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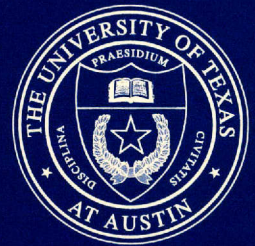


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## Volume 46, Issue 1

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THE BRITISH ARE COMING!: BRITAIN CHANGES ITS LAW ON FOREIGN BRIBERY AND JOINS THE INTERNATIONAL FIGHT AGAINST CORRUPTION
*F. Joseph Warin, Charles Falconer, and Michael S. Diamant*

"ISLAM IS THE SOLUTION":
CONSTITUTIONAL VISIONS OF THE EGYPTIAN MUSLIM BROTHERHOOD
*Kristen Stilt*

*TO TESTIFY OR NOT TO TESTIFY*: A COMPARATIVE ANALYSIS OF AUSTRALIAN AND AMERICAN APPROACHES TO A PARENT-CHILD TESTIMONIAL EXEMPTION
*Hillary Farber*

DEMOCRACY, HUMAN RIGHTS, AND INTELLIGENCE SHARING
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DOES FINLAND HOLD ANSWERS?
*Lilith Houseman*

GOOGLING A TRADEMARK:
A COMPARATIVE LOOK AT KEYWORD USE IN INTERNET ADVERTISING
*Tyson Smith*

THE UNIVERSITY OF TEXAS SCHOOL OF LAW

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1. E. Ernest Goldstein, *Thank You Fidel! Or How the International Law Society and the* Texas International Law Journal *Were Born*, 30 TEX. INT'L L.J. 223 (1995).

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# The British are Coming!: Britain Changes its Law on Foreign Bribery and Joins the International Fight Against Corruption

F. JOSEPH WARIN, CHARLES FALCONER, AND MICHAEL S. DIAMANT*

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## INTRODUCTION

"Al Yamamah" means "the dove" in Arabic.[1] This name of an ancient district in Saudi Arabia was once synonymous with peace. These days, however, the name has a different resonance. Al Yamamah is now inextricably linked in the minds of the British public with the defense contracts of that same name between the U.K. defense contractor BAE Systems PLC (BAE) and the Government of Saudi Arabia. BAE and the Saudi Government signed the contracts for a £43 billion (approximately $65 billion) arms deal in the mid-1980s, forming the U.K.'s largest-ever export deal.[2] Since then, the Al Yamamah contracts have been tainted by highly publicized allegations of bribery and corruption.[3]

On February 5, 2010, after years of controversy, BAE reached settlements with U.K. and U.S. authorities and agreed to pay fines totaling $400 million (approximately £250 million) to settle the long-running corruption allegations.[4] Tellingly, the key player in securing guilty pleas was not, as might have been expected, the United Kingdom's own corruption watchdog, the Serious Fraud Office (SFO),[5] but rather the U.S. Department of Justice (DOJ).[6] The SFO's original investigation was controversially discontinued at the behest of the British Government in 2006 on grounds of national security.[7] A barrage of global criticism ensued and the SFO ultimately prosecuted BAE for unrelated conduct,[8] while U.S.

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1. David Leigh & Rob Evans, *BAE and the Saudis: How Secret Cash Payments Oiled £43bn Arms Deal*, GUARDIAN, Feb. 5, 2010, *available at* http://www.guardian.co.uk/world/2010/feb/05/bae-saudi-yamamah-deal-background.

2. *See id.* (noting this was the U.K.'s "largest-ever arms agreement," generating £43 billion in revenue).

3. *Id.*

4. BAE Press Release, BAE Systems PLC, BAE Systems PLC Announces Global Settlement with United States Department of Justice and United Kingdom Serious Fraud Office (Feb. 5, 2010), *available at* http://www.baesystems.com/Newsroom/NewsReleases/autoGen_1101517013.html; David Leigh, Rob Evans & Mark Tran, *BAE Pays Fines of £285m Over Arms Deal Corruption Claims*, GUARDIAN, Feb. 5, 2010, *available at* http://www.guardian.co.uk/world/2010/feb/05/bae-admits-bribery-saudi-yamamah; XE—UNIVERSAL CURRENCY CONVERTER, http://www.xe.com/ucc/ (allowing for conversion from the British pound to the U.S. dollar).

5. In April 2010, the new U.K. Government announced plans to fold the SFO into two other regulatory agencies, the Financial Services Authority and the Office of Fair Trading, to form a single economic crime enforcement agency. *See* Michael Peel, *Watchdogs Sharpen Teeth on Raft of Cases*, FIN. TIMES, May 31, 2010, *available at* http://www.ft.com/cms/s/0/00c3d35e-6cd5-11df-91c8-00144feab49a.html (discussing increased activity for the SFO and the potential creation of a super-agency). It is currently unclear whether this proposal will ultimately result in a single super-agency. Recent reports indicate that it may not come to fruition. *See* Brian Brady, *Turf Wars Prevent Whitehall Tackling Britain's Fraudsters*, INDEPENDENT, Sept. 10, 2010, *available at* http://www.independent.co.uk/news/uk/politics/turf-wars-prevent-whitehall-tackling-britains-fraudsters-2077178.html ("A senior official admitted last week that the Government had scaled down its ambitions and might have to settle for closer co-operation between existing organisations.").

6. Leigh & Evans, *supra* note 1.

7. Press Release, Serious Fraud Office, *BAE Systems PLC/Saudi Arabia* (Dec. 14, 2006), *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2006/bae-systems-plcsaudi-arabia.aspx.

8. Robert Verkaik & Sarah Arnott, *SFO Demands Prosecution of BAE*, INDEPENDENT, Oct. 1, 2009, *available at* http://www.independent.co.uk/news/business/news/sfo-demands-prosecution-of-bae-1795850.html.

prosecutors targeted Al Yamamah.[9] This controversy served to highlight the deficiencies in the U.K.'s anti-bribery and anti-corruption laws. Today, the United Kingdom is making a concerted effort to fortify those laws to meet international standards and ensure Britain's engagement in the global fight against corruption.

The centerpiece of this effort is the Bribery Act, which the U.K. Parliament passed earlier this year.[10] This article compares the Bribery Act to its U.S. analogue, the Foreign Corrupt Practices Act (FCPA),[11] and examines the Bribery Act's potential effect on global anti-corruption enforcement efforts. Part I provides background on the Act and addresses the parliamentary process through which it passed into law. Part II compares the Act's provisions to the key provisions of the FCPA and discusses the potential impact of the Act on businesses in the United Kingdom and worldwide. Part III describes the self-disclosure framework established by the SFO—the prosecutorial entity primarily charged with the Bribery Act's enforcement—and compares this approach to that taken by DOJ and the U.S. Securities and Exchange Commission (SEC) in enforcing the FCPA. Finally, Part IV considers the potential future of cooperation between U.K. and U.S. anti-corruption enforcement authorities.

## I. PASSING THE BRIBERY ACT AND CHANGING THE UNITED KINGDOM'S APPROACH TO ANTI-BRIBERY ENFORCEMENT

Since 1977, when the FCPA was introduced in the United States in reaction to the Watergate scandal, international pressure for global anti-corruption reform has grown.[12] Although the United Kingdom, as a member of the Organisation for Economic Co-operation and Development (OECD), had joined other nations in signing a series of anti-corruption conventions,[13] the United Kingdom's inadequate anti-bribery laws were the subject of persistent criticism by various OECD Working Groups.[14] Indeed, the old anti-bribery and anti-corruption framework in the United

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9. United States v. BAE Systems PLC, No. 10-035, 2010 WL 2293412, at *41–47 (D.D.C. June 4, 2010).

10. Bribery Act, 2010, c.23 (Eng.).

11. Foreign Corrupt Practices Act of 1977 (FCPA), 15 U.S.C. § 78dd-1 (1998).

12. Linda Chatman Thomsen, Former Director, Division of Enforcement, SEC, Remarks Before the Minority Corporate Counsel 2008 CLE Expo (Mar. 27, 2008), *available at* http://www.sec.gov/news/speech/2008/spch032708lct.htm.

13. Organisation for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Nov. 21, 1997, 37 I.L.M. 1, *available at* http://www.oecd.org/dataoecd/4/18/38028044.pdf [hereinafter OECD Convention]; First Protocol to the Convention on the Protection of the European Communities' Financial Interests, 1996 O.J. (C 313) 2-10, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41996A1023(01):EN:HTML; Second Protocol to the Convention on the Protection of the European Communities' Financial Interests, 1997 O.J. (C 221) 12-22, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41997A0719(02):EN:HTML; Council of Europe, Criminal Law Convention on Corruption, Jan. 27, 1999, E.T.S. No. 173, *available at* http://conventions.coe.int/treaty/en/treaties/html/173.htm; Council of Europe, Additional Protocol to the Criminal Law Convention on Corruption, May 15, 2003, E.T.S. No. 191, *available at* http://conventions.coe.int/treaty/en/treaties/html/191.htm; European Union, Convention on the Fight Against Corruption Involving Officials of the European Communities, May 26, 1997, 37 I.L.M. 12; Council of Europe Civil Law Convention on Corruption, Nov. 4, 1999 E.T.S. No. 174; United Nations Convention Against Corruption, Dec. 11, 2003, 41 I.L.M. 37, *available at* http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.

14. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT: WORKING GROUP ON

Kingdom was outdated and difficult to apply in practice. There was no comprehensive statute proscribing bribery or corruption. Rather, the applicable legal framework was a patchwork of three statutes dating from the late nineteenth century and the early twentieth century, supplemented by the common law offense of bribery.[15] Little had changed in this legal framework during the last ninety years.

In 1998, the United Kingdom ratified the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of November 1997.[16] Although the U.K. Government never conceded that its criminal laws fell short of its obligations under the Convention,[17] it acknowledged that failure to implement legal reform could call into question the United Kingdom's commitment to it.[18] The Anti-Terrorism, Crime and Security Act of 2001 included provisions criminalizing the bribing or corruption of foreign officials by U.K. nationals or companies.[19] By applying only to U.K. nationals, however, this reform ignored the actions of foreign nationals domiciled or habitually resident in the United Kingdom. This omission created the unsatisfactory situation whereby non-U.K. nationals who reside or conduct their business in the United Kingdom remained immune from prosecution for behavior that could send a U.K. national to prison.[20]

Pressure built on the British Government for its perceived lack of progress. In October 2008, the OECD published a report heavily criticizing the United Kingdom's "continued failure" to address its unsatisfactory anti-bribery and anti-corruption laws.[21] By then, however, change was already underway. After the BAE controversy, the SFO initiated a comprehensive review of its anti-corruption practices.[22] The U.K. Government referred the issue to the English Law Commission,[23] which produced a comprehensive report and a draft Bribery Bill.[24] The draft Bill proposed repeal of all existing corruption crimes in favor of four new offenses: bribing, being bribed, bribing a foreign official, and a corporation's

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BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS, UNITED KINGDOM: PHASE 2BIS, REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 4 (2008), *available at* http://www.oecd.org/dataoecd/23/20/41515077.pdf [hereinafter UNITED KINGDOM: PHASE 2BIS].

15. Public Bodies Corrupt Practices Act, 1889, 52 & 53 Vict. (Eng.); Prevention of Corruption Act, 1906, 5 Edw. 7 (Eng.); Prevention of Corruption Act, 1916, 6 Geo. 5 (Eng.) (in each case as amended, in particular by the Anti-Terrorism, Crime and Security Act, 2001 (U.K.)).

16. OECD Convention, Ratification Status as of March 2009, *available at* http://www.oecd.org/dataoecd/59/13/40272933.pdf (listing dates on which signatories ratified the Convention).

17. HL Hansard, 9 December 2009, Col.1086.

18. UNITED KINGDOM: PHASE 2BIS, *supra* note 14, at 7.

19. Anti-Terrorism, Crime and Security Act, 2001, § 109 (U.K.). This Act came into force on February 14, 2002.

20. THE LAW COMMISSION, REFORMING BRIBERY, 2008–09, H.C. 313, para. 2.34, *available at* http://www.lawcom.gov.uk/bribery.htm [hereinafter REFORMING BRIBERY].

21. UNITED KINGDOM: PHASE 2BIS, *supra* note 14, at 4.

22. *See infra* Part III (discussing in depth the background, implications, findings, and consequences of that review).

23. The Law Commission is a statutory, independent body created by the Law Commissions Act of 1965 to continually review English and Welsh law and to recommend reform where needed. LAW COMMISSION, http://www.lawcom.gov.uk/.

24. *See* REFORMING BRIBERY, *supra* note 20 (explaining bribery law recommendations).

negligent failure to prevent bribery.[25] The Government published the draft Bill for the purposes of pre-legislative scrutiny (during which a committee of Parliament considers a draft bill and recommends changes before the bill is introduced for passage).[26] On March 25, 2009, a Joint Committee of both Houses of Parliament heard extensive evidence on the draft Bill.[27] The Joint Committee published its findings on July 28, 2009; although it generally supported the Bill's approach, the Joint Committee made a number of proposals for amendment.[28] On November 19, 2009, the Government introduced the Bill for passage in the House of Lords.[29] The Bill contained some amendments suggested by the Joint Committee, but retained the basic structure of the Bill proposed by the Law Commission.[30] The proposed Bribery Bill completed all legislative stages in the House of Lords on February 8, 2010.[31] The only significant amendment made during this process was the removal of the negligence requirement from the corporate offense of failure to prevent bribery.

Despite the efforts of business lobbyists, which led to a wave of proposed changes and amendments and threatened to derail or weaken the Bill, the Bill continued its seemingly inexorable progress through the parliamentary process.[32] Finally, on April 7, 2010, the Bribery Bill successfully proceeded through the Third (and final) Reading in the House of Commons.[33] Remarkably, it survived its journey through the House of Commons largely intact and without substantial amendments.[34] On April 8, 2010, after the House of Lords' final consideration of the Bill and the granting of Royal Assent, the Bribery Act 2010 became law.[35] Under the current implementation schedule, the Bribery Act goes into force in April 2011.[36] In the meantime, the U.K. Ministry of Justice will satisfy its statutory obligation to issue guidance on corporate compliance with the law.[37]

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25. *See id.* (exemplifying the legislative procedure in question).

26. *Id.*

27. *See* Nick Mathiason, *Bribery Bill Finally Reaches Parliament*, GUARDIAN, Mar. 25, 2009, *available at* http://www.guardian.co.uk/business/2009/mar/25/bribery-bill-reaches-parliament (discussing the presentation of the legislation to Parliament).

28. *See* JOINT COMMITTEE ON THE DRAFT BRIBERY BILL, FIRST REPORT, 2008–09, H.L. 115-I/H.C. 430-I, *available at* http://www.publications.parliament.uk/pa/jt200809/jtselect/jtbribe/115/11502.htm (displaying the report on the findings of the Joint Committee) [hereinafter JOINT COMMITTEE REPORT].

29. *See* Bill Stages—Bribery Bill [HL], 2009–10, BILLS BEFORE PARLIAMENT, http://services.parliament.uk/bills/2009-10/briberyhl/stages.html (displaying list of dates in Bribery Bill legislative process).

30. Bribery Bill, 2009, H.L. Bill [69], *available at* http://www.publications.parliament.uk/pa/cm200910/cmbills/069/10069.i-ii.html (displaying a version of the Bill as introduced to the House of Lords).

31. *See* Bill Stages—Bribery Bill [HL], 2009–10, BILLS BEFORE PARLIAMENT, http://services.parliament.uk/bills/2009-10/briberyhl/stages.html (displaying list of dates in Bribery Bill legislative process).

32. Michael Peel, *Fear over Moves to 'Derail' Bribery Bill*, FIN. TIMES, Mar. 16, 2010, *available at* http://www.ft.com/cms/s/0/c3224186-3064-11df-bc4a-00144feabdc0,s01=1.html.

33. Bill Stages—Bribery Bill [HL] 2009-10, *supra* note 29.

34. *See* Bill Stages—Bribery Bill [HL] 2009–10, *Commons Amendments*, BILLS BEFORE PARLIAMENT, http://www.publications.parliament.uk/pa/ld200910/ldbills/052/10052.1-4.html (showing amendments made in House of Commons).

35. Bill Stages—Bribery Bill [HL] 2009-10, *supra* note 29. Royal Assent is the final procedural step to enact a Bill into law and is typically a mere formality in the United Kingdom. Jeremy Waldron, *Are Constitutional Norms Legal Norms?*, 75 FORDHAM L. REV. 1697, 1702–03 (2006).

36. MINISTRY OF JUSTICE, BRIBERY ACT IMPLEMENTATION (July 20, 2010), *available at* http://www.justice.gov.uk/news/newsrelease200710a.htm.

37. Bribery Act, 2010, § 9.

Against this legislative backdrop, the SFO was gearing up for action. It had already significantly increased the number of officials assigned to overseas corruption matters.[38] And it adopted new strategies to combat international corruption, borrowing many of these tactics from the United States. In 2008, the SFO established a "separate work area" known as the "Anti-Corruption Domain" to investigate and prosecute cases of overseas corruption.[39] Further, it introduced a self-reporting framework to encourage better enforcement of U.K. anti-corruption laws. This framework is considered in detail in Part III of this article.

## II. A STATUTORY COMPARISON OF THE BRIBERY ACT AND THE FCPA

Any attempt to explore the implications of the Bribery Act should begin with its comparison to the FCPA. The FCPA was enacted in 1977, and U.S. authorities have over time developed a massive body of enforcement precedent.[40] Further, many multinational companies already have robust FCPA compliance programs, and lawyers who specialize in international white collar crime are already intimately familiar with the U.S. statute's strictures. Therefore, the impact that the Bribery Act has on multinational corporations will be, at least in part, determined by how it differs from the FCPA.[41] Acknowledging that the Bribery Act's final effect, like any criminal law, will depend heavily on how it is ultimately enforced, Part III of this article addresses aspects of the anti-bribery enforcement regimes on both sides of the Atlantic.

Practitioners and law enforcement officials alike tend to group the FCPA's provisions into two complementary sets: the anti-bribery provisions and the accounting provisions. The anti-bribery provisions establish a statutory prohibition on bribing foreign government officials "to obtain or retain business."[42] The accounting provisions create a regime whereby entities regulated by the SEC, regardless of their domicile, are required to (1) keep and maintain accurate books and records, and (2) establish and maintain a system of internal controls that reasonably assures that corporate assets are used only for authorized corporate purposes.[43] Both sets of provisions have criminal and civil applications—with the criminal elements falling within the exclusive jurisdiction of DOJ and civil regulation lying primarily within the SEC's purview.[44]

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38. *See* SERIOUS FRAUD OFFICE, APPROACH OF THE SERIOUS FRAUD OFFICE TO DEALING WITH OVERSEAS CORRUPTION 1 (2009), *available at* http://www.sfo.gov.uk/media/28313/approach%20of%20the%20sfo%20to%20dealing%20with%20overseas%20corruption.pdf [hereinafter SFO APPROACH] (noting the establishment of the new "work area").

39. *Id.*

40. 15 U.S.C. § 78dd-2 (1998).

41. It will, of course, have an even more significant effect on U.K.-based companies that are not subject to the FCPA. Kobus Beukes, Op-Ed., *Assess Your Exposure to UK's New Bribery Act*, BUS. TIMES (Sing.), July 6, 2010.

42. U.S. DEPARTMENT OF JUSTICE, LAY-PERSON'S GUIDE TO FCPA 2, *available at* http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf [hereinafter LAY-PERSON'S GUIDE].

43. 15 U.S.C. § 78m(b) (1998).

44. *See* R. Christopher Cook & Stephanie L. Connor, The Foreign Corrupt Practices Act: Enforcement Trends in 2010 and Beyond (Jones Day, 2010), *available at* http://www.jonesday.com/newsknowledge/publicationdetail.aspx?publication=f0950ee5-18bb-496f-acfe-662b219a108e&RSS=true

In contrast, the Bribery Act creates four separate anti-bribery offenses: (1) bribing (section 1); (2) being bribed (section 2); (3) bribing a foreign public official (section 6); and (4) failing as a commercial organization to prevent bribery (section 7).[45] The Act does not create any positive obligations regarding corporate accounting,[46] but the United Kingdom's Companies Act 2006 (the Companies Act) already imposes requirements similar to those of the FCPA's books-and-records provision.[47] Importantly, the Bribery Act allows for an "adequate procedures" defense to the fourth offense, "[f]ailure of commercial organisations to prevent bribery."[48] Despite differences in the legal mechanisms employed by the Bribery Act and the FCPA, they may similarly influence corporate behavior. In practice, for a commercial organization to avoid violations of either the accounting provisions of the FCPA or the "failure to prevent" bribery offense of the Bribery Act, it will have to devise and maintain adequate internal anti-corruption compliance policies, procedures, and controls.[49]

The first two offenses enumerated in the Bribery Act—those of bribing and of being bribed—are as concerned with domestic bribery as they are with foreign bribery.[50] The second two—bribing a foreign public official and failing to prevent bribery—will form the basis of most foreign corruption cases pursued by U.K. authorities. Indeed, the offense of bribing a foreign public official is directly analogous to the FCPA's anti-bribery provisions.

The following discussion compares these two approaches to prohibiting the bribing of foreign officials. It then briefly describes the general bribery offenses in the Bribery Act, before turning to the most novel aspect of the new U.K. law: the corporate offense of failing to prevent bribery. It examines this crime alongside the FCPA's accounting provisions and considers a few similar implications of these distinct statutes, including their broad jurisdictional reach. Finally, this part of the article provides a brief description of the penalties associated with both statutory frameworks and then concludes by considering what aspects of the Bribery Act could spur the most significant changes in the compliance programs of multinational corporations that are already subject to the FCPA.

### A. *The FCPA's Anti-Bribery Provisions*

The FCPA's anti-bribery provisions prohibit corruptly paying or promising to pay money or anything of value to a foreign official, foreign political party, foreign political party official, or candidate for foreign political office to influence the foreign

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(reviewing various enforcement actions and procedures of the SEC and DOJ).

45. Bribery Act, 2010, §§ 1–2, 6–7.

46. *Id.* at c. 23 (Eng.).

47. Companies Act, 2006, c. 1, § 380 *et seq.* (U.K.); 15 U.S.C. § 78m(b) (1998).

48. Bribery Act, 2010, § 7.

49. *See* Bribery Act, 2010, §7 ("[I]t is a defence for [a commercial organization] to prove that [the commercial organization] had in place adequate procedures designed to prevent persons associated with [the commercial organization] from undertaking such conduct."); 15 U.S.C. § 78m(b) (1998) (requiring organizations to have internal systems to ensure that transactions and access to assets comply with management authorization).

50. *See* Bribery Act, 2010, §§ 1–2 (the offenses do not distinguish between domestic and foreign acts).

official in the exercise of his or her official duties to assist the payor in obtaining or retaining business.[51]

1. The Provisions' Broad Reach

The FCPA's anti-bribery provisions cast a wide net. They can ensnare corporations and individuals, including any officer, director, employee, or agent of a corporation and any stockholder acting on behalf of a subject entity.[52] Individuals and firms may also be penalized if they order, authorize, or assist in violations of the anti-bribery provisions or if they conspire to violate those provisions.[53]

U.S. jurisdiction over corrupt payments to foreign officials hinges on whether the violator is an "issuer," a "domestic concern," or a foreign national or business carrying out an act "in furtherance" of this type of payment in the United States.[54] An "'issuer' is a corporation that has 'issued securities' that have been registered with the SEC in the United States pursuant to section 12 of the Securities Exchange Act of 1934 or that is "required to file periodic reports with the SEC pursuant to section 15 of the Securities Exchange Act of 1934."[55] For FCPA purposes, "issuer" includes companies that list American Depositary Receipts (ADRs) on a U.S. exchange.[56] ADRs are receipts, issued by U.S. depositary banks, that represent an interest in a foreign security.[57] Because they effectively allow U.S. investors to own and trade in foreign securities without participating in cross-border transactions,[58] ADRs are a common corporate instrument that many non-U.S. companies use as their only U.S.-listed securities. By listing on U.S. exchanges, however, foreign companies subject themselves to FCPA enforcement.

The FCPA defines a "domestic concern" as "any individual who is a citizen, national, or resident of the United States," or any business organization that has its principal place of business in the United States or that is "organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States."[59] Issuers or domestic concerns may be liable under the FCPA both for acts performed in furtherance of a corrupt payment to a foreign official *within* the

51. 15 U.S.C. §§ 78dd-1(a), (g), 78dd-2(a), (i), 78dd-3(a) (1998).

52. *Id.* § 78dd-1(a).

53. *Id.*

54. LAY-PERSON'S GUIDE, *supra* note 42.

55. 15 U.S.C. § 78c(a)(8) (1998); LAY-PERSON'S GUIDE, *supra* note 42.

56. *See, e.g.*, THOMPSON & KNIGHT, *American Depositary Receipts and The Foreign Corrupt Practices Act*, July 14, 2010, http://www.tklaw.com/resources/documents/TKClientAlert-AmericanDepositaryReceiptsAndTheForeignCorruptPracticesAct.pdf (explaining that Technip S.A., a French company, was an "issuer" for purposes of the FCPA because its ADRs are traded on a U.S. stock exchange); *Fiat Pays $17.8 Million in Combined Fines and Penalties to Settle Iraqi Oil-for-Food Matter, Including FCPA Charges*, FCPA ENFORCEMENT, Dec. 29, 2008, http://www.fcpaenforcement.com/documents/document_detail.asp?ID=5542&PAGE=2 (explaining that Fiat became an "issuer" because its ADRs traded on U.S. stock exchanges).

57. *American Depositary Receipts*, Sec. and Exch. Comm'n, American Depositary Receipts, http://www.sec.gov/answers/adrs.htm.

58. Eugene R. Erbstoesser, John H. Sturc & John W.F. Chesley, *The FCPA and Analogous Foreign Anti-Bribery Laws—Overview, Recent Developments, and Acquisition Due Diligence*, 2 CAP. MARKETS L.J. 381, 385 n. 27 (2007).

59. 15 U.S.C. § 78dd-2(h)(1) (1998).

territory of the United States and any such acts performed *outside* the United States.[60]

The FCPA's anti-bribery provisions generally do not apply directly to foreign subsidiaries of issuers or domestic concerns (even those wholly or majority-owned).[61] Before 1998, foreign companies were generally not subject to the FCPA at all, unless they qualified as issuers or domestic concerns.[62] Since the 1998 amendments to the FCPA, however, a foreign company is subject to the FCPA "if it causes, directly or through agents, an act in furtherance of the corrupt payment to take place within the territory of the United States."[63] U.S. regulators have construed relatively minor acts, such as routing a payment through a U.S. bank account or e-mail traffic to the parent company in the United States, as "act[s] in furtherance" sufficient to trigger FCPA jurisdiction.[64] Additionally, as discussed in more detail in Part II.D.2.a below, foreign subsidiaries may be considered agents of an issuer or domestic concern parent, thereby subjecting the subsidiaries to liability.[65] Their overseas actions also may form the basis of liability for the parent issuer if the parent knew of or consciously disregarded a risk of the subsidiary's illicit payments.[66] Further, a foreign subsidiary can cause its U.S. parent to violate the FCPA's accounting provisions due to its activities outside of the United States.[67]

### 2. The Intent of the Payor

To violate the FCPA, the payment—or offer or promise of payment—must be corrupt.[68] If the payment is made for the purpose of inducing an official to misuse his

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60. LAY-PERSON'S GUIDE, *supra* note 42.

61. *Cf.* H. Lowell Brown, *Parent-Subsidiary Liability Under the Foreign Corrupt Practices Act*, 50 BAYLOR LAW. REV. 1, 37–38 (1998) (describing what is required for a parent corporation to be found in violation of the FCPA for the acts of its subsidiary).

62. LAY-PERSON'S GUIDE, *supra* note 42.

63. *Id.*

64. RICHARD M. TOLLAN, DAVID S. KRAKOFF & JAMES T. PARKINSON, IS YOUR BUSINESS AFFECTED BY THE US FCPA? ARE YOU SURE? (Mayer Brown, 2009), *available at* http://www.mayer brown.com/publications/article.asp?id=7391&nid=6.

65. Information at 2, United States v. DPC (Tianjin) Co. Ltd., No. CR 05-482 (C.D. Cal. May 20, 2005) (alleging that defendant DPC Tianjin, "a wholly-owned subsidiary" of the U.S. issuer, Diagnostics Productions Corporation ("DPC"), "*acted as an agent of DPC within the meaning of the Foreign Corrupt Practices Act*, 15 U.S.C. § 78dd-1") (emphasis added); Plea Agreement at 5, United States v. DPC (Tianjin) Co. Ltd., No. CR 05-482 (C.D. Cal. May 20, 2005) (stating that defendant DPC Tianjin agreed and stipulated to the facts alleged in the Information). Although DOJ specifically charged DPC Tianjin as an agent under 15 U.S.C. § 78dd-1, the Information also alleges that the defendant, "in the Central District of California and elsewhere . . . used electronic mail and other means and instrumentalities of interstate commerce corruptly in furtherance of an offer, promise to pay and authorization of the payment of money," Information at 6, United States v. DPC (Tianjin) Co. Ltd., No. CR 05-482 (C.D. Cal. May 20, 2005) (invoking the language of 15 U.S.C. § 78dd-3).

66. *See* Brown, *supra* note 61, at 28–34 (discussing how the original "knows or has reason to know" standard for holding parent companies accountable for their subsidiaries' actions was subsequently changed to a "no willful blindness" standard).

67. *See, e.g.*, Complaint paras. 20, 31, SEC v. Westinghouse Air Brake Techs. Corp., Civ. Action No. 08-706 (E.D. Pa. 2008) (punishing a parent company for its Indian subsidiary's bribes to Indian government officials).

68. 15 U.S.C. §§ 78dd-1(a), 78dd-1(g), 78dd-2(a), 78dd-2(i), 78dd-3(a) (1998); LAY-PERSON'S GUIDE, *supra* note 42.

or her position, the element of corrupt intent is met.[69] As set forth below, U.K. lawmakers deliberately chose not to include the word "corrupt" or any similar description in the Bribery Act's prohibition on bribing foreign government officials.

3. The Violative Act

The FCPA's anti-bribery provisions prohibit not only actual payments, but also any offer, promise, or authorization of the provision of anything of value.[70] Thus, any offer to make a prohibited payment or gift, even if rejected, may breach the FCPA. There need not be any actual payment made or benefit bestowed.

Further, the statute does not limit "anything of value" to the payment of (or promise to pay) cash or cash equivalents.[71] The term reaches all tangible items of economic value. Even further, it can encompass anything that a recipient would find useful or interesting, including gifts, internships,[72] favors,[73] meals, education,[74] medical expenses,[75] and travel assistance.[76]

4. The Recipient of the Bribe

In accordance with its broad reach, the FCPA also defines "foreign official" expansively to include any officer or employee (including low-level employees and officials) of a foreign government or of any department, agency, or instrumentality of a foreign government, which has been interpreted to include government-owned or government-controlled businesses and enterprises.[77] The term "foreign official" also encompasses officers and employees of "public international organizations," such as the United Nations, the International Monetary Fund, and the Red Cross.[78] Other

69. 15 U.S.C. §§ 78dd-1(a), 78dd-1(g), 78dd-2(a), 78dd-2(i), 78dd-3(a) (1998); *see also* H.R. REP. No. 95-640, at 7 (1977) ("The word 'corruptly' is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position; for example, wrongfully to direct business to the payor or his client, to obtain preferential legislation or regulations, or to induce a foreign official to fail to perform an official function.").

70. 15 U.S.C. §§ 78dd-1(a), 78dd-1(g), 78dd-2(a), 78dd-2(i), 78dd-3(a) (1998); LAY-PERSON'S GUIDE, *supra* note 42.

71. Nonetheless, the majority of FCPA prosecutions to date have involved cash or cash equivalents.

72. Deferred Prosecution Agreement at Attachment A § II(B), United States v. DaimlerChrysler China Ltd., No. 10-cr-00066 (D.D.C. Mar. 24, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/daimlerchrysler-china.html.

73. *Id.*

74. Lucent Technologies Inc., Non-Prosecution Agreement, Appendix A, para. 20 (Nov. 14, 2007) *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/lucent-tech.html.

75. Indictment para. 23, United State v. Kozeny (S.D.N.Y. 2008) (No. 05-cr-00518), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/kozenyv.html.

76. Information paras. 12, 16, United States v. ABB Vetco Gray, Inc. (S.D. Tex. June 22, 2004) (No. 04-cr-00279).

77. *See In re* Schnitzer Steel Indus., Inc., Order and Imposing Instituting Cease-and-Desist Proceedings, Exchange Act Release No. 54,606, 89 SEC Docket 302 (Oct. 16, 2006), *available at* http://www.sec.gov/litigation/admin/2006/34-54606.pdf ("foreign official" was scrap metal manager at Chinese companies wholly or partly-owned by the Chinese government).

78. 15 U.S.C. §§ 78dd-1(f)(1), 78dd-2(h)(2),78dd-3(f)(2) (1998); Exec. Order No. 9698, 11 Fed. Reg. 1809 (Feb. 19, 1946); Exec. Order No. 9751, 11 Fed. Reg. 7713 (July 11, 1946); Exec. Order No. 12,643, 53 Fed. Reg. 24,247 (June 23, 1988).

potential bribe recipients covered by the statute include political parties, party officials, and candidates for political office.[79]

5. The Bribe's Purpose

Although the recipient of the corrupt payment (or promise or offer to pay) must be a foreign official, the business need not be with a foreign government to satisfy the business purpose requirement. U.S. prosecutors and the courts interpret "obtaining or retaining business" broadly.[80] Examples could include winning a bid, retaining existing business, reaching an agreement or signing a contract, receiving, renewing or amending a lease or license, reducing taxes or other financial liabilities, and obtaining confidential information.[81] Contributions to political candidates or political party officials that are made corruptly to obtain or retain business are also prohibited.[82]

6. The Role of Third Parties

In addition to direct payments to foreign officials, the FCPA also forbids corrupt payments to any person (e.g., third-party agents) while knowing that all or part of the payment will ultimately be given to a foreign official.[83] The term "knowing" means either being aware of such conduct or substantially certain that such conduct will occur, or consciously disregarding a "high probability" that a corrupt payment or offer will be made.[84] Because the term encompasses conscious disregard and deliberate ignorance,[85] it rules out the so-called "head-in-the-sand" defense. This "knowledge" standard presents significant compliance issues for companies doing business in countries where the use of a local agent, over whom the company has limited control and potentially limited contact, is a practical if not a legal necessity.

7. The Exception and Affirmative Defenses

There are three circumstances in which acts otherwise prohibited by the FCPA's anti-bribery provisions do not constitute an offense punishable by law:

(1) A facilitating or expediting payment made to secure the performance of a routine governmental action by the recipient;[86]

(2) Payments expressly permitted by the written laws of the host country;[87] and

79. 15 U.S.C. §§ 78dd-1(a)(2), 78dd-2(a)(2), 78dd-3(a)(2) (1998).

80. LAY-PERSON'S GUIDE, *supra* note 42; *e.g.*, United States v. Kay, 359 F.3d 738, 755 (5th Cir. 2004) (holding "that Congress intended for the FCPA to apply broadly to payments intended to assist the payor, either directly or indirectly, in obtaining or retaining business for some person").

81. *E.g.*, United States v. Kay, 359 F.3d at 761 (holding that a "diminution in duties or taxes" may assist in "obtaining or retaining business").

82. 15 U.S.C. §§ 78dd-1(a)(2), 78dd-2(a)(2), 78dd-3(a)(2) (1998).

83. 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3), 78dd-3(a)(3) (1998); LAY-PERSON'S GUIDE, *supra* note 42.

84. 15 U.S.C. §§ 78dd-1(f)(2), 78dd-2(h)(3)(B), 78dd-3(f)(3) (1998).

85. LAY-PERSON'S GUIDE, *supra* note 42.

86. 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b) (1998).

(3) "Reasonable and bona fide expenditure[s], such as travel and lodging expenses . . . directly related to (A) the promotion, demonstration, or explanation of products or services; or (B) the execution or performance of a contract with a foreign government or agency thereof."[88]

The first situation constitutes the statutory exception to the FCPA's anti-bribery provisions; the latter two circumstances are affirmative defenses set forth in the statute.

a. The Facilitating Payments Exception

The statutory exception provides that the FCPA's anti-bribery provisions do not apply to "facilitating or expediting" payments made to foreign officials to "expedite or to secure the performance of a routine government action."[89] This exception only covers actions that are "ordinarily and commonly performed by the official."[90] In contrast to bribes, facilitating payments are understood as those paid for "essentially ministerial" actions that "merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action."[91] As Congress observed, although "payments made to assure or to speed the proper performance of a foreign official's duties may be reprehensible in the United States . . . they are not necessarily so viewed elsewhere in the world and . . . it is not feasible for the United States to attempt unilaterally to eradicate all such payments."[92]

The statute lists a number of examples of activities that may qualify as permissible "routine governmental actions" under the right circumstances: obtaining permits or licenses to do business in the country; processing government papers (e.g., visas or work orders); providing police protection, mail services, or scheduling inspections; providing utility services (e.g., phone, power, water); and "actions of a similar nature."[93]

Practitioners, however, debate the usefulness of the facilitating payments exception. The SEC and DOJ have construed the facilitating payments exception narrowly—if the facts suggest that the payments actually involved influencing a discretionary governmental function or obtaining a positive outcome, regulators and courts may not recognize the exception. For example, in a recent prosecution of Westinghouse Air Brake Technologies Corporation, the company entered into a settlement with the SEC and DOJ for various FCPA violations.[94] Some of the payments classified as "improper" were payments "to schedule pre-shipping product inspections" and "to have certificates of product delivery issued."[95] Even though

87. 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1) (1998).

88. 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2) (1998).

89. 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b) (1998).

90. 15 U.S.C. §§ 78dd-1(f)(3), 78dd-2(h)(4), 78dd-3(f)(4) (1998).

91. H.R. REP. NO. 95-640, at 7 (1977).

92. *Id.*

93. 15 U.S.C. §§ 78dd-1(f)(3), 78dd-2(h)(4), 78dd-3(f)(4) (1998).

94. Press Release, DOJ, *Westinghouse Air Brake Technologies Corporation Agrees To Pay $300,000 Penalty To Resolve Foreign Bribery Violations in India* (Feb. 14, 2008), http://www.justice.gov/opa/pr/2008/February/08_crm_116.html.

95. Letter from Steven A. Tyrrell, Chief of DOJ Fraud Section, to Eric A. Dubelier, Attorney for WABAC Inc., Appendix A: Statement of Facts, para. 4 (Feb. 8, 2008) (Westinghouse Air Brake

these payments facially appear to be "facilitating or expediting payments," they were not recognized as such in the settlement agreement.[96] The settlement documents never explain why these payments did not qualify for the statutory exception. A likely explanation is that, in addition to expediting these official actions, the payments could have influenced their outcome.[97] This non-routine, discretionary quality would remove them from the statutory exception's ambit. Yet in practice, as the Westinghouse matter illustrates, distinguishing true facilitating payments from those that influence an official's discretion proves quite difficult.

#### b. The Affirmative Defenses

The two affirmative defenses are also the topic of much discussion. Indeed, they have been the subject of numerous DOJ Opinion Procedure Releases.[98] The affirmative defenses are relatively straightforward:

(1) the payment was "lawful under the written laws and regulations" of the foreign official's country;[99]

(2) the payment was for "reasonable and bona fide expenditure[s], such as travel and lodging expenses," incurred in relation to the promotion or demonstration of the payor's products or services, or the execution or performance of a contract between the payor and the foreign official's employer.[100]

But these affirmative defenses, especially the business promotion defense, can generate great confusion. U.S. companies and issuers that promote their products to government purchasers overseas must rely on what is still a fairly limited body of interpretive guidance when providing business courtesies. As Lucent Technologies learned the hard way, these affirmative defenses have limits, and the U.S. Government will prosecute companies that step over the line and transgress the "reasonable and bona fide" restrictions.[101]

### B. *Bribing Foreign Officials: A Comparison of the FCPA and the Bribery Act's Section 6*

Having set forth the key elements of the FCPA's anti-bribery provisions, the discussion now turns to a comparison of the FCPA's statutory framework with the Bribery Act's prohibition on bribing foreign public officials. The centerpiece of the

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Technologies Corp. Non-Prosecution Agreement).

96. *Id.*; *see also* H.R. REP. NO. 95-640, *supra* note 91 (facilitating or expediting payments to foreign officials are not prohibited foreign trade practices).

97. *See* H.R. Rep. No. 95-640, *supra* note 91, at 8 (1977) (noting that the statute excludes payments to foreign officials to perform non-discretionary actions).

98. *See, e.g.*, DOJ Opinion Procedure Release, No. 07-01 (July 24, 2007); DOJ Opinion Procedure Release, No. 07-02 (Sept. 11, 2007); DOJ Opinion Procedure Release, No. 04-03 (June 14, 2004); DOJ Opinion Procedure Release, No. 04-04 (Sept. 3, 2004) (determining not to take FCPA enforcement action against various entities based on the presence of affirmative defenses).

99. 15 U.S.C. §§ 78dd-1(c)–3(c) (1998).

100. *Id.*

101. *Id.*; DOJ Press Release, Lucent Technologies Inc. Agrees to Pay $1 Million Fine to Resolve FCPA Allegations (Dec. 21, 2007), *available at* http://www.justice.gov/opa/pr/2007/December/07_crm_1028.html (holding Lucent liable for spending "millions of dollars on approximately 315 trips for Chinese government officials that included primarily sightseeing, entertainment and leisure").

Bribery Act, section 6, establishes the offense of bribing a foreign public official[102] and is most analogous to the FCPA. Specifically, section 6(1) provides that "[a] person ('P') who bribes a foreign public official ('F') is guilty of an offence if P's intention is to influence F in F's capacity as a foreign public official."[103] As mentioned in the Explanatory Notes that accompanied the Bribery Bill,[104] this provision mirrors the OECD Anti-Bribery Convention.[105] Like the FCPA, the Bribery Act requires prosecutors to prove each constituent part of section 6 when enforcing the law.[106]

1. Section 6's Jurisdictional Reach

Under pre-existing U.K. law, an individual of any nationality could be convicted of a bribery offense where any of the acts or omissions took place inside the United Kingdom—similar to the FCPA's "act in furtherance" hook. The Bribery Act retains this jurisdiction for individuals and organizations.[107] Under the old law, however, when none of the relevant acts or omissions took place inside the United Kingdom, an individual was subject to liability only if he or she was a U.K. citizen (which includes British Overseas Citizens).[108] The Bribery Act expands this jurisdiction. Importantly, this expanded jurisdiction also applies to sections 1 and 2, discussed in detail below.

The offense of bribing a foreign public official (section 6) is now governed by a "close connection" test.[109] The Act asserts U.K. jurisdiction if the person or entity has a close connection with the United Kingdom, even if the act or omission at issue does not take place in the United Kingdom.[110] A person has a "close connection with the United Kingdom" if he or she is any of the following:

a British citizen or various other categories of British passport holder;

a resident of the U.K.;

an entity "incorporated under the law of any part of the United Kingdom";

or

a "Scottish partnership."[111]

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102. Bribery Act, 2010, at c. 23, §6(1).

103. *Id.* (the actual text of the Act uses the abbreviations "P" and "F").

104. *See* Sir Christopher Jenkins CB QC, First Parliamentary Counsel, *Helping the Reader of Bills and Acts*, NEW L.J. [N.L.J.] (May 28, 1999), *available at* http://www.cabinetofficegov.uk/parliamentarycounsel/bills_and_acts/explanatory_notes_article.aspx (describing what Explanatory Notes entail).

105. Bribery Act, 2010, at Explanatory Notes, para. 34.

106. OECD Convention, *supra* 13, art. I, para. 3.

107. *See* Bribery Act, 2010, § 12(1) ("An offence is committed under section 1, 2 or 6 in England and Wales, Scotland or Northern Ireland if any act or omission which forms part of the offence takes place in that part of the United Kingdom.").

108. Anti-terrorism, Crime and Security Act, 2001, c. 24, § 109 (U.K.).

109. *See* Bribery Act, 2010, §§ 12(4), 12(2)(c) (enumerating the territorial application for offenses under the Bribery Act). This test also applies to the offense of bribing another person (§ 1) and the offense of being bribed (§ 2).

110. *Id.* § 12(2).

111. *Id.* §§ 12(1)–12(4).

Thus, a person can commit an offense under section 6 irrespective of whether the acts or omissions that form part of the offense take place in the United Kingdom.[112] On its face, this "close connection" test is far narrower than the wide jurisdictional hook that U.S. agencies enjoy when enforcing the FCPA's anti-bribery requirements against issuers. In practice, however, section 7's far more liberal jurisdictional requirements for a business's failure to prevent bribery could have a profound impact on multinational corporations. This is discussed in detail in section D below.

2. The Intent of the Payor (the "Fault Element")

The *mens rea* requirement in section 6 of the Bribery Act—referred to in the Bill's Explanatory Notes as the "fault element"—is that the payor must intend to influence the foreign public official in the performance of his or her functions *as a foreign public official*.[113] This fault requirement would include the intent "to influence a foreign public official in the performance of his or her functions as a public official, including any failure to exercise those functions and any use of his or her position, even if he or she does not have authority to use the position in that way."[114]

This intent requirement under section 6 is quite similar to the intent needed to violate the FCPA. But what is immediately noticeable is that section 6 of the Bribery Act lacks the FCPA's requirement that the payor act "corruptly."[115] As discussed above, under the FCPA, the person making, aiding, or authorizing the payment to the foreign official must have a corrupt intent to wrongfully induce the recipient to misuse his or her official position to aid the payor's business.[116] The Joint Committee considered adding the word "corrupt" or a similar descriptor to the section 6 offense, specifically to exclude legitimate commercial conduct—for example, business courtesies—from the ambit of section 6.[117] In fact, the general bribery offenses (sections 1 and 2) do feature such a requirement—the "improper performance" test, discussed below. Without such a limiting principle, section 6 could potentially sweep in legitimate conduct. Instead of qualifying the *mens rea* requirement of section 6 with an adjective like "improper" or "corrupt," the drafters ultimately decided to leave the matter to prosecutorial discretion.[118] According to the Joint Committee, the main reason for omitting a limiting descriptor was that it would raise "questions about whether cultural norms and expectations" can legitimize an otherwise illegal payment.[119] Thus, the fault element of section 6 does not require corrupt or improper intent, although it does require an intent to influence a foreign public official in his or her official capacity for the purpose of obtaining or retaining business. As discussed further below, the U.K. Government has indicated that it is unlikely to prosecute

112. *Id.* § 12(5).
113. *Id.* § 6(1), Explanatory Notes, para. 44.
114. *Id.* at Explanatory Notes, para. 44.
115. 15 U.S.C. § 78dd-1(a) (1998).
116. *Id.* § 78dd-1(a)(1)(A).
117. JOINT COMMITTEE REPORT, *supra* note 28, paras. 146–147.
118. *Id.* para. 147.
119. *Id.* para. 146 (quoting Professor Jeremy Horder, Criminal Commissioner of the Law Commission).

businesses or individuals for bona fide business expenditures, despite the absence of a "corrupt" intent element in the Act.

3. The Actus Reus (the "Conduct Element")

In terms of specific conduct (i.e., the *actus reus*), the offense of bribing a foreign public official covers the offering, promising, or giving of bribes, but not their acceptance. Section 6(3) of the Act provides the following:

> P bribes F if, and only if, (a) directly or through a third party, P offers, promises or gives any financial or other advantage (i) to F, or (ii) to another person at F's request or with F's assent or acquiescence, and (b) F is neither permitted nor required by the written law applicable to F to be influenced in F's capacity as a foreign public official by the offer, promise or gift.[120]

That is, there must be an offer, promise, or provision of some advantage, financial or otherwise, to a foreign official, and the foreign official must request or accept that advantage.[121] Although, unlike the FCPA, section 6 does not address the *authorization* of the provision of the financial or other advantage to F, section 14 of the Bribery Act, discussed in Part II.C.4 below, criminalizes the "consent or connivance" of a "senior officer" of the corporation to the company's violation of section 6, or section 1 or 2.[122]

Interestingly, the Bribery Bill's drafters inserted the "permitted nor required" language after the Joint Committee failed to include a "reasonable belief" defense. The reasonable belief defense would have protected a payor who "mistakenly, but reasonably, believed that a foreign public official was required or permitted to accept an advantage under the official's local law."[123] Such a defense was deemed inconsistent with "the United Kingdom's international obligations and the policy aims of the draft Bill."[124] The U.K. Government's view was that the "real issue" turned on whether the foreign official was "permitted or required to be influenced by the offering," not whether the payor's belief was "reasonable."[125]

But if the "written law applicable" to a foreign official *permits* that official to be influenced in his or her official capacity, then the payor has not committed an offense under section 6. This aspect of section 6's conduct element is clearly analogous to the FCPA's affirmative defense allowing for payments that are expressly permitted by the written laws of the host country.[126] For the purposes of the Bribery Act,

120. Bribery Act, 2010, § 6(3).

121. *Id.*

122. *Id.* § 14.

123. JOINT COMMITTEE REPORT, *supra* note 28, para. 65.

124. *Id.* para. 71.

125. MINISTRY OF JUSTICE, GOVERNMENT RESPONSE TO THE CONCLUSION AND RECOMMENDATIONS OF THE JOINT COMMITTEE REPORT ON THE DRAFT BRIBERY BILL, 2009, Cm. 7748, at 6–7, para. 8 [hereinafter GOVERNMENT RESPONSE].

126. *Compare* 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1) (1998) (providing for the affirmative defense that the payment was lawful under local written laws or regulations), *with* Bribery Act, 2010, at § 6(3) (stating that the payor has not committed an offense if the foreign official is permitted to be influenced under the written law).

"[w]ritten law" is the law of the relevant part of the United Kingdom that would govern the performance of the official's functions.[127] In situations where those functions would not be subject to the law of a part of the United Kingdom, the "written law applicable" would either be the "applicable rules of a public international organisation" to which the official belongs or the laws of the country where the official at issue is considered a "foreign public official."[128] The intention behind the insistence on "written law" in this provision,[129] as explained by the Joint Committee, is threefold: to "remove the potential for loopholes," to "provid[e] greater certainty to prosecutors, jurors and businesses," and to "provide an appropriately narrow gateway restricting the circumstances in which advantages can legitimately be provided to foreign public officials."[130]

4. The Recipient of the Bribe

The Bribery Act and the FCPA cover a very similar universe of prohibited bribe recipients. Section 6(5) of the Act defines "foreign public official" as an individual who:

> (a) holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom (or any subdivision of such a country or territory);
>
> (b) exercises a public function—
>
> (i) for or on behalf of a country or territory outside the United Kingdom (or subdivision of such a country or territory), or
>
> (ii) for any public agency or public enterprise of that country or territory (or subdivision), or
>
> (c) is an official or agent of a public international organisation.[131]

This closely mirrors the FCPA's definition of a "foreign official," which includes "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of [such an entity]."[132] Indeed, both the Bribery Act's and the FCPA's definitions of "foreign official" track the definition provided in the OECD Convention.[133] Various FCPA enforcement actions have stretched the definition of "foreign official" to cover employees of state-owned commercial enterprises.[134] The Bribery Act's drafters may not have troubled

127. Bribery Act, 2010, at Explanatory Notes, para. 39.

128. *Id.*

129. JOINT COMMITTEE REPORT, *supra* note 28, para. 64.

130. *Id.*

131. Bribery Act, 2010, § 6(5).

132. 15 U.S.C. § 78dd-1(f)(1) (1998).

133. *See* OECD Convention, *supra* note 13, art. 1(4)(a) (stating the definition of a foreign public official); *see also* Bribery Act, 2010, at Explanatory Notes, para. 36 (explaining the similarities between the definition in the Bribery Act and OECD Convention).

134. O. Thomas Johnson, Jr., *International Law & Practice: Foreign Corrupt Practices Act*, AM. BAR ASS'N, GEN. PRACTICE, SOLO & SMALL FIRM DIV., http://www.abanet.org/genpractice/magazine/1997/spring-bos/johnson.html (explaining that "foreign official" includes "persons employed by commercial

themselves with whether "foreign public officials," like "foreign officials," should include such employees. After all, the U.K. legislation also criminalizes overseas commercial bribery. But in light of the absence of any "corruptly" or "improperly" requirement in section 6, the answer to this question could have serious implications for the provision of business courtesies to such employees—an issue explored in greater depth below.

Interestingly, the Bribery Act defines "public international organisation" as an organization whose members consist of countries or territories (or governments thereof), other public international organizations, or a mixture of any of the foregoing.[135] This is significantly broader than the definition of "public international organization" in the FCPA, which is defined as (1) "an organization that is designated by Executive Order pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. § 288)" or (2) "any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register."[136] Currently, only eighty-three organizations have such designation by executive order.[137] One would expect far more organizations to fall within the Bribery Act's definition of "public international organisation."

5. The Bribe's Purpose

Section 6 of the Bribery Act requires that the payor's bribe be for the purpose of "obtaining or retaining business, or an advantage in the conduct of business."[138] This is, on its face, broader than the FCPA's requirement that the bribe be to "obtain or retain business."[139] But as the above discussion of the FCPA shows, U.S. courts and federal law enforcement officials alike have interpreted this phrase to include far more than just actually winning business from the government. For this reason, it is likely that these elements will be in accord.

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enterprises owned or controlled by foreign governments and private persons who have responsibilities similar to those of governmental employees"); Mike Johnson, *Disconnected: Another Telecommunications Company Settles an FCPA Enforcement Action*, CORP. COMPLIANCE INSIGHTS, June 30, 2010, http://www.corporatecomplianceinsights.com/2010/veraz-networks-settles-fcpa-enforcement-action/ (enforcement action against Veraz Networks for bribing government-owned Chinese telecommunications companies); U.S. Sec. and Exch. Comm'n, Litigation Release No. 21357, SEC Charges California Telecom Company with Bribery and Other FCPA Violations (2009) (enforcement action against UTStar.com, Inc., for funding trips for officials of government-controlled Chinese telecommunications companies).

135. Bribery Act, 2010, § 6(6).

136. 15 U.S.C. §§ 78dd-1(f)(1)(B), 78dd-2(h)(2)(B), 78dd-3(f)(2)(A) (1998).

137. *See* 22 U.S.C.A. § 288 (1945) (noting Executive Orders designating eighty-one public international organizations entitled to enjoy the privileges, exemptions, and immunities conferred by 22 U.S.C. § 288 *et seq.*); Exec. Order No. 13,259, 67 Fed. Reg. 13,239 (Mar. 19, 2002) (announcing two additional public international organization designations).

138. Bribery Act, 2010, § 6(2).

139. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (1998).

6. The Role of Third Parties

As noted above, the conduct element of section 6(3) of the Bribery Act also prohibits payments to foreign government officials made through a third party.[140] In contrast to the FCPA, the Bribery Act provides no guidance regarding the meaning of "through a third party." It is thus unclear whether the Bribery Act is broader or narrower than the FCPA in this area. As discussed in the previous section, the FCPA's third-party-payment provision's liberal knowledge standard includes those who do not themselves act with the specific intent to bribe a foreign official. The role of third parties under the Bribery Act is addressed in greater detail below during the discussion of section 7's treatment of "associated persons."

7. Exceptions and Affirmative Defenses

On its face, the Bribery Act's prohibition on bribing foreign public officials is stricter than the FCPA's in that it does not contain the same array of defenses. As noted above, the FCPA has one exception and two affirmative defenses:

- facilitating or expediting payments;
- payments expressly permitted by the written laws of the host country; and
- certain bona fide promotional expenses or expenses pursuant to the performance of a contract.[141]

The Bribery Act takes a different approach to these issues.

a. Facilitating Payments

The Bribery Act contains no exception or defense for facilitating payments. Like past U.K. law, it prohibits such payments.[142] The only facilitating payments likely to be acceptable under section 6 are those expressly allowed under a local written law.[143] The Joint Committee describes facilitating payments as "the practice of paying a small sum of money to a public official (or other person) as a way of ensuring that they [sic] perform their duty, either more promptly or at all."[144] Prima facie, therefore, the Bribery Act criminalizes the sorts of common payments currently permitted under the FCPA—payments for obtaining permits or licenses, processing government papers, or scheduling inspections. This potentially leaves U.K. companies and individuals at a commercial disadvantage vis-à-vis similarly situated companies in the United States and could significantly impact corporate compliance programs, as discussed below.

As a matter of practice, however, U.K. authorities do not plan to base many prosecutions on such payments. The Joint Committee stated that there is a "general understanding" that prosecution will be unlikely for an offense involving "such small amounts of money."[145] In other words, U.K. authorities may at their discretion

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140. Bribery Act, 2010, § 6(3)(a).

141. 15 U.S.C. §§ 78dd-1(b)–(c), 78dd-2(b)–(c), 78dd-3(b)–(c) (1998).

142. JOINT COMMITTEE REPORT, *supra* note 28, para. 130.

143. *Id.* para. 131.

144. *Id.* para. 130.

145. *Id.*

decline to prosecute certain facilitating payments that are technically illegal under the Bribery Act.[146] Unsurprisingly, the SFO endorses this reliance on prosecutorial discretion.[147] But this is cold comfort to companies subject to the Bribery Act. Indeed, although the SFO staff has indicated that they are unlikely to prosecute isolated, low-value facilitating payments, they expect companies to adopt a "zero tolerance" policy toward such expenditures.[148]

b. Payments Expressly Permitted by Written Law

As discussed above in Part II.B.3, section 6 explicitly provides that no violation occurs if the written law governing the official's conduct requires or permits him or her to be influenced by the offer, promise, or gift.[149]

c. Promotional Expenses

Unlike the FCPA, the Bribery Act provides no affirmative defense for reasonable and bona fide promotional or explanatory expenses, like travel or lodging for a foreign official, or other benefits for a foreign official related to "the execution or performance of a contract with a foreign government or agency thereof."[150] Accordingly, most business courtesy expenditures provided to foreign public officials constitute a prima facie offense under the Act. Evidence presented to the Joint Committee revealed that this is a matter of concern for many corporations for which corporate hospitality is an ordinary part of doing business.[151] That the definition of "foreign public official" will not necessarily extend to employees of state-owned commercial enterprises could prove extremely helpful in this area. Those recipients may fall under the general bribery offenses (section 1 and section 2), which predicate what is and what is not permissible on whether the payment is "improper."[152] As SFO Director Richard Alderman put it, "most routine and inexpensive hospitality would be unlikely to lead to a reasonable expectation of improper conduct."[153] But it

146. *See* GOVERNMENT RESPONSE, *supra* note 125, para. 18 (citing CPS POLICY DIRECTORATE, CODE FOR CROWN PROSECUTORS, Feb. 2010, *available at* http://www.cps.gov.uk/Publications/docs/code2010english.pdf, as the SFO's guide for applying prosecutorial discretion to facilitation payments).

147. *See* Memorandum submitted by the Serious Fraud Office (June 2009), *available at* http://www.publications.parliament.uk/pa/jt200809/jtselect/jtbribe/memo/430/ucm1402.htm ("Facilitation payments will be unlawful .... [but] small facilitation payments are unlikely to concern the SFO unless they are part of a larger pattern (when, by definition, they would no longer be facilitation payments).").

148. GIBSON, DUNN & CRUTCHER LLP, *UK Serious Fraud Office Discusses Details of UK Bribery Act with Gibson Dunn*, Sept. 7, 2010, *available at* http://gibsondunn.com/publications/Pages/UKSeriousFraudOfficeDiscussion-RecentlyEnactedUKBriberyAct.aspx [hereinafter GIBSON, DUNN & CRUTCHER LLP, *UK Serious Fraud*] ("The Staff stated that the SFO does not approve of any company that does not adopt a 'zero-tolerance' policy regarding facilitation payments. They stated that the SFO will view a company's policies, if they allow for facilitation payments, as not constituting 'adequate procedures' even if the company allows such payments because it is predominantly a US-based company.").

149. *Supra* Part II.B.3 and accompanying discussion.

150. 15 U.S.C. §§ 78dd-1(c)(2)–3(c)(2) (1998).

151. JOINT COMMITTEE REPORT, *supra* note 28, paras. 139–147.

152. Bribery Act, 2010, §§ 1, 2.

153. JOINT COMMITTEE REPORT, *supra* note 28, para. 139 (quoting SFO Director Richard Alderman).

remains unclear what relevance this reassurance has for potential section 6 offenses, as the offense of bribing a foreign public official features no "improper" test.[154]

Lord Tunnicliffe, a Government minister involved in drafting the legislation, has commented that the absence of an exception for corporate hospitality is deliberate. In a letter to Lord Henley, he stated:

> We recognise that corporate hospitality is an accepted part of modern business practice and the Government is not seeking to penalise expenditure on corporate hospitality for legitimate commercial purposes. But lavish corporate hospitality can also be used as a bribe to secure advantages and the offences in the Bill must therefore be capable of penalising those who use it for such purposes.[155]

Just as with facilitating payments, it will fall to prosecutors to exercise their discretion to determine whether any particular hospitality is illegitimate and thus deserving of criminal charges.

Thankfully for multinational corporations, the U.K. Ministry of Justice has indicated publicly and in conversation with the authors that it is not inclined to prosecute bona fide promotional expenditures provided to foreign public officials.[156] On September 14, 2010, it issued draft guidance on "adequate procedures" by corporations to comply with the Act—an issue discussed in further detail below in Part II.D.1.[157] It specifically stated that "[w]here the prosecution is able to establish a financial or other advantage has been offered, promised or given but there is no sufficient connection between the advantage and the intention to influence and secure business or a business advantage then section 6 is unlikely to be engaged."[158] Whether there is such a connection will be a highly fact-specific analysis, but the draft noted that "it is unlikely . . . that a routine and incidental business courtesy where the advantage involved is of small value, or where hospitality is standard, will have any impact on decision making in the context of a business opportunity of high value and therefore engage section 6."[159] Thus, this aspect of the Bribery Act may function similarly to the FCPA. However, without more explicit assurances, companies may wish to tighten their compliance programs in this area, especially if the employees of state-owned commercial enterprises are considered "foreign public officials."

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154. Bribery Act, 2010, § 6.

155. Letter from Lord Tunnicliffe, Minister in the Government Whips Office, Government Spokesperson for the Ministry of Justice, to Lord Henley (Jan. 14, 2010), *available at* http://www.justice.gov.uk/publications/docs/letter-lord-henley-corporate-hospitality.pdf.

156. GIBSON, DUNN & CRUTCHER LLP, *UK Serious Fraud*, *supra* note 148; *see also*, MINISTRY OF JUSTICE, CONSULTATION ON GUIDANCE ABOUT COMMERCIAL ORGANISATIONS PREVENTING BRIBERY (SECTION 9 OF THE BRIBERY ACT 2010) 22 (2010), *available at* http://www.justice.gov.uk/consultations/docs/bribery-act-guidance-consultation1.pdf [hereinafter MINISTRY OF JUSTICE] (providing guidance to organizations about the boundaries of what is likely to be prosecuted).

157. MINISTRY OF JUSTICE, *supra* note 156, at 11.

158. *Id.* at 22.

159. *Id.*

### C. *Sections 1 and 2 of the Bribery Act: The General Bribery Offenses*

Unlike the FCPA, a significant portion of the Bribery Act deals with domestic and commercial bribery.[160] The offenses under sections 1 and 2, those of bribing and being bribed, extend the reach of the U.K. law into the private sector.[161] Further, they apply to those acting abroad, even if the act has no jurisdictional nexus with the United Kingdom, so long as the payor (for purposes of section 1) or the recipient (for purposes of section 2) has a "close connection" with the United Kingdom, as described above in Part II.B.1.[162] Again, the FCPA lacks any equivalent.

#### 1. The Elements of the General Bribery Offenses

It is useful to consider the two general bribery offenses—the offense of bribing another person and the offense of being bribed—together, as they are linked by a common interpretative framework under the Act.

Under section 1, a person (P) is guilty of an offense where he or she offers, promises, or provides a financial advantage to another person in one of two circumstances that reward or give rise to the improper performance of a relevant function:

- In Case 1, P intends the financial advantage "to induce a person to perform improperly a relevant function or activity" or provides it "to reward a person for the improper performance of such a function or activity."[163]
- In Case 2, "P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity."[164]

In the first case, "it does not matter whether the person to whom the advantage is offered, promised or given is the same person as the person who is to perform, or has performed, the function or activity concerned."[165] In either case, the advantage can be offered, promised, or given by the payor himself or herself, or through an intermediary.[166]

Section 2 defines the offense of bribery as it applies to the recipient or potential recipient of the bribe (R).[167] The recipient is guilty of an offense in one of four scenarios (identified as Cases 3–6 in the Act):

- In Case 3, "R requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly (whether by R or another person)."[168]

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160. Bribery Act, 2010, §§ 1–5, 7–9.

161. *Id.* § 3(2) (defining function or activity to which offenses under section 1 and section 2 relate as "any activity connected with a business, . . . performed in the course of a person's employment, . . . [or] performed by or on behalf of a body of persons (whether corporate or unincorporate[d]).").

162. *Id.* § 12(2)–(4); *supra* Part II.B.1.

163. Bribery Act, 2010, § 1(2).

164. *Id.* § 1(3).

165. *Id.* § 1(4).

166. *Id.* § 1(5).

167. *Id.* § 2.

- In Case 4, "R requests, agrees to receive or accepts a financial or other advantage," and "the request, agreement or acceptance itself constitutes the improper performance by R of a relevant function or activity."[169]
- In Case 5, "R requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance (whether by R or another person) of a relevant function or activity."[170]
- In Case 6, R or "another person at R's request or with R's assent or acquiescence" performs a relevant activity or function improperly "in anticipation of or in consequence of R requesting, agreeing to receive or accepting a financial or other advantage."[171]

Thus, in all cases, there is a requirement that the ostensible recipient "requests, agrees to receive or accepts" an advantage, regardless of whether the recipient *actually* receives anything.[172] This requirement must then be linked to the "improper performance" of a relevant function or activity, discussed further below.[173] In Cases 3, 5, and 6, it does not matter whether the improper performance is by the recipient or by another person. In Case 4, the recipient's act of requesting, agreeing to receive, or accepting a financial advantage itself amounts to improper performance.

Subsection 6 of section 2 governs all of these provisions (cases 3–6) and specifies that "it does not matter whether" the recipient directly requests, receives, or agrees to accept the financial advantage or does so through an intermediary.[174] Further, subsection 6 makes clear that the advantage need not even be for the benefit of the recipient.[175]

One of the most notable aspects of the Bribery Act's criminalization of passive corruption is that the Act does not specify that the recipient must have a corrupt intent. The Bribery Act states, "In cases 4 to 6 it does not matter whether R knows or believes that the performance of the function or activity is improper," and it thereby clarifies that the absence of language signifying that R intends for the activity or function to be performed improperly in cases 4, 5, and 6, is not an oversight."[176] Likewise, as to case 6, where another person performs the function or activity, it is immaterial whether that person "kn[ew] or believe[d] that the performance of the function [was] improper."[177] These provisions mark a significant and deliberate departure from the ordinary requirement of subjective fault under the pre-existing U.K. criminal law. The express intention of the Joint Committee was to "chang[e] the culture in which taking a bribe is viewed as acceptable."[178] Stating the policy decision in stern terms, the Joint Committee's report explains that these provisions will "encourage anyone who is expected to act in good faith, impartially or under a

168. *Id.* § 2(2).
169. Bribery Act, 2010, § 2(3).
170. *Id.* § 2(4).
171. *Id.* § 2(5).
172. *Id.* §§ 1, 2(4).
173. *Id.* § 2(4); *infra* Part II.C.3 (discussing improper performance test).
174. *Id.* § 2(6)(a).
175. Bribery Act, 2010, § 2(6)(b).
176. *Id.* § 2(7).
177. *Id.* § 2(8).
178. JOINT COMMITTEE REPORT, *supra* note 28, para. 46.

position of trust, to think twice before accepting an advantage for their [sic] personal gain."[179]

2. Relevant Function or Activity

Section 3 of the Act defines the fields within which bribery can take place, in other words, the "relevant function or activity" that can be improperly performed for the purposes of sections 1 and 2:

> (a) any function of a public nature,[180]
>
> (b) any activity connected with a business,
>
> (c) any activity performed in the course of a person's employment, [or]
>
> (d) any activity performed by or on behalf of a body of persons (whether corporate or unincorporate).[181]

This clause expressly extends the law of bribery so that it equally covers "public and selected private functions, without discriminating between the two."[182] According to the Bill's Explanatory Notes, the "functions or activities in question include all functions of a public nature and all activities connected with a business, trade, or profession."[183] The last two categories of relevant function or activity—any activity performed in the course of a person's employment and any activity performed by or on behalf of a body of persons (whether corporate or unincorporated)—are intended to capture both public and private activities. In the words of the drafters, these categories "straddle the public/private divide."[184]

Yet despite these definitions of "relevant functions," not all acts or omissions in these categories violate the Bribery Act.[185] There must be an expectation that the person performing the function is

> performing it in good faith (Condition A);[186]
>
> performing it impartially (Condition B);[187] or
>
> "in a position of trust by virtue of performing it" (Condition C).[188]

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179. *Id.*

180. "Functions of a public nature" is the same phrase that is used in the definition of "public authority" in section 6(3)(b) of the Human Rights Act of 1998, but this phrase in the Bribery Act is not subject to the same limitations as in the Human Rights Act. Human Rights Act, 1998, c. 42, §§ 6(3)(b), 6(5) (U.K.). Section 6(5) of the Human Rights Act limits the definition of a public authority in relation to a particular act. A person will not be a public authority solely by virtue of being a "person certain of whose functions are functions of a public nature," if the essential nature of the act is private. *Id.* § 6(5).

181. Bribery Act, 2010, § 3(2)(a)–(d).

182. *Id.* at Explanatory Notes, para. 28.

183. *Id.*

184. *Id.*

185. *Id.* para. 29.

186. *Id.* § 3(3).

187. Bribery Act, 2010, § 3(4).

188. *Id.* § 3(5).

According to the Joint Committee, this "reliance on a reasonable person's expectation of 'good faith', 'impartiality', and 'trust' represents a careful balance between simplicity, certainty and effectiveness" and also "takes into account the approach adopted in other countries and international anti-bribery conventions."[189]

Subsection 6 of section 3 provides that the functions or activities may nonetheless be "relevant" regardless of whether they were carried out in the United Kingdom or abroad. That is, there need not be a geographic connection between the underlying function or activity and the United Kingdom.[190]

### 3. The Improper Performance Test

Section 4 of the Bribery Act sets forth the "improper performance" test—specifying what type of deviation from a relevant function gives rise to a general bribery offense.[191] As noted above, this provision serves a similar function to the FCPA's "corruptly" requirement, limiting enforcement of sections 1 and 2 to those instances where some duty of the bribe recipient was violated.[192] The absence of such a requirement in section 6's prohibition on the bribing of foreign public officials is one of the most significant features of the Bribery Act.

"Improper performance" is defined as a performance or non-performance *that breaches a "relevant expectation."*[193] The Act defines "relevant expectation[s]" as expectations that a function will be performed in good faith or impartially (as per Condition A or B, above).[194] Further, a relevant expectation that a function will be performed in a certain way may arise by virtue of the functionary being in a position of trust (as per Condition C, above).[195] Importantly, under the Act an omission can also amount to improper performance.[196] Finally, if a recipient no longer engages in a given function or activity, but he or she still carries out acts related to his or her former function or activity, those acts also may be considered part of the "improper performance."[197]

To avoid confusion over whether a particular function or activity includes a "relevant expectation," the drafters of the Bribery Act expressly incorporated a reasonableness standard into the law for the purposes of sections 3 and 4.[198] This appears in section 5 of the Act. This provision defines a reasonable expectation as "what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned."[199] But if the performance of a function or activity is not governed by U.K. law, the Act requires that "any local custom or practice [must] be disregarded" when considering "reasonable

189. JOINT COMMITTEE REPORT, *supra* note 28, para. 35.

190. Bribery Act, 2010, § 3(6)(a)–(b). This preserves the effect of § 108(1) and (2) of the Anti-terrorism, Crime and Security Act 2001 (which would be repealed by the Bill). *Id.* § 17(3) sch. 2: Repeals and Revocations.

191. Bribery Act, 2010, § 4.

192. 15 U.S.C. § 78 dd-2(a) (1998).

193. Bribery Act, 2010, § 4(1)(a)–(b) (emphasis added).

194. *Id.* §§ 4(2)(a), 3(3)–(4).

195. *Id.* §§ 4(2)(b), 3(5).

196. *Id.* § 4(1)(b).

197. *Id.* § 4(3).

198. *Id.* § 5(1).

199. Bribery Act, 2010, § 5(1).

expectation," with the exception that local customs should be considered only if "permitted or required by the written law applicable to the country or territory concerned."[200] If there were any uncertainty about the Bribery Act's lack of an FCPA-type "facilitating payments" exception for commercial bribery, this deliberate rejection of any cultural relativism clarifies the situation. The existence in local custom of different "relevant expectations" about the impartiality or good faith inherent in a particular function or activity *does not* curtail the Bribery Act's sweep. On the contrary, the law forestalls the development of any such loophole.

4. Other Provisions Relevant to Corporate Liability for the Bribery Offenses

The offenses under sections 1, 2, and 6 of the Bribery Act can be committed by any legal person.[201] For the prosecution of an individual, the Act focuses attention on the *mens rea* and *actus reus* of the person accused. Where a corporate entity is prosecuted under section 1, 2, or 6—section 7 creates a second, corporation-specific regime, described below in Part II.D.1—it is unclear whose acts and mental state will constitute the relevant acts and mental state for the offense. Under normal principles of English criminal law applicable to serious offenses with a fault element, and absent statutory language to the contrary, the existence of a crime would turn on the acts and mental states of those individuals "directing the mind and will of the company"[202]—normally its directors and senior management. Although this matter may ultimately require resolution by the courts, the Bribery Act on its face appears to incorporate this legal presumption.

The Act establishes in section 7, discussed below, a specific corporate offense that would cover bribery by a person remote from the management of the company (for example, an employee or agent).[203] Under section 7, such bribery will lead to criminal liability for the corporation itself.[204] The presence of this specific provision for corporate liability may suggest a legislative intent to forgo direct criminal corporate liability under sections 1, 2, and 6 for acts performed by a company's junior staff or agents.

Further, subsections 14(1) and 14(2) of the Bribery Act specifically provide for the liability of certain individuals under sections 1, 2, and 6 when the offense is committed by a commercial entity.[205] If an offense under section 1, 2, or 6 is committed by a "body corporate"[206] and the offense is proved to have been committed "with the consent or connivance" of "a senior officer of the body corporate," or "a person purporting to act in such capacity," that individual may be liable for the offense in addition to the commercial entity.[207] "Senior officer" means a "director, manager, secretary, or other similar officer" of the organization.[208] This

200. *Id.* § 5(1)-(2).

201. *See id.* § 11 (distinguishing between "individual[s]" and "other person[s]" when prescribing penalties for violators of sections 1, 2, and 6).

202. Tesco Supermarkets Ltd. v. Nattrass [1971] UKHL 1, [1972] A.C. 153 [4] (on appeal from Eng.).

203. Bribery Act, 2010, §§ 7(1), 8(3).

204. *Id.* § 7(1).

205. *Id.* § 14(1)-(2).

206. *Id.* § 14(1). This also applies to a Scottish partnership. *Id.*

207. *Id.* § 14(2).

208. *Id.* § 14(4)(a). In relation to a Scottish partnership, it means a partner in the partnership. *Id.* §

provision does not apply, however, unless the senior officer or person has a close connection with the United Kingdom within the meaning of section 12, as discussed above in Part II.B.1.[209]

### D. *The Bribery Act's Section 7 and the FCPA's Accounting Provisions*

It is section 7 of the Bribery Act that makes the new U.K. law so striking in its extraterritoriality and scope of potential criminal liability for multinational corporations. Under section 7, the Bribery Act in many ways exceeds the aggressive jurisdictional claims of even the FCPA. Section 7 makes it a criminal offense for a commercial organization to fail to prevent bribery.[210] But it also provides the corporation with a statutory defense if it shows on the balance of probabilities that it has instituted effective internal controls to prevent persons associated with it from committing bribery.[211] Although the FCPA lacks any directly analogous provisions, the FCPA's accounting provisions have similar implications—both in terms of extending the FCPA's reach and in impacting the internal controls of multinational corporations.[212]

#### 1. Section 7's Prohibition on Failing to Prevent Bribery

Unlike section 6 of the Bribery Act, which has a relatively constrained jurisdictional reach compared to its U.S. analogue, section 7 has extraordinary territorial breadth—apparently outreaching even the long arm of the FCPA. Section 7 applies to any entity that is a "relevant commercial organisation."[213] The following qualify as a "relevant commercial organisation" under the Act:

> (a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere),
>
> (b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom,
>
> (c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or
>
> (d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom.[214]

The inclusion of the second and fourth groups as "relevant commercial organisations" seemingly sweeps into the Bribery Act's ambit virtually all major multinational corporations—the vast majority of which conduct some business in the United Kingdom. Just as the U.S. legislators who drafted the FCPA determined that all companies that avail themselves of the United States' public capital markets need

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14(4)(b).

209. Bribery Act, 2010, § 14(3).

210. *Id.* § 7.

211. *Id.*

212. 15 U.S.C. § 78m(b)(6) (1998).

213. Bribery Act, 2010, § 7(5) (a)–(d).

214. *Id.*

to play by its rules when operating elsewhere, it appears that U.K. legislators made a similar determination with regard to all companies that avail themselves of the United Kingdom's economy. Of course, as has been oft-repeated throughout this article, the practical implications of these provisions on multinational companies will depend primarily on how the SFO chooses to exercise its enforcement authority. Although the SFO has suggested that it intends to assert broad jurisdiction under the Bribery Act,[215] the Ministry of Justice's draft guidance is silent on the jurisdictional implications of section 7, leaving open the question of what precisely it means to "carr[y] on business" in the United Kingdom.[216] Indeed, the illustrative examples contained in annex B of the guidance address only U.K.-based organizations.[217] For the time being then, it appears that the U.K. Government is content to remain mum on how it views the scope of its jurisdiction under the Act.[218]

For the corporation or partnership to violate section 7, a person "associated" with the organization must violate section 1 or 6 (regardless of prosecution for the underlying act) or otherwise be guilty of violating section 1 or 6 but for a failure to have a "close connection" with the United Kingdom.[219] In other words, the "associated person" needs to commit the underlying violative act. Associated persons include any person or entity that "performs services for or on behalf of" the organization.[220] This would include, for example, employees, agents, and subsidiaries.[221] Indeed, employees are presumed to be associated persons absent a showing to the contrary.[222] The Bribery Act further clarifies that "[t]he capacity in which [the associated person] performs services for or on behalf of [the company] does not matter,"[223] and it warns that the existence of an associated person "is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between" the company and the associated person.[224]

The Bribery Act's admonishments seem to echo the FCPA's third-party-payment provision,[225] which eschews the formalistic master-agent relationship in favor of a broader understanding of the interaction between two legal persons. Thus, it is possible that the SFO may determine that an "associated person" could be a distributor or even an arm's-length purchaser that resells a product.

Perhaps even more unclear is whether associated persons include individuals or entities associated with a relevant commercial organization's subsidiaries or affiliates.

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215. *See* GIBSON, DUNN & CRUTCHER LLP, *UK Serious Fraud*, *supra* note 148 (stating that the SFO intends to assert broad jurisdiction).

216. MINISTRY OF JUSTICE, *supra* note 156, at 20–21.

217. *See id.* at 24–31 (positing only U.K.-based corporations in the "Illustrative Scenarios").

218. *Id.*; *see also* GIBSON, DUNN & CRUTCHER LLP, *UK Serious Fraud*, *supra* note 148. ("The [SFO] Staff declined to opine on specific, hypothetical fact patterns designed to test elements of the Act's jurisdictional reach. [T]hey made clear that the test for jurisdiction is simply whether the company in question carries out business in the UK.").

219. MINISTRY OF JUSTICE, *supra* note 156, at 20; Bribery Act, 2010, § 12(1)–(4).

220. Bribery Act, 2010, § 8(1).

221. *Id.* § 8(3).

222. *Id.* § 8(5).

223. *Id.* § 8(2).

224. *Id.* § 8(4).

225. 15 U.S.C. §§ 78dd-1(a)(3), 2(a)(3), 3(a)(3) (1998).

In short, is a non-U.K. subsidiary, by virtue of being owned by a "relevant commercial organisation" (e.g., one that does business in the United Kingdom), subject to—or does it subject its parent to—section 7 for the activities of persons associated with the non-U.K. subsidiary? If other entities in which a company holds an ownership interest are not only associated persons, but also qualify themselves as part of the "relevant commercial organisation," section 7's requirements could effectively extend to even the remotest corners of a global organization.

Of course, when such an associated person performs a violative act, a commercial organization can still overcome the presumption that it has failed to prevent bribery.[226] In defending itself against a charge under section 7, a commercial organization can assert that it maintained "adequate procedures" to prevent associated persons from committing bribery.[227] Although not explicit on the face of the Bribery Act, the burden of proof that the defendant will need to meet is the "balance of probabilities," in accordance with established case law.[228] This standard is analogous to the U.S. civil standard of the preponderance of the evidence—which means that a fact is "more likely than not."[229]

The Bribery Act does not define what procedures are "adequate." Rather, the law provides that the U.K. "Secretary of State must publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing."[230] The Secretary of State may also periodically update this guidance.[231] In developing such guidance, the U.K. Government is liaising with a number of experts from various organizations, including Transparency International,[232] the Institute of Business Ethics,[233] and the Anti-Corruption Forum,[234] as to the substantive contours of the guidance.[235] Ultimately, it is likely that whatever procedures satisfy the FCPA's strict internal controls requirement will also satisfy whatever guidance the Secretary of State issues.

As noted above, on September 14, 2010, the U.K. Ministry of Justice released a draft of its first guidance on "adequate procedures" under the Act, as part of an eight-week consultation period. The draft guidance sets forth six general principles to inform organizations' internal control environments:

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226. *See* Bribery Act, 2010, § 7(2) (offering a possible defense to the offense).

227. *Id.* § 7(2).

228. *Id.* at Explanatory Notes, para. 50.

229. Likewise, the balance of probabilities was simply described by Lord Denning as "more probable than not." Miller v. Minister of Pensions, [1947] 2 All ER 372 (K.B.).

230. Bribery Act, 2010, § 9(1).

231. *Id.* § 9(2).

232. *See* TRANSPARENCY INTERNATIONAL UK, http://www.transparency.org.uk. Transparency International is a U.K.-based anti-corruption NGO.

233. The Institute of Business Ethics is a U.K. organization formed to encourage high standards of corporate behavior and the sharing of best practice. *See* INSTITUTE OF BUSINESS ETHICS, http://www.ibe.org.uk.

234. The Anti-Corruption Forum is "an alliance of U.K. business associations, professional institutions, civil society organizations and companies with interests in the domestic and international infrastructure, construction and engineering sectors." *See* UK ANTI-CORRUPTION FORUM, http://www.anticorruptionforum.org.uk/acf/pages/acf.php.

235. Letter from Lord Bach, Parliamentary Under Sec'y of State, to Lord Henley, House of Lords, 1–2 (Dec. 2009), *available at* http://www.justice.gov.uk/publications/docs/bach-letter-adequate-procedures-guidance.pdf.

1. Businesses should regularly assess the bribery risks that they face globally.[236]
2. Senior management should establish a culture within the organization that is intolerant of bribery, and they should ensure that the company's policy to operate without bribery is effectively communicated throughout the organization.[237]
3. Commercial organizations should employ due diligence procedures and policies covering all parties to a business relationship, including the organization's supply chain, intermediaries and agents, "all forms of joint venture and similar relationships" and "all markets in which the commercial organisation does business." [238]
4. Organizations should maintain "clear, practical, accessible and enforceable" policies and procedures that prohibit bribery and effectively reflect the functional diversity of the entity's work force, including "all people and entities over which the commercial organisation has control." [239]
5. Companies should embed their compliance policies and procedures within the business to ensure its efficaciousness. [240]
6. Commercial organizations should institute mechanisms to review and monitor their compliance with relevant anti-bribery procedures and policies.[241]

The Ministry of Justice will accept comments on the draft until November 8, 2010, and issue final guidance in early 2011.[242]

Clearly, some of these proposed requirements dovetail with the FCPA's "internal controls" provisions, although internal controls under the FCPA are a positive obligation rather than a defense. The practical—if not the legal—effect of these provisions may indeed be quite similar. Once the final guidance is published, corporations will need to assess their obligations carefully under both pieces of legislation.

2. Implications of the Accounting Provisions and the Bribery Act's "Adequate Procedures" Defense

Although the FCPA's accounting provisions differ significantly from the Bribery Act's various requirements, the Bribery Act's section 7 and its "adequate procedures" affirmative defense have similar implications for the internal controls of multinational corporations. Namely, both laws effectively require multinational corporations (issuers under the FCPA or "relevant commercial organisations" under the Bribery Act) to devise and maintain adequate anti-bribery internal controls.[243]

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236. MINISTRY OF JUSTICE, *supra* note 156, at 12.

237. *Id.* at 13.

238. *Id.* at 14.

239. *Id.* at 15.

240. *Id.* at 16.

241. *Id.* at 17.

242. MINISTRY OF JUSTICE, *supra* note 156, at 5.

243. *Compare* 15 U.S.C. § 78m(b)(2) (1998) (requiring issuers to "devise and maintain a system of internal accounting controls" that functions to compare "recorded accountability for assets" with "the

Further, both the FCPA's accounting provisions and section 7 extend the anti-bribery mandate well beyond the laws' anti-bribery provisions' coverage of proscribed bribes.[244] As just described, section 7 does this by significantly loosening the jurisdictional nexus for sections 1 and 6. The FCPA's accounting provisions do this by addressing the behavior of issuer's subsidiaries that do not list their securities on U.S. exchanges.[245] Finally, it is important to bear in mind that the United Kingdom already requires its companies to maintain accurate books and records under the Companies Act.[246]

3. The FCPA's Accounting Provisions

As noted above, the FCPA has two accounting provisions: the "books-and-records" provision and the "internal controls" provision. The "books-and-records" provision requires that issuers "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets . . . ."[247] The FCPA defines "reasonable detail" as "such level of detail . . . as would satisfy prudent officials in the conduct of their own affairs."[248] This provision, which makes it much more difficult for a company to disguise improper payments, also applies to the recording of legitimate transactions.[249] One interesting challenge that this provision poses for multinational companies is how to record and describe payments to foreign officials that are permissible as facilitating payments under the FCPA, but illegal in the host country.

The "internal controls" provision requires that issuers "devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that":

> (i) transactions are executed in accordance with management's general or specific authorization;
>
> (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting

existing assets at reasonable intervals and ensure that "appropriate action is taken with respect to any differences"), *with* Bribery Act, 2010, § 7(2) (providing that it is a defense to prosecution under section 7 of the Bribery Act if a commercial organization had procedures in place to prevent persons associated with that organization from engaging in conduct constituting bribery).

244. *Compare* 15 U.S.C. § 78m(b)(2) (1998) (obligating issuers to implement internal accounting controls to require that transactions are completed and assets are accessed only with proper authorization, records are kept "in accordance with generally accepted accounting principles," and existing assets are compared regularly with recorded assets to address any differences in expected and actual assets), *with* Bribery Act, 2010, § 7(2) (suggesting that commercial organizations need to implement adequate procedures to prevent bribery by persons associated with them to be fully protected from prosecution under section 7).

245. *See* 15 U.S.C. § 78m(b)(6) (1998) (requiring issuers to "in good faith . . . use [their] influence" to cause foreign subsidiaries to "maintain a system of internal accounting controls consistent with [15 U.S.C. § 78m(b)(2) (1998)]).

246. Companies Act, 2006, c. 46, § 386 (U.K.).

247. 15 U.S.C. § 78m(b)(2)(A) (1998).

248. 15 U.S.C. § 78m(b)(7) (1998).

249. *See* 15 U.S.C. §§ 78m(b)(7), 78(b)(2)(A) ("the terms 'reasonable assurances' and 'reasonable detail' mean such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs").

principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;

(iii) access to assets is permitted only in accordance with management's general or specific authorization; and

(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences . . . .[250]

The FCPA defines "reasonable assurances" to mean the "degree of assurance as would satisfy prudent officials in the conduct of their own affairs."[251] The SEC has clarified that such reasonableness "is not an 'absolute standard of exactitude for corporate records'" and that "while 'reasonableness' is an objective standard, there is a range of judgments that an issuer might make as to what is 'reasonable . . . .'"[252]

The accounting provisions extend the reach of the FCPA to cover entities that are not subject to the anti-bribery provisions (foreign non-issuer subsidiaries of issuers) and to address conduct that is not even otherwise substantively violative of the anti-bribery provisions. The latter point is evident from the text of the statute.[253] Nowhere does it discuss any underlying malfeasance. In noted contrast, the Bribery Act's section 7 requires the existence of underlying misbehavior, even if the United Kingdom lacks jurisdiction to prosecute it.[254]

The jurisdictional reach of the FCPA's accounting provisions is a little less obvious. Although the accounting provisions do not themselves apply directly to non-issuer subsidiaries, the failure of a subsidiary to comply with their requirements can result in the parent's violation of the FCPA.[255] The parent company may be criminally liable for violations of the accounting provisions at the corporate or subsidiary level if it "knowingly" fails to comply with them.[256] Also, it may be held civilly liable for any failures to comply with either accounting provision, regardless of its knowledge.[257]

With regard to the internal controls provision, the FCPA imposes strict civil liability on issuers for violations by entities in which the issuer holds an interest that affords it greater than fifty percent of the voting power.[258] Even when the issuer has

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250. 15 U.S.C. § 78m(b)(2)(B) (1998).

251. 15 U.S.C. § 78m(b)(7) (1998).

252. Commission Guidance Regarding Management's Report on Internal Control Over Financial Reporting Under § 13(a) or 15(d) of the Securities Exchange Act of 1934, 72 Fed. Reg. 35324-01, 35324 (June 27, 2007) (citations and quotation marks omitted).

253. *See, e.g.*, 15 U.S.C. § 78m(b)(2)(B)(ii) (1998) (requiring the recording of transactions to permit preparation of financial statements).

254. *See* Bribery Act, 2010, § 7(1) (requiring that an individual intend to "obtain or retain business . . . or . . . advantage in the conduct of business").

255. 15 U.S.C. § 78m(b)(6) (1998) (listing the requirements for an issuer to comply with 15 U.S.C. § 78m(b)(2) (1998) with respect to its subsidiaries). *See also In re* Chiquita Brands Int'l, Inc., Exchange Act Release No. 44,902, 75 SEC Docket 2308 (Oct. 3, 2001) (bringing an enforcement action against Chiquita Brands International for its wholly owned subsidiary's failure to adhere to the requirements of the accounting provisions).

256. 15 U.S.C. § 78m(b)(5) (1998).

257. 15 U.S.C. § 78m(b)(2), (6) (1998).

258. *Id.*

fifty percent or less of the voting power in the subsidiary, it may still be held liable if it fails to "proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with [the internal controls provision]."[259] The SEC appears to view operational control as the touchstone for liability in minority ownership situations.[260]

Similarly, for the books-and-records provision, the issuer parent may face strict civil liability for the subsidiary's failure to comply when it incorporates the subsidiary's books-and-records into its own.[261] Additionally, Exchange Act Rule 13b2-1 appears to impose strict liability for any violation of the books-and-records provision, by removing the modifier "knowingly."[262] But courts and the SEC have interpreted the rule to incorporate a reasonableness standard.[263]

Finally, a foreign subsidiary of an issuer can face FCPA liability for causing its parent to violate the accounting provisions. Just like the parent, the subsidiary is liable for knowingly causing an issuer's violation of the accounting provisions.[264] Such a prosecution for knowing conduct could be brought under 15 U.S.C. § 78m(b)(5) or an aiding and abetting theory.[265] And like the parent company, the subsidiary could also be subject to liability under Exchange Act Rule 13b2-1, which applies to *all* persons and entities, not just issuers, that cause the falsification of an issuer's books or records.[266]

Clearly, the expansiveness of these provisions—both jurisdictionally and substantively—is patently distinct from section 7 of the Bribery Act. Section 7 and the FCPA's internal controls provision could, however, have similar implications for multinational corporations. They both effectively require entities that are issuers

259. *Id.*

260. *See, e.g.*, *In re* BellSouth Corp., Exchange Act Release No. 45279, 2002 WL 47167, §§ 3, 4 (Feb. 13, 2007) (subjecting BellSouth Corporation to civil FCPA liability for the actions of a subsidiary in which it owned only a forty-nine percent stake, because its degree of "operational control" afforded it "the ability to cause [the subsidiary] to comply with the FCPA's books and records and internal controls provisions").

261. *See, e.g.*, Complaint para. 16, SEC v. ITT Corp., No. 09-cv-00272 (D.D.C. Feb. 11, 2009) (alleging a violation of the books-and-records provision for "consolidat[ing] and includ[ing] in ITT's financial statements" the financial statements of a wholly owned Chinese subsidiary that made approximately $200,000 in illicit payments, which it "improperly recorded . . . as commission payments"); *In re* Dow Chem. Co., Exchange Act Release No. 55,281, 2007 WL 460872, para. 10 (Feb. 13, 2007) (imposing liability on Dow Chemical for improper payments made by a 75.7 percent-owned, fifth-tier subsidiary, "without knowledge or approval of any Dow employee," inaccurately recorded by the subsidiary and then consolidated into Dow's books and records); *In re* Monsanto Co., Exchange Act Release No. 50,978, 2005 WL 38787, para. G § 4 (Jan. 6, 2005) (imposing liability for Monsanto's consolidation of inaccurate financial records from two of its affiliates into its own books).

262. 17 C.F.R. § 240.13b2-1 (1979).

263. *See* SEC v. Softpoint, Inc., 958 F. Supp. 846, 866 (S.D.N.Y. 1997) ("[L]iability [under 13b2-1] is predicated on 'standards of reasonableness.'") (quoting Promotion of Reliability of Financial Information, Exchange Act Release No. 34-15570 (Feb. 15, 1979)).

264. *See* 15 U.S.C. § 78m(b)(5) (1998) ("No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account described in paragraph (2).").

265. *See, e.g.*, Complaint paras. 47–52, SEC v. Halliburton Co., No. 09-cv-399 (S.D. Tex. Feb. 11, 2009) (charging subsidiary KBR, Inc., with aiding and abetting for "knowingly or recklessly substantially assist[ing]" its parent Halliburton Co. with violations of the accounting provisions, and charging the subsidiary itself under 15 U.S.C. § 78m(b)(5) (1998) for violating the accounting provisions).

266. 17 C.F.R. § 240.13b2-1 (1979).

(under the FCPA) or "relevant commercial organisations" (under the Bribery Act) to devise and maintain adequate internal controls. What this ultimately means for issuers is largely spelled out in the various U.S. enforcement actions. As discussed above in Part II.D.1, the U.K. Secretary of State has initiated the process of providing guidance regarding the contours of section 7's requirements.[267] Based on the draft guidance, it appears that the SFO's expectations regarding the animating principles of a corporation's internal control framework will likely mirror those of U.S. enforcement authorities.[268] Nevertheless, certain issues will remain murky until the Bribery Act takes force and U.K. enforcement actions shed light on the Act's interstices. As noted above, section 7's jurisdictional parameters—specifically their application to non-U.K. subsidiaries—are still a mystery. For example, the draft guidance offers no insight as to whether the U.K. authorities will attempt to extend liability (if any) under the Act to the actions of minority-owned overseas subsidiaries—an issue with which the FCPA deals statutorily. In such areas, section 7 could impose greater liability, although in most others it will be narrower than the internal controls provision, which of course touches many controls that do not directly involve anti-bribery compliance.

4. The U.K. Companies Act 2006

In contrast to the internal controls provision, the FCPA's other accounting provision, the books-and-records provision, lacks even a remote analogue in the Bribery Act. But the Companies Act[269] already imposes a similar duty on all U.K.-incorporated companies to keep adequate accounting records. Under the Companies Act, adequate accounting records are records sufficient:

> to show and explain the company's transactions, to disclose with reasonable accuracy, at any time, the financial position of the company at that time, and to enable the directors to ensure that any accounts required to be prepared under UK law comply with the requirements of the Companies Act (and, where applicable, Article 4 of the International Accounting Standards Regulation).[270]

Failure to do so constitutes an offense punishable by a fine and/or imprisonment.[271]

*E. Penalties*

The FCPA and the Bribery Act provide for largely similar penalties. Nonetheless, the real force of any such statute depends significantly on the

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267. *See* MINISTRY OF JUSTICE, *supra* note 156, at Annex B (demonstrating how the application of six anti-bribery principles might relate to a number of problem scenarios commercial organizations may encounter).

268. GIBSON, DUNN & CRUTCHER LLP, *Bribery Act 'Adequate Procedure' Draft Guidance Published*, Oct. 22, 2010, *available at* http://www.gibsondunn.com/Publications/Pages/UKBriberyAct AdequateProcedureDraftGuidance.aspx.

269. *See generally* Companies Act, 2006 (Eng.).

270. *Id.* § 386(1)–(2).

271. *Id.* § 387(3).

enforcement regime that applies it; an issue discussed in detail in Part III of this article.[272] Although the SFO may have less discretion than DOJ in determining the penalties for self-reporting violators,[273] surely it too will have a tremendous amount of power in shaping the penalties associated with the United Kingdom's new anti-bribery regime.

The FCPA provides for both criminal and civil penalties. For individuals who violate the statute's anti-bribery provisions, criminal penalties include up to five years imprisonment and a $250,000 fine or a fine totaling twice the pecuniary gain or loss resulting from the bribe.[274] Corporations and other business entities face fines of up to $2 million or twice the pecuniary gain or loss resulting from the bribe.[275] Remarkably, these penalties pale in comparison to those applied to violations of the accounting provisions. Specifically, the FCPA provides that criminal violations of the accounting provisions allow individuals to be fined up to $5 million and imprisoned for up to five years.[276] Likewise, corporations and other business entities may be fined as much as $25 million for such violations.[277] Finally, both individuals and organizations may face fines and injunctions for civil violations of the FCPA.[278]

The Bribery Act similarly allows for significant penalties against organizations and individuals, although the Bribery Act may ultimately grant regulators even broader discretion. Section 11 of the Bribery Act specifies all the penalties for violations involving the crimes of bribing, being bribed, and bribing foreign government officials, as well as the corporate crime of failure to prevent bribery (sections 1, 2, 6, and 7, respectively).[279] Unlike the FCPA, all possible penalties for Bribery Act violations are considered "criminal" in the United Kingdom.[280] The Bribery Act provides for no civil enforcement. But it does create two tracks of punishment—one for summary convictions and one for indictment convictions.[281] Summary offenses are typically less severe and may be tried in lower courts such as the Magistrate's Court (essentially the equivalent of a "misdemeanor"), while indictable offenses are more egregious and are tried in the Crown's Court.[282]

Violations of section 1, 2, or 6 on summary conviction carry a maximum fine of $5,000 or imprisonment of up to twelve months (but only six months in Northern

272. *See infra* Part III (discussing the enforcement regimes of the FCPA and the Bribery Act).

273. *See* R v. Innospec Ltd., [2010] Southwark Crown Court, para. 26, *available at* www.millerchevalier.com/portalresource/InnospecSentencingJudgment ("It is clear, therefore that the SFO cannot enter into agreement under the laws of England and Wales with an offender as to the penalty in respect of the offence charged . . . .").

274. 15 U.S.C. § 78dd-2(g)(2) (1998); 18 U.S.C. § 3571(b)(3) (1998); 18 U.S.C. § 3571(d) (1998) ("If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.").

275. 15 U.S.C. § 78dd-2(g)(1) (1998); 18 U.S.C. § 3571(b)(3), (d) (1998).

276. 15 U.S.C. § 78dd-2(g)(1) (1998); 18 U.S.C. § 3571(b)(3), (d) (1998); 15 U.S.C. § 78ff(a) (1998).

277. 15 U.S.C. § 78dd-2(g)(1) (1998); 18 U.S.C. § 3571(b)(3), (d) (1998); 15 U.S.C. § 78ff(a) (1998).

278. 15 U.S.C. §§ 78u(d), 78dd-2(g), 78dd-3(e) (1998).

279. Bribery Act, 2010, § 11.

280. *See U.S. FCPA vs. U.K. Bribery Act*, Jun. 25, 2010, *available at* http://www.transparency-usa.org/documents/FCPAvsBriberyAct.pdf (chart comparing the UK Bribery Act with the US FCPA).

281. Bribery Act, 2010, § 11(1)–(2).

282. BLACK'S LAW DICTIONARY 1187–88 (9th ed. 2009).

Ireland).[283] For conviction on indictment for violations of these same provisions, the Act provides for unlimited fines—as it specifies no maximum—and a maximum of ten years imprisonment.[284] Interestingly, when setting the financial penalties associated with violations of section 1, 2, and 6, the Bribery Act does not differentiate between juridical persons, such as corporations, and real persons.[285] Finally, the corporate offense of failing to prevent bribery (section 7) also has a presumably unlimited level of fines associated with it, as the Bribery Act sets no limit. Section 11 simply states that a person "guilty of an offence under section 7 is liable on conviction on indictment to a fine."[286]

The lack of any cap on fines could theoretically grant to the SFO more flexibility than DOJ and the SEC in meting out punishment for violations of the Bribery Act. But, as the *Innospec* decision (discussed below in Part III.D.3) amply demonstrates, U.K. judges will ultimately decide what punishments corporations and individuals suffer. [287] In contrast, U.S. regulators have tremendous flexibility in determining the ultimate financial penalties suffered by corporate offenders, as the massive fines that can accompany each violation of the accounting provisions—as well as the required disgorgement of profits—would set the theoretical cap on monies paid to the U.S. Government at a point far greater than most corporations could afford. Thus, far more important than the technicalities of either statute is the surrounding enforcement environment. Only time will tell how the SFO will enforce the Bribery Act and how that enforcement will compare to the existing FCPA enforcement regime.

### *F. How the Bribery Act May Affect Corporate Compliance Programs*

To conclude this exploration of the differences and similarities between the FCPA and the Bribery Act, it is perhaps useful to consider which among these qualities may prove the most significant. The differences, in particular, will determine how multinational corporations already subject to the FCPA will have to adjust their corporate compliance programs to avoid running afoul of the new Bribery Act.

The key similarities are the laws' common focus on the bribery of foreign public officials, their similarly broad jurisdictional claims, and how each requires organizations to police themselves by having effective internal controls. The way in which both laws criminalize overseas bribery is actually quite similar. They both address benefits to officials that are not merely financial and criminalize offers and promises, as well as actual consummated bribes. Further, they both feature a business nexus requirement, linking the provision of the benefit to the payor's possible commercial gain.

Both laws also have remarkably aggressive jurisdictional claims, although they attain their expansive extraterritorial reach differently. The FCPA's applicability to

283. Bribery Act, 2010, § 11(1)(a)–11(4).

284. *Id.* § 11(1)(b), (2)(b).

285. *Id.* § 11(2).

286. *Id.* § 11(3).

287. R v. Innospec Ltd., [2010] Southwark Crown Court, para. 26, *available at* www.millerchevalier.com/portalresource/InnospecSentencingJudgment.

all issuers' conduct, regardless of that conduct's jurisdictional nexus, immediately extends the statute's reach around the globe. What is more, the FCPA's accounting provisions implicate the activities of foreign, non-registered subsidiaries of issuers, bringing the entire commercial organization within the statute's ambit. At its outer jurisdictional limits, the Bribery Act's section 7 criminalizes the failure of any commercial organization that conducts business in the United Kingdom to prevent commercial or public-sector bribery. As the United Kingdom has the sixth largest economy in the world, this will naturally include an extraordinary number of multinational corporations.[288] Finally, both the FCPA and the Bribery Act require such organizations to develop an effective internal control environment. In the case of the FCPA, the requirement is explicit—the internal controls provision provides that issuers must devise and maintain effective internal controls, a directive that extends well beyond controls that merely prevent bribery.[289] Organizations subject to section 7 of the Bribery Act, on the other hand, do not necessarily have to maintain an effective system of internal controls—but because of the strict liability they will face for underlying violations of sections 1 and 6 by "associated persons," they have little choice but to do so. The Bribery Act makes "adequate procedures" an affirmative defense to this crime and commits the U.K. Government to provide guidance as to the meaning of the term.[290] The effect of this aspect of the Bribery Act will therefore be similar, although unlike the FCPA, the internal controls requirement is limited to anti-bribery compliance.

For multinational corporations already subject to the FCPA and its internal controls requirements, much of this is already ingrained practice. Most of these entities already employ organization-wide anti-bribery training requirements, utilize numerous mechanisms addressing control over funds and requiring a segregation of duties for any payments that could go to government officials, and charge their internal audit functions with testing the FCPA compliance program periodically.[291] They need to focus on the Bribery Act's novel elements. The remainder of this Part addresses those distinctions between the FCPA and the Bribery Act that are most likely to cause problems for multinational corporations that already maintain FCPA compliance programs. Notably, the Bribery Act may alter the terrain for three hot-button areas of corporate FCPA compliance: business courtesies (gifts, meals, entertainment, and travel) provided to government officials, the risks posed by third-party agents and consultants, and facilitating payments. Additionally, the Bribery Act requires corporations to consider more seriously the possibility of commercial bribery harming the organization.

#### 1. Business Courtesies

The provision of business courtesies—gifts, entertainment, meals, and travel—to foreign officials has become a major focus of corporate FCPA compliance

288. The World's Largest Economies, ECONOMYWATCH.COM, http://www.economywatch.com/economies-in-top/ (listing top ten economies by gross domestic product).

289. 15 U.S.C. § 78m(b) (1998).

290. Bribery Act, 2010, § 9.

291. *See, e.g.*, F. Joseph Warin, Michael S. Diamant & Jill M. Pfenning, *FCPA Compliance in China and the Gifts and Hospitality Challenge*, 5 VA. L. & BUS. REV. 33, 78 (2010) (discussing the benefits of employee training).

programs.[292] It is particularly a concern in countries, such as China and Vietnam, where many commercial enterprises are state-owned or -operated.[293] Because business courtesies are things of value under the FCPA, their provision to foreign officials directly implicates the law.[294] Indeed, many companies, including Avery Dennison Corp., Daimler AG, Lucent Technologies, Paradigm, Schnitzer Steel, Siemens AG, and UTStarcom, have been prosecuted for crossing the line in providing business courtesies to foreign officials.[295] But certain aspects of the statute do permit their provision in a number of circumstances.

First, it is important to recall that the FCPA only criminalizes things of value provided to foreign officials "corruptly." DOJ's official guidance provides that "[t]he person making or authorizing the payment must have a corrupt intent, and the payment must be intended to induce the recipient to misuse his [or her] official position to direct business wrongfully to the payer or to any other person."[296] Unless the provider of the thing of value explicitly states his or her intent, the circumstances and nature of the business courtesy will inform whether the authorities would see the act as corrupt.[297] All things being equal, the lower the value of the business courtesy, the less likely such corrupt intent can be inferred. That is, a low-value item is unlikely to induce a foreign official to misuse his or her official position. Although there is no safe harbor threshold or de minimis standard for such low-value gifts, they pose a less serious compliance risk.

Second, as discussed above, the FCPA *does* provide an explicit affirmative defense for the provision of things of value that are "directly related to the promotion, demonstration, or explanation of products or services."[298] Thus, gifts with logos of the commercial enterprise and trips to tour company facilities will generally be acceptable. But, of course, all such expenditures must be "reasonable and bona fide." For example, if an organization wishes to invoke the affirmative defense, the plant inspection cannot be a pretext for a vacation and the pen stamped with the organization's logo cannot cost $1,000.[299]

Acknowledging the limitations of this affirmative defense, as well as the risk of overreliance on a "no corrupt intent" justification, the FCPA clearly carves out a significant amount of space around business courtesies provided to foreign officials.[300] A properly tailored corporate compliance program should permit multinationals to engage in routine business promotion and networking, as part of an ethical business model, without running afoul of the FCPA. Such programs generally include restrictions on the value of certain business courtesies, escalation procedures depending on the value and circumstances of the provision of the thing of value, required documentation and reconciliation of expenditures, and compliance training.

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292. *Id.* at 58.
293. *Id.* at 45.
294. *Id.* at 61.
295. *Id.* at 48–55.
296. LAY-PERSON'S GUIDE, *supra* note 42.
297. 15 U.S.C. § 78u(a)(1) (1998).
298. *Id.*
299. 15 U.S.C. § 78dd-1(c) (1998).
300. 15 U.S.C. § 78u(a)(1) (1998).

This may not be the case under the strict letter of the new Bribery Act. As discussed above, the Bribery Act's prohibition on bribing foreign officials contains no "corrupt intent" or "improper purpose" requirement, unlike the FCPA and section 1 of the Bribery Act, respectively. Nor does the Act feature an affirmative defense for reasonable and bona fide demonstration, promotion, or explanation. All things of value provided to "foreign government officials" to influence them constitute prima facie violations of section 6. Thankfully for multinational corporations adjusting their anti-bribery compliance programs in the wake of the Bribery Act's passage, the Ministry of Justice's draft guidance approves "reasonable and proportionate hospitality or promotional expenditure which seeks to improve the image of a commercial organisation, better to present products and services, or establish cordial relations."[301] The guidance clarifies that "section 6 is unlikely to be engaged" in situations where "there is no sufficient connection between the advantage [i.e., the hospitality] and the intention to influence and secure business or a business advantage."[302] In sum, although the letter of the Bribery Act appears to ban outright the provision of business courtesies to foreign government officials, the U.K. Government has published preliminary guidance suggesting that reasonable, bona fide business courtesies will be permissible. That said, it remains to be seen whether prominent multinational corporations will want to maintain policies or procedures that sanction even technical violations of criminal law.

2. Third-Party Risks

As discussed above, the FCPA's third-party-payment provision makes organizations liable for those who act on its behalf.[303] This includes employees and agents, who traditionally impute liability on their masters, as well as other third parties, such as distributors, who normally do not. Indeed, U.S. authorities have prosecuted a number of corporations for the activities of their distributors.[304] Liability under the third-party-payment provision turns on the mental state of the organization when it provides the thing of value to the third party.[305] It must "know" what the third party will do, but the mere awareness of a high probability of corrupt activity satisfies the knowledge requirement,[306] and courts have applied a willful blindness standard when assessing liability.[307]

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301. MINISTRY OF JUSTICE, *supra* note 156, at 22.

302. *Id.* In addition to the statutorily mandated "adequate procedures" guidance that will issue in early 2011, the SFO and the Director of Public Prosecutions are in the midst of developing "joint legal guidance for prosecutors." Dominic Grieve, U.K. Att'y Gen., Address Before the World Bribery & Corruption Compliance Forum (Sept. 14, 2010), available at http://www.attorneygeneral.gov.uk/NewsCentre/Speeches/Pages/Attorney%20General%20World%20Bribery%20and%20Corruption%20Compliance%20forum.aspx. The U.K. Attorney General has explained that this guidance will provide prosecutors with a "clear, comprehensive and consistent guide to the law and relevant public interest considerations." *Id.* This guidance may also shed light on some of the questions raised by the evident differences between the FCPA and the Bribery Act.

303. 15 U.S.C. § 78dd-2(a)(3) (1998).

304. *See, e.g.*, Warin, Diamant & Pfenning, *supra* note 291, at 48, 52 (listing InVision Technologies and AGA Medical, both which made payments through distributors, among historical FCPA prosecutions involving China).

305. 15 U.S.C. § 78dd-2(a)(3) (1998).

306. *Id.* § 78(h)(3)(B).

307. *See, e.g.*, F. Joseph Warin, Michael S. Diamant & Matthew P. Hampton, *Use of "Conscious Avoidance" Doctrine in Frederic Bourke Conviction Expands Corporate Executives' FCPA Exposure,*

Unsurprisingly, multinational corporations have developed sophisticated internal controls to mitigate this risk. Due diligence is possibly the most important third-party risk mitigation. An effective third-party due diligence regime helps reduce risk in two ways. First, and most importantly, it will help identify risky counterparties and allow the organization to forgo the relationship or institute-appropriate compensating controls to minimize the chance of improper conduct.[308] Second, it will help reduce the risk that the organization will form and maintain relationships with third parties, while having the required culpable mental state.[309] That is, appropriate due diligence, linked to the organization's contracting controls, significantly reduces the possibility that prosecutors will be able to allege that the organization "conscious[ly] disregard[ed]" or remained "deliberate[ly] ignoran[t]" of the possibility of a corrupt payment, even if the third party *does* make such a payment.[310] Other key internal controls may include prohibitions on cash payments, a centralized procurement and contracting function, third-party anti-bribery training, contractor anti-bribery compliance certifications, and anti-corruption and audit-rights provisions in the contracts. The use and extent of all controls, including due diligence, should reasonably reflect the risks that attend the particular business relationship.

Eschewing the nuanced treatment of knowledge under the FCPA, the Bribery Act's section 7 makes organizations strictly liable for the actions of their "associated person[s]."[311] As noted, "associated person" includes agents and other third parties acting for or on behalf of the company.[312] Of course, the Bribery Act also contains an affirmative defense to section 7 violations—the existence of "adequate procedures" to prevent the underlying violative conduct.[313]

The Ministry of Justice's draft guidance on "adequate procedures" to prevent bribery by "associated persons" contemplates many of the same controls as those that many multinationals have instituted to mitigate third-party risk under the FCPA. The guidance suggests that businesses should implement "due diligence policies and procedures which cover all parties to a business relationship," including suppliers, agents, intermediaries, and joint venture partners.[314] One illustrative example attached to the draft guidance suggests that businesses may wish to "take steps to establish the background, status and qualifications of [an] agent" and review the agent's "connections to any politicians or other public officials."[315] The U.K. Government's guidance, however, does not conclusively establish what types of

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SECURITIES DOCKET, July 22, 2009, http://www.securitiesdocket.com/2009/07/22/guest-column-use-of-conscious-avoidance-doctrine-in-frederic-bourke-conviction-expands-corporate-executives-fcpa-exposure/ (commenting on an FCPA case where the jury was instructed that they did not need to find subjective knowledge of unlawful conduct).

308. Warin, Diamant & Pfenning, *supra* note 291, at 70–72.

309. *See* LAY-PERSON'S GUIDE, *supra* note 42 (informing U.S. companies of the need to exercise due diligence—along with providing examples of appropriate due diligence—to avoid being held liable for corrupt third-party-payments).

310. *Id.*

311. Bribery Act, 2010, § 7(1).

312. *Id.* § 8(1).

313. *Id.* § 7(2).

314. MINISTRY OF JUSTICE, *supra* note 156, at 14.

315. *Id.* at 25.

third-party due diligence policies and procedures will meet the Bribery Act's adequacy threshold.

It is possible that the scope of such "adequate procedures" will be broader than those required by the FCPA. There is one simple reason for this: FCPA liability turns on knowledge, while section 7 liability hinges on the *actual prevention* of such corrupt payments. Therefore, the determination of an "adequate procedure" in this area could very well be much more stringent than a control that merely ensures that the organization does not have the knowledge required for culpability under the third-party-payment provision.

3. Facilitating Payments

The area of facilitating payments is a particularly thorny one for FCPA compliance. As discussed above, many practitioners increasingly fear that U.S. regulators have simply read the exception out of the statute. As a result, more and more organizations are starting to prohibit such payments outright.[316] The Bribery Act will likely accelerate this trend. Like the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,[317] the Bribery Act features no exception for expediting or facilitating payments. The Ministry of Justice's recent draft guidance emphasizes that such payments violate sections 1 and 6 of the Bribery Act.[318]

Appropriately addressing the Bribery Act's prohibition on facilitating payments will actually be an exercise in simplification for most corporate compliance policies. Recall that the distinction between an impermissible bribe and an acceptable facilitating payment under the FCPA is highly nuanced and often turns on the discretionary authority of the payment recipient. Anti-corruption compliance policies therefore commonly struggle with how to guide employees in this area. Now, they can simply state that all bribes are forbidden. Unfortunately, small "grease" payments are a way of life in many countries.[319] Thus, strictly prohibiting them may actually complicate the compliance function's task.

SFO officials have indicated that prosecution is unlikely if the payments are small, one-off payments, so long as the company identifies the expenditure through its internal procedures and clarifies the company's proscription of such payments to those involved.[320] In addition to prohibiting facilitating payments in their corporate policies, organizations subject to the Bribery Act should maintain stricter controls over cash, augment the internal audit function and focus its efforts on countries at

316. *See* TRACE FACILITATION PAYMENTS BENCHMARKING SURVEY 2 (Oct. 2009) ("Nearly 44% of survey respondents reported that their corporations prohibit facilitation payments or simply do not address them because facilitation payments are prohibited together with other forms of bribery.").

317. OECD Convention, *supra* note 13.

318. *See* MINISTRY OF JUSTICE, *supra* note 156, at 22–23 (noting that facilitation payments—where intended to induce improper conduct—likely violate sections 1 and 6 of the Bribery Act, and that there are no exemptions for such payments, although prosecutorial discretion may be employed as justice requires).

319. Joan Keston, *'Grease Payments'—A Cost of Doing Business Overseas*, LOCALTECHWIRE, Dec. 28, 2007, http://localtechwire.com/business/local_tech_wire/opinion/story/2226239/.

320. GIBSON, DUNN & CRUTCHER LLP, *UK Serious Fraud*, *supra* note 148 ("[T]he Staff stated that there is only a remote chance that a small, one-off payment will result in prosecution (for example, a $5 payment for customs clearance)—provided that the company picks up the payment through its internal procedures and makes it clear to those involved that such payments are not acceptable.").

risk for facilitating payments, and invest more in employee education, as employees may be tempted to make such small payments out of their own pockets. The risk of a restrictive policy on facilitating payments that does not account for the reality of business in many developing countries is that it will drive non-compliance underground. But it is nevertheless what multinational corporations may be forced to do under the Bribery Act.

4. Commercial Bribery

Perhaps the most immediately evident difference between the FCPA and the Bribery Act is that the FCPA is silent about commercial bribery. In contrast, the Bribery Act leads off in section 1 by prohibiting the bribery of all persons to induce or reward improper performance.[321] This means that all entities subject to the Bribery Act must expand their anti-bribery compliance programs to address all forms of bribery. Currently, many multinational companies lavish particular attention on preventing public-sector corruption. Now, they will have to balance out their policies by discussing the risks of commercial bribery.

In reality, reorienting a compliance program to address commercial bribery may not be a major shift for some organizations. After all, the improper performance test is similar to the FCPA's corrupt intent requirement, so expanding many of the company's existing FCPA compliance controls to cover the private sector may adequately secure the entity. Further, issuers always had to worry about the accounting provisions, which have been used on numerous occasions to prosecute "bribery" that did not violate the FCPA's anti-bribery provisions.[322] And prosecutors in the United States have cleverly used the Travel Act and the federal wire fraud statute to prosecute improper payments overseas.[323] So multinational companies with some nexus to the United States always needed to worry about commercial bribery

321. Bribery Act, 2010, § 1(2)(b)(i)–(ii).

322. Perhaps the best examples of this are the prosecutions of companies for paying kickbacks under the U.N. Oil-for-Food Program. These actions did not involve illegal payments under the FCPA, as the monies did not go to individual officials. The SEC and DOJ were instead able to prosecute Oil-for-Food improprieties as violations of the accounting provisions. For instance, in its enforcement action against Textron Inc., the SEC alleged that the company's transactions were not "executed in accordance with management's authorization" because they "contravened . . . [Textron's] own internal FCPA and anti-bribery policies." Complaint para. 35, SEC v. Textron Inc., No. 07-cv-01505 (D.D.C. 2007). Textron also allegedly failed "to maintain accountability for the company's assets," in that "although Textron knew of endemic corruption problems in the Middle East, it appeared to take on faith, without adequate confirming steps, that its managers and employees were exercising their duties to manage and comply with compliance and control issues." *Id.* paras. 35, 36. Likewise, the SEC brought an enforcement action against El Paso Corp. for, among other things, a failure to institute processes for reviewing transactions and ensuring that such transactions comply with company policies and are fully documented. *See* Complaint para. 31, SEC v. El Paso Corp., No. 07-cv-899 (S.D.N.Y. 2007) ("El Paso's contract files did not even contain proof that invoices had been paid for at least thirteen shipments, there was no process for documenting commercially reasonable prices paid for oil cargos, no evidence that documents were reviewed by anyone to ensure propriety and adequacy, and inadequate explanations of why documents were missing from files.").

323. Thomas O. Gorman, *DOJ Continues to Focus on FCPA Enforcement*, LEXISNEXIS CORPORATE & SECURITIES LAW COMMUNITY, July 6, 2010, https://www.lexisnexis.com/Community/corpsec /blogs/corporateandsecuritieslawblog/archive/2010/07/06/doj-continues-to-focus-on-fcpa-enforcement. aspx; *Novo Nordisk Pays $18 Million In Penalties For Iraq Bribery*, THE FCPA BLOG, May 11, 2009, http://www.fcpablog.com/blog/2009/5/12/novo-nordisk-pays-18-million-in-penalties-for-iraq-bribery.html.

prosecutions by U.S. authorities. It is possible that many of these entities, because of their focus on bribing foreign officials, have not properly assessed or considered all of the commercial bribery risks that their business may entail overseas. Once they do, they may conclude that commercial bribery poses a much greater risk to their particular organization than did public sector corruption. After all, a corporation's interactions with private parties will often differ from those with public ones.

## III. ANTI-BRIBERY ENFORCEMENT AND THE USE OF VOLUNTARY DISCLOSURE

The foregoing discussion of the Bribery Act's statutory framework implicitly attempts to project how the United Kingdom will ultimately enforce its new law. Without enforcement, any law is a dead letter. Just like the FCPA, the new Bribery Act falls into an enforcement framework that will determine its actual effect on corporations and individuals. Even the U.K. Government's guidance issued to date only hints at the potential contours of Bribery Act enforcement. Corporations, in particular, need to understand the expectations of law enforcement and its approach to investigating and punishing alleged acts of overseas bribery. Possibly the most interesting facet of international anti-corruption enforcement on both sides of the Atlantic is the use of voluntary corporate disclosure. This part of the article focuses on the self-disclosure framework recently established by the SFO[324] and compares this approach to that taken by DOJ and the SEC in enforcing the FCPA.

Part III.A provides background on the SFO and describes its development of a self-disclosure framework that shares similarities with DOJ and SEC approaches. Part III.B examines the SFO's incentives and expectations for self-reporting. Part III.C analyzes the process of self-reporting a case to the SFO, including the procedures for investigation, settlement, and monitoring. Part III.D identifies steps that companies can take beyond self-reporting to help mitigate enforcement actions by the SFO or U.S. authorities. Finally, Part III.F looks toward future enforcement activity on both sides of the Atlantic.

### *A. The United Kingdom's Serious Fraud Office*

The SFO, established in 1988 pursuant to the Criminal Justice Act, "is responsible for investigating and prosecuting the most serious and complex cases of fraud and corruption in England, Wales and Northern Ireland," including investment

324. According to section 10 of the Bribery Act, a prosecution under the Act "can only be brought with the consent of the Director of one of three senior prosecution authorities[:] the Director of Public Prosecutions, the Director of the Serious Fraud Office [or] the Director of Revenue and Customs Prosecutions." Bribery Act, 2010, § 10. Prior to the Bribery Act, the SFO had jurisdiction to prosecute cases of overseas bribery, such as the Mabey & Johnson Ltd. case, pursuant to the Criminal Justice Act, 1987. The Financial Services Authority (FSA) may also prosecute overseas bribery cases pursuant to Principle 3 of the FSA's Principles for Business, which requires companies to "take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems." *See, e.g.*, Letter from U.K. Fin. Serv. Auth., Final Notice to Aon Ltd. (Jan. 6, 2009), *available at* http://www.fsa.gov.uk/pubs/final/aon.pdf (fining Aon £5.25 million for "not tak[ing] reasonable care to establish and maintain effective systems and controls for countering the risks of bribery and corruption associated with making payments to . . . overseas third parties . . . who assisted Aon Ltd in winning business from overseas clients, particularly in high risk jurisdictions").

fraud, corporate fraud, public sector fraud, and bribery and corruption.[325] Accordingly, the SFO is responsible for enforcing the provisions of the Bribery Act addressing overseas corruption.[326]

Following the Al Yamamah controversy, then-Attorney General Lord Goldsmith hired former Manhattan Assistant District Attorney Jessica de Grazia to conduct a review of how the SFO handles its investigations and prosecutions. De Grazia's report, issued in June 2008, stated that "the SFO uses significantly more resources per case than [the Southern District of New York U.S. Attorney's Office and the Manhattan District Attorney's Office] and achieves significantly less for its efforts, as measured by both its productivity (the number of defendants prosecuted) and its conviction rate."[327] She provided thirty-four recommendations to make the SFO more effective.[328]

De Grazia's report, combined with the Al Yamamah controversy, appears to have sparked change at the SFO. Former SFO Director Robert Wardle resigned in April 2008 and was replaced by Richard Alderman, a former senior investigator at HM Revenue and Customs.[329] Additionally, the British press reported that dozens of lawyers and investigators were asked to leave the SFO following de Grazia's review.[330]

On November 18, 2008, the new SFO Director Richard Alderman announced that the SFO would increase the number of its anti-corruption investigators from

325. SIR GUS O'DONNELL, SERIOUS FRAUD OFFICE: BASELINE ASSESSMENT 4 (Dec. 2009), *available at* http://www.civilservice.gov.uk/Assets/SFO%20Capability%20Review%20web_tcm6-35130.pdf; Serious Fraud Office, *What is Fraud?*, http://www.sfo.gov.uk/fraud/what-is-fraud.aspx.

326. SFO APPROACH, *supra* note 38, at 1. A prosecution under the Bribery Act may also be brought with the consent of the Director of Public Prosecutions or the Director of Revenue and Customs Protections. Bribery Act, 2010, c. 23, § 10 (Eng.). Additionally, while the FSA was not granted jurisdiction to prosecute cases of overseas corruption under the Bribery Act, it may enforce violations of the FSA's Principles for Business that involve overseas corruption. *See* FIN. SERV. AUTH., HANDBOOK §§ 2.1.1, 3.3.1 (Sept. 2010), *available at* http://fsahandbook.info/FSA/html/handbook/ (providing that "firm[s] must take reasonable care to organise and control [their] affairs responsibly and effectively, with adequate risk management systems," which principle applies, in certain contexts, "with respect to activities wherever they are carried on"); *see also* Letter from U.K. Fin. Serv. Auth., Final Notice to Aon Limited § 2.1 (Jan. 6, 2009), http://www.fsa.gov.uk/pubs/final/aon.pdf ("During the Relevant Period, Aon Ltd breached Principle 3 by failing to take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems."). This spring, the FSA warned "that many [commercial insurance broker] firms are not currently in a position to demonstrate adequate procedures to prevent bribery [under section 7 of the Bribery Act]" and, regardless of potential Bribery Act exposure, "[f]or FSA-regulated firms, [FSA's] financial crime rules and principles will remain in force." FIN. SERV. AUTH. ANTI-BRIBERY AND CORRUPTION IN COMMERCIAL INSURANCE BROKING 5, 10 (May 2010), *available at* http://www.fsa.gov.uk/pubs/anti_bribery.pdf.

327. JESSICA DE GRAZIA, REVIEW OF THE SERIOUS FRAUD OFFICE, FINAL REPORT 3 (June 2008), *available at* http://www.sfo.gov.uk/about-us/our-policies-and-publications/jessica-de-grazia-review-.aspx.

328. *Id.* at 17–28.

329. David Leigh & Rob Evans, *BAE, the SFO and the Inquiry That Refused to Go Away*, THEGUARDIAN.CO.UK, Oct. 1, 2009, http://www.guardian.co.uk/world/2009/oct/01/bae-bribery-allegation-sfo-inquiry.

330. David Leppard, *SFO Staff Gets Huge Payoffs*, SUNDAY TIMES, Feb. 1, 2009, *available at* http://business.timesonline.co.uk/tol/business/economics/article5627633.ece (noting that "[d]ozens of staff at the [SFO] have been offered early-release payoffs worth up to £240,000 after a secret Whitehall report found its work was being undermined by alleged cronyism and incompetence").

sixty-five to approximately one hundred.[331] In a demonstration of increased focus on anti-bribery enforcement that coincided with the issuance of the voluntary disclosure guidance the SFO announced the establishment of "a separate work area," the "Anti-Corruption Domain," to investigate and prosecute cases of overseas corruption.[332] Far exceeding the current personnel commitment from the U.S. Government,[333] the SFO plans on having ultimately one-hundred staff members in the Anti-Corruption Domain.[334]

Finally, in June 2010, Prime Minister Cameron appointed Justice Secretary Kenneth Clarke to serve as the United Kingdom's "international anti-corruption champion."[335] In addition to overseeing the Bribery Act's implementation for the U.K. Government, Clarke will work with the SFO and other enforcement entities to ensure a coherent approach to the prosecution of international bribery.[336]

These changes are already producing results. In July 2009, the SFO announced that it had obtained a guilty plea to overseas corruption by U.K. construction firm Mabey & Johnson Ltd (M&J), the SFO's first successful overseas corruption prosecution of a U.K. company.[337] M&J allegedly violated U.N. sanctions in Iraq and engaged in overseas bribery in Jamaica and Ghana to obtain public contracts.[338] The SFO emphasized that the prosecution arose from M&J's voluntary disclosure.[339]

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331. Press Release, Serious Fraud Office, More Resources for Anti-Corruption Work, Serious Fraud Office, (Nov. 18, 2008), *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2008/more-resources-for-anti-corruption-work.aspx.

332. SFO APPROACH, *supra* note 38, at 1.

333. Most estimates place the current combined DOJ, FBI, and SEC investigation and prosecution resources at fewer than fifty individuals. In August 2009, however, the SEC Director of Enforcement explained that the SEC planned to create a national specialized FCPA enforcement unit that would be "more proactive in investigations, work[] more closely with [the SEC's] foreign counterparts, and take[] a more global approach to [FCPA] violations." Robert Khuzami, Dir., Div. of Enforcement, U.S. Sec. and Exchange Comm'n, Remarks Before the New York City Bar: My First 100 Days as Director of Enforcement (Aug. 5, 2009), http://www.sec.gov/news/speech/2009/spch080509rk.htm. Additionally, the SEC recently appointed Cheryl J. Scarboro, an eighteen-year veteran of the SEC, as head of the Enforcement Division's new Foreign Corrupt Practices Act Unit. Press Release, U.S. Sec. and Exchange Comm'n, SEC Names New Specialized Unit Chiefs and Head of New Office of Market Intelligence (Jan. 13, 2010), http://www.sec.gov/news/press/2010/2010-5.htm. Similarly, DOJ has indicated that it has "begun discussions with the Internal Revenue Service's Criminal Investigation Division about partnering with [DOJ] on FCPA cases around the country" and begun "pursuing strategic partnerships with certain U.S. Attorney's Offices throughout the United States where there are a concentration of FCPA investigations." Lanny A. Breuer, Asst. Att'y Gen., U.S. Dep't of Justice Criminal Div., Prepared Address at the 22nd Nat'l Forum on the Foreign Corrupt Practices Act 6 (Nov. 17, 2009), http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-17-09aagbreuer-remarks-fcpa.pdf.

334. SFO APPROACH, *supra* note 38, at 1.

335. Press Release, Ministry of Justice, Kenneth Clarke to be International Anti-corruption Champion (June 15, 2010), *available at* http://www.justice.gov.uk/news/newsrealease150610a.htm.

336. *Id.*

337. *See* Press Release, Serious Fraud Office, Mabey & Johnson Ltd Sentencing (Sept. 25, 2009), *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/mabey--johnson-ltd-sentencing-.aspx [hereinafter Mabey & Johnson Sentencing] (noting that M&J pleaded guilty to charges of conspiracy to commit corrupt acts in Jamaica and Ghana, and violating U.N. sanctions imposed on Iraq).

338. Prosecution Opening Note, Regina v. Mabey and Johnson Ltd., No. T2009 7513 [2009] Southwark Crown Court; *see also* Mabey & Johnson Sentencing, *supra* note 337.

339. Mabey & Johnson Sentencing, *supra* note 337.

M&J's sentence obligated it to pay a total penalty of £6.6 million and retain an independent monitor.[340]

In October 2009, the SFO announced that it had obtained a Civil Recovery Order of nearly £5 million against AMEC PLC, an international engineering and project management firm, for the "receipt of irregular payments . . . associated with a project in which AMEC is a shareholder."[341] Similar to M&J, the AMEC case resulted from a voluntary disclosure by the corporation and, as part of the resolution, AMEC agreed to "appoint an independent consultant to review [its ethics, compliance and accounting standards] and report their [sic] findings to the SFO."[342]

### B. *Self-Reporting Incentives and Expectations*

Although the recent improvements to the SFO will allow it to initiate and execute many of its own investigations, it will undoubtedly still rely significantly on voluntary disclosures from corporations. Indeed, similar to the approach of U.S. authorities,[343] the SFO encourages corporations to identify, investigate, and monitor cases of foreign corruption.[344] Although U.S. prosecutors claim that a majority of FCPA cases under investigation do not come from voluntary disclosure,[345] thirty-four of the forty-nine FCPA enforcement actions taken against U.S. companies between 2004 and 2009 resulted from voluntary disclosures.[346] In a world of limited resources and a seemingly endless supply of prosecution targets,[347] it is unsurprising that voluntary disclosures will play a major role in any enforcement regime.

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340. *Id.* Although M&J agreed to a total sum payable as part of its plea bargain with the SFO, the court has discretion as to the sentence under English law.

341. Press Release, Serious Fraud Office, SFO obtains Civil Recovery Order against AMEC PLC (Oct. 26, 2009), *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/sfo-obtains-civil-recovery-order-against-amec-plc.aspx.

342. *Id.*

343. SFO Director Richard Alderman has explained that in attempting to introduce "a system whereby companies who discover corrupt payments and come and disclose this voluntarily to [the SFO] will receive an appropriate response," he "learned a lot from the US system." Richard Alderman, Director of the SFO, Tackling Corruption–Working Smarter, Address at the International Association of Anti-Corruption Authorities, Oct. 4, 2008, *available at* http://www.sfo.gov.uk/about-us/our-views/director%27s-speeches/speeches-2008/tackling-corruption---working-smarter.aspx.

344. *See* Richard Craig Smith et al., *Recent International Anti-Corruption Enforcement Efforts & Compliance Guidance*, FULBRIGHT & JAWORSKI, Dec. 14, 2009, http://www.fulbright.com/index.cfm?fuseaction=publications.detail&pub_id=4271&site_id=494 (listing new factors the SFO will use in assessing civil and criminal penalties).

345. *See* Mark Mendelsohn, former Deputy Chief of the DOJ Criminal Division's Fraud Section, Practice Guide to the Foreign Corrupt Practices Act, Panel Discussion Sponsored by D.C. Bar Corporation, Washington, D.C. (Sept. 24, 2009) (estimating that less than one-third of DOJ's current open FCPA investigation caseload came from voluntary disclosures); *see also* Breuer, *supra* note 333, at 3 ("Although many of these [FCPA] cases come to us through voluntary disclosures, which we certainly encourage and will appropriately reward, I want to be clear: the majority of our cases do not come from voluntary disclosures.").

346. The authors have been collecting a data report on FCPA cases since 2004. Their data have been compiled for the authors' personal use and review. F. JOSEPH WARIN & MICHAEL S. DIAMANT, FCPA RESOLUTIONS STATISTICAL DATA (on file with author) [hereinafter FCPA DATA].

347. *See* Dionne Searcey, *Breuer: Beware, Execs, The DOJ Will Take Your Fancy Cars*, WALL ST. J. LAW BLOG (Nov. 17, 2009, 4:57 PM), http://blogs.wsj.com/law/2009/11/17/breuer-beware-execs-the-doj-wants-your-fancy-cars/ (reporting Mark Mendelsohn's statement that the "DOJ currently has 130 ongoing

1. Encouragement to Self-Report

On July 21, 2009, the SFO issued guidance entitled "Approach of the Serious Fraud Office to Dealing with Overseas Corruption" that encourages corporations to self-report overseas corruption and establishes procedures for voluntary disclosure, self-investigation, and post-settlement monitoring.[348] It states that "the benefit to the corporate [of self-reporting] will be the prospect (in appropriate cases) of a civil rather than a criminal outcome as well as the opportunity to manage, with [the SFO], the issues and any publicity proactively."[349] U.K. law permits civil settlement, and this will be an added incentive as an alternative to criminal prosecution under the Bribery Act.[350] Although the SFO further emphasizes that it intends to settle voluntarily disclosed cases civilly "wherever possible," it does not give an "unconditional guarantee that there will not be a prosecution of the corporate."[351] An exception to the SFO's inclination to settle cases civilly is when "[b]oard members of the corporate had engaged personally in the corrupt activities, particularly if they had derived personal benefit from this."[352]

Besides highlighting the benefits of voluntary disclosure, the SFO indicates that "the failure to self report [is] a negative factor."[353] If the SFO learns about an undisclosed corruption issue, it will assume "that the corporate has chosen not to self report" and therefore "[t]he prospects of a criminal investigation followed by prosecution and a confiscation order are much greater . . . ."[354] Interestingly, Director Alderman has stated that the SFO expects that companies will self-report conduct within the scope of the Bribery Act even if the conduct occurs before April 2011, when the Act goes into force.[355]

To date, the only two corporate SFO overseas corruption enforcement actions, the M&J and AMEC cases, resulted from voluntary disclosure.[356] Thus, while this may signal some impact of the voluntary disclosure regime, it is far too early to assess whether the SFO's encouragement will have its full desired effect, especially when compared to the U.S. regime, which saw eleven corporate FCPA enforcement actions resolved in 2009, of which seven (sixty-four percent) involved voluntary disclosures.[357]

FCPA investigations").

348. SFO APPROACH, *supra* note 38, at 1.

349. *Id.* A criminal conviction of a corruption-based offense would lead to mandatory debarment pursuant to Article 45 of the EU Public Sector Procurement Directive of 2004.

350. *See* Proceeds of Crime Act 2002, c. 5, §§ 240–45 (describing civil recovery rationale and process).

351. *Id.* at 4.

352. *Id.*

353. *Id.* at 8.

354. *Id.* at 9; GIBSON, DUNN & CRUTCHER LLP, *UK Serious Fraud*, supra note 148.

355. *See* GIBSON, DUNN & CRUTCHER LLP, *UK Serious Fraud*, *supra* note 148 (clarifying that the "'report now or expect worse consequences later' standard will apply equally to companies that elect not to report an instance of violative conduct that would fall within the scope and jurisdictional contours of the Act but for the fact that the events occurred prior to the Act coming into force").

356. Mabey & Johnson Sentencing, *supra* note 337; Press Release, Serious Fraud Office, SFO obtains Civil Recovery Order against AMEC PLC (Oct. 26, 2009), *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/sfo-obtains-civil-recovery-order-against-amec-plc.aspx.

357. Cases involving voluntary disclosures included IIT Corp., Latin Node, Inc., United Industrial Corp., Control Components, Inc., Avery Dennison, Helmerich & Payne, Inc., and Nature's Sunshine Products. The four corporate FCPA cases that were resolved that did not originate from voluntary disclosures included Halliburton/KBR, Novo Nordisk A/S, AGCO Corp., and UTStarcom, Inc.

Another complicating factor for the SFO is its limited ability to enter into criminal plea agreements in exchange for cooperation. Earlier this year, the SFO suffered two setbacks in this area. First, in the Innospec prosecution (discussed further below), the sentencing judge, while accepting the company's plea, sharply challenged the SFO's power to enter into plea agreements with cooperative entities: "I have concluded that the director of the SFO had no power to enter into the arrangements made and no such arrangements should be made again."[358] Then, in April 2010, a judge rejected the cooperation agreement that the SFO forged with Robert John Dougall, the former vice president of Depuy International Ltd., and sentenced Dougall to twelve months in prison.[359] Although an appeals court reversed this sentence, it chastised the SFO: "Responsibility for the sentencing decision in cases of fraud or corruption is vested exclusively in the sentencing court (or on appeal, from that court, to the Court of Appeal Criminal Division). There are no circumstances in which it may be displaced."[360]

Despite the greater power that U.S. enforcement authorities have in crafting plea agreements, the benefits of self-reporting remain far from clear, in part because U.S. enforcement authorities have not issued FCPA-specific guidance on the benefits of voluntary disclosure. The 2003 Memorandum from then-Deputy Attorney General Larry Thompson (the Thompson Memorandum) and the 2006 Memorandum by then-Deputy Attorney General Paul McNulty (the McNulty Memorandum) emphasized the importance of a corporation's "timely and voluntary disclosure of wrongdoing" to the Government's charging decision.[361] Former Deputy Attorney General Mark Filip's 2008 Memorandum (Filip Memorandum) modified some of DOJ's policy defining cooperation—for example, with respect to privilege—

Additionally, a total of twenty-six DOJ and fourteen SEC cases were brought in 2009 alone. GIBSON, DUNN & CRUTCHER LLP, *2009 Year-End FCPA Update*, Jan. 4, 2010, *available at* http://www.gibsondunn.com/Publications/Pages/2009Year-EndFCPAUpdate.aspx [hereinafter GIBSON, DUNN & CRUTCHER LLP, *2009 Year-End FCPA Update*]. Just midway through 2010, DOJ has already brought more cases than it did in 2009 (twenty-seven), and the SEC has brought nine cases. GIBSON, DUNN & CRUTCHER LLP, *2010 Mid-Year FCPA Update*, July 8, 2010, *available at* http://gibsondunn.com/publications/Pages/2010Mid-YearFCPAUpdate.aspx [hereinafter GIBSON, DUNN & CRUTCHER LLP, *2010 Mid-Year Update*].

358. Nick Clark, *Judge Attacks SFO Deal with Innospec*, INDEPENDENT, Mar. 27, 2010, *available at* http://www.independent.co.uk/news/business/news/judge-attacks-sfo-deal-with-innospec-1928636.html.

359. Press Release, Serious Fraud Office, British executive jailed for part in Greek healthcare corruption (Apr. 14, 2010), *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/british-executive-jailed-for-part-in-greek-healthcare-corruption.aspx.

360. R v. Dougall, [2010] EWCA Crim 1048 (appeal taken from Eng. and Wales Court) (U.K.), para. 25. On the other hand, the SFO reports that "in the vast majority of cases where [plea agreements] have been employed, there have been no judicial issues." *See also* GIBSON, DUNN & CRUTCHER LLP, *UK Serious Fraud*, *supra* note 148 (noting further that "the SFO remains committed to plea negotiations").

361. *See* Memorandum from Larry D. Thompson, Deputy Att'y Gen., Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), *available at* http://www.justice.gov/dag/cftf/corporate_guidelines.htm (stating that a "corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents" is a factor influencing the decision whether to bring charges); Memorandum from Paul McNulty, Deputy Att'y Gen., Principles of Federal Prosecution of Business Organizations (Dec. 2006), *available at* http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf (stating that prosecutors must consider a corporation's "timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents").

but nonetheless emphasized the importance of a corporation's timely and voluntary disclosure of violations.[362]

In various speeches, DOJ attorneys have been more explicit in emphasizing the benefit of voluntarily disclosing FCPA violations. Then-Assistant Attorney General Alice S. Fisher stated in October 2006 that a company will receive a "real benefit" from voluntary disclosures (but noted that "nothing is off the table when you voluntarily disclose").[363] Current Assistant Attorney General Lanny A. Breuer has stated that "a company will receive meaningful credit for [voluntary] disclosure and . . . cooperation" and that "the Department's commitment to meaningfully reward voluntary disclosures and full and complete cooperation will continue to be honored in both letter and spirit."[364]

Similarly, the SEC has indicated that voluntary disclosure, cooperation with the SEC, and the existence of compliance procedures influence the SEC's decision regarding the initiation of an enforcement action or civil proceedings.[365] In 2007, then-SEC Associate Director (and current FCPA Enforcement Chief) Cheryl Scarboro suggested that companies will receive a real benefit from the SEC for voluntarily disclosing violations.[366] On January 13, 2010, the SEC announced a new initiative "to encourage individuals and companies to cooperate and assist in investigations."[367] The "new cooperation tools" for SEC enforcement matters include cooperation agreements, deferred prosecution agreements (DPAs), and non-prosecution agreements (NPAs).[368] Additionally, the SEC identified four factors that it will evaluate when considering how to credit cooperation by individuals: (1) "[t]he assistance provided by the cooperating individual," (2) "[t]he importance of the underlying matter in which the individual cooperated," (3) "[t]he societal interest in ensuring the individual is held accountable for his or her misconduct," and (4) "[t]he

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362. *See* Principles of Federal Prosecution of Business Organizations, Title 9, Chapter 9-28.00 (effective Aug 28, 2008), *available at* http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf (stating "while a corporation remains free to convey non-factual or 'core' attorney-client communications or work product—if and only if the corporation voluntarily chooses to do so—prosecutors should not ask for such waivers and are directed not to do so").

363. Alice S. Fisher, Assistant Att'y Gen., U.S. Dep't of Justice, Prepared Remarks of Alice S. Fisher, Assistant Attorney General, U.S. Department of Justice at the American Bar Association National Institute on the Foreign Corrupt Practices Act (Oct. 16, 2006) (transcript available at http://www.justice.gov/criminal/fraud/pr/speech/2006/10-16-06AAGFCPASpeech.pdf).

364. Breuer, *supra* note 333.

365. *See* SEC. AND EXCH. COMM'N, REPORT OF INVESTIGATION PURSUANT TO §21(A) OF THE SECURITIES EXCHANGE ACT OF 1934 AND COMMISSION STATEMENT ON THE RELATIONSHIP OF COOPERATION TO AGENCY ENFORCEMENT DECISIONS (THE "SEABOARD REPORT"), EXCHANGE ACT RELEASE NO. 44,949 (Oct. 23, 2001) (citing several factors, including voluntary disclosure, which influence their decision to pursue enforcement action); *see* Robert Khuzami, Dir. of Enforcement, Sec. and Exch. Comm'n, Remarks Before the N.Y. City Bar: My First 100 Days as Director of Enforcement (Aug. 5, 2009), (transcript available at http://www.sec.gov/news/speech/2009 spch080509rk.htm) (stating that the SEC is contemplating creating a "Seaboard" report for individuals to incentivize the cooperation of corporate officers and employees).

366. Breuer, *supra* note 333; Cheryl Scarboro, Assoc. Dir. of Enforcement, Sec. and Exch. Comm'n, Address to the 22nd Nat'l Forum on the Foreign Corrupt Practices Act (Nov. 17, 2009).

367. Press Release, Sec. and Exch. Comm'n, SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations, (Jan. 13, 2010), *available at* http://www.sec.gov/news/press/2010/2010-6.htm [hereinafter SEC Initiative]; DIV. OF ENFORCEMENT, SEC. AND EXCH. COMM'N, ENFORCEMENT MANUAL at 123–40 (Jan. 13, 2010) [hereinafter ENFORCEMENT MANUAL].

368. SEC Initiative, *supra* note 367; *see also* ENFORCEMENT MANUAL, *supra* note 367, at 123–40.

appropriateness of cooperation credit based upon the risk profile of the cooperating individual."[369]

Thus, U.S. authorities encourage cooperation and indicate that a company that voluntarily discloses a potential FCPA violation will be better situated than one that finds itself being investigated having not disclosed the conduct. But unlike the SFO, which has stated that it will reward voluntary disclosure with civil rather than criminal enforcement actions, substantial questions exist about just how tangible any benefits corporations receive from U.S. enforcement authorities actually are[370]—especially when the decision not to disclose wrongdoing could avoid enforcement altogether.

A review of recent corporate FCPA enforcement actions illustrates that the treatment accorded voluntary disclosures is difficult to quantify. For example, from 2004 through 2009, approximately twenty-one percent of voluntary disclosure cases have been resolved with DPAs compared to forty-four percent of non-voluntary disclosure cases.[371] Similarly, twenty-seven percent of voluntary disclosure cases have been resolved through NPAs versus twenty-five percent of non-disclosure cases.[372] Overall, during those five years, sixteen voluntary disclosure cases (forty-eight percent) were settled through DPAs or NPAs while eleven non-disclosure cases (sixty-nine percent) were settled through DPAs or NPAs.[373] Because information about "no action" determinations is not publicly available, however, it is difficult to assess the benefit of self-disclosure empirically and the actual benefits may be underestimated. Regardless, it remains challenging for a company to anticipate the consequences of disclosure to either U.K. or U.S. authorities, although the U.K. authorities hold out more hope of a purely civil settlement. The decision to report to U.S. authorities is complicated further because the SEC and DOJ share responsibility for enforcing the FCPA and therefore may initiate separate investigations and make separate decisions about the weight to give a voluntary disclosure and whether to bring an enforcement action.[374]

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369. SEC Initiative, *supra* note 367; *see also* ENFORCEMENT MANUAL, *supra* note 367, at 123–40.

370. A recent attempt to quantitatively analyze the benefits of self-disclosure has generated debate on this issue. *See* Bruce Hinchey, *Punishing the Penitent: Disproportionate Fines in Recent FCPA Enforcements and Suggested Improvements* (July 15, 2010), *available at* http://ssrn.com/abstract=1650925 (finding that the ratio between bribes and fines in forty cases dating from 2002 to 2009 "reveal[s] that there does not appear to be a benefit to voluntary disclosure").

371. FCPA DATA, *supra* note 346.

372. *Id.*

373. *Id.*

374. *See, e.g.*, Aruna Viswanatha, *General Electric to Pay $23 Million to Settle FCPA Charges*, MAIN JUSTICE, (July 27, 2010), *available at* http://www.mainjustice.com/2010/07/27/general-electric-to-pay-23-million-to-settle-fcpa-charges/ (discussing an instance in which when DOJ and SEC reached very different resolutions for the same conduct); *see also* Mike Koehler, *General Electric Settles Iraqi Oil for Food Matter*, FCPA PROFESSOR BLOG (July 27, 2010, 12:48 PM), http://fcpaprofessor.blogspot.com/2010/07/general-electric-settles-iraqi-oil-for.html ("The GE enforcement action is also an outlier of sorts in that it is merely a[n] SEC enforcement action with no parallel DOJ enforcement action . . . . So much for substantively similar conduct being resolved in a similar fashion.").

2. Disclosure Expectations

Recent remarks by Director Alderman suggest that the SFO may have more stringent self-reporting expectations than DOJ. Alderman recently warned that self-reporting is "not something [companies] can dip in and out of as they please . . . they need to come forward every time something rotten turns up rather than wait for something they consider really serious before they make the call."[375] He further stressed that one of the SFO's first questions to a company "will be whether the company has had similar issues in the past."[376] If the company has not voluntarily reported past issues, Alderman "will not be pleased" and will "investigate whether the decision-makers are criminally liable for the cover-up."[377]

In contrast, DOJ has suggested that a corporation "can responsibly not report" FCPA issues in limited circumstances.[378] Specifically, Mark Mendelsohn, former Deputy Chief of DOJ's Fraud Section, stated in 2007 that a company can responsibly deal with an FCPA issue and not tell DOJ about it if the company:

> has good controls in place; it trains people; it trains them regularly; it tests its controls regularly so it can be satisfied that they are in place and working; it has appropriate disciplinary policies in place and utilizes them; it thoroughly investigates the matter and gets to the bottom of the issue and is satisfied it has done it; [and] it understands how its controls were circumvented in this case and why it is not a broader problem.[379]

Similarly, Assistant Attorney General Breuer recently recognized that the decision whether to make a voluntary disclosure is "sometimes [a] difficult question . . . [Breuer] grappled with as a defense lawyer."[380]

Additionally, SFO Director Alderman has asserted that failing to self-report "turns a problem that is not the personal problem of Board members into one that definitely is" and can "bring about personal criminal liability on the part of Board members."[381] If the SFO in fact brings criminal enforcement actions against board members for failing to report corruption issues, this would constitute a significant difference between the U.K. and U.S. regimes. While a corporate control group in the United States may face civil liability, such as the case against the CEO and CFO

375. *Alderman: No Second Chances in SFO Reporting*, TIMES ONLINE, Nov. 10, 2009, *available at* http://timesonline.typepad.com/law/2009/11/alderman-no-second-chances-in-sfo-self-reporting.html.

376. *Id.*

377. *Id.*

378. GIBSON, DUNN & CRUTCHER LLP, CHALLENGES IN COMPLIANCE AND CORPORATE GOVERNANCE 26 (Jan. 17, 2008), *available at* http://www.gibsondunn.com/publications/Documents/Webcast-CorpCompliance4thAnn-Slides.pdf (quoting Mark Mendelsohn, former Deputy Chief Fraud Section, DOJ (Oct. 17, 2007)). But an issuer nonetheless may have an obligation to disclose pursuant to the securities laws apart from the FCPA, such as the Sarbanes-Oxley Act of 2002.

379. *Id.*

380. Breuer, *supra* note 333, at 4.

381. Richard Alderman, Director of Serious Fraud Office, Combating Corruption and Bribery: the SFO perspective, Speech at the Anti-Corruption and Bribery Conference (Nov. 18, 2008), *available at* http://www.sfo.gov.uk/about-us/our-views/director%27s-speeches/speeches-2008/combating-corruption-and-bribery-the-sfo-perspective.aspx.

of Nature's Sunshine Products,[382] the FCPA's criminal provisions do not apply to board members not directly involved with the underlying violation.[383]

*C. The Self-Reporting Process*

After voluntarily disclosing to the SFO, DOJ, or SEC, a company typically begins a three-step process. First, the company usually conducts an internal investigation into the corruption issue. Waiver of attorney-client privilege and work-product protection, which differs under U.K. and U.S. law, is a key issue at the investigation stage. Second, the company reports its findings to the enforcement authority and negotiates a resolution of the issues. The criteria used by the SFO to decide whether to pursue a civil or criminal settlement of a case differs significantly from the U.S. FCPA enforcement regimes. Finally, all three enforcement agencies frequently require the self-reporting company to retain an independent compliance monitor for several years.

1. The Investigation

Unlike the SEC and DOJ, the SFO informs organizations what they can expect following the disclosure of a potential violation. "Very soon after the self report and the acknowledgement of a problem,"[384] the SFO seeks to establish the following:

- that the board is "genuinely committed to resolving the issue and moving to a better corporate culture";
- that the company is "prepared to work with [the SFO] on the scope and handling of any additional investigation [the SFO] consider[s] to be necessary";
- that the company will "be prepared to discuss resolution of the issue on the basis, for example, of restitution through civil recovery, a programme of training and culture change, appropriate action where necessary against individuals and at least in some cases external monitoring in a proportionate manner" following the conclusion of an investigation;
- that the company understands that "any resolution must satisfy the public interest and must be transparent . . . almost invariably involv[ing] a public statement"; and

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382. *See, e.g.*, Complaint, S.E.C. v. Nature's Sunshine Products, Inc., No. 2:09cv0672 (D. Utah July 31, 2009), http://www.sec.gov/litigation/complaints/2009/comp21162.pdf (naming CEO and COO as defendants and requesting payment of civil money penalties in complaint alleging failure to disclose undocumented cash payments to foreign customs officials).

383. *See* 15 U.S.C. § 78dd-2(g)(2)(A) (1998) ("Any natural person that is an officer, director, employee, or agent of a domestic concern . . . who *willfully violates* [the FCPA] shall be fined not more than $100,000 or imprisoned not more than 5 years, or both.") (emphasis added), § 78dd-2(g)(2)(B) ("Any natural person that is an officer, director, employee, or agent of a domestic concern . . . who violates [the FCPA] shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.").

384. If a case falls under both U.S. and U.K. jurisdiction, the SFO expects to be notified at the same time as DOJ. SFO Approach, *supra* note 38, at 3.

- that the company will "work with regulators and criminal enforcement authorities, both in the UK and abroad, in order to reach a global settlement . . . ."[385]

The SFO has a "very strong preference . . . that all investigative work . . . be carried out by the [corporation's] professional advisers."[386] "[D]ocument recovery and analysis will be a very significant issue in any investigation" and "[e]lectronic searches will be needed."[387] Additionally, the SFO expects the corporation to discuss the scope of its internal investigation and to provide regular updates.[388] Although it has observed that the corporation will bear the cost of an investigation,[389] the SFO stated that "[c]learly no report will ever cover every issue that could possibly be raised" and professes that it is "anxious not to put disproportionate cost on the corporates."[390]

DOJ has similarly stressed that cooperating corporations may be expected to share relevant information and evidence. In practice, this means that corporations often conduct internal investigations at their own cost as a necessary element of the voluntary disclosure.[391] For instance, the recent settlement of civil FCPA charges against oil services provider NATCO Group Inc. shows how a voluntary disclosure in the United States often requires the company to expand its internal investigation at significant cost.[392] In that matter, NATCO, which discovered problems in Kazakhstan during a routine audit, "expanded its investigation to examine . . . other worldwide operations, including Nigeria, Angola, and China, geographic locations with historic FCPA concerns."[393]

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385. *Id.*

386. Letter from Richard Alderman, Dir. U.K. Serious Fraud Office, to Marcus A. Asner, Arnold & Porter LLP 2 (Dec. 7, 2009), *available at* http://www.arnoldporter.com/resources/documents/FINAL_ASNER_LETTER.pdf [hereinafter Alderman Letter].

387. SFO Approach, *supra* note 38, at 5.

388. *Id.*

389. *Id.*

390. Alderman Letter, *supra* note 386, at 2.

391. *See, e.g.*, Principles of Federal Prosecution of Business Organizations, *supra* note 362, at 7 ("In gauging the extent of the corporation's cooperation, the prosecutor may consider, among other things, whether the corporation made a voluntary and timely disclosure, and the corporation's willingness to provide relevant information and evidence and identify relevant actors within and outside the corporation, including senior executives . . . . [A] corporation's cooperation may be critical in identifying potentially relevant actors and locating relevant evidence, among other things, and in doing so expeditiously.").

392. *See* NATCO Group Inc., Exchange Act Release No. 61325 (Jan. 11, 2010), *available at* http://www.sec.gov/litigation/admin/2010/34-61325.pdf ("NATCO undertook numerous remedial measures . . . [t]he company also . . . established new due diligence procedures regarding the vetting and retention of third-party intermediaries; increased staffing in its global compliance department, including the appointment of a full-time Chief Compliance Officer; . . . improved its FCPA compliance training worldwide, investing heavily in software to assist in enhancing internal controls and compliance; and restructured its internal audit function and enhanced its monitoring and auditing process for the compliance program.").

393. *Id.* at 4. The voluntary FCPA investigation that Avon Products, Inc., initiated in 2008 has also increased dramatically in its geographic scope and, presumably, in cost. *Compare Avon Statement on Voluntary Disclosure*, Int'l Bus. Times, Oct. 20, 2008, *available at* http://www.ibtimes.com/prnews/20081020/ny-avon-disclosure.htm (disclosing investigation into issues in China), *with* Ellen Byron, *Avon Bribery Probe Expands to Four Units*, WALL ST. J., May 1, 2010, *available at* http://online.wsj.com/article/SB10001424052748703871904575215913745075480.html (stating that the investigation "has expanded beyond China into four other international units").

2. Privilege

The concept of waiver of privilege differs between U.S. and U.K. law, and the SFO and U.S. enforcement authorities may expect cooperating corporations to disclose different types of information. SFO Director Alderman stated that the SFO expects to see the report of the internal investigation and "any notes of interviews during the course of the investigation."[394] But he qualified this by noting that he "cannot foresee the SFO wanting to review "the advice that lawyers are giving to the corporate on the investigation, the types of remediation to be offered and any issues regarding the conduct of the negotiations."[395]

In the United States, DOJ's view on privilege has changed substantially in the past few years. Pursuant to the McNulty Memorandum and the Thompson Memorandum, DOJ viewed waivers of the attorney-client privilege and work-product protection as indicia of authentic cooperation.[396] The McNulty Memorandum also permitted prosecutors to request waiver of attorney-client or work product protections if "there is a legitimate need for the privileged information to fulfill their law enforcement obligations."[397] By 2008, however, Congress began to express concern about DOJ's policies. Senator Arlen Specter introduced legislation that would ban DOJ from seeking attorney-client waivers in corporate investigations, and the U.S. House of Representatives actually passed similar legislation.[398] On June 26, 2008, Senate Judiciary Committee Chairman Patrick Leahy revealed that he had met with Deputy Attorney General Mark Filip to discuss his concerns about DOJ's approach to corporate attorney-client privilege and stated that he expected prompt action from DOJ.[399]

On August 28, 2008, then-Deputy Attorney General Mark Filip published the Filip Memorandum, which substantially modifies DOJ's policy defining cooperation. According to the Filip Memorandum, "[e]ligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection."[400] The Memorandum emphasizes that prosecutors "should not ask for such waivers and are directed not to do so."[401] But just as the SFO notes that it needs to see the report of any internal investigation and "any notes of interviews during the

394. Alderman Letter, *supra* note 386, at 3.

395. *Id.*

396. *See, e.g.*, Memorandum from Paul J. McNulty, Deputy Attorney Gen., U.S. Dep't of Justice, to the U.S. Attorneys, Heads of Dep't Components (Dec. 12, 2006), *available at* http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf (stating that "[w]aiver of attorney-client and work product protections is not a prerequisite to a finding that a company has cooperated in the government's investigation . . . [but] a company's disclosure of privileged information may permit the government to expedite its investigation . . . [and] may be critical in enabling the government to evaluate the accuracy and completeness of the company's voluntary disclosure.").

397. *Id.*

398. Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. (2007); Attorney-Client Privilege Protection Act of 2007, H.R. 3013, 110th Cong. (2007).

399. Lawrence Hurley, *Leahy Reveals Discussions with DOJ Over McNulty Memo*, WASHINGTON BRIEFS (June 28, 2008, 3:34 p.m.), http://washingtonbriefs.blogspot.com/2008/06/leahy-reveals-discussions-with-doj-over.html.

400. Principles of Federal Prosecution of Business Organizations, *supra* note 362, at 9.

401. *Id.*

course of the investigation,"[402] the Filip Memorandum provides that a corporation may need to provide factual information—possibly including information obtained in an internal investigation—to obtain cooperation credit.[403]

The Filip Memorandum does not apply to the SEC. The SEC may ask for a waiver of privilege with the approval of the Director or Deputy Director of Enforcement.[404] According to the Seaboard Report, the SEC will consider a company's self-reporting of misconduct and the disclosure of "the results of its review . . . [with] sufficient documentation" in assessing cooperation.[405] Additionally, the Seaboard Report states that "[i]n some cases, the desire to provide information to the Commission staff may cause companies to consider choosing not to assert the attorney-client privilege, the work product protection and other privileges, protections and exemptions with respect to the Commission."[406] Parties' legitimate assertion of attorney-client privilege or work product protection, however, "will not negatively affect their claim to credit for cooperation."[407]

### D. *Resolution*

Following an investigation, there are a variety of ways in which the enforcement authorities may resolve a case, including declining to take action. And as highlighted by M&J's guilty plea in July 2009 and the subsequent charging of David Mabey, the former chief of M&J, nearly six months later, the resolution of corporate enforcement actions may differ substantially from enforcement decisions regarding individuals included in the corporate conduct.[408]

#### 1. Resolution with the Company

In perhaps the most striking contrast with DOJ, the SFO has an expressed preference for civil settlements of self-reported cases. According to Director Alderman, the SFO will weigh the following questions when determining whether to treat a self-reported case as a criminal or civil matter:

- How serious is the wrongdoing?
- Is this an isolated incident or have there been other examples of this?

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402. Alderman Letter, *supra* note 386, at 3.

403. Principles of Federal Prosecution of Business Organizations, *supra* note 362, at 9; *See also United States v. Stein*, 541 F.3d 130, 136 (2d Cir. 2008) (on the same day the Filip Memorandum was issued, the Second Circuit held a company's decision not to pay their employees' legal fees—based on pressure from DOJ—violated the employees' Sixth Amendment rights).

404. ENFORCEMENT MANUAL, *supra* note 367, at 99–100 ("The staff should not ask a party to waive the attorney-client privilege or work product protection without prior approval of the Director or Deputy Director. A proposed request for a privilege waiver should be reviewed initially with the Assistant supervising the matter and that review should involve more senior members of management as appropriate before being presented to the Director or Deputy Director." (emphasis omitted)).

405. Report of Investigation Pursuant to § 21(a) of the Securities Exchange Act of 1934, *supra* note 365.

406. *Id.* at n.3.

407. ENFORCEMENT MANUAL, *supra* note 367, at 100.

408. *See, e.g.*, Michael Peel, *Ex-Mabey Chief to Face Graft Charges*, FIN. TIMES, Jan. 14, 2010, at 6 (using company confessions to prosecute individual executives).

- Is it systemic and part of the established business practice of the group?
- Have continuing Board members derived personal profit from the wrongdoing?
- Had the group been given warnings that its processes were inadequate?
- Did it fail to report within a reasonable time?
- Was the report detailed and complete?[409]

This is a major difference between the U.K. and U.S. enforcement regimes, as U.S. authorities have *not* expressed a preference for civil settlements of self-reported cases. In fact, at least eight of the approximately thirty-three corporate voluntary disclosure enforcement actions in the United States between 2004 and 2009 involved a guilty plea.[410] An additional seven corporate voluntary disclosure enforcement actions in that time period involved DPAs.[411] Moreover, U.S. authorities have not issued guidance articulating the criteria that they apply in deciding whether to deal with a self-reported case criminally or civilly.

In cases where the SFO does not seek criminal sanctions, it will consider the following settlement terms:

- "restitution by way of civil recovery to include the amount of the unlawful property, interest and our costs,"
- "monitoring by an independent, well qualified individual nominated by the corporate and accepted by [the SFO]" that is "proportionate to the issues involved,"
- "a programme of culture change and training agreed with [the SFO],"
- "discussion, where necessary, and to the extent appropriate, about individuals," and
- "a public statement agreed by the corporate and the SFO . . . to provide transparency so far as possible for the public."[412]

Because of the SFO's limited corporate prosecution track record, it is difficult to assess and compare the approaches of the U.S. and U.K. regimes to monetary penalties and other settlement terms. As noted, M&J paid a total penalty of £6.6 million and agreed to retain an independent monitor,[413] and AMEC PLC paid nearly £5 million pursuant to a Civil Recovery Order.[414]

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409. Alderman Letter, *supra* note 386, at 1.

410. FCPA DATA, *supra* note 346.

411. *Id.*

412. SFO Approach, *supra* note 38, at 6; *see also* Richard Alderman, Director of the SFO, Tackling Corruption—Working Smarter, Address at the International Association of Anti-Corruption Authorities (Oct. 4, 2008), *available at* http://www.sfo.gov.uk/about-us/our-views/speeches/speeches-2008/tackling-corruption---working-smarter.aspx ("[I]t would be permissible to restrict the territories in which an offending company could operate or to limit the types of goods and services a company could offer.").

413. Mabey & Johnson Sentencing, *supra* note 337.

414. Press Release, Serious Fraud Office, SFO Obtains Civil Recovery Order Against AMEC PLC (Oct. 26, 2009), *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/sfo-obtains-civil-recovery-order-against-amec-plc.aspx.

The SFO has indicated that some voluntary disclosure cases have been closed without the SFO taking any action.[415] Director Alderman noted that such cases involved "special circumstances" and the companies paid "suitable remediation to the countr[ies] involved."[416] Alderman emphasized that these cases "will remain comparatively rare because there is a very strong public interest in this jurisdiction in publicity for the settlement and for the involvement of a [j]udge including a judge in our civil courts agreeing to a civil recovery order."[417]

Similarly, DOJ has represented that "despite rumors to the contrary, [DOJ does] decline prosecution in appropriate cases."[418] Assistant Attorney General Breuer stated that DOJ "recognize[s] that there will be situations in which guilty pleas or criminal charges are not appropriate" and is "mindful of the direct impact on the company itself, as well as the numerous collateral consequences that often flow from these charging decisions."[419] Breuer emphasized that DOJ's attorneys are "sophisticated" and "understand the challenges and complexities involved in doing business around the globe."[420] But voluntary disclosures that do not result in prosecutions—on either side of the Atlantic—are "dogs that don't bark," and so understanding and comparing the prosecutors' approach to them is virtually impossible.

#### 2. Prosecution of Individuals

In contrast to its preference for civil enforcement actions against corporations that self-report, the SFO states that "[t]here are no guarantees" for criminal investigations of individuals employed by the self-reporting entity and that it will "assess the position of individuals on their merits."[421] The questions that the SFO will ask in evaluating individual conduct include the following:

- how involved were the individuals in the corruption (whether actively or through failure of oversight)?
- what action has the company taken?
- did the individuals benefit financially and, if so, do they still enjoy the benefit?
- if they are professionals should [the SFO] be working with the appropriate Disciplinary Bodies?
- should [the SFO] be looking for Directors' Disqualification Orders?

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415. Alderman Letter, *supra* note 386, at 3.

416. *Id.*

417. *Id.*

418. Breuer, *supra* note 333.

419. *Id.*

420. *Id.*

421. SFO Approach, *supra* note 38, at 4; *see also* Richard Alderman, Director of Serious Fraud Office, Combating Corruption and Bribery: the SFO perspective, Speech at the Anti-Corruption and Bribery Conference (Nov. 18, 2008), *available at* http://www.sfo.gov.uk/about-us/our-views/director%27s-speeches/speeches-2008/combating-corruption-and-bribery-the-sfo-perspective.aspx (asserting that the SFO will "want to consider whether to commence [its] own investigation [of individuals] (leading possibly to prosecution) irrespective of what we do in respect of the corporate").

- should [the SFO] think about a Serious Crime Prevention Order?[422]

Although the SFO obtained no convictions of individuals for overseas corruption in 2009, in December of that year it brought the Dougall prosecution for allegedly making illegal payments and/or other inducements to Greek public healthcare professionals.[423] Additionally, in January 2010, the SFO announced that it planned to charge David Mabey, the former chief of M&J, with false accounting and breach of U.N. sanctions in Iraq[424] with regard to the corrupt business practices at M&J (to which the company pleaded guilty in July 2009).[425]

U.S. enforcement authorities have aggressively prosecuted individuals for FCPA violations, and in 2009, more individuals were tried and criminally convicted for FCPA violations (four) than in any other year.[426] Assistant Attorney General Breuer contends that this "is no accident."[427] He recently explained that the "prosecution of individuals is a cornerstone of [DOJ's] enforcement strategy.... Put simply, the prospect of significant prison sentences for individuals should make clear to every corporate executive, every board member, and every sales agent that we will seek to hold you personally accountable for FCPA violations."[428]

The trend appears likely to continue in 2010. On January 19, 2010, DOJ indicted twenty-two executives and employees from military/law enforcement product companies for allegedly attempting to bribe foreign officials to obtain business.[429] Significantly, the investigation involved the use of undercover law enforcement officials to detect the alleged FCPA violations.[430] Further, on April 19, 2010, a U.S. federal court sentenced a former executive of Ports Engineering

422. SFO Approach, *supra* note 38, at 4.

423. Press Release, Serious Fraud Office, Former Vice President of DePuy International Ltd. Charged with Corruption (December 1, 2009), *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/former-vice-president-of-depuy-international-ltd-charged-with-corruption.aspx.

424. Michael Peel, *Ex-Mabey Chief to Face Graft Charges*, FIN. TIMES, Jan. 14, 2010, at 6, *available at* http://www.ft.com/cms/s/0/d2208ebe-00ac-11df-ae8d-00144feabdc0.html.

425. Prosecution Opening Note, Regina v. Mabey and Johnson Ltd., No. T2009 7513, para. 17 [2009] Southwark Crown Court, *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/maybey--johnson-ltd-sentencing.apsx; Mabey & Johnson Sentencing, *supra* note 337.

426. Frederic Bourke was convicted of conspiracy to violate the FCPA and sentenced to one year imprisonment for his alleged participation in a business partnership engaged in a bribery scheme in Azerbaijan. Congressman William Jefferson received a thirteen year prison sentence following his conviction for conspiracy, although Jefferson was acquitted on the substantive FCPA count, and the verdict form did not specify which alleged objects of the conspiracy served as the basis for the guilty verdict. Finally, two Hollywood firm executives, Gerald and Patricia Green, were tried and convicted in September 2009 of nine substantive FCPA counts and one conspiracy count for allegedly bribing the former head of the Thai Tourism Authority in exchange for Thai government contracts. Additionally, four former executives of Control Components, Inc., were indicted in April 2009 and are scheduled for trial in November 2010 for alleged FCPA violations. Christopher M. Matthews, *Justice Racks up More FCPA Convictions*, MAIN JUST., Sept. 14, 2009, *available at* http://www.mainjustice.com/justanticorruption/2009/09/14/justice-wracks-up-more-fcpa-convictions/; Breuer, *supra* note 333.

427. Breuer, *supra* note 333.

428. *Id.*

429. Ashby Jones, *FCPA Goin' Prime Time: Huge Bribery Sting Leads to Arrest of 22*, WALL ST. J. LAW BLOG (Jan. 19, 2010, 5:55 PM), http://blogs.wsj.com/law/2010/01/19/fcpa-goin-prime-time-huge-bribery-sting-leads-to-arrest-of-22.

430. *Id.*

Consultants Corporation to eighty-seven months in prison, the longest term of incarceration imposed to date in an FCPA case.[431]

3. Independent Compliance Monitorships

Both enforcement regimes consider appointment of a monitor to be an important settlement term. In U.S. enforcement actions from 2004 through 2009, twenty-three of the thirty-nine companies (fifty-nine percent) that entered into a resolution of FCPA violations with the SEC or DOJ received a compliance monitorship as a term of their agreement with the Government.[432] In the first half of 2010, fifty-seven percent of corporate FCPA settlements required the retention of monitors. Assistant Attorney General Breuer recently emphasized that "corporate monitors continue to play a crucial role and responsibility in ensuring the proper implementation of effective compliance measures and in deterring and detecting future violations."[433]

The SFO may be following suit on this front, as M&J received a monitor as a condition of settlement.[434] But significant differences exist between the two regimes, particularly in regard to the amount of guidance provided by the enforcement authorities concerning the selection of a monitor and the scope of a monitor's responsibilities. In cases where the SFO determines that a monitor is necessary, it will impose "light touch monitoring" to help "the Board carry out its commitment to the anti-corruption culture."[435] The SFO has indicated that it would expect "the Board to come to [the SFO] with proposals about a monitor they [sic] would like to work with," "would regard it as no job of the SFO to impose a particular monitor against the wishes of the Board," and would "expect to be able to reach agreement on the scope of the monitoring needed."[436]

In contrast to this general guidance from the SFO, DOJ has promulgated detailed guidelines regarding the selection process for an external monitor, the scope of a monitor's responsibilities, and other issues. A memorandum issued by then-Acting Deputy Attorney General Craig S. Morford (Morford Memorandum) on March 10, 2008, provides the relevant guidance.[437] First, the Morford Memorandum requires the creation of a "standing or *ad hoc* committee in the Department component or office where the case originated to consider monitor candidates," prohibits individual prosecutors from "mak[ing], accept[ing], or veto[ing] the selection of monitor candidates unilaterally," and requires that the Office of the

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431. GIBSON, DUNN & CRUTCHER LLP, *2010 Mid-Year Update*, supra note 357.

432. F. Joseph Warin, Michael S. Diamant, & Veronica S. Root, *Somebody's Watching Me: FCPA Monitorships and How They Can Work Better*, 13 U. PA. J. BUS. L. (forthcoming early 2011).

433. Breuer, *supra* note 333.

434. Mabey & Johnson Sentencing, *supra* note 337. AMEC also agreed to appoint an independent consultant to review its ethics, compliance and accounting standards and report his or her findings to the SFO. Press Release, Serious Fraud Office, SFO Obtains Civil Recovery Order Against AMEC PLC (Oct. 26, 2009) *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/sfo-obtains-civil-recovery-order-against-amec-pkc.aspx.

435. Alderman Letter, *supra* note 386, at 2.

436. *Id.*

437. Memorandum from Craig S. Morford, Acting Deputy Att'y Gen., U.S. Dep't of Just., to Heads of Dep't Components and U.S. Attorneys (Mar. 7, 2008), para. 3, *available at* http://www.justice.gov /dag/morford-useofmonitorsmemo-03072008.pdf.

Deputy Attorney General approve all monitors.[438] A monitor may not have "an interest in, or relationship with, the corporation or its employees, officers or directors that would cause a reasonable person to question the monitor's impartiality" and must be prohibited from employment or affiliation with the corporation for at least one year from the date of the end of the monitorship.[439]

Second, the Morford Memorandum defines the scope of the monitor's responsibilities. The Memorandum states that the monitor is "an independent third-party, not an employee or agent of the corporation or of the Government" and therefore the corporation may not seek or obtain legal advice from its monitor.[440] Instead, the monitor's purpose is to "assess and monitor a corporation's compliance with those terms of the agreement that are specifically designed to address and reduce the risk of reoccurrence of the corporation's misconduct."[441] The corporation has the responsibility for designing and maintaining its compliance program, "subject to the monitor's input, evaluation and recommendations."[442] Additionally, the Morford Memorandum notes that the monitor's role is to analyze ongoing compliance efforts and not to "investigate historical misconduct."[443]

Perhaps moving toward the SFO's "light touch" approach, DOJ has recently begun to permit self-monitoring in select cases. On July 30, 2009, Helmerich & Payne, Inc. (H&P) settled FCPA charges with the SEC and DOJ for allegedly improper payments to customs officials in Argentina and Venezuela.[444] H&P paid a $1 million criminal fine to DOJ and disgorged $375,681.22 in illicit profits and prejudgment interest to the SEC.[445] Significantly, DOJ agreed to allow H&P to self-monitor and report on the implementation of its improved compliance policies without requiring the retention and oversight of an external compliance monitor.[446] Speaking at a conference in November 2009, Assistant Attorney General Breuer explained that H&P's "forward leaning, pro-active, highly cooperative approach" to DOJ's investigation influenced DOJ's decision to allow H&P to self-monitor.[447] On December 31, 2009, UTStarcom, Inc., settled FCPA charges with DOJ and the SEC,

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438. *Id.* DOJ remains keen on ensuring the qualifications of monitors. *See, e.g.*, Jeremy Pelofsky, *BAE Says US Agrees to Extend Time to Hire Monitor*, REUTERS, June 3, 2010, *available at* http://in.reuters.com/article/idINN0324269720100603?feedType=RSS&feedName=everything&virtualBrandChannel=11709 (describing DOJ's rejection of three monitor candidates proposed by BAE).

439. Morford, *supra* note 437, at 3.

440. *Id.* at 4–5.

441. *Id.* at 5.

442. *Id.*

443. Morford, *supra* note 437, at 6. More recently, DOJ supplemented the Morford Memorandum by defining the role DOJ can play in resolving disputes between the monitor and the company being monitored. Memorandum from Gary G. Grindler, Acting Deputy Attorney Gen., U.S. Dep't of Justice, to Heads of Dep't Components U.S. Attorneys (May 25, 2010), *available at* http://www.justice.gov/dag/dag-memo-guidance-monitors.html.

444. Helmerich & Payne, Inc., Exchange Act Release No. 60400, 2009 WL 2341649 (July 30, 2009) (cease and desist order), *available at* http://www.sec.gov/litigation/admin/2009/34-60400.pdf; Letter from Steven A. Tyrrell, Chief, Fraud Section, Crim. Div., U.S. Dep't of Justice, to Kimberly A. Parker, Wilmer Cutler Pickering Hale and Dorr LLP (July 28, 2009), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/docs/06-29-09helmerich-agree.pdf.

445. Helmerich & Payne, Inc., Exchange Act Release No. 60400, 2009 WL 2341649, at § IV(ii) (July 30, 2009) (cease and desist order), *available at* http://www.sec.gov/litigation/admin/2009/34-60400.pdf.

446. Breuer, *supra* note 333.

447. *Id.*

paying a $1.5 million criminal fine and a $1.5 million civil penalty to the respective agencies.[448] Similar to H&P, UTStarcom was permitted to self-monitor and report on its implementation of improved compliance policies.[449]

The SFO has not publicly opined about the possibility of self-monitoring. But SFO Director Alderman has stated that "[n]ot all cases will require a monitor," such as instances of a "one off lapse in an ethical corporate with a very strong anti-corruption culture, particularly if the corporate has shown [the SFO] that this was picked up and remedied by its own processes."[450]

Finally, both regimes recognize the costs of imposing a monitor on a company. The SFO stated that it would like to "ensur[e] that the monitoring process strikes the right balance between assuring the public that the corporate is genuinely committed to the new anti-corruption culture while not imposing disproportionate burdens on the corporate."[451] Consistent with this policy, M&J's sentence provided for a first year monitoring cost of up to £250,000.[452] Assistant Attorney General Breuer similarly has acknowledged that "[i]n appropriate cases, we will also continue to insist on a corporate monitor, mindful that monitors can be costly and disruptive to a business, and are not necessary in every case."[453] The SEC and DOJ, however, have not limited the fees charged by independent compliance monitors.

The recent Innospec enforcement action not only sheds light on current U.S. attitudes toward FCPA monitors, but does so in the context of an enforcement action arising out of parallel U.S. and U.K. prosecutions. Innospec, an international chemical company with principal offices in both the United States and England, was investigated for improper payments in Iraq and Indonesia.[454] Pursuant to a plea agreement with U.S. regulators, Innospec consented to entry of a court order in federal court "without admitting or denying" the SEC's allegations.[455] As part of that plea agreement, Innospec agreed to hire a compliance monitor for three years.[456] Perhaps further supporting U.S. regulators' trend to a "light touch" approach, presiding U.S. District Judge Ellen Segal Huvelle pointedly criticized some monitorships: "It's an outrage, that people get $50 million to be a monitor."[457] Judge Huvelle went further, adding that she was "not comfortable, frankly, signing off on something that becomes a vehicle for someone to make lots of money."[458] While

448. Press Release, Department of Justice, UTStarcom Inc. Agrees to Pay $1.5 Million Penalty for Acts of Foreign Bribery in China para. 4 (Dec. 31, 2009), *available at* http://www.justice.gov/opa/pr/2009/December/09-crm-1390.html.

449. *Id.*

450. Alderman Letter, *supra* note 386, at 2.

451. *Id.*

452. Mabey & Johnson Sentencing, *supra* note 337.

453. Breuer, *supra* note 333.

454. Press Release, U.S. Sec. and Exch. Comm'n, SEC Charges Innospec for Illegal Bribes to Iraqi and Indonesian Officials para. 6 (Mar. 18, 2010), *available at* http://www.sec.gov/news/press/2010/2010-40.htm.

455. *Id.* para. 14.

456. *Id.*

457. Christopher M. Matthews, *Judge Blasts Compliance Monitors at Innospec Plea Hearing*, MAIN JUSTICE (Mar. 18, 2010, 7:45 PM), http://www.mainjustice.com/2010/03/18/judge-blasts-compliance-monitors-at-innospec-plea-hearing/ (suggesting that Judge Huvelle was referring to a $52 million monitoring contract that was given by current New Jersey Governor Chris Christie to former U.S. Attorney General John Ashcroft in 2007).

458. *Id.*

Judge Huvelle ultimately accepted Innospec's plea, her comments during the plea hearing may suggest a trend toward lower-cost, less-intrusive monitorships in the U.S. context. Further, as will be discussed in Part IV below, the Innospec enforcement action serves as a harbinger of future cooperative enforcement actions between the United States and the United Kingdom.

*E. Best Practices*

Besides promptly self-reporting overseas corruption issues to the relevant authority, companies can take two other precautions to mitigate subsequent enforcement actions. First, a company may seek an opinion of the SFO or DOJ regarding prospective conduct. Second, and more generally, a company can adopt recommended compliance policies and procedures.

1. Opinion Procedure

In the United States, a company may "obtain an opinion of the Attorney General as to whether certain specified, prospective—not hypothetical—conduct conforms with the Department's present [FCPA] enforcement policy."[459] Although these opinions are made publicly available, only a party that joins in the request may authoritatively rely on it. Since the inception of the FCPA, DOJ has issued fifty-one opinions, including three in 2008, one in 2009, and three in 2010.[460]

For example, on August 3, 2009, DOJ issued its only opinion of the year in response to a submission from a U.S. medical device company.[461] The company inquired whether it could donate one-hundred sample devices, along with any necessary accessories and support (valued at approximately $1.9 million) to ten government medical centers in a foreign country at the request of a senior foreign government official.[462] The company represented that the foreign country planned to purchase some of the devices, but first wanted to evaluate them.[463] Among other conditions designed to reduce corruption risks, the company asserted that the patients who would receive the sample devices would be selected, based on economic need, by a working group of healthcare professionals in the country, including a physician who had received FCPA training.[464] In FCPA Opinion Procedure Release No. 2009-01, DOJ concluded that the company's proposed donation fell "outside the scope of the FCPA in that the donated products will be provided to the foreign government, as opposed to individual government officials, for ultimate use by patient recipients selected in accordance with specific guidelines."[465]

459. 28 C.F.R. § 80.1 (1992).

460. *See* DOJ Opinion Procedure Releases, http://www.justice.gov/criminal/fraud/fcpa/opinion/ (collected U.S. DEP'T OF JUSTICE Opinion Procedure Releases organized by year, specifically Foreign Corrupt Practices Act No. 10-03, 10-02, 10-01, 9-01, 8-03, 8-02, 8-01).

461. DOJ Opinion Procedure Release, No. 09-01 (Aug. 3, 2009), at 1, *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2009/0901.pdf.

462. *Id.*

463. *Id.*

464. *Id.*

465. *Id.*

Similar to DOJ, the SFO now offers to provide opinions regarding potential foreign corruption issues. At least initially, the SFO stated that it would provide opinions regarding potential corporate acquisitions where the acquiring company discovered overseas corruption issues in a proposed acquiree during the course of due diligence.[466] The SFO represented that it might be able to assure that it would not take any enforcement action if the acquiring company took the appropriate remedial action identified by the SFO. But in cases where "the corruption is long lasting and systemic," the SFO may still consider a criminal investigation.[467] More recently, SFO staff explained that the SFO "envisions any opinions it issues as not commenting on particular facts, but rather providing more general advice on best practice."[468] The staff noted, however, that the SFO is willing to "review and discuss in detail draft guidance prepared by companies."[469] The SFO staff also noted it would consider other views regarding the opinion procedure.[470]

Thus, at least two major differences exist between DOJ's and the SFO's opinion procedures. First, the SFO currently circumscribes its opinion procedure to macrocosmic "best practices" guidance. Second, the SFO has not yet issued any guidance detailing the process for requesting and obtaining an opinion. And to date, the SFO has not issued any opinions.[471]

2. Compliance Policies

Both the U.K. and U.S. authorities have outlined compliance policies and procedures for companies to adopt. As discussed above, the Ministry of Justice recently released draft guidance on "adequate procedures" that provided six general qualities of an effective anti-bribery compliance program. In its current form, the guidance is "not prescriptive" and "do[es] not propose any particular procedures in themselves."[472] It remains to be seen what final form it will take. Similarly to the Ministry of Justice draft guidance, the U.S. guidance, as set forth in the United States Sentencing Guidelines (U.S.S.G.), addresses anti-corruption compliance generally, without prescribing specific measures.[473] In contrast with the draft guidance and the U.S.S.G., the SFO's guidance on self-reporting, released last year, suggests with somewhat greater specificity policies and procedures to deal directly with foreign corruption. But it remains unclear whether the SFO will incorporate these older guidelines into its understanding of "adequate procedures" for purposes of section 7 of the Bribery Act. Much like the adequate procedure defense, the U.S.S.G.'s guidance provides a tangible benefit—a three-point reduction in a company's U.S.S.G. "culpability" score.[474]

According to the SFO's commentary, examples of procedures that the SFO will "look for" include the following:

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466. SFO Approach, *supra* note 38, at 7.

467. *Id.*

468. GIBSON, DUNN & CRUTCHER LLP, *UK Serious Fraud*, *supra* note 148.

469. *Id.*

470. *Id.*

471. But, as noted, the SFO did not announce until July 21, 2009, that it would provide opinions. SFO Approach, *supra* note 38, at 7.

472. MINISTRY OF JUSTICE, *supra* note 156, at *Annex A*.

473. U.S. SENTENCING GUIDELINES MANUAL §§ 8B2.2, 8C2.5 (2009).

474. *Id.* § 8C2.5(f).

- a clear statement of an anti-corruption culture fully and visibly supported at the highest levels in the corporate.
- a Code of Ethics.
- principles that are applicable regardless of local laws or culture.
- individual accountability.
- a policy on gifts and hospitality and facilitation payments.
- a policy on outside advisers/third parties including vetting and due diligence and appropriate risk assessments.
- a policy concerning political contributions and lobbying activities.
- training to ensure dissemination of the anti-corruption culture to all staff at all levels within the corporate.
- regular checks and auditing in a proportionate manner.
- a helpline within the corporate which enables employees to report concerns.
- a commitment to making it explicit that the anti-bribery code applies to business partners.
- appropriate and consistent disciplinary processes.[475]

The SFO also emphasizes in its guidance that it will "be looking closely at the culture within the corporate to see how well the processes really reflect what is happening in the corporate."[476]

Under the U.S.S.G., a "culpability" score is calculated for an organization convicted of a criminal offense. If the organization "had in place at the time of the offense an effective compliance and ethics program [as defined by the Guidelines]" the organization's culpability score will be reduced.[477] According to U.S.S.G. § 8B2.1, an organization has "an effective compliance and ethics program" if it "exercise[s] due diligence to prevent and detect criminal conduct [and] otherwise promote[s] an organizational culture that encourages ethical conduct and a commitment to compliance with the law."[478] To satisfy these two criteria, the organization must at least do the following:

- "establish standards and procedures to prevent and detect criminal conduct";
- ensure that the organization's governing authority is "knowledgeable about the content and operation of the compliance and ethics program and . . . exercise[s] reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program";
- assign "[s]pecific individual(s) within high-level personnel . . . overall responsibility for the compliance and ethics program";
- assign "[s]pecific individual(s) within the organization . . . day-to-day operational responsibility for the compliance and ethics program," require

475. SFO Approach, *supra* note 38, at 7.

476. *Id.*

477. SENTENCING GUIDELINES, *supra* note 473, § 8C2.5.

478 *Id.*, § 8B2.1.

those individuals to "report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program," and give those individuals "adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority";

- "use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program";
- "take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program";
- "take reasonable steps . . . to ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct[,] . . . to evaluate periodically the effectiveness of the organization's compliance and ethics program; and . . . to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation";
- "promote[] and enforce[] consistently throughout the organization [the compliance program] through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct";
- "take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program"; and
- "periodically assess the risk of criminal conduct and . . . take appropriate steps to design, implement, or modify each requirement . . . to reduce the risk of criminal conduct identified through this process."[479]

In addition to the U.S.S.G., companies subject to U.S. jurisdiction may look to DOJ's FCPA Opinion Release No. 04-02, which highlights key components of an FCPA compliance program.[480] According to Release No. 04-02, an investment group (requestors) made a request relating to an acquisition of companies and assets from ABB Ltd.[481] After signing a preliminary agreement relating to the acquisition, the requestors engaged separate counsel to conduct an FCPA compliance review of the acquired businesses, and approximately nine months later, two of the acquired businesses (ABB Vetco Gray, Inc., and ABB Vetco Gray (UK) Ltd.) entered guilty pleas to violations of the FCPA and settled SEC enforcement actions.[482] Among

479. *Id.* § 8B2.1.

480. DOJ Opinion Procedure Release, No. 04-02 (July 12, 2004), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2004/0402.pdf.

481. *Id.*

482. *Id.*

other precautions that the requestors represented they would take; such as continuing to cooperate with DOJ and SEC investigations and ensuring that employees who made unlawful or questionable payments were disciplined, they represented that they would require that the newly acquired entities "adopt a rigorous anti-corruption compliance code . . . that is designed to detect and deter violations of the FCPA and foreign anti-corruption laws."[483] The release states that the compliance code would consist of the following elements:

> (A) A clearly articulated corporate policy against violations of the FCPA and foreign anti-bribery laws and the establishment of compliance standards and procedures to be followed by all directors, officers, employees, and all business partners, including, but not limited to, agents, consultants, representatives, and joint venture partners and teaming partners, involved in business transactions, representation, or business development or retention in a foreign jurisdiction (respectively, "Agents"; and "Business Partners") that are reasonably capable of reducing the prospect that the FCPA or any applicable foreign anti-corruption law of [the] Compliance Code will be violated;
>
> (B) The assignment to one or more independent senior [newly acquired entity] corporate officials, who shall report directly to the Compliance Committee of the Audit Committee of the Board of Directors, of responsibility for the implementation and oversight of compliance with policies, standards, and procedures established in accordance with [the] Compliance Code;
>
> (C) The effective communication to all shareholders' representatives directly involved in the oversight of [the newly acquired entity] ("Shareholders") and to all directors, officers, employees, Agents, and Business Partners of corporate and compliance policies, standards, and procedures regarding the FCPA and applicable foreign anti-corruption laws, by requiring (i) regular training concerning the requirements of the FCPA and applicable foreign anti-corruption laws on a periodic basis to all Shareholders, directors, officers, employees, Agents, and Business Partners and (ii) annual certifications by all Shareholders, directors, officers, employees, including the head of each [newly acquired entity] business or division, Agents, and Business Partners certifying compliance therewith;
>
> (D) A reporting system, including a "Helpline"; for directors, officers, employees, Agents, and Business Partners to report suspected violations of the Compliance Code or suspected criminal conduct;
>
> (E) Appropriate disciplinary procedure to address matters involving violations or suspected violations of the FCPA, foreign anti-corruption laws, or the Compliance Code;
>
> (F) Clearly articulated corporate procedures designed to assure that all necessary and prudent precautions are taken to cause [the newly acquired entity] to form business relationships with reputable and qualified Business Partners;

483. *Id.*

> (G) Extensive pre-retention due diligence requirements pertaining to, as well as post-retention oversight of, all Agents and Business Partners, including the maintenance of complete due diligence records at [the newly acquired entity];
>
> (H) Clearly articulated corporate procedures designed to ensure that [the newly acquired entity] exercises due care to assure that substantial discretionary authority is not delegated to individuals whom [the newly acquired entity] knows, or should know through the exercise of due diligence, have a propensity to engage in illegal or improper activities;
>
> (I) A committee consisting of senior [newly acquired entity] corporate officials to review and to record, in writing, actions relating to (i) the retention of any Agent or subagents thereof, and (ii) all contracts and payments related thereto;
>
> (J) The inclusion in all agreements, contracts, and renewals thereof with all Agents and Business Partners of provisions: (i) setting forth anti-corruption representations and undertakings; (ii) relating to compliance with foreign anti-corruption laws and other relevant laws; (iii) allowing for internal and independent audits of the books and records of the Agent or Business Partner to ensure compliance with the foregoing; and (iv) providing for termination of the Agent or Business Partner as a result of any breach of applicable anti-corruption laws and regulations or representations and undertakings related thereto;
>
> (K) Financial and accounting procedures designed to ensure that [the newly acquired entity] maintains a system of internal accounting controls and makes and keeps accurate books, records, and accounts, and;
>
> (L) Independent audits by outside counsel and auditors, at no longer that three-year intervals, to ensure that the Compliance Code, including its anti-corruption provisions, are implemented in an effective manner.[484]

Based on these representations, DOJ stated that it "does not presently intend to take an enforcement action against the requestors or their recently-acquired entities for violations of the FCPA committed prior to their acquisition."[485] DOJ cautioned, however, that "[a]lthough the Department views the Requestors' representation concerning a compliance program to be significant precautions against future violations of the FCPA, the Department's opinion should not be deemed to endorse any specific aspect of the Requestors' program."[486] Additionally, as with all DOJ FCPA Opinion Releases, the release does not bind parties that did not join the request.[487]

In keeping with the prescriptive guidance of Opinion Release No. 04-02, DOJ's DPAs typically include a section setting forth the "minimum . . . elements" of an effective anti-corruption control framework.[488] The standard set of minimum

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484. *Id.*

485. DOJ Opinion Procedure Release, No. 04-02, *supra* note 480.

486. *Id.*

487. *Id.*

488. Deferred Prosecution Agreement, Attachment C, United States v. Technip S.A., Crim. No. H-10-439 (5th Cir. June 28, 2010); Deferred Prosecution Agreement, Attachment C, United States v. Daimler AG, No.1:10-cr-00063 (D.C. Cir. Mar. 22, 2010); Deferred Prosecution Agreement, Attachment

requirements contained in DPAs closely track the elements delineated in Opinion Release No. 04-02.[489] Notably, in more recent DPAs, DOJ has mandated that the entity conduct "[p]eriodic testing" of the entity's compliance policies and procedures "to evaluate their effectiveness in detecting and reducing violations of the FCPA," other anti-corruption laws, and the entity's policies.[490]

### *F. An Upward Trajectory*

In the United States, FCPA enforcement increased dramatically during the past six years. Between January 1, 2006, and June 30, 2010, U.S. enforcement authorities brought 162 cases[491]—more than the entire number of prosecutions brought between 1977 and 2005.[492] The acceleration of prosecutorial activity is even more remarkable: in 2004, DOJ only brought two cases and the SEC brought three cases; in 2009, DOJ brought twenty-six cases and the SEC brought fourteen cases.[493] By the midpoint of 2010, DOJ had initiated twenty-seven cases and the SEC nine.[494]

The promulgation of the SFO's voluntary disclosure guidelines—modeled partly on the U.S. regime—and establishment of the "Anti-Corruption Domain" work area may position the United Kingdom to see a similar growth in overseas corruption prosecutions in the next few years. Moreover, as discussed above, the passage of the Bribery Act expanded the United Kingdom's anti-corruption enforcement toolkit and will almost certainly drive an increase in global enforcement. As identified in this article, substantive differences exist between the two approaches and, therefore, it is imperative for global corporations to examine the U.K. regime as well as the U.S. regime when contemplating future disclosures involving foreign corruption and, more generally, in their approach to complying with the Bribery Act and the FCPA.

## IV. FUTURE TRANSATLANTIC COOPERATION

What can companies expect the global regulatory and enforcement framework to look like in the next few years? There will clearly be large multinational corporations whose multi-jurisdictional structures will bring them within the jurisdictional ambit of both the FCPA and the Bribery Act. Indeed, even before the advent of the Bribery Act, U.S. and U.K. authorities had increased their efforts at

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C, United States v. Willbros Group, Inc., Crim. No. H-08-287 (5th Cir. May 14, 2008); Deferred Prosecution Agreement, United States v. York Int'l Corp., Crim. No. 07-00253, at 8–10 (D.C. Cir. Oct. 1, 2007).

489. Deferred Prosecution Agreement, Attachment C, United States v. Willbros Group, Inc., Crim. No. H-08-287 (5th Cir. May 14, 2008).

490. Deferred Prosecution Agreement, Attachment C, United States v. Technip S.A., Crim. No. H-10-439 (5th Cir. June 28, 2010) (requiring "[p]eriodic testing of the compliance code, standards, and procedures to evaluate their effectiveness in detecting and reducing violations of the FCPA, . . . other applicable anti-corruption laws, and [the entity's] policy against such violations"). *See also* Deferred Prosecution Agreement, Attachment C, United States v. Daimler AG, No.1:10-cr-00063 (D.C. Cir. Mar. 22, 2010).

491. GIBSON, DUNN & CRUTCHER LLP, *2010 Mid-Year Update*, *supra* note 357.

492. Stephen Fishbein & Danforth Newcomb, *Compliance Advisers Reduce FCPA Risk*, CORPORATE COUNSEL, May 26, 2010, http://www.law.com/jsp/cc/PubArticleFriendlyCC.jsp?id=1202458742540.

493. GIBSON, DUNN & CRUTCHER LLP, *2009 Year-End FCPA Update*, *supra* note 357.

494. GIBSON, DUNN & CRUTCHER LLP, *2010 Mid-Year Update*, *supra* note 357.

transatlantic cooperative enforcement.[495] The enactment of the Bribery Act will only add to this trend's forward momentum. Moreover, the new Bribery Act may serve as an international signal—prodding states that consider themselves international economic forces, such as China, Japan, and the countries of the European Union, to ramp up their anti-corruption efforts. A recent spate of anti-corruption enforcement actions highlights the future of transatlantic cooperation.

The investigation into BAE eventually led to guilty pleas on both sides of the Atlantic.[496] Although the SFO did not explicitly prosecute the Al Yamamah contracts, the U.K. regulator did enter a settlement agreement with BAE regarding its activities in Tanzania.[497] In the press release, citing the "ground breaking global agreement," Director Alderman declared: "I am very pleased with the global outcome achieved collaboratively with DOJ. This is a first and it brings a pragmatic end to a long-running and wide-ranging investigation."[498] Even though the SFO's handling of the Al Yamamah investigation may have brought criticism and pressure upon the office, the BAE enforcement action is most likely a harbinger of U.S. and U.K. cooperation in anti-corruption efforts.

Another recent corruption-related investigation—into Alstom, a multinational power and transportation conglomerate—confirms the SFO's increased enforcement efforts.[499] On March 24, 2010, the SFO arrested three Alstom officials in connection with corrupt overseas payments.[500] According to the press release, the investigation involved close cooperation with U.S. and Swiss authorities.[501] SFO Director Alderman again emphasized that the SFO is "working closely with other criminal justice organizations across the world" to tackle global corruption.[502] As discussed above, these efforts are likely to continue increasing, especially in light of the enactment of the Bribery Act and the continued publicity garnered by these corruption investigations.

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495. *See supra* Part I and accompanying discussion (describing the impetus for the passage of the Bribery Act).

496. *BAE Pleads Guilty*, FCPA BLOG (Mar. 1, 2010, 5:43 PM), http://fcpablog.squarespace.com/blog/2010/3/1/bae-pleads-guilty.html; Press Release, Dep't of Justice, BAE Systems PLC Pleads Guilty and Ordered to Pay $400 Million Criminal Fine (Mar. 1, 2010), *available at* http://www.justice.gov/opa/pr/2010/March/10-crm-209.html.

497. Press Release, Serious Fraud Office, BAE Sys. PLC (Feb. 5, 2010), *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/bae-systems-plc.aspx.

498. *Id.*

499. Sandra Laville & Rob Evans, *Three Directors of Rail Engineering Firm Alstom Held in Bribery Investigation*, GUARDIAN, Mar. 25, 2010, at 10, *available at* http://www.guardian.co.uk/business/2010/mar/24/alstom-directors-bribery-dawn-raids.

500. Press Release, Serious Fraud Office, Dirs. of ALSTOM Arrested in Corruption Investigation Following Raids on Nine Props. (Mar. 24, 2010), *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/directors-of-alstom-arrested-in-corruption-investigation-following-raids-on-nine-properties.aspx.

501. *Id.*; *see* Graeme Brown, *Searches Continue in Alstom Corruption Probe*, BIRMINGHAM POST, Mar. 25, 2010, *available at* http://www.birminghampost.net/news/west-midlands-news/2010/03/25/searches-continue-in-alstom-corruption-probe-65233-26112494/ (describing global cooperation between anti-corruption agencies).

502. Graeme Brown, *Searches Continue in Alstom Corruption Probe*, BIRMINGHAM POST, Mar. 25, 2010; Amir Efrati, *Bribe Case Focuses on Negotiator for Alcoa*, WALL ST. J., Apr. 6, 2010, *available at* http://online.wsj.com/article/SB10001424052702303912104575163883462666928.html (recent investigation into the multinational metal company Alcoa Inc. further highlights the cooperation between U.S. and U.K. authorities; "[p]rosecutors in Washington and London [have been] sharing information . . . .").

Similarly, the much-publicized Innospec enforcement action, discussed above, highlights how multinational corporations can face liability on both sides of the Atlantic, sometimes in the form of parallel enforcement actions.[503] As mentioned, Innospec reached a settlement for making improper payments to the Iraqi regime as part of the United Nation's Oil for Food Program.[504] The settlement involved agreements with the SEC, DOJ, and SFO.[505] According to former U.S. Deputy Attorney General George Terwilliger, the most "striking" aspect of the Innospec enforcement action is the "level of interaction and cooperation it shows between enforcement authorities with different jurisdictions, both internationally and within the U.S."[506] Terwilliger goes further, perhaps implicitly referencing the Bribery Act and predicting an increase in such cooperative investigations "[a]s we see more teeth put into the enforcement of anti-corruption laws by other nations . . . ."[507] SEC Enforcement Division Director Robert Khuzami further emphasized the point, noting that "law enforcement authorities within the United States and across the globe are working together to aggressively monitor violators of anti-corruption laws."[508] The enactment of the Bribery Act will provide additional "teeth" to the United Kingdom's enforcement regime, and the rising tide of transatlantic corruption investigations is not likely to ebb.

Despite the dramatic evidence of increased and cooperative enforcement, the limited ability of the SFO to enter into plea agreements with cooperators, discussed above, may put a wrinkle into the transatlantic enforcement web. In response to the SFO's settlement with Innospec, Senior Judge and deputy head of criminal justice Lord Justice Thomas sharply criticized the "DOJ-like" settlement.[509] Lord Justice Thomas argued that the settlement was too lenient and that the SFO did not have the "power to enter into the arrangements made."[510] The extent of the SFO's power to reach settlement agreement remains in question, but more importantly, Lord Justice Thomas's comments suggest that U.K. and U.S. anti-corruption cooperation will not necessarily be completely glitch-free. This potential tension is an area that will undoubtedly unfold quickly in the coming year, especially in light of the enactment of the United Kingdom's Bribery Act.[511]

Given this landscape, it seems clear that cooperation between states will increase. Not only is it efficient for regulators in multiple jurisdictions to coordinate their efforts against multi-jurisdictional corruption, it is in the interest of justice that

503. *See* GIBSON, DUNN & CRUTCHER LLP, *2010 Mid-Year FCPA Update* (July 8, 2010), http://www.gibsondunn.com/publications/pages/2010Mid-YearFCPAUpdate.aspx (describing a parallel enforcement action in January, 2010).

504. Press Release, Sec. & Exch. Comm'n, SEC Charges Innospec for Illegal Bribes to Iraqi and Indonesian Officials (Mar. 18, 2010), *available at* http://www.sec.gov/news/press/2010/2010-40.htm.

505. Melissa Klein Aguilar, *Innospec Settlement Shows Latest FCPA Thinking*, COMPLIANCE WEEK, Apr. 6, 2010, *available at* http://www.complianceweek.com/article/5874/innospec-settlement-shows-latest-fcpa-thinking.

506. *Id.*

507. *Id.*

508. *Id.*

509. *Id.*

510. *Id.*

511. *Cf.* GIBSON, DUNN & CRUTCHER LLP, *UK Serious Fraud*, *supra* note 148 ("The Staff stated that the SFO anticipates that in the next two years, precedents for multi-jurisdictional cases involving plea negotiations will emerge.").

multinational companies are not investigated and punished repeatedly in different countries for the same underlying wrongdoing. The case against Siemens proved that cross-jurisdictional cooperation can work.[512] It is clear that the new regime in the United Kingdom will form alongside a concurrent commitment in the United States to increasing resources in this area. According to Mark Mendelsohn, former Deputy Chief of DOJ's Fraud Section, cases will soon grow "substantially," perhaps by as much as fifty percent in the next few years.[513]

But the regulators do not expect to act alone. Both the SFO and DOJ intend that companies themselves will play a more aggressive role in combating corrupt behavior. "Companies—individually and collectively and in collaboration with countries—need to adopt stricter standards."[514] The collaboration between companies and enforcement agencies will likely be the scene of the most interesting developments.

512. David Hechler, *DOJ Unit That Prosecutes FCPA to Bulk Up 'Substantially,'* CORPORATE COUNSEL, Feb. 26, 2010, *available at* http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202444478279.

513. *Id.*

514. *Id.*

# "Islam is the Solution": Constitutional Visions of the Egyptian Muslim Brotherhood

KRISTEN STILT*

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## I. INTRODUCTION

Islamist political parties in the Middle East now form an important part of the political landscape.[1] Previously operating as opposition movements outside the formal process, parties stemming from these movements have succeeded in recent years in countries including Jordan, Morocco, and Kuwait.[2] As part of the national political field, voters can evaluate their accomplishments in office and indicate their approval through the ballot. Political involvement comes at a price, however—to participate, these parties typically have to make some compromises that can involve implicit limitations on the range of criticisms they make of the ruling regimes. Nevertheless, inclusion of these Islamist movements is a crucial step in the development of democratic systems.

Egypt is a significant exception to this trend. The major opposition "party," the Muslim Brotherhood, is considered the parent of many of the Islamist political parties in the region.[3] Unlike its progeny, the Muslim Brotherhood does not have legal party status, although its members have managed to run for office as independents. In the November-December 2005 lower house parliamentary elections, independent candidates from the Muslim Brotherhood running with the slogan "Islam is the Solution" gained eighty-eight of 454 seats in those elections, many more than the other opposition groups combined, and even with an election process that has been criticized as involving government-supported fraudulent practices.[4] These results, however, should not be seen as indicative of gradual

1. Islamist movements participating in national elections include the Islamic Action Front (IAF) in Jordan, the Islamic Constitutional Movement in Kuwait, and the Party of Justice and Development in Morocco. Nathan J. Brown, Amr Hamzawy & Marina Ottaway, *Islamist Movements and the Democratic Process in the Arab World: Exploring the Gray Zones*, 67 CARNEGIE PAPERS 3–4 (Carnegie Endowment for International Peace & Herbet-Quandt-Stiftung, Mar. 2006). Recently, the Jordanian IAF announced that it will boycott the November 9, 2010 parliamentary elections to protest the electoral fraud that took place in the 2007 parliamentary elections. Muhammad Abu Rumman, *Jordan's Parliamentary Elections and the Islamist Boycott*, ARAB REFORM BULLETIN, Oct. 20, 2010, http://www.carnegieendowment.org/arb/?fa=show&article=41769.

2. Brown, Hamzawy & Ottaway, *Islamist Movements*, *supra* note 1, at 4–5. Ruling regimes largely determined that preventing such popular movements had become more disadvantageous than allowing participation, and that inclusion would hopefully lead to moderation and stem extremism. Robert S. Leiken & Steven Brooke, *The Moderate Muslim Brotherhood, Friend or Foe?*, 86 FOREIGN AFFAIRS, Mar.–Apr. 2007, at 107–08. Exclusion has been justified on the grounds that they were inherently violent movements promoting absolutist views of Islam, which they wanted to enforce on society through a devious form of democracy depicted as "one man, one vote, one time." *Id.* at 109, 111.

3. Leiken & Brooke, *supra* note 2, at 115–17.

4. *Id.* at 111, 113–14; Samer Shehata & Joshua Stacher, *The Brotherhood Goes to Parliament*, 240 MIDDLE EAST REPORT 32 (Fall 2006). At that time, only 444 of the 454 seats were determined by election; the remaining ten members of the parliament were appointed by the President. Amira Howeidy, *Waiting for the Brothers*, AL-AHRAM WEEKLY, (Sept. 23–29 2010), http://weekly.ahram.org.eg/2010/10167eg6.htm. The number of total seats has now been increased to 518, with the additional sixty-

informal participation leading toward formal recognition and inclusion by the regime. Brotherhood officials continue to be arrested and there is no indication that the regime will change its position on the group's legality.[5] The next milestone in Egypt is the November 28, 2010 parliamentary elections.[6] Egyptian President Mubarak has already indicated his intent to tighten the political freedoms that flourished slightly but significantly in the 2005 parliamentary elections.[7] Despite recent imprisonments of some of its leaders and the expectation that the new General Guide Muhammad Badi' would focus more on the movement from within rather than on engagement with Egyptian politics more broadly, the Brotherhood has suggested that it could put forward as many as 200 candidates.[8]

Americans need to pay attention to the Egyptian 2010 parliamentary elections, and in particular, the role of the Muslim Brotherhood as the only meaningful opposition. Egypt is the largest Arab country, the U.S.'s most important Arab ally in the region, and the second largest recipient of U.S. foreign aid.[9] President Barack Obama chose Egypt as the site from which he delivered the new U.S. message to the Muslim world, which sought a new beginning between the U.S. and the region.[10] Significantly, American foreign policy has already influenced electoral developments in Egypt, making Egyptian elections an American issue. The Bush administration pressured Egypt to move in the direction of a democratic opening, and Mubarak allowed multi-candidate elections for President in 2005 and more freedom in the November-December 2005 parliamentary elections, which led to the Brotherhood's win of eighty-eight seats.[11] Several analysts of Egyptian politics informally surmised that Mubarak allowed enough Brotherhood candidates to win to show the U.S. what will result from increasing pressure to open up the political system, while not allowing them to obtain enough seats to affect the outcome of legislation. The U.S. subsequently seemed to back away from pushing Egypt for political reforms, in part due to a focus on bigger problems in Iraq.

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four seats reserved for female candidates. *President Hosni Mubarak Sets Egypt Election Date*, BBC (Oct. 20, 2010), http://www.bbc.co.uk/news/world-middle-east-11589354.

5. Amr Hamzawy & Nathan J. Brown, *The Egyptian Muslim Brotherhood: Islamist Participation in a Closing Political Environment*, 19 CARNEGIE PAPERS 30–32, (Mar. 2010), http://carnegieendowment.org /files/muslim_bros_participation.pdf.

6. *President Hosni Mubarak Sets Egypt Election Date*, *supra* note 4.

7. *Id.*; Hamzawy & Brown, *The Egyptian Muslim Brotherhood*, *supra* note 5, at 18.

8. *Banned Egypt Party Muslim Brotherhood to Run in Poll*, BBC (Oct. 10, 2010), http://www.bbc.co.uk/news/world-middle-east-11509354; Interview with Essam al-Arian, Member of the Egyptian Muslim Brotherhood's Guidance Bureau, ARAB REFORM BULLETIN (June 15, 2010), http://www.carnegieendowment.org/arb/?fa=show&article=40998. For a discussion of the internal tensions within the Brotherhood over the issue of political participation, *see* Hamzawy & Brown, *The Egyptian Muslim Brotherhood*, *supra* note 5, at 32 (pointing out that the newly elected General Guide, Muhammad Badi', seems quite interested in refocusing reform efforts at the level of individuals, which seems to suggest a shift away from electoral participation).

9. JEREMY M. SHARP, U.S. FOREIGN ASSISTANCE TO THE MIDDLE EAST: HISTORICAL BACKGROUND, RECENT TRENDS, AND THE FY2010 REQUEST, CONG. RESEARCH SERV., RL32260, at 4 (July 18, 2009). According to the U.S. Department of State, Egypt received $1,289,470,000 in U.S. Foreign Military Aid in 2008, second only to Israel, which received $2,380,560,000. "Egypt: Security Assistance," Department of State, http://www.state.gov/t/pm/64694.htm (last visited July 14, 2010).

10. Jeff Zeleny and Alan Cowell, *Addressing Muslims, Obama Pushes Mideast Peace*, N.Y. TIMES, June 5, 2009, at A1.

11. Leiken & Brooke, *supra* note 2, at 114.

The stakes and level of responsibility are very high for U.S. policy toward the 2010 Egyptian elections, and U.S. policy makers need to understand the Brotherhood's agenda in a careful and nuanced way, outside the reductionist framework that the Mubarak regime has set up, which presents itself as the only bulwark against radical Islamists.[12] This Article uses documents issued by the Muslim Brotherhood, in particular the lengthy 2007 Draft Political Party Platform, and personal interviews with Brotherhood leadership to examine the group's specific goals and beliefs for the place of religion within the structure of the Egyptian legal system.[13] While many important angles need to be explored, I focus on one topic that has drawn the most attention: the place of religion in the state, or religion defined and enforced by state institutions.[14] I show that while the Brotherhood carefully acknowledges the existing constitutional structure and jurisprudence on the position of Islam in the state, it also significantly expresses a desire to expand the place of Islam in a way that is constructed around and built upon the existing system.

This Article first provides essential background on the Muslim Brotherhood and then briefly explains Egypt's existing constitutional structure with regard to Islam. The main part of the Article discusses in detail the Brotherhood's agenda and its significance. In conclusion, the Article returns to the larger topic of Islamist political parties participating in national legislatures and identifies general challenges that any such party will face in explaining its agenda and, in particular, how it will combine religious sources along with a commitment to public welfare.

## II. THE MUSLIM BROTHERHOOD AS A POWERFUL UNOFFICIAL POLITICAL PARTY

The Brotherhood began as a social-religious organization in 1928 and slowly evolved into what looks in many respects like a political party, albeit an unauthorized one. Founded in 1928 in Egypt by Hasan al-Banna, a schoolteacher stationed at that time in Isma'iliyya, the Society of the Muslim Brothers focused initially on serving the needs of the Muslim community and improving their levels of morality and

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12. *See* Shehata & Stacher, *supra* note 4, at 36 ("While a healthy dose of skepticism toward any political organization is prudent, commentary on the Brotherhood frequently leaps to unsubstantiated conclusions that paint the group as a monolith bent on oppression and rule by force in the future."); *see also* Mona El-Ghobashy, *Unsettling the Authorities: Constitutional Reform in Egypt*, 226 MIDDLE EAST REPORT 28–29 (2003) ("The reductive tendency to shoehorn all of Egyptian politics into a deadlock between the regime and the Islamists, one the one hand, and the regime and the unwieldy masses, on the other, has kept most Egypt-watchers from noticing all the meaningful and consequential forms of political expression in the country today.").

13. The Platform covers a vast range of topics, including the economy, education, and foreign policy, to name just a few. An examination of any one of these areas would also help to advance knowledge of the Brotherhood's political agenda.

14. Noah Feldman describes the call for an "Islamic state" by Islamist political parties as indicative of a desire for a state "governed by law and that governed through law." NOAH FELDMAN, THE FALL AND RISE OF THE ISLAMIC STATE 21 (2008). Rather than calling for any particular rules from within the vast Islamic legal corpus, he argues, Islamist parties are offering an alternative system to the authoritarian regimes that have come into power in the post-independence era in many Muslim-majority countries. That system of reform is based on the notions of rule of law and separation of powers that characterized many pre-modern Islamic societies. *See also* ABDULLAHI AN-NA'IM, ISLAM AND THE SECULAR STATE 1–2 (2008) (objecting to benign characterizations, the author argues that the concept of an Islamic state is a "dangerous illusion" that threatens "constitutionalism, human rights, and citizenship in Islamic societies").

religiosity, which can be referred to as the missionary activity of the organization.[15] Within a decade of its founding, the ideology of the Brotherhood had solidified into three core beliefs: "(1) Islam as a total system, complete unto itself, and the final arbiter of life in all its categories; (2) an Islam formulated from and based on its two primary sources, the revelation in the Qur'an and the wisdom of the Prophet in the Sunna [the normative practice of the Prophet]; and (3) an Islam applicable to all times and all places."[16] These beliefs have been reiterated throughout the Brotherhood's history and appear clearly in the contemporary literature as examined in this Article.

Early in its life, the Brotherhood took steps into two additional fields of activity, which created a conflict with the Egyptian state that continues to this day. First, the Brotherhood determined that political activity was part of its agenda and fielded candidates in the general elections of 1941 and 1945.[17] Second, as Brotherhood friction with the government continued to develop, some members formed an armed wing of the organization called the Secret Apparatus, purportedly to defend both Islam and the Brotherhood.[18] As the monarchical period ended with the "Free Officers" who overthrew the Egyptian monarchy in 1952, the Brotherhood's initial good relations with the state soon became strained, culminating in the attempted assassination of Nasser in 1954 by a member of the Brotherhood.[19] The regime arrested thousands of other Brotherhood members, and courts ordered a life sentence for General Guide Hudaybi, the execution of six members, and prison sentences for hundreds more.[20] One of the Brothers arrested during Nasser's rule was Sayyid Qutb, whose subsequent writings are considered to have inspired the Brotherhood's violent offshoot groups such as Islamic Jihad.[21]

When Anwar al-Sadat became President, following the death of Nasser in 1970, he initially treated the Brotherhood favorably, in part as a counterbalance to his predecessor's support among the leftists.[22] But the good relations between Sadat and the Brotherhood did not last long. In 1979, the Brotherhood took an openly hostile stance toward Sadat's agreement with Israel at the Camp David Accords. Sadat ordered mass arrests of Brotherhood members and other Islamist groups in September 1981.[23] The Brotherhood's splinter groups, however, ultimately proved a far greater threat to Sadat: members of Islamic Jihad assassinated Sadat on October

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15. RICHARD P. MITCHELL, THE SOCIETY OF THE MUSLIM BROTHERS 7–9 (1969).

16. *Id.* at 14.

17. *Id.* at 26–33 (Banna declared himself a candidate in Isma'iliyya in 1941 but the Prime Minister asked him to withdraw. Banna did so in exchange for several promises, including the government taking action against the sale of alcohol and the existence of prostitution. In 1945, Banna and other Brotherhood members ran again in what were subsequently described as dishonest elections. They were all defeated in races where their popularity would have strongly suggested a victory.).

18. *Id.* at 30–32. During the monarchial period, the Brotherhood was not the only political movement to form an armed division.

19. *Id.* at 24, 151.

20. *Id.* at 151–162.

21. Leiken & Brooke, *supra* note 2, at 110.

22. *See* Mona El-Ghobashy, *The Metamorphosis of the Egyptian Muslim Brothers*, 37 INT. J. OF MIDDLE E. STUD. 373, 377 (2005) (discussing the release of Brotherhood members as part of Sadat's "de-Nassserization" of Egyptian political society).

23. Saad Eddin Ibrahim, *Domestic Developments in Egypt*, *in* THE MIDDLE EAST: TEN YEARS AFTER CAMP DAVID 19, 54–55 (William B. Quandt ed., 1988).

6, 1981.[24] Hosni Mubarak succeeded Sadat and recognized religious extremism as the most immediate threat. He sought to mobilize moderate Islamists, including the Muslim Brotherhood, against extremism, and released many from the Brotherhood from prison.[25] Mubarak tried to distinguish between violent Islamists, whom he wanted to punish, and some moderate Islamists, represented by the Brotherhood, whom he needed on his side.[26]

The Brotherhood wanted more political involvement than Mubarak was prepared to tolerate. In 1984, it entered parliamentary elections in the form of an alliance with the Wafd party and effectively ran on the Wafd ticket, winning eight seats.[27] This early success was followed by another, when the Brotherhood won thirty-six seats in a 1987 alliance with the Liberal Party and the Socialist Labor Party.[28] These wins were not enough to challenge Mubarak's National Democratic Party (NDP), but by the late 1980s, Mubarak recognized that the Muslim Brotherhood posed a serious threat to his legitimacy. As members of parliament, they criticized practices of the state as un-Islamic.[29] The Brotherhood became heavily involved in syndicates and professional organizations, taking the lead in several of these associations.[30] More significantly, in the 1990s, militant groups in Egypt targeted the regime directly and indirectly through attacks on the tourism industry, one of Egypt's main forms of income.[31] The Brotherhood's status as the mother organization of radical splinter groups led to strong measures against it, even as actual Brotherhood involvement in these actions was unclear.[32]

The Brotherhood and other major opposition parties boycotted the parliamentary elections of 1990 because the elections were supervised by the Minister of Interior.[33] The Brotherhood also opposed Mubarak's desire to seek a third term as president.[34] While the Brotherhood condemned Iraq's invasion of Kuwait in 1990, it also criticized the western-led efforts against Iraq, which Egypt joined, and the bombing of Baghdad.[35] After the 1992 Cairo earthquake, the Brotherhood provided greater services to the people than the state, further damaging the state's image.[36] Furthermore, the Islamist victory in Algeria in 1992 showed Mubarak what could happen in Egypt, and the ensuing civil war there gave Mubarak an excuse to keep Egypt's political system closed.[37]

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24. Abd al-Monein Said Aly & Manfred W. Wenner, *Modern Islamic Reform Movements: The Islamic Brotherhood in Contemporary Egypt*, 36 MIDDLE E. J. 336, 359 (1982).

25. HESHAM AL-AWADI, IN PURSUIT OF LEGITIMACY: THE MUSLIM BROTHERS AND MUBARAK, 1982–2000, 50, 57 (2004).

26. *Id.* at 59; *see also* Tamir Moustafa, *Conflict and Cooperation between the State and Religious Institutions in Contemporary Egypt*, 32 INT'L J. OF MID. E. STUD. 3 (2000) (examining Mubarak's strategy).

27. El-Ghobashy, *supra* note 22, at 378.

28. *Id.* at 379.

29. *Id.*

30. AL-AWADI, *supra* note 25, at 57–58.

31. *Id.* at 153–80.

32. *Id.* at 189.

33. The Tagammu' party did participate. *Id.* at 142, 144, 213.

34. *Id.* at 214.

35. *Id.* at 147–50.

36. AL-AWADI, *supra* note 25, at 147–50.

37. AL-AWADI, *supra* note 25, at 170–73.

The tension that had been building since 1990 erupted in 1995. The regime resorted to severe authoritarian methods of dealing with opposition, arresting hundreds of Brotherhood members and trying them in military, not civil, courts.[38] Most of those tried in these military courts were convicted.[39] In the 1995 elections, the Brotherhood won only one seat.[40] The level of state coercion used to prevent success of the opposition was the highest during these elections, and at least fifty-one people were killed during two days of voting.[41] At the same time, Islamist violence continued to rise and Mubarak was the target of an assassination attempt when he visited Ethiopia.[42] Even though Jihad claimed responsibility, the regime made no distinction between radical and moderate Islamists, and Mubarak stressed the similarity between the Brotherhood and Jihad.[43]

Brotherhood members continued to attempt to run for the legislature, and ran as independents once the electoral law allowed independent candidates. Running on the slogan "Islam is the Solution," independent candidates from the Muslim Brotherhood won seventeen seats in 2000 and went on to gain eighty-eight of 454 seats in the 2005 lower house parliamentary elections, many more than all of the other opposition groups combined.[44] The potential for electoral success had been even higher, but the Brotherhood chose to run candidates in only a limited number of districts, and the state cracked down on the group and its candidates in particular before the elections.[45]

The Brotherhood remains a non-party that is, in effect, the only real opposition to Mubarak's NDP.[46] This status does not please all Brotherhood members, some of whom want to renew focus on the original social and religious mission.[47] Other members sought to separate out the Brotherhood's political functions to form a new political party that would reach across the aisle and present a religiously-inspired yet secular message. They left the Brotherhood to form the Wasat (Center) party in conjunction with other politicians, including Christians.[48] Although the Wasat Party has applied for party recognition, the government has refused to grant it.[49] Finally, some in the Brotherhood want the group to function as a legally-recognized political

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38. *Id.* at 170–75.

39. *Id.* at 175.

40. *Id.* at 170.

41. *Id.*

42. AL-AWADI, *supra* note 25, at 179.

43. *Id.* at 179–80.

44. Leiken & Brooke, *supra* note 2, at 114; Shehata & Stacher, *supra* note 4, at 33.

45. TAMIR MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT 211 (2007). Hamzawy and Brown point out that the Brotherhood strategically slated only 161 candidates; even if they all won, they would still only have about one-third of the seats. Further, they did not run candidates against prominent NDP candidates. Hamzawy & Brown, *The Egyptian Muslim Brotherhood*, *supra* note 5, at 7.

46. Mona El-Naggar, *New Call for Election Boycott in Egypt*, N.Y. TIMES, Sept. 7, 2010, at A4.

47. Abdul Monem Abu al-Futuh, *Reformist Islam: How Gray are the Gray Zones?*, ARAB REFORM BULLETIN, Jul. 18, 2009, http://www.carnegieendowment.org/arb/?fa=show&article=20814&zoom_highlight=Reformist+Islam; Interview with Ibrahim Houdaiby, Muslim Brotherhood member and columnist for the group's English-language website, www.ikhwanweb.com (June 16, 2009).

48. Carrie Rosefsky-Wickham, *The Path to Moderation: Strategy and Learning in the Formation of Egypt's Wasat Party*, 36 COMPARATIVE POLITICS 207, 219 (2004).

49. *Id.* at 222.

party.[50] Existing law, however, poses a significant obstacle to such recognition. The Political Parties Law prohibits political parties founded on a religious basis or on "manipulation of religious feelings."[51] Article Five of the Constitution concerning parties as originally drafted did not mention religion, but was amended in 2007 to include the statement that: "Citizens have the right to establish political parties according to the law. It is not permitted to pursue any political activity or establish political parties on the basis of a religious authority, a religious foundation, or discrimination on the grounds of gender or origin."[52] While this language does not refer to Islam specifically, the Brotherhood claims that this amendment was targeted at them to prevent legal recognition of the party.[53]

## III. THE CURRENT PLACE OF ISLAM IN THE EGYPTIAN CONSTITUTIONAL STRUCTURE

This section overviews the position of Islam and Islamic law in the Egyptian constitutional structure to contextualize the changes called for, explicitly or implicitly, by the Brotherhood. It also explains the basic details of the Supreme Constitutional Court (SCC), the body charged with interpreting the constitution.

The current constitution was promulgated in 1971, early in President Anwar Sadat's term.[54] The most significant provision dealing with religion is Article Two, the current formulation of which states: "Islam is the religion of the state; Arabic is the official language; and the principles of the Islamic Sharia are the main source of legislation." The original 1971 version stated that the principles of the Islamic Sharia are "a" main source of legislation; the amendment from "a" to "the" was made by national referendum on May 22, 1980.[55]

The SCC has sole responsibility for constitutional review of laws and regulations.[56] The court's relative autonomy made it an attractive forum for Islamists

50. As evidenced by the 2007 Draft Political Party Platform, *infra* note 92.

51. Law No. 40 of 1977 as amended by Law No. 177 of 2005 (Law on the Political Parties System), 6 July 2005 (Egypt).

52. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 SEPT. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, art. 5.

53. *See* Nathalie Bernard-Maugiron, *The 2007 Constitutional Amendments in Egypt, and Their Implications on the Balance of Power*, 22 ARAB L.Q. 397, 411 (2008) ("The Muslim Brothers accuse the regime of denying them any possibility of legal recognition.").

54. For a discussion of the drafting history of the constitution, *see* Adel Omar Sherif and Kristen Stilt, *Egypt's Constitutional Summer of 1971* (forthcoming).

55. EGY. CONST., art. 2.

56. Law No. 48 of 1979, art. 25 (Law on the Supreme Constitutional Court, as amended by Law No. 168 of 1998) (Egypt). This law and all SCC decisions referenced in this Article can be found at the SCC website, http://www.hccourt.gov.eg. The SCC has the exclusive authority to (1) exercise the power of judicial review in constitutional issues with respect to laws and regulations; (2) settle jurisdictional conflicts among judicial bodies when a case of the same subject matter is brought before two forums; and (3) determine the final judgment when two or more judicial bodies have produced contradictory judgments. *Id.* The powers of judicial review are the most significant, and can occur through two paths. First, when in the course of deciding a case on the merits, if a court views that a provision of law or regulation on which the settlement of the dispute depends is unconstitutional, the proceedings are suspended by the court and the case is forwarded to the SCC for adjudication of the constitutional issues. *Id.* at 29(a). Second, when the constitutionality of a provision of law or regulation has been contested by a party to a case before a court, and the grounds are found to be plausible by that court, the court shall declare the postponement of the case and specify for that party a period not exceeding three months within which the constitutional

who were displeased with various aspects of Egyptian law.[57] In early cases, challengers sought to declare unconstitutional legislation they claimed was inconsistent with the vaguely expressed "principles of the Islamic Sharia."[58] In its decisions, the SCC has made clear that the constitution gives the legislature wide latitude to legislate for the general welfare (*maslaha*) of the nation.[59] While recognizing that religious texts should be a guiding force in determining welfare and thus play a role in the formulation of laws, the SCC has declined to impose any particular kind of law making process regarding Islamic law.[60] Instead, the SCC has focused on Article Two as a "negative criterion" to mean that no legislation may violate rules of Islamic law that are definite in terms of both their authenticity and meaning.[61] Such rules, according to the SCC, neither need nor permit interpretation (*ijtihad*) because their meanings are absolutely clear, and because they are absolutely clear, they do not change with time.[62]

The SCC adopted this test—"definite in terms of authenticity and meaning"—from classical Islamic law sources.[63] It means that (1) the authenticity of the text must be certain; and (2) there must be one clear meaning of the text.[64] As for part one, the authenticity of the Quran in whole is accepted, so this part concerns the Sunna (normative practice of the Prophet), about which there is extensive debate. Part two provides a challenge for both the Quran and the Sunna, since multiple opinions about the meaning of a text is the typical result, rather than clarity and unanimity. As a result, the principles of the Islamic Sharia that the SCC protects are narrow, giving the legislature wide discretion, since "as even classical scholars of [jurisprudence] have acknowledged, few texts of the revelation can be said to have only one possible meaning or interpretation, and few Sunna texts to be authenticated beyond doubt (the Qur'an alone is considered authentic in its entirety)."[65]

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issue is to be presented to the SCC. *Id.* at 29(b).

57. *See* MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER, *supra* note 45, at 217 (discussing the effectiveness of the SCC as an avenue for change); *see also* Tamir Moustafa, *The Islamist Trend in Egyptian Law*, 3 POL. & RELIGION 610 (2010) (examining the reasons for the growth of the Islamist trend within the legal profession).

58. *See* EGY. CONST., art. 2; *see also* Tamir Moustafa, *Law Versus the State: The Judicialization of Politics in Egypt*, 28 L. & SOC. INQUIRY 883, 884 (2003) ("even Islamists mobilized through the SCC to challenge the secular underpinnings of the Egyptian state").

59. Frank E. Vogel, *Conformity with Islamic Shari'a and Constitutionality under Article 2: Some Issues of Theory, Practice, and Comparison*, *in* DEMOCRACY, THE RULE OF LAW, AND ISLAM 525, 528 (Eugene Cotran & Adel Omar Sherif eds., 1999).

60. *Id.* at 532–38.

61. *Id.* at 539.

62. *Id.* at 529; Case no. 7/Judicial Year 8/Supreme Constitutional Court, 15 May 1993. A number of studies deal in whole or in part with the SCC's jurisprudence on Article Two. *See* Vogel, *Conformity with Islamic Shari'a*, *supra* note 59, at 541; CLARK LOMBARDI, STATE LAW AS ISLAMIC LAW IN MODERN EGYPT 174–200 (2006); *see also* Adel Omar Sherif, *Constitutional Law*, *in* EGYPT AND ITS LAWS 315 (Nathalie Bernard-Maugiron & Baudouin Dupret eds., 2002); Kristen Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 GEO. WASH. INT'L L. REV., 695, 722–728 (2004).

63. Vogel, *Conformity with Islamic Shari'a*, *supra* note 59, at 528–29. Vogel brilliantly shows how the SCC test replicated the classical Islamic law standards elaborated by the scholars for determining the permissible *siyasa* power of the ruler.

64. *Id.*

65. *Id.* at 531.

For example, a 1993 SCC case involved Law 100 of 1985, which amended existing personal status legislation and added new provisions.[66] While challenging the law generally, the claim focused specifically on Articles 18-b and 20.[67] Article 18-b provides for an extra compensation payment to a woman whose husband divorced her against her will and without any specific cause for which the woman was responsible.[68] The compensation amount is, at a minimum, equal to (and separate from) two years of any maintenance payment she might receive.[69] Article 20 extended the woman's right to custody of minor children post-divorce, providing that her right to custody (and maintenance from the ex-husband) terminates when the male child reaches the age of ten and the female child reaches the age of twelve. At that point, a judge may further allow a boy to remain in her custody until the age of fifteen and a girl until she marries, if it serves the child's interest.[70] In rejecting the Article Two claim, the SCC stated that although the claimant might find some legal view rejecting the provisions of the Law as contrary to Islamic law, this was not sufficient.[71] A law will be struck under Article Two only if it violates a rule that is certain in both its authenticity and meaning. In this case, since scholars disagreed about the obligatory nature and amount of the compensation payment and the maximum custodial age for children under their mother's care, there was no Article Two violation.[72]

The Supreme Constitutional Court judges are appointed by the President.[73] When making an appointment, the President chooses from among two candidates, one nominated by the General Assembly of the Court, which is the body of all the SCC's judges, and the other nominated by the Chief Justice.[74] Although SCC judges cannot be removed, they must retire at the age of sixty-six.[75] The judges can only be disciplined by the General Assembly itself.[76] The President appoints the Chief Justice by Presidential decree, and the person need only meet the minimum qualifications for any member of the Court.[77] From the Court's establishment in 1979 until 2001, the president had always appointed the most senior judge on the SCC to the position of Chief Justice.[78]

The appointment process for the Chief Justice changed dramatically in late 2001. President Mubarak appointed Fathi Nagib, who at the time held the second highest position in the Ministry of Justice.[79] The human rights community,

66. Case no. 7/Judicial Year 8/Supreme Constitutional Court; Law No. 100 of 1985 (amending several provisions of the Personal Status Laws No. 25 of 1920 and No. 25 of 1929). The law has been translated into English in Dawoud S.El Alami, *Law No. 100 of 1985 Amending Certain Provisions of Egypt's Personal Status Laws*, 1 ISLAMIC L. & SOC'Y 116, 120 (1994).

67. Case no. 7/Judicial Year 8/Supreme Constitutional Court.

68. *Id.*

69. *Id.* In assessing the amount, the judge should take into account the financial means of the husband, the circumstances of the divorce, and the length of the marriage. *Id.* at 120–21.

70. Law No. 100 of 1985 art. 20.

71. Case no. 7/Judicial Year 8/Supreme Constitutional Court.

72. Case no. 7/Judicial Year 8/Supreme Constitutional Court.

73. Moustafa, *Law Versus the State*, *supra* note 58, at 893–94.

74. *Id.*

75. *Id.* at 894, n.11.

76. *Id.* at 894.

77. *Id.* at 893.

78. *Id.*

79. Moustafa, *Law Versus the State*, *supra* note 58, at 924.

opposition parties, and legal scholars expressed concern because Nagib was a man closely affiliated with the regime.[80] On a practical level, the position of Chief Justice controls many aspects of the court's decision making.[81] One former justice stated that even if a majority of judges voted against the Chief Justice, he can simply refuse to sign the ruling.[82] Nagib immediately appointed five new justices to the Court.[83] Since SCC law does not specify the number of justices, referring only to the requirement of seven judges to form a quorum, the appointments complied with the law while contravening SCC customs.[84] Further, the custom had been to appoint new members at the junior level of commissioner counselor, with an eventual rise to the highest level of justice.[85] Nagib made all five appointments directly to the level of justice, increasing the number of judges by fifty percent.[86] Since then, Mubarak has appointed three Chief Justices from outside the SCC: Mamduh Mara'i Mari in 2003, Maher Abd al-Wahid in 2006, and Farouk Sultan in 2009.[87] Further, the Chief Justice position was given a new and significant responsibility as head of the Presidential Elections Commission through the 2005 amendment to Article Seventy-Six of the Constitution.[88]

As the sole body with the power to interpret the constitution, the SCC plays a crucial role in defining the meaning of Islamic law for the Egyptian state. Because of its susceptibility to presidential control, the SCC could be used to the advantage of the Brotherhood or other political party that reaches a position of power. With this sense of the SCC's constitutional status and current jurisprudence in mind, this Article now turns to the Brotherhood's constitutional visions.

## IV. THE MUSLIM BROTHERHOOD'S CONSTITUTIONAL VISION

This Section addresses in Part (b) areas in which the Brotherhood takes careful pains to accept aspects of the existing constitutional structure in Egypt. It then turns in Part (c) below to areas of proposed change. First, however, it examines the sources that provide the basis for these conclusions.

80. *Id.*

81. MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER, *supra* note 45, at 200.

82. *Id.*

83. Moustafa, *Law Versus the State*, *supra* note 58, at 924.

84. *Id.* at 924 n. 86; Law No. 48 of 1979, art. 3.

85. MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER, *supra* note 45, at 199.

86. *Id.* Nagib had more plans to remodel of the SCC. He proposed to divide the Court into three sections, corresponding to the three areas of the SCC's jurisdiction. This proposal, coupled with the court packing move, opened the way to put the most regime-friendly judges into the judicial review section, pushing the others into less significant areas. The SCC judges apparently resisted this division at the time, although the idea apparently is not completely abandoned. *Id.* at 199–200.

87. For the 2003 appointment, *see* Noah El-Hennawy, *Reigning Supreme*, EGYPT TODAY (Aug. 2006), http://www.egypttoday.com/article.aspx?ArticleID=6884; for the 2006 & 2009 appointments, *see* Gamal Essam El-Din, *Roadmap to the Presidency*, AL-AHRAM WEEKLY (JULY 23–29, 2009), http://weekly.ahram.org.eg/2009/957/eg5.htm.

88. EGY. CONST., art. 76; Kristen Stilt, *Constitutional Authority and Subversion: Egypt's New Presidential Election System*, 16 IND. INT'L & COMP. L. REV. 335, 350–52 (2005–2006).

### A. Sources for the Views of the Muslim Brotherhood

This analysis relies mainly on official documents, public interviews, and statements made by Brotherhood officials, along with interviews I conducted with members of the Brotherhood in June 2009. The official documents include the 2004 *Initiative of the Muslim Brotherhood on Principles of Reform in Egypt*, which is a broad statement of goals;[89] the 2005 *Electoral Program of the Muslim Brotherhood*, issued in advance of the elections to the lower parliamentary house (the *Majlis al-Sha'b*);[90] the 2007 *Electoral Program of the Muslim Brotherhood*, issued in advance of the elections to the upper parliamentary house (the *Majlis al-Shura*);[91] and the 2007 *Draft Platform of the Political Party* (the "Platform").[92] Prior to the Platform, Muslim Brotherhood official documents largely avoided details of the role of Islamic law in state structures.[93] The much lengthier and more detailed Platform finally attempted a statement on key issues of governance, and it was intended to explain the positions that the party would hold if allowed to participate as a legitimate part of Egyptian politics.[94]

The Platform as issued in August 2007 was marked "first draft." The apparent intent of the Party was to get opinions from a limited group of intellectuals within Egypt to assist in the crafting of a final platform.[95] The document soon became widely available in Egypt and internationally, which resulted in heavy media attention and much criticism that tended to focus on a few of the more controversial points.[96] The "first draft" remains the only version, although Muslim Brotherhood leaders report that it is undergoing internal revision and review and a final draft will appear eventually.[97] Even as a first draft, the Platform has tremendous value in

89. MUHAMMAD MAHDI AKIF, INITIATIVE OF THE MUSLIM BROTHERHOOD ON PRINCIPLES OF REFORM (2004) [hereinafter INITIATIVE].

90. THE MUSLIM BROTHERHOOD, THE MUSLIM BROTHERHOOD'S ELECTORAL PROGRAM OF 2005 (Nov. 6, 2005), *available at* http://www.ikhwanweb.com/onlinelibrary.php [hereinafter 2005 PROGRAM].

91. THE MUSLIM BROTHERHOOD, THE ELECTORAL PROGRAM OF THE MUSLIM BROTHERHOOD FOR SHURA COUNCIL IN 2007 (June 14, 2007), *available at* http://www.ikhwanweb.com/article.php?id=822 [hereinafter 2007 PROGRAM].

92. THE MUSLIM BROTHERHOOD, DRAFT PLATFORM OF THE POLITICAL PARTY (2007) (on file with author) [hereinafter PLATFORM]. By beginning with the 2004 document, I do not suggest that the Brotherhood did not think about or publish opinions on the issue of religion in the Egyptian constitution. Indeed the Brotherhood has been interested in legal-political topics from its earliest years. An exhaustive study of the history of the Brotherhood's views of the Egyptian constitution would begin with these early statements.

93. This is still the case for other policy platforms that have been distributed by Islamist organizations in recent years. One example is the Moroccan Justice and Development Party (known by its French acronym as PJD). The PJD platform was released on September 7, 2007, around the same time as the Platform of the Egyptian Muslim Brotherhood. The PJD platform details policies in areas such as education, economics, and industry, but few details deal with the vision of the constitutional structure of the state. In another example, the "Islamic State" document of Malaysia's PAS provides no information about its view of the country's constitutional structure.

94. Nathan J. Brown & Amr Hamzawy, *The Draft Party Platform of the Egyptian Muslim Brotherhood: Foray Into Political Integration or Retreat Into Old Positions?*, 89 CARNEGIE PAPERS: MIDDLE EAST SERIES 1 (2008).

95. Mahmoud Mohammad, *"Al-Masri Al-Youm" Publishes the Muslim Brotherhood Platform*, AL-MASRI AL-YOUM, Aug. 10, 2007, http://www.almasry-alyoum.com/article2.aspx?ArticleID=71772.

96. Brown & Hamzawy, *The Draft Party Platform*, *supra* note 94, at 2 n.1.

97. Interview with Muhammad Habib, Deputy Guide of the Muslim Brotherhood (June 11, 2009). Essam al-Arian, Member of the Brotherhood's Guidance Bureau, specified that the process of revising the Platform will last until the Brotherhood could "survive and grow" as a political party. Interview with

ascertaining the Brotherhood's views on the role of Islamic law in the Egyptian constitutional system.

The Platform differs from the previous documents in not only length and detail; it is also the first time a Brotherhood document refers to itself as a "party" in such a prominent way.[98] This choice of wording deserves examination. Under the current Egyptian political situation, the Muslim Brotherhood is not a political party, and any application by the Brotherhood to be recognized as a political party would surely be rejected on the grounds that the party is based on religion, which is prohibited by the Political Parties Law and now the Constitution itself.[99] Despite this, the Brotherhood functions as a party in many ways. The Brotherhood-affiliated independents who won seats in the legislature in 2005 generally act as a single bloc and have an administrative structure in place to support the research and information needs of the legislators.[100]

Even with the Platform as a major source, any attempt to present the Brotherhood's constitutional vision as a unitary one must be approached with caution. Official documents and pronouncements can no longer be considered to represent every member within the group, although they are still highly meaningful. Previously, the official Brotherhood view was typically clear—it was announced by the Supreme Guide and members did not dissent, at least not publicly. As Mona el-Ghobashy explained, "[o]ver the past quarter century, the Society of Muslim Brothers (Ikhwan) has morphed from a highly secretive, hierarchical, antidemocratic organization led by anointed elders into a modern, multi-vocal political organization steered by educated, savvy professionals not unlike activists of the same age in rival Egyptian political parties."[101] More recently, a younger segment of members have expressed their dissent with the leadership through online blogs, bringing to public view some of the rifts between the reformist and the conservative members and the younger and the older generation.[102] Even with internal Brotherhood disagreements about some aspects of the Platform, a young blogger still conceded that it does officially represent the Brotherhood view.[103]

Very little has been reported or disclosed about the drafting process itself. According to Abdelmonem Mahmoud, a young journalist and blogger, the process

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Essam al-Arian, *supra* note 8. An earlier news report relying on sources within the Brotherhood stated that the Brotherhood was putting the draft platform on hold for an indefinite period of time in order to improve relations with the regime in hopes of gaining the release of several of its leaders from prison. Tariq Salah, et al., *The Members of the Brotherhood Agree to Put the Party Platform on Hold*, AL-MASRI AL-YOUM, May 10, 2007, http://www.almasry-alyoum.com/article2.aspx?ArticleID=246791.

98. Al Said Ramadan, *The Muslim Brotherhood and Political Party*, Ikhwanweb (June 13, 2007), http://www.ikhwanweb.com/article.php?id=809.

99. *See supra* text accompanying notes 51–52.

100. *See generally* Shehata & Stacher, *supra* note 4. This insightful short article contains significant details about the Brotherhood's bloc. When parliament is in session, for example, all of the Brotherhood's members stay in the same hotel so they can continue the day's discussions and plan for the next. The Brotherhood legislators also maintain their own website, www.nowabikhwan.com.

101. El-Ghobashy, *supra* note 22, at 373.

102. These two sets overlap but not perfectly; Guidance Bureau member 'Abd al-Mun'im Abu al-Futuh criticized some of the more controversial elements of the Platform. Brown & Hamzawy, *The Draft Party Platform*, *supra* note 94, at 7.

103. Interview with Abdelmonem Mahmoud, blogger, http://ana-ikhwan.blogspot.com (June 10, 2009).

initially included individuals with a range of views, including Essam al-Arian and several young members such as himself. When al-Arian was arrested, Muhammad Mursi, whom Mahmoud called the "old guard," took over the drafting process and several members left the process, including Mahmoud.[104] It is difficult to know, however, how the substance of the Platform might have changed with the involvement of a different set of people in the drafting process. How the revision process will develop under the new Supreme Guide, Muhammad Badi', who is considered a conservative member, remains to be seen.[105]

Specifically, Brotherhood members expressed disagreement over two topics in the Platform: the Council of Scholars and exclusion of women and Christians from the position of President or Prime Minister.[106] Although these topics have generated the most public controversy, they are not the only—or even the most important—issues for determining the Brotherhood's vision of constitutional structure. I discuss these issues below, along with responses from Brotherhood dissenters. Most of the material I rely upon in the analysis, however, comes from language in the Platform that is less dramatic on the surface, but highly significant when read carefully and placed in historical and social context.

Some analysts consider official documents such as the Platform as under representing the degree to which the Brotherhood has actually embraced liberal notions of equality. In this line of thought, the Platform presents a view that is too conservative and not representative of the whole movement. This is in part a rephrasing of the first point, that the Brotherhood has internal divisions, and it may be that the conservative voices had the upper hand in drafting the Platform. In addition, this position says that the Platform (and other documents) do not truly reflect the Brotherhood's position because it is crafted to appeal to and reassure its core supporters that despite changes, reforms, and an explicit embracing of the democratic process, it has not strayed from core and original beliefs to make society more Islamic. Thus, official documents might overstate the Islamic components in an effort to appeal to the Brotherhood's longtime and core supporters.

For a different set of critics, reliance on the Platform will be seen as presenting a far too friendly face of the Brotherhood; these critics will claim that the Platform is an effort to mislead both Egyptians and Westerners into thinking that the Brotherhood is a reformist political party with no intention of bringing a strict version of Islam and Islamic law to Egypt. Indeed, one of the main criticisms of the Brotherhood thus far is that it has been so vague on key points for fear that saying exactly what they believe would give critics tangible evidence.[107] Along these lines, then, the Platform may be a careful effort to say what will be broadly accepted while retaining all of their older, more conservative, positions.

As a final caveat to the limitations of the Platform as a source, some of the Brotherhood members I interviewed said that from a legal perspective, the Platform may seem imprecise because there were no lawyers on the drafting committee.[108] It is

104. *Id.*

105. Husam Tamam, *Egypt's New Brotherhood Leadership: Implications and Limits of Change*, ARAB REFORM BULLETIN (Feb. 17. 2010), http://www.carnegieendowment.org/arb/?fa=show&article=30995.

106. Brown & Hamzawy, *The Draft Party Platform*, *supra* note 94, at 7.

107. *Id.* at 3.

108. Interview with Ibrahim Houdaiby, *supra* note 47. Nathalie Bernard-Maugiron suggested that

impossible to verify this statement. Even if that was the case, I am reading the text for deeper concerns that I do not think would have changed if there had been a clearer textual presentation. I also look for trends and corroborations between the Platform and other documents from the Brotherhood. The Brotherhood members who made this comment seem to be saying something more than merely that a lawyer might have clarified language. They also were admitting at some level that the organization has only begun to think about the place of Islam in the state in detail and at the level of practicalities, and this inexperience was revealed publicly when the Platform reached widespread distribution. Although many thinkers and writers on Islamic constitutionalism, notably Tariq al-Bishri, Kamal Abu al-Majd, Yusuf al-Qaradawi, and Salim al-'Awwa, have influenced the Brotherhood's thinking, they typically do not deal with detailed and pragmatic questions of constitutional structure that the Platform attempts to address and that I discuss here.[109] This Article is both an effort to explain the Brotherhood's positions and an effort to prompt the Brotherhood to consider and clarify the questions and problems I pose herein.

Despite these caveats and acknowledgements, the written documents of the Brotherhood, and in particular the Platform, coupled with interviews in the press and those I personally conducted, provide a solid means to discern some of the subtle yet significant points of their constitutional vision. The Article first turns to areas in which the Platform takes careful pains to accept aspects of the existing constitutional structure in Egypt before turning to areas of proposed change.

### *B. Acceptance of the Egyptian Constitutional Structure*

The Platform specifies clearly that the Brotherhood accepts the place of Islam as defined in the constitution. I focus here on three critical areas of acceptance: the specific formulation of Article Two, the Supreme Constitutional Court, and the civil nature of the state.

#### 1. The Constitution and Article Two

The 2007 Platform recognizes the current Egyptian constitution and makes no mention of any plan to prepare a new one.[110] Previous Brotherhood statements indicated that at least some members found the current constitution sufficiently flawed as to merit wholesale replacement.[111] In 2006, Deputy Guide Muhammed

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the Muslim Brotherhood has not studied the SCC's jurisprudence in any detail. Interview with Nathalie Bernard-Maugiron, senior researcher at the Institute for Research and Development (June 17, 2009).

109. *See* BRUCE K. RUTHERFORD, EGYPT AFTER MUBARAK: LIBERALISM, ISLAM, AND DEMOCRACY IN THE ARAB WORLD 98, 107 (2008) (identifying these individuals as particularly important; they have been writing about a notion of Islamic constitutionalism for many years, typically speaking in general terms and not about any one country's specific constitutional framework). An exhaustive study of the Brotherhood's constitutional vision would examine how the Brotherhood developed, expanded, modified, or rejected the ideas of influential intellectuals writing on Islamic constitutionalism. This is beyond the scope of this Article.

110. PLATFORM, *supra* note 92, at 6.

111. El-Ghobashy, *supra* note 12, at 32–33. The call for a new constitution was also made by a broad coalition in 1991, when the heads of all political parties, the Muslim Brothers, and the Communists issued

Habib wrote in the newspaper *al-Sharq al-Awsat* that if the Brotherhood achieved parliamentary power through free elections, it would appoint a committee of scholarly experts in national and Islamic law to draft a new constitution for Egypt.[112] He said very little else about a new constitution, except that it would define Egypt as a democratic and parliamentary republic, clarify the relations between the people and the government (including term limits for president and the right of interrogation), define the rights and responsibilities of the citizens, and separate the jurisdictions of the powers, taking guidance from the fundamentals of the Islamic Sharia and benefitting from the experience of history.[113] His position that the drafters should include Islamic law and national law scholars indicated a strong belief that spokesmen for Islamic law should have an equal place at the drafting table.

The Brotherhood intended the Platform, at least in part, to reassure moderate Egyptians who might have suspected the Brotherhood of wanting to bring an extremist interpretation of Islamic law to Egypt. Given this intention, endorsing Habib's statement in the Platform could have created serious opposition. While the Platform does not mention the issue of a new constitution, it does not foreclose the possibility of a future effort. One possible conclusion is that Habib's 2006 statement was his own opinion. Skeptics might say that the Brotherhood realized this was a losing political strategy but the goal of radical constitutional reform still exists within the organization. However, the number of major problems facing Egypt today and discussed in the Platform suggests that the Brotherhood will not likely expend political capital on drafting a new constitution, or at least not as a priority, even if they have the power to do so.

Within the framework of embracing the existing constitution, the Platform highlights several articles particularly important to the Brotherhood. Chief among these is Article Two. In its introduction, the Platform states, "[w]e present this reformist platform to the Egyptian people . . . based on Article Two of the Egyptian constitution . . . ."[114] Article Two of the Constitution is then praised as "the moderate stance and the just position in the Islamic way."[115] Article Two is the crucial link for the Brotherhood because it connects the Party's agenda—which claims to be heavily grounded in Islamic law, morals, and culture—and the current Egyptian state structure. This constitutional article allows the Brotherhood to claim that *they*, not the NDP, are the party of the constitution, because their ideology and positions are firmly supported by Article Two, and in turn they are the ones who want to carry out fully the message of Article Two.[116] For example, the Platform states that "the text of Article Two is just an affirmation of the authority of the Islamic Sharia."[117] By basing itself on the Islamic Sharia, the Brotherhood is thus merely promoting the Egyptian constitution and nothing more than that. Yet, Article Two has been given a precise

a statement requesting the president to consider a proposal for a new constitution to be drafted by legal scholars. The concern behind this movement was mainly the extensive presidential powers of the current Constitution. *Id.*

112. Muhammad Habib, *What Would Happen If the Muslim Brotherhood Came to Power?*, AL-SHARQ AL-AWSAT (Feb. 6, 2006), http://www.ikhwanonline.com/Article.asp?ArtID=17810&SecID=0.

113. *Id.*

114. PLATFORM, *supra* note 92, at 6.

115. *Id.*

116. *See* Brown & Hamzawy, *The Draft Party Platform*, *supra* note 94, at 3.

117. PLATFORM, *supra* note 92, at 13.

meaning by the SCC.[118] As discussed below, the Platform has to deal with the fact that while on its face Article Two seems capable of embracing the Brotherhood's agenda, the SCC has already given it a particular meaning that is not necessarily consistent with the Brotherhood's own constitutional vision.

2. Respect for SCC

The Platform's introduction states that "[w]e present this reformist platform to the Egyptian people . . . based on Article Two of the Egyptian constitution, which provides that the official religion of the state is Islam and that the principles of the Islamic Sharia are the main source of legislation, *according to what the SCC has determined in interpreting the Article*."[119] This is an important recognition of the SCC's Article Two jurisprudence. The statement also implicitly recognizes that the SCC has the authority to determine the meaning of the constitutional language "the principles of the Islamic Sharia."[120] In some ways, this point is obvious: the SCC is the authorized body to interpret the constitution.[121] However, this does not end the analysis—as a matter of constitutional expansion, the Platform accepts the current situation as a floor rather than as a ceiling for the place of Islamic law in the state.

The idea of a national high court determining matters of Islamic law warrants further discussion here. In *The Fall and Rise of the Islamic State*, Noah Feldman discusses this concept, and calls it "Islamic judicial review."[122] This delegation of religious interpretation to the national courts "transforms the highest judicial body of the state into a guarantor of conformity with Islamic law."[123] He presents the idea as something the Islamist constitutional theorists have proposed "not merely to ensure [legislation's] compliance with the constitution, but to guarantee that it does not violate Islamic law or values."[124] For Feldman, Islamic judicial review could be the solution to conflicts within states over the place of Islamic law in the legal system and over who gets to decide what Islamic law means in that particular national context.[125]

The Platform suggests that while Islamic judicial review by the SCC (with the current roster of judges) may be acceptable to the Brotherhood, it is not sufficient. The concept of the SCC serving as a check to determine, as Feldman describes it, "if the laws passed by the legislature, whether enacted in good faith or not, do not correspond to the 'true' content of Islamic law or values" is not a Brotherhood proposal.[126] Rather, this concept is a part of the Egyptian system that the Brotherhood has chosen to acknowledge in order to accept the Egyptian constitution and the SCC's interpretation of it to date. In contrast to the multiple references to

118. *See supra* text accompanying note 62.

119. PLATFORM, *supra* note 92, at 6 (emphasis added).

120. *Id.* Ibrahim Houdaiby stated that the current Article Two jurisprudence could not be better. Interview with Ibrahim Houdaiby, *supra* note 47. Khalid Hamza stated that the Muslim Brotherhood does not want or need more from the SCC regarding Article Two. Interview with Khaled Hamza, editor of the Muslim Brotherhood's English language website, http://www.ikhwanweb.com (June 12, 2009).

121. Law No. 48 of 1979, art. 25.

122. FELDMAN, *supra* note 14, at 122.

123. *Id.*

124. *Id.* at 121.

125. *Id.* at 122.

126. *Id.* at 121.

Article Two, the Platform makes little mention of the SCC, suggesting that the Brotherhood accepts what the SCC has done as a minimal step but has larger plans that it can accomplish in part through other mechanisms.[127] The Platform also touches on the sensitive issue of how the Brotherhood would like to change the SCC, and this is discussed below.

3. Egypt as a Civil State based on Citizenship

The documents from the Brotherhood make clear that it recognizes Egypt as a civil state and does not seek to impose some kind of theocracy. The *2005 Electoral Program of the Muslim Brotherhood* even states that the religion of Islam rejects a religious political power and establishes that the state in Islam is a civil state in which the community determines its system within the framework of the fixed norms of Islamic law.[128] The reference to a religious political power clearly indicates the Iranian state, and the Brotherhood made clear that it deems the Iranian system unacceptable as a fundamental matter of Islam. In part, this statement is an example of Sunni Muslims rejecting Shi'a Islam, along with some nationalistic political posturing.[129] Since Iran serves as such a negative model for Egypt and the Arab world generally, it is essential for the Brotherhood to clearly distance itself from suggesting it supports an Egyptian state that looks like Iran. Yet on a deeper level, the Platform cannot adequately define the boundaries of what the democratic process might produce in relationship to "fixed norms of Islamic law" or other religiously derived points of non-negotiability.

Further drawing fine lines with terminology, the Platform links the labels "civil state" and "Islamic state," claiming that Egypt is—and should be—both.[130] In doing so, the Platform tries to make the label "Islamic state" sound unobjectionable by saying that the Egyptian constitution confirms that "Egypt is an Islamic state and that Islam is the basic source of legislation in it."[131] By taking this starting point, the Brotherhood does not need to call for something new, but rather can cast itself as trying to carry out what the constitution already has determined. The problem with this assertion is that the constitution does not actually use the phrase "Islamic state." In addition, other than citing Article Two, the Platform does not explain the reasons for this assertion. The idea that Islam is the basic source of legislation is not

127. *See generally* PLATFORM, *supra* note 92.

128. 2005 PROGRAM, *supra* note 90, at 2.

129. Walid M. Abdelnasser, *Islamic Organizations in Egypt and the Iranian Revolution of 1979: The Experience of the First Few Years*, 19 ARAB STUD. Q. 25, 28–30 (1997). Diplomatic relations terminated between Egypt and Iran after the Iranian revolution in 1979 when President Sadat hosted the deposed Shah in Cairo. Iran also objected to the peace treaty with Israel. After Sadat's assassination, Tehran named a major street after Sadat's assassin, Islambouli, which further harmed relations between the two countries. In the Iran-Iraq war, Egypt, along with the rest of the Arab world, supported Iraq. Relations have recently warmed: the Tehran City Council officially changed the name of the Islambouli Street to Intifada Avenue, in recognition of the Palestinian uprising. *Id.*; *Iran and Egypt to Restore Ties*, BBC NEWS (Jan. 6, 2004), http://news.bbc.co.uk/ 2/hi/middle_east/3371545.stm.

130. PLATFORM, *supra* note 92, at 82. As explained by Guidance Bureau member 'Abd al-Mun'im Abu al-Futuh, the Brotherhood does not want a religious state; it wants an Islamic state where people are the source of the authority. For him, an Islamic state is one where the majority of residents are Muslim and accept Islam as a reference for society and for behavior. It is a civil state that depends on Islamic principles. A Muslim cannot *not* introduce Islam into the state, he said. Interview with 'Abd al-Mun'im Abu al-Futuh, Guidance Bureau member (June 14, 2009).

131. *Id.* This statement is made after describing classical Islamic criminal law.

constitutional language but a revised form of Article Two, which states "the principles of the Sharia are the main source of legislation."[132] The significance of this revised language is discussed below.

The label "Islamic state" is not defined, and on its face has little explanatory meaning. The Platform does not attempt to define it but rather simply asserts that whatever it may mean, it is already provided for in the constitution. The Brotherhood's strategy is to show that Egypt is already both a civil and Islamic state, and then expand from the labels to fill out the content. This rhetorical move allows the Brotherhood to claim it is not calling for any change to the structure and basic constitutional characteristics of the Egyptian state. Rather, the Brotherhood wants to see these important characteristics filled out, given meaning, and implemented.

Complementing the point that Egypt is a civil state, the Platform says that membership in the state is based on citizenship.[133] The clear implication is that Egyptian citizenship, not religion, determines one's place in the state. This endorses the current Egyptian law, and any deviation from it would have caused serious concern. Christian Egyptians comprise approximately ten percent of the population and are generally very concerned about the consequences of the Brotherhood making major political gains.[134]

### C. *Areas of Desired Expansion*

The Platform implicitly and explicitly stresses the importance of Islamic law in the Egyptian constitutional system. First, it does so through a lengthy definition of Islamic law, which provides important signals about both content and vehicles for implementation. Second, it presents a view of Article Two that goes beyond the SCC's current jurisprudence, in terms of meaning, application, and enforcement.

#### 1. Definition of Islamic Law

The Platform provides a fairly lengthy definitional discussion of Islamic law that is worth examining in detail. This discussion seems to be presented for purposes of background rather than as a call to implementation, yet it provides important clues when linked to other parts of the Platform. The Platform begins with a very general statement that the purposes (*maqasid*) of the Islamic Sharia, stated as the protection of religion, life, honor, reason, and property, form the Brotherhood's guiding policies in determining its goals, strategies, and policies.[135] The purposes are a concept from Islamic jurisprudence and are based on the idea that God's law is more than merely rules, but rather is an entire system that has its own aims or purposes.[136] If humans

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132. EGY. CONST., art. 2.

133. PLATFORM, *supra* note 92, at 15.

134. CIA WORLD FACTBOOK, EGYPT, https://www.cia.gov/library/publications/the-world-factbook/geos/eg.html; Steve Stanek, *Coptic Believers Say Extremists are Driving them out of Egypt*, THE GLOBE AND MAIL, July 7, 2007, at F3; *see generally* RACHEL SCOTT, THE CHALLENGE OF POLITICAL ISLAM: NON-MUSLIMS AND THE EGYPTIAN STATE (2010).

135. PLATFORM, *supra* note 92, at 11.

136. R.M. Gleave, *Makasid al-Shari'a (a.)*, *in* 12 ENCYCLOPEDIA OF ISLAM, 2D ED. 569 (P. Bearman et al. eds., 2006). The identification of these five aims is also a product of human interpretation and is

implement the system correctly, then they will be able to bring about God's intentions.[137] The SCC has also said that legislation should aspire to protect these same five purposes of the Sharia.[138]

The Platform's statement that the purposes of the Islamic Sharia determine the goals, priorities, and strategic policies of the Brotherhood does not express a specific parliamentary agenda. It is only a statement of general guidance and direction, and non-controversial except in the most conservative of circles that would object to human's power to understand God's aims or, on the other end, those who do not want religion mentioned in national law. Indeed the Platform presents the aims as a broad concept that goes beyond Islam and can serve as the guiding goals for the state generally: "[t]he aims represent the cornerstone of our cultural values, and are the Muslims' source of faith and culture and the non-Muslims' source of culture."[139]

One person might believe that a particular rule is necessary to preserve life or religion, while someone else might believe that the same rule threatens religion. For example, if prayer is a requirement of religion, then upholding and promoting prayer is an aim of Islamic law. But how should a government carry out that aim? One possibility is a roving state authority that enforces prayer times, as takes place in Saudi Arabia.[140] Other options include building more mosques or strengthening religious education in elementary schools. While all of these might legitimately take place under the heading of carrying out the aims of the Sharia, the impact on people's daily and personal lives differs dramatically from one option to the other. What the Brotherhood would seek to carry out under the heading of the purposes of the Sharia remains unclear.

The Platform then discusses the sources of Islamic law, giving the basic mainstream Sunni view with some nuances. The authority of the Islamic Sharia, according to the consensus of Muslim legal scholars, is limited to two primary sources, the Quran and the Sunna (normative practice) of the Prophet that is considered "*sahih*."[141] The Sunna refers to the speech, action, and tacit approval of the Prophet; each account is called a *hadith* and collectively, they are considered the Prophet's *sunna*.[142] A *hadith* that is considered "*sahih*" (sound) means it has the highest rating of authenticity.[143] The category of *hadith* directly below *sahih*, good (*hasan*), has always been considered by Muslim scholars to be acceptable for purposes of developing law, since the *hadith* considered *sahih* do not contain a significant range of legal topics.[144] However, the Platform seems to suggest a

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malleable; the source texts neither list aims nor even state explicitly that God identified and is guided by higher aims. For example, the modern scholar Ibn 'Ashur added equality and freedom to the list of purposes of the Sharia. *Id.*

137. *Id.*

138. Case no. 7/Judicial Year 8/Supreme Constitutional Court.

139. PLATFORM, *supra* note 92, at 11.

140. *See* Frank Vogel, *The Public and Private in Saudi Arabia: Restrictions on the Powers of Committees for Ordering the Good and Forbidding the Evil*, 70 SOC. RES. 758 (2003) (noting mandatory prayer times enforced by Saudi Arabian authority).

141. PLATFORM, *supra* note 92, at 11.

142. J. Robson, *Hadith*, in 3 ENCYCLOPEDIA OF ISLAM, 2D ED. 23, 23 (P. Bearman et al. eds., 1986).

143. *Id.* at 24–25.

144. *Id.* at 26–27. The remaining two categories of *hadith* are weak and infirm.

limitation on the range of *hadith* used, without recognizing that most law derived by scholars over the centuries has involved *hadith* not considered sound by compilers.[145]

In addition to these two primary sources, the Platform then discusses the doctrinal rules (*fiqh*) that jurists derived from these sources using interpretative methodologies, namely *ijtihad* (independent legal reasoning) and *ijma‘* (consensus of the jurists). The Platform emphasizes that the rules of *fiqh* have changed over time in response to the environment, the needs of the ruler, the relative authority of the sources that support the views, the interest of the public, and other factors that change with time and place.[146] This statement stresses the temporal nature of *fiqh*, and lays the groundwork for the conclusion that rules of *fiqh* produced in one generation are not necessarily authoritative for the next.[147] But not all rules of *fiqh* are or should be responsive to social changes, according to the Platform, as seen below.

After reviewing the sources, the Platform makes general statements about Islamic law that are important for understanding the Brotherhood's goals for the Egyptian state. First, it makes the general statement that the Islamic Sharia is a complete law that deals with the ordering of both religious and worldly matters.[148] Then, it states that the Islamic Sharia is distinguished by complete flexibility and power to face new events and changing practices and customs because God provided it with suitability and lasting power over the spread of time and place.[149] The fact that it is now applied in a growing number of environments and civilizations serves to confirm that Islamic law has a global message and is not limited to one particular historical or cultural context.[150] These statements indicate the view that Islamic law is broad, covering every topic, yet is not detailed, and the actual rules change due to new circumstances. This conceptual framework raises many questions regarding how to turn Islamic law into a legislative agenda, such as: which rules can humans change, and which rules are flexible? How do humans know when they can change a rule? And who has the authority to make these decisions?

In order to deal with these large and significant questions, the Platform then explains that the primary source texts (*nusus*) of the Quran and Sunna can be divided into three types based on the level of detail that the texts provide.[151] The first category includes the texts that regulate subject matters that are not affected by changes in time, place, environment, or customs.[152] A topic falls in this category if the texts concerning it provide a high level of detail; they should be followed precisely and do not change simply because times change.[153] The Platform states that the detailed rules of the Quran and Sunna should be applied just as they appeared in the texts, without independent interpretation and without any changes.[154]

145. PLATFORM, *supra* note 92, at 11.
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. PLATFORM, *supra* note 92, at 11.
152. *Id.*
153. *Id.*
154. *Id.*

The subject matters of these kinds of detailed texts are almost entirely matters of belief and religious devotional practice, such as how one prays.[155] A correlation between matters of religious practice and a high level of detail is not surprising because it is difficult to know what kinds of rules humans would deduce if God had only given a general statement such as "pray justly." The Platform then states that the topics of this first category are not in its purview.[156] The creeds, practices, and religious ceremonies are the religious part of Islam and are included in the missionary part of the Brotherhood, but the Platform's view of Islamic law is limited to the Islamic Sharia in the constitutional and legal sense that appears in Article Two of the Constitution.[157] The Platform tries to draw a clear distinction between Islamic law that governs the worldly life in the constitutional legal context and the purely religious side of Islam.[158]

The second category includes texts on subjects that are slightly affected by changes in time and place.[159] These topics have textual rules that provide both general principles and some necessary details.[160] Topical examples given in the Platform include personal status law such as marriage and divorce.[161] Muslim society is based upon these rules and has no value without them.[162] If these rules are lost, then the character of the society that distinguishes it as Muslim is also lost. The Platform does not state that these rules are outside its purview, so presumably they remain part of the Platform's discussion.

The third category are the texts that regulate the daily, civil, and worldly relations in all their types, such as economic, political, and social, among the people themselves, between people and the state, and among states.[163] These matters are affected by circumstances of time and place, and differ depending on environment, customs, and civilizations.[164] In this third type, the Sharia is content with placing general goals, comprehensive roots, principles, and pliant aims that defer, at the time of their application, to the changing environment.[165] In this area, the Sharia rarely meddles in the details and indeed provides virtually none, leaving the concrete plan to legal interpretation conducted by human intelligence, which can adjust to the conditions and changing public needs.[166] Based on this definition, these matters are squarely within the purview of the Platform and law making generally. The implication is that as long as the general goals and aims are followed in these matters, a wide range of actual rules may be adopted for society.

In addition to the division of texts into three subject-matter categories that correspond to the level of detail of the texts, the Platform explains that substantive areas also can be divided into two groups according to the strength of their proof

155. *Id.*
156. *Id.*
157. PLATFORM, *supra* note 92, at 11.
158. *Id.* at 12.
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. PLATFORM, *supra* note 92, at 12.
164. *Id.*
165. *Id.*
166. *Id.*; *see also* Vogel, *The Public and Private*, *supra* note 140, at 751.

texts.[167] In defining these two groups, the Platform presents the same distinction used by the SCC between texts that are definite in terms of authenticity and meaning and those that are not.[168] To pass this test of definiteness on both grounds, the Platform suggests that (1) the authenticity of the text must be proven, and (2) there must be one clear meaning of the text. For texts that are certain in terms of their authenticity and meaning, there is no room for human interpretation, and there are very few of such texts.[169]

The second large category, per the Platform, includes all primary texts that fail this test of definiteness in terms of authenticity and meaning; all of these are only probable.[170] These texts are open to interpretation (*ijtihad*) and to multiple results, and are especially numerous in rulings that organize daily worldly matters.[171] Presumably, these areas are open to lawmaking, and correlate with categories two and three of the first set of divisions (that is, source texts whose interpretation is only slightly affected by changes in time and place, and source texts that regulate the daily, civil, and worldly relations and are affected by circumstances), although the Platform does not say so. It does state that in these matters, the door is open to consideration and *ijtihad* to those who fulfill the conditions for exercising *ijtihad* and who adhere to its jurisprudential methodologies for deriving *fiqh* from the sources. The issue of limiting *ijtihad* to a particular qualified group is discussed below in the context of the Council of Scholars.[172]

Why does the Platform introduce these two sets of divisions of texts? The first system of division, which separates the detailed religious texts from the political purview of the Brotherhood, presents something of a conceptual jurisdictional limitation, an effort to divide between the Brotherhood as a missionary organization and the Brotherhood as a political party. The Platform states that Islamic law covers all aspects of life, but as a practical matter it takes some aspects of it, notably the detailed rules of religious practice, out of the jurisdiction of the state.[173] These topics of personal devotion are not part of political discussion because their proof texts are detailed, the rules do not change with time and place, and perhaps even the rules themselves are definite in terms of authenticity and meaning.[174] These topics are for the Brotherhood as a missionary society, and members will continue to work on the level of individual piety in that capacity, but they have no place in the political party, the Platform suggests. This statement is probably an attempt to reassure Egyptians that the Brotherhood does not want to interfere in personal religious life.

The statement that the fixed and unchanging rules mainly address areas of personal worship and devotion, and that the Platform does not concern itself with these topics, is not as straightforward as it may sound. First, there will be disagreements about what is considered fixed, unchanging, and not subject to interpretation. For example, in a case before the SCC involving a decision of the Minister of Education that forbade girls from wearing the *niqab*, which is a form of a

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167. PLATFORM, *supra* note 92, at 12.
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id*
173. PLATFORM, *supra* note 92, at 11.
174. *Id.*

veil that covers the face, the SCC concluded that the issue of the proper form of women's clothing is not one that involves rules that are certain with respect to their authenticity and meaning. While the father of two schoolgirls who were affected by the *niqab* ban asserted that Article Two of the Egyptian constitution should protect their right to wear it, the SCC held that the *niqab* is not based on a rule that is certain in its authenticity and meaning, and thus the ruler, in the form of the Minister of Education, may prohibit it.[175] The Platform does not provide details on what it proposes to include under the heading of the fixed and unchanging rules.

Secondly, even if a rule is considered unchanging and entirely clear, such as the requirement that Muslims fast during Ramadan or the prohibition on the consumption of certain intoxicating substances, how will that rule be enforced? Does the Platform suggest that the rule should not be a part of national law or even part of national political debate? Nothing in the Platform suggests that the Brotherhood is willing to relinquish jurisdiction over matters of this kind. For example, the personal obligation of a Muslim to fast during Ramadan presumably falls under the category of a topic of personal devotion. Indeed, it is probably the case that the Brotherhood has no intention of dealing in legislation that regulates the details of how an individual fasts during Ramadan, but the boundaries between the personal and the worldly are not as clear in practice as presented here. What if someone is openly and publicly not fasting when he should be? Currently there are no laws against this in Egypt, although, as a matter of practice, non-fasting people, Muslim or otherwise, do not openly flaunt their consumption during Ramadan.[176] But if a legislator wanted to increase control of restaurants that operate through the day in Ramadan, would the legislator be overreaching into areas beyond his jurisdiction according to the Platform's division of texts? As a practical matter, it seems difficult without further clarification to keep the topics that might fall under even the first category of detailed doctrinal rules out of the realm of lawmaking and enforcement.[177] Further, it is difficult to claim that detailed rules of ritual that are fixed and unchanging are outside the meaning of Article Two, when in fact the fixed and unchanging are exactly what the SCC has said it will protect.[178] If a national law interfered with some area of religious practice, the Platform probably does not mean to suggest that this is outside the Brotherhood's scope of interest because it involves a matter of religious devotion.

For all other substantive areas of law, the Platform emphasizes the malleability of Islamic law. Who is supposed to decide how to mold that flexibility into tangible legislative ends and on what basis? The Platform puts emphasis on the role of the legislature, calling for "the application of the Islamic Sharia in the view that the *umma* (community of Muslims) agrees upon via a majority in Parliament that is elected in free elections."[179] With this description, the Platform seems to suggest no

175. Case no. 8/Judicial Year 17/Supreme Constitutional Court, 18 May 1996. A translation of this case along with a commentary is provided in Nathan Brown and Clark Lombardi, *The Supreme Constitutional Court of Egypt on Islamic Law, Veiling, and Civil Rights: An Annotated Translation of Supreme Constitutional Court of Egypt Case No. 8 of Judicial Year 17 (May 18, 1996)*, 23 AM. U. INT'L REV. 437 (2006).

176. *See, e.g.*, Nadia Abou el Magd, *Furore as 155 arrested for not fasting*, THE NATIONAL (Sept. 9, 2009), http://www.thenational.ae/apps/pbcs.dll/article?AID=/20090910/FOREIGN/709099831/1011/NEWS (describing arrests in Aswan of people who publicly broke the fast during Ramadan).

177. *Id.*

178. *See supra* text accompanying note 175.

179. PLATFORM, *supra* note 92, at 12.

more than the vision of Muslim legislators (chosen in free elections) representing their constituents and trying to do their best for society according to the needs of the day. They are not bound by any pre-set rules, either because those rules govern topics that are not for the legislators, or because the topics they are dealing with have rules that either change with or are slightly affected by the contextual circumstances.[180] This kind of statement supports the Brotherhood's vision as a reform party. So long as citizens agree with the starting point of some limits on legislation per Article Two of the Constitution, then the rest is left to the democratic process.

This idea of Islamic law as democratic process, checked by the SCC, is certainly present in the Platform. It is accompanied by, and is perhaps in competition with, several other conceptions of Islamic law, including the idea of limiting the production or interpretation of laws that are Islamically-compliant to certain qualified people. One conception, discussed next, tries to expand the meaning and reach of current Article Two jurisprudence, while another, discussed further below, lodges responsibility for Islamic law in a broader range of actors.

2. An Expansive View of Article Two in Terms of Inherent Meaning, to Whom It Applies, and Who Has Standing

The Platform posits an expansion of Islamic law beyond the current constitutional structure through its conception of the meaning, application, and enforcement of Article Two. While embracing Article Two and its jurisprudence, the Platform also makes efforts to assert that "principles of the Islamic Sharia" have a wider meaning than have been determined by the SCC and indeed have application in society in general beyond matters that are specifically constitutional questions as currently defined.[181] The power of the SCC as the sole body with authority to conduct judicial review is never challenged, nor is the SCC's jurisprudence ever criticized in the Platform. Rather, Article Two's meaning and force is discussed independently of the SCC, leaving unclear which part of the state, if not the SCC, would carry out these more expansive views.[182]

Point Four of the Platform accepts Article Two's jurisprudence and at the same time pushes to give it more meaning. It states that the text of Article Two is just an affirmation of the authority of the Islamic Sharia, whether in terms of text, indication, or *ijtihad*.[183] The statement suggests that Article Two merely recognizes and affirms a pre-existing legal order, such that Article Two of the Constitution was not necessary for the Islamic Sharia to have legal force as a matter of state law, but this is not how the SCC interpreted this issue. The SCC's first Article Two case involved a challenge by al-Azhar University to an article of the Civil Code that required payment of post-judgment interest.[184] The University wanted to avoid

180. *See* Abdel Monem Said Aly, *Understanding the Muslim Brothers in Egypt*, MIDDLE EAST BRIEF NO. 23 (Brandeis Univ. Center for Middle East Studies), Dec. 2007, at 5 ("The legislature, in cases that are not related to definitive religious rulings based on irrefutable evidence, has the right to decide by an absolute majority.").

181. *Id.* at 10.

182. *Id.*

183. PLATFORM, *supra* note 92, at 13.

184. Case no. 20/Judicial Year 1/Supreme Constitutional Court; *see also Supreme Constitutional*

payment on post-judgment interest owed as a result of a commercial lawsuit, and argued that interest payments conflict with the principles of the Islamic Sharia and thus the Constitution.[185] The SCC determined that it did not have jurisdiction over legislation adopted prior to May 22, 1980—the date of the amendment making the principles of the Islamic Sharia *the* main source of legislation.[186] The Civil Code dated to 1949 and thus was not subject to Article Two scrutiny, since the legislative committee that proposed the Article Two amendment said it "requires the lawmaker to resort to the rulings of the Islamic Sharia—and not to any other source—to investigate the compatibility of any legislation under consideration with the Sharia."[187] For the SCC, its ability to examine the compatibility of legislation with the principles of the Islamic Sharia was created by Article Two, as amended.

This statement from the Platform that Article Two is just an affirmation of the authority of the Islamic Sharia, whether in terms of text, indication, or *ijtihad*, suggests that the Islamic Sharia as protected by Article Two is not limited to a core set of fixed and unchanging rules, however defined, but rather includes any kind of rule produced from the source texts, even if that rule is from a scholar's individual exercise of legal interpretation (*ijtihad*), which is inherently uncertain. Yet the SCC already decided that it would not protect a rule that was merely the result of a scholar's *ijtihad* because it is indeterminate, stating explicitly that the rules that are definite in terms of their authenticity and meaning neither need nor permit *ijtihad* because their meanings are absolutely clear and do not change with time. If the SCC's standard were to strike legislation that violated the results of any *ijtihad*, it could invalidate a wide array of rules, since the range of opinions is vast. The presentation of this concept in the Platform is subtle but suggests a broader understanding of Islamic law as state law than the current SCC rulings.[188]

In addition to expanding the meaning of Article Two, the Platform indicates that Article Two applies to a broader range of decisions than it does currently. The Platform states that Article Two speaks to the parliamentary authority and to the power of the President to issue laws, decisions, and internal and foreign policies.[189] Currently, the law on the SCC states that the SCC has the exclusive authority to exercise the power of judicial review in constitutional issues with respect to laws and regulations only, which includes presidential decrees that contain substantive norms of general application.[190] Proposing to include the President's decisions generally and domestic and foreign policies under the purview of Article Two is a major expansion of the SCC's power. Since this proposal is presented in the Platform in such a casual way, it is hard to know whether the authors knew of its significance. By referencing the President's foreign policies, the Platform appears to be alluding to a foreign policy issue that still receives Brotherhood criticism: Egypt's relations with Israel.[191]

On at least one occasion, Brotherhood parliamentarians have asserted the use of Article Two beyond its current constitutional realm of applicability. In November

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*Court (Egypt)—Shari'a and riba: Decision in Case No. 20 of judicial year No. 1*, 1 Arab L.Q. 1, 100–07 (Nov. 1985) (translating case no. 20).

185. *Id.* at 102.

186. *Id.* at 104–05.

187. *Id.* at 104.

188. *See generally* PLATFORM, *supra* note 92.

189. *Id.* at 13.

190. Case no. 20/Judicial Year 1/Supreme Constitutional Court.

191. PLATFORM, supra note 92, at 4.

2006, the Minister of Culture, Faruq Husni, said in an interview that he considered the headscarf a symbol of backwardness.[192] Egyptians generally were angered by this statement.[193] The Brotherhood parliamentarians immediately called for the President to dismiss Husni. The reason they gave for his dismissal is significant: the Brotherhood claimed that the Minister had gone against the language of Article Two of the constitution (and specifically the clause that "Islam is the religion of the state") because the headscarf is required by Islam.[194] However, the statement of a Minister is not currently a justiciable event; the power of judicial review is in respect to laws and regulations only.[195] Asserting that Article Two bears on the statements of ministers exemplifies either a simplistic understanding of the Constitution or a creative one. Unlike Article Two's language that "the principles of the Islamic Sharia are the main source of legislation," with its extensive jurisprudence, the SCC has not had occasion to interpret the original language of Article Two that "Islam is the religion of the state." In the absence of a SCC determined meaning, this clause of Article Two might become a blank page upon which a differently constituted SCC could develop a new jurisprudence regarding Islam and the state.

The same concept of extending the reach of Article Two is presented through different language elsewhere in the Platform. The second item listed under goals of the Party is to "disseminate and deepen the morals, values, and true understandings of the principles of Islam as a way of life for the individual and society, and to put into action Article Two of the Constitution as to include all levels of law-making."[196] These clauses may have been written with a focus on the results desired—further scrutiny of decisions and policies for their compliance with some notion of the Sharia—without attention to the mechanics of the implementation and enforcement or what such enforcement might mean for the SCC. Importantly, the Platform never proposes to modify the law that gives the SCC its jurisdiction; rather it makes these statements of expansion without specifying how it would take place as a matter of constitutional structure.

The final expansion issue deals with standing to make a claim on the basis of Article Two, although the expression of this point in the Platform also echoes the other expansion issues already addressed. The Platform says that every person who has an interest—whatever that may be—should be entitled to appeal to the SCC for any law, decision, or policy claiming that it conflicts with the rulings of the Islamic Sharia as agreed upon by the relevant contemporary scholars.[197] First, the Platform's language is not limited to laws and regulations, again expanding the sources included under Article Two's purview. Second, the statement suggests that the test for Article Two is whether a law conflicts with the rulings of the Islamic Sharia "as agreed upon by relevant contemporary scholars."[198] This test would be far broader than the SCC's

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192. Editorial, *Not So Veiled Complaints*, EGYPT TODAY (Dec. 2006), http://www.egypttoday.com/article.aspx? ArticleID=7081.

193. Yasmine Saleh and Sarah El Sirgany, *Religious Scholars Slam Farouk Hosny for Anti Veil Remarks*, DAILY NEWS EGYPT (Nov. 19, 2006), http://www.dailystaregypt.com/article.aspx? ArticleID=4033.

194. *Id.*

195. Law No. 48 of 1979, art. 25.

196. PLATFORM, *supra* note 92, at 10.

197. *Id.* at 13.

198. *Id.*

current test of protecting only those texts from the Sharia that are definite in authenticity and meaning.

Most importantly, this statement adds the new element of expanded standing for Article Two claims by stating that any person with an interest may appeal to the SCC. Currently, an issue can reach the SCC in two ways. First, when in the course of deciding a case on the merits, if a court views that a provision of law or regulation on which the settlement of the dispute depends is unconstitutional, the proceedings are suspended by the court and the case is forwarded to the SCC for adjudication of the constitutional issues. Second, when the constitutionality of a provision of law or regulation has been contested by a party to a case before a court and the grounds are found to be plausible by that court, the court shall declare the postponement of the case and specify for that party a period not exceeding three months within which the constitutional issue is to be presented to the SCC. There is currently no mechanism for individual citizens generally troubled by a law to challenge it before the SCC.[199] The Platform has thus set up a situation whereby it recognizes the current SCC and its decisions, but at the same time gives Article Two more meaning in law and society. How the Platform envisions accomplishing this is the topic of the next section.

### D. *Mechanisms of Change*

#### 1. Parliamentary

According to the Platform, change begins with free and fair parliamentary elections. The third of the policies and strategies is to apply the authority of the Islamic Sharia in a way agreed upon by the Muslim community. Under this view, Islamic Sharia must be implemented through majority will, in a parliamentary authority elected in truly transparent elections, free of fraud, forgery, compulsion, and state interference.[200] The elections must take place under the supervision of foreign and domestic civil societies that are clearly independent of the executive branch.[201] Indeed, most observers agree that if elections were held this way, far more Brotherhood candidates would be elected.[202] Clearly, an open path to the legislature is a necessary pre-condition for many of the reforms discussed in the Platform.

The Platform assumes officials elected in free and fair elections would carry out the wishes of their constituents, and, consequently, be more attentive to Islamic law. Although the Brotherhood's goals address the process of getting lawmakers into office, they cannot guarantee any tangible legal or statutory results.[203] The Platform and Brotherhood generally put great emphasis on bringing all Egyptian laws into compliance with some notion of Islamic law through the democratic legislative

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199. Law No. 48 of 1979, art. 25.

200. PLATFORM, *supra* note 92, at 12.

201. *Id.*

202. *See generally* Denis Sullivan, *Will the Muslim Brotherhood Run in 2010?*, ARAB REFORM BULLETIN (May 5, 2009), *available at* http://www.carnegieendowment.org/arb/?fa=downloadArticlePDF&article=23057 (debating the electability of Brotherhood candidates in open and fair elections).

203. FELDMAN, *supra* note 14, at 120 (calling this the democratization of the Sharia—"its keeping is given over to a popularly elected legislature charged with enacting legislation derived from the source that is the shari'a").

process. Muhammad Habib stated that while in theory the legislature should not pass any laws unless they are in accordance with Article Two, this does not happen in practice.[204] One way to improve the situation would be to replace members of parliament who hold their seats because of their position in the ruling NDP with members who are genuinely popularly elected.

2. Executive

The second avenue of reaching tangible change in the Egyptian legal system is to re-conceive the position of the President as a leader of the Muslim community. The Platform requires that the president be a male Muslim, and that his policies be subject to Article Two. While the current Egyptian constitution does not impose religious or gender requirements on the President, the Platform, in one of the most controversial provisions, adds such a requirement.[205] Under the heading of "civil state," the Platform says that there are basic religious positions in the state and the officials who hold them are responsible for protecting and encouraging religion.[206] In Egypt, these officials are the President and the Prime Minister—both must ensure that no state action contradicts Islamic practices of worship, propagation, pilgrimage, and the like.[207] The Islamic state also has the responsibility for protecting non-Muslims in their belief and worship.[208] Further, decisions concerning war are decisions governed by Islamic law, and cannot be made by a non-Muslim. Since the leader of an Islamic community must be male, the Platform asserts, the positions of Prime Minister and President must be held by a Muslim male.[209] This notion of the Presidency as a religious position relates to the concept that the President's policies must be in accordance with Article Two.

In the controversy that this position has created, several lines of thought appeared among members of the Brotherhood. Some rejected the religion and gender requirements, since these positions are created by the modern nation-state and have no religious content.[210] Abu al-Futuh said that the position in the Platform represents merely the Brotherhood's preference—while the Brotherhood will not put up a woman or a Coptic candidate, others are free to do so.[211] Do the members of the Brotherhood who supported the restrictive language as written mean the religion of the President is part of the flexible zone of Islamic law, so that the rules can change from time and place? If so, why did they choose this view? On the other hand, if the Brotherhood claims that the religion of a leader is within the fixed and unchanging, then how can they defend their position against the several prominent scholars who disagree? This issue of competing sources of authority is revisited in the Conclusion.

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204. Interview with Muhammad Habib, *supra* note 97.

205. *Compare with* CONSTITUTION OF THE REPUBLIC OF SYRIA art. 3(1), *available at* http://www.servat.unibe.ch /icl/sy00000_.html (requiring the President to be Muslim).

206. PLATFORM, *supra* note 92, at 17.

207. *Id.*

208. *Id.*

209. Brown & Hamzawy, *The Draft Party Platform*, *supra* note 94, at 5.

210. *Id.* at 8.

211. Interview with ʿAbd al-Munʿim Abu al-Futuh, *supra* note 130.

### 3. Council of Scholars

The second issue that generated public controversy, far more than the religion of the President, is the few sentences in the Platform that propose the creation of a Council of Scholars to advise legislators in lawmaking. After explaining the policy to implement the authority of the Islamic Sharia through elected members of the legislature, and describing how free and fair parliamentary elections should take place, the Platform states that "the legislature must request the opinion of a council of senior religious scholars from the Muslim community (the Council)."[212] This raises several questions: who would make up the Council? What kind of opinion would it give? Finally, would its opinion be binding on the legislature?

The Platform says very little about the composition of the Council, merely that its members should be elected freely and directly from religious scholars who are completely independent of the executive branch.[213] The only other information provided is that the legislature should determine the required qualifications for Council members.[214] Not only the legislature but also the President of the Republic is required to consult the Council and request its opinion when he issues decisions that have the force of law and the legislature is not in session.[215] The Platform states that the Council's opinions will provide guidance, and "in the absence of certain legal rulings based on texts that are certain in authenticity and meaning, it is for the legislature to make the final decision, by absolute majority vote, with regard to the opinion of the Council."[216] As proposed by the Platform, the legislature may submit revised versions of proposed laws to the Council before adopting legislation. Implied is that if the Council makes the decision on the basis of a "certain legal ruling based on texts that are certain in authenticity and meaning," then the opinion is binding on the legislature.[217] The reference to texts that are certain in authenticity and meaning is the same that the SCC uses in its Article Two jurisprudence.

Most of the criticism of the Platform centered on these few sentences creating the Council.[218] Yet, this language reveals more about larger concerns of the Brotherhood than the Brotherhood's desire to implement a Council of the kind cursorily described. The section was inserted rather clumsily into a larger paragraph on the legislature, showing that the Brotherhood is struggling with some fundamental tensions between a bottom up approach to Islamic law in society—that is, the belief that good Muslim legislators will produce good Islamic law—and the sense that at the end of the day, a legal scholar should have the final (or near final) word because the average legislator is not an expert in the legal texts. Legislators, no matter how pious and well-intentioned, might get it "wrong," and thus need to be checked by someone with greater knowledge and experience with Islamic legal texts and methodologies. Yet it is hard to know what a "wrong" legislative outcome would be other than violating those few texts that are certain in authenticity and meaning since everything else is open to *ijtihad*, as the Platform states.

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212. PLATFORM, *supra* note 92, at 12.
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.* at 12; Brown & Hamzawy, *The Draft Party Platform*, *supra* note 94, at 4.
218. Brown & Hamzawy, *The Draft Party Platform*, *supra* note 94, at 2.

Proposing the Council suggests that at least some within the Brotherhood are not sure that relying on legitimately elected legislators, coupled with the later possibility of judicial review by the SCC, is sufficient to reach outcomes they desire. Thus, the raw democratic process needs to be checked by a small elite body, a notion compatible with constitutional review generally and in the case of Egypt the practice of the SCC. Because the Council would apply the same standard as the SCC, according to the Platform, the Council would be able to prevent offensive legislation, rather than having to wait years until the SCC possibly reviews the law following its adoption. In all other matters, the Council's view is not binding and can be rejected by a majority vote.[219]

If the Council can be characterized as basically a mirror image of the SCC, inserted earlier into the legislative process, why was there so much outrage over the Council? Critics said that it imposed an Iranian-style Council of Guardians on Egypt[220] and that it resembled the government of the Taliban.[221] Intellectuals who had advocated accepting the Brotherhood for what it was functionally—a political actor—distanced themselves from it in the face of what looked like a move toward control by unelected Islamic legal scholars over the democratic process.[222] The objections were based in large part on the assumption that the members of the Council, who would be religious scholars, would have a stricter approach to Islamic law than the members of the SCC. Indeed, the identity of the interpreter is perhaps the most important variable in the interpretation of Islamic law. Some within the Brotherhood criticized the idea of the Council as unrepresentative of the membership's views. Deputy Guide Muhammad Habib was the first to defend the Council.[223] Others from the Guidance Bureau, namely 'Abd al-Mun'im Abu al-Futuh, criticized the Council.[224] Some members supporting Abu al-Futuh even said that "these elements had been introduced in an inappropriate manner, without the process of consultation and consensus building about which the Brotherhood normally boasts."[225] Subsequently Habib modified his position somewhat, calling the section in the Platform a mistake and opposing the formation of a council with anything more than advisory capacities.[226]

As a result of the controversy over the Council, it is widely expected that if the Party issues a final Platform it will remove any binding role for the Council in order to show that it is not "interested in importing an Iranian-style theocracy to the country."[227] In an interview with Egyptian daily *al-Masry al-Yaum*, the General Guide at that time, Mahdi Akef, stated that the Brotherhood seeks to form a council of elected religious scholars to serve as merely an advisory body, available to public

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219. *Id.* at 3–4.

220. Mohamed Elmenshawy, Op-Ed., *The Muslim Brotherhood Shows Its True Colors*, CHRISTIAN SCIENCE MONITOR, Oct. 12, 2007.

221. Khalil al-Anani, *For the first time since its founding over 80 years ago . . . a party platform for Egypt's Brotherhood arouses doubts and restores the political project to its origins*, AL-HAYAT, Sept. 25, 2007.

222. Hamzawy & Brown, *The Egyptian Muslim Brotherhood*, *supra* note 5, at 11.

223. Brown & Hamzawy, *The Draft Party Platform*, *supra* note 94, at 7.

224. *Id.*

225. *Id.*

226. *Habib Admits Errors in Party's Platform*, IKHWANWEB, Oct. 17, 2007, http://www.ikhwanweb.com/article.php?id=14397.

227. Brown & Hamzawy, *The Draft Party Platform*, *supra* note 94, at 16.

figures who wish to consult it.[228] Such a council would also choose the Shaykh of al-Azhar, an important religious leadership position. The Brotherhood has criticized the Shaykh as a functionary of the state, rather than an independent religious thinker, because the President currently fills the post.[229]

#### 4. Judiciary

As discussed above, the Platform envisions an expanded role for the meaning of Article Two. How will this meaning translate from conceptual to practical if the SCC maintains its current jurisprudence? The Platform calls for a true separation of powers among state institutions and, notably, for judicial independence from the executive.[230] Brotherhood leaders have stressed that they recognize the authority of an independent SCC with independent judges to determine the meaning of Article Two. Muhammad Habib emphasized this point by stating that if there were an independent judiciary, there would be more room for Article Two implementation.[231] The meaning seems clear: the Brotherhood does not consider the SCC, as currently constituted, to be an independent body, the remedy for which is the separation of powers, implying that judges with ties to the executive will tend to interpret Article Two narrowly and uphold most, if not all, of the legislation challenged. When judges are appointed through a process that ensures their independence from the executive, they will naturally tend toward a more expansive view of Article Two, and strike down legislation more aggressively, the Platform suggests.

## V. CONCLUSION: CHALLENGES OF CLARITY FOR ISLAMIST PARTIES

While the Platform is the most detailed statement of the Brotherhood's political agenda, it still leaves many questions unanswered. The Platform repeatedly calls for a state where the three branches of government function with adequate separation from one another; where elections are free, fair, and supervised by independent monitoring bodies; and where candidates can run for office without state control over political party registration on the basis of the party's beliefs.[232] These simple demands, essential to any liberal democratic society, reflect the Brotherhood's call for a society governed by the rule of law. By accepting the authority of the SCC, the Brotherhood limits itself to influencing the interpretation of the Article through the current legal channels. Presented in this way, the Brotherhood differs little from a political party in the United States that favors a particular interpretation of a provision of the U.S. Constitution and advances it through all appropriate possible mechanisms.

Yet, the Brotherhood's agenda still troubles some in Egypt and worldwide, in particular human rights scholars and activists, women's groups, and religious

228. *Id.*

229. *Id.*

230. *See generally* PLATFORM, *supra* note 92.

231. Interview with Muhammad Habib, *supra* note 97. Guidance Bureau member ʿAbd al-Munʿim Abu al-Futuh stated that the SCC is the sole authority on constitutional interpretation, but that it does need to be a more independent body. Interview with ʿAbd al-Munʿim Abu al-Futuh, *supra* note 130.

232. PLATFORM, *supra* note 92, at 12. According to Ibrahim Houdaiby, the Platform is a statement that "Islam has no problem with democracy." Interview with Ibrahim Houdaiby, *supra* note 47.

minorities.[233] The Platform's position that women and non-Muslims cannot hold the positions of President and Prime Minister is a clear example of a discriminatory position, although these statements have been rejected or at least softened by many within the Brotherhood leadership. It is difficult to address the criticism that the Brotherhood strategically keeps its many discriminatory intentions private, because the evidence comes from the unspoken. But taking the Platform and other important statements of the Brotherhood as representing their position, as this Article does, then what larger areas of concern does the Platform raise and how can the Brotherhood, or any political party that presents itself as having an Islamic frame of reference, try to address them adequately?

Significant ambiguity persists in three areas of the Platform: the sources of reference for Islamic law and the content they produce; comparative authority of religious-based arguments and arguments of public welfare; and mechanisms for applying law in society. First, the Platform's references to Islamic law are unclear. The Platform itself recognizes the fallacy that Islamic law is some kind of code of law that can be applied in any environment, and acknowledges that most of the source texts are subject to human interpretation. These are both important recognitions, but the question remains: What is the Islamic legal content of the Brotherhood's agenda?

One example demonstrates the inability to adequately answer this question based on what the Brotherhood has said thus far. The Platform's discussion of crime and punishment recognizes two important components to crime reduction: Islamic education and upbringing as well as direct crime prevention.[234] The Platform states that if society achieves these two goals, then any crime that is committed is not done from dire need, and the person responsible is a depraved threat to society, who must be punished according to Islamic law.[235] To explain depravity, the Platform uses the example of theft, which it says is one of the most wide-spread crimes in Egypt.[236] The Platform asserts that throughout Islamic history, the defined Islamic legal punishments (the *hudud*), particularly amputation and stoning, were used infrequently, and only as a result of strict procedures.[237] The Platform then states that Islamic societies that applied Islamic law fully were the most stable and secure societies in history, and had the least amount of crime.[238]

It is unclear whether the Platform suggests that the *hudud* crimes and punishments should be part of Egyptian law, or whether the Platform's statements are merely unsubstantiated assertions about Islamic legal history as part of a larger discussion on criminal law. While the *hudud* crimes and penalties (or some modern re-imagining of them) are applied in some places in the world today, and while their proponents claim the *hudud* are essential to an Islamic society, the vast majority of countries with Muslim majority populations, including Egypt, have not made the *hudud* part of their criminal laws. Indeed, the Brotherhood has given little other

233. Amr Hamzawy, *Regression in the Muslim Brotherhood's Platform?*, DAILY STAR, Nov. 1, 2007, *available at* http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=19686; Elmenshawy, *supra* note 220 (alleging the Muslim Brotherhood's discrimination against Egyptian Christians).

234. PLATFORM, *supra* note 92, at 80. The classical language of "blocking the means" is used here.

235. *Id.* at 81.

236. *Id.*

237. *Id.*

238. *Id.*

indication of its interest in adopting these laws in Egypt, making this a curious discussion. The Platform's ambiguous position on *hudud* is further complicated by its statement regarding its discussion of the *hudud* crimes and penalties:

> [The discussion] is consistent with the Egyptian constitution, which confirms that Egypt is an Islamic state and that Islam is the main source of legislation, just as [the discussion] is consistent with the conclusion of modern studies—some of which are western—that the *hudud* as it appears in the Islamic Sharia is the most effective instrument in controlling crime and preventing it in all types of societies, even non-Muslim societies.[239]

This discussion presents no clear view on the Brotherhood's aims with regard to *hudud* crimes and does not provide clarity to Egyptians who do not want such penalties incorporated into national law and who would not support the Brotherhood if this were part of their agenda.

The second area of ambiguity deals with the comparative authority of religious-based arguments and arguments of public welfare. While the Platform places great emphasis on the importance of free and fair elections, it is also clear that lawmakers are subject to certain limitations derived from Islamic law.[240] Per Article Two, these limitations might merely be the power of the SCC to strike down laws that contradict some core norms of Islamic law. However, the Platform appears to go further, suggesting that some Sharia-derived arguments should trump efforts of the legislators, even when the legislators' efforts are clearly in the public interest.

Two examples illustrate this comparative authority problem. As discussed above, the Platform as drafted included the controversial Council of Scholars. The specific formulation of the Council itself is not as important as the underlying anxieties that seem to have led to it. At least some of the drafters of the Platform did not want to leave decisions completely up to the lawmakers with only a post-promulgation check by the SCC to prevent core Islamic rules from being violated.[241] Therefore, the drafters proposed inserting the Council of Scholars into the legislative process to advise the lawmakers. On the one hand, the wording of the Platform suggests that the binding nature of the Council would only be for a core set of rules, similar to the SCC.[242] However, the religious scholars who form the Council could adopt the SCC's approach to determining the fixed and unchanging rules, but could also adopt their own broader test, potentially leading to significant disputes with lawmakers.

The second example in the Platform is the general principle of non-discrimination that the Platform states is an essential component of true democracy. The concept is described as:

> Non-discrimination among citizens in rights and duties on the basis of religion, sex, or color such as the rights of property ownership, internal

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239. *Id.* at 82.

240. PLATFORM, *supra* note 92, at 12.

241. Hamzawy & Brown, *The Egyptian Muslim Brotherhood*, *supra* note 5, at 10 ("On the one hand, the proposed council answered apparent pressure from the movement's more ideologically committed foot soldiers that it not abandon Shari'a behind anodyne formulas, as well as the insistence of some senior leaders to make Shari'a-based rules a viable restriction on rulers.").

242. *See* PLATFORM, *supra* note 92, at 12.

> migration, education, work, exercising political rights, expression of opinion (in the context of protecting the political values of society), running for representative assemblies, and undertaking all executive and judicial positions, with exception of President. Only Muslim males may run for or hold this office. We view that women have the right in all administrative positions in the country except President, because religious scholars agreed that women may not hold this office.[243]

This presents the position that women may not hold the office of President based solely on one interpretation of Islamic law presented as a scholarly consensus, without any mention of whether such a rule would be in Egypt's interest or even whether other competing views exist.

On one level, Brotherhood legislators are free to introduce legislation imposing gender restrictions on candidates for President, but in the end they must accept the majority will of the legislative body. But if Brotherhood candidates become the majority in the legislature, will they then seek to impose legislation solely because they believe it to be required by an interpretation of Islamic law without any other reasoning? Could a person adhering to this view and claiming that he is bound to do so because it is a fundamental religious rule be convinced otherwise? And on what basis will this lawmaker decide that a rule is required? What evidence of scholarly consensus will be persuasive to him? And what if other lawmakers do not believe there is a consensus on the issue?

The line of questions raises several types of concerns. If the premise is accepted that a rule presented as Islamic (because accepted by some scholars) can trump other legislative proposals, then legislative debates will turn into discussions of which rule is more Islamic than the other, shifting the debate from public interest to one of Islamic legal methodologies and competing scholarly views. Abdullahi an-Na'im argues forcefully against the scenario where considerations of public welfare take a back seat, and rejects the idea of Islamic law "enacted and enforced by the state as public law and public policy solely on the grounds that they are believed to be part of the Shari'a."[244]

As a final note on this example, it also contains an internal contradiction that highlights the problem of arguing on the basis that all religious scholars have agreed on a position and so it is non-negotiable. The Platform states that women may not be President "*because* religious scholars agreed that women may not hold this office."[245] Yet this is not an accurate statement. One of the key thinkers who influenced the Brotherhood, Yusuf al-Qaradawi, presented the alternative view that women are only prohibited from serving as the head of the community of Muslims, the *umma*. Because the position of President of Egypt is a position constructed in the modern era of nation-states and conceptually distinct from the Islamic *umma*, Islamic legal rules do not apply to this issue.[246]

The third conceptual problem the Platform raises is the mechanisms for implementing rules based on Islamic law. The Platform accepts the existing

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243. *Id.* at 23.
244. AN-NA'IM, *supra* note 14, at 1.
245. PLATFORM, *supra* note 92, at 23 (emphasis added).
246. *See* RUTHERFORD, *supra* note 109, at 181–82.

institutions and the functions they serve, but it does not limit itself to working through this structure. The Brotherhood suggests it will harness the power of the state for the right cause, develop new institutions, and breathe new life into existing ones to extend the state's power and control with respect to Islamic law. But how exactly will these new powers take effect, and how will they affect daily lives of Egyptians, Muslim and non-Muslim alike?

These three conceptual difficulties will remain until the Brotherhood provides clear guidance as to their agenda. One way to clarify the agenda is through further policy documents, and perhaps the Brotherhood will issue a final Platform. Perhaps the most valuable and meaningful way to study the Muslim Brotherhood's agenda is to observe how its members behave in the legislature.[247] Official statements are helpful, but empirical studies will be even more useful to answer the basic questions: What types of legislation do they propose? What legislation do they oppose? What is their voting record? The Platform and other position papers suggest some answers, but vague praises for the classical Islamic criminal laws cannot predict how elected officials will behave once in office. Samer Shehata and Joshua Stacher began this line of research with the Brotherhood parliamentarians in 2006, and several small studies have followed suit.[248] Far more empirical work needs to be done in this area, in particular a comprehensive study on all Brotherhood parliamentarians in the 2005 session and those who will be elected on November 28, 2010. But if the number of Brotherhood candidates who win seats is kept to some "acceptable" level by the NDP, then voters will only be able to observe the Brotherhood as a minority opposition movement without the numbers to pass or block legislation on their own. In that case, the NDP's suggestion that the Brotherhood will behave differently when in the majority will remain as an unsubstantiated threat.

Egyptians and outside observers alike need to be willing to assess the Brotherhood's agenda in an objective and nuanced way. As this examination of the Brotherhood's Platform and positions has shown, a slogan of "Islam is the Solution" is about as precise as a political party calling for change. Many points of tension and ambiguity remain in the Brotherhood's Platform, and it is quite possible that the Brotherhood has not considered many of the questions raised in this Article. It may be unfair, as Samer Shehata has pointed out, that the Brotherhood is pressed to formulate and provide clearer answers when the same is not asked of the ruling NDP. The practical reality, however, is that the NDP is keeping the Brotherhood outside the formal political process with claims and allegations that the Brotherhood has chosen to attempt to refute. The November 2010 parliamentary elections have the potential to begin to advance a solution for this political impasse, just as they have to further entrench the status quo.

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247. Shehata & Stacher, *supra* note 4, at 33 ("[T]he Brotherhood parliamentary bloc is being noticed in Egypt for its work across ideological lines to serve constituents and increase its collective knowledge of local, national and international affairs. Moreover, the delegation has not pursued an agenda focused on banning books and legislating the length of skirts. It has pursued an agenda of political reform.").

248. *Id.* at 36–39; *see* RUTHERFORD, *supra* note 109, at 183–90 (summarizing the main areas of concern to the same parliamentary cohort based on Egyptian newspaper reports from 2005–2008); *see also* Hamzawy & Brown, *The Egyptian Muslim Brotherhood*, *supra* note 5, at 15–27 (surveying at a general level the concerns of the Brotherhood parliamentarians from the 1995–2000 and 2000–2005 sessions).

# *To Testify or Not to Testify*: A Comparative Analysis of Australian and American Approaches to a Parent-Child Testimonial Exemption

HILLARY FARBER*

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## INTRODUCTION

The notion of parents compelled to testify against their under-age children conflicts with deeply rooted societal values about familial privacy and the appropriate reach of government. As a society, we place a premium on time spent with children and the accompanying level of communication and care necessary to foster and maintain a strong parent-child relationship. Parents are the most important contributors to the socialization of their children.[1] From birth they teach the child to act in socially appropriate ways and to become a productive member of society.[2] Parents play a central role in determining the child's initial trajectories in life. Trajectories in crime and deviance are no exception[3] Social scientists who have studied patterns between parental attachment and delinquent behavior have found that when parents devote time to their children, communicate about the child's feelings and frustrations, and provide guidance and advice, they prevent involvement in crime and delinquency.[4]

It is natural that children will share some of their most personal secrets with their parents in order to receive the benefit of their parents' counsel. In a close relationship, parents have considerable sway over their child's decisions. They are often the first to assess their child's predicament and can judge when to seek professional services, if needed. Children are by nature impulsive and frequently fail to consider the long-term consequences of their actions.[5] Accurate and truthful information from the child provides parents the ammunition to make the best

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1. *See In re* A & M, 61 A.D. 2d 426, 432 (N.Y. App. Div. 1978) ("The role of the family, particularly that of the mother and father, in establishing a child's emotional stability, character and self-image is universally recognized. The erosion of this influence would have a profound effect on the individual child and on society as a whole.").

2. Dr. Travis Hirschi, a renowned expert in social control theory, believed that a child who does not have strong attachment to his parents has no way of learning moral rules and is incapable of developing a conscience. *See* TRAVIS HIRSCHI, CAUSES OF DELINQUENCY 86 (1969).

3. Gerald R. Patterson and Magda Stouthamer-Loeber, *The Correlation of Family Management Practices and Delinquency*, 55 CHILD DEV. 1299, 1304–06 (1984).

4. *See, e.g.*, HIRSCHI, *supra* note 2, at 90–91 (finding that as intimacy of communication between parent and child increased, the less likely the child was to commit a delinquent act); Rolf Loeber and Magda Stouthamer-Loeber, *Family Factors as Correlates and Predictors of Juvenile Conduct Problems and Delinquency*, 7 CRIME & JUST. 29 (1986) (concurring with Hirschi and finding that if parents are generally unaware of their children's activities, social relationships, and whereabouts, the children have greater opportunity to become alienated from their parents, and to act without adult guidance and supervision, thereby increasing the likelihood of committing delinquent acts); John P. Wright & Francis T. Cullen, *Parental Efficacy and Delinquent Behavior: Do Control and Support Matter?*, 39 CRIMINOLOGY 677, 693 (2001) (using term "parental efficacy" to refer to parents who control and support their children and finding that parents who give their children emotional support are more likely to exercise greater supervision and form greater attachment).

5. *See* Roper v. Simmons, 543 U.S. 551, 569 (2005) ("A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.") (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)); Graham v. Florida, 560 U.S.—,130 S.Ct. 2011, 2030–32 (2010) (discussing whether a categorical rule for sentencing juveniles is necessary, the Supreme Court articulated some of the difficulties encountered by counsel in juvenile representation due to juveniles' impulsiveness, difficulty in thinking in terms of long-term benefits, and reluctance to trust adults); Elizabeth Cauffman and Laurence Steinberg, *Researching Adolescents' Judgment and Culpability*, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 325, 326–27 (Thomas Grisso and Robert G. Schwartz eds., 2000) (explaining different ways of looking at adolescent immaturity and adolescents' diminished decision-making abilities).

decisions. There is an implicit assumption of privacy with respect to the information shared between a parent and a child within the institution of the family.[6]

Given these assumptions, why would any legal system not give the parent-child relationship the legal protection of a privilege? It is counter-intuitive to undermine the trust and confidence essential to the parent-child relationship by forcing a parent to testify against his or her child in order to assist the government. And yet, Australia is one of the few common law countries to recognize a testimonial exemption for parents and their children.[7] Australia is also unique in that it protects the privilege in the context of a restorative justice approach to crime. When it comes to juvenile offenders, Australia's response strives to achieve reconciliation, reparation, and reintegration.[8] The system incentivizes diversionary practices that accommodate offender-victim dialogue, family involvement, and community-based programs geared toward achieving offender accountability without stigmatizing the juvenile for transgressions committed at a young age.[9] Emphasis is less on formal adjudication and more on encouraging parental involvement and supervision as a means of keeping children out of the formal court process. Each state's youth justice legislation expressly promotes as part of its core mission the goal to support and maintain the parent-child relationship.[10] With restorative justice as a framework, a parent-child exemption makes sense; if the systemic concern is for family integrity, the absence of a privilege will undermine the systemic goal.

The fact that in the United States information shared between parent and child is not protected from government intervention would likely be an unpleasant shock for most parents. In the U.S. juvenile justice system, where the principal players are predominantly between the ages of eleven and sixteen, parental presence and intervention are common, as they are often expected and sometimes required. The system assigns parents a key role both in advising and participating in juvenile

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6. *See* Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955 (1993) (discussing the development of the concept of the family as a private sphere).

7. Hillary B. Farber, *Do You Swear to Tell the Truth, the Whole Truth, and Nothing but the Truth Against Your Child?*, 43 LOY. L.A. L. REV. 551, 624 (2010). Interestingly, although much of Australian law borrows from the English common law, none of the countries of the United Kingdom recognize a common law or statutory evidentiary privilege for parents and their children. *See* Police and Criminal Evidence Act 1984 c. 60, §80 (U.K.) (addressing the compellability of spouses but not children or parents); Police and Criminal Evidence Order 1989 c. 1341 §79 (N. Ir.) (granting spousal privilege, but no others, under certain circumstances). Some civil law countries recognize a testimonial exemption among family members. *See, e.g.*, NOUVEAU CODE DE PROCÉDURE CIVILE [N.C.P.C.] art. 206 (Fr.); STRAFPROZEßORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT [BGBL] I, 1074, as amended, § 52, para. 1, sentence 3 (Ger.); Codice di procedura civile [C.p.c.] art. 247 (Italy); Art. 199 Codice di procedura penale [C.p.p.] (Italy); KEIJI SOSHŌHŌ [KEISHOHŌ] [C. CRIM. PRO.] 1948, art. 147–48 (Japan); REVISED RULES ON EVIDENCE, R. 130 § 25 (Phil.). The origin of this prohibition is rooted in Judeo-Christian tradition. Traditional Jewish law forbids family members from testifying against one another. See *In re* Grand Jury Proceedings (Greenberg), 1982 WL 597412, at *2 (D.Conn. June 25, 1982). Similarly, the Romans believed that the foundation of society depended on a cohesive family unit; under the rule of *testimonium domesticum*, spouses, patrons, freedmen, and slaves were excluded as witnesses at a trial of a close relative or master. Wendy Meredith Watts, *The Parent-Child Privileges: Hardly a New or Revolutionary Concept*, 28 WM. & MARY L. REV. 583, 592 (1987).

8. *See* CHRIS CUNNEEN & ROB WHITE, JUVENILE JUSTICE: YOUTH AND CRIME IN AUSTRALIA 358–61 (2007) (describing the theoretical framework and benefits of a restorative justice approach).

9. *See id.* at 367–71 (providing an overview and explanation of the many diversionary alternatives employed as practical approaches to restorative justice).

10. *See infra* Part II.

delinquency proceedings. The law encourages parents' presence prior to police interrogation to advise the child whether or not to speak to police.[11] Almost all jurisdictions require some form of parental involvement in their child's juvenile proceedings, including summoning parents to appear in court or requiring parents to approve the child's plea agreement.[12] For an unemancipated minor, parents are usually financially responsible for their child's legal expenses.[13] Many courts automatically assign the costs and probation fees to parents, even for indigent defendants.[14]

In contrast to the Australian juvenile justice system, the American juvenile justice system has evolved into a formal adjudicatory system, with an emphasis on deterrence and incapacitation. Zero-tolerance policies, waivers for transferring youth to the adult criminal court, and greater numbers of youth in detention illustrate a paradigm shift in America's treatment of its youth.[15] These legislative

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11. *See* Hillary B. Farber, *The Role of the Parent/Guardian in Juvenile Custodial Interrogations: Friend or Foe?*, 41 AM. CRIM. L. REV. 1277, 1286 n.56 (2004) ("Several state supreme courts have commented on the great weight given to the presence or absence of a parent in determining the validity of a juvenile's waiver."); State v. Presha, 748 A.2d 1108, 1110 (N.J. 2000) ("[C]ourts should consider the absence of a parent or legal guardian from the interrogation area as a *highly significant fact* when determining whether the State has demonstrated that a juvenile's waiver of rights was knowing, intelligent, and voluntary.") (emphasis added); Commonwealth v. Jones, 328 A.2d 828, 831 (Pa. 1974) ("*An important factor*, therefore, is whether the juvenile had access to the advice of a parent, attorney, or other adult who was primarily interested in his welfare, before making a decision to waive constitutional rights.") (emphasis added).

12. *See, e.g.*, ALASKA STAT. § 47.12.050(a) (2010) (requiring "each parent" and guardian to receive notice of the proceedings against the juvenile); MASS. GEN. LAWS ANN. ch. 119, § 55 (West 2008) (requiring that a parent or guardian receives a summons from the court for the juvenile proceeding); IOWA CODE ANN. § 232.43(5)(c) (West 2000) (the court may reject a juvenile's plea agreement if the juvenile's parents do not agree to the terms); 42 PA. CONS. STAT. ANN. § 6335(a) (West 2000) (requiring that a parent receives a summons for the juvenile's hearing); N.Y. FAM. CT. ACT § 312.1(1) (McKinney 2008) (requiring that the court issue a summons for a parent to appear at the juvenile's initial court appearance).

13. *See, e.g.*, CAL. PENAL CODE § 987.4 (West 2004) (allowing a court to order "the parent or guardian of [a] minor to reimburse the [state] for all or any part of such expense, if it determines that the parent or guardian has the ability to pay such expense . . . ."); COLO. REV. STAT. § 19-2-706(2)(b) (2002) (mandating that the state seek reimbursement for the cost of an appointed counsel for a juvenile defendant where the parents refused to retain counsel); N.H. REV. STAT. ANN. § 604-A:9(I-a) (2003) (permitting the state to collect the cost of providing a public defender to a juvenile from the juvenile defendant or the person liable for the juvenile's support commensurate with present or future ability to pay).

14. *See* Andrea L. Martin, *Balancing State Budgets at a Cost to Fairness in Delinquency Proceedings*, 88 MINN. L. REV. 1638, 1657–58 (2004) (acknowledging that legal expenses are generally considered "necessaries" that a parent is financial responsible for, despite difficulties associated with the classification of such expenses as "necessaries").

15. As juvenile offenses both increased and became more violent, "[g]enerally held public perceptions concerning the extent and nature of juvenile crime . . . resulted in a 'get-tough' public sentiment toward delinquency and a series of 'get-tough' approaches to the treatment of young offenders." George Smith & Gloria Dabiri, *The Judicial Role in the Treatment of Juvenile Delinquents*, 3 J.L. & POL'Y 347, 364 (1995). Get-tough approaches included: "prosecuting younger children as adults for certain crimes, as well as imposing mandatory, longer and more restrictive placements." *Id.* This trend, promulgated by public fear and legislative action, resulted in a nineteen percent increase in admissions to juvenile facilities between 1983 and 1993. *Id.* at 365. The transformation of procedural requirements in juvenile proceedings, combined with increases in juvenile crime rates and corresponding public fear, significantly altered the American juvenile justice system from the 1970s onward. *See generally* Barry Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 691–92 (1991) (noting that juvenile courts frequently transfer cases to criminal courts and sentence juvenile offenders based on a theory of

prescriptions, designed to address public safety concerns and school decorum, increased the need for procedural requirements in the adjudicating of such matters.[16] The adversarial nature of juvenile delinquency proceedings combined with adherence to constitutional protections effectively narrows the opportunities for community redress.

This article adopts a comparative approach toward the promotion of the legal and social utility of a testimonial exemption[17] for parents and their children. The article will contrast Australia's widespread acceptance of a parent-child testimonial exemption with the general rejection of the privilege in the United States. The differences in the Australian and American approaches to juvenile crime explain, in part, why Australia recognizes a parent-child testimonial exemption, while the majority of the American states do not. Both juvenile justice systems rely on the involvement of parents, whether it is for the fulfillment of a diversionary plan or parental assent to a plea agreement, but the correlation between Australia's restorative approach and the parent-child exemption is significant.

There are efforts afoot in the United States to reverse the legislative get-tough mentalities that catapulted the American juvenile justice system on an increasingly adversarial and punitive trajectory.[18] Most notable is the restorative justice movement, which is assuming a stronger foothold throughout localities in the United States.[19] For instance, thirty-six states have legislatively approved some facet of the principles behind restorative justice for one or more aspects of their juvenile justice

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"just desserts" rather than the child's "real needs").

16. *See* Feld, *supra* note 15, at 709–10 (discussing how change in juvenile law and policy "de-emphasize[s] rehabilitation and the child's 'best interests,' and emphasizes the importance of protecting public safety, enforcing children's obligations to society, applying sanctions consistent with the seriousness of the offense, and rendering appropriate punishment to offenders"). An example of this is the express purpose of Minnesota's juvenile court: "to promote the public safety and reduce juvenile delinquency by maintaining the integrity of the substantive law prohibiting certain behavior and by developing individual responsibility for lawful behavior." MINN. STAT. § 260B.001, subd. 2 (2009).

17. In the United States, a rule of evidence that bars otherwise relevant evidence is characterized as an evidentiary privilege. *See* BLACK'S LAW DICTIONARY 1317 (9th ed. 2009) (defining "testimonial privilege" as "[a] right not to testify based on a claim of privilege; a privilege that overrides a witness's duty to disclose matters within the witness's knowledge, whether at trial or by deposition."). Under Australian common law and statutory authority, an otherwise competent and compellable witness can apply to the court for an exemption from testifying. *See, e.g.*, AUSTL. LAW REFORM COMM'N, REPORT No. 38: EVIDENCE, Summary, para. 13 (1987), *available at* http://www.austlii.edu.au/au/other/alrc/publications/reports/38/ (noting that certain jurisdictions allow a spouse, who is otherwise a compellable witness, to "seek exemption from the trial judge" in criminal proceedings). This article will use the two terms interchangeably. Australia's Evidence Act 1995 and its state counterparts provide for exemptions to the compellability of specific persons, such as spouses, parents, and children. *See infra* Part II (discussing the development of the parent-child exemption in Australian federal and state evidence laws).

18. *See* C. Antoinette Clarke, *The Baby and the Bathwater: Adolescent Offending and Punitive Juvenile Justice Reform*, 53 U. KAN. L. REV. 659, 680–81 (2005). In an attempt to balance rehabilitative goals for young offenders and demand for public protection, at least seventeen states have implemented "extended juvenile jurisdiction" or "blended sentencing" laws, which give judges discretion over whether or not to impose adult sentences to juvenile offenders should juvenile sentences prove to be ineffective at rehabilitation. *Id.*

19. *See* Sandra Pavelka, *Restorative Juvenile Justice Legislation and Policy*, 4 INT'L J. RESTORATIVE JUSTICE 100, 100 (2004) (examining the restorative justice programs in several states and noting that the modern day restorative justice movement continues to evolve at the state and community levels).

system.[20] The American Bar Association has endorsed use of restorative justice victim-offender mediation in the courts.[21] Throughout the country, courts, police departments, law school clinics, and youth advocacy groups are instituting restorative justice practices with varied success. Studies have tracked a correlation between restorative justice and lower recidivism rates among juvenile offenders, high rates of participant satisfaction, and effective school implementation.[22] These positive results are leading to increased support and greater visibility for restorative justice in the United States.

As this article will discuss, there is a mutually supportive relationship between restorative justice and the parent-child privilege. While the privilege has much to recommend it, with or without restorative justice as the crime prevention model, the discussion of why a parent-child privilege should be recognized under U.S. law would not be complete if it did not consider the implications of the restorative justice approach for these kinds of evidentiary issues. Australia offers a looking glass into the positive results that flow from the coexistence of a parent-child privilege and restorative justice, making the comparison between these two countries all the more worthwhile.

This article begins, in Part I, by explaining the history of the parent-child privilege in the United States. In Part II, the article turns to the Australian experience, looking at the origins of the parent-child testimonial exemption and where it is today. Part III explains how in Australia the restorative approach to juvenile offending and the parent-child testimonial exemption work in tandem to promote, preserve, and strengthen family stability. In Part IV, the article argues that the United States' increased use of restorative justice practices among young offenders provides traction for recognizing a parent-child privilege because of the mutually supportive relationship between the two. In conclusion, this article suggests that by adopting a testimonial parent-child privilege such as in Australia, the American legal system can likewise promote parent-child relationships that encourage honest communication between parents and children without the fear of compelled disclosure and incrimination.

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20. Hon. T. Bennett Burkemper Jr., et al, *Restorative Justice in Missouri's Juvenile System*, 63 J. MO. B. 128, 130 (2007) [hereinafter Burkemper]. However, it should be noted that the degree of implementation of restorative justice principles ranges from state to state, and range from the adoption of a single basic principle to a more comprehensive change in how the legal system deals with juvenile offenders. *See* Marlyce Nuzum, *Summaries of State Restorative Justice Legislation*, http://www.stop violence.com/restorative/rjleg-detail.htm (last visited Sept. 6, 2010). For example, Kansas legislation permits a court to order a juvenile offender to make restitution to victims, but does not employ specific restorative justice terminology and does not address the philosophy of restorative justice as a whole. On the other hand, Alaska employs a more targeted approach, as its legislation directs the Department of Corrections to study the principles of Restorative Community Justice and to produce a plan for implementing these principles. *Id.*

21. A.B.A. Endorsement of Victim-Offender Mediation/Dialogue Programs, 1994 A.B.A. Res., *available at* http://www.vorp.com/articles/abaendors.html [hereinafter A.B.A. Endorsement].

22. *See* MARK UMBREIT, *et al.*, CTR. FOR RESTORATIVE JUSTICE & PEACEMAKING, RESTORATIVE JUSTICE DIALOGUE: EVIDENCE-BASED PRACTICE (2006) (describing the results of several studies on the effectiveness of restorative justice programs in juvenile offense cases).

## I. THE HISTORY OF A PARENT-CHILD PRIVILEGE IN THE UNITED STATES

In the United States, courts have recognized an evidentiary privilege for spouses, psychotherapists and their patients, and lawyers and their clients.[23] Individual states have also identified relationships deemed worthy of a testimonial privilege, some of which include relationships not recognized under federal common law. For instance, most states recognize a clergy-communicant privilege.[24] Some states recognize a privilege between victims and domestic violence or sexual assault counselors.[25] Surprisingly, given the importance of parent-child relationships, the United States has not adopted a federal common law or statutory parent-child privilege.[26] Only Connecticut, Idaho, Massachusetts, Minnesota, and New York have a parent-child testimonial privilege.[27] Massachusetts does not recognize a privilege protecting parents from testifying against their children; rather it protects children from testifying against their parent in proceedings other than domestic violence cases.[28] Connecticut's parent-child privilege is the most protective because it extends to communications *and* observations made by the parent.[29]

The U.S. Congress has considered a "parent-child evidentiary privilege" bill in four separate legislative sessions.[30] Senator Patrick Leahy (D-VT) introduced legislation instructing the Attorney General and the Judicial Conference of the United States to study "important questions" concerning the establishment of a privilege to protect parent-child communications in both civil and criminal cases

23. Trammel v. United States, 445 U.S. 40, 47–50 (1980) (discussing the history of spousal privilege); Jaffee v. Redmond, 518 U.S. 1, 9–10 (1996) (recognizing a psychotherapist-patient privilege); Swidler & Berlin v. United States, 524 U.S. 399, 407–08 (1998) (holding that attorney-client privilege survives the death of the client).

24. 81 Am. Jur. 2d. *Witnesses* § 493 (2009).

25. *See e.g.*, ARIZ. REV. STAT. ANN. § 12-2239 (2003); CAL. EVID. CODE § 1035.4 (West 2009); MASS. GEN. LAWS ANN. ch. 233 § 20K (West 2004); 23 PA. CONS. STAT. ANN. § 6116 (West 2001).

26. Farber, *supra* note 7, at 553.

27. IDAHO CODE ANN. § 9-203(7) (2003) (a parent or guardian "shall not be forced to disclose any communication made by their minor child or ward to them concerning matters in any civil or criminal action to which such child or ward is a party" unless the case involves violence against the adult); CONN. GEN. STAT. ANN. 46b-138a (West 2009) (parent of a minor who is accused in a juvenile court matter "may elect or refuse to testify for or against the accused child" regardless of whether the source of the parent's knowledge is a confidential communication or personal observation, with the exception that the parent must testify if he or she is the victim of violence allegedly inflicted by the child); MINN. STAT. ANN. § 595.02 (West 2003) (a parent may not be compelled to testify "as to any communication made in confidence by the minor to the minor's parent," except in certain enumerated situations); MASS. GEN. LAWS ANN. ch. 233 § 20 (West 2004) (a minor child "shall not testify before a grand jury, trial of an indictment, complaint or other criminal proceeding, against said parent, where the victim in such proceeding is not a member of said parent's family and who does not reside in the said parent's household"). Some New York courts have recognized a confidential privilege between parents and their children. *See, e.g.*, In re A & M, 61 A.D.2d at 435 (N.Y. App. Div. 1978) ("We conclude, however, the communications made by a minor child to his parents within the context of the family relationship may, under some circumstances, lie within the "private realm of family life which the state cannot enter.").

28. MASS. GEN. LAWS ANN. ch. 233 § 20 (West 2004).

29. CONN. GEN. STAT. ANN. § 46b-138a (West 2009); Catherine J. Ross, *Implementing Constitutional Rights for Juveniles: The Parent-Child Privilege in Context*, 14 STAN. L. & POL'Y REV. 85, 99 (2003).

30. H.R. 3577, 105th Cong. (1998); H.R. 522, 106th Cong. (1999); H.R. 733, 107th Cong. (2001); H.R. 538, 108th Cong. (2003).

following the treatment of Monica Lewinsky's mother, Marcia Lewis, by Independent Counsel Kenneth Starr.[31] Leahy explained:

> This is not the Star Chamber of hundreds of years ago. This is not the Spanish Inquisition. No child, no matter what their age, expects his or her conversations with a parent to be disclosed to prosecuting attorneys. Compelling a parent to betray his or her child's confidence is repugnant to fundamental notions of family, fidelity, and privacy. Indeed, I can think of nothing more destructive of the family and family values, nor more undermining of frank communications between parent and child, than the example of a zealous prosecutor who decides to take advantage of close-knit ties between mother and daughter, of a prosecutor who said, if a mother loves a daughter and a daughter will go to a mother to talk to that mother, then we are going to grab the mother. Great family values, Mr. President. Great family values, Mr. Starr.[32]

At the same time in the House of Representatives, U.S. Representative Zoe Lofgren (D-CA), introduced H.R. 3577, the "Confidence in the Family Act," which proposed a parent-child privilege in federal criminal and civil proceedings and an amendment to the Federal Rules of Evidence.[33] Among Representative Lofgren's main reasons for proposing the legislation was her belief that the parent-child relationship deserves the protection of a testimonial privilege for the same reasons that the spousal relationship does.[34] According to Lofgren, "the relationship between mother and daughter, between father and daughter, between father and son is as valuable, as precious as that between husband and wife."[35] Representative Lofgren referred to the lack of such a privilege as a "trilemma" of cruel choices for parents compelled to testify against their children: perjury, betrayal of the child's confidence, or potential jail time for contempt of court.[36]

Lofgren's proposed privilege made no distinction between adult and minor children.[37] The privilege would have extended to any relationship where an individual had a legal right to act as a parent.[38] This definition included foster care and long-term custody relationships.[39] Some lawmakers suggested that they would support a parent-child privilege applicable only to minor children in civil cases: the

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31. *See* 144 CONG. REC. S1508-02, S1508-10 (1998). Mr. Starr subpoenaed Ms. Lewis to testify before the grand jury investigating President Clinton as to statements Ms. Lewinsky was believed to have made to her mother concerning her relationship with President Clinton. Despite her lawyers' best efforts and public sentiment opposing the intrusion into the private conversations between mother and daughter, no privilege barred Mr. Starr from compelling the information. *Id.*

32. 144 CONG. REC. S803-01, S804 (1998). The bill was read twice and referred to the Senate Committee on the Judiciary, but never made it out of the Judiciary Committee. The Library of Congress, Bill Summary & Status for S.1721, http://ecip.loc.gov/cgi-bin/bdquery/z?d105:s.01721: (last visited Sept. 23, 2010).

33. H.R. 3577, 105th Cong. (1998).

34. 144 CONG REC. H2268–69 (1998) (introducing the bill and some of Rep. Lofgren's arguments in favor of the privilege).

35. *See id.* at H2269 (statement of Rep. Lofgren).

36. *See id.* at H2271–72.

37. *See* Shonah Jefferson, *The Statutory Development Of The Parent-Child Privilege: Congress Responds To Kenneth Starr's Tactics*, 16 GA. ST. U.L. REV. 429, 457 (1999) (discussing the failure of legislation via House Judiciary deliberations on Lofgren bill).

38. H.R. 3577, at § 2, para. 4.

39. *Id.*

implication being that shielding inculpatory communications between children and parents from a criminal investigative arm of the government was contrary to public policy.[40] The legislation was modeled after the spousal privilege, but left to the courts to determine its applicability in specific cases.[41] The over-breadth of Lofgren's bill was largely responsible for its failure.[42] The "Confidence in Family Act" was rejected by a vote of 162 to 256 on April 23, 1998.[43]

A separate bill introduced by Representative Robert Andrews (D-NJ), termed "The Parent Child Privilege Act," sought to amend the Federal Rules of Evidence to establish a parent-child privilege.[44] Similar to the spousal privilege, the proposed legislation created an adverse testimonial privilege and a confidential communications privilege.[45] Andrews first introduced this bill in 1998, and thereafter in 1999, 2001, 2003, and 2005.[46] Each time the legislation has failed to clear the House Judiciary Committee.[47]

On the state level, Massachusetts is considering amending its evidence rules to include a parent-child privilege. During the 2009–2010 legislative session, the Massachusetts legislature considered a bill in support of a parent-child privilege that would protect parents from being forced to testify in any criminal proceeding against their child.[48] Currently Massachusetts has a statute that disqualifies the child witness

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40. *See* Jefferson, *supra* note 37, at 456–57 (listing the reasons why many lawmakers opposed the parent-child privilege).

41. 144 CONG. REC. H2268.

42. Jefferson, *supra* note 37, at 456–57.

43. *See id.* at 456 n. 216.

44. H.R. 4286, 105th Cong. (1998).

45. The bill included the standard exceptions for testimonial privileges:

> 1) in any civil action or proceeding by the parent against the child or the child against the parent; 2) in any civil action or proceeding in which the child's parents are opposing parties; 3) in any civil action or proceeding contesting the estate of the child or child's parent; 4) in any action or proceeding in which the custody, dependency, deprivation, abandonment, support or nonsupport, abuse, or neglect of child, or termination of parental rights, with respect to the child, is at issue; . . . 7) in any criminal or juvenile action or proceeding in which the child or a parent of the child is charged with an offense against the person or property of the child, a parent of the child, or any member of the or household of the parent or child.

*Id.* The bill also assigns a guardian *ad litem* or attorney for a minor child to represent the child's interests with respect to the privilege. *Id.*

46. HR. 4286, 105th Cong. (1998); H.R. 522, 106th Cong. (1999); H.R. 733, 107th Cong. (2001); H.R. 536, 108th Cong. (2003); H.R. 3433, 109th Cong. (2005).

47. *Id.*

48. "An Act Relative to Testimony in Criminal Proceedings," S. 2473, 186th Gen. Ct. Mass. (2010), *available at* http://www.mass.gov/legis/bills/senate/186/st02pdf/st02473.pdf. Senator Creem originally introduced legislation in support of a parent-child privilege in 2000. Kris Axtman, *Do Parents Belong on the Witness Stand?*, CHRISTIAN SCI. MONITOR, Feb. 17, 2000, at 1 [hereinafter Axtman]. In a Massachusetts case involving two teenagers arrested for rape whose parents were subpoenaed to testify before the grand jury regarding communications they had with their sons pertaining to the rape accusation, the Supreme Judicial Court stayed enforcement of the subpoenas in order to allow the legislature the opportunity to consider the important social policy issue affecting children and families inherent in establishing a parent-child privilege. *In re Grand Jury Subpoena*, 722 N.E.2d 450, 451–52, 457 (2000). Senator Creem has gone on record regarding the injustice that can occur as a result of the lack of legal protections for communications between children and their parents: "We would hope that if children came to their parents, they would be able to share their problems . . . . But as it stands now, if my children come to me, I have to say, 'Go talk to your priest, go talk to your doctor, because I can't hear it.'"

from testifying against his parent, unless the inquiry involves domestic violence or child abuse.[49] The proposed parent-child privilege completes the circle by protecting parents from being forced to testify against their children in the same way children are protected from being forced to testify against their parents. Furthermore, the proposed bill gives parents the same privilege afforded them in their relationships with their spouse, attorney, clergy, and health care provider.[50] The privilege would not extend to either the parent or the child, if the victim is a family member who resides in the household.[51] Lastly, the Massachusetts legislation expands the existing definition of "parent" to meet the complex and varied family situations that are part of today's society.[52] The privilege offers a more inclusive definition of "parent," changing from "the natural or adoptive mother or father of said child" to "the biological or adoptive parent, stepparent, foster parent, legal guardian of a child, or any other person that has the right to act *in loco parentis* for such child."[53] On June 10, 2010 the bill was reported on favorably by the Joint Committee on the Judiciary.[54] The newly numbered bill, S. 2473, was referred to the Senate Committee on Ethics and Rules.[55]

Drafting legislation for a parent-child privilege involves a myriad of considerations, such as whether the protections should apply to adult children, and civil and criminal proceedings. As evidenced on the federal level, legislation that was not limited to parents and their minor children, or to criminal proceedings weakened majority support. On the state level, the Illinois legislature considered a bill that would have amended the Civil Procedure Code to create a parent-child privilege.[56] The privilege, which was supported by the Illinois State Bar Association, could be asserted by either the parent or the child, and extended to communications between adult children and their parents as well as between parents and minors.[57] The majority of the opposition to the legislation focused on its breadth.[58] Legislators

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Axtman, at 1.

49. *See* MASS. GEN. LAWS ANN. ch. 233 § 20 ("An unemancipated, minor child, living with a parent, shall not testify before a grand jury, trial of an indictment, complaint or other criminal proceeding, against said parent, where the victim in such proceeding is not a member of said parent's family and who does not reside in the said parent's household.").

50. *See* Axtman, *supra* note 48, at 1 ("If passed, parent-child confidentiality would be similar to that already granted priest and penitent, lawyer and client, therapist and patient—though many argue the secrecy between a parent and a child is paramount to all those.").

51. S. 2473, 186th Gen. Court, Joint Comm. on the Judiciary (Mass. 2010), http://www.malegislature.gov/Bills/Details/8793.

52. *Compare* ch. 233 § 20 *with* S. 2473.

53. *Id.*

54 S. 2473, 186th Gen. Court, Joint Comm. on the Judiciary (Mass. 2010), http://www.malegislature.gov/Bills/Details/8793.

55 *Id.*

56. H.R. 90th Gen. Assem., Reg. Sess., at 11–12 (Ill. 1998) (Statement of Rep. Burke), http://www.ilga.gov/house/transcripts/htrans90/t040298.pdf ("Many of you here are quite familiar with the attorney-client privilege. There exists in law, the untouchable secrecy of the confessional and the privileged communication between a doctor and patient. In some cases even the media has attempted to claim this exemption. Are these relationships any more important than that of a parent to child? And what might the affect [sic] be if these secret entitled communications were corrupted and society would lose confidence in the confidentially of communication with these parties? I submit to this Body, that certain relationships must remain sacred, incorruptible, inviolate and secure.").

57. *Id.* at 19.

58. The legislation proposed in the House was devoid of certain exceptions that are commonly included with such privileges, such as in cases alleging physical abuse. *See id.* at 18–19 (making no mention

expressed concern that the legislation would upset the proper adjudication in abuse and neglect proceedings, as well as custody disputes, because parents would exercise the privilege to prevent their children from testifying.[59] Ultimately, a vote on the bill was postponed indefinitely.[60]

During the 2009 legislative session, the Oregon legislature considered a narrowly tailored bill, which proposed to create an evidentiary privilege in criminal cases for confidential communications between children under the age of eighteen and their parents.[61] The legislation was designed to allow either the child or the parent/guardian to whom the communication was made to assert the privilege. The Senate approved the legislation but it did not gain sufficient traction in the House.[62] Also in the past year, North Dakota's highest court considered the constitutionality of a parent-child privilege in a case involving a mother subpoenaed to testify against her minor child in a delinquency case.[63] The Court declined to recognize a parent-child privilege in the state constitution but left open the possibility that such a reform could be achieved through legislative action.[64]

Legal protections, such as evidentiary privileges, are given to some relationships as an expression of their societal worth. The concern in any debate about admissibility of relevant evidence is the danger of removing evidence from the trier of fact's deliberation toward a fair and just determination. In a criminal prosecution, any mechanism that limits the availability of relevant evidence to the fact finder is controversial. However, as noted above, in the United States evidentiary privileges already exist for certain relationships.[65]

The relationship between parents and children is equally deserving of a legal privilege.[66] The absence of legal protections for parent-child communications is inconsistent with society's expectations of parents and with the value placed on the parent-child relationship. The parent-child relationship shares many characteristics with those relationships that have been accorded an evidentiary privilege. For example, the spousal privilege, which is recognized in nearly all fifty states and under

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of certain commonly recognized exceptions to familial privilege).

59. *See id.* at 14–26 (discussing concerns about the scope of the privilege for certain proceedings and the possibilities of "conspiracies" between adult children and their parents to block information).

60. *Id.* at 33.

61. S. 313, 75th Leg. Assem., Reg. Sess. (Or. 2009), http://www.leg.state.or.us/09reg/measpdf/sb0300.dir/sb0313.b.pdf.

62. *See* 75th Or. Leg. Assem. Rep. (2009 Reg. Sess.), Status Report for Senate Measures upon Adjournment, June 29, 2009, at S-55 (stating that the bill was in committee upon adjournment of the regular session).

63. *In re* O.F., 773 N.W.2d 206, 211 (N.D. 2009).

64. *See id.* at 211 (stating that the legislature is better suited to amend the state constitution to add a parent-child privilege, if it is so inclined).

65. *See* Trammel v. United States, 445 U.S. 40, 47–50 (1980) (discussing the history of spousal privilege); Jaffee v. Redmond, 518 U.S. 1, 9–10 (1996) (recognizing a psychotherapist-patient privilege); Swidler & Berlin v. United States, 524 U.S. 399, 407–08 (1998) (holding that attorney-client privilege survives the death of the client).

66. *See* Farber, *supra* note 7, at 568–74 (arguing that since parents act as advisors and counselors to their children they are as deserving, if not more so, than other relationships that enjoy an evidentiary privilege).

federal common law, protects an intimate personal relationship.[67] As one commentator noted,

> The child-parent relationship resembles the husband-wife relationship in that both involve a fundamental and private family bond. The child-parent relationship ideally encompasses aspects found in the marital relationship—mutual love, intimacy and trust.... The fact that the child-parent relationship is part of the institution of the family that it is hoped is promoted by a marital privilege makes the protection of children's private conversations with parents even more appealing.[68]

At the heart of the psychotherapist-patient and attorney-client relationships is a commitment of trust and privacy that, if eroded, harms the patient or the client and threatens the integrity of the profession.[69] The virtue of both of these professional privileges is that patients and clients will reveal honest and accurate information to their therapists and lawyers, without fear of recrimination.[70] Similarly, children share some of the most personal information with their parents in order to receive the benefit of their parents' counsel. Children rely on parents to support and guide them through an oftentimes complicated and frightening legal process.[71] Parents sometimes work in conjunction with the child's attorney, assisting in the legal decision making.[72] The essence of inter-generational loyalty is threatened when the government is permitted to force parents and children to divulge confidences shared between them.

Most courts that have refused to recognize a parent-child privilege have done so in cases involving an adult child compelled to testify against his parent or a parent testifying against an adult child.[73] The U.S. Supreme Court has never decided a case

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67. *See* GEORGE FISHER, EVIDENCE 836 (2d ed. 2008). From its inception under English common law, it was felt that "the alarm and unhappiness occasioned to society by invading its sanctity and compelling the public disclosures of confidential communications between husband and wife would be far a greater evil than the disadvantages which may occasionally arise from the loss of light which such revelations might throw on questions in dispute." *Id.* at 840 (quoting COMMISSIONERS ON COMMON LAW PROCEDURE, SECOND REPORT 13 (1853)).

68. *See* Nissa M. Ricafort, *Jaffe v. Redmond*: *The Supreme Court's Dramatic Shift Supports the Recognition of a Federal Parent-Child Privilege*, 32 IND. L. REV. 259, 289 (1998) (quoting Ann M. Stanton, *Child-Parent Privilege for Confidential Communications: An Examination and Proposal*, 16 FAM. L.Q. 1, 6–7 (1982)).

69. *Jaffee*, 518 U.S. at 12–13; Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

70. Farber, *supra* note 7, at 560–62. *See generally Jaffee*, 518 U.S. 1; *Upjohn*, 449 U.S. 383 (comparing the parent-child privilege and many of the common law and statutory privileges).

71. Waiver of counsel among juveniles is significantly higher than their adult counterparts; one-third of public defender offices surveyed in a 1993 national study on the issues pertaining to juvenile representation reported that some percentage of youth waive their right to counsel at the detention hearing. *See* AM. BAR ASS'N JUVENILE JUSTICE CTR. ET AL., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 44, *available at* http://www.njdc.info/pdf/cfjfull.pdf. Twenty-one percent said the right is waived one to ten percent of the time; whereas four percent of respondents said it is waived fifty-one to eighty percent of the time. *Id.* In a 2002 indigent juvenile defense assessment, experts estimated that in one county in Virginia, fifty percent of youth waived counsel regardless of the seriousness of the offense. *See* AM. BAR ASS'N JUVENILE JUSTICE CTR. ET AL., VIRGINIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 23–24 (2002).

72. *See* Farber, *supra* note 7, at 569–70 (asserting that in the juvenile justice system, parents often work closely with attorneys, providing important personal background about the child, helping the child to identify the pros and cons of legal choices, and very often paying for the child's legal services).

73. *See, e.g.*, United States v. Davies, 768 F.2d 893, 900 (7th Cir. 1985) (refusing to recognize a

involving judicial recognition of a parent-child privilege. In 1984, the Court declined *certiorari* in a case involving three adolescent children compelled to testify before a grand jury investigating their father for murder.[74] *Three Juveniles* was the first and last time the parent-child privilege was presented to the U.S. Supreme Court for review.

In 1996, the Supreme Court expanded the list of evidentiary privileges recognized under Federal Rule of Evidence 501 by creating a psychotherapist-patient privilege.[75] *Jaffee v. Redmond* involved the compulsion of statements that a police officer made to her licensed social worker during psychotherapy sessions following an incident where the officer shot and killed a man while on duty.[76] Police officer Mary Lu Redmond and the department she worked for at the time were sued under a federal civil action after Redmond killed the plaintiff.[77] The plaintiff, the administrator of the decedent's estate, sought a clinical social worker's notes, which were taken during her counseling sessions with Redmond.[78] Resting on the belief that protecting the communications between psychotherapists and patients promotes sufficiently important social interests, the Court continued the expansion of common law privileges under Rule 501 by recognizing a psychotherapist-patient privilege.[79] The Court reasoned that the psychotherapist-patient relationship is dependent on trust and privacy.[80] The ethical rules governing licensed psychotherapists and clinical social workers mandate confidentiality, except in instances where the law requires disclosure.[81] Without an assurance of confidentiality, many patients would never divulge the intimate details of their personal relationships, habits, and professional conduct to their therapists.[82] From the therapist's perspective, the lack of a guarantee that the patient's communication will be kept confidential compromises the therapist's assistance and the integrity of the profession.

Since *Jaffee*, only three federal courts have considered recognition of a parent-child privilege.[83] One of those cases, *In re Grand Jury*, involved a criminal investigation of an eighteen-year-old, whose father was subpoenaed to testify before

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privilege between an adult defendant and the defendant's adult child); United States v. Ismail, 756 F.2d 1253, 1258 (6th Cir. 1985) (holding no error where district court permitted defendant's adult son to testify against him, over asserted parent-child privilege); United States v. Jones, 683 F.2d 817, 819 (4th Cir. 1982) (refusing to extend privilege to emancipated adult child's testimony that involved "no communication between father and son").

74. Three Juveniles v. Commonwealth, 455 N.E.2d 1203 (Mass. 1983), *cert. denied*, 465 U.S. 1068 (1984).

75. *See Jaffee*, 518 U.S. at 1–2 (establishing a common law privilege for psychotherapist and patient under Fed R. Evid. 501).

76. *Id.* at 3–4.

77. *Id.* at 4–5.

78. *Id.*

79. *Id.* at 11–12.

80. *Id.* at 10–11.

81. Jaffee, 518 U.S. at 13 n.12, 18 n.19.

82. *See id.* at 11–12 ("Effective psychotherapy, by contrast, depends upon a atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears.").

83. *See generally In re* Grand Jury, 103 F.3d 1140 (3d Cir. 1997) (consolidating appeals from two District Courts); *In re* Grand Jury Proceedings (Unemancipated Minor Child), 949 F. Supp. 1487 (E.D. Wash. 1996) (denying motion to quash grand jury subpoena where motion was based on parent-child privilege).

a grand jury concerning conversations he had with his son.[84] The father said that if he were forced to testify, it would irreparably harm their close and loving relationship.[85] The court refused to quash the subpoena, explaining that a confidential communication between parent and child is not indispensable to the survival of that relationship.[86] Stating that typically parents and children are not aware that there is no testimonial privilege covering the communication between them, the court found that it is irrelevant to the parent's and child's decision to discuss private matters between them.[87] Indeed, ignorance of the law may not be a factor before sharing potentially incriminating information with one's parent or one's child. But as the public is made aware of the absence of any legal protection for their communications, there will likely be some parents and children who alter their behavior so as not to place themselves at risk of self-incrimination.[88]

Furthermore, the court's explanation does nothing to address the concerns of those parents and children whose conversations are being compelled by the government. There was public outcry when Special Prosecutor Ken Starr subpoenaed Monica Lewinsky's mother and forced her to reveal the substance of her conversations with her daughter concerning President Clinton.[89] If the Ken Starr spectacle teaches us anything, it should be that intruding on the personal nature of the parent-child relationship shocks the conscience of many Americans, and the parent-child relationship should be afforded the same level of confidentiality as other recognized confidential relationships.

The Court of Appeals in *In re Grand Jury* hypothesized that "the parent-child privilege is probably one of the least important considerations in any child's decision as to whether to reveal an indiscretion, legal or illegal, to a parent."[90]

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84. *In re* Grand Jury, 103 F.3d at 1142–43. The case before the court of appeals presented two separate matters, both involving the same legal question: should the court recognize a parent-child privilege? *Id.* at 1142. One case involved a parent witness; the other involved an adult child witness. *Id.* at 1142–44. The case discussed herein came from the Virgin Islands, while the Delaware case involved the testimony of a sixteen-year-old daughter as to her knowledge of the crime her father was being investigated for, but not specifically statements the father made to her. *Id.* at 1143. The witnesses in both cases sought to quash the grand jury subpoenas, and asserted a parent-child privilege as grounds for their appeals. *Id.*

85. *Id.*

> I will be living under a cloud in which if my son comes to me or talks to me, I've got to be very careful what he says, what I allow him to say. I would have to stop him and say, "you can't talk to me about that. You've got to talk to your attorney." It's no way for anybody to live in this country.

*Id.*

86. *Id.* at 1152.

87. *Id.*

88. Likewise, lawyers will advise their clients against having discussions with their parents/children.

89. *See, e.g.*, Ruth Marcus, *Starr Pushing Envelope, Former Prosecutors Say Grilling Lewinsky's Mom is Perfectly Legal and a Tactic Justice Officials Often Use*, MILWAUKEE J. SENTINEL, Feb. 15, 1998, at 1 (noting that numerous federal prosecutors have criticized Starr's aggressive approach and lack of restraint); Richard T. Cooper et al., *Monica's Mom, the Reluctant Starr Witness Controversy*, L.A. TIMES, Apr. 2, 1998, at E1 (discussing the unique and intense pressure that Starr's questioning placed on Lewinsky's mother); Jerry Seper, *Lewinsky's Mom Cites "Hell" of Testimony, Requests Delay*, WASH. TIMES, Feb. 24, 1998, at A6 (noting that Lewinsky's mother asked to delay her testimony before a grand jury because of the stress that she was experiencing); Eric Zorn, *With Ma on Stand, Lawyers Can Mine the Mother Lode*, CHI. TRIB., Feb. 12, 1998, at 1 (commenting on the legal inconsistency which protects spousal communications but not confidences to parents).

90. *In re* Grand Jury, 103 F.3d at 1153.

Notwithstanding, when criminal culpability is or becomes a concern, then legal recognition of the privilege is necessary. A child may disclose incriminating information to his or her parent for the purpose of seeking guidance, counsel, and support, which results in the parent learning of the child's culpability. A parent-child privilege would allow a parent to prospectively rely on the guarantee that his or her communications with the child will be confidential.[91]

Another rationale used to deny a testimonial privilege to parents and their children weighs the value of acquiring the information against the harm caused from eliciting the information. Dean Wigmore, one of the foremost experts on evidence law, devised criteria to evaluate whether communications within a particular relationship are worthy of an evidentiary privilege.[92] Under the Wigmore test, four conditions must be met: (1) the communications must originate in a confidence that they will not be disclosed; (2) confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) the relation must be one which, in the opinion of the community, ought to be sedulously fostered; and (4) the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.[93] The fourth criterion has been the greatest source of disagreement in evaluating whether an evidentiary privilege should be recognized—it is also the most relevant to this article. The language used in the Australian parent-child exemption is strikingly similar to Wigmore's fourth condition.[94]

A case that poignantly illustrates the tension between a parent's unwillingness to testify against his child and the government's purported need for the parent's testimony is *Port v. Heard*.[95] The parents of David Port were so adamant that testifying against their seventeen-year-old son would be the ultimate act of betrayal that they both went to jail to maintain their loyalty to their child. Bernard and Odette Port were subpoenaed to testify before the grand jury investigating their son for murder.[96] The Ports refused to testify against their son despite a judge's order.[97] They were ultimately jailed for contempt of court; Bernard Port spent approximately two months in jail, while Odette Port spent four.[98] On review, the question before the appellate court was whether there is a constitutionally based privilege that

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91. *See* Susan Levine, Comment, *The Child-Parent Privilege: A Proposal*, 47 FORDHAM L. REV. 771, 788 (1979) ("The most salient effect of both the marital confidential communications privilege and child-parent privilege is not so much that they encourage open communication (although this may well be true in some instances), but that they protect the confidentiality of a communication once it has been made.").

92. *See* 8 WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285 (John T. McNaughton rev., Little Brown and Co. 1904).

93. *Id.*

94. *Compare* WIGMORE, *supra* note 92, § 2285 (explaining that for a privilege to apply, the "injury [caused by disclosing the allegedly privileged communications]... must be greater than the benefit thereby gained for the correct disposal of litigation"), *with Evidence Act 1995* (Cth) s 18(6)(Austl.) (stating that the "nature and extent of [the harm that would be suffered by the person] outweighs the desirability of having the evidence given").

95. Port v. Heard, 764 F.2d 423 (5th Cir. 1985).

96. *Id.* at 425.

97. Peter Carlson, *A Texas Murder Case Raises an Exquisite Question: Must Parents Testify Against Their Child?*, PEOPLE, Oct. 15, 1984, at 146. Bernard Port was quoted as telling the judge, "I've worked so hard to be a father, I just couldn't testify," while Odette Port stated, "A mother's instinct is to protect. And I would feel unnatural doing just the opposite." *Id.*

98. *Port*, 764 F.2d at 425.

prevents parents from testifying against their children.[99] The court considered and rejected arguments that such a privilege derives from the right to privacy, the First Amendment right to exercise one's religion, or the Fourteenth Amendment right to equal protection under the laws.[100] In dicta, the court added it may have decided differently if the issue had been whether it would recognize a common law privilege under Federal Rule 501, but it was not raised because state laws and rules of evidence controlled.[101] The court noted the Ports' argument that the forced disclosure of confidential communications by a parent impedes a parent's ability to foster trust and potentially threatens the "sanctity and integrity of the family unit."[102] Furthermore, the court stated that appellants could have made an even stronger argument as to the psychological and social strain that testifying against one's own child may cause.[103]

The paucity of reported cases involving a parent compelled to testify against his or her minor child makes it difficult to assess how frequently this phenomenon occurs.[104] However, we know from cases such as *Port v. Heard*, as well as media accounts that this phenomenon is occurring, even if only occasionally.[105] Moreover, there has never been a research study that has examined the frequency or the context with which prosecutors compel, or even contemplate compelling, parents to testify against their children. Despite the lack of such empirical data, some courts have used the lack of published decisions as an important justification for rejecting a parent-child testimonial privilege.[106]

Only one federal court in the United States has endorsed an evidentiary privilege for parent-child communications.[107] *In re Agosto* held that a parent-child privilege is fundamental in protecting the privacy of familial relationships and the

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99. *See id.*

100. *See id.* at 430–32.

101. *Id.* at 430.

102. *Id.* at 429.

103. *Id.* at 430.

104. A contributing factor to the few reported cases involving compulsion of parental testimony is that juvenile prosecutions go to trial even less often than adult criminal cases, and the cases that go to trial are even less frequently appealed than adult criminal cases. Second, due to the private nature of juvenile proceedings, information about the proceedings is difficult to obtain. *See infra* note 162 (discussing the low rate of reporting for juvenile cases).

105. Examples of parents compelled to testify against their children include Arthur and Geneva Yandow, subpoenaed to appear before a Vermont grand jury to testify against their twenty-five-year-old son. Barry Siegel, *Choosing Between Their Son and the Law*, L.A. TIMES, June 13, 1996 at 1. Both parents protested that they could not testify against their child. "I can't betray my son," Arthur Yandow told the judge. "I couldn't live with myself . . . I'd lose him forever . . . I'd be the instrument of destroying my family and my son," said Geneva Yandow. *Id.* In response, the judge jailed the Yandows for contempt of court. *Id.* Only after their son was indicted, without his parents' testimony, were the Yandows released. *Id.* They spent forty-one days in jail. *Id.* The parents of eighteen-year-old Amy Grossberg, who was charged with the murder of her newborn baby, were subpoenaed to testify about what their daughter told them about the death of her son. Doug Most, *A Court Has Ears Inside the Home; Parent Child Secrets Not Safe*, THE RECORD, Dec. 7, 1997 at A1. Parents of two teenagers charged with killing two Dartmouth college professors agreed to cooperate with investigators in turn for not having to testify before a grand jury. *Police Talk to Dartmouth Suspects' Parents*, N.Y. TIMES, Mar. 18, 2001, at A28.

106. *See* In re Grand Jury, 103 F.3d at 1147 (noting that eight federal courts of appeal had rejected the privilege).

107. *See* In re Agosto, 553 F. Supp. 1298, 1325 (D. Nev. 1983) (deeming parent-child privilege deserving of constitutional protection on privacy grounds).

inviolability and integrity of the family.[108] The court stressed the importance of intervening in matters that place an individual in a position of choosing between loyalty to his family and loyalty to the state.[109] In a lengthy opinion with high praise for a common law parent-child privilege, the court cited another federal decision in stating that:

> The family has been traditionally recognized by society as the most basic human and psychological unit, and when the state intrudes with its vast resources in an attempt to disassemble that unit, then every safeguard under the law must be abundantly exercised by the Court to guarantee that the inherent imbalance of experience and expertise between parent and state is minimized to the greatest extent humanly possible.[110]

## II. THE TESTIMONIAL EXEMPTION FOR PARENTS AND CHILDREN IN AUSTRALIA

### A. *The Australian Legal System*

The Commonwealth of Australia contains six states and two major territories: New South Wales, Queensland, South Australia, Tasmania, Victoria, Western Australia, the Australian Capital Territory, and the Northern Territory.[111] There are also a number of minor territories including the Norfolk Islands and seven other territories in the Indian Ocean, South Pacific Ocean, and Antarctica.[112] Australia is a common law country based on the English legal system.[113] The Australian Constitution of 1901 united six separate colonies (New South Wales, Queensland, South Australia, Tasmania, Victoria, and Western Australia) under the British rule into states of the Commonwealth of Australia.[114] Similar to the United States, the Australian legal system is comprised of a federal and a state court system, each with its own constitution.[115] "State and Territory Courts decide cases brought under state

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108. *See id.* at 1328 ("It would be unjust for society to teach that while a child should listen to his parents, he does so at the risk of being required to testify against them.").

109. *See id.* at 1326 ("If the government in its zeal to pursue law enforcement goals steps into the realm of constitutionally privileged relationships, the courts must intervene. In our democratic system of justice which is based in part on respect for the law, if the law places family members in a position of choosing between loyalty to a special, life-long bond as opposed to involuntarily testifying to confidential and private matters, then the law would not merely be inviting perjury, but perhaps even forcing it. The reticence to testify or the fabrications which family members would invent to protect one another would bring the government no closer to the truth it so zealously seeks.").

110. *Id.* at 1330 (quoting Brown v. Guy, 476 F. Supp. 771, 773 (D. Nev. 1979)).

111. *Researching Australian Law*, HARV. L. SCH., http://law.harvard.libguides.com/australia (last visited Sept. 27, 2010).

112. *Id.*

113. Nicholas Pengelley & Sue Milne, *Researching Australian Law*, LLRX.COM, http://www.llrx.com/features/researchingaustralianlaw.htm#Background (last updated Mar. 21, 2009).

114. *Researching Australian Law*, *supra* note 111.

115. *About Australia: Our Government*, AUSTRALIAN GOV'T, http://australia.gov.au/about-australia/our-government (last visited Sept. 27, 2010).

or territory laws, and where jurisdiction is conferred on these courts by the Commonwealth Parliament, they also decide cases arising under federal laws."[116]

In the beginning of the twentieth century, several Australian states and territories established separate courts for children.[117] These courts are termed "children's courts," and all hearings, including trials, are conducted by a magistrate or judge, without a jury.[118] Children's courts have jurisdiction over all summary offenses.[119] For more serious offenses (e.g., car theft, burglary, etc.), the accused can elect to have the case adjudicated either in the children's court or a higher court; however, the children's court reserves the right to decline jurisdiction and refer the case to a higher court.[120] Generally, the most common offenses in children's court are non-violent offenses such as burglary, motor vehicle theft, and offenses against public order.[121] For the most serious offenses such as homicide, where the offense might result in a sentence of life imprisonment, a minor is automatically tried in the Supreme Court.[122] Criminal responsibility begins at ten years of age in all Australian states and territories.[123]

### B. *Federal Law of the Commonwealth of Australia*

The Evidence Act of 1995 ("Evidence Act") codified Australian evidence rules at the federal level. The Evidence Act is applicable to all federal courts and the ACT courts.[124] Section 18 of the Evidence Act establishes a testimonial exemption for spouses, de facto partners, parents, and children.[125] The exemption applies only in criminal proceedings and entitles any person in one of the specified relationships with the accused to object to giving evidence as a witness for the prosecution.[126]

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116. Attorney General's Department, *The Courts*, AUSTRALIAN GOV'T, http://www.ag.gov.au/www/agd/agd.nsf/Page/Legalsystemandjustice_TheCourts (last visited Sept. 27, 2010). In cases where federal and state law may overlap, federal law preempts the state law to the extent it is inconsistent. *About Australia: State and Territory Government*, AUSTRALIAN GOV'T, http://australia.gov.au/about-australia/our-government/state-and-territory-government (last visited Sept. 27, 2010).

117. *See, e.g., Neglected Children and Juvenile Offenders Act 1905* (NSW); *Children's Court Act 1906* (Vic); *Children's Courts Act 1907* (Qld); *State Children Act 1907* (WA); *The Children's Charter 1918* (Tas); *State Children Act 1895* (SA).

118. CUNNEEN & WHITE, *supra* note 8, at 267. In Victoria, Queensland, Western Australia, and South Australia, the children's court is headed by a judge. In states where the court is headed by a judge, the judge conducts the appellate review for the matters determined by magistrates. *Id.*

119. *Id.* Summary offenses are the less serious offenses in the Criminal Code, such as those that are generally heard in a magistrate's court. *Id.*

120. *Id.*

121. AUSTL. LAW REFORM COMM'N, REPORT NO. 84, SEEN AND HEARD: PRIORITY FOR CHILDREN IN THE LEGAL PROCESS §§ 2.78, 2.89–105 (1997).

122. *See* AUSTL. INST. OF HEALTH & WELFARE, JUVENILE JUSTICE IN AUSTRALIA 2007–08 128 (2009) *available at* http://www.aihw.gov.au/publications/juv/juv-5-10853/juv-5-10853.pdf ("The Supreme Court deals with all charges of homicide regardless of the age of the offender.").

123. *Criminal Code 2002* (ACT) s 25; *Children (Criminal Proceedings) Act 1987* (NSW) s 5; *Criminal Code 2008* (NT) s 43AP; *Criminal Code 1899* (Qld) s 29; *Young Offenders Act 1993* (SA) s 5; *Children, Youth and Families Act 2005* (Vic) s 344. *See also* AUSTL. INST. OF HEALTH & WELFARE, *supra* note 122, at 7. *But see Crimes Act 1900* (ACT) ss 252A, 252B (specifying when a police officer may arrest a child under ten years of age).

124. *Evidence Act 1995* (Cth) s 4.

125. *Id.* s 18

126. *Id.*; section 19 provides that section 18 does not apply in the ACT when the person is charged with certain offenses against a person under sixteen years of age, certain offenses under ACT's Children's

The Evidence Act of 1995 was conceived in response to a need to produce a comprehensive law of evidence among federal courts.[127] At the outset, the Evidence Bill had three objectives. The first objective was to craft a body of evidence law to apply in federal courts.[128] Prior to the Evidence Act, federal courts applied the evidence laws in the state or territory in which the case was being adjudicated, causing a lack of uniformity among the courts.[129] The second objective of the bill was to provide a modern law of evidence for Australia.[130] Before the Evidence Act, the existing evidence law caused cost and delay in proceedings and the exclusion of relevant evidence because of overly technical rules of evidence.[131] The third aim of the bill was to provide a "substantially uniform" body of evidence law throughout Australia.[132] Two of the six Australian states, South Australia and Victoria, already had statutorily created parent-child testimonial exemptions.[133] New South Wales and Tasmania followed suit after the Evidence Act was passed.[134]

During the 1980's, at the request of the Attorney General, the Australian Law Reform Commission (Commission)[135] conducted an inquiry into the feasibility of including parents and children among those persons that could be excluded from giving evidence in a criminal proceeding.[136] Prior to 1995, several states limited non-compellability of a witness to spouses.[137] Nevertheless, the Commission's review

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Services Act of 1986, and a domestic violence offense within the meaning of the Domestic Violence Act 2001 of the ACT. *Id.* s 19.

127. Cth, Parliamentary Debates, House of Representatives, 15 Dec. 1993, 4087 (Duncan Kerr, Minister for Justice).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *See Evidence Act 1929* (SA) s 21 (providing that where a prospective witness is a "close relative," such as a parent or child of the accused, the prospective witness may apply to the court for an exemption from his or her obligation to testify); *Crimes Act 1958* (Vic) s 400 (providing that the presiding magistrate or judge "shall exempt the accused's . . . mother, father or child . . . from giving evidence on behalf of the prosecution" where certain conditions are met).

134. *Evidence Act 1995* (NSW) s 18; *Evidence Act 2001* (Tas) s 18.

135. Australian Law Reform Commission (ALRC) was established in 1975 as an independent statutory corporation, operating under the Australian Law Reform Commission Act of 1996. *About the Australian Law Reform Commission*, AUSTRALIAN GOV'T, http://www.alrc.gov.au/about (last visited Sept. 27, 2010). The ALRC's focus is on federal laws and legal processes. *Id.* The ALRC conducts inquiries—called references—into various areas of law reform at the request of the Attorney-General of Australia. *Id.* When conducting an inquiry, the ALRC has several objectives: simplify and modernize the law; improve access to justice; "remove obsolete or unnecessary laws, and eliminate defects in the law; suggest new or more effective methods for administering the law and dispensing justice; ensure harmonisation among Commonwealth, state and territory laws where possible; [and] monitor overseas legal systems to ensure Australia compares favorably with international best practice." *Id.* While accountable to the federal Parliament for its budget and activities, the ALRC is not under the control of government. *Id.* Over eighty-five percent of the ALRC's reports have been either substantially or partially implemented, making it one of the most effective and influential agents for legal reform in Australia. *Id.*

136. AUSTL. LAW REFORM COMM'N., REPORT NO. 38, *supra* note 17, paras. 79–80 (1987), *available at* http://www.austlii.edu.au/au/other/alrc/publications/reports/38/ALRC38Ch5.html#ALRC38Ch5Legalcompetence.

137. *Id.* para. 80. Additionally, Queensland abolished spousal non-compellability and privilege all together. *Evidence Act 1977* (Qld) s 8. Some scholars have argued that such an approach is the fairest, in that it denies any and all arbitrariness in pre-determining which relationships are more deserving than

found that the principles underlying the spousal exemption were equally applicable to the exemption of parents and children.[138] The Commission's concern was with procedures that could be used to disrupt familial relationships (outside of spousal harmony) to a greater extent than the interests of the community really require.[139] While bearing in mind the desirability of making available all relevant evidence to the courts, the Commission recommended a procedure by which a judge could weigh the necessity of the evidence against requiring family members to betray confidences and bring punishment to those they love.[140]

Under the Evidence Act, a parent is defined as a biological parent, an adoptive parent, or a person with whom the child is living as if the child were a member of the person's family.[141] A child is defined as an adopted child, biological child, an ex-nuptial child, or a child living with the person as if the child were a member of the person's family.[142] The exemption must be asserted by the witness prior to or as soon as practicable after the prospective witness becomes aware of his right to do so.[143]

The court employs a balancing test to assess the appropriateness of compelling the witness to testify. The court must relieve the witness of testifying in the event that two conditions are met: (1) "there is a likelihood that harm would or might be caused (whether directly or indirectly)" to the proposed witness, or to the relationship between the witness and the accused, if the witness testifies, and (2) "the nature and extent of the harm outweighs the desirability of having the evidence given."[144] The Evidence Act provides criteria for courts to consider in determining the compellability of the witness.[145] Such factors include the nature and gravity of the offense charged; the substance and importance of the proffered evidence; the existence of alternative evidence available to the government; the nature of the relationship between the witness and the accused; and whether, upon giving the evidence, the proposed witness would have to divulge information that was received in confidence from the accused.[146] If the court finds that the nature and extent of the harm to the witness and/or the relationship between the witness and the accused outweighs the desirability of admitting the evidence, the court will exclude the witness from testifying.[147] Otherwise, the proposed witness shall be competent and compellable to testify against the accused.[148] Section 18 forbids the prosecution from

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others. *See, e.g.*, Lee Struesser, *A Comparison of the Law of Evidence*, 2 J. AUSTRALASIAN L. TEACHERS ASS'N 73, 76 (2009) ("The attraction of abolishing the rule completely is that it is simple, fair and is not arbitrary. Simplicity is a quality to be admired. It provides certainty in application. It is also the fairest of solutions. Everyone is treated the same. No one person or group is left out. De facto spouses, same sex partners, siblings, parents, children are treated exactly the same.").

138. *See* AUSTL. LAW REFORM COMM'N, REPORT No. 38, *supra* note 17, para. 80 (stating that the policy concerns underlying the spousal privilege, such as the unwillingness to disrupt family relationships, supported extending the privilege to "appropriate family relationships," such as parents and children).

139. *Id.*

140. *Id.*

141. *Evidence Act 1995* (Cth) Dictionary, pt 2, subcl 10(2).

142. *Id.* s 10(1).

143. *Id.* s 18(3).

144. *Id.* s 18(6).

145. *Id.* s 18(7). The criteria are meant to provide a constructive assessment tool rather than an exhaustive list of factors. *Id.*

146. *Evidence Act 1995* (Cth) s 18(7).

147. *Id.* s 18(6).

148. *See id.* ss 18(6)–18(7) (implying that if the judge finds that the given factors do not weigh in favor of excluding testimony, the prospective witness can be compelled to testify).

commenting on the objection, the court's ruling on the objection, or the witness's failure to testify.[149] The Evidence Act is modeled after the pre-existing Victoria Crimes Act and South Australia's Evidence Act.[150]

Also in 1995, section 18 of the Evidence Act was adopted in its entirety in New South Wales.[151] The Court of Criminal Appeal of New South Wales issued one of its most notable decisions applying this relatively new provision of its evidence code.[152] In *Regina v. Fowler*, the Court upheld a district court's ruling compelling evidence from the defendant's mother concerning statements he made to her regarding the alleged offense.[153] In the trial, the Crown sought to compel the mother to give evidence, but pursuant to section 18 of the Evidence Act, she objected to testifying on behalf of the government against her son.[154] Having determined that the relationship between mother and son would be affected by requiring her to testify, the trial court balanced the nature and extent of the harm to the parent-child relationship against the government's need for the mother's testimony.[155] The district court concluded that the desirability of Ms. Fowler testifying outweighed any harm that would be done to her relationship with her son, and required she testify against her son.[156] The Court of Criminal Appeal found no error in the lower court's application of the balancing test and upheld the ruling.[157] In light of all the evidence presented, including Ms. Fowler's disclosure of her son's statements to her about the crime, Mr. Fowler was convicted of armed assault.[158] His conviction was affirmed on appeal.[159]

*Fowler* is one of the few reported cases where a parent was compelled to testify against his or her child in a criminal proceeding.[160] Among the reported cases, more common is the situation where a child is compelled to testify against his or her parent in a criminal proceeding.[161] In addition, as most decisions are not reported, criminal

149. *Id.* s 18(8).

150. *See Crimes Act 1958* (Vic) s 400 (providing for a similar balancing test with factors roughly identical to those in the federal Evidence Act); *Evidence Act 1929* (SA) s 21 (directing the court to weigh the risk of serious harm to the relationship between the accused and the prospective witness, or to the witness, in considering whether to grant an exemption).

151. *See Evidence Act, 1995*, (NSW) Introductory Note ("This Act is in most respects uniform with the Evidence Act 1995 of the Commonwealth."). Section 18 of the New South Wales Evidence Act conforms to the federal Evidence Act. *Id.* s 18.

152. *R v Fowler* [2000] NSWCCA 352.

153. *Id.* para. 26.

154. *Id.* para. 21. The reported opinion is sparse with details; however, the decision indicates that the defendant's mother testified during voir dire that she believed that forcing her to give evidence would cause "tremendous strain on her relationship with her son." *Id.* para. 24.

155. *Id.* paras. 22–26.

156. *Id.* para. 26.

157. *Fowler*, [2000] NSWCCA, para. 26.

158. *Id.* paras. 2, 63.

159. *Id.* para. 74.

160. *But see R v Braun* [1997] NSWSC 507 (Unreported, Supreme Court, 24 Oct. 1997). *Braun* involved a twenty-two-year-old defendant who admitted to her parents that she started a fire that killed her brother. The prosecutor in the matter elected not to compel either parent to testify against their daughter, anticipating that the parents would likely invoke section 18 of the Evidence Act and the court would exclude the parents from testifying. *Id.* para. 19.

161. *See, e.g.*, *R v Fajloun* [2007] NSWDC 367 (concerning a son who was called as a government witness and who raised a section 18 objection because his father was the accused. The court performed

cases involving evidence law are not frequently published.[162] Finally, infractions of criminal laws handled in youth court are not commonly, if ever, published.[163] This makes it difficult to assess how frequently parents or children in Australia seek exemption from testifying under state or federal law.[164]

### C. *The South Australia Evidence Act*

The South Australia Evidence Act of 1929 was created to codify common law evidentiary rules, such as the absolute spousal privilege, and consolidate certain acts relating to evidence in South Australia. Part II of the Act relates to witnesses, and section 21 states that a close relative of a person charged with a crime shall be compellable to give evidence for the prosecution subject to the provisions of this section.[165] In 1983, the Act was amended to recognize a privilege for "close relatives" as well as spouses to object to giving evidence when the effect of giving such evidence would be damaging to the individual or to the relationship.[166] The amended Act states that where a person is charged with an offense, and a close relative of the accused is a prospective witness against the accused in any proceedings related to the charge, the prospective witness may apply to the court for an exemption from the obligation to give evidence against the accused.[167] If, by giving this evidence, there would be a substantial risk of serious harm to the relationship between the prospective witness and the accused, or serious harm of a material, emotional, or psychological nature to the prospective witness, the court may decide to grant the exemption.[168] The judge will weigh this potential harm with "the nature and gravity of the alleged offense and the importance to the proceedings of the evidence that the prospective witness is in a position to give" and determine if there is sufficient "justification for exposing the prospective witness to the risk."[169]

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the balancing test and found that no harm would be done in requiring the son to testify against his father.). In *R v YL* [2004] ACTSC 115, the child witness's attorney made a section 18 objection to the seven-year-old child being forced to testify against his step-mother. The judge found that the child was compellable but would not require the child to be brought to court against his will.

162. *See* Dietrich Fausten et al., *A Century of Citation Practice on the Supreme Court of Victoria*, 31 MELB. U. L. REV. 733, 743 (2007) (stating that only a "relatively small number" of decisions are reported in the Victorian Reports). Although the study focuses on the Supreme Court of Victoria, the supreme courts of the other states and territories "share many of the same characteristics as the Supreme Court of Victoria." *Id.* at 737. Thus it is possible to infer from the Victoria study that the small number of reported cases in juvenile proceedings does not necessarily imply that compulsion of parental testimony is not occurring in children's courts.

163. *See* KELLY RICHARDS, AUSTL. INST. OF CRIMINOLOGY, JUVENILES' CONTACT WITH THE CRIMINAL JUSTICE SYSTEM IN AUSTRALIA 110 (2009) ("Children's court outcomes, and factors influencing these outcomes, are areas on which few data exist. It is unknown, for example, what proportion of juvenile convictions are formally recorded by the children's courts and the implications of this.").

164. Interviews with lawyers who practice in youth and criminal court could help determine whether or not compulsion of parental testimony is occurring and under what circumstances. To date no such study in the United States or Australia has been conducted.

165. *Evidence Act 1929* (SA) s 21.

166. *R v T, T* [2004] 90 SASR 567, 577.

167. *Evidence Act 1929* (SA) § s 21(2).

168. *Id.* s 21(3)(a).

169. *Id.* s 21(3)(b).

As noted above, in 1983 the legislature recognized the need to "make a provision for circumstances where the close relative of an accused, for example a young child, may not be able to fully appreciate their right to apply to be exempt from giving evidence against the accused."[170] The Supreme Court Judges echoed this recognition in their 1991 Annual Reports, noting that the procedure for exemption might need to be modified when the witness is a young child or mentally ill:

> The Supreme Court Judges in their 1991 Annual Report adumbrated that the procedure is inappropriate where the close relative is a young child or mentally impaired. The Judges recommended that the section be amended to give the court a discretion to dispense with the section's requirements, wholly or in part, where by reason of the prospective witness's immaturity or impaired mental condition, the court considers it proper to do so. The section is amended as recommended by the Judges.[171]

The judges recommended that the court eliminate the need for such a witness to apply for an exemption, and that the court should decide whether or not there should be an exemption without the witness submitting an application or formally objecting.[172] This recommendation was adopted, altering the Act to declare that if the prospective witness is a young child or is mentally impaired, the court should consider whether to grant an exemption *even if* no application for such exception has been made.[173] If the proceeding is a jury trial, the objection to testifying must be heard only by the judge in the absence of the jury.[174] This section defines "close relative" as "spouse, domestic partner, parent or child."[175]

The 1929 South Australia Evidence Act, although similar to the federal Evidence Act of 1995, provides more detailed protections for a potential witness. The South Australia Act specifies the criteria that the court should consider, specifically the potential for serious harm of a material, emotional, or psychological nature to the prospective witness.[176] In contrast, the federal Act outlines more general criteria such as direct or indirect harm to the person.[177] Practically, the difference in language may produce the same result. However, the South Australia legislation acknowledges that forcing persons in relationships defined by love, support, and nurturance to testify against one another may produce tangible and intangible harm.

The South Australia Act offers a more detailed description of how the court should ensure that individuals who may not be aware of this privilege are informed of their right to object to giving evidence against a close relative. The federal Evidence Act contains only one sentence that alludes to the possibility of a judge ensuring they are aware of the privilege: "If it appears to the court that a person may

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170. *R v T, T* [2004] 90 SASR at 577.

171. *Id.* at 578 (quoting SA, Parliamentary Debates, House of Assembly, 25 Mar. 1993, 2662–63 (Hon. GJ Crafter, Minister of Housing, Urban Development and Local Government Relations)).

172. *Id.*

173. *Id.*; *Evidence Act 1929* (SA) s 21(3)(a).

174. *Evidence Act 1929* (SA) s 21(4)(a).

175. *Id.* s 21(7).

176. *Id.* s 21(3)(a)(ii).

177. *Evidence Act 1995* (Cth) s 18(6)(a).

have a right to make an objection under this section, the court is to satisfy itself that the person is aware of the effect of this section as it may apply to the person."[178] In comparison, the South Australia Act requires the court to consider whether an exemption should be applied, even if the individual has not applied for an exemption.[179] If an individual is mentally impaired or is a young child and is unaware or unable to claim the privilege, there does not seem to be a duty under the federal Evidence Act to consider an exemption, but under the South Australia Act, there is such a duty. According to section 21, paragraph 3a:

> If the prospective witness is a young child, or is mentally impaired, the court should consider whether to grant an exemption under subsection (3) even though no application for exemption has been made and, if of opinion that such an exemption should be granted, may proceed to grant the exemption accordingly.[180]

In addition, case law interpreting the South Australia Act suggests that certain individuals should be given representation when presenting a potential exemption to a judge.[181]

### D. *The Victoria Crimes Act of 1958*

The compellability exemption for parents and children originated in section 400 of the 1958 Crimes Act.[182] Section 400 applies to any proceeding against an accused, and allows the presiding judge to exempt the accused's "wife, husband, mother, father or child . . . from giving evidence on behalf of the prosecution."[183] Any person included in one of these categories who wishes not to testify must make an application for an exemption to the judge, who then applies a balancing test.[184] The assessment by the court is threefold: to determine if the community's interest in obtaining the evidence of the proposed witness is outweighed by (1) the likelihood of damage to the relationship between the accused and the proposed witness; (2) the harshness of compelling the proposed witness to give the evidence; or (3) the combined effect of the two measures.[185] Similar to the Commonwealth's Evidence Act, the Victoria Crimes Act contains factors to be considered as part of the balancing test.[186] The factors include the:

> nature of the [offense] charged; the importance in the case of the facts which the proposed witness is to be asked to depose; the availability of

178. *Id.* s 18(4).

179. *Evidence Act 1929* (SA) s 21(3a).

180. *Id.*

181. *R v Andrews* [2005] 92 SASR 442 (providing that a person applying for the exemption may have legal representation under certain circumstances, such as when the person is "suffering from the mental illness or other condition which is the basis of the application").

182. *Crimes Act 1958* (Vic) s 400. Victoria also had an Evidence Act of 1958 in place, but the compellability exemption is not mentioned in that Act. *See Evidence Act 1958* (Vic) div. 2 (making no mention of an exemption for parent-child communications).

183. *Crimes Act 1958* (Vic) s 400(3).

184. *Id.*

185. *Id.*

186. *Id.* s 400(4).

other evidence to establish those facts and the weight likely to be attached to the proposed witness's testimony as to those facts; the nature, in law and in fact, of the relationship between the proposed witness and the accused; the likely effect upon the relationship and the likely emotional, social and economic consequences if the proposed witness is compelled to give the evidence; and any breach of confidence that would be involved.[187]

If a judge finds that any of these concerns singlehandedly or in combination with one another outweigh the community's interest in having the witness compelled to testify, then he must exempt the witness.[188]

For example, in *Regina v. Ngo*, the applicant was found guilty of one count of robbery and appealed his conviction and sentence.[189] At the time of the offense, he was thirty years old.[190] The Crown planned to call the applicant's mother as a witness at trial, but the judge excused her from providing evidence pursuant to section 400 of the Crimes Act.[191] Although the appellate opinion does not go into detail about why the trial judge excluded the mother's evidence, this case shows that there are situations where the community's interest in hearing the evidence is outweighed by considerations for preserving the relationship between a child and his mother.

Similarly, in *Regina v. Annette Ryan*, the mother of the defendant applied for exemption under section 400 of the Crimes Act when the prosecution sought her testimony in an attempted robbery trial against her daughter.[192] During opening statements, the government told the jury that the defendant's mother would testify about a conversation she had with her daughter concerning the composite sketch of the alleged assailant that was published in the local newspaper.[193] The court granted the mother's request to be exempt from testifying, and despite the omission of the evidence, the defendant was convicted.[194]

Although section 400 of the Crimes Act does not categorically exclude certain crimes from the compellability exemption, like its federal counterpart,[195] for all intents and purposes the balancing test allows a judge to assign whatever weight he deems appropriate to the seriousness of the offense in his determination. Case law demonstrates that judges do not always grant the exemption to parents compelled to testify against their children, even though being forced to give evidence against their child is an experience that will likely alter the parent-child relationship. In *Regina v. G.A.M.*, the defendant was charged with seven counts of sexually interfering with his thirteen-year-old stepdaughter.[196] The grandmother of the victim, also being the mother of the accused, was called to give evidence at trial about statements made by

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187. *Id.*

188. *Crimes Act 1958* (Vic) s 400(3).

189. *R v Ngo* [2002] VSCA 188, paras. 1, 2.

190. *Id.* para. 1.

191. *Id.* para. 3.

192. *R v Ryan* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, 15 Apr. 1991).

193. *Id.*

194. *Id.*

195. *See Evidence Act 1995* (Cth) s 19 (specifying that the section 18 exemption does not apply to certain crimes).

196. *R v G.A.M.* [2003] VSCA 185, para. 1.

the victim to the grandmother attesting to sexual abuse by the defendant.[197] As might be expected in such a case, the judge rejected the grandmother's request for exemption, finding that "the interests of the community in obtaining the grandmother's evidence was paramount and outweighed the prospects of further damaging the relationship between the proposed witness and her son."[198]

### E. *The Victoria Evidence Act 2008*

As part of a national effort toward the establishment of uniformity among the laws of evidence in Australia, the Victorian Law Reform Commission (VLRC) began a comprehensive review of the evidence law in Victoria.[199] The VLRC began its work in 2004 with the state's 1958 Evidence Act.[200] Following suit with the promulgation of new evidence acts in New South Wales (1995), the Commonwealth (1995), Tasmania (2001), and Norfolk Island (2004), Victoria enacted its new Evidence Act in 2008.[201] By implementing this new legislation, section 400 of the Crimes Act 1958 was repealed and relocated in the Evidence Act 2008 under section 18, to correspond with the sections in the uniform evidence acts.[202]

The Evidence Act 2008 brought about slight modifications to the compellability exemption to reflect uniformity with its corresponding federal section. Perhaps the most relevant change broadened the former exemption's coverage: the 2008 Act includes the giving of evidence, as well as evidence of a communication.[203] This modification allows a court more options in terms of exclusion. For instance, a judge may compel a parent to testify against his child but permit the witness to refrain from testifying as to any communications between the parent and child. Protecting the confidences between parent and child may be viewed as more socially vital than compelling a parent to testify as to observations, even if they might have the effect of convicting the child.[204] A child may more readily accept a parent's compliance with a

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197. *Id.* para. 4.

198. *Id.* para. 5.

199. VIC. LAW REFORM COMM'N, COMPLETED REPORTS: EVIDENCE, http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/Home/Completed+Projects/Evidence/ (last updated Aug. 2, 2008). The VLRC, an independent, government-funded organization, was established under the Victoria Law Reform Commission Act 2000 as a central agency to propel law reform in Victoria. *See About Us*, VIC. LAW REFORM COMM'N, http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/Home/About+Us/ (last updated Oct. 8, 2010). The Commission's purpose is to solicit community input and advise the Attorney-General on how to improve and update Victorian Law; like the ALRC, the VLRC researches issues the Attorney-General refers to it, but may also recommend minor changes to the law without a reference. *Id.*

200. VIC. LAW REFORM COMM'N, IMPLEMENTING THE UNIFORM EVIDENCE ACT: REPORT 2 (2006), http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/law+reform/home/completed+projects/evidence/lawreform+-+implementing+the+uniform+evidence+act_+report.

201. *Id.* at 3. *See also* JUDICIAL COLL. OF VIC., INTRODUCTION TO THE UNIFORM EVIDENCE ACT IN VICTORIA: SIGNIFICANT CHANGES 1 (2009) (noting that Victoria's 2008 Evidence Act is "largely uniform" with the federal Evidence Act 1995, as well as legislation in New South Wales, Norfolk Island, and Tasmania).

202. VIC. LAW REFORM COMM'N, REPORT NO. 2, *supra* note 200, at 217; *see Evidence Act 2008* (Vic) s 18 (providing an exemption to the requirement to give evidence for a person who is the "spouse, de facto partner, parent or child of an accused . . . .").

203. *Evidence Act 2008* (Vic) s 18(2).

204. *See, e.g.*, *In re* A&M, 61 A.D. 2d 426, 429 (N.Y. App. Div. 1978) ("Although the communication [between parent and child] is not protected by a statutory privilege, we do not conclude that it may not be shielded from disclosure. It would be difficult to think of a situation which more strikingly embodies the

court order (especially after the parent has sought exemption) and testimony as to observations made or facts known about the child than the divulgence of words shared with the parent during a subjectively private exchange. In contrast to the United States, where forty-five states offer no legal protection for these communications, the fact that, in Australia, judicial discretion exists is significant.

Perhaps less significant, but nevertheless worthy of mention, is the slight variation in the balancing test a judge employs under the new Evidence Act versus the old Crimes Act. Under the Crimes Act, a judge was explicitly instructed to consider the interest of the community in obtaining the evidence.[205] This language is entirely omitted from the Evidence Act; instead, the statute instructs the judge to focus on the likelihood of harm that may be caused to the witness or the relationship between the witness and the defendant.[206] The judge must also find that this likely harm "outweighs the desirability of having the evidence given."[207] In the Crimes Act, the exemption requirement could be met if a judge found "the likelihood of damage to the relationship between" the witness and the defendant outweighed the community's interest, the harshness of compelling the witness outweighed the community's interest, or a combined effect of both of these factors.[208] Thus, the exemption requirements could be met in more ways under the Crimes Act than in the current Evidence Act.

Unlike the Commonwealth and New South Wales Evidence Acts, the Victoria Evidence Act 2008 does not contain an equivalent to the federal act's section 19, which allows for spouses, parents, and children to be compelled to give evidence in certain criminal proceedings.[209] Through an inquiry process conducted by the VLRC, Victoria Legal Aid, along with other advocacy groups, voiced its opposition to an exception provision, explaining that "in its experience the court's discretion in these matters was appropriately exercised and that even when a witness is not ultimately exempted from giving evidence, the process of applying for exemption had significant benefits."[210] For example:

> The witness has an opportunity to explain the nature and importance of their relationship to the defendant and the judicial officer has an opportunity to explain the policy reasons compelling the witness to give evidence. This dialogue often reduces the stress for the witness and [minimizes] damage to the relationship between the witness and defendant (a victim, in relevant cases). This beneficial process would not occur if [section] 400 applications were prohibited for particular offences.[211]

intimate and confidential relationship which exists among family members than that in which a troubled young person, perhaps beset with remorse and guilt, turns for counsel and guidance to his mother and father.").

205. *Crimes Act 1958* (Vic) s 400(3).

206. *Evidence Act 2008* (Vic) s 18(6)(a).

207. *Id.* s 18(6)(b).

208. *Crimes Act 1959* (Vic) s 400(3).

209. VIC. LAW REFORM COMM'N, REPORT No. 2, *supra* note 200, at 23, para. 2.31.

210. *Id.* at 23–24, para. 2.32.

211. *Id.*

Similarly, the Victoria police were not in favor of any exceptions to the non-compellability rule because they believed that it could result "in children being automatically compelled to give evidence, [and] may endanger both the child and the family unit."[212] Furthermore, the VLRC found that "the certainty of the compellability of a witness" that section 19 would provide does not provide assurance to prosecutors because they will always face difficult witnesses who are unwilling to confirm statements.[213] Given these inquiries, the VLRC concluded that, "section 18 provides an adequate means for ensuring that witnesses are required to give evidence in appropriate circumstances and excused when there are greater overriding concerns," thus making section 19 superfluous.[214]

As noted above, the parent-child exemption weighs the present and potential future harm caused to the person and/or to the parent-child relationship against the desire for the evidence in the proceeding. Such a balancing test favors exemption in the juvenile justice context because the significance of harm (present and future) to the parent-child relationship is even greater when it involves a minor child and his or her parent. Forcing a parent to divulge personal information shared with him by his minor child in order to assist the government in securing a conviction against the child has a strong probability of fracturing the family unit, causing severe psychological strain, and furthering deep feelings of betrayal on the part of the child. Likewise, forcing a parent to testify against his child undermines the primary objective of prosecuting the child in juvenile court—restoring the order upset by the juvenile and emboldening the family unit to help the juvenile not reoffend. Naturally, this would include repairing, nurturing, and maintaining a supportive community to which the offender may return. For a juvenile, family is often the key component for ensuring a successful transition to becoming a productive member of society.

## III. THE CORRELATION BETWEEN RESTORATIVE JUSTICE AND THE PARENT-CHILD TESTIMONIAL EXEMPTION: *THE AUSTRALIAN EXAMPLE*

For more than a decade, the volume of cases in children's courts throughout Australia has declined significantly.[215] This is due in large part to restorative justice practices widely accepted and utilized with great effectiveness.[216] Restorative justice programs in Australia largely derive from the conferencing model developed in New

212. *Id.* at 24, para. 2.33.

213. *Id.* at 24–25, para. 2.35.

214. *Id.* at 26, para. 2.37.

215. AUSTL. INST. OF CRIMINOLOGY, *supra* note 163, at xiv. During 2007–2008, half of all juveniles in New South Wales who were considered "persons of interest" and who came into contact with the police were diverted by a warning, caution, or a youth justice conference, while approximately twenty-six percent of such juveniles were proceeded against in court. *Id.* at 54. Similarly, 2005 police data for South Australia indicates that nearly half of all juveniles apprehended were dealt with through diversionary means (either a formal caution or family group conferencing), whereas forty-two percent were referred to the youth court. *Id.* at 55.

216. *See id.* at 67 (noting the decline in children's court cases and "[t]he emergence of a general trend [toward] diverting juveniles from the criminal justice system" in favor of "drug and alcohol courts and programs, family group conferencing, youth justice conferencing, juvenile justice teams and Indigenous-specific courts and programs").

Zealand in the late 1980's.[217] The principal means of facilitating resolution of the conflict is a practice called family group conferencing (FGC).[218] In FGC, the offender, the victim, their respective families, friends, and teachers convene for the purpose of facilitating a discussion that leads to reconciliation, appropriate reparations, and support to assist the juvenile in not re-offending.[219] "In both the New Zealand and the Australian models, it is the individual offender and his or her family that is the primary focus of any intervention .... Within both, the family and the individual are seen as the things to be changed, on the assumption that the delinquency itself represents a symptom of family and individual malfunction."[220]

The conferencing process is quintessential restorative justice. The group discusses reasons for the crime, the impact of the crime, and ways to mitigate or resolve the harm caused.[221] The conference or meeting is facilitated by a public official.[222] Proponents of restorative justice argue that this type of face-to-face interaction helps the young offender to recognize the impact his or her actions had on others.[223] Likewise, participating in determining the reparations most appropriate for the victim and the community gives the offender a stake in the outcome.[224] Most states in Australia use FGC to divert cases from the formal court process.[225] As one

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217. HEATHER STRANG, RESTORATIVE JUSTICE PROGRAMS IN AUSTRALIA: A REPORT TO THE CRIMINOLOGY RESEARCH COUNCIL 4 (2001). Following decades of dissatisfaction with the treatment of juveniles in the criminal justice system, the New Zealand legislature enacted the Children, Young Persons and Their Families Act, which sought to increase participation among offenders, victims and their families in reaching resolution of the conflict. *Id.*

218. Mark Umbreit & Howard Zehr, *Restorative Family Group Conferences: Differing Models and Guidelines for Practice*, 60 FED. PROBATION 24 (1996).

219. *Id.* at 25.

220. Kenneth Polk, *Family Conferencing: Theoretical and Evaluative Concerns*, *in* FAMILY CONFERENCING AND JUVENILE JUSTICE: THE WAY FORWARD OR MISPLACED OPTIMISM? 123, 130 (Christine Alder and Joy Wundersitz eds., 1994).

221. Umbreit & Zehr, *supra* note 218, at 25. A family group conference is intended to be a "relatively informal, loosely structured meeting" in which the participation of families and victims is considered a key feature of the process. Christine Alder & Joy Wundersitz, *New Directions in Juvenile Justice Reform in Australia*, *in* FAMILY CONFERENCING AND JUVENILE JUSTICE: THE WAY FORWARD OR MISPLACED OPTIMISM? 1, 7 (Christine Alder and Joy Wundersitz eds., 1994). The offender and his or her extended family (and, in some systems, a legal advocate) are "brought together with the victim, her/his supporters, and any other relevant parties to discuss the offending and to negotiate appropriate responses." *Id.* For a more comprehensive overview on conferencing in Australia, *see* Kathleen Daly, *Conferencing in Australia and New Zealand: Variations, Research Findings and Prospects*, *in* RESTORATIVE JUSTICE FOR JUVENILES: CONFERENCING, MEDIATION & CIRCLES, 59–84 (Allison Morris and Gabrielle Maxwell eds., 2001).

222. Umbreit & Zehr, *supra* note 218, at 25. Some populations refer to the conferences as "circles," after the native/indigenous custom. *See* STRANG, *supra* note 217, at 6 (noting that "sentencing circles with their hybrid indigenous and formal justice characteristics," though used in New Zealand, had not been tried in Australia).

223. *See* Umbreit & Zehr, *supra* note 218, at 25 (noting that "FGCs provide victims an opportunity to express what impact the crime had upon their lives, to receive answers to any lingering questions about the incident, and to participate in holding offenders accountable for their actions").

224. Garth Luke and Bronwyn Lind, *Reducing Juvenile Crime: Conferencing versus Court*, 69 CRIME & JUST. BULL. 1 (2002) ("At a conference, which is facilitated by a trained conference convenor, the young offender(s), family, victims and other supporters discuss the offending and its impact in order to encourage acceptance of responsibility by the offender, negotiate some form of restitution to the victim or community and help to reintegrate the offender back into his/her family and community.").

225. In New South Wales must the child admit to the offense as a prerequisite to the conferencing process. *Young Offenders Act 1997* s 36(b).

commentator described the value of this diversionary process, "[c]ompared to courtroom interactions, there is greater potential for an offender at a conference to explain what happened, for an offender's parent or supporter to say how the [offense] affected them, and for a victim to speak directly to an offender about the impact of the [offense] and any lingering fears."[226]

The seminal juvenile-justice legislation in New South Wales, the Young Offenders Act, institutionalized conferencing state-wide and transferred oversight of the practice to the Department of Juvenile Justice.[227] Any juvenile between the ages of ten and seventeen who commits a summary or indictable offense is eligible for conferencing.[228] Offenses include assault, breaking and entering, theft, and property damage offenses.[229] Section 34 of the Act sets forth the principles and purposes of conferencing as follows:

> (i) to promote acceptance by the child concerned of responsibility for his or her own [behavior], and (ii) to strengthen the family or family group of the child concerned, and (iii) to provide the child concerned with developmental and support services that will enable the child to overcome the offending [behavior] and become a fully autonomous individual . . . .[230]

The conferencing model relies on sustained communication between parents and kids, which may often be incriminating for the child. Also included in the Young Offenders Act is the prohibition against any statement made by a child during a caution or a conference being admitted in future court proceedings.[231]

The mechanisms by which conferences are facilitated differ slightly among states. For example, in New South Wales, a conference is run by a convenor, who is a member of the community trained and paid by the state.[232] In order to be eligible

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226. Kathleen Daly, *Revisiting the relationship between retributive and restorative justice*, in RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE 33, 46 (Heather Strang & John Braithwaite, eds., 2000).

227. Kathleen Daly & Hennessey Hayes, *Restorative Justice and Conferencing in Australia*, 186 TRENDS & ISSUES IN CRIME & CRIM. JUST. 3 (2001). The Act established a hierarchy of pre-trial interventions of juveniles ranging from police warnings to cautions, to juvenile conferences. *Young Offenders Act 1997* (NSW) s 9(1). The Act established a hierarchy of pre-trial interventions of juveniles ranging from police warnings to cautions, to juvenile conferences. *Young Offenders Act 1997* (NSW) s 9(1).

228. *Young Offenders Act 1997* (NSW) s 4 (defining "child" as "a person who is of or over the age of [ten] years and under the age of [eighteen] years"); *id.* s 35 (providing that a conference can be held for any offense under the Act, including summary and indictable offenses, which are covered by the Act pursuant to section 8(1)).

229. *See Criminal Procedure Act 1986* (NSW) sch 1 (defining indictable offenses). Excludable offenses are sexual offenses, offenses causing death, certain drug offenses, some traffic offenses, and offenses relating to violence orders. *Id.* s 8.

230. *Id.* ss 34(1)(a)(i)–(iii).

231. *See Young Offenders Act 1997* (NSW) s 67(1) ("Any statement, confession, admission or information made or given by a child during the giving of a caution or a conference under this Act is not to be admitted in evidence in any subsequent criminal or civil proceedings.").

232. *The NSW Scheme—Juvenile Justice*, NSW GOVERNMENT, JUVENILE JUSTICE, DEP'T OF HUMAN SERVICES, http://www.djj.nsw.gov.au/conferencing_scheme.htm (last visited Oct. 13, 2010) ("One unique aspect of the scheme that is different from other statutory schemes is the identity of conference convenors. These are individuals who live and work in the local communities and who are engaged by contract to [organize] and facilitate youth justice conferences as needed."); JUVENILE JUSTICE, NEW SOUTH WALES GOV'T HUMAN SERVICES, YOUTH JUSTICE CONFERENCE CONVENOR INFORMATION PACKAGE 9 (stating

for conferencing, the offender must have admitted to the offense and agreed to participate in the conferencing process.[233] Referrals for conferences are made by police specialist youth officers.[234] The tone set for the discussions is intended to be compassionate, as opposed to the adversarial tenor of youth court. The youthful offender is "given the opportunity to talk about the circumstances associated with the [offense] and why [he or she] became involved in it. The young person's parents or supporters discuss how the offense has affected them."[235]

Within the first twelve months that the Young Offenders Act 1997 authorized juvenile conferencing, 928 conferences were held involving 1155 juvenile offenders.[236] The Attorney General described the objectives of conferencing as:

> to encourage discussion between those affected by the offending [behavior]and those who have committed it in order to produce an agreed outcome plan which restores the harm done and aims to provide the offender with developmental and support services which will enable the young person to overcome his or her offending [behavior].[237]

In South Australia, police and judges can make referrals for conferencing if either decides that a matter should not be formally prosecuted.[238] Conferences are convened by youth justice coordinators who are either appointed or are youth court magistrates.[239] In Western Australia, conferences are organized by juvenile justice teams comprised of a youth justice coordinator, police officer, Ministry of Education officer, and an Aboriginal community worker.[240] In the Australian Capital Territory, Tasmania, and the Northern Territory, police officers even function as conferencing facilitators.[241] Ordinarily, juvenile justice teams convene family meetings to deal with juveniles who have been apprehended for minor offenses.[242] Recent studies show that in Western Australia, conferencing had a dramatic effect on reducing the number of cases in the Children's Court. In 1995, formal charges against youth dropped twenty-two percent and admissions to detention centers dropped thirty percent.[243]

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the pay rate of convenors and mandating training provided by the Juvenile Justice department), *available at* http://www.djj.nsw.gov.au/Career%20documents/YJC%20Information%20Pack%20v4.1.pdf.

233. *Young Offenders Act 1997* (NSW) s 36.

234. *See id.* s 37 ("[T]he child is not entitled to be dealt with by holding a conference if, in the opinion of the specialist youth officer to whom the matter is referred, it is more appropriate to deal with it by commencing proceedings against the child or by giving a caution because it is not in the interests of justice for the matter to be dealt with by holding a conference.").

235. Daly and Hayes, *supra* note 227, at 2.

236. LILY TRIMBOLI, N.S.W. BUREAU OF CRIME STAT. & RES., AN EVALUATION OF THE NEW SOUTH WALES YOUTH JUSTICE CONFERENCING SCHEME 13 (2000).

237. NSW, Young Offenders Bill: Reading Before the Legislative Council, 21 May 1997, 8960 at *3 (J.W. Shaw, Attorney General).

238. AUSTL. LAW REFORM COMM'N, REPORT No. 84, *supra* note 121, para. 18.47.

239. *Id.*

240. *Id.* para. 18.48.

241. STRANG, *supra* note 217, at 22–27.

242. AUSTL. LAW REFORM COMM'N, REPORT No. 84, *supra* note 121, paras. 18.46, 18.48.

243. *Id.* para. 18.48.

In Victoria juvenile conferencing "is not legislatively based and relies on existing provisions of the Children's and Young Persons Act of 1989."[244] It operates solely in the Melbourne children's court and is modeled on New Zealand's family group conferencing scheme.[245] Those participating in the program "are juveniles who have admitted their offense, who would otherwise go to court and who are likely to be given a Supervisory Order."[246] A distinctive feature of the program is that it uses conferences for young offenders with prior court appearances as opposed to just first-time offenders or minor offenses.[247]

Evaluations of the conferencing process reveal high levels of satisfaction among participants. In Queensland, data collected by the Department of Justice indicates that of the 351 offenders, parents, and victims interviewed about their experience with conferencing, ninety-seven to 100 percent said their experience was fair and they were satisfied with the resolution.[248] An evaluation of the youth justice conferencing scheme in New South Wales found exceptionally high levels of satisfaction with the conference experience among victims, offenders, and offender supporters.[249] Over ninety percent felt the conference was fair to both the victim and the offender, and felt they had the opportunity to express their views and were treated with respect.[250] At least seventy-nine percent responded that they were satisfied with the way their case had been dealt with by the justice system.[251] Similarly, Western Australia conducted an evaluation of family meetings. In the Perth portion of the study, which surveyed 265 offenders, parents, and victims who participated in family meetings during 1996 and 1997, between ninety to ninety-five percent of participants stated that "they felt that they or their children were treated fairly in the process."[252] In Victoria, satisfaction studies were completed during a small pilot project between 1995 and 1997.[253] Evaluation of the Victoria program revealed that "victims found the process helpful and healing" and "young people said that the conference had a beneficial impact on them."[254]

What all these juvenile conferencing schemes have in common is the involvement of lay people who are important to the offender and the victim. All of these supporters facilitate the restoration and rehabilitation process by bearing witness to the dialogue between the offender and victim, helping to construct the appropriate reparations, and pledging their support to provide constructive assistance to keep the juvenile from reoffending. The parents of the offender are

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244. STRANG, *supra* note 217, at 10.

245. *Id.* The Victoria program derives from an alternate dispute resolution model, rather than from a restorative justice philosophy. *Id.*

246. *Id.*

247. *See id.* (explaining that the program "is an attempt by the Court to deal effectively with young offenders at risk of progressing through the justice system").

248. Daly & Hayes, *supra* note 227, at 4. *But see* Jeremy Prichard, *Parent-Child Dynamics in Community Conferences: Some Questions for Reintegrative Shaming, Practice and Restorative Justice*, 35 AUSTL. & N.Z. J. CRIMINOLOGY 330, 330 (2002) (noting that qualitative observations of the behavior of parents in thirty-four juvenile conferences in Tasmania revealed a sense of disillusionment, shame, and diminishing sense of responsibility among the parents).

249. TRIMBOLI, *supra* note 236, at vii.

250. *Id.*

251. *Id.*

252. Daly & Hayes, *supra* note 227, at 4.

253. STRANG, *supra* note 217, at 10.

254. Daly & Hayes, *supra* note 227, at 5.

critical to this process: typically they are the primary means of support and guidance for the child. Logically, a legal paradigm which delegates the responsibility to assist the juvenile in not re-offending directly to the family should ensure that its rules and procedures do not undermine the parent-child relationship. Hence, it stands to reason that Australia's legal system would include a mechanism to exempt a parent from testifying against one's child when it would be harmful to the parent-child relationship.

As has been demonstrated with juvenile conferencing, support for the parent-child relationship is a fundamental part of Australia's response to juvenile crime. Moreover, Australia's commitment to promoting and sustaining parental involvement is explicit in its youth justice legislation.[255] For instance, section 30 of the Queensland Youth Justice Act of 1992 states that the child's parents may benefit by, "(i) being involved in decision making about the child's behaviour; and (ii) being encouraged to fulfill their responsibility for the support and supervision of the child; and (iii) being involved in a process that encourages their participation and provides support in family relationships . . . ."[256] Similarly, the main objectives of Tasmania's Youth Justice Act are "to enhance and reinforce the roles of guardians, families and communities in (i) minimising the incidence of youth crime; and (ii) punishing and managing youths who have committed offences; and (iii) rehabilitating youths who have committed offences and directing them towards the goal of becoming responsible citizens . . . ."[257]

Open and honest communication between parent and child is a key ingredient to maintaining meaningful parental participation in a child's life. The existence of laws that protect the confidentiality of communication between parents and their children is inextricably intertwined with the juvenile justice system's mission to enhance the role of parents to help their children become responsible and law-abiding citizens.

Cautioning is another diversionary method used by police to deal with young people who commit offenses.[258] As with all diversionary tactics in the Australian juvenile justice system, parents are informed of the juvenile's misconduct and expected to assist the juvenile with staying out of the formal court process. An informal caution involves minor intervention with the juvenile such as taking the child home or calling his or her parents, ending with a warning to cease the suspicious behavior.[259] A formal caution is administered at the police station with a parent present and record of the incident that involved police contact remains on file with police.[260] Each jurisdiction's process for issuing a caution, whether formal or

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255. *See, e.g.*, *Youth Justice Act 1992* (Qld) s 2(e) (listing among the objectives of the Act, "to recognise the importance of families of children . . . . in the provision of services designed to rehabilitate children who commit offenses" and "reintegrate" juvenile offenders back into the community); *Young Offenders Act 1993* (SA) s 3 ("family relationships between a youth, the youth's parents and other members of the youth's family should be preserved and strengthened"); *Young Offenders Act 1997* (NSW) s 7(f) ("parents are to be [recognized] and included in justice processes involving children and . . . are to be [recognized] as being primarily responsible for the development of children").

256. *Youth Justice Act 1992* (Qld) s 30(b)(i)–(iii).

257. *Youth Justice Act 1997* (Tas) s 4(f).

258. *See* AUSTL. INST. OF CRIMINOLOGY, *supra* note 215, at 26.

259. CUNNEEN & WHITE, *supra* note 8, at 371.

260. *Id.*

informal, operates differently. In Queensland, a caution may only be given to a child who admits to committing the offense and consents to being dealt with through this process.[261] The caution must be given in the presence of another person of the child's or his or her parents' choosing.[262] The child must be given notice of, *inter alia*, the substance of the offense, the police officer's name and rank, and the nature and effect of a caution.[263]

In Western Australia, an oral or written caution can be administered for minor offenses, and a cautioning certificate must be issued.[264] In South Australia, police officers have statutory power to give an informal caution to a person who admits the commission of a minor offense.[265] Thereafter, no further proceedings may be taken against the child regarding this offense, and no official record is kept.[266] In New South Wales, police can formally caution a child who admits an offense and consents to being cautioned.[267] An officer must consider the degree of violence involved and the harm caused to the victim.[268] In addition, a caution must be expressed in language readily capable of being understood by children.[269]

Whether police elect to use warnings, informal cautions, or formal cautions is largely within an officer's discretion. In Queensland, between 1995 and 1996, 15,681 formal cautions were issued to children.[270] During the same period in South Australia, 3,161 informal police cautions and 2,511 formal police cautions were issued, and 1,180 family conferences were held.[271] In Western Australia, 8,268 cautions were given to 7,021 children in 1995.[272] There was no data on diversionary programs in Victoria, but approximately 9,000 children receive police cautions annually.[273]

Because the Australian diversionary process funnels children out of the formal court process to begin with, it is difficult to make comparisons among Australian jurisdictions regarding sentencing outcomes. For example, it is difficult to determine if a higher detention rate in one state is indicative of a more punitive approach or whether the less serious cases were diverted through cautioning or conferencing. But when comparing Australian juvenile detention rates to the United States, the rate of pre-trial and post-trial detention in the United States is proportionately higher than any state or territory in Australia.[274] Once again, we can find support in the Australian juvenile justice system for the proposition that judges and other stakeholders are deliberately involving parents in the effort to keep kids out of detention and using incarceration as a last resort.

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261. *Youth Justice Act 1992* (Qld) s 16(1).
262. *Id.* s 16(2).
263. *Id.* ss 20(1), (2).
264. *Young Offenders Act 1994* (WA) ss 22, 23A.
265. *Young Offenders Act 1993* (SA) s 6(1).
266. *Id.* ss 6(2), 6(3).
267. *Young Offenders Act 1997* (NSW) s 19.
268. *Id.* s 20(3).
269. *Id.* s 29(1).
270. AUSTL. LAW REFORM COMM'N, REPORT NO. 84, *supra* note 121, para. 2.81.
271. *Id.*
272. *Id.*
273. *Id.*
274. *See infra* Part IV.

The Australian experience demonstrates that restorative justice is not at odds with reducing juvenile crime. In fact, Australia's widespread use of restorative justice throughout the justice system is testament to its success. Although there is no empirically-based causal connection between restorative justice and the parent-child exemption, there is a significant correlation between the two. The role of parents is vital to the success of the Australian experience. Without the exemption, a parent's role would be compromised by the fear that if the child divulges incriminating information to the parent, he or she could be forced to reveal it. A legal system which places responsibility directly on the family to support the juvenile to not re-offend needs to have as part of its infrastructure a set of rules that protect the sanctity of the family as well as promote open and honest communication within it.

## IV. THE CRIMINALIZATION OF THE AMERICAN JUVENILE JUSTICE SYSTEM: AN IMPEDIMENT TO RECOGNITION OF A PARENT-CHILD PRIVILEGE

Despite their present differences, there are historical parallels between the U.S. and Australian juvenile justice systems. The first juvenile courts in Australia and the United States were established in the late nineteenth century.[275] Both have their origins in the doctrine of *parens patriae*, where the best interests of the child are paramount.[276] Courts acted *in loco parentis*, where judges treated the children that came before them like sons and daughters in need of guidance.[277] From their inception, delinquency proceedings were deemed civil, not criminal, and many of the due process protections afforded to adult criminal defendants were unavailable to children.[278]

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275. CUNNEEN & WHITE, *supra* note 8, at 18.

276. *Id. Parens patriae* is defined as "parent of his or her country." BLACK'S LAW DICTIONARY, *supra* note 17, at 1144 (8th ed. 2004).

277. Judge Julian Mack set forth the predominant philosophy of the juvenile court in an influential law review article:

> [The criminal court] put but one question, "Has he committed this crime?" It did not inquire, "What is the best thing to do for this lad?" It did not even punish him in a manner that would tend to improve him; the punishment was visited in proportion to the degree of wrongdoing evidenced by the single act .... Why is it not just and proper to treat these juvenile offenders, as we deal with the neglected children, as a wise and merciful father handles his own child whose errors are not discovered by the authorities? Why is it not the duty of the state, instead of asking merely whether a boy or a girl has committed a specific offense, to find out what he is, physically, mentally, morally, and then if it learns that he is treading the path that leads to criminality, to take him in charge, not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen.

Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909).

278. *See* Marygold S. Melli, *Juvenile Justice Reform in Context*, 1996 WIS. L. REV. 375, 378–79 (1996) (noting that the juvenile court was based on a "nonadversarial clinical-therapeutic model" in which evidentiary rules did not apply and the presence of an attorney was discouraged). Because rehabilitation was the goal, dispositions were necessarily open-ended rather than time-limited; in most jurisdictions, commitments to juvenile corrections departments were indeterminate, extending until the child turned twenty-one, or until the juvenile corrections department made a determination that the youth had been rehabilitated. *Id.* at 380.

Beginning with the birth of the civil rights movement in the United States, the American juvenile justice system gradually evolved into a rights-based, autonomous system where due process superseded informality and benevolence. Following the landmark case of *In re Gault,* those adjudicated in juvenile court were guaranteed many of the same procedural protections that applied to adults in criminal proceedings.[279] Most notably, *Gault* granted to juveniles the right to counsel and the right against self-incrimination.[280] Justice Fortas, writing for the majority, explained that the juvenile justice system in the United States had taken on a different character since its inception; he described a system where judges have "unbridled discretion" as inferior to a system with "principle and procedure" at its core.[281] *Gault* affirmed that "[d]ue process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise."[282] Three years later in the case *In re Winship,* the U.S. Supreme Court determined that the beyond a reasonable doubt standard should apply to juvenile proceedings.[283] *Gault* and *Winship* mandated procedural parity for juveniles largely because of the liberty interest at stake in both juvenile and adult criminal proceedings.[284]

Interestingly, at the same time that due process rights were being instituted into juvenile adjudications, there was a rise in the number of children arrested and prosecuted in the American juvenile justice system. Juvenile crime in the United States rose to its highest level in the 1990s.[285] From 1985 to 1997, the number of juvenile delinquency cases rose by sixty-one percent.[286] The murder arrest rate among juveniles was at its highest in 1993 at 14.4 murder arrests per 100,000 juveniles.[287] The spike in juvenile crime caused major revision to the policies and penalties imposed on children in the juvenile justice system.[288] A number of states enacted legislation that imposed harsher penalties on juvenile offenders, including being adjudicated as an adult in the criminal justice system.[289]

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279. *In re* Gault, 387 U.S. 1, 55 (1967) (holding that "the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults").

280. *Id.* at 36, 55.

281. *Id.* at 18.

282. *Id.* at 20.

283. *In re* Winship, 397 U.S. 358, 368 (1970).

284. *Gault*, 387 U.S. at 55; *Winship*, 397 U.S. at 368.

285. *See* Melissa Sickmund, *Delinquency Cases in Juvenile Court, 2005*, OJJDP FACT SHEET (Office of Juvenile Justice and Deliquency Prevention), June 2009, *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/224538.pdf (showing that the number of juvenile cases reached a peak in the mid-1990s).

286. *Id.* Between 1997 and 2005, delinquency cases declined by nine percent. *Id.*

287. Charles Puzzanchera, *Juvenile Arrests 2008*, JUVENILE JUSTICE BULLETIN (U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention), Dec. 2009, at 1, *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/228479.pdf.

288. JAMES AUSTIN ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT 1 (2000), *available at* http://www.ncjrs.gov/pdffiles1/bja/182503.pdf.

289. As crime rates increased in the 1980s and 1990s, many states saw trying juveniles in adult courts as a solution. *Id.* at 2. Between 1992 and 1996, forty-three states and the District of Columbia modified their criminal codes with respect to juveniles who commit violent or serious crimes. *Id.* Further, thirty-six states and the District of Columbia imposed laws that would try juveniles as young as fourteen as adults for violent crimes and for crimes deemed serious "such as aggravated stalking, lewd and lascivious assault . . ., violation of drug laws near a school or park, sodomy, and oral copulation." *Id.* Within forty of the nation's largest urban counties, over 7,100 juvenile defendants were charged in adult court with

The 1990's marked an important shift away from the treatment toward punishment of juveniles accused of crimes, which led to a greater number of juveniles adjudicated as adults and incarcerated for longer periods of time.[290] Between 1985 and 2005, the number of delinquency cases involving detention increased by forty-eight percent.[291] In 2005, juvenile courts handled an estimated total of 1.7 million delinquency cases, forty-six percent more cases than in 1985.[292] In 2008, an estimated 2.11 million arrests of persons under the age of eighteen were made by law enforcement agencies in the United States.[293] Since the 1990's, pre-trial detention and post-trial detention have been more frequently imposed by judges. In 2005, over 140,000 juveniles—that is approximately twenty-two percent of all adjudicated delinquents—were in detention, correctional, or shelter facilities.[294] For juveniles adjudicated as delinquent for violent offenses, 172 out of every 1000 resulted in out-of home placement (approximately seventeen percent).[295] Sixty percent of juveniles received formal probation as their disposition.[296]

The American juvenile justice system, in an effort to redress juvenile crime, has been transformed into a retributive system of justice akin to the adult criminal justice system.[297] Greater reliance on incarceration and probation has minimized the role of family in the adjudicatory and dispositional phases of a case. In all but five states, obtaining all relevant evidence for prosecution is preferable to an evidentiary privilege for parents and their children. Quite possibly, the substantive and procedural convergence of the juvenile and adult criminal justice systems perpetuates the absence of a parent-child privilege in the United States.

One bright spot is that America has begun to look for examples around the globe for alternative approaches to juvenile crime. Restorative justice offers a sound

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felonies in 1998 alone. GERARD A. RAINVILLE & STEVEN K. SMITH, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, JUVENILE FELONY DEFENDANTS IN CRIMINAL COURTS 1 (2003), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/jfdcc98.pdf. A survey conducted by the U.S. Department of Justice found that of prosecutors' offices handling juvenile cases, almost two-thirds transferred at least one juvenile case to criminal court in 1994. *See National Survey of Prosecutors 1994*, OFFICE OF JUSTICE PROGRAMS, http://bjs.ojp.usdoj.gov/content/pub/ascii/JPSCC.TXT (last updated Mar. 1997). Nineteen percent of prosecutors' offices had a specialized unit to deal with those juvenile cases that were transferred to criminal court. *Id.*

290. Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 413 UTAH L. REV. 413, 415–16 (2003).

291. SICKMUND, *supra* note 285, at 3. During the same time period, the number of adjudicated delinquency cases resulting in residential placement dropped from thirty-two percent in 1985 to twenty-two percent in 2005, the number of cases resulting in formal probation increased slightly from fifty-five percent to sixty-one percent, and the number of cases resulting in other court sanctions increased by seven percent. *Id.*

292. *Id.* at 1. There were three percent fewer arrests of juveniles in 2008 than in 2007, and the juvenile crime rate fell two percent. Puzzanchera, *supra* note 287, at 1.

293. Puzzanchera, *supra* note 287, at 1. Juveniles accounted for sixteen percent of all violent crime arrests and twenty-six percent of all property crime arrests. *Id.* In 2005 juveniles under the age of sixteen at the time of referral to court "accounted for 57 [percent] of all delinquency cases handled." SICKMUND, *supra* note 285, at 2.

294. CHARLES PUZZANCHERA & MELISSA SICKMUND, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE COURT STATISTICS 2005, 50–51 (2008).

295. *Id.* at 66.

296. *Id.* at 58.

297. *See* Feld, *supra* note 15, at 691–92 ("[T]he sentences that delinquents charged with crimes receive are now based on the idea of just deserts rather than the child's "real needs.").

approach; it is a model well designed to address juvenile transgressions. Evidence of restorative justice in the United States first appeared in the late 1970s among the Mennonite community.[298] Mennonites sought to apply their philosophy to the criminal justice system by conducting victim-offender dialogues as a means toward reconciliation.[299] The United States is slowly moving in the direction of more institutionalized support for restorative justice practices with juveniles. In the 1990s, the Balanced and Restorative Justice Project (BARJ) was created, bringing more visibility to restorative justice.[300] BARJ provided technical assistance and training for juvenile justice systems interested in adopting restorative justice practices.[301] In 1994, the American Bar Association endorsed victim-offender mediation (VOM) and provided guidelines for its use and development in courts.[302] A study conducted in 2000 found that at least nineteen states have passed legislation promoting restorative justice elements in their juvenile justice systems.[303] Additionally, twenty-nine states have statutes that promote VOM[304] or some aspect of restorative justice.[305]

Victim-offender mediation is the most commonly used restorative justice practice in the United States.[306] Typically, VOM involves juveniles accused of property offenses and minor assaults.[307] The victim must be willing to participate, and the offender must acknowledge that he committed the wrong.[308] A majority of VOM programs have a mediator initially meet with crime victims and offenders separately to prepare them for later dialogue together.[309] After the separate sessions, there is a mediation session where the goal is to allow the parties to engage in a dialogue where emotional and informational needs are met and where a plan is created for the offender to rectify his misdeeds.[310]

Satisfaction rates among victims and offenders of VOM are consistently higher than the satisfaction rates among those who had gone through the formal court

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298. *See* MARGARITA ZERNOVA, RESTORATIVE JUSTICE: IDEALS AND REALITIES 8 (2007) (noting that the first recorded usage of the restorative justice approach occurred in Canada in 1974, and that the idea soon caught on among the Mennonite community in the United States).

299. *See id.* (noting that the approach used by the Mennonites was a conference between the offenders and victims, and required the offenders to "bring back a report of the damage [the victims] have suffered").

300. *See* Burkemper, *supra* note 20, at 130 (noting that "vast growth" in restorative justice programs occurred with the formation of the BARJ). The Office of Juvenile Justice and Delinquency Prevention of the U.S. Department of Justice developed the BARJ project. *Id.*

301. *Id.* Thirty-six states have passed legislation allowing the use of BARJ "in one or more aspects of their juvenile justice systems." *Id.* The thirty-six states include: Arizona, California, Colorado, Illinois, Iowa, Minnesota, New York, Ohio, Oregon, Pennsylvania, Texas, Vermont, and Wisconsin. *Id.*

302. A.B.A. Endorsement, *supra* note 21.

303. Mark S. Umbreit et al., *Restorative Justice: An Empirically Grounded Movement Facing Many Opportunities and Pitfalls*, 8 CARDOZO J. CONFLICT RESOL. 511, 523 (2007).

304. *Id.*

305. Joanne Katz & Gene Bonham, Jr., *Restorative Justice in Canada and the United States: A Comparative Analysis*, 2006 J. INST. JUST. INT'L STUD. 187, 191 (2006).

306. Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systemic Look at the Legal Issues in Restorative Justice*, 53 DRAKE L. REV. 667, 673 (2005). A survey conducted in 1999 found more than 300 VOM programs in North America. Mark S. Umbreit & Jean Greenwood, *National Survey of Victim Offender Mediation Programs in the United States*, 16 MEDIATION Q. 235, 235 (1999).

307. William R. Nugent et al., *Participation in Victim-Offender Mediation and the Prevalence and Severity of Subsequent Delinquent Behavior: A Meta-Analysis*, 2003 UTAH L. REV. 137, 137 (2003).

308. Umbreit & Greenwood, *supra* note 306, at 239.

309. *Id.* at 240.

310. *Id.*

process. One study reported that "79 [percent] of juvenile crime victims were satisfied with the justice system referral of their case to mediation, and 83 [percent] of victims felt the mediation process was fair."[311] Reasons for victims were significantly more likely to be satisfied and to experience fairness than those in a comparison group that went through the traditional court process.[312] In fact, nine out of ten victims would recommend VOM programs to other participants.[313] Victim willingness to participate in VOM ranged from "a desire to receive restitution, to hold the offender accountable, to learn more about the 'why' of the crime, to share their pain with the offender, to avoid court processing, to help the offender change behavior, or to see the offender adequately punished."[314]

An analysis conducted by William Nugent, Mona Williams, and Mark Umbreit compared fifteen studies of VOM and recidivism rates.[315] Eleven of the fifteen studies showed that VOM participants "reoffended at a lower rate than nonparticipants."[316] A separate study conducted by some of the same authors compared one-year re-offense rates among approximately 1300 juveniles.[317] The sample involved 619 juvenile offenders who participated in VOM and 679 who did not.[318] For those who participated in VOM, one-third were less likely to commit another offense than their non-VOM counterparts who were matched by age, sex, offense, and racial/ethnic characteristics.[319] Additionally, "less than one in five (18 percent) [VOM] juveniles committed a crime within a year, compared to more than one in four (or 27 percent) of [non-VOM] juveniles."[320] Those VOM juveniles who re-offended within a year committed less serious offenses than their non-VOM counterparts.[321]

Several studies on VOM programs in the United States found lower rates of recidivism for VOM participants than for offenders who went through traditional

311. Burkemper, *supra* note 20, at 130. Typically, when participants were asked about the fairness of the process and the resulting agreement, over eighty percent felt that the process was fair to both sides and that the resulting agreement was fair. Umbreit et al., *supra* note 303, at 538. Umbreit found that eighty percent of burglary victims in Minneapolis who participated in VOM indicated that they felt the criminal justice system was fair, as compared with only thirty-eight percent of burglary victims who did not go through VOM. *Id.* at 538–39. Half of the VOM studies that Ubreit reviewed addressed restitution cases, and of those cases, 90 percent or more generated agreements. *Id.* at 540. Eighty to ninety percent of the resulting contracts were reported as completed. *Id.* However, some comparative studies report higher rates of restitution or completion rates for VOM than comparison groups while other studies report no difference. *Id.*

312. Umbreit et al., *supra* note 303, at 538.

313. *Id.* at 534.

314. *Id.* at 531.

315. Nugent, *supra* note 307, at 140. The fifteen studies included nineteen different locations and 9307 juveniles. *Id.*

316. *Id.* at 148. The remaining four studies showed that non-VOM groups had lower re-offense rates. *Id.*

317. Burkemper, *supra* note 20, at 129.

318. Umbreit et al., *supra* note 303, at 545–46.

319. *Id.*

320. Burkemper, *supra* note 20, at 129.

321. *Id.* An evaluation of the 22nd Circuit Court in Missouri found that 27.1 percent of juvenile offenders who completed a victim-offender dialogue program had re-offended, while 41.1 percent in the control group of youths who did not participate in the VOM re-offended. *Id.* at 132.

justice system programs.[322] Five out of six VOM programs in California showed reduced recidivism rates.[323] Two studies concluded that reoffending youths tended to incur less serious charges than their counterparts.[324] Another study reported little or no difference in recidivism rates between youths participating in VOM and youths processed through traditional means.[325]

Limited use of family group conferencing has been adopted in the United States.[326] While not as robust or institutionalized as in Australia, the format and principles are much the same.[327] For example, a Milwaukee, Wisconsin community conferencing program brings together victims, offenders, and community members to "discuss crimes and decide how offenders will make amends."[328] Twelve different sites in the First Judicial District of Minnesota utilize FGC.[329] A juvenile diversion program in Honolulu, Hawaii developed around FGC in 1999.[330] In this program, between March and September 2000, 102 first-time juvenile offenders participated in conferences instead of traditional police diversion programs, and eighty-five conferences were held.[331] Satisfaction rates among participants in family group conferences were extremely high. In one study conducted on the twelve sites in the First Judicial District of Minnesota, post-conference telephone interviews were conducted with 105 victims, 103 juvenile offenders, and 130 support persons to generate satisfaction rates with the FGC experience.[332] The results showed that ninety-three percent of victims and ninety-four percent of offenders were satisfied with how their cases were handled; ninety-two percent of support people indicated they were satisfied with the outcome; ninety percent of victims felt the offender was held adequately accountable; and ninety-eight percent of victims, ninety-nine percent

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322. Umbreit et al., *supra* note 303, at 544.

323. *Id.* at 544–45 (citing AUDREY EVJE & ROBERT CUSHMAN, THE JUDICIAL COUNCIL OF CALIFORNIA, CENTER FOR FAMILIES, CHILDREN, AND THE COURTS, A SUMMARY OF THE EVALUATIONS OF SIX CALIFORNIA VICTIM OFFENDER RECONCILIATION PROGRAMS 2 (2000), *available at* http://www.courtinfo.ca.gov/programs/cf-cc/pdffiles/vorp.pdf).

324. *Id.* at 545.

325. *Id.*

326. Estimates from 2001 show ninety-four active FGC programs in the United States. Reimund, *supra* note 306, at 677.

327. *See generally* Tina S. Ikpa, *Balancing Restorative Justice Principles and Due Process Rights in Order to Reform the Criminal Justice System*, 24 WASH. U. J. L. & POL'Y 301, 309–10 (2007) (describing the family group conferencing model). There are typically two forms of family group conferencing, one involving a script that uses specially-trained facilitators like police officers, and another form run by a paid social service coordinator. *Id.* Four fundamental assumptions of conferences must be adhered to: "(1) family and extended family are respected and the focus must be on strengthening family and social supports; (2) power must be given to all participants; (3) conferences must be culturally sensitive and respectful to families; and (4) victims must be involved in the process and get what is needed to repair the harm done to them . . . ." *See* William Bradshaw & David Roseborough, *Restorative Justice Dialogue: The Impact of Mediation and Conferencing on Juvenile Recidivism*, 69 FED. PROBATION 15, 16 (2005).

328. STATE OF WIS. LEGISLATIVE AUDIT BUREAU, AN EVALUATION: RESTORATIVE JUSTICE, MILWAUKEE AND OUTAGAMIE COUNTIES 4 (2004), *available at* http://oja.state.wi.us/docview.asp?docid=6395&locid=97.

329. Claudia Fercello & Mark S. Umbreit, *Practicing Restorative Justice: Family Group Conferencing and Juvenile Crime in the Suburban Metro Area,* CURA REP. (U. of Minn. Center for Urban and Regional Affairs, Minneapolis, Minn.), June 2000, at 16.

330. Lorenn Walker, *Conferencing: A New Approach for Juvenile Justice in Honolulu*, 66 FED. PROBATION 38, 39 (2002).

331. *Id.*

331. *Id.*

332. Fercello & Umbreit, *supra* note 329, at 16.

of support persons and ninety-four percent of offenders would recommend the program to others.[333]

Three studies of family group conferencing in Minnesota, Pennsylvania, and Indianapolis revealed that ninety-five percent of victims indicated that the process or outcome of group conferencing was fair.[334] Eighty-nine percent of juvenile offenders in the Minnesota study said the resulting conference agreement was fair.[335] There were also high agreement rates among the participants in the Minnesota group conferencing study.[336] The Pennsylvania group conferencing study found that youths who participated in conferencing were "more likely to experience fairness in the justice system than court-referred youth (97 [percent] versus 87 [percent])."[337] A study conducted on the Honolulu program showed that 100 percent of the conferences had resulted in agreements.[338]

Jurisdictions choosing to implement restorative justice practices have seen a positive impact on recidivism rates. In the Milwaukee program, from 2002 to 2003, 4.3 percent of forty-seven offenders were charged with another crime, compared to 13.5 percent of fifty-two non-participating juvenile offenders.[339] The Honolulu program reported an overall rate of recidivism (within six months) of twenty-eight percent for juveniles who had conferences.[340] However, the recidivism rate was only eleven percent right after the last conference held between the participating parties.[341] Additionally, "juveniles who had conferences for non-violent offenses were less likely to escalate to violent crimes, compared to juveniles" similarly situated who did not conference.[342] Out of the 102 conference juveniles, fifty-nine committed non-violent offenses and only one was rearrested within the following six months for a violent crime.[343] In the group of similarly situated juveniles without conferencing, seventy-five out of eighty-two juveniles were arrested for non-violent crimes, and six were arrested for violent crimes within the following six months.[344]

The Pennsylvania group conferencing study found that "group conferencing had a more positive impact on recidivism rates for participants whose offenses were relatively more violent."[345] Notably the Indianapolis program, which works in tandem with the police department to offer FGC where young offenders and their families meet the individuals they victimized and work toward reparation and reconciliation, has seen "significant reduction in recidivism among these [young] offenders."[346] In a meta-analysis performed by William Bradshaw and David

333. *Id.* at 16–18.

334. Umbreit et al., *supra* note 303, at 539.

335. Fercello & Umbreit, *supra* note 329, at 17.

336. Umbreit et al., *supra* note 303, at 540–41.

337. *Id.* at 539.

338. Walker, *supra* note 330, at 4.

339. STATE OF WIS. LEGISLATIVE AUDIT BUREAU, *supra* note 328, at 5.

340. Walker, *supra* note 330, at 5.

341. *Id.*

342. *Id.*

343. *Id.* at 5–6.

344. *Id.* at 6.

345. Umbreit et al., *supra* note 302, at 547.

346. *See* Umbreit et al., *supra* note 302, at 524 (citing EDMUND F. MCGARREL ET AL., RETURNING JUSTICE TO THE COMMUNITY: THE INDIANAPOLIS JUVENILE RESTORATIVE JUSTICE EXPERIMENT 48

Roseborough involving nineteen studies and 11,950 juveniles from twenty-five different sites, they found that VOM and FGC together contributed to a twenty-six percent reduction in recidivism.[347]

Restorative justice practices like VOM and FGC expand the family's role in a juvenile's rehabilitation. While restorative justice is not on a trajectory to become the leading approach to addressing juvenile crime in America, it continues to gain momentum across the country. The success of restorative justice among youth is largely based on communication between parents and their children, which is why protecting these relationships through a legal privilege is essential for replicating some of the successes experienced in Australia. Likewise, support for a parent-child testimonial privilege will gain traction in the United States if or when restorative justice becomes more popular and widely used.

## V. CONCLUSION

An exemption for parent-child communications fits logically within Australia's restorative approach to juvenile justice. Much of the success that Australia has experienced with respect to a decline in the number of children prosecuted in the juvenile courts is testament to the diversionary practices that rely on parents as active participants. A restorative approach depends upon open dialogue between stakeholders. Parents are stakeholders in their children's social, physical, and moral development. The restorative model is designed to allow parents, among others, to see and hear how their child's actions have affected other members of their community. It provides an opportunity for parents and children to speak candidly about the child's conduct without fear of incrimination and gives parents ample opportunity to participate in reconstituting a parent-child relationship that can assist the rehabilitative effort. Diversion places a large responsibility on the juvenile and his family to identify the root causes for the delinquent behavior and find appropriate ways to address it in a relatively short time frame. To be successful, parents need to have accurate and truthful information in order to assess their children's needs, know whether their child is complying with requirements, and access the appropriate services when needed. For all of these reasons, a rule which exempts parents and their children from being compelled to provide information against one another fits squarely within a restorative approach.

The American model embodies the virtues of autonomy and due process. The juvenile justice system, not unlike the adult criminal justice system, is decidedly rule-based, which ensures a certain degree of procedural conformity. A parent-child testimonial privilege is consistent with the framework utilized by the American criminal justice system. This article offers the Australian experience as a lens through which to view the legal and social utility of a parent-child privilege. A parent-child privilege will not be a panacea for juvenile crime, but it is one more resource that can aid families in assisting wayward youth. The Australian experience teaches us that the fewer barriers we erect to intra-family communication, the more resilient and successful the efforts toward rehabilitation will be.

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(2000)).

347. Bradshaw, *supra* note 327, at 18.

# Democracy, Human Rights, and Intelligence Sharing

ELIZABETH SEPPER*

ABSTRACT

*In this Article, the author explores the networks used by intelligence agencies to share intelligence and conduct joint operations with foreign counterparts worldwide. Understanding how these intelligence networks operate, the author argues, is imperative both for effective intelligence gathering and for a democratic society. Characterized by secrecy, flexibility, and informality, intelligence sharing networks are constrained almost exclusively by a shared professional ethos, rather than law. According to the author, such an ethos can exert some degree of accountability to professional norms, but has been strained by the inclusion of less professional and often ruthless intelligence services in the network. Nonetheless, all such networks pose serious threat to the preservation of liberal democracies in that they essentially govern themselves. The very concept of democracy demands that an intelligence agency be held accountable to a democratic body or officials outside of the agency itself. Yet, as this Article shows, few democratically elected officials are aware of intelligence sharing; and virtually no mechanism, other than self-regulation, provides oversight or accountability for any intelligence agency's transnational activities. As a result, through their network ties, intelligence agencies that are expected to serve democratic interests have undermined foreign policy and circumvented safeguards established by domestic law and international treaties. The author argues that this serious gap in the rule of law must be filled and posits ways to render intelligence agencies more accountable to the democracies they purport to serve.*

SUMMARY

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## INTRODUCTION

Although the global community—and the United States in particular—had long discussed improving information sharing to combat transnational crime, the events of September 11, 2001 brought networks for information sharing center-stage. Coalition forces in Afghanistan formed networks to exchange information about military operations; financial regulators established formal links to enforce sanctions; and law enforcement agents institutionalized more frequent contact with other services. Pride of place was reserved, however, for the intelligence agencies and their networks.

The post-9/11 counterterrorism strategy was intelligence-driven, and intelligence agencies and their networks would be at the helm. These agencies, which had long networked with foreign counterparts, thus broadened and deepened their connections. They incorporated new, and sometimes surprising, partners for the exchange of information. Network exchanges became frequent and widespread with ever more information shared with an increasing number of actors.

Almost ten years later, the role of intelligence agencies has not diminished. If anything, their prominence has grown. Barely a week goes by without a government touting its intelligence cooperation. Media reports hinting at the degree and regularity of cooperation and intelligence sharing have become commonplace.

Yet, the specifics remain secret. For those outside the intelligence profession, little is clear about how intelligence agencies cooperate with each other, which partners are most involved, and how sharing mechanisms function in practice.

This Article argues that it is imperative that we understand these little known intelligence networks, given their central role in global counterterrorism strategy and their serious risk to democracy and accountability. Characterized by secrecy, flexibility, and informality, the intelligence sharing networks are constrained almost exclusively by a shared professional ethos, rather than law. Such an ethos can exert some degree of accountability to professional norms, but has been strained by the inclusion of less professional and often ruthless intelligence services in the network. These networks, which essentially regulate themselves, pose an increasingly serious threat to the preservation of liberal democracies. Intelligence agencies in a liberal democracy are expected to act professionally, to inform foreign policy, and to serve democratic interests. The very concept of democracy demands that an intelligence agency be watched and held accountable by a democratic body or officials, outside of the agency itself. Yet, as this Article shows, virtually no other mechanism provides oversight or accountability for an intelligence agency's transnational activities. Democratically elected officials, whether legislative or executive, often are entirely ignorant of intelligence cooperation. With little oversight or regulation of their network ties, agencies can circumvent domestic and international legal restraints and collude with one another to the detriment of their respective states. These networks thus strain our conceptions of the role of intelligence agencies, the effectiveness of national control, and the democratic state itself. Recognizing that intelligence cooperation and democratic principles will likely always be in tension, this Article proposes several solutions to tip the balance from self-regulation to democratic oversight and accountability.

Part I begins with an examination of currently known network arrangements and their common characteristics. It explains that intelligence sharing networks

trade information on shared threats, function in secrecy, and operate with a high level of informality. Most importantly, intelligence professionals identify with one another—especially their trusted partners. Within their network arrangements, agencies develop standards of professional behavior and enforce some degree of compliance with them by sanctioning violations of professional standards.

Part II argues that in addition to the benefits they offer for the rapid exchange of information, transnational intelligence network arrangements exact significant costs for democracy and human rights. Without vigilant oversight, intelligence networks have significant ability to undermine foreign policy and circumvent safeguards established by domestic statutes and international treaties. The human rights abuses committed by intelligence services in recent years are not isolated examples but rather symptoms of a more systemic problem inherent in allowing intelligence services to escape scrutiny of their transgovernmental ties. As Part II will show, intelligence agencies through their network contacts have been able to countermand policies made in democratic fora. Together, agencies have undermined human rights protections, strengthened authoritarian governments, and outsourced torture and abuse.

Accepting that intelligence networks can and should counter transnational threats, Part III proposes several improvements to make intelligence sharing more effective. It recommends two reinforcing methods to secure better, more democratic and human rights-compliant intelligence exchange. First, agencies from liberal democracies should establish more robust professional standards and use their networks to acculturate less reputable agencies to more ethical and accurate behavior. Second, democratic representatives and the global public should devote greater time and attention to the problems that persist in transnational intelligence networks. The transnational activities of agencies should be monitored and regulated. Ultimately, intelligence agencies should be rendered accountable to the democracies they purport to serve.

## I. CHARACTERISTICS OF TRANSNATIONAL INTELLIGENCE SHARING NETWORKS

Often presumed nationalistic and averse to cooperation, intelligence agencies in fact have long networked with one another, sharing information and coordinating operations to address mutual problems. Some contemporary intelligence networks date back to the Cold War.[1] Many others materialized after the fall of the Soviet Union, when agencies found that, in a globalized world, they were increasingly called upon to combat problems spanning borders, such as drug and human trafficking, organized crime, and terrorism.[2] After the attacks of 9/11, these networks were

1. *See* RICHARD ALDRICH, THE HIDDEN HAND: BRITAIN, AMERICA AND COLD WAR SECRET INTELLIGENCE 8–9 (2001) (discussing the development of the Western intelligence community after World War II). These intelligence exchange networks took on one of three forms: the client-server network of the Union of Soviet Socialist Republics; Western, or Western-allied, agencies exchanging information through NATO and more commonly bilateral arrangements; and former (or then) colonial powers continuing ties with intelligence services in former colonies. *Id.* at 8–9, 400; Chris Clough, *Quid Pro Quo: The Challenges of International Strategic Intelligence Cooperation*, 17 INT'L J. OF INTELLIGENCE & COUNTERINTELLIGENCE 601, 603–04 (2004) (discussing the Soviet client-server network).

2. Richard J. Aldrich, *Dangerous Liaisons: Post-September 11 Intelligence Alliances*, HARV. INT'L REV., Fall 2002, at 50, 54 ("[T]here is something to be said for viewing clandestine agencies and their

further expanded to include some unlikely and otherwise hostile intelligence partners and, in some cases, deepened to allow more regular information exchange.[3]

Although intelligence networks are often described as a one-on-one relationship or as a "hub and spokes" configuration, they are best conceptualized as a spider web with a multiplicity of connections expanding in every direction. The complexity of connections cannot be overstated. A single intelligence agency may have hundreds of ties and relationships to counterpart agencies worldwide. The Canadian Security Intelligence Service (CSIS), for example, which has relatively little independent ability to collect intelligence globally, has more than 250 information sharing arrangements with foreign security and intelligence organizations.[4] Unlike the CSIS, the U.S. Central Intelligence Agency (CIA) has global reach, including connections to more than 400 agencies.[5]

These networks supply reach and competence far beyond that permitted by the budgets and resources of each individual agency, giving members access to fiscal and technological intelligence resources and global intelligence product.[6] Through contacts with foreign intelligence agencies, an intelligence official receives information she otherwise might not have because of her agency's limited technical, geographical, human, or linguistic resources. Even the United States—which has by far the highest intelligence budget in the world, outstanding capability in technical

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secret friendships as the product of structural change, most obviously of globalization."). Several factors counseled in favor of wider cooperation. Regulation and enforcement at the national level proved increasingly ineffective to contain transnational threats. Victor D. Cha, *Globalization and the Study of International Security*, 37 J. OF PEACE RESEARCH 391, 394 (2000); Björn Müller-Wille, *For Our Eyes Only? Shaping an Intelligence Community Within the EU*, Eur. Union Inst. for Sec. Studies Occasional Paper No. 50, at 5 (Jan. 2004), *available at* http://www.iss.europa.eu/uploads/media/occ50.pdf (last visited Sept. 30, 2010) ("Detecting and assessing the so-called 'new threats' correctly requires increased intelligence cooperation between . . . agencies from different countries."). Technological advances allowed previously impossible, rapid, real-time transmission of information, making intelligence sharing more manageable. PETER GILL, ROUNDING UP THE USUAL SUSPECTS?: DEVELOPMENTS IN CONTEMPORARY LAW ENFORCEMENT INTELLIGENCE 37 (2000); Andrew N. Liaropoulos, *A (R)evolution in Intelligence Affairs? In Search of a New Paradigm*, Research Inst. for Eur. and Am. Studies Paper No. 100 14 (June 2006), *available at* http://www.isn.ethz.ch/isn/Current-Affairs/Security-Watch/Detail/?size320=50&page320=3&ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id= 31740.

3. Michael Herman, *Ethics and Intelligence After September 2001*, 19 INTELLIGENCE & NAT'L SECURITY 342, 352 (2004). Intelligence exchange with counterparts in hostile nations may be counterintuitive, but it is not uncommon. While only one state (or coalition of states) can win a war, trade contract, or border dispute, most states benefit from reduced drug trafficking or terrorism—it is not a zero sum game.

4. Comm'n of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *A New Review Mechanism for the RCMP's National Security Activities* 140 (2006), *available at* http://www.sirc-csars.gc.ca/pdfs/cm_arar_rcmpgrc-eng.pdf [hereinafter Arar Commission Report—A New Review Mechanism]. *See also* Stéphane Lefebvre, *The Difficulties and Dilemmas of International Intelligence Cooperation*, 16 INT'L J. OF INTELLIGENCE & COUNTERINTELLIGENCE 527, 534 (2003) ("As of 2003, ASIO [Australian Security Intelligence Organisation] had 233 liaison partners, distributed across 104 countries, and, as of 2002, CSIS had 230 liaison arrangements with agencies from 130 countries.").

5. Michael Herman, *11 September: Legitimizing Intelligence?*, 16 INT'L REL. 227, 233 (2002); Loch Johnson, *The Liaison Arrangements of the Central Intelligence Agency*, *in* THE CENTRAL INTELLIGENCE AGENCY: SECURITY UNDER SCRUTINY 85, 93 (Athan Theoharis et al. eds., 2006).

6. LOCH K. JOHNSON, SECRET AGENCIES: U.S. INTELLIGENCE IN A HOSTILE WORLD 122 (1996) ("Another means for less affluent nations to economize in their intelligence budgets is through sharing arrangements with allies, commonly known as 'intelligence liaison' or 'burden sharing'—an increasingly attractive approach also for wealthy nations undergoing fiscal stress.").

areas, and world-wide reach—depends on foreign intelligence agencies with comparative advantage in other specialized areas.[7]

This Part provides a brief background of the defining characteristics of transgovernmental intelligence networks. Such networks are transgovernmental in that the relevant actors are not heads of state or foreign ministers, but rather specialized government agencies.[8] "Intelligence" networks thus connect intelligence agencies to their counterparts in other countries for the purpose of exchanging information.[9] The primary characteristics of these networks, as Section A describes, are absolute secrecy and flexibility in the form, style, and mechanisms of sharing. Section B explains that networks give rise to a professional community that sets its own standards and norms. Within this community, the extent to which an intelligence agency receives valuable information is decided by its reputation (the degree to which it can be trusted and add value). Therefore, as Section C argues, reputation is sacrosanct. As a result, in the absence of control by more democratic organs, networks can exert some compliance with professional norms through sanctioning.

### A. *Secret and Flexible Arrangements*

Although transgovernmental networks generally lack transparency as compared to other institutions, intelligence sharing networks operate with the highest levels of secrecy. The very structures through which agencies share information are among the intelligence community's top secrets.[10] Even where the existence of such

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7. *See, e.g.*, SHLOMO SHPIRO, THE COMMUNICATION OF MUTUAL SECURITY: FRAMEWORKS FOR EUROPEAN-MEDITERRANEAN INTELLIGENCE SHARING 6 (2001), *available at* www.nato.int/acad/fellow/99-01/shpiro.pdf (noting that most intelligence services of Mediterranean countries do not have global coverage but "possess the capabilities to train and operate agents throughout the region in a better way than the US intelligence community or many of their European counterparts").

8. Kal Raustalia, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 3 (2002).

9. A number of scholars and intelligence professionals define intelligence functionally, as information generated by intelligence agencies. *See* MICHAEL HERMAN, INTELLIGENCE POWER IN WAR AND PEACE 96 (1996) (stating that "[u]nprocessed single-source data is officially 'information,' and becomes intelligence only through 'the conversion of information into intelligence through collation, evaluation, analysis, integration and interpretation'"); Roy Godson, *Intelligence: An American View*, *in* BRITISH AND AMERICAN APPROACHES TO INTELLIGENCE 3 (K.G. Robertson ed., 1987) (noting that "[g]overnments and even intelligence services rarely define intelligence explicitly. Instead, they develop policies, programmes, and patterns of organization. These demonstrate the role the state visualizes for itself, and its concept—i.e. definition—of intelligence."); Müller-Wille, *supra* note 2, at 7. For the purpose of this Article, intelligence is defined functionally as information generated by intelligence agencies. This Article will therefore use the terms intelligence and information interchangeably. The definition of intelligence used here excludes "open source" intelligence, which is publicly available, since it generally does not raise the human rights and accountability issues endemic to other forms of intelligence.

10. Martin Rudner, *Hunters and Gatherers: The Intelligence Coalition Against Islamic Terrorism*, 17 INT'L J. INTELLIGENCE & COUNTERINTELLIGENCE 193, 222 (2004) [hereinafter Rudner, *Hunters and Gatherers*]; Aldrich, *supra* note 2, at 50 ("Intelligence alliances are among the most closely guarded secrets of clandestine agencies."). In the United States, the fact of cooperation and details of intelligence sharing arrangements are kept classified as a general rule. DIRECTOR OF CENTRAL INTELLIGENCE DIRECTIVE 1/10, SECURITY CLASSIFICATION GUIDANCE ON LIAISON RELATIONSHIPS WITH FOREIGN INTELLIGENCE ORGANIZATIONS AND FOREIGN SECURITY SERVICES (effective Dec. 14, 1982), *available at* http://www.fas.org/irp/offdocs/dcid1-10.htm.

networks has been revealed, the essential elements—the participants, methods of operation, and agreements themselves—remain classified.[11]

In the rare case, these secret intelligence networks have been negotiated and agreed to by the heads of states, likely resulting in executive agreements between states.[12] Such is the case, for instance, with the most formalized and best-known intelligence network between the signals intelligence (SIGINT) services of the United Kingdom, Canada, Australia, New Zealand, and the United States.[13] The allied intelligence superpowers emerging from World War II negotiated the United Kingdom-United States Intelligence Agreement ("UKUSA Agreement") in 1947 at a high level of government to achieve global SIGINT coverage, which neither could achieve alone.[14] Canada, Australia, and New Zealand rapidly signed on as second parties to the agreement. Unlike more informal arrangements, this agreement institutionalized and divided the collection and exchange of SIGINT between all five agencies—resulting in the most integrated known intelligence network.[15] These agencies were namely the U.S. National Security Agency (NSA), U.K. Government Communications Headquarters (GCHQ), Australian Defence Signals Directorate (DSD), Canadian Communications Security Establishment (CSE), and New Zealand Government Communications Security Bureau (GCSB).

While most academic studies have focused on the UKUSA Agreement, it represents an aberration both in its formality and its degree of integration. Other multilateral networks have developed more informally. Best known are the numerous, long-standing plurilateral "clubs" of European agencies focused on intelligence exchange against transnational threats.[16] TRIDENT, the cooperative

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11. The UKUSA Agreement set the precedent for institutionalizing the requirement of absolute secrecy as to the agreement's existence. JEFFREY T. RICHELSON, THE U.S. INTELLIGENCE COMMUNITY 294 (4th ed., 1999) (1985) ("Despite numerous references to the agreements in print, officials of some of the participating governments have refused to confirm not only the details of the agreement but even its existence."). While recently there has been some public discussion of UKUSA's existence, freedom of information requests to relevant governments generate no information. Kevin J. Lawner, *Post-Sept. 11th International Surveillance Activity—A Failure of Intelligence: The ECHELON Interception System & the Fundamental Right to Privacy in Europe*, 14 PACE INT'L L. REV. 435, 444–45 (2002).

12. Rudner, *Hunters and Gatherers*, *supra* note 10, at 195. The prime example involves the early SIGINT sharing agreements to which the Commonwealth countries are signatories. JEFFREY T. RICHELSON & DESMOND BALL, THE TIES THAT BIND: INTELLIGENCE COOPERATION BETWEEN THE UKUSA COUNTRIES 4–7 (1985). *See also* Matthew M. Aid, *The National Security Agency and the Cold War*, *in* SECRETS OF SIGNALS INTELLIGENCE DURING THE COLD WAR AND BEYOND 27, 33 (Matthew M. Aid & Cees Wiebes, eds., 2001). Canada even permitted the United Kingdom to represent its interests in negotiations. Rudner, *Hunters and Gatherers*, *supra* note 10, at 196; Martin Rudner, *Britain Betwixt and Between: UK SIGINT Alliance Strategy's Transatlantic and European Connections*, 19 INTELLIGENCE & NAT'L SECURITY 571, 574 (2004) [hereinafter Rudner, *Britain Betwixt and Between*] ("Later, countries like Denmark, Germany, and Turkey were reportedly included in a somewhat looser, more limited association as so-called 'Third Parties', usually by virtue of bilateral arrangements . . . .").

13. David Alan Jordan, *Decrypting the Fourth Amendment: Warrantless NSA Surveillance and the Enhanced Expectation of Privacy Provided by Encrypted Voice Over Internet Protocol*, 47 B.C. L. REV. 505, 510 (2006) (defining SIGINT as information intercepted by technological means including communications intelligence, electronics intelligence, and foreign instrumentation signals intelligence).

14. SHPIRO, *supra* note 7, at 12.

15. RICHELSON, *supra* note 11, at 293.

16. Rudner, *Hunters and* Gatherers, *supra* note 10, at 210 ("The Club of Berne, dating from 1971, is a forum for the heads of the security services of European Union (EU) member countries . . . . The Club has no statutory mandate; neither does it report to any authority within the EU framework."). Established in the 1970s, the Kilowatt group now unites twenty-four states—including most EU members

arrangement between intelligence services of Israel, Turkey, and Ethiopia, is another example, although little is known about it.[17] Informal regional arrangements, supplemented by bilateral ties, have been set up throughout the Asia-Pacific region as well.[18]

The great majority of intelligence is shared, however, not through formal or multilateral agreements but rather through informal, typically bilateral network arrangements.[19] Even among the five UKUSA countries, the UKUSA Agreement does not govern all intelligence exchange. Instead, hundreds of less formal ties connect the various agencies of the five countries.[20]

Most commonly, national intelligence agencies (rather than governments) negotiate memoranda of understanding (MOUs), setting out modalities of intelligence exchange.[21] In contrast to treaties, or even executive agreements, MOUs do not require approval by national legislators (or foreign policy ministers) and can be implemented by the agencies themselves.[22] As non-binding, soft law agreements, MOUs regularize contacts and cooperation between individual intelligence services.[23] Considered flexible and easy to establish, they "create a loose and adaptable framework in which to share information, ideas, and resources."[24] These written agreements establish both the degree and method of cooperation.[25]

Less formal arrangements based on oral agreements or personal friendships are also widespread among intelligence agents. Generally speaking, they govern information exchanges in the absence of an MOU, supplant existing MOUs, and characterize ad hoc contacts during crises.[26] Frequently operating below the level of

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and Canada, Israel, Britain, the United States, and South Africa. Lefebvre, *supra* note 4, at 531.

17. SHPIRO, *supra* note 7, at 15.

18. *See, e.g.*, Simon S.C. Tay, *Asia and the United States After 9/11: Primacy and Partnership in the Pacific*, 28 FLETCHER F. WORLD AFF. 113, 118 (2004) ("ASEAN signed an anti-terrorism pact that would commit members to cooperate in stemming the flow of funds to terrorist groups as well as sharing intelligence and increasing police cooperation in order to 'prevent, disrupt and combat international terrorism.'"); ANDREW SCHEINESON, COUNCIL ON FOREIGN REL., PUB. NO. 10883, THE SHANGHAI COOPERATION ORGANIZATION (Mar. 24, 2009), *available at* http://www.cfr.org/publication/10883/ (noting that under the Shanghai Cooperation Organization, the security services of Russia, China, Kazakhstan, Kyrgyzstan, Tajikistan, and Uzbekistan share intelligence and conduct joint counterterrorism drills).

19. HERMAN, *supra* note 9, at 207.

20. RICHELSON & BALL, *supra* note 12, at 141. To give an indication of the sheer number of agencies involved, the United States alone has fifteen intelligence agencies. Norman C. Bay, *Executive Power and the War on Terror*, 83 DENV. U. L. REV. 335, 350 (2005).

21. Lefebvre, *supra* note 4, at 533 ("Bilateral liaison arrangements are a defining characteristic of the intelligence world. Set up formally (i.e., with the signing of a Memorandum of Understanding) or informally (on the basis of an unwritten, gentlemanly agreement), they pay particular attention to the participants' protection of their intelligence.").

22. Anne-Marie Slaughter, *The Accountability of Government Networks*, 8 IND. J. GLOBAL LEGAL STUD. 347, 359 (2001).

23. Sol Picciotto, *Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism*, 17 NW. J. INT'L L. & BUS. 1014, 1047 (1997); Raustalia, *supra* note 8, at 22.

24. Raustalia, *supra* note 8, at 22. The relative level of formality or informality is not, however, determinative of the network's efficiency. GILL, *supra* note 2, at 36.

25. *See* SHPIRO, *supra* note 7, at 13 (discussing three interrelated levels of cooperation—macro, micro, and meso—and what each level entails).

26. *Id. See also* Comm'n of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar Policy Review, *National Security and Rights and Freedoms: A Background Paper to the Commission's Consultation Paper* 16 (Dec. 10, 2004), *available at* http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/National%20Security%20and%20

official control, informal cooperative arrangements also allow contact even when interaction with a certain intelligence agency (or state) is officially disfavored.[27]

Ultimately, these varied networks share numerous characteristics. We can expect them to form against common threats, to remain secret, and to operate with a high level of informality. Most importantly, intelligence professionals exhibit a high level of identity with one another—especially their trusted partners. This professional community and its potential for sanctioning violations of professional standards will be explored further in Section B.

### B. *Adherence to Professional Network Norms*

Through their network ties, intelligence agencies form what Peter Haas terms "an epistemic community," that is, a network of professionals who share a specialized expertise and knowledge in a particular field.[28] Shared practices, normative principles, and evaluative criteria within their domain give agencies a sense of identity with their counterparts in other countries.[29] These commonalities make it possible, indeed probable, that agencies network with one another.[30]

Three principal attributes are common to all intelligence services. First among these is the requirement of secrecy in performing collection, analysis, counterintelligence, and covert operations.[31] Second, security clearances and access to classified information generate "a deliberate culture of identification as a member of a unique, even elite club."[32] The secrecy of intelligence agencies magnifies this corporate cohesiveness—which all professions exhibit to some degree—generating a sense of superiority and an affinity for fellow intelligence professionals.[33] Third, all intelligence agencies understand themselves to assist national-level decision-making and serve in the defense of the state.[34] They consequently, at least among professionalized services, attempt to act in accordance with a professional ethos of objectivity and pursuit of truth so that decisions can be made on valid, reliable information.[35]

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Rights%20and%20Freedoms.pdf [hereinafter National Security Background Paper to Arar Commission] (commenting on the impact of international cooperation during national security investigations).

27. GILL, *supra* note 2, at 36 (observing that with regard to law enforcement intelligence, "[s]ome of these contacts will be legitimated *via* official agreements while others will be officially frowned on").

28. Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1, 3 (1992).

29. *Id.*

30. *Id.*

31. Thomas C. Bruneau & Kenneth R. Dombroski, *Reforming Intelligence: The Challenge of Control in New Democracies*, *in* WHO GUARDS THE GUARDIANS AND HOW: DEMOCRATIC CIVIL-MILITARY RELATIONS 157, 165 (Thomas C. Bruneau & Scott D. Tollefson eds., 2006).

32. *Id.*

33. *Id.* *See also* HERMAN, *supra* note 9, at 327 (observing a "greater-than-usual sense of *difference* from other walks of life").

34. Bruneau & Dombroski, *supra* note 31, at 166.

35. LOCH K. JOHNSON, BOMBS, BUGS, DRUGS, AND THUGS: AMERICA'S QUEST FOR SECURITY 100 (2000) ("The ethos—in theory at least and usually in practice—is objectivity, and the goal is to provide decision makers with accurate, timely, and relevant information and insight . . . ."); *accord* Herman, *supra* note 3, at 345.

Within this community of networked intelligence agencies, intelligence producers develop standards and norms—more or less formally articulated—to which members must adhere.[36] The professional standards of the UKUSA network in particular are so well-developed that, according to James Bamford, an expert on the NSA, the UKUSA community constitutes "a unique supranational body, complete with its own laws, oaths, and language, all hidden from public view."[37] What then are the network standards with which intelligence agencies must comply, or stand accountable before their peers?

Information security and handling, as well as provision of reliable information, figure prominently in these standards. Because every exchanged secret risks disclosing sources and methods and thereby jeopardizing future information,[38] sending agencies require the enforcement of tight rules for the handing and storage of shared intelligence. Communications, physical facilities, and personnel must be secure and able to protect sensitive information.

Two principal rules ensure that shared intelligence will be kept confidential and not further disseminated without the sending state's consent. First, the "need to know" principle, typical of intelligence agencies worldwide, dictates that individuals only receive access to shared, classified information when they need it for their work. Within intelligence networks, a sending agency may stipulate that only it or the specific addressee of the intelligence may make the decision that an individual "needs to know."[39] In some cases, shared "intelligence may even be designated only for the specific agency with which it is shared; the latter being expected to restrict circulation even with its sister agencies."[40]

Second, information shared remains the property of the originator of the information. Known as originator or user control, this rule restricts subsequent dissemination of information.[41] Before confidential information is released, a

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36. *See* Simon Chesterman, *The Spy Who Came in from the Cold War: Intelligence and International Law*, 27 MICH. J. OF INT'L L. 1071, 1099 (2007) (arguing that intelligence agencies' interactions have generated some agreed-upon normative guidelines and a professional ethic that suggests "a kind of community that generates, adapts, and internalizes rules").

37. JAMES BAMFORD, BODY OF SECRETS: THE ANATOMY OF THE ULTRA-SECRET NATIONAL SECURITY AGENCY: FROM THE COLD WAR THROUGH THE DAWN OF A NEW CENTURY 403–04 (2001); RICHELSON & BALL, *supra* note 12, at 5 (stating that the Agreement includes access to intelligence and security arrangements, standardized codewords, security agreements that all employees of each UKUSA agency must sign, and procedures for storing and disseminating material); James I. Walsh, *Intelligence-Sharing in the European Union: Institutions Are Not Enough*, 44 J. COMMON MARKET STUD. 625, 630 (2006) ("It establishes common security procedures and standardized technical terms, code words and training across the participating countries' intelligence services, ensuring that shared intelligence is handled in a consistent manner and is unlikely to be misinterpreted by a receiving state.").

38. Müller-Wille, *supra* note 2, at 15 ("All intelligence collectors are concerned about the security of their sources and their methods of collecting information. If these are uncovered, access to the information will be jeopardized. In addition, they may want to protect the information itself.").

39. Alasdair Roberts, *Entangling Alliances: NATO's Security of Information Policy and the Entrenchment of State Secrecy*, 36 CORNELL INT'L L.J. 329, 337–38 (2003).

40. Comm'n of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar: Policy Review, *Accountability and Transparency: A Background Paper to the Commission's Consultation Paper* 7 (Dec. 10, 2004) [hereinafter Accountability and Transparency Background Paper to Arar Commission].

41. Roberts, *supra* note 39, at 338 ("The principle was central to the agreement signed by NATO members in January 1950."). Intelligence sharing between domestic agencies of the same national intelligence community also occasionally uses a classification caveat, known as ORCON (originator controlled). The CIA uses ORCON most extensively than any other U.S. agency—perhaps because it receives much intelligence from foreign agencies. MICHAEL A. TURNER, WHY SECRET INTELLIGENCE

receiving agency is obliged to guarantee that it will not be disclosed.[42] The provider also sets the classification level, which the recipient is bound to respect, and reserves the right to maintain or change it.[43] Sometimes a sending agency authorizes the future sharing of information with the services of certain other states a priori; at other times, it only approves further distribution on an ad hoc basis.[44] This is to avoid what is known as a "Trojan Horse"—where "a receiver shares the intelligence with third parties that have not obtained the provider's security clearance."[45]

To avoid intelligence failure caused by inaccurate intelligence, professional best practices require screening exchanged intelligence for relevance and attaching written caveats to indicate the information's reliability.[46] These caveats can allow a receiving agency to judge a piece of information's probative value. If the intelligence has not been tested, the receiving agency should not rely on it without corroboration. Professional standards provide that, in all cases, an agency generally should "test" or corroborate received intelligence through its own independent collection capabilities. Alternately, services can cross-check the information through contacts with other foreign counterparts.[47] For example, if France provides Germany with intelligence indicating that a specific individual is associated with terrorist activities and crossed into Germany in a given month, German intelligence might request information regarding that person from intelligence agencies in bordering states. If other information proved that he or she had been in Singapore for the entirety of that month, France's shared intelligence would be deemed incorrect.[48]

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FAILS 94–95 (2006).

42. Accountability and Transparency Background Paper to Arar Commission, *supra* note 41, at 7 (noting that much of the intelligence "Canada receives is designated as confidential and released only on the guarantee that it will not be publicly revealed").

43. Simon Duke, *Intelligence, Security and Information Flows in CFSP*, 21 INTELLIGENCE & NAT'L SECURITY 604, 611 (2006).

44. *Id.* (noting senders may stipulate, for example, that information may be shared within NATO or members of the EU's Partnership for Peace framework who have adequate, pre-approved security agreements).

45. Müller-Wille, *supra* note 2, at n.21 (setting out reasons a receiving agency might pass on information to a third agency).

46. Comm'n of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* 22–23 (2006), *available at* http://www.sirc-csars.gc.ca/pdfs/cm_arar_rec-eng.pdf [hereinafter Arar Commission Report—Analysis and Recommendations]. With regard to intelligence delivered to the U.S. CIA and DIA in the lead-up to the Iraq war, foreign services generally caveated intelligence properly. Report of the Select Committee on Intelligence on the Use by the Intelligence Community of Information Provided by the Iraqi National Congress, 109th Cong., 2d Sess. 59, 167–68 (Sept. 8, 2006) [hereinafter Senate Report on Iraqi National Congress]. However, some less dependable intelligence agencies may have fed reports from the Iraqi National Congress without identifying their source, therefore causing general unreliability and contributing to intelligence failure. *Id.* at 5.

47. Paradoxically, for these agencies, the only way the quality of intelligence exchanged can be improved is through further sharing. Müller-Wille, *supra* note 2, at 16 ("The accuracy can only be verified or falsified if the collection of intelligence is increased, not if it is reduced.").

48. A disadvantage of this approach lies in the potential for "circular reporting," where "[a] snippet of data may be passed in a full circle, and thus, when received by the originating nation, may be considered corroboration for what might have been only a tentative assumption in the first place." Clough, *supra* note 1, at 606. In our example, if Germany had received the same intelligence from the United States as from France, it might accept that as corroboration—even if the U.S. had simply passed on intelligence received from French intelligence. For examples of networked connections that led to circular reporting, see BAMFORD, *supra* note 37, at 417.

Between closer network partners, standards may also include agreements to distribute all intelligence gathered on a certain issue or by a specific collection discipline (such as SIGINT), or to refrain from intercepting communications of a partner's nationals or using the network to gather economic information for national corporate interests.

A reputation for compliance with these norms helps determine the volume, type, and quality of information an agency receives and thus correlates to the network's overall level of efficiency.[49] Highly trusted partners receive intelligence in real-time and on a frequent basis, and may share intelligence gathering resources such as satellites or listening stations.[50] At one extreme, the "ECHELON" system between the UKUSA SIGINT agencies represents a tightly integrated—and likely unprecedented—network for sharing intelligence, spanning collection centers worldwide and enabling the agencies to collect an enormous volume of communications, as many as three billion a day.[51] According to Nicky Hager, who wrote the first detailed exposé of the system, the network allows the stations of each partner agency to function as "components of an integrated whole."[52] The example of ECHELON shows that networks function mostly efficiently and effectively when composed of partners that can be trusted to abide by professional standards.

In order for an intelligence agency to gain trust within the network, it must establish a good professional reputation.[53] Because networks facilitate transmission of information relating to a member's reputation for competence and trustworthiness,[54] intelligence officials are familiar with their peer's reputations, which vary even among agencies in the same country.[55] Many intelligence agencies are acutely aware that their performance will be measured by their counterparts

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49. Wenpin Tsai & Sumatra Ghoshal, *Social Capital and Value Creation: The Role of Intrafirm Networks*, 41 ACADEMY OF MANAGEMENT J. 464, 467 (2004). Chris Clough identifies five levels of intelligence sharing: (1) raw intelligence product revealing the source and product in detail; (2) "all or part of raw product without exposing the source;" (3) summary of data (4) finished analysis of data; and (5) "policy conclusions resulting from the intelligence." Clough, *supra* note 48, at 603.

50. *See* Clough, *supra* note 1, at 603–605 (noting examples of close intelligence cooperation between countries).

51. BAMFORD, *supra* note 37, at 404. The partners share a massive computer network, linking computer systems belonging to members worldwide and hosted at NSA headquarters. *Id.* France's SIGINT agency also has similar partnerships, sharing satellites with Italian, Spanish, Belgian, and German intelligence. Duke, *supra* note 43, at 623; The New Challenges Facing European Intelligence—Reply to the Annual Report of the Council, Report Submitted on Behalf of the Defence Committee, Assembly of Western European Union Doc. A/1775, paras. 77–80 (June 4, 2002) [hereinafter New Challenges].

52. NICKY HAGER, SECRET POWER: NEW ZEALAND'S ROLE IN THE INTERNATIONAL SPY NETWORK 29 (1996). Nicky Hager's report is considered among the best informed analyses, although the existence of the ECHELON system have never been officially confirmed. Rudner, *Britain Betwixt and Between*, *supra* note 12, at n.31. *See also* Lawrence D. Sloan, Note, *Echelon and the Legal Restraints on Signals Intelligence: A Need for Reevaluation*, 50 DUKE L.J. 1467, 1470 (2001) ("The closest a representative of the United States intelligence community has come to publicly confirming the existence of ECHELON was when the Director of Central Intelligence, George Tenet, referred to the 'so-called ECHELON program of the National Security Agency' in congressional testimony.").

53. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 49, 54–55 (2004) (citing Majone who referred to networks in the European Union as "bearers of reputation").

54. *Id.* at 54 (noting that "evident violations of those norms would quickly be transmitted across the network, raising the cost of those violations").

55. Stephen Fidler, *The Human Factor: All Is Not Well in Clandestine Intelligence Collection*, FIN. TIMES (LONDON), July 7, 2004, at 15.

domestically and abroad.[56] As former intelligence official Michael Herman says, "[i]n secret intelligence more than in most activities, a good reputation is slowly gained, and easily lost."[57]

### *C. Reputational Sanctioning to Ensure Compliance with Professional Norms*

Whereas numerous civilian controls, including statutory limits, budgetary oversight, and professional rewards, govern actions of law enforcement and military officials, intelligence professionals even in democratic states generally rely on professional norms to delineate the boundaries of their own transnational actions and to hold partners accountable.[58] The written agreements (whether executive agreements or MOUs) and oral understandings that apply to intelligence sharing networks are not legally enforceable; there are no judicial remedies or political sanctions to provide redress for breaches.[59] Nonetheless, networks can create conditions under which professional standards come to be respected, despite the lack of legal sanctions.

Within networks, real and imagined pressures from the intelligence peer group drive compliance with professional norms in a process Ryan Goodman and Derek Jinks have labeled "acculturation."[60] These pressures "include (1) the imposition of social-psychological costs through shaming or shunning and (2) the conferral of social-psychological benefits through displays of public approval."[61] Goodman and Jinks suggest this drive toward acculturation may actually work better within a denser network of relationships, because the network partners know one another, have multiple interactions, and seek to remain members in good standing.[62]

Unlike persuasion, acculturation does not require that "actors actively assess the content of a particular message—a norm, practice, or belief—and 'change their

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56. *See* HERMAN, *supra* note 9, at 207 (explaining that "most intelligence agencies are producing partly for an international audience of fellow-professionals, as well as their primary national recipients").

57. *Id.*; Stephen Fidler & Mark Huband, *A Special Relationship? The US and UK Spying Alliance Is Put Under the Spotlight*, FIN. TIMES (London), July 6, 2004, at 17.

58. Bruneau & Dombroski, *supra* note 31, at 164. Arthur S. Hulnick & Daniel W. Mattausch, *Ethics and Morality in United States Secret Intelligence*, 12 HARV. J. L. & PUB. POL'Y 509, 509, 520 (1989) ("Ethics are often defined as behavior relating to professional standards of conduct. As in any other profession, such standards exist in the field of intelligence, even if these standards require behavior that is unacceptable for private citizens."); SLAUGHTER, *supra* note 53, at 54. *See also* Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 204 (1996) ("As transnational actors interact, they create patterns of behavior and generate norms of external conduct which they in turn internalize.").

59. *See* Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29, 35 (2005) (stating that one can "expect accountability to operate chiefly through reputation and peer pressure, rather than in more formal ways").

60. Harold Hongju Koh, *How is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1404 (1999) (discussing his theory of transnational legal process, which explains legal compliance at the state level in a way that bears numerous similarities to Jinks and Goodman's theory of acculturation); *see also* RYAN GOODMAN & DEREK JINKS, SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW 14 (forthcoming 2011), *available at* http://www.lcil.cam.ac.uk/Media/lectures/pdf/GoodmanJinksSocializingStatesMay2009.pdf ("[C]onnectedness with a reference group determines conformity to a social norm as opposed to the substantive content of a norm.").

61. GOODMAN & JINKS, *supra* note 60, at 8.

62. *Id.* at 5–6.

minds.'"[63] For example, if Jordanian intelligence understands that complying with standards like caveating for reliability or not sharing information obtained through torture is a precondition for inclusion and good reputation in the network, it will obey the standards out of a desire to join or become a respected member of the group.[64] The agency need not have an inherent belief in the normative legitimacy of the rule to comply. It may even consider torture to be a useful interrogation method, but desist from the practice for the purpose of information sharing because of its desire to be an esteemed network partner. Classic social network analysis suggests that the agency—through network interactions—may then come to internalize those norms, resulting in a higher rate of compliance and greater incentives to maintain a good reputation.[65]

Experience shows that when prestigious actors within the intelligence networks transmit network standards and exert pressure on their peers, other intelligence agencies comply even when not admitting the legitimacy of the rule. The United States and the United Kingdom, in particular, have acculturated their partners to relatively arbitrary standards of behavior. At the insistence of U.S. intelligence, for example, positive vetting of intelligence recruits for disloyalty or allegiance to radical groups remains the professional standard[66]—despite its dubious contribution to increasing security. Even the United States' closest allies must adopt such regulations in order to secure its cooperation.[67] In a similar pattern, the U.S. Drug Enforcement Agency has used its cooperative networks to acculturate partners to drug trafficking detection, investigation, and interdiction; as a result, methods of agencies are now very similar.[68]

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63. *Id.* at 3–4, 5 ("The touchstone of the overall process [of persuasion] is that actors are consciously convinced of the truth, validity, or appropriateness of a norm, belief, or practice.").

64. *Id.* at 7 (arguing that compliance can be motivated by the "social-psychological benefits of conforming to group norms and expectations (such as the 'cognitive comfort' associated with both high social status and membership in a perceived 'in-group')").

65. *See* GOODMAN & JINKS, *supra* note 60, at 8 (discussing the various social pressures that cause internalization of and conformation with group behavioral patterns). Initially, however, those less-professionalized services that join the network may abide by network standards out of pure self-interest, rather than any internal sense of normativity. *Id.* at 8–9.

66. SHPIRO, *supra* note 7, at 39–40 (explaining that "development of intelligence cooperation frameworks would depend on developing effective systems of information classification acceptable on both cooperating sides. It also requires NATO authorities to accept, or at least endorse, the personnel vetting practices and security clearances of potential cooperation partner intelligence services."). *See also* SLAUGHTER, *supra* note 53, at 172 (observing a similar phenomenon with regards to MOUs concluded by the U.S. Securities and Exchange Commission and foreign regulators' implementation of U.S.-style regulation).

67. Aldrich, *supra* note 2, at 425 (Soon after U.S.-U.K. peacetime intelligence sharing began, the advisor said ". . . Officials have already offered the procedure now proposed [positive vetting] and nothing short of that offer . . . will secure their cooperation.").

68. GILL, *supra* note 2, at 75 ("'Americanization' rather than 'harmonization' fairly describes global evolution of law enforcement since the 1960s, especially regarding drugs."). Foreign drug enforcement agencies are not necessarily persuaded of the value of these techniques, rightly so since international drug enforcement efforts have generally failed. Diane Marie Amann, *The Rights of the Accused in a Global Enforcement Arena*, 6 ILSA J. INT'L & COMP. L. 555, 556 (2000). However, drug or transnational crime intelligence units in illiberal countries have improved and adopted more professional methods in spite of the otherwise repressive tactics typically employed by other intelligence units. *See, e.g.*, Seth G. Jones et al., *Nat'l Security Research Division, Securing Tyrants or Fostering Reform? U.S. Internal Security Assistance to Repressive and Transitioning Regimes*, RAND 85 (2006), *available at* http://www.rand.org/pubs/monographs/2006/RAND_MG550.pdf (noting that Uzbek Sensitive Investigation Unit, charged with countering drug trafficking, now operates within Western norms with the support of the U.S. DEA).

To counteract incentives to depart from professional standards, intelligence networks rely heavily on reputational sanctioning. Anecdotal evidence suggests that professionalized services agonize over their foreign partners' potential disapproval. The British government, for example, sought an injunction against *Spycatcher*, an exposé of British intelligence, because it would cause "damage to the reputation of the services in the eyes of foreign allies."[69] For intelligence officers, "the consequences of exceeding [international professional norms is] unacceptable—personally and professionally, nationally and internationally."[70]

Exclusion from a network because of a bad reputation is improbable—largely because most partners need the comparative advantage that the other provides. Nevertheless, without a good reputation, the individual agencies (or agents) may find themselves deprived of necessary information. For example, in the early 1960s, the relationship of the British Secret Intelligence Service (MI6) with the CIA fell to a low because security lapses and molehunts damaged the CIA's trust in MI6. MI6 remained valuable, however, due to high-quality intelligence it gathered from a few select sources behind the Iron Curtain.[71] The history of Communist agent penetration of the German Federal Intelligence Service (or Bundesnachrichtendienst (BND)) resulted in its allies withholding the most sensitive or high-resolution intelligence.[72] Even today, residual fears of Russian infiltration sometimes cause Germany's allies to hold back intelligence.[73] Although trilateral negotiations between the BND, NSA, and GCHQ resulted in a U.S. eavesdropping station jointly manned by BND and NSA officials, the BND is not allowed access to communications gathered by the NSA.[74] Those services that develop a reputation for providing bad intelligence to the network likewise may find their flow of shared intelligence reduced to a trickle.

Misuse of intelligence may also reduce sharing. For example, connections between the CIA and Mossad were interrupted at least twice. The first time, Israel used U.S. intelligence to bomb Iraq's nuclear reactor in 1981 over the CIA's objections; the second time, the Mossad was revealed to have a spy within the U.S.

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69. PATRICK BIRKINSHAW, FREEDOM OF INFORMATION: THE LAW, THE PRACTICE AND THE IDEAL 38 (3rd ed. 2001); *see also* Kent Pakel, *Integrity, Ethics and the CIA: The Need for Improvement*, STUDIES IN INTELLIGENCE 85 (Spring 1998) (stating that in interviews, many intelligence officials at the CIA described a "tyranny of reputation," in which "a bad call can stay with you for three years").

70. *See* Chesterman, *supra* note 36, at 1097 (arguing that this notion "rings true"). *See also* Anne-Marie Slaughter & William Burke-White, *The Future of International Law is Domestic (or, the European Way of Law)*, 47 HARV. INT'L L.J. 327, 334 (2006) ("They build trust and establish relationships among their participants that create incentives to establish a good reputation and avoid a bad one.").

71. STEPHEN DORRIL, MI6: INSIDE THE COVERT WORLD OF HER MAJESTY'S SECRET INTELLIGENCE SERVICE 703 (2000). *See also* RICHELSON & BALL, *supra* note 12, at 6 (noting that security lapses have resulted in compromise of UKUSA intelligence numerous times).

72. *See* James Risen, *Bonn Sniffs for Russian Moles, Worrying C.I.A.*, N.Y. TIMES, June 4, 1998 (One U.S. intelligence officer asserts that the BND has had "a history of penetration, and the truth is we have never really taken them too seriously as an intelligence organization").

73. Charles Grant, *Intimate Relations: Can Britain Play a Leading Role in European Defence—and Keep Its Special Links to US Intelligence?* 7 (Ctr. for Eur. Reform Working Paper Apr. 2000), *available at* http://www.cer.org.uk/pdf/cerwp4.pdf.

74. Erich Schmidt-Eenboom, *The Bundesnachrichtendienst, the Bundeswehr and Sigint in the Cold War and After*, *in* SECRETS OF SIGNALS INTELLIGENCE DURING THE COLD WAR AND BEYOND 129, 147–50 (Matthew M. Aid & Cees Wiebes eds., 2001); DORRIL, *supra* note 71, at 778.

Navy Investigative Service.[75] More recently, Australian intelligence was reportedly frustrated by the degree to which British and American intelligence flooded it with untested, often poor, intelligence in the run-up to the Iraq war, and considered expanding its own collection abilities to reduce its dependence on other intelligence agencies.

Consequently, other network actors can exercise a powerful form of accountability. Unlike the public, intelligence agencies have the knowledge and means to demand information and compliance from their intelligence sharing partners.[76] Although the secrecy of transnational sharing makes it impossible to evaluate the extent to which network sanctioning results in compliance with professional norms, reputational control is not necessarily less effective than hierarchical control.[77] When all network members subscribe to a norm, internal regulation may be even more effective and efficient than external controls.[78] Nevertheless, as the next section will show, the lack of democratic oversight and control of intelligence networks permits abuses and undermines human rights in a way that calls out for democratic scrutiny and stringent regulation.

## II. CHALLENGES OF TRANSNATIONAL INTELLIGENCE COOPERATION FOR DEMOCRACY AND HUMAN RIGHTS

The self-regulating and secret nature of transnational intelligence networks poses a significant challenge to our very conception of democracy and the appropriate role of agencies in the democratic state. A democracy requires that the people set policy. Thus, in liberal democracies, intelligence agencies have the sole function of preserving the democratic state.[79] They are to carry out and inform policy, not to make it. Democracy also entails transparency and oversight of executive agencies and demands accountability, that is, clear standards to guide agency behavior. The coercive power of intelligence agencies is, therefore, to be reined in through statute, treaty, and legislative oversight.

Yet, as this Part argues, the involvement of our intelligence agencies in information sharing networks challenges each of these assumptions. Section A describes the lack of democratic accountability and oversight inherent in these intelligence networks. The opacity with which these networks operate results in

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75. Ephraim Kahana, *Mossad-CIA Cooperation*, 14 INT'L J. OF INTELLIGENCE & COUNTERINTELLIGENCE 409, 414 (2001); PAT M. HOLT, SECRET INTELLIGENCE AND PUBLIC POLICY: A DILEMMA OF DEMOCRACY 127 (1995) (discussing the shake-up in CIA-Mossad relations after the arrest of Jonathan Pollard for spying in the U.S. on behalf of Israel).

76. Robert O. Keohane, *The Concept of Accountability in World Politics and the Use of Force*, 24 MICH. J. INT'L L. 1121, 1129–30 (2003) ("Unlike outsiders, they can identify who is responsible for results or for failures: they have information as a result of their organizational activity. Precisely because they are likely to suffer if their organization does badly (insofar as accountability operates at the level of the organization), they have incentives to help correct the problem at the individual level.").

77. *Id.* at 1134.

78. Koh, *supra* note 60, at 1401 (arguing that "the most effective form of law-enforcement is not the imposition of external sanction, but the inculcation of internal obedience"). *See also* ORAN R. YOUNG, INTERNATIONAL COOPERATION: BUILDING REGIMES FOR NATURAL REGIMES AND THE ENVIRONMENT 71 (1989) ("Most members of social systems comply with the dictates of prevailing institutions most of the time for reasons having little or nothing to do with their expectations regarding the imposition of sanctions.").

79. PETER GILL & MARK PHYTHIAN, INTELLIGENCE IN AN INSECURE WORLD 148–49 (2006).

public ignorance and legislative indifference, leaving services largely to determine their own transnational activities even in liberal democracies. Instead of being checked by legislation, information sharing is only minimally regulated by professional standards. Section B argues that without proper oversight, intelligence networks permit domestic foreign policy to be undermined and national and international law to be circumvented. Paradoxically, as Section C explains, Western intelligence agencies attempt to carry out their mission of preserving the democratic state by cooperating with unethical intelligence agencies in illiberal states and lending their support to authoritarian regimes. Moreover, the professional norms agencies set for themselves in these networks prove easy to disregard. With connections to less-reputable agencies, intelligence services from liberal democracies often give in to the temptation to commit human rights abuses and to outsource torture. Even the most professional agencies may trade in unreliable or untested information, to the detriment of the demos.

### A. *Deficit of Democratic Accountability and Control*

A functioning democracy assumes that each executive agency's actions are subject to executive and legislative approval and control. Yet, intelligence networks effectively shield ever-greater degrees of government activity from public view and domestic structures of accountability.[80] With secrecy and non-disclosure as its cardinal rules, transgovernmental intelligence cooperation often occurs without the knowledge of domestic constituencies. The coercive power and substantial potential for error of intelligence networks are subject to little or no domestic oversight or review. As to terrorism or arms smuggling, the issue of accountability is especially salient, because measures are usually taken against individuals (often citizens of nations lacking strong accountability mechanisms) with little possibility of effective political or legal challenges. Although networks exert some degree of accountability through professional standards and reputational sanctioning, from a democratic standpoint the "view of intelligence as a profession that largely governs itself according to its own definition of responsibility" is alarming.[81]

This section argues that the network connections of agencies of liberal democracies currently operate in a legal void, an anathema to the rule of law and democracy. As Section 1 explains, the secrecy and opacity with which these networks function marginalize democratic institutions. Section 2 shows that democratic oversight at any level is minimal, which in turn means intelligence agencies have few clear statutory or regulatory limits on activities conducted with their foreign counterparts.

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80. Although scholars differ on the exact definition of accountability, Robert Keohane explains that "[a]ll satisfactory definitions of accountability include, explicitly or implicitly, two essential features: *information* and *sanctions*." Keohane, *supra* note 76, at 1124. More specifically, "there must be some provision for interrogation and provision of information, and some means by which the accountability-holder can impose costly sanctions on the power-wielder." *Id.*

81. Bruneau & Dombroski, *supra* note 31, at 166.

1. Lack of Transparency

At the heart of the lack of democratic accountability lies the fact that even though intelligence agencies regularly cooperate with one another, their network arrangements are nearly invisible to national publics, legislators, and international bodies.[82] The opacity and deniability under which networks operate insulate each intelligence agency from criticism. An agency can seldom be reprimanded for sharing or failing to share information with network partners, since it denies having them; nor does it risk major repercussions for other states' intelligence failures caused by bad intelligence it provided. Put simply, an oversight committee cannot provide input, request information, or impose restraints on arrangements of which it has no knowledge.

Cooperation can take place without public knowledge, legislative consent, or even executive approval.[83] In 1954, for example, the Danish intelligence chief approved and then covered up United States intelligence reconnaissance flights across Danish territory, which could not be cleared through diplomatic channels.[84] Similarly, Turkish government leaders were not informed of the secret agreement between Turkish and American military intelligence agencies to gather SIGINT.[85] More recently, the Lithuanian state security service gave permission to the CIA to run a secret prison in the country, without informing the president or the prime minister.[86]

The perpetual secrecy of information shared through networks further exacerbates the problem. Under current arrangements, any intelligence provided in confidence by another intelligence agency stays perpetually secret and exempt from freedom of information requests, unless the originator consents to its declassification and release.[87] Within tightly knit intelligence agreements such as the UKUSA arrangement, domestic and shared information may become commingled, resulting in the more restrictive rule, intended for foreign information, to become the default

82. Aldrich, *supra* note 2, at 53 ("[I]n a global era, when clandestine agencies rarely work alone on large issues, the near invisibility of liaison arrangements to oversight by elected representatives is problematic. Oversight mechanisms have not kept pace with global issues.").

83. Matthew M. Aid & Cees Wiebes, *Conclusions*, *in* SECRETS OF SIGNALS INTELLIGENCE DURING THE COLD WAR AND BEYOND 313, 324 (Matthew M. Aid & Cees Wiebes eds., 2001) ("[I]ntelligence chiefs of many of the European Sigint organisations sometimes kept many of the details of their intelligence collaboration with the US and Great Britain a secret from senior civilian officials in their own governments."). At other times, political sensitivity created incentives to shield intelligence sharing from the public eye. *Id.* at 326 ("[W]hile the working relationship between NSA and the CIA on one hand and the Norwegian military intelligence organisation, the FO/E, on the other hand was quite close, the political leaders of Norway were constantly fearful that this relationship would become a matter of public record.").

84. Alf R. Jacobsen, *Scandinavia, Sigint and the Cold War*, *in* SECRETS OF SIGNALS INTELLIGENCE DURING THE COLD WAR AND BEYOND 209, 228 (Matthew M. Aid & Cees Wiebes eds., 2001).

85. Aid & Wiebes, *supra* note 83, at 324 ("American military officials in Turkey had to remind their colleagues back in Washington '. . . not to mention [this agreement] in any discussions with Turkish political or diplomatic authorities'").

86. Milda Seputyte, *Lithuania Let CIA Use Secret Prison for Interrogation*, BLOOMBERG, Dec. 22, 2009.

87. *See, e.g.*, Roberts, *supra* note 39, at 353–357 (listing examples of the continuing influence of NATO's security of information policy over domestic access-to-information laws accommodation of originator control).

rule for classification and access to information.[88] Based on a study of NATO's information sharing, Alasdair Roberts concluded that "[t]he connection of governmental networks means that the flow of information through any one government will be increased," thus increasing incentives to tighten security and classification of all information.[89] Thus, more information becomes permanently withheld from those outside the intelligence community.[90] Even when the originator or sharing agreement provides for declassification after a certain number of years, declassification is not linked to the existence of a justification for continued secrecy.[91]

### 2. Absence of Democratic Oversight

A constant throughout the globe is that intelligence agencies are considerably insulated from sunshine and sanctions as compared to other government agencies. Even in the United States, which is considered to have some of the most stringent legislative monitoring of intelligence agencies,[92] Congress typically only reviews intelligence policy after an issue becomes public—putting out the fire rather than preventing it. Within Europe, some states do not have any parliamentary body to monitor intelligence, although some employ other means of supervision.[93]

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88. *See id.* at 359. Roberts concludes that intelligence exchange agreements challenge assumptions that "global integration is favorable to increased transparency" and that "domestic policy on matters of state secrecy is increasingly constrained by the thickening web of agreements on security of information." *Id.* at 332.

89. *Id.* at 359 ("Since the end of the Cold War, Canada is said to have developed 'more bilateral intelligence relationships, and arguably, a more complex set of sensitivities regarding the protection of information provided in confidence.'"). Romanian intelligence, for example, informed parliament that NATO required that a bill for the classification and protection of shared intelligence as state secrets be passed. *Id.* at 332 n.10; *see also* Duke, *supra* note 43, at 609–10 (discussing increased classification and "very secret" designations required of the EU to gain access to information from member states or other organizations by NATO). Even international tribunals are forced to become more secretive. *See* Chesterman, *supra* note 36, at 1122 (observing that the International Criminal Tribunal for the former Yugoslavia, for example, created a national security exemption to its obligation "to produce documents and information").

90. WALTER LAQUEUR, THE USES AND LIMITS OF INTELLIGENCE 209 (1993) (stating that it is not "readily obvious why, many years after the event, intelligence files should remain closed. Some suspect that this has less to do with the defense of the realm than with the wish to cover up past mistakes."); Roberts, *supra* note 39, at 353–54 (noting that international information sharing agreements cause the Canadian government to continue to deny requests for access to information provided by other states even where disclosure would not cause harm).

91. Under EU regulations, for example, the member state originator determines declassification; originators may either state a date upon which a document may be declassified or review the classification level every five years. Björn Müller-Wille, *Improving the Democratic Accountability of EU Intelligence*, 21 INTELLIGENCE & NAT'L SECURITY 100, 122 (2006). Nonetheless, because of lack of enforceability, "declassification rests fully on the will of the originator, most notably the Member States' intelligence communities." *Id.*

92. WILLIAM J. DAUGHERTY, EXECUTIVE SECRETS: COVERT ACTION AND THE PRESIDENCY 29 (2004) (stating that according to the former Director of Central Intelligence, "[i]n no other country—including the parliamentary democracies of Western Europe—has intelligence been subject to so much investigation and review by the legislative branch as it has in the United States").

93. EUR. PARL., Comm. on Foreign Affairs, Human Rights, Common Security & Defence Policy, Temp. Comm. on the ECHELON Interception System, *European Parliament Resolution on the Existence of a Global System for the Interception of Private and Commercial Communications (ECHELON Interception System)*, para. K, INI/2001/2098 (May 9, 2001), *available at* http://www.cyber-rights.org/interception/echelon/European_parliament_resolution.htm [hereinafter European Parliament

Central to the absence of democratic oversight and control is the fact that most intelligence agencies, even in Western democratic states, operate either under ambiguous statutes or without any statutory authorization. In Britain, the United States, and Canada, at least one particular intelligence agency has operated (or continues to operate) without any statutory authority or limitations.[94] This represents a near total absence of accountability, the very concept of which "presuppose[s] norms of legitimacy that establish, not only the standards by which the use of power can be judged, but also who is authorized to wield power and who is properly entitled to call the power-wielders to account."[95] The absence of limits set by a democratic body poses a serious danger given intelligence agencies' coercive power and capacity for deception.[96]

Where legal restraints do exist, they impose limits almost exclusively on domestic activity. These include requirements that foreign and domestic intelligence be separated, residents' and citizens' information not be intercepted, and, as applies to intelligence networks, residents' and citizens' data be shared only in accordance with domestic data protections.[97] Even in democracies, however, there are generally no statutory permissions or limitations on intelligence work outside national borders or intelligence relations to foreign counterparts.[98] From a practical standpoint, this indicates a lack of legislative involvement in setting the proper powers and limits of intelligence. It also confounds democratic accountability because there are no clear standards of what an agency is permitted to do, with whom it may form connections, and under what circumstances intelligence sharing or other operations are authorized.

Similarly, to the extent they do oversee intelligence agencies, national systems by and large fail to address the transnational relationships and activities of their intelligence agencies. Traditional democratic mechanisms used to attain information and impose sanctions—namely, oversight, legal/judicial constraints, and publicity from the media, NGOs, and citizens—pay little attention to transnational intelligence cooperation.[99] For example, it was only after the European Parliament expressed

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Resolution on ECHELON].

94. *See* TURNER, *supra* note 41, at 32 (noting that the existence of the National Reconnaissance Office was only revealed in 1994); Stuart Farson, *Canada's Long Road from Model Law to Effective Political Oversight of Security and Intelligence*, *in* WHO'S WATCHING THE SPIES? ESTABLISHING INTELLIGENCE SERVICE ACCOUNTABILITY 99, 101 (Hans Born et al. eds., 2005) (noting that the CSE's existence was only acknowledged in the mid-1970s); BIRKINSHAW, *supra* note 69, at 50 (noting history of lack of statutory authority for U.K. intelligence).

95. Grant & Keohane, *supra* note 59, at 30.

96. BIRKINSHAW, *supra* note 69, at 50 ("It could be argued that, from a constitutional point of view, one of the most glaring omissions is the absence of a precise statutory code covering the powers of the services."); Müller-Wille, *supra* note 91, at 103 ("It is crucial that laws regulating the services' activities are credible and adequate, i.e. that they allow agencies to do what is required to safeguard the democratic system and the people. For the sake of checks and balances, these special powers must be regulated by law and not simply by governmental decrees.").

97. As Stansfield Turner, former Director of Central Intelligence, observed, "the laws and rules apply mostly to interference with Americans and hence do not greatly affect most foreign intelligence espionage operations." STANSFIELD TURNER, SECRECY AND DEMOCRACY: THE CIA IN TRANSITION 152 (1985).

98. *See, e.g.*, Ian Leigh, *Accountability of Security and Intelligence in the United Kingdom*, *in* WHO'S WATCHING THE SPIES? ESTABLISHING INTELLIGENCE SERVICE ACCOUNTABILITY 79, 82 (Hans Born et al. eds., 2005) (noting that legislation creating authority for U.K. intelligence failed to detail arrangements for international cooperation).

99. Currently, we depend on the media, NGOs, and social networks to reveal abuses and activities of our own intelligence agencies. Ronald J. Deibert, *Deep Probe: The Evolution of Network Intelligence*, 18

concern over the ECHELON system that the democratic bodies in the UKUSA countries showed any interest in transnational intelligence agreements. The U.S. investigation into the arrangement only began after illegal interceptions of citizens' communications were alleged.[100]

Apathetic oversight bodies combined with few statutory restraints make intelligence networks and their activities outside the domestic sphere the area of weakest oversight and thus accountability.[101] As we will see, the failure to take transnational relationships into account can render statutes limiting intelligence activity in the domestic sphere practically toothless as well.

The transnational aspect of intelligence work can also stymie national efforts at regulation and oversight. Oversight bodies are often specifically excluded from receiving information exchanged through networks—depriving them of the potential to review the use of network arrangements.[102] The Arar Commission, a Canadian public inquiry into the extraordinary rendition of Syrian-born Canadian citizen Maher Arar to Syria, is a case in point.[103] Without the cooperation of Canada's intelligence partners, the findings were inevitably incomplete and the appropriate officials and agencies could not be held accountable for wrongdoing. A Dutch government inquiry into intelligence failures at Srebrenica faced similar obstacles to uncovering the role of allied intelligence.[104] Likewise, although the U.S. House Permanent Select Committee on Intelligence investigated, requested documents, and held hearings on ECHELON, they were denied information due to its transnational nature.[105]

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INTELLIGENCE & NAT'L SECURITY, 175, 175, 186–87 ("[M]any citizen networks have thrived on the circulation of information concerning the signals intelligence capabilities and intelligence sharing arrangements among the U.S., UK, Canada, Australia and New Zealand."); JOHNSON, *supra* note 35, at 211 (noting that were it not for a leak of the secret Iran arms sale operation in a Middle Eastern magazine the Iran contra affair would not have been uncovered); LAURENCE LUSTGARTEN & IAN LEIGH, IN FROM THE COLD: NATIONAL SECURITY AND PARLIAMENTARY DEMOCRACY xi (1994) ("[J]ournalists are often the only people able to gain access .... The media is also the only channel by which information from insiders may reach the public."). Nevertheless, the media provide an inconsistent means of accountability. Their inquiries remain principally domestic; they cannot impose the sanctions which are so important for effective control of agencies. By necessity, they rely heavily on leaks—which, in the best-case scenario are motivated by conscientious objections to wrongdoing, but in the worst, are selective or officially sanctioned in order to support official policy. *See* Len Scott, *Secret Intelligence, Covert Action and Clandestine Diplomacy*, 19 INTELLIGENCE & NAT'L SECURITY 322, 326 (2004) (stating that "[t]he study of intelligence requires consideration of the motives and agendas of sources and how far they can be dissociated from the substance of what they provide"). For example, in order to justify Maher Arar's continued detention, both Syrian Military Intelligence and the Canadian intelligence agencies leaked inaccurate, misleading information to journalists. Ronald-Frans Melchers, *The Maher Arar Case: Implications for Canada-U.S. Law Enforcement Cooperation*, 2006 J. INST. JUST. INT'L STUD. 37, 39–40 (2006). The leak was entirely self-serving and the information unfounded. *Id.*

100. Sloan, *supra* note 52, at 1487. In Canada, another UKUSA partner, "'Echelon' is yet to reach the parliamentary radar screen." Stuart Farson, *Parliament and its Servants: Their Role in Scrutinizing Canadian Intelligence*, *in* AMERICAN-BRITISH-CANADIAN INTELLIGENCE RELATIONS 1939-2000 249 (David Stafford & Rhodri Jeffrey-Jones eds., 2000).

101. Müller-Wille, *supra* note 91, at 107.

102. BIRKINSHAW, *supra* note 69, at 42–43 (noting the director of the GCHQ can refuse to disclose information to the UK Parliamentary Committee on Security and Intelligence with oversight over GCHQ because it was "provided by, or by an agency of, the government of a territory outside the UK").

103. Maherarar.ca Home Page, http://www.maherarar.ca/ (last visited April 21, 2010).

104. Aldrich, *supra* note 2, at 53.

105. Sloan, *supra* note 52, at 1487.

Because secret written agreements, informal understandings, and professional standards govern network exchanges of intelligence instead of legislation, the judiciary is also almost completely excluded from regulating an intelligence agency's foreign activities and contacts with foreign counterparts. Although domestic courts rarely visit the issue of intelligence shared through networks, when legal issues implicit in sharing arrangements have arisen, international obligations to network partners have typically trumped judicial scrutiny and the rights of criminal defendants.[106] For instance, in the U.K. trial of the IRA's Nicholas Mullen, intelligence officers withheld information about his allegedly illegal deportation by Zimbabwean intelligence agents from the court and government officials.[107] Most recently, however, in a decision that may indicate courts' reassertion of their role in overseeing intelligence, the British Court of Appeals rejected the British government's argument that release of information regarding the torture of a former Guantanamo prisoner should be kept secret out of concern for its intelligence sharing relationship with the CIA.[108] As a general matter, however, the result of information sharing arrangements is "to deny domestic actors, including the courts, the opportunity to make their own decisions about the disclosure of information within a certain policy domain."[109]

*B. Collusion to Avoid Democratically Determined Policies and Statutes*

In practice, a unique danger of intelligence networks lies in their tendency to encourage intelligence agencies to collaborate with one another to the detriment of the interests of the democratic nations they are meant to serve. Because of the corporatism agencies exhibit through networks, "the closeness of the practitioners to each other may be greater than to the precise policy objectives and interests of the organizations or states to which they formally belong."[110] This is especially likely to occur among tight-knit intelligence services. In the UKUSA intelligence community, "elements of [the community] frequently come to perceive their ultimate loyalties as lying more with the UKUSA community than with their own governments."[111] For example, Australian army officers working with the CIA during the Vietnam War were prepared to swear not to divulge details about their joint activities to their own commanding officers and government.[112] The closeness of ties has sometimes been used counter to the policies of the agencies own governments.[113] For instance,

106. Martin Rudner, *Canada's Communications Security Establishment from Cold War to Globalization*, *in* SECRETS OF SIGNALS INTELLIGENCE DURING THE COLD WAR AND BEYOND 97, 123–24 (Matthew M. Aid & Cees Wiebes eds., 2001) [hereinafter Rudner, *Canada's Communications Security Establishment*] ("The legal issues implicit in Sigint-derived evidence have never been tested before Canada's courts. Whenever questions have been raised, mere reference to Canada's 'international' obligations has sufficed to defer detailed inquiries.").

107. DORRIL, *supra* note 71, at 768.

108. Scott Horton, *British Appeals Court Forces Release of Torture Details*, HARPER'S, Feb. 11, 2010, *available at* http://www.harpers.org/archive/2010/02/hbc-90006521.

109. Roberts, *supra* note 39, at 355.

110. GILL, *supra* note 2, at 37. *See also* Philip B. Heymann, *International Cooperation in Dealing with Terrorism: A Review of Law and Recent Practice*, 6 AM. U. J. INT'L L. & POL'Y 1, 2 (1990) ("[I]nstitutional constituencies such as law enforcement officials may find that their interests resemble those of their foreign counterparts more than those of other groups within their own country.").

111. RICHELSON & BALL, *supra* note 12, at 305.

112. *Id.*

113. *Id.*

intelligence professionals in various countries were aware of or suspected each other's knowledge of weapons-smuggling rings operating out of Pakistan to supply weapons to countries including Libya and North Korea, yet they kept this information from the populations that they purported to protect.[114]

Network partners have also colluded to avoid statutory restraints on domestic activity. Statutes prohibiting eavesdropping on citizens or residents without a warrant, or creating a barrier between intelligence and law enforcement, have been circumvented. The German BND, for instance, reportedly uses the European Counter-Terrorist Intelligence Center in Paris (where agents from Britain, France, Germany, Canada, Australia, and the United States work together against terrorism) to read information from German law enforcement agencies it would be barred from obtaining at home as a matter of domestic law.[115] In Norway, the CIA was given permission to penetrate Muslim groups and investigate individuals on Norwegian soil without normal review and accountability procedures in place and "with little, if any, control on the part of Norwegian authorities."[116]

Numerous revelations involving the UKUSA arrangement disclose the potential for circumventing statutory and constitutional law. Within ECHELON, the partner agencies all submit a list of keywords; every partner station in the world then collects telephone, fax, email, and other electronic communications (and, it is suspected, internet traffic) in which the keywords appear and then sends them to the requesting agency.[117] Likely as part of this program, at least three of the major telephone lines in Great Britain, each capable of carrying 100,000 calls, are wired through the NSA listening station, allowing direct taps into British Telecom's network.[118] The result is that the collecting agency does not necessarily know what its stations are collecting.[119]

Reports suggest that UKUSA agencies also purposely use ECHELON to exchange surveillance information on each others' citizens in violation of domestic statutes.[120] NSA employees have provided details of the use of the network to

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114. RON SUSKIND, THE ONE PERCENT DOCTRINE: DEEP INSIDE AMERICA'S PURSUIT OF ITS ENEMIES SINCE 9/11 269 (2006) ("In the interplay between decisions made by the intelligence professionals and a small circle of policy makers—and the competing claims made by other branches of government or by the public, with its recognized right to understand what truly guides U.S. foreign policy—almost all the options reside with the parties of the first part.").

115. Dana Priest, *Help from France Key in Covert Operations: Paris's 'Alliance Base' Targets Terrorists*, WASH. POST, July 3, 2005, A1; European Parliament Resolution on ECHELON, *supra* note 95, para. J ("[W]hereas the Member States cannot circumvent the requirements imposed on them by the ECHR by allowing other countries' intelligence services, which are subject to less stringent legal provisions, to work on their territory, since otherwise the principle of legality, with its twin components of accessibility and foreseeability, would become a dead letter . . . ."). Privacy protections also risk being violated. *See generally* Francesca Bignami, *Towards a Right to Privacy in Transnational Intelligence Networks*, 28 MICH. J. INT'L L. 663 (2007) (stating that privacy "is one of the most critical liberal rights to come under pressure from transnational intelligence gathering").

116. Rudner, *Hunters and Gatherers*, *supra* note 10, at 215.

117. HAGER, *supra* note 52, at 29; Sloan, *supra* note 52, at 1476–78 (listing various types of methods and communications intercepted through the ECHELON system); Rudner, *Britain Betwixt and Between*, *supra* note 12, at 581–82.

118. Lawner, *supra* note 11, at 453.

119. HAGER, *supra* note 52, at 29 ("This means that the New Zealand stations are used by the overseas agencies for their automatic collecting—while New Zealand does not even know what is being intercepted from the New Zealand sites for the allies.").

120. Seth F. Kreimer, *Watching the Watchers: Surveillance, Transparency, and Political Freedom in*

intercept politicians' telephone calls.[121] CSE also monitored communications of U.K. Prime Minister Margaret Thatcher's cabinet members on behalf of the GCHQ.[122] Several GCHQ officials similarly revealed that partners were targeting and distributing information regarding peaceful political groups.[123] More recently, at a meeting of the UKUSA intelligence heads, U.S. Director of Central Intelligence George Tenet described statutes against eavesdropping as "among the 'shackles' that would, at the very least, be loosened, if not in practice discarded."[124] He suggested, as Suskind describes, that "[a] country may not be able to tap the lines of its own citizens without legal authorization. But there's nothing to stop it from listening in on some other country's citizen, and then filing very thorough reports to that foreign citizen's government. Just as long as the report does not hand over the specific raw matter—the SIGINT dispatch of nouns and verbs—the letter of various privacy laws would stay intact."[125]

Where there is peer accountability, rather than outside oversight, as these examples demonstrate, network norms will check the power of network partners only "insofar as abuses are against the interests or principles of the other entities within the transgovernmental networks."[126] Consequently, there is a danger that congruence of goals and close cooperation within intelligence networks will lead to "collusion against the interests of outsiders" rather than improved professional norms.[127] The next section will examine several such instances.

### C. *Undermining Foreign Policy and Human Rights through Connections to Illiberal Agencies*

Just as intelligence cooperation imperils legal safeguards, so too does it run the risk of intelligence services working with each other against the interests of their domestic publics. In particular, cooperation with intelligence agencies in regimes that have little in common with liberal democracies threatens the promotion of democracy and human rights. As Section 1 argues, information exchange with authoritarian regimes comes with a price. A quid pro quo is expected (and has been provided) by professionalized intelligence services and democratic nations. As Section 2 demonstrates, less-reputable agencies have profited from their inclusion in

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*the War on Terror*, 7 U. PA. J. CONST. L. 133, n.114 (2004).

121. *See, e.g.*, Sloan, *supra* note 52, at 1485–86 (discussing the claim by an NSA contract employee "to have witnessed firsthand the real-time interception of a telephone call made by United States Senator Strom Thurmond").

122. Rudner, *Canada's Communications Security Establishment: From Cold War to Globalisation* 15 (Ottawa: Norman Paterson Sch. of Int'l Affairs, Carleton Univ., Occasional Paper No. 22, 2000) (noting that due to the political sensitivity, GCHQ could not be directly involved, so CSE intercepted the communications at the Canadian High Commission in London and delivered the information to the GCHQ).

123. Patrick S. Poole, CENTER FOR TECHNOLOGY POLICY, ECHELON: AMERICA'S SECRET GLOBAL SURVEILLANCE NETWORK (1999/2000), *available at* http://hp.kairaven.de/miniwahr/freecongress1.html (describing the technical workings of ECHELON in detail).

124. SUSKIND, *supra* note 114, at 85.

125. *Id.*

126. Grant & Keohane, *supra* note 59, at 39.

127. *Id.*; Herman, *supra* note 3, at 351 (confirming that since 9/11, the balance has tipped against ethical restraints, and commenting that "[i]f the wartime metaphor fits counter-terrorism, it implies relatively few moral restrictions on information gathering on its targets.").

intelligence sharing networks to crack down on dissenters, demand concessions from the West, and continue systematic torture and indefinite detention. While admitting that these partners engage in rights violations, numerous commentators suggest that no one is harmed by the exchange of information.[128] Section 3 aims to challenge this assumption. The problem is not simply illiberal regimes engaging in violations of individual rights, but also liberal democracies encouraging and soliciting violations for which they are not held accountable.

1. Quid Pro Quo: Intelligence at What Price?

Partner services in illiberal regimes do not offer intelligence out of altruistic motives; like any other intelligence partner, they want something in return. Most commonly, less reputable agencies demand repayment in kind. Russian intelligence warned the United States that information sharing could not be "one-way traffic."[129] The desirability of sharing with authoritarian regimes, however, depends on the type of information requested. It is one thing for Canadian intelligence to supply "an assessment on the potential for terrorists to use the avian flu virus as a biological weapon with the Libyan, Saudi Arabian and Egyptian intelligence services."[130] It is quite another to provide intelligence on individual Chechens to Russian intelligence.

Illiberal agencies may also demand that intelligence services in liberal democracies spy on émigré or dissident groups on their behalf. South Africa, for example, was tipped off to the activities of the African National Congress and the location of Nelson Mandela by intelligence services in Western democracies whose publics opposed apartheid.[131] In return for providing the CIA with information on Libyan nationals with ties to international terrorists, Libyan intelligence was allowed to interrogate prisoners at Guantanamo Bay about exiles in London.[132] The FBI also arrested and interrogated one of Qadaffi's primary opponents and long-time critic of al Qaeda based on information provided by Libya.[133] Unsavory agencies have come to expect such cooperation; British intelligence faced complaints from Egyptian and Jordanian intelligence for failing to act on their requests for information on émigré communities.[134]

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128. Peter Gill, *Securing the Globe: Intelligence and the Post-9/11 Shift from 'Liddism' to 'Drainism,'* 19 INTELLIGENCE & NAT'L SECURITY 467, 477 (2004) ("Transnational information exchange is one thing, brokering the use of torture is another."); Herman, *supra* note 3, at 342 (observing that some say that "[i]ntelligence is information and information gathering, not doing things to people; no-one gets hurt by it, at least not directly").

129. Julian Borger & Richard Norton-Taylor, *Dirty War that Could Prove Decisive*, GUARDIAN (U.K.), Oct. 2, 2001, at 2.

130. Arar Commission Report—A New Review Mechanism, *supra* note 4, at 142.

131. HOLT, *supra* note 75, at 72 (contrasting this intelligence exchange with "intelligence on Soviet submarine and other ship movements around the Cape of Good Hope in exchange for information on Soviet and Cuban activities in Angola"). Cooperation with apartheid South Africa posed a dilemma for Western intelligence, whose governments officially opposed apartheid. MICHAEL HERMAN, INTELLIGENCE SERVICES IN THE INFORMATION AGE: THEORY AND PRACTICE 40 (2001).

132. Ken Silverstein, *How Kadafi Went from Foe to Ally*, L.A. TIMES, Sept 4, 2005, *available at* http://articles.latimes.com/2005/sep/04/world/fg-uslibya4/1.

133. *Id.* at 10.

134. Rudner, *Hunters and Gatherers*, *supra* note 10, at 214. Jamie Wilson et al., *New Brothers in Arms—and Cash and Intelligence*, GUARDIAN (U.K.), Oct. 20, 2001, at 7 ("Britain's contribution is expected to include the granting of Russian demands that a hard line be taken against Chechen exiles in

A partner agency may also expect Western intelligence to turn a blind eye to its activities in their territory. For instance, out of fear of jeopardizing relations with Iranian intelligence under the Shah, the U.S. intelligence community tolerated operations against Iranian dissidents in the United States.[135] Iran later used the information gained from these operations to take reprisals against dissidents' families in Iran.[136] Chinese intelligence cooperation has reportedly generated German intelligence support for surveillance of the Chinese democratic opposition abroad.[137] Through these arrangements, intelligence services in liberal democracies help silence domestic and international dissent against authoritarian governments.[138]

Another preferred method of compensating network partners is to provide them with funds and equipment. This may seem ethically neutral but often serves to prop up authoritarian regimes and subvert democracy. For example, equipment provided by the German BND was used by: the Indonesian military intelligence service to overthrow President Sukarno; Ugandan dictator Idi Amin to eavesdrop on opponents; a guerrilla organization to destabilize the legal Mozambique government; and, more recently, Chinese intelligence to monitor the movements of journalists and dissidents.[139] Similarly, British intelligence officials report that, in return for information on terrorist groups, states like Malaysia receive surveillance equipment they can use against dissidents in their own territory.[140] Just a month after 9/11, intelligence partners, like Egypt and Oman, received arms from the United States for their cooperation.[141] The United States has also built counterterrorist intelligence centers for numerous foreign agencies, hoping to gain valuable intelligence from agencies the CIA's former Deputy Director for Operations described as "utterly unhesitant in what they will do to get captives to talk."[142]

### 2. Silencing Criticism and Bolstering Authoritarian Regimes

When their intelligence agents aid antidemocratic and human-rights abusive practices of friendly dictators in hopes of good intelligence, liberal democracies sacrifice their leverage to promote rights and damage their reputations at significant political cost.[143]

Criticism of repressive governments with cooperative intelligence agencies has dramatically declined. In the past the U.S. condemned Malaysia's detention of dissidents under the Internal Security Act; today Malaysia is hailed as a "beacon of stability" and the detentions have been praised.[144] Other liberal democracies have similarly reduced public criticism.[145]

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London . . . .").

135. HOLT, *supra* note 75, at 129.

136. *Id.*

137. Schmidt-Eenboom, *supra* note 74, at 158.

138. HOLT, *supra* note 75, at 127.

139. Schmidt-Eenboom, *supra* note 74, at 154–59 (listing more examples).

140. Wilson et al., *supra* note 134, at 7.

141. *Id.*

142. SUSKIND, *supra* note 114, at 87.

143. Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT'L L.J. 23, 29 (2002).

144. INT'L CAMPAIGN AGAINST MASS SURVEILLANCE, THE EMERGENCE OF A GLOBAL INFRASTRUCTURE FOR MASS REGISTRATION AND SURVEILLANCE 46 (2005), *available at* www.statewatch.org/news/2005/apr/icams-report.pdf [hereinafter INT'L CAMPAIGN AGAINST MASS

As a result, in many countries, progress in improving human rights practices, especially those of security services, has been reversed. For example, in Morocco, a key U.S. intelligence ally, security services resumed indefinite detention of suspects in secret interrogation centers, and the government enacted a broad anti-terrorism bill so in which covers almost any violent crime.[146] By labeling dissidents or rebels as "terrorists," authoritarian states now legitimize repressive practices and shield these practices from criticism by their partners.[147]

Counterterrorism intelligence sharing with the West actively bolsters the power of authoritarian dictators and their ruthless intelligence services. Due to the cooperation of the brutal Uzbek security services, U.S. policymakers refer to Uzbek President Islam Karimov as a partner and ally, strengthening his hand.[148] Indeed, one of the reasons that we may now know so much more about the illiberal agencies involved in information sharing is that certain foreign services disclose their ties to Western intelligence agencies as a way of demonstrating their strength and shoring up their position domestically.[149] Two instances of it was Libya's Qadaffi and Syria's Assad, for example, who revealed their agencies' intelligence sharing with the West.[150]

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SURVEILLANCE]. The relationship between less criticism and greater intelligence cooperation may not be apparent. However, Malaysia's most substantial contributions to U.S. counterterrorism efforts seem to be in the intelligence field; it has shared intelligence, offered access to detainees, and now hosts a Southeast Asia center for terrorism training. Tay, *supra* note 18, at 119 (noting that Malaysia supplied intelligence and detained numerous suspects on behalf of the U.S. and criticism about human rights subsequently waned). Moreover, the presence of intelligence gathering facilities or reliable intelligence sources has historically discouraged criticism of human rights abuses. HOLT, *supra* note 75, at 127.

145. INT'L CAMPAIGN AGAINST MASS SURVEILLANCE, *supra* note 144, at 46 ("Weeks after the 9/11 attacks, . . . democratic leaders like German Chancellor Gerhard Schroeder and Italy's Prime Minister Silvio Berlusconi were saying that they would have to judge Russian operations in Chechnya differently."); AMNESTY INTERNATIONAL, HUMAN RIGHTS DISSOLVING AT THE BORDERS? COUNTER-TERRORISM AND EU CRIMINAL LAW 2 (2005), *available at* http://web.amnesty.org/library/pdf/IOR610132005 ENGLISH/$File/IOR6101305.pdf [hereinafter AMNESTY INTERNATIONAL] ("As far as cooperation with third countries in the fight against terrorism is concerned, the EU and its Member States too often are prepared to remain silent on the issue of rights protection.").

146. CAROL MIGDALOVITZ, CONG. RESEARCH SERV., RS 21579, MOROCCO: CURRENT ISSUES (2005), *available at* http://www.policyarchive.org/handle/10207/bitstreams/3768.pdf; JOSEPH L. DERDZINSKI, INTERNAL SECURITY SERVICES IN LIBERALIZING STATES TRANSITIONS, TURMOIL, AND (IN)SECURITY 72–73 (2009).

147. INT'L CAMPAIGN AGAINST MASS SURVEILLANCE, *supra* note 144, at 46 (noting that on the extension of Egypt's emergency law in February 2003, the U.S. State Department stated that the U.S. "under[stood] and appreciate[d] the Egyptian government's commitment to combat terrorism and maintain stability"); Tay, *supra* note 18, at 120 (noting that the Indonesian's government relabeling as "counterterterrorism" its renewed military efforts in Aceh has received muted criticism from the U.S.). Syria's 1982 massacre of 10,000 residents and the disappearance of thousands more in reaction to a Muslim Brotherhood insurgency has been repackaged as a "textbook antiterrorism campaign." Neil MacFarquhar, *Syria Repackages of Muslim Militants as Antiterror Lesson*, N.Y. TIMES, Jan. 14, 2002, at A8.

148. Thomas Carothers, *Promoting Democracy and Fighting Terror*, 82 FOREIGN AFFAIRS 84, 86 (2003).

149. HOLT, *supra* note 75, at 71. The practice of disclosing ties seems to have increased after September 11.

150. Gawdat Bahgat, *Transatlantic Cooperation: Libya's Diplomatic Transformation*, 29 FLETCHER F. WORLD AFF. 43, 47 (2005); Rudner, *Hunters and Gatherers*, *supra* note 10, at 217. Sudanese intelligence officers brag that "American intelligence considers us to be a friend" and "[t]he information we have provided has been very useful to the United States." Silverstein, *supra* note 132, at A1.

Political favors that fly in the face of human rights policies of liberal democracies have also been doled out. In the past, the U.S. rejected Sudan's overtures, refusing to cooperate with its intelligence service in fear it would legitimize the repressive government.[151] Yet, days after CIA officials and Sudan's deputy intelligence chief concluded a secret intelligence sharing arrangement, the U.S. abstained on a vote at the United Nations Security Council, freeing Sudan from international sanctions.[152] Due to ties with Western intelligence services, Pakistan also succeeded in lifting U.S. prohibitions on arms sales.[153]

### 3. Complicity of Liberal Democracies in Rights Violations

Liberal states and their authoritarian partners are subject to various international and domestic legal obligations that constrain the scope of action against individuals. Citizens in many liberal democracies see themselves as devoted to human rights and have enshrined protections against torture and other fundamental rights violations into national law. Although it is expected that intelligence agencies violate the domestic laws of other states in their collection activities, they are not authorized to circumvent these international and domestic restraints.[154]

Yet, as has become apparent since 9/11, intelligence agencies from liberal democracies sometimes intentionally solicit torture or coercive action from illiberal partners. At others, they innocently ask for help within the normal course of investigations, but may be reckless as to the consequences of their requests. Always, however, connections to illiberal regimes will raise the specter of complicity in or encouragement of the violation of individual rights.

In their hunt for terrorist operatives, Western intelligence has depended on counterparts in countries around the world to conduct interrogations and report information gleaned.[155] Western intelligence agencies provide lists of questions and

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151. Silverstein, *supra* note 132, at A1.

152. *Id.*

153. Wilson et al., *supra* note 134, at 7.

154. E.U. NETWORK OF INDEPENDENT EXPERTS IN FUNDAMENTAL RIGHTS, THE BALANCE BETWEEN FREEDOM AND SECURITY IN THE RESPONSE BY THE EUROPEAN UNION AND ITS MEMBER STATES TO THE TERRORIST THREATS 20 (Mar. 31, 2003), *available at* http://www.humanrights-observatory.net/dhangles/tematic2.pdf ("It is important to keep in mind that the Member States of the European Union, which are party to the European Convention of Human Rights, are bound to comply with that instrument, including in the context of interstate cooperation that they choose to enact with nonmember States."). As a matter of international law, a state that solicits or assists in a human rights violation is responsible for it. Report to the International Law Commission to the General Assembly, 56 U.N. GAOR Supp (No. 10) at 64, U.N. Doc. A/56/10 (2001), *reprinted in* [2001] 2 Y.B. Int'l L. Comm'n 31, U.N. Doc. AA/CN.4/SER.A/2001/Add.1 (Part 2). ("[I]nternationally wrongful conduct often results from the collaboration of several States rather than of one State acting alone."). *See also id.* at 66 ("An aiding or assisting State may not deliberately procure the breach by another State of an obligation by which both States are bound; a State cannot do by another what it cannot do by itself.").

155. *See* HUMAN RIGHTS WATCH, REPORT TO THE CAN. COMM'M OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR 7 (May 17, 2005) [hereinafter HUMAN RIGHTS WATCH] ("If we are getting everything we need from the host government, then there's no need for us to [conduct interrogations]," a former U.S. government official told Human Rights Watch. "There are some situations in which the host government can be more effective at getting information."). *See, e.g.*, INT'L CAMPAIGN AGAINST MASS SURVEILLANCE, *supra* note 144, at 47 (noting the CIA station chief in Tashkent "readily acknowledged torture was deployed [in Uzbekistan] in obtaining intelligence [from U.S. suspects]").

accept answers that are almost certainly coerced from the suspects, while knowing that many of these agencies engage in acts of torture. Involvement is not limited to U.S. intelligence services, but rather includes a wide variety of intelligence agencies from democratic states.[156]

In the most egregious cases, Western services have exploited the lack of accountability and rights protection in partner nations to circumvent human rights law and violate individual rights. The case of Maher Arar provides a well-known example. Arar is a Canadian citizen entirely innocent of wrongdoing who was detained at a U.S. airport, sent to Syria, and interrogated and tortured by Syrian Military Intelligence (SMI).[157] Despite knowing that the SMI, an agency notorious for its torture practices, had custody of a Canadian citizen, the Royal Canadian Mounted Police (RCMP) offered "large volumes of highly sensitive documents and information, seized during investigative efforts or obtained from confidential informants associated to terrorist cells operating in Canada."[158] The RCMP also sent questions for Arar and other detainees in Syria against advice that the SMI would likely use torture to seek answers and would consider the questions proof that the individuals were in fact terrorists.[159] Arar was indeed tortured—beaten and kept alone in an unlit cell the size of a grave.[160] A proper appreciation of the SMI's practices and lack of professionalism should have suggested that answers obtained from these interrogations would be untrustworthy. The SMI, for example, found Arar's salary and job description unbelievable.[161]

In another instance, the U.K. security service MI5 solicited abuse from its network partners in Africa. When several of acquaintances of cleric Abu Qatada traveled to the Gambia, MI5 cabled a "foreign intelligence agency," labeling them "Islamic extremists" and disclosing their destination.[162] Upon arrival, CIA and Gambian intelligence agents were waiting. When one of them, a British citizen,

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156. *See, e.g.*, Rudner, *Hunters and Gatherers*, *supra* note 10, at 219 (observing that Australia and Southeast Asian partners submitted lists of questions to be put to terrorist suspect Hambali). Canadian intelligence has also implicated individuals and sent questions to foreign counterparts. For example, Maher Arar's brother-in-law was questioned by the Tunisian police after moving there from Canada, based on information to which only Canadian agents would have had access. In a similar incident, "Kassim Mohamed, who divides his time between Toronto and Egypt, was questioned by CSIS in Canada after videotaping Toronto landmarks .... When he arrived in Egypt, he was arrested and held for two weeks, handcuffed and blindfolded, in a prison in Cairo." INT'L CAMPAIGN AGAINST MASS SURVEILLANCE, *supra* note 144, at 26. *See also* Philip B. Heymann, *Civil Liberties and Human Rights in the Aftermath of September 11*, 25 HARV. J.L. & PUB. POL'Y 441, 455 (2001) (noting that many abuses occur in cases "in which the CIA will know of the capture of individuals and may make known to the international security apparatus of a foreign nation exactly what it would like to know").

157. *See generally* Arar Commission Report—Analysis and Recommendations, *supra* note 46, at 32 (includes detailed account of Mr. Arar's experience).

158. *Id.* at 38

159. *Id.*

160. *Id.* at 56–57.

161. *Id.* at 56.

162. Craig Whitlock, *Courted as Spies, Held as Combatants: British Residents Enlisted by MI5 After Sept. 11 Languish at Guantanamo*, WASH. POST, Apr. 2, 2006, at A1. *See also* HUMAN RIGHTS WATCH, CRUEL BRITANNIA: BRITISH COMPLICITY IN THE TORTURE AND ILL-TREATMENT OF TERROR SUSPECTS IN PAKISTAN 1–7 (2009), *available at* http://www.hrw.org/en/reports/2009/11/24/cruel-britannia-0 (investigating U.K. complicity in torture in Pakistan and concluding that it is inconceivable that security services were not aware their partners were engaging in torture of detainees about whom they were providing questions and receiving information).

asked to meet with the British consul, an American agent replied, "Who do you think asked us to arrest you? Where do you think this information came from, the questions we are asking you?"[163] All were detained for over a month. The two non-British citizens were subsequently sent to Guantanamo Bay and remain there (MI5 has paid them several visits).[164] Because it only shared information, the United Kingdom denies responsibility because it did not specifically request that the individuals be detained.[165]

Even where a Western agency attempts to mitigate rather than capitalize on the tactics of disreputable or brutal agencies, the possibility of torture, disappearance, or detention remains a serious risk. The tendency of intelligence officers to focus on worst case scenarios increases the likelihood that information, will be acted upon often to the detriment of individual human rights.[166] Repressive countries' intelligence services are particularly unlikely to exercise restraint when called upon to conduct interrogations on behalf of Western services, especially where allegations of Islamic terrorism are involved.[167] The simple act of providing questions about an individual to a less professional agency can cause it to conclude that the sharing agency considers the individual to be a serious terrorist threat.[168]

The brutal nature of some partners of Western intelligence agencies blurs the line between acceptable and unacceptable requests. For example, in an attempt to confirm reports of the death of al Qaeda leader Zawahiri, a CIA operations manager called an Egyptian intelligence chief for a DNA sample from Zawahiri's brother, who had been detained in Cairo.[169] The Egyptian officer reportedly responded, "No problem. We'll get his brother, cut off his arm, and send it over."[170] Even well-intentioned and necessary requests for intelligence may, therefore, create a "ripple effect" beyond the requesting country's borders "with consequences that cannot be controlled" by that country.[171] Western intelligence should thus carefully evaluate the risks posed by requesting information from illiberal services, meticulously phrase requests for information, and attempt to ensure treatment of persons in accordance with legal obligations. Unless they do so, requests for information may become, in fact, requests for violation of human rights law.[172]

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163. Whitlock, *supra* note 162, at A1.

164. *Id.*

165. *Id.* Even if the United Kingdom did not specifically ask for the detention (which seems unlikely), Western agencies provide specific intelligence with the intent that their partners act on it. RONALD KESSLER, THE CIA AT WAR: INSIDE THE SECRET CAMPAIGN AGAINST TERROR 273 (2003) ("By the middle of 2002 the CIA had rolled up three thousand terrorists in a hundred countries. Usually a foreign service made the arrest based on CIA information.").

166. HOLT, *supra* note 75, at 86. As a general matter, there are fewer repercussions for acting against individuals or on terrorist information since it generally does not engage geopolitical concerns.

167. *See* Heymann, *supra* note 156, at 453–54. ("[P]rotections [available in the United States] are often not available in anything like the same measure in states where terrorists are likely to seek haven. Those countries' internal structure and police apparati are likely to be far less constrained if activated by the CIA on behalf of America.").

168. Arar Commission Report—Analysis and Recommendations, *supra* note 46, at 39.

169. SUSKIND, *supra* note 114, at 132.

170. *Id.*

171. *See* National Security Background Paper to Arar Commission, *supra* note 26, at 16 (discussing effect from Canadian perspective).

172. Heymann, *supra* note 156, at 455.

Western agencies also have subverted human rights and endorsed abuse by receiving information from their new "allies." The case of Craig Murray, former British ambassador to Uzbekistan, is one example of Western knowledge of abuse. When he urged the British Foreign Office to stop using intelligence elicited from terrorism suspects through torture and other coercive means, he was told that the intelligence could still permissibly be used "even if it was elicited by torture, as long as the mistreatment was not at the hands of British interrogators."[173]

Using information obtained through torture or indefinite detention is not in the interest of accuracy or effectiveness. Mistreatment typically results in information replete with false positives,[174] on the basis of which innocent persons are then detained and mistreated, continuing the cycle. The cost of receiving information of dubious reliability from illiberal states is paid not only by persons in or sent to repressive countries but also by residents of liberal democracies throughout the world. As the Arar Commission determined, "[r]eceipt of... information may lead to significant personal consequences for individuals... such as surveillance, further collection of personal information, or interrogation."[175]

Services in repressive regimes are of questionable reliability because of their use of torture. They are doubly dubious as their chief functions are to lend blind allegiance to the regime and to repress dissidents.[176] They also often have contradictory interests: providing financing and support to some designated terrorist groups, and offering to work against others (or sometimes the same group).

Western services' apparent credulity has already resulted in numerous errors. A human source identified by the Libyan intelligence head was responsible for allegations that Saddam Hussein provided biological and chemical weapons training to al Qaeda.[177] The Bush administration acted upon it even though the CIA already doubted the source's veracity.[178] New intelligence sharing arrangements between U.S. intelligence and the Russian security intelligence services (FSB) have also generated unreliable information and rights violations. A naturalized U.S. citizen,

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173. Don Van Natta, Jr., *U.S. Recruits a Rough Ally to be a Jailer*, N.Y. TIMES, May 1, 2005, at A22.

174. Tony Pfaff, *U.S. Army, Bungee Jumping Off the Moral Highground: The Ethics of Espionage in the Modern Age*, http://www.usafa.edu/isme/JSCOPE02/Pfaff02.html ("It is a well-established fact that information gained under the duress of torture is rarely reliable."). *See also* Shane O'Mara, *Torturing the Brain: On the Folk Psychology and Folk Neurobiology Motivating 'Enhanced and Coercive Interrogation Techniques,'* 13 TRENDS IN COGNITIVE SCI. 497, 497–98 (2009) (showing with scientific evidence that coercive intelligence techniques and torture make it less likely for the subject to accurately recall information, and more likely for false memories to replace real ones).

175. National Security Background Paper to Arar Commission, *supra* note 26, at 17 ("[I]nformation obtained from other countries may not have been acquired in ways consistent with rights and freedoms protected [in Canada]. It may, for example, have been obtained through torture or other unacceptable investigation techniques, or in the absence of checks and balances to ensure reliability.").

176. *See* Herman, *supra* note 5, at 229. Moroccan intelligence, for example, spends a great deal of its resources on extensive surveillance of "three particular classes of foreigners: US citizens (for their 'own safety,') Spaniards, and journalists, the latter two to ensure they were engaging in approved activities." DERDZINSKI, *supra* note 146, at 58–59.

177. Peter Finn, *Detainee Who Gave False Iraq Data Dies in Prison in Libya*, WASH. POST, May 12, 2009.

178. *See* SUSKIND, *supra* note 114, at 187–88 (discussing the CIA's concerns over intelligence on WMDs in Iraq). This is not a new experience for the CIA and Mossad, which together created the Iranian intelligence agency and the Korean Central Intelligence Agency (known for their "heavy-handed brutality and torture") and received much "intelligence of dubious validity" from both. HOLT, *supra* note 75, at 71.

Omar Shishani was accused of having links to terrorism, based on information provided by the FSB.[179] The FSB and witnesses it supplied identified Shishani as an Islamic radical who introduced Wahhabism to Chechnya in the 1990s. In the end, this information was revealed to be inaccurate—a case of false identity.[180] Yet, U.S. intelligence appeared willing to accept this information unconditionally.

In the end, it is clear that the sort of compliance enforced through professional network sanctioning does not necessarily produce strong compliance or good behavior on the part of intelligence services. A real risk is the proliferation of lower, rather than higher, standards. Because acculturation relies on the pull of peer pressure rather than the legitimacy of the norm, it is value-neutral as to the norms transmitted through the network. Thus, "actors systematically conform (under the right conditions) even if the group is clearly wrong. . . ."[181] In the case of transnational intelligence sharing networks, the norms have both been positive—good investigative tactics—and negative—most recently, torture and indefinite detention.[182] Though professionalized intelligence services may generally be relied upon to achieve high standards, greater cooperation with intelligence agencies of dubious virtue has strained the professional ethos.[183]

## III. A PROPOSAL FOR MORE PROFESSIONAL, DEMOCRATIC INTELLIGENCE EXCHANGE

While the days immediately after 9/11 may not have permitted reflection on the proper safeguards for efficacious, humane arrests and interrogations, the problems that have emerged from recent intelligence cooperation call for their institution.[184] This section proposes two mutually enforcing methods to reduce human rights abuses and poor intelligence, support policies in favor of democracy and rights, and reassert democratic control over intelligence activities. This section offers hope that the combination of internal controls and democratic rules can allay some of the excesses and irrationalities that arise from the participation of democratic states in intelligence networks that often include repressive states.

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179. Peter Baker, *Old Enemies Enlist in U.S. Terror War: Former Soviet Republics Become Allies*, WASH. POST, Jan. 1, 2004, at A1.

180. *Id.*

181. GOODMAN & JINKS, *supra* note 60, at 8. Another danger, which Jinks and Goodman consider an identifying characteristic of acculturation, is "decoupling" which involves adoption of structural commitments that do not correspond to local practices such that true human rights compliance does not occur. *Id.* at 33–34. For example, Uzbekistan, a U.S. partner in the "war on terror," now understands that other states attach importance to human rights and accountability and has enacted legislation and brought prosecutions against police for torture; yet, no conviction based on coerced confessions has been overturned. Jones et al., *supra* note 68, at 78.

182. Another example of negative norm transmission is the pressure exerted through a "strong lobby of the foreign intelligence functionaries, who in order to maintain their influence successfully pressured to maintain a post-Soviet model of the secret services in Poland," despite significant concern that such services were persistent rights violators and extremely politicized. Andrezej Zybertowicz, *An Unresolved Game: The Role of the Intelligence Services in the Nascent Polish Democracy*, *in* WHO'S WATCHING THE SPIES? ESTABLISHING INTELLIGENCE SERVICE ACCOUNTABILITY 145, 147 (Hans Born et al. eds., 2005).

183. This is confirmed by the network literature, which suggests that smaller or more-cohesive networks exhibit a higher degree of internalization of and compliance with network standards. *See, e.g.*, Slaughter, *supra* note 22, at 359.

184. STEPHEN GREY, GHOST PLANE: THE TRUE STORY OF THE CIA TORTURE PROGRAM 151–52 (2006).

First, regulation internal to intelligence networks must be strengthened, as Section A argues. Agencies purporting to represent the interests of democratic governments should ascribe to more stringent and ethical professional norms for the sake of accuracy, human dignity, and overall efficacy. They must use the reputational sanctioning of network relations to acculturate repressive partners to more ethical rules of the game. While there is substantial room for improvement of intelligence's democratic accountability, a number of networked intelligence services, especially in the global counterterrorism effort, are not held to account in any way. All intelligence agencies are, however, subject to reputational sanctioning from their fellow professionals. Professional standards within the network, therefore, offer the most promising basis for accountability.

Second, efforts internal to intelligence networks must be supplemented by greater public and legislative involvement. Section B argues that the protection of democratic governance and mitigation of intelligence excesses requires oversight, accountability, and some measure of transparency. As they currently exist, traditional means of accountability systematically fail to provide any of these. Legislative oversight and public involvement are imperative to set proper limitations and permissions on our intelligence services. Greater transparency in turn will facilitate democracy and rule of law. Ultimately, as Section C contends, problems related to the accountability and accuracy of intelligence may be best solved by prioritizing law enforcement.

## A. *Acculturation of Intelligence Agencies to Ethical Professional Norms*

If the experience of the last nine years is any indication, existing professional standards in network arrangements are inadequate to ensure that intelligence services act both in the most effective way and in the best interests of democracy. Connections to untrustworthy, unreliable intelligence partners create a substantial risk of bad foreign policy decisions, false positives, and subversion of democracy. This section proposes ways to mitigate some of these problems. Section 1 argues in favor of clear ethical professional standards to advance reliable intelligence sharing and human rights compliance. Section 2 contends that the most effective way to institute compliance with such standards is through acculturation within the network—that is, communitarian pressure on illiberal agencies to adopt more professional, rights-respective behavior. Official training and aid, the "quid pro quo" delivered by Western intelligence, must also support these efforts and the wider foreign policy goals of democratic states. Ultimately, however, Western intelligence may need to establish limits and cut or minimize ties to certain partners.

### 1. New Rules for Intelligence Cooperation

It is vital that information exchanged be precise and accurate and that the means used to collect it be ethical and minimally intrusive on individual rights. This section proposes clear, ethical professional standards to further information sharing against transnational threats—in both the long and short term.

The first section contends that professional norms must include prohibitions on torture and indefinite or arbitrary detention. The second section proposes professional rules that make caveating information mandatory, rather than

discretionary. The third section argues in favor of use restrictions to ensure that information sent to other states does not foster human rights abuses.

a. Ethical Standards in Compliance with International Human Rights Law

Abuses generate inaccurate information, alienate populations, and impede successful, rights-respecting cooperation. They do not constitute an effective strategy to counter transnational threats. In order to deter rights violations and mitigate their effects, professional intelligence standards should include principles relating to the handling of intelligence and the arrest, detention, and interrogation of suspects. There must be clear norms barring the use of coerced information. This will avert Western complicity in human rights violations and incentivize placing greater pressure on rights-violating partners to comply with proper intelligence gathering techniques.

As a general rule of thumb, intelligence ethics should include principles of justification, proportionality, necessity, and accuracy. All intelligence partners should understand that "individuals will be targeted only when it is justified, authorised and the information gathered will be properly recorded and only retained or made accessible where legitimate need can be established."[185] As the 9/11 Commission recommended, the "United States should work with friends to develop mutually agreed-on principles for the detention and humane treatment of captured international terrorists . . . ."[186] Such norms must bring the principle of harm minimization to the forefront with the result that individual intelligence officials confronting ethical dilemmas recognize them, seek guidance in codes of practice, and ultimately minimize the potential harm to democracy, individuals, and consumers of intelligence.[187] Like military professionals, who are governed largely by their professional ethical rules, intelligence officials should "take care not to act in such a way that disregards the notion that individual human life and dignity are valuable for their own sake and that people should be treated as an end in themselves and not merely a means."[188]

Professional intelligence services should abide by international prohibitions on torture, summary execution, and cruel, inhuman, and degrading treatment. As the Harvard University Project on Justice in Times of Transition has proposed in the Intelligence Bill of Rights, "agencies must conduct their work in a manner consistent with respect for human rights as such standards are defined by international law," including prohibitions on "[t]orture and other [c]ruel, [i]nhuman or [d]egrading [t]reatment or [p]unishment."[189] Agencies should further refrain from "measures

185. GILL, *supra* note 2, at 153.

186. 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 379 (2004) [hereinafter 9/11 COMMISSION REPORT].

187. GILL & PHYTHIAN, *supra* note 79, at 155 ("[N]ot just individual security officials are 'moral agents'; so are the agencies and governments of which they are part, so statutes, guidelines and codes of practice must all be drawn up within the context of ethical agreements . . . . Since intelligence cannot be disinvented, and current practice is dominated by realist ethics, perhaps the most we can strive for is harm minimization . . . .").

188. Pfaff, *supra* note 174, at 2.

189. Project on Justice in Times of Transition, Harvard University, Safeguarding Human Rights in Relation to Intelligence Activities: An Intelligence Bill of Rights, para. 6 (Nov. 17, 2004) (on file with

designed to interfere with the normal political or judicial processes or with the lawful internal workings of parties and organizations engaged in lawful activity," such as spying on émigré communities or peaceful protesters.[190]

A commitment to refrain from exploiting information obtained through coercive tactics should similarly travel in the toolbox of Western intelligence norms. The determination of whether information has requisite reliability and credibility should include an evaluation of whether the information was obtained through torture or cruel, inhuman, or degrading treatment. If coercion has been used, the information should be designated of dubious reliability. As recommended by the Ottawa Principles on Anti-Terrorism and Human Rights, it should not be used as a basis for:

(a) the deprivation of liberty;

(b) the transfer, through any means, of an individual from the custody of one state to another;

(c) the designation of an individual as a person of interest, a security threat or a terrorist or by any other description purporting to link that individual to terrorist activities; or

(d) the deprivation of any other internationally protected human rights.[191]

While this limit would not eliminate rights violations, it would curtail receiving states' ability to exploit those violations. This is in contrast to the current system under which Western agencies encourage coercive tactics by gladly accepting information gained through them. Over time, limits on use of coerced intelligence might reduce torture by intelligence services. Just as the exclusionary rule serves as a deterrent for the use of coercive tactics in the domestic context,[192] these restrictions would bolster incentives for services to professionalize and train partners to engage in more humane practices.

#### b. Caveats as a Requirement

Because intelligence is used to inform decision making on vital foreign and domestic issues and may have serious consequences for individuals, it is imperative that agencies institute clear requirements for quality control of shared information. First of all, before information is shared, it ideally should be checked against other available sources.[193] When information is shared with a partner, "there is the implicit expectation that the data you provide is *accurate* and that there are steps to ensure

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author) [hereinafter Intelligence Bill of Rights] (proposing basic guidelines for intelligence based on a study of intelligence systems and their regulation).

190. *Id.* paras. 6–7.

191. Ottawa Principles on Anti-Terrorism and Human Rights, Principle 8.1.2 (Oct. 16, 2006), *available at* http://aix1.uottawa.ca/~cforcese/hrat/principles.pdf [hereinafter Ottawa Principles].

192. This is not a perfect analogy because intelligence agencies use information less often than law enforcement agents. In the context of terrorism intelligence sharing, this rule would be stronger if more criminal prosecutions for violent criminal acts were brought—as they indeed should be. *See infra* part III.C.

193. New Challenges, *supra* note 51, para. 6 ("It is vital that intelligence should be reliable, which means sound intelligence that can be cross-checked against different sources. Complementary sources are an operational requirement.").

*information quality*."[194] Second, proper caveating on shared intelligence should be required, rather than discretionary. Lacking definitive guidance, agencies engage in "indiscriminate reporting of unverified information, without regard to the information quality, reliability or usefulness, or without considering the receiving agency's ability to analyze the information"—generating a highly ineffective information sharing environment.[195]

The findings of the inquiry into Arar's case amply demonstrate the importance of proper caveating to ensure accuracy and minimize the negative repercussions of false positives. According to the inquiry, as part of the RCMP's terrorism intelligence responsibilities, it provided a great deal of misleading, inaccurate, and piecemeal information to the United States. For example, the RCMP reported that Arar and his wife were "Islamic Extremist individuals suspected of being linked to the Al Qaeda terrorist movement," had refused to be interviewed, and had connections to known terrorists.[196] Officials systematically failed to attach written caveats that indicated the reliability of the source and relevance to the investigation.[197] This failure to caveat was not an isolated occurrence, but rather a direct consequence of the informal and often implicit nature of understandings and requirements between networked actors. By contract, requiring caveats could protect individuals implicated, prevent unwise foreign policy decisions, and ensure the integrity of intelligence sharing and collection processes.[198]

In all cases, agencies should attach quality and reliability caveats. Each piece of information shared should indicate whether it has been cross-checked and confirmed. Reliability scales, contextual data, and the greatest information possible about the source and method of collection should be indicated along with doubts or conflicting data.[199] Codes for different sources could make information possible to track without exposing sources' identifying features, and meters of credibility could reduce circular reporting and intelligence agencies "intoxicating each other."[200] Since intelligence agencies are charged with analyzing the reliability of information as accurately as possible, the requirement that intelligence be caveated should not be overly burdensome.[201]

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194. U.S. DEP'T OF JUSTICE, PRIVACY AND INFORMATION QUALITY POLICY DEVELOPMENT FOR THE JUSTICE DECISION MAKER 3 (Sept. 2005) ("Promoting information quality by internal safeguards and procedures helps to ensure the accuracy of the information you handle."). *See also* MARKLE FOUND., MOBILIZING INFORMATION TO PREVENT TERRORISM: ACCELERATING DEVELOPMENT OF A TRUSTED INFORMATION SHARING ENVIRONMENT 23 (2006), *available at* www.markle.org/downloadable_assets/2006_nstf_report3.pdf, [hereinafter MARKLE FOUNDATION] ("If users do not believe that the information is reliable and comprehensive . . . they will implement their own collection systems and may keep the information to themselves.").

195. MARKLE FOUNDATION, *supra* note 194, at 19.

196. Melchers, *supra* note 99, at 40–41.

197. *Id.*

198. *Id.*

199. MARKLE FOUNDATION, *supra* note 194, at 30 (arguing there also must be "mechanisms to make any limitations on the reliability or accuracy of data known to those using the information").

200. Müller-Wille, *supra* note 91, at 118–119 ("The exposure of intelligence products to a formalized quality control would raise the demand for 'trackability' of sources (codes can be used to prevent exposure) and for clarity concerning what facts, assumptions and interpretations different conclusions are based on.").

201. HERMAN, *supra* note 9, at 104.

In the interest of accuracy, receiving agencies should only retain properly caveated information that is accurate and complete.[202] Given the number of false positives (and negatives) caused by mistaken identity and misspellings, a receiving agency similarly should take care when combining information from various sources that it all relates to the same individual.[203] At an institutional level, creating a position for quality control might be helpful. Indeed, after the debacle over allegations of weapons of mass destruction in Iraq, British MI6 created the position of senior quality control officer to review and determine the credibility and veracity of gathered intelligence.[204]

In a similar vein, agencies should adopt rules to correct inaccurate information.[205] This would involve a duty to investigate allegedly erroneous information and to implement a process to correct inaccurate or materially unreliable information.[206] Because of the transnational nature of intelligence cooperation, correction of inaccurate information at the domestic level will not suffice. Informing network partners upon the discovery of an error is crucial.[207] In the Arar case, for example, this would have meant Canadian intelligence had a duty to notify both U.S. and Syrian intelligence of the inaccuracy of information they had previously forwarded.

c. Restrictions on the Use of Shared Information

Intelligence agencies should also attach use restrictions to prevent the use of information to facilitate torture, arbitrary detention, or other abuses, as they already do in other contexts. Some Western agencies screen intelligence for relevance and personal information that, as a matter of domestic law, can only be shared in certain circumstances and attach caveats limiting the information's uses.[208] Several of the

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202. U.S. DEP'T OF JUSTICE, PRIVACY, CIVIL RIGHTS, AND CIVIL LIBERTIES: POLICY TEMPLATES FOR JUSTICE INFORMATION SYSTEMS C.3.10(c) (Sept. 2006), *available at* http://it.ojp.gov/documents/Privacy_Civil_Rights_and_Civil_Liberties_Policy_Templates.pdf. *See also* Ottawa Principles, *supra* note 191, at 8.2.2 ("All state agencies involved in the collection and storage of personal information must ensure that: (a) data are protected against unauthorized access, use or disclosure; (b) data are only used in connection with the purpose for which they were collected; and (c) data are only held for as long as necessary and are destroyed thereafter.").

203. U.S. DEP'T OF JUSTICE, *supra* note 202, at C.3.10(d).

204. MARK M. LOWENTHAL, INTELLIGENCE: FROM SECRETS TO POLICY 315–16 (4th ed. 2009).

205. Close allies may already tend to correct one another and withdraw inaccurate information. *See* Senate Report on Iraqi National Congress, *supra* note 46, at 59, 167, 172 (providing examples of a foreign agency withdrawing intelligence previously shared and indicating as an intelligence error the failure to withdraw from circulation information shown to be unreliable).

206. MARKLE FOUNDATION, *supra* note 194, at 30; U.S. DEP'T OF JUSTICE, *supra* note 202, at C.3.10(e) ("Investigate in a timely manner any alleged errors and correct or delete information found to be erroneous . . . ."); U.S. DEP'T OF JUSTICE, *supra* note 194, at 7 (proposing as a central principle that agencies "[i]mplement safeguards to ensure information is accurate, complete, and current, and provide methods to correct information discovered to be deficient or erroneous").

207. U.S. DEP'T OF JUSTICE, *supra* note 202, at C.4.20 ("When a participating agency gathers or receives information that suggests that information originating from another agency may be erroneous, may include incorrectly merged information, or lacks relevant context, the alleged error will be communicated . . . ."); Ottawa Principles, *supra* note 191, at 8.3.3 ("States sharing information have an obligation to correct information once they learn of its unreliability. States agencies and/or private companies involved must be subject to shared, joint and several liability where errors or abuses occur.").

208. Arar Commission Report—Analysis and Recommendations, *supra* note 46, at 18, 22–23.

United States' Western partners attach use restrictions to law enforcement information, prohibiting the use of shared information to impose the death penalty.[209]

Although there is a danger that use restrictions could chill intelligence sharing,[210] misuse of intelligence and abuses by Western intelligence services is likely to have a similar impact on the willingness of agencies to share intelligence with those services.[211] Cruel treatment at the hands of U.S. and other intelligence partners has already prompted some Western intelligence agencies to consider restricting uses of shared information as well. One of the Arar Commission recommendations was that Canada evaluate sharing on a case-by-case basis and carefully limit potential uses of shared information.[212] Canadian agencies are now required to consider limiting cooperation with agencies in cases where individuals might be exposed to human rights abuses or torture.[213] In other instances, partners have withheld information unless they receive assurances it will not be used for proceedings in military commissions or with relaxed evidentiary standards.[214] Still others have considered limiting intelligence support to the United States out of fear that this relationship will make them targets for attack.[215]

To supplement use restrictions for individual pieces of intelligence, the amendment of MOUs or formal agreements for the sharing of information may be necessary. Such action would not be unprecedented. For example, when Israel used U.S. satellite images to strike Iraq's Osirak reactor, against American intentions and

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209. E.U. NETWORK OF INDEPENDENT EXPERTS IN FUNDAMENTAL RIGHTS, *supra* note 154, at 19–20 (noting that the first example was the refusal of France to cooperate with the United States in the case of Zacarias Moussaoui until it received commitments that information provided by France would not be used to impose the death sentence); Rudner, *Hunters and Gatherers*, *supra* note 10, at 214 ("[A]llies like Britain, France, Germany, and Spain have refused to extradite suspected al-Qaeda terrorists to the United States, where they might face capital punishment.").

210. Melchers, *supra* note 99, at 42 ("[S]ubsequent recommendations pertaining to the sharing of investigative information and intelligence with foreign governments may provoke some degree of chill in Canada-U.S. relations, though not unjustifiably so."); Rudner, *Canada's Communications Security Establishment*, *supra* note 106, at 124 ("[F]or Canada (or another partner country) to impose national legal or human rights standards unilaterally onto Sigint interceptions might well jeopardize future UKUSA collaboration against transnational crime and other sensitive targets.").

211. MARKLE FOUNDATION, *supra* note 194, at 24.

212. Arar Commission Report—Analysis and Recommendations, *supra* note 46, at 348.

213. Melchers, *supra* note 99, at 43. The Canadian Security Intelligence Service has restricted its cooperation with at least one foreign counterpart because of human rights concerns. Rudner, *Hunters and Gatherers*, *supra* note 10, at 214.

214. AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT ON MILITARY COMMISSIONS FOR THE TRIAL OF TERRORISTS 22–23 (March 2003) (noting that "France and Germany have announced that they will not disclose information to U.S. law enforcement authorities is that information could be used to convict an alleged terrorist who might then be subject to the death penalty"). *See* Walsh, *supra* note 37, at 629–30 ("[C]oncerns about civil and political rights might preclude one state from sharing intelligence with another. Such states might be reluctant to share intelligence in their possession with receivers who have weaker data protection laws or norms."); James Igoe Walsh, *Intelligence-Sharing and United States Counter-Terrorism Policy*, *in* EMERGING TRANSNATIONAL (IN)SECURITY GOVERNANCE: A STATIST-TRANSNATIONALIST APPROACH 44, 47 (Ersel Aydinli ed., 2010) ("Governments have legitimate reasons to surround their intelligence gathering and analysis with considerable security.").

215. Simon Tisdall, *Fighting Terror the Malaysian Way, Not the US Way*, GUARDIAN (U.K.), June 8, 2005, at 16 (reporting that Malaysia was focused on not becoming a target and was only cooperating quietly); *see also* ALFRED B. PRADOS, CONG. RESEARCH SERV., IB 93085, JORDAN: U.S. RELATIONS AND BILATERAL ISSUES 8 (2006), *available at* http://www.fas.org/sgp/crs/mideast/IB93085.pdf ("Jordan's cooperative relationship with the United States has made it vulnerable to terrorist attacks, particularly from organizations operating from Iraq.").

interests, U.S. intelligence amended its agreement with Israeli intelligence so as to limit Israel's use of U.S. intelligence to defensive purposes only.[216] At the domestic level, several proposals have suggested use caveats or authorized use principles as a way of facilitating information sharing.[217]

Respect for these information sharing standards, which promote accuracy and ethical intelligence behavior, can be developed in two reinforcing ways. First, pressure from well-respected network partners can help acculturate illiberal agencies to professional and rights-respecting norms, as Section 2 will discuss. Second, as Section B will argue, standard setting and oversight through democratic bodies can reinforce network acculturation to ethical intelligence standards and encourage intelligence behavior in the interest of liberal democracies.

2. Professionalization of Illiberal Agencies

To the extent that Western intelligence must cooperate with services in illiberal regimes, it is in the interest of all network partners that illiberal agencies be professionalized and acculturated to professional norms through reputational sanctioning within the networks. Unless the network acculturates less reputable agencies to accept accurate, reliable information gathering skills and safeguards for the humane treatment of suspects, it will be unable to provide consistently useful information—especially in the long-term. Successful transnational cooperation may necessitate maintaining contact with certain repressive regimes, but consistent pressure should be exerted on partners to improve their practices and become more professional.

Professional standards, rather than legislative or other domestic oversight, are the prime mechanism to sanction and professionalize network partners.[218] Therefore, the use of peer accountability and reputational sanctioning to enforce ethical professional norms, including prohibitions on mistreatment, may present the most effective mechanism to professionalize repressive intelligence agencies.[219] Changing the culture of intelligence agencies is without a doubt a difficult task, and "[l]egal and ethical standards have to be taken seriously if they are to become part of the organizational culture, rather than just window dressing."[220] Effective acculturation to ethical professional standards will require concerted reputational sanctioning and targeted use of intelligence aid and training. If leading intelligence powers set

216. Lefebvre, *supra* note 4, at 536.

217. U.S. DEP'T OF JUSTICE, *supra* note 194, at 7 (setting forth a use limitation principle, which would require purpose specification and subsequent use only in conformance with such purposes); MARKLE FOUNDATION, *supra* note 194, at 35 (proposing an authorized use criterion which must be articulated and recorded prior to sharing).

218. Ian Cameron, *Beyond the Nation State: The Influence of the European Court of Human Rights on Intelligence Accountability*, *in* WHO'S WATCHING THE SPIES? ESTABLISHING INTELLIGENCE SERVICE ACCOUNTABILITY 34, 41 (Hans Born et al. eds., 2005) ("It is probably correct to say that a system of internal controls, in particular the maintenance of the democratic sensibilities of the staff themselves, is the most important safeguard against abuse of power.").

219. *Id.*

220. GILL & PHYTHIAN, *supra* note 79, at 157–58.

standards through intelligence collaboration, restraint, and objective assessment, other professional norms can spread to less professionalized agencies.[221]

This section recommends using professional sanctioning and transmitting norms through intelligence networks to encourage more effective long-term counterterrorism information sharing and overall strategy. It relies primarily on the theory of acculturation and argues that where hegemons or groups of influential intelligence agencies encourage compliance with certain norms, other intelligence agencies may adopt and comply with them. The idea of communitarian pressure operating within intelligence networks to induce human rights compliance may seem unlikely, but changes may occur, especially where well-respected intelligence agencies target their support and sanction violators collectively and consistently.[222]

In the past, Western intelligence powers exported their professional standards and methods through networked contacts and transparent foreign aid. As Michael Herman notes, because of the involvement of the U.S. and U.K. in the development of various intelligence agencies worldwide, "[i]ntelligence to some extent has its own international patterns. Different national structures have points in common, with influence and imitation operating on transnational intelligence networks."[223] Concepts beyond immediate operational capabilities have long been prominent in Western attempts to acculturate and train foreign partners. Assistance from Britain has focused on "'training to improve the objectivity of threat analysis, especially on the civilian side of government' and 'strengthening the capacity of intelligence services to assess genuine outside threats'" with the understanding that depoliticized, objective intelligence "figures among the attributes of good governance and responsible international citizenship."[224] Similarly, after the Cold War, the U.K. and U.S. both focused on building the democratic accountability of intelligence services in Central Europe.[225]

Such use of intelligence networks suggests the capacity of intelligence contacts to provide a lever for change.[226] Inclusion in a network can lead to pressure to imitate and identify with the group, which is likely to generate compliance with the group's norms.[227] Within intelligence networks, interactions among partners and concern over the development of reputation can drive compliance with professional norms.[228] In order to accomplish this, the network must provide clearly identifiable

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221. *See* Herman, *supra* note 5, at 238.

222. HERMAN, *supra* note 131, at 219 ("[T]he OECD nations plus some others signed a 'bribery convention' in which 'the United States has got all the right countries to play by roughly the same rules.' This is still far removed from intelligence; but it is still a reminder that unexpected things can happen when states are persuaded of common interests."); Herman, *supra* note 5, at 238 (noting that during the Cold War, the U.S. and USSR agreed not to extend some of their encryption for the mutual benefit of facilitating verification).

223. HERMAN, *supra* note 9, at 277.

224. Herman, *supra* note 5, at 230 (quoting the British Secretary of State for International Development). Herman suggests that "[p]erhaps Canada, Australia and New Zealand could make particular contributions where US and UK advice is suspect, as perhaps could Germany whose post-1945 intelligence has fewer associations than most with covert activities." *Id.* at 237.

225. Herman, *supra* note 5, at 237.

226. Jones et al., *supra* note 68, at 18.

227. *See id.* at 34 (suggesting that the difficulty of reforming El Salvador's security forces after the human rights tragedies of the civil war is an example of this pressure to imitate group norms).

228. Raustalia, *supra* note 8, at 51 (concluding that "when networks promote regulatory change, change occurs more through persuasion than command").

membership benefits.[229] For less reputable agencies, the anticipated long-term benefits of a good professional reputation may then outweigh the present value of violating network standards. Rewarding good behavior similarly may help induce compliance by less reputable intelligence agencies. Rewards must, however, be carefully constructed and include incentives for progress toward greater respect for democracy and human rights.

Agencies should also use the capacity of intelligence networks to more consistently penalize violations of rules. Intelligence professionals are those most likely to become aware of impropriety by partner agents and are therefore the best actors to conduct oversight and demand compliance with professional guidelines.[230] Clear rules, sanctions, and rewards facilitate efficacious intelligence sharing and create predictable and consistent standards of professional behavior.[231] For, "[i]f there is no expectation that misuse of the system will result in a penalty, there is little disincentive for misuse."[232]

Maintaining full contact with a partner who continually violates professional norms may impede sharing and trust-building. Communicating an agency's violation of network standards, by contrast, can shame the agency and incentivize replication of more professional, well-respected agencies in the network.[233] When a partner agency fails to make progress toward professional and accountable behavior, several alternative responses are possible: "[a]t the lowest level, the system terminates access by an offending user. If the problem is more pervasive in the agency, it can terminate access by the agency. Finally, there is the option of maintaining access but working with the agency to improve its practices and compliance."[234] Partner agencies might similarly only share information with violating partners on a case-by-case basis or in limited areas less likely to result in repression such as countering biological weapons.

The goal of intelligence network sanctions and rewards should be to cultivate capable, accountable, and professionalized network partners who can be trusted to gather, analyze, and use information in humane and professional ways. As is the aspiration of Western intelligence generally, intelligence networks should employ reputational sanctions and aid in order to "keep[] the players honest, not permit[] disreputable arguments to thrive, [and] point[] out where positions are internally contradictory or rest on tortured readings of the evidence."[235] The combination of network sanctioning and targeted support can lead to greater professionalization of our network partners. Regarding all contact with less reputable agencies, Western

229. LTG. PETER A. KIND & J. KATHARINE BURTON, INSTITUTE FOR DEFENSE ANALYSES, INFORMATION SHARING AND COLLABORATION BUSINESS PLAN 52 (2005).

230. GILL & PHYTHIAN, *supra* note 79, at 158 ("[T]here is increasing recognition of the need for some international oversight mechanism to reinforce changes made to operational guidelines and training").

231. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-04, INFORMATION SHARING: PRACTICES THAT CAN BENEFIT CRITICAL INFRASTRUCTURE PROTECTION 8 (2001) (concluding that there must be procedures for handling rules violations because a violation of partners' trust will undermine purpose and diminish willingness to share information).

232. MARKLE FOUNDATION, *supra* note 194, at 29 ("[A] clear, calibrated, and predictable system of accountability for misuse of the system should be an important part of the information sharing environment .... Penalties should be known, and they must be applied consistently.").

233. GOODMAN & JINKS, *supra* note 60, at 7.

234. U.S. DEP'T OF JUSTICE, *supra* note 202, at C.5.20.

235. HERMAN, *supra* note 9, at 152 (quoting R. Jarvis).

intelligence should seek to minimize potential harm and foster greater accountability and respect for professional standards. In contrast to current practice, Western intelligence should recognize when the costs outweigh the benefits and when withdrawal of support is in order. Ultimately, raising the professional level of partners through training, aid, and support is imperative. The next section will examine the most effective way to attain this goal.

3. Limits on Quid Pro Quo

This section argues that training and aid should be tailored to further professionalization, and that the quid pro quo for counterterrorism support should minimize potential contribution to rights violations. It relies on studies that show that professionalization through training, aid, and network contact of security services can enhance accountability and efficiency of security services.

To foster greater respect for accuracy, depoliticization, and proposed prohibitions on cruel treatment and arbitrary detention, it is imperative that Western nations seriously consider the most appropriate and effective form of assistance to less professional agencies. Future aid should specifically take into account the short- and long-term costs of counterterrorism efforts. Although long-term costs are frequently ignored, counterterrorism efforts have substantial short-term costs as well. For example, not only did U.S. support to Pakistani intelligence and security forces feed anti-American sentiment and religious extremism there (a long-term cost), it also caused the Pakistani economy to lose in excess of $10 billion in two short years.[236]

Assistance to intelligence services should encourage progress toward competence and accountability. Studies show that properly designed training and aid can enhance the accountability and efficiency of more illiberal security services.[237] In El Salvador, for example, qualitative and quantitative evidence reveal the success of UN and U.S. efforts to improve the security services.[238] In less than a decade, security services that had been responsible for thousands of summary executions and systematic torture were called to account and made subject to external review and human rights vetting.[239] The same study also found that aid and training of security intelligence forces generally does not work in highly authoritarian countries, but can have significant effects in emerging democracies.[240] Such findings should be a key consideration when and where the United States decides to provide aid. All aid should be evaluated on the basis of its effects on human rights as well as its contribution to security.

To avoid contributing tools to its repressive partners that facilitate human rights abuses or subvert democracy, Western intelligence should focus on areas with less

236. K. ALAN KRONSTADT, CONG. RESEARCH SERV. IB 94041, PAKISTAN-U.S. ANTI-TERRORISM COOPERATION 4, 6, 17 (2003), *available at* http://fpc.state.gov/documents/organization/27323.pdf.

237. *See, e.g.*, Jones et al., *supra* note 68, at xii–xvi, 6 (conducting a multi-country study of U.S. aid to internal security forces in Pakistan, Uzbekistan, El Salvador, and Afghanistan and concluding that there is evidence that providing assistance to internal security forces can lay the groundwork for future support for reform to human rights practices).

238. *Id.* at 38–41.

239. *Id.*

240. *Id.* at xi–xiii.

risk of rights violations. Some assistance—such as bomb-squad training and counter-proliferation support—may increase security with little impact on rights, and thus provide a mechanism for continued intelligence contact and the promotion of mutual interests.[241] Other apparently innocuous techniques can create the potential for further repression.[242] Where possible, money should be targeted to certain specific benchmarks, because due to its fungibility it carries risks of undermining foreign policy and reform.[243] In all cases, assistance should be assiduously conditioned, and further aid should depend on progress made toward improving practices.

Training must consistently impart the lesson that arbitrary arrests, detention, and torture are unacceptable. In the United States, in the late 1970s, executive policy mandated just such training in a move that was welcomed by many within the intelligence community.[244] Jack Devine, the former acting head of the CIA's worldwide operations observed that the refusal to descend to the level of repressive and Communist regimes gave the United States an ideological advantage.[245] Discarded in the heady post-9/11 days, these standards gave credence to the principle that Western intelligence agencies acting as an arm of democratic governments would uphold, not undermine, the values of liberal democracies. Since 9/11, U.S. and other Western intelligence agencies have wandered far from the promotion of these values and have faced significant dilution of professional norms and damage to their reputations.

Ultimately, Western intelligence agencies should know when to cut ties with certain partners. While they should not expect perfect compliance with professional standards and rights norms to result from these efforts, they must weigh the costs of associating with a service that continues to commit abuses. Agencies from liberal democracies should consider the danger of bolstering the capacity of their partners that carry out the policies of brutal authoritarian governments.[246] Certainly, an agency "should end, reduce, or significantly restructure assistance," when it bears no fruit.[247]

### *B. Establishing Democratic Oversight and Accountability*

This section argues in favor of more watchful and involved legislative and transnational bodies, engaged public debate, and a greater degree of transparency. So doing, it sets out the general principles that should underlie proposed domestic and international mechanisms. Fundamentally, there should be more comprehensive and transparent debate over the purpose, guidelines, and limits of transnational intelligence networks. Because the tension between the demands of democracy and

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241. *Id.* at xiv.

242. *Id.* at 87 ("[E]ven forensic training (including training in explosives) raises concerns that it could enable Uzbek personnel to more effectively fabricate evidence in criminal and counterterrorism proceedings.").

243. *See, e.g.*, Van Natta, *supra* note 173, at A22 (reporting that the U.S. State Department cut off $18 million in aid because the Uzbek government failed to improve its human rights record, but the U.S. military then provided an additional $21 million for removal of biological weapons).

244. GREY, *supra* note 184, at 13.

245. *Id.*

246. Jones et al., *supra* note 68, at xviii–xix.

247. *Id.* at 85.

the secrecy of intelligence networks is particularly acute, the argument focuses on democratic states with professional intelligence services.

Section 1 tackles the problem of the secrecy that obscures the activities of transnational networks from public and legislative awareness. It proposes that intelligence network agreements and MOUs be declassified and that, with the passage of time, originator controls not be permitted to trump Freedom of Information Act requests and declassification of documents. Section 2 calls for democratic bodies to turn their attention to transnational networks. For too long, legislatures and the public have been unaware of and uninvolved in the transnational activities of agencies that purport to serve democratic interests, but often subvert them. Clear statutory permissions and limitations should be devised by democratic representatives. While not without cost, the involvement of the legislatures and the public would convey substantial advantages for intelligence agencies in terms of greater rationality, consistency, and accuracy.

Section 3 argues that, as a general matter, law enforcement networks offer greater potential to counter terrorism in an accurate, reliable, and rights-respecting way and should, therefore, be the focus of international cooperation. Intelligence and law enforcement officials have long worked together to counter and prosecute terrorist groups. Law enforcement intelligence must be prioritized, and any genuine problems involved in prosecutions and information exchange should be the focus of international and transnational cooperation.

### 1. Improve Transparency through Declassification

Greater transparency is essential to proper accountability, oversight, and vigilance on both the domestic and international levels. Democratic governance, which depends on the consent of the governed, requires the public to have some knowledge of intelligence activities. Tension between secrecy and accountability is inevitable, but democratic states have erred too far in the direction of secrecy, especially with regard to transnational intelligence sharing arrangements.[248] This Article proposes that sharing agreements be made public and that there be a presumption in favor of declassifying information shared through networks, especially as time progresses.

#### a. Declassification and Legislative Approval of Intelligence Sharing Agreements

Disclosure of the details of intelligence-sharing agreements (what quid pro quo is promised) is key to public scrutiny and accountability. Other regulatory and enforcement agencies regularly publish their MOUs. It is not clear why formal intelligence agreements, some of which have been in existence for half a century, remain classified as top secret. As Richelson and Ball argue, with regard to the UKUSA relationships, "the citizens of the five democracies [should] be officially and fully apprised of the nature and operations of these agencies, and of the consequences (both beneficial and disadvantageous) of the international cooperative

248. RICHELSON & BALL, *supra* note 12, at 310 ("[T]he conflict of interest between the requirements of secrecy and the basis of democratic government itself has come to be reconciled in each of the UKUSA countries too far in favour of secrecy.").

arrangements among them—to the extent permitted by the genuine requirements of national security."[249] Under existing rules, however, declassification of the agreements would likely require the consent of all agencies party to them. Additionally, despite practical difficulties, future intelligence sharing agreements that permit the exchange of personal information should be reviewed by legislatures to ensure their compliance with international and national data protection and human rights legislation.[250]

Some fear that making information about networks public would endanger security by permitting our enemies to know too much about the quantity and quality of intelligence and the methods of sharing. This concern, however, is largely overstated since other nations' intelligence services already know a great deal more about our intelligence agencies and their information sharing arrangements than the public does.[251] While the level of transparency characteristic of other government agencies cannot be expected, some measure of transparency is important to democratic accountability and well-functioning, accurate intelligence. Equipped with the knowledge of the intelligence partners and the mechanisms of sharing, citizens would be able to engage with intelligence policy.[252]

b. Presumption in Favor of Declassification of Shared Information

Declassification of information shared through networks is central to improving accountability for actions taken through network arrangements. Declassification creates the potential for delayed scrutiny. As we have seen in the United States, historians, intelligence experts, and the National Security Archives have made valuable use of information declassified and released years later.[253]

It is likely that—as with other government agencies—intelligence shared through networks is significantly over-classified.[254] To remedy this, more precise, uniform classification standards for national security information should be developed to ensure that information only remains classified so long as "there are specific and articulable facts suggesting that disclosure of such information would cause identifiable harm to national security or critical infrastructure and that harm

249. *Id.* at 309. *See also* Ottawa Principles, *supra* note 191, § 7.5 ("Confidentiality rules that apply to information-sharing agreements between states may not take precedence over the right of citizens to access information from their governments.").

250. Ottawa Principles, *supra* note 191, §§ 8.3.5–6.

251. *See* Aldrich, *supra* note 2, at 51–52 (suggesting that the United States has long maintained a 'clandestine kinship' with intelligence services in Syria and Libya, despite public condemnation of these services during the 1990s for their association with terrorists).

252. Steven C. Boraz, *Establishing Democratic Control of Intelligence in Colombia*, 19 INT'L J. OF INTELLIGENCE & COUNTERINTELLIGENCE 84, 102 (2006) (arguing that intelligence accountability calls for an engaged citizenry, public debate, training civilians to understand intelligence, and opening intelligence training schools for those who engage in oversight).

253. *See* 2005 NATIONAL SECURITY ARCHIVE ANN. REP., at 1–11 (2006) (detailing many uses of declassified information obtained by the National Security Archives).

254. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-706, MANAGING SENSITIVE INFORMATION: DOD CAN MORE EFFECTIVELY REDUCE THE RISK OF CLASSIFICATION ERRORS 1–2 (2006) ("[F]ormer DOD Deputy Under Secretary of Defense for Counterintelligence and Security . . . estimated that 50 percent of information may be overclassified, to include overclassification between the classification levels.").

outweighs the public interest in disclosure."[255] Failure to declassify information whose sources and methods no longer need protecting is irrational, as it responds to no national security or foreign policy objectives.

Subject to the requirement that classification supports a legitimate national security interest, a presumption in favor of declassification should be instituted and gradually grow heavier over time. The interest in secrecy recedes with the passing years as targets change, sources die, and methods become outdated.[256] Sometimes, this can occur very quickly; for example, the release of information relating to Saddam Hussein's regime should raise no serious concerns, as the regime has been toppled, and no one doubts that foreign intelligence agents were actively spying there.

Under such circumstances, the consequences of declassification generally will be beneficial, not harmful, to proper intelligence work. Intelligence operatives report that the current system's "presumption of secrecy makes it tempting to ignore longer-term costs."[257] Transparency, therefore, can be expected to generate more effective and efficient intelligence over time.[258] The knowledge that their activities will be made known in the future should generate intelligence policies and behavior that resonate more clearly with democratic values. For example, French intelligence agents might have reconsidered engaging in surveillance of peaceful Iraqi dissident groups in France and providing reports to Iraqi intelligence had there been a system that would eventually declassify their wrongdoing. Instead, this collusion, which the French people did not support, was revealed by documents seized during the Iraq invasion.[259]

Indeed, wrongdoing often eventually emerges to the detriment of an intelligence service's reputation and respect—through media reports, whistleblowers, or eventual declassification.[260] The result is that policymakers and other intelligence consumers question the judgments of intelligence agencies and doubt their

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255. Christina E. Wells, *"National Security" Information and the Freedom of Information Act*, 56 ADMIN. L. REV. 1195, 1218–20 (2004); *see also* ARTICLE 9, JOHANNESBURG PRINCIPLES ON NATIONAL SECURITY, FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION 11–13 (1996), *available at* http://www.article19.org/pdfs/standards/joburgprinciples.pdf (setting forth general rule on access to information and narrow use of security exemption so as to further public interest in disclosure of government information).

256. Müller-Wille, *supra* note 91, at 121–22 ("The issue of releasing intelligence is merely a matter of determining the date for declassification, not a matter of principle and national security. The argument of the necessity to protect sources and methods disappears with time."); Thomas Blanton, *The World's Right to Know*, FOREIGN POL'Y 50, 56 (Jul./Aug. 2002) ("Former U.S. Secretary of State Lawrence Eagleburger has said most of the secrets he saw in his government career could easily be released within 10 years of their creation.").

257. TURNER, *supra* note 41, at 139 (citing veteran CIA operative Gregory Treverton); *see also* Bruneau & Dombroski, *supra* note 31, at 163 ("If the intelligence agencies know that in the future their files will be open for public scrutiny, they are logically more likely to keep a rein on the behavior of their members."); RICHELSON & BALL, *supra* note 12, at 310 ("Secrecy has shielded these agencies from full accountability and effective supervision and led to their being less effective and less efficient than they otherwise might be.").

258. Blanton, *supra* note 256, at 52 (noting that "openness fights terrorism by empowering citizens . . . and holding officials accountable").

259. Rudner, *Hunters and Gatherers*, *supra* note 10, at 220.

260. RICHELSON & BALL, *supra* note 12, at 310 ("The truth inevitably prevails, and operations which have been undertaken on the premise that they could be plausibly denied will in the end only damage the reputation of the UKUSA countries and the faith of their citizens in their governments.").

legitimacy.[261] What is reported and leaked regarding intelligence largely brings transgressions and errors to the public attention with a "negative effect on motivation and morale" among intelligence agents.[262] By contrast, greater transparency through declassification of information should help bring intelligence successes as well as failures to light and result in greater legitimacy for intelligence agencies.

2. Establish Democratic Control and Oversight

Hand in hand with greater transparency must come more rigorous oversight. While the precise features of oversight are specific to the historical and institutional experience of each country, it is clear that current oversight mechanisms in every nation must be rethought. The principle of national control—compelled by democratic accountability—should guide the development of new mechanisms. To counter agencies' temptation to use networks to subvert democratically determined policy, standards of legality and propriety of intelligence cooperation must be decided and enforced at the national level.[263] Each democratic state should institutionalize a regular reassessment of the costs and benefits of intelligence relationships with its partners.[264] Decisions should be made by elected officials, instead of a closed group of professionals who are largely insulated from the demands of their constituent publics or, worse, a group of foreign intelligence officials who make changes in policy through their influence on domestic intelligence services.[265] Such oversight mechanisms will contribute to, rather than detract from, the effectiveness of intelligence services and ensure that engagement in transnational networks advances the protection and promotion of democracy.

Clear statutory permissions and limitations, as Section a sets out, are imperative to proper oversight and democratic involvement in the transnational activities and connections of agencies. So too is budgetary control, as Section b argues.

a. Set Clear Statutory Authority and Limitations on Intelligence Cooperation

The lack of democratic involvement in setting clear statutory permissions and limitations must be remedied. The rule of law demands that no intelligence agency be established in secrecy and that its legislative mandate, limitations, funding

261. Liaropoulos, *supra* note 2, at 11–12.

262. LAQUEUR, *supra* note 90, at 231 ("[B]ecause the work of intelligence has always proceeded at least somewhat in the shadows, open recognition is seldom heard . . . there has been little encouragement and many public attacks for U.S. intelligence.").

263. GILL & PHYTHIAN, *supra* note 79, at 152 ("[A] legal framework for security intelligence is a necessary, but not a sufficient, condition for democratic oversight."). *See also* Ottawa Principles, *supra* note 191, at 9.1 (setting forth a monitoring regime for security intelligence activities that focuses on the effectiveness, propriety, legitimacy, and accountability of intelligence activities).

264. RICHELSON & BALL, *supra* note 12, at 307 ("As the Australian Royal Commission on Intelligence and Security found in 1977, 'We . . . need constantly to re-assess the benefits to Australia from intelligence relationships with other countries against the costs.'").

265. JOHNSON, *supra* note 35, at 95.

sources, and oversight mechanisms be public.[266] As compared to professional standards that currently regulate transnational networks, legislation and formal democratically approved agreements have the advantage of clarity and precision. They would focus expectations and set forth proscribed, permitted, and required behavior.[267]

Through legislation, domestic legislatures could play a significant role in better evaluating the costs and benefits of intelligence agencies' associations. They could ensure that intelligence sharing networks respect basic human values and form part of long-term, well-functioning strategy to deal with transnational threats. Such legislative measures have been enacted in the past, but have suffered from inconsistent application and fallen into desuetude. In the 1960s and 1970s, the CIA's training of foreign partners in countersubversion, counterguerilla, and intelligence gathering techniques often increased these foreign entities' capacity for repression.[268] The U.S. Congress responded with a prohibition on the provision of U.S. funds and support to any internal security service, police, or law enforcement.[269] This law likely went too far. Some support, especially to security services in emerging democracies, can improve the human rights practices of those services. Nevertheless, the brutality of many current intelligence partners calls for legislative involvement to minimize potential complicity in rights violations and to ensure effective foreign policy. Legislative dialogue would take into account the panoply of foreign policy goals and would consider international and national legal limits. It would therefore be a promising starting point to reduce intelligence networks' potential for complicity in violation of rights and repression of democracy.

Legislatures in liberal states should require intelligence agencies to vet their partners, weigh the potential for abuse against a clearly articulated benefit of cooperation, and advance professionalism and humane treatment through their support to foreign counterparts. The United States requires vetting to prohibit funding or association with known human rights violators, but applies the policy inconsistently; the policy also does not apply to the CIA's funding of foreign intelligence partners—leaving a gaping hole in enforcement.[270] By establishing

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266. Intelligence Bill of Rights, *supra* note 189, para. 2 ("Intelligence services must be established pursuant to duly enacted legislation by a democratically elected government. The establishment of the agency, its mandate, its funding sources and the nature of its oversight must be made part of the public record.").

267. *See* BIRKINSHAW, *supra* note 69, at 33 (observing that Canada's Commission of Inquiry on the Royal Canadian Mounted Police concluded that "[t]he agency's activities in relation to security and its responsibilities should be defined in statute and not 'diffuse and ambiguous' sources arising as they did from a 'melange of Cabinet directives, ministerial correspondence and unstated RCMP assumptions'"). Within Western democracies, these should include measures to ensure appropriate levels of privacy protection not be undermined by transnational networks. *See* Ottawa Principles, *supra* note 191, at 8.2.5, 8.3; U.S. DEP'T OF JUSTICE, *supra* note 194, at 3–4 (discussing importance of agents' adherence to and understanding of privacy restrictions).

268. Jones et al., *supra* note 68, at 11.

269. *Id.* at 11. Though still in effect, this law has been rendered toothless by widespread waivers and exemptions. *Id.*

270. *Id.* at 15; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-850, SECURITY ASSISTANCE: LAPSES IN HUMAN RIGHTS SCREENING IN NORTH AFRICAN COUNTRIES INDICATE NEED FOR FURTHER OVERSIGHT (2006) (concluding that human rights vetting was not done or was insufficient when counterterrorism training and equipment were provided to security forces in Algeria, Morocco, and Tunisia); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-793, SOUTHEAST ASIA: BETTER HUMAN RIGHTS REVIEWS AND STRATEGIC PLANNING NEEDED FOR U.S. ASSISTANCE TO FOREIGN SECURITY

proper vetting procedures, legislatures could set uniform guidelines and clarify the criteria agencies should use to evaluate partners.[271] Specific to intelligence sharing, legislatures in democratic states should seriously consider requiring, as Canada does, a case-by-case evaluation and a finding that the disclosure to a service of a government that violates rights "is justified by Canadian security or law enforcement interests . . . can be controlled by specific terms and conditions; and does not have a negative human rights connotation."[272] With consistent national oversight and statutory control, some of the excesses of involvement in transnational intelligence networks might be reduced.

Domestic oversight mechanisms will be insufficient to counter all the abuses and inefficiencies in intelligence networks. These oversight mechanisms will be biased toward the protection of citizens, sometimes to the detriment of the interests of non-citizens affected by the activities of intelligence agencies. They also will not exist in the many states without robust democratic systems, with the result that their agencies' international cooperative arrangements will go unchecked.

These oversight deficits may call for an international or transnational monitoring body. Slaughter suggests that once aware of networks of government agencies, legislators will "expand their oversight capacities and develop networks of their own."[273] Within close-knit arrangements like the UKUSA network, some cooperative oversight body might be plausible even if subject to more executive than legislative control. It certainly would present an interesting and possibly more effective way to regulate international networks.[274]

Already, some small measure of contact between legislatures has resulted from increasing awareness of intelligence agency network relations. For example, the U.K. oversight body, the Intelligence and Security Committee, "takes part in international liaison and exchanges, both by visiting oversight agencies abroad and receiving such visits (these have included many European and former Eastern bloc countries, the United States, and the other Commonwealth states)"; it also conducts many visits a year to agencies' premises to examine their functioning.[275] Similarly, in response to requests from Poland and Argentina during their transitions to democracy, the U.S. Senate Select Committee on Intelligence provided assistance in creating mechanisms for legislative oversight and direction of intelligence agencies, including sending staff to those countries.[276] The Church Commission and U.S. establishment of intelligence agency oversight also influenced legislatures in other

FORCES (2005) (concluding same with regard to Philippines, Indonesia, and Thailand).

271. Jones et al., *supra* note 68, at 173 ("Congress can play a critical role by seeking to establish uniform guidelines [for vetting practices] and providing further clarification regarding the criteria executive branch agencies should use in identifying and vetting both units and individuals.").

272. COMM'N OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR: FACTUAL BACKGROUND 246–47 (2006) (paraphrasing the RCMP Operational Manual).

273. Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF., Sept.–Oct. 1997, at 183, 197.

274. Aldrich, *supra* note 2, at 53. *See generally Post Cold-War International Security Threats: Terrorism, Drugs, and Organized Crime Symposium Transcript*, 21 MICH. J. INT'L L. 655 (1999) (arguing that an international terrorism court run by the agencies of the G-8 would benefit intelligence sharing and enable coordination of standards and procedures).

275. Leigh, *supra* note 98, at 90.

276. *Searching for Answers: US Intelligence After September 11: A Conversation with Bob Graham*, HARV. INT'L REV., Fall 2002, at 40, 43.

countries to move toward increased regulation and oversight of their intelligence services.[277]

Especially within the European Union, there are calls for harmonization and more transnational or regional oversight of intelligence sharing and cooperative networks. In light of the ECHELON investigation, the European Parliament appealed to member states to draw up a common code of conduct establishing proper levels of protection against intelligence operations that would bind each national agency as to operations against anyone within the European Union.[278] It further advocated including the United States in a common code so as to provide maximum protection for EU citizens.[279] Within the European context, Björn Müller-Wille suggests a "model building on an independent oversight body composed of professional experts."[280] As he envisions it:

> [E]xperts, e.g., from national oversight bodies, could be appointed by Member States and representatives from the [European Parliament] . . . EU oversight bodies should report to their national equivalents (and through them to national parliaments), the Council and, if not to the responsible committee of the EP as a whole, at least to the five MEPs with security clearance . . . . [T]hese bodies should be responsible for ensuring that agencies act within their mandate and that they do not violate civil liberties and constitutional rights.[281]

Some form of transnational oversight, whether expert, executive or legislative, may ultimately be necessary in order to solve some of the inconsistencies and dangers particular to intelligence networks. Pre-existing networks, such as the UKUSA agreements, or regional institutions, such as the European Union, might provide a foundation for the development of such mechanisms.

b. Develop Budgetary Control

Key to democratic oversight and the prevention of intelligence agency subversion of statutory or policy limits is budgetary control. Participation in intelligence networks offers numerous benefits, but comes at a cost to democratic rule, especially when agencies receive or impart funds without democratic involvement.

Networks can prevent legislatures from exercising fiscal accountability, which is a central and, in many countries, constitutionally-mandated tool to check the executive.[282] Imagine a democratic country that attempted to limit the power of its

277. *See* Farson, *supra* note 100, at 226 (stating that within the UKUSA network, "it was not until attitudes shifted in the US, by then the alliance's leading partner, that reforms occurred elsewhere").

278. EUROPEAN PARLIAMENT RESOLUTION ON ECHELON, *supra* note 93, para. 13. *See also* Ottawa Principles, *supra* note 191, at 8.3.7 ("The UN member states should develop and adopt an international instrument affirming privacy and data protection as fundamental human rights and laying down minimum standards for protection in accordance with these principles.").

279. EUROPEAN PARLIAMENT RESOLUTION ON ECHELON, *supra* note 93, para. 14.

280. Müller-Wille, *supra* note 91, at 124.

281. *Id.*

282. Keohane, *supra* note 76, at 1132 ("Fiscal accountability describes mechanisms through which funding agencies can demand reports from, and ultimately sanction, agencies that are recipients of funding."); 9/11 COMMISSION REPORT, *supra* 186, at 410 ("When Congress passes an appropriations bill to allocate money to intelligence agencies, most of their funding is hidden in the Defense Department in

national intelligence agency by restricting funding or issues on which it can gather intelligence. Through networking with partners, however, an agency could escape these funding limits—expanding its available resources and areas of interest. Even more problematically, the intelligence service could receive money or equipment in return for network cooperation, which if kept from legislators could allow it to become self-funded and more powerful than the people, through their legislators, intended.

This may seem far-fetched, but it is not unprecedented. For instance, until the 1990s, ninety percent of the budgets of the Norwegian Secret Services came from the United States and NATO without public or parliamentary knowledge.[283] Similarly, the National Reconnaissance Office, a U.S. military intelligence agency, whose existence was only publicly disclosed in 1994, accumulated a $4 billion slush fund of appropriations without congressional knowledge.[284]

Oversight mechanisms should therefore take into account funds received from partners. With regard to large intelligence agencies which sometimes fund extremely repressive partners, national overseers should be aware of how appropriations are being dispensed. Under the current system, many countries' budgets obscure the most basic facts regarding the amount of funds available and how they are spent; intelligence funds often simply "disappear" in the defense budget.[285] In the United States, the 9/11 Commission advised Congress to "pass a separate appropriations act for intelligence, defending the broad allocation of how these tens of billions of dollars have been assigned among the varieties of intelligence work."[286] In this way, overseers could limit improper funding of illiberal regimes.

Budgetary control can be remarkably successful. As the former U.S. Director of Central Intelligence Colby remarked, in order to convince the CIA to abandon a plan, "an [Intelligence] Committee chairman needs only to say to the DCI at the end of the briefing: 'Write down in your notebook $100 million, because—if you go ahead—that is what is coming out of your CIA budget next year.'"[287]

### *C. Rely on and Bolster Law Enforcement Intelligence*

Due to the persistent human rights and democratic accountability problems manifested by intelligence networks, the best way to counter transnational crime, ensure accurate information, and reduce rights violations is to improve information

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order to keep intelligence spending secret."). James Bamford has been quoted as saying that "[b]ecause the issue is hidden under heavy layers of secrecy, it is impossible for even Congress to get accurate figures on just how much money [is being spent] and how many people are involved." Pratap Chatterjee, *Military Interrogation Training Gets Privatized*, CORPWATCH.ORG, (Mar. 7, 2007), http://www.corpwatch.org/article.php?id=11940.

283. Fredrik Sejersted, *Intelligence and Accountability in a State Without Enemies: The Case of Norway*, *in* WHO'S WATCHING THE SPIES? ESTABLISHING INTELLIGENCE SERVICE ACCOUNTABILITY 119, 121 (Hans Born et al. eds., 2005).

284. JOHNSON, *supra* note 6, at 103.

285. Müller-Wille, *supra* note 91, at 113.

286. 9/11 COMMISSION REPORT, *supra* 186, at 416.

287. JOHNSON, *supra* note 35, at 135 (quoting DCI William Colby); *accord* Müller-Wille, *supra* note 91, at 113 ("At the national level, budgetary control represents one of the most powerful means by which parliaments can influence and sanction the executive's policies.").

sharing networks for law enforcement and criminal convictions. Treating terrorist violence as a criminal act—to be handled through legal systems in accordance with the rule of law, democracy, and human rights—represents the most consistent and successful way to reduce violence and terrorist threats. Arrest and prosecution of suspects, instead of detention and torture at the hands of less reputable partners, would check abuses and engender public support. It would also involve the single most valuable tool to discern inaccuracies, mistakes, and manipulation: an adversarial process before an independent court.

1. Improve Law Enforcement Sharing Networks

Because of the benefits inherent in criminal prosecutions, the focus of the international community and national legislatures should be on improving the law enforcement networks, which link police, prosecutors, and judges.

With regard to transnational threats and actors, the primary approach has long been law enforcement. Terrorist organizations generally rely on criminal acts for their financing; criminal prosecution for lesser crimes, therefore, offers a mechanism to disrupt terrorist activities and turn would-be terrorists into witnesses against higher-ups.[288] Successful investigation and prosecutions of these crimes have long demanded regular contact among law enforcement agents.[289] As a result, police and law enforcement intelligence agencies typically have relied on close and often long-standing connections to their counterpart agencies to counter transnational threats.[290] Only after the end of the Cold War did intelligence professionals, in an attempt to remain relevant, begin to take over the field.[291]

Prior to 9/11, law enforcement was effective against suspected terrorism. Intelligence and law enforcement officials jointly operated against transnational crime, including terrorism. U.S. intelligence and law enforcement (primarily the CIA and FBI) routinely targeted leaders of terrorist groups together. In the context of their "rendition to justice" program, the CIA used connections to foreign intelligence services to coordinate the arrest of terrorists and hand them over to the FBI for prosecution in U.S. courts.[292] Immediately after 9/11, states and their respective agencies worked to improve law enforcement intelligence sharing. Through informal

288. JOHN R. WAGLEY, CONG. RESEARCH SERV., RL 33335, TRANSNATIONAL ORGANIZED CRIME: PRINCIPAL THREATS AND U.S. RESPONSES 11–12 (2006), *available at* http://www.fas.org/sgp/crs/natsec/RL33335.pdf.

289. MALCOLM ANDERSON, POLICING THE WORLD: INTERPOL AND THE POLITICS OF INTERNATIONAL POLICE CO-OPERATION 162 (1989). *See also* GILL, *supra* note 2, at 28 ("[I]n recent years law enforcement agencies have come to view 'serious' crime as increasingly transnational and to exchange information and techniques with foreign agencies."). *See generally* INTERNATIONAL POLICE COOPERATION: A WORLD PERSPECTIVE (Daniel J. Koenig & Dilip K. Das eds., 2001).

290. Heymann, *supra* note 110, at 14 (noting that "[p]olice agencies have a greater tradition of sharing information across borders" than intelligence agencies).

291. *See* RICHARD A. BEST, CONG. RESEARCH SERV., RL 30252, INTELLIGENCE AND LAW ENFORCEMENT: COUNTERING TRANSNATIONAL THREATS TO THE US 1 (2001), *available at* http://www.fas.org/irp/crs/RL30252.pdf.

292. MARGARET SATTERTHWAITE & ANGELINA FISHER, CTR. FOR HUMAN RIGHTS & GLOBAL JUSTICE, N.Y. UNIV. SCH. OF LAW, BEYOND GUANTANAMO: TRANSFERS TO TORTURE ONE YEAR AFTER RASUL V. BUSH 9–11 (2005), *available at* http://www.chrgj.org/docs/Beyond%20Guantanamo%20Report%20FINAL.pdf. *See also* HUMAN RIGHTS WATCH, *supra* note 155, at 4 ("During the decade prior to 1998, the U.S. government used extraordinary rendition to bring 13 terrorist suspects to the United States to stand trial on criminal charges.").

MOUs and formal agreements, states bolstered existing mechanisms of exchange, such as Interpol and Europol.[293] States also concluded mutual legal assistance and recognition treaties in order to alleviate some of the difficulties in arrest and extradition of terrorist suspects.[294] Many experts still believe "a more coordinated law enforcement and intelligence approach would better combat both international crime and terrorism."[295] As they did in the past, liberal democracies could harness the connections of their intelligence agencies to help rather than hinder criminal prosecutions. To encourage the arrest, prosecution, and conviction of perpetrators of terrorism, intelligence should be "preferably produced in a way that allows it to be exploited as evidence," and law enforcement officials should use the tools at their disposal, such as witness protection programs, to protect those intelligence sources that might be endangered.[296]

Aligning intelligence and law enforcement work is no easy task,[297] but the conclusion that intelligence should automatically trump law enforcement is by no means the logical one. Prosecution in civilian criminal courts undeniably exacts cost and effort, requiring officials to assemble evidence, meet evidentiary thresholds, and locate and arrest perpetrators abroad.[298] Nevertheless, most liberal democracies are equipped with criminal statutes applicable to terrorist acts committed at home and abroad. As a general matter, they boast successful records of prosecuting terrorist acts and other transnational crimes.[299] Although some fear that court procedures will reveal classified information and pose risks to intelligence sources and methods,[300] courts are adept at finding creative solutions to protect information while allowing for an effective defense. Legislatures also can and have enacted statutes to protect classified information while maintaining the integrity of criminal proceedings.

2. Benefits of Law Enforcement Intelligence and the Involvement of Courts

Though affected by some of the same problems as intelligence cooperation, law enforcement networks benefit from greater transparency and the involvement of courts. The involvement of courts has several distinct advantages. It advances Western intelligence's interests in accuracy and the pursuit of truth, which facilitates

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293. WAGLEY, *supra* note 288, at 13 (discussing various mechanisms for exchange of criminal information transnationally). *See also* Jorg Monar, *Anti-Terrorism Law and Policy: The Case of the European Union*, *in* GLOBAL ANTI-TERRORISM LAW AND POLICY PAGE, 425–30 (Victor V. Ramraj et al. eds., 2005) (analyzing the law enforcement cooperation mechanisms adopted within the EU, including Europol).

294. Council Directive 9153/03, Agreements on Extradition and on Mutual Legal Assistance, 2003 O.J. (L181).

295. WAGLEY, *supra* note 288, at 11.

296. Müller-Wille, *supra* note 2, at 19.

297. Gregory F. Treverton, *Terrorism, Intelligence and Law Enforcement: Learning the Right Lessons*, 18 INTELLIGENCE & NAT'L SECURITY 121, 122 (2003) (declaring a fundamental disconnect between the intelligence culture and the law enforcement).

298. Bay, *supra* note 20, at 356–57 (describing several difficulties with criminal prosecution).

299. Heymann, *supra* note 156, at 451 (noting the success of Department of Justice prosecutions for terrorism); Richard Falk, *Human Rights: A Descending Spiral*, *in* HUMAN RIGHTS IN THE 'WAR ON TERROR' 225, 236–37 (Richard Ashby Wilson ed. 2005); *see also* Mark A. Drumbl, *Victimhood in our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries*, 81 N.C. L. REV. 1, 73 (2002).

300. Bay, *supra* note 20, at 357.

the protection of democratic states, a task at the heart of these agencies' missions. It also tempers the impulse to rely on illiberal partners to extract information through coercive tactics. Even if the safeguards to prohibit the use of coerced information proposed in previous sections were adopted, one could imagine that an agency might still receive, use, and forward intelligence that has been obtained in violation of human rights law.[301] The best way to reduce this potential is to facilitate challenges to the information. Criminal trials afford the affected individual the means to challenge the credibility, reliability, and accuracy of information. The rights to present a defense, to confront one's accusers, to protect against self-incrimination, and to assistance of counsel reduce the risk of error and incidence of government wrongdoing.

Anecdotal evidence from post-9/11 counterterrorism efforts indicates the importance of these procedural safeguards. A U.K. court review of the detention of several individuals found that MI5 had relied on very weak evidence, and falsely claimed that weapons had been found in order to detain them.[302] The court's involvement also enhanced MI5's accuracy. After the proceedings revealed that "the purpose behind a group of Muslim men's visit to Dorset had not been to elect a terrorist leader [as MI5 had asserted] but to get away from their wives for the weekend," MI5 withdrew its assessment of their dangerousness.[303]

In the United States, courts played a similar role. In one case, intelligence officers and prosecutors were willing to accept intelligence and witnesses provided by a Russian agency indicating a U.S. citizen was a well-known terrorist financier. The information turned out to be utterly unreliable as a case of false identity.[304] Yet only because the individual concerned was prosecuted in a court of law did the falsity of this information come to light.

Court proceedings lessen the risk of Western involvement in or reliance on coerced evidence, inherent in cooperation with less-reputable partners, by exposing wrongdoing and improprieties. For example, a U.S. court uncovered allegations of torture when Wang Zong Xiao, a defendant arrested and charged in China, came to the United States to testify against other defendants and recanted his confession, claiming coercion.[305] Similarly in Britain, an MI5 officer admitted in court that MI5 possibly assessed evidence obtained through torture as reliable and that administrative agencies likely relied on that evidence.[306] By creating incentives for Western intelligence to demand high professional and ethical standards from their intelligence partners, participation of courts may generate more credible, efficient intelligence exchange against transnational threats.

Court proceedings help ensure that the right person is subject to sanctions for wrongdoing. Interrogation by intelligence officials can subject individuals to the

301. Müller-Wille, *supra* note 91, at 108.

302. Mark Phythian, *Still a Matter of Trust: Post-9/11 British Intelligence and Political Culture*, 18 INT'L J. OF INTELLIGENCE AND COUNTERINTELLIGENCE 653, 669–70 (2005). Among the intelligence that MI5 relied upon was the observation that the detainees were "excessively security conscious" while shopping. *Id.*

303. *Id.* at 669.

304. *Id.*

305. Amann, *supra* note 68, at 557–58 ("The desire to proceed with the joint effort seemed to have blinded the United States prosecutor to earlier indications that the confession might have been coerced and unreliable.").

306. AMNESTY INTERNATIONAL, *supra* note 145, at 23.

impossible situation of having to disprove an allegation, in many countries under the threat of torture. By contrast, criminal procedures place the burden on the government to make a case, permit the defendant to engage in discovery, and require disclosure of exculpatory information known to or in the possession of the government. Whereas the current transnational system which errs by not prosecuting those who have committed violent acts and by detaining innocent people who have not, criminal procedures aim to convict the guilty and release the innocent, in the best interest of Western states and their intelligence agencies.

Accuracy—getting the right guy—has a better outcome both in terms of the reputation of liberal democracies and of the promotion of the rule of law in our partner nations. The involvement of courts bestows counter-terrorism efforts and the agencies that implement them with greater legitimacy and public support. By upholding the rule of law, trials give the countries involved moral legitimacy and encourage the development of international legal norms to deal with terrorism.[307] Their capacity for verification portends some measure of quality control, which could remedy certain irrationalities in current intelligence gathering and sharing arrangements.

Although this discussion has focused largely on the use of courts independent of the executive, certain administrative procedures might also be developed to permit challenges to and correction of inaccurate intelligence information and to trigger investigation of possible wrongdoing or statutory violations through intelligence networks.[308] Some states have already developed an administrative right for redress of abuses produced through improper intelligence gathering. The United Kingdom instituted a tribunal where a person can file complaints regarding actions taken by or on behalf of the intelligence's services with regards to him, his property, or communications.[309] Similarly in Australia, a Security Appeals Tribunal, which has a high-level of security clearance, provides a forum for complaints of illegal intelligence activity.[310] In addition, an Inspector-General of Intelligence and Security acts as an ombudsman for the public and has the power to demand information, examine the records of departments, and investigate complaints about the propriety and accuracy of information gathered.[311]

International tribunals present another intriguing alternative. Some contend that trials before an ethnically and nationally diverse panel of judges offer the most appropriate forum for criminal prosecution of transnational crimes.[312] International tribunals have the comparative advantage of involving the global public, standardizing cooperation and punishment, and enhancing legitimacy of

307. Bay, *supra* note 20, at 355–56.

308. *See* Intelligence Bill of Rights, *supra* note 189, para. 10 (advising that "[c]itizens and resident aliens who believe that their rights were violated by intelligence agencies . . . be able to apply to the intelligence agency concerned for access to information held by the state and or such agency about them").

309. BIRKINSHAW, *supra* note 69, at 47.

310. *Id.* at 54.

311. *Id.* at 60–61, 242.

312. Drumbl, *supra* note 299, at 2; *see generally* Laura A. Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407 (2002) (arguing in favor of an international process for terrorism prosecutions).

counterterrorism efforts and factual narratives developed at trial.[313] Laura Dickinson argues that international trials "could help to strengthen the needed intelligence-sharing networks and could help to provide a framework for screening sensitive information that would have greater legitimacy than a purely U.S.-run process." Accordingly, Muslim states might more willingly extradite suspects and provide full cooperation.[314]

Whether national or international, judicial or administrative, court proceedings conducted with respect for due process and individual rights should diminish the affinity of many civilians for terrorist groups and strengthen resolve against such groups. The criminal process establishes a historical record of events and exposes evidence of wrongdoing, which can serve to dissipate terrorists' cult status.[315] Perhaps the greatest value is that "[l]aw enforcement, with its focus on the illegal act itself, removes the temptation to try to judge between just and unjust motivations, legitimate and illegitimate concessions, worthy and unworthy political causes."[316]

## CONCLUSION

If anything is certain in the murky world of intelligence collection, it is that intelligence sharing will continue. Though the partners and the level of sharing may change, intelligence sharing will remain an indispensable component of any effective strategy against transnational threats. But, as this Article has shown, intelligence sharing networks must not remain as they are. As they function now, these networks strain the principles of democracy and accountability. They create ample opportunities for even the most professionalized agency to subvert international and national legal restraints through collusion with network partners, and resulting in untold human rights abuses. More fundamentally, the operation of intelligence sharing networks challenges our democratic system, eviscerating notions of national jurisdiction and traditional mechanisms of managing intelligence agencies.

Reconciling the necessity of transnational cooperation and the constraints of liberal democracy should therefore be a top priority for national executives, legislatures, and international bodies. Network sanctions and high professional standards, although desirable, should not be the only means to evaluate and improve intelligence cooperation. National democratic bodies, international institutions, and regional alliances all have a role to play. As implausible as it may seem, executive and legislative engagement with their counterparts in allied states may prove necessary to ensure intelligence cooperation that is effective and furthers the larger interests of Western democracies. A return to law enforcement and use of the judiciary is essential for the accuracy and legitimacy of efforts to counter transnational threats.

Without real concerted change, we will continue to see the proliferation of inaccurate information, brutal tactics, and intelligence failures due to improper information sharing. Accountability and democracy will continue to suffer. And the network arrangements of our intelligence agencies will continue to challenge our

313. Drumbl, *supra* note 299, at 13–14.

314. Dickinson, *supra* note 312, at 1448.

315. Falk, *supra* note 299, at 237–38.

316. United States Institute of Peace, The Diplomacy of Counterterrorism: Lessons Learned, Ignored, and Disputed 5–6 (Jan. 14, 2002), *available at* http://www.usip.org/files/resources/sr80.pdf.

conceptions of international law, accountability, and ultimately the role of our own state in the world.

# Reducing Reliance on Incarceration in Texas: Does Finland Hold Answers?

LILITH HOUSEMAN*

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## I. INTRODUCTION

In the 1970s, with incarceration rates in Finland four times higher than those of other Nordic countries, Finnish officials, policy makers, and criminologists came together to revise the Finnish Criminal Code and sentencing schemes, with the express goal of reducing their reliance on incarceration. Their efforts have been an unqualified success. From 1977 to 1992 incarceration rates in Finland have decreased by forty percent.

Theories of culpability in Finland do not fit comfortably into the American understanding of punishment, either on the liberal or conservative side. Liberals are startled by the Finnish belief that the criminal justice system should not take on a rehabilitative function. In contrast, Finland's deliberate rejection of general deterrence as a motivation for incarceration is counterintuitive for conservatives. "Humane neoclassicism," a policy ideology that "stresse[s] both legal safeguards against coercive care and the goal of less use of repressive measures in general," simply does not fit into the American conceptual framework when it comes to sentencing policy.[1] How then, can Finnish sentencing policy be of use in considering reforms to American, and specifically Texan, sentencing policy?

It is difficult to dispute that changes need to be made to Texan sentencing policy. Texas has one of the highest incarceration rates in the country, a country with one of the highest incarceration rates in the world. Simultaneously, the recent recession has placed even more strain on the already strained Texas Department of Criminal Justice (TDCJ), the state's prison agency.

This article explores the specific changes that have been made in Finland to reduce that country's reliance on incarceration, and whether those changes can be implemented in Texas. The article begins by examining the extent of incarceration in Texas and the cost of that incarceration. This is followed by a brief description of the historical context for sentencing reforms in Finland and basics of the Finnish sentencing structure. The next part includes an in depth analysis of those reforms in Finland that could best be implemented in Texas. Following that is an examination of the work of the Texas Punishment Standards Commission in 1993 and how their findings could have been changed and improved if they had examined some of the principles at play in the Finnish system in their work. This article then concludes with an evaluation of the political climate in Texas, and whether these changes would be politically feasible at this time.

1 Tappio Lappi-Seppala, *Penal Policy in Scandinavia*, 36 CRIME & JUST. 217, 230 (2007).

## II. PROBLEMATICALLY HIGH INCARCERATION RATES IN TEXAS

Prisons have been growing in the United States as a whole since the 1980s.[2] From 1980–1990 and again from 1990–2000, the nation imprisoned more people than it had in the entire previous century, and it was Texas's growth that drove those numbers.[3] The Texas prison expansion is the biggest the world has ever seen.[4] In 1991 the Texas state prison population was 51,700; by 1996 it had jumped to 132,400.[5]

This dramatic increase in incarceration in Texas has come at great financial cost. In 2008, $2.96 billion was allocated to the Department of Corrections.[6] That is 6.8 percent of the general funds allocated by the legislature in that fiscal year.[7] This figure has only continued to grow. General fund appropriations for corrections in Texas increased by 6.6 percent from fiscal year 2009 to fiscal year 2010, despite the ongoing recession.[8] These figures are for operating costs only and do not include construction costs.

In the state of Texas, one in every twenty-two adults is under the control of the criminal justice system in one way or another.[9] With the second largest prison system in the United States, Texas currently has more young black males in prison than in university.[10] Furthermore, this expansive prison system cannot simply be chalked up to Texas's size. In reality, this is a policy choice, expressed through sentencing decisions in individual cases, as well as through state sentencing policies. Texas sentence lengths are almost double the national average.[11]

As a result, Texas's incarceration rate is one of the highest in the country. In 2009, Texas had 649 prisoners per 100,000 residents, which was thirty-one percent higher than the national average of 447.[12] Texas cannot afford to keep incarcerating so many people. The costs, both financial and otherwise, are simply too high.

A change must be made, but this does not explain why we should look outside of Texas, much less outside of the United States, for solutions. The reason is that in

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2. VIVIEN STERN, A SIN AGAINST THE FUTURE: IMPRISONMENT IN THE WORLD 277 (1998).

3. Henry Ruth & Kevin Reitz, THE CHALLENGE OF CRIME: RETHINKING OUR RESPONSE 20, 93 (2003).

4. *See* JUSTICE POLICY INSTITUTE, TEXAS TOUGH? AN ANALYSIS OF INCARCERATION AND CRIME TRENDS IN THE LONE STAR STATE 2–3 (Oct. 2000), *available at* http://www.justicepolicy.org/images/upload/00-10_REP_TXTexasTough1_AC.pdf.

5. STERN, *supra* note 2, at 277.

6. PEW CENTER ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 41 (2009).

7. *Id.*

8. Texas Transparency, *Where the Money Goes*, http://www.texastransparency.org (follow "Search Spending by Agency" hyperlink; then compare funding data for fiscal years 2009 and 2010 for the Texas Department of Criminal Justice) (last visited Nov. 9, 2010).

9. PEW CENTER, *supra* note 6, at 42.

10. JUSTICE POLICY INSTITUTE, RACE AND IMPRISONMENT IN TEXAS, THE DISPARATE INCARCERATION OF LATINOS AND AFRICAN AMERICANS IN THE LONE STAR STATE, *available at* http://www.justicepolicy.org/images/upload/05-02_REP_TXRaceImprisonment_AC-RD.pdf.

11. TEXAS LULAC STATE EXECUTIVE OFFICE, CRIMINAL JUSTICE POLICY BRIEF 15 (Aug. 2004), *available at* http://realcostofprisons.org/materials/LULAC.pdf.

12. NAT'L INST. OF CORRECTIONS, CORRECTIONS STATISTICS FOR THE STATE OF TEXAS (2009), *available at* http://nicic.gov/features/statestats/?State=TX.

the 1970s Finland found itself in a similar situation to the one Texas is currently experiencing. Compared to other Nordic countries, Finland had extremely high incarceration rates.[13] Recognizing that it was unlikely that Finnish citizens were more prone to criminality than citizens of other Nordic countries, Finnish authorities decided to investigate reducing its incarceration rates, if they could do so without endangering citizens. Their efforts have been a success.[14]

In the mid-1960s, the United States and Finland incarcerated their citizens at about equal rates. Since then, the violent crime rate in Finland has tripled, while in the United States it has quintupled.[15] Simultaneously, Finland deliberately reduced their reliance on incarceration through many of the methods discussed in this article. As a result, the incarceration rate in Finland has been cut by more than half while in the United States the incarceration rate has more than tripled. Although many of the steps taken in Finland will not be helpful in the Texas context, this article argues that many could be implemented successfully.

## III. HIGH INCARCERATION RATES IN FINLAND AND POLICY REASONS FOR REVISING THE SENTENCING STRUCTURE

In the 1950s, the incarceration rate in Finland was four times higher than those of neighboring Nordic countries.[16] The incarceration rate in Finland in 1950 was 187 per 100,000 inhabitants, which for a Nordic country was extremely high.[17] Other Nordic countries at that time averaged about fifty prisoners per 100,000.[18]

The Finnish response to this situation was substantial. According to Patrik Törnudd of Finland's International Research Institute of Legal Policy, Finnish officials, policy analysts, and criminologists "shared an almost unanimous conviction that Finland's internationally high prisoner rate was a disgrace and that it would be possible to significantly reduce the amount and length of prison sentences without serious repercussions on the crime situation."[19] Thus began an in-depth examination of and change to the Finnish Criminal Code and sentencing laws.

From 1889 to the late 1960s, Finnish sentencing laws and the penal code were virtually unchanged.[20] This code was highly punitive, and no longer reflected the

13. Patrik Törnudd, *Sentencing and Punishment in Finland*, *in* SENTENCING REFORM IN OVERCROWDED TIMES: A COMPARATIVE PERSPECTIVE 189, 193–94 (Michael Tonry & Kathleen Hatlestad eds., 1997).

14. *Id.* at 194.

15. G. Roger Jarjoura, *Prisoner Reentry: Evidence and Trends* 9 (Oct. 1, 2003) (unpublished PowerPoint presentation) (on file with author).

16. Tapio Lappi-Seppala, *Sentencing and Punishment in Finland: The Decline of the Repressive Ideal*, *in* SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 92, 106 (Michael Tonry & Richard S. Frase eds., 2001).

17. THE NAT'L RESEARCH INST. OF LEGAL POLICY, CRIME AND CRIMINAL JUSTICE IN FINLAND 478–79 (2007), *available at* http://www.optula.om.fi/uploads/0uh9l9hp7b7w.pdf.

18. *Id.*

19. Törnudd, *supra* note 13, at 188. *See also* Jean-Paul Brodeur, *Comparative Penology in Perspective*, 36 CRIME & JUST. 49, 77 (2007) (discussing Törnudd's comment as motivated in part by Finland's renewed membership in the Nordic Council countries' alliance).

20. Lappi-Seppala, *Sentencing and Punishment in Finland*, *supra* note 16, at 92.

philosophical premise for punishment embraced by Finland in the late 1960s and early 1970s.[21] Instead, Finland chose to move in the direction of what officials termed "humane neoclassicism," which was essentially both "anti-treatment and anti-repression."[22] In 1972, a complete overhaul of the criminal code commenced and in 1981, a task force was appointed to implement the specified reforms.[23] These reforms represented a purposeful movement toward a more lenient system of sanctions, with the result being that the number of prisoners in Finland is currently half of what it was before the reforms began.[24]

The philosophy behind the revised Finnish Criminal Code is no longer punitive, nor is it rehabilitative. Instead, the emphasis is on proportionality and predictability.[25] General prevention, rather than general deterrence, is the name of the game.[26] The premise is that criminal sanctions themselves are not effective at deterrence, but rather that citizens must perceive the criminal justice system as reasonably efficient and legitimate, and this legitimacy, or lack thereof, will dictate people's actions.[27] Sentencing is based on principles of predictability, proportionality, and equality, with the express aim of reducing disparity in sentences.[28] The criminal justice system is expected to meet certain minimum requirements, namely standards of certainty and adequacy of punishment, legitimacy of procedure, and appropriateness in the scope of criminal laws.[29] Therefore, the principal aim of the system is not retribution, or justice, but the control of crime through these indirect and long-term mechanisms.[30]

Coupled with this emphasis on proportionality is an understanding of the appropriate place for discretion. In Finland, discretion rests primarily with the legislature.[31] There is no plea-bargaining in Finland, which vastly curtails the discretion a prosecutor can exercise.[32] Essentially, the prosecutor's options are to choose not to prosecute or to charge the offender by the letter of the law.[33] Courts are also severely restricted in the sentences they can mete out, and must justify any departure from the sentencing guidelines in a written memorandum that may be reviewed by a higher court.[34] Even in this instance, the court may depart down, but

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21. *Id. See also* Tappio Lappi-Seppala, *Penal Policy in Scandinavia*, *supra* note 1, at 229 (noting a dramatic disparity in sentencing, wherein one month of incarceration in Norway corresponded to three months in Finland).

22. Lappi-Seppala, *Sentencing and Punishment in Finland*, *supra* note 16, at 93.

23. *Id.*

24. *Id.*

25. Törnudd, *supra* note 13, at 190.

26. *Id.*

27. *Id.*

28. Lappi-Seppala, *Sentencing and Punishment in Finland*, *supra* note 16, at 123.

29. Törnudd, *supra* note 13, at 190.

30. *Id.*

31. Lappi-Seppala, *Sentencing and Punishment in Finland*, *supra* note 16, at 130.

32. *Id.* at 99.

33. *Id.* at 98–99 ("The prosecutor has a duty to prosecute when the required evidence of an offence and offender are at hand . . . . This rigidity is softened primarily by two elements: complainant offenses and the statutory rules of non-prosecution.").

34. *Id.* at 97.

may not depart up.[35] Although it is inevitable that the courts, prosecutors, and police officers hold some degree of discretion, "it is the task of the legislator to establish the norms that meet societal requirements and protect vital individual and collective interests."[36] The legislature's primary goal in the limitation of discretion is maintaining proportionality between the seriousness of the crime and the severity of the sanctions, as well as similarity in sentence lengths for similar offenses.[37]

In addition, there are two connected legal principles that, although not codified in the Finnish Criminal Code, have been accepted as part of the customary law of Finland: *ultima ratio* and *in dubio mitius*.[38]

> The principle of *ultima ratio* requires that the use of criminal law be restricted to the smallest justifiable minimum. Argument in sentencing should begin at the lowest level of the ladder. The judge must first consider the more lenient options. In borderline cases the principle of *in dubio mitius* applies; this principle advises the judge to choose the least restrictive option.[39]

Changes in Finnish sentencing laws have resulted in a forty percent reduction in incarceration rates from 1976–1992.[40] Meanwhile, crime rates have not changed in any way that correlates meaningfully with these changes in sentencing. Furthermore, recidivism rates in Finland are still lower than in the United States. A study was conducted in Finland in 2002 looking at all people who had been incarcerated between 1993–2001 to determine which of them had been incarcerated multiple times.[41] The study found that over half of all released prisoners returned to prison, but of those who were in prison for the first time, the majority did not return.[42] Additionally, those imprisoned for homicide or sexual offenses re-offended less often than others.[43]

Although differences in methodologies make it difficult to compare studies done in different countries, a study of 272,111 prisoners who were released in the United States in 1994 found that over sixty-seven percent were re-arrested within three years.[44] In 2001, Texas found that only twenty-eight percent of offenders were re-incarcerated within three years, but this low number (significantly lower than that

35. *Id.* at 97. *See also* Törnudd, *supra* note 13, at 190–92.

36. Lappi-Seppala, *Sentencing and Punishment in Finland*, *supra* note 16, at 131.

37. *Id.* at 98.

38. Lappi-Seppala, *Sentencing and Punishment in Finland*, *supra* note 16, at 133.

39. *Id.*

40. Stan C. Proband, *Success in Finland in Reducing Prison Use*, *in* SENTENCING REFORM IN OVERCROWDED TIMES: A COMPARATIVE PERSPECTIVE, 187, 187 (Michael Tonry & Kathleen Hatlestad eds., 1997).

41. RISE CRIMINAL SANCTIONS AGENCY, *The released from prison in Finland 1993–2001 and the re-entered*, http://www.rikosseuraamus.fi/25234.htm (last visited Aug. 4, 2010).

42. *Id.*

43. *Id.*

44. PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: RECIDIVISM OF PRISONERS RELEASED IN 1994 3 (2002), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf.

of most other states and the national average) can be attributed in large part to the dramatically longer sentence lengths in Texas than in most of the rest of the country.[45] This low figure is not as relevant as the fact that, despite lower recidivism rates, violent crime rates in Texas have continued to rise at a higher rate than the national average in either the United States or Finland.[46] With both lower incarceration rates and lower crime rates, Finland is a reasonable resource to examine in Texas's quest to reduce incarceration rates.

## IV. BASICS OF FINNISH SENTENCING STRUCTURE

Upon conviction, there are essentially four types of punishment that can be meted out under the revised Finnish Criminal Code: fines, conditional imprisonment, community service, and unconditional imprisonment.[47] There is no capital punishment in Finland.[48]

Under the Finnish statutory sentencing structure, courts must take into account "the goal of uniformity of sentencing and all grounds for increasing and decreasing the severity of the punishment."[49] There are four aggravating factors a court may consider in determining a sentence: the degree of premeditation, whether the offender committed the offense as part of a group organized with the purpose of committing crimes, if the offense was committed for remuneration, and the criminal history of the offender.[50] This last fact may only be taken into account if the previous offenses and the current offense are similar or it can be shown that the offender is "apparently heedless of the prohibitions and commands of the law."[51]

Additionally, there are three factors that a court may consider in mitigation: significant coercion, exceptional temptation, and the offender's voluntary attempt "to prevent or remove the effects of the offence or to further it being cleared up."[52]

In 2006, fifty-seven percent of all penalties imposed by the courts were fines.[53] Conditional imprisonment made up twenty-four percent, twelve percent of sentences were for unconditional imprisonment, and five percent resulted in community service.[54] One percent resulted in waiver, which is a kind of warning.[55]

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45. LEGISLATIVE BUDGET BOARD, STATEWIDE CRIMINAL JUSTICE RECIDIVISM AND REVOCATION RATES 2 (Jan. 2005), *available at* http://www.lbb.state.tx.us/PubSafety_CrimJustice/3_Reports/Recidivism_Report_2005.pdf; TEXAS LULAC STATE EXECUTIVE OFFICE, *supra* note 11, at 15.

46. TEX. PUNISHMENT STANDARDS COMM'N, FINAL REPORT: RECOMMENDATIONS TO THE 73RD LEGISLATURE 21 (1993). *See* Michel H. Tonry, *Punishment Policies and Patterns in Western Countries*, *in* SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 11 (Michel H. Tonry & Richard S. Frase eds., 2001).

47. Lappi-Seppala, *Sentencing and Punishment in Finland*, *supra* note 16, at 93.

48. The most severe sentence in Finland is a life sentence, which usually lasts between twelve and seventeen years. Lappi-Seppala, *Penal Policy in Scandinavia*, *supra* note 1, at 223.

49. Törnudd, *supra* note 13, at 192.

50. *Id.*

51. Rikoslaki [Criminal Code], Ch. 6 § 5(1)(5) (Fin.).

52. *Id.* § 6(3).

53. THE NATIONAL RESEARCH INSTITUTE OF LEGAL POLICY, *supra* note 17, at 482.

54. *Id.*

55. *Id.*

### A. *Fines*

Finland has used day fines as a form of criminal sanction since 1921.[56] A day fine is a unit of fine that is based on an offender's income. The premise is that incarceration is essentially a financial punishment because the offender is unable to work. However, a fine has the same result, without the cost to the state of incarceration. Because it is a progressive fine that is based on income, it will have the same proportional effect on the income of the offender as incarceration.

Under this system, the number of day fines is determined by the severity of the offense, with the minimum being one day fine and the maximum being 120.[57] The amount of the fine itself is based on the financial situation of the offender, usually calculated by income bracket, although other factors such as period of employment or number of children can be taken into account.[58] If a fine is not paid, it can result in imprisonment, with three day fines corresponding to one day in prison.[59]

Most fines are imposed through summary penal proceedings, known as penalty orders.[60] In 1994, the power to dispense penalty orders was taken from the courts and given to prosecutors.[61]

### B. *Imprisonment*

#### 1. Conditional Imprisonment

Conditional imprisonment is when a sentence is handed down, but it is specified as conditional, meaning that the offender will be put on probation and will only have to serve that sentence if his probation is revoked.[62] Probation can be revoked if the offender commits a new offense while on probation, at which time the original conditional sentence is enforced.[63] Sentences of up to two years may be imposed conditionally, "unless the seriousness of the offence, the guilt of the perpetrator as manifested in the offence, or the criminal history of the perpetrator requires the imposition of an unconditional sentence of imprisonment."[64] Conditional sentences generally result in probation without supervision for one to three years, although occasionally the length of probation is longer or shorter.[65] Further, the courts may

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56. Lappi-Seppala, *Sentencing and Punishment in Finland*, *supra* note 16, at 94.

57. *Id.*

58. *Id.*

59. RISE CRIMINAL SANCTIONS AGENCY, *Sentences*, http://www.rikosseuraamus.fi/16920.htm (last visited Oct. 31, 2010).

60. Lappi-Seppala, *Sentencing and Punishment in Finland*, *supra* note 16, at 94.

61. *Id.*

62. *Id.* at 94–95.

63. *Id.* at 95. *See also* Lappi-Seppala, *Penal Policy in Scandinavia*, *supra* note 1, at 224 (explaining that conditional sentences are used for "middle-range offenses").

64. Rikoslaki [Criminal Code], Ch. 6 § 9(1) (Fin.).

65. Lappi-Seppala, *Sentencing and Punishment in Finland*, *supra* note 16, at 95.

choose to impose a supplementary fine along with a conditional sentence, even if a fine is not specified as punishment for the offense in question.[66]

2. Unconditional Imprisonment

Sentences of unconditional imprisonment in Finland may be for a determinate period of time or for life.[67] If a determinate period of time is decreed, it must be between fourteen days and twelve years for a single offense and at most fifteen years for multiple offenses.[68] Although Finnish law has provisions for dangerous and violent offenders to remain in prison after their sentence is up, they are never used.[69] Most sentences of imprisonment are for a determinate period of time because life sentences are only available for murder, treason and genocide.[70] In 1991, less than one and a half percent of unconditional sentences were longer than four years.[71]

Murder, defined under the Finnish Criminal Code as homicide with at least one of four aggravating factors, requires a mandatory life sentence.[72] The aggravating factors to be considered are: premeditation, exceptional brutality or cruelty, significantly endangering public safety, or an offense committed against a public official engaged in enforcing the law.[73]

However, most individuals serving a life sentence are released after ten to twelve years.[74] Initially, release was only possible through a pardon by the President of the Republic. However, in 2006, the laws were changed such that an appellate court now reviews every life sentence after twelve years.[75]

*C. Community Service*

Community service is an option for offenders who have been unconditionally sentenced to no more than eight months of imprisonment.[76] Over the last few years, "approximately 35% of unconditional prison sentences not exceeding eight months have been converted into community service."[77] In order to qualify for community

66. *Id.*

67. *Id.* at 94.

68. *Id.*

69. Törnudd, *supra* note 13, at 190.

70. Lappi-Seppala, *Sentencing and Punishment in Finland*, *supra* note 16, at 94.

71. Törnudd, *supra* note 13, at 192.

72. Lappi-Seppala, *Sentencing and Punishment in Finland*, *supra* note 16, at 94.

73. Rikoslaki [Criminal Code], Ch. 21 § 2 (Fin.).

74. Lappi-Seppala, *Sentencing and Punishment in Finland*, *supra* note 16, at 94.

75. Rikoslaki [Criminal Code], Ch. 2c § 10 (Fin.). *See also* Criminal Sanctions Agency, *Prison Policy, Prison Regime and Prisoners' Rights in Finland*, *in* PRISON POLICY AND PRISONERS' RIGHTS, PROCEEDINGS OF THE COLLOQUIUM OF THE IPPF, STAVERN, NORWAY 317, 330 (Virva Ojanperä-Kataja ed. 2008), *available at* http://fondationinternationalepenaleetpenitentiaire.org/Site/documents/Stavern/17_Stavern_Report%20Finland.pdf.

76. Lappi-Seppala, *Sentencing and Punishment in Finland*, *supra* note 16, at 95.

77. RISE CRIMINAL SANCTIONS AGENCY, *Community Service*, http://www.rikosseuraamus.fi/16934.htm (last visited Oct. 31, 2010).

service the offender must consent to and be physically capable of carrying out the community service order.[78] The Probation and After-Care Association, at the request of the defendant, prosecutor, or the court, will prepare a suitability report to determine the offender's physical capability.[79]

The suitability report is based primarily on an interview with the offender.[80] The purpose of the interview is to determine the life situation of the offender, and his or her level of motivation for the community service.[81] The Probation Service provides its opinion on the suitability of the offender for a community service sentence.[82] Often, the reason given for a denial of the community service option is that the offender has a substance abuse problem.[83]

The imposition of a community service sentence is included in the sentencing process.[84] First, the court makes its sentencing determination in its usual way, without considering the option of community service.[85] If the offender is given an unconditional sentence of eight months or less, the court can choose to exercise its discretion to convert the sentence to community service.[86] In doing so, the court will use the conversion rate of one day in prison to one hour of community service.[87]

Community service entails unpaid work for a non-profit organization.[88] In order to ensure that the service activities are done properly, The Probation and After-Care Association supervises the offender.[89] There are no additional supervision requirements.[90] However, if the community service is not properly carried out, the court may impose a new unconditional imprisonment sentence on the offender.[91]

## V. FINNISH STRATEGIES: A MODEL FOR TEXAS

### A. *Reducing Penalties for Theft*

By the early 1970s, Finnish courts were already, independently of the legislature, imposing shorter sentences for theft offenses. Then in 1972, new definitions of theft and new punishment ranges for theft were implemented in order to decrease the rate of incarceration for theft.[92] Theft is now defined under the

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78. *Id.*

79. *Id.*

80. RISE CRIMINAL SANCTIONS AGENCY, *Suitability Assessment*, http://www.rikosseuraamus.fi/16962.htm (last visited Oct. 31, 2010).

81. *Id.*

82. *Id.*

83. *Id.*

84. Lappi-Seppala, *Sentencing and Punishment in Finland*, *supra* note 16, at 95.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. Lappi-Seppala, *Sentencing and Punishment in Finland*, *supra* note 16, at 95.

91. *Id.*

92. *Id.* at 113.

Finnish Criminal Code as the appropriation of "movable property from the possession of another" and is punishable with either a fine or imprisonment of up to eighteen months.[93]

Theft can be elevated to "aggravated theft" if the offender took property that is very valuable, caused "particularly significant loss to the victim," took advantage of the victim's helplessness or distress, used a firearm, or broke into an occupied residence in the course of the theft.[94] The punishment for aggravated theft can range from four months to four years of imprisonment.[95]

A theft "when assessed as a whole, with due consideration to the value of the property or to the other circumstances connected with the offence," may be deemed a "petty theft" and as such is only punishable with a fine.[96]

The result of these revisions was a twenty-seven percent reduction in the number of prison sentences given for theft between 1971 and 1997.[97] In 1950, the median length of imprisonment was twelve months.[98] By 1971, the median had been reduced to seven and a half months, and in 1991 it was only a little over two and a half months.[99]

This reduction in incarceration for theft raises the question: did the number of thefts in Finland increase, decrease or remain constant as a result of these policy changes? The answer, unfortunately, is not so straightforward. For example, the severity of sanctions and the number of robberies appear to have varied independently of each other.[100] Between 1950 and 1965, when the median sentence length decreased by more than a third, the number of robberies remained constant.[101] Between 1965 and 1990, on the other hand, the number of reported robberies quintupled, then decreased by a quarter, almost doubled from that, and then dropped by almost forty percent.[102] These numbers do not correlate in any meaningful way to the length of sentences imposed at that time. Instead, changes in the rate of theft offenses in Finland "appear to have been connected with the economic development of society. Periods of economic upswings have often been followed by an above-average increase in recorded theft."[103]

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93. Rikoslaki [Criminal Code], Ch. 28 § 1(1)(Fin.).

94. *Id.* § 2(1).

95. *Id.*

96. *Id.* § 3(1).

97. Lappi-Seppala, *Sentencing and Punishment in Finland*, *supra* note 16, at 113.

98. *Id.* at 114.

99. *Id.*

100. *Id.* at 119–20. This finding has been true in other contexts besides Finland. "Researchers have found little correlation between incarceration and measures of public safety such as crime rates, and to the degree that a relationship exists, it doesn't necessarily go in the right direction." Kevin Pranis, *Doing Borrowed Time: The High Cost of Backdoor Prison Finance*, *in* PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION 36, 48 (Tara Herivel & Paul Wright eds., 2007). *See also* MARC MAUER, RACE TO INCARCERATE 83 (1999) (examining the "prison-crime connection").

101. Lappi-Seppala, *Sentencing and Punishment in Finland*, *supra* note 16, at 119–20.

102. *Id.*

103. *Crime and Criminal Justice in Finland*, *supra* note 17, at 468.

It is somewhat difficult to compare incarceration rates for theft in Finland and Texas because Finland does not use the same monetary value ladder that Texas does. However, assuming that Class B misdemeanors in Texas would be the equivalent of a petty misdemeanor in Finland, the potential punishment in Texas is up to 180 days in jail, whereas in Finland the only punishment would be a fine.[104] Further, a theft that would qualify as a Class A misdemeanor in Texas is punishable by up to a year in jail, whereas in Finland the average for theft offenses is approximately two and a half months.[105]

Reducing sentence lengths for non-violent thefts is a change that could be successfully implemented in Texas, particularly in conjunction with a day fine system. Although some political pushback would be inevitable due to the number of campaigns that run on the platform of being "tough on crime," the fact that the rates of theft in Finland do not appear to have been affected by the reduction in sentence lengths is very persuasive evidence that lengthy prison sentences may be tough on criminals but not necessarily tough on crime. A public information campaign that disseminated this message, particularly in conjunction with information on the savings to tax-payers of not having to house and feed these offenders for such protracted lengths of time, would go a long way towards easing public anxiety over decreasing sentence lengths.

*B. Alternatives to Incarceration for Driving While Intoxicated*

The problem of driving while intoxicated (DWI) has received a lot of attention in the Finnish media. Finns are stereotypically heavy drinkers and Finnish society has an understandably "restrictive and intolerant attitude towards drinking and driving."[106] In response to public pressure, Finnish penalties for DWI were comparatively lengthy until the sentencing reforms of the 1970s.[107] Determined to find a way to reduce these sentences without increasing the incidence of DWI, the Finnish legislature pass three bills in 1977.[108] Punishment for DWI changed to non-custodial alternatives, the definition of drunk driving was modernized and unconditional imprisonment for DWI was replaced by conditional imprisonment, coupled with a fine.[109]

Simultaneously, the Finnish legislature reformed both the Conditional Sentencing Act and the day fine system.[110] Conditional sentences can now be

104. TX. PEN. CODE ANN. § 12.22 (West 2010) (listing the maximum confinement in jail for a Class B misdemeanor "not to exceed 180 days"). *See* Rikoslaki [Criminal Code], Ch. 6 (Fin.) (listing crimes and the sentences imposed for those crimes).

105. TX. PEN. CODE ANN. § 12.21 (West 2010) (listing the maximum confinement in jail for a Class A misdemeanor "not to exceed one year"). *See* Lappi-Seppala, *Sentencing and Punishment in Finland*, *supra* note 16, at 114 (noting that the median sentence for theft in 1991 was 2.6 months and that the post-1991 reform "caused an additional 'drop' in the already falling trend of penalties").

106. Lappi-Seppala, *Sentencing and Punishment in Finland*, *supra* note 16, at 114.

107. *Id.*

108. *Id.* at 115.

109. *Id.* at 114–15.

110. *Id. See also* Brodeur, *supra* note 19, at 75 (noting that this strategy "rest[s] on a penal culture that values criminal justice expertise and allows government experts to practice an activist top-down

imposed in combination with a fine, and day fines themselves increased.[111] This change gave judges more discretion to impose conditional sentences and fines as punishment for DWI.[112] When Chapter 6 of the Finnish Penal Code was revised to be more in line with the principle of "humane neoclassicism," the revisions gave guidance for deciding punishment and encouraged further discussions on sentencing levels.[113] DWI was the first offense to come up in these discussions which were run by judges with organizational help from the Ministry of Justice.[114]

The changes to the Finnish sentencing structure have dramatically reduced the length of DWI sentences in Finland. In the ten-year period from 1971 to 1981, the rate of offenders receiving unconditional sentences dropped from seventy percent to twelve percent.[115] Since then, conditional sentences for aggravated DWI have become the norm.[116] Under the current legislation, in place since 1977, punishment for aggravated DWI (blood alcohol level of ".12%" or above) is "at least 60 day fines or . . . imprisonment for at most two years."[117] Regular DWI charges result in either a fine or imprisonment for at most six months.[118]

As with theft, there is no rational correlation between the change in sentences for DWI and rates of conviction. Between 1975 and 1978, when the use of unconditional sentences for DWI decreased from fifty percent to twenty percent, there was no affect on the rate of DWI.[119] The rate increased in 2003 and 2004, but this "was mostly caused by the change of law concerning driving under the influence of drugs."[120] Aside from the increase caused by that change, the recorded cases of DWI have remained stable in Finland for the last ten years.[121]

Texas, like Finland, should and does take DWI very seriously. However, as shown by the example of Finland, being "tough on crime" in the context of DWI does not necessarily have to correlate to lengthy jail time. In Texas, a first-time DWI conviction is a Class B Misdemeanor[122] and earns the offender between three and 180 days in jail.[123] A system of punishment that made greater use of day fines and community service would be a much less expensive and equally effective method of punishing DWI.

approach in solving problems").

111. Lappi-Seppala, *Sentencing and Punishment in Finland*, *supra* note 16, at 115.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. Rikoslaki [Criminal Code], Ch. 23 § 4 (Fin.).

118. Rikoslaki [Criminal Code], Ch. 23 § 3 (Fin.).

119. Lappi-Seppala, *Sentencing and Punishment in Finland*, *supra* note 16, at 119.

120. CRIME AND CRIMINAL JUSTICE IN FINLAND, *supra* note 17, at 473.

121. *Id.*

122. TEX. PEN. CODE ANN. § 49.04(b) (West 2010).

123. TEX. PEN. CODE ANN. § 12.22 (West 2010).

### C. *Community Service*

The concept of community service as an alternative to incarceration was introduced in Finland in the 1990s.[124] Because the goal of introducing community service was reduction of incarceration rates, rather than rehabilitation, a two-prong test was established to qualify offenders for community service: first, the court applies normal sentencing criteria; second, if the result is an unconditional sentence, the judge may consider commuting the sentence to community service.[125] The community service option has been used in lieu of mandatory incarceration since its inception in the 1990s, and has been particularly effective at reducing incarceration rates for DWI.[126]

Community service is already employed in Texas as part of the basic conditions of community supervision.[127] Because this sentencing alternative already exists in Texas to some degree, it may be less difficult to incorporate community service as an alternative to incarceration in sentencing schemes, particularly for non-violent offenders who need to be sanctioned, but do not necessarily need to be confined at the taxpayers' expense.

### D. *Juveniles*

Finland does not have a distinct juvenile justice system.[128] There are no courts dedicated to juveniles and very few penalties designed to apply specifically to juveniles.[129] This is in large part because the prosecution of juveniles in Finland is relatively rare, as is a sentence of incarceration for a juvenile.[130]

Youth under the age of fifteen are not held criminally responsible in Finland.[131] Instead, they fall under the supervision of the child welfare and social policy organizations, which engage them in intensive support and counseling.[132] Young juveniles, those between ages fifteen and seventeen, receive mitigated sentences, in light of their reduced culpability.[133] Young offenders, under the age of twenty-one, who do end up with sentences of imprisonment, are usually released on parole after

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124. Lappi-Seppala, *Sentencing and Punishment in Finland*, *supra* note 16, at 119.

125. *Id.* at 95, 116. *See also* Lappi-Seppala, *Penal Policy in Scandinavia*, *supra* note 1, at 224 (noting that the lack of rehabilitative motive distinguishes Finland from other nations).

126. *See* Lappi-Seppala, *Sentencing and Punishment in Finland*, *supra* note 16, at 116–17.

127. TEX. CODE CRIM. PROC. ANN. §§ 42.12, 11(a)(10) (West 2010).

128. Lappi-Seppala, *Sentencing and Punishment in Finland*, *supra* note 16, at 117; Michael Tonry, *Determinants of Penal Policies*, 36 CRIME AND JUST. 1, 8 (2007).

129. Lappi-Seppala, *Sentencing and Punishment in Finland*, *supra* note 16, at 117.

130. *Id.*

131. *Id.*

132. *Id.* at 117–18. *See also* Lappi-Seppala, *Penal Policy in Scandinavia*, *supra* note 1, at 226 (referencing Finland's adoption of "youth punishment," which is run by the social welfare board and the probation service jointly).

133. Lappi-Seppala, *Sentencing and Punishment in Finland*, *supra* note 16, at 117.

serving approximately one-third of their sentence.[134] Once released on parole they are required to be under supervision until the term of their parole has expired.[135]

The Finnish criminal justice system does not play a rehabilitative role in the case of juveniles.[136] It is understood that the child welfare system much more successfully fills this role.[137] The child welfare system aids juveniles in finding jobs, finding housing, and receiving vocational training or other education.[138]

Finland has expressed a deliberate policy preference against incarcerating juveniles, Lappi-Seppala notes that "[t]he detrimental effects of closed institutions on the lives of young people have been widely acknowledged since the 1960s."[139] Until 1989, there was no juvenile code or legislation mandating that juveniles receive alternatives to incarceration as their sentence, but courts were becoming progressively less willing to impose custodial sentences on juveniles.[140] This policy preference was codified in 1989 when the Conditional Sentencing Act was revised to include a provision that permitted conditional sentences for juveniles only for extraordinary reasons.[141] Due to this policy choice and later codification, rates of incarceration of juveniles were ten times lower in 1995 than they had been in the 1960s.[142]

Again, the most important tool for making changes to the rates of incarceration of juveniles politically viable is information. There is a belief in Texas that the juveniles who are being certified as adults and given lengthy prison sentences are the most dangerous and violent, the so-called child "super-predator."[143] Placing greater restrictions on the offenses that can qualify a juvenile for certification as an adult would be a politically viable first step towards a reduction of reliance on incarceration for juveniles.

### E. *Parole*

The amount of time a Finnish prisoner must serve before becoming eligible for parole has decreased dramatically from the 1960s to today.[144] In the early 1960's, the minimum sentence a prisoner had to serve was six months.[145] It was shortened to four

134. *Id.*

135. *See* RISE CRIMINAL SANCTIONS AGENCY, *Supervision of Release Prisoners*, http://www.rikosseuraamus.fi/16933.htm (stating supervisory conditions to parole) (last visited Oct. 31, 2010).

136. Lappi-Seppala, *Sentencing and Punishment in Finland*, *supra* note 16, at 118.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. Lappi-Seppala, *Sentencing and Punishment in Finland*, *supra* note 16, at 118.

143. WILL HARRELL & TERRY SCHUSTER, OFFICE OF THE INDEP. OMBUDSMAN FOR THE TEXAS YOUTH COMM'N, MEETING THE SPECIAL NEEDS OF TDCJ'S YOUTHFUL OFFENDERS 2 (2008), *available at* http://www.tyc.state.tx.us/ombudsman/TDCJ_YOP_program.pdf. *See also* J. J. DiIulio, *The Coming of the Super-Predators*, THE WEEKLY STANDARD, Nov. 27, 1995, at 23–28 (coining the term "super-predator").

144. Lappi-Seppala, *Sentencing and Punishment in Finland*, *supra* note 16, at 119.

145. *Id.*

months in the mid-1960s, shortened again to three months in the mid-1970s, and finally reduced to fourteen days in 1989.[146] This reduction has had a dramatic impact on the length of incarcerations, and thus the number of prisoners locked up at any given time.[147]

Parole is automatically granted to first-time offenders after they have served half of their sentence.[148] This is a particularly logical decision, in light of Finnish recidivism rates, which indicate that first time offenders are significantly less likely to recidivate than those who have offended previously.[149]

Another feature of parole in Finland that distinguishes it from parole in Texas is that there are no restrictions put on the majority of parolees. As long as the parolee does not commit a new offense, he is not required to be under supervision during his time on parole.[150] This is a dramatic departure from the limitations placed on parolees in Texas.

In some cases, parolees in Finland may be required to agree to supervision as a condition of their release.[151] This is the case when an offender receives a conditional sentence and his probationary period is more than one year, or the offense was committed when the offender was under twenty-one years of age.[152] An offender may also request supervision.[153] Approximately one in five parolees are under supervision for some portion of their time on parole.[154] While under supervision a parolee is required to attend appointments and discuss his "work, housing, education, studies and financial situation."[155] He may not be under the influence of alcohol or otherwise intoxicated when he attends these appointments, although there are no restrictions on the consumption of alcohol at other times while he is on parole.[156] If the parolee fails to attend meetings or is intoxicated at a meeting he may get a written warning or his supervisor may request the police to pick him up.[157] In the case of gross violations, he may be obligated to serve between four and fourteen days of his remaining sentence.[158]

By contrast, in 2003, 10,224 parolees in Texas, approximately thirteen percent of the population on parole, had their parole revoked and were required to serve the remainder of their sentence.[159] Of these revocations, twenty-eight percent were

146. *Id.*
147. *Id.* at 118.
148. Törnudd, *supra* note 13, at 192.
149. *Cf.* RISE CRIMINAL SANCTIONS AGENCY, *supra* note 41.
150. *Cf. Supervision of Conditionally Released Prisoners*, *supra* note 135.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. RISE CRIMINAL SANCTIONS AGENCY, *Obligations of People Ordered to Supervision*, http://www.rikosseuraamus.fi/17485.htm (last visited Oct. 31, 2010).
156. *Id.*
157. *Id.*
158. *Id.*
159. LEGISLATIVE BUDGET BD., *supra* note 45, at 9.

returned to prison for technical violations of their parole.[160] The parole revocation policy should be reformed. A moderate step would be to allow parolees, whose parole has been revoked for technical violations, to serve for a brief time instead of requiring them to serve the remainder of their sentence.

### F. *Mediation*

An alternative to the criminal justice system, in the form of mediation, emerged in Finland in the 1980s.[161] However, to maintain its character as extra-governmental, mediation has not been formally integrated into the criminal justice system.[162] Mediation is never required and may only be entered into if all parties agree to participate.[163] Where an offender has successfully concluded mediation, this may be grounds for non-prosecution or waiver of sentence.[164]

Restorative justice programs such as mediation have also begun to take hold in the United States.[165] In 1994, "the Vermont Department of Corrections embarked on one of the most ambitious system-wide restorative justice initiatives."[166] Reparative Community Boards, made up of citizen volunteers, hold a dialogue with the offender and determine whether alternative options, such as victim-offender mediation or a meeting with a victim panel, would be appropriate.[167]

The TDCJ currently offers mediation for victims of violent crime, but participation in mediation does not affect sentencing or the likelihood of parole approval.[168] While there is an understandable state interest in not releasing violent criminals simply for participating in mediation, the TDCJ should consider mediation for non-violent criminals as well. In those cases, after mediating victims should be permitted to recommend early release on parole for the offender, if they choose to do so. Giving the victims a voice in the process would be an excellent way to make reduction of incarceration through mediation more politically viable.

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160. *Id.*

161. Lappi-Seppala, *Sentencing and Punishment in Finland*, *supra* note 16, at 96; Lappi-Seppala, *Penal Policy in Scandinavia*, *supra* note 1, at 227.

162. Lappi-Seppala, *Sentencing and Punishment in Finland*, *supra* note 16, at 96; Leena Kurki, *Restorative and Community Justice in the United States*, 27 CRIME & JUST. 235, at 269 (2000). *See also* Sara Sun Beale, *Interdisciplinary Perspectives on Restorative Justice: Still Tough on Crime? Prospects for Restorative Justice in the United States*, UTAH L. REV. 413, 420 (2003) (noting that despite being extra-governmental victim-offender programs handle as much as twenty percent of the caseload).

163. Lappi-Seppala, *Sentencing and Punishment in Finland*, *supra* note 16, at 96; Lappi-Seppala, *Penal Policy in Scandinavia*, *supra* note 1, at 227.

164. *Id.*

165. Mark S. Umbreit, *Restorative Justice Through Victim-Offender Mediation: A Multi-Site Assessment*, W. CRIMINOLOGY REV., 1998 at 1, http://wcr.sonoma.edu/v1n1/umbreit.html.

166. *Id.*

167. *Id.*

168. TEXAS DEPT. OF CRIM. JUST., VICTIM SERVICE DIVISION, VICTIM OFFENDER MEDIATION/DIALOGUE, http://www.tdcj.state.tx.us/victim/victim-vomd.htm (last visited Oct. 18, 2010).

### G. *Day Fines*

Instituting a system of day fines in the United States is an idea that has been greatly debated. In 1996, the Bureau of Justice Assistance within the U.S. Department of Justice prepared an extensive report detailing how day fines can be used effectively in the United States.[169] The Bureau acknowledged in its report that "[b]ecause structured fines are valued individually . . . they produce greater benefits for the criminal justice and the civic communities than other types of intermediate sanctions, particularly in regard to offender accountability, fairness, deterrence, and revenue generation."[170]

Even in Harris County, Texas, known for having the most punitive sentencing in the state, a structured fine pilot program was considered for use in the county's criminal courts.[171] The fact that Harris County has considered taking such an action should be very influential to policy makers concerned about appearing "soft on crime."

## VI. TEXAS PUNISHMENT STANDARDS COMMISSION

In 1993, Texas House Bill 93 established the Punishment Standards Commission (PSC) to examine punishment and sentencing in Texas, the costs associated with prison construction, and the variance between sentences that were handed down and actual time served.[172] Citing many of the economic concerns referenced in this article, the Punishment Standards Commission proposed thirty-one sentencing law changes as part of its recommendations.[173] Many of these recommendations are in harmony with Finnish principles of criminal justice, while about an equal number are contrary to these principles, being based on a uniquely American understanding of how the criminal justice process should operate. It would be instructive to examine the PSC's proposed sentencing reforms in order to understand what types of reforms have been considered in Texas up to this point.

### A. *The Role of Discretion in Sentencing Disparity*

The Texas Penal Code of 1973 chose a sentencing scheme that "maintained broad prosecutorial and judicial discretion."[174] One of the primary concerns of the PSC was that, due to the large number of inmates being released on parole before their sentences were completed, the parole board was given too much discretion and was undermining the decisions of judges and prosecutors.[175] They also pointed out

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169. *See generally* BUREAU OF JUSTICE STATISTICS, DEPARTMENT OF JUSTICE, HOW TO USE STRUCTURED FINES (DAY FINES) AS AN INTERMEDIATE SANCTION (1996), *available at* http://www.ncjrs.gov/pdffiles/156242.pdf.

170. *Id.* at iii.

171. *Id.* at 29.

172. TEXAS PUNISHMENT STANDARD COMMISSION, *supra* note 46, at 5.

173. *Id.* at 25–31.

174. *Id.* at 1.

175. *Id.* at 15.

that although "[r]estricting judicial discretion by legislation obviously represents the legislature's assertion of more power . . . it also tends to shift hidden discretion to prosecutors."[176]

In a state such as Texas where plea-bargaining is such an integral part of the criminal justice system, this observation by the PSC is absolutely correct. Part of the reason that Finland is able to keep discretion so firmly in the hands of the legislature is that there is no plea-bargaining. This is an option in a country like Finland, which has a population of less than 5.5 million people.[177] In Texas, which has a population of approximately 25.3 million, plea-bargaining is an essential aspect of the system.[178]

But looking beyond this practical difference, there is a fundamental difference in understanding regarding where in the process discretion ultimately ought to rest. Finland places a very strong emphasis on uniformity of sentencing. Jury sentencing, which Texas prides itself on, would not be considered appropriate in Finland. Even when examining other American sentencing schemes, differences in philosophy can be observed. For example, when the PSC investigated Oregon's grid system as an option for Texas, "[o]pponents of the grid argued that it would be incompatible with Texas's unique jury sentencing system, and feared that it would too narrowly limit the discretion of the judges and attorneys."[179] Any attempt to embrace Finnish belief in legislative discretion is nearly impossible because of the belief in the appropriate role of judicial discretion coupled with the practical realities of Texas's population. This is not necessarily a bad thing. Increasing discretion in the hands of prosecutors, courts and jurors will not necessarily correspond to greater reliance on incarceration any more than legislative discretion would necessarily correspond to less reliance on incarceration.

Allowing attorneys to tell juries the average sentence length for the offense being prosecuted would maintain jury discretion in sentencing while curtailing disparity in sentences. The attorneys could explain what they would recommend for a sentence and why. This would give jurors more information about average sentences without curtailing their discretion, since they would be able to depart upward or downward as they saw fit. This might also reduce sentence lengths if jurors were given information on alternative forms of sanctions and their effectiveness.

### *B. "Truth in Sentencing"*

The authors of the PSC Report felt very strongly that "[t]ruth in sentencing is the only way to reestablish the integrity of our criminal justice system in Texas and to restore the public's faith in that system."[180] In order to achieve this ideal of "truth in sentencing," their recommendation was that "[a]n offender's prison sentence will not

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176. *Id.*

177. STATISTICS FINLAND, POPULATION, http://www.stat.fi/tup/suoluk/suoluk_vaesto_en.html (last visited Oct. 18, 2010).

178. TEXAS DEP'T OF STATE HEALTH SERVICES, PROJECTED TEXAS POPULATION BY AREA (2010), http://www.dshs.state.tx.us/chs/popdat/ST2010.shtm.

179. TEX. PUNISHMENT STANDARDS COMM'N, *supra* note 46, at 11.

180. *Id.* at 29.

be reduced by more than twenty percent, and that reduction in sentence must reflect good time earned by the inmate's participation in education, work, and treatment programs as well as a good disciplinary record."[181]

In contrast, "truth in sentencing" appears to be of no concern in Finland. Almost a quarter of Finnish offenders will be given a conditional sentence, which they will not serve unless they re-offend during their time on probation. Furthermore, those first-time offenders who are given an unconditional sentence are automatically granted parole after half of their sentence has been completed.

In some ways, the Texan emphasis on "truth in sentencing" can be compared to the Finnish belief in predictability as a hallmark of the criminal justice system. However, the Finnish system achieves predictability without requiring that their inmates serve their full prison sentence. A first-time Finnish offender who has been given an unconditional sentence knows that he will serve exactly half of that sentence. Similarly, someone given a conditional sentence knows exactly how much time he will have to serve if he violates the terms of his probation. This type of "truth in sentencing" is achievable without as much emphasis on incarceration as the PSC puts on it.

## VII. CONCLUSION—CAN THESE CHANGES BE IMPLEMENTED IN TEXAS?

Part of the reason that the Finnish legislature was able to implement their reforms successfully, and thus decrease the country's reliance on incarceration, was the widespread support for these measures.[182] The belief, prevalent in the United States, that high incarceration rates make the public safer has not been accepted in Finland.[183] Instead, there was widespread embarrassment that Finland was incarcerating so many more people than many other countries.[184] Patrik Törnudd observed that, "[t]he decisive factor in Finland was the attitudinal readiness of the civil servants, the judiciary, and the prison authorities to use all available means in order to bring down the number of prisoners."[185]

A study was conducted in 1996 to measure the public's support of imprisonment.[186] Individuals were questioned about an appropriate sentence for a repeat burglar who is twenty-one years of age.[187] In Finland, seventeen-and-a-half percent of those surveyed were in favor of imprisonment.[188] In contrast, fifty-six

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181. *Id.* at 25.

182. Proband, *supra* note 40, at 189; Dame Sian Elias, *Blameless Babes*, 40 VUWLR 581, 589 (2009). *But see* Tapio Lappi-Seppala, *Trust, Welfare, and Political Culture: Explaining Differences in National Penal Policies*, 37 CRIME & JUST. 313, 380 (2008) (observing that "[i]n Finland, tabloids do not direct government policies, and public opinion is not a valid argument in legal discourse").

183. Proband, *supra* note 40, at 189.

184. *Id.*

185. *Id.*

186. Stern, *supra* note 2, at 314.

187. *Id.*

188. *Id.*

percent of Americans favored imprisonment for the hypothetical offender.[189] These attitudes will not change overnight, so it is essential that any steps taken to reduce reliance on incarceration be incremental.

However, these attitudes are changeable. When the public is exposed to increased information, support for incarceration has decreased.[190] Even in Texas, known for its "tough on crime" stance, studies have shown that support for incarceration is not as high as one would expect. A 1994 survey of Houston residents found that, "although three-quarters of residents saw crime as the city's greatest problem, only 38 per cent thought that spending more money on locking people up for long periods of time was the solution, compared with over half who favored spending the money on reducing poverty and keeping young people in school."[191]

The most helpful thing that could be done to make these changes politically feasible would be to engage in a public information campaign. This campaign would have two prongs. The first prong would be to emphasize that Texas's over-reliance on incarceration does not actually make the public safer. In California, a panel of federal judges has encouraged releasing non-violent offenders and technical parole violators in order to reduce overcrowding, and have articulated that release of these inmates would not endanger public safety.[192]

The ACLU expressed this principle very eloquently and coherently in a paper on Michigan's attempts to reduce reliance on incarceration. The ACLU explained:

> While it may seem obvious that locking up more people would lower the crime rate, the reality is much more complicated. Sentencing and release policies, not crime rates, determine the numbers of persons in prison. This point is illustrated by examining what happened to incarceration rates and crime rates nationally in the period from 1991–1998. This was a period in which crime rates fell but rates of incarceration continued to increase. During that time, the states that experienced below-average increases in their rate of incarceration actually experienced above-average decreases in crime. The three largest states offer useful examples: Texas experienced a 144% increase in incarceration with a 35% drop in crime rates, and California had a 44% rise in its incarceration rate with a 36% drop in crime rates. In contrast, New York saw its incarceration rate increase by only 24%, yet nonetheless experienced a drop in crime rates of 43%.[193]

The second prong of this public information campaign would be to quantify the savings to the taxpayers. The public information campaign would explicitly detail

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189. *Id.*

190. *Id.* at 315.

191. *Id.* at 315–16.

192. Coleman v. Schwarzenegger, No. 90-0520, 2010 U.S. Dist. LEXIS 2711, at *31 (N.D. Cal. Jan. 12, 2010); Solomon Moore, *California Prisons Must Cut Inmate Population*, N.Y. TIMES, Aug. 5, 2009.

193. ELIZABETH ALEXANDER, MICHIGAN BREAKS THE POLITICAL LOGJAM: A NEW MODEL FOR REDUCING PRISON POPULATIONS, ACLU/NATL. PRISON PROJECT, New York, N.Y., at 4 (2009), *available at* http://www.aclu.org/files/assets/2009-12-18-MichiganReport.pdf.

how these savings would be diverted to other programs beneficial to the community and result in an anticipated reduction in the crime rate.

A similar public information campaign took place during the work of the Texas Punishment Standards Commission. As the committees of the commission studied alternatives, "members and staff held a series of outreach hearings across the state to gather public testimony on sentencing issues. These hearings aimed to educate the public on criminal justice issues and to gauge public sentiment toward possible policy decisions."[194]

In conclusion, Texas's overreliance on incarceration has placed a heavy burden on the taxpayers and changes needs to be made. Finland is an appropriate place to turn for guidance because it has successfully reduced reliance on incarceration without endangering the public. Changes should be made in areas such as punishments for theft and driving while intoxicated, such as implementing community service as an alternative to incarceration, non-custodial alternatives for juveniles, changes in the requirements for successful completion of parole, and the implementation of monetary penalties, such as day fines. However, these changes should be made incrementally and should be accompanied by an expansive public information campaign to educate the public and to ensure support for these measures.

194. TEX. PUNISHMENT STANDARDS COMM'N, *supra* note 46, at 8.

# Googling a Trademark: A Comparative Look at Keyword Use in Internet Advertising

TYSON SMITH*

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## I. INTRODUCTION

> The act of typing a keyword into an internet search engine has become part of our culture, its results immediately familiar. The actual inner workings of how those results are provided are, it is fair to say, mostly unknown to the general public. It is simply assumed that if you ask, it shall be given to you; seek, and you shall find.[1]

These words from Advocate General Poiares Maduro of the European Court of Justice, delivered in a much-anticipated advisory opinion on the issue of keyword advertising,[2] capture the essence of an internet search. It can be argued that nearly every major brand one can think of has an internet presence in an attempt to capitalize on the potential revenue that can be generated through internet sales.[3]

Because of the internet's potent impact on the economies of countries worldwide, the issue of using trademarks as keywords in internet advertising has become an important topic and a much-litigated issue in both Europe and the United States.[4] However, in both the United States and in Europe, trademark laws were promulgated before the advent of the internet; thus, interpreting how the relevant laws bear on this issue has been a challenge for courts on both sides of the Atlantic.[5]

1. Joined Case C-236, 237 & 238/08, Google Fr. SARL v. Louis Vuitton Malletier SA (Opinion of Mr. Advocate General Poiares Maduro), Sept. 22, 2009, para. 1, *available at* http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?lang=en&num=79909077C19080236&doc=T&ouvert=T&seance=CONCL [hereinafter Opinion of Advocate General].

2. *Id.* para. 6.

3. Darren Meale, *The Online Advertising Free-riding Free-for-all*, 3 J. INTELL. PROP. L. & PRAC. 779, 779 (2008).

4. *Id.* at 780–782.

5. *See* WORLD INTELLECTUAL PROP. ORG., THE IMPACT OF THE INTERNET ON INTELLECTUAL PROPERTY LAW, para. 123 (2002) (noting that trademark provisions "are not tailored for the borderless world of the internet"), *available at* http://www.wipo.int/export/sites/www/copyright/en/ecommerce/pdf/survey.pdf.

On the European front, a dearth of relevant case law from the European Court of Justice (ECJ) construing the relevant provisions in both Directive 89/104,[6] which attempts to bring harmony among the national trademark laws, and Regulation 40/94,[7] which governs European Community trademarks in the European Union, has left national courts without much guidance on how to apply the laws when ruling on the issue of using trademarks as keywords.[8] Recently, several national courts have referred questions to the ECJ, each asking for guidance on how to interpret the Directive and the Regulation for purposes of deciding keyword cases.[9] The ECJ handed down two decisions in March 2010 in response to several of those questions.[10] While these preliminary rulings do not answer all of the questions related to applying the Directive and the Regulation to the issue of using trademarks as keywords, they are an important start both in harmonizing the law among the various member states and providing more certainty to search engines, trademark proprietors, and advertisers in the European Union.[11]

In the United States, courts have not been any more successful in providing consistent, clear guidance on the issue of using trademarks as keywords. Until 2009, the U.S. courts had been roughly split into two camps, with courts in the Second Circuit holding that use of trademarks as keywords "is not use of the mark in a trademark sense," thereby removing the potential liability of advertisers or search engines for using trademarks as keywords.[12] The rest of the country, while not necessarily setting forth a united front on all aspects of the issue, has generally found that the use of keywords does constitute a "trademark use" and has looked to whether the use of trademarked keywords leads to a likelihood of confusion.[13] However, the Second Circuit's *Rescuecom* decision in April 2009, which held that Rescuecom adequately pled that Google's use of trademarks in keyword advertising was a use as contemplated by the Lanham Act,[14] placed the Second Circuit in greater conformity with the other circuits.[15] Even with this increased uniformity, courts

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6. Council Directive 89/104, 1988 O.J. (L 40) (EC).

7. Council Regulation 40/94, 1993 O.J. (L 11) (EC).

8. *See* Martin Viefhues & Jan Schumacher, *Country Correspondent: Germany*, WORLD TRADEMARK REV., Feb.–Mar. 2009, 62, 63 (discussing the various positions that German courts of appeal have taken on the issue of using trademarks in keyword advertising).

9. *See, e.g.*, Joined Cases C-236, 237 & 238/08, Google Fr. SARL v. Louis Vuitton Malletier SA (*Google France & Google*), Mar. 23, 2010, paras. 32, 37, 41, *available at* http://eurlex.europa.eu/Lex UriServ/LexUri Serv.do?uri=CELEX:62008J0236:EN:HTML (citing the questions referred to the ECJ by the French Court of Cassation); Case C-278/08, Die BergSpechte Outdoor Reisen und Alpinschule Edi Koblmüller GmbH v. Günter Guni (*BergSpechte*), Mar. 23, 2010, para. 15, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0278: EN:HTML, (citing the questions referred to the ECJ by the Oberster Gerichtshof of Austria).

10. *Google France & Google*, paras. 1–2; *BergSpechte*, paras. 1–2.

11. *See* Max Colchester, *Adword Victory Means Pain for Brand Owners*, WALL ST. J., (Mar. 23, 2010, 5:42 PM) http://blogs.wsj.com/source/2010/03/23/google-adword-victory-will-inflict-pain-on-brand-owners (indicating that the *Google France & Google* ruling by the ECJ sheds some light on the keyword issue).

12. Merck & Co. v. Mediplan Health Consulting, Inc., 425 F. Supp. 2d 402, 415 (S.D.N.Y. 2006); *see also* Jessica A.E. McKinney, *Rescuecom Corp. v. Google Inc.: A Conscious Analytical Shift*, 95 IOWA L. REV. 281, 294 (2009) (discussing the circuit split over the issue of trademark use).

13. *See* Google Inc. v. Am. Blind & Wallpaper, No. C 03-5340 JF (RS), 2007 WL 1159950, at *2–6 (N.D. Cal. Apr. 18, 2007) (laying out the case law from various jurisdictions in the United States on the issue of using trademarks in internet advertising).

14. Rescuecom Corp. v. Google Inc., 562 F.3d 123, 124 (2d Cir. 2009).

15. Noah Shemtov, *Mission Impossible? Search Engines' Ongoing Search for a Viable Global*

around the country must still grapple with how to ultimately resolve the question of whether keyword advertising constitutes trademark infringement.

With this background in mind, this paper first briefly describes keyword advertising and how it works. Then, it lays out the legislative backdrop in the European Union that governs keyword cases, and subsequently turns to two recent preliminary rulings handed down by the ECJ in response to several questions referred to the court by France and Austria on how to interpret the relevant European legislation. It attempts to articulate the legal framework set forth by the ECJ for deciding keyword cases. The paper then outlines some of the important case law in several EU countries and discusses possible implications of the ECJ rulings. Next, the paper turns to the United States, laying out the relevant provisions of the Lanham Act, looking at the relevant case law, and trying to articulate the basic framework that U.S. courts are using to confront keyword cases. Finally, the paper broadly compares the approach taken by the ECJ with that of courts in the United States.

## II. KEYWORD ADVERTISING: HOW IT WORKS

When an internet user types words into a search engine, the search engine will typically return two sets of results. The first, "natural results," are results based on the search engine's own objective criteria, and these results display links to websites that best correspond to the terms entered into the search by the internet user.[16] The second set of results consists of paid advertisements displayed alongside the "natural" results and are chosen because the terms entered into the search by the internet user match keywords purchased by advertisers.[17] Nearly every search engine has such a paid referencing service, and the revenue generated by these sponsored ads can make up a large part of the search engines' revenues.[18] Google has its AdWords program, Windows Live Search has its Microsoft adCenter, and Yahoo! has its Yahoo! Search Marketing program.[19]

In Google's AdWords program, for example, to get an advertisement displayed in the sponsored listings in response to a Google search, an internet advertiser creates an ad consisting of a short text message and a link to the advertiser's website.[20] The advertiser can then select keywords from Google related to the advertiser's products or services and must decide the amount it is willing to pay Google each time the ad is clicked.[21] Since many advertisers may choose the same keyword to relate to their advertisement, and all of the different ads cannot be displayed at once, the advertisements will be ranked according to the price per click

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*Keyword Policy*, J. INTERNET L., Sept. 2009, at 3, 4–6 (discussing the *Rescuecom* decision and its relation to district court decisions in other circuits).

16. Joined Cases C-236, 237 & 238/08, Google Fr. SARL v. Louis Vuitton Malletier SA (*Google France & Google*), para. 22; Opinion of Advocate General, *supra* note 1, paras. 2–3.

17. Opinion of Advocate General, *supra* note 1, para. 3.

18. Meale, *supra* note 3, at 779; *see also* Greg Lastowka, *Google's Law*, 73 BROOK. L. REV. 1327, 1348 (2008) (noting that the majority of Google's revenue are generated by AdWords).

19. Meale, *supra* note 3, at 779.

20. Opinion of Advocate General, *supra* note 1, para. 10.

21. *What is Google AdWords?*, GOOGLE.COM, http://adwords.google.com/support/aw/bin/answer.py?hl=en&answer=6084 (last visited May 26, 2010).

established by the advertiser and by the number of times internet users have previously clicked on the link.[22] Based on these rankings, Google will display the created advertisement to internet users in response to an internet search using those keywords.[23] Thus, a retailer advertising shoes on the internet may select keywords such as Nike and Adidas, hoping that any time a Google search for one of these name brands is performed, its own ad will appear in the sponsored listings.

Because many online advertisers select trademarks as keywords, trademark owners are concerned that their marks are being inappropriately exploited and compromised by competitors or even counterfeiters.[24] Owners want to prevent advertisers from selecting their trademarks as keywords, and they want to keep search engines from displaying ads in response to the use of their trademarks as search terms in an internet search.[25]

## III. KEYWORDS IN THE EUROPEAN UNION

### A. *Legislative Background in the EU*

The European Union has two sets of laws that affect trademark ownership in the EU. The first is Directive 89/104 (the Directive), which was passed "to approximate the laws of the Member States relating to trade marks"[26] and functions as a framework for national trademark laws in each member state of the EU.[27] The second is Regulation 40/94 (the Regulation), which governs Community trademarks.[28] While several provisions of each are implicated in the keyword cases, the infringement provisions found in Article 5 of the Directive and Article 9 of the Regulation are principally at issue.[29]

Article 5(1)(a) of the Directive and Article 9(1)(a) of the Regulation are the so-called "double identity" provisions.[30] They provide that a trademark "proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade: (a) any sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered[.]"[31] Significantly, in order for a trademark proprietor to prevail in an action under the double identity provisions, likelihood of confusion need not be found.[32] However, the ECJ has held that in order for a trademark proprietor to

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22. Opinion of Advocate General, *supra* note 1, para. 11.

23. Shemtov, *supra* note 15, at 4.

24. Opinion of Advocate General, *supra* note 1, para. 4.

25. *Id.*

26. *See generally* Council Directive 89/104, 1988 O.J. (L 40) (EC).

27. *See id.* art. 1 (describing concern over disparities in trademark law and outlining model protections for member nations to adopt into law).

28. *See* Council Regulation 40/94, 1993 O.J. (L 11) (EC), art. 1.

29. Opinion of Advocate General, *supra* note 1, paras. 30, 33.

30. Noam Shemtov, *Searching for the Right Balance: Google, Keywords Advertising and Trade Mark Use*, 30 EUR. INTELL. PROP. REV. 470, 471 (2008).

31. *Compare* Council Directive 89/104, 1988 O.J. (L 40) (EC), art. 5(1)(a) (enumerating when the proprietor of a trademark may limit third-party use of the mark), *with* Council Regulation 40/94, 1993 O.J. (L 11) (EC), art. 9(1)(a) (stating a virtually identical provision to Council Directive 89/104, art. 5(1)(a)).

32. Joined Cases C-236, 237 & 238/08, Google Fr. SARL v. Louis Vuitton Malletier SA (*Google*

prevent the use of a mark by a third party under either of these provisions, the use by the third party must affect the functions of the trademark.[33]

Similarly, Article 5(1)(b) of the Directive and the parallel likelihood of confusion provision in Article 9(1)(b) of the Regulation provide that a trademark proprietor may prohibit the unapproved use by any third party in the course of trade of "any sign where, because of its identity with, or similarity to, the trade mark and the identity or similarity of the goods or services covered by the trade mark and the sign, there exists a likelihood of confusion on the part of the public; the likelihood of confusion includes the likelihood of association between the sign and the trade mark."[34]

Also implicated in the keyword cases in the European Union is E-Commerce Directive 2000/31 (the E-Commerce Directive).[35] While not a trademark provision, the E-Commerce Directive sets out a liability exemption for certain hosting activities of information service providers.[36] Thus, the E-Commerce Directive is relevant to search engines providing keywords to advertisers in the EU.[37]

This legislative framework provides a backdrop for how keyword issues are handled with respect to both Community trademarks and trademarks registered under national laws of the EU member states.

### B. *Preliminary Rulings from the European Court of Justice: Google France & Google and BergSpechte*

#### 1. Background of the Cases

As national courts in the European Union have tried to apply the relevant trademark provisions to keyword cases, they have produced differing results.[38] Thus, the ECJ recently announced two opinions, answering several questions referred to it by French and Austrian courts on the appropriate interpretation of these provisions in relation to keyword advertising.[39]

The first of these opinions, *Google France & Google*, answered questions referred to the ECJ by the French Court of Cassation, the highest court in France. The French court stayed the proceedings in each of three cases to refer questions to the ECJ for a preliminary ruling.[40] The questions arising out of these cases dealt with

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*France & Google*), para. 78.

33. *Id.* paras. 76–77.

34. Council Directive 89/104, 1988 O.J. (L 40) (EC), art. 5(1)(b); *see also* Council Regulation 40/94, 1993 O.J. (L 11) (EC), art. 9(1)(b) (showing that it is virtually identical to Council Directive, art. 5(1)(b)).

35. *Google France & Google*, para. 13.

36. Opinion of Advocate General, *supra* note 1, para. 34.

37. *Id.* paras. 130–31.

38. *See* Niels Lehmann, *Clear Guidelines Needed for Keyword Advertising*, MANAGING INTELL. PROP., Apr. 2008, at 2, 4–5, *available at* http://www.valea.se/upload/Pdf/MIP2008BM-Keyword Advertising -reprint.pdf (discussing keyword decisions from several EU countries).

39. *See generally Google France & Google*; Case C-278/08, Die BergSpechte Outdoor Reisen und Alpinschule Edi Koblmüller GmbH v. Günter Guni (*BergSpechte*).

40. *Google France & Google*, paras. 32, 37, 41.

the application of Article 5 of the Directive, Article 9 of the Regulation, and Article 14 of the E-Commerce Directive to the question of keyword advertising.[41]

The first of the stayed French cases pitted Louis Vuitton, one of the world's largest luxury-goods groups, against Google.[42] The two parties had been locked in a battle since 2003 over whether Google infringed upon Louis Vuitton's trademarks by providing the marks as keywords in its AdWords program.[43] At least part of Louis Vuitton's concern was that "Google offered advertisers the possibility of selecting not only keywords which correspond to Louis Vuitton's trade marks, but also those keywords in combination with expressions indicating imitation, such as 'imitation' and 'copy.'"[44] Moreover, if a consumer entered Louis Vuitton's trademarks into a Google search, advertisements for sites offering counterfeit goods were displayed as sponsored links.[45] In 2005, in a decision affirmed on appeal and eventually brought before the Court of Cassation, the French trial court found Google guilty of infringing upon Louis Vuitton's marks.[46] The French high court, in turn, referred three questions to the ECJ.[47]

In the second French case, Viaticum, a proprietor of French marks, along with Luteciel, the company that maintained Viaticum's website, also brought suit against Google for selling their marks as keywords.[48] As in the Vuitton action, Google was found liable for trademark infringement by both the trial and appellate courts, and Google again appealed to the French Court of Cassation.[49] Similarly, in the third case, an individual trademark proprietor and his licensee brought suit against Google and two advertisers who had purchased the proprietor's marks as keywords from Google.[50] After being found liable of trademark infringement, Google and the two

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41. *Id.*

42. Michele Sinner & Georgina Prodhan, *UPDATE 4-European Court Rules Google's Ad Model is Legal*, REUTERS, Mar. 23, 2010, *at* http://www.reuters.com/article/idUSLDE62L0P720100323.

43. *Google France & Google*, paras. 29–30.

44. *Id.* para. 29.

45. *Id.*

46. *Id.* para. 31.

47. *Id.* para. 32. The questions were phrased as follows:

> (1) Must Article 5(1)(a) and (b) of [Directive 89/104] and Article 9(1)(a) and (b) of [Regulation No 40/94] be interpreted as meaning that a provider of a paid referencing service who makes available to advertisers keywords reproducing or imitating registered trade marks and arranges by the referencing agreement to create and favourably display, on the basis of those keywords, advertising links to sites offering infringing goods is using those trade marks in a manner which their proprietor is entitled to prevent?
>
> (2) In the event that the trade marks have a reputation, may the proprietor oppose such use under Article 5(2) of [Directive 89/104] and Article 9(1)(c) of [Regulation No 40/94]?
>
> (3) In the event that such use does not constitute a use which may be prevented by the trade mark proprietor under [Directive 89/104] or [Regulation No 40/94], may the provider of the paid referencing service be regarded as providing an information society service consisting of the storage of information provided by the recipient of the service, within the meaning of Article 14 of [Directive 2000/31], so that that provider cannot incur liability until it has been notified by the trade mark proprietor of the unlawful use of the sign by the advertiser?

48. *Id.* paras. 35–36.

49. *Google France & Google*, para. 36.

50. *See id.* paras. 38–40 (detailing the plaintiffs' claim against Google).

advertisers successfully appealed to the French Court of Cassation.[51] In each of these cases, the Court of Cassation stayed the proceedings and referred questions to the ECJ for a preliminary ruling on the interpretation of the Directive and Regulation.[52]

The *Google & Google France* decision answered the questions of these three French cases and was passed by the ECJ on March 23, 2010.[53] Two days later, a related decision, *BergSpechte*, ruled on questions referred to it by the Austrian Supreme Court.[54] The facts of *BergSpechte* were similar to the French cases that led to the *Google France & Google* decision, except the words sold and purchased as keywords were not all identical to the plaintiff's mark,[55] Google was not a party, and the action was brought only against the advertisers who had purchased the keywords from Google.[56] The Austrian lower courts enjoined the advertisers from such purchasing based on alleged trademark infringement under Article 5(1)(a) of the Directive, and the advertisers appealed to the Austrian Supreme Court.[57] The Austrian high court in turn referred a question to the ECJ for a preliminary ruling on the interpretation of Article 5(1) in the keyword context.[58]

2. The Holdings of *Google France & Google* and *BergSpechte*

The holdings of the cases, which should be viewed together since *BergSpechte* applied and clarified some of the holdings of *Google France & Google*, are summarized below.

First, the court held in *Google France & Google* that an internet referencing service provider, like Google, that "stores, as a keyword, a sign identical to a trademark" and displays advertisements triggered by entering certain search terms into an internet search does *not* use the trademark within the meaning of Article 5(1) and (2) of the Directive and Article 9(1) of the Regulation.[59] Overall, this holding was a victory for search engines like Google that offer services such as AdWords.[60]

Second, the court held that Article 5(1)(a) of the Directive and Article 9(1)(a) of the Regulation must be interpreted to mean that a trademark proprietor *may* be able to prohibit advertisers (as opposed to search engines) from advertising, on the

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51. *Id.* para. 40.

52. *Id.* paras. 37, 41. The questions referred to the ECJ in these two cases were similar to the questions referred to the ECJ in the action between Google and Louis Vuitton. *See* Opinion of Advocate General, *supra* note 1, para. 4 (raising the issue of trademark infringement).

53. *Google France & Google*, para. 1.

54. Case C-278/08, Die BergSpechte Outdoor Reisen und Alpinschule Edi Koblmüller GmbH v. Günted Guni (*BergSpechte*), paras. 14–15.

55. *See id.* paras. 8–13. The plaintiff's mark contained, in large lettering, the word "BergSpechte," underneath which was found the phrase (in German) "Outdoor-Reisen und Alpinschule Edi Koblmüller." *Id.* para. 8. The defendant had purchased as keywords "Edi Koblmüller" and "Bergspechte" from Google. *Id.* paras. 11–12.

56. *Id.* para 2.

57. *Id.* paras. 13–14.

58. *Id.* para. 15. The questions referred to the ECJ in this case were similar to the questions referred to the ECJ by the French Court of Cassation. *See* Opinion of Advocate General, *supra* note 1, para. 20 (raising a question about Article 5(1)(a) of the Trademarks Directive).

59. Joined Cases C-236, 237 & 238/08, Google Fr. SARL v. Louis Vuitton Malletier SA (*Google France & Google*), para. 121(2).

60. *See* Colchester, *supra* note 11 (reporting that analysts predict Google "will continue to see rival companies trying to outbid each other for popular adwords").

basis of a keyword purchased from a paid referencing service which is identical with or similar to the proprietor's mark, goods or services identical to those for which the mark is registered, depending on the effect of the advertisement.[61] If an advertisement does not allow an average internet user to easily ascertain whether the goods or services to which the ad refers originate from the proprietor of the trademark, an undertaking economically connected to it, or from a third party, then the trademark proprietor may prevent such use.[62] If an average user can distinguish whether or not the goods or services advertised come from an entity connected with the proprietor, then no infringement has occurred.[63] Notably, as the court points out in the two opinions, this leads to the conclusion that the selection and use of a keyword by an advertiser does constitute trademark use as contemplated by Article 5 of the Directive and Article 9 of the Regulation.[64]

Finally, the court held in *Google France & Google* that a referencing service provider like Google may or may not qualify for an exemption from liability based on Article 14 of the E-Commerce Directive.[65] In other words, national courts must decide as a question of fact whether or not Google takes an active role in (*i.e.*, has knowledge or control of) the data which it stores related to keywords.[66] This holding, while not directly related to the keyword issue, does temper the comfort that companies like Google can take from the first holding of the court, since national courts may still find them liable based on other laws.[67]

### 3. The ECJ's Legal Framework for Analyzing Keyword Cases

To digest the effect these holdings will have on European trademark law and to compare the European and American approaches to this issue, it is helpful to analyze the framework the court used to determine the liability of those selling and buying keywords.

The threshold issue for the court in these two cases was whether use of the keywords amounted to use as contemplated by the relevant provisions.[68] The court broke the question into two component parts: (1) whether it was "use in the course of trade," and (2) whether that use was "in relation to goods or services which are identical with, or similar to, those for which that trade mark is registered."[69] In deciding the issue of use, the court also made an important distinction between

61. *Google France & Google*, paras. 75, 121(1); *BergSpechte*, paras. 41, 45. *BergSpechte* extended the holding of *Google France & Google*, which construed Article 5(1)(a) and Article 9(1)(a) with respect to identical marks, to Article 5(1) generally. *BergSpechte*, paras. 41, 45.

62. *BergSpechte*, para. 45; *Google France & Google*, para. 121(1).

63. *BergSpechte*, para. 45; *Google France & Google*, para. 121(1).

64. *Google France & Google*, para. 73; *BergSpechte*, paras. 18–19.

65. *Google France & Google*, para. 121(3).

66. *Id.*

67. *See* Sinner & Prodhan, *supra* note 42 ("National courts guided by the principles in Tuesday's ruling will also have to decide whether in fact Google, eBay and others are as passive as they appear to be in the administration of their automated services.").

68. *Google France & Google*, para. 42, 49; *BergSpechte*, para. 16.

69. *Google France & Google*, para. 49.

advertisers on the one hand and search engines providing the keyword services on the other.[70]

With regard to service providers, the keyword issue as a whole was resolved by the court's holding that a search engine does *not* use a mark in the course of trade by either offering the mark for sale as a keyword or by arranging for and displaying ads based on those keywords.[71] The court made the distinction that, although a search engine like Google is using the marks in commercial activity, it is not using the marks in its own commercial communication;[72] instead of using the marks themselves, search engines allow their clients to use the marks in the course of trade.[73] Because it found Google did not use the marks in the course of trade, the court had no need to decide if it used the marks in relation to goods or services like those for which the trademark was registered.[74]

The court arrived at a different conclusion for advertisers. First, the court held that an advertiser is using a mark in the course of trade when it selects a trademark as a keyword because the keyword is the "means used to trigger that ad display."[75] Next, the court held that use by an advertiser of a trademark as a keyword constitutes use "in relation to goods or services."[76] The court in *BergSpechte* also made it clear that this is the case even when the trademark selected as a keyword does not appear in the ad itself.[77]

After establishing that an advertiser's use of a keyword was indeed use within the meaning of the relevant provisions, the court turned to whether, in the context of Article 5(1)(a) and Article 9(1)(a) when the marks and goods are identical to those registered by the trademark proprietor, the use by the advertiser is liable to have an adverse effect on the functions of the mark.[78] If the mark and goods are not necessarily identical to those of the trademark proprietor, the question posed by Article 5(1)(b)—and inferred from Article 9(1)(b)[79]—is whether there is a likelihood of confusion created by an advertiser's use of the keyword.[80] The court punted these questions to the national courts, holding that courts in each member state must decide whether the marks fall under the double identity provision or the likelihood of confusion provision.[81] National courts must also determine whether the use of the

70. *See id.* paras. 51–53, 58–59, 121 (distinguishing the use of a keyword by a service provider from use by an advertiser).

71. *See id.* para. 121(2) ("An internet referencing service provider which stores, as a keyword, a sign identical with a trade mark and organi[z]es the display of advertisements on the basis of that keyword does not use that sign within the meaning of Article 5(1) and (2) of Directive 89/104 or of Article 9(1) of Regulation 40/94.").

72. *Id.* paras. 53–56 (distinguishing Google's use of marks in commercial activity from commercial communication by third parties).

73. *Id.* para. 56.

74. *Google France & Google*, paras. 58–59.

75. *Id.* paras. 51–52; *see also* Case C-278/08, Google Fr. SARL v. Louis Vuitton Malletier SA (*BergSpechte*), paras. 18–19 (holding the same).

76. *Google France & Google*, para. 73; *BergSpechte*, para. 19.

77. *BergSpechte*, para 19 (citing *Google France & Google*, paras. 65–73).

78. *Google France & Google*, paras. 75–76.

79. *See* Opinion of Advocate General, *supra* note 1, para. 33 ("Paragraphs 1 and 2 of Article 9 of Regulation No 40/94 are the equivalent, as regards Community trade marks, of Article 5 of Directive 89/104 . . . .").

80. *BergSpechte*, para. 22; *Google France & Google*, para. 78.

81. *BergSpechte*, paras. 24–26 (holding that while the sign in question was not identical to

mark is liable to affect the functions of the mark or whether a likelihood of confusion exists.[82]

Interestingly, the standard for whether the use is liable to affect the essential function of the mark (the function of indicating origin so as to allow a consumer to distinguish the identified goods or services from the goods and services of others)[83] is nearly the same as the standard the court must use to assess whether the use is likely to cause confusion. In assessing whether the essential function of a mark has been affected, a national court must look to whether the ad enables "normally informed and reasonably attentive internet users, or enables them only with difficulty, to ascertain whether the goods or services referred to by the ad originate from the proprietor of the trade mark or an undertaking economically connected to it or, on the contrary, originate from a third party."[84] This standard is identical to the one articulated in *BergSpechte* for determining a likelihood of confusion.[85] The court in *Google France & Google* did indicate that the protection offered by the double identity provisions is more extensive than that provided by the likelihood of confusion provisions of Article 5 and Article 9; however, that may be more of a theoretical construction than a workable distinction.[86]

In either case, it is clear that the court breaks the issue into a two-step analysis. First, the issue of use is presented—whether the use of a trademark as a keyword is use within the meaning of the relevant provisions. The ECJ decided that the use of keywords by service providers like Google was *not* use as contemplated by the provisions, and thus, Google and others cannot be held liable under EU trademark laws for selling keywords or displaying ads based on those keywords.[87] However, the court held that use by advertisers of trademarks as keywords *is* in the course of trade and in relation to goods and services.[88] Therefore, with respect to advertisers' liability, national courts can simply move past the threshold issue to the second step: determining whether an advertisement allows an average internet user, without difficulty, to ascertain whether the goods or services referenced in the ad originate from the proprietor of the trademark, from an undertaking economically connected to the proprietor, or from a third party. Because the issue of confusion will be decided by national European courts on a case-by-case basis, results are likely to remain largely unharmonious from jurisdiction to jurisdiction.[89]

Last, although the court held that service providers like Google cannot be held liable under trademark laws in the EU for providing keyword services,[90] these search engines are not wholly shielded from liability. Because the court held that an internet referencing service provider is not necessarily exempt from liability based on

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BergSpechte's mark, it was for the national courts to determine whether the same sign was similar to BergSpechte's mark).

82. *Google France & Google*, para. 88; *BergSpechte*, paras. 37, 39.

83. *Google France & Google*, para. 82.

84. *Id.* para. 84.

85. *BergSpechte*, para. 39.

86. *Google France & Google*, para. 78.

87. *Id.* para. 98.

88. *Id.* paras. 51, 55.

89. Sinner & Prodhan, *supra* note 42, at 2.

90. *Google France & Google*, paras. 105, 121(3).

Article 14 of the E-Commerce Directive,[91] EU member states may still hold search engines liable under other national laws.[92]

## IV. EU MEMBER STATES ON KEYWORD LIABILITY AND THE IMPACT OF THE ECJ PRELIMINARY RULINGS IN NATIONAL COURTS

As mentioned, while *Google France & Google* and *BergSpechte* provide some guidance to national courts deciding cases on these issues, the rulings are not likely to eliminate the disparities among member states in applying either the Directive or the Regulation to keyword issues.[93] Still, *Google France & Google* and *BergSpechte* are sure to have an impact on how national courts resolve keyword disputes. Thus, after providing relevant background by outlining some of the important case law dealing with the use of trademarks as keywords in Germany, the United Kingdom, and France, this section discusses some possible implications of *Google France & Google* and *BergSpechte* in these countries.

### A. *Using Trademarks as Keywords in Germany*

#### 1. German Case Law

The German position on keyword liability stems mainly from a decision concerning the use of a third party's trademarks in metatags[94] of a website's source code.[95] In 2006, the highest court in Germany, the Bundesgerichtshof ("BGH"), settled the issue of using trademarks in metatags when it held, under Section 14 of the German Trade Mark Act, that use of a third party's trademark as a metatag on one's own website can constitute trademark infringement regardless of whether the mark was displayed in the results of an internet search.[96]

Since 2006, lower German courts have been grappling with the question of whether the BGH's holding regarding the use of trademarks in metatags should be extended to the use of trademarks as keywords.[97] Until 2009, the BGH had not ruled on the issue, and the lower courts took several divergent approaches.[98] For example, some courts found the use of a trademark as a keyword to be comparable to use as a

91. *Google France & Google*, para. 121(3).

92. *See id.* (discussing when an internet service provider might liable under Article 14 of the E-Commerce Directive); *see also* Sinner & Prodhan, *supra* note 42, at 2 (noting that national courts will have to decide whether companies such as Google will be exempt from liability in their current administration of automated services).

93. *See* Colchester, *supra* note 11 (indicating that the *Google France & Google* ruling by the ECJ sheds some light on the keyword issue).

94. A metatag is a word or phrase in HTML computer code that identifies the subject of a webpage and acts as a hidden keyword for Internet search engines. BLACK'S LAW DICTIONARY 1011 (8th ed. 2004).

95. *See* Viefhues & Schumaker, *supra* note 8, at 62 (noting that this decision put an end to the metatags debate). The legal issues involved in metatag cases arise when a website owner embeds into the source code of its website, as a metatag, another party's trademark. *Id.*

96. Shemtov, *supra* note 15, at 7.

97. *Id.*

98. *See* Viefhues & Schumaker, *supra* note 8, at 62–63 (summarizing the different positions taken by German courts of appeal on the issue of using trademarks in keyword advertising).

metatag and consequently use as a trademark.[99] Their rationale was that an advertiser is taking advantage of a trademark's distinctiveness and thus using it in a manner that may cause consumer confusion.[100] Other courts held that, as long as ads produced by use of a trademarked keyword are clearly separated from natural results, keyword advertising does not lead to a likelihood of confusion.[101]

In 2009, however, the BGH was presented with three cases in which it had to rule on the issue of whether use of a competitor's mark or company name as a keyword is permissible.[102] The first of these cases was the *PCB* case, in which the plaintiff owned the registered mark PCB-POOL.[103] The defendant had selected the term "pcb" as a Google AdWord.[104] Because the defendant selected the keyword option for "broad match" when choosing this term, the defendant's advertisement was shown as a sponsored link even when an internet user entered the plaintiff's mark in a Google search.[105] While not ultimately deciding the issue, the BGH held that it appeared doubtful that the use of the trademark in this case constituted a relevant use of the mark since the mark did not appear anywhere in the defendant's advertisement.[106] Moreover, the court ultimately held that there could be no infringement because the mark PCB (a common abbreviation in German for "printed circuit boards")[107] was descriptive, and under German law a trademark owner cannot inhibit the use of a descriptive term.[108]

The second case, decided by the BGH in January 2009, was the *Beta Layout* decision.[109] In *Beta Layout*, the defendant in a declaratory judgment action had selected the term "Beta Layout" as a keyword in Google's AdWords program, which was a distinctive part of the plaintiff's company name.[110] The court held that, since web users can generally distinguish between advertisements and natural results, there was no risk of confusion if the search results based on the selected AdWords were displayed separately from the natural results and if the search terms (the company name, in this case) were not part of the displayed advertisement.[111] The court in this case did not refer the question to the ECJ because company names, while protected in Germany, are not protected under either the Directive or the Regulation.[112]

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99. *Id.* at 62.

100. *Id.*

101. *Id.*

102. Isabella Peiker, *Question on AdWords' Trademark Infringement Submitted to ECJ*, WORLD INTELL. PROP. REP., Apr. 2009, at 8.

103. Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 22, 2009, 32 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2384, 2009; Peiker, *supra* note 102, at 8.

104. 32 NJW 2384 (2009); Peiker, *supra* note 102, at 8.

105. 32 NJW 2384 (2009); Peiker, *supra* note 102, at 8.

106. 32 NJW 2384 (2009); Peiker, *supra* note 102, at 8.

107. Peiker, *supra* note 102, at 8.

108. 32 NJW 2384 (2009); Peiker, *supra* note 102, at 8.

109. Peiker, *supra* note 102, at 8–9.

110. Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 22, 2009, 32 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2382, 2009; Peiker, *supra* note 102, at 9. Under German law, company names enjoy similar protections as trademarks. Peiker, *supra* note 102, at 9.

111. 32 NJW 2382 (2009); Alexander Klett, *Google AdWord Advertising and German Trademark Law: Is Use of a Third-Party Trademark as a Keyword Infringing?*, INTA BULLETIN (Int'l Trademark Ass'n, New York, N.Y.), May 15, 2009, at 6–7.

112. Klett, *supra* note 111, at 7.

The last case decided by the BGH on this issue involved the registered mark BANANABAY.[113] The defendant, a competitor of the plaintiff, had selected the term "bananabay" as a Google AdWord.[114] The BGH referred a question to the ECJ, asking for guidance on whether there is trademark use as contemplated by Article 5(1)(a) of the Directive when: (1) a trademark is used as a keyword; (2) the related advertisement is displayed apart from the natural results as a sponsored link; and (3) the advertisement does not contain any references to the mark or the products sold by the trademark proprietor.[115]

In a decision on March 26, 2010, the ECJ echoed *Google France & Google* in holding that Article 5(1)(a) of the Directive should be interpreted to allow a trademark proprietor to prohibit an advertiser from using a keyword identical to the trademark without the proprietor's consent, in the context of an online referencing service, to advertise products or services identical to those for which the trademark is registered.[116] However, proprietors may only prohibit third-party use if the average internet user cannot discern, or can only discern with difficulty, whether the products or services in advertisement belong to the proprietor of the trademark, to another company economically linked to the proprietor, or, on the contrary, to a third party.[117]

While the reference by the BGH does not state how it would decide the matter, the court seems to indicate that it would follow the reasoning in *Beta Layout* (i.e., that there was no risk of confusion if the search results based on the selected AdWords were displayed separately from the natural results and if the search term were not part of the displayed advertisement).[118] According to the court, it was far-fetched to assume that internet users would associate the search term used with advertisement because AdWord ads were clearly marked as sponsored links, separated from the natural results, and made no reference to the mark in the advertisement itself.[119]

2. The Impact of the ECJ and BGH decisions on German Keyword Cases

While the BGH decisions, coupled with the ECJ decisions in *Google France & Google* and *BergSpechte*, added to the jurisprudence pertaining to German keyword issues, these cases do not dispose of the issue definitively.

First, while no search engines were party to the three BGH cases,[120] the holding in *Google France & Google* seems to dispose of the issue of search engine trademark liability.[121] However, in light of the ECJ's holding that internet referencing service

113. *See* Peiker, *supra* note 102, at 8 (summarizing the BGH's decision in *Bananabay*).

114. *Id.*

115. Case C-91/09, Eis.de GmbH v. BBY Vertriebsgesellschaft mbH (Reference for a Preliminary Ruling From the Bundesgerichtshof), Mar. 6, 2009, para. 1.

116. Case C-91/09, Eis.de GmbH v. BBY Vertriebsgesellschaft mbH, Mar. 26, 2010, para. 29, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009O0091:FR:HTML.

117. *Id.*

118. Klett, *supra* note 111, at 7.

119. *Id.*

120. *See* Peiker, *supra* note 102, at 8–9 (summarizing the *PCB, BetaLayout*, and *Bananabay* cases, which concerned competitors of the respective trademark proprietors).

121. *See* Joined Cases C-236, 237 & 238/08, Google Fr. SARL v. Louis Vuitton Malletier SA (*Google France & Google*), para. 121 (holding that the sale and display of keywords identical or similar to a

providers are not *per se* exempt from liability, German courts must determine if the search engines are liable for selling and displaying keywords identical or similar to trademarks under other domestic laws.[122]

Furthermore, *Google France & Google* and *BergSpechte* held that an advertiser does use a mark in the course of trade by selecting a keyword identical or similar to the mark; however, German courts must still determine if the functions of the mark are affected by that use.[123] Because of this, the three BGH decisions discussed above will come into play. Consider a case similar to *PCB* in which the mark selected as a keyword is descriptive. A German court would likely find that the functions of the mark are not affected by the advertiser's use because German trademark proprietors may not inhibit third-party use of a descriptive mark.[124] Moreover, if as in *Beta Layout*: (1) the designation selected is a company name protected under the German Trade Mark Act,[125] (2) the displayed advertisements are set apart from the natural results and designated as advertisements, and (3) the designation does not appear in the advertisements, then *Beta Layout* would seem to compel the German courts to find advertisers not liable for trademark infringement.[126]

Also, German courts may extend this *Beta Layout* approach beyond cases dealing with descriptive terms and find that advertisers using non-descriptive trademarks as keywords are not liable for trademark infringement. This approach would seem to be in line with *Google France & Google* and *BergSpechte* in that a German court could hold that the purchase by an advertiser of a keyword identical or similar to a trademark constitutes use, but still determine that the advertisers are not affecting the functions of the mark if the related advertisement is displayed separately as a designated sponsored link and the mark does not appear in the ad itself.[127] This would be an interesting approach since, even though the sale and display of a keyword by a search engine does not constitute use of a mark in the course of trade, the search engine still actively chooses to display keyword advertisements that would largely determine the trademark liability of advertisers who purchase trademarks as a keywords.

### *B. Trademarks and Keywords in the United Kingdom*

#### 1. Case Law in the United Kingdom

Courts in the U.K. will also be affected by the *Google France & Google* and *BergSpechte* rulings. But despite the commercial importance of keywords, courts in

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trademark by internet referencing service providers does not constitute use in the course of trade).

122. *See id.* (holding that internet referencing service providers like Google may or may not qualify for an exemption from liability based on Article 14 of the E-Commerce Directive).

123. *See id.*, paras. 51, 73, 79 (holding that use of a trademark as a keyword by an advertiser is use in the course of trade and in relation to goods and services, but that a proprietor of a trademark can prohibit such use only if it affects the functions of the mark); Case C-278/08, Die BergSpechte Outdoor Reisen und Alpinschule Edi Koblmüller GmbH v. Günted Guni (*BergSpechte*), paras. 17–20 (reaffirming this holding from *Google France & Google*).

124. Peiker, *supra* note 102, at 8.

125. *Id.* at 9.

126. Klett, *supra* note 111, at 7.

127. *Google France & Google*, paras. 51, 73, 79; *BergSpechte*, paras. 17–20.

the U.K. have considered a relatively small number of keyword cases.[128] Until 2008, the most authoritative opinion in the U.K. on trademark liability for keyword advertising was the *Reed v. Reed* decision, which dealt with pop-up advertisements.[129]

The defendant in *Reed* was an advertiser who had purchased keywords from the Yahoo! search engine, including REED, a trademark registered in the U.K. by the plaintiff.[130] As a result, the term "reed" would trigger a pop-up advertisement for the defendant's website when typed into a Yahoo! search.[131] Analyzing the case under Article 5(1)(b) of the Directive,[132] the court had no trouble answering the question of whether the use by the advertiser constituted infringement and found that "[n]o likelihood of confusion was established" since the pop-up banner advertisement did not refer to the trademark; therefore, internet users would not be confused.[133] The court also indicated in dicta that it might have reached a similar conclusion had the question been analyzed under the double identity provision, Article 5(1)(a) of the Directive, since the use of keywords was "invisible."[134]

Four years after *Reed*, the first decision in the U.K. directly exploring keyword advertising was decided.[135] *Wilson v. Yahoo!* pitted a trademark proprietor who owned a Community trademark in the name MR. SPICY against the Yahoo! search engine.[136] When the trademark owner found that a third party had selected a number of keywords containing the word "spicy," he sued Yahoo! for infringing upon his rights under Article 9(1)(a) of the Regulation.[137]

The court granted Yahoo!'s application for summary judgment and gave three reasons for dismissing the claim.[138] First, the court reasoned that the trademark had been used only by the internet user who had entered the term "spicy" into the search engine; no one else had used the mark, including the defendant search engine who had merely responded "to the use of the trade mark by the browser" by displaying an advertisement.[139] Second, even if the defendant had used the term, it had not used the claimant's mark, but merely the English word "spicy."[140] Third, even if the defendant had used the claimant's mark, it was not use as a trademark since the proprietor "is not able to prohibit the use of [the mark] . . . if that use cannot affect his own interest as proprietor of the mark having regard to its functions."[141]

A little more than a year after *Wilson*, the High Court was confronted with another keyword case in *Interflora Inc. v. Marks & Spencer plc.*[142] The claimant in the case, Interflora, operated the largest flower delivery network in the world and

128. Meale, *supra* note 3, at 782.

129. *Id.*

130. Reed Executive PLC v. Reed Bus. Info. Ltd., [2004] EWCA (Civ) 159, [5], [138] (Eng.).

131. *Id.* [2004] EWCA (Civ) 159, para. 138.

132. The corresponding provision in the U.K.'s trademark legislation is §10(1) of the Trade Marks Act 1994. *Id.* para. 14.

133. *Reed*, [2004] EWCA (Civ) 159, para. 140.

134. *Id.* para. 142.

135. Meale, *supra* note 3, at 782.

136. Wilson v. Yahoo! U.K. Ltd., [2008] EWHC (Ch) 361, [4]–[5] (Eng.).

137. *Id.* [2008] EWHC (Ch) 361, paras. 8, 31.

138. *Id.* para. 63.

139. *Id.* para. 64.

140. *Id.*

141. *Id.* para. 65.

142. Interflora Inc. v. Marks & Spencer plc, [2009] EWHC (Ch) 1095, [3] (Eng.).

was the proprietor of both Community and U.K. trademarks containing the word INTERFLORA.[143] The principal defendant, Marks & Spencer ("M&S"), one of Britain's largest retailers, admitted to purchasing keywords that included the word INTERFLORA and close variants.[144] Interflora filed for an interim injunction to stop M&S and others from using the terms as Google AdWords.[145] The court denied the injunction[146] and referred the matter to the ECJ for a preliminary ruling in August of 2009 with a list of ten questions.[147]

2. The Impact of the ECJ Opinions on Keyword Cases in the United Kingdom

The ECJ's *Google France & Google* and *BergSpechte* decisions are likely to affect the future of keyword cases in the U.K. and may alter how English courts will apply the precedents of *Wilson v. Yahoo!* and *Reed v. Reed*. For example, *Wilson* held that neither the advertiser nor the search engine used the mark, and that only the internet user who enters the phrase into a search query uses the mark under Article 9(1).[148] *Google France & Google* validates that case's holding that the search engine does not use a mark by selling a trademark as a keyword or displaying a related ad.[149]

However, *Wilson*'s holding that no one uses the mark besides the internet browser typing the term into a search should not hold up in light of the ECJ's ruling that an advertiser who selects a trademark as a keyword *does* use the mark in the course of trade and in relation to goods and services.[150] Also, the ECJ's holding that this is the case even when the trademarked keyword does not appear in the ad itself, at least with respect to the issue of trademark use, seems contrary to the reasoning in *Reed* that no trademark infringement exists when the displayed ad does not contain the mark.[151]

The ECJ rulings do leave intact and even reinforce the dicta in *Wilson* that to constitute infringement, the use of the mark must affect the functions of the mark.[152] This leaves courts in the U.K. free, with respect to advertisers, to apply the reasoning in the *Reed* dicta and find no infringement if the ad displayed does not contain the mark.[153]

143. *Id.* [2009] EWHC (Ch) 1095, paras. 3, 7, 11.

144. *Id.* paras. 4, 28.

145. *Id.* para. 99.

146. *Id.* paras. 77, 98, 100.

147. C-323/09, Interflora Inc. v. Marks & Spencer plc (Reference for a Preliminary Ruling from High Court of Justice), Aug. 12, 2009, paras. 1–10.

148. *Wilson*, [2008] EWHC (Ch) 361, para. 64.

149. *Google France & Google*, paras. 57–58.

150. *Wilson*, [2008] EWHC (Ch) 361, para. 64; Joined Cases C-236, 237 & 238/08, Google Fr. SARL v. Louis Vuitton Malletier SA (*Google France & Google*), paras. 51–52, 73; Case C-278/08, Die BergSpechte Outdoor Reisen und Alpinschule Edi Koblmüller GmbH v. Günter Guni (*BergSpechte*), paras. 18–19.

151. *Google France & Google*, para. 65; *BergSpechte*, paras. 18–19; *but see* Reed Executive PLC v. Reed Bus. Info. Ltd., [2004] EWCA (Civ) 159, para. 140 (reaching the opposite conclusion).

152. *Wilson*, [2008] EWHC (Ch) 361, para. 65.

153. *Reed*, [2004] EWCA (Civ) 159, para. 140.

### C. *Trademarks and Keywords in France*

#### 1. Keyword Case Law in France

While keyword cases arise infrequently in the U.K., French courts have considered quite a few keyword cases.[154] They have, in large measure, viewed the issue as fairly straightforward, generally finding that the use of trademarks as keywords by advertisers constitutes infringement.[155] With respect to advertisers, the Court of Nanterre,[156] the Court of Paris,[157] and the Court of Appeal of Versailles[158] all found that advertisers who selected trademarks as keywords had committed trademark infringement. In 2007, the Court of Strasbourg broke ranks when it stressed the essential function of a trademark and found no trademark infringement, but the court still held the advertiser liable based on unfair competition.[159]

French courts have not been consistent in their approach to the liability of search engines. There have been many contradictory decisions based on various legal grounds. For example, the Court of Nanterre and the Court of Versailles have both found search engines liable for trademark infringement for offering to sell protected trademarks as keywords.[160] The Court of Paris, on the other hand, found no trademark infringement, but found the search engines liable on other grounds.[161]

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154. *See, e.g.*, Viaticum & Luteciel v. Google Fr., Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Nanterre, Oct. 13, 2003, *available at* http://www.legalis.net/jurisprudence-decision.php3?id_article=1016 (deciding a case on trademark infringement); Hotel Meridien v. Google Fr., Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Nanterre, Dec. 16, 2004, *available at* http://legalis.net/breves-article.php3?id_article=1396 (ruling that infringement flows automatically under the double identity provisions); Pierre Alexis T. v. Google Fr., Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Nanterre, Dec. 14, 2004, *available at* http://www.legalis.net/jurisprudence-decision.php3?id_article=1423 (deciding on the use of a trademark keyword).

155. *See* Shemtov, *supra* note 15, at 7 (discussing keyword cases decided by French courts); *see also* Hotel Meridien v. Google Fr., Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] (ruling, with little discussion on whether the use affected the functions of the mark, that infringement follows automatically under the double identity provisions).

156. *See generally* Pierre Alexis T. v. Google Fr., Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Nanterre, Dec. 14, 2004, *available at* http://www.legalis.net/jurisprudence-decision.php3?id_article=1423.

157. *See generally* La Société Agence des Medias Numériques v. Espace 2001, Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, 3e ch., June 24, 2005, *available at* http://www.legalis.net/jurisprudence-decision.php3?id_article=1502; Kertel v. Google Fr., Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, 3e ch., Dec. 8, 2005, *available at* http://www.legalis.net/jurisprudence-decision.php3?id_article=1566.

158. *See generally* Pierre Alexis T. v. Google Fr., Cour d'Appel [CA] [regional court of appeal] Versailles, 12e ch., Mar. 23, 2006, *available at* http://legalis.net/jurisprudence-decision.php3?id_article=1613.

159. Atrya v. Google Fr., Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Strasbourg, 1e ch., July 20, 2007, *available at* http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=1995.

160. *E.g.*, Hotel Meridien v. Google Fr., Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] (finding Google liable for trademark infringement); Overture v. Accor, Cour d'Appel [CA] [regional court of appeal] Versailles, 12e ch., Nov. 2, 2006, *available at* http://www.legalis.net/jurisprudence-decision.php3?id_article=1789 (ruling against Google on issue of trademark infringement).

161. Citadines v. Google Fr., Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Oct. 11, 2006, *available at* http://legalis.net/breves-article.php3?id_article=1765 (deciding no trademark infringement existed but finding Google liable under civil law).

The Court of Strasbourg, expressing yet another view, is the only French court to exonerate Google from all trademark liability.[162]

2. Questions Referred to the European Court of Justice

The ECJ's keyword rulings are likely to have an impact in France since the *Google France & Google* decision was in response to questions from the French Court of Cassation.[163] However, the tendency of French courts to hold advertisers liable for trademark infringement is not likely to change as a result of the ruling, as *Google France & Google* and *BergSpechte* simply reinforce that an advertiser's selection of a trademark as a keyword is use as contemplated by the relevant provisions and leaves national courts the discretion to decide whether or not the use affects the functions of the mark.[164] While the ECJ decisions may potentially result in fewer cases being brought against Google and other search engines in the keyword business, the courts may still find them liable under other provisions of the French civil code.[165] Thus, the various viewpoints of the French courts on search engine liability may not be brought into harmony by the recent decisions.

## V. THE UNITED STATES

### A. *Legislative background*

The Lanham Act is the federal trademark statute in the United States.[166] Sections 32, 43, and 45 are the provisions relevant to the keyword issue.[167] Section 32 imposes liability for "use in commerce" of another's registered mark without the registrant's consent if that use "is likely to cause confusion, or to cause mistake, or to deceive,"[168] and Section 43(a) gives similar protection to unregistered marks.[169] Section 45 defines "use in commerce" as "the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark."[170]

162. Atrya v. Google Fr., Tribunal de grande instance [TGI] [ordinary court of original jurisdiction]; Lehmann, *supra* note 38, at 5.

163. Joined Cases C-236, 237 & 238/08, Google Fr. SARL v. Louis Vuitton Malletier SA (*Google France & Google*), para. 2.

164. *Id.* paras. 51–52, 73, 88; Case C-278/08, Die BergSpechte Outdoor Reisen und Alpinschule Edi Koblmüller GmbH v. Günter Guni (*BergSpechte*), paras. 18–19, 37, 39.

165. *Google France & Google*, paras. 119–120, 121(3).

166. 15 U.S.C. §§ 1051–1141n (2006).

167. *See* Rescuecom Corp. v. Google Inc. (*Rescuecom II*), 562 F.3d 123, 128 (2d Cir. 2009) (discussing the infringement provisions of the Lanham Act).

168. 15 U.S.C. § 1114 (2006).

169. *Id.* § 1125.

170. *Id.* § 1127.

*B. Case Law in the United States*

Like the European courts, U.S. courts have not applied these provisions to keyword cases in a uniform fashion, and until recently, courts in the United States were split roughly into two camps regarding the trademark use doctrine as applied to internet advertising.[171] Until *Rescuecom Corp. v. Google Inc.* was decided by the Second Circuit in April 2009, courts in the Second Circuit had held that the use of trademarks as keywords was not "trademark use" when used to "trigger the display of sponsored links."[172] The *Rescuecom* decision put the Circuit more in line with other courts around the country, which have generally concluded that using trademarks as keywords *is* use in commerce and have further considered whether the use is likely to cause confusion.[173]

1. Keyword Use in the Second Circuit

Until recently, the Second Circuit had found that use of trademarks as keywords "is not use of the mark in a trademark sense" as contemplated by the Lanham Act.[174] District courts in the Second Circuit were influenced on this issue by *1-800 Contacts, Inc. v. WHENU.COM, Inc.*[175] In *1-800 Contacts*, the defendant was sued for distributing software that provided contextually relevant advertising to computer users by generating pop-up ads depending on the website or search terms the computer user entered into his internet browser.[176] The district court found that the plaintiff had not shown that its mark had been used in commerce as defined in Section 45 of the Lanham Act because the use of the mark by the defendant was "internal."[177] Although this case did not deal specifically with keywords, courts in the Second Circuit applied it in keyword cases, concluding that use of a mark by either an advertiser or a search engine in the context of keyword advertising was not use in a trademark sense.[178]

In *Merck & Co. v. Mediplan Health Consulting*, for example, three of the defendants had purchased the keyword ZOCOR, a registered mark of the plaintiff, from search engines Yahoo! and Google.[179] The district court, noting the decision of *1-800 Contacts*, held that "[t]his internal use of the mark 'Zocor' as a key word to trigger the display of sponsored links is not use of the mark in any trademark

171. *See* McKinney, *supra* note 12, at 293–94 (discussing the circuit split over the issue of trademark use).

172. *See* Merck & Co. v. Mediplan Health Consulting, 425 F. Supp. 2d 402, 415 (S.D.N.Y. 2006) (finding the purchase of trademarks as keywords that "trigger[ed] the display of sponsored links to defendants' websites" was not "trademark use"); *see also* Rescuecom Corp. v. Google Inc. (*Rescuecom I*), 456 F. Supp. 2d 393, 403 (N.D.N.Y. 2006), *vacated*, 562 F.3d 123 (2d Cir. 2009) ("defendant's use of plaintiff's trademark to trigger sponsored links" is not a trademark use within the Lanham Act).

173. Shemtov, *supra* note 15, at 4–6.

174. *Merck*, 425 F. Supp. 2d at 415.

175. *See id.* (applying *1-800 Contacts* in a keyword context).

176. 1-800 Contacts, Inc. v. WhenU.com, 414 F.3d 400, 404–05 (2d Cir. 2005).

177. *Id.* at 408–09.

178. *Merck*, 425 F. Supp. 2d at 415; *see also Rescuecom I*, 456 F. Supp. 2d at 403 (granting Google's motion to dismiss because Google's keyword use did not constitute trademark use).

179. *Merck*, 425 F. Supp. 2d at 407, 415.

sense."[180] As a result, it was unnecessary for the court to consider the likelihood of confusion, and the trademark claims were dismissed.[181]

However, when the Second Circuit held in *Rescuecom* that *1-800 Contacts* does not apply to keyword cases, the district courts halted their trend of finding that keyword use did not constitute trademark use.[182] The district court in *Rescuecom* had granted defendant Google's motion to dismiss on grounds that the sale and suggestion by Google of the trademark RESCUECOM (the plaintiff's registered mark) as a keyword to advertisers was not "use in commerce."[183] The district court felt that the *1-800 Contacts* decision compelled the conclusion that the use by Google was internal, explaining its decision by saying that, even if Google had employed the mark in a manner likely to cause confusion, Google's actions would not constitute a "use in commerce" under the Lanham Act because the triggered advertisements did not exhibit the plaintiff's mark.[184]

On appeal, the Second Circuit vacated the judgment and remanded to the district court, concluding that the practice of recommending and selling trademarks as keywords does indeed qualify as a "use in commerce."[185] The court found that the case "contrast[ed] starkly" with important aspects of the *1-800 Contacts* decision, opining that the district court had "[over-read] the *1-800* decision" and that "Google's recommendation and sale of Rescuecom's mark to its advertising customers are not internal uses."[186] The court did not decide the issue of likelihood of confusion, leaving the district court to sort it out on remand.[187] Ultimately, Rescuecom abandoned its claim against Google,[188] so the Second Circuit is still devoid of any case law under the new *Rescuecom* standard addressing whether using trademarks as keywords is likely to cause confusion. Thus, while the *Rescuecom* decision does not ultimately clarify the keyword issue in the Second Circuit, the decision does oblige Second Circuit courts in future keyword cases to determine whether a likelihood of confusion exists rather than simply disposing of the case at the threshold question of trademark use.[189]

2. Outside the Second Circuit

Beyond the Second Circuit, courts have generally been in agreement that use of a trademark as a keyword qualifies as use in commerce, and the focus has been more on whether the use is likely to cause confusion.[190]

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180. *Id.* at 415.
181. *Id.* at 415–16.
182. *Rescuecom II*, 562 F.3d at 124, 127, 129.
183. *Rescuecom I*, 456 F. Supp. 2d at 403.
184. *Rescuecom II*, 562 F.3d at 127.
185. *Id.* at 124, 127, 129.
186. *Id.* at 129.
187. *Id.* at 130.
188. Eric Goldman, *Rescuecom Abandons Its Litigation Against Google*, TECH. & MKTG. LAW BLOG, (Mar. 5, 2010, 10:45 a.m.) http://blog.ericgoldman.org/archives/2010/03/rescuecom_aband.htm.
189. McKinney, *supra* note 12, at 307.
190. *See* Jonathan J. Darrow & Gerald R. Ferrera, 17 TEX. INTELL. PROP. L.J. 223, 261 (2009) (discussing the agreement of courts outside the Second Circuit that "invisible use" is actionable use as contemplated by the Lanham Act).

In the Fourth Circuit, for example, insurance company GEICO sued Google in the Eastern District of Virginia for allegedly infringing on its GEICO mark.[191] GEICO complained of two practices: the selling of its trademarks as a keyword and incorporating its marks into the text of advertisements.[192] The court held that both practices constitute trademark use by Google and that Google may be held liable if the uses create a likelihood of confusion.[193] On the likelihood of confusion issue, the court concluded that the complained of use did not necessarily violate the Lanham Act and that a factual determination, to be made outside the context of the motion to dismiss, would have to be made on whether the uses created a likelihood of confusion.[194]

Courts in the Ninth Circuit have focused on whether using trademarks as keywords is likely to cause confusion,[195] though the analytical approach for deciding whether using keywords constitutes a trademark use is not entirely clear.[196] In *Playboy Enterprises, Inc. v. Netscape Communications Corp.*, the Ninth Circuit considered the practice of "keying" by search engines, in which an advertiser wishing to have its ad displayed in response to an internet search must choose among various lists of terms related to its ad as provided by the search engine.[197] In deciding the case, the court focused almost exclusively on the likelihood of confusion without addressing whether the use by the search engines was a trademark use.[198]

An unreported case in a Ninth Circuit district court between American Blind & Wallpaper and Google again involved the sale by Google of the plaintiff's trademarked terms as keywords.[199] The court held that "the sale of trademarked terms in [Google's] AdWords program is a . . . use in commerce for the purposes of the Lanham Act."[200] The court denied Google's motion for summary judgment after considering the likelihood of confusion factors and the possible applicability of the initial interest confusion doctrine.[201]

Within the Third Circuit, two district courts in New Jersey and a Delaware district court have also concluded that use of trademarks as keywords satisfies the "use in commerce" requirement of the Lanham Act. In *800-JR Cigar, Inc. v. GoTo.com*, a "pay-for-priority" search engine "solicit[ed] bids from advertisers for key words or phrases to be used as search terms, giving priority results on searches for those terms to the highest-paying advertiser."[202] The search engine also had a tool that suggested terms for advertisers to bid on.[203] The court concluded as a matter of

191. GEICO v. Google Inc., 330 F. Supp. 2d 700, 701 (E.D. Va. 2004).

192. *Id.* at 701–02.

193. *Id.* at 703.

194. *Id.* at 704.

195. *See, e.g.*, Playboy Enters., Inc. v. Netscape Commc'ns Corp., 354 F.3d. 1020, 1023–24 (9th Cir. 2004) (discussing the likelihood of confusion, the "core element of trademark infringement"); *see also* Google Inc. v. Am. Blind & Wallpaper, No. C 03-5340 JF (RS), 2007 WL 1159950, at *7–8 (N.D. Cal. April 18, 2007) (articulating factors that contribute to a likelihood of confusion).

196. McKinney, *supra* note 12, at 296.

197. *Playboy*, 354 F.3d. at 1022–23.

198. *Id.* at 1022–24.

199. *Am. Blind*, 2007 WL 1159950, at *1.

200. *Id.* at *6.

201. *Id.* at *9–10.

202. 800-JR Cigar, Inc. v. GoTo.com, Inc., 437 F. Supp. 2d 273, 277 (D.N.J. 2006).

203. *Id.* at 285.

law that the "use in commerce" requirement was met because the search engine "injected itself into the marketplace" by placing paid advertisements above any natural listings and by marketing terms to advertisers through its Search Term Suggestion Tool.[204] The court discussed the likelihood of confusion factors and considered initial interest confusion, ultimately finding material issues of fact and dismissing the motion for summary judgment.[205] *Buying for the Home, LLC v. Humble Abode, LLC* also held that an advertiser's purchase of keywords from search engines "clearly [satisfies] the Lanham Act's 'use' requirement."[206] The Delaware district court in *J.G. Wentworth v. Settlement Funding* also found that an advertiser's purchase of keywords through Google's AdWords program constituted trademark use under the Lanham Act, but concluded that initial interest confusion did not apply to the case and granted the defendant's motion to dismiss.[207]

Finally, a Minnesota district court (part of the Eighth Circuit) reached a similar result to the New Jersey and Delaware courts in the unreported *Edina Realty, Inc. v. MLSOnline.com*.[208] In *Edina Realty*, a real estate broker had purchased a competitor's trademark as a keyword from Google.[209] The court concluded that, while not a conventional use in commerce, the advertiser had nevertheless used the mark as contemplated by the Lanham Act.[210]

### C. *The Legal Framework in the United States*

While a coherent or consistent legal framework for deciding keyword cases in the United States is not readily apparent from this array of decisions, some common threads run throughout the country's case law.

Similar to the ECJ, the first question that courts in the United States deal with when deciding whether using a trademark as a keyword is trademark infringement has generally been whether there is "use in commerce," or whether such use is a "trademark use."[211] Although courts have taken slightly different approaches in resolving the issue, they have generally concluded that the use of keywords by advertisers and search engines constitutes use as contemplated by the Lanham Act.[212]

Second Circuit courts in cases like *1-800 Contacts* and *Merck* separated this threshold question of use from the likelihood of confusion analysis altogether, holding that use of a trademark as a keyword is not a "trademark use."[213] But, when the court held in *Rescuecom II* that Rescuecom had presented an actionable claim

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204. *Id.*

205. *Id.* at 285–92.

206. Buying for the Home, LLC v. Humble Abode, LLC, 459 F. Supp. 2d 310, 323 (D.N.J. 2006).

207. J.G. Wentworth v. Settlement Funding, No. 06-0597, 2007 WL 30115, at *6, *8 (E.D. Pa. Jan. 4, 2007).

208. *See* Edina Realty, Inc. v. The MLSOnline.com, No. 04-4371JRTFLN, 2006 WL 737064, at *1, *7 (D. Minn. Mar. 20, 2006) (finding the purchase of a competitor's trademark as a keyword from Google falls under the Lanham Act).

209. *Id.* at *1.

210. *Id.* at *3.

211. *See* Jonathan Moskin, *Virtual Trademark Use: The Parallel World of Keyword Ads*, 98 TRADEMARK REP. 873, 873 (2008) (discussing the threshold question of use in commerce).

212. *Id.* at 906.

213. *1-800 Contacts*, 414 F.3d at 408–09; *Merck*, 425 F. Supp. 2d at 415.

that Google had used the RESCUECOM mark in commerce, its reasoning that internal uses of a mark could still deceive consumers marked a shift away from its previous analytical framework of strictly separating use from likelihood of confusion. Instead, it folded considerations of confusion into its threshold trademark-use analysis.[214]

This less strict version of the threshold question applied in *Rescuecom I* was also used in *GEICO*.[215] This approach is evident because the court found trademark use but acknowledged that "defendants are using the trademarks in commerce in a way that may imply that defendants have permission from the trademark holder to do so."[216]

The Ninth Circuit in *Playboy* went even further than the *GEICO* court in conflating the use and likelihood of confusion analysis.[217] The court essentially ignored the use question by merely stating that the "defendants used the marks in commerce" without expounding on why this qualified as an actionable use.[218] Though not entirely clear, this may have been an implicit finding of trademark use, an inference supported by *American Blind*'s application of *Playboy* to find use in commerce.[219]

After considering whether using a trademark as a keyword constitutes use as contemplated by the Lanham Act, courts in the United States have turned to whether the use is likely to cause confusion.[220] In evaluating the likelihood of confusion, courts have looked at the traditional likelihood of confusion factors.[221] Some courts have considered the doctrine of initial interest confusion,[222] while others have declined to apply it to keyword use.[223]

While a consensus has not been reached in U.S. courts on the analytical approach for determining whether using a trademark as a keyword constitutes trademark infringement, it is worth noting that so far no U.S. court has held either an advertiser or a search engine liable for trademark infringement as a result of using a trademark as a keyword.[224] However, that possibility is not foreclosed, as courts since

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214. *Rescuecom II*, 562 F.3d at 129, 130; McKinney, *supra* note 12, at 297, 306–07.

215. McKinney, *supra* note 12, at 297.

216. *GEICO*, 330 F. Supp. 2d at 704; McKinney, *supra* note 12, at 297.

217. McKinney, *supra* note 12, at 296.

218. *Playboy*, 354 F.3d at 1024; McKinney, *supra* note 12, at 296.

219. *Am. Blind*, 2007 WL 1159950, at *5.

220. *See Rescuecom II*, 562 F.3d at 130 (implying that Google's use of Rescuecom's trademark would not escape liability if it caused consumer confusion); *GEICO*, 330 F. Supp. 2d at 704 (upholding plaintiff's claim but refusing to rule on whether defendants' uses of plaintiff's trademark create a likelihood of confusion).

221. *See 800-JR Cigar*, 437 F. Supp. 2d at 285–92 (discussing the likelihood of confusion factors at length).

222. *See, e.g.*, Brookfield Commc'ns, Inc. v. W. Coast Entm't Corp., 174 F.3d 1036, 1062–65 (9th Cir. 1999) (restating the reliance of many jurisdictions on initial interest confusion); *Playboy*, 354 F.3d at 1024–27, 1034–36 (discussing both the likelihood of confusion and initial interest confusion).

223. *See, e.g.*, *Am. Blind*, 2007 WL 1159950, at *5, *9–10 (failing to reach the initial interest confusion question in declining to grant Google's motion for summary judgment); *J.G. Wentworth*, 2007 WL 30115, at *6, *8 (finding initial interest confusion inapplicable to the facts of the case).

224. *See* Shemtov, *supra* note 23, at 4–6 (discussing U.S. courts' interpretations of keyword use as use under the Lanham Act).

*Rescuecom II* have almost unanimously found trademark use, and since very few cases have actually made it all the way through trial to a final verdict.[225]

## VI. COMPARING THE EUROPEAN UNION AND THE UNITED STATES

Having looked at how the keyword issue has been dealt with thus far in both the European Union and in the United States, I will now compare the ECJ's approach with that of courts in the United States. In doing so, several observations are apparent.

The first noteworthy comparison between the United States and the EU is the difference in the relevant legislation. While both the EU and the United States have likelihood of confusion provisions that must be applied in keyword cases, the United States does not have a corollary to the double identity provisions found in the Directive and the Regulation of the EU.[226] This could potentially have important consequences, since a plaintiff in the EU does not have to prove likelihood of confusion if the case must be decided based on the double identity provisions.[227] That being said, a plaintiff in the EU trying to prove trademark infringement under the double identity provisions must still show that an "ad does not enable an average internet user, or enables the user only with difficulty, to ascertain whether the goods or services referred to" in the ad originate from the trademark proprietor, an undertaking economically connected to it, or a third party.[228]

Another difference arises regarding whether using a trademark as a keyword constitutes use. *Google France & Google* clearly articulated that the threshold question, before considering the likelihood of confusion, is whether using a trademark as a keyword constitutes use as contemplated by the Directive and Regulation.[229] The ECJ definitively decided in *Google France & Google* and *BergSpechte* that an advertiser does use the mark in the course of trade and in relation to goods and services, while a search engine does not use the mark in the course of trade.[230]

U.S. courts have also addressed the threshold question of use, but courts vary in the degree of separation they give between the issues of use and likelihood of confusion.[231] Moreover, U.S. courts have not made the clear-cut distinction between

225. *Id.*

226. *Compare* Council Directive 89/104, 1988 O.J. (L 40) (EC), art. 5(1)(a), *and* Council Regulation 40/94, 1993 O.J. (L 11) (EC), art. 9(1)(a) (providing that a trademark holder may exclude another from using, without consent, "any sign which is identical to the trademark in relation to goods or services which are identical with those for which the mark is registered"), *with* 15 U.S.C. §§ 1114, 1125(a) (establishing liability for use of a mark without consent only when there is a likelihood of confusion, mistake or deception).

227. Joined Case C-236, 237 & 238/08, Google Fr. SARL v. Louis Vuitton Malletier SA *(Google France & Google)*, para. 78.

228. *Id.* para. 99.

229. *Id.* paras. 49–59.

230. *Id.* paras. 51, 58–59, 73; Case C-278/08, Die BergSpechte Outdoor Reisen und Alpinschule Edi Koblmüller GmbH v. Günter Guni, *(BergSpechte)*, para. 45.

231. *Compare Rescuecom II*, 562 F.3d at 129, 130 (distinguishing between use and unauthorized when examining the likelihood of confusion under the Lanham Act), *and GEICO*, 330 F. Supp. 2d at 704

search engines and advertisers that the ECJ made in *Google France & Google* and *BergSpechte*. Courts in the United States have determined that both search engines and advertisers are subject to a likelihood of confusion analysis.[232] Thus, search engines are not exempt from trademark liability in the United States for their keyword advertising programs as they are in the European Union.

Still, the *Google France & Google* decision does make clear that search engines providing internet referencing services are not necessarily exempt from liability under Article 14 of the E-Commerce Directive.[233] Thus, national courts in the EU must still assess whether a search engine's keyword services fit the liability exemption, and then determine whether the search engine will be held liable under laws other than the country's trademark laws for providing keyword advertising services.

## VII. CONCLUSION

Because of the internet's impact on economies around the world, the issue of using trademarks as keywords in internet advertising will continue to be an important topic in the United States and in Europe. While individual member states in the European Union have struggled with how to apply the relevant provisions of the Directive and the Regulation to keyword cases, the preliminary rulings of *Google France & Google* and *BergSpechte* are an important start in setting out a workable framework for national courts to use. Even so, countries still have much room to maneuver in determining the liability of search engines and advertisers using trademarks as keywords.

Like the different national courts in the European Union, courts in the United States have taken varying approaches to deciding keyword cases, and though *Rescuecom II* put the Second Circuit more in line with the rest of the country with its conclusion that using trademarks as keywords constitutes "trademark use,"[234] one cannot expect complete uniformity in the outcomes of keyword cases yet to be decided in different jurisdictions around the United States.

And finally, while a comparison between how courts in the United States and courts in the European Union have decided keyword cases reveals both similarities and differences, it seems clear that the future of internet advertising will be significantly impacted by how the keyword case law continues to develop on both continents.

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(folding considerations of confusion into its threshold trademark-use analysis), *with Playboy*, 354 F.3d at 1024 (essentially ignoring the question of trademark use in holding the defendant had "used the marks in commerce"); *see also* McKinney, *supra* note 12, at 296–98, 307–12 (discussing the various degrees of separation between the issues of use and likelihood of confusion in several U.S. jurisdictions).

232. *See, e.g.*, *Rescuecom II*, 562 F.3d at 127 (finding that Google did use the mark in commerce by providing trademarks as keywords in its AdWords program); *Buying for the Home*, 459 F. Supp. 2d at 323 (holding that an advertiser used the mark in commerce by purchasing a trademark as a keyword).

233. *Google France & Google*, paras. 20, 106, 112, 120–21.

234. *Rescuecom II*, 562 F.3d at 127.

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