childqa.cfm.

53. Antipsychotic medications such as chlorpromazine (Thorazine), haloperidol (Haldol), clozapine (Clozaril), quetiapine (Seroquel), and risperidone (Risperdal) are used for psychosis (e.g., schizophrenia, mania, psychotic depression), severe ADHD unresponsive to other treatments, conduct disorder, and problematic behaviors such as uncontrollable agitation, aggression, or rage, self-injurious behaviors, and extreme impulsivity. ELLIOTT & KELLY, supra note 26, at 185; see also BROWN & SAWYER, supra note 3, at 33–34, 99–106.

54. Physicians prescribe antidepressants to children for such diverse conditions as depression, anxiety disorders, ADHD, bulimia, bedwetting, obsessive-compulsive disorder, and post-traumatic stress disorder, as well as uncontrollable agitation, aggression, obsessive behaviors, and self-injurious behaviors. ELLIOTT & KELLY, supra note 26, at 174.

55. Antianxiety or anxiolytic medications are typically used for anxiety disorders, behavior disorders, seizures, and panic attacks. See generally BROWN & SAWYER, supra note 3, at 32–33; ELLIOTT & KELLY, supra note 26, at 214–24.
ren for conditions such as ADHD, obsessive-compulsive disorder (“OCD”), depression, and bipolar (manic-depressive) disorder, as well as for non-disorder-specific behaviors such as severe aggression, sleep problems, and bedwetting.57

Best practices dictate that psychotropic drugs should be used only as a last resort, and never as the sole approach to addressing children’s mental health needs.58 The National Institute of Mental Health identifies a range of psychotherapies available to address mental health needs, including: cognitive behavioral therapy, dialectical behavior therapy, interpersonal therapy, and family-focused therapy, as well as other nonpharmaceutical approaches, such as light therapy, expressive or creative arts therapy, animal-assisted therapy, and play therapy.59 Advocates of drug therapy claim that psychotropic drugs help stabilize behaviors and emotions that impair the abilities of some children to function at home, in school, and in interactions with their peers.60 However, proponents recognize that these drugs can also worsen existing problems or create entirely new ones.61 The risks posed by psychotropic drugs to the health and safety of children range from the fairly innocuous—e.g., dry mouth and headache—to more serious side effects, such as thyroid dysfunction, growth retardation, increased risk for polycystic ovary syndrome, abnormal weight gain, liver damage, heart failure, and death.62

56. Doctors prescribe mood stabilizers, including drugs such as lithium and the anticonvulsants (Depakote) and carbamazepine (Tegretol), for bipolar disorder, conduct disorder, aggressive behaviors, and labile mood with tantrums or rages. ELLIOTT & KELLY, supra note 23, at 115–17. See generally, BARBARA A. LEADHOLM, PSYCHOACTIVE MEDICATIONS FOR CHILDREN AND ADOLESCENTS: ORIENTATION FOR PARENTS, GUARDIANS, AND OTHERS 7–12 (rev. 2007), available at http://www.mass.gov/Eeohhs2/docs/dmh/publications/psychoactive_booklet.pdf.


58. See, e.g., CHILD WELFARE LEAGUE OF AM., STANDARDS OF EXCELLENCE FOR HEALTH CARE SERVICES FOR CHILDREN IN OUT-OF-HOME CARE 18 (Julie Gwin ed., rev. ed. 2007) (“Psychiatrists specializing in the treatment of children advise that psychotropic medication should not be used as the sole treatment for children with mental health disorders.”).


60. See GRUTTADARO & MILLER, supra note 1, at 6.

61. ELLIOTT & KELLY, supra note 26, at 9.

62. See, e.g., Christoph U. Correll & Harold E. Carlson, Endocrine and Metabolic Adverse Effects of Psychotropic Medications in Children and Adolescents, 45 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 771 (2006); see also FLA. STATEWIDE ADVOCACY COUNCIL, RED ITEM REPORT: PSYCHOTROPIC DRUG USE IN FOSTER CARE 4
Although many of the psychotropic drugs that are prescribed to children are not subject to international control, they nevertheless can raise the same significant safety and health concerns sought to be addressed by provisions of the 1971 Convention examined in this Article. These include: antidepressants (e.g., tricyclics such as clomipramine (Anafranil) and imipramine (Tofranil); SSRIs (e.g., escitalopram (Lexapro), fluoxetine (Prozac), paroxetine (Paxil), and sertraline (Zoloft)); typical and atypical antipsychotics (e.g., chlorpromazine (Thorazine), haloperidol (Haldol), aripiprazole (Abilify), quetiapine (Seroquel), risperidone (Risperdal), and ziprasidone (Geodon)); and mood stabilizers (e.g., Lithium, carbamazepine (Tegretol), and valproic acid (Depakote)). The medications commonly prescribed to children that are deemed to be “controlled substances” are listed on the 1971 Convention’s “Green List,” and include: Schedule II methylphenidates and amphetamines primarily used to treat ADD/ADHD (e.g., methylphenidates marketed as Concerta, Focalin, Metadata, Methylin, and Ritalin, and amphetamines marketed as Adderall, Dextrostate, and Dexedrine); Schedule IV benzodiazepines, primarily used as anti-anxiety agents (e.g., alprazolam (Xanax), clonazepam (Klonopin), diazepam (Valium), and lorazepam (Ativan)); and the non-benzodiazepine sleep agent zolpidem (Ambien). As described in the next section, the 1971 Convention mandates that governments implement and enforce strict controls over the prescription and use of Green List drugs.

II. INTERNATIONAL LAW GOVERNING PSYCHOTROPIC DRUGS: THE 1971 CONVENTION

Due to the limited therapeutic value, highly addictive properties, and susceptibility to illegal trafficking of psychotropic drugs, the 1971 Convention establishes strict guidelines for governmental control over the use of such drugs. Thus, while it recognizes that “the use of psychotropic substances for medical and scientific purposes is indispensable and that their availability for such purposes should not be unduly restricted,” the Convention emphasizes that “rigorous measures are necessary to restrict the use of such substances to legitimate purposes.”

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63. See generally ELLIOTT & KELLY, supra note 26, at 151–224.
64. See GREEN LIST, supra note 30, at 5.
65. See 1971 Convention, supra note 4, preamble.
66. Id.
67. Id.
The World Health Organization (“WHO”) has sole responsibility for evaluating and making recommendations to the Commission on Narcotic Drugs about the level of international control to be applied to a particular drug. Placement of a drug in a particular “Schedule” indicates the WHO’s determination as to the balance between a drug’s potential for abuse and its medical usefulness. Accordingly, more restrictive controls are imposed as the potential for abuse increases and the medical usefulness of a particular psychotropic drug decreases. For example, substances such as lysergide (“LSD”) are placed in Schedule 1, indicating that its “liability to abuse constitutes an especially serious risk to public health” and that it has “very limited, if any, therapeutic usefulness.” Amphetamines (e.g., Adderall) and methylphenidate (e.g., Ritalin) are placed in Schedule II along with other psychotropic substances “whose liability to abuse constitutes a substantial risk to public health and which have little to moderate therapeutic usefulness.” The likelihood of abuse of Schedule III substances (e.g., various barbiturates such as amobarbital and pentobarbital, and the “date rape drug” flunitrazepam (“Rohypnol”)) constitute a “substantial risk to public health” with “moderate to great therapeutic usefulness.” Schedule IV drugs such as pemoline (Cylert), diazepam (Valium), and lorazepam (Ativan) are deemed to pose a “significant risk to public health” and “a therapeutic usefulness from little to great.”

Under the 1971 Convention, the United States must, “with due regard to its constitutional provisions,” prohibit the advertisement of psychotropic drugs to the general public. It must ensure that psychotropic drugs are used only for legitimate “medical and scientific” purposes in ways that do not “compromise individual and public health,” and make sure that psychotropic drugs are “supplied or dispensed for use by individuals pursuant to medical prescription only.” Furthermore, labels for these drugs must provide: “directions for use, including cautions and

69. Id. at 3.
70. Id.
71. Id.
72. Id.
73. 1971 Convention, supra note 4, art. 10(2).
74. Id.
76. 1971 Convention, supra note 4, art. 9(1).
warnings, . . . necessary for the safety of the user.”77 Prescriptions must be issued in accordance with “sound medical practice,”78 and the government must take “all practicable measures for the prevention of abuse of psychotropic substances.”79

The nature of psychotropic drugs as a threat to public health and safety is echoed in the United Nations Convention on the Rights of the Child (“CRC”).80 This treaty, ratified by every recognized government except the United States,81 reflects the international community’s recognition that children are particularly deserving of protection from the potentially devastating effects of unwarranted exposure to psychotropic drugs. Although it has not ratified the Convention, the United States has signed it, and, as such, commentators and courts have argued that the United States is obligated to uphold its provisions both under the Vienna Convention’s exhortation to refrain from doing anything that “would defeat the purposes and objects” of a treaty signed but not ratified by a government,82 as well as under customary international law.83

The central motivating premise of the CRC is that “the best interests of the child shall be a primary consideration” in all actions undertaken by public and private institutions and governmental agents.84 In accordance with that principle, Article 33 of the CRC explicitly provides that governments “shall take all appropriate measures, including legislative, administrative, social[,] and educational measures, to protect children from the illicit use of . . . psychotropic substances as defined in the relevant international treaties.”85 Concomitantly, governments must “undertake to ensure the child such protection and care as is necessary” for the child’s well-being, and “ensure that the institutions, services[,] and facilities responsible for the care or protection of children . . . conform with the

77. Id. at art. 10(1).
78. Id. at art. 9(2).
79. Id. at art. 20.
84. Convention on the Rights of the Child, supra note 80, art. 2.
85. Id. at art. 33.
standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.”

These principles embodied in the Convention on the Rights of the Child further illuminate the international community’s concern that children be protected from unwarranted exposure to psychotropic drugs. The overarching thrust of the 1971 Convention and the Rights of the Child is that governments should take all necessary measures to ensure that the public in general, and children in particular, are protected from the harmful effects of unregulated, medically unjustified uses of psychotropic drugs. With this legal framework as the backdrop, the next part of this Article documents the shockingly high rates at which state-involved children are prescribed psychotropic drugs while exploring the connection between the overmedication of state-involved children and the U.S. government’s failure to aggressively regulate off-label prescription to children and direct-to-consumer advertising of psychotropic drugs.

III. EPIDEMIC PSYCHOTROPIC DRUG PRESCRIBING TO UNITED STATES CHILDREN

Although psychotropic drugs have long been used (illegitimately) to control problematic behaviors of children in juvenile prisons,87 psychotropic drug prescriptions to state-involved children, as well as to children

86. Id. at art. 3. More generally, Article 19 of the CRC provides that children are to be protected from “all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, . . . while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.” Id. at art. 19. Additionally, children have the right to be free from economic exploitation, id. at art. 32, and from “all other forms of exploitation prejudicial to any aspects of the child’s welfare.” Id. at art. 36. Finally, Article 37 requires that “no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment,” and that “every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.” Id. at art. 37.

87. See, e.g., Nelson v. Heyne, 491 F.2d 352, 357 (7th Cir. 1974) (detailing abuses of psychotropic drugs in juvenile facilities and concluding that “the use of tranquilizing drugs as practiced by defendants constituted cruel and unusual punishment” in violation of the children’s rights under the 14th Amendment to the United States Constitution); Pena v. N.Y. State Div. for Youth, 419 F. Supp. 203, 204 (S.D.N.Y. 1976) (challenging the Goshen Annex for Boys, an institution within the New York State training school system, for its use of isolation, hand and feet restraints, and thorazine and other tranquilizing drugs to control excited behavior of the children under the Eighth and Fourteenth Amendments); Drugs in Institutions: Hearings Before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, 94th Cong., 1st Sess. 2 (1975) [hereinafter Drugs in Institutions].
in the general public, have exploded since the 1990s. The following section details those astronomical increases and traces their evolution to the “Decade of the Brain,” during which time the federal government shifted the national focus from ecological factors in mental illness with an emphasis on psychosocial interventions to the biomedical view of mental illness as an organic brain disease best remediated with pharmaceuticals.

A. Psychotropic Drugs Are Prescribed to State-Involved Children at Alarming Rates

According to a widely-cited 2006 Brandeis University study, psychotropic drug prescriptions for teenagers skyrocketed 250% between 1994 and 2001. The Brandeis researchers found that the proportion of visits that resulted in psychotropic prescription rose from 3.4% in 1994–1995 to 8.3% in 2000–2001, with the rate of such visits increasing 161.6% for youth ages fourteen to eighteen during that same period. Strikingly, they also found that the proportion of these visits associated with a mental health diagnosis did not increase. In fact, during this same period, no psychiatric diagnosis was recorded for 14 to 26% of the youths who were prescribed a psychotropic medication. The authors concluded, somewhat diplomatically, that it was unclear whether the rapid increases in psychotropic drug prescriptions represented “a move toward greater access and more appropriate treatment or whether this represents an overreliance on medications.”

Some view the dramatic shift toward psychotropic drug use in children as an indication of “better case finding, better diagnosing, and a realization that we do have active treatments that can benefit children.” However, some critics see the increasing proliferation of pediatric psycho-


90. Id. at 65–66.

91. Id.

92. Id.

93. Id. at 68.

pharmacology as evidence that psychotropic drugs are being used illegitimately under the guise of beneficial mental health treatment, to serve as a “chemical sledgehammer” to make state-involved children easier to manage.95 Indeed, evidence shows that children in state custody are particularly at risk of being prescribed psychotropic medications for problematic behaviors such as causing disturbances or acting out.96 Although poor record-keeping makes it difficult to accurately determine the exact magnitude of the practice, the predominance of psychopharmacology as the intervention of choice in responding to the psychological needs of state-involved children is well-documented.97

For example, a 2001 report established that approximately 600 children who were enrolled in the Florida Medicaid system—most of which were in foster care and younger than age five—were prescribed drugs marketed to treat schizophrenia, an illness very rarely diagnosed in children of that age.98 Jack Levine, then president of the Center for Florida’s Children, noted that

[we make some basic assumptions about children who need medical care, assumptions about services that are supported by tax dollars, and especially about children who are in the care of state agencies.

An assumption I thought we made was that their care would never be appreciably different, in terms of medical carefulness and appropriateness of prescriptions, than everyone else’s children.99

Levine’s analysis suggested “a remarkable difference in how these children are being looked at, diagnosed, and treated,” and he went on to warn that he was “starting to get scared.”100 Similarly frightening findings were made by the Texas Comptroller, Carole Strayhorn, who, in 2004, issued a scathing report on the Texas foster care system, charging

96. Id. (”[C]oast to coast, states are wrestling with how best to treat the legions of emotionally troubled foster kids in their care. Critics contend that powerful psychiatric drugs are overused and say poor record keeping masks the scope of the problem.”).
99. Id.
100. Id.
that “astronomical amounts” of psychotropic medications were being dispensed to Texas foster children and that the Texas child welfare agency exercised “little meaningful oversight over these medications.” Strayhorn found evidence that many Texas foster care children were administered psychotropic drugs, not for legitimate medical purposes, but rather to generate more money for the child welfare agency and foster parents.

Other accounts of prescribing practices with respect to state-involved children include a University of Minnesota study showing that nearly 35% of foster children in St. Louis County were receiving psychotropic medication compared with 15% of the general population, and a 2003 report from the Florida Statewide Advocacy Council finding that over 50% of the children enrolled in the Florida Medicaid program (approximately 9,500) “had been treated with one or more psychotropic drugs in the year 2000.” The ages of the Florida children ranged from less than one to seventeen. Additionally, several investigative news reports in recent years attest to the sharp increase in prescriptions of psychotropic drugs to foster care children nationwide.

A similar pattern is evident in juvenile prisons across the country. For example, an April 2002 study by the Oregon Youth Authority (“OYA”) found that 81% of girls in Oregon’s juvenile correctional facilities met the requirements for a psychiatric diagnosis and 72% were taking psy-

102. Id.
103. Hagen & Orbeck, supra note 12.
104. FLA. STATEWIDE ADVOCACY COUNCIL, supra note 62, at 4. The Florida study further documented that 44% of the children on psychotropic medications were not under the care of a physician, while others had no psychiatric diagnosis or had a diagnosis described as “other.” Id. at 12, 13. Thirty-eight percent of the children studied were given drugs without a signed consent from a parent, guardian or judge, as state law requires. Id. at 17. Moreover, 89% of the children had no records in their file to show they were being medically monitored. Id. at 18.
105. Id. at 5.
106. See, e.g., Gary Craig, Potent Pills: More Foster Kids Getting Mood-Altering Drugs, DEMOCRAT & CHRONICLE, Dec. 9, 2007; Gary Craig, Issue Hasn’t Had Much Scrutiny in N.Y., DEMOCRAT & CHRONICLE, Dec. 10, 2007; Crary, supra note 95; Editorial, The Drugging of Foster Youth, S.F. CHRON., June 11, 2006 (noting that California does not attempt to keep track of how many foster youth are given psychotropic drugs, and that members of a state created Blue Ribbon Commission on Foster Care were caught off guard “when the overuse of psychotropic medications emerged as a major theme of foster youth talking about what is wrong with the system.”).
The report similarly documented that 54% of boys diagnosed with psychiatric conditions such as personality disorders and mental retardation were prescribed psychotropic drugs. A 2000 survey of juvenile correctional facilities in Pennsylvania found that psychotropic drugs were prescribed to as many as 40% to 50% of the children in some of the state’s juvenile prisons. Further, a 2004 report by the New Jersey Office of the Child Advocate detailing the conditions of juvenile confinement in New Jersey’s seventeen county juvenile detention centers revealed that, depending on the facility, anywhere from 10% to 50% of the children were taking psychotropic medications.

Low-income children are also particularly susceptible. Medicaid is a major source of funding for mental health and related support services for children, and, as of 2005, it covered 26% of U.S. children. In Texas, the prevalence of anti-psychotic drugs in the population of children receiving benefits from the Texas Medicaid Program increased by 164% between 1996 and 2000 and the use of atypical antipsychotics increased by 494% over the same period. A study of children and adolescents in low- and moderate-income families who received medical care through TennCare (Tennessee’s managed care program for Medicaid enrollees and the uninsured) revealed that the use of antipsychotic

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108. Id.
112. See CHRISTINE CULHANE, MENTAL HEALTH RESEARCH INSTITUTE OF VICTORIA, A GUIDE TO PSYCHOTROPIC DRUGS 2 (2005), available at http://www.mhri.edu.au/pdf/A%20GUIDE%20TO%20PSYCHOTROPIC%20DRUGS.pdf (“Antipsychotics are used primarily in the treatment of psychoses. They diminish the agitation, delusions, hallucinations and thought disorder of these illnesses. . . . They are loosely divided into typical (older) agents and atypical (newer) agents. The main differences are in the side effect profiles. The newer drugs are less likely to produce parkinsonian symptoms or other movement problems.”)
drugs among low-income children nearly doubled between 1996 and 2001.\textsuperscript{114} The percentage of psychotropic prescriptions to Tennessee’s poor children jumped by 61\% among preschoolers, 93\% among those age six to twelve, and 116\% among children age thirteen to eighteen.\textsuperscript{115} Consistent with statistics in other states, a study of Connecticut’s Medicaid managed care database concluded that the strongest predictor for whether a Connecticut child would be receiving psychotropic medications was state custody.\textsuperscript{116}

These staggering statistics beg the question whether the behaviors of state-involved children are sufficiently aberrant to warrant such apparently heavy-handed medication practices. While some argue that the huge increase in the use of psychotropic medications among children during the 1990s indicates a greater awareness of treatments—both within the medical industry and society at large—that can better children’s lives,\textsuperscript{117} others describe the phenomenon as “child abuse on a grand scale.”\textsuperscript{118} As Thomas Grisso, a well-known expert in juvenile justice and pediatric forensic psychology has stressed, even “beneficent interventions unrestrained can carry with them potential dangers to liberty and self-determination,” including the “potential overuse of medications to achieve behavioral control” of children.\textsuperscript{119}

\textbf{B. The 1990s: “Decade of the Brain”}

Studies have documented that pediatric psychopharmacotherapy in the United States increased dramatically during the late 1980s and through-

\begin{itemize}
\item \textsuperscript{114} William O. Cooper et al., \textit{New Users of Antipsychotic Medications Among Children Enrolled in TennCare}, 158 ARCHIVES PEDIATRICS & ADOLESCENT MED. 753, 753 (2004).
\item \textsuperscript{115} Id.
\item \textsuperscript{116} Martin et al., supra note 97, at 76; see also Encarnacion Pyle, supra note 16. Pyle reported that, in July 2004, 31\% of children ages 6 to 18 in foster and group homes were on psychotropics, and, as of January 2005, 22\% of children in juvenile detention facilities were taking the drugs. Many of the children were prescribed five or more psychotrophic drugs. Encarnacion Pyle, supra note 16. The investigation found that nearly 40,000 Ohio children on Medicaid were taking drugs for anxiety, depression, delusions, hyperactivity and violent behavior as of July 2004, and that Ohio spent over $65 million on the drugs for kids in 2004. Id. The report also found that doctors in Ohio prescribed sedatives and mood-altering medications for nearly 700 babies and toddlers who were on Medicaid. Id.
\item \textsuperscript{117} See An Interview with Marilyn Benoit, M.D., supra note 94.
\item \textsuperscript{119} Grisso, supra note 51, at 17; see also SAMI TAMIMI, PATHOLOGICAL CHILD PSYCHIATRY AND THE MEDICALIZATION OF CHILDHOOD 15 (2002).
\end{itemize}
out the 1990s. Psychopharmacology rests on the premise that certain behaviors or psychological conditions are evidence of organic disease stemming from brain dysfunction and/or genetic abnormality that are most effectively treated with psychotropic drugs that chemically alter the brain. This understanding of psychiatric disorder or mental illness as biomedical “brain disease” marks a significant departure from previously dominant theories that recognize social-environmental factors as prominent contributors to mental, emotional, and cognitive disturbances. Historically, the biomedical view of mental disorder gained its stronghold in 1980 with the publication of the third edition of the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (“DSM-III”). Despite the lack of scientific proof for its underlying theory of brain dysfunction, the DSM-III, “with its symptom-based orientation . . . contributed significantly to a biological vision of mental health—which stresses the neurosciences, brain chemistry, and medications—superseding the psychosocial vision that had dominated for decades.” This new paradigm of mental illness “focused on the symptoms of mental disorders rather than their causes and emphasized pharmacological treatments over talk therapy and behavioral changes.”

The United States government has played a central role in promoting the biomedical paradigm of mental disorder and the concomitant empha-

120. See, e.g., Thomas et al., supra note 89, at 63–69 (2006) (finding that the proportion of office-based visits of 14 to 18 year olds that resulted in a psychotropic drug prescription rose from 3.4% in 1994-1995 to 8.3% in 2000-2001); Zito et al., supra note 88, at 17–25 (finding that, during the 1990s, psychotropic drug use among youth increased 2 to 3-fold across most categories of medication, nearly reaching the adult utilization rates); Olfson, National Trends in the Use of Psychotropic Medications, supra note 88 (documenting significant increases in psychotropic drug use among children and adolescents between 1987 and 1996, particularly stimulants and antidepressants).

121. Rick Mayes & Allan Horwitz, DSM-III and the Revolution in the Classification of Mental Illness, 41 J. Hist. Behavioral Sci. 249, 258 (2005). In this article, the authors endeavor to “explain the origins of the DSM-III, the political struggles that generated it, and its long-term consequences for clinical diagnosis and treatment of mental disorders in the United States.” Id. at 249. Mayes and Horwitz argue that “[a] revolution occurred within the psychiatric profession in the early 1980s that rapidly transformed the theory and practice of mental health in the United States” wherein “mental illnesses were transformed from broad, etiologically defined entities that were continuous with normality to symptom-based, categorical diseases.” Id. According to the authors, “[b]y the mid-1980s, . . . the historic shift from a psychosocial to a symptom-based view of mental health was complete” and “psychotherapy became the primary domain of clinical psychologists, counselors, and social workers,” while “[p]sychotherapeutic therapy became the private ‘turf’ of medically trained psychiatrists.” Id. at 255–56.

122. Id.

123. Id.

124. Id.
sis on drug intervention. The National Institute of Mental Health ("NIMH"), the government agency that finances and conducts research on mental illness, funded field trials of the DSM-III and "legitimized" the results by granting them the government’s seal of approval.\footnote{125} Government support for the brain disease vision of mental illness crystallized in 1989 with the designation by former President George Walker Bush of the 1990s as the "Decade of the Brain."\footnote{126} In his official proclamation Bush asserted that "millions of Americans are affected each year by disorders of the brain," and declared that the goal of the initiative was twofold: to enhance "public awareness of the benefits to be derived from brain research," and to focus government research on disorders and disabilities that affect the brain.\footnote{127}

In the aftermath of these developments, the NIMH de-emphasized funding for research into social, economic, and familial factors in mental disorders and prioritized research on brain dysfunction, genetics, and chemical imbalances.\footnote{128} This intensified quest to promote the concept of

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  \item \footnote{125} Id. at 261.
  \item \footnote{127} Proclamation No. 6153, 55 Fed. Reg. 29,553 (July 18, 1990). Library of Congress, Project on the Decade of the Brain, http://www.loc.gov/loc/brain (to advance this goal, from 1990 to the end of 1999, the Library of Congress and the National Institute of Mental Health co-sponsored a variety of activities including publications and programs “aimed at introducing Members of Congress, their staffs, and the general public to cutting-edge research on the brain and encouraging public dialogue on the ethical, philosophical, and humanistic implications of these emerging discoveries.”).
  \item \footnote{128} See generally Neuroscience Research at NIH: Hearing Before the S. Comm. on Labor & Human Resources, 104th Cong. (1996) (statement of Zach W. Hall, Director, National Institute of Neurological Disorders and Stroke & Carl Kupfer, Director, National Eye Institute & Alan I. Lesner, Director, National Institute on Drug Abuse), available at http://www.hhs.gov/asl/testify/t960306d.html (observing that “the treatment of brain disease has been transformed by two developments. First, the extent and pervasiveness of brain diseases has become more apparent, as the biological basis of such disorders as mental illnesses, alcohol abuse, and other drug addiction have become increasingly recognized. Second we are entering an era of treatment of brain disease. . . . A wide range of treatments for mental illness has greatly improved the lives of many people.”); Edward G. Jones & Lorne M. Mendell, Editorial, Assessing the Decade of the Brain, 284 SCIENCE 739, 739 (1999).

Norbert Myslinki, a professor of pharmacology at the University of Maryland wrote in 2001 that “[a] nother indicator of the success of the Decade of the Brain is that the public increasingly views mental illness as a dysfunction of the brain, not a matter of choice, not a character defect, and not (as a few psychiatrists have argued) as an arbitrary label that society puts on undesirable behavior. . . . [L]awmakers . . . were able to understand [mental illness] is a physical disease of the brain, just as heart disease is a physical
mental illness as brain disease, fueled by an infusion of government funding,129 led to a shift in mental health treatment modalities toward primacy for drug therapies.130 Government support came to be weighted heavily toward research into neuropsychological processes—"mapping the brain’s biochemical circuitry"131—as an avenue for developing drugs to treat mental disorders.132

More specifically, during the Decade of the Brain, the U.S. government played a central role in promoting pediatric psychopharmacotherapy.133 The federal government targeted the study of mental illness among children and adolescents as an explicit priority,134 and NIMH funding for
research in the field of child and adolescent psychiatry expanded dramatically.\textsuperscript{135} The NIMH’s 1990 National Plan for Research on Child and Adolescent Mental Health Disorders clearly signaled the government’s new, biomedically-oriented direction. Although it acknowledged, in passing, the role of environment in children’s mental health issues, the National Plan firmly asserted that “[b]iology often sets the stage for trouble, as brain cells develop or function abnormally. We need to understand how this happens and how to set things right.”\textsuperscript{136} The plan highlighted the shift to pharmacological interventions; for example, it claimed that NIMH funding for lithium had “helped millions of adults with manic-depressive illness, and it may have additional therapeutic payoff for many children and adolescents with mental disorders.”\textsuperscript{137}

Before the 1990s, prescription rates of psychotropic drugs to children in the general population were relatively low.\textsuperscript{138} However, it can be argued that the combination of the U.S. government’s increased emphasis on brain research, its support for prioritizing biomedical approaches to treatment of psychiatric conditions, and its targeted focus on children and adolescents all contributed significantly to the meteoric rise in the prescription of psychotropic drugs to children since 1990, and to the rise among state-involved children in particular.\textsuperscript{139} In the words of noted

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\textsuperscript{135} See Kimberly Hoagland & S. Serene Olin, The NIMH Blueprint for Change Report: Research Priorities in Child and Adolescent Mental Health, 41 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 760, 761 (2002) (noting that, as a result of NIMH’s National Plan for Research on Child and Adolescent Mental Disorders, published in 1990, “research in the field of child and adolescent mental health expanded dramatically. In fact, from 1989 to 2000 the number of grants nearly doubled (from 460 to 775) and the research support almost tripled (from $95 million to $262 million.”).

\textsuperscript{136} NIMH NATIONAL PLAN, supra note 133, at 16.

\textsuperscript{137} Id. at 17.

\textsuperscript{138} Thomas et al., supra note 89, at 64.

\textsuperscript{139} See, e.g., Cooper et al., supra note 114, at 753 (200% increase in prescriptions of antipsychotic medications among children and adolescents enrolled in Medicaid program in Tennessee from 1996 to 2001); Nick C. Patel et al., Trends in Antipsychotic Use in a Texas Medicaid Population of Children and Adolescents: 1996 to 2000, 12 J. CHILD & ADOLESCENT PSYCHOPHARMACOLOGY 221 (2002) (finding 160% increase in antipsychotics prescribed to children and adolescents enrolled in the Texas Medicaid program during the period 1996-2000; use of “atypical antipsychotics” jumped by almost 500% during same period); Daniel J. Safer et al., Increased Methylphenidate Usage for Attention Deficit Disorder in the 1990s, 98 PEDIATRICS 1084, 1085 (1996) (use of stimulant medication for the management of ADHD in the school setting increased approximately 250% from 1990 to 1996); Zito et al., supra note 88, at 17–25 (observing a 200 to 300% increase in
Brandeis sociologist, Dr. Peter Conrad, “The 1990s may become known as the decade of psychotropic medication use in children.”

Along with its affirmative support for pediatric psychopharmacotherapy, the United States government has further contributed to the excessive reliance on psychotropic drugs to respond to the mental health needs of state-involved children via its blatant refusal to comply with the 1971 Convention’s explicit prohibition of direct-to-consumer (“DTC”) advertising of psychotropic drugs. Researchers have noted the influential effect of advertising in encouraging increased acceptance of, and demand for, psychotropic drugs, particularly after the FDA relaxed its rules on prescription drug advertising at the height of the Decade of the Brain in 1997. As described in the forthcoming part, the government’s failure to ban the advertising of controlled psychotropic drugs has rendered both the public and physicians more accepting of psychopharmaceutical intervention as the primary response to children’s mental health issues, and, as a result, the health and safety of state-involved children has been significantly undermined.

IV. DIRECT-TO-CONSUMER ADVERTISING OF PSYCHOTROPIC DRUGS VIOLATES ARTICLE 10 OF THE 1971 CONVENTION ON PSYCHOTROPIC SUBSTANCES

Along with its affirmative support for pediatric psychopharmacology (outlined in Part III above), the United States government has further promoted overprescription of psychotropic drugs to state-involved children by failing to comply with the 1971 Convention’s explicit prohibition on advertising of controlled psychotropic drugs directly to the public. Recognizing that the intended and inevitable result of advertising is to increase demand and consumption of psychotropic drugs—a result diametrically opposed to the overarching goal of the 1971 Convention—Article 10(2) provides that each party “shall, with due regard to its constitutional provisions, prohibit the advertisement of [psychotropic] substances to the public.” Underscoring the convention’s public health protection principle, the WHO has taken the position that DTC advertising should not be allowed for any prescription drug, let alone for the

prevalence of psychotropic drug use in children from 1987-1996 and that six percent of youth under 20 years of age were on psychotropic medications in 1996).


141. See, e.g., Thomas et al., supra note 89, at 68.

142. 1971 Convention, supra note 4, art. 10(2).
marketing of prescription drugs directed at children. There is virtually universal international compliance with the psychotropic drug advertising prohibition; most industrialized nations do ban DTC advertising for all prescription drugs. However, of the 183 signatories to the 1971 Convention, only the United States and New Zealand do not have statutes in place to effectuate the DTC advertising provision—and the U.S. does not even ban advertising for those prescriptions that contain internationally scheduled psychotropic substances.

The advertising ban placed the onus on governments to prioritize public health needs over drug companies’ profit-maximizing interests. The international agreement to prohibit DTC advertising of psychotropic drugs recognized the existence of an “inherent conflict of interest between the legitimate business goals of manufacturers and the social, medical, and economic needs of providers and the public to select and use drugs in the most rational way.” Nevertheless, concurrent with its intensive promotion of biological psychiatry during the 1990s, the United States government progressively liberalized key elements of existing drug advertising regulations, thereby enhancing the drug companies’ influence over public awareness, acceptance, and use of psychotropic drugs. As the following discussion demonstrates, the United States government has been complicit in elevating the commercial interests of the drug industry over the health and safety of children, effectively turning state-involved children into “cogs in the multi-million dollar pharmaceutical industry machine.”

The United States has never banned advertising of prescription drugs. In 1938, as a result of a proliferation of advertisements for a variety of

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145. Id. at 5.


medicinal “cures,” the U.S. Congress enacted the Federal Food, Drug and Cosmetic Act (the “FFDCA”), which established the FDA, required that drugs be proven safe before they are advertised, and gave the FDA authority to consider drugs “misbranded” if their labeling or advertising is found to be misleading. A 1962 amendment to the FFDCA gave the FDA authority to regulate advertising of prescription drugs, and prohibited the agency from requiring prior approval of any such advertisement’s content.

The amendment did not craft any distinctions on the basis of an advertisement’s audience—for instance, between professional and lay audiences —and, prior to the 1980s, drug companies advertised prescription drugs primarily in medical journals directed at physicians. However, in the early 1980s, drug companies began advertising directly to the public in magazines and newspapers. In response to constituents’ concerns, the FDA asked for a voluntary moratorium on prescription drug advertising in 1983 to allow for public hearings and research on the subject. Two years later, while acknowledging “differences between healthcare professionals and consumers as recipients of drug promotion, such as differences in medical and pharmaceutical expertise, perception of pharmaceutical claims, and information processing,” the FDA withdrew the moratorium without making any regulatory changes to account for those differences, stating that the existing regulations provided “sufficient safeguards to protect consumers.”

Under the FFDCA and implementing FDA regulations, prescription drug ads must identify the product, its quantitative composition, and

155. Id. at 42,582.
156. Id.
“other information in brief summary relating to side effects, contraindications, and effectiveness.”\(^{157}\) This “brief summary” provision mandates disclosure of all side effects, contraindications, and precautions on the product’s approved labeling.\(^{158}\) The requirement, which apparently anticipated print advertisements only, is “generally fulfilled by including in the advertisement the sections of the approved labeling that discuss the product’s adverse event profile, contraindications, warnings, and precautions.”\(^{159}\) Subsequent regulations added that product-claim broadcast advertisements\(^{160}\) must include “information relating to the most common side effects and contraindications in the audio or audio and visual parts of the advertisement,” and, importantly, rather than including every known risk of the drug, a product-claim broadcast advertisement could make “adequate provision” for the consumer to obtain the information through some other venue.\(^{161}\) However, before 1997 the FDA had not

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157. Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 352(n) (2006); see also 21 U.S.C. §§ 352(a), 321(n), 202.1(e) (2006) (providing that drugs are deemed to be “misbranded” if their labeling or advertising is false or misleading in any particular or fails to reveal material facts).


160. See id. at 42,582 (recognizing three broad categories of DTC broadcast advertisements: (1) product-claim ads identify a particular drug by name and make safety and efficacy claims about the drug; (2) help-seeking ads discuss a disease or condition and direct the consumer to “ask your doctor” for more information, but do not mention specific treatments or drugs; because help-seeking ads do not mention specific drug products, they are not subject to the Act or FDA regulations; and (3) reminder ads mention the name of the drug and other limited information, but does not make any representations or suggestions about the drug(s)); see also 21 C.F.R. § 202.1(e)(2) (2009) (describing product claim ads and help seeking ads); FOOD & DRUG ADMIN., DRAFT GUIDANCE FOR INDUSTRY: CONSUMER-DIRECTED BROADCAST ADVERTISEMENTS (1997) (explaining that, as of 1995, drug manufacturers primarily used reminder and help-seeking advertisements, which are exempt from the disclosure requirements).

issued any guidance for how the industry could satisfy the adequate provision alternative, and, given the costs of most commercial broadcast advertising, “to include this kind of detailed information in television and/or radio advertising was thought by the drug industry to be too cumbersome and expensive.”

With the Decade of the Brain in full swing, the FDA implemented a major policy in 1997 that “dramatically changed the playing field by allowing the expansion of direct-to-consumer advertising into broadcast and electronic media.” The agency issued a Draft Guidance for Industry (the “guidance”), which became final in 1999. This guidance made it much easier for drug companies to meet the requirement that broadcast advertisements contain extensive information about risks. It allowed drug companies to “omit detailed risk information (the ‘brief summary’) in broadcast full product ads if they stated a product’s major risks and provided specified means to obtain more complete risk information, including toll-free phone numbers, websites, and print DTCA [direct-to-consumer advertising of prescription drugs].” In the wake of the guidance, spending on DTC advertising of prescription drugs rapidly increased; today, it is a multi-billion dollar industry.

As this brief historical overview suggests, the U.S. government’s progressive relaxation of restrictions on prescription drug advertising has actively facilitated the Decade of the Brain goal of increasing public awareness regarding pharmaceutical interventions for mental health

connection with the broadcast presentation shall contain a brief summary of all necessary information related to side effects and contraindications.

Id. (Side effects and contraindications include among other things “side effects, warnings, precautions and contraindications.”).

162. Id.
163. VOGT, supra note 153, at 17.
164. Gelland & Lyles, supra note 149, at 476.
166. PUBLIC HEALTH IMPLICATIONS, supra note 144, at 14.
problems. With that increased awareness has come greater acceptance and consumption of pharmaceuticals, not just by adults, but by children as well, all despite the significant risks involved. For example, methylphenidate, the active ingredient in Ritalin, Concerta, and Metadate, is advertised directly to consumers and is the drug most commonly prescribed to children diagnosed with ADHD. Methylphenidate, along with phencyclidine (commonly known as “PCP” or “angel dust”), is listed on Schedule II of the 1971 Convention’s “Green List” as a substance that “constitutes a substantial risk to public health” with “little to moderate therapeutic usefulness.” According to a 2009 National Institute of Drug Abuse (“NIDA”) funded study, methylphenidate has many similarities with cocaine, and “can have structural and biochemical effects in some regions of the brain that can be even greater than those of cocaine.” Commenting on the NIDA study, NIDA Director Dr. Nora Volkow observed that “non-medical use of methylphenidate and other stimulant medications can lead to addiction as well as a variety of other health consequences.” Dr. Volkow underscored the danger of uncritical acceptance of Ritalin and other stimulants touted in DTC ads, emphasizing the paucity of knowledge about “how methylphenidate affects the structure of and communication between brain cells.” Not surprisingly,

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168. See generally McBride, supra note 147.
170. GREEN LIST, supra note 30, at 5.
175. NIH Press Release, supra note 173.
the wisdom of dispensing methylphenidate to children remains highly controversial.176

Researchers have pinpointed direct-to-consumer advertising of prescription drugs as a key contributor to the explosive growth in the prescribing of psychotropic drugs to children in the United States. One study that examined prescribing trends for adolescents between 1994 and 2001 concluded that “direct-to-consumer advertising and other marketing strategies are key in encouraging greater use of psychotropics, particularly for the increased use found after 1999.” 177 Notably, the FDA’s draft guidance, which liberalized prescription drug advertising, became final in 1999. 178 Soon after that, in 2001, advertisements for Adderall, Concerta, and Ritalin began appearing in women’s magazines and on cable television, which, according to one news reporter, marked “the first break from a 30-year old agreement between nations and the pharmaceutical industry not to market controlled drugs to consumers.” 179

The INCB has made clear that it considers the United States’ failure to prohibit DTC advertising of psychotropic drugs to be an egregious viola-

176. NAT’L HEALTH INST., DIAGNOSIS AND TREATMENT OF ATTENTION DEFICIT HYPERACTIVITY DISORDER (1998), available at http://consensus.nih.gov/1998/1998AttentionDeficitHyperactivityDisorder110html.htm (“Despite progress in the assessment, diagnosis, and treatment of ADHD, this disorder and its treatment have remained controversial, especially the use of psychostimulants for both short- and long-term treatment.”); see also Katherine Ellison, Brain Scans Link ADHD to Biological Flaw Tied to Motivation, WASH. POST, Sept. 22, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/09/21/AR2009092103100.html (“For decades, attention-deficit hyperactivity disorder has sparked debate. Is it a biological illness, the dangerous legacy of genes or environmental toxins, or a mere alibi for bratty kids, incompetent parents and a fraying social fabric? With 4.5 million U.S. children having received a diagnosis of the disorder—and more than half of them taking prescription drugs to control it—the question has divided doctors and patients, parents and teachers, and mothers and fathers.”).

177. Thomas et. al., supra note 89, at 63-69 (“Advertisements for medications for ADHD, social phobia, and depression are now common in various public media. . . . Such drug industry promotion combined with the practice of detailing to physicians may affect both the public and physicians. Increasing numbers of patients come to physicians asking for particular medications, and drug industry detailing can promote off-label uses more aggressively. Surveys have suggested increasing pressure on physicians to prescribe drugs that they may or may not feel are medically warranted, and the most common reason reported by physicians for inappropriate prescribing is patient demand.”).

178. FDA GUIDANCE FOR INDUSTRY, supra note 158.

179. Karen Thomas, Back to School for ADHD Drugs, USA TODAY, Aug. 28, 2001, at D1; see also Strawn, supra note 169, at 495 (“As parents prepared their children for the start of the 2001 school year, they were greeted for the first time with advertisements pitching behavior control drugs for their children. . . . This pushing of the advertising envelope for prescription stimulants, like Ritalin, is contrary to a thirty-year old international agreement prohibiting the advertisement of such controlled substances.”).
tion of the 1971 Convention and a serious threat to public health. In its 2000 annual report, the INCB noted that “[e]ffective but questionable sales promotion methods have often preceded increases in the consumption of psychotropic substances,” and reiterated that governments should “strictly implement the provisions of article 10 of the 1971 Convention, which prohibits the advertisement of psychotropic substances to the general public.” In its 2001 annual report, alarmed by reports that methylphenidate was being “diverted for abuse by schoolchildren,” the INCB expressed concern about “legal loopholes in the United States that make possible public advertising of prescription drugs.” In a press release issued that year, the INCB noted that promotion to the public of psychotropic drugs “frequently portrays drugs as common consumer goods,” and stressed that “the 1971 Convention on Psychotropic Substances prohibits the advertisement of psychotropic substances to the general public.”

Reprimanding the United States for its longstanding failure to comply with the advertising ban, in its 2002 annual report the Board pointedly observed that “[a]dvertising through media in the United States reaches consumers not only in the United States, but also in other countries where such advertising is prohibited in line with article 10, paragraph 2, of the 1971 Convention.”

The INCB has explicitly linked DTC advertising to the “over-prescription of methylphenidate in the United States,” asserting that such over-prescription “may be the direct result of the direct-to-consumer advertising of that drug.” In its 2006 annual report, the INCB stated that “[a]ggressive promotion and advertising to the general public, in contravention of the treaty obligations, may influence public perception about the availability of drugs on the unregulated market.”

Succinctly capturing the problematic effects of consumer advertising on children, the Board observed that public advertisement of controlled drugs used to treat ADD/ADHD “not only promotes their licit medical use and availability, but at the same time makes young people more aware of those drugs and thus more prone to illicitly consume them.” The Board expressed concern that public advertising of ADD/ADHD drugs “may send

180. INCB 2000 REPORT, supra note 6, at para. 22.
181. INCB 2001 REPORT, supra note 6, at para. 342.
183. INCB 2002 REPORT, supra note 6, at para. 175.
184. Id.
185. INCB 2006 REPORT, supra note 6, at para. 18.
186. Id.
the wrong signal about their real psychoactive and misuse potential.\footnote{187}

Most recently, in its 2008 annual report, the Board again criticized the United States, pointedly urging “the governments in which companies undertake direct-to-consumer advertising for drugs containing internationally controlled substances to adopt and implement regulations to ban such advertisements, in compliance with Article 10 of the 1971 Convention.”\footnote{188}

While commentators vigorously debate the pros and cons of direct-to-consumer advertising of prescription drugs,\footnote{189} the essential question raised by the 1971 Convention’s advertising ban is the permissible scope of government regulation of such advertising under the United States Constitution’s limited protection for commercial speech.\footnote{190} Although a thorough examination of that question is beyond the scope of this Article, it is conceivable that narrowly drawn legislation banning DTC advertising of internationally controlled psychotropic drugs could withstand a constitutional challenge.\footnote{191} In any event, presumably with full knowledge of the United States’ constitutional free speech jurisprudence, the INCB remains steadfast and unequivocal, maintaining that the United States can and must comply with the 1971 Convention’s advertising ban. Unfortunately, the only enforcement mechanism available to the INCB to force compliance with the convention is its authority to “name and shame.”\footnote{192} Thus, it is up to the United States government to take the in-

\footnote{187. Id.}
\footnote{188. INCB 2008 REPORT, supra note 6, at para. 69.}
\footnote{189. See, e.g., PETER R. BREGGIN & GINGER ROSS BREGGIN, THE WAR ON CHILDREN OF COLOR: PSYCHIATRY TARGETS INNER-CITY YOUTH (1998); McBride, supra note 147 (contending that it contributes to the medicalization of childhood in particular); Barbara Mintzes et al., Influence of Direct to Consumer Pharmaceutical Advertising and Patients’ Requests on Prescribing Decisions: Two Site Cross Sectional Survey, 324 BMJ 278 (2002); Lenz, supra note 49. See generally Gilbody et al., supra note 167. (arguing that DTC advertising increases consumer knowledge about prevalent health conditions and treatment options, and that the increased use of prescription drugs spurred by DTC advertising has enhanced the public’s health).}
\footnote{191. See Strawn, supra note 169.}
\footnote{192. 1971 Convention, supra note 4, at art. 19. (describing the Board’s function as “quasi-judicial” in overseeing the implementation of the conventions. If the Board finds
itiative to fulfill its commitment under the 1971 Convention and implement legislation banning psychotropic drug advertisements. A ban on DTC advertising of psychotropic drugs in compliance with the 1971 Convention would be a step in the right direction to begin to stem the growing tide of overmedication of state-involved children.

V. THE PRESCRIPTION OF PSYCHOTROPIC DRUGS TO CHILDREN AS CURRENTLY PRACTICED IN THE UNITED STATES VIOLATES THE 1971 CONVENTION’S “MEDICAL PURPOSES” RESTRICTION

The United States government must fulfill its obligation under the 1971 Convention to ensure that state-involved children are not prescribed psychotropic drugs without medical justification. Article 5 of the convention requires governments to limit, by appropriate measures, the use of drugs in Schedules II, III, and IV “to medical and scientific purposes.”193 The following examination of criteria, developed by the INCB to guide its work in monitoring the implementation of the 1971 Convention, provides the framework for analyzing the legitimacy of the extensive off-label prescription of psychotropic drugs to state-involved children in the United States. This analysis supports the conclusion that off-label prescription of psychotropic drugs to children does not meet the international requirement that use of controlled psychotropic drugs be restricted to “medical purposes.”

that the goals of the Convention “are being seriously endangered” by a country’s failure to implement its provisions, it may “ask for explanations from” the government in question. The Board may call upon the Government “to adopt such remedial measures as shall seem under the circumstances to be necessary for the execution of the provisions” of the Convention, and, if satisfactory explanations are not forthcoming or the government fails to adopt remedial measures set out by the Board, the Board can call attention of the parties, the Council and The Commission to the matter, and the party under scrutiny “shall be invited to be represented at a meeting of the Board at which a question directly interesting it is considered.”). These measures basically come down to “naming and shaming” as the penalty for violations of the 1971 Convention. See generally Sandeep Gopalan, Alternative Sanctions and Social Norms in International Law: The Case of Abu Ghareib, 2007 Mich. St. L. Rev. 785 (examining the role of shame and embarrassment in enforcing international law). According to Gopalan, “[s]haming in the international law arena is aimed at achieving the following outcomes—labeling a state as an offender, creating a reputation as a bad actor and non-cooperator, expulsion from international organizations, causing economic harm, shunning by other states and commercial entities, and mobilizing domestic public opinion against the offending regime or leader.” Id. at 794.

193. 1971 Convention, supra note 4, art. 5(2) (“Each Party shall . . . limit by such measures as it considers appropriate the manufacture, export, import, distribution and stocks of, trade in, and use and possession of, substances in Schedules II, III and IV to medical and scientific purposes.”). The convention restricts use of Schedule I substances to “scientific and very limited medical purposes.” Id. at art. 7(a) (emphasis added).
Noting that the terms “medical purposes” and “medical use” are used in, but not defined in, existing international drug control conventions, the INCB set out criteria to elucidate those expressions in its 2003 annual report.\textsuperscript{194} The INCB explained the term “medical purposes”—as used in Article 5 of the 1971 Convention—as a function of a drug’s “medical use”\textsuperscript{195} (that is, its usefulness in medical therapy).\textsuperscript{196} Legitimate medical uses for scheduled psychotropic drugs include “improving health and well-being” and “preventing and treating disease.”\textsuperscript{197} Because “efficacy and safety are basic conditions that have to be established before [a scheduled] drug can be marketed,”\textsuperscript{198} medical uses of psychotropic drugs “should be approved by the competent regulatory authority”\textsuperscript{199} of each country. In addition to efficacy and safety, the INCB considers “availability and cost and the knowledge and experience of those prescribing . . . and administering [the drug],”\textsuperscript{200} in order to establish compliance with the medical purposes requirement. Without sound evidence of therapeutic value as measured by these criteria, the usefulness of a scheduled drug for medical purposes is significantly diminished; such lack of evidence means the drugs “usefulness” becomes a subjective determination based solely on the drug’s “reputation for usefulness, which reflects the general opinion of practitioners or expert panels.”\textsuperscript{201} Moreover, even with FDA approval or a favorable reputation within the medical community, the actual value of psychotropic drugs in addressing the problems

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\textsuperscript{194} See INCB 2003 REPORT, supra note 6, at para. 227–35.
\textsuperscript{195} Id. at para. 234 (“The ‘medical use’ of a substance can be stated as its utilization for the above-mentioned medical purposes in a given country.”).
\textsuperscript{196} “The type and degree of international control” for a substance which is being considered for scheduling under the 1971 Convention “must be based on two considerations: (a) the degree of risk to public health; and (b) the usefulness of the drug in medical therapy.” Id. at para. 229.
\textsuperscript{197} Id. at para. 233 (“[A] medicine . . . is a substance used, designed or approved for the following medical purposes: (a) Improving health and well-being; (b) Preventing and treating disease (including the alleviation of symptoms of that disease); (c) Acting as a diagnostic aid; (d) Aiding conception or providing contraception; (e) Providing general anaesthesia.”).
\textsuperscript{198} Id. at para. 231.
\textsuperscript{199} Id. at para. 234. In the United States, the Food and Drug Administration is the “competent regulatory authority” governing the approval for sale of prescription drugs, including internationally scheduled psychotropic drugs. U.S. Food & Drug Admin., Drugs, http://www.fda.gov/AboutFDA/Basics/ucm192696.htm.
\textsuperscript{200} INCB 2003 REPORT, supra note 6, at para. 230.
\textsuperscript{201} Id.
faced by state-involved children is substantially decreased where there are “safer alternatives for the same purposes.”

Assessed against these criteria, the conditions under which state-involved children are typically prescribed psychotropic drugs fail altogether to meet the 1971 Convention’s “medical purposes” requirement. As described in more detail below, the use of psychotropic drugs as chemical restraints to control disruptive or problematic behavior of children in foster care and in juvenile prisons is emphatically not a “medical purposes” use. Moreover, many contest the notion that state-involved children who are labeled with a psychiatric diagnosis are actually suffering from a “disease” for which drug treatment is appropriate or necessary. This raises a legitimate concern because the majority of psychotropic drugs are prescribed to children off-label, without the benefit of FDA-reviewed and approved evidence of safety and efficacy for pediatric use. Finally, there is a notable lack of consensus among the medical community about the suitability of psychotropic drugs for pediatric use in light of the demonstrated and constantly emerging risks, uncertain benefits, and worrisome lack of knowledge about the long-term impact on children. Moreover, and perhaps most importantly, there are a wealth of safer alternatives for addressing the mental, behavioral, and emotional problems experienced by state-involved children. Given the serious problems associated with use of psychotropic drugs in children, it is urgent that the United States government take aggressive steps to comply with the 1971 Convention’s medical purposes requirement.

A. Chemical Restraint is Not a “Medical Purpose”

The deliberate use of psychotropic medications to control nonconforming or problematic behavior of state-involved children for the convenience of others obviously violates the 1971 Convention’s medical purposes requirement. According to the American Association of Child and Adolescent Psychiatry (“AACAP”), “chemical restraint” of a child is the use of a drug without a therapeutic purpose, but for the sole purpose of sedating and immobilizing the child. Chemical restraint of children has

202. INCB 2000 Report, supra note 6, at para. 2 (observing that “in the absence of perfect alternatives, many less than ideal . . . psychotropic substances continue to be used today as pharmaceuticals for the treatment of diseases and the alleviation of pain and other forms of human suffering. Their actual value in medicine always depends on the availability of safer alternatives for the same purposes.”).

been roundly condemned by the AACAP, the Child Welfare League, and Amnesty International. Despite the fact that there is virtually no research to support the use of psychotropics on children for such conditions as “acute aggression,” state-involved children are sometimes given these powerful, brain-altering chemicals simply for being aggressive, unruly, or otherwise problematic.

Juvenile prison staff members are often given authority to forcibly inject children with psychotropic drugs on an “as needed” (“p.r.n”) basis “simply to stop the current aggressive outburst” of a child. United States Department of Justice (“DOJ”) investigative letters reporting on conditions in juvenile prisons across the country have noted the routine use of psychotropic medications by juvenile prison staffs to restrain, punish, and sedate incarcerated children—sometimes simply for annoying behavior. For example, federal investigators found that children in a

[144x674]2010]  "THEY USE IT LIKE CANDY"  493

[238x674]

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Georgia facility “were subject to forced injections [of psychotropic drugs] as punishment for angering staff nurses, rather than as an appropriately monitored medical treatment to prevent injury to the youths or others.” The investigators emphasized that the practice of giving juvenile prison staffs unrestrained authority to give psychotropic drugs to children on an “as needed” basis “is subject to dangerous abuses in a correctional setting.”

Similar misuse of psychotropic drugs in the foster care setting is well-documented. For example, a physician reviewing the medication records of children in the Texas foster care system found sparse support for the aggressive use of psychotropic medications discovered there. The report questioned whether the children had behaved in ways “sufficiently aberrant to warrant these medication practices,” and wondered whether the children had simply been “medicated” into compliance for home expectations. The report alleged that some foster care parents sought out medication for children in their care not only to make them more

that psychotropic medication decisions appeared to be “directed at behavior control rather than improved functioning, a practice that represents a substantial departure from generally accepted standards of treatment.” Letter from R. Alexander Acosta, Assistant Att’y Gen., U.S. Dep’t of Justice, to Robert L. Ehrlich, Jr., Governor, State of Maryland 27 (Apr. 9, 2004), available at http://www.justice.gov/crt/split/documents/cheltenham_md.pdf. The investigators found that “youth are often prescribed sleep medications with little justification. These medications are often administered late in the afternoon, thus unnecessarily sedating youth early, making them less able to participate in evening programs.” Id. at 28. A 2007 report found that staff at the Marion Juvenile Correctional Facility in Marion, Ohio, used four-point restraints, bed restraints and forced medications to manage severely mentally ill youth. Letter from Wan J. Kim, Assistant Att’y Gen., U.S. Dep’t of Justice, to Ted Strickland, Governor, State of Ohio 12 (May 9, 2007), available at http://www.justice.gov/crt/split/documents/marion_findlet_5-9-07.pdf.

209. Georgia Findings Letter, supra note 208, at n5.

210. Id.

211. See sources cited supra note 106; Potent Pills: More Foster Kids Getting Mood-Altering Drugs, DEMOCRAT & CHRONICLE, Dec. 9, 2007 (investigating psychotropic drug use amongst New York foster children and questioning whether sharp increase in such use is “because they have so many needs” or whether drugs are “used more as a convenient way to straitjacket troublesome behavior”); Crary, supra note 95 (summarizing concerns about overmedication of foster children in Florida, Texas, California, and New York, and reporting that “[s]ome parents and advocacy groups say child welfare authorities routinely resort to drugs to pacify foster children without fully considering non-medication options”); Carol Marbin Miller, 1 in 4 Foster Kids on Risky Mind Medication, MIAMI HERALD, Jan. 15, 2005, at 1A (noting evidence that some children in the care of the Florida Department of Children and Families are prescribed psychotropic medications simply to address behavioral problems).

212. STRAYHORN, supra note 101, at 204.
submissive during care, but, more nefariously, to get more money in public benefits.213

State-involved children are not only vulnerable to the misuse of psychotropic drugs for the purpose of behavior control; they are also at high risk of being wrongly diagnosed with a mental illness for which medication is then prescribed.214 As compared to children in the general population, children in foster care and juvenile justice systems are disproportionately exposed to a variety of risk factors that may negatively impact their mental, emotional, and cognitive development, and which may lead to acting out behaviors and emotional disturbances.215 Premature birth, prenatal drug and alcohol exposure, parents with mental illness or substance abuse problems, exposure to high levels of violence in their homes or communities, child maltreatment, and poverty are all risk factors that may contribute to acting out behaviors and cognitive, mental, and emotional difficulties.216 The medicalization of these problems “is likely to result in frequent misdiagnosis—labeling of behavioral problems that result from interpersonal difficulties, realistic feelings that are not excessive or out of proportion to the child’s real life experiences, or reactions to current life stresses as major psychiatric disorders needing possibly unnecessary medical treatment.”217

213. Id. at 199 (survey comments expressing concern that Texas foster children were “medicated for higher-level ratings [more money for agency and parents] instead of assisting foster parents in making these kids good citizens” and that children “were given astronomical amounts of medication. Diagnoses were altered to accommodate hallucination[s] which may have been induced by overmedication.”).

214. As Comptroller Carole Strayhorn astutely observed in Forgotten Children:

Many foster children have psychological problems and are being treated with an array of medications to manage their symptoms. But even fundamentally normal children who have been taken from their homes and families can become aggressive and “emotionally reactive” due to a lost sense of trust and their conditions are only worsened by multiple placements and frequent caseworker turnover. As their feelings of instability increase, their emotions may erupt, and their caretakers then are, in the words of one child psychiatrist, “just chasing an untreatable problem with more medication.

Strayhorn, supra note 101, at 199.

215. See, e.g., Naylor et al., supra note 15 at 176.


217. Irwin, supra note 216, at 1. Irwin stresses that foster children’s expressions of “unhappiness, sadness, worry and anger,” which are appropriate and understandable res-
The use of psychotropic drugs to control nonconforming behavior of children is not a new phenomenon in the United States. For example, in 1975, the United States Senate heard testimony describing the “chemical straitjacketing” of thousands of children within the juvenile justice system and in other institutions. The use of psychotropic drugs to chemically restrain state-involved children without medical justification clearly violates the medical purposes requirement of the 1971 Convention, and damages rather than improves the health and well-being of children who are subjected to this horrendous and illegal practice. The United States government must comply with its obligation under the 1971 Convention and put an end to this long-standing and egregious abuse of state-involved children.

B. Contesting the Characterization of Childhood Behavior as “Disease”

A fundamental pre-condition of legitimate medicinal use of a scheduled psychotropic drug under the 1971 Convention is the presence of “disease.” Whether the widespread use of psychotropic drugs to address problematic behaviors exhibited by state-involved children constitutes a legitimate medical purpose under the 1971 Convention is highly questionable. The trend toward medicalization of child behavior can be seen as a key factor contributing to the increasing prescription of psychotropic drugs to state-involved children in the United States.

Medicalization of social problems has been described as “a process by which nonmedical problems become defined and treated as medical problems.” Undergirding the contemporary expression of this process is the reality of their lives “can easily be confused with depression, anxiety or bipolar disorder, ADHD or conduct disorder.” Id.; see also Foster Child Medication Parameters, supra note 216 at 2 (noting that foster children “often present with a fluidity of different symptoms over time reflective of past traumatic and reactive attachment difficulties that may mimic many overlapping psychiatric disorders. Establishment of rapport is often difficult. These multiple factors serve to complicate diagnosis.”).

218. Drugs in Institutions, supra note 87. The inappropriate use of psychotropic drugs as chemical restraints has been noted in other confinement contexts. See, e.g., Auerhahn & Leonard, supra note 207, at 604 (describing use of psychotropic medication as disciplinary tools in prisons, and observing that “jail and prison inmates in the United States are frequently medicated without diagnosis or proper psychiatric and physical assessments”); see also 42 C.F.R. § 483.13(a) (2009) (“The [nursing home] resident has the right to be free from any physical or chemical restraints imposed for purposes of discipline or convenience, and not required to treat the resident’s medical symptoms.”).


is the idea that a broad array of mental, emotional, and behavioral manifestations are the result of chemical imbalances in the brain and that the right pill will correct this imbalance and make the problems go away.\textsuperscript{221} The INCB has repeatedly expressed concern about the use of psychotropic drugs in the United States to address typical childhood behaviors and social difficulties. For example, in a 1996 press release, the INCB highlighted concerns expressed in its 1995 annual report about “the unprecedented sharp increase” in the “controversially extensive use” of methylphenidate in treating ADD in children.\textsuperscript{222} The Board noted concerns that doctors prescribing methylphenidate might be “too often overlooking other causes for attention and behaviour problems” and “opting for an ‘easy’ solution for behavioral problems that may have complex causes,”\textsuperscript{223} The following year, the INCB said that abuse of amphetamine-type stimulants such as methylphenidate had reached “epidemic proportions,” and stressed that “despite the warning issued a year ago, the issue still requires serious attention.”\textsuperscript{224} Observing that ADD is “a syndrome largely manifested in behavioral patterns” with the primary signs being “inattention, impulsivity, and, in some cases, hyperactivity,” the INCB took special note of warnings about the highly subjective nature of “parents’ and teachers’ assessments of what constitutes ‘inattention’ and ‘impulsivity.’”\textsuperscript{225}

Dr. Hamid Ghodse, the immediate past president of the INCB, has denounced the “liberal use of a drug with the specific intention of modifying a child’s behavior such that he or she becomes more compliant and

\textit{The key to medicalization is definition. That is, a problem is defined in medical terms, described using medical language, understood through the adoption of a medical framework, or “treated” with a medical intervention. Thus, we can examine the medicalization of epilepsy, a disorder most people would agree is “really” medical, as well as we can examine the medicalization of alcoholism, or ADHD, menopause, or erectile dysfunction. While “medicalize” literally means “to make medical,” . . . the main point in considering medicalization is that an entity that is regarded as an illness or disease is not ipso facto a medical problem; rather, it needs to become defined as one. 

\textit{Id.}  
\textsuperscript{221} See generally Mayes & Horwitz, \textit{supra} note 121.  
\textsuperscript{223} \textit{Id.}  
\textsuperscript{224} International Narcotics Control Board, \textit{supra} note 6.  
\textsuperscript{225} \textit{Id.}
less troublesome.” Dr. Ghodse has asserted that children in the United States “who are prescribed drugs for attention-deficit hyperactivity disorder (ADHD) are often not ill,” and believes that “[w]e are medicalising something that is often not a medical condition,” and that psychotropic drugs are too often “used to counter social problems, sometimes without solid medical justification.”

Indeed, the editors of the Diagnostic and Statistical Manual of Mental Disorders (“DSM-IV”) themselves admit that the manual describes diagnoses “strictly in terms of patterns of [behavioral] symptoms that tend to cluster together. These symptoms can be observed by the clinician or reported by the patient or family members.” The American Academy of Pediatrics (“AAP”) has noted that “the specification of behavior items, number of items, and level of impairment” required for a DSM-IV diagnosis of ADHD are simply reflections of “the current consensus among clinicians, particularly psychiatry.” The AAP emphasizes that “[d]espite the agreement of many professionals working in this field, the DSM-IV criteria [for ADHD] remain a consensus without clear empirical data . . . . [T]he behavioral characteristics specified in DSM-IV, despite efforts to standardize them, remain subjective and may be interpreted differently by different observers.”

Given the deep uncertainties surrounding the origins of symptomatic patterns exhibited by those labeled with a psychiatric diagnosis, the lack of empirical support is unsurprising. In fact, the DSM-IV editors candidly acknowledge that “there is no objective marker that can identify a large majority of mental disorders; diagnosis is a judgment call based on an interview and/or observation of behavior.”


227. Id.


231. Id. at 1162–63.

232. Albee, supra note 130, at 638.
“the cause of most mental disorders is currently unknown and subject to much speculation,” they caution that

patients sharing the same diagnostic label do not necessarily have disturbances that share the same etiology nor would they necessarily respond to the same treatment. It is therefore critical to understand that the diagnostic terms and categories in the DSM represent only current knowledge about how symptoms cluster together. We fully expect that, over the coming decades, the DSM system will be radically reorganized as the etiologies of mental disorders become better understood.233

Nevertheless, various professional associations actively promote the view that mental disturbances are organic in nature. For example, while asserting that mental disorders represent “dysfunctions of the highest integrative functions of the human brain including cognition, or thought; emotional regulation; and executive function, or the ability of the brain to plan and organize behavior,” the American Psychiatric Association acknowledges that “brain science has not advanced to the point where scientists or clinicians can point to readily discernible pathologic lesions or genetic abnormalities that in and of themselves serve as reliable or predictive biomarkers of a given mental disorder or mental disorders as a group.”234 The American Association for Marriage and Family Therapy flatly states on its website that “[m]ental illnesses are biologically based, meaning that chemicals or structures in the brain are not working as they are supposed to, resulting in symptoms that cannot be managed or overcome without treatment, often resulting in lives that are unstable and unfulfilled.”235 The website goes on to state that “[d]ue to the biological basis of [childhood onset mental illness or ‘COMI’], psychiatric evaluation and treatment is generally necessary. The disorders associated with COMI usually require medications for symptom management.”236

These pronouncements are remarkable in light of the fact that the idea that there is irrefutable scientific evidence that mental illness is biologically based was soundly refuted by a panel of experts convened in 1998 by the National Institutes of Mental Health to study Attention Deficit Hyperactivity Disorder (“ADHD”). The panel explicitly confirmed that there exists no evidence to establish ADHD, or any other psychiatric disorder, as a brain disease. “After years of clinical research and experience with ADHD,” the panel reported, “our knowledge about the cause or causes of ADHD remains largely speculative.” Further, such a lack of scientific evidence “is not unique to ADHD, but applies as well to most psychiatric disorders, including disabling diseases such as schizophrenia.” Thus, the conclusion that a child is suffering from a psychiatric disorder or mental illness is not based on biological or physiological measures, but on normative value judgments and subjective characterizations of the child’s behavior. As explained by one physician, there are no specific blood tests, brain scans, or any other procedure guaranteed to give us an unequivocal answer to any given child’s “real” problem. Instead, we must rely on what we see and hear during clinical visits and learn from taking a history to try to fit each child into the right diagnostic box, and the definition of who belongs in each box can change over time.

238. Id.; see also Breggin & Breggin, supra note 189, at 53–55 (highlighting lack of proof for claims that mental illness is biomedically or genetically based); Albee & Joffe, supra note 236.
239. See Nat’l Inst. of Health, supra note 176; see also Elliott & Kelly, supra note 23, at 59 (“The fact that there is no definitive test for ADHD or other disruptive disorders further complicates the situation. The behaviors that we use to define these disorders are by no means specific to the disorder—they can arise from a variety of conditions or even represent normative behavior.”).
240. See, e.g., Baughman, supra note 236 (arguing that “[i]f there is a macroscopic, microscopic, or chemical abnormality, a disease is present. Nowhere in the brains or bodies of children said to have ADHD or any other psychiatric diagnosis has a disorder/disease been confirmed.”); see also APA Press Release, supra note 234 (rejecting the critique that the lack of a diagnostic laboratory test capable of confirming the presence of a mental disorder constituted evidence that these disorders are not medically valid conditions,” but nevertheless acknowledging that “[i]n the absence of one or more biological markers for mental disorders, these conditions are defined by a variety of concepts,” including “the distress experienced and reported by a person who has a mental disorder; the level of disability associated with a particular condition; patterns of behavior; and statistical deviation from population-based norms for cognitive processes, mood regulation, or other indices of thought, emotion, and behavior.”).
If state-involved children are given psychotropic drugs on the premise that the drugs have medicinal value in the treatment of disease, it would arguably be necessary to demonstrate with sound evidence that the children are indeed suffering from a medical disease or illness. To the extent that behavioral problems exhibited by state-involved children are largely the result of predictable and normal reactions to the stresses from their life experiences and are not evidence of medical disease or illness, “treatment” of these behaviors with psychotropic drugs is glaringly inconsistent with the medical purposes requirement set out in Article 5 of the 1971 Convention.

C. Treating Children with Psychotropic Drugs “Off-Label”: “Legitimate Medical Use”?

Under Article 10 of the 1971 Convention, the United States government must “require . . . such directions for use, including cautions and warnings, to be indicated on the labels where practicable and in any case on the accompanying leaflet of retail packages of psychotropic substances, as in its opinion are necessary for the safety of the user.” However, the overwhelming majority of psychotropic drugs prescribed to children are prescribed “off-label,” meaning that they have not been approved by the FDA for pediatric use. Consequently, their labels do not provide child-specific instructions for use or cautions or warnings necessary to ensure the safety of the children taking them.

242. BROWN & SAWYER, supra note 3, at 14 (noting that use of medication for the management of behavioral problems in classroom settings for diagnostic entities, particularly ADHD, are more often based on insufficient normative data rather than on any solid scientific basis). Indeed, several years before the NIH Consensus Statement, Peter Breggin similarly observed:

There are some real diseases that produce brain damage and mental dysfunction. The defects can be genetic, as in a limited number of cases of Alzheimer’s disease, in some forms of mental retardation, such as Down’s syndrome, and in dementing disorders such as Huntington’s chorea. In each case there is a generalized impairment of the brain, resulting in measurable losses of mental function, such as short-term memory, calculating, and abstract reasoning. These losses can be detected in clinical interview and often they can be roughly quantified on neuropsychological testing. But even in severe psychiatric disorders, such as “schizophrenia” or “manic-depressive disorder,” brain function is not impaired, and no biological cause has been discovered . . . often the individual is functioning at a superior level of intelligence and mental ability.

BREGGIN & BREGGIN, supra note 189, at 54.

243. 1971 Convention, supra note 4, art. 10(1).
In its role as the “competent regulatory authority” of the United States government, the Food and Drug Administration approves prescription drugs for sale and marketing. Approval is granted only if the human studies conducted by the drug company support a drug’s safe and effective use by the tested populations. As part of the approval process, manufacturers are required to submit proposed labeling, which must contain “a summary of essential scientific information needed for the safe and effective use of the drug,” including the product’s intended use—for example, the conditions it treats, the appropriate patient population, administration and dosage information, and contraindications, warnings, and precautions. “Contraindication” describes “situations in which the drug should not be used because the risk of use . . . clearly outweighs any possible therapeutic benefit.” “Warnings and precautions” describe “clinically significant adverse reactions . . . , other potential safety hazards . . . , limitations in use imposed by them . . . , and steps that should be taken if they occur,” and any other “information regarding any special care to be exercised by the practitioner for safe and effective use of the drug.”

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244. See INCB 2003 REPORT, supra note 6, at para. 234.
246. See 21 C.F.R. § 314.2 (2009); Althea Gregory, Denying Protection to Those Most in Need: The FDA’s Unconstitutional Treatment of Children, 8 ALB. L. J. SCI. & TECH. 121, 126–27 (describing in detail the FDA’s drug approval process). It is important to note that, in reporting the usefulness or potential benefits of psychopharmacotherapies for psychiatric disorders or their symptoms, researchers distinguish between efficacy and effectiveness of a particular treatment. As Grisso explains, in research into the efficacy of a psychopharmacological treatment, study patients are “selected according to rigorous specifications to ensure that they have the disorder for which the method is intended to be of benefit,” and the psychotropic medication is employed “under highly controlled conditions.” GRISSO, supra note 51, at 87. Grisso further notes:

Efficacy is expressed as the proportion of patients in the experimental group, compared to the proportion of patients in the control group, who demonstrate a specific beneficial outcome (as measured with standardized instruments). In contrast, a method’s effectiveness refers to its value in the real world where researchers cannot control the quality of its application. . . [T]he effectiveness of a method of therapy refers to its value when ordinary clinicians in actual clinical settings provide it to whatever patients obtain their services.

Id.

248. 21 C.F.R. §§ 201.56(b)(1), 201.57(c)(5) (2009).
249. 21 C.F.R. § 201.57(c)(6)(i)–(ii).
The most common use of “off-label” prescription occurs when drugs approved for the treatment of adults are prescribed to treat children. In the United States, “approximately 45% of medications used for the treatment of emotional or behavioral disturbances in children are [prescribed] off-label, [with] no approved use, medical or psychiatric, for patients under 18.” Additionally, only about one-third of psychotropic drugs are approved for psychiatric treatment of children; some of them, such as divalproex sodium (Depakote) and clonidine, “are approved for the treatment of specific medical illnesses in patients less than 18 years of age, but not for the treatment of psychiatric disorders.” Thus, most psychotropic drugs prescribed to children do not carry child-specific labeling information.

Accurate labeling information is crucial to the safety and well-being of state-involved children who are prescribed psychotropic drugs. Prescription drug labels or packet inserts are “intended to provide all of the information judged to be necessary for the drug or biological to be used safely and effectively for the approved indication(s).” However, doctors routinely prescribe psychotropic drugs to state-involved children without any clinically-tested proof that they are safe or effective for use in children, and with little or no label information to guide their decision-making as to if and how to use them. Thus, the United States government’s failure to require child-specific labeling of psychotropic drugs in compliance with the 1971 Convention’s regulatory agency approval not

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252. Naylor Testimony, supra note 251 (emphasis added).


254. Id.

255. See Psychotropic Medication Patterns, supra note 12. Dr. Zito’s study of psychotropic drug prescribing to youth in foster care noted “the prominent [off-label] use of patent-protected, expensive psychotropic medications” such as sertraline and escitalopram, which “comprised 74% of SSRI use in the study month, although neither drug has a labeled indication for the treatment of depression in children and adolescents.” Id. at 161.
only violates the convention’s medical purposes requirement, but more importantly, puts hundreds of thousands of children at grave risk of harm from exposure to powerful and addictive psychotropic drugs.

Off-label prescribing, even of controlled substances, is not illegal, and the FDA does not regulate the practice. Off-label prescribing of FDA-endorsed drugs is minimal; physicians may use FDA approved drugs “in whatever way they deem beneficial, as long as there is some evidence that it could be helpful.” Particularly with respect to psychotropic drugs under international control, the FDA’s permissive stance seems untenable, given that the off-label use of psychotropic medications in children is “plagued with uncertainties about genuine efficacy and safety.”

Although there are laws designed to induce pharmaceutical companies to gather information about the safety and efficacy of their products in children, and to provide the same dosing and risk information as is required for adults, most psychotropic drugs commonly prescribed to state-involved children still do not contain this information. However, while these laws have somewhat increased the number of prescription drugs that provide child-specific dosing and risk information, they have not, for the most part, resulted in psychotropic drug labeling changes sufficient to provide prescribers and parents with necessary use and risk informa-

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256. See 21 U.S.C. § 396 (2006) (“Nothing in this chapter shall be construed to limit or interfere with the authority of a health care practitioner to prescribe or administer any legally marketed device to a patient for any condition or disease within a legitimate health care practitioner-patient relationship.”).

257. ELLIOTT & KELLY, supra note 26, at 23.

258. Id. Using the example of how anticonvulsants approved by the FDA for controlling epileptic seizures in adults came to be widely used for treating bipolar disorder in children, Dr. Elliot explains that if a physician concludes that a medication seems to help with a condition for which the FDA has not given its approval, “the clinician may publish what is called a case report, or may simply tell colleagues, who pass it on to other colleagues. Word spreads, and others begin using it. Inevitably, it starts being used in children and adolescents too . . . . This type of work, often just clinical reports based on a few patients, is much simpler, faster, and far cheaper than what the FDA requires.” Id.

Given the well-founded concerns about the safety of psychotropic drugs, particularly the long-term risks to children’s developing brains, the United States’ continued failure to require regulatory approval for pediatric use of psychotropic drugs and appropriate child-specific labeling in contravention of the 1971 Convention is egregious.

D. Safer Alternatives to Psychotropic Drug Therapy Are Available

A thorough assessment of the legitimacy of psychotropic drug use for state-involved children under the 1971 Convention requires a consideration of the availability of safer alternatives for addressing each child’s presenting issues. The INCB stresses that the actual value of a scheduled psychotropic drug for medical purposes “always depends on the availability of safer alternatives for the same purposes.”

Addressing this very issue, a comprehensive study examining the evidence base of psychopharmacological and psychosocial interventions for childhood disorders released in 2006 by the American Psychological Association (the “APA”) stated that “[t]he preponderance of available evidence indicates that psychosocial treatments are safer than psychoactive medications.”

Indeed, experts agree that most children and teenagers suffering from psychological problems do not require psychiatric medication; instead, as recommended by the APA Working Group, best practices indicate that

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260 See BPCA REPORT, supra note 251; see also Joseph Deveaugh-Geiss et al., Child and Adolescent Psychopharmacology in the New Millennium: A Workshop for Academia, Industry, and Government, J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 261, 264 (2006) (stating that “despite the many studies generated by the FDAMA [Food and Drug Administration Modernization Act], only about one third of drugs used in children have pediatric prescribing information in the product label. In psychopharmacology, of the 12 products granted exclusivity, the studies resulted in additional indications for just four products: sertraline for pediatric obsessive-compulsive disorder, and Adderrall XR, Concerta, and atomoxetine for adolescent ADHD. The latter three were already intended for use in childhood ADHD, and the labeling was simply expanded to include use in adolescents. . . . [O]therwise, exclusivity studies of psychopharmacological agents have, for the most part, resulted in labeling language noting that clinical studies did not support a pediatric indication.”).

261 See, e.g., Daryl Efron et al., Prescribing of Psychotropic Medications for Children by Australian Pediatricians and Child Psychiatrists, 111 PEDIATRICS 372, 373 (2003), available at http://pediatrics.aappublications.org/cgi/reprint/111/2/372 (noting that “for many psychotropic medications it is not clear that the benefits outweigh the potential harms in children. Potential long-term effects are of concern, particularly given the increasing understanding of the susceptibility of the developing brain, biochemically and even microstructurally, to environmental influences.”).

262 INCB 2000 REPORT, supra note 6, at para. 2.

263 WORKING GROUP ON PSYCHOACTIVE MEDICATIONS FOR CHILDREN AND ADOLESCENTS, supra note 41.
psychosocial interventions, most often involving the family, as well as
the individual, can be effective in addressing children’s problems.\textsuperscript{264}
Even in regard to those childhood conditions that are judged to be largely
neurobiological in nature and responsive to medication treatments, most
experts agree that medication should \textit{never} be the sole treatment.\textsuperscript{265}

There are a host of evidence-based approaches available to address
children’s mental health needs, including: cognitive behavioral therapy,
assertiveness training, problem-solving skills training, traditional patient-
therapist relationships, peer group therapy, functional family therapy,
multi-systemic therapy, and systems therapy, to name a few.\textsuperscript{266} As noted
child mental health expert Dr. Thomas Grisso explains, there are a range
of approaches to children’s mental health that do not rely on drugs:

At one end of this spectrum is any mode of treatment primarily involv-
ing a therapist and a patient in conversation, for any theoretical or prac-
tical reason, focused on changing the patient’s behavior, thinking, or
emotional condition. At the other end is an intervention that seeks these
changes by altering the environmental circumstances in which the pa-
tient is expected to function in everyday life. Midway along this spec-
trum are a variety of methods that involve direct work with the patient
in the context of people and social systems that are important in the pa-
tient’s life.\textsuperscript{267}

Also taking note of the link between excessive and exclusive reliance
on pharmacological treatment of mental disorders and psychiatric condi-
tions and overconsumption of psychotropic drugs, the INCB has ob-
served that “[t]here is a wide range of complementary or alternative
treatment approaches for many of the mental disorders and painful condi-
tions treated today with pharmaceuticals (psychotherapy, counseling,
traditional medicine), and such alternatives may often be culturally more
relevant and more effective.”\textsuperscript{268}

Nevertheless, despite the existence of these safer alternatives that may
improve children’s daily functioning without the serious risks associated
with psychotropic drugs, treatment with psychotropic medication is the

\textsuperscript{264} John Preston et al., Child and Adolescent Clinical Psychopharmacology Made Simple 2 (2d ed. 2010).
\textsuperscript{265} Id. Foster Child Medication Parameters, supra note 216, at 3 (observing that “[g]iven the unusual stress and change in environmental circumstances associated with being a foster child, counseling or psychotherapy should generally begin before or concurrent with prescription of a psychotropic medication.”).
\textsuperscript{266} Grisso, supra note 51, at 84–85; see also Elliott & Kelly, supra note 26, at 227–39 (describing psychotherapies, natural treatments, and somatic treatments).
\textsuperscript{267} Grisso, supra note 51, at 84–85.
\textsuperscript{268} INCB 2000 Report, supra note 6, at para. 28.
only treatment considered and implemented for dealing with the problematic behavior of large numbers of children in foster care and juvenile prisons. The availability of nondrug alternatives that rely on interpersonal relationships and support for the youth, his or her family, community, and the systems in which he or she operates substantially undermine the notion that administration of psychotropic drugs to children serves a “legitimate medical use” under the 1971 Convention, especially given the well-documented risks and lack of scientific evidence of their safety and efficacy.269

For all the above reasons—concerns about the validity of classifying childhood behaviors as disease; the availability of less harmful and potentially more beneficial therapies to address children’s emotional, behavioral, and cognitive difficulties; and the virtually complete absence of scientific proof of the efficacy and safety of their use for childhood disorders—pediatric psychopharmacotherapy as commonly practiced in the United States does not satisfy the 1971 Convention’s requirement that psychotropic drugs be strictly limited to use for “medical purposes.”

VI. PSYCHOTROPIC DRUGS ARE NOT PRESCRIBED TO CHILDREN IN STATE CUSTODY IN ACCORDANCE WITH SOUND MEDICAL PRACTICE

Article 9 of the 1971 Convention imposes another requirement, distinct from, but integral to the “medical purposes” requirement of Article 5. Article 9 requires the United States government to ensure that psychotropic drugs are prescribed “in accordance with sound medical practice and subject to such regulation . . . as will protect the public health and welfare.”270 To ensure compliance with the sound medical practice requirement, the INCB insists that governments establish national standards for prescribing and administering psychotropic drugs.271 In the United States, a number of professional organizations have published 269. See, e.g., R. Elliott Ingersoll et al., Children and Psychotropic Medication: What Role Should Advocacy Counseling Play?, 82 J. COUNSELING & DEV. 337 (2004); Lidia Wasowicz, Ped Med: Non-Drug Options Slighted?, UPI.COM, July 16, 2007, http://www.upi.com/Consumer_Health_Daily/Reports/2007/07/16/ped_med_nondrug_options_slighted/6725/.

270. 1971 Convention, supra note 4, art. 9(2) (“The Parties shall take measures to ensure that prescriptions for substances in Schedules II, III and IV are issued in accordance with sound medical practice and subject to such regulation, particularly as to the number of times they may be refilled and the duration of their validity, as will protect the public health and welfare.”).

271. INCB 1998 REPORT, supra note 6, at para. 32 (“National health authorities should implement drug control measures and ensure that good prescribing and dispensing practices are established and followed and that patients are provided with complete and correct information.”).
best practices guides for the use of psychotropic drugs in state-involved children,272 and increasing numbers of states have enacted legislation and/or agency level guidelines aimed at setting standards and guidelines for monitoring psychotropic drug prescriptions for state-involved children.273 However, despite the growing recognition of the urgent need for close control and monitoring of psychotropic drug prescriptions to state-involved children, to date, the federal government has not set national, uniform standards to ensure that they are prescribed and administered to state-involved children only for medical purposes and in accordance with sound medical practice. In the absence of such legislation, state-involved children are routinely subjected to egregious and flagrant violations of their right under the 1971 Convention to be free from illegitimate exposure to psychotropic drugs.

The United States government itself has documented many of these abuses in juvenile prisons across the country. Pursuant to its authority under the Civil Rights of Institutionalized Persons Act of 1980 (CRIPA), the Attorney General investigates institutional conditions and may file lawsuits to remedy a pattern or practice of unlawful conditions uncovered.274 The Attorney General is also authorized, under the Violent


273. See Naylor et al., supra note 15, at 181 (the authors provide a table summarizing psychotropic medication consent procedures by state); see also Informational Letter from Office of Strategic Planning & Policy Dev., N.Y. State Office of Children and Family Serv., to Commissioners of Social Services et al. (Feb. 13, 2008), available at http://www.ocfs.state.ny.us/main/sppd/health_services/manual.asp (regarding The Use of Psychiatric Medications for Children and Youth in Placement: Authority to Consent to Medical Care).

274. In pertinent part, the Civil Rights of Institutionalized Persons Act provides that

[w]hensoever the Attorney General has reasonable cause to believe that any State or political subdivision of a State, official, employee, or agent thereof, or other person acting on behalf of a State or political subdivision of a State is subjecting persons residing in or confined to an institution . . . to egregious or flagrant conditions which deprive such persons of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States causing such persons to suffer grievous harm, and that such deprivation is pursuant to a
Crime Control and Law Enforcement Act of 1994, to sue administrators of juvenile justice systems where there is a pattern or practice of violating incarcerated juveniles’ federal statutory and constitutional rights.\textsuperscript{275} Over the years, pursuant to the Attorney General’s authority under these laws, investigations by the Special Litigation Section (the “SLS”)\textsuperscript{276} of the United States Department of Justice, Civil Rights Division have called attention to numerous flagrant and dangerous departures from generally accepted medical practices in almost every area relating to the prescription and administration of psychotropic drugs in juvenile prisons across the country. The DOJ has documented a frightening array of substandard practices and substantial departures from generally accepted medical practices that not only constitute serious violations of children’s constitutional rights, but, as the following analysis will demonstrate, also contravene the 1971 Convention’s mandate that the government ensure that sound medical practices are followed in the prescription and administration of controlled psychotropic drugs.

Children in juvenile prisons are subjected to substantial departures from sound medical practices in almost every area of psychotropic drug administration. For example, DOJ investigations have documented fail-
to follow proper psychiatric diagnostic procedures, and administration of psychotropic drugs to children by staff untrained in psychiatric diagnosis or psychopharmacology. The failure to gain informed consent or court authorization for psychotropic drug treatment is pervasive, and drugs are commonly used as the sole intervention for children’s mental health problems, without any attempts to integrate appropriate psychotherapy or other types of counseling. Documentation supporting the use of medications and medical charting is often incomplete or missing altogether, and close monitoring of the effectiveness of pre-

277. See, e.g., Letter from Loretta King, Acting Assistant Att’y Gen., U.S. Dep’t of Justice, to David A. Patterson, Governor, State of New York 17 (Aug. 14, 2009), available at http://www.justice.gov/crt/split/documents/NY_juvenile_facilities_findlet_08-14-2009.pdf [hereinafter New York Findings Letter] (finding that the majority of psychiatric evaluations at juvenile facilities “did not come close to meeting the criteria” for professional standards of care for youth in juvenile detention facilities; “[t]he evaluations typically lacked basic, necessary information, including justification for the diagnosis and evidence of prior record review. As a consequence, the treatment of youth with serious mental illness was based on poor information and was generally ineffective.

278. See, e.g., Letter from R. Alexander Acosta, Assistant Att’y Gen., U.S. Dep’t of Justice, to Jennifer M. Granholm, Governor, State of Michigan 14–15 (Apr. 19, 2004), available at http://www.justice.gov/crt/split/documents/granholm_findingslet.pdf [hereinafter Michigan Findings Letter] (observing that the facility used “non-medical staff to dispense medications. Given that the staff have no training in pharmacology, side effect recognition, psychological aspects of medication compliance, or symptom management, this practice places both the youth and the facility at great risk. . . . We observed several occasions where medical personnel took it upon themselves to dispense especially dangerous medications.”). 

279. See, e.g., id. at 14 n.3 (noting that the facility “lack[ed] a formal policy regarding youth and/or parental consent to medication. Staff gave various answers when asked about the facility’s practice regarding consent, evidencing the absence of a consistent practice.

280. See, e.g., Georgia Findings Letter, supra note 208 (observing that the contract psychiatrist, who was not a specialist in child and adolescent psychiatry, spent his time “solely monitoring psychotropic medications, meeting with youths on medications for brief (five- to fifteen-minute) interviews once a month” and “[v]ery few youths in any of the facilities receive[d] any significant psychotherapy, skilled mental health counseling or behavior management”); Michigan Findings Letter, supra note 278, at 13 (observing that the facility “fail[ed] to treat adequately youths with severe mental illnesses, lacks important protocols for psychotropic medication, and does not provide treatment planning tailored to the needs of the individuals with mental illness”)

281. See, e.g., Michigan Findings Letter, supra note 278, at 12–13 (“Neither the psychiatrists, who prescribe a range of psychotropic medications, nor the security staff . . . provide any information for the medical chart. As a result of this system, the use and reasons for the use of anti-psychotic medication are not always clearly documented in the medical chart. A youth may be prescribed a psychotropic medication by a psychiatrist for a mental illness or for a contraindicated use, but because the medication would not be documented in the medical chart, the facility physician could be unaware of the exis-
scribed drugs or the side effects on children’s health is often inadequate or absent. Additionally, at least one government investigation uncovered serious breaches in security in the monitoring of distribution of drugs, resulting in numerous instances of hoarding and illicit trafficking of medication among youth. The DOJ’s assessment of conditions at a Georgia juvenile prison succinctly captures the essence of the egregious departures from sound medical practice across the nation:

For example, at the Bill E. Ireland YDC, there were no diagnoses or initial psychiatric evaluations prior to beginning medications; no interaction between psychiatrists and medical or direct care staff; insufficient monitoring of the efficacy and side effects of drugs; inadequate follow-up and re-evaluation; and deficient record keeping. The facility’s contract psychiatrist has prescribed dangerously high dosages of medication, purpose, or reason for the medication. This leads to a dangerous situation where follow-up on medical care may not be done, or adverse drug interactions may occur.

New York Findings Letter, supra note 277, at 20 (“Across the four facilities, there was a pervasive lack of documentation of either the target symptoms for the medications or monitoring of the effectiveness (or lack thereof) of medication on those target symptoms.”).

282. Price, supra note 2 (“Wards [in California Youth Authority facilities] were prescribed Cylert, an [internationally controlled] central-nervous-system stimulant that can cause liver damage, but no follow-up liver-function tests were ordered.”). Concluding that “the overall risk of liver toxicity from Cylert and generic pemoline products outweighs the benefits of this drug,” the FDA withdrew approval of Cylert in 2005. See Safety Information, Food & Drug Admin., MedWatch, Cylert and Generic Pemoline Products, http://www.fda.gov/Safety/MedWatch/SafetyInformation/SafetyAlertsforHumanProducts/ucm151073.htm; see also New York Findings Letter, supra note 277, at 21 (finding “substantial departures from generally accepted professional standards” in facilities’ psychotropic medication practices; no charts were found “where youth were being monitored for abnormal involuntary movement. . . . [T]he psychiatrists confirmed that they did not routinely monitor for involuntary movements but one agreed that ‘it would probably be a good idea.’ In addition, there are no system-wide protocols specifying which medications require which laboratory examinations. Where laboratory examinations were conducted, they omitted critical information.”).

283. See, e.g., Letter from R. Alexander Acosta, Assistant Att’y Gen., U.S. Dep’t of Justice, to Brad Henry, Governor, State of Oklahoma 13 (June 8, 2005), available at http://www.justice.gov/crt/split/documents/split_rader_findlet_6-15-05.pdf. The investigators found that children “regularly hoard medication and either share it with or sell it to other youth.” Id. In one instance, “a youth provided two pills of a psychotropic medication and two pills of an anti-depressant to two other youth who crushed the pills and snorted them. In another example, ‘a male youth swallowed eight pills during medication distribution. Over a two-week-period the youth had ‘cheeked’ some of his own medication and had received prescription medication from other youth.” Id. In yet another situation “a male youth provided 13 pills to three other youth. The three youth took the pills without knowing what they were. One youth, with slurred speech, informed staff that he wanted to fly like Superman.” Id.
tions (sometimes beginning youths on dosages five or six times acceptable starting dosages) without adequate evaluation or monitoring for serious side effects, as well as continued youths on non-therapeutic dosages of medications without taking adequate steps to determine their efficacy.284

The foregoing examples, documented by the United States government, clearly establish a nationwide pattern and practice of serious departures from sound medical practice in the use of psychotropic drugs among state-involved children in juvenile facilities. Similar conditions exist among children in foster care.285 To comply with the sound medical practice requirement in Article 9 of the 1971 Convention, the United States government must promulgate nationally applicable standards and guidelines to protect state-involved children from these rampant and improper breaches of proper medical protocol.

CONCLUSION

The conditions under which children in the foster care and juvenile justice systems are prescribed psychotropic medications in the United States do not come close to satisfying the standards established by the 1971 United Nations Convention on Psychotropic Substances. In the final analysis, the indiscriminate and unchecked use of psychotropic medications is a threat of great magnitude to the health, safety, and well-being of state-involved children. In the eloquent and poignant words of one child:

_Caged_
I’m a child in a cage,
locked in a mental hospital for being underage
and not being on DCF’s “page”,
I’m the property of the state
And of workers earning minimum wage,
I’m restrained and tranquilized
Like an animal on a stage,
I’m shut-up and shut-away
But I’m not allowed to feel rage,
I’m just a child in foster care
Growing up in a cage.
-Anna, Age 16286

Anna’s words are echoed by Dr. Peter Breggin, who says that “[c]hildren don’t have disorders. They live in a disordered world.”287 It is hoped that this Article will precipitate action by the United States government to closely study its obligations under the 1971 Convention on Psychotropic Substances, and take all necessary and appropriate measures to comply with its mandates. The government must act swiftly and aggressively to alleviate the unnecessary suffering of the thousands of children across America for whom the experience of being “restrained and tranquilized” has become disturbingly commonplace.

287. BREGGIN & BREGGIN, supra note 191, at 86.
GENETICALLY MODIFIED FOOD AND INFORMED CONSUMER CHOICE: COMPARING U.S. AND E.U. LABELING LAWS

INTRODUCTION

A lthough you might not know it, chances are that the salad you have for lunch or the crackers you eat as an afternoon snack contain some amount of genetically modified ("GM") plants.¹ Those ingredients almost certainly do not bear labels disclosing their genetic modifications. Even if they did, would you understand what the labels mean enough to make an informed decision whether to purchase and consume GM or non-GM food?

The labeling of genetically modified foods is an extremely complicated subject—one that falls at the intersection of a complex scientific field and deeply held religious, moral, and personal beliefs about what one puts into one’s body. It is possible that there is no right answer to the question whether foods should be labeled to indicate genetic modification.

Developments in the genetic engineering of food have been heralded by proponents and reviled by detractors. Proponents argue that genetically modified plants² provide important benefits, such as decreased pesti-

¹. See infra note 47.

². Unless specified otherwise, for the purposes of this Note, “plant foods” means crops grown for human consumption and products produced from those crops. This is in contrast to animals that are raised for human consumption. To date, the debate over biotechnology has centered around plants, as plants have been the GM products most widely available commercially. See AMERICAN MEDICAL ASSOCIATION, REPORT 10 OF THE COUNCIL ON SCIENTIFIC AFFAIRS (I-00) FULL TEXT: GENETICALLY MODIFIED FOOD AND CROPS (2000), available at http://www.ama-assn.org/ama/no-index/about-ama/13595.shtml. Thus, this Note will restrict its discussion to the debate surrounding GM plant foods. Regarding the scope of this Note, see infra note 24 and accompanying text.

The genetic modification of animals meant for human consumption raises many issues similar to those involved in the genetic modification of plant foods. However, as GM animals meant for human consumption are not currently available commercially, and since different laws apply to animals and plants—and different governmental agencies are responsible for monitoring the raising of food animals—labeling of GM food animal products is beyond the scope of this Note. The debate over labeling requirements with respect to animals will likely intensify as animals meant for human consumption increasingly become the focus of biotechnology developments. For example, regulatory approval of “Enviropigs” engineered to digest a higher percentage of phosphorous, resulting in waste that is less toxic to the environment, could come soon. Megan Ogilvie, Genetically Engineered Meal Close to Your Table, TORONTO STAR, Nov. 22, 2008, at A1, available at http://www.thestar.com/comment/columnists/article/541710.
cide use, increased vitamin content, and increased crop yields, and that they have great potential to yield even more impressive benefits in the future. Opponents claim that the technology poses significant risks, such as gene drift, the production of new allergens or toxins, and the transfer of genetically modified proteins to human cells. Still, genetically modified organisms ("GMOs") have not been demonstrated to be unsafe—in fact, they are safer than conventional or even organic food products by some measures.

GM plants have received relatively little public attention in the U.S., but they have been hotly debated and strongly resisted in Europe. In response to public fears in Europe, the European Union tried to ban the growth and importation of GMOs entirely, but the U.S., Canada, and Argentina successfully challenged this ban at the World Trade Organization ("WTO"). The WTO ruled that the E.U.'s GMO ban violated the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement"). To control the importation and domestic growth of GMOs, the E.U. now relies on strict approval processes for GMOs coupled with a labeling regime that has become the most complicated and stringent in the world.

The E.U.'s anti-GM attitude has spread to other countries, including Australia, New Zealand, Japan, Indonesia, and South Korea, all of which

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3. See infra note 48 and accompanying text.
4. See infra note 45.
5. U.S. Dep't of Agric., Biotechnology FAQ, http://www.usda.gov/wps/portal?!ut/p/\_s.7.0_A/7.0.1OB\_contentidonly=true&navid=AGRICULTURE&contentid=BiotechnologyFAQs.xml (last visited Apr. 11, 2010).
7. See infra note 61 and accompanying text.
9. See infra notes 78–81 and accompanying text.
11. This has resulted in a de facto ban on GMOs. See infra notes 76, 77, 155.
currently have some form of GM-labeling law in place. It has also caused particularly strong opposition to the planting of GM crops in Africa due to the fear that they would endanger African exports to the E.U. This fear has led some African governments to reject shipments of GM food aid, resulting in unnecessary starvation.

Proponents of labeling in these countries and others argue that the consumer has a “right to know” whether his or her food has been genetically modified. The U.S. Food and Drug Administration (“FDA”), however, rejects this view, stating that the consumer’s “right to know” is not a sufficient justification for mandatory labeling under existing law.

The FDA’s position is that, because GM technology does not result in an end product that is materially different from similar products produced by conventional agricultural methods, neither the fact that the food is GM nor the fact that it was produced using biotechnology needs to be disclosed on the label.

12. See infra notes 188–91 and accompanying text.


14. Some African governments have gone so far as to order shipments of food aid at their shores to return to the U.S. if the shipments contain GM corn, citing worries that farmers would save and replant the grain instead of eating it. Id. at 6. In October 2003, “Zambia refused 63,000 tons of GM corn from the United States intended to help relieve . . . famine.” Id. Zimbabwe has similarly refused shipments worth millions of dollars. Andrew Meldrum, Starving Zimbabwe Shuns Offer of GM Maize, The Guardian, June 1, 2002, at 19, available at http://www.guardian.co.uk/science/2002/jun/01/gm.zimbabwenews. These governments have chosen to let their people starve rather than give them food that American consumers have been eating for close to 20 years, with no demonstrated adverse health effects. Further, African farmers who choose to grow non-GM crops forego the increased yields available from GM crops. These farmers, the vast majority of whom are women, remain in poverty. They could potentially pull themselves out of poverty, as farmers in India and China did, by adopting GM varieties. Robert Paarlberg, Starved for Science: How Biotechnology is Being Kept Out of Africa 23 (2008). Thus, the debate over GMOs is a world trade issue, a globalization issue, a human rights issue, and a women’s rights issue.


16. See infra notes 132, 133, 142, and 143 and accompanying text. In other words, the FDA does not agree that the consumer has a right to know whether food is GM.

17. See infra notes 132–35 and accompanying text.
The FDA has approved many varieties of GM plants for commercial sale in the U.S. In light of the FDA’s position, the U.S. currently does not require producers of plant foods to disclose the presence of GM material by labeling their products. Some labeling is permitted, however. For instance, the FDA allows producers to label their products “GMO-free,” and the “USDA-Organic” label indicates that food is free of GMOs and GM material, among other things. The E.U., on the other hand, has not approved most GM crop varieties for commercial sale. For the few varieties it has approved, it requires that plant foods with more than 0.9% genetically modified content be labeled as “genetically modified.”

18. The list of approved crop varieties, now numbering more than 40, is available on the FDA’s website. U.S. Food & Drug Admin., The FDA List of Completed Consultations on Bioengineered Foods, http://www.cfsan.fda.gov/~lrd/biocon.html#list (last visited Apr. 11, 2010). Crops that have been the subject of successful modifications include plums, cantaloupes, papayas, tomatoes, corn, canola, soybeans, squashes, potatoes, radicchio, sugar beets, and cotton. Id. By far the largest commercial application of GM technology is in three crops: corn, cotton, and soybeans. See infra note 47.

19. See infra note 142 and accompanying text.

20. See infra note 143 and accompanying text.

21. 7 C.F.R. § 205.105. The F.D.A. regulation states that “to be sold . . . as ‘100 percent organic,’ ‘organic,’ or ‘made with organic (specified ingredients or food group(s)),’ the product must be produced and handled “without the use of . . . (c) excluded methods,” which § 205.2 of Subpart A defines to include genetic engineering methods such as “cell fusion, microencapsulation and macroencapsulation, and recombinant DNA technology.”


23. Council Regulation 1829/2003, 2003 O.J. (L 268); Council Directive 2001/18, art. 21 ¶ 2, 2001 O.J. (L 106) 13. For further discussion of the de minimis threshold, see infra note 180 and accompanying text. “Organism’ means any biological entity capable of replication or of transferring genetic material,” id. art. (1), and “genetically modified organism (GMO)” means an organism, with the exception of human beings, in which the
This Note proposes a framework for a U.S. labeling regime derived by comparing current regulations in the United States and the European Union that deal with genetically modified plants that are grown for human consumption. This scope is intended to address the most commercially significant applications of biotechnology to food. As yet, GM animals are not commercially available for human consumption. However, GM corn, cotton, oilseed rape (canola), and soybeans are widely available to consumers.

Part I provides background on biotechnology generally and the state of the debate between the U.S. and the E.U. regarding genetically modified food. Part II discusses the rationale behind labeling laws—that it is important for consumers to know the contents of the foods they purchase so that they may make informed choices. Part III examines the labeling regime in the U.S., which is currently voluntary at the federal level because regulators assume that biotech crops do not pose any dangers greater than those posed by conventional foods. Part IV examines the labeling regime in the E.U., which requires producers to label food products that contain at least 0.9% GM content. Part V proposes a labeling regime for the United States that would be a compromise between the polar positions taken by the U.S. and the E.U. Such a regime would consist of a federal law requiring plant foods that are GMOs or that contain more than a certain threshold GM content to be labeled “genetically modified.” The discussion of how to design a labeling regime highlights the difficulties associated with ensuring informed consumer choice, shedding further light on why the U.S. does not currently require labeling. Finally, genetic material has been altered in a way that does not occur naturally by mating and/or natural recombination.” Id. art. (2). This definition is incorporated into the Directive on Traceability and Labelling of GMOs, Council Regulation 1830/2003, art. 3, 2003 O.J. (L 268) 25–26, and the Directive on Genetically Modified (GM) Food and Feed, Council Regulation 1829/2003, 2003 O.J. (L 268). Together, these two sets of laws currently govern the labeling of GM content in food in the E.U.

24. To comprehensively address the concerns of consumer autonomy discussed in Part IV, any labeling regime would have to include labels on animal products grown for food as well. In the first instance, any direct modification of the genome of an animal grown for human consumption would have to be disclosed. Furthermore, even if the genome of an animal is not modified directly, the labeling regime should disclose whether the animal is fed genetically modified plant or animal products. However, laws applying to animals grown for human consumption are outside the scope of this paper.

25. See supra note 2.

26. GMO Compass, GMO Cultivation Area by Crop, http://www.gmo-compass.org/eng/agri_biotecnology/gmo_planting/144.gmo_cultivation_area_crop.html (last visited Apr. 11, 2010); see also infra notes 46, 47.

27. Some state labeling regimes require mandatory labeling of specific products. See infra note 125.
this Note concludes with a discussion of the potential effects of the proposed labeling regime, the most significant of which are monetary cost and a potential consumer shift away from GM food products.

I. THE DEBATE OVER GENETICALLY MODIFIED ORGANISMS

The U.S. is strongly in favor of the current growth and further development of GMOs because this technology has been demonstrated to be safe and beneficial.28 The U.S. produces the most GM crops of any country,29 resulting in large financial investments in the technology. Conversely, the E.U. has resisted the importation and growth of GMOs, focusing on the theoretical risks of the technology30 and opposition from farmers and consumers.31

GMOs have a relatively long history in the United States. They were first grown in the U.S. for public consumption in 1996.32 To date, no significant occurrence of harm has been reported.33 Scientific studies and safety tests conducted on animals have shown GMOs to be safe.34 The

28. See infra notes 33, 34 and accompanying text.
30. See infra notes 58–62 and accompanying text.
31. See infra notes 63–72.
32. PAARLBERG, supra note 14, at 26.
34. Studies so far have been done in mice, rats, chicken and cattle (as intentional consumers of Bt corn), and on non-target organisms such as Monarch butterflies in one highly-publicized study. “An experiment performed at Cornell University showed that large amounts of pollen from Bt corn . . . could kill larvae . . . .” Center for Science in the Public Interest, Biotechnology Project: Frequently-Asked Questions, http://www.cspinet.org/biotech/faq.html (last visited Apr. 11, 2010). However, subsequent research showed that harm was unlikely to occur in nature because, inter alia, “Monarch larvae are not often present when pollen [containing the Bt toxin] is found on the milkweed leaves.” Id.
U.S. public, however, remains largely uninformed of these findings, as well as of the processes and science behind genetic engineering in general. A 2005 consumer opinion survey found that “only 25 percent of respondents believed they had ever eaten genetically modified foods,” but it is fair to say that most Americans eat genetically modified foods regularly. Nevertheless, most Americans are opposed to consuming GMOs. When American consumers are “asked directly if they would

Research initially appeared to show “negative effects on rats of eating GM potatoes,” but “further analysis revealed [the assertions of negative effects] to be at best uncertain, and at worst, groundless.” AMERICAN MEDICAL ASSOCIATION, supra note 2. To date, there have been no safety tests conducted in humans (although the experience of the populations of countries in which GMOs have been commercially available for more than a decade shows no negative results).

35. PAARLBERG, supra note 14, at 23 (discussing a survey by the Pew initiative). Another survey by the International Food Information Council conducted earlier in 2005 found that “only one-third of consumers in the United States were aware that GM foods were being sold in stores.” Id. This reflects widespread lack of knowledge of the state of the market in GM foods, as well as lack of consumer understanding of the food supply, given the prevalence of GM foods as discussed infra in note 47.

36. See PAARLBERG, supra note 14. In a focus-group study, when participants were told that “most processed foods probably contain some GM ingredients, some participants seemed upset because they felt that they should have known this information” and yet did not. Mario F. Teisl et al., Focus Group Reactions to Genetically Modified Food Labels, 5 J. AGROBIOENGINEERING MGMT. & ECON. 6, 7 (2002).

On the other hand, the researchers also found that “other participants found the information comforting; these participants combined the fact that GM foods are prevalent with the notion that they had not heard or known of anyone getting sick as positive news.” Id. The study was conducted by researchers at the University of Maine, Ohio State University, and Unity College, and was funded in part by the USDA. Id. at 9. It is not possible to generalize the results of this study, as the sample size was limited, but this effect might repeat itself in the general public. In Europe, fear of the unknown has not been tested, as consumers have not been exposed to GM plant foods. If GM foods are introduced with labels and the non-harmful effects perpetuate themselves as they have so far in the United States, perhaps consumers will come (albeit slowly) to accept GMOs as safe.

37. A 2005 survey by the Pew Initiative found that 33% of consumers said they would oppose GM food “strongly.” PAARLBERG, supra note 14, at 22; PEW INITIATIVE ON FOOD AND BIOTECHNOLOGY, PUBLIC SENTIMENT ABOUT GENETICALLY MODIFIED FOOD, NOVEMBER UPDATE (2005), available at http://pewagbiotech.org/research/2005update/2.php. A 2002 study found that consumers in two urban Midwest areas would pay a “14 percent premium for foods items (vegetable oil, tortilla chips and potatoes) they perceived as non-GM,” where the genetically modified food items were labeled as such. Teisl & Caswell, supra note 33, at 8–9.

Conversely, the results of this study could be characterized as the amount of price reduction consumers demand in order to eat GM food. In other words, consumers will choose GM, but only when it is significantly less expensive than non-GM. For example,
like to see all GM foods labeled, 94 percent say yes." \(^{38}\) This desire for labels is likely the result of popular fear of the unknown. People are often skeptical of the unfamiliar, so it is not surprising that most consumers are against eating GM food despite inadvertently having already made it part of their daily diets. But genetic modification is not a new technology, and even non-GM foods are affected by human intervention in the evolutionary process.

Manipulating the genome of an organism can be accomplished via several methods. These methods fall under two general umbrellas: conventional plant breeding \(^{39}\) and biotechnology \(^{40}\) (the latter of which may also be referred to as genetic engineering ("GE"), genetic modification, gene splicing, and "recombinant Deoxyribonucleic Acid" ("rDNA") technology). \(^{41}\) Conventional plant breeding is a process by which scientists select particular plant specimens with desirable traits “from a great variety of naturally occurring types of plants” \(^{42}\) and reproduce them by pollinating

in a Japanese study, “consumers would only be willing to purchase GM [foods] if there were a 60 percent discount” as opposed to non-GM foods. \(\text{Id.}^{38}\)

38. PAARLBERG, supra note 14, at 23.

39. Conventional plant breeding involves cross-pollinating genes from different varieties of plants to produce hybrids that will express the desirable traits of the parents. For example, crossing a plant that is disease resistant with a plant that produces flowers of a desired color in order to produce a disease resistant plant with such flowers. For a general discussion of conventional plant breeding, see ROBERT W. ALLARD, PRINCIPLES OF PLANT BREEDING (2d ed. 1999).

40. “Traditional breeding techniques are limited to genetic mating between related species, and require several generations (often years) to achieve the desired results. With transgenic technology, a genetic trait can be introduced into a selected plant via the direct introduction of the gene responsible for that trait.” AMERICAN MEDICAL ASSOCIATION, supra note 2. “Genetically engineered animals used for research, such as mice, have been commercially available for several years.” Center for Science in the Public Interest, supra note 34.


42. Nuffield Council on Bioethics, The Use of GM Crops in Developing Countries, http://www.nuffieldbioethics.org/go/browseablepublications/gmcropsdevcountries/report_132.html (last visited Dec. 1, 2008). “This has led to completely new varieties such as Triticale (a hybrid between wheat and rye). Another technique, mutation breeding, involves the exposure of plants and seeds to radiation or chemical substances.” \(\text{Id.}^{38}\)

However, the progeny of this first cross inherit a mix of genes from both parent plants and so both positive and negative traits may be inherited. Breeders have to look at all the progeny and select the ones with the most positive traits and least negative traits. They then cross this selected progeny back to one of the
other plants with the pollen carrying desirable traits. Genetic engineering, on the other hand, involves isolating a gene from one organism and inserting it into the genome of another, unrelated organism.\footnote{Merriam-Webster defines “genetic engineering” as “the group of applied techniques of genetics and biotechnology used to cut up and join together genetic material and especially DNA from one or more species of organism and to introduce the result into an organism in order to change one or more of its characteristics.” Merriam-Webster, http://www.merriam-webster.com/dictionary/genetic\%20engineering (last visited Dec. 1, 2008).} Because genetic engineering involves the \textit{direct} modification of an organism’s genome, it generates more opposition than conventional plant breeding.\footnote{AMERICAN MEDICAL ASSOCIATION, \textit{supra} note 2.}

Genetic engineering has been used to produce a wide range of effects in plants, such as tolerance to herbicides, toxicity to certain pests, resistance to viruses, increased yields, tolerance of extreme growing conditions (such as drought, high winds, and acidic or excessively salty soil), extended shelf life (also known as “delayed ripening”), increased vitamin content, altered oil content, and decreased acid content.\footnote{Id.; Stella G. Uzogara, \textit{The Impact of Genetic Modification of Human Foods in the 21st Century: A Review}, 18 BIOTECHNOLOGY ADVANCES 176, available at http://www.sciencedirect.com/ (search for author “Uzogara”); U.S. Dep’t of Agric., \textit{supra} note 5.}

The introduction of a pesticidal gene from a soil bacterium, \textit{Bacillus thuringiensis (“Bt”)}, into corn and cotton,\footnote{Interestingly, organic food producers make extensive use of the ‘natural’ pesticidal effects of \textit{Bt}. They spray large quantities of the bacteria on their plants to kill pests. The only difference between organic and non-organic \textit{Bt} crops, therefore, is that the pesticidal gene is incorporated into the GM crop genome rather than the genome of the bacteria coating the non-GM plant. University of California, San Diego, \textit{Bacillus thuringiensis}, http://www.bt.ucsd.edu/organic_farming.html (last visited Oct. 9, 2009).} and the introduction of an \textit{Agrobacterium} gene producing a degradative enzyme that confers tolerance to the herbicide glyphosate into soybeans have been the most monetarily significant and widespread applications of genetic engineering in the United States.\footnote{“As of 2006 an estimated 61 percent of all corn grown in the United States and 89 percent of all soybeans were GM varieties.” AMERICAN MEDICAL ASSOCIATION, \textit{supra} note 2 (“glyphosate-tolerant plants, especially soybeans, have received the most widespread commercial use”); PAARLBERG, \textit{supra} note 14, at 22–23. Because these plants,} The introduction of the \textit{Bt} gene makes the plants

original parent plants to try and transfer more of its positive traits into the following generation.


43. Merriam-Webster defines “genetic engineering” as “the group of applied techniques of genetics and biotechnology used to cut up and join together genetic material and especially DNA from one or more species of organism and to introduce the result into an organism in order to change one or more of its characteristics.” Merriam-Webster, http://www.merriam-webster.com/dictionary/genetic\%20engineering (last visited Dec. 1, 2008).

44. AMERICAN MEDICAL ASSOCIATION, \textit{supra} note 2.


46. Interestingly, organic food producers make extensive use of the ‘natural’ pesticidal effects of \textit{Bt}. They spray large quantities of the bacteria on their plants to kill pests. The only difference between organic and non-organic \textit{Bt} crops, therefore, is that the pesticidal gene is incorporated into the GM crop genome rather than the genome of the bacteria coating the non-GM plant. University of California, San Diego, \textit{Bacillus thuringiensis}, http://www.bt.ucsd.edu/organic_farming.html (last visited Oct. 9, 2009).

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produce a protein that kills insect pests, thus allowing farmers to grow *Bt* crops entirely without—or with significantly reduced levels of—synthetic chemical pesticides. The introduction of the *Agrobacterium* gene enables farmers to more efficiently kill weeds in soybean fields with the herbicide glyphosate (marketed commercially under the brand name “Roundup”). Glyphosate is preferable to chemical herbicide alternatives used in conventional agriculture because “[u]nlike many herbicides, glyphosate has low toxicity, is safe for humans and animals, and degrades quickly in the soil.”

These changes in plant characteristics have produced many important benefits, including lower average levels of fungal toxins on produce, increased shelf life, reduction in the use of chemical pesticides (and thus reduction in pesticide residues on produce), tillage practices that

particularly corn and corn derivatives, are incorporated into so many processed foods, “roughly 70 percent of all supermarket products in the United States have at least some GM content.”

The United States accounts for two thirds of bioengineered crops produced globally. Other major suppliers include Argentina, Canada, and China. More than 20% of the global crop acreage of soybeans, corn, cotton, and canola is now biotech varieties. In addition, biotech ingredients and biotech processes are used in producing a wide selection of food and beverage products such as meat, poultry, cheese, milk, and beer.


50. AMERICAN MEDICAL ASSOCIATION, *supra* note 2. Glyphosate cannot be used on plants that have not been genetically modified to be tolerant to it, because as a broad-spectrum herbicide, it will kill them. *Id.*

51. PAARLBerg, *supra* note 14, at 28. Insect damage to produce tissue gives these fungi the opportunity to grow. Thus, pesticides that kill the insects that cause damage to plant tissue deny these fungi such opportunity. *Id.*

52. *Id.*

53. Other benefits include “[s]ubstantial[] red[uction] in the use of broad-spectrum and highly poisonous insecticides”; fewer applications of herbicides, which results in less herbicide in the environment and more time for farmers to attend to other matters; and the “adoption of conservation tillage, which conserves soil [that] is more easily eroded when fields are conventionally cultivated” and decreases the amount of crops lost to pests, thus reducing commodity costs. Center for Science in the Public Interest, *supra* note 34. Some studies have shown reduction in the spraying of chemical pesticides through use of *Bt* corn and soybeans by 40–60%. PAARLBerg, *supra* note 14, at 29.
encourage soil conservation,\textsuperscript{54} and increased crop yields.\textsuperscript{55} In turn, pesticide reduction preserves biodiversity, prevents environmental degradation, safeguards workers’ health, and reduces the amount of diesel fuel burned by the machines that apply such pesticides.\textsuperscript{56} Increased yields could help prevent starvation in countries prone to hunger.\textsuperscript{57} These benefits are widely ignored in regulatory regimes that ban the growth and importation of genetically modified plants, to the detriment of consumers and the environment.

On the other hand, even though no harm has yet been reported, the use of genetic engineering in plants grown for human consumption does pose potential risks to both the environment and human health.\textsuperscript{58} These risks include the possibility that the plants might produce “new allergens or toxins, or unexpectedly increased levels of naturally occurring toxicants or allergens found in crops.”\textsuperscript{59} Additionally, there is the unlikely possibility that the modified plant could produce unknown harmful substances,\textsuperscript{60} and there is the exceedingly remote possibility that the proteins engineered into the plants could be transferred to human cells.\textsuperscript{61} Notably,

\textsuperscript{54} PAARLB\textsuperscript{5}ERG, supra note 14, at 29.
\textsuperscript{55} Id.; see also U.S. Dep’t of Agric., supra note 5.
\textsuperscript{56} PAARLB\textsuperscript{5}ERG, supra note 14, at 29.
\textsuperscript{57} Id.
\textsuperscript{58} Other risks associated with the technology but not relevant to consumption of food include environmental risks, such as reduction in biodiversity, harm to non-target organisms, gene pollution, increased pest resistance, increased herbicide resistance, and the development of super-weeds. All of these risks may occur with conventional agricultural methods as well, with the exception of gene pollution and super-weeds. For a discussion of the reasons for which all of these risks are minimal at most, and the outlook with respect to each is likely better with use of biotech plants and methods than with conventional agricultural methods, see AMERICAN MEDICAL ASSOCIATION, supra note 2.
\textsuperscript{59} Center for Science in the Public Interest, supra note 34. However, “[t]here are no known cases of allergic reactions caused by marketed foods derived from GM plants. Of note, genetic engineering also offers the opportunity to decrease or eliminate the protein allergens that occur naturally in specific foods through the use of, among others, antisense technology.” AMERICAN MEDICAL ASSOCIATION, supra note 2.
\textsuperscript{60} Center for Science in the Public Interest, supra note 34.
\textsuperscript{61} See AMERICAN MEDICAL ASSOCIATION, supra note 2.

The transfer of plant DNA into microbial or mammalian cells under normal circumstances of dietary exposure would require all of the following events to occur: (1) the relevant gene(s) in the plant DNA would have to be released (excised), probably as linear fragments; (2) the gene(s) would have to survive nucleases in the plant and gastrointestinal tract; (3) the gene(s) would have to compete for uptake with dietary DNA; (4) the recipient bacteria or mammalian cells would have to be competent for transformation and the gene(s) would have to survive their restriction enzymes; and (5) the gene(s) would have to be inserted
labeling is already required under current law if any of these effects occurs, as they amount to material changes in the composition of the food. 62

Fears over these potential risks have produced some opposition to the development and growth of GMOs in the United States, and have produced strong (sometimes violent) opposition in Europe63 and some developing countries.64 Among those opposed to GMOs are religious groups,65 organic food groups (such as local food cooperatives66 and The

into the host DNA by rare repair or recombination events, and the inserted gene would have to be stably maintained.

Id. To date, studies have shown that no such gene transfer has occurred. Id.

62. See infra note 142 and accompanying text.


The protests of José Bové, probably the most well-known European anti-GM activist, have included destroying a facility producing GM seeds and ‘hijacking’ GM corn. José Bové: Profile, BBC, http://www.bbc.co.uk/bbcfour/documentaries/profile/jose_bove.shtml (last visited Oct. 20, 2008). To protest another aspect of the globalization of food and food politics, Bové drove his tractor into a local McDonald’s restaurant.

Id.

64. Vandana Shiva is one of the most outspoken critics of biotechnology in India. See generally MANIFESTOS ON THE FUTURE OF FOOD AND SEED (Vandana Shiva ed., 2007). Perhaps surprisingly, farmers (in both the United States and the European Union) at all levels of income have not been opposed to the introduction of GM crops. PAARLBerg, supra note 14, at 63.


When asked specifically about their own religious or moral views in regards to agricultural biotechnology, a majority of Christians (Protestants, born-again Christians and Catholics) and a plurality of Muslims say they are opposed to moving genes from one species or organism to put into another, the poll found. Jews were the only religious group polled that had a majority that supported this technology.

Id.

66. Park Slope Food Coop, Environmental Policy (July 1998), http://www.foodcoop.com/go.php?id=39. The Coop’s policy is that it will “[s]ell no products that are genetically engineered or contain products of genetic engineering, except that sales of genetically engineered products shall not be discontinued unless there is a similarly priced equivalent product that is not genetically engineered.” Because

genetically engineered products or products containing genetically engineered inputs are not labeled as such . . . products shall be considered to be genetically engineered if they contain non-organically produced ingredients that are known
Campaign to Label Genetically Engineered Foods\(^\text{67}\), and environmental groups (such as Greenpeace\(^\text{68}\) and Friends of the Earth\(^\text{69}\)). Some opponents of GM food “believe that ‘it is not natural’ and implies ‘tampering with nature.’”\(^\text{70}\) Environmental groups argue that the unknown risks of biotechnology, the severity of the theoretical risks to human health,\(^\text{71}\) and certain risks to the environment of gene pollution and reduction of biodiversity are in fact already occurring and significantly outweigh the benefits of GMOS.\(^\text{72}\) Critics in developing countries argue that intellectual property rights in GM technology prevent traditional seed-saving practices, thereby harming traditional agrarian cultures.\(^\text{73}\)

A fundamental flaw in GM opponents’ arguments is that all of the categories of unexpected changes they find disconcerting “can occur through traditional forms of plant breeding that have been carried out for many decades.”\(^\text{74}\) According to the Center for Science in the Public Interest, a non-partisan think tank, “the only known cases of increased or new harmful compounds have been [the results of] traditional breeding methods, not genetic engineering.”\(^\text{75}\) Thus, as opponents of genetic modification through biotechnology do not oppose traditional plant breeding, their arguments against biotechnology are specious.

Whether or not these anti-GM views are flawed, they have taken hold in Europe. In 1997, in response to European consumer concerns, the EU

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Id.


\(^{69}\) Friends of the Earth, What is Synthetic Biology, http://www.foe.org/healthy-people/what-synthetic-biology (last visited Mar. 1, 2009) (“Friends of the Earth is against the assumption that humans can re-design or create superior forms of life . . . Challenging and attempting to improve upon the original design of life disrespects and ignores the perfect balance of the natural world.”).

\(^{70}\) Thomas Bernauer, Genes, Trade, and Regulation: The Seeds of Conflict in Food Biotechnology 33 (2003).


\(^{72}\) See generally Greenpeace, supra note 68.

\(^{73}\) See generally MANIFESTOS ON THE FUTURE OF FOOD AND SEED, supra note 64. Farmers are not forced to use GMO seeds; therefore, those who want to use non-GMO seeds and continue seed-saving practices are free to do so.

\(^{74}\) Center for Science in the Public Interest, supra note 34.

\(^{75}\) Id.
European Union instituted a requirement that GM content in food be disclosed on labels, and in 1998, the E.U. introduced a moratorium on the importation and domestic growth of genetically modified organisms. The United States, together with Argentina and Canada, challenged the European Union ban via the Dispute Settlement Understanding ("DSU") of the WTO in *European Communities—Measures Affecting the Approval and Marketing of Biotech Products* ("EC-Biotech"). In late 2006, the WTO Dispute Settlement Body adopted a ruling that the E.U. ban violated Annex C(1)(a) of the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement") because the ban did not "undertake and complete the approval procedures without undue delay," and the ban violated Articles 2.2 and 5.1 of the SPS Agreement because the state safeguard measures "were not based on risk assessments satisfying the definition of the SPS Agreement and hence could be presumed to be maintained without sufficient scientific evidence." The panel ruling allowed the plaintiff countries to impose punitive sanctions on the E.U. in the amount of exports lost due to the ban, but the parties are currently arbitrating whether—and the extent to which—the plaintiff countries

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76. By that point, “most retail stores had already decided voluntarily not to stock any GM products so as to avoid boycott campaigns from activists.” PAARLBerg, supra note 14, at 23.

77. Id. at 17.


79. Simon Lester, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, 101 AM. J. INT’L L. 453, 454 (2007). “Sanitary or Phytosanitary measures include . . . packaging and labeling requirements directly related to food safety.” Id. at 454 (emphasis added) (quoting SPS Agreement Annex A(1)). Thus, labeling for GM content would arguably not be an SPS measure at all (and therefore not under the WTO framework) because it is not a regulation intended to ensure food safety.

will actually impose such trade sanctions. Thus, an outright ban is not an option available to the E.U. under current WTO law.

The U.S. could challenge the E.U.’s current labeling regime in the WTO, arguing that, like the outright ban on GMOs, labeling requirements violate the SPS Agreement because they are not supported by science. Such a challenge might not succeed under the EC-Biotech holding because required labeling does not disrupt trade as severely as an outright ban. Moreover, if the U.S. challenges the E.U. labeling law in the WTO, it risks rendering the WTO impotent. If the citizens of member countries feel that WTO decisions ignore their values, the WTO will lose credibility and States will feel justified in ignoring its decisions. Therefore, it is unlikely that the U.S. will bring such a challenge; rather, the U.S. and the E.U. will persist in disharmony on this subject. This Note explores whether a change in U.S. labeling law would be a feasible method of harmonizing this regulatory divide.

II. THE RATIONALE FOR LABELING LAWS: INFORMED CONSUMER CHOICE AND INCREASED DEMOCRATIC INPUT IN RISK MANAGEMENT

Both the E.U. and the U.S. labeling regimes claim to have the facilitation of informed consumer choice as a goal, but neither regime in fact accomplishes this goal. While governments battle on the international

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81. EC-Biotech, supra note 78.
82. U.S. regulators and consumers have recently been much more in favor of GMOs than their European counterparts. However, unless precipitated by a change in circumstances, a ban on GM or GMO products is not a viable option for the U.S. under current WTO law should U.S. regulators and consumers change their favorable views of GMOs. For example, a public health scare with scientific evidence of a GMO as the cause of harm would be a ground for banning that particular organism, and potentially all GMOs produced using the method of production of the harmful GMO, if the method produced the same harm in other organisms.
83. Lester, supra note 79, at 454.
84. This assumes that labeling requirements are applied in the same manner to domestic crops and products as they are to imports, or they could be viewed as a disguised restraint on trade. Depending on its requirements, a labeling regime may run afoul of the SPS requirement that distinctions be made based on a scientific risk assessment. However, the United States has yet to challenge the current E.U. labeling regime, so there has not yet been any decision that such is the case.
86. The European Council Regulation of 2003 on Genetically Modified Food and Feed states that one of its goals is to “enable[] the consumer to make an informed choice . . . .” Council Regulation 1829/2003, ¶17, 2003 O.J. (L 268).
stage over whether GMOs will be prohibited, many scholars and activists say that the layperson is cut out of the debate even though the effects of allowing GM food in the market touch consumers personally.

What we put into our bodies is tremendously important to most people. People follow restricted diets for religious reasons (some Jews keep Kosher, some Muslims only eat Halal food, and some Hindus refuse beef), for moral or personal reasons (many vegetarians and vegans restrict their diets for moral reasons), or because they physically cannot eat certain foods (those with celiac disease cannot eat wheat, those who are lactose intolerant cannot consume dairy products, and those with other food allergies face similar restrictions). In the last case, eating the food in question could cause severe physical harm or death. In the first two cases, while the diets may be driven by personal choice rather than physical necessity, the beliefs behind the choices are often deeply held. If a Muslim eats soup that is labeled vegetarian but in fact contains pork, or if a vegetarian eats cereal that contains mouse parts, the mislabeling that led to the inadvertent consumption is likely to be extremely offensive.

The majority of people in the U.S. do not grow their own food and therefore necessarily depend on others to grow it for them. Producers are thus endowed with public trust. Consumers expect that the information producers use to market their products is consistent with the actual contents of food products they sell, and the public expects that every ingredient or process that would be material to a consumer’s purchasing decision is disclosed on the product label. In addition to major ingredients, examples of other processes or contents that would be material to consumers include allergens, animal parts or products, and pesticide residues.

The question then is whether genetic modification of food is material to consumers in their decisions to purchase and consume food. At what point does public demand for disclosure of GM content become “material to consumers”? As mentioned above, one survey showed that 94% of consumers would like labels to indicate the presence of GM content. Some things can be tremendously important to some consumers and


87. This would probably upset even nonvegetarians eating cereal, but vegetarians would be particularly offended because they have intentionally chosen a food that they reasonably expect not to contain animals, but that in fact does contain animals or animal parts.

88. PAARLBG, supra note 14, at 23.
quite unimportant to others, such as whether food is Kosher, contains animal parts, or contains specific allergens.

The fact that some would characterize restrictive dietary choices as irrational is irrelevant; people should be able to control what they eat. In order to address the current lack of control, many scholars have called for increased democratic input in national and international risk assessment and risk management procedures. Risk assessment refers to the process of measuring risk (defined as potential adverse effects), while risk management refers to measures taken to avoid the occurrence of risks.89 While public participation is inappropriate at the risk assessment stage (the task properly belongs to experts and is not subject to democratic or unscientific input90), risk management can and should accommodate diverse perspectives, including those of the public.

On a national level, scholars say these procedures should be “responsive not only to expert views, but also broader public perspectives on risks and concerns over possible uncertainties.”91 Internationally, these scholars argue that state practice as a source of international law should affect the WTO’s decisions more,92 and state practice in the area of labeling is tending more to require labeling than prohibit it.93 Furthermore, scholars argue that the WTO owes more deference to public opinion.94 If the public feels strongly that it does not want to run a given risk, even where the evidence shows that technology is safe, the WTO should not impose that risk on the population of a member State.95 In other words, risk management in this area should be less technocratic and more democratic. Allowing increased public participation in risk management will “help ensure consistency between international economic law and broad-

90. See id. The fact that a person feels afraid of something should not enter into the assessment of whether that thing is in fact risky, but that person’s fear may be an appropriate consideration in the context of how the product is presented, so as to allow that person to avoid it.
93. See infra notes 188–91 and accompanying text. States with labeling laws currently include the countries of the E.U., Australia, China, Indonesia, Japan, New Zealand, Russia, Saudi Arabia, South Korea, Switzerland, and Thailand. BERNAUER, supra note 70, at 62.
94. Foster, supra note 85, at 427.
95. Id.
er public international law, including international human rights treaties and international environmental law.96

Neither the U.S. nor the E.U. government has adequately addressed this lack of consumer participation, and neither U.S. nor E.U. consumers are able to make informed choices: “[i]n the United States consumers have a choice between GMO and non-GMO but no information, while in Europe consumers are guaranteed information but with no choice, since only non-GM products can be found on the shelf.”97 Proponents of GM foods feel that, in light of their safety, labeling is an unwarranted cost and would steer consumers away from a beneficial product, but these proponents “have failed to inform the public sufficiently about this new technology or to convince consumers of the benefits that may accrue from it.”98 Detractors are often inflammatory, citing fears that are not based on science and refusing to consider the possible benefits of the technology.99 Because the average consumer does not understand the technology, public participation in risk analysis is difficult. Neither the E.U. nor the U.S. has articulated a framework for meaningful public debate on biotechnology.100

Labeling strikes a balance by allowing producers to grow GMOs and send them into national and international commerce101 while simultaneously educating consumers about the large array of genetic modifications and altered attributes of GMOs so that they may make informed choices and may avoid GMOs if they wish.102 By giving consumers a choice in what they consume, labeling for GM content is a preferable alternative in response to arguments for increased democratic input in risk management systems. As consumers acquire more information and more familiarity with GM foods,103 they are likely to become more comfortable with the technology, and in turn, they are likely to support it

96. Id. at 427, 453.
97. PAARLBerg, supra note 14, at 23.
98. AMERICAN MEDICAL ASSOCIATION, supra note 2.
99. Id.
100. Id.
101. Traceability is a goal addressed by the current E.U. regulations. It would be a significantly expensive component in the U.S. labeling regime and is ancillary to the goal of informed consumer choice; thus, it should be considered only as a second step to any labeling regime. See discussion in conclusion.
102. But see McHughen, supra note 8, at 203–14 (describing a range of problems that McHughen says combine to render informed consumer choice impossible in the area of GM labeling).
103. In other words, as consumers gain personal experience of the benefits and lack of harmful effects of GMOs.
more. At the same time, a labeling regime is not a ban—producers would still be permitted to grow GMOs in the United States.

Of course, such a labeling regime would have direct costs, as well as costs in terms of decreased revenue (perhaps only temporarily) as a result of consumers refraining from purchasing foods once they realize they are genetically modified. But these costs, discussed in Part V, are not prohibitive to a labeling regime.

Theoretically, an American labeling regime is desirable. However, it remains to be seen whether a labeling system can adequately inform the consumer and thereby allow him or her to choose GMO or non-GMO, particularly considering the public’s limited familiarity with GM technology and the inherently limited information-conveying capacity of food labels.

III. THE LABELING REGIME IN THE UNITED STATES

American laws governing the approval of new varieties of GMOs and their labeling are much laxer than E.U. laws due to social priorities and two facets of the relative regulatory approaches. Socially, American consumers have been more tolerant of GMOs and have not demanded harsher laws. In terms of regulatory approach, the U.S. is more tolerant of risk than the E.U., evaluating only the product of biotechnology rather than both the product and its method of production (or process).

American consumers have not been as troubled by GMOs as European consumers: the International Food Information Council (“IFIC”) released a survey in early 2008 that deemed U.S. consumer confidence in the domestic food supply “high,” at 68%. The same survey showed that “the majority of [American] consumers (53%) continue to have neutral im-

104. See discussion infra in conclusion.
106. See infra notes 116–17 and accompanying text.
107. See infra notes 131–34 and accompanying text.
108. Int’l Food Info. Council, 2008 Food Biotechnology: A Study of U.S. Consumer Attitudinal Trends, available at http://www.foodinsight.org/Resources/Detail.aspx?topic=Food_Biotechnology_A_Study_of_U_S_Consumer_Attitudinal_Trends_2008_Report [hereinafter IFIC Report on Food Biotechnology]. The survey was conducted using 1,000 adults in the U.S. between July 29 and August 18, 2008. Id. The International Food Information Council (“IFIC”) is a non-profit organization that describes its mission as to “effectively communicate science-based information about food safety and nutrition to health professionals, government officials, educators, journalists, and consumers.” Int’l Food Info. Council, FAQs, http://www.ific.us/About/FAQ.aspx (last visited Apr. 8, 2010). Its projects are supported by the broad-based food, beverage, and agricultural industries, as well as the U.S. government. It does not represent any product or company, and it does not lobby for legislative or regulatory action. Id.
pressions of plant biotechnology,” with 31% holding favorable impressions, and 16% holding negative impressions. Furthermore, consumer attitudes are generally positive when consumers are informed of potential benefits associated with biotechnology. Approximately 70–75% of consumers in the survey stated that they would be “somewhat likely” or “very likely” to purchase GM foods if they were notified that the modifications were for the purposes of providing healthful fats such as Omega-3s, requiring less pesticide, reducing the content of saturated and trans-fats, or producing better-tasting or fresher foods.

Another reason American laws regarding GMOs are less stringent is that American consumers are simply unaware that GMOs are almost certainly in the foods they are eating. There is also a strong farmers’ lobby in the United States that is generally in favor of GM technology, as is true for the biotechnology industry, which has invested vast sums of money in the development of these gene manipulation methods. Whether for these or other reasons, anti-biotechnology groups have not been able to mount the kind of coordinated campaigns here that European groups have been able to mount across the pond. While the United States has generally accepted the precautionary principle as a guiding


110. Id.

111. See supra note 35. There was one widely-publicized contamination scandal in the United States: in 2000, a variety of corn (named ‘Starlink’ corn) engineered with “a different Bt gene than other Bt corn varieties and microbial Bt sprays used by conventional and organic farmers” that had not yet been approved for human consumption by the EPA, because sufficient allergenicity tests had not yet been performed to ensure that it would not cause allergic reactions in consumers, was incorporated into taco shells sold to restaurant chains. Taco Bell recalled these taco shells immediately when they discovered that they contained these genes. Center for Science in the Public Interest, supra note 34. “Starlink is no longer grown, even for animal feed use.” Id.

112. One reason for widespread farmer support of GM technology is that generally, the increases in productivity produced via GM corn and soybeans are scale-neutral, meaning that small farmers (as well as large ones) capture benefits of increased productivity prorata to the acreage of crops they have planted with GM seeds. PAARLBerg, supra note 14, at 18. By contrast, small farmers have been opposed to many other types of agricultural technology because it often benefits large farmers much more than small. Id.


114. See PAARLBerg, supra note 14.
American consumers and regulators are still much more tolerant of risk in the service of biotechnological advancement than their European counterparts.

Because of this tolerance, there is no current federal law requiring labeling of GMOs or GM food products. Federal labeling laws have been proposed numerous times since 1999 in both the U.S. House of Representatives and the U.S. Senate, but none has passed. Most recently, on July 29, 2008, Representative Dennis Kucinich introduced to the House the “Genetically Engineered Food Right to Know Act,” a bill that would amend the Federal Food, Drug, and Cosmetic Act (“FDCA”) § 403 to require that foods that contain genetically modified material, or that are produced with genetically modified material, be labeled with the text “Genetically Engineered” or “[t]his product contains a genetically engineered material, or was produced with a genetically engineered material.” The bill would exempt from the labeling requirements food served in restaurants or retail establishments, and would institute civil penalties and authorize private suits for violations. The bill is currently held up in the Subcommittee on Specialty Crops, Rural Development, and

115. “Ironically, notwithstanding strong American criticisms of the E.U.’s use of the precautionary principle to prevent or delay the approval of GMOs, no country has so fully adopted the essence of the precautionary principle in domestic law as the United States.” David Vogel, Ships Passing in the Night: The Changing Politics of Risk Regulation in Europe and the United States 2 (2001). Perhaps American regulatory tolerance of risk is also reflective of the idea that Americans “tend to use litigation after the fact rather than pre-emptive regulation to ensure consumer and environmental safety” as opposed to the European precautionary regulatory approach. Paarlberg, supra note 14, at 18.


117. H.R. 6636, 110th Cong. (2008). The bill was co-sponsored by 10 Democrats and 1 Republican, although previous versions of the bill had more bipartisan support. Senator Barbara Boxer introduced a bill that was similar to an earlier version of H.R. 6636 into the U.S. Senate. That bill—S. 2080, 106th Cong. (2000)—also died in committee and has not been reintroduced. For Senator Boxer’s statement accompanying the introduction of her bill, see http://www.thomas.gov (search for Bill Number ‘S2080’).


119. H.R. 5269, 109th Cong. (2006). The Act further specifies the font required and that the label be “clearly legible and conspicuous.” Id. at § 3(a).

120. Id.

Foreign Agriculture of the House Agriculture Committee. Previous versions of the bill all died in subcommittees, but Representative Kucinich reintroduced the bill each time.

Despite the lack of a federal labeling law, there is some form of labeling requirement under the laws of nine U.S. states, and other states are debating labeling laws. For instance, the New York State Legislature is considering New York Assembly Bill 500 (State Senate Bill 2052), which would require foods containing GM material to have labels that say: “[t]his product contains a genetically modified material,” or “[t]his product was produced with a genetically modified material.”

The absence of a federal framework for labeling GMOs is a result of two aspects of regulatory philosophy in which the U.S. diverges from Europe: the theory of risk evaluation and the focus on end product only as opposed to the end product as well as the production process.

First, European regulators are guided by the precautionary principle, whereas American regulators use risk-benefit analysis. There are various formulations of the precautionary principle, but in essence it is the idea that regulators must always err on the side of caution, even in the absence of any demonstrable risk. Regulations should focus exclusively

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122. Thomas (Library of Congress), http://www.thomas.gov (search for Bill Number ‘HR6636’).
124. Farquhar & Meyer, supra note 86, at 459. These states include Alaska, Maine, Michigan, Minnesota, Mississippi, Pennsylvania, Vermont, Virginia, and Wisconsin. Id. For example, Alaska requires labeling of GM fish sold in-state. Id. In addition, some states and some counties have laws banning the growth of GMOs in the area. PAARLBerg, supra note 14, at 25–26.
125. Assemb. 500, 2009 Leg., 231st Sess. (N.Y. 2009). Previous versions of this bill were considered in 2001–02. Id. Each one died in committee.
126. The bill defines “Genetically Modified Material” as “material derived from any part of a genetically modified organism, without regard to whether the altered molecular or cellular characteristics of the organisms are detectable in the material”; it defines GMOs as organisms “that [have] been altered at the molecular or cellular level by means that are not possible under natural conditions or processes,” detailing a variety of processes that are intended to be exhaustive of currently known methods of genetic modification. N.Y. Assemb. 500 § 1. It is thus much wider in scope than even current law in the E.U. and individual States that require labeling, which exempt processing aids such as yeast used in beer production. See infra notes 179, 189.
127. The Act also provides for penalties for violations. N.Y. Assemb. 500 § 3(A).
128. The precautionary principle has been described in the following way: “If there is a potential for harm from an activity and if there is uncertainty about the magnitude of impacts or causality, then anticipatory action should be taken to avoid harm.”
on minimizing risk; potential benefits are thus excluded from the calculation. By contrast, the American regulatory approach has been to use risk-benefit analysis, which weighs the potential benefits of a technology against the reasonably foreseeable risks to human and environmental health.  

The second regulatory difference is that regulators in the United States focus on the end product resulting from a new technology, whereas European regulators focus on the product as well as the process by which it is produced. The product approach compares the safety risks of a product produced by the new technological process to products produced via conventional processes. The process approach, by contrast, compares the risks inherent in an approved (conventional) technological process with the foreseeable risks of the new technological process at issue.  

In the U.S., the FDA’s policy regarding food safety regulation generally is that “safety concerns should be characteristics of the food product, rather than the fact that new methods are used.” With respect to biotech foods specifically, the agency has stated that it “has no basis for concluding that bioengineered foods differ from other foods in any meaningful or uniform way, or that, as a class, foods developed by the new techniques present any different or greater safety concern than foods developed by traditional plant breeding.” Accordingly, the regulations do not address the use of biotechnology technique; they address the use of GMO end-products, such as food or seeds.  

Thus, genetically modified foods and food products are evaluated pursuant to the same laws as their conventionally produced counterparts.

CAUTIONARY PRINCIPLE 1 (Carolyn Raffensperger & Joel Tickner eds., 1999). However, the editors immediately acknowledge that “we can never know with certainty whether a particular activity will cause harm.” Id.


130. Id. at 167–69. Thus, the FDA approach focuses on the product of genetic engineering (comparing the characteristics of the GM product to the same product produced conventionally), as opposed to the process by which it is produced.


133. Id.

134. In other words, there are no American federal laws governing biotechnology separately from conventional agricultural methods.
under the Coordinated Framework promulgated by the White House’s Office of Science and Technology Policy. This framework encompasses the statutory authority of the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”); the FDCA; the Toxic Substances Control Act (the “TSCA”); and the Federal Plant Protection Act (the “FPPA”). The USDA has general responsibility for ensuring that new biotech plant varieties are safe to grow regardless of the purpose for their genetic modification; the EPA is charged with “ensuring that new pest-resistant [plant] varieties” will not harm the environment; and the “FDA is responsible for ensuring that new plant varieties are safe” for human consumption.

Consistent with the end-product approach, the FDA has maintained the position that:

Labeling of GM foods should only be mandatory if they are shown to differ significantly in composition from their conventional counterparts in some way that might pose a risk to the consumer—such as through

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137. 21 U.S.C. § 301–392 (2006). The FDCA is administered by the EPA and the Food and Drug Administration (“FDA”). Section 408 of the FDCA authorizes EPA to set tolerances, or maximum residue limits, for pesticide residues on foods. In the absence of a tolerance for a pesticide residue, a food containing such a residue is subject to seizure by the government. Once a tolerance is established, the residue level in the tolerance is the trigger for enforcement actions. That is, if residues are found above that level, the commodity will be subject to seizure. U.S. Envtl. Prot. Agency, Summary of FFDCA, http://www.epa.gov/lawsregs/laws/ffdca.html (last visited Nov. 1, 2009).
140. AMERICAN MEDICAL ASSOCIATION, supra note 2. The FDA also has authority to ensure the safety of animal feed. Id.
the presence of an allergen, a changed level of a major dietary nutrient, an increased level of toxins, or a change in the expected storage or preparation characteristics of the food.\footnote{141}

The FDA does not consider consumer demand to be “a sufficient justification [under existing law] to require labeling without an underlying nutritional or safety concern.”\footnote{142}

While FIFRA, the TSCA, and the FPPA all regulate the products of biotechnology, only the FDCA sets regulations concerning food-labeling requirements.\footnote{143} The National Uniform Nutritional Labeling clause of the FDCA\footnote{144} requires labeling on food that discloses serving size, the presence of adulterations such as chemical preservatives and colorings, and nutritional data such as the content of calories, cholesterol, saturated and unsaturated fat, sodium, total and complex carbohydrates, sugars, dietary fiber, total protein, and vitamins and minerals.\footnote{145} According to the FDA’s Center for Food Safety and Applied Nutrition (the “Center for Food Safety”), “[t]he central purposes of food labeling are to inform and educate consumers to enable them to wisely choose food and improve their health.”\footnote{146}

In 2001, the Center for Food Safety promulgated draft “guidance for industry”\footnote{147} titled, “Voluntary Labeling Indicating Whether Foods Have or Have Not Been Developed Using Bioengineering.”\footnote{148} The guidance “spell[s] out what needs to be labeled on genetically-modified food, and what labeling is voluntary.”\footnote{149} As reflected in the title, the guidance encourages voluntary labeling of GM content in food but does not require that manufacturers label food as “genetically modified” or “genetically

\footnote{141. PAARLB{\textsc{g}}ERG, supra note 14, at 23. Interestingly, pharmaceutical drugs that are produced using biotechnology are labeled “genetically modified.” \textit{Id.} at 21.}

\footnote{142. Farquhar & Meyer, supra note 86, at 449. But the FDA encourages voluntary labeling, and it is conceivable that the agency could come to view mandatory disclosure as justified in order to deal with intense (even if baseless) concern over the potential dangers of biotechnology.}

\footnote{143. 21 U.S.C. § 343–1 (2006).}

\footnote{144. \textit{Id.}}

\footnote{145. \textit{Id.}}

\footnote{146. Farquhar & Meyer, supra note 86, at 452 (quoting DRAFT GUIDANCE FOR INDUSTRY, supra note 133, at 7).}

\footnote{147. This draft guidance was a proposal of regulations for comment by interested parties. It was never adopted as law, although parties remain free to follow its guidance as to voluntary labeling. \textit{See id.}}

\footnote{148. DRAFT GUIDANCE FOR INDUSTRY, supra note 133; Emily Marden, \textit{Risk and Regulation: U.S. Regulatory Policy on Genetically Modified Food and Agriculture}, 44 B.C. L. REV. 733, 757 n.106 (2003).}

\footnote{149. Farquhar & Meyer, supra note 86, at 469.
enginedered.”150 However, the FDA reiteratd in the Guidance that biotech food products are subject to the same labeling requirements as conventional foods under the FDCA. The FDA applied the FDCA requirements to biotech foods as follows:

- If a bioengineered food is significantly different from its traditional counterpart such that the common or usual name no longer adequately describes the new food, the name must be changed to describe the difference.

- If an issue exists for the food or a constituent of the food regarding how the food is used or consequences of its use, a statement must be made on the label to describe the issue.

- If a bioengineered food has a significantly different nutritional property, its label must reflect the difference.

- If a new food includes an allergen that consumers would not expect to be present based on the name of the food, the presence of that allergen must be disclosed on the label.151

Thus, while the label need not say specifically, for example, “this tomato has been genetically engineered to contain a brazil nut gene,” it must say something to the effect of, “this tomato contains proteins that may engender allergic responses in people allergic to brazil nuts.”152 Further, the FDA identified examples of voluntary statements that companies could use, such as: “[t]his product contains cornmeal that was produced using biotechnology”; “[t]his product contains high oleic acid soybean oil from soybeans developed using biotechnology to decrease the amount of saturated fat”; or “[t]hese tomatoes were genetically engineered to improve texture.”153

The cumulative effect of these regulations is that U.S. producers are not required to label their products as genetically modified, but are free to label their products as not genetically modified—in others words, “GM-free”—to the extent that such labeling is not misleading. In addition, consumers who wish to avoid GM foods may limit their purchases to foods bearing the “USDA-Organic” label.154 But even with this seem-

150. DRAFT GUIDANCE FOR INDUSTRY, supra note 133, at 7–8.
151. Id. at 3–4.
152. Id.
153. Id. at 7–8.
154. 7 C.F.R. § 205.105; see also infra note 21.
ing variety, U.S. consumers do not enjoy informed choice—they cannot assume that foods that do not bear labels are not GM, and they likely do not understand what labels they do encounter.

IV. THE LABELING REGIME IN THE EUROPEAN UNION

Regulations regarding approval and labeling of GMOs are much stricter in Europe than in the U.S. for two reasons. Distrust of regulators has led consumers to demand harsher regulations, and European regulators approach risk regulation conservatively—they evaluate both the product and the production process, and they use the precautionary principle. The E.U. would prefer to ban the importation and growth of GMOs altogether, as discussed in Part I. As this is not a viable option, regulators have instituted the world’s broadest and harshest regulations. These regulations have led to a de facto ban on GMOs in the E.U.155

The strong distrust of government and opposition to GMOs in Europe are the result of regulatory failures. These failures have included the Sang Contaminé (contaminated blood) scandal,156 contamination of eggs and meat with the highly carcinogenic industrial chemical dioxin in Belgium,157 and, most memorably, the Bovine Spongiform Encephalopathy (“BSE” or “mad cow disease”) scare in the United Kingdom.158 The strongest driver of the intensely negative consumer reaction to the BSE scare was not the fact that humans contracted the disease, or that some

155. GMO Compass, http://www.gmo-compass.org/eng/home/ (“No genetically modified fruits or vegetables are on the market in the EU. Any GM plants authorised in the EU are not intended for direct consumption.”).

156. The Sang Contaminé scandal was a public health scandal in France, Canada, and China. It was said that AIDS deaths resulting from infusions to hemophiliacs of infected blood could have been averted because public health officials knew of the causal link and refused to institute a moratorium on blood transfusions until screening procedures for HIV (the virus that causes AIDS) could be implemented. See generally ANNE-MARIE CASTERET, L’AFFAIRE DU SANG (1992).

157. Failure to properly clean industrial tanks first used to hold mineral and industrial oil, then used to store animal fats used in the manufacture of animal feed, was cited as the cause of a dioxin contamination in animal food products and led to an E.U.-wide recall of “Belgian agricultural exports of eggs, chickens, pork and beef” as well as the destruction of “livestock that were given animal feeds believed to be contaminated with dioxin, a serious carcinogen.” Richard Tyler, Dioxin Contamination Scandal Hits Belgium: Effects Spread Through European Union and Beyond, WORLD SOCIALIST WEB SITE, June 8, 1999, http://www.wsws.org/articles/1999/jun1999/belg-j08.shtml.

158. Relatedly, polio vaccines were withdrawn from the E.U. market at the time of the BSE scare because they had been produced from calf fetuses and it was feared that the fetuses had been infected with BSE that the vaccine might pass on to humans. Polio Vaccine in BSE Scare, BBC NEWS, Oct. 20, 2000, http://news.bbc.co.uk/2/hi/health/980968.stm.
died, but the anger over E.U. regulators’ “belated failure to recognize” the health hazards of BSE.\textsuperscript{159} This failure “severely undermined public trust in E.U. food safety regulations and the scientific expertise on which they were based.”\textsuperscript{160} Both the government of Britain and the European Commission denied the validity of consumer concerns and placed no restrictions on the sale of British beef until there had been a significant number of human deaths.\textsuperscript{161}

As a result of these food supply scandals and regulatory failures, European consumers are distrustful of food modification in general, and they are not confident in their national and supranational regulators’ abilities to ensure the safety of the food supply. This general distrust also applies to GM foods: “a majority of Europeans do not support GM foods. [They] are judged not to be useful and to be risky to society.”\textsuperscript{162} Interestingly, the level of support differs by country: “[w]hile GM crops are supported in Spain, Portugal, Ireland, Belgium, [the United Kingdom], Finland, Germany, and the Netherlands,” the public is generally opposed to GM crops in “France, Italy, Greece, Denmark, Austria, and Luxembourg.”\textsuperscript{163}

Before the integration of the European Union, food safety was regulated at the national level in each member country by myriad individual state agencies. With the creation of the European Common Market, the free flow of goods took priority over food safety.\textsuperscript{164} In 1985, the European Community (“EC”) moved to a labeling regime as an alternative to attempting to harmonize member countries’ regulations regarding approval of individual biotech varieties. The labeling “indicate[d] the differences in composition and production methods,” which aimed to allow consumers to make informed decisions.\textsuperscript{165}

\textsuperscript{159} Trust is important because it functions as a proxy for knowledge. If consumers cannot trust their regulators to make adequate tests for safety, they face the choice of either trying to replicate those safety tests themselves (something that is functionally impossible in the context of food GMOs) or foregoing the product they distrust (something that is also nearly impossible, unless one grows all of one’s own food, or restricts oneself to consuming only organic foods, meaning avoiding processed foods entirely).

\textsuperscript{160} Vogel, supra note 116, at 24.

\textsuperscript{161} Id.


\textsuperscript{163} Id.


\textsuperscript{165} Id. at 432.
The labeling regime was considered a success, but as the E.U. succeeded at integrating the markets and the political systems of its member countries, the regulatory focus shifted to ensuring food safety. In 2000, responding to calls from various groups for increased “excellence, transparency, and independence” of food regulation, the European Commission created the European Food Safety Authority (EFSA). While the EFSA is charged with risk assessment, risk management remains entrusted to each individual member state.

Under the old guidelines, which were part of the E.U. novel food regulation of 1997, genetically modified foods required labeling only if GM content could be detected in the final product. Proof of GM content could be obtained by testing for characteristic, genetically modified DNA fragments. In April 2004, the European Union replaced the previous product-oriented set of labeling laws covering genetically modified foods and animal feed with a more conservative, process-oriented set of regulations. The Directive on Genetically Modified (GM) Food and Feed and the Directive on the Traceability and Labelling of GMOs require producers to label more products and the food production industry to put in place a compliance system for monitoring the presence of GM material throughout the supply chain.

167. The EFSA was established pursuant to Council Regulation 178/2002, 2002 O.J. (L 31); Liebovitch, supra note 164, at 433.
168. Liebovitch, supra note 164, at 434. As with many aspects of the legal integration of the E.U., there remains a tension between national and supranational competence with respect to approving and labeling GM foods. There is a strong concern in all of the countries of the E.U., and particularly in the countries with strongest cultural identification with agrarian society, that ceding competence to a supranational authority will destroy countries’ distinctive identities and cultures.
169. PAARLBERG, supra note 14, at 17.

Feeds containing GM plants or ingredients from GM microorganisms must be labelled. The foods made from animals raised with GM feed, however, such as meats, eggs, and dairy products, do not require labelling. They are considered
The stated goals of the new regulations are to protect “human life and health, animal health and welfare, [and] environment and consumer interests,”174 to ensure “the effective functioning of the internal market,” to “lay down provisions for the labeling of genetically modified food and feed,”175 to promote “the right of consumers to information,”176 and to “enable[] the consumer to make an informed choice and facilitate[] fairness of transactions between seller and purchaser.”177 This is not a hierarchy of purposes, as nothing is explicitly given priority, and the various goals are distributed throughout the regulations.

The labeling requirements apply to virtually all foodstuffs, including “processed, pre-cooked or packaged food . . . bulk or unpacked goods, and catered food in restaurants and canteens.”178 There are two important exceptions, however. Processing aids are exempt,179 and “[u]nintentional and technically unavoidable mixing only needs to be labeled if the GM content exceeds 0.9 percent (of the original ingredient).”180

The regulations divide food into three categories: pre-cooked or packaged food with a list of ingredients, packaged food without a list of ingredients,181 and unpackaged food182 or very small package sizes. For foods made ‘with the help of GMOs’ and are therefore exempted from labelling requirements.

Id.
177. Council Regulation 1829/2003, §17, 2003 O.J. (L 268). The labels aim to facilitate informed choice in part by assuring that labels are not misleading.
178. GMO Compass, supra note 173.
180. GMO Compass, supra note 22. Council Regulation 1829/2003, art. 12, ¶2, 2003 O.J. (L 268). In order to qualify for the safe harbor, the producer must meet two conditions. First, “[t]he affected producer must prove that the traces of GMO were technically unavoidable. If GMOs are mixed intentionally, labelling is always required.” GMO Compass, supra note 173. Second, “[t]he GMO that is present must be authorised in the EU and thereby considered safe.” Id. (interpreting Council Regulation 1829/2003, art. 12, ¶3, 2003 O.J. (L 268)). Council Regulation 1829/2003 requires that producers “be in a position to supply evidence to satisfy the competent authorities that they have taken appropriate steps to avoid the presence of such material.” Council Regulation 1829/2003, art. 12, ¶3, 2003 O.J. (L 268).
181. Foods without a list of ingredients include, for example, sugar or packaged fruits or vegetables. GMO Compass, GMO Labelling: What Does Labelling Look Like?, http://www.gmo-compass.org/eng/regulation/labelling/90.gmo_labelling.html (last visited Apr. 11, 2010)
182. Unpackaged food includes bread sold in an open display or candy sold from bins. Id.
each category, the regulations detail the exact form, location, and content of the label. For pre-cooked or packaged foods with a list of ingredients, the GM ingredient “must be labeled, in the form of an addition to the ingredient concerned, either as ‘genetically modified’, or as ‘produced from genetically modified’ material.”183 This text may be added in a footnote to the list of ingredients.184 For packaged foods without a list of ingredients, the text must be clearly visible on the label.185 Lastly, for unpackaged foods or for very small package sizes, the text must be attached to the display, or be displayed in direct connection with the relevant product.186 The use of symbols or logos is not allowed for any of the three categories.187

The E.U. is not alone in requiring labeling; many other countries have some form of labeling law. Canada and Argentina (the other large producers of GM crops) allow voluntary labeling, as does the United States.188 Australia and New Zealand require that GM content that makes up more than 1% of the total weight of a product be labeled, and provide exemptions for “vegetable oils, food additives, and food processing aids (such as enzymes used in cheese and brewing).”189 Japan similarly requires labeling, but with a threshold of at least 5% GM content, and provides exemptions for “feedstuffs, alcoholic beverages, and processed foods, such as soya sauce, corn flakes, and other vegetable oils.”190 South Korea and Indonesia require labeling, with 3% thresholds.191

The complexity and scope of the E.U.’s current labeling laws render them the harshest in the world.192 The effect of these regulations, combined with strict approval procedures for introducing GMOs to the E.U.

183. Council Regulation 1829/2003, art. 13, ¶1(a), 2003 O.J. (L 268). The footnote must be in the same font size as that of the ingredient list. Id.
187. GMO Compass, supra note 22.
188. Carter & Gruere, supra note 47.
189. Id.
190. Id.
191. Id.
192. As of 2003, in addition to the E.U., “Australia[,] and New Zealand require labeling if a food contains more than one percent GM ingredients (with important exceptions for some foods, e.g., foods served in restaurants). Japan’s policy is similar except its threshold before labeling is required is five percent.” Teisl & Caswell, supra note 33, at 2. “Currently, Taiwan and Hong Kong are moving to implement labeling rules similar to Japan’s and China recently issued regulations that appear to require all GM foods to be labeled.” Id. at 9.
market, has been to maintain the prior legal moratorium on the importation and growth of GMOs de facto. Producers and grocers do not want to run the risk of consumer boycotts or penalties for incorrect labeling, so GMOs are not commercially available in the E.U.

V. PROPOSED LABELING REGIME

The E.U. would prefer to ban GMOs altogether but has settled for harsh approval requirements and strict labeling for those varieties it does approve. The U.S., on the other hand, does not consider the “consumer’s right-to-know” a sufficient justification for requiring labeling. The purpose of a U.S. federal labeling law for GM content is to reconcile the nation’s interest in preserving the legality of GMO growth and consumption with the underappreciated importance of facilitating informed consumer choice.

Still, there are six factors that affect how useful a label is to the consumer, including (A) the level of complexity of the label; (B) whether the label is positive or negative; (C) whether the system is mandatory or elective; (D) whether the label contains information only about the end product or also about the production process; (E) what threshold of GM content triggers labeling requirements; and (F) the scope of the regulations, or the definition of genetic modifications that must be labeled. Each of these factors must be evaluated in light of the purpose of facilitating consumer choice.

194. See supra notes 76, 77, 155.
195. See supra note 155.
196. Consumers do not truly have a choice in a regime that bans GMOs, because they cannot then purchase GMOs if they wish to do so. Furthermore, as a matter of policy, avoiding a total ban on what already is and promises to be increasingly of significant benefit to farmers, consumers, and the world’s hungry is as important as providing consumers with information and choice. It should be noted that consumer autonomy and rejection of GMOs are not synonymous. It is quite possible that, given the choice, consumers will choose GMOs over non-GMOs, especially in light of lower prices for GMOs.
197. A goal of the E.U. regime is also to facilitate the identification and flow of GM content through the food production chain, so that GM content may be traced in the event of contamination or a public health scare. Given that this same concern applies to all types of food and food production, and is not required of conventional methods, the argument in favor of these extra requirements is weak. This is particularly true in light of the onerous burdens they place on farmers and producers in terms of identification and document retention.
A. Label Complexity

The level of complexity denotes how much information a food label conveys. “Simple labels,” or labels that only indicate whether a product is or is not genetically modified (as opposed to explaining why the product was genetically modified or what changes result to the product from the modification), “do not maximize potential benefits because, by not providing enough detail, they do not allow consumers to adequately rank competing products by key attributes.”198 The benefits of labeling are maximized “if either 1) the information is important to a large number of consumers, even if the information may be of relatively small importance to each consumer or 2) the information is extremely important for even a small number of consumers.”199 With respect to the first factor, studies indicate that a large percentage of American consumers would like genetically modified content in food to be labeled.200 Thus, the labels should, at minimum, denote the presence or absence of GM content.201

In order for a labeling regime to effectively facilitate consumer choice, the label must convey information that consumers understand, consumers must trust the information,202 and the information conveyed must allow consumers to differentiate among products.203 Conveying information that consumers understand via a food label is very difficult. The science of genetic modification is unusually complicated and technical and does not lend itself to facile distillation. While it is easy to set a daily caloric intake for oneself and to add up the calories in the foods one eats in a day to roughly approximate one’s daily allowance, understanding biotechnology well enough to make one’s own individual assessment of whether GMOs are safe or beneficial requires extensive scientific training. This difficulty of distillation presents a high hurdle for any labeling regime.

Labeling that only conveys whether a food product is or is not GM will not adequately assist consumers in differentiating among products, as the reason a product was modified also factors into the consumer’s choice to

198. Teisl & Caswell, supra note 33, at 19.
199. Id. at 6.
200. See supra note 38 and accompanying text.
201. With respect to the second factor, awareness of the presence of allergens is extremely important to a small percentage of the population. Teisl and Caswell refer to peanut allergens as substances that can be life-threatening if consumed by some people, supra note 33, at 6. Notably, the presence of allergenic genetic content, even if introduced into a product in which it does not naturally occur, is already required to be labeled. See supra notes 142, 152.
202. To trust the information, consumers must also trust the source of the information.
203. Teisl & Caswell, supra note 33, at 18.
buy or avoid the product. Consumers may choose to consume GMOs as opposed to non-GMOs in order to obtain benefits such as increased nutritional content or reduced pesticide or herbicide residue. They cannot choose GMOs if the GM food products are not labeled in a way that explains not only that they are modified, but why they are modified.

B. Positive Labels, Negative Labels, or Both

One of the most significant factors in the success of a label is whether the label is either positive or negative, or both positive and negative. “So-called ‘positive’ . . . labeling requires companies to tell consumers when biotechnology has been used in production or when cross-contamination from bioengineered products is above a defined threshold.” In other words, a positive label is one that says, “This product contains GMOs or genetically modified material.” By contrast, “‘negative’ . . . labeling allows companies to tell consumers that their product is a non-[GMO].” Thus, a negative label is one that says, for example, “This product does not contain GMOs or genetically modified material.” To fully inform, a regime must require both positive and negative labels if it requires either. Comprehensive labeling is unnecessarily cost-

204. Id. “[M]ost individuals can identify the color of a product rather easily,” or compare the calorie content of two different foods, “while verifying that a product [is] not genetically modified would be difficult.” Id. at 6. Moreover, a label that only discloses whether a product is genetically modified does not disclose the full range of information necessary for the consumer to understand what he or she is choosing.

205. Consumers may still be eating GMOs but not choosing them. At least one study offers evidence that not only would consumers choose to purchase GM foods over non-GM foods when the relative benefits (such as “reduced use of pesticides, improved nutritional or organoleptic characteristics, or longer shelf life”) of GM foods are disclosed on the label, but that consumers would pay a 10 percent premium for such GM foods. Id. at 9. Moreover, this study was conducted in Italy, where consumer attitudes against GM foods have generally been stronger than in the U.S.

206. Id. at 5. Note that ‘positive’ labels are not synonymous with mandatory labels. However, due to negative consumer sentiment toward GMOs, manufacturers do not voluntarily disclose the presence of GMOs in their products because they fear consumers will not buy them. Thus, ‘negative’ and voluntary are often synonymous in practice, as are ‘positive’ and mandatory.

207. Again, if it meets standards for such a claim.

208. Surprisingly, in a focus-group study conducted by researchers at the University of Maine, Ohio State University, and Unity College, and funded in part by the USDA, almost all focus group participants reacted negatively to “GMO-free” labels, viewing such labels “with skepticism.” Teisl et al., supra note 36, at 6–9.

209. In such a system, the costs of monitoring are increased and borne by both those producers reaping the benefits of consumer choice (organic producers) and those producers forced to label involuntarily (non-organic producers). These increased producer costs are balanced by the increased information available to the consumer.
ly, however, if it is possible for the regime to only require either positive or negative labeling and capitalize on consumer assumptions as to the GM status of non-labeled foods. For example, where foods are labeled positively, consumers assume that products that are not labeled are not GM even if they are GMOs or contain GM material. The converse is true in a regime that requires negative labeling: where products are labeled, consumers know they do not contain GMOs. Where there is no label, consumers assume the product is GM. These assumptions are only correct to the extent that the regime is “symmetric,” meaning that all instances of absence and presence are properly labeled.

An asymmetric regime would be most efficient, but to succeed it would have to capitalize on consumer assumptions. If the regime is only positive, it must require all GM foods to be labeled as such, and it must not allow any non-GM foods to be labeled as “GM-free.” However, implementing an asymmetric regime in the U.S. presents a catch-22. If the regime required positive labeling and did not allow negative labeling, the regime would encounter strong opposition from organic food producers, who currently label their foods as GM-free to capture a certain market segment. On the other hand, if the regime required negative labels, these organic groups would be allowed to substantially continue their current labeling practices but the regime would be incredibly costly and confusing to consumers, as focus group studies have shown that consumers distrust negative labels.

C. Mandatory or Elective Regime

The question whether labeling should be positive or negative is closely related to the question whether labeling should be mandatory or elective. Studies show that consumers do not trust negative labels that say “this product is not a GMO.” Further, consumers assume that in a regime that requires GM products to be labeled positively, the absence of a label means that the product is not GM. Given these assumptions, it would be most efficient to require positive labeling and to proscribe negative labeling. However, a regime that prohibited voluntary negative labeling would defeat the purpose of capitalizing on consumer assumptions. Consumers would no

210. Teisl & Caswell, supra note 33, at 5.
211. Id.
212. Id.
213. See supra note 36.
214. Teisl & Caswell, supra note 33, at 6–9. Perhaps this is because consumers incorrectly assume that all foods are non-GMO unless specifically labeled.
215. Id. at 5.
216. In a regime that required positive labeling, allowing voluntary negative labeling
ling would encounter strong resistance from organic food producers. These producers currently capitalize on the fact that their products are non-GM by labeling them as such,\textsuperscript{217} attracting customers who wish to avoid GMOs. The labeling regime should not bow to the will of organic producers because to require both positive and negative labeling would impose significant costs, and those costs would be borne by groups that are not reaping the benefits of the labels.\textsuperscript{218} The costs of the labeling regime are discussed further in Part V.

\textbf{D. Regulatory Focus: End-Product and/or Production Process}

The fourth factor addresses the differing approach to regulation in the U.S. and E.U.—while the U.S. regulatory focus is limited to the end-product, the E.U. focuses on the product as well as the production method or process. According to the Center for Science in the Public Interest, there is no \textit{a priori} reason for the FDA to restrict the focus of its biotechnology labeling policy to the product only.\textsuperscript{219} By comparison, other

\begin{itemize}
  \item longer be able to assume that an unlabeled product were non-GM if some products were labeled as non-GM and others remained unlabeled.
  
  \textsuperscript{217} In addition to higher sales volume, producers are often able to charge more for their non-GMO products. Andrew Martin & Kim Severson, \textit{Sticker Shock in the Organic Aisles}, N.Y. TIMES, Apr. 18, 2008, at C1, available at http://www.nytimes.com/2008/04/18/business/18organic.html (“organic food . . . typically costs 20 percent to 100 percent more than a conventional counterpart.”).
  
  \textsuperscript{218} If either positive or negative labeling is required or allowed (i.e., if we are going to have labeling at all), both positive and negative labels are necessary to ensure that labels do not violate the FDCA requirement that labels not be misleading. “Section 201(n) of the act . . . states that labeling is misleading if it fails to reveal facts that are material in light of representations made or suggested in the labeling, or material with respect to consequences that may result from the use of the food to which the labeling relates.” DRAFT GUIDANCE FOR INDUSTRY, \textit{supra} note 133. “The legislative history of section 201(n) contains little discussion of the word ‘material.’” However, historically, the agency has generally interpreted the scope of the materiality concept to mean information about the attributes of the food itself. FDA has required special labeling on the basis of it being “material” information in cases where the absence of such information may: 1) pose special health or environmental risks (e.g., warning statement on protein products used in very low calorie diets); 2) mislead the consumer in light of other statements made on the label (e.g., requirement for quantitative nutrient information when certain nutrient content claims are made about a product); or 3) in cases where a consumer may assume that a food, because of its similarity to another food, has nutritional, organoleptic, or functional characteristics of the food it resembles when in fact it does not (e.g., reduced fat margarine not suitable for frying).

\textit{Id.}

\textsuperscript{219} Center for Science in the Public Interest, \textit{supra} note 34.
\end{itemize}
federal labeling programs, such as organic labels and irradiation labels, disclose information about process attributes. Still others, such as “dolphin-safe” labels on canned tuna, address “the public consequences of product consumption.”

Both the current E.U. labeling regime and the proposed U.S. “Genetically Engineered Food Right to Know Act” consider the product and the process. They provide for product-oriented labels that say, “This product contains a genetically modified material,” and process-oriented labels that say, “This product was produced with a genetically modified material.”

The reason that the FDA currently does not consider process attributes is its philosophy that “safety concerns should be characteristics of the food product, rather than the fact that new methods are used.” However, the FDA also maintains that food labels should not be misleading. It is potentially misleading to only provide for product labels, because, while foods produced with GM materials (e.g., beer fermented using GM yeast) are not necessarily GM themselves, the fact that their production used GM materials is still important to some consumers. Thus, the labeling regime should provide primarily for product-oriented labels but should also consider, on a case-by-case basis, whether a given method of production would be material to a sufficient number of consumers so as to require process-oriented labeling in that instance.

E. Threshold GM Content

“Threshold GM Content” refers to the percentage of GM content that is allowed before a plant food is required to be labeled as “genetically modified” or as “containing GMOs.” De minimis thresholds have a long history in food law in the U.S. and the E.U. Although “conta-

220. Teisl & Caswell, supra note 33, at 6.
221. Id.
222. See supra notes 118–24 and accompanying text.
224. See supra note 132 and accompanying text.
225. See supra note 219.
226. It may be thought of as a level below which products are exempted from labeling requirements; it thus determines to a significant extent the scope of labeling regulations.
227. See McHughen, supra note 8, at 212.
228. GMO Compass, GMO Labelling Guidelines: Why a Threshold?, http://www.gmocompass.org/eng/regulation/labelling/89.gmo_labelling_guidelines_threshold.html (last visited Apr. 8, 2010). In the E.U., “[l]abels on honey, for example, will often indicate the plant the honey was produced from (i.e. acacia). If the label states only one plant, the honey must be ‘predominantly’ from the nectar of that plant, i.e. 60–70 percent.” Id.
minants are present in all foods,” food batches are only “rejected when the contaminants reach the threshold level.” When contaminants are present at levels below the threshold, no labeling is required. Contaminants are present in small amounts in most foods, although most consumers are probably unaware of their presence. According to one study, “21% of 567 cereal-based foods tested in the UK . . . contained mites.”

This use of de minimis thresholds in general food law supports the use of such a threshold with respect to GM content, but does not provide a specific level at which the GM threshold should be set.

Theoretically, if the point of labeling is to inform consumers, the threshold should be set at whatever level consumers consider material. However, this requires a determination of the amount of GM content that would trigger an average consumer’s desire to know of the GM nature of the product. This method of determining the threshold is impracticable because there is no such level. Most consumers do not understand GM technology and, therefore, cannot come up with any meaningful level at which they consider modifications “material” to know about.

Of course, some consumers would prefer to see all food products with any GM content labeled. Some groups are completely opposed to GM technology and—if they cannot convince the government to ban GMOs—want to see comprehensive labeling at the very least. But even the E.U. recognizes that it is practically impossible to label all instances of genetic modification. Thus, the labeling regime must provide some threshold percentage below which labeling is not required.

229. McHughen, supra note 8, at 212.
230. Id. McHughen notes that some consumers in the same group that wants to see GM content labeled (such as vegetarians opposed to GM) should like to see mite (or rat or other pest) content in food labeled as well, “particularly as these contaminant animals contribute far more animal DNA and protein to the food than GM will.” Id.
231. McHughen, supra note 8, at 204–13 (explaining in detail the many different types of mistakes consumers may make in interpreting labels generally, and specifically with regard to GMOs).
233. GMO Compass, supra note 230.

During the production, transportation, and processing of agricultural products, a small amount of mixing between different fields and different shipments is difficult to prevent. For this reason, even when a product was intended to be completely GMO-free, traces of GMOs can often still be detected. Products containing these unintentional or technically unavoidable mixtures with GM material do not require labelling, as long as the GM content does not exceed 0.9 percent.
As the U.S. does not currently require labeling, it has not attempted to determine what threshold percentage is appropriate, but four factors would be significant to such a determination: cost, consumer confidence, the type of genetic modification, and whether the mixing of GM and non-GM crops was intentional. The incredibly high cost of a zero-tolerance threshold suggests the need for a non-zero tolerance level. A recent study suggested that labeling “costs rise nonlinearly as the threshold for purity is decreased.” Thus, a 1% purity threshold would be more than five times as expensive to ensure as a 5% purity threshold.

Of countries that do require labeling, the E.U. has set the lowest threshold. All crops that are intentionally GM must be approved for commercial sale in the E.U., and those products approved for commercial sale must be labeled as GM. Where producers intend to use non-GM crops, “[p]roducts containing . . . unintentional or technically unavoidable mixtures with GM material do not require labeling, as long as the GM content does not exceed 0.9 percent.” Nothing in the E.U. regulations or on the E.U. website for consumer outreach explains how the 0.9% figure was calculated or what the figure represents in terms of policy. Of countries that maintain mandatory labeling regimes, the most permissive is Japan—the threshold is 5%.

The trade-off is that while a high threshold is more practical and less costly to enforce, the label becomes less meaningful to consumers, who will therefore become more distrustful of labels in general. If something containing 3% GM content is labeled as not GM when consumers feel that 3% GM content is material, they lose confidence in the label. There is no evidence available as to what threshold consumers consider material in their decision to consume or avoid GMOs. To date, because the technology is so complicated, scientists have been the ones who decide what threshold is material.

In addition to different types of genetic modifications, there are different methods of measuring the percentage of GM content. Take GM soybeans for example. Should GM content be measured by the percentage of genes that are GM? Perhaps it should instead be measured by the percentage of proteins the plant expresses that are coded for by genes that are foreign to the original plant?—or by the weight of GM proteins as a per-

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234. The current grain elevator system in the U.S. also necessitates a de minimis threshold level, as mixing of different producers’ grains is inevitable.
236. GMO Compass, supra note 22.
237. Id.
238. Carter & Gruere, supra note 47.
percentage of total proteins produced by the plant? Or, maybe a bag of 100 soybeans should have to be labeled if more than one of the individual seeds is found to contain a genetic modification?

Thus, a threshold is necessary and in keeping with food labeling law generally. However, due to the differences in methods of genetic modification, a threshold will have to be worked out for each category of modification, and perhaps even more specific thresholds will be needed for different products within each category. If you, the reader, do not understand the foregoing distinctions, would you understand labels enough to make an informed choice? The average consumer has never thought about these issues and does not have the scientific knowledge to make an informed choice as to the test to use for the threshold or the numerical percentage at which to set the threshold.

F. Scope of the Regulations and Definition of Material Genetic Modifications

In addition to the different methods of measuring threshold GM content, there are many different types of genetic modifications, and no single threshold will apply to all types. For example, a single gene engineered into a tomato could hypothetically represent 1% of the proteins expressed by the tomato plant. Does that fact make the entire tomato GM? On the other hand, a beer produced using GM yeast could result in a finished product with no GM protein content at all. Is that beer non-GM? Citrus are routinely grown using rootstock. The root of the plant is from one variety, while most of the trunk and all of the branches are from another variety. If the root is GM but the branches are not, are the oranges GM?

Professor McHughen notes that while it is relatively easy to label individual tomatoes, the products that will be the most expensive to segregate and label are those products at the bottom of the market, such as generic or store-brand ketchup, which is commonly produced using whatever tomatoes are available at the time of production of each batch. Thus, the cost of labeling will fall primarily on the people who

239. McHughen raises the question whether labeling in this case would be required on each individual tomato, or on the bin containing the tomatoes. Individual labeling is needed in the context where food is sold in open bins, because if tomatoes are not individually labeled, they can easily be accidentally or intentionally mixed with non-GM tomatoes, which would destroy the efficacy of the intended label. See McHughen, supra note 8, at 214. It seems feasible to label the tomatoes individually, as bananas currently are labeled with stickers bearing the brand name “Chiquita.” In this situation, the cost is borne by the producer of the GM product.

240. See McHughen, supra note 8, at 214.
buy store brands—i.e., the less well-off. 241 This is an important consideration. A possible solution would be to only require labeling on the items that are the easiest to label, such as whole fruits. This would potentially be misleading based on the consumer assumptions with asymmetrical labeling, discussed in Part IV, but it would comport with E.U. law, which exempts many types of processing aids and processed foods from labeling requirements.

In addition to the direct cost of a labeling regime, adding GM data dilutes information already included on the label; more information means each item gets less space on the label and less attention from consumers. We live in a world that is already full of information. Any further information we consider putting on labels must be material to our decision whether to buy the product. 243 “Simply increasing the amount of information content on a label may actually decrease the consumer’s ability to process other[,] more important label information.”

CONCLUSION

All things considered, an American labeling regime is feasible. A federal framework for labeling GM content in plant foods would address calls for increased regulation and democratic input into the risk management process, while still allowing the continued development and cultivation of GM crops for human consumption. Such a labeling regime would go far to quiet fears about personal risk through involuntary exposure to GM food, and, in conjunction with a public information campaign, would likely increase consumer confidence in such food in the long run.

241. In addition to being less able to bear the cost of labeling, the poor are arguably less able to make informed choices with regard to food, because they are in general less educated than wealthier consumers.

242. See supra note 179 and accompanying text.


244. Teisl & Caswell, *supra* note 33, at 10. This is an argument against the unconditional “consumer right-to-know” argument.
Logistically, the labeling regime would best balance cost with the goal of facilitating consumer choice if it required positive labeling and prohibited negative labeling, set a threshold GM content to trigger labeling requirements at a percentage that varies depending on the category of modification, and provided exemptions for processing aids and processed foods at the lower end of their respective markets.

The proposed labeling regime would have both positive and negative effects. Any labeling regime would impose costs on producers (and consumers, if producers pass on these costs). It would require a large-scale change to the current system of grain production in the U.S. This overhaul would be costly in the short term. Further, it is likely that consumers would avoid purchasing GM crops and food products in the short term, thereby decreasing nonorganic producers’ profits (but correspondingly benefiting organic producers). In the long term, it is likely that U.S. consumers would accept GMOs and market forces would adjust the percentage of consumers choosing organic food as opposed to conventionally produced food. Stricter labeling laws would go far to bolster consumer confidence in the food supply and in regulatory authorities. Labeling requirements in the U.S. would partially harmonize the U.S. system with that of much of the rest of the world. Finally, a federal labeling law would preempt existing state labeling laws, producing beneficial regulatory uniformity but potentially destroying some currently meritorious claims.

Foremost among the concerns with any labeling regime is cost: any labeling regime would be expensive to implement. The costs involved include both direct costs (in terms of the actual cost of physical labeling)
and indirect costs, such as increased label complexity and competition of GM-related information on the label with other types of information. Some of these costs are more significant in the short-term, while others are incurred on an ongoing basis and, thus, remain significant.

Implementing a labeling regime involves developing “a set of standards, actions to meet the standards, certification of the actions, and governmental enforcement of the program.”\(^\text{249}\) There is evidence that “the costs of the actual physical labeling (e.g., label design and printing) are a tiny fraction of the costs of compliance and certification (supply chain costs) . . . “\(^\text{250}\)

Various studies have estimated the monetary cost of instituting a labeling regime in the U.S. One study “estimated the monetary costs per unit of segregating nonbiotech crops along the marketing chain . . . [at about] $0.22 \text{ [per] bushel for corn and $0.54 [per] bushel for soybeans.”\(^\text{251}\) Dividing these quotations by the USDA average reported price per bushel for corn\(^\text{252}\) and soybeans\(^\text{253}\) between 2006 and 2008 ($4.14 and $8.73, respectively)\(^\text{254}\) shows that these costs represent an increase of 5.3% in the price of corn and an increase of 6.2% in the price of soybeans attributable to labeling costs. A second study found that “[Intellectual Property] systems\(^\text{255}\) . . . raised the price of soybeans by 0.6–1.3%, while providing traceability for oilseed rape (canola) raised prices by 2.8–4.1%.”\(^\text{256}\) The results of these studies suggest that “while the costs are not small, they do not imply that disarray would occur in the grain marketing

\(^{249}\) Teisl & Caswell, supra note 33, at 5.

\(^{250}\) Id. at 9.

\(^{251}\) Id. at 13. Neither estimate included any premium paid to the producer. Id.


\(^{254}\) Calculated by averaging the prices reported for these years in the sources cited in notes 260 and 261.

\(^{255}\) In other words, systems designed to ensure traceability of GMOs and GM material throughout the food production system (i.e. from ‘farm to fork’). The European system of traceability is to assign each GMO an ID number. GMO Compass, supra note 170.

\(^{256}\) Teisl & Caswell, supra note 33, at 13. Two other studies, both by KPMG, yielded cost estimates as low as “0.43% of sales in Australia and 0.23% of sales in New Zealand,” and as high as a 10% increase in retail food prices and 35–41% increase in producer prices in Canada. Id. at 15. Thus, costs may vary by country and by region within a country.
Thus, cost is not an insurmountable obstacle to a U.S. labeling regime. Changing the current system of grain production in the U.S. would be very difficult. Producers would have to segregate their products in order to certify that they are GM-free. In the current system, GM and non-GM crops mix freely. The Starlink episode, in which a variety of GM corn that had only been approved for animal consumption accidentally made its way into the human food supply, showed that “it is difficult to segregate different varieties of commodity crops like corn, soybeans, or wheat from each other in the current grain-handling system.” The Starlink accidental release ultimately caused the Starlink variety to be withdrawn from the market entirely.

Both short-term and long-term costs are involved. For example, overhauling the grain-elevator system might cost a significant amount at first, but it would not have to be repeated. Monitoring costs are incurred, on the other hand, on an on-going basis. In the short term, it is likely that consumers would reduce their consumption of products labeled as containing GMOs. However, this effect may be at least partially alleviated where the labels describe why the food was modified, so as to lessen the view that positive labels are warning labels. Further, it is likely that the shift away from GM foods will be short-lived, because organic produce is significantly more expensive than nonorganic produce. As consumers observe the lack of negative effects and the benefits of consuming GMOs, they are likely to trust GMOs more and more, and therefore choose to purchase them.

A federal regulatory scheme would preempt state labeling laws to the extent that they impose similar requirements, thus ensuring national regulatory authority regarding labeling requirements but potentially eliminating some plaintiffs’ claims based on state law or current federal law. Current state labeling laws would be nullified if Congress imposed affirmative labeling requirements through the National Uniform Nutritional Labeling clause of the FDCA. A state can challenge the FDA’s

257. Teisl & Caswell, supra note 33, at 18.
258. See supra note 112.
259. Center for Science in the Public Interest, supra note 34.
260. Id.
261. An example of the benefits of GMOs is the reduced consumption of synthetic chemical pesticides. See supra note 48 and accompanying text.
striking down the state’s proposed label, but the state bears the burden of showing that its label is not unduly burdensome to interstate commerce.263 State courts “may not impose liability upon a pesticide manufacturer,” for example, “if that liability is premised on an inadequate label, as the manufacturer would be required to change the label in order to avoid liability.”264 Additionally, claims of failure to warn premised on the completeness and accuracy of disclosure of risks on a label under both current federal law and state law would be preempted.265 The basis of failure to warn claims is that the consumer has involuntarily exposed herself to risk; in other words, “I would not have bought or eaten this product had I known what it was made of.” If the label discloses the presence of GM content, then there is no failure to warn; self-exposure to risk from consuming GMOs is voluntary. Claims of actual harm from unsafe products266 or gene pollution would not be preempted. The proposed Genetically Engineered Food Right to Know Act would go even further than current law, authorizing private suits for damages as a result of gene pollution.267

Traceability is a separate but related issue. Europe’s labeling regime incorporates traceability requirements in European Council Directive 1830/2003 on the Traceability and Labelling of GMOs. This set of laws

prohibits implied preemption using its provisions: the FDCA “shall not be construed to preempt any provision of State law, unless such provision is expressly preempted under [21 U.S.C. § 343-1]” of the FDCA. Holk v. Snapple Beverage Corp., 575 F.3d 329 (3d Cir. 2009).

263. The United States District Court for the Southern District of New York issued two conflicting decisions in related cases in 2007 and 2008. In the first case, the court struck down a state regulation, determining that the Nutritional Labeling and Education Act preempted the state regulation because the state regulation imposed different requirements than the federal act. N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health, 509 F. Supp. 2d 351 (S.D.N.Y.) (2007). In the second (related) case, the court declined a restaurant association’s motion for a preliminary injunction to stop the enforcement of a new city regulation requiring restaurants to post the calorie content of food items on their menus, because there was not the substantial possibility of success on appeal of the association’s claim that the regulation was preempted by the Nutrition Labeling and Education Act. N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health, 545 F. Supp. 2d 363 (S.D.N.Y.) (2008).


265. Ideally, in order to provide the most consistency and thereby facilitate consumer understanding and ease of use, the labeling regime should be supranational. Given the lack of congruence between current E.U. and U.S. policy, however, the emergence of a supranational regime is highly unlikely in the near future.

266. For example, claims that GM content acted as a poison or induced an allergic response.

267. See supra notes 118, 122 and accompanying text.
requires that all operators\textsuperscript{268} at all marketing stages of GMO-containing
food products must notify the operators of subsequent stages (to whom
they are passing on the food material) in writing that the food contains
GM material or GMOs, and they must supply the next operator with the
GMO’s ID number.\textsuperscript{269} All operators must retain documentation of the
source of their products, the identities of operators to whom they passed
on their products, and the ID numbers of their products, for five years.\textsuperscript{270}
Incorporating traceability requirements like those in the European system
would make it easier to trace problems with the food supply and identify
or rule out the possibility that a contamination or problem was associated
with a GMO. Thus, traceability requirements are an investment now to
avert future costs, perhaps even future injuries and deaths.\textsuperscript{271} However,
traceability requirements are not essential to providing the consumer
with choice in the form of a label that discloses whether a product has or
has not been genetically modified. Because they are superfluous to the
central purpose of the labeling regime and they add costs, traceability
requirements should be a second step in the regime, adopted after enough
time has passed to determine whether labeling requirements have served
the purpose of facilitating consumer choice.

Finally, any labeling regime would benefit from a contemporaneous
governmental public information campaign.\textsuperscript{272} Such a campaign should
be based on scientific studies as to health and environmental risks. It
could present the positive nutritional attributes and theoretical risks of
consuming GMOs along with the societal costs of foregoing GMOs, such

\textsuperscript{268} “Operator” is defined as “a natural or legal person who places a product on the
market or who receives a product that has been placed on the market in the Community,
either from a Member State or from a third country, at any stage of the production and
distribution chain, but does not include the final consumer.” Council Regulation
1830/2003, art. 3(5), 2003 O.J. (L 268).


\textsuperscript{270} GMO Compass, supra note 170 (paraphrasing Council Regulation 1830/2003, art.
4(A)(4), 2003 O.J. (L 268)).

\textsuperscript{271} This would be true if a problem traced to a GMO is identified early enough to
stop consumers from eating the problematic product, or if GMOs can be ruled out as a
cause in time to direct resources to the real cause of a public health scare.

\textsuperscript{272} Teisl & Caswell, supra note 33, at 19. “To avoid confusion, it is likely that any
labeling program for [GMOs] will require a significant information campaign to educate
consumers.” Id.
as starvation in developing countries, environmental degradation, and harm to agricultural workers from continued use of chemical fertilizers and pesticides. With a balanced approach, such an information campaign might contribute to public acceptance of GMOs and to the ultimate goal of the labeling regime: ensuring informed consumer choice.

Valery Federici*
I AMEND THEREFORE I AM?
DISCRETIONARY REFERENDA AND THE
IRISH CONSTITUTION

INTRODUCTION

On July 1, 1937, the people of the Republic of Ireland approved a new constitution by a plebiscite. The public’s consent “rooted [the constitution] in the will of the people” and put it “beyond challenge,” except via amendment by the people. Specifically, Article 46 of the new constitution provided that, in addition to being passed in both houses of the Oireachtas (the Irish parliament), prospective amendments must also “be submitted by Referendum to the decision of the people” in accordance with the current referendum law. Since the adoption of the Constitution in 1937, there have been thirty amendment proposals submitted to the people by referendum. Of these, twenty-one have been approved.

Meanwhile, regular bills that do not propose amendments to the Constitution may be put to referendum at the discretion of the executive branch. This is according to Article 27 of the Constitution of Ireland, which states:

1. JOHN MAURICE KELLY, FUNDAMENTAL RIGHTS IN THE IRISH LAW AND CONSTITUTION 8 (1961). The 1937 Constitution (Bunreacht na eireann) replaced the 1922 Constitution (Saorstat Eireann) which was a product of the 1921 Anglo-Irish Treaty with Great Britain. JAMES CASEY, CONSTITUTIONAL LAW IN IRELAND 23–26 (1987).
2. CASEY, supra note 1, at 23.
3. Id.
4. Id.
6. The Oireachtas is split into two houses: the Dáil Éireann and the Seanad Éireann. Id. art. 15.
7. Id. art. 46. Any citizen who has the right to vote at an election for members of the Dáil Éireann may vote in a referendum. Id. art. 47.
9. This number does not include the 1937 plebiscite on the constitution.
10. See Elections Ireland, Referendums, http://electionsireland.org/results/referendum/index.cfm. The First and Second Amendments did not require referendums. Article 51 of the Constitution allowed for a transitional period of three years in which the government could pass amendments without actually putting them to a referendum. After the three year period was over, Article 51 was deleted from the Constitution pursuant to Article 51.4. J.M. KELLY, THE IRISH CONSTITUTION 716–17 (2d ed. 1984)
12. See Ir. CONST., 1937, art. 27. Article 27 applies to bills that have already been approved by both the Seanad Éireann and the Dáil Éireann. Id.
A majority of the members of Seanad Éireann and not less than one-third of the members of Dáil Éireann may by a joint petition addressed to the President by them under this Article request the President to decline to sign and promulgate as a law any Bill [other than a Bill expressed to be a Bill containing a proposal for the amendment of this Constitution] on the ground that the Bill contains a proposal of such national importance that the will of the people thereon ought to be ascertained.13

If the President decides that the contents of a bill are “of such national importance that the will of the people thereon ought to be ascertained,” he will decline to sign the bill until it has been approved by the people, either by referendum within eighteen months, or by a resolution of the Dáil Éireann (The House of Representatives of the Irish parliament) within eighteen months of a new election.14 To date no bill has been referred to the people under Article 27.15

Having a direct say in amending their constitution is of great importance to the Irish people,16 but recent referendums reveal flaws in the practice.17 The integrity of a referendum does not stem from its mere inclusion in the constitutional structure18 but from the fact that it requires and, thus, reflects the people’s approval or disapproval.19 However, the decisions of under-informed or misinformed voters may produce misleading results.20 And such ambiguities may jeopardize a referendum’s integrity.21

13. Id.
14. Id.
15. Id.
16. In her support of the Irish referendum system, Maria Cahill writes:
   
   The very holding of a referendum on a proposal to amend the constitution is testament to the fact that what is at stake in the proposal is not something about which we can be casual; not something that costs us nothing; not something about which we can delegate our decision-making role, but rather something that goes to the heart of who we are, something that changes fundamentally those things that we take most seriously, something that has deep and enduring ramifications for our project of living-in-common.


17. This note does not attempt to argue either side of the proposals at issue, but instead intends to offer them as evidence that the constitutional amendment referendum system is flawed.
19. Ir. Const., 1937, art. 47.
Referendums, especially on social issues, may have effects that go beyond the substance of the proposals at stake. For instance, the vote may be perceived as a statement of majority sentiment toward certain individuals or groups within the community. Because a referendum is required once a proposal to amend the constitution has been passed by both houses of the Oireachtas, the current system does not allow for considerations regarding fairness, equality, or complexity of the issues.

This Note argues that recent referendums on constitutional amendments regarding citizenship and European Union (“EU”) treaties suggest the government should be granted discretion to identify whether a proposal to amend the Constitution should be put to the people. Part I examines Ireland’s 2004 citizenship referendum, which was problematic because the vote could have been seen as indicating racist or anti-immigration sentiments, especially in light of the events leading up to it (the Belfast Agreement of 1998, the economic boom of the late twentieth century, and the consequent influx of immigrants to Ireland, among others). Part II considers the referendums on the ratification of the most recent EU agreement, the Treaty of Lisbon, in order to criticize the government’s inability to provide voters with adequate information explaining the complexities of the proposals at stake, and to argue that EU
treaty ratification referendums ultimately place excessive burdens on both the government and the voters. Finally, Part III explains the particulars of this Note’s overall proposal that the government should only be required to order a referendum when the matter at stake is of the utmost importance, and, even then, the government must carefully consider its ability to educate the voters on the issues. By ensuring an informed electorate, such a system would protect the right of the people to participate in their government without sacrificing the integrity of the referendum as a tool of democracy.

I. THE 2004 REFERENDUM ON CITIZENSHIP

In 1998, the Irish and British governments and a group of political parties from Northern Ireland28 met in Belfast to negotiate an agreement on control of the six counties in Northern Ireland.29 As part of this “Belfast Agreement,”30 Ireland amended its Constitution to afford Irish citizenship to all persons born on the island of Ireland, including those born in Northern Ireland.31 Such an automatic entitlement to citizenship based on

stand... Another common problem... is the counterintuitive nature of the ballot questions, which often seek to repeal or overturn existing laws or regulations, setting up a situation in which a “Yes” vote is a vote against a policy, and a vice-versa for a “No” vote.

Gastil, Reedy, & Wells, supra note 20, at 1441–42. Such was the case in Ireland’s 2004 Citizenship Referendum. A “yes” vote was a vote against the existing policy of birthplace citizenship and a “no” vote affirmed the current policy. However, given the highly publicized debate over the referendum, this problem may not have been an issue in this instance.

28. The political parties included the Alliance Party, the Progressive Unionist Party, Sinn Fein, the Social Democratic Labour Party, the Ulster Unionist Party, and the Women’s Coalition. Belfast Agreement, supra note 25.


31. Belfast Agreement, supra note 25; see Ir. Const., 1937, art. 2:

It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish Nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage.

Ir. Const., 1937, art. 2
birthplace is referred to as *jus soli* (or, “law of ground”).  

Since the right to *jus soli* had become part of Ireland’s Constitution after the Belfast Agreement, an amendment—and, thus, an Article 46 referendum—were required before *jus soli* could be modified. Six years after the Belfast Agreement, however, the people of Ireland pass another referendum allowing the government to amend the constitution:

Notwithstanding any other provision of this Constitution, a person born in the island of Ireland, which includes its islands and seas, who does not have at the time of the birth of that person, at least one parent who is an Irish citizen or entitled to be an Irish citizen is not entitled to Irish citizenship unless provided for by law.

Furthermore, The Irish Nationality and Citizenship Act of 2004 states that:

A person born in the island of Ireland shall not be entitled to be an Irish citizen unless a parent of that person has, during the period of 4 years immediately preceding the person’s birth, been resident in the island of Ireland for a period of not less than 3 years or periods the aggregate of which is not less than 3 years.

By adding the parental requirements to the citizenship laws, Ireland significantly curtailed its birthplace citizenship policy.

Proponents of the citizenship referendum, including the government, pointed to the influx of immigrants to Ireland, abuses of the Irish Constitution, and pressure from other EU members as grounds for the

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33. See Ir. CONST., 1937, art. 2; Ryan, supra note 32, at 177–78.

34. Ir. CONST., 1937, art. 46.

35. Elections Ireland, Referendums, supra note 10.

36. Ir. CONST., 1937, art. 9.


amendment. Opponents claimed that it gave force to racial prejudices.\textsuperscript{42} Furthermore, it was argued that “the existing terms of the Constitution helped define Ireland as a compassionate and welcoming country.”\textsuperscript{43} The following section will argue that the citizenship referendum, in light of the events that led to it, created a unique constitutional problem; the people were put in the position in which they were asked to vote not only on the constitutional amendment, but also, implicitly, on race, immigration, and equality.\textsuperscript{44}

\textit{A. Events Leading to Citizenship Referendum}

1. The Belfast Agreement of 1998

The Belfast Agreement was meant to provide a “new beginning” for the relationships among Northern Ireland, the Republic of Ireland, and Great Britain, which had been strained during years of violent dispute over control of the six counties in Northern Ireland.\textsuperscript{45} One way the Belfast Agreement attempted to achieve this goal was to address constitutional ambiguities.\textsuperscript{46} The Belfast Agreement included a provision that Ireland rewrite Article 2 of its constitution. The revised Article 2 reads, in part:

\begin{quote}
It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish Nation. That is also the entitlement of all the persons otherwise qualified in accordance with law to be citizens of Ireland.\textsuperscript{47}
\end{quote}

This new language clarified that those born in Northern Ireland, which remained united with Great Britain, were entitled to citizenship in the Republic of Ireland because they were born on the “island of Ireland.”\textsuperscript{48} The amended Article 2 also enshrined in the Constitution the concept of


\textsuperscript{43} Ryan, \textit{supra} note 32, at 192 (“The principle of unconditional \textit{jus soli} has been central to Irish nationality law for most of the period since the Irish state came into being.”); Lavery, \textit{supra} note 42.

\textsuperscript{44} See infra Part I.B.

\textsuperscript{45} Belfast Agreement, \textit{supra} note 25, Declaration of Support.


\textsuperscript{47} Ir. Const., 1937, art. 2; Belfast Agreement, \textit{supra} note 25.

\textsuperscript{48} See Belfast Agreement, \textit{supra} note 25.
birthright citizenship, which had been part of Irish law, but not part of the Constitution since the 1950s.\textsuperscript{50}

Despite the Agreement’s intent, the “entitlement” language of Article 2 may have curtailed Ireland’s birthplace citizenship laws by using the term “entitlement,” rather than “automatic.”\textsuperscript{51} This significance, however, was most likely not understood at the time of the Agreement. It seemed to be a prudent measure by the Irish government to help further the peace process in Northern Ireland and bolster the possibility of uniting Ireland.\textsuperscript{52} Inserting this law into the Constitution meant that it could only be changed by re-amending the Constitution with a referendum.\textsuperscript{53} Due to changes in the Irish economy that were beginning to take place,\textsuperscript{54} however, the country’s focus on the application of *jus soli* changed, from those born in Northern Ireland, to children being born to the large numbers of immigrants entering Ireland.

2. Inequality and the Celtic Tiger

Inequality is a problem that has existed in Ireland since the adoption of the 1937 Constitution;\textsuperscript{55} however, as John A. Harrington describes in *Citizenship and the Biopolitics of Post-Nationalist Ireland*, the inequality

\begin{itemize}
\item \textsuperscript{51} Bernard Ryan observes:

\begin{quote}
[The principle of unconditional *jus soli*] attained the rare status of having been constitutionally entrenched as a consequence of the Belfast Agreement in 1998 . . . . The move away from that approach to Irishness had already been seen in the Belfast Agreement: the ‘birthright’ clauses treated Irish citizenship as an entitlement rather than as automatic, while the new Article 2 deliberately substituted a personal entitlement for the previous territorial claim.
\end{quote}

\item \textsuperscript{52} According to the Belfast Agreement, both the Republic of Ireland and Great Britain recognize the status of Northern Ireland as chosen by the majority of its people. Belfast Agreement, *supra* note 25. At the time of the Agreement and still today, that majority wishes to remain united with Great Britain. Should that majority change its stance and allow Northern Ireland to become part of the Republic of Ireland, then, under the Agreement, complications would be avoided as all those born in Northern Ireland would already be entitled to Irish citizenship. Ir. Const., 1937, art. 3; Trimble, *supra* note 46, at 1152–53.
\item \textsuperscript{53} Ir. Const., 1937, art 46.
\item \textsuperscript{54} See infra Part II.B.
\item \textsuperscript{55} Harrington, *supra* note 40, at 435.
\end{itemize}
of post-constitutional Ireland “was often obscured by the language of nationalism and . . . Roman Catholic ideas of charity.”56 Despite any social inequalities that existed, the Irish did not have a defined hierarchy similar to that of the English.57 In fact, legal equality for citizens is explicitly provided for by the Irish constitution.58 Birthright citizenship was an example of this legal equality because every child born in Ireland was equal to any other child born in Ireland in that they were all entitled to be Irish citizens.59

As the Irish economy began to improve toward the end of the twentieth century, inequality of wealth became more noticeable.60 After two decades of stagnant economic growth and development,61 Ireland experienced an economic boom in the late twentieth century.62 Harrington describes the situation as follows:

Ireland’s largely well-educated, relatively low-wage workforce, along with the lowest rate of corporation tax in Europe, attracted US firms seeking a manufacturing platform inside the European Union. Information technology, chemicals, and pharmaceuticals led the boom, known to posterity as the ‘Celtic Tiger’. Gross Domestic Product . . . increased by 9 per cent per annum in the second half of the 1990s. Irish Gross National Product . . . had reached 100 per cent of the EU average in 2000, where it had been 60 per cent at the time of joining in 1973.63

The results of the economic boom, however, did not benefit all of Ireland.64 Harrington points out that “[t]he fruits of the Tiger period have

56. Id.
57. Id.
58. See Ir. Const., 1937, art. 40 (“All citizens shall, as human persons, be held equal before the law.”).
59. Crowley, supra note 38, at 19.
60. Harrington, supra note 40, at 435.
61. Id. at 433 (labeling the 80s in Ireland as “yet another ‘lost decade’ characterized by jobless growth and a dramatic return to emigration”).
64. Battel, supra note 62, at 104 (“There are major reservations about the social consequences of such sudden wealth, with deepening social divisions between those who are benefiting from the Celtic tiger and those still excluded from prosperity.”); Crowley, supra note 38, at 11–13; Harrington, supra note 40, at 434;
been largely distributed in the form of tax cuts rather than social spending with predictably negative consequences for equity.\textsuperscript{65} It was believed that inequality created by this imbalanced disbursement of the benefits of the Celtic Tiger helped drive the growing free-market economy through individualism and competition.\textsuperscript{66} Inequality seemed to be a necessary evil in order to feed the Celtic Tiger.

3. Citizenship Tourism, Anchor Babies and the Common Sense Campaign

The increase in inequality took an even more drastic turn when Ireland began to experience large amounts of immigration as a result of its economic success.\textsuperscript{67} “In the boom years, some 40,000 foreigners from outside the European Union secured work permits each year to fill a shortage of labor.”\textsuperscript{68} However, the increase in immigrants brought problems for Ireland too. For instance, there was backlash from citizens, and the immigrants were subjected to discrimination and violence.\textsuperscript{69} Meanwhile, though the immigration population participated in sustaining the Celtic Tiger economy by supplementing the workforce, many of the resulting economic benefits were denied to immigrants.\textsuperscript{70} Moreover, because immigration was a fairly new phenomenon for modern Ireland, it presented constitutional problems lawmakers and the Constitution’s drafters had not foreseen.\textsuperscript{71}

Many Irish citizens focused their growing anti-immigration sentiments around the notion that immigrants were taking advantage of Ireland’s birthright citizenship laws via so-called “citizenship tourism.”\textsuperscript{72} To engage in “citizenship tourism” is to purposely travel to a country that

\textsuperscript{65} Harrington, supra note 40, at 435.

\textsuperscript{66} Id.

\textsuperscript{67} DeParle, supra note 39 (“Years of Irish prosperity have drawn Polish plumbers, Lithuanian nannies, Latvian farm workers, Filipino nurses, Chinese traders, and sub-Saharan asylum seeker.”).

\textsuperscript{68} Cowell, supra note 63; see also DeParle, supra note 39. Immigrants share 11% of the population, which is almost as high as the United States. But see Harrington, supra note 40, at 437 (noting that some believe Ireland’s immigration volume was exaggerated). When a country allows immigration it appears “passive and vulnerable. Thus, the entry of relatively small numbers of asylum seekers is accounted a ‘flood’ or an ‘influx[]’” so that the immigration “problem” is not a product of the county’s ability to handle the immigrants, but is instead due to the vast number of immigrants. Id.

\textsuperscript{69} Harrington, supra note 40, at 437.

\textsuperscript{70} Crowley, supra note 38, at 13. (“Indeed, the system is set up so that migrant workers can give to the state, and contribute to its social and economic life, but are entitled to nothing beyond a wage.”).

\textsuperscript{71} Id. at 9 (“For the two centuries prior to the present period of immigration, Ireland has been a net exporter of people.”).

\textsuperscript{72} Harrington, supra note 40, at 438.
grants *jus soli* citizenship solely to give birth to a child so that the child will be entitled to citizenship in that country.\(^73\) The tourists (parents) then rely on the child’s citizenship to gain residency in the country for themselves.\(^74\) Ireland was a particularly desirable destination for citizenship tourism not only because of its grant of *jus soli* citizenship but also because of the special protection the Constitution of Ireland provides for families.\(^75\) The Irish-born children of these foreign-born parents were referred to as “anchor babies” because they could secure the parents’ residency in Ireland.\(^76\) As a result of citizenship tourism and anchor babies, Ireland’s government reported that hospitals were becoming overwhelmed by non-Irish women showing up during late-term pregnancy.\(^77\) Eventually, the news media began to report on the issue.\(^78\) In 2003, around twenty percent of babies born in Ireland were born to non-Irish mothers, with seventy percent of those mothers coming from sub-Saharan Africa.\(^79\) Those opposed to the referendum, however, argued that the government’s numbers were misleading because they did not differentiate between non-Irish women who were legal residents of Ireland and those seeking asylum.\(^80\)

The government argued that it was “common sense” for the people of Ireland to want to close the loophole in the Constitution that allows for

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\(^73\) *Id.*.  
\(^74\) *Id.*.  
\(^75\) Ir. Const., 1937, art. 41 (“The State . . . guarantees to protect the Family in its constitution and authority, as necessary basis of social order and as indispensable to the welfare of the Nation and the State.”); see also Harrington, supra note 40, at 438 (noting that the Constitution of Ireland gives a special protection to families).  
\(^76\) Barnhart, supra note 49, at 543.  
\(^77\) Ryan, supra note 32, at 188. The difficulties that the hospitals faced included language barriers and lack of information regarding the medical histories of the expecting mothers. *Id.*  
\(^79\) Irish Baby Laws Attract Africans, supra note 78.  

The precise numbers of non-EU nationals arriving unannounced or late in pregnancy at Dublin in 2003 was put at 548 or just 2.4 per cent of the total. But, as critics pointed out, both percentages included non-EU nationals lawfully resident in Ireland and non-nationals with an asylum application still pending, as well as alleged “citizenship tourists.”  

Harrington, supra note 40, at 446.
citizenship tourism and anchor babies, and the government also argued that the Constitution must be amended in order to protect the “integrity” of Irish citizenship. Meanwhile, Professor of Geography, Una Crowley outlines a number of reasons why “there is nothing commonsensical about the complex issues on which the electorate were being asked to vote.” Perhaps one weakness of the government’s “common sense” argument was that it grouped all immigrants in the “citizenship tourist” category regardless of their intentions of coming to Ireland. According to Crowley:

[A] commonsense understanding of immigration worked to undermine the legitimacy of a range of immigrants—guest workers, asylum seekers[,] and refugees—by questioning their authenticity and by generalizing their motivations and experiences. The discursive construction and denigration of refugees, asylum seekers[,] and economic migrants’ as bogus, spongers, or economic parasites cast doubt on their right to stay in Ireland and claim citizenship for themselves and their children.

By generalizing, the government’s campaign spurned those immigrants who were legal residents. Opponents of the referendum considered this generalization racist and insulting to the immigrants who were legitimately in Ireland.

The common sense campaign exemplified the contours of the unique constitutional issue facing both the government and the voters. The government wanted to close the Constitution’s citizenship loophole but without being perceived as anti-immigration and racist. By framing the argument as a matter of the voters’ common sense, the government attempted to separate the discussion from considerations of alienage and race. Presumably, the government reasoned that, if voters believed they were using their common sense, their fears of being labeled “racist” would be less likely to dissuade them from supporting the referendum.

81. Crowley, supra note 38, at 6.  
82. Ryan, supra note 32, at 189. This argument also took the focus away from the number of citizenship tourists, which was being disputed, see Brennock, supra note 80; Harrington, supra note 40, at 446, and placed it squarely on the abuse of the Constitution. Ryan, supra note 32, at 189.  
83. Crowley, supra note 38, at 7.  
84. Id. at 6.  
85. Id.  
86. Id. at 15–17.  
87. Id. at 6.  
88. Harrington, supra note 40, at 444.  
89. Id.  
90. Id.
The voters were put in an even more precarious position because the decision was ultimately in their hands; they could either fix the Constitution’s loophole and risk being perceived as xenophobic and racist, or they could continue to allow the Constitution to be used in a way it was not intended.

4. Pressure from the European Union and the Chen Case

At the time of the citizenship referendum, Ireland was the only EU member state to allow *jus soli* citizenship, and this discrepancy with the rest of the EU members was an embarrassment to the Irish government because it created a possible loophole for EU residency for non-EU citizens. If a child was born in Ireland and granted Irish citizenship, and then the child’s parents used the child’s citizenship to gain residency in Ireland, they might be eligible under EU law to gain residency in any EU country.

The government’s fear that Ireland’s unique citizenship laws would lead to such a situation were played out in *Chen v. Secretary of State for the Home Department*. In 2000, Man Chen, a Chinese national, traveled to Northern Ireland to give birth to her second child, Catherine. Since Catherine was born on the island of Ireland she was considered an Irish citizen under the law at the time. Catherine, however, was not granted citizenship of the United Kingdom despite the fact that Northern Ireland is a part of the United Kingdom, because the United Kingdom does not grant automatic *jus soli*. Additionally, Catherine had lost her right to obtain Chinese citizenship because she was born in Northern Ireland, and

91. *Id.* at 446.
92. *Id.*
93. Rostek & Davies, *supra* note 41, at 130 (“[Ireland’s pre-referendum citizenship policies] limited the effects of . . . efforts [of EU countries with strict immigration policies] “because third-country citizens can gain access to their countries, exercising the right to free movement inherent in EU citizenship . . . . In this context, easiness to obtain Irish citizenship caused apprehension among other EU states.”).
96. *See*Ir. CONST., 1937, art. 2 (“It is the entitlement and birthright of every person born in the island of Ireland . . . to be part of the Irish Nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland.”); *supra* Part I.A.
she could not enter China without a visa and, then, with a visa, only for thirty days.\textsuperscript{98}

Ms. Chen had travelled to Belfast to give birth on the advice of her attorneys in order to avoid China’s policies dissuading families from having a second child.\textsuperscript{99} Ms. Chen and her daughter then moved to Wales and applied for long-term residency, which the Secretary of State for the Home Department denied.\textsuperscript{100} The Department reasoned that Catherine, as an infant, could not consciously exercise any of the rights granted by the EU governing treaties, including the right of freedom of movement within the EU.\textsuperscript{101} With limited options, Ms. Chen appealed the decision of the Department to the European Court of Justice (“ECJ”).\textsuperscript{102}

Although the ECJ would not decide the case until after the citizenship referendum in Ireland,\textsuperscript{103} the ECJ Advocate General gave a preliminary opinion one month prior to the referendum that upheld Catherine’s “right to residence in the United Kingdom as long as she was not a financial burden on that state. Since [Catherine] would be provided for by her mother, she met the condition. Furthermore, [Ms.] Chen benefited from a right of residence derived from her daughter’s primary right.”\textsuperscript{104} Supporters of the referendum seized upon this outcome and “predicted that the ECJ would follow the ruling of the Advocate General,”\textsuperscript{105} which it did in October of 2004.\textsuperscript{106}

Because a loophole in the Irish citizenship law was the catalyst for the Chen case,\textsuperscript{107} the referendum’s supporters used the case to fortify their argument that Ireland has a responsibility to the other EU members to update its Constitution.\textsuperscript{108} However, the crux of the Chen decision was not the determination regarding Catherine’s citizenship but the ECJ’s

\textsuperscript{98} Id. para. 13.
\textsuperscript{99} Id. para. 7. Although it is unclear if having the child would have been illegal, the Chens wanted to avoid any complications they would have faced with the birth control laws in China and, at the advice of their attorneys, planned to have the baby in Northern Ireland. King, supra note 95, at 293–94.
\textsuperscript{100} Chen, 2004 E.C.R. at para. 14. Although Catherine, as an Irish national, could move freely within the United Kingdom, she was not entitled to reside in the United Kingdom. Id. para 12.
\textsuperscript{101} Id. para. 14.
\textsuperscript{102} King, supra note 95, at 295.
\textsuperscript{103} Chen was decided in October 2004, and the referendum had taken place in June of that year. Elections Ireland, Referendums, supra note 10.
\textsuperscript{104} Harrington, supra note 40, at 446–47.
\textsuperscript{105} Id. at 447.
\textsuperscript{106} Id.
\textsuperscript{107} Chen, 2004 E.C.R. at para. 9.
\textsuperscript{108} Harrington, supra note 40, at 446.
liberal expansion of the right of freedom of movement in the EU and the “grant[ing of] a ‘derivative’ right of residency to Ms. Chen.” It is unclear whether the Irish were influenced by pressures from EU members prior to voting in the referendum, especially considering that Irish voters have been willing to defy EU member interests in referendums on EU treaties. However, the concerns of Ireland’s fellow EU members were a likely motivation for the government’s zeal in pushing the “[vote] yes” and “commonsense citizenship” campaigns even harder. Because Ireland was the only member state to grant automatic birthright citizenship, the rest of the EU was watching the Chen case and the referendum.

B. The Referendum and its Effects

An unusually large number of voters turned out for the 2004 referendum—almost sixty percent of those eligible. The large turnout was presumptively a result of the public debate leading up to the referendum, the government’s “commonsense citizenship” campaign, and the fact that the referendum was held on the same day as local and European parliamentary elections. Ultimately, the referendum passed with nearly eighty percent voting in favor.

Still, despite the wide margin of support, the issue of birthright citizenship arguably may not have been ripe for a referendum. Even before the proposed change in the law, family members could not rely on a child’s Irish citizenship to avoid deportation; thus, the referendum was

110. See infra Part II. Additionally, whether or not the government’s motivation of alleviating the pressure from other EU members was appropriate or not is outside the scope of this discussion.
111. Rostek & Davies, supra note 41, at 131.
112. Id. at 129 (“[A]fter introducing Union citizenship, all [Member State]’s nationality policies became highly interdependent. Therefore, [other EU countries] started to pay attention to particular citizenship legislations.”)
113. Elections Ireland, Summary of Referendums, http://electionsireland.org/results/referendum/summary.cfm (last visited October 15, 2009). Compare the results of the referendums on the ratification of the Nice treaties I and II, 38.4% and 48% participation, respectively, with the more recent referendums on the ratification of the Lisbon treaty, 53% and 59% participation. Id.
114. Supra Part I.C.
115. Supra Part I.C.
116. Lavery, supra note 42. (“The referendum was held on the same day as elections for representatives to local councils and to the European Parliament, which also encouraged a high percentage of the electorate to vote.”).
117. Elections Ireland, Summary of Referendums, supra note 113.
potentially unnecessary because Ireland would technically not be a very desirable location for citizenship tourists if they knew they could still get deported.119 Furthermore, if claims of citizenship tourism overburdening hospitals had been exaggerated,120 then perhaps a solution less drastic than a referendum on constitutional amendment could have been found. More debate and investigation into citizenship tourism and its actual effects would have made the residency requirement for non-Irish parents seem less arbitrary.121 According to Bernard Ryan, Senior Lecturer at the Kent Law School:

It was widely argued that a fundamental reform of nationality law should not occur without a thorough process of consultation and debate on the whole subject . . . . [T]he requirement of a connection with Ireland was not being pursued systematically, given the possibility of acquiring citizenship through descent for a minimum of two generations, and given the lack of any proposal that an Irish-born child should be able to obtain citizenship through their own residence in Ireland.122

Had the government allowed more time for debate, then perhaps the people could have reached a more creative and comprehensive solution.123 But, given the pressure from the media124 and the EU,125 it seems understandable that the government wanted to address the issue as soon as possible. And, considering that the citizenship problem stemmed from a provision in the Constitution (as a result of the Belfast Agreement),126 an amendment was probably a necessary solution.127

Many Irish referendums have focused on social issues such as marriage, divorce, and abortion; only on rare occasions have the voters been asked to limit the rights of members of the community.128 Meanwhile,

120. See Harrington, supra note 40, at 446.
121. Ryan, supra note 32, at 189; Minister Right to Act on Citizenship, IR. INDEP., Mar. 14, 2004, available at http://www.independent.ie/opinion/editorial/minister-right-to-act-on-citizenship-478339.html (“The public must know how the proposed change may affect the Good Friday Agreement. The referendum does not necessarily have to be held in June [2004] to coincide with the local and European elections. It can wait.”).
122. Ryan, supra note 32, at 189.
123. Id.
124. See supra Part I.A.3.
125. See supra Part I.A.4.
126. See supra Part I.A.1.
127. Ir. CONST., 1937, art. 46.
128. One exception was the referendum on the Sixteenth Amendment proposal: “Provision may be made by law for the refusal of bail by a court to a person charged with a serious offence where it is reasonably considered necessary to prevent the commission of a serious offence by that person.” Id. art. 40.
most past Irish referendums have expanded the rights of community members. For example, the Fourth Amendment lowered the minimum age for voting from twenty-one to eighteen; the Fifth Amendment removed the State’s recognition of the “special position” of the Roman Catholic church and guaranteed free exercise of all religions; and the Ninth Amendment extended the right to vote in the Dáil elections to non-Irish citizens. The citizenship referendum, however, asked the Irish people to curtail citizenship rights of a minority group to which they had consented just six years prior. For example, if a baby was born the day the new citizenship law went into effect (January 1, 2005) in a Dublin hospital, to non-Irish parents, and both parents had not been residing in Ireland for three of the previous four years, the baby would not have the same rights as a baby born under identical circumstances on December 31, 2004.

Indeed, the citizenship referendum was unlike most previous referendums on individual rights; it created a situation where the voters’ had the opportunity to send current immigrants and future would-be immigrants the message that they would no longer be welcomed. According to Harrington, “A third of ‘yes’ voters interviewed stated they ‘were motivated by anti-immigrant feelings,’ 36 per cent felt the country was being exploited by immigrants and 27 per cent felt there were too many immigrants in the country.” Although most voters merely intended to fix the Constitution’s loophole, these statistics provide evidence that the referendum could quite plausibly be perceived as an anti-immigration statement. When the results of a referendum can be “interpreted by some as a statement by the majority that a particular minority is undeserving of

129. See id. art. 16.
130. CASEY, supra note 1, at 550.
131. Ir. CONST., 1937, art. 44.
132. See id. art. 16.
133. Rostek, supra note 41, at 134.
134. Lavery, supra note 42. (“Opponents of constitutional change said it would stir up latent racist tendencies.”).
135. Harrington, supra note 40, at 448.
136. As Una Crowley notes:

While Michael McDowell, the Minister for Justice, Equality and Law Reform who introduced the referendum, claimed it was not racist, the coordinating body for groups opposed to the referendum disagreed. [The] Campaign Against the Racist Referendum, argued that if the referendum was passed “some children born here will be less equal than others because of their parents’ origins. Racial discrimination will be put into the constitution.”

Crowley, supra note 38, at 19.
full inclusion in the community,” there is reason for concern.\textsuperscript{137} This is especially true where the particular minority does not have a chance to vote.\textsuperscript{138} Unfortunately, the current procedure for referendums does not allow the government to take such factors into account when deciding whether to put an issue to the people.\textsuperscript{139} The responsibility—and, thus, the culpability for unfavorable results—are then transferred to the voters because they are the ultimate decision-makers.

Referendums require voters to balance the advantages and disadvantages of a given proposal. Voters must trade-off the disadvantages of their choice for its advantages. But when voters are asked to amend a law they had already approved and the disadvantages of doing so include the potential for severe tension, if not hostile interaction, between majority and minority,\textsuperscript{140} the government should be afforded more latitude than the Irish Constitution currently provides in deciding whether the issue should go to a referendum.\textsuperscript{141}

II. THE LISBON TREATY REFERENDUM

The EU is governed by treaties that are signed and ratified by its member states.\textsuperscript{142} In order to provide for its continued growth and integration, the EU has had to amend these treaties.\textsuperscript{143} When an EU treaty is amended, it must be signed and ratified by each member state in accordance with that state’s procedures.\textsuperscript{144} In ratifying an EU treaty, the member states transfer powers that belong to their respective national gov-

\begin{itemize}
\item \textsuperscript{137} Ferguson, supra note 22, at 1539.
\item \textsuperscript{138} “Every citizen who has the right to vote at an election for members of Dáel Éireann shall have the right to vote at a Referendum.” Ir. Const., 1937, art. 47. “All citizens . . . without distinction of sex who have reached the age of eighteen years who are not disqualified by law and comply with the provisions of the law relating to the election of members of Dáel Éireann, shall have the right to vote at an election for members of Dáel Éireann.” Id. art. 16.
\item \textsuperscript{139} Id. art. 46.
\item \textsuperscript{140} See Ferguson, supra note 22, at 1539.
\item \textsuperscript{141} See Steven J. Johansen, Clearly Ambiguous: A Visitor’s View of the Irish Abortion Referendum of 2002, 25 Loy. L.A. Int’l & Comp. L. Rev. 205, 239 (2005) (“Perhaps foremost among these lessons is that swift legal solutions to difficult and divisive social issues are rarely successful.”).
\item \textsuperscript{142} See generally Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Feb. 26, 2001, 2001 O.J. (C 80) 1. [hereinafter Treaty of Nice].
\item \textsuperscript{143} See Patricia Roberts-Thompson, EU Treaty Referendums and the European Union, 23 J. Eur. Integration 105, 106 (2001) (“The ratification of new treaties is vital to the European Union as it establishes new patterns of institutional behavior and new legal relationships, thus shaping the development of integration.”).
\item \textsuperscript{144} Id. at 114.
\end{itemize}
ernments and “delegate [them] to the European Union.”

When Ireland decided to join the European Communion, the Oireachtas delegated some of its constitutionally-vested rights to the EU. Because these rights were vested by the Constitution, an amendment—and, thus, a referendum—were necessary. Subsequent Irish Supreme Court cases have held that, under the Constitution, both the ratification of amendments to EU treaties and the ratification of new treaties require referendums. Such referendums, which propose to amend or replace EU treaties, have been categorized by Patricia Roberts-Thompson as “EU treaty referendums.” In light of the recent EU treaty referendums on the Lisbon treaty, however, the law that ratification of EU treaties requires a referendum may need to be reexamined, not because of the referendums’ outcome, but because the gravity of the referendum hinges on the importance of the decision and on whether people can be properly informed about the issue. If the decision is important but the people cannot be properly informed about the merits and limitations of the treaty, then the people’s acquiescence is either unnecessary or inappropriate, and the decision to ratify should be left to the government.

This section will explore the efforts taken by the Irish government to inform the voters about the Lisbon treaty and how, despite these efforts,
many voters still claimed they lacked sufficient information. In addition, this section will suggest that the difficulties posed by EU treaties are just another indication that it is necessary for Ireland to rethink its amendment process.

A. The Referendum Commission

In order to better inform the voting public on the issues presented at a referendum, the government of Ireland established the Referendum Commission in the Referendum Act of 1998. The Referendum Commission was an independent body that “initially had the role of setting out the arguments for and against referendum proposals . . ..” However, the Referendum Act of 2001 amended the 1998 Act and the current primary functions of the Referendum Commission are:

To prepare one or more statements containing a general explanation of the subject matter of the proposal and of the text thereof in the relevant Bill . . . ; to publish and distribute those statements in such manner and by such means including the use of television, radio and other electronic media as the Commission considers most likely to bring them to the attention of the electorate . . . ; and to promote public awareness of the referendum and encourage the electorate to vote at the poll.

Apparently, by creating the Referendum Commission, the Irish government acknowledged its duty to inform the voters about the proposals at referendum.

It is unrealistic to assume that the voting public will become experts in the treaties proposed for ratification, but it is necessary that a voting public at least be informed on the basic issues surrounding the treaty.
especially considering the importance and historical significance of many referendums.\footnote{164} Despite the efforts of the Referendum Commission, the voters at past referendums on EU treaties were not always equipped with enough information to make informed decisions.\footnote{165} But, governments can only do so much to prepare the voters.\footnote{166} Roberts-Thompson explains, “Treaty referendums are the most problematic of all referendums for governments to conduct . . . their source is largely external to the national political system, they are held more frequently than other [EU] referendums, and governments find themselves with little control over their conduct or timing.”\footnote{167} Meanwhile, the normal difficulties the government inevitably faces in informing the citizens about anything,\footnote{168} are further complicated by EU treaty referendums because of the separation between the voters and the EU treaties.\footnote{169} Unlike referendums on the national government and social issues, it may be difficult for voters to understand how the ratification actually affects them, and this can lead to apathy\footnote{170} regardless of the government’s efforts.

**B. The Referendums on the Lisbon Treaty**

1. **Background**

On December 13, 2007, the member states of the EU signed a treaty in Lisbon\footnote{171} that was to amend the treaties governing the EU at that time.\footnote{172}

\begin{itemize}
\item \footnote{164} Cahill, supra note 16, at 1200.
\item \footnote{165} See Post-Referendum Survey in Ireland: Preliminary Results, supra note 156, at 2.
\item \footnote{166} Roberts-Thompson, supra note 143, at 130.
\item \footnote{167} Id.
\item \footnote{168} See generally Gastil, Reedy, & Wells, supra 20, at 1438–40 (focusing on the problem of voters’ knowledge).
\item \footnote{169} A common argument against the EU by citizens of the Member States is that the EU is too detached from the citizens. Sarah Lyall & Stephen Castle, *Ireland Derails a Bid to Recast Europe’s Rules*, N.Y. TIMES, June 14, 2008, at A1 (“For all its benefits, many people in Ireland and in Europe feel that the union is remote, undemocratic and ever more inclined to strip its smaller members of the right to make their own laws and decide their own futures.”).
\item \footnote{170} Roberts-Thompson, supra note 143, at 130 (“[S]hort-term expediencies dominate the conduct of [treaty] referendums and national attitudes towards the European Union and European integration remain ambivalent.”). The short-term expediencies are due to the fact the groups concerned with specific issues of the Treaty will cooperate efforts with other similarly interested groups. Michael Holmes, *The Referendum on the Treaty of Lisbon in the Republic of Ireland* (Eur. Parties Elections and Referendums Network, Referendum Briefing No. 16, 2008), available at http://www.sussex.ac.uk/sei/documents/epern_no_16_lisbon_08.pdf. These groups only argue their specific issue and the voter is not provided with a broader prospective of the treaty as a whole. \textit{Id}.
\item \footnote{171} Lisbon Treaty, supra note 26.
\end{itemize}
The Lisbon treaty was also intended to “replace the draft European constitution, which was thrown out by voters in France and the Netherlands in 2005.” In addition, the treaty was to improve the EU’s effectiveness and efficiency by reorganizing the EU governing bodies in order to change the way the EU makes laws. Currently, some of the proposed EU laws are decided jointly by the Council of Ministers (composed of the ministers from each member state who are charged with overseeing issues of the type under consideration) and the European Parliament (composed of representatives elected by the citizens of each member state). Other decisions are made exclusively by the Council of Ministers. The Treaty of Lisbon proposed to expand the range of issues for which decisions must be approved by both the Council of Ministers and the European Parliament. The treaty also proposed an allowance for citizen initiatives and sought to clarify, in specific areas of law and policy, whether the EU, the national governments, or both, have the authority to act.


175. Id. at 3. For example, if the proposal was on agriculture, then each member would be represented by their Ministers of Agriculture. Id. Some of the decisions by the Council must be unanimous such as decisions on foreign policy. Decisions on other matters require a qualified majority. Id. Under this system, each member state is given a weighted vote that is in relation to, but not proportional to, its population. Id. The Treaty of Lisbon would increase the number of issues that require a qualified majority thus decreasing the number of issues one country can veto. Id.


177. REFERENDUM COMMISSION, supra note 174, at 3.


179. Id.

180. REFERENDUM COMMISSION, supra note 174, at 6–9.
2. Rejection of the Lisbon Treaty

All twenty-seven members of the EU have signed the Lisbon treaty, but it cannot take force until it is ratified by each member state in accordance with their national procedures. Ireland is the only member of the EU that required a referendum to ratify the treaty, and, on June 13, 2008, the people voted against ratification. The rejection disappointed the Irish government, which had signed and supported the treaty, and it frustrated the other members of the EU.

Statistical evidence supports the theory that, despite the efforts of the Referendum Commission, many voters did not feel as if they were properly informed about the treaty prior to the vote. According to a post-referendum survey conducted by Eurobarometer, which regularly conducts surveys on behalf of the European Commission, over half of the eligible voters who did not vote abstained because they “did not fully understand the issues raised by the referendum” and over forty percent felt they “were not informed about the issues at stake.” Among the reasons that voters voted “no,” the most common was, “Because I do not know enough about the Treaty and would not want to vote for something I am not familiar with.” Dr. Michael Holmes, Senior Lecturer at Liverpool Hope University, asserts that the number of voters claiming they did not know enough about the treaty “could be a reflection of the fact that there was a multiplicity of reasons for voting ‘No’, rather than any single dominant narrative.” For instance, special interest groups each

182. Dr. Holmes relays an interesting analogy regarding the referendum in Ireland and the Iowa caucus of the 2008 United States presidential primary. An Irish radio announcer had commented that during the referendum, “All of Europe will be watching, just like we’re a caucus, Europe’s Iowa.” Holmes, supra note 170, at 1–2. Since Ireland was the only country having a referendum, as Dr. Holmes points out, it would be as if Iowa were deciding the entire election. Id. Cahill points out, however, that considering the constitutional configuration from which the Irish referendum system belongs, it is not “ridiculous” to have a referendum on a treaty, which “materially alters the ‘essential scope and objectives’ of the previous treaties,” even if Ireland was the only country to require such a treaty. Cahill, supra note 16, at 1199–1200.
184. Lyall & Castle, supra note 169.
185. Id.
188. Id. at 2.
189. Holmes, supra note 170 at 8.
offered the public a variety of different reasons for opposing ratification of the treaty.\footnote{190}

Holmes’s proposition suggests that voters had multiple reasons for voting against the treaty but simply failed to articulate one definitive reason. Although this is surely possible, an alternative conclusion can be drawn from Dr. Holmes’s assertion. The multiple sources of the opposition campaign and the different issues they opposed may have confused the voters as to what the issues actually were.\footnote{191} This is supported by the fact that different members within the opposition offered reasons for rejecting the treaty that contradicted others’ reasons.\footnote{192} For example, the Socialist party believed that the treaty did not properly support workers’ rights and was “fundamentally pro-business;”\footnote{193} meanwhile businesses and business leaders claimed the treaty “would permit EU interference in Ireland’s highly pro-business tax rates.”\footnote{194} Based on the conflicting information that was being provided to the voters, it is unsurprising that many did not feel comfortable voting for the treaty.

Although it appears that the Referendum Commission failed in its duty to provide the voters with adequate information on the issues,\footnote{195} it could also be argued that the nature of the Lisbon treaty actually made it too difficult for the Referendum Commission to fulfill its responsibility. This theory seems particularly compelling, considering the Lisbon treaty was not the first treaty the Irish people had rejected, and there were legitimate questions as to the adequacy of the information the voters took to the polls. In a 2001 referendum, the majority of voters rejected the ratification of the Treaty of Nice,\footnote{196} which would have allowed the EU to expand to twenty-seven members.\footnote{197} Those in favor of the treaty felt that the spreading of misconceptions by the opposition as to the treaty’s purpose—(the opposition claimed the purpose focused on defense rather

\footnote{190. \textit{See}, \textit{e.g.}, \textit{id.} at 4 (The Catholic groups claimed that the Treaty “would lead to an undermining of Ireland’s laws on abortion.”)).}

\footnote{191. Proponents of the referendum accused opponents of misrepresenting the issues leading voters to vote against the Lisbon treaty for reasons that had nothing to do with the actual treaty. \textit{Ireland Rejects EU Reform Treaty}, BBC NEWS, June 13, 2008, http://news.bbc.co.uk/2/hi/europe/7453560.stm.}

\footnote{192. Holmes, \textit{supra} note 170, at 4.}

\footnote{193. \textit{Id.}}

\footnote{194. \textit{Id.}}

\footnote{195. \textit{See Post-referendum survey in Ireland: Preliminary Results, supra} note 156, at 2.}


\footnote{197. Treaty of Nice, \textit{supra} note 142.}
than expansion)—and low voter turnout together evinced that the voters were either uninformed or confused about the issues. A year later, another referendum was held on the Treaty of Nice and the people approved ratification.

As with the Treaty of Nice, the number of voters and nonvoters who felt they were not adequately informed about the Lisbon treaty suggests there was a disconnect between the information being provided and the information the voters received. Meanwhile, the Referendum Commission spent €5 million during the Lisbon treaty referendum to provide the voters with information on the issues and encourage them to vote. The Referendum Commission’s expectation is that it can provide an explanation of the issues in simple and understandable language, but EU treaties and the issues surrounding them are far from simple. Providing minimal explanations or merely conveying the “gist” of the treaty may be insufficient because such approaches weaken the significance of the

198. A common argument by those opposed to the Treaty of Nice was that it jeopardized Ireland’s neutral position regarding defense because it set up a common defense committee for international crisis, even though the main purpose of the Treaty was to provide for the expansion of the EU. Katz, supra note 196, at 257.


200. See Post-referendum survey in Ireland: Preliminary Results, supra note 156, at 7 (noting that the leading reason for voters to vote “no” was a lack of information); Brian Lavery, World Briefing, Europe: Ireland: Confusion Over Europe Treaty, N.Y. TIMES, Sept. 19, 2002, at A12 (“Only 16 percent of Irish people polled understand the Treaty of Nice. . . . More than 40 percent of people could not state a single issue related to the treaty . . . .”).

201. To get the second referendum on the Treaty of Nice approved by the people, the government campaigned to inform the public as to the expansion aspect of the Treaty. Katz, supra note 196, at 257–58. The government also presented a National Declaration to the European Council clarifying its retention of the right to decide on whether to commit military personnel. Id. at 258. This declaration, however, did not change the stance of Ireland or the EU. Id.


204. Id.

205. Even those who supported the referendum admitted that it was “largely incomprehensible” and that “no sane or sensible person could be expected to read the document.” Holmes, supra note 170, at 5. Even the President of the Referendum Commission said, “[I]t certainly would not be your favourite holiday reading. It is a dense legal document.” Id.
referendum by failing to truly require the acquiescence of the people. If
the voters are unfamiliar with actual issues surrounding the treaty then
they are not voting on the treaty itself—rather, they are merely voting on
which campaign was more effective.206 It is worth mentioning again that
the average voter is not expected to be extensively familiar with the trea-
ty,207 but, when the issues are so complex that voters are voting on the
basis of misconceptions or factors irrelevant to the treaty,208 then it must
be questioned whether a vote to approve ratification can actually be tak-
en as legitimate acquiescence of the people is obtained.

3. The Second Referendum on the Lisbon Treaty

On October 2, 2009, Ireland held a second referendum on ratification
of the Lisbon treaty.209 The referendum passed with over sixty-seven
percent voting in favor.210 With another year to “digest” the treaty,211 it is
reasonable to assume that the electorate developed a better understanding
of the issues. However, there was still confusion as to the effect the trea-
ty would have on social issues in Ireland.212 The New York Times re-
ported that “[s]ome ‘no’ campaigners worry that [the treaty] could usher
in legalized abortion. . . . Others have played up fears that the treaty
could undermine Ireland’s military neutrality and drive down pay. Sup-
porters say that neither policy will change.”213 Although the treaty itself
was not changed,214 the European Council and the Referendum Commiss-
ion did attempt to clarify these issues215 and to clarify the treaty’s exact
affect on the nomination of Commissioners to the European Commis-

206. Ferguson, supra note 22, at 1539 (“[V]otes on initiatives and referendums are
the aggregation of individual opinions that often seem to be influenced by well-financed
campaigns appealing to base fears and self-interest, rather than reflecting the will of a
rationally deliberative public.”).
207. Cahill, supra note 16, at 1200.
208. Holmes, supra note 170, at 8 (“[M]ost people on both sides of the argument con-
cur that Lisbon does not pose a threat to Ireland’s constitutional restriction on abortion,
but that did not stop a considerable amount of people from believing the opposite.”).
209. Eric Pfanner, E.U. Vote in Ireland Hangs on the Economy, N.Y. TIMES, Oct. 2,
210. Irish Times Reporters, Lisbon Treaty Passes With Decisive 67% in Favour, I.R.
1003/breaking1_9f.html.
211. Pfanner, supra note 209.
212. Id.
213. Id.
215. REFERENDUM COMMISSION, supra note 174, at 6. (“The Lisbon Treaty proposes
no changes in relation to abortion or family rights.”).
sion.216 Furthermore, based on earlier reactions to the 2009 referendum, it seems the most significant change between the 2008 and 2009 referendums was the depletion of Ireland’s economy.217 Concerns about the economy and unemployment218 most likely explain the increase of five percent in voter turnout.219 Whether the “yes” vote was a result of assurances as to what was not in the treaty or concerns over the economy, it remains unclear whether the voters’ understanding of how the treaty would actually affect Ireland had improved for the 2009 referendum.

4. The Lisbon Treaty Difficulties

Based on the difficulties faced by the government, the Referendum Commission, and the voters during the Lisbon treaty referendums, it is appropriate to consider whether a referendum is the most effective way to ratify an EU treaty.220 If a referendum is required solely to fulfill its

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216. Originally, the Treaty was to reduce the number of Commissioners appointed to the European Commission, which “propose[s] policies and laws, implement[s] EU decisions[,] and ensure[s] that EU law is respected by Member States.” REFERENDUM COMMISSION, THE LISBON TREATY: GET THE COMPLETE PICTURE 4–6, available at http://www.lisbontreaty2008.ie/HandBookEng.pdf. Currently, each member state is allowed to nominate one member of the European Commission; therefore, there are twenty-seven Commissioners. Originally, the number of Commissioners was to be reduced by two-thirds to eighteen, if the number of member states remains the same. Member states would therefore be able to nominate their Commissioners on a rotating basis. Every member state would therefore be able to nominate a Commissioner for two out of every three Commissions. Each Commission lasts five years. Id. at 5. After the 2008 Treaty of Lisbon referendum, the European Council decided that if the Lisbon treaty is ratified, the number of Commissioners will remain consistent with the number of member states and each member state would continue to elect its own Commissioner. REFERENDUM COMMISSION, supra note 174, at 2.


218. Pfanner, supra note 209.


220. Because the referendum system only allows for a “yes” or “no” decision, it does not provide the appropriate forum for discussion on the issues; the only way to change the treaty is to reject it and hope to renegotiate. Gráinne de Búrca & Jo Beatrix Aschenbrenner, The Development of European Constitutionalism and the Role of the EU Charter of Fundamental Rights, 9 COLUM. J. EUR. L. 355, 359 (2003); see also Holmes, supra note 170, at 9 (“The EU has failed to find an effective way of allowing its citizens to engage with its process.”).
constitutional role, then it can be reduced to a mere procedure and can be seen as actually compromising its intended significance rather than as “something that goes to the heart of who [the Irish people] are, something that changes fundamentally those things that we take most seriously. . . .” Alternatively, if the government is allowed the discretion to decide which amendment proposals should be put to referendum, then the government could evaluate case-by-case whether the proposal rises to the level of national importance requiring the voters’ permission and is of such a nature that the voters will be able to make an informed decision on the actual issues presented. The government, therefore, would be able to protect the integrity of the referendum as a democratic tool.

III. A PROPOSED REVISION TO THE AMENDMENT REFERENDUM SYSTEM

The citizenship referendum and the recent referendums on the ratification of the Treaty of Lisbon provide evidence that the referendum system in Ireland should be revised. Under the Irish Constitution, if a bill contains an amendment to the Constitution then it must be submitted to the people at a referendum. For those bills that do not require amendment, the President, with the recommendation of the Oireachtas, decides if the issue is “of such national importance that the will of the people thereon ought to be ascertained.” This Note proposes that in order to ensure, or, at least, improve the chances that a proposal actually deserves the people’s approval, the referendum process for regular bills should apply to amendment proposals and treaty approval referendums as well. Article 27 should continue to govern decisions as to whether a proposal is “of such national importance that the will of the people thereon ought to be ascertained.” The President should have discretion after receiving the recommendation of the Seanad Éireann and Dáil Éireann.

A danger to any referendum system or popular voting system in general is that misguided voters—ill-equipped with incorrect or insufficient information—may not be voting in line with their personal beliefs and values with respect to the proposal at issue and are instead voting on the basis of the information they have been provided. Again, this is not to say that all voters must be political experts aware of every nuance of any

221. Cahill, supra note 16, at 1200–01.
222. Id. at 1200.
223. Ir. Const., 1937, art. 46.
224. Id. art. 27.
225. Id.
226. See id.
227. See Ferguson, supra note 22, at 1539.
given proposal—that would be an unrealistic burden.228 “A more modest goal . . . is that voters must at least be able to follow reliable cues that guide them to a voting choice consistent with their deeper values and understanding.”229 An alternative amendment system would allow the government to account for these concerns.

The revised system would not undermine democracy; it would instead ensure that the voters’ participation in their democracy is legitimate and fair. In support of the current system, Dr. Maria Cahill, Lecturer of Law at the University College Cork, argues that drawbacks in the referendum system are balanced out by the constitutional system and its history, which provides for the referendum in the first place.230 According to Cahill, the value of an amendment referendum stems from the magnitude of the constitutional system in which the referendum functions.231 Therefore, the referendum should “not be judged on its own merits.”232 However, following Cahill’s logic may lead us in the opposition direction. If we assume that the constitutional system bears significance, then a referendum to amend the constitution is not necessarily significant solely because it exists. This would make it merely a procedure. Conversely, because a referendum to amend the constitution plays such a significant role in the constitutional system, the referendum must be substantially worthy of its role on its own merits.

Moreover, the constitutional amendment referendum does not exist in a vacuum;233 it must be viewed in terms of its circumstances and effects.234 Michaele Ferguson, Assistant Professor of Political Science, recognizes how “a concern for democratic inclusion demands broader attention, not only to the fairness of procedures relating to the crafting and debating of initiatives and referen[ums] prior to an election, but also—in certain cases—to perceptions of fairness and their consequences for democratic participation after an election.”235 The citizenship proposal illustrated an instance where issues of fairness and equality should at least have been considered before the referendum. Changing the amendment referendum system will assist the government in protecting the voters should another constitutional problem arise that is as unpredictable as the citizenship

228. Gastil, Reedy, & Wells, supra note 20, at 1439.
229. Id.
231. Id. at 1200.
232. Id.
233. Contra id.
234. Ferguson, supra note 22, at 1539.
235. Id.
tourism problem and just as likely—if not more likely—to compromise fairness and equality. 

Ironically, implementation of the amendment system suggested here would, in and of itself, require an amendment to the Irish Constitution; thus, a referendum would be necessary. In the end, though, the new amendment system would likely result in a significant reduction in overall referendums as a result of its new discretionary standard. All in all, to assume that the Irish would not at least entertain the prospect of such a revision to the system would be an underestimation of the Irish people and the importance they place on participation in their democracy. By giving the government discretion to choose which amendment proposals are appropriate to offer to the people for their assent, the suggested system would protect the integrity of the referendum process and the people’s participation in the most important decisions that face their country.

CONCLUSION

The most recent referendums illustrate why a more conservative approach to referendums is necessary in Ireland. The citizenship referendum proved that constitutional problems and loopholes are unpredictable, and the effect or message that the vote sends can be almost as important as the substance of the referendum itself. Future constitutional problems may require creative and sometimes difficult decisions. Allowing the government some discretion over whether to put an amendment proposal to the people allows the government to protect the public if such a procedure would be inappropriate in light of the considerations discussed above.

In addition, if the EU wishes to continue to grow and integrate, then the member states can expect more treaties to be ratified. And, unless the EU develops its own system for member state treaty ratification, Ireland will likely face another EU treaty referendum soon. The Treaty of Lisbon and the Treaty of Nice both provide evidence of the difficulties EU treaty referendums present for both the government and the voters,

236. Articles 27, 46, and 47 would need to be revised accordingly.
237. Under the current Irish Constitution, all amendments must be approved by a majority of the people by referendum. Ir. Const., 1937, art. 46.
238. Cahill, supra note 16, at 1200.
239. See supra Part I.
240. Supra Part I.
241. Roberts-Thompson, supra note 143, at 131.
242. Id.
243. Id.
and they perhaps prove that, in certain instances, ratification of an EU treaty should not be decided by referendum.

The referendum system in Ireland has served the State well since the 1937 Constitution was approved.244 However, the recent referendums have shown that the referendum system itself needs to be amended. In order to protect the integrity of the referendum as a tool of democracy, and in order to be sure that the issues that truly require the assent of the people, the decision to hold a referendum should always be made at the discretion of the members of the legislative and executive branches.

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244. Elections Ireland, Referendums, supra note 10.

* B.A., College of the Holy Cross (2003); J.D., Brooklyn Law School (expected 2010). Thank you to my family, both in the U.S. and in Ireland, for their support and inspiration. Special thanks to Tara Quane for your love, support, and patience. Thank you to the Executive Board of the Brooklyn Journal of International Law. All errors and omissions are my own.
A PROPOSED REMEDY FOR THE DILEMMA OF INNUMERABLE FUTURES: UKRAINE, RUSSIA, AND NATO MEMBERSHIP

“Time forks perpetually toward innumerable futures. In one of them I am your enemy.”

INTRODUCTION

In the years following the fall of the Soviet Union, Ukraine has faced numerous political and social challenges as it strives toward self-determination. Many of these hardships can be directly attributed to its tenuous relationship with an imposing geopolitical superpower in neighboring Russia. Efforts to gain independence and foster relationships with Western states have been stymied by what some have called the “Russian Factor” in Ukrainian zeitgeist. What has resulted from nearly twenty years of a new Ukrainian regime is a pastiche of western ideals and Russian nationalism, a nation striving to achieve recognition as an independent force, but continually reverting to its status as a “younger brother” to Russia. In an assertive move toward independence, Ukraine was able to secure promises of territorial integrity and sovereignty when it obtained Russia’s signature on the landmark Treaty of Friendship, Cooperation, and Partnership in 1997 (the “Friendship Treaty”). Now, though, as Ukraine looks to take the next step in Westernizing its defense

3. See Morrison, supra note 2, at 682 (“Ukraine’s stake in the outcome of this process of Russian self-definition is much higher than that of the other former Soviet republics.”).
4. See Feldhusen, supra note 2, at 119 (arguing that Ukraine is in the process of turning its back on Russia by establishing a view toward Western policies as evidenced by four factors: the relationship with NATO; a stronger position with the Black Sea Fleet; implementation of the Treaty on Friendship, Cooperation, and Partnership; and economic policy).
5. Morrison, supra note 2, at 682.
mechanisms, many politicians and citizens from both States have raised debate over whether Ukraine’s signature on the North Atlantic Treaty would violate its obligations to Russia under the Friendship Treaty.\(^7\) While many writers have focused on the political and social ramifications of NATO membership, this Note aims to explore the legal ramifications as recognized by international treaty law if Ukraine were to accept a bid to join the NATO military alliance.\(^8\) Fundamentally, for the treaties to conflict there must be an established violation of international law.\(^9\) This statement begs the question whether an anticipatory breach\(^10\) of a treaty gives rise to a material breach, and to what extent this breach invalidates an earlier treaty.\(^11\) Relying on the universally accepted treaty law maxim *pacta sunt servanda*,\(^12\) this Note concludes that Ukraine-NATO


\(^8\) See Anatoliy M. Zlenko, Foreign Policy Interests of Ukraine and Problems of European Security, 21 FORDHAM INT’L L.J. 45 (1997) (discussing the political development and foreseeable political ramifications of Ukraine in Post-Soviet Europe, as well as Ukraine’s developments with NATO); see also Friendship Between Russia and Ukraine Comes to an End, supra note 7; Shchedrov, supra note 7; Stern, supra note 7; Vatutin, supra note 7.

\(^9\) GUOROA BINDER, TREATY CONFLICT AND POLITICAL CONTRADICTION: THE DIALECTIC OF DUPLICITY 28 (1988). Binder’s work on the Arab-Israeli conflict and his examination of the various treaty obligations between the United States, Egypt, and the Arab League is an inspiration for much of the reasoning and arguments in this Note. Binder, however, analyzes treaty obligations in light of a theory that a treaty confers an objective property right. *Id.* While this is an intriguing theory, it is not addressed in this Note; meanwhile, the basic tenants of Binder’s argument are indeed relevant to this discussion.

\(^10\) Id. at 160 n.175 (“By anticipatory breach, I mean the doctrine that the formation of a contract obligating one to violate an earlier contract under some future circumstance is a wrong, mandating imposition of whatever sanctions ordinarily attend breach.”).

\(^11\) DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 38 (2001) (“International law clearly recognizes the right of a State to terminate a treaty if another party has breached its obligations under the agreement. Customary International law and VCLT [,however, does not allow for termination] unless another party has materially breached a provision essential to the accomplishment of the object or purpose of a treaty.”) (emphasis in the original, internal quotations and citations omitted).

\(^12\) Vienna Convention on the Law of Treaties, done May 23, 1969, 1155 U.N.T.S 331, art. 26 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”); MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL
membership would require a renegotiation of the terms of the Treaty of Friendship in order to avoid uncertainties that would arise inevitably in the event of a conflict between Russia and a NATO ally.

Part I of this Note examines the basic theories of international law as purported by legal positivists and political realists. Part II outlines the fundamentals of international treaty interpretation. Part III provides background on the political and legal complications of the relationship between Russia and Ukraine. Part IV analyses the conflicting aspects of the North Atlantic Treaty and the Treaty of Friendship, and juxtaposes the conflict with a prior, similar dispute between Egypt, Israel, and Syria in order to highlight the insufficiency of past efforts and identify remaining shortfalls. Then, finally, Part V evaluates prospective methods for avoiding ambiguous treaty obligations in the future. Ultimately, this Note argues that transparent, preemptive renegotiation of ambiguous obligations is the best path to establishing bright-line alliances between Ukraine and Russia going forward.

I. BASIC PHILOSOPHY OF INTERNATIONAL LAW

Treaty law is, for the most part, noncontroversial. By definition, a treaty is a written agreement between states, governed by international law, conferring upon states certain legal rights and obligations. Because treaties are governed by international law, their terms are subject to the hierarchy of international laws of interpretation rather than the municipal and domestic laws of their various member-states. Unlike domestic law, sources of international law are not as readily identifiable. No international legislation or international court exists to issue binding legal rules; the international court, for example, is not bound by the principle

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Law 9 (3d ed. 1999) (“[P]acta sunt servanda . . . express[es] the fundamental principle that agreements, even between sovereign states, are to be respected.”).


14. Vienna Convention on the Law of Treaties, supra note 12, art. 2, sec. 1(a) (“‘treaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments . . . .”); Janis, supra note 12, at 9; Wallace, supra note 13, at 197. But see South West Africa (Eth. v. S. Afr.), 1962 I.C.J. 319, 402 (Dec. 21) (separate opinion of Judge Jessup). (“The notion that there is a clear and ordinary meaning of the word treaty is a mirage.”).

15. Bederman, supra note 11, at 12.

Therefore, the binding force of treaties is derived from an implied good faith obligation—pacta sunt servanda (agreements are to be respected). Treaty law, then, is largely self-regulating; to resolve construction and interpretation disputes, one must look to other treaties and customs of international practice.

It is crucial to note that treaties have a dual nature. Each is a creature of both political and legal intentions, borne out of a political process to serve as a component of the system of international law. While the legal doctrine of treaty law may be relatively straightforward, myriad social and political factors can blur state obligations and make treaties more difficult to interpret than other types of agreements. In analyzing
the scope and application of a treaty, it is helpful to look at the intentions of the parties when they entered into the agreement. However, because treaties are borne of politics and law, it is difficult to separate legal from political obligations. Moreover, further difficulty may arise during this part of the analysis because constructions of legal and political obligations often overlap.

Thus, to understand a given state’s intentions with respect to a treaty, it is necessary to understand the two dominant schools of legal philosophy in international law. Throughout the twentieth century, the doctrine of legal positivism has developed significantly, but notions of legal positivism in international law can be traced to the writings of Grotius, who said, “[A]ll things are uncertain the moment men depart from law.” The proliferation of international conventions, such as the United Nations, the North Atlantic Treaty Organization, and the World Trade Organization, evince the extent of support for this sentiment in the international arena. Arguably, the driving force behind these organizations is the shared will to create a web of adherence—the desire for feasible enforcement,

Judicial actions that contravene executive foreign policy can harm national foreign policy and compromise the ability of the Executive to speak with one voice. At the same time, treaties create obligations that are designed to have the force of law with the implicit corresponding responsibility of the Judiciary to provide meaning to that law. Treaties are not unilateral actions by the Executive; rather, they acquire the force of law through legislative review and consent. Unwarranted deference to executive treaty interpretations of instruments purporting to limit executive actions and that are interpreted inconsistently within the Executive Branch compromises separation-of-powers principles . . . .

See Sullivan, supra note 21, at 810–11.
23. See Scott, supra note 21, at 7.
24. Id.
25. Id. at 5 (“Assumptions that are internal to positivist legal analysis cannot be meaningfully transferred to explain political phenomena. Words take on a particular meaning when used within the sub-system of international law.”).
26. See Janis, supra note 12, at 6 (noting that the two types of international lawyers are positivists and naturalists). In this paper, naturalist and realist are understood to be interchangeable.
27. See generally Janis, supra note 12, at 12; Brian Leiter, Legal Realism and Legal Positivism Reconsidered, 111 Ethics 278 (2001).
28. Martin Wright, Four Seminal Thinkers in International Theory 39 (Gabrielle Wright & Brian Porter eds., 2005) (internal citations omitted).
made possible by threats of legal or economic sanctions against noncompliant state parties.  

Doctrinally, the philosophy of legal positivism argues that “legal rules are valid only because they are enacted by an existing political authority or accepted as binding in a given society, not because they are grounded in morality or in natural law.”31 Eschewing the notion of rules grounded in intangible concepts of morality, the theory relies on the belief that legal norms are separable from other norms in society.32 This feature is an important facet of legal positivism that suggests certain norms exist because they are set in place by a legislature.33 From there it follows that these legal norms “play a distinctive role in the practical reasoning of citizens,” causing behavior to yield to legally proscribed boundaries.34 While this might seem obvious, the theory begins to lose force in the international arena.35 Unlike the sanctions imposed on a speeding motorist, the sanctions imposed on a treaty violator are not easy to predict, and this

30. With regard to the WTO, see Chios Carmody, A Theory of WTO Law, 11 J. INT’L ECON. L. 527, 555–56 (2008) One theory behind WTO law suggest a basic assumption that “the principal purpose of WTO law is to protect expectations, that its subsidiary purpose is to adjust to realities, and that these two purposes interact to promote interdependence.” Id.; see also, Daniel C. K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL TRADE LAW 52–53 (2008) (“Under the WTO system, . . . dispute settlement bodies have no power to coerce nations to comply with its decisions. . . . The ultimate goal of the WTO is to induce the offending member to bring its measures into conformity with the WTO agreements.”). For the U.N., see sources cited supra note 29.


32. Leiter, supra note 27, at 286.

33. S.G. Sreejith, Public International law and the WTO: A Reckoning of Legal Positivism and Neoliberalism, 9 SAN DIEGO INT’L. L.J. 5, 9–10 (2007) (providing an overview of the development of legal positivism. The running thread through all these theories is that law and morality are not connected, and legal validity is determined ultimately by reference to social facts).

34. Leiter, supra note 27, at 286. Leiter explains:

[L]egal norms play a distinctive role in . . . [one’s] reasoning about what one ought to do. If I say, for example, “Don’t go faster than 65 m.p.h. on the highway,” that may give you reasons for acting depending, for instance, on whether you think I am a good driver, knowledgeable about the roads, sensitive to your schedule, and the like. But when the legislatures issues the same proscription—“Don’t go faster than 65 m.p.h. on the highway”—that adds certain reasons for action that were not present when I articulated the same norm.

Id.

uncertainty is magnified when parties agree to ambiguous resolution provisions.36 In an international forum, the positivist doctrine is not supported by a hierarchy of legitimacy, but rather by a norm of agreeance that the law is to be respected.37

In contrast to the positivist doctrine, legal realism adheres to the notion that parties will act in their best interests because legal rules are often indeterminate, and domestic law “is based, not on formal rules or principles, but instead on judicial decisions that should derive from social interests and public policy.”38 The realist, for example, is in a better position to explain when cases with similar facts have different outcomes.39 With respect to case law, the realist does not go so far as to suggest that judges are making up law—rather they are free to employ “equally legitimate, but conflicting, canons of interpretation,” which can result in the indeterminacy of the contents of a rule.40 On an international scale, the legal realist theory often manifests as the political realist—or, realpolitik—notion that international law lacks intrinsic power to prevent states from acting when politics suggests a contrary course.41 Former U.S. Secretary of State Henry Kissinger advocated this school of political thought, arguing that a nation’s foreign policy should reflect its natural

36. Binder, supra note 9, at 21. Binder refers to, but rejects, a positivist argument that international law loses its legal character due to the absence of an international sovereign, and instead assumes that “international law can function as a legal system in the presence of conditions fulfilling criteria of legitimacy recognizable to such participants.” Id.
37. Id. at 21–22.
38. Black’s Law Dictionary, supra note 31, at 915; see also Leiter, supra note 27, at 289. Leiter follows the “empirical rule skepticism” realist philosophy, as Hart illegitimated the conceptual rule skeptic theory.
39. See Leiter, supra note 27, at 288–89.
40. Id. at 295.

[F]or realists, state power remains the fundamental category for explaining behavior in the international realm. The state continues to be the main actor in international relations and, therefore, realists question the degree to which there may be significant substantive transformation in the relation international law bears to the state-citizen relationship (for example, changes relating to the judicialization of the state) or any other citizen-collective relationship.

Id.; see Scott, supra note 21, at 3 (noting that a realist would say, for instance, a treaty is a “mere scrap of paper”); see also Binder, supra note 9, at 39 (noting, while not referring to political realism explicitly, that “[a]s a practical matter, nations have rarely accorded much authority to international law”).
interests rather than its moral or legal ideals, should they conflict. To the realist, what defines the scope of a treaty will raise political questions regarding state power and state interests, rather than international legal obligations.

While many of the basic tenets of the realist approach are heavily refuted, one of the important points an international lawyer can take away from it is the understanding that nations, when given the opportunity, will act in their best interest and not necessarily for the betterment of the international society. What the international legal system must strive for, then, is a clear set of obligations that promote compliance and strike against the notion that a nation will act solely in its best interest. Therefore, it is important that countries eliminate conflicting obligations in order to avoid unforeseeable legal consequences when they are called forth to fulfill those obligations as required in the treaty framework. Otherwise, when left free to employ conflicting means of interpretation,

43. See Totaro, supra note 35, at 721.
44. Bederman, supra note 11, at 9.

Myth #4: No one obeys international law. This is the ultimate, realist critique of international law and relations. It depends on a utilitarian and rationalist attitude that States and other international actors conduct themselves only out of self-interest. . . .

This myth raises the most fundamental question in international law: what is the basis of obligation in international affairs, or, put even more simply, Why do States obey international law? . . . States and other international actors do, indeed, follow international law norms out of self-interest. But that self-interest is expressed as more than a situational observance of a particular rule at a particular time. Instead, nations have a self interest in promoting a systemic rule of law in international relations, a “culture” of law observance. . . .

Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.


BEDERMAN, supra note 11, at 9.
45. See Moore, supra note 29, at 884 (“[T]he greatest weakness of the contemporary international system is not the absence of authoritative norms, or underlying intellectual understanding about the need for such norms, but rather the all-too-frequent absence of compliance.”).
46. Id. at 884–85.
a nation can justify acts that may run counter to the true purpose of a treaty.

II. TREATY ANALYSIS

When States enter into treaties and abide universal agreements, conflicts in obligations are inevitable. 48 Having registered the Friendship Treaty with the United Nations, 49 Russia and Ukraine normally would have submitted to the jurisdiction of the International Court of Justice ("ICJ") for treaty dispute resolutions. 50 However, during negotiations for the Vienna Convention on the Law of Treaties ("VCLT"), the former Union of Soviet Socialist Republics made a reservation about submitting to the ICJ for such resolutions. 51 It is therefore unclear whether post-

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48. Id.
49. Russia and Ukraine registered the Friendship Treaty pursuant to Article 102 of the U.N. Charter.
50. Fewer than five cases have ever been brought before the International Court of Justice to determine if a treaty has been breached.
51. Moore, supra note 29, at 915–16. The Union of Soviet Socialist Republics included the following reservations and declaration in the instrument of accession to the VCLT:

The Union of Soviet Socialist Republics does not consider itself bound by the provisions of article 66 of the Vienna Convention on the Law of Treaties and declares that, in order for any dispute among the Contracting Parties concerning the application or the interpretation of articles 53 or 64 to be submitted to the International Court of Justice for a decision, or for any dispute concerning the application or interpretation of any other articles in Part V of the Convention to be submitted for consideration by the Conciliation Commission, the consent of all the parties to the dispute is required in each separate case, and the conciliators constituting the Conciliation Commission may only be persons appointed by the parties to the dispute by common consent.

The Union of Soviet Socialist Republics will consider that it is not obligated by the provisions of article 20, paragraph 3 or of article 45 (b) of the Vienna Convention on the Law of Treaties, since they are contrary to established international practice.

. . . [I]t reserves the right to take any measures to safeguard its interests in the event of the non-observance by other States of the provisions of the Vienna Convention on the Law of Treaties.

Soviet states would find themselves before the ICJ for treaty interpretation disputes.\(^52\) Regardless, this Note applies rules derived from ICJ decisions in an effort to advance a scholarly approach to resolving this treaty dispute, as ICJ decisions generally reflect the international understanding of treaty interpretation.\(^53\)

In discussing treaty interpretation, the most appropriate place to begin is the VCLT, which is “quite literally, a treaty on treaties.”\(^54\) Treaty interpretation should begin with the default rules set forth in the Convention.\(^55\) The VCLT’s conflict provisions are “applicable when supposedly conflicting treaties are successive and related to the same subject matter.”\(^56\) This gives the VCLT broad jurisdiction, as there are many subjects that a single treaty can affect—the term “subjects” can refer to the “subject matter of the relevant rules or the legal subjects bound by it.”\(^57\) The notion of conflict, then, is interpreted broadly due to the many factors and obligations that affect the scope and application of a treaty.\(^58\) Therefore, the first step is to analyze the legal norms set forth in an agreement

\(^52\). Moore, supra note 29, at 915.

\(^53\). FITZMAURICE & ELIAS, supra note 18, at xiv (“The recent jurisprudence of the ICJ has also contributed to the development and clarification on a number of aspects of the law of treaties.”).

\(^54\). BEDERMAN, supra note 11, at 26; Arie E. David, The Strategy of Treaty Termination 159 (1975) (“Thus it is no surprise that the [International Law Commission], in drafting the Vienna Convention on the Law of Treaties, tried to judicialize treaty termination.”); FITZMAURICE & ELIAS, supra note 18, at xiii (“Even the functioning of treaties themselves is regulated to a significant extent by a treaty, the Vienna Convention on the Law of Treaties.”); see JANIS, supra note 12, at 17 (“Since the Vienna Convention is largely, though not entirely, a codification of the existing customary international law of treaties, it constitutes a useful depository of international legal rules even for countries, like the United States, which are not yet parties to it.”).

\(^55\). Oil Platforms (Iran v. U.S.), 2003 I.C.J 161, 237 (Nov. 6) (separate opinion of Judge Higgins) (“It is commonplace that treaties are to be interpreted by reference to the rules enunciated in Article 31 of the Vienna Convention on the Law of Treaties, which Article is widely regarded as reflecting general international law.”).

\(^56\). See Borgen, supra note 47, at 603 (internal citations omitted).


\(^58\). Borgen, supra note 47; see also Int’l Law Comm’n, supra note 57, at 19 (“This report adopts a wide notion of conflict as a situation where two rules or principles suggest different ways of dealing with a problem.”); FITZMAURICE & ELIAS, supra note 18, at 4–5 (“Treaties are one of the sources which give rise to international legal obligations. . . . ‘[T]here 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.’”) (internal citations omitted); SEYED ALI SADAT-AKHAVI, METHODS OF RESOLVING CONFLICTS BETWEEN TREATIES 5–23 (2003).
as composed of subjects and predicates in order to illustrate what the rule is “about,” and what assertions are made regarding the scope.⁵⁹ In defining the scope, one must determine whether or not the norm is mandatory or permissive.⁶⁰ Mandatory norms impose an obligation, while permissive norms provide for the freedom to do or to not do something.⁶¹ Once the scope of a norm has been properly delineated, obligations can be seen as either overlapping, completely identical, or disjointed.⁶²

Determining the subject matter of a treaty provision can include considerations of sources outside the treaty.⁶³ Providing guidance for analysis, the VCLT’s treaty-conflict provision includes three theories for treaty interpretation: textualism, intentionalism, and purposivism.⁶⁴ Article 31 of the VCLT states:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.⁶⁵

Initially, the VCLT prescribes a preference for textualism in the phrase “ordinary meaning given to the terms.”⁶⁶ This directs the reader to begin by looking at the words of a provision as they are commonly understood, without taking outside sources into account.⁶⁷ The words of the treaty

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⁵⁹. See SADAT-AKHAVI, supra note 58, at 14 (diagramming the complex scopes of various norms). For an example, see Int’l Law Comm’n, supra note 57, at 17–18:

A treaty on, say, maritime transport of chemicals, relates at least to the law of the sea, environmental law, trade law, and the law of maritime transport. The characterization has less to do with the “nature” of the instrument than the interest from which it is described.

. . . But there are no such classification scheme. . . .

. . . The criterion of “same subject-matter” seems already fulfilled if two different rules or sets of rules are invoked in regard to the same matter, or if, in other words, as a result of interpretation, the relevant treaties seem to point to different directions in their application by a party.

Id.

⁶⁰. SADAT-AKHAVI, supra note 58, at 5.

⁶¹. Id.

⁶². Id. at 17.

⁶³. BEDERMAN, supra note 11, at 33–36.

⁶⁴. WALLACE, supra note 13, at 204 (“The Vienna Convention adopts an integrated approach to interpretation, but nevertheless gives emphasis to the ordinary meaning approach.”); BEDERMAN, supra note 11, at 34 (noting that there are three “schools” or approaches to treaty interpretation codified into the VCLT).


⁶⁶. Id; BEDERMAN, supra note 11, at 34; WALLACE, supra note 13, at 204.

⁶⁷. BEDERMAN, supra note 11, at 34.
form the “foundation for the interpretive process,” and an interpreter must give meaning and effect to all the terms of the treaty. However, skillful lawyers can usually assign ambiguity to seemingly straightforward phrases when a state asserts a particular construction to gain advantage in international relations. To assist with the strict reading of the text, subsections (2) and (3) of Article 31 list the specific documents an interpreter may take into account in order to deduce the “meaning to be given to the terms of the treaty in their context and in the light if its object and purpose.” The VCLT provides:

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

   (a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

   (b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

   (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

   (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

   (c) Any relevant rules of international law applicable in the relations between the parties.

Additionally, Article 31(4) stipulates that, where parties claim to have assigned a “special meaning” to a term, interpreters shall recognize that

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69. James D. Fry, Legitimacy Push: Towards a Gramscian Approach to International Law, 13 UCLA J. INT’L L. & FOREIGN AFF. 307, 330 (2008) (“Article 31 . . . leaves the door open for dominant states to push for political interpretations that best serve their own interests.”); Bederman, supra note 11, at 34 (2001) (“If words always had fixed and determinable meaning for every circumstance, then one would have no need for interpretation—nor for lawyers, for that matter.”).

70. Vienna Convention on the Law of Treaties, supra note 12, art. 31; Bederman, supra note 11, at 35.

meaning if “it is established that the parties so intended.” 72 Furthermore, while not explicitly stated, the reference to “object and purpose” has been understood as directing interpreters to employ a “teleological” approach. 73 Teleological interpretation gives relevance to the fundamental reason or problem the treaty was supposed to address. 74 Therefore, after establishing the ordinary meaning of a term, an interpreter should examine the above-referenced documents and consider the overall purpose of the agreement.

If the interpreter has applied the Article 31 framework and the meaning of a term is “ambiguous or obscure” or leads to a result that is “manifestly absurd or unreasonable,” additional documents may be considered to determine the intentions of the parties. 75 Article 32 of the VCLT states that, in order to deduce the parties’ intentions, an interpreter may take into account “supplemental means of interpretation, including preparatory work of the treaty and the circumstances of its conclusion.” 76 The phrase “circumstances of conclusion” is generally understood to permit the examination of the “historical background against which the treaty was negotiated.” 77 While some commentators have called into question the fairness of looking at negotiation history, the use of such documents has become a constant feature of interpretive disputes over treaties. 78 As a result, while sources that shed light on the parties’ intentions take a subordinated role to the plain text of the treaty, they are often brought into the interpretive process due to the ease with which a given term can be labeled ambiguous. 79

72. Id. at art. 31(4).
73. Fry, supra note 69, at 70.
74. Bederman, supra note 11, at 35.
75. Appellate Body Report, European Communities – Customs Classification of Certain Computer Equipment, ¶ 86, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (June 5, 1998); Janis, supra note 12, at 30–31; see Wallace, supra note 13, at 205 (“If giving the ordinary meaning to the terms of the treaty would lead to an ambiguous or obscure meaning, or would produce a manifestly absurd and unreasonable approach, supplementary means of interpretation may be invoked.”); Bederman, supra note 11, at 35.
76. Bederman, supra note 11, at 35.
77. European Communities – Customs Classification of Certain Computer Equipment, supra note 75, at ¶ 86.
78. Bederman, supra note 11, at 35.

The apparent preference for the primacy of text, moreover, reflects the predominant influence of the Continental approach over an Anglo-Saxon view.
Ultimately, the aim of analysis is to find not just a conflict between obligations, but one that rises to the level of a material breach per Article 60 of the VCLT:

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

3. A material breach of a treaty, for purposes of this article, consists in:

   (b) The violation of a provision essential to the accomplishment of the object or purpose of the treaty.

Because a treaty can have multiple purposes, it is well-settled that a breach must offend a main object or purpose of the agreement. Accordingly, a minor breach of a major purpose is likely more significant than a major breach of a minor purpose. All in all, the Convention sets forth an understanding that there are instances where “a degree of such violation justifies termination or suspension, and that the touchstone of that degree is that the provision violated should be essential to the accomplishment of the treaty’s object and purpose.”

Once a material breach has been established, it is generally accepted that the other party may repudiate the treaty and unilaterally initiate a

The International Law Commission, through what appears to be a delicate mixture of lex latae and de lege feranda, had striven to give legal character to what in judicial experience denotes “historicity of subjectivity.” According to Sir Humphrey, “the concept [of the ordinary meaning] must in his view always be related to the context . . . .

Id. (alteration in the original, internal citations omitted).

80. Moore, supra note 28, at 885–936. Moore illustrates in a comprehensive review of the drafting history of Article 60 of the Vienna Convention and subsequent legal commentaries that, while it is uncertain what a trivial breach may give rise to, a material breach by either party in a bilateral treaty gives the nonbreaching party the right to terminate the treaty in whole or in part. Id.

81. Vienna Convention on the Law of Treaties, supra note 12, art. 60; Fitzmaurice & Elias, supra note 14, at 125–26 (noting that the determination of “object and purpose” of the treaty is the difficult issue in determining whether there has been a material breach for Article 60 requirements).

82. Moore, supra note 29, at 920–21.

83. See id.

peaceable reprisal.\footnote{85}{T. O. ELIAS, THE MODERN LAW OF TREATIES 114 (1974) ("It is generally agreed that the breach of a treaty obligation by one party entitles the other party to retaliate by means of peaceable reprisals."); see also Moore, supra note 29, at 910.} Normally, "[Grounds] for invalidating, terminating, withdrawing from or suspending the operation of a treaty . . . may be invoked only with respect to the whole treaty,\footnote{86}{Vienna Convention on the Law of Treaties, supra note 12, art. 44.} but some legal scholars believe that a state may initiate a peaceable reprisal in the event that a breaching party has materially breached an important portion of the treaty.\footnote{87}{Moore, supra note 29, at 885–93.} This notion, though, is much easier to apply with treaties that deal with commerce, and it is difficult to see how one could severally repudiate the Friendship Treaty.\footnote{88}{Treaties that relate to commerce between nations generally have quantifiable subject matter: a ton of barley, or a cargo of wheat. In contrast, a treaty that defines human rights is not so severable. See BINDER, supra note 9, at 31.}

III. FACTUAL BACKGROUND OF RUSSIAN-UKRAINIAN RELATIONS

In an effort to understand the intent behind treaties between Russia and Ukraine, it is critical to examine the history of agreement between these two nations.\footnote{89}{Morrison, supra note 2, at 677–78.} The Pereyaslav Agreement of 1654 marks a defining moment in Russia-Ukraine relations that shaped the subsequent three centuries of foreign policy and law between the two States.\footnote{90}{Id. at 679.} While history has blurred the details of the agreement, it is understood that Ukraine sought protection from the Poles and turned to Russia for military assistance.\footnote{91}{Alexander Biryukov, The Doctrine of Dualism of Private Law in the Context of Recent Codifications of Civil Law: Ukrainian Perspectives, 8 ANN. SURV. INT’L & COMP. L. 53, 55 n.5 (2002); see also Press Release, Ukrainian World Congress, Pereyaslave Treaty—Statement on Observance of the Pereyaslav Treaty of January 1654 (July 3, 2002), http://www.artukraine.com/old/historical/pertreaty.htm.} After signing the agreement, Ukraine expected to engage in a bilateral military alliance but found itself pledging a unilateral oath of loyalty to the Russian tsar.\footnote{92}{Biryukov, supra note 91, at 55 n.5; Morrison, supra note 2, at 682.} The years following the agreement were marked by Ukrainian hardship, famine, and oppression, resulting in a general skepticism toward promises from Moscow.\footnote{93}{Morrison, supra note 2, at 679–80.} While the Pereyaslav Agreement had many longstanding effects on Russian-Ukrainian relations, the most significant is the fear among Ukrainian citizens that “any deal with Russia is a potential trap, however favourable to Ukraine its terms might
appear.94 These sentiments continued to manifest throughout the twentieth century under the oppressive rule of Joseph Stalin, reinforcing the Ukrainian inferiority complex with respect to Russia.95

However, to regard Russia’s relationship with Ukraine as solely oppressive would be to disregard the notion held by many Russian leaders and philosophers that Ukraine is an integral part of the Russian dynasty—a State coexisting with Russia, following the same worldly mission and preserving similar social ideologies.96 Kiev, for many Russians, was the “birthplace of the Russian nation . . . [where] Russians adopted Christianity.”97 The notion that Ukraine is a “younger brother” to Russia may be seen as a Russian understanding that the two States coexist, and the boundaries that have developed are purely artificial and evidence of a failure to understand that “Russia is a larger concept than the territory within the borders of the Russian Federation.”98 From this angle, one can begin to understand the motivation for Russia to enter into agreements where Ukraine garners sovereignty but not total independence; to some Russian nationalists, an “independent Ukraine” would be a contradiction of terms.99

After the fall of the Soviet Union, Ukraine found itself in an all too familiar setting. Meeting in the town of Pereyaslav-Khmelnytsky,100 leaders from Russia and Ukraine set an example for surrounding territories by becoming two of the original parties to the Commonwealth of Independent States (“CIS”).101 Ostensibly, the document recognized Ukrainian independence and renounced the Pereyaslav agreement, but the years following the signing were marked by Russian influence and

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94. Id. at 680.
95. See Morrison, supra note 2, at 679; Press Release Ukrainian World Congress, supra note 91.
96. John Edwin Mroz & Oleksandr Pavliuk, Ukraine: Europe’s Linchpin, FOREIGN AFF., May/Jun 1996, at 52, 52 (“Much of the Russian political spectrum, obsessed with reclaiming great power status and reuniting the former Soviet republics, recognizes that Ukraine is the key to its plans and openly espouses reabsorption.”); see also Morrison, supra note 2, at 681.
98. Id. at 682.
99. Id. at 681.
100. Pereyaslav-Khmelnytsky is the town named after the aforementioned Pereyaslav Agreement and its Ukrainian cosigner, Hetman Khmelnytsky.
reluctance to accept what was widely regarded as an unacceptable, polarizing mandate by then Russian President Boris Yeltsin.102 Largely due to the confusion expressed by Russian nationals toward the ramifications of the CIS, Ukraine spent subsequent years advocating a new, more explicit treaty for Russia to recognize borders and Ukrainian independence.103 Thus, in 1997, the two parties entered into the Friendship Treaty.104 The Friendship Treaty outlines reciprocal obligations for explicit recognition of Ukraine’s sovereignty and self-determination, but there are numerous factors that call into question the true sentiment behind Russia’s assent.105 When the presidents of the two countries met in Kiev, they discussed a number of matters, but the primary Russian objective was to reach a deal on a lease for the naval port in Sevastopol, a Ukrainian municipality located on the Black Sea.106 Until these negotiations, Russia had continually stalled talks about the Friendship Treaty, and only once the lease was agreed upon did both parties make any progress toward its execution.107 The importance of the lease is highlighted by its annexation to the Friendship Treaty when it was submitted and registered with the UN.108

As early as 1991, relations between NATO and Ukraine began to take shape as the country sought a new identity in a post-Soviet world.109 However, at the 1997 signing of the Friendship treaty, it was unclear

102. Feldhusen, supra note 2, at 126–28 (noting that later agreements and Russian sentiment muddied the obligations of the Ukraine-Russia relationship in the subsequent years).Morrison, supra note 2, at 682, 684.
103. Feldhusen, supra note 2, at 126–27 (“President Kuchma compared the signing of the treaty to cutting the umbilical cord between the two countries.”).
whether Ukraine would continue to pursue NATO membership. Questions about its intentions were answered when Ukraine formally signed the Charter on a Distinctive Partnership in July of 1997, which established the NATO-Ukraine Commission in Kiev. In the following years, Ukraine contributed military forces to NATO-led operations and continued to engage NATO on a yearly basis with updates and reports as it progressed toward satisfying the NATO requirements for membership. In recent years, Ukraine has become the focus of U.S. efforts to increase NATO membership, and, as recently as September 2008, U.S. officials have visited Kiev to affirm that “Washington ha[s] a deep and abiding interest in Ukraine’s security.”

While this Note focuses largely on the legal issues raised by NATO membership, politics and law are often closely intermingled on the international stage, thus it is necessary to illustrate some of the political hurdles as well. In recent years, rifts within Ukraine’s government and general population make NATO membership seem unlikely in the near future.

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110. See Specter, supra note 106 (quoting Volodimyr Horbulin, Ukraine’s top military official, as stating, “Ukraine is not going to join NATO now, and there are no conditions for that.”). Note, however, that in an accompanying declaration to the submission of the Friendship Treaty to the United Nations, it was stated that “the Presidents consider that the instruments on relations between the Russian Federation and the North Atlantic Treaty Organization and between Ukraine and the North Atlantic Treaty Organization safeguard the national interests of their countries and contribute to the strengthening of security and stability in European and Atlantic region.” Russian-Ukrainian Declaration, Russ.-Ukr., May 31, 1997, U.N. Doc. A/52/174. While this provision likely opens the door for Ukraine to engage NATO, years of new leadership in Russia have altered the sentiments toward NATO that former President Boris Yeltsin may have held in 1997. Regardless, this Note does not consider whether Ukraine is allowed to join NATO, but whether such a treaty would present obligations that conflict with Ukraine’s present obligations to cooperate in a military effort with Russia.


114. See SCOTT, supra note 21, at 1–25.

115. Id. (noting that focusing solely on the legal aspects of a treaty would mean neglecting its broader application in the international political sphere).

116. Brian Knowlton & Judy Dempsey, Rice Defends Stance on 2 States’ NATO Push, INT’L HERALD TRIB., Nov. 27, 2008, at 3 (quoting U.S. Secretary of State Condoleezza Rice as stating, “Georgia and Ukraine are not ready for [NATO] membership . . . . That is very clear.”).
In 2004, democratic elections were held in Ukraine and resulted in the installation of a pro-Moscow regime led by Viktor Yanukovich as Prime Minister. The legitimacy of the election was hotly contested, and the successful Orange Revolution in 2004 took Yanukovich out of power and replaced him with the pro-Western Viktor Yuschenko as President and Yulia Tymoshenko as Prime Minister. Despite the rise of a pro-Western government, however, the President and Prime Minister failed to cooperate in efforts toward NATO membership and engaged in in-fighting that ultimately stalled progress toward satisfying NATO requirements. Then, with many commentators criticizing the Orange Revolution beneficiaries for poor leadership and ineffective governing, Yanukovich managed to reclaim power in the 2010 presidential election.

While Yanukovich’s return to power clearly signals a “pro-Moscow tilt,” his campaign focused on refashioning his image as the type of leader who will not only advance the values of the Orange Revolution but also mend ties with the Kremlin. Furthermore, the recent election carries with it a collateral, more important message that Ukraine has persisted as a democracy, moving away from elections that have “hardly been free and fair.”

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120. Gideon Rachman, *Oranges and Lemons in Ukraine*, FIN. TIMES, at 11 (“Over the past six years, during the Yushchenko presidency, Ukraine has been democratic and pro-western—but badly governed. The average Ukrainian now yearns for better government, which accounts for the backlash against the ineffective Mr. Yushchenko.”).
121. Mary Dejevsky, *Ukraine is at Last Throwing off the Shackles of the Cold War*, THE INDEPENDENT, Feb. 9, 2010, at 32 (“But the many different roads of disillusionment with the Orange Revolution do not lead automatically back to Moscow. What has been the most striking, and most hopeful, about the 2010 election is the extent to which it has not been a contest between West and East, either globally, or within Ukraine.”).

[Yanukovich’s victory] may be a relief to Vladimir V. Putin, but the election was competitive and relatively fair, the kind of race that has not been held in Russia under Mr. Putin.

While [Ms. Tymoshenko, defeated Prime Minister,] might indicate a rejection of the [Orange] [R]evolution, the fact that the country carried out a contentious
Similarly, Ukraine’s citizens have divided on the NATO issue. Re-
cent polls show that 52% of Ukrainians would vote against joining
NATO, while only 22% would vote in favor of membership. Still, pro-
NATO government officials insist that the statistics are not a perfect pic-
ture of public sentiment, as much of Ukraine’s population is greatly unin-
formed as to what NATO membership entails (many think, for instance,
that NATO membership would involve nuclear weapon deployment on
Ukrainian territory), and harsh words from Moscow have swayed many
citizens’ sentiments. Furthermore, residents of key Ukrainian territo-
ries, such as Crimea, have demographics with strong ties to Russia, and
these allegiances have stymied NATO progress. While the recent pres-
idential election effectively ousted the Orange government, effective lea-
dership, democratic elections, and a core of pro-Western voters could set
Ukraine on a more effective path towards E.U. and NATO membership.

IV. IDENTIFYING A CONFLICT

In order for an official “conflict” to exist, the two treaties at issue must
have a similar object or purpose. This VCLT rule is reflected in the
nonconflict provision of the North Atlantic Treaty:

> Each party declares that none of the international engagements now in
> force between it and any other of the Parties or any third State is in con-
> flict with the provisions of this Treaty, and undertakes not to enter into
> any international agreement in conflict with this Treaty.

presidential election that was widely considered fair suggested that the Orange
legacy had endured.

Id.; see also Dejevskly, supra note 121 (“In this election there was no high-profile elec-
tioneering by Russia or by the United States. . . . Above all, though, this was an election
between Ukrainians, not cold-war proxies, campaigning on Ukrainian issues.”).
123. Judy Dempsey, NATO Examines Ukraine’s Readiness to Join—Strong Opposition
Seen from Russia, INT’L HERALD TRIB., June 16, 2008, at 3.
124. Id. (statistics from the Independent Democratic Initiatives Foundation in Kiev).
125. Dempsey, supra note 123.
126. For an account of the tensions existing between Ukraine and Crimea, see Chase,
supra note 2.
127. Clifford J. Levy, For Kremlin, Ukraine Vote Cuts 2 Ways, N.Y. TIMES, Feb. 8,
2010, A1 (“While the public ousted the Orange government, . . . it did not want to do
away with all aspects of the Orange democracy. [Other analysts] said a backlash would
occur if Mr. Yanukovich tried to crack down.”); Luke Harding Kiev, International Ob-
servers Hail Ukraine Election as Fair, THE GUARDIAN, Feb. 9, 2010, at 20 (“Ukraine’s
chances of joining the EU had been significantly enhanced, the observers noted.”).
128. See Vienna Convention on the Law of Treaties, supra note 12, art. 30; see also
Borgen, supra note 47, at 603.
Meanwhile, this comparable clause is found in the Friendship Treaty:

Each High Contracting Party shall refrain from participating in, or supporting, any actions directed against the other High Contracting Party, and shall not *conclude any treaties with third countries against the other Party*.\(^\text{130}\)

Here, there are two explicit scenarios for a conflict. For Ukraine, becoming a party to the North Atlantic Treaty may constitute “conclus[ing] a treaty with third countries” against Russia. This will depend largely on the scope of the phrase “against the other Party” and whether the mere potential for a breach, absent an overt act, would justify repudiation. The second issue is whether the Friendship treaty could constitute an international agreement in conflict with the North Atlantic Treaty. The Friendship treaty describes Ukraine and Russia as neighborly allies maintaining a cooperative front to ward off hostile measures against either state; a role that could be compromised if Ukraine joins a military alliance to which Russia is not a signatory.\(^\text{131}\) Therefore, in order to determine if there is a conflict, it becomes necessary to use the VCLT rules of treaty interpretation.\(^\text{132}\)

A treaty conflict can occur “when a state concludes a treaty that creates international obligations the performance of which would be inconsistent with the performance of an international obligation to a third state under a previously concluded treaty.”\(^\text{133}\) When looking for a conditional breach that can occur in the future, the analysis of a potential conflict aims to identify the presence of an anticipatory breach.\(^\text{134}\) On a domestic level, jurisdictions such as the United States have defined procedures for addressing an anticipatory breach.\(^\text{135}\) However, on the international level,

\(^{130}\) Treaty of Friendship, Cooperation and Partnership, *supra* note 6, art. 6 (emphasis added).

\(^{131}\) See *id*.

\(^{132}\) See *supra* text accompanying note 76.

\(^{133}\) BINDER, *supra* note 9, at 7.

\(^{134}\) Borgen, *supra* note 47, at 627–28. Borgen states:

Much attention has focused on whether the law on treaties encompasses a norm of anticipatory breach . . . . Current analysis does not address the problem of treaty conflicts in these terms; as such it is not a developed norm. Based on analogies from the domestic cases of contractual conflicts, however, the idea of anticipatory repudiation is a useful one, as it focuses attention on the underlying goals of each treaty. This, in turn, urges a more systematic inquiry into the interrelationship of treaties.

\(^{135}\) 17A AM. JUR. 2D Contracts § 716. For the definition of anticipatory breach in the international context, see BINDER, *supra* note 9.
the issue of whether an anticipatory breach would nullify a treaty has yet to be addressed, and there has been little speculation as to the consequences for two treaties that may breach in the future.\textsuperscript{136}

In 1979, two parties were required to resolve a similar issue at the Camp David negotiations over the Arab-Israeli conflict.\textsuperscript{137} In that instance, Egypt and Israel began the implementation of a plan that concluded with a treaty of peace, whereby Egypt agreed that Israel would “live in peace within secure and recognized boundaries.”\textsuperscript{138} In 1952, though, Egypt sought leadership among Arab nations by “giving voice to a Pan-Arab nationalist movement, at times even proposing to merge with other Arab states.”\textsuperscript{139} Egypt’s commitment to the mission of the Pan-Arab world had its foundation in a treaty between Egypt and the Arab League that required Egypt to maintain collective security with Arab governments and advance national aspirations of the Palestinian people.\textsuperscript{140} Consequently, at the time Egypt and Israel submitted their treaty to the United Nations for ratification, Egypt was “considered to be under a continuing obligation to join in hostilities against Israel” but also committed to not use force against Israel.\textsuperscript{141}

The issue was hotly negotiated among Egypt and Israel, and they eventually submitted a side-letter with the agreement clarifying that each would “exclude the use of force by either party against the other unless the latter were deemed the aggressor in a conflict with third parties.”\textsuperscript{142}

Yet, minutes to the negotiations reveal that the treaty was not intended to abrogate defense obligations already in place for either party.\textsuperscript{143} Most

\begin{itemize}
  \item \textsuperscript{136} Binder, supra note 9, at 3; see Borgen, supra note 47, at 627–28.
  \item \textsuperscript{137} Binder, supra note 9, at 3.
  \item \textsuperscript{138} Treaty of Peace Between the Arab Republic of Egypt and the State of Israel, Mar. 26, 1979, 18 I.L.M.; Agreement on the Framework for Peace in the Middle East Agreed at Camp David preamble, Egypt-Isr., Sept. 17, 1978, 17 I.L.M. 1463, 1467; Binder, supra note 9, at 3.
  \item \textsuperscript{139} Binder, supra note 9, at 10 (“Of great symbolic importance in this enterprise was Egypt’s central role in expressing Arab hostility to Israel, in consequence of which it had bore the brunt of every Arab hostility to Israel.”).
  \item \textsuperscript{140} Id. at 3.
  \item \textsuperscript{141} Id. at 11.
  \item \textsuperscript{142} Id.
  \item \textsuperscript{143} Louis René Beres, Prosecuting Iraqi Gulf War Crimes: Allied and Israeli Rights Under International Law, 16 Hastings Int’l & Comp. L. Rev. 41, 62 n.70 (1992). Beres notes:

A Minute to Article VI, paragraph 5 of the Israel-Egyptian Peace Treaty provides that it is agreed by the parties that there is no assertion that the Peace Treaty prevails over other treaties or agreements or that other treaties or agreements prevail over the Peace Treaty. . . . This means that the treaty with Israel
notably, this would include cooperative military agreements between Syria and Egypt. So, while the side letter ostensibly set forth a standard for determining sides, the letter hardly corrected the problem since “aggression, like beauty, is in the eye of the beholder.” The problem of determining aggression becomes more difficult when one reflects upon the myriad border disputes and entitlements in the Israeli-Arab world.

Despite these problems, the treaty is considered a success in terms of Israeli-Egyptian relations, and still remains in effect today. The treaty failed in other respects, however, as the members of the Arab League responded with a unanimous vote to suspend Egypt from the Arab

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144. BINDER, supra note 9, at 11. For a description of the Syria-Israel conflict, see discussion infra Part IV.

145. BINDER, supra note 9, at 13; Louis René Beres, Preserving the Third Temple: Israel’s Right of Anticipatory Self-Defense Under International Law, 26 VAND. J. TRANSNAT’L L. 111, 125 n.42 (1993). Beres explains:

Although it is generally believed that the peace treaty in force with Egypt constrains that state from joining with other Arab forces against Israel, this belief causes problems. The Israel-Egyptian Peace Treaty provides that the parties do not assert that the Peace Treaty prevails over other treaties or agreements or that other treaties or agreements prevail over the Peace Treaty. This means that the treaty with Israel does not prevail over the defense treaties that Egypt has concluded with Syria, and that Cairo—should it determine that Israel has undertaken aggression against Syria—could enter into belligerency against Israel on behalf of Damascus. Indeed, even if Syria were to commence hostilities against Israel to recover the Golan Heights, Egypt might abrogate its agreement with Israel and offer military assistance to Syria. Shortly after the signing of the Israeli-Egyptian Peace Treaty, then Egyptian Prime Minister Khalil stated that he would regard any attempt by Syria to recover the Golan-Heights as a defensive war, one that would bring into play the Egyptian-Syrian defense treaty despite the existence of the Israel-Egyptian Peace Treaty.

Beres, supra, at 125 n.42.

146. See George Anastaplo, On Freedom: Explorations, 17 OKLA. CITY U. L. REV. 465, 612 (“[I]t is probably not difficult in the Middle East to invokes longstanding border disputes in the course of the bargaining that any controversy promotes.”).

League, having viewed the treaty as a violation of the Arab League’s commitments in the Middle East.148

Therefore, the conflict between the North Atlantic Treaty and the Friendship treaty remains an exposed doctrinal problem of treaty conflict left largely unaddressed after the Egypt-Israeli Peace Treaty because of Egypt’s removal from the Arab League and a stated reservation about the Egypt-Syrian treaty.149 The potential for conflict is high among the post-Soviet states for reasons that mirror the problems in the Middle East—most notably, the dispute over the entitlement of certain lands and borders.150 Recently, these problems garnered national media attention when Russia and Georgia engaged in military action over the South Ossetia territory.151 Like Georgia’s dispute over South Ossetia, Ukraine’s tenuous relationship with Crimea is troubling given the latter’s dense Russian population and strategic location on the Black Sea.152

148. Borgen, supra note 47, at 627–28 (“Current analysis does not address the problem of treaty conflicts [in terms of anticipatory breach]; as such it is not a developed norm.”); see also Binder, supra note 9, at 15.

149. See Binder, supra note 9, at 15.

150. Zlenko, supra note 8, at 45–46. Zlenko explains:

Radical social and political movements in Central and Eastern Europe during the late 1980s and early 1990s . . . , the emergence on the political landscape of several independent states each striving to obtain its own model of social development, and the collapse of the Soviet Union have all drastically altered the geopolitical balance in Europe . . . .

The dramatic events taking place in Europe have raised a number of new issues, the most significant of which are the need to maintain further political balance in the region and the need to ensure the security of the newly independent countries by creating an effective security system throughout the entire Euro-Atlantic region.

Id. at 45.


152. Crimea is a hot bed for entitlement problems. For more information on Crimea, see Chase, supra note 2. There are significant differences, though, between South Ossetia and Crimea. Most significantly, South Ossetia is internationally regarded as a sovereign territory, while Crimea is an autonomous, parliamentary republic of Ukraine. It is not under formal dispute that Crimea is subject to Ukrainian authority. However, similarities exists due to the territory’s proximity to Russia and questions of legitimacy. Some Russian nationalists question whether Crimea was legitimately transferred to Ukraine in 1954. Furthermore, the existence of a large Russian population and the presence of the Port Sevastopol, home of the Black Sea Fleet, make Crimea a volatile territory. For more on the transfer of Crimea to Ukraine, see the International Committee for Crimea, Trans-
The Friendship Treaty imposes on Ukraine a duty to perform according to the principle \textit{pacta sunt servanda}, which dictates that treaties must be performed in good faith.\textsuperscript{153} This principle bars parties from concluding agreements that undermine the value of existing treaties on the same subject.\textsuperscript{154} To avoid breaching good faith, Parties entering a new treaty must avoid obligations that frustrate or destroy their other treaty-made obligations.\textsuperscript{155} Therefore, to conclude a treaty that entails obligations that would foreseeably frustrate the rights of a third party\textsuperscript{156} may ultimately be a type of anticipatory breach and, thus, a breach of good faith.\textsuperscript{157}

It is necessary, then, to analyze whether the North Atlantic Treaty would frustrate the object and purpose of the Friendship Treaty, and, if so, whether such frustration amounts to a material breach of the Friendship Treaty. The scope of the Friendship Treaty’s obligations can be defined by utilizing the interpretative framework established by the VCLT.\textsuperscript{158} The text of the Friendship Treaty states in part:

\begin{quote}
If a situation arises which, in the opinion of one of the High Contracting Parties, poses a threat to peace, violates the peace or affects the interests of its national security, sovereignty or territorial integrity, it may propose to the other High Contracting Party that consultations on the subject be held without delay. The States shall exchange relevant information and, if necessary, carry out coordinated or joint measures with a view to overcoming the situation.\textsuperscript{159}
\end{quote}

This clause creates an obligatory norm.\textsuperscript{160} The right to cooperate must be asserted, as it does not arise automatically when either state has a

\textsuperscript{153}See Janis, supra note 12, at 27. “Every treaty in force is binding upon all the parties to it and must be performed in good faith. The notion of good faith and observance of international agreements is, of course, a fundamental principle of international law.”

\textsuperscript{154}See Binder, supra note 9, at 28 (“Any act which destroys the value of a treaty right is a breach of the obligation to perform a treaty in good faith.”).

\textsuperscript{155}Lord McNair, \textit{The Law of Treaties} 550 (Oxford Univ. Press, 1961). In discussing the good faith requirement, Lord McNair notes, “In short, the making of regulations by one party which in substance destroyed or frustrated the right of the other party would be a breach of good faith and of the treaty.” \textit{Id}.

\textsuperscript{156}“Third party,” here, refers to a third party with whom one has already contracted.

\textsuperscript{157}Binder, \textit{supra} note 9, at 28.

\textsuperscript{158}See supra text accompanying note 76.

\textsuperscript{159}Treaty of Friendship, Cooperation and Partnership, \textit{supra} note 6, art. 7.

\textsuperscript{160}See Sadat-Akhavi, \textit{supra} note 58, at 8 (describing situations in which a norm requires an act, while another norm permits a contrary act—two acts that cannot be performed at the same time, but can both be avoided).
claim for a threat to its territorial integrity, but when that right is asserted, the other party “shall” meet and exchange information.161 Analyzing the treaty as a whole, though, the clause does not just create an obligation to discuss mutual defense possibilities in the time of an attack—rather, it suggests a procedure for the overall intent and purpose of the treaty, stated in the preamble:

Considering that the strengthening of friendly relations, good-neighborliness and mutually advantageous cooperation is in keeping with the basic interests of their peoples and serves the cause of peace and international security . . . .

Desiring to improve the quality of these relations and strengthen their legal basis . . . .162

The second and third schools of interpretation—intentionalism and purposevisim—can help in determining the “value” of the treaty when the text is ambiguous or unclear.163 Due to the broad language used in the Friendship treaty, supplemental information is helpful to define its object and purpose.164 Interpreting a treaty in a way that acknowledges the fundamental problem the drafters sought to address clarifies the object and purpose of the treaty.165 For Ukraine, the Friendship Treaty was intended as a declaration of independence and sovereignty—a major step toward achieving self-determination and official recognition by Russia.166 For Russia, it seems that the drive behind the Friendship Treaty was twofold; while Russia surely wanted to maintain its diplomatic relationship with Ukraine, it also worried about solidifying its position at the strategic naval base in Sevastopol (a Ukrainian municipality located in the Black Sea).167 The Sevastopol naval base is attractive because its location allows for quick deployment to all the surrounding territories, and, up until the signing of the Friendship Treaty, its status as a Russian-friendly port

161. Id.
163. Moore, supra note 28, at 919. Sir Gerald Fitzmaurice, Special Rapporteur to the International Law Commission, proposed that a fundamental breach “goes to the root or foundation of the treaty relationship between the parties and call[s] in question the continued value or possibility of that relationship in the particular field covered by the treaty.” Id. (internal citations omitted).
164. See supra text accompanying note 76.
165. BEDEMAN, supra note 11, at 35; see Vienna Convention on the Law of Treaties, supra note 12, art. 60.
166. Specter, supra note 106.
167. Feldhusen, supra note 2, at 127.
was unclear. 168 Therefore, the object and purpose of the treaty was to increase stability and cooperation in the Eastern European region by fostering diplomatic relations between the two states and fortifying the Black Sea Fleet.

Similarly, the North Atlantic Treaty seeks to maintain security and peace throughout Europe and the Atlantic region, and, if necessary, to guarantee a framework of concerted military action when any of the members suffers an armed attack. 169 In part, it states:

The parties agree that an armed attack against one or more of them . . . [is] an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of an individual or collective self-defense . . . , will assist the Party or Parties so attacked by taking . . . in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area. 170

It seems clear that the object and purpose of these two treaties conflict; both call for cooperative military action or cooperative efforts to defend territorial integrity of their parties. 171 In context, when one requires an act, the other necessarily requires a contrary act. 172 These conflicting obligations “cannot be performed at the same time,” however, “both can be avoided.” 173 Potentially, performance of its obligations under the Friendship Treaty could prohibit Ukraine from performing its obligations under the North Atlantic Treaty; but there are numerous scenarios in which

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169. North Atlantic Treaty, supra note 129, preamble; LAWRENCE S. KAPLAN, THE UNITED STATES AND NATO, THE FORMATIVE YEARS 1–10 (1984) (stating that the purpose of NATO was to increase American influence in Europe in order to maintain peace and stability amidst the threat of communism after World War II).
171. Borgen, supra note 47, at 580. In regard to treaties that are concerned with the same subject matter for instance:

NAFTA and the General Agreement on Tariffs and Trade (GATT) cover much of the same subject-matter, although GATT covers many other subject as well. Similarly, one can see that the Inter-American Convention on Human Rights and the International Covenant on Civil and Political Rights essentially cover the same subject-matter as well. While a case could be made either way, the stronger argument is that these treaties would meet any reasonable test for “same subject matter.”

Id.
172. See SADAT-AKHAVI, supra note 58, at 8.
173. Id. (emphasis added).
conflict is avoidable. Still, the guidance set forth by the “Successive Treaties” conflict resolution principles in the VCLT does not provide an adequate solution for these types of conflicts. To follow the VCLT strictly, Ukraine would be required to abide the earlier treaty in the event of a conflict, yet commentators have noted that in reality there is no way of determining or preventing the fulfillment of one obligation over the other. We are confronted, then, with the same problems anticipated by political realism. Without a clear framework of obligations, the state will be free to employ realist foreign policy and make choices based on self-interest instead of international legal compliance.

V. THE PROPOSED REMEDY

With unsatisfactory procedures in place, it is important for Ukraine and Russia to settle on other means for resolving a foreseeable dispute. Theoretically, there are three tactics Ukraine may employ in order to avoid liability for a breach. First, when the Friendship Treaty expires, Ukraine could terminate the agreement in accordance with its built-in termination clause:

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174. For example, cases where NATO allies and Russia are not involved in a military conflict.
175. Vienna Convention on the Law of Treaties, supra note 12, art. 30. In regard to the “Application of successive treaties relating to the same subject matter,” the VCLT merely provides that

When the parties to the later treaty do not include all the parties to the earlier one:

   

   (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.”

Id; see also Binder, supra note 9, at 3 (“A review of the practice of states and international tribunals in instances of treaty conflict will reveal a pattern of avoiding the question of conflicting treaties.”); Sadat-Akhavi, supra note 58, at 60 (noting that the conflict passages of the VCLT leave many questions unanswered); Borgen, supra note 47, at 578.
176. See Sadat-Akhavi, supra note 58, at 64.
177. Borgen, supra note 47, at 589. The problem with the interpretation of pacta sunt servanda is that, in the event of conflicts where treaties of the same object and purpose conflict, the theory would “thus give the state the choice and risk of breaching either or both treaties depending on the obligations of the treaties and the state’s actions. This opens the door to state responsibility and places the burdens on the potentially breaching state or states to negotiate a solution.” Id.
178. Id.
This Treaty is concluded for a period of 10 years. It shall subsequently be extended automatically for further 10-year periods unless one of the High Contracting Parties notifies the other High Contracting Party in writing of its desire to terminate it at least six months before the expiry of the current 10-year period.\textsuperscript{179}

In doing so, Ukraine may avoid the legal complications presented by signing the North Atlantic Treaty, but Ukraine would also be taking a damaging step backward in diplomatic relations with Russia, a nation with whom Ukraine has a long history and strong social ties.\textsuperscript{180} Additionally, Ukraine has a large Russian population,\textsuperscript{181} and, amidst the present chaos within Ukraine’s government,\textsuperscript{182} it is unlikely that any political party would advocate such a strong showing of Russian dissent. Moreover, the object and purpose of the Friendship Treaty was for Russia to explicitly recognize Ukraine’s independence and borders; to renounce the document that ostensibly grants such recognition would be counterintuitive for a nation still progressing toward complete sovereignty. Therefore, while this might be an easy legal resolution, the political contingencies make it grossly unattractive.

The second way Ukraine may be able to avoid liability for a breach is by asserting an \textit{ergo omnes} rights defense—Ukraine could claim that since every nation has an interest in self-preservation, and since joining a military alliance furthers this interest, doing so served a fundamentally justifiable priority.\textsuperscript{183} The notion of \textit{ergo omnes} was elucidated by the ICJ in the case of \textit{Barcelona Traction}:

When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be

\begin{itemize}
  \item \textsuperscript{179} Treaty of Friendship, Cooperation and Partnership, \textit{supra} note 6, art. 40.
  \item \textsuperscript{180} Feldhusen, \textit{supra} note 2, at 119; Morrison, \textit{supra} note 2, at 682.
  \item \textsuperscript{181} Dempsey, \textit{supra} note 123.
  \item \textsuperscript{182} Steven Erlanger & Steven Lee Myers, \textit{Bush Adds Drama to NATO Summit}, \textit{Houston Chronicle}, Apr. 3, 2008, at 13.
  \item \textsuperscript{183} Bederman, \textit{supra} note 11, at 23. Bederman explains:

[T]here are some rules of custom that are so significant . . . that the international community will not suffer States to “contract” out of them by treaty. . . . [S]ome customary international law obligations are so significant that the international community will permit any State to claim for their violations . . . . These are \textit{erga omnes} principles.

\textit{Id.} “Erga” and “ergo” are used interchangeably by commentators, but this Note uses “ergo” for simplicity.
drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.184

In short, *erga omnes* obligations are those obligations for which “all States have a legal interest” in fulfillment, “by reason of the importance of their subject-matter for the international community.”185 The *Barcelona Traction* case singled out slavery, genocide, and racial discrimination as violations *erga omnes*—violations of preemptory norms that states have a duty to refrain from irrespective of any treaty, because the obligatory duty of compliance is understood as being owed to the international community as a whole.186 Commentators, though, have found that the notion of the preemptory norm exceeds pure human rights obligations and also includes the right of a state to maintain international peace and cooperation.187 This includes the right to maintain peace and security on an international scale—a principle that arguably includes a nation’s ability to join a military alliance such as NATO.188 The VCLT reflects this


185. See SADAT-AKHAVI, supra note 58, at 55.

186. Alex Glasshauser, *What We Must Never Forget When It is a Treaty We are Expounding*, 73 U. CIN. L. REV. 1243, 1290 n.289 (2005).


[Tunkin,] on this basis, classified the peremptory norms of general international law under three fundamental principles of the U.N. Charter: The principle of peaceful coexistence; the principle of maintaining international peace, which includes the principle of the non-use of force or the threat of force; and the general principle of international cooperation, which includes the principle of equal rights and self-determination of peoples and the principle of respect for human rights.

*Id.*

188. *Id.* Van der Vyver goes on to note:

Alexidze, took note of a wider range of U.N. practice and consequently included in his classification of peremptory norms of general international law a broader scope of fundamental norms. Those norms entail, according to him:

. . . .

(b) principles defending the peace and security of nations (which include prohibition of the use and the threat of the use of force).

*Id.*
sentiment in maintaining that a treaty is void if it conflicts with a preemptory norm of general international law, but the argument for _ergo omnes_ obligations in the present case is attenuated and likely poses an affront to the prevailing international principle that treaties are to be respected. Moreover, the Friendship Treaty does not bar Ukraine from furthering its defense mechanisms; rather, the problem is the foreseeable confusion that would result if a NATO ally were to attack Russia. Therefore, it is unlikely that a court would find that the Friendship Treaty violates a preemptory norm of international law.

Ukraine’s third option would be to enter into negotiations with Russia and submit a side letter to the United Nations amending and clarifying the obligations set forth in the current Friendship Treaty. This option seems best, as it would preserve the purposes of the Friendship Treaty on a political level and also help secure the legal obligations of both parties in the future. Furthermore, according to Article 37, this was the method of resolution agreed upon at the ratification of the Friendship Treaty:

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190. Recall that the principle _pacta sunt servanda_ requires that treaties be performed in good faith, and in reality, nearly every obligation prohibits a state from exercising its sovereignty in one form or another. _See_ Binder, _supra_ note 9, at 1 (“The modern international legal system rests on a paradox—its legitimacy derives from the sovereignty of nations, yet its function is the constraint of such sovereignty.”).
191. Asserting a defense of a breach by relying on an _ergo omnes_ obligation seems to require a more significant right. If there is a treaty obligation that bars a state from complying with a universal norm of international law, this would be a better argument for _ergo omnes_ violation. _See_ Dinah Shelton, _Righting Wrongs: Reparations in the Articles on State Responsibility_, 96 Am. J. Int’l L. 833, 844 (2002) (noting that the discussion of preemptory norms in modern international jurisprudence and arbitration is largely absent, and the main signifier of its presence lies in the VCLT). Here, though, there does not appear to be an explicit bar to Ukraine, but rather a foreseeable situation that would present dual, conflicting obligations. Meanwhile, according to Bodansky:

> “[T]he commentary and most authors on the subject essentially contend that preemptory rules exist because they are needed, i.e., to ‘prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values.’”

_Id._ (internal citations omitted).
192. Vienna Convention on the Law of Treaties, _supra_ note 12, art. 39 (“A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide.”).
193. There will undoubtedly be difficulty in crafting an amendment that is both enticing to the parties and sufficient for all foreseeable outcomes. Similar problems arose in the Camp David negotiations, where crafting language free of manipulative or difficult interpretation was nearly an impossible feat. _See_ Binder, _supra_ note 9, at 13.
Disputes regarding the interpretation or application of the provisions of this Treaty shall be settled through consultations and negotiations between the High Contracting Parties.194

While parties have a largely “uncontroversial”195 prerogative to negotiate amendments to their agreements, the chief foreseeable problem is that severe complications will arise nevertheless if the parties fail to engage in negotiations preemptively—that is, prior to a dispute actually arising. It would likely make more sense for Ukraine to outline reservations with NATO, eluding an obligation to cooperate in a military effort against Russia in the case of a NATO strike against a Russian territory. This reservation, though, should clearly express Ukraine’s unwillingness to participate in the military effort on either side, as Ukraine would have to abstain from joining efforts with Russia against a NATO ally.

CONCLUSION

“Uncertainty is a calculable cost that treaties operate to decrease.”196 These words echo the positivist warnings first written by Grotius, that “all things become uncertain the moment men depart from law.”197 As it presently stands, the VCLT is wholly inadequate for dealing with the recent proliferation of treaties as a substantial source of international law.198 This Note calls on Russia and Ukraine to meet and discuss brightline conditions for triggering Ukraine’s military cooperative obligations in the event of an action by a NATO ally that threatens Russia’s territorial integrity.

Ultimately, the international legal system needs to develop a framework for dealing with anticipatory breaches of treaties. A foreign policy that promotes clarity and transparency with respect to obligations would further the positivist agenda toward enhancing compliance and respect for international law; this is a necessity a fortiori when military action is

194. Treaty of Friendship, Cooperation and Partnership, supra note 6, art. 37. Issues regarding the Black Sea Fleet lease are already starting to arise. See Kramer, supra note 168.

195. Michael Bowman, Towards a Unified Treaty Body for Monitoring Compliance with UN Human Rights Conventions? Legal Mechanisms for Treaty Reform, 7 Hum. RTS. L. REV. (Special issue) 225, 235 (2007) (“[R]ules governing the revision of treaties are to be found in Part IV of the Vienna Convention (Articles 39–41), which are unlikely to be regarded as controversial.”).

196. Binder, supra note 9, at 31.

197. See Wright, supra note 28.

198. Borgen, supra note 47, at 578 (“[T]he VCLT’s treaty conflict provisions are neither an accurate description of current state practice, nor are they adequate prescriptions for how states should act.”).
the basis of a dispute. Over time, unforeseeable events can drastically alter the course of international relations. Bright-line obligations are necessary when one’s ally has the potential to become an enemy in the future.

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199. Binder, supra note 9, at 31 (“In the realm of politics and war, uncertainty is even more prevalent than in commerce, and its costs may be higher. Nevertheless, treaties may operate like other agreements to provide a measure of diplomatic and military security.”).

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