Texas International Law Journal

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The University of Texas School of Law

TEXAS INTERNATIONAL LAW JOURNAL

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Texas International Law Journal

In the rapidly expanding discipline of international law, the *Texas International Law Journal* helps readers stay abreast and informed of recent developments and new scholarship by providing access to leading international legal, theoretical, and policy analysis. The *Journal* publishes academic articles, essays, and student notes in the areas of public and private international law, international legal theory, the law of international organizations, comparative and foreign law, and domestic laws with significant international implications. The editors and staff aim to fulfill these needs by concentrating on groundbreaking articles that will be useful to both practitioners and scholars. We hope you enjoy this latest issue.

The *Journal* is among the oldest and best-established student-published international law journals in the United States. In the wake of the Bay of Pigs disaster and the Cuban Missile Crisis, our publication began as an offshoot of the Texas International Law Society.[1] In January 1965, under the guidance of Professor E. Ernest Goldstein, we planted the Texas flag in the international arena with our first issue, entitled *The Journal of the University of Texas International Law Society*. Publications thereafter were biannual, taking the name *Texas International Law Forum* until summer 1971, when the *Journal* adopted its present title and began publishing three or four issues per year. Of the more than one hundred student-published international law journals across the country, only three schools have an older international heritage: Harvard, Columbia, and Virginia.

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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).

of International Law, chief reporter of the Restatement of Foreign Relations Law of the United States, and former editor-in-chief of the *American Journal of International Law*; **the Honorable Richard J. Goldstone**, member of the Constitutional Court of South Africa and former chief prosecutor of the United Nations International War Crimes Tribunal for the former Yugoslavia and Rwanda; and **the Honorable Dalia Dorner**, Associate Justice of the Supreme Court of Israel.

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Leveraging Asylum

JAMES C. HATHAWAY*

SUMMARY

I. INTRODUCTION

Until the mid-1980s, only refugees could invoke international law to resist removal to a dangerous country of origin. The evolution in international law since that time has been both fast-paced and profound.

This is most clearly true under European human rights law. No less an authority than the House of Lords has declared that the right of non-return extends not only to refugees, but to any person at risk of torture or inhuman or degrading treatment or punishment, and—at least where the risk is clear and extreme—applies also where there is a threat to: life; freedom from slavery; liberty and security of person; protection against *ex post facto* criminality; privacy and family life; or freedom of thought, conscience, or religion.[1]

But the dramatic expansion of protection is not limited to Europe. While less easily enforced than the rules of the European safety net,[2] the combination at the

* Dean of the Melbourne Law School and William Hearn Professor of Law, University of Melbourne. The research assistance of Anne Kallies, as well as the thoughtful comments of Michelle Foster, Martin Jones, Paul McDonough, Jason Pobjoy and Michael Timmins on an earlier draft are acknowledged with appreciation. This analysis was initially presented at the Auckland University Faculty of Law 'Human Rights at the Frontier' Conference, Sept. 12, 2008. The author thanks the New Zealand Legal Research Foundation and University of Auckland Law Faculty for the invitation to participate in this conference.

1. R. (Ullah) v. Special Adjudicator, Do v. Immigration Appeal Tribunal, [2004] UKHL 26, [2004] 2 A.C. 323 (H.L.) (appeal taken from Eng. Ct. App.) (U.K.). *See generally* NUALA MOLE, ASYLUM AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS (4th ed. 2007) (1984) (surveying asylum-related case law of the European Court of Human Rights (ECHR) and developments in European asylum law); THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 433–40 (Pieter Van Dijk et al. eds., Intersentia 2006) (1978) (discussing non-return in cases where there would be risks for the returned individual in his or her country of origin).

2. *See generally* THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING (Philip Alston & James

global level of an explicit duty of non-return in the United Nations Torture Convention[3] and of implied duties of non-return grounded in recent authoritative application of Articles 6 and 7 of the Civil and Political Covenant[4] now establishes a principled limit on the right of most states to remove a broadly defined group of at-risk non-citizens from their territory.[5] More embryonic support for an expanded duty to protect may be found in the Convention on the Rights of the Child[6] and through invocation of international humanitarian law, specifically Common Article 3 of the Geneva Conventions.[7]

The problem is that none of these new sources of international protection expressly defines how members of the broader class of non-returnable persons are to be treated. In contrast to the Refugee Convention, nearly all of which is devoted to defining the precise legal entitlements of members of the protected class (for example, to freedom of internal movement[8] and to other civil liberties, as well as to key socioeconomic rights, including to work[9] and to access education[10]), the new protections against *refoulement*[11] are bare-bones entitlements. Members of the beneficiary class may not be returned to the place of risk,[12] but there is no express

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Crawford eds., Cambridge Univ. Press 2000) (analyzing the strengths and weaknesses of the human rights treaty monitoring system).

3. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Torture Convention].

4. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 172 [hereinafter Civil and Political Covenant].

5. *See* JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 369–70 (2005) ("[T]he insufficiency of the *non-refoulement* guarantee set by Art. 33 of the Refugee Convention is effectively remedied by the ability to invoke other standards of international law.").

6. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3. *See* JANE MCADAM, COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW 173–96 (2007) (discussing the possible application of the "best interests" principle of children's rights to the context of minor asylum seekers). It is, of course, true that relevant norms under these accords are more substantively circumscribed than the Refugee Convention's open-ended focus on persons at risk of "being persecuted." But protection claims derived from the Torture Convention, the Civil and Political Covenant, the Convention on the Rights of the Child, and international humanitarian law are in other ways less constrained than is refugee status. In particular, there is no need to show the element of civil or political disfranchisement inherent in the Refugee Convention's "for reasons of" nexus requirement; and states are not authorized to deny protection on the basis of lack of deservingness as Article 1(F) of the Refugee Convention requires.

7. *See, e.g.*, Orelien v. Canada, [1992] 1 FC 592 (Can. FCA, Nov. 22, 1991) (accepting that the Geneva Conventions might be violated by *refoulement*, but refusing to incorporate them into the *Immigration Act* process). *See generally* HATHAWAY, *supra* note 5, at 369 (explaining how international humanitarian law "should be construed to preclude the forcible repatriation of aliens who have fled generalized violence or other threats to their security arising out of internal armed conflict in their state of nationality").

8. Convention relating to the Status of Refugees art. 26, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

9. *Id.* art. 24.

10. *Id.* art. 22. *See generally* HATHAWAY, *supra* note 5, at 171–90 (detailing the various rights protections available to refugees at different levels of attachment).

11. *Refoulement*, literally forcing back, is the expulsion or return of a refugee from one state to another. BLACK'S LAW DICTIONARY 1307 (8th ed. 2004); THE PENGUIN FRENCH DICTIONARY 265 (Merlin Thomas & Raymond Escoffey eds., 1992). *Non-refoulement* is the right of refugees not to be returned, directly or indirectly, to a place where there is a risk of persecution. HATHAWAY, *supra* note 5, at 279. Specifically, Article 33 of the Refugee Convention grants protection against *refoulement* to refugees whose life or freedom would be threatened on account of race, religion, nationality, or membership of a particular social group or political opinion. Refugee Convention, *supra* note 8, art. 33.

12. *Id.*

duty in international law to provide them with any particular bundle of rights, much less to enfranchise them in the host community.

This situation is grave for the protected persons themselves and is potentially destabilizing for the governments and communities that host them. The same arguments advanced at the birth of refugee law, namely that the social inclusion of non-returnable persons is both ethically right and socially responsible,[13] have clear contemporary resonance. Perhaps for this reason the European Union's 2004 Qualification Directive[14] came remarkably close to granting Refugee Convention rights to all persons legally entitled to protection against *refoulement*,[15] and is likely to be revised soon to go even further in that direction.[16] Canada has already amended its domestic law to give the same rights to refugees and other legally non-returnable persons,[17] with Australia and New Zealand poised to follow suit.[18]

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13. *See* James C. Hathaway, *The Evolution of Refugee Status in International Law: 1920–1950*, 33 INT'L & COMP. L.Q. 348, 348–50 (1984) (discussing trends in international legal accords from 1920 to 1950).

14. Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, 2004 O.J. (L 304) 12 (EC) [hereinafter Qualification Directive].

15. The original draft of the Qualification Directive denied only two Refugee Convention rights to the beneficiaries of subsidiary protection. Council Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection, EU Doc. 14643/1/02 REV 1 (Asile 68), 27 Nov. 2002. First, it was proposed that they would only be granted travel documents in limited circumstances. James C. Hathaway, *What's in a Label?*, 5 EUR. J. MIGRATION & L. 1, 8 (2003). Second, access to the labor market was to be denied for up to six months following the date of status recognition. *Id.* The rights afforded to beneficiaries of subsidiary protection were, however, diluted as a consequence of further drafting. The limitation on access to travel documents was retained. Qualification Directive, *supra* note 14, art. 25. The six-month limitation for access to the labor market was removed, but discretion was introduced allowing Member States to take into account the situation of the labor market when considering potential limitations on access to the labor market for beneficiaries of subsidiary protection. *Id.* art. 26. Discretionary exceptions were also introduced in relation to access to social welfare, access to health care, and the availability of family unification. *Id.* arts. 24, 28, 29. There is nonetheless a high correlation between the standards adopted for beneficiaries of subsidiary protection and Refugee Convention rights.

16. The Commission of the European Communities has announced its intention to "reconsider the level of rights and benefits to be secured for beneficiaries of subsidiary protection, in order to enhance their access to social and economic entitlements which are crucial for their successful integration, whilst ensuring respect for the principle of family unity across the EU." *Commission of the European Communities, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: Policy Plan on Asylum, An Integrated Approach to Protection Across the EU*, at 6, COM (2008) 360 final (June 17, 2008).

The Commission's proposal finds support in a Staff Working document accompanying the Communication: "Given the fact that in practical terms the situation of the two groups is comparable, their level of rights should also be (close to) equivalent. A clear example is the lack of provisions in EU law on family reunification for subsidiary protection beneficiaries. A higher level of rights for these persons is necessary if the EU wants to avoid creating a subclass of protected persons and also to respond to the call of the Hague programme which mention[s] the establishment of a uniform protection status in the EU." *Commission of the European Communities, Commission Staff Working Document Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: Policy Plan on Asylum, An Integrated Approach to Protection Across the EU, Impact Assessment*, at 20, SEC (2008) 2029 (June 17, 2008).

17. Immigration and Refugee Protection Act, 2001 S.C., ch. 27, § 97 (Can.).

But does international law actually *require* states bound by duties of *non-refoulement* beyond those in the Refugee Convention to adopt rights-granting measures of this kind? Is the provision of civil liberties and socioeconomic entitlements to non-returnable persons simply good policy, or is it legally compelled?

Recent scholarship suggests that granting rights to all non-returnable persons is not just advisable, but is already required by international law. First, it is said that even states not bound by relevant conventions are required by customary international law to honor the duty of *non-refoulement* in relation to a wide-ranging group comprised of both refugees and others facing the prospect of serious harm.[19] Second, it is suggested that all persons who are entitled to protection against *refoulement*—not just refugees—must, by virtue of a conceptual fusion of the Refugee Convention and other human rights accords, be granted all of the refugee-specific entitlements codified in the Refugee Convention itself.[20]

In essence, under the first claim, the protection of refugees against *refoulement* ceases to be a matter of treaty-based entitlement. Under the second claim, the specific treaty-based entitlements of refugees are deemed applicable to all beneficiaries of the duty of *non-refoulement*, whether refugees or not.

Taken together, the two claims amount to an assertion that there is today a legally binding and universally applicable right to asylum for all seriously at-risk persons. In short, the right to asylum has been leveraged through scholarly analysis despite its express rejection by states.[21]

I believe that the analysis underlying the leveraged right to asylum is conceptually flawed. As I will show, there is no duty of *non-refoulement* that binds all states as a matter of customary international law and it is not the case that all persons entitled to claim protection against *refoulement* of some kind are ipso facto entitled to refugee rights. These claims are unsound precisely because the critical bedrock of a real international legal obligation—namely, the consent of states evinced by either formal commitments or legally relevant actions—does not yet exist.

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18. For Australia, see DEPT. IMMIGRATION AND CITIZENSHIP [Austl.], DRAFT COMPLEMENTARY PROTECTION MODEL: AUSTRALIA (2008) (copy with author); UN HIGH COMM'R FOR REFUGEES (UNCHR), DRAFT COMPLEMENTARY PROTECTION VISA MODEL: AUSTRALIA: UNHCR COMMENTS (2009). The proposed model evidences an intention to provide an identical status to refugees and to beneficiaries of complementary protection. A similar approach has been proposed in New Zealand. The enacted bill, Immigration Act 2009, No. 132-3 (2009) (NZ), is available at http://www.legislation.govt.nz/bill/government/2007/0132-2/latest/versions.aspx (last visited Jan. 14, 2009). *See generally* J. Pobjoy, Treating Like Alike: The Principle of Non-discrimination as a Tool to Mandate the Equal Treatment of Involuntary Aliens Entitled to International Protection, (forthcoming) (discussing extension of Refugee Convention rights to the *non-refoulement* acquiring class through the Civil and Political Covenant's non-discrimination provision).

19. *See* Sir Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement, in* UNHCR, REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 87, paras. 196–253 (Erika Feller, Volker Türk & Frances Nicholson eds. 2003) (discussing *refoulement* in customary international law); Philip C.W. Chan, *The Protection of Refugees and Internally Placed Persons: Non Refoulement under Customary International Law?*, 10 INT'L J. HUM. RIGHTS 231 (2006) (discussing the sources and content of customary international law on *non-refoulement*).

20. MCADAM, *supra* note 6, at 1.

21. A right to asylum was rejected both in the drafting of the Refugee Convention, and at the 1977 Territorial Asylum Conference. *See generally* ATLE GRAHL-MADSEN, TERRITORIAL ASYLUM (Almqvist & Wiksell Int'l 1980) (tracing the development and current status of international instruments dealing with territorial asylum); JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 13–16 (1991) (summarizing the contemporary significance of the abortive effort to draft a binding commitment to grant asylum).

The leveraged right to asylum is attractive because it allows scholars simply to ordain law, rather than having to work to create a renewed protection architecture that convinces states that existing duties can be reconciled to national self-interest. But the effort to rebuild, rather than simply to ordain, is required precisely because rhetorical claims standing alone will not serve as a meaningful constraint on the behavior of states.[22]

II. THE FIRST CLAIM: THE DUTY OF *NON-REFOULEMENT* BINDS ALL STATES

The essence of the first claim is that because an express or implied duty of *non-refoulement* is recognized in the various treaties I have previously cited, it is now the case that *all* states—whether bound by a relevant treaty or not—are legally obligated to honor the duty of *non-refoulement.* This duty of *non-refoulement* applies not only to any refugee, but also to any potential victim of torture, cruel, inhuman, or degrading treatment or punishment,[23] as well as to most persons facing risk to "life, physical integrity, or liberty."[24] The claim is that at least this one critical refugee right inheres in all persons who are in fact refugees or who face another serious human rights risk, regardless of treaty accession. How was this conclusion reached?

In a study commissioned and championed by the United Nations High Commissioner for Refugees (UNHCR), Eli Lauterpacht and Daniel Bethlehem invoke the decision of the International Court of Justice (ICJ) in the *North Sea Continental Shelf Cases*[25] for the view that treaties "may influence the creation of . . . a rule of custom."[26] They argue that because the treaty-based norm of *non-refoulement* is of norm-creating character,[27] enjoys widespread and representative state support,[28] and has stimulated consistent relevant practice,[29] "*non-refoulement* must be regarded as a principle of customary international law."[30] If sound, this analysis means that the duty of *non-refoulement* is no longer merely a matter of treaty-based obligation (applicable only to state parties) but instead now binds all states, including those which have never signed on to a relevant treaty.

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22. *See, e.g.*, James Hathaway, *Why Refugee Law Still Matters*, 8 MELBOURNE J. INT'L L. 89 (2007) (arguing for a revitalization of international refugee law by utilizing the flexibility inherent in the Refugee Convention itself).

23. Strictly as a matter of convenience, torture, cruel, inhuman or degrading treatment or punishment will be referred to herein simply as torture. Note, however, that the Torture Convention protects against *refoulement* only when there is a risk of torture, not when there is only a risk of cruel, inhuman, or degrading treatment. Torture Convention, *supra* note 3, art. 3.

24. Lauterpacht & Bethlehem, *supra* note 19, para. 253. The exception is for persons who face a threat to "life, physical security, or liberty" not rising to the level of a risk of "torture or cruel, inhuman or degrading treatment or punishment," whose entitlement to protection against *refoulement* can be trumped by "overriding reasons of national security or public safety." *Id.*

25. North Sea Continental Shelf Cases (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3 (Jan. 20); Lauterpacht & Bethlehem, *supra* note 19, para. 198.

26. Lauterpacht & Bethlehem, *supra* note 19, para. 198.

27. *Id.* paras. 201–08. They add for good measure, that there is an "evident lack of expressed objection by any state to the normative character of the principle of *non-refoulement.*" *Id.* para. 216.

28. *Id.* paras. 209–10.

29. *Id.* paras. 211–15.

30. *Id.* para. 216. Somewhat confusingly, they also seem to suggest that *non-refoulement* is a general principle of international law, though they provide no analysis in support of that view. *Id.*

The basic notion that customary law may emerge from a treaty-based norm is well-accepted. At least since the *Asylum Case*,[31] it has been recognized that the tree of customary international law can grow from the acorn of specific treaties.[32] But the role of the treaty-based norm is essentially auxiliary:[33] it crystallizes the content of the putative norm[34] and provides a context within which the two essential elements of a customary norm—*opinio juris* and consistent state practice[35]—can be located.[36] In the case of the putative customary duty of *non-refoulement*, these two essential requirements for the emergence of customary international law are not met.[37]

To begin, is there *opinio juris* sufficient to justify the putative norm?[38] The rigid traditional understanding of *opinio juris sive necessitatis*—requiring that the observed uniformity of practice be a *consequence* of a sense of legal obligation[39]—has, of course, given way to the less demanding requirement "of an express, or most often presumed, acceptance of the practice as law by all interested states."[40] It is sufficient

31. Asylum Case (Colom. v. Peru), 1950 I.C.J. 266 (Nov. 20).

32. *See id.* at 277 (including Colombia's unsuccessful argument for the existence of a rule of customary international law rooted in regional treaties).

33. "It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them." Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, para. 27 (June 3). *See also* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, para. 183 (June 27) (quoting Continental Shelf, 1985 I.C.J. 13); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, para. 64 (July 8) (quoting Continental Shelf, 1985 I.C.J. 13).

34. Thus, the norm must "be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law." North Sea Continental Shelf Cases, 1969 I.C.J. 3, para. 72. While there was some concern in the case that the "equidistance principle" invoked as treaty-based custom met this test given its secondary character, there is little doubt that the duty of *non-refoulement* is of a norm-creating character. *Id.*

35. *Id.* para. 77; Nicaragua, 1986 I.C.J. 14, para. 183 ("[T]he material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States . . . .") (quoting Continental Shelf, 1985 I.C.J. 13, para. 27); INT'L LAW ASS'N, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW 6 (2000).

36. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 25 (May 28) ("At best, the recommendation made by the Council constitutes the point of departure of an administrative practice . . . .").

37. To be fair, customary international law is notoriously murky terrain. As Goldsmith and Posner write, "It is unclear which state acts count as evidence of a custom, or how broad consistent state practice must be to satisfy the custom requirement. It is also unclear what it means for a nation to follow a custom from a sense of legal obligation, or how one determines whether such an obligation exists." Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1114 (1999). As a result, "international law arguments based on custom always suffer from a considerable degree of arbitrariness." Niels Petersen, *Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation*, 23 AM. U. INT'L. L. REV. 275, 277 (2008).

38. Anthony D'Amato has strongly criticized the ICJ for commencing with analysis of *opinio juris* (rather than with analysis of whether there is consistent relevant state practice) in the *Nicaragua* case. Anthony D'Amato, *Trashing Customary International Law*, 81 AM. J INT'L L. 101, 102 (1987). But as Oscar Schacter has observed, "Even if the [reversal] seemed to place the cart before the horse, it did not depart in principle from the basic postulate that binding custom was the result of the two elements: State practice and *opinio juris*." Oscar Schachter, *New Custom: Power,* Opinio Juris *and Contrary Practice, in* THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOUR OF KRZYSZTOF SKUBISZEWSKI 531, 534 (J. Makarczyk ed., 1996).

39. Only if relevant state actions are "based on their being conscious of having a duty to [act in a particular way] would it be possible to speak of an international custom." The Case of the S.S. "Lotus", (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 28 (Sept. 7).

40. KAROL WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW 51 (1993). *See also* INT'L LAW

to show that states presently regard the putative norm as legally compelled, even if their concordant actions in keeping with the norm were not induced by a sense of legal duty. Moreover, there is good authority that *opinio juris* can be shown in many different ways. In its *Nicaragua* decision, for example, the ICJ held that "*opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of . . . States towards certain General Assembly resolutions .... support of [regional conference] resolution[s] .... [and] statements by State representatives."[41] The views of most scholars are similarly inclusive.[42]

Despite this very flexible approach to the material basis for identification of *opinio juris*, the specific facts relied upon by Lauterpacht and Bethlehem fall short. They ground their claim of *opinio juris* for a universally binding duty of *non-refoulement* on a combination of three indicia: first, the "near-universal acceptance"[43] of a *non-refoulement* duty in various UN and regional treaties; second, the unanimous adoption by the General Assembly of the 1967 *Declaration on Territorial Asylum*;[44] and third, the absence of express opposition to the principle of *non-refoulement* by the states which neither signed a relevant treaty nor were present in the General Assembly when the 1967 declaration was adopted.[45]

The primary portion of the claim is substantively unsound. For a single rule of customary international law to emerge, the indicia of *opinio juris* must clearly relate to *the same* putative rule.[46] In contrast, Lauterpacht and Bethlehem weave together disparate bits of *opinio juris* arising from distinct treaties dealing with distinct issues to locate *opinio juris* for a principle that is more comprehensive than any of the underlying commitments. Specifically, they argue that because all but nineteen UN

ASS'N, *supra* note 35, at 10 ("[T]he main function of the subjective elements is to indicate what *practice* counts (or, more precisely, does not count) towards the formation of a customary rule."). As Kammerhofer writes, "The concept of *opinio juris* is arguably the centrepiece of customary international law. It is the most disputed, least comprehended component of the workings of customary international law. At the heart of the debate lies an important conflict: on the one hand, customary law-making seems by nature indirect and unintentional. On the other hand, law-making normally requires some form of intentional activity, an act of will. In the international legal system, great value has traditionally been placed in the states' agreement or consent to create obligations binding upon them." Jörg Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems*, 15 EUR. J. INT'L L. 523, 532 (2004).

41. Nicaragua, 1986 I.C.J. 14, paras. 188–90.

42. *See, e.g.*, OPPENHEIM'S INTERNATIONAL LAW 28 (Sir Robert Jennings & Sir Arthur Watts eds., 2008) ("[The] subjective element may be deduced from various sources ...."); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 6 (2008) (listing various sources of *opinio juris*). *But see* J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L. L. 449, 487 (2000) ("Aspirational or recommendatory instruments, enacted while states remain unwilling to sign concrete treaties, provide compelling evidence that states lack the normative conviction necessary to create customary obligations, rather than evidence that states believe these norms are binding.").

43. Lauterpacht & Bethlehem, *supra* note 19, para. 209.

44. Declaration on Territorial Asylum, G.A. Res. 2312(XXII), U.N. GAOR, 22d Sess., 1631st plen. mtg., U.N. Doc. A/6716 (Dec. 14, 1967) [hereinafter Declaration on Territorial Asylum]; Lauterpacht & Bethlehem, *supra* note 19, para. 209.

45. Declaration on Territorial Asylum, *supra* note 44; Lauterpacht & Bethlehem, *supra* note 19, para. 209.

46. Writing in relation to the practice component of customary law, Villiger observes that "the condition of uniform practice requires that the instances of practice of individual States and of States in general circumscribe, apply, or refer to, and thereby express, the *same* customary rule." MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES: A MANUAL OF THEORY AND PRACTICE OF THE INTERRELATION OF SOURCES 43 (2d ed. 1997).

member states "participat[e] in some or other conventional arrangement embodying *non-refoulement*"[47]—that is, they have all agreed to be bound by at least *one of* Article 33 of the Refugee Convention, Article 3 of the Torture Convention, Articles 6 and 7 of the Civil and Political Covenant, or by a comparable provision under a relevant regional treaty—it is now possible to conclude that there is a sufficiently widespread and representative *opinio juris* for an overarching principle that "*non-refoulement* must be regarded as a principle of customary international law."[48]

The incongruity of the claim arises from the fact that *non-refoulement* is merely a means to a protection end. The means itself can only be the subject of general acceptance within a particular context. That is, the assertion that all states accept the duty of protection against *refoulement* assumes some agreement about the circumstances in which the duty is owed. Yet there is no such agreement, since the evidence of *opinio juris* relied upon by Lauterpacht and Bethlehem sometimes relates to persons who have a well-founded fear of being persecuted; in other cases, to persons at risk of torture; and in still other circumstances, to persons at risk of other forms of human rights abuse.[49] There is, in short, no common acceptance of the duty of *non-refoulement* related to any particular class of persons or type of risk, much less to their combined beneficiary class.

By way of analogy, one might consider the claim that there is *opinio juris* to support an international legal duty to issue an injunction. At one level, it is almost certainly true that the courts of virtually all states do, in fact, authorize injunctive relief in at least some circumstances. Yet it would be meaningless to claim a normative consensus on a duty "to issue injunctions" since there is no substantive accord on the circumstances in which the remedy is to be granted. The argument for *opinio juris* in support of a general duty of *non-refoulement* is similarly flawed. Lauterpacht and Bethlehem's assertion of agreement sufficient to count as *opinio juris* is a thinly veiled cobbling together of disparate commitments with only the veneer of a remedial mechanism—*non-refoulement*—in common. With no substantive commonality to the obligations agreed, no general *opinio juris* can be derived.

The second form of evidence of *opinio juris* relied upon by Lauterpacht and Bethlehem, the unanimous adoption by the General Assembly of the 1967 *Declaration on Territorial Asylum*,[50] does have a common substantive core. Unfortunately for their project, the common core is limited to persons seeking "asylum from persecution,"[51] a group far smaller than said by them to benefit from the customary norm.[52] Equally fundamental, General Assembly resolutions cannot be relied upon in abstract as evidence of universal *opinio juris*.[53] As the ICJ observed

47. Lauterpacht & Bethlehem, *supra* note 19, para. 210.

48. *Id.* para. 216.

49. *Id.* paras. 173–208.

50. Declaration on Territorial Asylum, *supra* note 44.

51. *Id.* at pmbl., art. 1.

52. Specifically, persons threatened with persecution are one of the three groups said by Lauterpacht and Bethlehem to be entitled to protection against *refoulement* under a general customary duty. The other two are persons who face "a real risk of torture or cruel, inhuman or degrading treatment or punishment" and persons who face "a threat to life, physical integrity, or liberty." Lauterpacht & Bethlehem, *supra* note 19, para. 218.

53. There is a not-insignificant policy concern, noted by Thomas Franck:

in *Nicaragua*, the *opinio juris* is instead to be deduced from "*the attitude of* . . . States towards certain General Assembly resolutions."[54] The Court noted that while General Assembly resolutions may be the basis for *opinio juris*,[55] they have to be considered "in their totality."[56] A critical part of that totality is the failure of the UN conference that convened in 1977 with the specific intent to transform the 1967 declaration into binding law.[57] Lapenna notes that "the Committee met for [more than] four weeks and only three of the ten articles of the experts' draft Convention were discussed and voted on. . . . [T]he preoccupation of the majority of the states attending the Conference was that of safeguarding, to exasperation point, the sovereign right of a state to grant asylum."[58] There has moreover been no

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> The effect of [an] enlarged concept of the lawmaking force of General Assembly resolutions may well be to caution states to vote against "aspirational" instruments if they do not intend to embrace them totally and at once, regardless of circumstance. That would be unfortunate. Aspirational resolutions have long occupied, however uncomfortably, a twilight zone between "hard" treaty law and the normative void. Even if passed with a degree of cynicism, they may still have a bearing on the direction of normative evolution. By seeking to harden this "soft" law prematurely, however, the [ICJ] advises prudent states to vote against such resolutions, or at least to abstain.

Thomas M. Franck, *Some Observations on the ICJ's Procedural and Substantive Innovations*, 81 AM. J. INT'L L. 116, 119 (1987).

54. Nicaragua, 1986 I.C.J. 14, para. 188 (emphasis added).

55. Some commentators take strong objection to this holding:

> [A] customary rule arises out of state practice; it is not necessarily to be found in UN resolutions and other majoritarian political documents. . . . If voting for a UN resolution means investing it with *opinio juris*, then the latter has no independent content; one may simply apply the UN resolution as it is and mislabel it 'customary law.'

D'Amato, *supra* note 38, at 102. This critique is overstated, as the ICJ merely held that General Assembly resolutions could contribute to *opinio juris*; consistent state practice must also be identified. D'Amato no doubt makes his charge in view of the Court's regrettable assumption (rather than interrogation) of consistent state practice. The judgment is, however, clear that consistent state practice remains an essential element of customary international law formation. Nicaragua, 1986 I.C.J. 14, para. 184; INT'L LAW ASS'N, *supra* note 35, at 63 ("Given that General Assembly resolutions are not, in principle, binding, something more is needed to establish [*opinio juris*] than a mere affirmative vote (or failure to oppose a resolution adopted by consensus).").

56. Nuclear Weapons, 1996 I.C.J. 226, para. 71. "[I]t is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule." *Id.* An extreme interpretation is that

> [t]his decision goes much farther than its predecessors in transforming [General Assembly resolutions] from exhortations or "soft law" principles into "hard law" prescriptions, at least in the eyes of the Court . . . . Every resolution that purports to express a legal norm, even a "soft law" exhortation or aspiration, has the potential of being recognized by the Court as a binding and strictly enforceable obligation, at least for those states which did not expressly dissent from it.

Fred L. Morrison, *Legal Issues in the Nicaragua Opinion*, 81 AM. J. INT'L L. 160, 161 (1987). As James Crawford helpfully reminds us, "[o]f course, the General Assembly is not a legislature. Mostly its resolutions are only recommendations, and it has no capacity to impose new legal obligations on States." JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 113 (2d ed. 2006).

57. *See supra* note 21.

58. Enrico Lapenna, *Territorial Asylum—Developments from 1961 to 1977—Comments on the*

subsequent effort to revisit the asylum convention project.[59] To rely on the 1967 asylum declaration as an indication of official acceptance of a comprehensive duty of *non-refoulement*—much less to isolate the nineteen abstaining countries and deem their failure to protest to be implied support—is disingenuous given the totality of the evidence of state attitudes.

The more plausible basis for General Assembly-based *opinio juris*—ironically, not invoked by Lauterpacht and Bethlehem[60]—is the line of subsequent General Assembly calls to respect the duty of *non-refoulement*, often said to apply to "asylum seekers" as well as to the arguably more constrained category of refugees.[61] While not as specific as the beneficiary category contended for,[62] the regularity of the endorsement of *non-refoulement* in the General Assembly[63] is noteworthy and goes some distance in support of the claim that there is *opinio juris* for a duty of *non-refoulement* owed to more than just Convention refugees.

The challenge, though, is that General Assembly resolutions are merely one factor to consider in the assessment of *opinio juris*. They must be weighed against contrary indications, in particular those emanating from states not already bound by

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Conference of Plenipotentiaries, 16 A.W.R. BULL. 1, 4 (1978).

59. A helpful contrast is provided by the facts of the *Fisheries Jurisdiction Case*, which notes that the *opinio juris* contended for by Iceland—a provision for special treatment of states overwhelmingly dependent on fishing— initially "failed to obtain the majority required, but a resolution was adopted at the 1958 Conference concerning the situation of countries or territories whose people are overwhelmingly dependent upon coastal fisheries for their livelihood or economic development." Fisheries Jurisdiction Case (U.K. v. Ice.), 1974 I.C.J. 3, para. 56 (July 25).

60. This argument is, however, made by the UNHCR. "The principle of non-refoulement has been consistently referred to by the United Nations General Assembly in its various resolutions on the High Commissioner's Annual Report. The Office of UNHCR considers that these references to the principle of non-refoulement, taken together with the ... Conclusions of the [UNHCR] Executive Committee constitute further evidence of its acceptance as a basic normative principle." U.N. HIGH COMMISSIONER FOR REFUGEES, THE PRINCIPLE OF NON-REFOULEMENT AS A NORM OF CUSTOMARY INTERNATIONAL LAW: RESPONSE TO THE QUESTIONS POSED TO UNHCR BY THE FEDERAL CONSTITUTIONAL COURT OF THE FEDERAL REPUBLIC OF GERMANY IN CASES 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93 para. 43 (1994).

61. *See, e.g.*, the references to *non-refoulement* in resolutions adopted routinely by the General Assembly upon receiving the High Commissioner's annual report: G.A. Res. 38/121, para. 2, U.N. Doc. A/RES/38/121 (Dec. 16, 1983); G.A. Res. 39/140, para. 2, U.N. Doc. A/RES/39/140 (Dec. 14, 1984); G.A. Res. 40/118, para. 2, U.N. Doc. A/RES/40/118 (Dec. 13, 1985); G.A. Res. 41/124, para. 2, U.N. Doc. A/RES/41/124 (Dec. 4, 1986); G.A. Res. 42/109, para. 1, U.N. Doc. A/RES/42/109 (Dec. 7, 1987); G.A. Res. 43/117, para. 1, U.N. Doc. A/RES/43/117 (Dec. 8, 1988); G.A. Res. 44/137, pmbl., U.N. Doc. A/RES/44/137 (Dec. 15, 1989); G.A. Res. 45/140, pmbl., U.N. Doc. A/RES/45/140 (Dec. 14, 1990); G.A. Res. 46/106, pmbl., U.N. Doc. A/RES/46/106 (Dec. 16, 1991); G.A. Res. 47/105, pmbl., U.N. Doc. A/RES/47/105 (Dec. 16, 1992); G.A. Res. 48/116, para. 3, U.N. Doc. A/RES/48/116 (Dec. 20, 1993); G.A. Res. 49/169, para. 4, U.N. Doc. A/RES/49/169 (Dec. 23, 1994); G.A. Res. 50/152, para. 3, U.N. Doc. A/RES/50/152 (Dec. 21, 1995); G.A. Res. 51/75, para. 3, U.N. Doc. A/RES/51/75 (Dec. 12, 1996); G.A. Res. 52/103, para. 3, U.N. Doc. A/RES/52/103 (Dec. 12, 1997); G.A. Res. 53/125, para. 8, U.N. Doc. A/RES/53/125 (Dec. 9, 1998); G.A. Res. 54/146, para. 9, U.N. Doc. A/RES/54/146 (Dec. 17, 1999); G.A. Res. 55/74, para. 10, U.N. Doc. A/RES/55/74 (Dec. 4, 2000); G.A. Res. 56/137, para. 3, U.N. Doc. A/RES/56/137 (Dec. 19, 2001); G.A. Res. 57/187, para. 4, U.N. Doc. A/RES/57/187 (Dec. 18, 2002); G.A. Res. 58/151, para. 3, U.N. Doc. A/RES/58/151 (Dec. 22, 2003); G.A. Res. 59/170, para. 3, U.N. Doc. A/RES/59/170 (Dec. 20, 2004); G.A. Res. 60/129, para. 3, U.N. Doc. A/RES/60/129 (Dec. 16, 2005); G.A. Res. 61/137, para. 3, U.N. Doc. A/RES/61/137 (Dec. 19, 2006); G.A. Res. 62/124, para. 4, U.N. Doc. A/RES/62/124 (Dec. 18, 2007); G.A. Res. 63/148, para. 4, U.N. Doc. A/RES/63/148 (Dec. 18, 2008).

62. *See supra* text accompanying note 24.

63. There is no pattern of substantial negative votes or abstentions of a kind that would negate the *opinio juris* value of the resolutions. Nuclear Weapons, 1996 I.C.J. 226, para. 71.

a treaty-based duty of *non-refoulement*.[64] Apart from the failure of (and failure to resuscitate over the ensuing forty years) the territorial asylum initiative described above, the major contraindication is the persistent refusal of most states of Asia[65] and the Middle East[66] to be formally bound by the asserted comprehensive duty of *non-refoulement*.[67] While such states have often agreed to admit refugees and other human rights victims, there is no evidence that whatever openness they have shown—often partial, and usually highly conditional[68]—has been influenced by a

64. "To begin with, over half the States concerned, whether acting unilaterally or conjointly, were or shortly [afterward] became parties to the Geneva Convention, and were therefore presumably, so far as they were concerned, acting actually or potentially in the application of the Convention. From their action no inference could legitimately be drawn as to the existence of a rule of customary international law in favor of the equidistance principle." North Sea Continental Shelf Cases, 1969 I.C.J. 3, para. 76.

65. For example, the Thai Ministry of the Interior lists as one of its key functions the effort "to intercept and drive back refugees." U.S. COMMITTEE FOR REFUGEES AND IMMIGRANTS, WORLD REFUGEE SURVEY 2008, 7 (2008). The Malaysian Minister of Information similarly announced with respect to Acehnese refugees: "We will treat them as we do other refugees. We will detain them and send them back." *Aceh Under Martial Law: Problems Faced by Acehnese Refugees in Malaysia*, HUM. RTS. WATCH, Mar. 31, 2004, at 10 (quoting Khalil Yaacob). In India, there is no domestic legal framework for recognizing refugees. The Foreigners Act 1946 does not distinguish between undocumented migrants and refugees, and allows the government to arrest, detain, and deport any undocumented migrant. The Foreigner's Act, No. 31 of 1946, India Code (1993), v. 1; *see* Prabodh Saxena, *Creating Legal Space for Refugees in India: the Milestones crossed and the Roadmap for the Future*, 19 INT'L J. REFUGEE L. 246, 250 (2007) (describing The Foreigners Act 1946 in which refugees are not distinguished from aliens).

66. Reliance is sometimes placed on express acknowledgments of the duty of *non-refoulement* in bilateral arrangements between regional states and the UNHCR, but these are not in fact a dependable indicator of *opinio juris*. For example, despite having executed such an agreement Jordan simply closed its borders to Palestinian and Iranian Kurdish refugees in 2006 on the basis of capacity and concerns that the refugees would not depart even when the risk abated. *Nowhere to Flee: The Perilous Situation of Palestinians in Iraq*, HUM. RTS. WATCH, Sept. 9, 2006, at 38–39, *available at* http://www.hrw.org/en/node/11181/section/1 [hereinafter *Nowhere to Flee*].

67. Participation in both the Torture Convention, *supra* note 3, (containing an express duty of *non-refoulement* in Art. 3) and the Civil and Political Covenant, *supra* note 4 (containing an implied duty of *non-refoulement* in relation to Arts. 6 and 7) is fairly strong.

Approximately 70% of Asian states and 85% of Middle Eastern countries are parties to the Torture Convention, while 80% of Asian countries and 85% of Middle Eastern nations are parties to the Civil and Political Covenant. *See* The Secretary-General, Multilateral Treaties Deposited with the Secretary-General, ch. IV, U.N. Doc. ST/LEG/SER.E/26 (Vol. I) (Apr. 1, 2009), *available at* http://treaties.un.org/Pages/ParticipationStatus.aspx (providing a list of countries who are parties to the treaties). Notwithstanding the high participation rate, only two Asian states (Kazakhstan and the Republic of Korea) and one Middle Eastern country (Qatar) have accepted the competence of the Committee Against Torture in accordance with Article 22 of the Torture Convention. Similarly, only 50% of Asian state parties to the Civil and Political Covenant and no Middle Eastern country have accepted the competence of the Human Rights Committee to hear individual complaints under the Optional Protocol to the Civil and Political Covenant. *Id.* ch. IV, pt. 5.

Acceptance of a duty of *non-refoulement* vis à vis refugees in both of these regions is very low. Only 40% of Asian countries and 23% of Middle Eastern states have acceded to either the Refugee Convention or Protocol. *Id.* ch. V.

This refusal formally to be bound by the duty to avoid the refoulement of refugees is long-standing. *See* Kay Hailbronner, Nonrefoulement *and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?*, *in* THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980S 123, 128–29 (David A. Martin ed., 1988) (describing the longstanding refusal of Eastern European, Asia, and Near East states to ratify agreements containing *non-refoulement* clauses). The claim of *opinio juris* in support of a comprehensive duty of *non-refoulement* is thus undermined.

68. Lebanon's Memorandum of Understanding with the UNHCR, for example, states that "Lebanon does not consider itself an asylum country." U.S. COMMITTEE FOR REFUGEES AND IMMIGRANTS, WORLD REFUGEE SURVEY 2009—LEBANON (2009), *available at* http://www.unhcr.org/refworld/

sense of legal obligation (rather than, for example, by political or economic calculus, social or cultural affiliation, or a sense of moral responsibility). A former Chief Justice of India, for example, affirmed that "while courts in his country 'have stepped in' on occasion to prevent refugee deportations, 'most often these are ad hoc orders. And an ad hoc order certainly does not advance the law. It does not form part of the law, and it certainly does not make the area clear.'"[69] As the ICJ noted in the *North Sea Continental Shelf Cases*, such actions do not support a finding of *opinio juris*.[70]

The persistent reluctance of the majority of states in Asia and the Middle East to embrace a comprehensive legal duty to protect refugees and others against *refoulement* is problematic for a second reason. Customary international law formation sensibly gives particular attention to the views of states "specially affected" by the phenomenon sought to be regulated.[71] With Asia and the Middle East hosting the majority of refugees in the world,[72] yet failing clearly to affirm a duty to protect, the assertion of universal *opinio juris* based on General Assembly resolutions is especially fragile.

To be clear, I recognize that when a treaty-based norm stimulates a broadly embraced sense of obligation (in particular, among non-party states), *opinio juris* in

docid/4a40d2ab53.html. Lebanon therefore permits refugees to remain only on the condition that they are resettled or repatriated by the UNHCR within a period of six months. *Id.* A similar concern arises in Jordan. *See Nowhere to Flee*, *supra* note 66 (describing how Palestinian refugees from Iraq were denied entry into Jordan and detained). *See generally* Michael Kagan, *The Beleagured Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination*, 18 INT'L J. REFUGEE L. 1 (2006) (arguing that the UNCHR should provide RSD on condition that refugee rights would be protected).

69. Hathaway, *supra* note 5, at 364 (quoting Jagdish Sharan Verma, Inaugural Address *in* SEMINAR REPORT: REFUGEES IN THE SAARC REGION: BUILDING A LEGAL FRAMEWORK 13–18 (UNHCR and SAARCLAW eds., 1997)). *Accord* Prabodh Saxena, *Creating Legal Space for Refugees in India: The Milestones Crossed and the Roadmap for the Future*, 19 INT'L. J. REF. L. 246, 255 (2007) ("A plethora of unreported cases demonstrates that the courts have treated these matters on purely technical grounds; no pronouncements of law are made nor are any general guidelines laid. This explains why the majority of these cases do not find a place in law reports. Interim non-speaking orders may provide relief in individual cases, but their contribution to jurisprudence is negligible, even negative at times. Ranabir Samaddar has agreed that the judicial reasoning has been mainly humanitarian and not rights based, dispensing kindness and not justice, and that the Court has nothing to say on the 'refugee-situation.'"). *See also* Omar N. Chaudhary, *Turning Back: An Assessment of Non-*Refoulement *Under Indian Law*, 39 ECON. & POL. WKLY. 3257 (2004) (explaining that although India generally avoids *refoulement* in practice, there is no duty in Indian law against *refoulement*). *But see* Veerabhadran Vijayakumar, *Judicial Responses to Refugee Protection in India*, 12 INT'L. J. REF. L. 235, 235–36 (2000) (arguing that Indian court decisions have provided "a series of rights to the millions of refugees who had to cross the internationally recognized borders and continue to stay in India").

70. "As regards those States, on the other hand, which were not, and have not become parties to the Convention, the basis of their action can only be problematical and must remain entirely speculative. Clearly, they were not applying the Convention. But from that no inference could justifiably be drawn that they believed themselves to be applying a mandatory rule of customary international law. There is not a shred of evidence that they did and . . . there is no lack of other reasons for using the equidistance method, so that acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature. . . . The frequency, or even habitual character of the acts is not itself enough." North Sea Continental Shelf Cases, 1969 I.C.J. 3, paras. 76–77.

71. North Sea Continental Shelf Cases, 1969 I.C.J. 3, para. 74 ("State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked;—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligations is involved.").

72. At the end of 2008, 6,343,800 refugees were in the Middle East and North Africa; 909,100 in East Asia and the Pacific; and 2,512,400 were in South and Central Asia. This amounts to more than 70% of the total world refugee population. U.S. COMM. FOR REFUGEES AND IMMIGRANTS, WORLD REFUGEE SURVEY 2009 at 33 (2009).

support of a cognate customary international legal obligation may emerge. But there is no basis to conclude that just because most countries have accepted something that may broadly be termed a *non-refoulement* obligation—applying to at least some kinds of cases and some contexts—that there is a universally applicable duty of *non-refoulement* owed to the combined class of all refugees and other persons at risk of significant human rights abuse. Much less can *opinio juris* be located in General Assembly resolutions considered in isolation from the broader context of state attitudes towards the putative norm, particularly the attitudes of states especially affected by refugee flows.

But even if *opinio juris* could be located, the next question that must be addressed is whether there is evidence of consistent state practice that aligns with the putative norm (the second essential element for establishment of a customary law[73]). Sadly, there is in fact significant empirical evidence that undermines the claim of state practice in conformity with a broad-ranging and universally applicable duty of *non-refoulement*. For example, a recent survey of the fifty-two countries hosting the largest number of refugees found that thirty-five such states—that is, more than two-thirds of the states examined—had committed acts of *refoulement* or comparable physical endangerment.[74] In nearly a quarter of the countries evaluated, the risk was adjudged to be intensifying over time.[75] This data moreover exists against a long-standing and extensive pattern of *refoulement* across the world, including blatant refusals to allow refugees[76] to access state territory;[77] turn-back policies implemented by the closure of borders to refugees;[78] the construction of blunt physical barriers to prevent the entry of refugees;[79] summary ejection of refugees able physically to cross a border;[80] removals ordered without access to a procedure to verify refugee status;[81] expulsions resulting from the failure to ensure even basic procedural safeguards in

73. Hudson's classic definition speaks of four elements, including "(a) concordant practice by a number of States with reference to a type of situation falling within the domain of international relations; (b) continuation or repetition of the practice over a considerable period of time; (c) conception that the practice is required by, or consistent with, prevailing international law; and (d) general acquiescence in the practice by other States." Manley O. Hudson, *Article 24 of the Statute of the International Law Commission*, U.N. Doc. A/CN.4/16 (1950), *reprinted in* [1950] 2 Y.B. Int'l L. Comm'n 26, U.N. Doc. A/CN.4/SER.A/1950/Add.1.

Elements (a), (b), and (d) have converged over time in the requirement to demonstrate that "the conduct of States should, in general, be consistent with [the putative norm]." Nicaragua, 1986 I.C.J. 14, para. 186. Yet "[i]t is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from [actions prohibited by the putative norm]." *Id.* para. 185. Hudson's element (c) remains a second and independent criterion for recognition of a rule of customary international law. Continental Shelf, 1985 I.C.J. 13, para. 27 ("It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States . . . .").

74. U.S. COMM. FOR REFUGEES AND IMMIGRANTS, *supra* note 72, at 22. Eleven of these states were found to have committed "some" acts of *refoulement* or physical endangerment while ten had committed "significant" acts and fourteen had committed "severe" acts. *Id.*

75. *Id.*

76. The most basic categories of Refugee Convention rights inhere provisionally in persons claiming to be refugees until and unless they are determined not to qualify for refugee status. HATHAWAY, *supra* note 5, at 156–60.

77. *Id.* at 279–81.

78. *Id.* at 281–82.

79. *Id.* at 282.

80. *Id.* at 283–84.

81. *Id.* at 284–86.

the assessment of refugee status;[82] disguised removals under the rubric of "voluntary" repatriation;[83] arms-length maneuvers to repel refugees in areas of arrogated jurisdiction beyond a state's borders;[84] and the establishment of *non-entrée* legal regimes that prevent refugees from even reaching the point of being able to present their cases for protection.[85]

In short, there is a pervasive—perhaps even dominant—state practice that denies in one way or another the right to be protected against *refoulement.*[86] These surveys of state practice are moreover restricted to the comparatively well-protected category of "refugees";[87] it is likely that the *refoulement* of the broader categories of human rights victims claimed by Lauterpacht and Bethlehem to be part of the beneficiary class of the customary norm is even more pervasive. How, then, can it be argued that there is relatively consistent state practice in conformity with the putative universal duty to protect refugees and other human rights victims against *refoulement*?

First, some argue that the depth and consistency of state practice required for the establishment of customary international law should not be overstated. So long as respect for *non-refoulement* remains the norm, it is suggested that the state practice requirement is met. Second, and impliedly allowing for the inadequacy of an empirical record of concordant practice, there is authority for the view that so long as there is an effort to justify acts of *refoulement* as permissible exceptions to the alleged norm, practice that is on its face violative of the norm is in fact supportive of it. And third and most significantly, it is claimed that while state practice is required, real state action on the ground may be overcome by alternative "practice" in the form of verbal commitments to protect refugees against *refoulement.* I will consider each of these claims in turn.

First, what of the view that the depth and consistency of state practice required for the establishment of customary international law should not be overstated? There has certainly been a trend in ICJ jurisprudence to soften the standard of uniformity required. The 1950 *Asylum* decision spoke of "constant and uniform usage,"[88] the 1969 *North Sea Continental Shelf Cases* stated the test as "extensive and virtually uniform"[89] practice, while the *Nicaragua* decision of 1986 noted that "absolutely rigorous conformity"[90] is not required. It is thus easy to see why scholars are disinclined to set an overly demanding threshold of consistency of state practice. Brownlie, for example, opines that consistency of state practice "is very much a matter of appreciation."[91]

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82. HATHAWAY, *supra* note 5, at 287.

83. *Id.* at 287–89.

84. *Id.* at 290–91.

85. *Id.* at 291–99.

86. Indeed, the United Nations Commission on Human Rights has formally expressed its "distress" at the "widespread violation of the principle of non-refoulement and of the rights of refugees . . . ." U.N. Comm'n on Human Rights Res. 1997/75, U.N. Doc. E/CN.4/1997/75 (Apr. 18, 1997).

87. U.S. COMM. FOR REFUGEES AND IMMIGRANTS, *supra* note 72, at 22.

88. Asylum Case, 1950 I.C.J. at 276.

89. North Sea Continental Shelf Cases, 1969 I.C.J. 3, para. 74.

90. Nicaragua, 1986 I.C.J. 14, para. 186.

91. BROWNLIE, *supra* note 42, at 7. Hersch Lauterpacht cautions, however, that "because of the underlying requirement of consent, the condition of constancy and uniformity is liable on occasion to be interpreted with some rigidity when there is a question of ascertaining a customary rule of general validity." HERSCH LAUTERPACHT, *The Sources of International Law*, *in* INTERNATIONAL LAW: THE

That having been said, there is little doubt that clearly predominant global practice remains a requirement for the establishment of a customary legal duty. The ICJ's exhortation in the *Asylum* decision, which stated that "fluctuation and discrepancy"[92] in practice undermines the argument for custom, is both a helpful and understated indicator of the circumstances in which consensus through action is simply not present.[93] While those seeking to downplay the relevance of practice often rely on the Court's statement in *Nicaragua* that custom can arise despite "not infrequent"[94] inconsistent practice, this *obiter dictum*[95] must be balanced against the same judgment's insistence that a "settled practice"[96] be identified.[97] More specifically, as Villiger writes, state practice for a customary norm binding *all* states must at least be "general" in the sense "that common and widespread practice among many States is required. While universal practice is not necessary, practice should be 'representative,' at least of all major political and socio-economic systems."[98]

Assessed against even this relatively low benchmark, the case for identification of consistent state practice in line with a broadly inclusive duty of *non-refoulement* fails. Not only is there a record of *refoulement* in the majority of the states hosting most of the world's refugees,[99] with the practice becoming *more* common in roughly a quarter of them,[100] but there is also a clear geopolitical skew to the pattern of non-compliance,[101] with half of the major hosting countries with the worst records on *refoulement* located in Asia or the Middle East.[102] To suggest that there is anything approaching a "settled practice" of *non-refoulement*, much less a settled practice that is geopolitically inclusive, defies analysis.

Nor is the case for a settled practice in line with the duty of *non-refoulement* assisted by a second argument, namely that breaches can sometimes support a finding of consistent state practice. The ICJ's *Nicaragua* judgment, generally regarded as the most authoritative statement of this rule,[103] is at pains to explain the

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COLLECTED PAPERS OF HERSCH LAUTERPACHT 58, 62 (Elihu Lauterpacht ed., 1970).

92. Asylum Case, 1950 I.C.J. at 277.

93. Kelly, *supra* note 42, at 500 ("State practice, the material element, provides the concrete evidence of normative conviction.").

94. Nicaragua, 1986 I.C.J. 14, para. 202.

95. In the same paragraph, the Court found that "[t]he existence in the opinio juris of States of the principle of non-intervention is backed by established and substantial practice." *Id.*

96. *Id.* para. 207.

97. As such, Duffy's conclusion "[t]hat states have rarely *totally disregarded* their duty not to 'refoule' individuals to face torture is evidence of the normative practice of non-refoulement" is not justified. Aoife Duffy, *Expulsion to Face Torture? Non-refoulement in International Law*, 20 INT'L. J. REFUGEE L. 373, 387 (2008) (emphasis added).

98. VILLIGER, *supra* note 46, at 29.

99. *See supra* text accompanying note 74.

100. *See supra* text accompanying note 75.

101. *See supra* text accompanying note 74. This is not to say that states outside of Asia and the Middle East have solid records of avoiding *refoulement*. To the contrary, states around the world have often violated the putative norm. *See supra* text accompanying notes 76–85.

102. Of the 24 states assessed as presenting "systemic" or "severe" risks of *refoulement*, half are in Asia or the Middle East, namely China, Egypt, Iran, Iraq, Israel (including the Occupied Territories), Lebanon, Libya, Malaysia, Pakistan, Saudi Arabia, Syria, and Yemen. U.S. COMM. FOR REFUGEES AND IMMIGRANTS, *supra* note 72, at 22.

103. *See* VILLIGER, *supra* note 46, at 42 (noting that in the *Nicaragua* case the court did not require rigorous conformity of state practice). *See also* D'Amato, *supra* note 38, at 101–03 (criticizing the court for easing the state practice requirement in the *Nicaragua* case).

basis for its holding that "instances of State conduct inconsistent with a given rule . . . treated as breaches of that rule"[104] contribute to a finding of consistent state practice in support of the norm:

> If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.[105]

In that case, the question was whether instances of foreign intervention in support of an internal opposition group espousing "worthy . . . political or moral values"[106]—at least *prima facie* in breach of the putative norm of non-intervention—had been defended on the basis of justifications or exceptions said to be part of the putative norm itself. The manner in which the argument was rejected is instructive:

> [T]he Court finds that States have not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition. The United States authorities have on some occasions clearly stated their grounds for intervening in the affairs of a foreign State for reasons concerned with, for example, the domestic policies of that country, its ideology, the level of its armaments, or the direction of its foreign policy. But these were statements of international policy, and not an assertion of rules of existing international law.
>
> In particular, as regards the conduct towards Nicaragua which is the subject of the present case, the United States has not claimed that its intervention, which it justified in this way on the political level, was also justified on the legal level, alleging the exercise of a new right of intervention . . . .[107]

Many of the same concerns arise from an examination of state practice of *refoulement*. To begin, most instances of *refoulement* appear not to be justified at all; they simply occur.[108] And where an effort to justify *refoulement* is made, states tend to offer only blunt and unsubstantiated assertions that those seeking protection are not refugees or that the political cost of protection is too high.[109] There is, in short,

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104. Nicaragua, 1986 I.C.J. 14, para. 186.

105. *Id.*

106. *Id.* para. 206.

107. *Id.* paras. 207–08.

108. For example, Egypt recently sent Eritrean refugees back to Eritrea with no explanation or justification given. AMNESTY INT'L, EGYPT: FURTHER INFORMATION ON UA 348/08 FORCIBLE RETURN/TORTURE AND OTHER FORMS OF ILL-TREATMENT (2009). President Bush simply declared, "We will turn back any refugees that attempt to reach our shore, and that message needs to be very clear as well to the Haitian people." Press Release, Human Rights Watch, U.S.: Don't Turn Away Haitian Refugees (Feb. 25, 2004), *available at* http://www.hrw.org/en/news/2004/02/25/us-don-t-turn-away-haitian-refugees. As Kelly observes, "Nations do not regularly explain the legal basis of their actions, nor is it clear how to determine the normative belief of hundreds of states, many of whom have never had the opportunity or need to express their opinion on a particular principle." Kelly, *supra* note 42, at 470.

109. Greece has asserted that whole groups of persons seeking protection are not refugees, treating them simply as unauthorized migrants: "The Greek coast guard systematically forced boatloads of potential asylum seekers out of its national waters and back into Turkish territorial waters, sometimes deliberately damaging their boats to prevent their return or attempting to swamp them with waves, and,

rarely an effort made to justify turn-backs and other acts of *refoulement* by reference to the norm of *non-refoulement* itself, much less by arguing the applicability of the internal limitations to that duty.[110] As such, inconsistent practice is just that: inconsistent, and hence at odds with the assertion of a customary legal duty.

This analysis leaves us with one final argument in support of state practice sufficient to ground a broad duty of *non-refoulement* in customary international law. The essence of the argument is that a very broad reading of "state practice" is justified under which words alone may amount to "practice."[111] The proponents of this position look to many of the same statements relied upon to show *opinio juris* as the relevant practice in support of the norm, and thereby arrive at the conclusion that consistent state "practice" can be located despite the evidence of non-conforming "practice on the ground" previously identified.[112]

It is in regard to this issue that the rules of customary law formation are most contested.[113] As Kammerhofer explains, there is a tendency among many academics to define "practice" in a way that obviates the distinction between practice and *opinio juris*:

> Behind the apparent dichotomy of "acts" and "statements" lies a more important distinction: that between one argument that sees practice as the exercise of the right claimed and the other that includes the claims themselves and thus blurs the border between the concept of "state practice" and "*opinio juris*."[114]

This is indeed the nub of the controversy: despite the continued insistence of the ICJ that there are two, not one, essential elements to the formation of customary

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occasionally abandoning migrants on uninhabited islands.... Greek border guards arrested migrants upon arrival, issued all of them automatic deportation orders, and detained them incommunicado without registration for several days before returning them to Turkey." U.S. COMM. FOR REFUGEES AND IMMIGRANTS, WORLD REFUGEE SURVEY 2009—GREECE (2009), *available at* http://www.refugees.org/countryreports.aspx?id=2138. *See also* Simone Troller, *Greece Does EU's Migration Dirty Work*, THE GUARDIAN, Jan. 25, 2009, *available at* http://www.guardian.co.uk/commentisfree/2009/jan/25/eu-greece (describing tactics used by Greek authorities). Jordan insisted that it had the right to refuse entry to Iraqi Palestinians on the grounds of the enormity of its other responsibilities towards the Palestinians. *Nowhere to Flee*, *supra* note 66, at 39.

110. Lauterpacht and Bethlehem argue that the only internal limitation to the putative customary norm is where a state demonstrates "[o]verriding reasons of national security or public safety ... in circumstances in which the threat of persecution does not equate to and would not be regarded as being on a par with a danger of torture or cruel, inhuman or degrading treatment or punishment and would not come within the scope of other non-derogable customary principles of human rights. The application of these exceptions is conditional on the strict compliance with principles of due process of law and the requirements that all reasonable steps must first be taken to secure the admission of the individual concerned to a safe third country." Lauterpacht & Bethlehem, *supra* note 19, para. 253.

111. *See* VILLIGER, *supra* note 46, at 16–22 (describing the different views on which acts constitute state practices).

112. *Id.*

113. For an eloquent example of the classic position, which asserts that only physical acts count as practice, see ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (Cornell University Press 1971). For a clear exposition of the contrary argument that custom may be based on verbal acts alone, see Bin Cheng, *Custom: The Future of General State Practice in a Divided World*, *in* THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY 532 (R. Macdonald & D. Johnston eds., 1983).

114. Kammerhofer, *supra* note 40, at 525.

international law,[115] there seems to be a determined academic effort to downplay that requirement. The Final Report of the International Law Association (ILA) Committee on Formation of Customary (General) International Law provides a classic example of this propensity to confuse:

> The Court has not in fact said in so many words that just because there are (allegedly) distinct elements in customary law the same conduct cannot manifest both. It is in fact often difficult or even impossible to disentangle the two elements.[116]

The language used is quite extraordinary. The ILA does *not* say that the International Court of Justice *has* held that both elements of custom may be manifested by the same, presumably purely verbal, evidence, but rather simply that it "has not . . . said in so many words" that it cannot![117]

This cautious, if convoluted, framing is warranted given the actual state of ICJ jurisprudence. The decision in *Nicaragua*, while often cited as the leading source of the notion that words alone can constitute state practice,[118] did not actually reach that conclusion. The focus of the dispute was whether there was a customary norm prohibiting the threat or use of force against the territorial integrity or political independence of a state that parallels the treaty-based rule in Article 2(4) of the UN Charter.[119] The Court was insistent that a customary norm could arise only upon proof of "the actual practice and *opinio juris* of States."[120] For good measure, it added:

> The mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law. . . . [I]n the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice.[121]

The common confusion about just what the Court decided arises from the fact that it took what can only be described as a fairly slipshod approach to the assessment of state practice before focusing on the issue of *opinio juris*.[122] Implicit in its analysis that "[i]t is not to be expected that the application of the rules in question should have been perfect"[123] and that "rigorous conformity"[124] is too high a standard

115. *See supra* note 35 and accompanying text.

116. INT'L LAW ASS'N, *supra* note 35, at 7.

117. *Id.*

118. *See, e.g.*, Franck, *supra* note 53, at 118–19; Stephen Donaghue, *Normative Habits, Genuine Beliefs and Evolving Law:* Nicaragua *and the Theory of Customary International Law*, (1995) 16 AUSTL. Y.B. INT'L L. 327, 338; VILLIGER, *supra* note 46, at 19–20.

119. Nicaragua, 1986 I.C.J. 14, para. 188.

120. *Id.* para. 183 (quoting Continental Shelf, 1985 I.C.J. 13, para. 27).

121. *Id.* para. 184.

122. "In *Nicaragua* . . . the ICJ discussed the requirement of state practice, but neither analyzed, nor cited examples of this element." Kelly, *supra* note 42, at 476, n. 112. *See also* Franck, *supra* note 53, at 118–19 (criticizing the Court's reference to *opinio juris* as evidence of state practice); Frederic L. Kirgis, Jr., *Custom on a Sliding Scale*, 81 AM. J. INT'L L. 146, 147 (1987) (highlighting the inconsistencies between actual state practice and the norms embodied by *opinio juris*).

123. Nicaragua, 1986 I.C.J. 14, para. 186.

is an assumption, though an empirically suspect one,[125] that there was evidence on the facts of the case of relatively consistent state practice of non-intervention other than as authorized by the Charter.[126] Because the parties chose not to contest the issue of state practice, the Court understandably focused its analysis on the *opinio juris* question, finding that a wide-ranging set of verbal acts could give rise to *opinio juris*.[127]

However, the Court is explicit that these verbal acts are approved strictly as forms of *opinio juris*, not state practice.[128] As such, and despite the failure of the Court to interrogate clearly the state practice dimension of the claim, it is disingenuous to suggest that its lack of precision in this regard amounts to an endorsement of a new theory of customary international law formation in which state practice is rendered virtually identical to *opinio juris*. If this had been the Court's intention, why would it have been at such pains to confirm the traditional two-part test and address the sufficiency of imperfect state practice?

It follows that the notion that verbiage without concordant state practice gives rise to customary law is at best *de lege ferenda* rather than settled law. Four main arguments favor this approach:[129] plain meaning allows it; it avoids a detrimental reliance concern; states want it; and it promotes international order and human values.

On the first point, Villiger argues that "the term 'practice' is general enough—thereby corresponding with the flexibility of customary law itself—to cover *any act or behaviour of a State*, and it is not ... entirely clear in what respect verbal acts originating from a State would be lacking."[130] While linguistically plausible[131] and with at least some support in the jurisprudence,[132] the double-counting of the same words as both *opinio juris* and relevant practice is difficult to square with the ICJ's continued insistence on *both* evidence of state practice and *opinio juris*.[133] If words evincing acceptance as law are the essence of *opinio juris*, a court inclined to view

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124. *Id.*

125. Franck, *supra* note 53, at 118–19; Kirgis, *supra* note 122, at 147.

126. Having found "abstention" from the use of force other than as authorized by the UN Charter, the Court turned to the issue of *opinio juris*. Nicaragua, 1986 I.C.J. 14, para. 188.

127. Nicaragua, 1986 I.C.J. 14, paras. 188–90.

128. "The Court has however to be satisfied that there exists in customary international law an *opinio juris* as to the binding character of such abstention. This *opinio juris* may, though with all due caution, be deduced from ... the attitude of the Parties and the attitude of States towards certainly General Assembly resolutions .... It would therefore seem apparent that the attitude referred to expresses an *opinio juris* respecting such rules (or set of rules), to be thenceforth treated separately from the provisions, especially those of an institutional kind, to which it is subject on the treaty-law plane of the Charter." *Id.* para. 188.

129. The arguments made by Donaghue—that verbal "practice" is neither more ambiguous in purport nor necessarily any more politically motivated than practice on the ground—are not really arguments *in favor* of treating verbiage as practice; rather, they are counterpoints to arguments made against this position. Donaghue, *supra* note 118, at 332.

130. VILLIGER, *supra* note 46, at 21.

131. The primary meaning of "practice," however, focuses on "habitual doing or carrying out *of* something; usual or customary action or performance; action as opposed to profession, theory, knowledge, etc." 2 SHORTER OXFORD ENGLISH DICTIONARY 2309 (Oxford University Press 5th ed. 2002).

132. *See supra* note 118. *But see* text at notes 122–127, indicating why a careful reading argues against this interpretation.

133. *See supra* note 35.

words as sufficient state practice ought simply to have dispensed with the dual requirement—which the ICJ has not.

Villiger advances a second argument for treating words alone as practice that is grounded in the importance of avoiding detrimental reliance. He writes that "whatever a State feels or believes when making a statement, at least other States may come to rely on this statement, and the original State may even be estopped from altering its position."[134] This is a circular argument. If it is clear that only practical actions "on the ground" count as relevant state practice, then the risk of detrimental reliance is disposed of because there is no reasonable basis for other states to put stock in statements standing alone.

A third argument, advanced by Oscar Schachter, is that in at least some circumstances states seem to want statements standing alone to be treated as practice relevant to the formation of custom:

> [In] the contemporary international milieu governments have felt a need for new law which, for one reason or another, could not be fully realized through multilateral treaties.... For one thing, the processes of treaty negotiation are often slow and cumbersome.... In these circumstances, it has been natural for States to turn to law-declaring resolutions of the General Assembly.[135]

In Schachter's view, there is implied consent for treating at least this one form of "words alone"—namely, law-declaring resolutions adopted unanimously or without significant dissent[136]—as instant customary international law.

This is, of course, a narrower point than the general argument in favor of treating words generally as state practice. Schachter is far from alone in wishing to see at least some resolutions of international organizations, in particular resolutions of the General Assembly,[137] treated as a special example of "state practice."[138] As Jennings and Watt opine, "the concentration of state practice now developed and displayed in international organisations and the collective decisions and activities of the organisations themselves may be valuable evidence of general practice accepted

134. VILLIGER, *supra* note 46, at 22.

135. Schachter, *supra* note 38, at 533–34.

136. *Id.* at 534–35.

137. 1 ROBERT JENNINGS, COLLECTED WRITINGS OF SIR ROBERT JENNINGS 10 (1998) ("Perhaps the difficulty arises in part from the attempt to differentiate too clearly between practice and the *opinio juris*. They are rather aspects of the same idea. Even the older writers do not always mean by 'practice' the mere habit of acting in a certain way but rather the evidence, in the form of dispatches, opinions, arguments and so on, which support the existence of an *opinio juris*. Seen thus, the possible effect of a generally acclaimed General Assembly resolution falls easily into place in the orthodox scheme of things.").

138. Others are more cautious in this regard. *See* LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS 236 (1988) ("Collective resolutions by States in international organizations are *not sufficient* by themselves to generate customary norms. There has to be evidence of *additional State practice* which is consistent with those collective resolutions."); CRAWFORD, *supra* note 56, at 114 ("State practice is just as much State practice when it occurs in the context of the General Assembly as in bilateral forms. The practice of States in assenting to and acting upon law-declaring resolutions may be of probative importance, in particular where that practice achieves reasonable consistency over a period of time.").

as law in the fields in which those organisations operate."[139] There are nonetheless several concerns.

First, the fact that the General Assembly is explicitly denied the right to engage in general lawmaking activities[140] should give pause before attributing special lawmaking force to its resolutions. Second, it seems contradictory to argue that governments have effectively consented to use of the General Assembly as a lawmaking forum in order to overcome the (presumably overly demanding) procedural requirements of lawmaking by treaty when those same governments have declined either to amend the rules of treaty-making or the Charter to provide for the speedy process Schachter assumes they want.[141] And finally, where precisely is the evidence that states, rather than scholars, want a speedy, less formal lawmaking process? The only example Schachter provides in support of his thesis is the adoption in 1946 of resolutions condemning genocide as a crime and approving the Nuremberg Principles.[142] Both the paucity of examples and the fact that Schachter's cited instances led to subsequent codification in treaty form[143] suggest that support for the "states want it" thesis is modest at best.

This leaves us with one final argument for treating verbal statements as practice: that the world needs a lawmaking process capable of generating results in some core areas, even if state consent cannot be located through one of the general modes, including via consistent practice in the case of custom.[144] In advancing this thesis, Schachter forthrightly acknowledges its instrumentalist tenor, writing that "[t]he problem of inconsistent practice (i.e. violations) comes up sharply in respect of declared norms of international human rights.... In the face of these facts, it is hard to conclude that the declared norms are confirmed by general and consistent practice."[145] He is equally candid in noting that "[m]ost international lawyers seek to minimize the violations by emphasizing strong verbal condemnations and denials.... [But] [t]he notion that contrary practice should yield to *opinio juris* challenges the basic premise of customary law."[146]

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139. *Oppenheim's International Law*, *supra* note 42, at 31; *accord* VILLIGER, *supra* note 46, at 21 ("For most members of the State community, the UN and similar bodies have become the most important fora in which to express themselves collectively or individually.").

140. U.N. Charter arts. 10–18 (authorizing the General Assembly to make binding decisions only on a range of administrative matters).

141. Kelly, *supra* note 42, at 497 ("[S]tates could amend the U.N. Charter to create a new, more democratic process at the U.N. General Assembly. Similarly, resolutions passed in a prescribed form could bind all members specifically voting for a measure. States could approve an even more radical measure that would specifically bind all states to norms upon passage of a law-defining resolution by an appropriate supermajority.").

142. Schachter, *supra* note 38, at 534.

143. Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 102 Stat. 3045, 78 U.N.T.S. 277; Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

144. A weaker version of this thesis is that treating words as practice "has many beneficial functions," in particular ease of access to documentation of practice and the ability to change international law without breaking it. VILLIGER, *supra* note 46, at 21–22 (emphasis removed). While these technical points have merit, it is difficult to imagine that either is so pressing that it justifies a revision of a core rule of international lawmaking.

145. Schachter, *supra* note 38, at 538.

146. *Id.*

Schachter's solution is to endorse that contradiction in relation to only a subset of customary lawmaking, where putative norms "are strongly supported and important to international order and human values."[147] He argues that in this context "the norm has to be maintained despite violations" because "they are brittle in the sense that violations are likely."[148] A more systematized version of this approach is offered by Frederic Kirgis, who asserts that the two elements of customary lawmaking—*opinio juris* and consistent state practice—should be viewed "not as fixed and mutually exclusive, but as interchangeable along a sliding scale":[149]

> The more destabilizing or morally distasteful the activity—for example, the offensive use of force or the deprivation of fundamental human rights—the more readily international decision makers will substitute one element for the other, provided that the asserted restrictive rule seems reasonable.[150]

Despite the fact that Kirgis speaks of what international decision makers do, his analysis relies only on the *Nicaragua* case to support the claim that "a clearly demonstrated *opinio juris* establishes a customary rule without much (or any) affirmative showing that governments are consistently behaving in accordance with the asserted rule."[151] For reasons previously given, this is not in my view an accurate interpretation of the *Nicaragua* case.[152] Even if advanced simply as a thesis *de lege ferenda*,[153] there are good reasons not to endorse the proposed instrumentalist "gloss over"[154] of the duty to show relatively consistent state practice in support of the putative customary norm.

Most fundamentally, this view of custom is a disingenuous circumvention of the requirements of lawmaking by treaty.[155] If words alone are to evince state consent to

147. *Id.* at 538–39. Schachter cites in particular "the prohibitions of aggression, genocide, slavery, torture and systematic racial discrimination . . . [and] the humanitarian law of armed conflict." *Id.* He distinguishes these areas from "the law on jurisdiction, immunities, State responsibility, [and] diplomatic privileges," where he does not believe the requirement of consistent state practice can be satisfied by words alone. *Id.* at 538.

Other commentators reach the same conclusion. *See, e.g.*, Jan Wouters & Cedric Ryngaert, *Impact on the Process of the Formation of Customary International Law*, *in* THE IMPACT OF HUMAN RIGHTS LAW ON GENERAL INTERNATIONAL LAW 111, 112 (M. Kamminga & M. Scheinin eds., 2009) ("It will be argued that the more important the common interests of states or humanity are, the greater the weight that may be attached to *opinio juris* as opposed to state practice. If the stakes are high, inconsistent state practice may be glossed over, and a high premium may be put on states' statements and declarations, *inter alia* in multilateral fora, in identifying customary law combined with general principles of law.").

148. Schachter, *supra* note 38, at 539.

149. Kirgis, *supra* note 122, at 149. But as Donaghue observes, "Arguments that practice, or *opinio juris* . . . form part of a sliding scale are clearly incorrect as they fail to recognize the purpose of the inclusion of these elements in Article 38 [of the ICJ Statute]." Donaghue, *supra* note 118, at 330–31.

150. Kirgis, *supra* note 122, at 149. *See also* INT'L LAW ASS'N, *supra* note 35, at 13 ("When defining State practice—the objective element in customary law—it is necessary to take account of the distinction between what conduct counts as State practice and the weight to be given to it.").

151. Kirgis, *supra* note 122, at 148–49. *Contra* WOLFKE, *supra* note 40, at 41 ("Views questioning the necessity of one of the . . . two elements . . . have no foundation in international legal practice.").

152. *See supra* text accompanying notes 118–128.

153. Kelly appropriately refers to these theories as "normative discourse masquerading as empirical." Kelly, *supra* note 42, at 497.

154. Wouters & Ryngaert, *supra* note 148, at 112.

155. Kelly, *supra* note 42, at 537 ("[T]hat [customary international law] furnishes a means to develop universal norms when actual agreement is difficult or inconvenient, cannot justify norms when there is no genuine acceptance.").

be bound, then those words are required to be formalized as treaty.[156] To treat a wide variety of words uttered in less exacting circumstances[157] not simply as *opinio juris*[158] but as binding in and of themselves would, as Kelly rightly asserts, be to "constitute a new legislative form of lawmaking, not [customary international law] based on state behavior accepted as law."[159] Proponents of an exaggerated definition of state "practice" deny the most elementary distinction between treaties and custom: custom is not simply a matter of words, wherever or by whomever uttered,[160] but is a function of what is happening in the real world.[161] Custom, as distinguished from treaty, is about negotiation via practice.[162] The effective obliteration of the consistent practice requirement advocated by many scholars is thus conceptually flawed.[163] As Wolfke has acerbically observed, "[R]epeated verbal acts are also acts of conduct . . . but only to customs of making such declarations . . . and not to customs of the conduct described in the content of the verbal acts."[164]

This is not a purely formalist point. The huge variation in theories of which words count as practice[165] makes clear that the risk of subjectivity and political distortion[166] inherent in the transmutation of words into practice is extreme.[167] Kelly

156. WOLFKE, *supra* note 40, at 40–41 ("Without practice (*consuetudo*), customary international law would obviously be a misnomer, since practice constitutes precisely the main *differentia specifica* of that kind of international law.").

157. INT'L LAW ASS'N, *supra* note 35, at 2 ("Customary law is by its very nature the result of an *informal* process of rule-creation, so that the degree of precision found in more formal processes of law-making is not to be expected here.").

158. *See supra* text accompanying notes 39–42.

159. Kelly, *supra* note 42, at 486.

160. The resolutions of the General Assembly may provide evidence of *opinio juris*, or confirm the existence of a norm of customary international law. Nuclear Weapons, 1996 I.C.J. 226, para. 70. It remains the case, however, that inconsistent state practice precludes the development of a customary norm despite strong evidence of *opinio juris*. *Id.* para. 73.

161. The International Court of Justice has taken the position that "[w]hen it is the intention of the State making [a] declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding." Nuclear Tests Case (Austl. v. Fr.), 1974 I.C.J. 253, 267 para. 43 (Dec. 20); Nuclear Tests Case (N.Z. v. Fr.), 1974 I.C.J. 457, 472 para. 46 (Dec. 20); *endorsed in* Nicaragua, 1986 I.C.J. 14, paras. 39–40.

It seems clearly to have been the Court's intention to constrain this doctrine; however, the same result could readily have been avoided by reliance on such general principles of law as acquiescence or estoppel. A WTO panel has appropriately urged caution in the application of this approach, noting that "[a]ttributing international legal significance to unilateral statements made by a State should not be done lightly and should be subject to strict conditions . . . ." Panel Report, *United States—Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, para. 7.118 (Jan. 27, 2000).

162. Wolfke, *supra* note 40, at 41–42 ("The misunderstanding resulting from such a broad interpretation [of State practice] arises from the fact that it neglects the very essence of every kind of custom, which for centuries has been based upon material deeds and not words.").

163. Kelly, *supra* note 42, at 494 ("The strategic advantage of elevating [customary international law] to a rule of recognition is that it allows the theorist to redefine the requirements of [customary international law] from empirical law to a preferred process while retaining its formal authority.").

164. Wolfke, *supra* note 40, at 42.

165. *See* Kelly, *supra* note 42, at 495–96 (noting the difficulties in determining whether new practices have definitively emerged and variations in definitions).

166. *Id.* at 458 ("Normative scholars, advocates, and self-interested states are misusing an empirical source of law to articulate their preferred norms as if they were propounding a constitution rooted in common culture. . . . I do believe that in a diverse world without a consensus on values, a general

rightly points to the likelihood of cultural bias[168] in the selection of which norms are "important to international order and human values,"[169] "important [to] the common interests of states or humanity,"[170] or which address concerns that are "destabilizing or morally distasteful":[171]

> Powerful states use "non-empirical" [customary international law] to justify the exercise of power without actual acceptance. Environmental and human rights activists, on the other hand, envision [customary international law] as an instrument for progressive change.... [Customary international law] is an inapt instrument for all of these uses. The clever use of arbitral decisions, general *dicta* from a few ICJ cases, the glorification of general and ambiguous non-binding instruments, or the reconceptualization of [customary international law] do not establish either requirement of customary law. Custom takes its authority from the belief in the normative quality of resolved experience, not the manipulation of legal instruments.[172]

In sum, "[t]his impressionistic disarray allows the scholar, advocate, or judge in the few cases that are adjudicated to subjectively arrive at a conclusion affected by normative predilection. The [customary international law] of human rights is a product of the normative perspective of academics and advocates practicing human rights law, not the social facts of states accepting legal norms."[173]

Given the inherent subjectivity[174] of treating some, but not all, words as customary law without need for concordant practice, it should come as little surprise that relevant assertions of customary duty rarely attract compliance by states.[175] It is surely true that "[t]he less powerful nations ... would be unlikely to accept the 'claims' approach of D'Amato[176] or the New Haven school because it would diminish their role in law formation."[177] It is equally clear that the view favored by many in

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normative approach is premature and would threaten primary values, such as state sovereignty and the procedural values of open, democratic decision-making, that retain vitality.").

167. Jack L. Goldsmith & Eric Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT'L L. 639, 640 (2000) ("Approximately two centuries after the rise of the positivist view, a new theory [of customary international law] is beginning to take hold in some quarters. This theory derives norms of [customary international law] in a loose way from treaties (ratified or not), UN General Assembly resolutions, international commissions, and academic commentary—but all colored by a moralism reminiscent of the natural law view.").

168. Kelly, *supra* note 42, at 467.

169. Schacter, *supra* note 38, at 538.

170. Wouters & Ryngaert, *supra* note 147, at 112.

171. Kirgis, *supra* note 122, at 149.

172. Kelly, *supra* note 42, at 498.

173. *Id.*

174. *Id.* at 451 ("Under the indeterminate and manipulable theory of [customary international law] ... [customary international law] is then a matter of taste.").

175. Sepet and Bulbul v. Secretary of State for the Home Department, [2003] UKHL 15, [2003] 1 W.L.R. 856, [11] (U.K.) ("[R]esolutions and recommendations ... however sympathetic one may be towards their motivation and purpose, cannot themselves establish a legal rule binding in international law."). *See also* Garza v. Lappin, 253 F.3d 918, 925 (7th Cir. 2001) ("The American Declaration of the Rights and Duties of Man, on which the Commission relied in reaching its conclusions in Garza's case, is an aspirational document which, as Garza admitted in his petition ... did not on its own create an enforceable obligation on the part of any of the OAS member nations.").

176. For more on the claims approach, see the discussion at note 113.

177. Kelly, *supra* note 42, at 495. *See also id.* at 466 ("The substantive norms offered as [customary

less powerful nations that "the accumulation of non-binding international instruments creates binding legal obligations is," as Kelly notes, "not one which is widely shared by [more powerful] states and has been specifically rejected by the United States."[178] This is the critical answer to scholars, such as Schachter, who argue for the revaluation of words as practice based on the need to secure critical social ends. If compliance is not in fact advanced by the assertion of words alone as customary international law,[179] and there is little evidence that it is,[180] then on what basis does the appeal to necessity really stand? And if the alleged necessity really does exist in the context of a *shared* assumption of critical need, as most theorists assume it should, then there will in any event be little difficulty proceeding to a treaty to concretize that agreement.[181]

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international law] in much of the Western literature are, not coincidentally, norms associated with individualism and the market economy.").

178. *Id.* at 489. As Byers has observed, "The newly independent non-industrialized States found themselves in a legal system which had been developed primarily by relatively wealthy, militarily powerful States. They consequently sought to change the system. They used their numerical majorities to adopt resolutions and declarations which advanced their interests. They also asserted, in conjunction with a significant number of legal scholars (and perhaps with the International Court of Justice) that resolutions and declarations are instances of State practice which are potentially creative, or at least indicative, of rules of customary international law .... Powerful States, for the most part, along with some scholars from powerful States, have resisted these developments. They have emphatically denied that resolutions and declarations can be State practice." MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW 41 (1999).

179. Kelly, *supra* note 42, at 540–41 ("[T]he [customary international law] process does not encourage compliance. With few effective means of enforcing norms, the international system relies on commitment and reciprocal self-interest for compliance. Nations that played no role in the formation of norms nor had their interests considered are unlikely to honor such norms.").

180. In the context of the asserted duty of *non-refoulement*, see for example, HATHAWAY, *supra* note 6, at 279–300. But the customary legal argument recently found favor before Justice Hartmann of the Hong Kong Court of First Instance. C. v. Director of Immigration, [2008] HKEC 281 (C.F.I.), HCAL No. 132/2006, *available at* http://legalref.judiciary.gov.hk/lrs/common/ju/judgment.jsp. Reviewing not only the Lauterpacht and Bethlehem opinion but also relevant UNHCR Executive Committee conclusions and the full range of scholarly positions, the judge determined that "[o]n balance ... it must be recognized that the principle of *non-refoulement* [as] it applies to refugees has grown beyond the confines of the Refugee Convention and has matured into a universal norm of customary international law." *Id.* at 27–34. Extraordinarily, the judgment makes this finding against an express acknowledgment that "a good many states have ... by their actions been unambiguous in their repudiation of the norm as it has evolved in customary international law." *Id.* at 30. Indeed, it observes that UNHCR proclamation of the non-derogable nature of the customary duty of *non-refoulement* "was made by the Executive Committee ... against the backdrop of 'widespread violations of the principle of *non-refoulement.*'" *Id.* at 31. In the end, however, the court refused the declaration sought by the applicants on the ground that Hong Kong has been a persistent objector to the norm—a conclusion reached not on the basis of real evidence of persistent objection, but rather on legally doubtful basis that in the context of "the refusal to accede to the Refugee Convention, the refusal to enlarge the terms of the Immigration Ordinance, the making of specific reservations concerning immigration and the often-stated policy against asylum—Hong Kong's refusal to pass legislation incorporating the rule is equivalent to passing legislation for the purpose of excluding it." *Id.* at 36. For a detailed description of this case, see Oliver Jones, *Customary Non-Refoulement of Refugees and Automatic Incorporation into the Common Law: A Hong Kong Perspective*, 58 INT'L & COMP. L.Q. 443, 447–68 (2009).

181. Kelly, *supra* note 42, at 538 ("If nations have, in fact, accepted legal norms and possess the necessary normative conviction, then the vast majority of states should have little difficulty signing a treaty. Modern communications and transportation have simplified the logistics of international meetings, reducing treaty negotiations and international decisionmaking to a common occurrence.").

III. THE SECOND CLAIM: NON-REFUGEES ARE ENTITLED TO REFUGEE RIGHTS

Jane McAdam's pioneering study, *Complementary Protection in International Refugee Law*,[182] links neatly to Lauterpacht and Bethlehem's analysis. McAdam's thesis is that all persons who are entitled to be protected against *refoulement* are—despite their non-refugee-status—entitled to the same rights as refugees who meet the requirements of the Refugee Convention.[183] To be clear, McAdam's argument is *not* simply that non-returnable persons are entitled to all generic, internationally recognized human rights. Her claim is specifically that all persons who are non-returnable under international law benefit from the entitlements which the Refugee Convention grants to refugees who satisfy the refugee definition set in Article 1 of that treaty.[184]

McAdam's claim at times appears to be (appropriately) aspirational. She is clearly correct that there is a "protection gap"[185] arising from the fact that most of the new duties of *non-refoulement* have simply been read into treaty law by authoritative interpretation of the supervisory bodies. In contrast to the Refugee Convention's explicit design as an instrument to codify the rights of its beneficiary class,[186] the incremental and opportunistic way in which broader duties of *non-refoulement* evolved[187] provided no comparable opportunity to secure clear agreement on the rights of the expanded class of persons entitled to protection against *refoulement*. Non-removable non-refugees have thus been forced to rely on generic (and hence often insufficiently attentive) rights set out in general human rights law.[188] McAdam acknowledges that customary law has not intervened to fill this void, forthrightly conceding that state practice does not presently support the attribution of refugee-specific rights to other persons benefitting from protection against *refoulement*.[189]

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182. MCADAM, *supra* note 6.

183. *Id.* at 1. The one critical exception asserted by McAdam relates to persons who would fall afoul of the exclusion clauses of the Refugee Convention. *See id.* at 223–42 (listing the exclusion clauses and situations not covered by the Refugee Convention).

184. McAdam's analysis of the beneficiary class is not grounded in customary international law. She focuses instead on the various treaty-based regimes which expressly or by interpretation give rise to a duty of *non-refoulement*. *See id.* at 53–196 (analyzing the rights of refugees based on the European Union Qualification Directive, the Torture Convention, the ECHR, the Civil and Political Covenant, and the Convention on the Rights of the Child). There is, however, no basis in principle to distinguish the rights of persons entitled to protection against *refoulement* under a treaty from those entitled to the same protection by virtue of customary international law.

185. *Id.* at 201 ("In the human rights context, however, [*non-refoulement*] has been separated from these other rights to provide the trigger for protection without any corresponding legal status. The result is a protection gap.").

186. HATHAWAY, *supra* note 5, at 91–93.

187. The clear exception is Article 3 of the Torture Convention, which contains an explicit duty of *non-refoulement* yet does not define the rights of the beneficiary class. Torture Convention, *supra* note 3, art. 3(1). Expert analysis of this treaty provides no explanation for the omission. MANFRED NOWAK & ELIZABETH MCARTHUR, THE UNITED NATIONS AGAINST TORTURE: A COMMENTARY 126, 195–224 (2008).

188. MCADAM, *supra* note 6, at 253 ("The strong theoretical claims of human rights law unfortunately do not always sit comfortably with the realities of State practice.").

189. *Id.* at 3 ("There is not yet a consistent understanding of what that resultant legal status [of the beneficiaries of complementary protection] should entail, although this book advances the argument that a status identical to Convention status ought to apply."); *id.* at 5 ("Though a number of States have traditionally respected these additional *non-refoulement* obligations, they have been reluctant to grant beneficiaries a formal legal status analogous to that enjoyed by Convention refugees."); *id.* at 11 ("States

She points instead to the comparability of needs between those non-removable, at-risk, non-citizen *refugees* and those non-removable, at-risk, non-citizen *others*.[190] McAdam encourages us to recognize the flexibility of the Refugee Convention's rights regime, noting that "there is nothing intrinsic in the Convention regime that prevents its extension to persons outside the article 1A(2) definition . . . ."[191] There is much force to this argument, at least as a sensible policy option.

I believe there is much to commend a second and more legally aggressive argument briefly alluded to by McAdam. Moving beyond the purely normative, she points to the utility of non-discrimination law as a basis for compelling states to grant non-removable others the same rights granted to non-removable refugees.[192] Arguing that "there is no legal justification for distinguishing between the status of Convention refugees and beneficiaries of complementary protection,"[193] McAdam asserts that "[t]o invoke the Convention refugee definition as intrinsically and exclusively legitimate in giving rise to a privileged alien status is . . . both historically inaccurate and legally flawed."[194] Noting that international law "permits distinctions between aliens who are in materially different circumstances, but prohibits unequal treatment of those similarly placed,"[195] she neatly sets the stage for invocation of the broad-ranging duty of equal protection of the law,[196] especially that set by Article 26 of the Civil and Political Covenant.[197] Unless the differential allocation of rights between refugees and other non-removable, at-risk, non-citizens is demonstrably "objective and reasonable," the same rights must be extended to both groups.[198] As such, both in state parties to the Refugee Convention and in countries that grant refugees preferred rights in practice, the duty of equal protection is in my view a powerful basis upon which to assert the need to enfranchise the broad category of persons in receipt of protection against *refoulement* with refugees.

But McAdam's claim is neither simply normative nor based on equal protection obligations.[199] Regrettably in my view, she insists that there is a present legal

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have sought to distinguish them from Convention refugees by granting them fewer rights and entitlements."); *id.* at 17 ("In many cases, healthcare, employment, social security, and other rights which Convention refugees receive are denied. Accordingly, the extent of protection may be little more than *non-refoulement* through time.").

190. *Id.* at 217 ("In real terms, the situation of Convention refugees and non-excludable beneficiaries of complementary protection is very similar.").

191. MCADAM, *supra* note 6, at 210.

192. *Id.* at 219–20.

193. *Id.* at 11.

194. *Id.* at 198.

195. *Id.* at 220.

196. *Id.* at 197 ("[T]here is no legal justification for differentiating the rights of beneficiaries of international protection based on the *source* of the protection need.").

197. Civil and Political Covenant, *supra* note 4. McAdam does not, however, explicitly reference this critical provision. *But see* HATHAWAY, *supra* note 15, at 7–8, n. 26 (discussing the principle of non-discrimination against members of the subsidiary class); and especially Pobjoy, *supra* note 18 (arguing that those entitled to complementary protection should benefit from many refugee rights by virtue of the principle of non-discrimination under Article 26 of the Civil and Political Covenant).

198. *See* HATHAWAY, *supra* note 5, at 123–47 (analyzing "reasonable and objective" in non-discrimination law).

199. MCADAM, *supra* note 6, at 17 ("[T]he Convention *operates* as a *lex specialis* for all persons in need of international protection—a specialized blueprint for legal status, rights, and obligations, irrespective of the legal source of the protection obligation.") (emphasis added); *id.* at 197 ("[B]eneficiaries of complementary protection *are entitled* to the same legal status as Convention refugees

obligation to assimilate refugees and other beneficiaries of protection against *refoulement*[200] for purposes of rights entitlement because the recognition of non-refugee-specific duties of *non-refoulement* amounts to an indirect amendment of the scope of the Refugee Convention.[201] She writes:

> [I]nstead of the Convention's terms being formally expanded by a Protocol or an amendment to the text itself, . . . the development of human rights-based *non-refoulement* has extended eligibility for protection, while the Convention may be appropriately viewed as articulating the resulting *status*."[202]

More explicitly:

> As a specialist human rights refugee treaty comprising one part of a holistic human rights regime, it is argued that the Convention's application has been extended through the expansion of *non-refoulement* under human rights law (and, by analogy, to protection granted in accordance with humanitarian and international criminal law), rather than by the conventional means of a Protocol. . . . Since the scope of *non-refoulement* has been broadened by subsequent human rights instruments, this necessarily widens the Convention's application.[203]

I believe this analysis to be in error.

Going even farther than the Lauterpacht and Bethlehem analysis, McAdam accords a reified place to the duty of *non-refoulement*.[204] Her premise is that the Refugee Convention is essentially a treaty concerned with identifying persons who should be granted protection against *refoulement* and then with defining the rights that attach to persons in receipt of protection against *refoulement*.[205] Under this rubric, since refugees are only a part of the "*non-refoulement*-acquiring class" which is in her view the basis for accessing Refugee Convention rights, refugees can receive no more rights than other beneficiaries of protection against *refoulement*.[206]

But the Refugee Convention is not an instrument that is organized around granting rights to a beneficiary class defined by the duty of *non-refoulement*. Codification of the duty of *non-refoulement* was actually far from the core of the Refugee Convention's purposes; indeed, as initially proposed, Article 33 would have

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. . . .") (emphasis added); *id.* at 252 ("[T]he extended scope of *non-refoulement* under international human rights and humanitarian law *imposes* a two-fold obligation on States: to refrain from removing persons to territories where they face a substantial risk of particular kinds of ill-treatment; and to provide such persons with a legal status equivalent to that of Convention refugees.") (emphasis added).

200. Indeed, McAdam speaks of the beneficiaries of complementary protection as "refugees who fall outside the framework of the major international treaties, the 1951 Refugee Convention and the 1967 Protocol." *Id.* at 1.

201. *Id.* at 10–11.

202. *Id.* at 11.

203. MCADAM, *supra* note 6, at 209.

204. *Id.* at 200 ("*Non-refoulement* is certainly the most fundamental principle of refugee law—indeed, its application to persons in need of international protection might be described as 'qualifying' or 'constitutive' of their status. The question, who are the beneficiaries of international protection?, is a converse way of asking, who is protected by the principle of *non-refoulement*?").

205. *Id.*

206. *Id.* at 252.

applied only to refugees arriving with pre-authorization in a state party.[207] As a matter of historical fact, there is no basis to suggest that the Refugee Convention exists to delineate the entitlements of persons granted protection against *refoulement.*

And even if the Refugee Convention were a treaty intended to define the rights of the beneficiaries of *non-refoulement* (rather than about the rights of refugees), how does one amend the express beneficiary class of the treaty by stealth? Would it really follow that the express scope of a treaty concerned to provide rights to the beneficiaries of protection against *refoulement* automatically expands to embrace persons granted comparable protection under other instruments, or under customary international law? Given the clarity of rules about the amendment of treaties,[208] how exactly can it be that "the [broadened] scope of *non-refoulement* [under] subsequent human rights instruments, . . . necessarily widens the [Refugee] Convention's application,"[209] as McAdam suggests?

Her theory of indirect amendment is that "[t]he Refugee Convention provides the clearest statement of international law's treatment of persons in need of international protection and, *as such*, this treaty may be seen as providing the status for a more broadly constituted notion of 'refugee.'"[210] The Refugee Convention amounts, in McAdam's view, to "a form of lex specialis (specialist law) *for all those in need of international protection*, and provides an appropriate legal status irrespective of the source of the State's protection obligation."[211] What is really being said here?

Assuming that McAdam is right (as I believe to be the case) that the Refugee Convention's rights regime is "the clearest statement" of duties owed to aliens in need of protection,[212] why then does it follow—"as such," to use McAdam's language—that it defines the rights of persons to whom it does not textually apply?[213] If the question were whether this would be desirable, the answer is likely "yes."[214]

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207. HATHAWAY, *supra* note 5, at 302. Indeed, the duty of *non-refoulement* did not appear in pre-1933 refugee conventions, having been added then as an afterthought to fill a perceived void in the scope of the duty of non-expulsion found in Article 32. *Id.*

208. *See* Vienna Convention on the Law of Treaties, arts. 39–41, May 23, 1969, 1155 U.N.T.S. 331.

209. MCADAM, *supra* note 6, at 209.

210. *Id.* at 11 (emphasis added).

211. *Id.* at 1 (emphasis added and removed).

212. It should, however, be acknowledged that generic international human rights law in some instances offers protections that exceed the scope of guarantees in the Refugee Convention itself. For example, rights to both physical security and to access the necessities of life, not codified in refugee law, can be established for refugees and other non-citizens by reliance on the Human Rights Covenants. *See* HATHAWAY, *supra* note 5, at 439–514 (demonstrating that the Human Rights Covenants offer protections for rights that the Refugee Convention is silent on).

213. McAdam at some points attempts a historical argument. MCADAM, *supra* note 6, at 198 ("[I]f historical definitions are considered, then persons who today 'only' fall within complementary protection would in some cases have been recognized as refugees under previous formal legal definitions, and persons who today fall within article 1A(2) of the Refugee Convention may in the past have been denied protection."). Assuming the point to be accurate, it nonetheless has no necessary present legal significance for purposes of interpreting the (present, Article 1A(2)-based) refugee definition.

214. However, in the European context of primary concern to McAdam, there is actually little value to be secured by assimilation of the rights of subsidiary protection beneficiaries to those of Convention refugees. As set out in *supra* note 16, the main difference in rights allocation between these groups within Europe concerns the length of residence permits and availability of family reunification—neither being a subject regulated by the Refugee Convention. Non-discrimination analysis is thus a more plausible basis to close the gap on these and most other points. *See* Pobjoy, *supra* note 18 (arguing that the principle of

But McAdam's is not a mere normative claim; rather, she states it as a legally required conclusion based on no more than the principled logic that the refugee rights list is a good fit with the needs of others.[215] Yet as she forthrightly concedes, not even the regime for stateless persons, drafted contemporaneously with the Refugee Convention, grants *all* of the same rights to that group as are bestowed upon refugees.[216] It is legally impossible to insist that the beneficiary class for refugee rights has been de jure expanded to include all those protected against *refoulement*, whether refugees or not, in the absence of any argument based on treaty amendment[217] or on the rise of either a customary or general principles norm.[218]

Nor is the argument assisted by McAdam's appeal to the notion of lex specialis.[219] This general principle of international law exists primarily to resolve a conflict between competing international norms; it is also sometimes invoked to justify reliance on specialized norms to interpret the scope of more general rules.[220] But neither the primary nor secondary meaning of lex specialis provides a legal basis for extending a treaty's beneficiary class to embrace persons outside its textual ambit.[221]

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non-discrimination may entitle those with *non-refoulement* protection to equal treatment).

215. MCADAM, *supra* note 6, at 12–13 ("[H]uman rights law alone does not provide a sufficient status for beneficiaries of complementary protection. Despite the theoretical universality of human rights law, in reality characteristics such as nationality or formal legal status can significantly affect the extent of rights an individual is actually accorded.... [O]nly the Refugee Convention creates a mechanism—refugee status—by which [rights] attach, and which does not permit derogation."); *id.* at 197 ("[T]he beneficiaries of complementary protection are entitled to the same legal status as Convention refugees, given their analogous circumstances and the Convention's function as a form of *lex specialis* for persons protected by the norm of *non-refoulement.*").

216. *Id.* at 212.

217. At one point, McAdam suggests that "it would in any case be futile for instruments like the CAT to enumerate the legal status arising from the application of *non-refoulement* since the Refugee Convention (as the *lex specialis*) already provides an appropriate status for any person protected by that principle." *Id.* at 209–10. Putting to one side the mis-characterization of the Refugee Convention as *lex specialis*, there is surely no prohibition against other treaties providing for differently defined protected status of their beneficiaries. The Convention relating to the Status of Stateless Persons, for example, does precisely that—a point ironically noted by McAdam. *Id.* at 212. Yet McAdam goes so far as to insist that the fact that Article 1A(1) of the Refugee Convention—which assimilated pre-World War II so-called "statutory refugees" to Convention refugees for purposes of rights entitlement—"*mandates* against the creation of additional statuses for persons in need of international protection who do not fall within the Convention definition." *Id.* at 210 (emphasis added).

218. McAdam rightly invokes the intention of the drafters of the Refugee Convention that the treaty "[e]xpress[ed] the hope that the Convention relating to the Status of Refugees will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides." U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Geneva, Switz. July 2–25, 1951, *Final Act*, Rec. E, U.N. Doc. A/CONF.2/108/Rev.1; MCADAM, *supra* note 6, at 11. But that hortatory statement is no basis to insist that this is a *binding* obligation. *Cf. id.* at 209 (referring to "the Convention's function as a 'charter of minimum rights to be guaranteed to refugees,' which the drafters envisaged *would* extend to additional groups of refugees") (emphasis added).

219. *Id.* at 209–10.

220. 1 GERALD FITZMAURICE, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE 370–72 (1986).

221. *See* International Law Commission, *Fragmentation of International Law: Topic (a): The Function of the Lex Specialis Rule and the Question of 'Self-Contained Regimes': An Outline* (2005), at 4 ("The maxim *lex specialis derogat lex generali* is usually dealt with as a conflict rule. However, it need not be limited to conflict. In the *Neumann* case, the European Court of Human Rights observed that the provision on compensation in case of unlawful arrest . . . was not *lex specialis* in relation to the general rule

Rather, the core meaning of lex specialis is that where two rules of international law—one specific, one more general—deal with the same subject matter, the more specific rule governs in the event of conflict.[222] Lex specialis does not require that general rules be ignored where they can be applied without infringing the specific rule;[223] to the contrary, "[f]or the lex specialis principle to apply . . . there must be some actual inconsistency between [the two rules], or else a discernible intention that one provision is to exclude the other."[224] Conde provides a helpful example:

> [F]reedom of religious expression ("manifestation of religion") can be considered a lex specialis of the norm of freedom of expression. It carves out a particular area of a more general subject for special normative treatment. It is usually used in the interpretation of treaty norms as a rule that states that a specific rule will always overrule a general rule covering the same subject.[225]

Therefore, if a treaty provision on religious freedom were framed in absolute terms whereas another treaty on freedom of expression in general were framed with permissible limitations, a state party to both treaties would be obliged to respect religious freedom without reliance on the limitations allowed under the general accord. But this primary understanding of lex specialis clearly does not support the view that non-refugees are entitled to refugee rights by virtue of the similarity of their predicament. Because there is simply a legal void to be filled in relation to non-refugees, there is no conflict of rules that lex specialis can assist to resolve.

The secondary role of lex specialis is similarly irrelevant to McAdam's argument. In addition to defining the "trump" in the case of legal conflict, lex specialis may be invoked as an interpretive aid, most commonly to assist in the construction of a general provision in relation to a matter also governed by a more specific norm. In the *Nuclear Weapons* decision, for example, the ICJ invoked lex specialis to require that the right not to be arbitrarily deprived of one's life, found in the Civil and Political Covenant's (general) provision, be construed—in the context

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on compensation .... The former did not set aside the latter but was to be 'taken into account' when applying the latter. In both cases—that is, either as an application of or an exception to the general law—the point of the *lex specialis* rule is to indicate which rule should be applied. In both cases, the special, as it were, steps in to replace the general.").

222. FITZMAURICE, *supra* note 220, at 371.

223. The exception may be in relation to what are usually referred to as "self-contained regimes"—in Pauwelyn's view, for example, including WTO law. Where a self-contained regime exists, lex specialis may completely oust the application of more general norms. JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 390 (2003). But McAdam clearly does not view refugee law as lex specialis in this strong sense. Rather, she correctly argues that "[h]uman rights law not only provides an additional source of protection for persons with an international protection need, but also strengthens the status accorded to *all* refugees through its universal application." MCADAM, *supra* note 6, at 253. "Since universal human rights law is coextensive with Convention status, it follows both as a matter of principle and of law that Convention status should not be used to read down rights. Rather, where human rights law provides more favourable standards, these should be interpolated to improve Convention rights." *Id.* at 11.

224. *Report of the International Law Commission on the Work of its Fifty-third Session*, 56 U.N. GAOR Supp. (No. 10) art. 55, U.N. Doc. A/56/10 (2001), *reprinted in* [2001] 2 Y.B. Int'l L. Comm'n 140, U.N. Doc. A/CN.4/SER.A/2001/Add.1.

225. H. VICTOR CONDÉ, A HANDBOOK OF INTERNATIONAL HUMAN RIGHTS TERMINOLOGY 150 (2d ed. 2004).

of armed conflict—in a way that takes account of the more specific provisions of the simultaneously applicable rules of international humanitarian law.[226] And in the *Israeli Wall* case, the court again relied on lex specialis to compel assessment of the legality of the wall not only by reference to the general provisions of human rights law, but also taking account of the more specific rules of international humanitarian law.[227]

While not resolving a conflict in the same direct way as it does when playing its primary "trump" role, the interpretive variant of lex specialis promotes the same general end—the avoidance of normative conflict—but in a more subtle way by refusing to allow generic norms to be construed or applied in isolation from more specialized rules.[228] This makes sense because, as Grotius observed, in determining the true intentions of state parties, "the preference is given to such [treaties] as are more particular, and approach nearer to the point in question."[229] But the importance of interpreting general rules in harmony with more specific rules does not advance McAdam's thesis that the absence of rules defining the status of the broader class of non-returnable persons must be filled by effectively recasting the Refugee Convention's beneficiary class.

In sum, lex specialis is a general principle of law concerned with determining the relationship between norms. It exists primarily in order to resolve a conflict between two binding standards—not, as McAdam tacitly suggests, to fill a normative void. Non-removable non-refugees can readily benefit from generic human rights without any infringement of the Refugee Convention's special provisions for refugees, so there is no normative conflict of either the direct or indirect variety. Because there is no normative conflict, lex specialis has no legal relevance to the definition of the scope of the duty to protect non-refugees.[230]

This is not to suggest that there are not good reasons in principle to extend many, if not all, Refugee Convention rights to the broader class of persons protected against *refoulement*. To the contrary, as observed above, the duty of equal protection may compel that result in at least some cases. But there is no extant legal basis to assert that all legally non-returnable persons are entitled de jure to claim all Refugee Convention rights.

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226. Nuclear Weapons, 1996 I.C.J. 226, para. 25.

227. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Israeli Wall), Advisory Opinion, 2004 I.C.J. 136, 178 para. 106 (July 9).

228. By way of an example of an argument invoking lex specialis in order to ground the continued relevance of specialized norms despite the subsequent development of less generous but broader norms, see Alice Edwards, *Crossing Legal Borders: The Interface Between Refugee Law, Human Rights Law and Humanitarian Law in the 'International Protection' of Refugees*, *in* INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW: TOWARDS A NEW MERGER IN INTERNATIONAL LAW 421, 429 (R. Arnold & N. Quenivet eds., 2008).

229. HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 193 (A.C. Campbell trans., 1625).

230. In any event, the result of such a characterization would not be to give rights to additional classes of non-removable non-citizens, but rather to deny to refugees the benefit of generic human rights entitlements, a position which McAdam clearly does not support. MCADAM, *supra* note 6, at 11, 253. *See* Penelope Mathew, *Review: James Hathaway, The Rights of Refugees under International Law*, 102 AM. J. INT'L L. 206, 207 (2008) ("[T]he [Refugee] Convention is not to be treated as *lex specialis* enabling one to restrict the implications of general human rights law.").

IV. CONCLUSIONS

Conceptual clarity on these issues matters.[231] The net result of the persistent overstatement of the reach of international refugee law is not, as presumably hoped, the effective incorporation of new standards into a clear and practical system of enforceable duties.[232] For example, consider the reaction of the English Court of Appeal when invited by UNHCR to find that the duty of *non-refoulement* had evolved beyond the text of Article 33. The UNHCR wanted to prohibit efforts by member states to stymie the departure of would-be refugees from their own country. UNHCR frankly acknowledged the basis for its submissions to this end:

> [T]he primary questions in this legal action do not turn on the text of the [Refugee] Convention. Rather, they turn on understanding the international protection regime as a complex of international practice and precepts drawn from refugee law, human rights law and general principles of international law.... Where, as in the present case, issues arise that strictly do not fall within the Convention's textual scope, its objectives and purposes should act as a reliable guide.[233]

The Court appropriately rejected this argument in clear terms. It approvingly cited the ICJ's view that "although the principle of good faith is 'one of the most basic principles governing the creation and performance of legal obligations ... it is not in itself a source of obligation where none would otherwise exist'...."[234] Most fundamentally, the Court refused to expand the duty of *non-refoulement* beyond what the text of the Refugee Convention would reasonably bear simply because such an expansion would prove beneficial to at-risk persons. Adopting the earlier view of the High Court of Australia, the court asserted instead that

> the Convention, like many international and municipal instruments, does not necessarily pursue its primary purpose at all costs. The purpose of an instrument may instead be pursued in a limited way, reflecting the accommodation of the differing viewpoints, the desire for limited achievement of objectives, or the constraints imposed by limited resources.... It would therefore be wrong to depart from the demands of language and context by invoking the humanitarian objectives of the Convention without appreciating the limits which the Convention itself places on the achievement of them.[235]

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231. *Oppenheim's International Law*, *supra* note 42, at 23 ("[T]he concept of a 'source' of a rule of law is important, since it enables rules of law to be identified and distinguished from other rules (in particular from rules *de lege ferenda*) ....").

232. *See* HATHAWAY, *supra* note 5, at 31–33 (arguing that overstating the scope of international law undermines its force and threatens to merge international law with politics).

233. R. (European Roma Rights Centre and others) v. Immigration Officer at Prague Airport, [2003] EWCA (Civ) 666, para. 28 (Eng.).

234. *Id.* para. 45 (quoting the decision on preliminary objections in Cameroon v. Nigeria, 1998 I.C.J. 275, 297, para. 39).

235. *Id.* para. 46 (quoting Dawson, J. in Applicant "A" and Another v. Minister for Immigration and Ethnic Affairs and Another (1997) 190 C.L.R. 225, 248 (Austl.)).

It is of course true that the reform of international law is a slow and often frustrating process, especially when reform presents few strategic, much less immediate, advantages to state parties. But the history of the last two decades makes clear that refugee law reform is not a Sisyphean pursuit. We can already draw on an extraordinary expansion of the duty of *non-refoulement* under the Civil and Political Covenant, as well as under regional norms. We can build on the potential for major gains in this regard under both the Convention on the Rights of the Child, and by reliance on international humanitarian law. We can also ground the arguments for rights-attribution to non-refugee beneficiaries of protection against *refoulement* in the duty of non-discrimination.[236] While less glamorous and surely less immediate,[237] this patient and incrementalist strategy allows us to pursue reform from within the relatively secure space of legal obligation. In contrast, if the scope of extant legal obligation is exaggerated, we impliedly jettison accrued gains and descend into the realm of pure policy—a space in which refugee rights are far too often deemed dispensable in the pursuit of narrow definitions of state self-interest.

In what may seem an ironic twist, those committed to expansion of the scope of protection must therefore concede that, contrary to the claim of Lauterpacht and Bethlehem, there is no customary international legal obligation enjoining states not bound by relevant conventions to honor the duty of *non-refoulement* in relation to refugees and others facing the prospect of serious harm. And, contrary to McAdam's view, it is not the case that all persons entitled to protection against *refoulement* must, by virtue of a conceptual fusion of the Refugee Convention and other human rights accords, be granted all of the refugee-specific entitlements codified in the Refugee Convention itself.

There is, in short, no leveraged right to asylum.

236. *See supra* text accompanying notes 3–7.

237. KELLY, *supra* note 42, 539–43 ("Universally recognized treaties can be achieved, but they require political will, compromise, and attention to the sensibilities of all perspectives.... If the goal is a world legal order, then the attempts to universalize standards, without the participation and consent of states, impede progress rather than promote it.").

Personal Jurisdiction over Non-Resident Class Members: Have We Gone Down the Wrong Road?

TANYA J. MONESTIER*

"It has not been easy to reconcile contemporary class-action practice with traditional adversary procedure."[1]

* Associate Professor, Roger Williams University School of Law. I would like to sincerely thank Martha Bailey, Barry Glaspell, Patrick Glenn, Bruce Pardy, Antonin Pribetic, and Janet Walker for their insightful comments in the preparation of this article. I would also like to thank Tyler McAuley for his excellent research assistance. Finally, a special thank you to David Coombs for his patience, support, and encouragement.

1. Edward H. Cooper, *Rewriting* Shutts *for Fun, Not To Profit*, 74 UMKC L. REV. 569, 569 (2006).

I. INTRODUCTION

With class action regimes in Canada in their infancy, at least in relation to those in the United States, Canadian courts are still filling some critical gaps in class action jurisprudence.[2] One such gap is in the area of the so-called "national" class action: a class action in a provincial forum that purports to determine the rights of residents in all Canadian provinces and territories. In reality, many "national" class actions are more appropriately termed "multijurisdictional" or "interjurisdictional" since such classes may not be truly national in scope.

One important matter yet to be resolved with respect to national or multijurisdictional classes involves the issue of personal jurisdiction over nonresident class members, that is, litigants who reside outside the province in which the class action is brought. On what basis does an Ontario court have the power to bind, for instance, an individual from British Columbia or Québec? Courts and commentators have struggled to articulate a precise answer to this question. The loose consensus appears to be that a court in one province has personal jurisdiction over a class member in another province if there is a "real and substantial connection" between the plaintiff class and the adjudicating forum. Divergent approaches have developed with respect to the real and substantial connection test as it applies to a nonresident plaintiff class. Some courts have merely required that there be an issue common to all class members, resident and nonresident, to find

2. *See, e.g.*, Janet Walker, *Coordinating Multijurisdiction Class Actions Through Existing Certification Processes*, 42 CAN. BUS. L.J. 112, 112 (2005) [hereinafter Walker, *Coordinating Multijurisdiction Class Actions*] (discussing the need for Canadian courts "to develop a means to regulate the scope of the multijurisdiction class actions that may be commenced in the same or related matters in different Canadian jurisdictions"); Canada Post Corp. v. Lépine, [2009] 304 D.L.R. 539, 2009 SCC 16 (discussing requirements of notice in the context of parallel provincial class actions).

jurisdiction; that commonality, in itself, supplies the real and substantial connection sufficient to assert jurisdiction over nonresident class members. Other courts have insisted that there be an actual link, in the sense of a nexus, between the nonresident plaintiff class and the adjudicating forum in order to ground jurisdiction. This lack of uniformity in the application of the real and substantial connection test is problematic for parties seeking finality in litigation. In particular, defendants cannot be assured that a settlement or judgment rendered in one province will in fact be enforceable in another since the enforcing court may conclude that the adjudicating court did not have jurisdiction over nonresident class members under its view of the real and substantial connection test.[3] There is thus the possibility that a defendant who has proceeded on the assumption that a settlement or judgment will be res judicata will nonetheless be required to re-litigate the claim. This hardly promotes the principles of "order and fairness" which are said to lie at the heart of the Canadian conflict of laws.[4]

This article suggests that it is necessary to re-think whether a real and substantial connection is needed to ground jurisdiction over a nonresident plaintiff class. The real and substantial connection test, initially propounded by the Supreme Court of Canada in the landmark case of *Morguard Investments Ltd. v. De Savoye*,[5] and later given constitutional status in *Hunt v. T&N plc*,[6] was developed to govern the question of when courts can assume jurisdiction over an individual, out-of-province defendant. The test cannot be readily transposed to the separate question of whether a court has jurisdiction over an amorphous class of unnamed plaintiffs. Instead of focusing on the issue of whether there is a real and substantial connection between a nonresident plaintiff class and the adjudicating forum to support the assumption of jurisdiction, courts should re-orient their analysis towards ensuring that procedural safeguards are afforded to nonresident plaintiffs. If a nonresident class member is provided with sufficient notice, an opportunity to opt out, and adequate representation, an adjudicating court should be viewed as jurisdictionally competent and its judgment accorded preclusive effect. Re-conceptualizing jurisdiction in this way eliminates the possibility that an enforcing court will be able to second-guess the adjudicating court's view on whether the real and substantial connection test has been satisfied and gives defendants a measure of control over the ultimate enforceability of the class judgment. If a defendant actively ensures that the plaintiff class receives adequate procedural protections, it can resolve class litigation relatively secure in the knowledge that an enforcing court will not refuse to enforce a judgment or settlement on personal jurisdiction grounds.

This article proceeds as follows: Part I begins by addressing the overall benefits that flow from multijurisdictional classes with reference to the policy objectives underlying class actions. Part II critically examines the law in relation to personal jurisdiction over nonresident class members. It first notes that Canadian courts have generally accepted the principle that a court can assume jurisdiction over

3. *See, e.g.*, HSBC Bank Can. v. Hocking, [2006] R.J.Q. 804, paras. 78–82, 2006 QCCS 330 (Can.), *aff'd*, Hocking v. Haziza 2008 QCCA 800 (Can.) (finding an Ontario judgment unenforceable in part because the enforcing court took a different view of whether the real and substantial connection test was satisfied). For an English translation of *Hocking*, see http://www.jugements.qc.ca/php/resultat.php?liste=42618518.

4. Morguard Investments Ltd. v. DeSavoye, [1990] 3 S.C.R. 1077, para. 42 (Can.).

5. *Id.* para. 47.

6. Hunt v. T&N plc, [1993] 4 S.C.R. 289 (Can.).

nonresidents in cases where there is a real and substantial connection between nonresidents and the adjudicating forum. It then examines and assesses the two main approaches that courts have used in determining whether the real and substantial connection test has been satisfied with respect to nonresident plaintiffs and addresses the problems associated with a lack of uniformity in court approaches to jurisdiction. Part III suggests that while these jurisdictional issues may be addressed either by courts simply adopting a uniform jurisdictional test or by permitting multijurisdictional classes only on an opt-in basis, it may be time to question the necessity for a real and substantial connection to ground jurisdiction. It argues that, as in the United States, jurisdiction over the nonresident plaintiff class should rest on the provision of adequate procedural safeguards: notice, an opportunity to opt out, and adequate representation.

There are several related issues that this article does not purport to tackle. First, it does not comprehensively address the myriad jurisdictional issues that arise in class action litigation. In particular, the article does not address the ongoing debate about whether a real and substantial connection between the adjudicating forum and an out-of-province defendant can ground jurisdiction over co-defendants with no connection to the forum.[7] Second, this article does not discuss how multiple multijurisdictional proceedings are best coordinated—whether such coordination takes place through formal or informal judicial cooperation, the creation of a national class action database, the use of the existing doctrine of forum non conveniens, or some other mechanism.[8] Third, this article considers only the issue of multijurisdictional classes within Canada. The enforcement of class judgments from foreign jurisdictions, in particular from the United States, may raise issues that necessitate special consideration.[9]

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7. For cases discussing this issue, see Frey v. BCE, [2006] 282 Sask. R. 29, paras. 12–19, 2006 SKQB 330 (Can.) and VitaPharm Can. Ltd. v. F. Hoffmann-La Roche Ltd., [2002] O.J. No. 298, para. 93 (Can.), *aff'd*, Ford v. F. Hoffman-La Roche Ltd., [2005] 74 O.R. (3d) 758 (Can.).

8. *See generally* Janet Walker, *Recognizing Multijurisdiction Class Action Judgments Within Canada: Key Questions—Suggested Answers*, 46 CAN. BUS. L.J. 450 (2008) [hereinafter Walker, *Recognizing Multijurisdiction Class Action Judgments Within Canada*] (suggesting the creation of the Canadian equivalent to the U.S. Multi-District Litigation Panel); Ward K. Branch & Christopher Rhone, *Solving the National Class Problem*, 4th Annual Symposium on Class Actions (Toronto: Osgoode Hall Law School of York University, 2007) (addressing the National Class Action Database); Walker, *Coordinating Multijurisdiction Class Actions*, *supra* note 2 (discussing the coordination of multiple multijurisdictional class actions); Fiona Hickman, *National Competing Class Proceedings: Carriage Motions, Anti-Suit Injunction, Judicial Co-operation and Other Options*, 1 CAN. CLASS ACTION REV. 367, 399 (2004) (concluding that the following policies are most likely to address the national competing class proceedings problem in Canada: "counsel collaboration when possible; national carriage declarations; and judicial cooperation"); Chris Dafoe, *A Path Through the Class Action Chaos: Selecting the Most Appropriate Jurisdiction with a National Class Action Panel*, 3 CAN. CLASS ACTION REV. 541 (2003) (exploring the possibility of adopting a body similar to the U.S. Federal Court's Judicial Panel on Multi-District Litigation in Canada). For recent cases demonstrating the difficulty in coordinating overlapping national class actions, see *Wuttunee v. Merck Frosst Can. Ltd.*, [2008] 312 Sask. R. 265, 2008 SKQB 229. *rev'd* [2009] 5 W.W.R. 228, 2009 SKCA 43 (Can.); and *Tiboni v. Merck Frosst Can. Ltd.*, 295 D.L.R. (4th) 32 (Can.), *aff'd* [2009] 95 O.R. (3rd) 269 (Can.), where both a Saskatchewan and an Ontario court certified parallel national classes of Canadian residents who had ingested the prescription drug Vioxx. Note that the Saskatchewan Court of Appeal's recent decision in *Wuttunee*, [2009] 5 W.W.R. 228, decertifying the class, ultimately rendered moot the issue of overlapping multijurisdictional class actions.

9. *See, e.g.*, Currie v. McDonald's Restaurants of Can., [2005] 250 D.L.R. (4th) 224, paras. 9–33 (Can.) (addressing the issue of whether a U.S. judgment precluded a proposed Ontario class action); *see also* Genevieve Saumier, *USA-Canada Class Actions: Trading in Procedural Fairness*, 5-2 GLOBAL JURIST ADVANCES 1, art. 1 (2005).

II. THE UTILITY OF NATIONAL CLASSES

Before addressing the problematic features of national or multijurisdictional class actions, it is helpful to examine some of the reasons such classes have been so eagerly embraced on the Canadian class actions landscape. A national or multijurisdictional class action is seen as serving the objectives underlying class actions—judicial economy, access to justice, and behavioral modification[10]—to a greater extent than class actions that are restricted to residents of a single province.

A. Judicial Economy

A national class action provides a unitary forum wherein similarly situated plaintiffs can seek redress.[11] Courts have emphasized that mass wrongs do not respect national boundaries, and that it "accords with requirements of comity, and with the policy underlying the enactment of . . . legislation enabling class actions to determine the liability of defendants for mass injury in one forum to the extent claimants may wish and fairness to the defendants may permit."[12] Adjudicating similar claims in one forum obviates the need for thirteen separate and duplicative actions that exhaust the resources of the parties and the court.[13]

Moreover, adjudicating the claims of all plaintiffs in a single forum reduces the risk that similarly situated claimants will end up with widely disparate relief—for example, that a claimant in Ontario recovers $5,000 and that a similar claimant in Alberta recovers nominal in-kind relief. A national class thus reduces the possibility of seemingly inconsistent and unfair results.

From the perspective of the plaintiff class, adjudicating claims in a single forum results in what one commentator refers to as "litigative efficiency."[14] A national or multijurisdictional class action permits plaintiffs to pool their litigation resources and thereby enjoy the economy of scale from which defendants in multiple related actions automatically benefit.[15] Craig Jones argues in this respect:

> Any unnecessary subdividing of the single class action into smaller actions will sacrifice some of the litigative efficiency of the whole, even where plaintiffs' counsel co-operate in bringing multiple provincial actions. In province-by-province certification, per-claim litigation costs will increase for plaintiffs at a greater rate than defendants, settlement incentives upon

10. Hollick v. Toronto (City), [2001] 3 S.C.R. 158, para. 15, 2001 SCC 68 (Can.) (citing 1 ONT. LAW REFORM COMMISSION, REP. ON CLASS ACTIONS 117–45 (1982); MINISTRY OF THE ATTORNEY GENERAL, REPORT OF THE ATTORNEY GENERAL, REP. OF THE ATTORNEY GENERAL'S ADVISORY COMM. ON CLASS ACTION REFORM 16–18 (February 1990)).

11. Craig Jones, *The Case For The National Class*, CAN. CLASS ACT. REV. 29, 30–31 (emphasizing that a single national class will allow similarly situated plaintiffs to pool litigation resources and fulfill objectives of both class proceedings and tort law (compensation and deterrence) better than will several provincial and territorial classes).

12. Harrington v. Dow Corning Corp., [2000] 193 D.L.R. (4th) 67, para. 85, 2000 BCCA 605 (Can.).

13. *See Developments in the Law: The Paths of Civil Litigation*, 113 HARV. L. REV. 1752, 1813–14 (2000) (discussing how multiple lawsuits and class actions waste both judicial resources and the resources of defendants).

14. Jones, *supra* note 11, at 31.

15. *Id.* at 31–33.

> defendants will decrease below the optimal, compensation per claim will decrease, and fewer valid claims will ever be brought. Free rider problems and inter-counsel blackmail will likely increase, further diminishing the efficiency of aggregate resolution.[16]

According to this view, larger class actions allow plaintiffs to consolidate litigation costs thereby increasing efficiency and expanding the overall benefits to the plaintiff class.

B. *Access to Justice*

The availability of a national class is thought to promote access to justice because it provides an incentive for class counsel to aggregate claims across provincial boundaries that would be uneconomical to litigate on an individual provincial basis. Ward Branch and Christopher Rhone argue that "a larger action creates a more effective 'carrot' to motivate that counsel" to represent the class on a contingency fee basis.[17] Conversely, having the same case subdivided into multiple jurisdictions "may water down each potential fee award to the extent that it no longer makes economic sense to pursue the case at all."[18] National or multijurisdictional classes permit claimants in all jurisdictions to participate in vindicating their rights.

C. *Behavior Modification*

Finally, the availability of national class actions may inhibit defendant behavior that produces diffuse, but harmful, effects. In *Western Canadian Shopping Centres v. Dutton*, McLachlin C.J., spoke of the behavioral modification objective of class actions, noting that "without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery."[19] McLachlin C.J., further observed that "[c]ost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation."[20] It stands to reason that the more aggregation possible, the greater the deterrent effect of class actions.[21] National classes are thus seen as serving the regulatory function of ensuring that defendants who cause widespread but minimal harm are called to account for their conduct.

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16. *Id.*
17. Branch & Rhone, *supra* note 8, at 4.
18. *Id.*
19. Western Canadian Shopping Centres v. Dutton, [2001] 2 S.C.R. 534, para. 29, 2001 SCC 46 (Can.).
20. *Id.*
21. *Developments in the Law: The Paths of Civil Litigation*, *supra* note 13, at 1809–10.

III. PERSONAL JURISDICTION OVER NONRESIDENT PLAINTIFFS IN MULTIJURISDICTIONAL CLASS ACTIONS

A. Defining the Issue

Prior to examining the issue of jurisdiction over nonresident class members, it should be noted that there is a lack of clarity in the case law concerning the issue of precisely *who* the court is asserting personal jurisdiction over in the class context: the defendant, the defendant in respect of the claims of out-of-province plaintiffs, or the nonresident plaintiff class.[22] This absence of a clear delineation between the three has muddied the jurisdictional waters and caused additional uncertainty.

The distinction is best highlighted through a concrete example. Tire Co., an American manufacturer of allegedly defective tires, is sued in Ontario by a class of plaintiffs who have purchased and used Tire Co.'s tires in Canada. Depending on the scope of the class, Tire Co. may have several jurisdictional arguments:

Scenario One: If the class is limited to Ontario plaintiffs, Tire Co. may argue that the court does not have jurisdiction over Tire Co. because none of the traditional bases of jurisdiction—presence, consent, real and substantial connection—have been satisfied. Scenario One involves a classic challenge by a defendant on jurisdictional grounds.[23]

Scenario Two: If the class purports to cover both Ontario and non-Ontario plaintiffs, Tire Co. may concede that the court has jurisdiction over Tire Co. in respect of the claims of the Ontario plaintiffs, but may argue that the court does not have jurisdiction over Tire Co. in respect of the claims of nonresident plaintiffs. The argument would be that there is no real and substantial connection between the forum (Ontario) and the action as it concerns the nonresident class members.[24]

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22. *See, e.g.*, H. Patrick Glenn, *The Bre-X Affair and Cross-Border Class Actions*, 79 CAN. BAR REV. 280, 281 (2000) (noting that in class actions, the issue of jurisdiction over the defendant is more complex than in traditional litigation "since it may be a question of jurisdiction over the defendant with regard to all members or only certain members of the class").

23. *See, e.g.*, Smith v. Nat'l Money Mart Co., [2006] 266 D.L.R. (4th) 275 (Can.) (involving a defendant challenging Ontario's jurisdiction to adjudicate pay-day loan dispute on the basis of a lack of real and substantial connection between the forum and the defendant).

24. See, for example, *Ward v. Canada (Attorney General)*, [2007] D.L.R. (4th) 684 (Can.), where the defendant argued that the potential inclusion of nonresidents in the proposed class would deprive the Manitoba court of jurisdiction *simpliciter* over the defendant, over whom the Manitoba court otherwise had jurisdiction owing to the defendant's presence in the province. The challenge to jurisdiction over a defendant turns on the distinction between "general" and "specific" jurisdiction, which is a well-established feature of American jurisdictional discourse. General jurisdiction exists when an out-of-state defendant has extensive, systematic and continuous dealings with the forum, such that the court has personal jurisdiction in *any* dispute involving the defendant. Specific jurisdiction, on the other hand, arises when the defendant does not have systematic and continuous dealings with the forum, such that the forum only has jurisdiction over the defendant in respect of that defendant's in-state activities. While Canadian courts have not adopted the labels of "general" vs. "specific" jurisdiction, it is thought that if a provincial court has jurisdiction over a defendant by virtue of the defendant's presence or consent, then the court has the power to adjudicate any claim involving that defendant. *See* Glenn, *supra* note 22, at 283 ("There are other circumstances . . . in which the territorial jurisdiction of the court would be established definitively with respect to the defendant, *erga onmes*, because of a connection between the defendant and the forum. These are the original, classic instances of territorial jurisdiction . . . ."). Conversely, if the court has

Scenario Three: If the class purports to cover both Ontario and non-Ontario plaintiffs, Tire Co. may attempt to argue that the Ontario court does not have jurisdiction over the nonresident class members because there is no real and substantial connection between such class members and the forum.[25]

Scenarios Two and Three are functionally very similar, in that they can result in a determination that a court lacks jurisdiction to render a binding judgment; for that reason, courts have tended to conflate the two. However, the questions are conceptually distinct in that the former asks whether the court has the power to bind the defendant, whereas the latter addresses whether the court has the ability to bind nonresident class members.

The issue of personal jurisdiction over a plaintiff is a unique one that does not typically arise in the context of traditional two-party litigation. In a non-class case, personal jurisdiction over the plaintiff is premised on the fact that the plaintiff has selected the forum.[26] In the language of private international law, the plaintiff consents to the jurisdiction of a certain court by launching suit there.

To understand the issue of jurisdiction over nonresident plaintiffs in the class context, it is first necessary to examine briefly the law of personal jurisdiction as it concerns defendants, particularly defendants served *ex juris*.[27] The law of personal jurisdiction in Canada has undergone significant changes in recent years, due principally to the Supreme Court of Canada's landmark decision in *Morguard*. The *Morguard* case concerned the enforcement of an Alberta default judgment in British Columbia where the defendant had neither consented to the jurisdiction of the Alberta courts, nor been served with process there.[28] By then-prevailing standards, the judgment was not enforceable.[29] The result seemed counterintuitive: if the Alberta court appropriately exercised jurisdiction under its service *ex juris* rules, why should the judgment not be enforceable in the province next door? The Supreme Court of Canada agreed. La Forest J., writing for a unanimous court, reasoned that "[i]f it is fair and reasonable for the courts of one province to exercise jurisdiction over a subject matter, it should as a general principle be reasonable for the courts of another province to enforce the resultant judgment."[30] Otherwise stated, Canadian courts should give "full faith and credit" to the judgments of another province, so long as the adjudicating court properly exercised jurisdiction.[31]

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jurisdiction over a defendant owing to a real and substantial connection, the dispute must relate to the defendant's connection with the forum. For a discussion of personal jurisdiction over the defendant in the American class context, see Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the Debate About 'Class Action Fairness'*, 58 SMU L. REV. 1313 (2005) and Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 IND. L.J. 597 (1987).

25. *See, e.g.*, McCutcheon v. The Cash Store, [2006] 80 O.R. (3d) 644, para. 57 (Can.) (noting the defendant's argument that "there is no real and substantial connection between Ontario and the claims of the residents of other Canadian provinces").

26. *See, e.g.*, Saumier, *supra* note 9, at 18 ("The typical foreign money-judgment does not give rise to it [the question of jurisdiction over the plaintiff] because the plaintiff, by choosing the foreign court as the forum for litigation, has necessarily attorned to its jurisdiction in a way that cannot later be disputed at the recognition stage.").

27. I am concerned here solely with the issue of jurisdiction *simpliciter* (*can* the court hear this case) rather than the issue of forum non conveniens (*should* the court hear this case).

28. Morguard Inv. Ltd. v. De Savoye, [1990] 3 S.C.R. 1077, paras. 2–4 (Can.).

29. *Id.* para. 22.

30. *Id.* para. 26.

31. *Id.* para. 41.

Morguard established the proposition that a court properly exercises jurisdiction over a defendant where there is a "real and substantial connection" between the forum and the action.[32] The implications of *Morguard* and the real and substantial connection test clearly extend beyond the judgment enforcement context. Since jurisdiction and enforcement are regarded as correlatives,[33] in setting out the real and substantial connection standard for assessing whether an originating court has jurisdiction for enforcement purposes, the Supreme Court in *Morguard* also set out the test for the assertion of in personam jurisdiction over a defendant.[34]

This same real and substantial connection test that was developed to ground jurisdiction over an out-of-province defendant in traditional two-party litigation has since been applied to ground jurisdiction over nonresident plaintiffs in the class setting.[35] Canadian courts appear to have accepted that a provincial court will have jurisdiction over nonresident class members in cases where there is a real and substantial connection between the nonresident class and the adjudicating forum.[36]

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32. The Supreme Court of Canada in *Beals v. Saldanha*, [2003] 3 S.C.R. 416, paras. 28, 32, 2003 SCC 72 (Can.), accepted what commentators had in the post-*Morguard* era referred to as the "broad view" of *Morguard*, i.e., that in order to found jurisdiction over a defendant "the 'real and substantial connection' test requires that a significant connection exist between the cause of action and the foreign court." *See also Beals*, [2003] 3 S.C.R. 416, para. 181 (LeBel J. dissenting, but not on this point) ("A broad interpretation of the 'real and substantial connection' test, whereby the test may be satisfied even in the absence of a connection to the defendant, seems appropriate given both our constitutional arrangements and the ultimate objective of facilitating the flow of goods and services across borders.").

33. *See* Morguard Inv. Ltd. v. De Savoye, [1990] 3 S.C.R. 1077, para. 42 (Can.) ("[T]he taking of jurisdiction by a court in one province and its recognition in another must be viewed as correlatives.").

34. It is unclear from *Morguard* whether the Supreme Court of Canada intended to replace the traditional bases of jurisdiction (consent and presence) with the real and substantial connection test. Major J. in *Beals* suggested that "[a] real and substantial connection is the overriding factor in the determination of jurisdiction" and that "[t]he presence of more of the traditional indicia of jurisdiction (attornment, agreement to submit, residence and presence in the foreign jurisdiction) will serve to bolster the real and substantial connection to the action or parties." *Beals*, [2003] 3 S.C.R. 416, para. 37. However, he proceeded to state, "[a]lthough such a connection is an important factor, parties to an action continue to be free to select or accept the jurisdiction in which their dispute is to be resolved by attorning or agreeing to the jurisdiction of a foreign court." *Id.*; *see also* Pro Swing Inc. v. Elta Golf Inc., [2006] 2 S.C.R. 612, para. 21 (Can.) (referring to "the passage, for the purpose of establishing jurisdiction over a defendant, from the service or attornment of the defendant requirement to the real and substantial connection test"). On the issue of the propriety of abandoning the traditional grounds of jurisdiction in favor of a real and substantial connection test, see Stephen G.A. Pitel and Cheryl D. Dusten, *Lost in Transition: Answering the Questions Raised by the Supreme Court of Canada's New Approach to Jurisdiction*, 85 CAN. BAR REV. 61 (2006).

35. In this article, I have distinguished between resident and nonresident class members. The cases seem to have assumed that class members' residence in the forum automatically constitutes a real and substantial connection sufficient to support the assumption of jurisdiction over them. As such, the concern is focused on establishing a real and substantial connection between the forum and nonresidents. Whether resident class members necessarily have a real and substantial connection with the forum simply by virtue of their residence is questionable. Walker notes that "using residency to determine whether or not a class action will bind a member of a plaintiff class who takes no step to join or to be excluded from the class is inconsistent with the general law of jurisdiction" and that "residency is not ordinarily relevant to the jurisdiction of a court over a claim." Walker, *Coordinating Multijurisdiction Class Actions*, *supra* note 2, at 115. For convenience, however, I will continue to distinguish between the two, though the analysis advanced with respect to nonresident plaintiffs applies equally with respect to resident plaintiffs.

36. *See, e.g.*, McCutcheon v. The Cash Store, [2006] 80 O.R. (3d) 644 (Can.); Harrington v. Dow Corning Corp., [2000] 193 D.L.R. (4th) (Can.); VitaPharm Can. Ltd. v. F. Hoffmann-La Roche Ltd., [2002] O.J. No. 298 (Can.), *aff'd*, Ford v. F. Hoffman-La Roche Ltd., [2005] 74 O.R. (3d) 758 (Can.).

Beyond the general assertion of the principle, however, the law is conflicting and confused.

B. *Applying the Real and Substantial Connection Test in the Multijurisdictional Class Action Context*

The principle that a provincial court will have jurisdiction over nonresident class members where there is a real and substantial connection between those class members and the adjudicating court is easy to state, but as the case law bears out, difficult to apply. Canadian courts have struggled to define the content of the real and substantial connection that provides the jurisdictional "hook" to enable the adjudicating forum to render a judgment binding on nonresident class members. As discussed below, it is possible to identify two main approaches[37] to the real and substantial connection test in the nonresident plaintiff class context.

1. The Expansive Approach: "Commonality" Between Resident and Nonresident Class Members

Several courts, in particular the courts of Ontario and British Columbia, have endorsed an approach to the real and substantial connection test in the context of class litigation that focuses on the commonality of interest between the claims of resident and nonresident class members. According to these courts, the real and substantial connection required to ground jurisdiction over nonresident class members is found in the identity or confluence of interest that such nonresident class members share with resident class members in the resolution of the common issues.

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37. Some courts have also used a third approach, employing the criteria outlined in the Ontario Court of Appeal's decision in *Muscutt v. Courcelles*, [2002] 60 O.R. (3d) 20 (Can.) in analyzing whether a court has personal jurisdiction over nonresident class members. In *Muscutt*, the Court of Appeal enumerated eight non-exhaustive factors for courts to consider in assessing whether the real and substantial connection test, as applied to an out-of-province defendant, was satisfied: (a) "[t]he connection between the forum and the plaintiff's claim;" (b) "[t]he connection between the forum and the defendant;" (c) "[u]nfairness to the defendant in assuming jurisdiction;" (d) "[u]nfairness to the plaintiff in not assuming jurisdiction;" (e) "[t]he involvement of other parties to the suit;" (f) "[t]he court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;" (g) "[w]hether the case is interprovincial or international in nature;" and (h) "[c]omity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere." *Id.* In *Punit v. Wawanesa Mutual Insurance Co.*, [2005] O.J. No. 1928, para. 22 (Can.), the Ontario Superior Court of Justice attempted to apply the *Muscutt* factors "as they need to be modified to suit the situation of an out-of-province plaintiff" to determine whether the court had jurisdiction over nonresident plaintiffs. *See also* McNaughton Automotive Ltd. v. Co-Operators General Insurance Co., [2003] 66 O.R. (3d) 466, para. 38 (Can.) ("Therefore, having due regard for the relevant factors listed in *Muscutt*, I find there is a demonstrated absence of any real connection between potential out-of-province class members and this forum and conclude that order and fairness would not be served by assuming jurisdiction over the claims of persons in those provinces and territories where the relevant statutory provisions are materially different from those in Ontario."), *overruled on other grounds*, McNaughton Auto. Ltd. v. Co-operators Gen. Ins. Co., [2006] 221 O.A.C. 102 (Can.). Note that the Ontario Court of Appeal in *Van Breda v. Village Resorts Ltd.*, [2010] ONCA 84, para. 84 (Can.), very recently reformulated the *Muscutt* test, such that now "the core of the real and substantial connection test is the connection that the plaintiff's claim has to the forum and the connection of the defendant to the forum, respectively. The remaining considerations or principles serve as analytic tools to assist the court in assessing the significance of the connections between the forum, the claim and the defendant." The implications of the *Van Breda* decision for both class and non-class jurisdictional determinations remain to be seen.

The issue of whether a prospectus is misleading or a product is fit for its intended purpose, for instance, is what supplies the requisite real and substantial connection between the nonresident class members and the adjudicating forum.

McCutcheon v. The Cash Store[38] is illustrative of the expansive approach to the real and substantial connection test. In *McCutcheon*, the Ontario Superior Court of Justice considered whether to certify a national class (excluding residents of British Columbia) of persons who had borrowed money as a "payday loan" from the defendant and who repaid the loan and standard broker fee on or after the due date of the loan.[39] The defendant argued that the court had no jurisdiction to bind persons who obtained loans from the defendant in the other provinces or territories in which they were residing because there was not a real and substantial connection between the nonresident class members and Ontario.[40] After reviewing the relevant (and conflicting) case law, the court ultimately settled on an expansive view of jurisdiction over nonresident class members which "accepts as a sufficiently real and substantial connection a commonality of interest between non-resident class members and those who are resident in the forum and whose causes of action have sufficiently real and substantial connections to it to ground jurisdiction over their claims against the defendants."[41] Cullity J. held that the Ontario court had jurisdiction over nonresident class members despite the fact that "all the material facts that [gave] rise to a non-resident class member's cause of action . . . occurred outside Ontario and their only other connection to Ontario consisted of a commonality of interest with the proposed representative plaintiff and the resident class members . . . ."[42]

British Columbia courts have also accepted the idea that a common issue can supply the real and substantial connection required to found personal jurisdiction over nonresident class members.[43] In *Harrington v. Dow Corning Corp.*, the British Columbia Court of Appeal affirmed Mackenzie J.'s certification of a class of both resident and nonresident women who had been implanted with the defendant's silicone gel breast implants.[44] The defendant manufacturer argued that the British Columbia court did not have jurisdiction over the nonresident class members under the real and substantial connection test.[45] In his jurisdiction analysis, Mackenzie J. posed the following question: "The common issue in this case has already been defined: 'Are silicone gel breast implants reasonably fit for their intended purpose?' Does that common liability issue establish a 'real and substantial connection' sufficient to found jurisdiction over claims otherwise beyond this court's jurisdiction?"[46] He answered that question in the affirmative: "It is that common issue which establishes the real and substantial connection necessary for

38. *McCutcheon*, [2006] 80 O.R. (3d) 644.

39. *Id.* paras. 27–29.

40. *Id.* paras. 30, 57.

41. *Id.* para. 49.

42. *Id.* para. 53.

43. *See* Harrington v. Dow Corning Corp., [2000] 193 D.L.R. (4th) 67, paras. 98–100 (Can.) (noting that the lower court was correct "to find that the existence of a common issue of fact constituted sufficient connection to found jurisdiction in this case").

44. *Id.* paras. 1, 100.

45. *Id.* para. 6.

46. Harrington v. Dow Corning Corp., [1997] 29 B.C.L.R. (3d) 88, para. 16 (Can.), *aff'd*, *Harrington*, [2000] 193 D.L.R. (4th) 67.

jurisdiction." The British Columbia Court of Appeal endorsed Mackenzie J.'s "common issue" approach to jurisdiction.[47]

McCutcheon and *Harrington* are typical of the expansive approach to the real and substantial connection in the class setting. In fact, most cases that have specifically considered the issue have relied on some variation of this "commonality" approach to found jurisdiction over nonresident class members.

2. The Restrictive Approach: Actual Connection Between Nonresident Class Members and the Adjudicating Forum

The commonality of interest approach can be contrasted with a more restrictive approach to the real and substantial connection which requires that there be a substantive connection, beyond a mere commonality of interest, between the nonresident class members and the adjudicating forum. The Québec Court of Appeal has recently endorsed this view of the real and substantial connection in the national class context.[48] In *HSBC v. Hocking*,[49] an Ontario court certified a settlement class of all Canadian customers of HSBC who had incurred penalties when they made early payouts of their mortgages. HSBC, the defendant, thereafter sought to have the settlement recognized in Québec.[50] The Québec Superior Court dismissed the motion to recognize the Ontario judgment approving of the settlement on the basis that the Ontario court could not assert jurisdiction over class members residing in Québec.[51] The trial court rejected HSBC's argument that "there is a real and substantial connection between the members or the cause of action and Ontario since a large number of the members are Ontario residents."[52] In dismissing this argument, the trial court stated:

> [The representative plaintiff in the Québec action] claims that a court that does not have jurisdiction to hear the dispute of a single member cannot obtain jurisdiction by reason of the collective exercise of rights. The members residing in Québec carried on business with HSBC in Québec; the contractual obligations were supposed to be performed there; and the alleged fault and prejudice suffered occurred in Québec. The action of the members residing in Québec therefore had *no* connection with Ontario.
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> . . . .
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> A careful study of the authorities submitted by the parties shows that, in most cases where the courts found a real and substantial

47. *Harrington*, [2000] 193 D.L.R. (4th) 67, paras. 98–100.

48. For the most recent decision on multijurisdictional classes in Québec, see *Brito v. Pfizer Can. Inc.*, [2008] R.J.Q. 1420, 2008 QCCS 2231 (Can.). In *Brito* a Québec court certified a national class of women who had used the defendant's contraceptive product. Although the court did not discuss the real and substantial jurisdictional issue in detail, it seemed to suggest that the Québec court's jurisdictional competence over nonresidents rested mainly on the fact that the defendant had its head office in Québec and that the fault was alleged to have been committed there. *Id.* paras. 113–16.

49. HSBC Bank Can. v. Hocking, [2006] R.J.Q. 804, 2006 QCCS 330 (Can.) (unofficial English translation), *aff'd* Hocking v. Haziza, [2008] R.J.Q. 1189, 2008 QCCA 800 (Can.).

50. *Id.* para. 21.

51. *Id.* paras. 87–95.

52. *Id.* para. 40.

> connection in class actions involving members residing in various provinces, such connection existed between the forum, the action, and *each* of the class members.[53]

The trial court further held that the "collective exercise of rights did not extend the connection factors that must necessarily exist between the reviewing forum and each member's application to establish the jurisdiction of the court."[54] The Québec Court of Appeal agreed with the trial judge's understanding of the jurisdictional test, noting that the existence of common issues had no bearing on whether or not there was a real and substantial connection between Ontario and Québec residents:

> [T]he element of the "similarity or commonality of facts and issues raised", although relevant to the question of whether the case lends itself to a class action, seems alien to the question of whether there is a substantial and real connection with the jurisdiction of the forum for the purpose of applying the constitutional principle of territoriality.[55]

According to the restrictive view, a shared interest in the common issues will not be sufficient to create a real and substantial connection where such a connection does not otherwise exist.[56] Instead, a real and substantial connection, in the sense of a link or nexus, must be made out between the adjudicating forum and the nonresident class in order for a court to be regarded as jurisdictionally competent.[57]

C. *Assessing the Expansive and Restrictive Approaches to the Real and Substantial Connection Test*

Both the "expansive" and the "restrictive" approach to the real and substantial connection test as it applies to nonresident plaintiffs suffer from serious shortcomings. Each of these will be discussed in turn:

1. The Expansive Approach: "Commonality" Between Resident and Nonresident Class Members

The major drawback of the "commonality" approach to the real and substantial connection with respect to jurisdiction over nonresident class members lies in its

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53. *Id.* paras. 43–45 (emphasis in original).

54. HSBC Bank Can. v. Hocking, [2006] R.J.Q. 804, para. 54, 2006 QCCS 330 (Can.). Presumably the court was referring to the adjudicating forum (Ontario) and not the reviewing forum (Québec).

55. Hocking v. Haziza, [2008] R.J.Q. 1189, para. 156, 2008 QCCA 800 (Can.) (unofficial English translation) ("[L]'élément « similarité ou caractère commun des faits et des questions soulevées », bien qu'il soit pertinent à la question de savoir si l'affaire se prête à un recours collectif, paraît étranger à la question de savoir s'il existe un lien substantiel et réel avec la compétence du for aux fins de l'application du principe constitutionnel de la territorialité."). For the English translation of *Hocking*, see http://www.jugements.qc.ca/php/resultat.php?liste=42618518.

56. *Id.*

57. *See id.* para. 220 (reiterating the requirement of a "real and significant link[] between the dispute from the standpoint of the Québec plaintiffs and the Ontario forum" as a basis for jurisdiction over nonresident class members).

artificiality. To say that there is a real and substantial connection to ground jurisdiction over an out-of-province class member because such an individual has an interest similar to class members who *actually* do have a real and substantial connection to the forum stretches the limits of this jurisdictional test.[58] It is hard to imagine a case where the real and substantial connection test, thus understood, would not be satisfied: provided that a court properly assumed jurisdiction over resident class members, nonresident class members with a similar claim would, by definition, have a shared interest in the resolution of the common issues.

Aside from its artificiality, the commonality of interest approach to the real and substantial connection test is inextricably intertwined with the certification of the case, and in particular, with the definition of the common issues. Commentators have noted that:

> The main criticism to which this [commonality] argument is susceptible is that it conflates the test for certification with the test for jurisdiction *simpliciter*. The issue of jurisdiction precedes and is distinct from the issue of an action's amenability to class proceedings. If a court does not have jurisdiction, it does not have the authority to consider the issue of certification. Assuming a court has jurisdiction to certify a national class, the presence or absence of a common issue then becomes relevant to the action's suitability to be certified as a class proceeding. The backwards ordering of the issues therefore tends to compromise issues of jurisdiction.[59]

Therefore, the commonality approach essentially substitutes the "common issues" inquiry for the jurisdictional one. Once a common issue is defined, it follows that a real and substantial connection is present. Given that the jurisdictional determination hinges upon the certification of at least one common issue, it becomes impossible to decide the jurisdictional question without reference to the merits of a case.

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58. *See* Walker, *Recognizing Multijurisdiction Class Action Judgments Within Canada*, *supra* note 8, at 459 ("Several courts have recognized the merits of having common issues decided in a single proceeding despite the fact that these might involve the claims of persons arising in different provinces. While it stretches the logic of a 'real and substantial connection' to say that the real and substantial connection test supports jurisdiction over those claims, some Canadian courts have felt obliged to base their conclusion on that test.").

59. F. Paul Morrison, Eric Gertner & Hovsep Afarian, *The Rise and Possible Demise of the National Class in Canada*, 1 CAN. CLASS ACTION REV. 67, 83 (2004); *see also* Baxter v. Canada, [2005] O.T.C. 391, para. 12 (Can.) ("In several recent cases it has been held that the certified common issues in a class action can serve as a basis for the proper assumption of jurisdiction by the court over extra-provincial parties. The thrust of [these cases], in relation to the jurisdiction determination, is that where a class action involving intra-provincial plaintiffs could be certified, and the common issues forming the basis for the certification are shared by both the resident class and extra-provincial non-residents against the defendant, the existence of such common issues provides a 'real and substantial connection' of the non-residents to the forum in relation to the action. Thus, the underpinnings of a successful certification motion could have a direct bearing on the jurisdictional analysis. On the other hand, if the certification motion fails, the jurisdictional motion will in all likelihood be rendered moot.") (citations omitted).

2. The Restrictive Approach: Actual Connection Between Nonresident Class Members and the Adjudicating Forum

While the commonality approach to the real and substantial connection test would seem to extend personal jurisdiction over nonresident class members in nearly every case, the restrictive approach suffers from the opposite problem: it is almost impossible for a court to assert jurisdiction over an out-of-province class member owing to a lack of actual connection between such a class member and the adjudicating forum. In *HSBC v. Hocking*, for instance, the Québec trial court held that there was a lack of demonstrable connection between Ontario and the claims of the Québec class members:

> Members took out hypothecary loans with HSBC in Québec. The contractual obligations had to be performed there. The alleged fault was committed in Québec, and the alleged prejudice was suffered there.[60]

In most multijurisdictional class actions, it will be the case that all the material facts that give rise to a nonresident class member's cause of action will have occurred outside the adjudicating forum.[61] There would appear to be only a few examples[62] where a meaningful connection could plausibly be made out between the adjudicating province and the nonresident class member. In a typical products liability, consumer protection, or securities fraud case one would be hard pressed to find an actual connection between the adjudicating forum and nonresident class members.[63] The fundamental problem with a restrictive approach to the real and

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60. HSBC Bank Can. v. Hocking, [2006] R.J.Q. 804, para. 73, 2006 QCCS 330 (Can.).

61. See, for example, *McCutcheon v. Cash Store Inc.*, [2006] 80 O.R. (3d) 644 (Can.), for a case where nonresident plaintiffs who obtained payday loan advances from defendants were improperly charged interest in their home jurisdictions and *Harrington v. Dow Corning Corp.*, [2000] 193 D.L.R. (4th) 67, para. 99, 2000 BCA 605 (Can.), in which nonresident plaintiffs were implanted with the defendants' breast implants and subsequently suffered injury in their home jurisdictions. *See also* Debra Lyn Basset, *U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction*, 72 FORDHAM L. REV. 41, 59 (2003) (noting that a requirement for minimum contacts, the U.S. analogue to the real and substantial connection test, "would effectively . . . eliminate[] nationwide class actions.").

62. The obvious example that comes to mind is where a mass tort occurs wholly within a certain jurisdiction (e.g., a train crash). In such a case, it is clear that there would be an actual connection between the forum and the nonresident class members. The jurisprudence also seems to suggest that an actual connection exists where the defendant is incorporated in the adjudicating forum and the wrong can be construed as having been committed there. *See, e.g.*, Currie v. McDonald's Restaurants of Can., [2005] 250 D.L.R. (4th) 224, para. 22 (Can.) (noting that "the alleged wrong occurred in the United States and Illinois is the site of [the defendant's] head office"). Note, however, that the idea of "the place of the wrong" is highly malleable. In *Currie*, for instance, an equally plausible interpretation would be that the "wrong" was committed where the plaintiffs suffered injury. *See* Moran v. Pyle, [1975] 1 S.C.R. 393 (holding that Saskatchewan, the location where the plaintiff suffered injury, was where the tort was deemed to occur for jurisdictional purposes).

63. See, for example, *Moelis v. Berkshire Life Ins. Co.*, 887 N.E. 2d 214, 219 (Mass. 2008), for a typical consumer protection case that pitted insurance policy holders against an insurer on deceptive practices allegations. *Id.* at 216–17. The court held that minimum contacts did not exist to ground jurisdiction over the nonresident plaintiff class: "Here, the only contacts the nonresident policyholders have with Massachusetts is their purchase of an insurance policy from Berkshire, a Massachusetts company, through agents located in their home States, and their mailing of annual premium payments to Berkshire in Massachusetts. We conclude that these facts are not sufficient to warrant the assertion of personal jurisdiction." *Id.* at 219. Many class actions in Canada will involve a similar factual posture, where

substantial connection test is that it essentially undercuts the ability of the class action to act as a vehicle for the resolution of issues that transcend provincial borders and are perhaps best suited to being addressed in class form.

D. *Defining the Problem: What Is the Harm with a Lack of Uniform Approach to Jurisdiction?*

Aside from the individual shortcomings of either a restrictive or expansive approach to jurisdiction, there is a more fundamental problem associated with a lack of uniformity in the application of the real and substantial connection test. Inconsistent approaches to the real and substantial connection test may lead to a scenario where a judgment or settlement is held to be binding on class members in some provinces but not binding on class members in other provinces. This is because prior to enforcing a judgment of another province, a provincial court in Canada must be satisfied that the adjudicating forum possessed jurisdiction over the parties to the dispute.[64] If the enforcing court does not regard the adjudicating forum as possessing jurisdiction over the nonresident class members, the judgment will not be enforceable and a nonresident class member will be permitted to proceed with his or her claim in the enforcing forum.[65]

This problem, sometimes referred to as the "back-end" jurisdictional problem,[66] is aptly illustrated through the following example. Assume that an Ontario court (F1) certifies a national class encompassing residents from all Canadian provinces and territories and renders a judgment favorable to the defendants. A Manitoba plaintiff who falls within the class definition, but who did not opt out of the proceeding, later seeks to bring an action against the defendant in Manitoba (F2). Whether this is permitted will turn on whether the Ontario judgment is binding on the Manitoba class member. A judgment will not be enforceable in Manitoba—i.e., will not be accorded res judicata effect—unless a Manitoba court concludes that Ontario, as the adjudicating forum, properly asserted jurisdiction over the Manitoba plaintiff under the real and substantial connection test. If a Manitoba court concludes that Ontario did not properly assert jurisdiction, the Manitoba plaintiff will be able to "re"-litigate the claim. However, if a plaintiff in Saskatchewan similarly attempts to commence an action against the defendant in Saskatchewan, and a Saskatchewan court determines that the Ontario court properly assumed jurisdiction under the real and substantial connection test, the Saskatchewan plaintiff will be barred from re-litigating because the Ontario judgment will be given

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nonresidents will have contracted with local agents in their respective provinces and any harm will have occurred in those provinces.

64. *See* 1 JANET WALKER & JEAN-GABRIEL CASTEL, CASTEL & WALKER: CANADIAN CONFLICT OF LAWS §14.4 (6th ed., LexisNexis Can. 2005) (loose-leaf) [hereinafter CASTEL & WALKER].

65. *Id.*

66. The "back-end" jurisdictional problem refers to the possibility that an enforcing court will not grant preclusive effect to a judgment because it does not regard the adjudicating court as possessing jurisdiction over the nonresident plaintiff. Craig Jones & Angela Baxter, *Fumbling Towards Efficacy: Interjurisdictional Class Actions After* Currie v. McDonald's, 3 CAN. CLASS ACTION REV. 405, 405; *see also* Walker, *Coordinating Multijurisdiction Class Actions*, *supra* note 2, at 116 ("Parties resisting the certification of multijurisdictional classes have focused on the question of whether a provincial superior court can exercise jurisdiction over non-residents. However, this is not the real question. The real question is whether other Canadian courts are obliged to grant preclusive effect to the judgment in respect of the claims described in the notice of certification.").

preclusive effect.[67] It is quite possible for the judgment to be regarded as enforceable in some provinces but not in others. Thus, a defendant who has successfully defended a purportedly national class action in F1 may nonetheless have to re-litigate the claim if F2 determines that F1 did not possess jurisdiction over the nonresident class members under the real and substantial connection test.[68]

The back-end jurisdictional problem raises an obvious concern about fairness to the defendant, who should not be exposed to the risk of re-litigation simply because the enforcing forum takes a contrary view on the adjudicating court's jurisdictional competence under the real and substantial connection test. This concern is particularly pronounced in the settlement context. One author notes that, "[a] party should be entitled to know what they are litigating when they embark upon a claim. In particular it is very difficult to arrange a settlement in a class action where the defendant cannot be given the certainty of resolution."[69] The price that a given defendant is willing to pay to resolve class action litigation is generally dependent on the "peace" that the defendant expects to buy.[70] Thus, if a defendant attempts to

67. I am concerned here with the pure jurisdictional question. There may be other grounds on which either the Manitoba or the Saskatchewan courts may refuse to enforce the judgment.

68. Some authors have expressed particular apprehension about "wait and see" plaintiffs given the unresolved issues of jurisdiction in the national class context. *See, e.g.*, Stephen Lamont, *The Problem of the National Class: Extra-Territorial Class Definitions and the Jurisdiction of the Court*, 24 ADVOCATES' Q. 252, 292 (2001) ("[A] significant problem for the fairness of the justice system is the non-resident class member's opportunity to simply observe the proceedings from the sidelines, and once judgment or settlement is achieved, to consider a favourable judgment binding on the defendant and an unfavorable judgment not binding on themselves as class members.... This sort of 'wait and see' opportunity is antithetical to the basic structure of the [Class Proceedings Act] and is generally inimical to the fundamental principle that a judgment in a proceeding is binding on the parties to it."); *see also* Chris Dafoe, *A Path Through the Class Action Chaos: Selecting the Most Appropriate Jurisdiction with a National Class Action Panel*, 3 CAN. CLASS ACTION REV. 541, 550 (2003) (noting that critics of the national class have argued that "out-of-province plaintiffs could play 'wait and see,' thus denying the defendant certainty and finality"). The concern is that some nonresident class members may deliberately refrain from taking steps to exclude themselves from a class proceeding and then seek to have an eventual judgment or settlement enforced if it benefits them, or seek to re-litigate if they are not satisfied with the result. It is suggested, however, that the problem is not limited to those nonresident class members who consciously play "wait and see." In fact, actual "wait and see" plaintiffs would likely be few and far between. More likely is the scenario where a nonresident class member who has not received actual notice of the proceeding, or who received the notice and did not fully comprehend the significance of it, seeks to litigate a claim, only to be met with the defense that the claim has already been fully adjudicated.

69. Lamont, *supra* note 68, at 297; *see id.* at 291 ("Defendants have the right to expect certainty in litigation, particularly when settling."); Ward Branch & Christopher Rhone, *Chaos or Consistency: The National Class Action Dilemma*, 1 CAN. CLASS ACTION REV. 3, 9 (2004) ("Where a defendant wishes to settle a class action, the calculus is different. The defendant then wishes to ensure that the case has maximum *res judicata* effect. Through various procedural routes, the Defendant will want to ensure that the action or actions cover ... as much of the country as possible."); Stephen B. Burbank, *Interjurisdictional Preclusion Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 767 (1985) ("Preclusion rules affect litigation strategy. It is therefore important that litigants know what the rules are ... the plaintiff should be able to predict with considerable assurance the rules of claim preclusion that will govern a judgment.").

70. *See generally* Steven Shavell, *Suit, Settlement and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982) (discussing the calculus involved in choosing a settlement figure based on assessment of risk and cost of proceeding to trial).

buy national peace for $1 million, but additional claims are then filed and permitted to proceed, the defendant will have overpaid to settle a claim.[71]

Defendants may attempt to guard themselves from this possibility in several ways. First, prudent defendants may decrease their original settlement offer to account for the possibility of additional litigation engendered by a lack of consistency in the courts' approach to jurisdiction. Thus, defendants may build into their settlement calculus the uncertainty associated with the enforceability of national or multijurisdictional class actions. Second, defendants may insert a clause into a settlement agreement purporting to void the settlement if a court determines that the settlement is not binding on certain nonresident class members.[72] Finally, defendants may take steps to have each provincial court "bless" a national settlement prior to the settlement taking effect.[73] In the *Indian Residential Schools* cases, for instance, settlement proceeded by way of an application for certification and settlement approval before nine provincial and territorial courts.[74] The defendants pursued this strategy in part because at the time of the settlement "[i]t was not at all clear that courts in certain jurisdictions (particularly Québec and Saskatchewan), would respect and enforce a settlement approved issued [sic] by only one jurisdiction."[75]

Whichever of these options, if any, defendants adopt to protect themselves from the possibility of a non-binding class settlement, one thing is clear: uncertainty surrounding the jurisdictional issues with national classes has the potential to unravel months or years of delicate settlement negotiations and may seriously undercut the efficiency gains associated with class actions. Within the Canadian federation, defendants should be able to engage in meaningful efforts to settle class litigation secure in the knowledge that all covered claims have been finally put to rest.

IV. WHERE DO WE GO FROM HERE?

There are several options for addressing the question of jurisdiction over nonresident plaintiffs in the class context. One approach would be for the Supreme Court to provide guidance on the content of the real and substantial connection test in the class setting. A second approach involves certifying multijurisdictional classes only on an opt-in basis, thereby eliminating the need for recourse to the real and substantial connection test. A third, and arguably more radical, approach lies in questioning whether the real and substantial connection test is necessary to found jurisdiction over nonresident plaintiffs in class actions.

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71. The total cost of litigating each claim if the case goes to trial factors into settlement calculations, so it follows that those total costs would be underestimated by the defendant if additional claims were later filed. *See id.* at 63–64 (explaining how estimated legal costs weigh in the value of settlement).

72. The problem with this approach is that the full settlement amount may have been paid and distributed before a challenge is levelled at the settlement agreement, thereby rendering such a clause meaningless.

73. Branch & Rhone, *supra* note 8, at 1.

74. *Id.* (discussing the *Indian Residential Schools* cases, which include *Baxter v. Can.*, [2006] 83 O.R. (3d) 481; *Quatell v. Can.*, 2006 BCSC 1840; *Kuptana v. Can. (Attorney Gen.)*, 2007 NTSC 1; *Anmaq v. Can.*, 2006 NUCJ 24; *Semple v. Attorney Gen. of Can.*, [2006] 213 Man. R. (2d) 220, 2006 MBQB 285; *Bosum v. Attorney Gen. of Can.*, 2006 QCCS 5794; *Sparvier v. Attorney Gen. of Can.*, [2006] 290 Sask. R. 111, 2006 SKQB 533; *Northwest v. Can. (Attorney Gen.)*, 2006 ABQB 902; *Fontaine v. Can.*, 2006 YKSC 63).

75. Branch & Rhone, *supra* note 8, at 1.

A. *Keeping the Real and Substantial Connection Test: The Need for Appellate Guidance*

The obvious and perhaps simplest solution to the jurisdictional chasm in the class setting would be for the Supreme Court of Canada to provide definitive guidance on the real and substantial connection test as it applies to nonresident class members. A national and uniform standard for courts to apply across Canada would solve, to the extent possible, the "back end" jurisdictional problem.[76]

If the Court were to continue to conceptualize jurisdiction over nonresident class members in terms of the real and substantial connection test, what would the test look like? More than likely, the Court would be required to choose between the expansive and restrictive approaches described above. Of the two, and with all its artificiality, the expansive approach is to be preferred. The test, however, should be re-articulated to better reflect the different dynamics at play in asserting jurisdiction over a nonresident plaintiff class. The test would examine whether there is a real and substantial connection between the nonresident class members as a whole and the litigation already before the adjudicating court.[77] In other words, the approach would not look for a "connection" per se between the nonresident class members and Ontario, but between the nonresident class members and the litigation that is properly before the Ontario court.[78] In practice, the test would resemble the commonality of interest approach that has found favor in Ontario and British Columbia.[79] However, the analysis would not be cast in terms of common issues and thus would avoid the doctrinal artificiality of finding a connection between the nonresident plaintiff class and the adjudicating forum through the conduit of the resident plaintiff class. It should be noted, however, that re-stating the test in this manner in order to preserve the verbiage of the "real and substantial connection" does not change the fact that, in most cases, a genuine nexus between the adjudicating forum and the nonresident plaintiff class will not exist.

One would caution the Court against adopting an approach to the real and substantial connection in the class context that sets out various criteria in order to assess the nonresident plaintiff class' connection to the forum. First, an approach which involves examining and weighing various factors in assessing jurisdictional

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76. The Supreme Court of Canada missed an opportunity to address thorny issues of jurisdiction over class members in multijurisdictional class actions in the recent case of *Société Canadienne des Postes v. Lépine*, [2009] 304 D.L.R. 539, 2009 SCC 16 (Can.). *Lépine* involved the enforceability of an Ontario settlement against a class member resident in Québec. While the Québec Court of Appeal rested its decision to refuse enforcement of the settlement primarily on the inadequacy of the Ontario notice, the case also raised issues of jurisdiction over nonresident class members. The Supreme Court of Canada cursorily brushed over the issue of jurisdiction over class members, noting that "[t]here is no doubt that the Ontario Superior Court of Justice had jurisdiction pursuant to [the Québec Civil Code] since the ... defendant to the action, had its head office in Ontario. This connecting factor in itself justified finding that the Ontario court had jurisdiction." *Id.* para. 38. The Court seemed to be confusing the issue of jurisdiction over the defendant (which the Ontario court clearly possessed) and jurisdiction over the plaintiff class members, which was far less clear. For further discussion and critique of the *Lépine* decision, see Tanya J. Monestier, Lépine v. Canada Post: *Ironing Out the Wrinkles in the Inter-provincial Enforcement of Class Judgments*, 34 ADVOCATES' Q. 499 (2008).

77. Note that this was the test that was proposed and rejected by the British Columbia Court of Appeal in *Harrington v. Dow Corning Corp.*, [2000] 193 D.L.R. (4th) 67, paras. 70–71 (Can.).

78. *Id.* para. 71.

79. *See supra* notes 40, 45.

competence (e.g., the domicile of the defendant, the applicable governing law, the location of the alleged wrongdoing, the percentage of class members resident in the forum, etc.) means that parties are unable to predict whether a prospective enforcing court will regard the adjudicating forum as jurisdictionally competent. Where, for instance, the defendant is domiciled in X, the impugned contract is governed by Y law, and 20% of the class members reside in Ontario, will a Québec court enforce a judgment rendered by an Ontario court? Litigants need to be in a position to predict with considerable certainty whether a judgment or settlement will be granted preclusive effect. A real and substantial connection test which examines all the potential factors linking the nonresident plaintiff class to the forum in order to found jurisdiction has the potential to create chaos in class litigation.

Second, aside from its lack of predictability, a multi-factored approach may lead to seemingly unsatisfactory results. For instance, based on the current case law, it is clear that the domicile of the defendant is a significant part of the real and substantial connection factor-based calculus. If a defendant is domiciled in the forum, courts have been prepared to conclude that there exists a real and substantial connection between nonresident class members and the forum.[80] Consider, however, the following scenarios:

Scenario 1: A French defendant with no presence in Canada distributes products in Canada, causing injury to Canadians in all provinces and territories.

Scenario 2: An Ontario defendant distributes products in Canada, causing injury to Canadians in all provinces and territories.

If the domicile of the defendant were relevant to the question of whether there is a real and substantial connection between the plaintiff class and the adjudicating forum, a national class is more likely permissible in Scenario 2 (domestic defendant) than in Scenario 1 (foreign defendant). Under this reasoning, foreign defendants may fare better in Canadian courts (by not facing the risk of nationwide classes) than Canadian defendants. A factor such as the happenstance of a defendant being incorporated in a Canadian jurisdiction should not determine the availability of national classes. Accordingly, to ensure consistency and predictability, a multi-factor test should be avoided.

B. Permitting Multijurisdictional Classes on an Opt-In Basis

Certain provincial class proceedings legislation in Canada allows for the creation of multijurisdictional classes only where nonresident plaintiff class members affirmatively opt into a given class proceeding. In particular, class proceedings statutes in British Columbia,[81] Alberta,[82] Newfoundland and Labrador,[83] and New

80. *See, e.g.*, Currie v. McDonald's Rest. of Can. Ltd., [2005] 250 D.L.R. (4th) 224 (Can.) (finding that the defendant's head office in Illinois supported the conclusion that there was a real and substantial connection between Illinois and nonresident class members); Lépine v. Société Canadienne des Postes, [2005] Q.J. No. 9806 (Can.), *aff'd* Société Canadienne des Postes v. Lépine, [2007] R.J.Q. 1920, 2007 QCCA 1092 (Can.), *aff'd* [2009] 1 S.C.R. 549, 2009 SCC 16 (finding that there was a real and substantial connection between the Ontario forum and the nonresident plaintiff class where defendant was present in all Canadian provinces).

81. Class Proceedings Act, R.S.B.C., c. 50, § 16 (1996).

82. Class Proceedings Act, S.A., c. C-16.5, §. 17 (2003).

83. Class Actions Act, S.N. 2001, c. C-18.1, § 17.

Brunswick[84] provide that a court may certify classes that include nonresident plaintiffs only on an opt-in basis. In other provinces, specifically Ontario[85] and Québec,[86] legislation is silent on the issue of whether a provincial class action can include nonresident plaintiffs. However, case law has established that classes can be certified in these jurisdictions on an opt-out basis, such that a class member will be bound unless he opts out of the class action.[87] Finally, in Manitoba[88] and Saskatchewan,[89] legislation explicitly contemplates the certification of multijurisdictional classes on an opt-out basis.

Irrespective of the statutory regime at play, courts considering the issue of jurisdiction have required that there be a real and substantial connection between the nonresident plaintiff class and the adjudicating province.[90] Courts appear to have missed a critical distinction between opt-in and opt-out regimes as they concern jurisdiction over nonresident class members. In an opt-in regime, a nonresident class member demonstrates an intention to be bound by the result of the proceeding through the very act of opting in.[91] The legitimacy of the court's power over the plaintiff stems from the fact that the plaintiff has consented to the jurisdiction of the court.[92] This is true regardless of whether there is a real and substantial connection between the plaintiff and the forum. Properly understood, opt-in regimes avoid the jurisdictional infirmities associated with the real and substantial connection test.[93] This is because a nonresident class member can hardly complain about a provincial court adjudicating upon his rights in cases where the class member has opted in to the proceeding.[94]

However, opt-in regimes arguably result in an under-inclusive class, with the core of the class being comprised of resident class members and the remainder consisting of a handful of nonresidents who have taken affirmative steps to opt into the proceeding. Walker identifies three ways that the under-inclusiveness of the

84. Class Proceedings Act, S.N.B. 2006, c. C-5.15, § 18(3).

85. Class Proceedings Act, 1992, S.O. 1992, c. 6.

86. An Act Respecting the Class Action, R.S.Q. c. R-2.1 (2000).

87. *See* Wilson v. Servier, [2000] O.R. (3d) 219, para. 114 (Can.) (noting that claimants in class action proceedings in four other Canadian jurisdictions "can of course opt out of certified national class action"); Carom v. Bre-X Minerals, Ltd., [1999] 43 O.R. (3d) 441, para. 18 (Can.) (allowing for a class action to include nonresident plaintiffs on an opt-out basis).

88. Class Proceedings Act, C.C.S.M., c. C-130, § 6(3) (2002) ("A class that comprises persons resident in Manitoba and persons not resident in Manitoba may be divided into resident and non-resident subclasses.").

89. Class Actions Act, S.S., c. C-12.01, § 18 (2001), amended by Class Actions Amendment Act, S.S. 2007, c. 21, § 2 (2007) (defining 'multi-jurisdictional class action' as "an action that is brought on behalf of a class of persons that includes persons who reside in Saskatchewan and who do not reside in Saskatchewan.").

90. *See, e.g.*, Harrington v. Dow Corning Corp., [2000] 193 D.L.R. (4th) 67, para. 87 (Can.) (requiring a real and substantial connection between the plaintiff class and the forum in an opt-in jurisdiction).

91. Lamont, *supra* note 68, at 285.

92. *Id.*

93. *See, e.g.*, Morrison et al., *supra* note 59, at 83 ("A national class regulated by an opt-in feature provides the surest and most legitimate means of binding all members."). Certain commentators are thus supportive of national class actions only on an opt-in basis. *See, e.g.*, Lamont, *supra* note 68, at 299 (suggesting that the adoption of an opt-in regime "would alleviate a great deal of the future uncertainty with a judgment binding non-residents").

94. Lamont, *supra* note 68, at 285.

class in an opt-in jurisdiction may ultimately undermine the goals sought to be achieved by multijurisdictional classes:

> First, to the extent that class actions are intended to have a regulatory effect by requiring market actors to internalize the costs of wrongful conduct, under-inclusive plaintiff classes mean that the costs internalized are less than the costs generated by the wrongful conduct.... Second, to the extent that class actions are intended to facilitate compensation for wrongs suffered, under-inclusive plaintiff classes result in the failure of members of the plaintiff class to receive compensation.... Finally, to the extent that class actions are intended to also bring closure to matters for defendants, the under-inclusiveness of plaintiff classes means that defendants will be left with unresolved claims that might be brought in other actions or in other fora.[95]

Requiring affirmative consent by nonresident class members in order to bind them to judgment is certainly the most doctrinally sound of the various approaches to jurisdiction. Where a plaintiff evidences an intention to submit to the jurisdiction of a court by opting into a class proceeding, he can no longer challenge the ability of the court to render a judgment binding against him.[96] However, by producing classes that are under-inclusive, opt-in regimes thwart the policy objectives of class actions, such that they are no longer able to achieve the very goals for which they were designed.[97]

C. *Re-Thinking Jurisdiction over Nonresident Class Members*

A third possibility lies not in fine-tuning the real and substantial connection test in the unique context of class litigation, but rather in abandoning it. This may seem to be a radical solution, as the real and substantial connection requirement for jurisdiction has become part of orthodox class actions discourse in Canada. In fact, it seems to be a foregone conclusion that a real and substantial connection, however conceived, is required to found jurisdiction over a nonresident plaintiff class member. However, given the problems inherent in the real and substantial connection approach, it may be time to reconsider the issue of personal jurisdiction over nonresident plaintiffs in class litigation from first principles.

1. The Real and Substantial Connection Test Was Developed To Govern the Issue of Jurisdiction Over *Ex Juris* Defendants in Non-Class Cases

The *Morguard* real and substantial connection test was the common law's response to the issue of whether a court could assume jurisdiction over an *ex juris* defendant who had neither consented to the jurisdiction of a certain court, nor been served with process there.[98] *Morguard* itself was a case about jurisdiction over a

95. Janet Walker, *Crossborder Class Actions: A View from across the Border*, 2004 MICH. ST. L. REV. 755, 770 (2004) (internal citations omitted) [hereinafter Walker, *Crossborder Class Actions*].

96. Lamont, *supra* note 68, at 285.

97. Walker, *Crossborder Class Actions*, *supra* note 95, at 770–71.

98. Morguard Inv. Ltd. v. De Savoye, [1990] 3 S.C.R. 1077, paras. 43–44 (Can.).

defendant in non-class litigation.[99] Walker observes that "while the *Morguard* principles may provide inspiration for the answers we seek, . . . [the] decision cannot supply the details of the standards and practices" since *Morguard* was fundamentally a case about the preclusive effect of judgments as they effect the interests of named parties.[100] Unfortunately, this point seems to have been lost on most Canadian courts, which have unquestioningly assumed that the same real and substantial connection test that governs the issue of jurisdiction over out-of-province defendants must automatically govern the issue of jurisdiction over nonresident plaintiffs.[101]

The U.S. Supreme Court's seminal decision in *Phillips Petroleum v. Shutts*[102] explicitly distinguished between a nonresident class member and a nonresident class defendant. Accordingly, the Court held that the minimum contacts test which is required to ground jurisdiction over nonresident defendants did not apply in the class context.[103] In *Shutts*, a Kansas state court certified a national class consisting of 33,000 gas company investors who had sued to recover interest on royalty payments that had been delayed by the defendant.[104] Class members were provided with notice by mail informing them of their rights, including their right to opt out of the class.[105] The final class consisted of 28,000 members who resided in all 50 States, the District of Columbia, and several foreign countries.[106] Notably, over 99 percent of the gas leases in question and 97 percent of the plaintiff class members had "no apparent connection to Kansas."[107] The defendant asserted that the "Kansas courts may exercise jurisdiction over these [out-of-state] plaintiffs only if the plaintiffs possess the sufficient 'minimum contacts' with Kansas as the term is used in cases involving personal jurisdiction over out-of-state defendants."[108] The U.S. Supreme Court disagreed, noting the significant differences that exist between absent class members and absent defendants:

> The burdens placed by a State upon an absent class-action plaintiff are not of the same order or magnitude as those it places upon an absent defendant. An out-of-state defendant summoned by a plaintiff is faced with the full powers of the forum State to render judgment *against* it. The defendant must generally hire counsel and travel to the forum to defend itself from the plaintiff's claim, or suffer a default judgment. The defendant may be forced to participate in extended and often costly discovery, and will be forced to respond in damages or to comply with

99. *Id.* paras. 1–4.

100. Walker, *Recognizing Multijurisdiction Class Action Judgments Within Canada*, *supra* note 8, at 451; *see also* Celeste Poltak, *Ontario and Her Sisters: Should Full Faith and Credit Apply to the National Class?*, 3 CAN. CLASS ACTION REV. 437, 451 (2000) ("Given the significant differences between a traditional two-party lawsuit and multi-jurisdictional class proceedings, a slavish adherence to the analogy of a foreign defendant cannot adequately capture the legal dynamics and complexities of situations involving an unnamed plaintiff in modern cross-border class action litigation.").

101. Walker, *Recognizing Multijurisdiction Class Action Judgments Within Canada*, *supra* note 8, at 459.

102. Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

103. *Id.* at 811.

104. *Id.* at 801.

105. *Id.*

106. *Id.* at 797.

107. *Id.*

108. *Shutts*, 472 U.S. at 806.

> some other form of remedy imposed by the court should it lose the suit. The defendant may also face liability for court costs and attorney's fees. These burdens are substantial, and the minimum contacts requirement of the Due Process Clause prevents the forum State from unfairly imposing them upon the defendant.
>
> A class-action plaintiff, however, is in quite a different posture. . . .
>
> . . . .
>
> In sharp contrast to the predicament of a defendant haled into an out-of-state forum, the plaintiffs in this suit were not haled anywhere to defend themselves upon pain of a default judgment. . . .
>
> A plaintiff class in Kansas and numerous other jurisdictions cannot first be certified unless the judge, with the aid of the named plaintiffs and defendant, conducts an inquiry into the common nature of the named plaintiffs' and the absent plaintiffs' claims, the adequacy of representation, the jurisdiction possessed over the class, and any other matters that will bear upon proper representation of the absent plaintiffs' interest. Unlike a defendant in a civil suit, a class-action plaintiff is not required to fend for himself. The court and named plaintiffs protect his interests.[109]

Including a nonresident plaintiff within a multijurisdictional class with the goal of allowing him to participate in litigation under the auspices of a court is not equivalent to "haling" a foreign defendant before the courts of a distant and inhospitable forum.[110] If one starts from this premise, then it is clear that nonresident plaintiffs do not necessarily warrant similar jurisdictional treatment to nonresident defendants.

2. "Order and Fairness" as the Overarching Principles

The real and substantial connection test was developed to place reasonable limits on the assumption of jurisdiction by protecting an out-of-province defendant against being pursued in a forum in which he had little interest or connection.[111] It was thought that if there is a sufficiently close nexus between the adjudicating forum and the out-of-province defendant, then it would be fair and reasonable to require the defendant to face suit there.[112] The real and substantial connection was thus the mechanism for ensuring that jurisdiction over an out-of-province defendant comported with the principles of order and fairness that animate the Canadian conflict of laws.[113] Or, in the words of Castel, the real and substantial connection test was "designed to give substance to order and fairness."[114]

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109. *Id.* at 808–09 (citations omitted) (emphasis in original).

110. *Id.* at 803–15.

111. Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077, para. 51 (Can.).

112. *Id.*

113. *Id.* Note in this respect that personal jurisdiction in Canada is not founded on notions of due process, as it is in the United States. *See, e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945) (holding that a court does not have personal jurisdiction over a defendant unless the defendant has minimum contacts with the forum).

114. Jean-Gabriel Castel, *Back to the Future! Is the "New" Rigid Choice of Law Rule for Interprovincial Torts Constitutionally Mandated?*, 33 OSGOODE HALL L.J. 35, 39 (1995); *see also* Succession

Requiring a real and substantial connection between nonresident plaintiffs and the forum in a class setting does not necessarily further the goals of order or fairness. As discussed, it hardly promotes order or fairness to require the defendant to embark on litigation or pursue settlement initiatives where, owing to the uncertainty of the jurisdictional test, the defendant cannot be reasonably assured some measure of finality due to circumstances entirely beyond his control. Similarly, fairness to the nonresident plaintiff class is not necessarily served by insistence on a real and substantial connection between the class and the forum. Often, even in the absence of a real and substantial connection, multijurisdictional classes promote the objectives of class actions (in particular, access to justice) better than individual provincial class actions.[115] This is particularly true in cases where the claims of class members are not individually viable, such as typical consumer protection actions.[116]

It is suggested that rather than focusing on the connection between the nonresident plaintiff class and the adjudicating forum, courts should focus on ensuring that the nonresident plaintiff class is provided with adequate procedural safeguards, namely notice, an opportunity to opt out, and adequate representation. These procedural safeguards are more directly relevant to ensuring order and fairness, the underlying tenets of the conflict of laws, than any sort of real and substantial connection.

Why does it make sense to ground personal jurisdiction over nonresident plaintiffs in procedural safeguards, rather than in a requirement for a real and substantial connection? First, it appears that the courts' true concern when they refuse to enforce a class judgment rendered by a court in a different province is not the degree of connection between nonresidents and the forum, but rather procedural unfairness—the idea that a court in one province improperly bargained away the rights of a class member resident in another province.[117] In *Hocking*, for instance, even though the Québec Court of Appeal refused to enforce the judgment on the basis that there was no real and substantial connection between the Ontario forum and the Québec class members, the judgment is infused with concerns about the fairness of a settlement where class members received no monetary compensation.[118] Would a Québec court be as concerned about an Ontario court adjudicating upon

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de feu Andre Gauthier v. Coutu, [2006] N.B.J. No. 38, para. 70, 2006 NBCA 16 (Can.) ("Order and fairness are the considerations that come into play in settling jurisdiction *simpliciter* disputes that arise in circumstances where the defendant has been served *ex juris*. Those considerations are guiding principles. They are given practical effect through the real and substantial test adopted by the Supreme Court of Canada.").

115. Walker, *Crossborder Class Actions*, *supra* note 95, at 777–88.

116. *Id.* at 786.

117. Craig Jones, *New Solitudes: Recent Decisions Call Into Question the National Class Action*, 45 CAN. BUS. L.J. 111, 118 (2007) ("Decisions of the Ontario and Québec courts, while allowing that interjurisdictional classes are not impermissible per se, have nevertheless shown themselves to be reluctant to bind their own citizens to 'foreign' decisions where there have been perceptions of unfair process, particularly inadequate notice."); Jones & Baxter, *supra* note 66, at 406 ("[D]ecisions . . . have established an unnecessarily high bar for the enforcement of class claims, and that they did so apparently due to the courts' concern that the settlements imposed upon the class were unsatisfactory.").

118. Poltak, *supra* note 100, at 461 (noting that the court in *Hocking* refused enforcement in part because of "a concern about the quality of the settlement itself"); Jones & Baxter, *supra* note 66, at 429 (remarking that in *Hocking*, "it would appear that the inadequacy of the settlement was the greatest factor weighing in the court's analysis").

the rights of Québec residents with no connection to Ontario, where such residents had in fact received an adequate recovery?

Second, from the perspective of the nonresident plaintiff class, it is safe to assume that their concern is simply that their interests are adequately represented, rather than represented in a forum with which they necessarily have a real and substantial connection.[119] According to one prominent class actions attorney, the primary concern of a "class member on the street" is to have "the best lawyer who is bringing the case in the best jurisdiction that will achieve the cheapest and quickest result."[120] In a similar vein, Wolfman and Morrison note that "[t]he location of the class action forum or the geographical confines of the jurisdiction where the class action was filed will almost certainly not be a factor in making [the] decision [to opt out or stay in the class]."[121] If this is true, it is hard to justify the current jurisdictional focus on the question of *where,* when it appears that the question of *how* is much more compelling.

Third, even in cases involving *ex juris* defendants, courts have recently focused their attention more on the apparent fairness of assuming jurisdiction and less on the degree of connection between the defendant and the forum.[122] While this approach has been criticized for producing unpredictable results, it is odd to look at connections between the forum and the nonresident plaintiff class when there is a move away from focusing on connections between the forum and the *ex juris* defendant in non-class jurisdiction cases.[123]

Fourth, while the plaintiffs' interest is in having their claims adjudicated in a manner so their rights are sufficiently protected, the defendants' interest is generally in being able to ensure some degree of finality to the litigation. This may be virtually impossible with a real and substantial connection test[124] since the enforcing court will always be able to second-guess the jurisdictional competence of the adjudicating court. Defendants are left at the mercy of whatever the enforcing court deems to be real and substantial in the class setting. By eliminating the real and substantial connection requirement and focusing instead on procedural safeguards as a means to establishing jurisdiction, defendants at least have a measure of control over the ultimate enforceability of a judgment and a vested interest in ensuring that plaintiffs receive the best possible procedural safeguards. A defendant who actively ensures

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119. Alternatively, even if it were important that plaintiffs be represented in their "home" courts, Jones notes that "[m]ost of this problem can be abated through subclassing of non-residents by jurisdiction; in a British Columbia action, for instance, there could be a subclass for Albertans, Manitobans, and so on, with the subclass's counsel familiar with the applicable law of the foreign province." Jones, *supra* note 11, at 38.

120. Branch & Rhone, *supra* note 8, at 4.

121. Brian Wolfman & Alan Morrison, *What the* Shutts *Opt-Out Right Is And What It Ought To Be*, 74 UMKC L. REV. 729, 732 (2006).

122. *See, e.g.*, Mynerich v. Hampton Inns Inc., [2008] O.J. No. 1290 (Can.).

123. Note, however, that the recent decision of the Ontario Court of Appeal in *Van Breda v. Village Resorts Ltd.*, [2010] ONCA 84 (Can.), suggests a move away from fairness consideration and towards connection-based considerations. In *Van Breda*, the court noted that "consideration of fairness should not be seen as a separate inquiry unrelated to the core of the test, the connection between the forum, the plaintiff's claim and the defendant. Consideration of fairness should rather serve as an analytic tool to assess the relevance, quality and strength of those connections, whether they amount to a real and substantial connection, and whether jurisdiction accords with the principles of order and fairness." *Van Breda*, [2010] ONCA 84, para. 98.

124. Unless, of course, courts continue to ascribe an artificially broad meaning to a real and substantial connection.

that the rights of nonresident class members are protected will have some assurance that an eventual settlement or judgment will be granted preclusive effect throughout Canada. With a real and substantial connection test, a defendant can simply hope that a prospective enforcing court takes a view similar to that of the adjudicating court on the relevant connections necessary to establish jurisdiction.

At least one appellate Canadian court, guided by the U.S. Supreme Court decision in *Shutts*, has recognized that procedural safeguards are relevant to the issue of jurisdiction over a nonresident plaintiff class.[125] In *Currie v. McDonald's Restaurants of Canada*,[126] the Ontario Court of Appeal was asked to enforce an Illinois settlement of a class action that included Canadian class members. The court commented that "[t]he novel point raised ... is the application of the real and substantial connection test and the principles of order and fairness to unnamed, nonresident plaintiffs in international class actions."[127]

Sharpe J.A., for the Ontario Court of Appeal observed that, although there was a real and substantial connection between the nonresident plaintiff class and Illinois because the defendant had its head office in Illinois and the alleged wrong had been committed there, this did not end the inquiry.[128] The Court of Appeal emphasized that the principles of order and fairness required that careful consideration be paid to the rights of nonresident class members, who would have no reason to expect that any legal claim arising from a consumer transaction that took place entirely within Ontario and that gave rise to damages in Ontario would be litigated in the United States.[129] In order to address the concern for fairness, the Court of Appeal noted that it was "helpful to consider the adequacy of the procedural rights afforded [to] the unnamed non-resident class members in the [Illinois] action."[130] In particular, "respect for procedural rights, including the adequacy of representation, the adequacy of notice and the right to opt out, could fortify the connection with Illinois jurisdiction and alleviate concerns regarding unfairness."[131] In other words, the procedural rights afforded to nonresident class members were relevant to assessing whether the assertion of jurisdiction was appropriate such that the nonresident class members should be bound to a class judgment.[132]

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125. Currie v. McDonald's Rest. of Can. Ltd., [2005] 250 D.L.R. (4th) 224, paras. 25–28 (Can.).

126. *Id.* paras. 1–2. For commentary on the *Currie* decision, see Saumier, *supra* note 9.

127. *Id.* para. 13.

128. *Id.* paras. 24–25.

129. *Id.* para. 25.

130. *Id.*

131. Currie v. McDonald's Rest. of Can. Ltd., [2005] 250 D.L.R. (4th) 224, para. 25 (Can.).

132. Sharpe J.A., summed up the approach to jurisdiction over nonresident class members in the enforcement of truly foreign class judgments:

> [P]rovided (a) there is a real and substantial connection linking the cause of action to the foreign jurisdiction, (b) the rights of non-resident class members are adequately represented, and (c) non-resident class members are accorded procedural fairness including adequate notice, it may be appropriate to attach jurisdictional consequences to an unnamed plaintiff's failure to opt out. In those circumstances, failure to opt out may be regarded as a form of passive attornment sufficient to support the jurisdiction of the foreign court.

Id. para. 30; *see also* Saumier, *supra* note 9, at 19 ("*Currie* must stand for the view that the adequacy of notice in class actions goes to jurisdiction by way of the fairness principle under *Morguard*."); Ellen Snow, *Protecting Canadian Plaintiffs in International Class Actions: The Need for a Principled Approach in Light of* Currie v. McDonald's Restaurants of Canada Ltd., 2 CAN. CLASS ACTION REV. 217, 238 (2005) ("The

Courts and commentators have criticized Sharpe's J.A., judgment in *Currie* as blurring the distinction between jurisdiction and recognition.[133] However, Sharpe J.A., may have been on the right track by conceptualizing jurisdiction in terms of procedural rights.[134] Focusing on procedural rights, rather than on the real and substantial connection, clears up much confusion in the application of the jurisdictional test and re-orients the analysis to what should matter most: ensuring that absent class members are given adequate procedural rights.

3. Addressing Potential Objections

a. The Practical Concern: What Will Stop a Canadian Court with Little Interest in the Litigation from Certifying a National Class?

One potential concern with abandoning the real and substantial connection requirement is that Canadian courts with little interest in, or connection to, the litigation would improperly certify national classes. What is to stop a Manitoba court, for instance, from certifying a nationwide class action where only a small percentage of class members reside in the forum and all the facts giving rise to the cause of action occurred outside the forum?

This concern is adequately addressed by both existing certification requirements as well as the doctrine of forum non conveniens. Prior to certifying a class action, a provincial court must be assured, inter alia, that there are common issues, that the class action is the preferable procedure for the resolution of the

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Currie decision in turn imports these procedural rights into applying the real and substantial connection test and thus changes the law in this area. Post-*Currie* it appears that the real and substantial connection test has a new dimension to it; the test is no longer limited to assessing whether there is a sufficient nexus between the forum and the action, but will now also assess the fairness of the proceedings to determine whether or not the assumption of jurisdiction is justified.").

133. *See, e.g.*, Snow, *supra* note 132, at 242 (stating that "the better and more principled approach to protecting plaintiffs comes from distinguishing between questions of jurisdiction and the defense of natural justice"); Jones & Baxter, *supra* note 66, at 425–26; McCutcheon v. Cash Store Inc., [2006] 80 O.R. (3d) 644, para. 56 (Can.) ("By incorporating fairness considerations into the rules for jurisdiction, the reasoning in *Currie* abandons some of the traditional distinctions between jurisdiction and recognition.").

134. Although the *Currie* decision should be welcomed for re-orienting to jurisdictional focus to procedural rights for nonresident plaintiffs, there are two flaws in Sharpe J.A.'s, reasoning which arise from his conflation of the U.S. and the Canadian approaches to jurisdiction over nonresident class members. First, contrary to what Sharpe J.A., suggests, the provision of adequate procedural safeguards to nonresident plaintiffs does nothing to bolster the connection between the forum and the nonresident plaintiff class. The Ontario class members in *Currie* would be no more "connected" to Illinois upon receipt of notice and an opt-out form than they were prior to such receipt. Thus, affording procedural safeguards to nonresident plaintiffs cannot create a connection where such a connection is not otherwise present. Second, Sharpe J.A., blends two distinct conceptual bases for jurisdiction in his analysis—real and substantial connection and implied consent. These bases of jurisdiction are alternative, not cumulative. On the current Canadian understanding of jurisdiction over nonresident class members, a court has jurisdiction where there is a real and substantial connection between the forum and the plaintiff class. Under the American approach, a court has jurisdiction over nonresident plaintiffs where such plaintiffs have been provided with notice and an opportunity to opt out of the proceeding, thereby permitting the inference that such class members have consented to the jurisdiction of the court. The *Currie* court layers the two, relying *both* on the notion of a real and substantial connection and that of implied consent. Either is sufficient, standing alone, for the assertion of jurisdiction over a nonresident plaintiff class.

common issues, and that the litigation plan is workable.[135] Given these requirements, it is likely that a class action brought in a jurisdiction with little interest in the case would decline to certify a case. Alternatively, the doctrine of forum non conveniens remains available as a basis upon which a court that otherwise would have jurisdiction, could decline to exercise that jurisdiction on the basis that there is a more appropriate forum somewhere else.[136] Moreover, it should be recalled that the court must also have personal jurisdiction over the defendant under the traditional bases of jurisdiction. Ordinarily, this would mean that there is some measure of connection between the adjudicating forum and the litigation, even if there is not necessarily a connection between the nonresident plaintiff class and the forum.

Even if a Canadian province without a real and substantial connection to the plaintiff class did certify a multijurisdictional class action, such a result would hardly be catastrophic. The *Shutts* decision was criticized in part because it created the potential for certain jurisdictions to act as "magnet forums."[137] Without a requirement for minimum contacts between the plaintiff class and the forum, a court with little connection to the litigation could end up deciding cases of national reach. This was particularly troubling given the well-documented disparities in the quality and perception of justice among American courts.[138] However, it cannot be said that Ontario or Alberta are magnet forums in the same way that Alabama, West Virginia, or Louisiana may be. In fact, the Supreme Court has repeatedly emphasized that "fair process is not an issue within the Canadian federation."[139] Speaking specifically of fair process with respect to class actions, Jones and Baxter observe:

> Canadian courts facing the "full faith and credit" conundrum in class actions ought . . . to consider whether there really is a Canadian equivalent to Alabama in its "abuse of the justice system [through] drive-by class certification," or whether LaForest J.'s optimistic view that "fair process is not an issue within the Canadian federation" should instead be the guiding principle.[140]

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135. *See, e.g.*, Class Proceedings Act, S.O., ch. 6.5(1) (1992).

136. In this respect, the law of forum non conveniens must be adapted to the unique challenges posed by multiple multijurisdictional class proceedings.

137. *See, e.g.*, Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum Co. v. Shutts, 96 YALE L.J. 1, 59 (1986) (noting that the *Shutts* decision created the potential for "magnet states . . . [to] resolve controversial issues on a nationwide basis").

138. *See, e.g.*, Lester Brickman, *Anatomy of a Madison County (Illinois) Class Action: A Study of Pathology*, CIV. JUST. REP. No. 6, at 2–3 (Ctr. for Legal Pol'y) (Aug. 2002) (setting forth a case study of victims of "class action justice" in popular plaintiffs' haven, Madison County, Illinois); Victor E. Schwartz, Sherman Joyce & Cary Silverman, *West Virginia as a Judicial Hellhole: Why Businesses Fear Litigating in State Courts*, 111 W. VA. L. REV. 757 (2008–2009) (discussing why West Virginia continues to present one of the nation's worst legal climates).

139. Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077, para. 43; *see also* para. 37 ("The Canadian judicial structure is so arranged that any concerns about differential quality of justice among the provinces can have no real foundation. All superior court judges—who also have superintending control over other provincial courts and tribunals—are appointed and paid by the federal authorities. And all are subject to final review by the Supreme Court of Canada . . . . Any danger resulting from unfair procedure is further avoided by sub-constitutional factors, such as for example the fact that Canadian lawyers adhere to the same code of ethics throughout Canada.").

140. Jones & Baxter, *supra* note 66, at 429 (footnote omitted); *see also* Brito v. Pfizer Can. Inc., [2008]

As there can be few legitimate concerns about the ability of provincial courts in Canada to adequately protect the interests of their residents alongside the interests of the residents of other provinces, this critique of multijurisdictional class actions in Canada would appear unfounded.

b. The Theoretical Concern: The Notion of Implied Consent

The U.S. Supreme Court's decision in *Shutts* attempted to align jurisdiction over nonresident, class action plaintiffs with jurisdiction over plaintiffs in traditional litigation.[141] In non-class litigation, jurisdiction over the plaintiff is predicated on the plaintiff having selected the forum, thereby consenting to the jurisdiction of the court. Since absent class members do not "consent" in any meaningful sense of the term, it is commonly thought that under the *Shutts* approach, jurisdiction is grounded in the idea of implied consent. Where a class plaintiff does not opt out of a class proceeding despite the opportunity to do so, he has implicitly consented to be bound by the jurisdiction of the court.[142] Numerous commentators have criticized the notion of implied consent as being largely fictitious.[143] According to this view, it is disingenuous to view a plaintiff's failure to opt out of a proceeding, of which he may or may not have had notice, as consenting to be bound by the court's jurisdiction.[144]

It is true that failure to opt out of a class action cannot genuinely be regarded as a form of consent. However, it is worth noting that the approach to the real and substantial connection test which focuses on the commonality of interest between resident and nonresident class members is no less a fiction than implied consent.

More importantly, however, it may not be necessary to conceive of jurisdiction over the plaintiff class as founded on either consent, presence, or a real and substantial connection. These three traditional defendant-centric bases for jurisdiction are an uncomfortable fit with the idea of assuming jurisdiction over a nonresident plaintiff class. Rather than stretching either the concept of consent or real and substantial connection to the point of fiction, it is suggested that jurisdiction over nonresident class members may rest on the twin pillars of order and fairness. Order and fairness are given practical effect through the procedural safeguards of notice, opportunity to opt out, and adequate representation. These safeguards are, in effect, proxies for the order and fairness that lie at the heart of the traditional jurisdictional tests. In fact, one U.S. commentator suggests that the *Shutts* decision itself may be read not as a case about implied consent, but as a case about

R.J.Q. 1420, para. 122, 2008 QCCS 2231 (Can.) ("[T]he law of Québec and other provinces with regard to class actions are not so different as to cause genuine prejudice to members of the contemplated class.") (translation by author).

141. Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

142. *See, e.g.*, Linda S. Mullenix, *Getting to* Shutts, 46 U. KAN. L. REV. 727, 729 (1997–1998) (characterizing the conclusion of the *Shutts* decision that "a class member's failure to exclude himself or herself from the class, after receiving adequate notice of the action, constituted consent to the action, consent to the court's jurisdiction, and consent to be bound by the class judgment").

143. *See* Morrison et al., *supra* note 59, at 85–86 ("Although a strong case of 'attornment by silence' can be made regarding a sophisticated non-resident class member who receives notice, carefully weighs her options, and makes a deliberate decision not to opt out, the situation is more problematic with respect to class members who fall into the following categories: the indifferent, the ignorant, and the incognizant."); Lamont, *supra* note 68, at 286 (recognizing that, in some cases, the notion of implied consent to another province's jurisdiction "is surely to enter the field of fiction").

144. Lamont, *supra* note 68, at 286.

"fundamental fairness." According to this view, "a fundamental fairness standard might not invariably require either prelitigation contact or consent in order to establish in personam jurisdiction over nonresident class members."[145]

Class actions are a procedural innovation that cannot be readily reconciled with orthodox notions of jurisdiction. Accordingly, it may be time to reassess the conventional understanding of jurisdiction in the class action context, drawing inspiration from the overarching goals of order and fairness that are thought to inform jurisdictional analysis, without necessarily being wedded to the idea of a real and substantial connection that usually supplies the content of order and fairness.

c. The Constitutional Concern: The Issue of Extra-Territoriality

This article has presented the possibility that *Morguard* does not necessarily require there to be a real and substantial connection between the forum and the nonresident plaintiff class in order to found personal jurisdiction. Rather, the question of judicial jurisdiction over nonresident plaintiffs may be answered by reference to the overarching principles of order and fairness, as effectuated through the provision of adequate procedural safeguards to the nonresident plaintiff class. How does conceptualizing jurisdiction in this way implicate the issue of the extra-territorial reach of provincial legislation? What, in other words, is the relationship between judicial jurisdiction and legislative jurisdiction in the class context?

Early in Canadian class action jurisprudence, defendants resisting certification of a national or multijurisdictional class tended to argue that provincial legislation governing class actions could not, as a constitutional matter, be applied extraterritorially so as to affect the rights of purported nonresident class members.[146] The argument was that section 92(16) of the Constitution Act permits provinces to legislate with respect to civil rights "within the province" and that the extension of class proceedings legislation to nonresident plaintiffs results in the impermissible extraterritorial application of provincial law.[147]

However, Walker notes that "the objection relating to extraterritoriality appears to be misconceived"[148] and that "there is simply no credible challenge to be made to the basic jurisdiction of Canadian courts to certify multijurisdiction class actions."[149] This is because section 92 of the Constitution Act, which defines the scope of provincial legislative competence, does not define the scope of a provincial court's *judicial* jurisdiction:

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145. Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1171 (1998).

146. *See, e.g.*, Wilson v. Servier, [2000] 50 O.R. (3d) 219, para. 59 (Can.) ("Thus, two issues are raised by the defendants. First, is the CPA *ultra vires* the Legislative authority of the Province of Ontario to the extent it may purport to allow for a national class?"); Carom v. Bre-X Minerals Ltd., [1999] 43 O.R. (3d) 441, para. 17 (Can.) ("[Certain defendants] object to the proposed class on the grounds that . . . it affects civil rights outside the province and, therefore, is unconstitutional and contrary to the presumption under the principle of territoriality that legislation does not operate extra-territorially.").

147. *Carom*, [1999] 43 O.R. (3d) 441, para. 27.

148. CASTEL & WALKER, *supra* note 64, § 11.4, at 11–23.

149. Walker, *Recognizing Multijurisdiction Class Action Judgments Within Canada*, *supra* note 8, at 459.

> It is to be noted that s. 129 of the 1867 [Constitution] Act provides that the court retains its pre-Confederation jurisdiction except as altered by Parliament or the Legislature of the respective province under the new Constitution. Section 92 sets forth the exclusive powers of provincial Legislatures. Section 92 does not limit the pre-Confederation jurisdictional reach of the courts. The third "Whereas" clause in the preamble makes it clear that it is the authority of Parliament and the provincial Legislatures, together with the nature of the Executive Government, that is being provided for in the 1867 [Constitution] Act. Thus, the referenced provisions of s. 92 have no relevance in limiting the court's jurisdiction. The CPA recognizes and affirms the court's jurisdiction to include non-resident claimants within an Ontario action.[150]

If a court starts from the predicate question of whether it has personal jurisdiction over the parties to the action (unconstrained by the limitations of section 92), then the court may apply its procedural law, including its class proceedings legislation, without running afoul of constitutional limitations on territorial competence.[151] Courts have continually emphasized that class proceedings statutes are procedural in character.[152] Indeed, the Supreme Court recently noted that "the class action, while having an important social dimension, is only a 'procedural vehicle whose use neither modifies nor creates substantive rights.'"[153]

Therefore, the issue is not whether provincial class proceedings legislation operates extraterritorially when nonresident plaintiffs are included within a class, but whether a provincial court has a proper basis for asserting personal jurisdiction over nonresident class members. If a provincial court has properly exercised personal jurisdiction under the principles of order and fairness (given practical effect through procedural safeguards), otherwise valid procedural, provincial class proceedings legislation does not operate extra-territorially when applied to nonresident class members. In other words, once a nonresident plaintiff is properly "before" the court, on whatever understanding of jurisdiction is appropriate, the court may apply its class proceedings statute to the case as a necessary incident of that jurisdiction. Just as an *ex juris* defendant who is properly within the jurisdictional embrace of the court—owing to his consent, presence, or a real and substantial connection—is

150. *Wilson*, [2000] 50 O.R. (3d) 219, para. 67; *see also* Walker, *Recognizing Multijurisdiction Class Action Judgments Within Canada*, *supra* note 8, at 459 n.18 ("Although class actions legislation is promulgated pursuant to the constitutional grant to the provinces of exclusive authority to make laws in relation to procedure in civil matters and this grant contains a limit on the extraterritorial operation of that authority, s. 92 provides for *legislative* authority, not *judicial* authority. The judicial jurisdiction of the superior courts of Canada is founded on the traditional authority of the courts of England and the provinces as reflected in s. 129 of the Constitution Act, 1867 and it is informed by the principles of order and fairness.").

151. *See* Elizabeth Edinger & Vaughan Black, *A New Approach to Extraterritoriality:* Unifund Assurance Co. v. I.C.B.C., 40 CAN. BUS. L.J. 161, 165 (2004) (noting that prescriptive or legislative jurisdiction is concerned with "the power to legislate with respect to the *substantive law* in matters with (arguably) extra-provincial elements") (emphasis added).

152. *See, e.g.*, Bisaillon v. Concordia Univ., [2006] 1 S.C.R. 666, paras. 15–19, 2006 SCC 19 (Can.) (emphasizing that class action legislation provides a procedural vehicle, and is not substantive in nature); Carom v. Bre-X Minerals Ltd., [1999] 43 O.R. (3d) 441, para. 48 (Can.) (characterizing class action legislation as procedural law).

153. Dell Computer Corp. v. Union des Consommateurs, [2007] 2 S.C.R. 801, para. 226, 2007 SCC 34 (Can.) (internal citations omitted).

subject to a province's procedural rules, so too is a nonresident plaintiff in class litigation. This does not mean that substantive provincial law may govern this dispute, as that will be determined by relevant choice of law principles.[154] It simply means that "[a] necessary corollary of [a] court's assumption of jurisdiction is the application of [its class action] legislation to the proceedings."[155]

Further support for this position is found in the Supreme Court of Canada's decision in *Western Canadian Shopping Centres Inc. v. Dutton*.[156] In that case, the Supreme Court determined that even in the absence of comprehensive class action legislation, courts could certify and fashion class proceedings under their "inherent power to settle the rules of practice and procedure as to disputes brought before them."[157] *Dutton* confirms that the source of the province's jurisdiction to certify a class action does not derive from underlying provincial class proceedings legislation, but instead rests on the judicial jurisdiction of the superior courts, which is to be exercised in accordance with the principles of order and fairness.[158]

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154. *See Wilson*, [2000] 50 O.R. (3d) 219, para. 83 ("*Morguard* and *Hunt* stand for the proposition that if there is a real and substantial connection between the subject-matter of the action and Ontario, then the Ontario court has jurisdiction with respect to the litigation and can apply Ontario's *procedural* law. Ontario may not necessarily apply its substantive law since there must be a determination of the choice of law that applies.") (emphasis in original). In *Hocking*, the Québec Court of Appeal expressed more concern about the application of Ontario's substantive law, rather than its procedural law:

> [E]n autorisant un recours collectif sans même se poser la question de savoir s'il existe entre tous et chacun des membres du groupe visé (en l'espèce, les Canadiens ayant eu certains rapports contractuels avec HSBC) et le for saisi (celui de l'Ontario) un lien réel et substantiel sur le fond, le jugement ontarien qui est au cœur du litige fait apparemment en sorte de rendre applicable à tous les non-résidants de l'Ontario, et notamment aux Québécois, non seulement la procédure de reconnaissance applicable aux recours collectifs en Ontario, *mais surtout le droit substantif de cette province*: voilà en effet que par ce jugement ontarien dont on demande la reconnaissance au Québec, les droits des justiciables québécois ayant contracté au Québec, avec une succursale québécoise de HSBC, un contrat hypothécaire relatif à une propriété située au Québec se trouveraient déterminés par le droit ontarien, alors qu'aucun lien de quelque sorte ne les rattache à celui-ci. Ne peut-on croire qu'il y a là une atteinte directe au principe constitutionnel de territorialité.
>
> Cette atteinte aurait pu être mitigée, peut-être, si, consciente de leffet d'une telle autorisation, la juge ontarienne avait, par exemple, en application des règles ontariennes en matière de droit international privé, considéré la possibilité que, sur le fond, les non-résidants de l'Ontario puissent être régis par le droit de leur province respective . . . .

Hocking v. Haziza, [2008] R.J.Q. 1189, paras. 151–52 (Can.) (emphasis added).

155. *Carom*, [1999] 43 O.R. (3d) 441, para. 48.

156. Western Canadian Shopping Centres, Inc. v. Dutton, [2001] 2 S.C.R. 534, paras. 31–34, 2001 SCC 46 (Can.). Note that in *Dutton*, the Court did not even consider the issue of whether it had personal jurisdiction over the plaintiff class of foreign investors. *See id.* paras. 1, 35. However, the Court did hold that procedural safeguards were relevant to whether plaintiffs could be bound: "A judgment is binding on a class member only if the class member is notified of the suit and is given an opportunity to exclude himself or herself from the proceeding. This case does not raise the issue of what constitutes sufficient notice. However, prudence suggests that all potential class members be informed of the existence of the suit, of the common issues that the suit seeks to resolve, and of the right of each class member to opt out, and that this be done before any decision is made that purports to prejudice or otherwise affect the interests of class members." *Id.* para. 49.

157. *Id.* para. 34.

158. *See id.* paras. 31–34 (determining that absent provincial class proceedings legislation, "courts must determine the availability of the class action and the mechanics of class action practice").

Despite the aforementioned analysis, some courts seem to suggest that it is the real and substantial connection itself that founds both judicial and legislative jurisdiction in the class context.[159] According to this view, even if one could abandon the real and substantial connection for personal jurisdiction, such a connection is still required to found legislative jurisdiction. It is doubtful that both the issue of personal jurisdiction over plaintiffs and legislative jurisdiction are in fact policed by the same standard—i.e., that laid out in *Morguard*, a case which was fundamentally about the recognition of foreign judgments.[160] In *Unifund Assurance Co. of Canada v. Insurance Corp. of British Columbia*, the Supreme Court was confronted with a case that raised concerns both about personal jurisdiction over a defendant and the constitutional applicability of a regulatory statute to that defendant.[161] The Court noted:

> [W]e are asked to apply the "real and substantial connection test" in the different context of the *applicability* of a provincial regulatory scheme to an out-of-province defendant. The issue is not just the competence of the Ontario court . . . but, as the constitutional question asks, whether the "connection" between Ontario and the respondent is sufficient to support the application to the appellant of Ontario's regulatory regime.[162]

Notably, this was the first time that the Supreme Court's jurisprudence on extra-territorial application of otherwise valid provincial law was cast in terms of a "sufficient" connection.[163] Moreover, the traditional language of "pith and substance" and "incidental effects"[164] which had previously been used in the context

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159. *See, e.g.*, *Carom*, [1999] 43 O.R. (3d) 441, para. 36 (noting that "*Morguard* and *Hunt* permit the extra-territorial application of legislation where the enacting province has a real and substantial connection with the subject-matter of the action and it accords with order and fairness to assume jurisdiction").

160. *See* Edinger & Black, *supra* note 151, at 165 (arguing that "it has *not* been true that judicial and prescriptive jurisdiction are circumscribed by a shared standard").

161. Unifund Assurance Co. of Can. v. Ins. Corp. of B.C., [2003] 2 S.C.R. 63, 2003 SCC 40 (Can.).

162. *Id.* para. 55; *see* Edinger & Black, *supra* note 151, at 175 (noting that in *Unifund* "the real and substantial connection test was adapted to a new role of evaluating the territorial applicability of provincial legislation"). In *Unifund*, the Court articulated the following principles with respect to the constitutional applicability of a provincial regulatory scheme to an out of province defendant:

> 1. The territorial limits on the scope of provincial legislative authority prevent the application of the law of a province to matters not sufficiently connected to it;
>
> 2. What constitutes a 'sufficient' connection depends on the relationship among the enacting jurisdiction, the subject matter of the legislation and the individual or entity sought to be regulated by it;
>
> 3. The applicability of an otherwise competent provincial legislation to out-of-province defendants is conditioned by the requirements of order and fairness that underlie our federal arrangements;
>
> 4. The principles of order and fairness, being purposive, are applied flexibly according to the subject matter of the legislation.

Unifund, [2003] 2 S.C.R. 63, para. 56.

163. *See, e.g.*, Edinger & Black, *supra* note 151, at 174–75 (describing the Court's development of the sufficiency test in *Unifund*).

164. *See Reference re* Upper Churchill Water Rights Reversion Act, [1984] 1 S.C.R. 297 (Can.) (holding that the Newfoundland *Upper Churchill Water Rights Reversion Act* was *ultra vires* the legislature of Newfoundland because "the pith and substance of the *Reversion Act* is to interfere with the rights of

of extra-territoriality, especially in cases of constitutional validity, was largely ignored.[165] While drawing on the language of *Morguard* and *Hunt* with respect to a "'sufficient' connection" and the "principles of order and fairness," it is far from clear that the Supreme Court intended the *Morguard* real and substantial connection test to now govern the issue of the constitutional applicability of otherwise *intra vires* provincial legislation.[166]

More importantly, however, the sui generis nature of class proceedings legislation may mean that the traditional approaches to extraterritoriality are of limited relevance.[167] First, all of the Canadian Supreme Court jurisprudence on the issue of extra-territorial reach of provincial law deals with its application to a named defendant. How this translates to a group of unnamed plaintiffs is far from clear. Second, cases on extra-territorial reach of provincial legislation have dealt with attempts to *regulate* defendant conduct and take away from those defendants certain property or contract rights that they would otherwise enjoy.[168] Class proceedings statutes, on the other hand, are designed to confer a benefit upon absent class members; indeed, that is their raison d'être. While a necessary consequence of their design is that civil rights (in particular, the right to sue) may be extinguished, they are not aimed at regulating conduct in the same way that, say, an insurance statute may be.[169] Finally, all class members have the ability to exclude themselves from the reach of class proceedings legislation by exercising the option to opt out of the litigation, and to commence actions in the courts of their choosing. A class member's rights are only potentially affected if an enforcing court in a different province accords res judicata effect to a class judgment. A provincial class

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Hydro-Québec outside the territorial jurisdiction of Newfoundland"); *see also* Global Securities Corp. v. British Columbia (Securities Commission), [2000] 1 S.C.R. 494, para. 47, 2000 SCC 21 (Can.) (holding that s. 141(1)(b) of the British Columbia *Securities Act* to be constitutional because "in pith and substance, [the provision is] aimed at furthering the effective enforcement of domestic securities laws and as such falls within the province's powers under s. 92(13) of the *Constitution Act, 1867*").

165. *See Unifund*, [2003] 2 S.C.R. 63 (nowhere do the phrases "pith and substance" or "incidental effects" appear in the majority opinion). *But see id.* para. 140 (Bastarache, J., dissenting) (citations omitted) (analyzing the constitutionality issue in more traditional language: "I do not propose to deal at any length with the question of the permissible reach of Ontario's *Insurance Act*. In *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, the Court opined that valid provincial legislation can affect extra-provincial rights in an 'incidental' manner. I am of the view that valid provincial laws can affect 'matters' which are 'sufficiently connected' to the province. In my view, the respondent has shown that the subject matter which the *Insurance Act* covers, interinsurer indemnification, falls within provincial jurisdiction and is sufficiently connected to Ontario so as to render the statute applicable to the ICBC.").

166. *See Unifund*, [2003] 2 S.C.R. 63, para. 58 (alluding to the fact that legislative and judicial jurisdiction are not governed by the same standard, noting that "a 'real and substantial connection' sufficient to permit the court of a province to take jurisdiction over a dispute may not be sufficient for the law of that province to regulate the outcome.").

167. *See* Carom v. Bre-X Minerals Ltd., [1999] 43 O.R. (3d) 441, para. 53 ("The CPA is sui generis legislation. The notion of a class of plaintiffs is conceptual in nature. That is to say a class proceeding may on occasion be initiated where a class of plaintiffs is discrete in that the members are identifiable at the time that the class is certified. More often however, as is the case here, the class is generic. The members will only be known at some later date, perhaps when the individual issues are dealt with. This latter situation is within the contemplation of the statute. The personal attornment of the type demanded by the defendants as a prerequisite runs contrary to the scheme of the CPA and its core concept of a proceeding brought on behalf of a class by a representative plaintiff.").

168. *See, e.g.*, *Unifund*, [2003] 2 S.C.R. 63, para. 56 (dealing with the applicability of a provincial regulatory scheme, the Ontario *Insurance Act*, to an out-of-province defendant).

169. *Id.*

proceedings statute does not prevent a class member from otherwise suing in the province of his choosing. The point is that just as the *Morguard* personal jurisdiction test does not work particularly well in its application to a class of unnamed plaintiffs, it is also an uncomfortable fit with the issue of extra-territorial applicability of provincial class proceedings law to unnamed plaintiffs.

In any event, it is not necessary to resort to either *Unifund* or the traditional cases on extraterritoriality because the source of the court's power to certify multijurisdictional classes does not originate from provincial class proceedings legislation, but rather rests on the judicial jurisdiction of the superior courts which, in turn, is "informed by the principles of order and fairness."[170] Once a court properly assumes jurisdiction over a nonresident plaintiff class, otherwise valid provincial class proceedings legislation applies as a necessary corollary of that exercise of judicial jurisdiction.[171]

V. CONCLUSION

As noted at the beginning of this article, it has been difficult to reconcile contemporary class action practice with traditional adversarial procedure. Nowhere has this been truer than in the area of jurisdiction. In non-class litigation, jurisdictional issues are viewed only in reference to the defendant. In class litigation, on the other hand, the jurisdictional issues are manifold: Is there jurisdiction over the defendant?; is there jurisdiction over the defendant in respect of the claims of nonresident class members?; and, is there jurisdiction over the plaintiff class? With respect to this latter question, the analytical approach is still unsettled, with courts extrapolating from the real and substantial connection test that guides jurisdictional determinations concerning nonresident defendants. Because of the divergent approaches to the real and substantial connection in a class context, defendants have encountered the "back-end" jurisdictional problem.

While the problem could be addressed by courts simply adopting a uniform approach to the real and substantial connection test or by legislatures crafting regimes which only permit class actions on an opt-in basis, it is time to probe the question of whether a real and substantial connection is necessary to ground jurisdiction over nonresident plaintiffs. Rather than focusing on the connections between the nonresident plaintiff class and the forum—where such connections are likely to be absent in most cases—it would be more appropriate to regard a court as jurisdictionally competent in circumstances where the nonresident plaintiff class has been provided with adequate procedural safeguards, in particular, notice, an opportunity to opt out, and adequate representation. These procedural safeguards are more conducive to ensuring that jurisdictional determinations are fair and orderly than any sort of real and substantial connection. Regardless of which solution is ultimately adopted, one thing is clear: existing notions of jurisdiction must be carefully reassessed and adapted to this new procedural device.

170. Walker, *Recognizing Multijurisdiction Class Action Judgments Within Canada*, *supra* note 8, at 459 n.18.

171. Carom v. Bre-X Minerals Ltd., [1999] 43 O.R. (3d) 441, para. 48 (Can.).

The Demise of Development in the Doha Round Negotiations

SUNGJOON CHO*

Abstract

This article provides a concise history of the Doha Round negotiation, analyzes its deadlock, and offers some suggestions for a successful Doha deal and for developing countries. The article observes that the nearly decade-long negotiation stalemate is symptomatic of diametrically opposed perceptions of the nature of the Round between developed and developing countries. While developed countries appear to be increasingly oblivious to Doha's original genesis, developing countries vehemently condemn their narrow commercial focus in the Doha Round talks. It will not be easy to untie this Gordian knot since both developed and developing countries tend to think that no deal is better than a bad deal. This political dilemma notwithstanding, the current global economic crisis has been a clarion call for a successful Doha deal. Ironically, the widespread protectionist reactions from both developed and developing countries have highlighted the vital importance of a well-operating multilateral trading system. This article concludes that the United States must exercise leadership in delivering the Doha Round and that developing countries must embrace open trade more vigorously beyond the Doha Development Agenda.

SUMMARY

* Associate Professor of Law, and Norman and Edna Freehling Scholar, Chicago-Kent College of Law, Illinois Institute of Technology. This article has greatly benefited from the comments of Professor John Jackson. I also thank Robert Beckman, Michael Ewing-Chou, Michael Gadbaw, Jane Bradley, Christophe Larouer, participants of the 2008 Staff Seminar Series at the National University of Singapore Faculty of Law, and the 2009 Luncheon Speakers Series at the Institute of International Economic Law (IIEL) of Georgetown Law Center for their valuable feedback. Special thanks to Kelly Stephenson and the staff of the *Texas International Law Journal* for their editorial efforts. Maribel Nash, Daniel Crimmins and, Claire Alfus provided excellent research assistance. All errors are those of the author.

I. INTRODUCTION

On July 29, 2008, Pascal Lamy, the head of the World Trade Organization (WTO), bitterly declared the collapse of yet another attempt to conclude the Doha Round talks.[1] Even his eleventh-hour Herculean effort to bridge the differences among the major negotiating groups was of no avail. As of March 2010, after nine years of talks, the Doha Round still has no framework (modalities) deal, let alone final national schedules.[2] A recidivistic pattern of collapses and resumptions in the negotiation process has fostered a sense of defeatism and learned helplessness among delegates. As such, the 2008 collapse was not entirely alien; it was just a recurring scene from the past. Because of the economic and political circumstances of the past several years, as well as the underlying lack of political will or capital among WTO members, the successful resolution of the Doha Round undoubtedly remains a "tough sell."[3] As the Doha Round has become the longest trade round in GATT/WTO history, its current torpor may only be broken by an epic catastrophe.

This nearly decade-long negotiation stalemate is attributable to the diametrically opposed perceptions of the Round between developed and developing countries. Developed countries appear to be increasingly oblivious to the original reasons for Doha's creation: to foster a *development* round launched in response to the urgency of the September 11 terrorist attacks and the UN Millennium

1. Pascal Lamy, Director-General of the World Trade Organization, DG Press Conference (July 2008) (transcript available at http://www.wto.org/english/news_e/news08_e/2008_07_29_pc_lamy_e.doc).

2. The most recent WTO Ministerial Conference, held in Geneva in December 2009, delivered no breakthrough on the Doha Round negotiation. *See* Chairman's Summary, WT/MIN(09)/18 (Dec. 2, 2009) (reviewing the accomplishments of the Ministerial Conference); Jonathan Lynn, *No Doha Decision from Meeting*, REUTERS, Nov. 27, 2009, http://uk.reuters.com/article/idUKTRE5AQ1ZP20091127?sp=true (recapping the conclusion that there will be no decision on the long-standing Doha Round).

3. Stephen Castle & Mark Landler, *After 7 Years, Talks on Trade Collapse*, N.Y. TIMES, July 30, 2008, at A1.

Development Goals (MDGs).[4] These countries, such as the United States and those of the EU, tend to consider the advancement of the Doha Round to be a liability rather than a goal. Ascribing to the Doha crisis its uncommon *development* label for a trade round, developed countries realized that "with a narrow agenda centered on giving market access to poor countries, little incentive was offered to the leading trading nations to compromise."[5] This position tends to regard any concessions in agricultural liberalization as potential bargaining chips to be exchanged squarely for reciprocal concessions from developing countries. Of course, developed countries' main target is not the world's poorest countries, but emerging countries such as India, Brazil, and China. Developed countries thus condition their reduction of farm protection on these emerging countries' matching reduction of industrial tariffs. This is why the Obama administration still believes that the most recent Doha package is "imbalance[d]."[6]

Developing countries, however, condemn this narrow commercial focus. To developing countries, Doha should not be yet another Wall Street deal. Principally, developing countries view the Doha Development Agenda (DDA) as an avenue for reducing or eliminating old, *unfair* protection by developed countries that the skewed Uruguay Round deal failed to resolve. In this context, developing countries perceive developed countries' consistent quid pro quo demands as unconscionable derelictions of Doha's development mandate. Even emerging economies argue that they should be granted more "policy space" than developed countries in cutting industrial tariffs, given the former's limited institutional capability.[7]

In sum, WTO members are split between two diametrically opposed worlds. This philosophical divergence on the nature of the Doha Round is the main culprit for the negotiation deadlock. It will not be easy to untie this Gordian knot since both worlds tend to think that no deal is better than a bad deal.[8] A new geography of power defined by the recent rise of emerging economies has also contributed to this deadlock.[9] Under these circumstances, the Doha Round may be relegated to

4. In the Doha Ministerial Declaration of 2001, WTO members highlighted that "the majority of WTO members are developing countries" and agreed to "place [developing countries'] needs and interests at the heart of the Work Programme adopted in this Declaration." World Trade Organization, Ministerial Declaration of 14 November 2001, para. 2, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) [hereinafter Doha Declaration]. Some commentators observe that the "grand-scale agreements format" became "obsolete." Alan Beattie, *Doha Hangovers But No Anger Next Morning*, FIN. TIMES, July 30, 2008, *available at* http://www.ft.com/cms/s/0/3e4f0e12-5e56-11dd-b354-000077b07658.html?nclick_ check=1 [hereinafter *Doha Hangovers*] (quoting Susan Schwab, U.S. Trade Representative). Yet the innovative negotiation procedures ("concentric circles") espoused by the WTO Director-General Pascal Lamy proved to be effective in gathering convergences. World Trade Organization, The July 2008 Package—Seeking Consensus, http://www.wto.org/english/tratop_e/dda_e/ meet08_circles_popup_e.htm# (last visited Feb. 6, 2010).

5. Editorial, *The Next Step for World Trade*, N.Y. TIMES, Aug. 2, 2008, at A14.

6. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, THE PRESIDENT'S TRADE POLICY AGENDA FOR 2009, at 3 (2009) [hereinafter 2009 Trade Policy Agenda].

7. World Trade Organization Secretariat, *Developmental Aspects of the Doha Round of Negotiations*, *in* AGREEING AND IMPLEMENTING THE DOHA ROUND OF THE WTO 41, 49 (Harald Hohmann ed., 2008) [hereinafter AGREEING AND IMPLEMENTING].

8. *See, e.g.*, *U.S. Presses WTO for Details on Doha Round Benefits*, REUTERS, Apr. 14, 2009, http://in.reuters.com/article/idINIndia-39048220090415 (reporting that U.S. business groups are pressuring the Obama administration not to agree on the current form of the Doha deal).

9. *See, e.g.*, *BRIC Makes Formal Debut with First Summit Meeting*, XINHUA, June 14, 2009, *available at* http://news.xinhuanet.com/english/2009-06/14/content_11541582.htm (observing that the rapid economic

inconvenience, irrelevance, or incorrectness as far as politicians of both worlds are concerned.

The political dilemma notwithstanding, the current global economic crisis has offered a clarion call for a successful Doha deal. Ironically, the widespread protectionist reactions from both developed and developing countries alike have highlighted the vital importance of a well-operating multilateral trading system.[10] Moreover, the fact that the crisis tends to victimize the poor in a highly disproportionate manner has also amplified the original mission for a development round.[11] In this regard, the Doha Round urgently needs to change its rhetoric of negotiation from a narrowly defined commercial deal to a broad, collective public good. WTO members should deem the Doha Round as a Gemeinschaftian enterprise in which they share a communitarian ethos and identity, not as a mere Gesellschaftian set of mercantilist bargains.[12] After all, the DDA is not as much of a consequentialist balance sheet as it is a teleological commitment.

Markedly, this is the moment of truth for the U.S. leadership, which can help crystallize the DDA into a concrete outcome as it overcomes many political hurdles, domestic and international. As Charles Kindleberger aptly observed more than three decades ago, the lack of U.S. leadership contributed greatly to the deepening of the Great Depression.[13] Now in the face of the biggest crisis since the Great Depression, what the global economic system truly needs is "a country which is prepared ... to set standards of conduct for other countries; and to seek to get others to follow them, to take on an undue share of the burdens of the system."[14]

At the same time, however, developing countries should not anticipate a panacea for development from the DDA. With or without the Doha Round, developing countries, in particular low-income developing countries, should take active development initiatives on their own terms. Developing countries should first realize that the conventional WTO development mantras, such as the special and differential (S&D) treatment, may not benefit them much in practice. In addition to the fact that its developmental potential is empirically doubted, it may implicitly provide developed countries with subterfuges for deviations from free trade

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growth of BRIC countries (Brazil, Russia, India, and China) has led them to "reposition" themselves in the international sphere).

10. *See* Steven Mufson, *WTO Seeks to Curtail Protectionist Measures*, WASH. POST, Feb. 9, 2009, at D03 (detailing many of the protectionist measures taken by China, India, and the United States); *WTO Chief: Multilateral Trading System to Face "Stress Test,"* GLOBAL TIMES, May 27, 2009, *available at* http://business.globaltimes.cn/world/2009-05/432914.html ("'It is precisely at this time, when protectionist temptations flourish, that the value of the multilateral trading system is all the more apparent to all [of] us' ....").

11. *See* Mark Landler, *Dire Forecast for Global Economy and Trade*, N.Y. TIMES, Dec. 10, 2008, at B1 (highlighting the disproportionate impact of the downturn on developing nations); Pascal Lamy, *We Must Seal the Deal on World Trade*, GUARDIAN, Nov. 23, 2009, *available at* http://www.guardian.co.uk/commentisfree/2009/nov/23/world-trade-doha-round-deal (observing that export earnings by the world's poorest countries have dropped by 44% since the onset of the global financial crisis and that the "Doha deal represents one of the most valuable tools at our disposal to help meet the United Nations' millennium development goals").

12. *See generally* Sungjoon Cho, *The WTO's Gemeinschaft*, 56 ALA. L. REV. 483, 541 (2004) [hereinafter Cho, *Gemeinschaft*] ("[T]he WTO Gesellschaft has not been, and should not be, an answer. Only global empathy realized through the achievement and operation of the WTO Gemeinschaft ... can deliver true changes.").

13. CHARLES P. KINDLEBERGER, THE WORLD IN DEPRESSION 1929–1939, at 297–98 (1973).

14. *Id.* at 28.

principles, such as tariff peaks. In the long term, developing countries should mainstream open trade more aggressively as their primary developmental avenue.

Against this backdrop, this article provides a concise history of the Doha Round negotiation, analyzes its deadlock, and offers some suggestions for a successful deal as well as for developing countries in general. Part II sketches the inglorious history of the Doha Round's nine years of stalled negotiations. It reveals a deep-rooted tension between developed and developing countries on the nature of the Doha Development Round. Part III determines why the nine-year negotiations have failed to secure a deal thus far; it critically observes that a confluence of underlying North-South tensions and other political factors adverse to the negotiations led to the current stalemate. Part IV characterizes the Doha failure as the WTO's legitimacy crisis: such failure will cause disproportionate harms to developing countries, accounting for more than three quarters of the WTO membership, which have already suffered from the current global financial crisis. Part V then suggests that developed countries, in particular the United States, mobilize more political capital to deliver a Doha success and that developing countries mainstream open trade as their primary developmental tool beyond Doha's promises.

II. THE HISTORY OF THE DOHA ROUND: AN INGLORIOUS TALE

A. The Genesis of a Development Round

The Doha Round began its existence amid a grim atmosphere after the September 11 terrorist attacks and global economic woes.[15] To signal a collective commitment to open trade and prosperity, in particular toward poor countries, the Round was established at the fourth WTO Ministerial Conference held in Doha, Qatar in November 2001. As a development round, the DDA's main concern was to reduce or eliminate agricultural trade barriers, such as farm subsidies and farm tariffs, which rich countries had maintained after the launch of the WTO.[16] The level of urgency in the international community at the DDA's inception enabled negotiators to nail down an ambitious deadline of January 1, 2005 as the date for completing the Doha Round.[17]

Importantly, the South expected to redeem the unbalanced deal that it had suffered as a result of the Uruguay Round, because the new round highlighted the development dimension of trade.[18] The emergence of a new geography of power

15. *See* William A. Lovett, *Bargaining Challenges and Conflicting Interests: Implementing the Doha Round*, 17 AM. U. INT'L L. REV. 951, 958 (2002) (documenting how the September 11 terrorist attacks led to the creation of the Doha Round).

16. *See* Doha Declaration, *supra* note 4, para. 13 ("Building on the work carried out to date and without prejudging the outcome of the negotiations we commit ourselves to comprehensive negotiations aimed at: substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support.").

17. *See id.* paras. 42, 45 (setting a deadline of early 2005 and noting the seriousness of concerns facing least-developed countries).

18. J. Michael Finger, *Trade and Development: Systematic Lessons from WTO Experience with Implementation, Trade Facilitation, and Aid for Trade*, *in* DEVELOPING COUNTRIES IN THE WTO LEGAL

within the WTO, exemplified by China's recent accession to membership, seemed to reinforce this development mandate in the Doha Round.[19] As negotiations proceeded, however, the Round's original development goals could not match the tough business realities on the ground. Developed countries' governments simply lacked the political capital to bring the development cause to light without obtaining serious concessions from developing countries. This lack of political will in developed countries to accommodate developing countries' interests had also eventually derailed the Seattle Ministerial Conference in 1999.[20]

B. Collapses and Missed Deadlines

The fanfare of the WTO Ministerial Conference in Cancún, Mexico in September 2003 quickly turned into a disgraceful tumult of infuriation and finger-pointing. According to the original plan, the Cancún Conference was supposed to deliver a basic deal on the modalities (framework) requiring WTO members to open their markets in implementing the DDA by the end of 2004. Yet major developed countries were simply not prepared to reform their long-standing agricultural protection policies to meet such ambition. Some observed that the $180 billion U.S. farm bill and the EU's refusal to reform its outmoded Common Agricultural Policy (CAP), led by a Franco-German collusion, made a "mockery of the idea that the Doha round was to be a development round."[21] In a frustrating testimony to rich countries' farm protectionism, the United States refused to reduce its notorious cotton subsidies, even in the face of desperate pleas from Africa's Cotton Four (Benin, Burkina Faso, Chad, and Mali) and then-WTO Director-General Supachai.[22] One representative of the cotton industry decried that "[w]e are used to hardship, disease and famine .... Now the WTO is against us as well. I think that this will stay in history."[23]

After the Cancún debacle, the Doha trade talks were largely deadlocked until the summer of 2004 when negotiators managed to work out the July 2004 Package. This Package was nothing but the modality of modalities. It contained the basic principles and framework for establishing the modalities in future negotiations. For example, the July 2004 Package adopted a tiered approach to reducing farm subsidies and tariffs, which required that a member with a higher level of trade-distorting agricultural subsidies and agricultural tariffs cut its subsidies and tariffs to

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SYSTEM 75, 87–90 (Chantal Thomas & Joel P. Trachtman eds., 2009).

19. Sungjoon Cho, *A Bridge Too Far: The Fall of the Fifth WTO Ministerial Conference in Cancún and the Future of Trade Constitution*, 7 J. INT'L ECON. L. 219, 234–35 (2004) (discussing the dramatic impact of the "China factor" on the power of the G-21 at the Cancun Ministerial Conference).

20. WORLD BANK, GLOBALIZATION, GROWTH, AND POVERTY: BUILDING AN INCLUSIVE WORLD ECONOMY 60 (2002) (quoting Report Commissioned by the Secretary-General, *Recommendations of High-Level Panel on Financing for Development*, at 7 (June 22, 2001)).

21. *Trading Insults*, ECONOMIST, Nov. 30, 2002, at 67. *See also Coming Unstuck*, ECONOMIST, Nov. 2, 2002, at 14 (explaining the failure of the United States and Europe to make good on their pledges to disable their farm support programs).

22. *At the Eleventh Hour, Divergence All Over Again*, BRIDGES DAILY UPDATE (Int'l Ctr. for Trade and Sustainable Dev.), Sept. 14, 2003, http://ictsd.org/downloads/2008/08/ben030914.pdf. *See generally* Kevin C. Kennedy, *The Doha Round Negotiations on Agricultural Subsidies*, 36 DENV. J. INT'L L. & POL'Y 335, 343 (2008) (demonstrating that cotton subsidies in rich countries have driven down the prices of cotton in the global market).

23. *At the Eleventh Hour, Divergence All Over Again*, *supra* note 22.

a higher degree.[24] In the reduction of industrial tariffs, developing countries would have longer implementation periods as well as some flexibility in choosing tariff lines to cut.[25]

Nonetheless, the July 2004 Package failed to motivate WTO members to further narrow differences in their substantive positions. The revised plan for the Doha Round was to achieve some concrete approximation of the members' substantial differences on critical issues—such as the size of the reduction of farm subsidies and tariffs—by July 2005, and then to deliver a deal on the modalities in the upcoming Hong Kong Ministerial Conference in December 2005.[26] Under this scenario, WTO members might have finalized the whole round by the end of 2006.[27] Yet the political climate was not ripe for the so-called July Approximation.[28] Having failed to resolve their differences, WTO members lowered their expectations for the Hong Kong Ministerial Conference.[29]

These recalibrated expectations naturally led to a largely face-saving pact in Hong Kong.[30] The Hong Kong Ministerial Declaration included some meaningful numbers, such as deadlines for getting rid of agricultural export subsidies (2013)[31] and cotton export subsidies (2006),[32] as well as a developmentally critical commitment that the exports of least developed countries (LDCs) enjoy duty and quota-free access, at least up to 97 percent, by 2008.[33] The positive view of the Hong Kong deal is that it put the Doha Round "back on track" with a "rebalancing in the favour of developing countries."[34] At the same time, however, the negative view of the deal was that it failed again to deliver the long-awaited deal on modalities for the agricultural and non-agricultural market access (NAMA) sector.[35] Negotiators simply deferred resolving this controversial issue and agreed that they would establish the modalities by April 30, 2006.[36]

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24. World Trade Organization, *Decision Adopted by the General Council on 1 August 2004*, Annex A, WT/L/579 (Aug. 2, 2004).

25. *Id.* Annex B.

26. *WTO Members Aim for July 'Approximations,' Hong Kong Deal*, 9 BRIDGES WKLY. TRADE NEWS DIG. (Int'l Ctr. for Trade and Sustainable Dev.), Feb. 16, 2005, *available at* http://ictsd.org/i/news/bridgesweekly/7683/.

27. *Id.*

28. Alan Beattie, *G8 Mood and Doha Talks 'Show Disconnect,'* FIN. TIMES, July 8, 2005, at 4.

29. *Members Scale Back Expectations for Hong Kong*, 9 BRIDGES WKLY. TRADE NEWS DIG. (Int'l Ctr. for Trade and Sustainable Dev.), Nov. 9, 2005, at 1, *available at* http://ictsd.net/downloads/bridgesweekly/bridgesweekly9-38.pdf; *Dark Clouds Over Doha*, ECONOMIST, Nov. 10, 2005, http://www.economist.com/agenda/displaystory.cfm?story_id=5134656&fsrc=nwl.

30. *See, e.g.*, Richard Waddington, *WTO Seeks Face-Saving Pact to Keep Talks Moving*, REUTERS, Dec. 13, 2005 (explaining that the conference's objectives were tempered from producing a draft free-trade treaty to providing special aid for poorer countries).

31. World Trade Organization, Ministerial Declaration Adopted on 18 December 2005, para. 6, WT/MIN(05)/DEC, (2005) *available at* http://www.wto.org/english/theWTO_e/minist_e/min05_e/final_text_e.htm.

32. *Id.* para. 11.

33. *Id.* Annex F.

34. World Trade Organization, Day 6: Ministers Agree on Declaration that 'Puts Round Back on Track,' (Dec. 18, 2005), http://www.wto.org/english/thewto_e/minist_e/min05_e/min05_18dec_e.htm.

35. *Id.*

36. Sungjoon Cho, *Half Full or Half Empty?: The Hong Kong WTO Ministerial Conference Has Delivered an Interim Deal for the Doha Round Negotiation*, AM. SOC'Y INT'L L. INSIGHTS, Dec. 29, 2005, http://www.asil.org/insights051229.cfm.

Yet this deadline lapsed and was replaced by another one (set for the end of June 2006),[37] which also lapsed without meaningful development.[38] On July 28, 2006, upon the Director-General's recommendation, the WTO General Council suspended the negotiation due to irreconcilable differences among negotiators over three major trade barriers: farm subsidies, farm tariffs, and industrial tariffs.[39] Without the announcement of any future negotiation schedule, the Doha Round's future had plunged into uncertainty.

C. *So Close, Yet So Far: The Demise of the 2008 Geneva Ministerial Conference*

Pascal Lamy declared the resumption of the stalled negotiation in February 2007 after trade ministers from major WTO members informally gathered at the Davos World Economic Forum in January 2007 and recommitted themselves to further negotiations.[40] As the year 2008 dawned, the agricultural negotiation emerged with some significant developments as the Chair improved the agricultural modalities text with each new draft, although the NAMA negotiation proved to be a tougher process.[41] Chairs in both the agricultural sector, Crawford Falconer, and NAMA, Don Stephenson, issued a series of drafts in February, May, and July of 2008 which identified areas of convergences and divergences.[42] These drafts were to provide negotiators with simplified options for modalities.[43]

When the WTO's head, Pascal Lamy, summoned trade ministers to Geneva in the summer of 2008, many cautiously predicted a successful deal on modalities.[44] Most negotiators felt compelled to complete the Doha Round in the foreseeable

37. *Lamy Sets End-June Deadline for AG, NAMA Modalities*, 10 BRIDGES WKLY. TRADE NEWS DIG. (Int'l Ctr. for Trade and Sustainable Dev.), May 31, 2006, at 1, *available at* http://ictsd.org/downloads/bridgesweekly/bridgesweekly10-19.pdf.

38. World Trade Organization, 'We Are Now in Crisis.' Director-General to Try to Break Impasse, July 1, 2006, http://www.wto.org/english/news_e/news06_e/mod06_summary_01july_e.htm.

39. *Id. See* World Trade Organization, Talks Suspended: 'Today There Are Only Losers,' July 24, 2006, http://www.wto.org/english/news_e/news06_e/mod06_summary_24july_e.htm ("The main blockage is ... agriculture ... market access and domestic support, [and] ... non-agricultural market access ...."); World Trade Organization, General Council Supports Suspension of Trade Talks, Task Force Submits 'Aid for Trade' Recommendations, July 27, 2006, http://www.wto.org/english/news_e/news06_e/gc_27july06_e.htm.

40. Pascal Lamy, Director-General, World Trade Organization, Informal TNC Meeting at the Level of Head of Delegation, Chairman's Remarks, JOB(07)/12 (Jan. 31, 2007), http://www.wto.org/english/news_e/news07_e/job07_12_e.doc.

41. *See Slow Progress on Industrial Goods Talks in Final Push to Ministerial*, 12 BRIDGES WKLY. TRADE NEWS DIG. (Int'l Ctr. for Trade and Sustainable Dev.), July 9, 2008, *available at* http://ictsd.org/downloads/bridgesweekly/bridgesweekly12-25.pdf ("Differences in the NAMA talks have proved especially stubborn.").

42. For a synopsis of these drafts, see Raj Bhala, *Doha Round Schisms: Numerous, Technical and Deep*, 6 LOYOLA CHI. INT'L L. REV. 5 (2008).

43. *Chair of WTO AG Talks Says New Draft Text Will Simplify Options for Ministers*, 12 BRIDGES WKLY. TRADE NEWS DIG. (Int'l Ctr. for Trade and Sustainable Dev.), July 9, 2008, at 2, *available at* http://ictsd.org/downloads/bridgesweekly/bridgesweekly12-25.pdf. Regarding the most recent Doha draft text, see World Trade Organization, The July 2008 Package, *available at* http://www.wto.org/english/tratop_e/dda_e/meet08_e.htm.

44. *Geneva Mini-Ministerial: 'Now or Never' For Real This Time?*, BRIDGES DAILY UPDATE (Int'l Ctr. for Trade and Sustainable Dev.), July 21, 2008, at 1, *available at* http://ictsd.org/downloads/2008/07/bridges-daily-update-21-july1.pdf.

future, especially considering the global financial turmoil.[45] Nonetheless, once the actual negotiation began, the general pace turned out to be rather slow-going. After days of negotiation, no clear signs of progress emerged. At long last, on the sixth day, a ray of hope shone over the stalemated negotiation. On the verge of collapse in the talks, Lamy managed to persuade negotiators to continue by presenting the critical "package of elements,"[46] which might have been coined the Lamy Draft. This deal-salvaging package was nothing more than a deliberate compromise proposal based on the most recent draft modalities on agriculture and NAMA.

What Lamy did was to present some concrete headline numbers on several major sticking issues, such as farm subsidies and industrial tariffs, in an articulated fashion out of the intense consultations among the seven key negotiating parties (United States, the EU, Australia, Japan, China, Brazil, and India). According to the Lamy Draft, the United States would cut the current bound level of farm subsidies ($48 billion) to $14 billion[47] (which was still much higher than the actual spending in the previous year of $7 billion), and the EU would cut its farm subsidies by 80 percent, to approximately €22 billion.[48] As to the market access, the Draft called for a 70 percent reduction for the highest farm tariffs (above 75 percent) of developed countries.[49] At the same time, the Draft allowed developed countries to designate 4 percent of their agricultural tariff lines as "sensitive products" which are exempt from the aforementioned tariff cut.[50]

Under the Draft, developing countries were also allowed to shelter 12 percent of all covered products (special products) from the normal tariff reduction.[51] As to the special safeguard mechanism (SSM), developing countries could use it only when an import surges by more than 40 percent in volume.[52] As to NAMA, coefficients, the maximum level of tariffs, would be 8 percent for developed countries and 20, 22 or 25 percent for developing countries, depending on three different "flexibility mechanisms."[53] Developing countries could choose from these flexibility mechanisms to protect some of their strategic products more than others within these limits.[54] Finally, the Draft proposed to hold the Services Signaling Conference to gather voluntary commitments in service-sector liberalization from developing countries in an effort to give some comfort to developed countries.[55]

Frustratingly, this rather "unexpected momentum" soon evaporated as the United States wrangled with India and China over the SSM and cotton.[56] India

45. World Trade Organization, Day 1: Ministers begin final effort to agree blueprints of deal, July 21, 2008, http://www.wto.org/english/news_e/news08_e/meet08_summary_21july_e.htm.

46. World Trade Organization, Lamy Presents "Package of Elements" from Consultations with Ministers, July 26, 2008, http://www.wto.org/english/news_e/news08_e/meet08_chair_26july08_e.htm.

47. *WTO Mini-Ministerial Evades Collapse, As Lamy Finds 'Way Forward,'* BRIDGES DAILY UPDATE (Int'l Ctr. for Trade and Sustainable Dev.), July 26, 2008, at 1, *available at* http://ictsd.org/downloads/2008/07/daily-update-issue-6-template.pdf.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 2.

53. *WTO Mini-Ministerial Evades Collapse, As Lamy Finds 'Way Forward,' supra* note 47, at 2.

54. *Id.*

55. *Id.*

56. *Disputes Threaten Doha Round*, FIN. TIMES CHINESE, July 29, 2008, *available at*

maintained a recalcitrant stance against tightening the eligibility of the SSM, while China severely criticized the United States for pressuring it to open its cotton market as a condition to cut the U.S cotton subsidies. On the ninth and final day of the talks, the core negotiating group (Australia, US, EU, Japan, China, India, and Brazil) and the G-33 bloc of food-importing developing countries (India, China, Indonesia, etc.) failed to close their gaps in some details of the SSM.[57] Other than this holdup, the deal was close to completion because negotiators had managed to reach a consensus on nearly all other sticking points.[58]

Jagdish Bhagwati blamed the United States as the "central spoiler" of the 2008 Geneva Ministerial Conference.[59] According to Bhagwati, the United States refused to significantly reduce its trade-distorting farm subsidies which are "universally recognized as intolerable," while it attacked India for requesting enhanced safeguards for its mostly subsistent, rural farmers.[60] Ironically, U.S. Trade Representative (USTR) Susan Schwab, at the time, probably did a service to the WTO since any deal sealed in Geneva but killed later in Washington might have dealt a more severe blow to the WTO.[61]

The Doha Round talks entered into yet another dormant stage after the Geneva debacle of the summer of 2008. Although during September 2009 in Pittsburgh, the G-20 leaders pledged, yet again, to conclude the Doha Round by the end of 2010,[62] no genuine breakthrough, such as an agreement on the modalities, had been made by October 2009.[63] The Geneva Ministerial Meeting in December 2009 ended without any substantial progress, merely reaffirming the 2010 deadline.[64] All in all, the Doha Round still remains a failure.[65]

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http://www.ftchinese.com/story/001020872/en.

57. *WTO Mini-Ministerial Ends in Collapse*, BRIDGES DAILY UPDATE (Int'l Ctr. for Trade and Sustainable Dev.), July 30, 2008. The United States insisted that an importing country might impose these emergency tariffs above the current WTO limits determined at the previous Uruguay Round only when imports increase more than by 40% over the preceding three years, while India wanted the trigger to be 15%. Daniel Pruzin, *Trade Officials Voice Doubts on Push by Lamy to Revive Doha Round Talks*, 25 Int'l Trade Rep. (BNA) 1256 (Sept. 4, 2008). Yet India argued that with a 40% threshold the SSM would be inoperable "because India's ability to monitor its imports of individual products is so haphazard that by the time the government detected a 40% import surge farmers would already be committing suicide *en masse*." Paul Blustein, *The Nine-Day Misadventure of the Most Favored Nations:* How the WTO's Doha Round Negotiations Went Awry in July 2008, BROOKINGS INST., Dec. 5, 2008, at 10, *available at* http://www.brookings.edu/articles/2008/1205_trade_blustein.aspx. Nonetheless, the United States was adamant with this 40% threshold, permitting no compromise; it also refused Pascal Lamy's alternative proposal which would have replaced this numerical trigger with an expert review on "demonstrable harm," which India accepted. *Id.* at 15.

58. World Trade Organization, Day 9: Talks collapse despite progress on a list of issues, July 29, 2008, http://www.wto.org/english/news_e/news08_e/meet08_summary_29july_e.htm [hereinafter WTO, Day 9].

59. Jagdish Bhagwati, *The Selfish Hegemon Must Offer a New Deal on Trade*, FIN. TIMES, Aug. 20, 2008, at 11.

60. *Id.*

61. *See* Blustein, *supra* note 57 (referencing Susan Schwab's outburst at Lamy).

62. Doug Palmer & Darren Ennis, *G-20 Leaders Pledge Quick Action on Doha Deal*, REUTERS, Sept. 26, 2009, http://www.reuters.com/article/idUSTRE58O5MO20090925.

63. Daniel Pruzin, *WTO Chief Warns 2010 Deadline for Doha Hard to Meet without 'Serious Acceleration,'* 26 Int'l Trade Rep. (BNA) 1414 (Oct. 22, 2009).

64. *See WTO Ministerial Lifts Hopes for Doha, But Scepticism Lingers*, 13 BRIDGES WKLY. TRADE NEWS DIG. (Int'l Ctr. for Trade and Sustainable Dev.), Dec. 9, 2009, at 1–2 [hereinafter *Scepticism Lingers*].

65. The most recent attempt by negotiators to "take stock" until March 2010 to meet the end of 2010 deadline seems to have faltered, darkening the prospects of completing the Round by the end of 2010. *See*

III. REFLECTIONS ON DOHA'S FAILURE: WHAT WENT WRONG?

What caused Doha's failure? There may have been a unique context for the Doha Round which has militated against smooth negotiation in a consistent manner. For example, different expectations for the Doha Round between the North and the South may have complicated the entire process of negotiation. Adverse election cycles in major economies, as well as the recent global economic recession, may have also rendered any concessions (liberalization commitments) politically unpalatable. Or, as a more immediate cause, an unfortunate discordant chemistry among major negotiators may have triggered the demise.[66] At any rate, a sobering exploration of causes and contributing factors for Doha's failure seems to be in order if we want to alter the direction of future trade talks toward a successful round.

A. *The Primary Cause: Irreconcilable Agendas of Development and Mercantilism*

As discussed above, the Doha Round was meant to be a development round. The Doha Ministerial Declaration (2001) states that:

> International trade can play a major role in the promotion of *economic development* and the *alleviation of poverty*. We recognize the need for all our peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates. The *majority* of WTO members are *developing countries*. We seek to place their needs and interests at the heart of the Work Programme adopted in this Declaration.[67]

However, the initial development focus of the Doha Round quickly blurred and faded. Some observers from developed countries even believe that the *development* label tended to distance powerful stakeholders (businesses and industries) who might think the Doha trade talks would be mere charity and thus find little incentive to participate.[68] They argue that developed countries basically perceive the Doha Round as yet another *commercial* negotiation in which could they can press for market opening by big developing countries, such as China, India, and Brazil.[69]

For example, the United States conditioned the reduction of its farm subsidies firmly on other members' concessions, not only on the EU's reduction of farm tariffs but also on developing countries' (such as China and India) disarmament of special

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Jonathan Lynn, *Ministers Won't Meet on Doha Prospects Soon*, REUTERS, Feb. 19, 2010, http://in.reuters.com/article/businessNews/idINIndia-46329820100220.

66. *See* Blustein, *supra* note 57, at 2 (depicting vehement negotiation styles of negotiators from major WTO members).

67. Doha Declaration, *supra* note 4, para. 2 (emphasis added).

68. *See* David S. Christy, Jr., *'Round and 'Round We Go . . .*, WORLD POL'Y J., Summer 2008, at 19, 24 (contending that "affixing the label 'development' to the Round may have warmed a few hearts, but it has not filled any bellies."); Simon J. Evenett, *What Can Researchers Learn from the Suspension of the Doha Round Negotiations in 2006?*, at 5 (Univ. of St. Gallen Discussion Paper No. 2007-17, 2007) (observing that the ambiguous and confusing "development" mandate of the Doha Round discouraged corporate executives from attending WTO Ministerial Conference).

69. *Political Positioning Dominates Opening Day of WTO Talks*, BRIDGES DAILY UPDATE (Int'l Ctr. for Trade and Sustainable Dev.), July 22, 2008 [hereinafter *Political Positioning Dominates*].

protection for their crops, even though this special protection was for non-mercantilist purposes (such as food and livelihood concerns).[70] While leaders of developed countries continued to advocate the vital cause of development, this rhetoric had little consequence at the negotiation table.[71] In the meantime, developing countries refused to make concessions before developed countries tabled substantial commitments in the area of agricultural protection.[72] It was this brinkmanship that frequently deadlocked the negotiation process.[73]

At the heart of the North-South clash in the Doha Round laid the domestic politics of rich countries which simply could not accommodate the cause of development on political terms. The heavily battered Bush administration was simply incapable of managing protectionist pressures from Congress in its lame-duck period. In a highly symbolic gesture, in April 2007 fifty-eight U.S. Senators jointly sent a warning letter to U.S. President Bush stating that "our trading partners have refused to offer significant tariff reductions, and they insist on exceptions for sensitive and special products that will render meaningless the modest tariff reduction formulas they have proposed."[74] Likewise, Charles Grassley, a powerful U.S. Senator from a farming state, urged shortly before the collapse of the deal that the U.S. negotiators "pack their bags and come home" if other trading partners refused to grant U.S. businesses substantial market access in agricultural and industrial goods.[75]

Mindful of these anti-trade sentiments in Congress, the USTR desired substantial concessions from trading partners and thus rejected any modest package, such as the "Doha-lite" proposal.[76] Delegates from major U.S. special interest groups, such as the American Farm Bureau and National Association of Manufacturers, were actually stationed in Geneva as they monitored and even instructed U.S. negotiators.[77] Such circumstances squeezed the negotiation space of the USTR who was preoccupied with the idea of sinking a deal in Geneva rather than failing to pass it in D.C.[78] Naturally, these mercantilist stances by developed

70. *G-6 Ministers Agree to Work to Conclude Doha Round by End of 2007*, 11 BRIDGES WKLY. TRADE NEWS DIG. (Int'l Ctr. for Trade and Sustainable Dev.), Apr. 18, 2007, at 2 [hereinafter *G-6 Ministers Agree to Work*].

71. *See* Alan Beattie, *G8 Mood*, *supra* note 28 (claiming that there was a "bizarre disconnect between the enthusiastic rhetoric from G8 leaders in Gleneagles on pushing ahead with trade talks and intransigence from negotiators that has brought the Doha round almost to a halt").

72. *See Members Try to Convert Dalian Effort into Negotiations Breakthrough*, 9 BRIDGES WKLY. TRADE NEWS DIG. (Int'l Ctr. for Trade and Sustainable Dev.), July 20, 2005, at 2 (noting insistence by developing nations that some of their demands be met in agriculture before moving forward on NAMA, and citing "demands that the EU reduce subsidies and open its markets to foreign farm products").

73. *See The Doha Round Cruising Along*, FIN. TIMES, July 15, 2005, at 12 (claiming that brinkmanship would once have led to a last-minute deal, "but the sheer breadth of the current round of trade talks, coupled with the involvement of no less than 148 countries, forecloses that option").

74. Letter to George W. Bush, President, United States of America (Apr. 12, 2007), https://conrad.senate.gov/issues/statements/agriculture/070412_WTO_Ag_Letter.pdf.; *see also* Bhala, *Doha Round Schisms*, *supra* note 42, at 12 (discussing the provisions on special products).

75. Doug Palmer, *U.S. Farm Programmes Spared as WTO Talks Collapse*, REUTERS, July 29, 2008, http://www.reuters.com/article/idUKL950898920080729.

76. Sungjoon Cho, *The WTO Doha Round Negotiation: Suspended Indefinitely*, ASIL INSIGHTS, Sept. 5, 2006, http://www.asil.org/insights060905.cfm.

77. Blustein, *supra* note 57, at 11.

78. *Id.*

countries irked developing countries. Indian Commerce Minister Kamal Nath commented that rich countries pursued only "commercial prosperity."[79]

In particular, lavish farm protection in major developed countries, such as the United States and the EU nations, continued to undermine the DDA as the negotiation progressed. Under the EU's Common Agricultural Policy, big agro-businesses in France alone receive more than $10 billion a year.[80] The EU's biofuels policy created a tariff equivalent of 1,000 percent for controversial environmental benefits.[81] In the United States, the renewal of the highly protectionist-oriented Farm Bill in the middle of the Doha Round negotiation disheartened many delegates.[82] This ignominious bill, which "rewards rich farmers who do not need the help while doing virtually nothing to help the world's hungry, who need all the help they can get," was lambasted by some U.S. media outlets.[83] As Victor Davis Hanson trenchantly observed, lavish farm subsidies in the United States are "transparent election-cycle harvests for farm-state politicians, who have small constituencies but exercise outsized national political clout."[84] In a six-year cycle, U.S. politicians have masqueraded this special interest legislation by phony rationalizations, as seen in the Freedom to Farm Act (1996), the Farm Security and Rural Investment Act (2002), and the Farm, Nutrition and Bioenergy Act (2008).[85]

Farm protectionism in the United States and EU entails enormous distortion in the global crop market beyond the level which might be remedied through occasional WTO litigation. The fixation by the G-33 bloc (food-importing developing countries) on the SSM originated mainly from rich countries' highly subsidized, and thus cheapened, crop.[86] Under these circumstances, "any opening up of agriculture would be doubly difficult politically because exposing one's farmers to the impact of highly subsidized foreign producers is regarded as yielding to unfair

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79. *Instant Analysis: Implications of the Failure of WTO Talks*, REUTERS, July 29, 2008, http://www.reuters.com/article/idUKL928387320080729. Admittedly, South-South relations were not without tensions in the Doha trade talks. For example, Brazil, one of the main agricultural exporting countries, criticized India for their recalcitrant position on the SSM. Gary G. Yerkey, *World Bank President Offers Some Ideas for Reviving WTO Talks, Focuses on Poor*, 25 Int'l Trade Rep. (BNA) 1218 (August 21, 2008) [hereinafter *Reviving WTO Talks*]. Other agricultural exporting countries, such as Argentina and Thailand, also opposed a separate exception of "special products" under which importing countries can protect certain agricultural sectors for food and livelihood security and rural development. *See also* Jonathan Lynn, *Developing Countries Split over WTO Farm Protection*, REUTERS, July 27, 2008, http://www.reuters.com/article/idUKL748592720080728 (discussing the division between poorer countries over proposals for a new trade deal). However, such tensions were negligible compared to deep-rooted North-South conflicts.

80. Patrick Messerlin, *A Doha Deal Would Aid Many European Farmers*, FIN. TIMES, July 21, 2008, at 9.

81. *Id.*

82. Missy Ryan, *New Farm Bill Seen Adding Fodder for Trade Feud*, REUTERS, May 11, 2008, http://www.reuters.com/article/idUSN0953063020080511. *See* David M. Herszenhorn, *House Passes Farm Bill by a Veto-Proof Margin*, N.Y. TIMES, May 15, 2008, at A19 (discussing the passage of the Farm Bill against the wishes of President Bush).

83. *See, e.g.*, *A Disgraceful Farm Bill*, N.Y. TIMES, May 16, 2008, at A22.

84. Victor Davis Hanson, *Harvesting Money in a Hungry World*, N.Y. TIMES, Aug. 1, 2008, at A19.

85. *Id.*

86. *G-7 Talks on Special Safeguard Mechanism Inconclusive as Blame Game Heats Up*, BRIDGES DAILY UPDATE (Int'l Ctr. for Trade and Sustainable Dev.), July 29, 2008, *available at* http://ictsd.org/i/wto/englishupdates/15018/.

trade."[87] The Uruguay Round outcome enabled developed countries to continue their old practice of lavish farm subsidies, but deterred developing countries from invoking the special safeguard mechanism under the Agreement on Agriculture for technical reasons.[88] This frustrated developing countries, who now want to fix this imbalance in the Doha Round.

In sum, different expectations over the Doha Round bred enormous tensions between the North and the South in the course of trade talks. While the South basically demanded from the North unreciprocated disarmament in farm protection under the DDA, the North still wanted to use the reduction of farm protection, if any, as a bargaining chip for reciprocal concessions from the South in areas of both agricultural and industrial market access.

B. The Secondary Cause: The Sterile Environment for Trade Talks

Apart from the aforementioned deep-rooted North-South tensions, a blend of adverse factors has undermined the odds for a successful round. First, as most commentators noted, the recent domestic political situations of major negotiating parties, such as the United States, EU, and India, have not been amenable to trade concessions, leading to a general lack of political support for a deal. Key elections were pending in the United States and India as delegates papered over the modalities. To make things worse, the Wall Street-born financial crisis quickly spread throughout the world and froze global trade, brewing protectionist sentiments. Amid this economic hardship, some politicians intensified their acerbic rhetoric against the Doha deal. For example, French President Nicolas Sarkozy stated that the EU Trade Commission's offer would destroy the European farm sector by reducing agricultural production by 20 percent and cutting 100,000 jobs.[89]

Another negative factor was the absence of the U.S. government's trade promotion authority (TPA), formerly known as "fast track authority."[90] Without the TPA, passing the Doha deal in Congress would have been a very difficult, if not impossible, task for the lame-duck administration. The U.S. negotiators, stripped of the TPA, had to grab a deal which could impress Congress, but major developing countries, such as Brazil and India, could not simply concede such a deal without a serious reduction of U.S. farm subsidies.[91]

Moreover, the U.S. proposal of cutting the trade-distorting subsidy to $15 billion, if implemented, would have forced the United States to dilute farm protection bestowed by the new Farm Bill[92] which had recently been passed over a

87. Jagdish Bhagwati & Arvind Panagariya, *How the Food Crisis Could Solve the Doha Round*, FIN. TIMES, June 23, 2008, at 9.

88. *Political Positioning Dominates*, *supra* note 69.

89. *Id.*

90. Business Roundtable, Trade Resource Center, Trade Promotion Authority (TPA) Is an Important Tool, http://trade.businessroundtable.org/trade_2006/tpa/important_tool.html (last visited Feb. 3, 2010).

91. Bradley S. Klapper, *Blame High, Confidence Low as WTO Heads into Another 'Final Year' for Free Trade Pact*, ASSOC. PRESS, Dec. 7, 2007.

92. Dan Looker, *Harkin: WTO Offer Could Affect 2008 Farm Bill Programs If Trade Talks Succeed*, AGR. ONLINE, July 25, 2008, http://www.agriculture.com/ag/story.jhtml?storyid=/templatedata/ag/story/data/1216993795055.xml.

presidential veto.[93] This forecast seemed to have pushed the U.S. negotiators to resist loosening the trigger threshold of the SSM, which would have hampered U.S. farmers' exports to emerging markets.[94] Tom Harkin, chair of the U.S. Senate agriculture committee, made it clear that this proposal was conditioned on enhanced access for U.S. farmers to foreign markets.[95]

IV. THE DOHA FAILURE AS THE WTO'S LEGITIMACY CRISIS

The failure of the Doha Development Round is particularly ill-timed amid the global financial crisis.[96] One recent study revealed that the global financial crisis will cut developing countries' income by $750 billion before the end of 2009 and leave another 50 million people in abject poverty.[97] Collateral damage to the world's poor, such as the decrease of foreign direct investment and remittances, may last long after rich countries start recovering economically.[98] A Doha success would certainly mitigate such developmental impacts to a great extent, considering that its agricultural package is two or three times larger than that of the Uruguay Round.[99] However, a Doha failure would reduce developing countries' agricultural exports by 11.5 percent.[100]

It is also of serious concern that a systemic failure of the WTO—representing the well-operating multilateral trading system—could inflict suffering on developing countries. The Doha failure is a WTO failure in that "commitment to free trade is weakening."[101] The Doha failure would embolden protectionism by generating a "public impression that whoever opens their markets loses."[102] Such sentiments have already emerged. For example, the EU has recently decided to pour lavish export refunds (subsidies) on its dairy farmers, despite the fact that such subsidies are clearly against the current Doha agricultural draft.[103] The EU, which had originally

93. Food, Conservation, and Energy Act of 2008, 7 U.S.C. § 8701 (2008); David Stout & David Herszhenhorn, *House Override of Farm Bill Veto Is Only the 2nd in Bush's Presidency*, N.Y. TIMES, May 22, 2008, at A24.

94. Alan Beattie, *Lamy Plan Spurs Optimism at Doha Talks*, FIN. TIMES, July 25, 2008, at 5.

95. Alan Beattie, *US Offers to Reduce Farm Subsidy Limit to $15bn*, FIN. TIMES, July 23, 2008, at 8.

96. *Dried Up*, ECONOMIST, July 29, 2008; *see* Blustein, *supra* note 57, at 2 (observing that the "financial crisis has greatly magnified the import of [Doha's] failure").

97. *How to Rescue the Global Economy?*, 13 BRIDGES MONTHLY (Int'l Ctr. for Trade and Sustainable Dev.), Mar. 2009, *available at* http://ictsd.org/i/news/bridges/44278/.

98. *WTO Worried about Developing Economies*, UNITED PRESS INT'L, Jan. 22, 2009.

99. Peter Mandelson, *Doha a Posteriori*, *in* AGREEING AND IMPLEMENTING THE DOHA ROUND OF THE WTO 9, 9 (Harald Hohmann ed., 2008). Under the current Doha package on the table, trade distorting farms subsidies will be cut by 70–80%. Lamy, *supra* note 11.

100. Antoine Bouët & David Laborde, *The Potential Cost of a Failed Doha Round*, 56 INT'L FOOD POL'Y RES. INST. 2 (2008), *available at* http://www.ifpri.org/sites/default/files/publications/ib56.pdf.

101. Niall Ferguson, *How a Local Squall Might Become a Global Tempest*, FIN. TIMES, Aug. 8, 2008, at 9.

102. Siobhán Dowling, *WTO Failure Reflects Changing Global Power Relations*, SPIEGEL ONLINE, July 30, 2008, http://www.spiegel.de/international/world/0,1518,569027,00.html.

103. Elisa Gamberoni & Richard Newfarmer, *Trade Protection: Incipient but Worrisome Trends*, TRADE NOTES (World Bank Int'l Trade Dept.), Mar. 2, 2009, at 2, *available at* http://siteresources.worldbank.org/INTRANETTRADE/Resources/239054-1126812419270/Trade_Note_37.pdf.

planned to repeal such export refunds, took advantage of the legal vacuum created by the Doha deadlock.[104]

Therefore, beyond any calculable welfare loss, the Doha failure might leave an irreversible systemic impact on the credibility of the WTO legal system. As the Doha failure undermines the WTO's legal shield, powerful countries tend to downplay the WTO's authority. This would be highly detrimental to less powerful developing countries.[105] Under these circumstances, a small developing country's victory against a big developed country in the WTO tribunal might seem to be less secure.[106]

It is imperative to fully realize the symbolic and dynamic impact which delivering the development round could bring to the WTO. Most quantitative studies on the welfare gains which a successful completion of the Doha Round might generate to developing countries are based on a rather static model.[107] This is why some studies forecast fairly limited benefits to developing countries from a Doha success.[108] However, such a model, by design, does not take into account long-term, institutional ramifications for development brought by Doha success.[109] Such institutional ramifications include enhanced credibility of trade for economic growth in the LDCs, further political impetus for trade liberalization—both unilateral and in South-South trade liberalization—and increased domestic and foreign investment in these countries' lifeline industries, such as agriculture.[110]

In addition to the Doha Round's importance in staving off protectionism during the current financial crisis, it is inextricably linked to the WTO's moral agenda. Moral foundations for delivering the development round can be located in multiple sources. The idea of a "duty to assist" less fortunate nations is established in well-known literature,[111] and has been applied in the trade context.[112] Given what

104. Peter Hunt, *EU Subsidies to Wreak Havoc on Global Dairy Industry*, WKLY. TIME NOW, Jan. 21, 2009; *EU Gives Boost to Dairy Exports*, BBC, Jan. 23, 2009; David McKenzie & Simone Smith, *Protectionism Is Back*, WKLY. TIMES NOW, June 10, 2009 (quoting the Australian trade minister Simon Crean who stated that "if the Doha round is concluded, export subsidies will be eliminated").

105. Kimberly Ann Elliott, *Does the Doha Round Matter?*, 108 CURRENT HIST. 39, 42 (2009).

106. Blustein, *supra* note 57, at 3.

107. Lance Taylor & Rudiger von Arnim, *Projected Benefits of the Doha Round Hinge on Misleading Trade Models*, POLICY NOTE (Schwartz Ctr. for Econ. Pol'y Analysis), Mar. 2007, at 2, *available at* http://www.newschool.edu/cepa/publications/policynotes/Doha%20Policy%20Note%20Final%2003_12_07.pdf.

108. *See, e.g.*, EDUARDO ZEPEDA ET AL., THE IMPACT OF THE DOHA ROUND ON KENYA (2009) (predicting that a Doha success would bring a negligible or small boost to Kenya's GDP); Taylor & von Arnim, *supra* note 107, at 1.

109. *See* Stephen Tokarick, *Trade Issues in the Doha Round: Dispelling Some Misconceptions* (Int'l Monetary Fund Policy Discussion Paper), Aug. 2006, http://www.imf.org/external/pubs/ft/pdp/2006/pdp04.pdf (arguing that the World Bank's forecast of small scale benefits to developing countries from the Doha success (US$20 billion in 2015) failed to fully appreciate dynamic effects of trade liberalization, which are hard to quantify).

110. Tonia Kandiero & Léonce Ndikumana, *Supporting the World Trade Organization Negotiations: Looking beyond Market Access*, VOX, Nov. 27, 2009, http://vox.cepr.org/index.php?q=node/4295 (observing that one of the benefits from the Doha Round to African countries is to "lock-in" domestic reforms).

111. *See, e.g.*, JOHN RAWLS, THE LAW OF PEOPLES 106 (1999) ("[W]ell-ordered peoples have a *duty* to assist burdened societies.").

112. *See* FRANK J. GARCIA, TRADE, INEQUALITY, AND JUSTICE: TOWARD A LIBERAL THEORY OF JUST TRADE 107 (2003) (arguing for the special treatment of developing countries along Rawlsian lines, and advocating for S&D treatment as a solution). *But cf.* Joost Pauwelyn, *Book Review* (reviewing FRANK

developing countries potentially stand to gain from a successful development round,[113] it is important for developed countries to fully realize that developing countries' effective access to the former's markets is a critical ingredient for the latter's development.[114]

The moral failure of a Doha breakdown is further highlighted by the developmentally unsound outcome of the previous Uruguay Round. Under the Uruguay Round, the concessions of developing countries (such as the inclusion of trade in services and trade-related intellectual property rights) materialized immediately, while those borne by developed countries (such as further liberalization in the areas of agriculture and textiles) "remained to be negotiated."[115] The Doha *Development* Agenda was the widely accepted acknowledgement that the WTO system "owed something to developing countries."[116] The Doha Round, if it fails to address this unfair legacy, will leave an indelible mark of moral failure on the WTO.

V. THE FUTURE OF THE DOHA ROUND AND BEYOND: COULD DEVELOPMENT SURVIVE DOHA?

A. The Exigency of a Doha Success

Does the Doha Round have a future? Can it ever be salvaged? Considering the dire consequences that its permanent failure would likely bring, in particular to the WTO system itself, the better question to ask might be *how*, not whether, it can be saved. The global trading community simply cannot afford an eventual Doha failure against the recent background of global economic hardship. As global trade contracted in 2009 for the first time since World War II,[117] a Doha failure would further discredit the WTO system and supply ample ammunition to politicians leaning toward protectionism.

It appears that the *timing*, not the substance, of a deal will be the most decisive factor for any successful conclusion of the framework agreement on modalities,

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J. GARCIA, TRADE, INEQUALITY, AND JUSTICE: TOWARD A LIBERAL THEORY OF JUST TRADE (2003)), 37 GEO. WASH. INT'L L. REV. 559 (2005) (criticizing Garcia's application of Rawls' difference principle to trade in terms of his focus on the allocation of natural endowments as *ex ante* disadvantages to developing countries, but agreeing with the premise that developing countries deserve special treatment and suggesting equal free trade, as opposed to S&D treatment, as a better solution). The concept of a moral obligation between states in trade related matters is worthy of a much more detailed discussion but is beyond the scope of this article.

113. *See supra* notes 107–10 and accompanying text.

114. *E.g.*, Joseph E. Stiglitz, *Two Principles for the Next Round or, How to Bring Developing Countries in From the Cold*, 23 WORLD ECON. 437, 452 (2000).

115. Finger, *supra* note 18, at 87. In the same context, a former Canadian trade negotiator, Sylvia Ostry, labeled the Uruguay Round deal as a "Bum Deal" for developing countries. Sylvia Ostry, *Asymmetry in the Uruguay Round and in the Doha Round*, *in* DEVELOPING COUNTRIES IN THE WTO, *supra* note 18, at 105, 105.

116. Finger, *supra* note 18, at 90.

117. *See Open Markets Would Support Rebound in Trade in 2010*, IMF SURV. MAG. (Int'l Monetary Fund), Jan. 13, 2010, http://www.imf.org/external/pubs/ft/survey/so/2010/SurveyartB.htm (indicating that trade volume fell by 18 percent).

which will guide each member's efforts to articulate its own improved schedule of commitments. Just remember how close negotiators were to a deal before negotiations suddenly collapsed at the eleventh hour in July 2008. Pascal Lamy observed that out of twenty topics on the "to-do-list," members' positions on eighteen topics had converged before the 19th topic (the special safeguard mechanism) busted the deal.[118] The very fact that the negotiation suddenly fell apart after members spent so much time and acquired substantial mileage signifies a lack of political will.[119] Without recharged political capital, negotiators cannot seal the deal on modalities.

Yet the current economic landscape tends to render any political initiative for free trade unpalatable. First, the global economic crisis appears to have hardened key players' intractable positions with regards to their wish lists.[120] For example, the United States has continued to push the "sectoral" approach in industrial tariffs reduction, which it spearheaded in the July Ministerial in Geneva.[121] Pressured by domestic interest groups, such as National Association of Manufactures (NAM), the United States desired to draw a substantial level of tariff reduction commitments in key sectors, such as chemicals, electronics, and industrial machinery, from major importing countries, including China.[122] China also repeated its previous position, strongly opposing the U.S. approach, that participation in the sectoral liberalization program should be "voluntary."[123]

Second, every trade deal tends to inevitably accompany certain churning effects and therefore leaves domestic constituencies that will be negatively affected by increased competition from abroad. Adding this trade-generated dislocation to recession-generated unemployment might be difficult for any government to implement. Against this backdrop, having acknowledged that "there was no readiness to spend the political capital needed," Lamy cancelled the pre-scheduled ministerial meeting in December 2008 where negotiators were supposed to deliver a breakthrough on modalities.[124]

Nonetheless, forsaking the Doha Round at this stage is not an option since it would likely broaden the room for protectionism. As discussed above, major governments have competitively responded to some of the consequences of the current economic crisis by simply relying on protectionist measures, such as subsidies.[125] If left unchecked, this competition may turn into an ugly trade war,

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118. WTO, Day 9, *supra* note 58.

119. Castle & Landler, *supra* note 3.

120. Daniel Pruzin & Gary Yerkey, *WTO's Lamy Calls Off Doha Ministerial; Deal up to Obama Team, U.S. Official Says*, 25 Int'l Trade Rep. (BNA) 1766, 1767 (Dec. 18, 2008) [hereinafter Pruzin & Yerkey, *Lamy Calls Off*].

121. *Id.*

122. *Id.*

123. Daniel Pruzin & Gary G. Yerkey, *U.S. Refutes NAMA Chairman's Report On Sectorals Agreement for Industrial Goods*, 25 Int'l Trade Rep. (BNA) 1216, 1216–17 (Aug. 21, 2008).

124. Pruzin & Yerkey, *Lamy Calls Off*, *supra* note 120, at 1766. Unfortunately, major players, in particular the United States, found it hard to gather the political capital necessary to sell the Doha deal to recession-battered domestic constituencies. *See US Not Prepared for High-Level Doha Engagement Before Fall: US Official*, 13 BRIDGES WKLY. TRADE NEWS DIG. (Int'l Ctr. for Trade and Sustainable Dev.), Apr. 1, 2009, at 11.

125. *See* Blustein, *supra* note 57, at 2 (claiming that the economic downturn discouraged countries from removing trade barriers and subsidies); Simon J. Evenett, *The Global Overview: Has Stabilisation Affected the Landscape of Crisis-Era Protectionism?*, *in* WILL STABILISATION LIMIT PROTECTIONISM?

invoking the old specter of economic balkanization on a global scale. The conclusion of the Doha Round can effectively deter such proclivity of major members. In fact, the news of a Doha deal will imbue a strong sense of hope in the global business community.[126]

B. Preconditions for a Successful Round

To resume the Doha negotiation, it is vital to mobilize necessary political capital both domestically and internationally. Doing so will require monumental leadership from global leaders. In particular, the United States is uniquely situated to offer such an important public good with a new president in office.[127] As the world's most powerful and affluent country and as the country responsible for engendering the current global financial crisis, the United States should recognize and shoulder its historic responsibility. As President Obama stated in his inaugural speech, the United States has duties to the world which it "do[es] not grudgingly accept but rather seize[s] gladly."[128] Other major trading nations, such as Canada, Japan, and those of the EU should join the United States in a move toward bold trade liberalization. In fact, to these countries trade liberalization means the saving of public money and the repealing of wasteful rent-seeking programs. They are nothing but a form of domestic economic reform.

True, the current economic landscape could complicate any trade deal. For example, the U.S. special interests' reciprocal demands from the Doha Round have intensified as the recession worsens.[129] Yet the Obama administration should be more proactive in exercising political capital and leadership that the exigency of the current financial crisis has called for.[130] The United States must embrace

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THE FOURTH GTA REPORT: A FOCUS ON THE GULF REGION 17, 17–18 (Simon J. Evenett ed., 2010), *available at* http://www.globaltradealert.org/sites/default/files/evenett_gta4.pdf (observing that the recent sign of stabilization has not ended protectionism in major countries).

126. World Trade Organization, "Ministers Continue to Attach Highest Priority to the Round's Conclusion"—Lamy, Feb. 3–4, 2009, http://www.wto.org/english/news_e/news09_e/tnc_chair_report_03feb09_e.htm ("Trade with its multiplier effect must be an integral part of the stimulus packages that are being adopted. A successful outcome of the Doha Development Round can therefore be part of the solution to the economic downturn.").

127. *See* KINDLEBERGER, *supra* note 13, at 307 (describing such leadership as a "public good").

128. President Barack Obama, Inaugural Address (Jan. 21, 2009) (transcript available at http://www.whitehouse.gov/blog/inaugural-address/).

129. *See* Claude Barfield, The Politics and Likely Trade Policies of the Obama Administration, Speech before the Japanese Ministry of Economy, Trade and Industry (Feb. 26, 2009) (transcript available at http://www.rieti.go.jp/en/events/bbl/09022601.html) (noting how current economic conditions have made parties less willing to negotiate); Doug Palmer, *Business Groups Tell Lamy Need More from Doha*, REUTERS, Mar. 24, 2009, http://uk.reuters.com/article/idUKTRE52N7KY20090324 (reporting the U.S. Congress' resistance to the idea of resuming the Doha talks from the last year's draft); Bruce Stokes, *Rousing Doha from Its Doze*, EUROPEANVOICE.COM, Feb. 12, 2009, http://www.europeanvoice.com/article/imported/rousing-doha-from-its-doze/63918.aspx (observing that U.S. businesses view the summer 2008 package as no longer acceptable).

130. *See* Claude Barfield, *What President Obama Can Learn from President Clinton*, THE AMERICAN, July 15, 2009, *available at* http://www.american.com/archive/2009/july/what-president-obama-can-learn-from-president-clinton (arguing that President Obama should abandon his ambivalent trade policy positions by disconnecting himself from anti-trade Democrats in the Congress as President Clinton did); Editorial, *Tangled Trade Talks*, N.Y. TIMES, July 11, 2009, at A18 (criticizing Obama's reluctance to spend any political capital at home on trade).

multilateralism as a critical global public good over myopic parochial interests.[131] If the United States provides constructive leadership and revitalizes the largely dormant Doha Round negotiation, WTO members can soon deliver a genuine breakthrough deal on the modalities, given the progress the negotiations have made thus far.[132] Once WTO members conclude the modalities deal, the rest of the process, including the actual composition of national schedules based on the modalities and the subsequent verification, would be finalized rather expeditiously, potentially within several months.[133] This means that WTO members can finalize the Doha Round by the end of 2010 or 2011.[134]

Nonetheless, any attempt to ignore the penultimate deal in the summer of 2008 as well as the whole modalities structure would gravely jeopardize the Doha Round.[135] Reflecting the increasing impatience from the major U.S. export industries, U.S. Trade Representative Ron Kirk has recently floated the idea of skipping the modalities deal and instead directly conducting bilateral negotiations to generate market-opening concessions.[136] This idea has gathered little support from other members, especially from developing countries, which fear being forced into a disadvantageous position in a bilateral setting with developed countries.[137]

Likewise, it seems to be vital that WTO members preserve the original scope of negotiation and defy any unreasonable ambition regarding what the Doha Round talks might achieve. In fact, the main reason why the last deal was so close in July

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131. *See* Antoine Bouët & David Laborde Debucquet, *The Doha Round: A Safety Net in Stormy Weather*, VOX, May 14, 2009, http://www.voxeu.org/index.php?q=node/3564 (arguing that "the WTO is an international public good that acts as an insurance scheme against potential trade wars"). *Cf.* Doug Palmer, *U.S. Trade Freeze Could Be Slowly Thawing*, REUTERS, June 21, 2009 (citing Jeffrey Schott who observed that with the U.S. economy improved and its social safety net reinforced, Obama will be in a better position to promote free trade polices).

132. *See* Roberta Rampton, *'Like Waiting for Godot,' WTO Awaits Next U.S. Move*, REUTERS, May 8, 2009, http://af.reuters.com/article/topNews/idAFJOE54703V20090508?sp=true (discussing halt in progress on talks until United States determines how to proceed). The WTO head Pascal Lamy observes that eighty percent of a Doha Round deal has been secured thus far (as of June 2009). *Welfare Payments Better than Trade Barriers—WTO Chief*, REUTERS, June 4, 2009, http://in.reuters.com/article/economicNews/idINIndia-40092320090604.

133. *See* Shapi Shacinda, *WTO's Lamy Says Doha Deal in Sight*, REUTERS, Apr. 7, 2009, http://af.reuters.com/article/topNews/idAFJOE5360JJ20090407?sp=true (quoting Pascal Lamy who observed that it would take six or eight months to complete the round once WTO members agree on the modalities).

134. *Doha Talks Get New Energy at Cairns Group Meeting*, 13 BRIDGES WKLY. TRADE NEWS DIG. (Int'l Ctr. for Trade and Sustainable Dev.), June 10, 2009, at 1 (observing that WTO members seem to have set a new deadline of the end of 2010 for the completion of the Doha Round). *See also G8 plus G5 Agree to Conclude Doha in 2010*, REUTERS, July 8, 2009, http://www.reuters.com/article/idUSTRE5665MK20090708 ("WTO chief Pascal Lamy said last month that a deal could be clinched in 2010 because the mood of the negotiations had improved since the appointment this year of U.S. Trade Representative Ron Kirk and India trade minister Anand Sharma whose countries are seen as key to unlocking a deal."); *Day 1: Ministers Target 2010 for Doha Conclusion, but Gaps Remain*, BRIDGES DAILY UPDATE (Int'l Ctr. for Trade and Sustainable Dev.), Dec. 1, 2009 ("Differences on substance notwithstanding, several countries have started to outline a potential process for concluding the round in 2010.").

135. 2009 Trade Policy Agenda, *supra* note 6, at 4.

136. *Kirk's Geneva Visit Signals US Engagement on Doha*, 13 BRIDGES WKLY. TRADE NEWS DIG. (Int'l Ctr. for Trade and Sustainable Dev.), May 13, 2009, at 2.

137. Bradley S. Klapper, *New U.S. Trade Chief Finds Few Takers on Doha Plan*, ASSOC. PRESS, Dec. 7, 2000 (reporting on the vehement opposition to Kirk's proposal to skip the modalities due largely to its potential effect on developing countries).

2008 was that Lamy was able to narrow down the zone of negotiation by excluding potential deal-breakers such as services, rules (antidumping), and geographical indications. Although these issues have been technically part of the Doha trade talks, they do not belong to essential agendas, such as agricultural trade and industrial tariffs. Those issues, albeit important to many members, have not fully ripened for a possible deal mainly because members' positions diverge to a great degree and they often cannot agree on basic concepts.[138] Under these circumstances, to force engagement on these issues may risk yet another collapse or provide recalcitrant negotiators with subterfuges for deal-blocking.[139] One commentator aptly encapsulated the desirable path of the Doha Round as follows: "It is time to step back and build political support for a limited, scaled-down conclusion to the Doha Round and then plot a course for the long-term survival of the multilateral system and the WTO."[140]

C. *With or Without Doha: Developing Countries' Own Initiatives*

As discussed above, developed countries' leadership, in particular that of the United States, is vital in reviving the stalled Doha Round. Given the state of negotiations, the United States could not avoid criticisms for the Doha failure both from the North and the South.[141] Developed countries should realize that certain S&D treatments, which the special products exemption and the special safeguard

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138. Of course, this position does not necessarily restrict the WTO's future agenda. Regarding positions in favor of the expansion of the WTO's agenda, see Pauwelyn, *supra* note 112 (evaluating Garcia's claims that preferential trade schemes are unjustified because of their unilateral and conditional nature). *See also* Aaditya Mattoo & Arvind Subramanian, *A Crisis Calls for a 'Crisis Round,'* WALL ST. J. ASIA, Mar. 25, 2009, at 14 (urging the launch of a "Crisis Round" of trade talks at the April 2009 G-20 summit).

139. *See* Sungjoon Cho, *Constitutional Adjudication in the World Trade Organization* 40 (Soc'y of Int'l Econ. Law, Working Paper No. 46, 2008), *available at* http://www.ssrn.com/link/SIEL-Inaugural-Conference.html (observing widely diverging views on zeroing among negotiators). *See also* Robert Wolfe, *Use Transparency to Keep Trade Flowing*, *in* REBUILDING GLOBAL TRADE: PROPOSALS FOR A FAIRER, MORE SUSTAINABLE FUTURE 75, 75 (Carolyn Deere Birkbeck & Ricardo Meléndez-Ortiz eds., 2009) (proposing *not* to "call for new items on the WTO's over-loaded agenda"). *But cf.* Mattoo & Subramanian, *supra* note 138 (proposing to replace the current Doha Round by a new "Crisis Round" which mainly targets new protectionism such as antidumping measures, government procurement, and climate change policies); Pauwelyn, *supra* note 138, at 572.

140. Claude Barfield, *The Doha Endgame and the Future of the WTO*, VOX, Jan. 19, 2009, http://www.voxeu.org/index.php?q=node/2806. *See also* Paul Blustein, *G20 Should Be Pragmatic about Protectionism*, REUTERS, Mar. 30, 2009 (arguing that WTO members "should recast the Doha talks as an emergency anti-protectionism round" and postpone controversial issues); Doug Palmer, *Remove Environmental Goods Talks from Doha: U.S. Groups*, REUTERS, Aug. 3, 2009 (reporting that U.S. businesses urged the Obama administration to remove the negotiation on environmental goods and services from the current Doha Round negotiation); John W. Miller & Peter Fritsch, *Few Expect Progress on Doha at WTO Talks*, WALL ST. J., Sept. 3, 2009, at A14 (quoting Fredrik Erikson from the European Center for International Politics and Economy who observed that for a Doha success "trade ministers could jettison the idea of liberalizing trade in services, such as law firms and banking").

141. *See, e.g.*, Francis Elliot, *President Obama 'Has Failed to Kick-Start World Trade Talks,'* TIMES, Dec. 2, 2009, *available at* http://www.timesonline.co.uk/tol/news/politics/article6939446.ece (citing Gareth Thomas, the British top trade negotiator who criticized President Barack Obama for his failure to galvanize the Doha Round negotiations); *India Blames U.S. for Delay in Doha Deal*, TIMES OF INDIA, Dec. 9, 2009 (criticizing the "non-serious" U.S. attitudes to the Doha Round talks in which it failed to appoint trade negotiators for the Round).

mechanism embody, are necessary for developing countries to cushion the overall liberalization impact on poor countries' subsistence farmers and to address food security concerns.[142] In fact, these S&D treatments do not significantly affect other countries' gains from the Doha Round.[143]

At the same time, however, developing countries, including low-income developing countries such as LDCs, should, on their own initiatives, mainstream open trade as their top development strategy and endeavor to integrate themselves to the global market, rather than relying solely on S&D treatments.[144] "Retreat from openness would unacceptably delay the development transformation that developing countries sorely need."[145] This awakening may start from a sobering reality check on the genuine effectiveness of pre-existing S&D treatments for developing countries. While a garden variety of development assistance initiatives with different labels, such as S&D and aid for trade, may symbolize the development mandate within the WTO system, in particular under the DDA, their practical values are still questionable.

First of all, the very concept of S&D treatment is obscure.[146] While it may offer useful rhetoric, it fails to generate any concrete legal rights and obligations among WTO members. The fact that even the Doha agenda calls for "more precise, effective and operational" S&D treatment[147] is testimonial to its innate nebulous nature. Yet such opacity, which certainly tends to jeopardize its effectiveness, cannot be easily fixed. Some developing countries desire to convert the current hortatory structure of S&D treatment into a legally binding mechanism.[148] However,

142. John Nash & Donald Mitchell, *How Freer Trade Can Help Feed the Poor*, 42 FIN. & DEV., Mar. 2005, at 34, 36, *available at* http://www.imf.org/external/pubs/ft/fandd/2005/03/pdf/nash.pdf.

143. SANDRA POLASKI, WINNERS AND LOSERS: IMPACT OF THE DOHA ROUND ON DEVELOPING COUNTRIES ix (2006) (submitting only a modest gain for developing countries from a Doha success). Even among developing countries positions on special products tend to diverge between food-exporting countries (such as Thailand, Malaysia, and Costa Rica) and food-importing countries (such as Brazil, China, and India). Daniel Pruzin, *Latest Round of WTO Farm Talks Reveals Mixed Progress on SSM, Special Products*, 26 Int'l Trade Rep. (BNA) 1603 (Nov. 26, 2009).

144. *See* Martin Wolf, *Two-Edged Sword: Demands of Developing Countries and the Trading System*, *in* POWER, PASSIONS, AND PURPOSE: PROSPECTS FOR NORTH-SOUTH NEGOTIATIONS 201–03 (Jagdish N. Bhagwati & John Gerard Ruggie eds., 1984) (describing developing country demands for special and differential treatment as a "two-edged sword," implying that it eventually damages developing countries themselves via the destruction of free trade regime); Kym Anderson et al., *The Cost of Rich (and Poor) Country Protection to Developing Countries*, 10 J. OF AFR. ECONOMIES 227, 227 (2001) (finding that around sixty percent of all trade barriers in the global trading system originate from developing countries, not developed countries); United Nations Conference on Trade and Development, Bangkok, Thailand, Feb. 12, 2000, U.N. Doc. TD(X)/RT.1/2 (Dec. 3, 1999) (highlighting the importance of openness and non-discrimination in light of reducing the opportunities for corruption and arbitrariness).

145. Joseph E. Stiglitz, *Two Principles for the Next Round or, How to Bring Developing Countries in From the Cold*, 23 WORLD ECON. 437, 452 (2000).

146. WORLD TRADE ORG. & ORG. FOR ECON. COOPERATION AND DEV., AID FOR TRADE AT A GLANCE 2009: MAINTAINING MOMENTUM 39 (2009) [hereinafter MAINTAINING MOMENTUM], *available at* http://www.wto.org/english/res_e/booksp_e/aid4trade09_e.pdf (acknowledging that the scope and definition of aid for trade is not clear).

147. World Trade Organization, Ministerial Declaration of 14 November 2001, para. 44, WT/MIN(01)/DEC/1, 41 I.L.M. 746, 753 (2002).

148. *See* Proposal for a Framework Agreement on Special and Differential Treatment (Communication from Cuba, Dominican Republic, Honduras, India, Indonesia, Kenya, Malaysia, Pakistan, Sri Lanka, Tanzania, Uganda, and Zimbabwe), para. 15, WT/GC/W/442 (Sept. 19, 2001) (proposing that S&D treatment "shall be mandatory and legally binding through the dispute settlement system of the WTO").

it is unlikely that such a drastic proposal would find supporters among other WTO members, especially developed countries. In fact, this proposal goes beyond the level of S&D treatment: it touches on the very constitutional nature of the WTO system as a whole. The current WTO structure would not permit such a far-reaching redistributive mechanism.

The practical effects of S&D treatment are also controversial. Non-reciprocal (free-riding) concessions from the North to the South may not necessarily be translated into poor countries' effective access to rich countries markets. Those products subject to reduced MFN tariffs may not match exports of low-income developing countries.[149] For example, suppose that the U.S. import duties for passenger cars are reduced to zero due to the U.S. negotiation with South Korea in the WTO. Even though Zimbabwe may theoretically benefit from such concession via the MFN principle, it will not practically help Zimbabwe since it does not produce and export any cars to the United States.

Furthermore, developing-exporting countries should demystify unilateral preferential tariffs such as the Generalized System of Preferences (GSP) and other regional preferential trade programs.[150] Empirical studies demonstrate that real preferential values of those programs may be relatively small. For sub-Saharan African countries, for example, such values are only four percent of their exports to the EU market and 1.5 percent to the U.S. market.[151] Such shocking statistics may be explained by the facts that (1) many developing country products have low or non-existent tariffs before the application of any preferences, (2) products with high duties are typically excluded from preferences, and (3) uncertainty surrounding preferences often dampen incentives to invest.[152] Likewise, the U.S. Caribbean Basin Initiative (CBI) strictly limits the import of sugar from Caribbean countries which earn more than a half of their foreign currencies from exporting sugar.[153] The cost of compliance with those preferential programs, such as the rules of origin, is also quite high.[154] According to Francois, Hoekman, and Manchin, these costs may amount to four percent of beneficiary countries' total exports from preference regimes.[155] Finally, importers, not poor countries' farmers or producers, may reap most of the

149. Chantal Thomas & Joel P. Trachtman, *Editor's Introduction* to DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM 1, 4–5 (Chantal Thomas & Joel P. Trachtman eds., 2009).

150. Regarding an earlier argument in favor of MFN-based trade liberalization over trade preferences, see ROBERT E. HUDEC, DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM (1987). From the standpoint of public choice theory, Hudec warned that trade preferences programs were vulnerable to capture and abuse in their arrangement. Thomas & Trachtman, *supra* note 149, at 2.

151. Tokarick, *supra* note 109, at 7–8. *See also* DILIP K. DAS, THE DOHA ROUND OF MULTILATERAL TRADE NEGOTIATIONS: ARDUOUS ISSUES AND STRATEGIC RESPONSES 95 (2005) (observing that the preference programs are rife with "restrictions, product exclusions and administrative rules").

152. *See* Paul Brenton & Takako Ikezuki, *The Value of Trade Preferences for Africa*, *in* TRADE, DOHA, AND DEVELOPMENT: A WINDOW INTO THE ISSUES 223, 226–27 (Richard Newfarmer ed., 2006).

153. Jeffrey L. Dunoff, *Dysfunction, Diversion, and the Debate over Preferences: (How) Do Preferential Trade Policies Work?*, *in* DEVELOPING COUNTRIES IN THE WTO, *supra* note 149, at 51–52. *See also* OXFAM, RIGGED RULES AND DOUBLE STANDARDS—TRADE, GLOBALIZATION, AND THE FIGHT AGAINST POVERTY 101 (2002) (pointing out the exclusion of sensitive products from liberalization under the U.S. African Growth and Opportunity Act).

154. Dunoff, *supra* note 153, at 53.

155. Joseph Francois et al., *Preference Erosion and Multilateral Trade Liberalization* 8–11 (World Bank Policy Research Working Paper No. 3730, 2005).

benefits from those preferential tariffs programs.[156] In sum, it seems fair to say that the economic benefits of preferential programs have been disappointing in general.[157]

A mercantilist assumption behind S&D treatment that no (reciprocal) tariff reduction somehow leads to development, as seen in the argument for the infant industry protection, remains debatable.[158] Maintaining high tariffs may in fact harm developing countries since it deprives them of potential gains from domestic trade liberalization.[159] As a matter of fact, this non-reciprocity tends to induce tariff peaks maintained by rich importing countries against main exports by low-income developing countries.[160] Such "reverse S&D," which refers to a number of exemptions from free trade principles that developed countries retain in practice, may outweigh any benefits from S&D treatment.[161] This is nothing but a "Faustian Bargain"[162] to developing countries: it is developmentally pernicious because it undermines economic efficiency domestically (due to the maintenance of high tariffs) *and* impedes developing countries' market access abroad (due to developed countries' lingering tariff barriers to developing countries' main exports).

Most importantly, lowering tariffs for developing countries' exports is not a panacea to their development. A plethora of the so-called non-tariff barriers (NTBs) or behind-the-border measures can effectively block the access of developing countries' exports even after tariffs are eliminated. For example, both the United States and the EU launched a large number of antidumping investigations against low- and lower-middle-income developing countries from 1995 to 2008: out of the 418 U.S. antidumping investigations, 179 were against low- or lower-middle-income developing countries; out of the 391 EU investigations, 208 were also aimed at such countries.[163] In a developmentally devastating pattern, these antidumping initiations have concentrated on those products in which low-income

156. *See, e.g.*, M. Olarrega & C. Özden, *AGOA and Apparel: Who Captures the Tariff Rent in the Presence of Preferential Market Access?*, 28 WORLD ECON. 63 (2005) (explaining that while trade regimes like the AGOA purport to encourage trade and direct investment in LDCs they have the effect of benefiting importing industrialized countries rather than LDCs); Dunoff, *supra* note 153, at 54.

157. U.N. Conference on Trade & Development [UNCTAD], *Trade Preferences for LDCs: An Early Assessment of Benefits and Possible Improvements*, UNCTAD/ITCD/TSB/2003/8 (Jan. 30, 2004); Dunoff, *supra* note 153, at 55.

158. GROUP OF THIRTY, SHARING THE GAINS FROM TRADE: REVIVING THE DOHA ROUND 55 (2004).

159. DAS, *supra* note 151, at 105. There is also a collective benefit from trade liberalization: developing countries should open their markets among one another to fully achieve "export-market diversification." *Id.* at 106.

160. Thomas & Trachtman, *supra* note 149, at 6.

161. Ablasse Ouedraogo, Deputy Director-General, World Trade Organization, Closing Remarks at Seminar on Special and Differential Treatment for Developing Countries (July 3, 2000) (transcript available at http://www.wto.org/english/news_e/pres99_e/pr150_e.htm).

162. BELA A. BALASSA, NEW DIRECTIONS IN THE WORLD ECONOMY 360 (1989) (quoting Sidney Weintraub, who observed that the developed countries' exclusion of most competitive exports from trade preferences was a price for non-reciprocal maintenance of tariffs retained by developing countries).

163. These figures were derived from antidumping investigations data on individual countries from the WTO website after applying the World Bank's list of low- and lower-middle-income economies. World Trade Organization, Statistics on Antidumping, http://www.wto.org/english/tratop_e/adp_e/adp_e.htm#statistics; World Bank, Data & Statistics: Country Groups, http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20421402~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html (last visited Mar. 16, 2010).

developing countries retain comparative advantages vis-à-vis developed countries, such as primary commodities and labor-intensive manufacturing goods.[164]

Taxing regulatory standards in the areas of environment and food safety that are imposed by rich importing countries also hinder poor countries' effective access to the former's markets. Most low-income developing countries, such as LDCs, simply cannot afford those sophisticated standards, nor do they have the necessary technology to meet them.[165] More often than not, some rich countries' prohibitively demanding standards, based on a zero-tolerance policy, unduly harm poor countries' exports. For example, the EU's aflatoxin regulation, which is more austere than a relevant international standard, could reduce African food exports by over sixty percent, while it might save only 1.4 deaths per billion a year.[166] These structural issues, such as capacity gap, cannot be fully addressed by S&D provisions alone without any serious redistributive measures such as financial aid and technology transfer.

The aforementioned reality check offers a new perspective on the prospects of the Doha Round as a development round. While the Doha Round's developmental potential as it stands under the current proposed package may not be insignificant, at the same time one should not overestimate it. Developing countries, in particular low-income developing countries such as LDCs, should look beyond Doha's promises.[167] Departing from the hitherto largely passive, recipient's standpoint, developing countries themselves should take more active and innovative stances toward their development, with or without the DDA.

First, developing countries may reconsider representing themselves in big groups, such as the G-77 or G-90. Each developing country's developmental agenda is unique. A more targeted approach—country or product-specific—in the trade negotiation may prove more effective than a big group approach. Here, a litigation threat under the WTO dispute settlement mechanism may boost individual developing countries' leverage in the trade negotiation.

Second, developing countries themselves should boldly embrace market opening[168] and thus situate themselves in a better position to pressure developed

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164. *Id.*

165. *See generally* STANDARDS AND GLOBAL TRADE: A VOICE FOR AFRICA (John S. Wilson & Victor O. Abiola eds., 2003) (providing case-by-base analyses of the struggles Kenya, Mozambique, Nigeria, South Africa, and Uganda have experienced complying with regulatory standards).

166. John S. Wilson, *Standards, Regulation, and Trade: WTO Rules and Developing Country Concerns*, *in* DEVELOPMENT, TRADE, AND THE WTO: A HANDBOOK 428, 431 (Bernard Hoekman et al. eds., 2002) (citing Sunehiro Otsuki et al., *Saving Two in a Billion: A Case Study to Quantify the Trade Effect of European Food Safety Standards on African Exports*, 26 FOOD POL'Y 495 (2001)).

167. *See generally* Sungjoon Cho, *Beyond Doha's Promises: Administrative Barriers as an Obstruction to Development*, 25 BERKELEY J. INT'L L. 395 (2007) (arguing that developing countries' exports are still subject to various non-tariff barriers, such as antidumping measures, rule of origin and regulatory standards, imposed by developed countries even though the Doha Development Agenda fully materializes).

168. The 2002 U.N. International Conference on Financing for Development featured many speeches highlighting the essential role which open trade can play in achieving development. These speeches were delivered by then World Bank President James Wolfensohn (stressing that all trading nations would eventually benefit from more open trade), IMF Managing Director Horst Koehler (describing trade as "the most import avenue for self-help"), and then WTO Director-General Mike Moore (pointing out that "poor countries need to grow their way out of poverty and trade can serve as a key engine of that growth"). *Mixed Reaction on Trade in Financing for Development Outcome*, 6 BRIDGES WKLY. TRADE NEWS DIG.

countries to drop chronic protectionism, such as tariff peaks. In particular, freer South-South trade, which many commentators on international trade have long advocated,[169] is an essential component for development. The developmental potential of some anecdotal South-South trade attempts, regional or plurilateral, appear to be largely limited in that they remain closed and exclusive.[170] Possible export decreases due to preference erosion could be compensated by export increases of non-preferential products.[171] Concomitantly, in what may be called "strategic liberalization,"[172] a developing country should set its own trade liberalization course, including a case-specific liberalization sequence, modality, and speed,[173] taking into account its own socio-economic context.[174] Often, developing countries are compelled to restrict trade due to the lack of adequate adjustment assistance programs as well as certain policy concerns such as food security. These inevitable restrictions should be regarded not as a mercantilist exemption but rather as a justifiable moderation in market opening, this is particularly true as long as rich countries' lavish subsidies continue to distort the global market.[175]

Finally, developing countries themselves, more than the WTO, should aggressively tap into development agencies, such as the World Bank and the United Nations Conference on Trade and Development (UNCTAD), to receive trade-related technical assistance for capacity building.[176] At the same time, donor governments may work directly with the developing countries' private sector without the intermediation of recipient governments. Developed countries' manufacturers may then outsource their production to the private sector of developing countries. For example, in 2003 the Norwegian Agency for Development Cooperation (NORAD), partnered with the Federation of Indian Chambers of Commerce and

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(Int'l Ctr. for Trade and Sustainable Dev.), Mar. 26, 2002, at 8.

169. *See* Raj Bhala, *Resurrecting the Doha Round: Devilish Details, Grand Themes, and China Too*, 45 TEX. INT'L L.J. 1, 121 (2009) (agreeing with United States that South-South trade must increase; poor countries must lift themselves out of poverty in part by trading more with each other).

170. *See* Sungjoon Cho, *Breaking the Barrier between Regionalism and Multilateralism: A New Perspective on Trade Regionalism*, 42 HARV. INT'L L.J. 419, 449 (2001) (observing that South-South regional trading blocks tend to generate only limited development impacts due to the lack of diversity in trade patterns).

171. Tokarick, *supra* note 109, at 10; Mary Amiti & John Romalis, *Will the Doha Round Lead to Preference Erosion?* 4 (Int'l Monetary Fund, Working Paper 06/10, 2006).

172. Jim Redden, *Introduction*, *in* TRADE AND POVERTY REDUCTION IN THE ASIA-PACIFIC REGION: CASE STUDIES AND LESSONS FROM LOW-INCOME COMMUNITIES 1, 19 (Andrew T. Stoler et al. eds., 2009) [hereinafter TRADE AND POVERTY REDUCTION].

173. *Id.*

174. *See* Euan McMillan, *The Economic Effects of Trade on Poverty Reduction: Perspectives from the Economic Literature*, *in* TRADE AND POVERTY REDUCTION, *supra* note 172, at 58–59 (observing that the effects of trade on developing countries are context-specific and depend on many non-economic variables such as history and geography). This is also true in the area of development aid, such as the Aid for Trade program. *See* MAINTAINING MOMENTUM, *supra* note 146, at 32 (emphasizing the notion of "country-owned development").

175. B.S. Chimni, *Some Reflections on the Idea of Free Trade and Doha Round Trade Negotiations*, *in* DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM 21, at 27–28 (Chantal Thomas & Joel P. Trachtman eds., 2009). Governments of developing countries, such as India, are under severe political pressure against market opening from their subsistent farmers who fear the dumping of highly subsidized crops from rich countries into their markets. *See Delhi Trade Talks Face Familiar Foe as India's Farmers Prepare to Protest*, TIMES, Sept. 3, 2009 (indicating that an association of 50,000 Indian farmers would rally "to keep agriculture out of the WTO").

176. Supachai Panitchpakdi, *The WTO, Global Governance and Development*, *in* THE WTO AND GLOBAL GOVERNANCE: FUTURE DIRECTIONS 187, 200 (Gary P. Sampson ed., 2008).

Industry (FICCI), and invested in a pilot project to train Indian grape growers about a voluntary European agricultural standard (EurepGAP).[177] Once these grapes, which are harvested in compliance with good practices prescribed by the EurepGAP, are certified, they can get access to the European market.[178] Such public-private (state-to-business) technical assistance might be more effective than a public-public (state-to-state) one in that the former could cut red tape and directly benefit producers (exporters) in the developing world.

VI. CONCLUSION

The Doha Round, the longest trade round ever, is yet another constitutional moment for the global trading system. How it ends may determine the way in which WTO members structure trade relations between each other in the future. At the same time, however, this Round will exhaust neither development challenges nor responses thereto. For the Doha Round to have any meaning for the future of the WTO, it is imperative that the rhetoric of the negotiation change from a mere commercial bargain controlled by major players to a public good whose institutional success benefits developing countries, which make up more than three quarters of the WTO membership. The more WTO members subscribe to the rhetoric of commercial bargains, the further they tend to jeopardize the Doha Round itself. Although some members prefer to explore alternative venues for allegedly equivalent commercial deals, such as RTAs,[179] they could not provide the same public good as the Doha Round, let alone their high costs to the global trading system.[180]

The lack of the U.S. leadership in the Doha Round is evidenced by both its dispassionate engagement in the negotiation[181] and insistence on the mercantilist balance in concessions. Its trading partners, both developed and developing countries, now criticize in unison that the United States is the "main stumbling block" to the success of the Round.[182] U.S. Doha leadership starts with the U.S. government's resistance to domestic lobbies from special interest groups, such as big

177. EurepGAP, What Is EurepGAP, http://www.eurepgap.org/Languages/English/about.html (last visited Feb 23, 2010); FICCI Quality Forum, http://www.ficci.com/fqf07/htm/europgap.htm (last visited Feb. 15, 2010).

178. *European Food Safety Norms Phase II Project Likely by June*, FIN. EXPRESS (Feb. 27, 2006), *available at* http://www.financialexpress.com/news/european-food-safety-norms-phase-ii-project-likely-by-june/70881/.

179. *See Time for Parallel and Alternative Paths?*, 13 BRIDGES WKLY. TRADE NEWS DIG. (Int'l Ctr. for Trade and Sustainable Dev.), Sept. 2009, at 1–2, *available at* http://ictsd.org/i/news/bridges/54391/ (contending that various countries are searching for alternative venues for trade governance).

180. *See generally* Sungjoon Cho, *Defragmenting World Trade*, 27 NW. J. INT'L L. & BUS. 39, 40 (2006) (arguing that the current proliferation of regional trading blocs risks fragmenting the multilateral trading system); Evenett, *supra* note 68, at 12–13 (observing that costs of Doha failure, such as more trade disputes and trade remedies, are often underestimated). *See also* KEVIN P. GALLAGHER & TIMOTHY A. WISE, SOUTH CENTRE, IS DEVELOPMENT BACK IN THE DOHA ROUND?, No. 18, Nov. 2009, at 6 (contending that North-South RTAs "exploit the asymmetric nature of bargaining power between developed and developing nations, divert trade away from nations with true comparative advantages, and curtail the ability of developing countries to deploy effective policies for development").

181. *See WTO's Lamy Says U.S. Slowing Doha Talks: Report*, REUTERS, Nov. 10, 2009, http://www.reuters.com/article/idUSTRE5A913T20091110.

182. *Scepticism Lingers*, *supra* note 64.

agro-businesses and labor unions.[183] Free from the myopic trade policy driven by rent-seekers, the U.S. government can reestablish its Doha goal from sealing a commercially attractive deal to helping secure a public good for the global trading system.

In terms of a strategic choice, the United States should accept the so-called Doha-lite, which largely reflects the current negotiation package (agriculture and NAMA) on the table. In particular, the United States may refrain from insisting on additional reductions of industrial tariffs from emerging economies (China, India, and Brazil). Due to unilateral tariff reduction, these countries now actually apply much lower tariffs than their official bound levels.[184] The United States argues that developing countries' tariff cut concessions in the Doha Round should be based on these applied levels, not the bound ones.[185] However, even the mere binding of the applied tariff levels by these developing countries in the Doha Round might be adequate, if not ideal, to seal the Doha Round. After all, what is vital for the future of the WTO is to maintain the culture of openness among WTO members, not particular numerical levels of tariff cuts which may or may not satisfy certain powerful countries' domestic constituencies. As they have done in the past, these developing countries will continue to slash their tariffs for their own economic purposes once a Doha success affirms the solemn existence of a credible multilateral trading system. This is why the United States should break from a narrow focus, defined by rent-seekers, and pursue a truly collective goal—delivering a development-friendly trade round.

Concededly, it would be naïve to interpret an international negotiation like the Doha Round by a moral mandate only. As the late Tip O'Neill famously stated, all politics is local,[186] and parochialism is often powerful enough to stall and sink international trade deals. Rightly, those impoverished foreign farmers would not cast a single vote for American politicians. After all, isn't it be a democratic virtue to respond faithfully to your *own* local constituency?

The problem, however, is that "poverty anywhere constitutes a danger to prosperity everywhere."[187] Although the financial crisis started in the United States, it now wreaks havoc on the world's poorest in a highly disproportionate manner. Poverty is one of the most horrible agonies, and it never comes alone: it accompanies diseases, violence, conflicts, and wars. From the insightful perspective of "comprehensive security" posited by Robert Scalapino,[188] tanks and soldiers may be a necessary but insufficient condition for peace and security. Genuine peace and security derives from global citizens who have a decent amount of food to eat and

183. *See, e.g.*, Ross P. Buckley, *Introduction: The Changing Face of World Trade and the Greatest Challenge Facing the WTO and the World Today*, *in* THE WTO AND THE DOHA ROUND: THE CHANGING FACE OF WORLD TRADE 5 (2003) (observing that while the WTO should grant poor countries "better and fairer" access to rich countries' agricultural markets to alleviate the world's income inequality, the opposition of farmers from rich countries remains "massive and undiminished").

184. Bhala, *Resurrecting the Doha Round*, *supra* note 169, at 8.

185. *Cf. id.* at 7.

186. *See generally* TIP O'NEILL, ALL POLITICS IS LOCAL, AND OTHER RULES OF THE GAME (1994) (stating that politicians must understand and connect to their constituents to be successful).

187. Constitution of the International Labour Organization, Annex, para. I(c), *available at* http://www.ilo.org/ilolex/english/constq.htm.

188. *See* Robert A. Scalapino, *"Regionalism in the Pacific: Prospects and Problems for the Pacific Basin,"* 26 ATL. COMMUNITY Q. 174 (1988) (discussing economic policies as a vital component of national security).

decent kinds of work to do, which trade can provide. The total financial burden of concessions necessary to help deliver Doha's success would be trivial compared to astronomical military spending to keep the world safe.

The completion of the Doha Round alone could never solve all the development problems that the WTO is facing. Yet it is still an important step to fulfill the ultimate *telos* of the WTO—sustainable development—especially amid the current global economic crisis.

Promoting Human Embryonic Stem Cell Research: A Comparison of Policies in the United States and the United Kingdom and Factors Encouraging Advancement

JODY SCHECHTER*

Abstract

Human embryonic stem cell (hESC) research has been touted for over a decade due to its potential to provide great improvements in healthcare, including finding cures for millions of people with debilitating and degenerative diseases. However, this research comes at a perceived moral price because it requires scientists to destroy embryos, the beginnings of human life. Newer scientific methods can be even more controversial because they involve creating embryos specifically for research purposes and mixing human and animal genes.

Nations have divided sharply in their approaches toward allowing, funding, and regulating various aspects of hESC research. The United States takes a conservative approach, allowing moral concerns to drive much of its policy. The current framework in the United States involves a decentralized system, with little regulatory control and high uncertainty. In contrast, the United Kingdom employs a more progressive approach and utilizes an extremely centralized, highly regulated system for hESC research, funded entirely by the government.

While the United States persists in an arena of political and scientific uncertainty, the United Kingdom forges ahead, furthering scientific progress in this field. Studying the differences between these two systems helps identify the factors that allow the United Kingdom to advance this highly promising research at a faster rate.

This article discusses the political and regulatory structures for hESC research in both the United States and the United Kingdom. It then explores some of the possible reasons for the differences in these structures. While it is not plausible to wholly adopt the U.K. format in the United States, this paper advocates emulating some of the United Kingdom's techniques to keep the United States competitive and encourage scientific advancement.

* J.D. Candidate at The University of Texas School of Law (2010).

SUMMARY

I. INTRODUCTION

Research on human embryonic stem cells (hESCs) holds immense potential to provide improvements in healthcare by furthering cellular developmental understanding;[1] developing transplantable tissues; and finding cures for millions of people with debilitating and degenerative diseases such as Parkinson's, Alzheimer's, multiple sclerosis, spinal cord injuries, and heart disease.[2] However, the controversial ethical nature of the scientific methods involved draws intense scrutiny and debate from policymakers as well as from the general public.[3] Nations across the globe have reacted with widely divergent levels of tolerance and support of this tremendously promising but, for many, ethically disconcerting research.[4]

Because of the universal goal to find cures for devastating diseases, hESC research creates an arena for international competition.[5] Advancements by progressive nations put pressure on international policymakers to adopt similar workable policies.[6] Otherwise, the fear is that scientists, researchers, and biotechnology firms will respond to relatively restrictive regulations by moving to countries more favorable to research.[7] Countries with advantageous regulation and funding will draw the top scientists and researchers, leading these countries to "become the producers," while "other nations will simply become their customers."[8] The United Kingdom in particular has become a world leader in its advancement of hESC research.[9] But while the United States has shown considerable support for

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1. *See* NATIONAL INSTITUTES OF HEALTH, STEM CELL BASICS 2 (2009), http://stemcells.nih.gov/staticresources/info/basics/SCprimer2009.pdf (discussing the study of stem cells as a valuable way to gain knowledge about how an organism develops and how healthy cells replace damaged cells).

2. Denise Stevens, Comment, *Embryonic Stem Cell Research: Will President Bush's Limitation on Federal Funding Put the United States at a Disadvantage? A Comparison Between U.S. and International Law*, 25 HOUS. J. INT'L L. 623, 629 (2003).

3. *See, e.g.*, Jordan Saltzberg, *The Current Embryonic Stem Cell Research Federal Funding Policy: Undue Respect to Minority Ethical Considerations?*, 29 J. LEGAL MED. 505, 505 (2008) (discussing the "fierce" ethical debates and political responses since the first successful isolation of hESCs).

4. *See* Stevens, *supra* note 2, at 637–45 (describing the current status of laws on hESC research in major countries).

5. *See, e.g.*, Piotr Rewerski, *The Need for a New U.S. Stem Cell Research Policy: A Comparative Look at International Stem Cell Research Laws*, 7 U. ILL. J.L. TECH. & POL'Y 415, 416 (2007) (discussing scientists' belief that stem cells have the potential to cure many diseases as the reason for conducting the research); Stevens, *supra* note 2, at 629 (discussing the potential cures to diseases as the reason why scientists want to conduct this research); Elizabeth M. Luk, Comment, *The United Kingdom and Germany: Differing Views on Therapeutic Cloning and How the Belgian Resolution Brings Them Together*, 10 MICH. ST. U. J. MED. & L. 523, 538 (2006) (discussing the competition between countries to take the lead in this field).

6. Luk, *supra* note 5, at 538.

7. *Id.* (citing Adam Greene, Note, *The World After Dolly: International Regulation of Human Cloning*, 33 GEO. WASH. INT'L REV. 341, 347, 356 (2001) ("[N]oting that Dr. Richard Seed, a research scientist who believes human cloning is inevitable, stated in response to President Bill Clinton's declaration of a moratorium on cloning research that he would simply conduct his research in Tijuana, Mexico. Additionally, one of the major biotechnology companies in the Netherlands relocated to Finland after overly restrictive legislation was established, and some biotech firms in Europe have considered moving to Africa to develop and implement their cloning research.")).

8. Luk, *supra* note 5, at 538 (citing Victoria Knight, *Politics May Move Stem-Cell Scientists*, WALL ST. J., Jan. 26, 2005).

9. Valerie Mauler, Recent Development, *Improving Public Health: Balancing Ethics, Culture and*

hESC research, the lack of a consistent and uniform federal policy encouraging this research could keep the United States from realizing its potential in this field.[10]

II. STEM CELL RESEARCH: ETHICAL CONTROVERSY

The debate over hESC research has traditionally focused on the ethical controversy over embryo destruction.[11] Although stem cells can be derived from several sources,[12] hESC research is currently believed to be the most promising.[13] However, research using hESCs necessarily involves the destruction of a human embryo, terminating the potential for life in the developing organism.[14]

As the field of embryonic stem cell research progresses, new technologies develop and evolve, challenging policymakers and advisors regarding what to support as well as how to best regulate these new devices.[15] A technology that has attracted increasing international attention is Somatic Cell Nuclear Transfer (SCNT), or "therapeutic cloning," a process involving the creation of an embryo through a cloning process in order to derive embryonic stem cells (ESCs) for research and potentially for tissue transplantation.[16]

A significant limitation of research on stem cells derived from pre-existing embryos is that transplantable tissues and cures developed from them may be rejected by a recipient's immune system.[17] By using ESCs cloned from the person's own cells, the risk of immune rejection is greatly reduced.[18] SCNT also provides the ability "to create disease-specific stem cell lines for study,"[19] allowing researchers to study certain diseases such as Alzheimer's and modify the stem cell lines created to try to find cures.[20]

Technology, 20 GEO. J. LEGAL ETHICS 817, 829 (2007); *see also* Stevens, *supra* note 2, at 648–49 (discussing the U.K.'s environment for hESC research as far more encouraging than that of the United States and Germany, and the benefits that will likely accrue to the United Kingdom, as opposed to other nations).

10. Stevens, *supra* note 2, at 645.

11. THE PRESIDENT'S COUNCIL ON BIOETHICS, MONITORING STEM CELL RESEARCH 5–6, 22–23 (2004), *available at* http://www.bioethics.gov/reports/stemcell/pcbe_final_version_monitoring_stem_cell_research.pdf [hereinafter MONITORING STEM CELL RESEARCH].

12. *See, e.g.*, *id.* at 8–11 (discussing differences between embryonic stem cells, embryonic germ cells isolated from a developing fetus, adult stem cells, and umbilical cord blood stem cells).

13. *E.g.*, Stevens, *supra* note 2, at 628.

14. MONITORING STEM CELL RESEARCH, *supra* note 11, at 8.

15. *See generally* John Bogatko, *Stem Cell Research: A Comparative Legal Analysis*, 6 MICH. ST. U. J. MED. & L. 123 (2002) (describing how various governments have addressed the issue of stem cell research and emergent technologies).

16. MONITORING STEM CELL RESEARCH, *supra* note 11, at 385; *see* John A. Robertson, *Two Models of Human Cloning*, 27 HOFSTRA L. REV. 609, 611 (1999) [hereinafter Robertson, *Two Models of Human Cloning*] ("[T]herapeutic cloning clones a person's cells to the blastocyst stage with no intent to transfer the cloned cells and resulting embryo to the uterus, as would occur with reproductive cloning. Embryonic stem ("ES") cells would then be removed from the embryo in order to obtain cells or tissue for research and eventually transplantation.").

17. George Kanellopoulos, *Embryonic Stem Cell Research: A Comparative Study of the Philosophies of the United States and the United Kingdom*, 4 J. INT'L BUS. & L. 170, 175 (2005).

18. *Id.*

19. Russell Korobkin, *Recent Developments in the "Stem Cell Century": Implications for Embryo Research, Egg Donor Compensation, and Stem Cell Patients*, 49 JURIMETRICS J. 51, 58 (2008).

20. COMM. ON GUIDELINES FOR HUMAN EMBRYONIC STEM CELL RESEARCH, NAT'L RESEARCH COUNCIL, GUIDELINES FOR HUMAN EMBRYONIC STEM CELL RESEARCH 33 (2005), *available at*

In contrast to "reproductive cloning," "therapeutic cloning" clones a person's cells only to the blastocyst stage of the embryo and solely for the purpose of developing cures and tissue for transplantation, with no intention of implanting the embryo into a uterus for development.[21] Although scientists have not yet been able to create hESC lines from cloned blastocysts,[22] this technology is likely on the horizon,[23] spurring the debate over its use.

However, SCNT involves not just the destruction of embryos for research purposes, but also the *creation* of embryos for destruction and research, which is even more morally repugnant to some.[24] Many also worry that the distinction between therapeutic cloning and reproductive cloning will eventually disappear—that once cloned embryos exist, it will be difficult to prevent scientists or physicians from using them for reproduction.[25]

Another controversial scientific development involves the chimera, a scientific cross-species created by mixing stem cells or embryos from one species with early embryos of another species.[26] This process could be used to create animals with a significant number of human nerve and brain cells, making them potentially useful subjects for biomedical research.[27] Additionally, this technology could possibly be utilized to develop organs genetically compatible with a human stem cell donor and harvest them in chimeras in preparation for human organ transplant, reducing the risk of transplantation rejection.[28] This technique, however, is highly contentious because of a feeling that it blurs species lines.[29]

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http://www.nap.edu/openbook.php?record_id=11278&page=R1 [hereinafter GUIDELINES FOR HUMAN EMBRYONIC STEM CELL RESEARCH].

21. Robertson, *Two Models of Human Cloning*, *supra* note 16, at 611.

22. *See id.* at 609 ("Although none of the scientists conducting cloning research claimed an interest in cloning humans, the techniques used to clone sheep, cows, and mice could easily be adapted to human beings.").

23. *See, e.g.*, Malcom Ritter, *Scientists Make Human Embryo Clones*, HUFFINGTON POST, Jan. 17, 2008, http://www.huffingtonpost.com/huff-wires/20080117/cloned-embryos (including statement by Dr. George Daley of the Harvard institute and Children's Hospital Boston that "[i]t's only a matter of time until some group succeeds" in creating stem cell lines from cloned embryos); *see* Deborah Smith, *Scientists Attempt Stem Cell Breakthrough*, SYDNEY MORNING HERALD, Sept. 17, 2008, *available at* http://www.smh.com.au/news/science/scientists-attempt-stem-cell-breakthrough/2008/09/16/1221330837133.html (discussing the first license granted in Australia to produce cloned embryos in an effort to extract hESCs, as part of the international race to be the first to make the extraction).

24. Luk, *supra* note 5, at 533 (citing Robertson, *Two Models of Human Cloning*, *supra* note 16, at 616).

25. Robertson, *Two Models of Human Cloning*, *supra* note 16, at 614.

26. Nicole E. Kopinski, *Human-Nonhuman Chimeras: A Regulatory Proposal on the Blurring of Species Lines*, 45 B.C. L. REV. 619, 624–25 (2004); Jason Scott Robert & Francoise Baylis, *Crossing Species Boundaries*, 3 AM. J. BIOETHICS 1, 8 (Summer 2003).

27. David E. Winickoff et al., *Opening Stem Cell Research and Development: A Policy Proposal for the Management of Data, Intellectual Property, and Ethics*, 9 YALE J. HEALTH POL'Y, L. & ETHICS 52, 79 (2009).

28. Kopinski, *supra* note 26, at 630.

29. Winickoff et al., *supra* note 27, at 79.

III. U.S. AND U.K. APPROACHES TO STEM CELL RESEARCH

A. *The United States: Political and Regulatory Framework*

1. The Issue of Federal Funding

The key issue in the United States regarding hESC research has generally not been what to allow and what to prohibit, but rather what to fund with federal dollars.[30] The decision to provide federal funding is seen as an endorsement of a particular pursuit as worthy of the nation's support and encouragement.[31] The United States has always held medical progress as a high priority.[32] Federal funding, however, is generally peppered with restrictions, mainly due to moral concerns and limitations.[33] In the debate over hESC research, the government has attempted to pursue a middle ground between those arguing that embryo "exploitation and destruction" is completely offensive and unjustifiable, based on the moral position that an embryo is deserving of life, and others arguing that embryo research is morally worthy or even socially obligatory because of the immense potential for good.[34]

An important note is that federal funding limitations do not restrict state or private funding or activities in this field.[35] Indeed, hESCs were first isolated and cultured in the private sector.[36] Research on embryos is not illegal in the United States, except in a few states.[37] However, a lack of federal funding is accorded substantial weight for numerous reasons. First, the sheer amount of money available

30. MONITORING STEM CELL RESEARCH, *supra* note 11, at 37; Aurora Plomer, *Beyond the HFE Act 1990: The Regulation of Stem Cell Research in the UK*, 10 MED. L. REV. 132, 134 n.8 (2002).

31. MONITORING STEM CELL RESEARCH, *supra* note 11, at 37.

32. The President's Council on Bioethics, The Administration's Human Embryonic Stem Cell Research Funding Policy: Moral and Political Foundations, http://www.bioethics.gov/background/es_moralfoundations.html (last visited Feb. 9, 2010) [hereinafter The Administration's Human Embryonic Stem Cell Research Funding Policy] (working paper discussed at meeting of the President's Council on Bioethics in September of 2003).

33. *Id.*

34. MONITORING STEM CELL RESEARCH, *supra* note 11, at 4; *see also id.* at 26 (stating that the U.S. government has not funded hESC research, and has allowed hESC research to continue with private funding).

35. *See, e.g.*, GUIDELINES FOR HUMAN EMBRYONIC STEM CELL RESEARCH, *supra* note 20, at 19 (stating that the derivation of stem cell lines has been proceeding legally with private funds despite the federal government's refusal to fund the activity and that some states prohibit, while other states actively promote, stem cell research); MONITORING STEM CELL RESEARCH, *supra* note 11, at 46–47 (discussing state policy as well as the ability and impact of private investors).

36. AM. ASS'N FOR THE ADVANCEMENT OF SCI. [AAAS] CTR. FOR SCI., TECH., AND CONG., AAAS POLICY BRIEF: STEM CELL RESEARCH (2009), http://www.aaas.org/spp/cstc/briefs/stemcells/index.shtml (last visited Feb. 9, 2010).

37. For a detailed discussion of the various state approaches to regulating stem cell research, see NAT'L CONFERENCE OF STATE LEGISLATURES, STEM CELL RESEARCH (2008), http://www.ncsl.org/IssuesResearch/Health/EmbryonicandFetalResearchLaws/tabid/14413/Default.aspx (last visited Feb. 9, 2010). States that prohibit research on embryos in some form include: Arkansas, Indiana, Michigan, North Dakota, and South Dakota (cloned embryos); Illinois and Michigan (live embryos); and Louisiana (in vitro fertilized embryos). *Id.*

should not be underestimated—the U.S. federal government is by far the greatest sponsor of science in the world.[38] Second, the lack of federal funding for a particular project does constrain private investors in practice; institutions that receive federal funding are often provided incentives to abide by federal restrictions for any research conducted within them, not just those activities directly funded with public money.[39] At the very least, an institution receiving both federal and private funding must establish a clear separation—a daunting task.[40] If a scientist researching with private funds so much as accidentally places an embryo in the wrong refrigerator, one maintained using federal funds, the whole facility could be threatened with a total loss of federal funding.[41] Third, federal sponsorship of research encourages sharing of information among scientists, which greatly accelerates scientific progress.[42] Conversely, when research is done privately, dissemination of knowledge is often delayed due to intellectual property issues.[43]

Next, the payoff for investment in stem cell research is likely to remain considerably far off in the future, and federal funding is crucial for research that is "too far upstream from marketable products to attract private investment."[44] Many argue that restrictions on federal funding and the surrounding controversy also cause a "chilling effect" on the private investment market.[45] Political uncertainty resulting from the instability of this field "not only turns off investors, but also turns off the other source of funding for biotech, which [is] pharmaceutical partners, who at this point in time are completely uninterested in this field."[46] Uncertainty regarding standards for conduct and lack of oversight may also discourage would-be researchers and investors.[47] Perhaps most importantly, if the federal government declines to fund this research, it essentially delegates regulation to the private sector rather than retaining control to more effectively ensure against abuse.[48]

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38. MONITORING STEM CELL RESEARCH, *supra* note 11, at 38.

39. *Id.* at 38.

40. *Id.* at 46.

41. Audio: Ronald M. Green, Ethics and Politics, Symposium on Law and Innovation: The Embryonic Stem Cell Controversy, held by the University of Texas School of Law (May 1, 2009), http://realaudio.cc.utexas.edu:8080/asxgen/law/depts/media/Reels/StemCell/SC5-1-09panel3.wmv.

42. GUIDELINES FOR HUMAN EMBRYONIC STEM CELL RESEARCH, *supra* note 20, at 19.

43. International Society for Stem Cell Research, Frequently Asked Questions on Stem Cell Research, http://www.isscr.org/science/faq_printversion.htm (last visited Jan. 26, 2010).

44. John A. Robertson, *Embryo Culture and the Culture of Life: Constitutional Issues in the Embryonic Stem Cell Debate*, 2006 U. CHI. LEGAL F. 1, 2 (2006) [hereinafter Robertson, *Embryo Culture*].

45. MONITORING STEM CELL RESEARCH, *supra* note 11, at 47 (citing Thomas Okarma, Chairman, President's Council on Bioethics, Presentation before the Council (Sept. 4, 2003), *available at* http://www.bioethics.gov/transcripts/sep03/session4.html; Steve Mitchell, *U.S. Stem Cell Policy Deters Investors*, WASH. TIMES, Nov. 2, 2002.

46. Thomas Okarma, Chairman, President's Council on Bioethics, Presentation before the Council (Sept. 4, 2003), *available at* http://www.bioethics.gov/transcripts/sep03/session4.html.

47. *See, e.g.*, GUIDELINES FOR HUMAN EMBRYONIC STEM CELL RESEARCH, *supra* note 20, at 19 (noting that some centers currently conduct hESC research in this uncertain funding and regulatory climate and "would benefit greatly from a set of uniform standards for conduct").

48. Saltzberg, *supra* note 3, at 517 (citing Carly Goldstein, *Dipping into Uncle Sam's Pockets: Federal Funding of Stem Cell Research: Is It Legal?*, 11 B.U. PUB. INT. L.J. 229, 256 (2002)).

2. Federal Policy: Summary of Relevant Historical Background

The United States has witnessed a back-and-forth political debate over the limits of federal funding, with moral concerns playing a large role in policy decisions.[49] Very little congressional action has been taken regarding stem cell appropriations, aside from one important limitation.[50] In 1995, Congress placed a provision known as the Dickey Amendment on the 1996 Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act.[51] The Dickey Amendment language has been attached by Congress to the appropriations bill every year since[52] and is the underlying congressional restraint under which all other policy decisions must be made.[53] Under this condition, the Department of Health and Human Services (DHHS) and the National Institutes of Health (NIH) are prohibited from funding: (1) "the *creation* of a human embryo or embryos for research purposes"; or (2) "research in which a human embryo or embryos are *destroyed* [or] discarded."[54] This law effectively forbids the use of any federal funds for any research that destroys human embryos, although it does not prohibit the use of private funds for this activity.[55]

In 1998, following the first successful isolation of hESCs, the NIH requested a legal opinion from DHHS to determine whether the Dickey Amendment precluded federal funding for research on hESCs.[56] Many presumed that this was the natural implication of the congressional language.[57] However, Harriet S. Rabb of the Office of General Counsel of DHHS responded with a legal memorandum in which she concluded that the statutory prohibition did not apply to research on hESCs.[58] She reasoned that such cells were "not a human embryo within the statutory definition."[59] The statute defined "embryo" as an "organism," and Rabb found that stem cells did not qualify as organisms since they were not alive and did not have the potential to become human beings.[60] Under this analysis, the Amendment did not prohibit the federal government from funding research on hESCs from embryos that had been previously destroyed through means other than federal funding. Critics complained that this interpretation contradicted the spirit of the law and was simply

49. *Id.* at 505.

50. *Id.* at 508.

51. Omnibus Consolidated Recissions and Control Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321.

52. Saltzberg, *supra* note 3, at 517 (citing Carly Goldstein, *Dipping into Uncle Sam's Pockets: Federal Funding of Stem Cell Research: Is It Legal?*, 11 B.U. PUB. INT. L.J. 229, 256 (2002)).

53. The Administration's Human Embryonic Stem Cell Research Funding Policy, *supra* note 32 ("*Everything about the subsequent debate over federal funding of the embryonic stem cell research must be made in the context of this legal restriction.*").

54. Balanced Budget Downpayment Act, § 128, Pub. L. No. 104-99, § 128, 110 Stat. 26, 34 (1996) (emphasis added).

55. *Id.*

56. Meredith Mullins, *Stemming the Tide of Research and Constitutional Challenges: Embryonic Stem Cell Legislation*, 85 U. DET. MERCY L. REV. 227, 240 (2008).

57. *Id.* at 240.

58. Memorandum from Harriet S. Rabb, General Counsel, Department of Health and Human Services, to Harold Varmus, M.D., Director, National Institutes of Health on Federal Funding for Research Involving Human Pluripotent Stem Cells (Jan. 15, 1999), *reprinted in* LORI B. ANDREWS, ET AL., GENETICS: ETHICS, LAW AND POLICY 138, 138–41 (2002).

59. *Id.* at 138.

60. *Id.* at 138–39.

an attempt by the administration to thwart an act of Congress.[61] However, Rabb's legal interpretation has generally been viewed as valid, and both the Clinton and George W. Bush administrations accepted and depended on it.[62] The Clinton administration drafted guidelines in preparation for going forward with federal funding for stem cell research, so long as the actual destruction of the embryo was done with private funds.[63]

When President George W. Bush took over in 2001, he immediately pulled the plug on the proposed NIH funding and announced that he would allow federal funding for research on existing stem cell lines, but not on any stem cell lines created after the date of his announcement.[64] He later used his very first presidential veto on July 19, 2006 to cement his rejection of the proposed relaxation of funding restrictions.[65] President Bush publicized his policy as an attempt at "juxtaposing the need to protect life in all its phases with the prospect of saving and improving life in all its stages," and stated that with existing stem cell lines, "the life and death decision [had] already been made."[66] This policy attempted to avoid encouraging any future, presumptively unethical destruction of embryos while allowing good to come from those for which it was already too late.[67] While many criticized President Bush's policy as too restrictive,[68] it was a significant step forward as it marked the first time any U.S. federal funds were ever spent on hESC research.[69]

On March 9, 2009, after less than two months in office, President Obama revoked this presidential limit, announcing that DHHS, through the NIH, "may support and conduct responsible, scientifically worthy human stem cell research, including hESC research, to the extent permitted by law."[70] President Obama pronounced his own moral balance between the concern over destruction and utilization of embryos and the desire for medical advance, stating:

> [O]ur government has forced what I believe is a false choice between sound science and moral values. In this case, I believe the two are not

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61. Mullins, *supra* note 56, at 240.

62. MONITORING STEM CELL RESEARCH, *supra* note 11, at 27.

63. Saltzberg, *supra* note 3, at 509.

64. Mullins, *supra* note 56, at 241 (citing Press Release, White House Office of the Press Sec'y, President Discusses Stem Cell Research (Aug. 9, 2001), http://georgewbush-whitehouse.archives.gov/news/releases/2001/08/20010809-2.html).

65. Rewerski, *supra* note 5, at 415 (citing Charles Babington, *Stem Cell Bill Gets Bush's First Veto*, WASH. POST, July 20, 2006, at A1).

66. George W. Bush, President, White House Office of the Press Sec'y, Remarks by the President on Stem Cell Research (Aug. 9, 2001), http://georgewbush-whitehouse.archives.gov/news/releases/2001/08/20010809-2.html.

67. *Id.*

68. *See, e.g.*, Rewerski, *supra* note 5 (claiming that President Bush's policy is overly restrictive and sets the United States back in the international race for biotechnology advancement); Stevens, *supra* note 2 (explaining that the political and legal landscape in the United States fails to allow U.S. scientists to fully explore the potential of stem cell research, severely disadvantaging the United States technologically and economically in the international context).

69. Zach W. Hall, *Stem Cell Research in California: The Intersection of Science, Politics, Culture, and Law*, 10 MINN. J. L. SCI. & TECH. 1, 9 (2009).

70. Exec. Order No. 13,505, 74 Fed. Reg. 10,667, § 2 (Mar. 11, 2009), *available at* http://www.whitehouse.gov/the_press_office/Removing-Barriers-to-Responsible-Scientific-Research-Involving-Human-Stem-cells/.

> inconsistent. As a person of faith, I believe we are called to care for each other and work to ease human suffering. I believe we have been given the capacity and will to pursue this research—and the humanity and conscience to do so responsibly.[71]

However, as discussed below, federal support of stem cell research under the Obama administration is not necessarily as progressive as it may first appear.

3. Regulation: A Decentralized Patchwork System

In the United States, hESC research functions within a highly decentralized framework with a mix of public and private regulation. Reproductive technologies are "not closely regulated at either the state or federal level" and decisions are generally made by the private individual players—the scientists, doctors, and patients.[72]

a. Relevant Federal Regulation

Certain federal regulations apply to hESC research, although not specifically created with hESC research in mind.[73] Relevant regulations include human subjects' protection for donors of genetic material, medical privacy protections, laboratory standards for research resulting in products requiring Food and Drug Administration approval, animal care regulations, and rules regarding transfer of biological material and data from other nations.[74] These piecemeal regulations, not specifically designed for hESC, leave definite gaps in regulatory oversight.[75] The restrictions only apply to research conducted with federal dollars at federally funded institutions, or research which will eventually be used to create products for which FDA approval will be sought.[76]

b. Implementation of Federal Funding Restrictions and Guidelines

The task of executing federal funding of biomedical research is designated mainly to the NIH.[77] On April 2, 2009, consistent with President Obama's authorization, the NIH promulgated new draft guidelines for public comment.[78]

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71. Press Release, Office of the Press Sec'y, Remarks on the Signing of Stem Cell Executive Order and Scientific Integrity Presidential Memorandum (Mar. 9, 2009), (transcript available at http://www.whitehouse.gov/the_press_office/Remarks-of-the-President-As-Prepared-for-Delivery-Signing-of-Stem-Cell-Executive-Order-and-Scientific-Integrity-Presidential-Memorandum/).

72. Margaret Foster Riley & Richard A. Merrill, *Regulating Reproductive Genetics: A Review of American Bioethics Commissions and Comparison to the British Human Fertilisation and Embryology Authority*, 6 COLUM. SCI. & TECH. L. REV. 1, 4 (2005).

73. GUIDELINES FOR HUMAN EMBRYONIC STEM CELL RESEARCH, *supra* note 20, at 63.

74. *Id.*

75. *Id.*

76. *Id.* at 65.

77. Mhairi Ransom, *Drugs & Money: The Impact of Industry "Donated" Money on Public Research and the Need for Stricter Conflict of Interest Standards*, 17 S. CAL. INTERDISC. L.J. 567, 579 (2008).

78. Nat'l Inst. of Health, Guidelines for Human Stem Cell Research, Apr. 17, 2009, *available at*

These guidelines allow federal funding only on hESCs that are derived from human embryos created for reproductive purposes, no longer needed for that purpose, and donated for research.[79] Additionally, the guidelines impose rigorous eligibility standards requiring stringent informed consent mechanisms for embryo donors.[80] While this system is a significant improvement in that it would allow federally funded scientists to conduct research on stem cell lines created in the future, the strict eligibility standards may rule out research on stem cell lines approved even under the Bush administration.[81]

c. Self-Regulation and State Legislation

The United States has a number of independent non-profit organizations made up primarily of medical professionals that conduct research, advance knowledge, and promulgate guidelines for physicians' practice in areas involving reproductive medicine.[82] The American Society for Reproductive Medicine and the Society for Assisted Reproduction have both offered guidelines on stem cell research issues.[83] However, these bodies are purely self-regulated, affecting only physicians and researchers that wish to be members or follow their guidelines.[84] Additionally, their influence is restricted "due to the groups' limited ability to monitor and enforce compliance rules."[85] The National Academies of Science (NAS) also recently formed the Committee on Guidelines for Human Embryonic Stem Cell Research, which published a report proposing guidelines for hESC research.[86]

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http://stemcells.nih.gov/policy/2009guidelines.htm [hereinafter NIH Proposed Guidelines].

79. *Id.* § II, para. B.

80. R. Alta Charo, Editorial, *Stem Cell Compromise*, N.Y. TIMES, Apr. 22, 2009, at A26.

81. *Id.*

82. *See, e.g.*, American Society for Reproductive Med., http://www.asrm.org/detail.aspx?id=35 (last visited Jan. 20, 2010) (describing the ASRM as a non-profit organization whose members must demonstrate the high ethical principles of the medical profession, evince an interest in infertility, reproductive medicine, and biology, and adhere to the objectives of the society); Society for Assisted Reproductive Technology, http://www.sart.org/WhatIsSART.html (last visited Jan. 20, 2010) (explaining SART's role as a organization of professionals dedicated to the practice of assisted reproductive technologies (ART) in the United States).

83. Rewerski, *supra* note 5, at 420 (citing Nathan Beaver & Matthew Mulkeen, Under the Microscope: the International Business and Legal Issues Surrounding the Stem Cell Initiative 18 (Sept. 8, 2005) (presentation available at http://www.foley.com/files/tbl_s31Publications/FileUpload137/2919/Stem%20Cell%20Presentation%20-%20BioJapan2005%20(2).pdf); ASRM, Ethical Considerations of Assisted Reproductive Technologies, http://www.asrm.org/Media/Ethics/ethicsmain.html (last visited Nov. 12, 2007)); AMERICAN SOC'Y FOR REPRODUCTIVE MED., ETHICS COMMITTEE REPORT, DONATING SPARE EMBRYOS FOR STEM CELL RESEARCH 667 (2008), *available at* http://www.asrm.org/Media/Ethics/donatingspare.pdf.

84. *See* Joe Leigh Simpson et al., *Professional Self-Regulation for Preimplantation Genetic Diagnosis: Experience of the American Society for Reproductive Medicine and Other Professional Societies*, 85 FERTILITY & STERILITY 1653, 1655 (2006) ("ASRM is not a regulatory agency, although it fosters *self*-regulation."); Society for Assisted Reproductive Technologies, http://www.sart.org/WhatIsSART.html (last visited Jan. 20, 2010) ("The mission of our organization is to set up and help maintain the standards for ART in an effort to better serve our members and patients.").

85. Rewerski, *supra* note 5, at 420.

86. GUIDELINES FOR HUMAN EMBRYONIC STEM CELL RESEARCH, *supra* note 20, at 1.

Finally, states are free to create their own legislation and regulation for state funding[87] within the limited confines of the patchwork federal rules.[88] State legislation and regulations vary considerably, ranging from Louisiana's strict ban on intentional use and destruction of embryos under any circumstances,[89] to South Dakota's prohibition on all "nontherapeutic research that destroys a human embryo."[90] California, Illinois, New Jersey, and Wisconsin have actually committed large amounts of money to stem cell research.[91]

The United States has shown a fairly clear preference, or at least tolerance, for self-regulation, allowing policy and private practice to be driven by practitioners, organizations, and individual states.[92]

B. The United Kingdom: Political and Regulatory Framework

1. Policy: A Historical Overview

In comparison to the United States, the United Kingdom's history of hESC policy and regulation has consistently favored embryonic stem cell research.[93] Although the United Kingdom has seen its share of political and moral debates, substantial credence is accorded to advice from independent bodies made up of a mix of accredited scientists and other members of society.[94] The United Kingdom has made the furtherance of this science a priority, while channeling its moral concerns into retention of control over scientists' actions.[95]

In 1978, Louise Brown, the world's first "test tube baby," was born in the United Kingdom.[96] Conservative members within the House of Lords reacted by calling for a commission of experts to examine the social, legal, and moral implications of assisted reproduction.[97] The resulting Department of Health and

87. Rewerski, *supra* note 5, at 420 (citing JUDITH A. JOHNSON & ERIN WILLIAMS, CONG. RES. SERV., CRS REPORT FOR CONGRESS NO. RL31015, STEM CELL RESEARCH 13 (2004)).

88. *See* JUDITH A. JOHNSON & ERIN WILLIAMS, CONG. RES. SERV., CRS REPORT FOR CONGRESS NO. RL31015, STEM CELL RESEARCH 13 (2004) (describing the legislation and regulations states have enacted for state funding).

89. Rewerski, *supra* note 5, at 420 (citing Allison Newhart, *The Intersection of Law and Medicine: The Case for Providing Federal Funding for Embryonic Stem Cell Research*, 49 VILL. L. REV. 329, 340 (2004)).

90. *Id.* (citing S.D. CODIFIED LAWS § 34-14-16 (2007)).

91. *Id.*

92. GUIDELINES FOR HUMAN EMBRYONIC STEM CELL RESEARCH, *supra* note 20, at 26–27.

93. KIRSTIN MATTHEWS, THE JAMES A. BAKER III INSTITUTE FOR PUBLIC POL'Y, AVENUES FOR ADVANCEMENT 7 (2007), http://www.bakerinstitute.org/publications/avenues_summary.pdf.

94. *See id.* ("In 1990, the Human Fertilisation and Embryology Act was passed, creating HFEA, a nondepartmental public body with a lay majority that can grant licenses and make policy decisions with regard to reproductive research.").

95. *See id.* (discussing restrictions set on scientists by the HFEA).

96. Lee Kuo, *Lessons Learned From Great Britain's Human Fertilization and Embryology Act: Should the United States Regulate the Fate of Unused Frozen Embryos?*, 19 LOY. L.A. INT'L & COMP. L. REV. 1027, 1034 (1997) (citing Robert L. Stenger, *The Law and Assisted Reproduction in the United Kingdom and United States*, 9 CLEV. ST. J.L. & HEALTH 135, 139 (1994)).

97. Riley & Merrill, *supra* note 72, at 40 (citing MICHAEL MULKAY, THE EMBRYO RESEARCH DEBATE: SCI. AND THE POLITICS OF REPRODUCTION 25 (1997)).

Social Security Committee on Inquiry into Human Fertilisation and Embryology (The Warnock Committee), led by Dame Mary Warnock, consisted of medical practitioners, researchers, social workers, legal specialists, theologists, and ethicists.[98]

Although moral disagreement certainly existed among members of the Committee, the group attempted to circumvent the moral debate from the beginning, focusing its attention on regulation instead.[99] In considering the moral status of the embryo, the Committee recognized that the members, like the public, were inherently divided, and that no solution could be reached on this disagreement.[100] The Committee recognized that "[b]arriers, it is generally agreed, must be set up; but there will not be universal agreement about where these barriers should be placed."[101] Their decision was "pragmatic and utilitarian"[102]—the Committee argued that an embryo should be granted a special moral status, affording it some level of protection, but that the protection may be waived in certain specific circumstances.[103] The Warnock Report ventured that while "continued research is essential, if advances in treatment and medical knowledge are to continue," research "must be subject to stringent controls and monitoring" to ensure against misuse.[104]

The Warnock Committee proposed the formation of a new statutory licensing authority with wide-ranging membership representing scientific and medical interests, as well as significant lay representation and a layperson as chair.[105] The importance of lay involvement was stressed in order to maintain public confidence in the licensing authority's function as an independent body.[106] The Committee recommended that all clinical use of assisted reproduction techniques be permitted only through license.[107] All research proposals would be evaluated and all projects closely supervised by the licensing authority.[108] The Warnock Report further

98. *See* MARY WARNOCK, A QUESTION OF LIFE: THE WARNOCK REPORT ON HUMAN FERTILISATION & EMBRYOLOGY iv–v (1985) (listing members of the committee and their positions).

99. Riley & Merrill, *supra* note 72, at 41; *see also* M. de Roubaix, *Ten Years Hence: Has the South African Choice on Termination of Pregnancy Act, Act 92 of 1996, Realised Its Aims? A Moral-Critical Evaluation*, 26 MED. & L. 145, 153 n.16 (2007) (criticizing the Warnock Report for deciding proper treatment of the fetus without first deciding its moral status, calling it the "easy way out of a difficult ethical dilemma" that "sidesteps the fundamental issues").

100. *See* WARNOCK, *supra* note 98, para. 2 ("[F]eelings among the public at large run very high in these matters [and] . . . are also very diverse . . . . So, to this end, we have attempted . . . to *argue* in favour of those positions which we have adopted, and to give due weight to the counter-arguments, where they exist.").

101. *Id.* para. 8.

102. Riley & Merrill, *supra* note 72, at 44.

103. WARNOCK, *supra* note 98, paras. 11.17–11.18; *see also* Nigel M. de S. Cameron, *Pandora's Progeny: Ethical Issues in Assisted Human Reproduction*, 39 FAM. L.Q. 745, 763–64 (2005) (discussing the special moral status articulated by the Warnock Report, by which research use of human embryos might be approved but only in situations of great moral seriousness).

104. WARNOCK, *supra* note 98, para. 11.18.

105. *Id.* para. 13.4.

106. *Id.*

107. *Id.* para. 11.18.

108. Barbara Gregoratos, *Tempest in the Laboratory: Medical Research on Spare Embryos from In Vitro Fertilization*, 37 HASTINGS L.J. 977, 1000 (1986).

proposed that certain actions should be criminal offenses, including unlicensed research.[109]

The Warnock recommendations were at first strongly contested by both the scientific community as well as religious anti-abortion groups, due to the Report's middle ground approach which did not fully appease either group.[110] Approval depended on a conservative Parliament, where a majority initially opposed embryological experimentation as immoral,[111] and a parliamentary bill was introduced to prohibit embryo research.[112] In response to this possible ban, the scientific community quickly organized, shifting its focus in debates from infertility treatment to the possibility of cures for genetic disease, and endorsing rather than fighting the proposed mandatory licensing regime.[113] After six long years of public and scientific debate,[114] the recommendations were approved by both houses of Parliament.[115]

The parliamentary shift necessary to allow for passage of the Warnock recommendations occurred for several reasons.[116] First, the scientific community compromised early in the debates,[117] assuring the public and the Parliament that it would cede to supervisory licensing authority and regulatory controls.[118] Second, the proposed regime guaranteed that research would be permitted only during the first fourteen days of embryo development, easing moral concerns over experimentation, since research could be viewed as conducted on clumps of cells, rather than on helpless human beings.[119] Finally, the focus on the potential of research to cure disease and relieve human suffering contributed to the perception of this research as a societal obligation.[120]

2. Regulation: Centralized Authority

Based on the Warnock Committee's recommendations,[121] the Human Fertilisation and Embryology Act of 1990 (1990 Act) established a Human Fertilisation and Embryology Authority (HFEA).[122] The United Kingdom concentrates its regulation of hESC research into this one centralized entity, which

109. WARNOCK, *supra* note 98, para. 11.18.

110. Riley & Merrill, *supra* note 72, at 44–45.

111. Kara L. Belew, *Stem Cell Division: Abortion Law and Its Influence on the Adoption of Radically Different Embryonic Stem Cell Legislation in the United States, the United Kingdom, and Germany*, 39 TEX. INT'L L.J. 479, 491 (2004) (citing MULKAY, *supra* note 97, at 22, 132).

112. Riley & Merrill, *supra* note 72, at 45 (citing MULKAY, *supra* note 97, at 24).

113. *Id.* at 45–46 (citing MULKAY, *supra* note 97, at 25, 29).

114. Belew, *supra* note 111, at 491 (citing MULKAY, *supra* note 97, at 3–4).

115. Riley & Merrill, *supra* note 72, at 48 (citing MULKAY, *supra* note 97, at 39, 41).

116. *Id.*

117. *Id.*

118. Belew, *supra* note 111, at 491 (citing MULKAY, *supra* note 97, at 133–35).

119. *Id.* (citing MULKAY, *supra* note 97, at 132–33).

120. *Id.*; Riley & Merrill, *supra* note 72, at 49.

121. John Bogatko, *Stem Cell Research: A Comparative Legal Analysis*, 6 MICH. ST. U.J. MED. & L. 123, 138 (2002).

122. Human Fertilisation and Embryology Act, 1990, c. 37, § 5 (U.K.), *available at* http://www.opsi.gov.uk/Acts/acts1990/ukpga_19900037_en_1.

operates as an independent governmental agency.[123] The HFEA grants and sustains licenses for embryonic research by both public and private entities.[124]

Under the Human Fertilisation and Embryology Act (HFE Act), the HFEA is only authorized to grant licenses for research that is "necessary or desirable for the purpose of providing treatment services,"[125] and "where use of human embryos is essential."[126] The 1990 Act originally restricted embryo research to five permitted purposes related to reproductive medicine: "(a) promoting advances in the treatment of infertility, (b) increasing knowledge about the causes of congenital disease, (c) increasing knowledge about the causes of miscarriages, (d) developing more effective techniques of contraception, or (e) developing methods for detecting the presence of gene or chromosome abnormalities in embryos before implantation . . . ."[127]

Although the HFE Act is the main statute regulating research on human embryos in the United Kingdom, at the time of its original passage, hESC research was not a foreseeable issue.[128] It was not until 1997 that Dr. James Thomson, an American cell biologist, became the first scientist able to successfully derive a hESC line for study.[129] While some hESC research falls under the originally permitted purposes, research into diseases which are neither congenital nor a factor in infertility or miscarriage was not covered.[130] However, the 1990 Act permitted research purposes to be extended by regulations for "authorisation of projects of research which increase knowledge about the creation and development of embryos, or about disease, or enable such knowledge to be applied."[131]

In response to the developments in embryonic research, the Parliament established a Chief Medical Officer's Expert Group to assess benefits, risks, and alternatives of new areas of research using human embryos, and to advise whether this research should be allowed.[132] The group recommended that the research be

123. Riley & Merrill, *supra* note 72, at 5, 146.

124. Rewerski, *supra* note 5, at 421 (citing Office of Public Sector Information: Human Fertilisation and Embryology Act 1990 c. 37, *available at* http://www.opsi.gov.uk/Acts/acts1990/Ukpga_19900037_en_1.htm (last visited Feb. 10, 2010)).

125. Human Fertilisation and Embryology Act, 2008, c. 22 (U.K.). For a comparative a view of the Human Fertilisation and Embryology Act of 1990 with the amendments to the Act enacted in 2008, see U.K. DEPT. OF HEALTH, HUMAN FERTILISATION AND EMBRYOLOGY ACT 1990: AS AMENDED: AN ILLUSTRATIVE TEXT, *available at* http://www.dh.gov.uk/dr_consum_dh/groups/ dh_digitalassets/@dh/@en/documents/digitalasset/dh_080206.pdf [hereinafter 1990 ACT & HFE ACT, ILLUSTRATIVE TEXT].

126. PARLIAMENTARY OFFICE OF SCI. AND TECH., REGULATING STEM CELL THERAPIES 2 (2004) (citing Human Fertilisation and Embryology Act, 2008, c. 22 (U.K.), *available at* http://www.parliament.uk/documents/upload/postpn221.pdf).

127. Human Fertilisation and Embryology Act, 1990, c. 37, sched. 2, para. 3(2) (U.K.).

128. Ryan Morgan, *A Tight Fit? Deficiencies in the Human Fertilisation and Embryology Authority (Research Purposes) Regulations 2001*, 28 STATUTE L. REV. 199, 199–200 (2007) [hereinafter Morgan, *A Tight Fit?*].

129. Ryan Morgan, *Embryonic Stem Cells and Consent: Incoherence and Inconsistency in the UK Regulatory Model*, 15 MED. L. REV. 279, 282 (2007).

130. Human Fertilisation and Embryology Act, 1990, c. 37, sched. 2, para. 3(2) (U.K.).

131. *Id.* para. 3(3).

132. Morgan, *A Tight Fit?*, *supra* note 128, at 201–02 (citing DEPT. OF HEALTH, STEM CELL RESEARCH: MEDICAL PROGRESS WITH RESPONSIBILITY 5 (2000), *available at* http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_4065085.pdf [hereinafter STEM CELL RESEARCH: MEDICAL PROGRESS WITH RESPONSIBILITY]).

permitted.[133] The Human Fertilisation and Embryology (Research Purposes) Regulations 2001 were thus approved, extending the permitted purposes to also allow "(a) increasing knowledge about the development of embryos; (b) increasing knowledge about serious disease, or (c) enabling any such knowledge to be applied in developing treatments for serious disease."[134]

The HFEA prohibits keeping or using any embryo after the appearance of the primitive streak, defined as appearing "not later than the end of the period of 14 days beginning with the day when the gametes are mixed . . . ."[135] The HFEA implemented most of the recommendations of the Warnock Committee,[136] including making certain violations criminal offenses.[137]

The United Kingdom has taken additional actions to increase oversight of hESC research, while actively promoting its advancement.[138] The HFE Act directs the HFEA to set up and maintain a Code of Practice to provide guidance regarding the proper conduct of licensed activities.[139] The ensuing Code of Practice for the Use of Human Stem Cell Lines (Code of Practice) contains specifications for compliance with the law as well as standards of good professional practice,[140] and the HFEA inspects facilities regularly to evaluate their compliance.[141]

In 2003, a National U.K. Stem Cell Bank was established to provide a repository of human stem cell lines and facilitate the sharing of quality-controlled stem cell lines by the clinical and research communities.[142] The Bank is operated within an independent national institution to prevent any conflicts of interest,[143] is overseen by the Stem Cell Steering Committee for the Stem Cell Bank and for the Use of Stem Cell Lines, and is regulated under the Code of Practice.[144] Additionally, a management committee composed of laypersons as well as representatives from

133. *Id.* at 202 (citing STEM CELL RESEARCH: MEDICAL PROGRESS WITH RESPONSIBILITY, *supra* note 132, at 44–48).

134. The Human Fertilisation and Embryology (Research Purposes) Regulations, 2001, S.I. 2001/188, art. 2, para. 2 (U.K.), *available at* http://www.opsi.gov.uk/SI/si2001/20010188.htm.

135. Human Fertilisation and Embryology Act, 1990, c. 37, § 3, para. 4 (U.K.), *amended by* Human Fertilisation and Embryology Act, 2008, c. 22 (U.K.).

136. 1990 ACT & HFE ACT, ILLUSTRATIVE TEXT, *supra* note 125, explanatory note 4. *Compare* Human Fertilisation and Embryology Act, 1990, c. 37, § 3 (U.K.), *amended by* Human Fertilisation and Embryology Act, 2008, c. 22 (U.K.) (listing prohibitions in connection with embryos), *with* the text accompanying footnotes *infra* 105–109 (Warnock recommendations of embryo prohibitions and licensing are similar to the HFE Act).

137. *See* Human Fertilisation and Embryology Act, 1990, c. 37, §§ 3(2), 41 (U.K.), *amended by* Human Fertilisation and Embryology Act, 2008, c. 22 (U.K.) (indicating that it is a criminal offense to place a human embryo in a woman other than by fertilization or to carry out embryonic research without an HFEA license).

138. *See* 1990 ACT & HFE ACT, ILLUSTRATIVE TEXT, *supra* note 125, explanatory note 12 (stating that the 2008 Amendments account for scientific developments and regulation changes, partly due to changes in social attitudes).

139. Human Fertilisation and Embryology Act, 1990, c. 37, § 25 (U.K.), *amended by* Human Fertilisation and Embryology Act, 2008, c. 22 (U.K.).

140. CODE OF PRACTICE FOR THE USE OF HUMAN STEM CELL LINES 5, para. 1 (UK Stem Cell Bank Steering Committee ed., version 3 2006), *available at*_http://www.ukstemcellbank.org.uk/documents/Code%20of%20Practice%20for%20the%20Use%20of%20Human%20Stem%20Cell%20Lines.pdf.

141. Human Fertilisation and Embryology Authority, How We Regulate (Treatment and Research), http://www.hfea.gov.uk/121.html (last visited Jan. 31, 2010).

142. CODE OF PRACTICE FOR THE USE OF HUMAN STEM CELL LINES, *supra* note 140, para. 5, at 8.

143. *Id.* para. 5, at 9.

144. *Id.* at 2.

research, healthcare, regulatory bodies, and the Bank's sponsors, monitors the Bank for observance of the Code.[145] The U.K. Stem Cell Bank is set up to be the preferred source of stem cell lines, but it is not a requirement that researchers access lines exclusively from the Bank.[146] The Steering Committee, however, oversees research involving hESC lines in the United Kingdom regardless of where they are obtained.[147]

Finally, in 2005, the Parliament established a U.K. Stem Cell Initiative (UKSCI) "to ensure that the UK remains one of the global leaders in stem cell research," and to continue the U.K.'s "position of strength in this area."[148] The UKSCI is expected to develop a proposal for U.K. stem cell research to be implemented over ten years in order to identify and preserve its strengths while rectifying its weaknesses.[149]

C. *Comparison of Political and Regulatory Approaches*

The back and forth political struggle over the funding of stem cell research in the United States has prevented a consistent furtherance of hESC science by the federal government.[150] President Obama's expansion of federal funding for stem cell lines created after President Bush's cut-off date will no doubt allow for federal funding on an increased number of stem cell lines,[151] and in turn could also encourage more private investment.[152] However, the proposed strict eligibility standards required by informed consent rules could exclude many of the stem cell lines already created, even some allowed under President Bush's policy.[153] This is only one example of the problems encountered in a system in which there is no consistency. The state of the science is upstream,[154] and the uncertainty over the pace of the development combined with the political and regulatory volatility will likely

145. *See* Med. Research Council, U.K. Stem Cell Bank, Management Committee, http://www.mrc.ac.uk/Ourresearch/Ethicsresearchguidance/Stemcellbank/Managementcommittee/index.htm (last visited Jan. 31, 2009) (stating that one of the terms of reference for the committee is to "[e]nsure compliance with the Steering Committee's Code of Practice for the Bank and other relevant national regulatory and legal requirements and guidelines").

146. CODE OF PRACTICE FOR THE USE OF HUMAN STEM CELL LINES, *supra* note 140, para. 8.3, at 14.

147. *See id.* (stating that all researchers must "inform the Steering Committee through the application procedure").

148. U.K. STEM CELL INITIATIVE, REPORT & RECOMMENDATIONS 5 (2005), *available at* http://www.advisorybodies.doh.gov.uk/uksci/uksci-reportnov05.pdf.

149. *Id.*

150. *See* Charo, *supra* note 80, at A26 (mentioning the different funding policies and consequences of the Bush and Obama administrations).

151. Exec. Order No. 13505, 74 Fed. Reg. 10,667 (Mar. 11, 2009).

152. *See, e.g.*, Guatam Naik & Robert Lee Holtz, *Obama's Promise on Stem Cells Doesn't Ensure New War on Disease*, WALL ST. J., Nov. 25, 2008, at A9 (explaining that President Obama's relaxation of restrictions may "possibly encourage more companies to wade into stem-cell medicine"); *Millipore Corporation Supports Presidential Order On Stem Cell Research*, MED. NEWS TODAY, Mar. 11, 2009, *available at* http://www.medicalnewstoday.com/articles/141790.php (global life science industry corporation supporting President Obama's executive order).

153. Charo, *supra* note 80, at A26.

154. *See* Robertson, *Embryo Culture*, *supra* note 44, at 2 (indicating that hESCs are not themselves readily marketable, thus making it hard for hESC research to attract private development funds).

continue to constrain advances in this field from even privately funded projects.[155] Despite almost universal endorsement from the scientific community, the political struggle over moral concerns in the United States prevents the nation from truly encouraging scientific and medical progress and staying competitive in this regard within the international community.[156]

The United Kingdom has instead chosen to deal with moral concerns practically, by implementing enhanced regulations to be followed under threat of criminal violation, setting up oversight bodies independent from the government with significant lay membership, and following the advice of medical advisors.[157] Rather than modifying the moral status accorded to an embryo depending on the political administration currently in power, the government has committed to pursue the promising potential of this research, while designing a system to effectively guard against the fears involved.[158] Scientists have wisely submitted to strict oversight in exchange for permission to conduct this research.[159] The government has implemented regulatory bodies that impose consistent eligibility requirements, thereby enhancing uniformity and predictability.[160] The United Kingdom has thus developed a consistent and progressive approach and has demonstrated its dedication to the continued progressive furtherance of this field with the U.K. Stem Cell Initiative Project.[161]

IV. THERAPEUTIC CLONING

A. *The United States*

The notion of therapeutic cloning has drawn intense reaction in the United States. President George W. Bush "strongly opposed cloning" of any type, stating that he "recoil[ed] at the idea of growing human beings for spare body parts, or creating life for our conveniences," and claiming that most Americans felt similarly.[162]

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155. *See* Okarma, *supra* note 47 (finding that "without public funding of basic research on stem cells, progress toward medical therapies is likely to be hindered"); GUIDELINES FOR HUMAN EMBRYONIC STEM CELL RESEARCH, *supra* note 20, at 19 (describing the consequences resulting from the "uncertain funding and regulatory climate"); *see also* COMM. ON THE BIOLOGICAL AND BIOMEDICAL APPLICATIONS OF STEM CELL RESEARCH, BD. ON LIFE SCI. NAT'L RESEARCH COUNCIL, BD. ON NEUROSCI. AND BEHAVIORAL HEALTH INST. OF MED., STEM CELLS AND THE FUTURE OF REGENERATIVE MEDICINE 57 (Norman Grossblatt ed., 2002).

156. *See* Robertson, *Embryo Culture*, *supra* note 44, at 3–5 (discussing how the restraints on the NIH due to the United States "culture of life" and related funding restrictions has slowed developments in the field and caused the United States to be unable to compete with countries such as the United Kingdom, Singapore, China, and South Korea).

157. *See* Riley & Merrill, *supra* note 72, at 51–60 (discussing the establishment of the HFEA as an independent regulatory body as well as its structure and function, including specific rules and regulations for licensing and use of genetic material).

158. *See id.* at 41–43 (discussing how the Warnock Commission approached the relevant moral concerns).

159. *Id.* at 48–49.

160. *Id.* at 63.

161. Belew, *supra* note 111, at 480.

162. Press Release, Office of the Press Sec'y, President Discusses Stem Cell Research (Aug. 9, 2001),

An important distinction from the debate concerning research on spare embryos is that the debate over SCNT concerns whether to make therapeutic cloning *illegal*, not just whether to withhold federal funding.[163] A Human Cloning Prohibition Act, which would make SCNT illegal regardless of the funding source, was passed by the House of Representatives in 2001 and in 2003, but failed to clear the Senate both times, rendering the movement so far ineffective.[164]

The use of therapeutic cloning has been condoned by several advisory groups in the United States, "provided that such research is conducted according to established safeguards," whereas reproductive cloning has been considered unacceptable by nearly unanimous agreement.[165] The National Academies of Science advocates that therapeutic cloning may actually be more ethically acceptable than the creation of embryos for research purposes through in vitro fertilization (IVF), since it results from an asexual process that does not involve fertilization of an egg by a sperm.[166]

SCNT is not prohibited by the federal government, and only five states, Arkansas, Indiana, Michigan, South Dakota, and North Dakota, have banned it.[167] President Obama's executive order lifting the Bush administration restrictions on federal funding for hESC research has presumably left the door open for federal funding of research on embryos created through SCNT[168] if Congress declines to adopt the Dickey Amendment language on the next appropriations bill. But despite President Obama's public support of therapeutic cloning during his presidential campaign,[169] the NIH Proposed Guidelines specifically forbid funding for research using hESCs derived through therapeutic cloning.[170] The guidelines reiterate that the Dickey Amendment prohibits funding the creation of new stem cells from human embryos.[171]

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http://georgewbush-whitehouse.archives.gov/news/releases/2001/08/20010809-2.html.

163. Korobkin, *supra* note 19, at 60 (citing Human Cloning Prohibition Act of 2001, H.R. 2505, 107th Cong.; Human Cloning Prohibition Act of 2003, H.R. 534, 108th Cong.).

164. *Id.*

165. GUIDELINES FOR HUMAN EMBRYONIC STEM CELL RESEARCH, *supra* note 20, at 2. "Reproductive cloning . . . clones a person's cells with the intent of placing the resulting embryo in the uterus in order to bring about the birth of a child with that genome." Robertson, *Two Models of Human Cloning, supra* note 16, at 615.

166. *Id.* at 16.

167. Korobkin, *supra* note 19, at 60 (citing ARK. CODE ANN. § 20-16-1002 (2005); IND. CODE §§ 16-18-2-56.5, 21-3-4, 16-34.5, 25-22.5-8-5, 35-46-5-2 to -3; MICH. COMP. LAWS §§ 333.16274–333.16275; N.D. CENT. CODE § 12.1-39-02 (Supp. 2007); S.D. CODIFIED LAWS §§ 34-14-26 to -28 (2004)).

168. *See* Exec. Order No. 13,435, § 2, 72 Fed. Reg. 34,591 (June 20, 2007), *available at* http://www.whitehouse.gov/the_press_office/Removing-Barriers-to-Responsible-Scientific-Research-Involving-Human-Stem-cells/ (permitting the NIH to "support and conduct responsible, scientifically worthy human stem cell research, including hESC research, to the extent permitted by law").

169. Charo, *supra* note 80, at A6.

170. NIH Proposed Guidelines, *supra* note 78, § IV, para. B.

171. *Id.* § IV, para. A.

B. *The United Kingdom*

The United Kingdom embraced the promise of therapeutic cloning early on.[172] It was initially unclear whether the HFE Act encompassed the technology used for SCNT.[173] The drafters of the HFE Act foresaw the prospect of cloning, but they assumed that it would involve an embryo.[174] Instead, SCNT was accomplished by replacing the nucleus of an egg cell with an adult somatic cell nucleus and then stimulating the egg cell to act as though it had been fertilized.[175] The statute, which handled "embryos," did not clearly encompass this new technology.[176]

In 1997, the HFEA and the Human Genetics Advisory Commission joined to examine the implications of cloning on science, resulting in a proposed ban on reproductive cloning while allowing therapeutic cloning to occur with the proper licensing procedure.[177] The government drafted a regulation to this effect.[178] The Pro-Life Alliance subsequently filed a lawsuit, seeking a resolution that SCNT, known as Cell Nuclear Replacement, or CNR, in British writings, did not produce an "embryo" within the definition under the Act.[179] The appellate court recognized that this use was a stretch of the statute, but allowed it under the justification that embryos created by CNR were essentially identical to those created by fertilization as far as structure is concerned, and each is capable of developing into a full grown form of the relevant species.[180]

Concerns that permitting therapeutic cloning might open the door to reproductive cloning led to the Human Reproductive Cloning Act of 2001.[181] But in the same year, the United Kingdom became the first nation to pass a law allowing human cloning for hESC research purposes.[182] This law amended the 1990 Act, and although debate over its passage spurred fervent opposition from religious leaders,[183] it passed after only seven hours of debate by a vote of 212 to 92.[184] Members who originally opposed the law were swayed by guarantees that a committee of experts

172. Plomer, *supra* note 30, at 144.

173. Riley & Merrill, *supra* note 72, at 49.

174. *Id.*

175. *Id.*

176. *Id.*

177. Plomer, *supra* note 30, at 141–42.

178. *Id.* at 146 (citing The Human Fertilisation and Embryology (Research Purposes) Regulations, 2001, S.I. 2001/188 (U.K.), *available at* http://www.opsi.gov.uk/SI/si2001/20010188.htm).

179. Regina v. Secretary of State for Health *ex parte* Quintavalle (on behalf of Pro-Life Alliance) [2003] UKHL 13, [2003] 2 All E.R. 625, paras. 1, 2, 5 (appeal taken from Eng.) (U.K.), *available at* http://www.publications.parliament.uk/pa/ld200203/ldjudgmt/jd030313/quinta-1.htm.

180. *Id.* para. 14.

181. Human Reproductive Cloning Act, 2001, c. 23 (U.K.); BIMAL CHAUDHARI, THE PARLIAMENTARY OFFICE OF SCI. AND TECH., REGULATING STEM CELL THERAPIES 2 (2004), *available at* http://www.parliament.uk/documents/upload/postpn221.pdf.

182. Jason H. Casell, *Lengthening the Stem: Allowing Federally Funded Researchers to Derive Human Pluripotent Stem Cells From Embryos*, 34 U. MICH. J.L. REF. 547, 571 (2001); *After Vigorous Debate Great Britain Becomes First Nation to Legalize Cloning Stem Cells from Human Embryos*, TRANSPLANT NEWS, Jan. 31, 2001 [hereinafter *After Vigorous Debate*].

183. *Id.*

184. *See* 621 PARL. DEB., H.L., (5th ser.) (Jan. 1, 2001) 122, *available at* http://www.publications.parliament.uk/pa/ld200001/ldhansrd/vo010122/text/10122-04.htm#10122-04_head2 [hereinafter House of Lords Debate] (documenting the seven hours of debate that ended with the vote).

would meticulously monitor ethical and scientific aspects.[185] Additionally, "Prime Minister Tony Blair had argued vigorously that permitting the research would allow Britain to stay at the forefront of the booming biotechnology industry."[186] Finally, the Lords agreed that the ethical issues should be debated by the special expert committee later, side-stepping more intense debate and helping the amendment to pass.[187]

In 2004, the HFEA granted its first license to researchers to conduct research using therapeutic cloning.[188] Under the HFE Act, bringing about the creation of an embryo, except in furtherance of a license granted by the HFEA, is prohibited.[189]

C. *Comparison of Therapeutic Cloning Policies*

Although President Obama endorsed therapeutic cloning during his campaign, the Obama administration's policy has been criticized for taking "the easy political path," due to its refusal to fund research on stem cell lines created for the purpose of disease-specific study.[190] President Obama has neither called for abolition of the Dickey Amendment nor advocated explicitly for an expansion of funding for this research, instead passing the buck to the NIH and Congress,[191] giving them free reign to do as they wish.[192] Despite approval and acceptance of SCNT by the NAS and other accredited scientific groups,[193] the U.S. government has yet to endorse therapeutic cloning.[194] This is a significant handicap given the immense benefits of conducting research on lines created through SCNT. Researchers in the United States, unlike in the United Kingdom, are prevented from utilizing federal funding to create disease-specific lines, a valuable endeavor.[195] As discussed in regards to hESC research generally, progress is likely to be constrained because the science is not yet

185. *Id.* at cols. 30, 32, 65, 71, 79, 112, 120; *After Vigorous Debate*, *supra* note 182 (describing how the creation of a select committee allayed moral and ethical concerns associated with the research).

186. *Id.*

187. *See* House of Lords Debate, *supra* note 184, cols. 109, 121 (discussing the proposal to vote immediately on the new regulations and let a Select Committee report on the issues raised by human cloning and stem cell research).

188. *HFEA Approves License for Therapeutic Cloning*, PHG FOUNDATION, Aug. 11, 2004, http://www.phgfoundation.org/news/1397/; Luk, *supra* note 5, at 524 (citing Stephen Pincock, *UK Grants Cloning License: Group Given Permission to Undertake Cell Nuclear Transfer*, SCIENTIST (Aug. 12, 2004), *available at* http://www.biomedcentral.com/news/20040812/04/).

189. Human Fertilisation and Embryology Act, 2008, c. 22, Part 1, § 4(2)(2)(b) (U.K.).

190. Charo, *supra* note 80, at A26.

191. James W. Fossett, *Beyond the Low-Hanging Fruit: Stem Cell Research Policy in an Obama Administration*, 9 YALE J. HEALTH POL'Y, L. & ETHICS 523, 537 (2009); Sheryl Gay Stolberg, *Obama Is Leaving Some Stem Cell Issues to Congress*, N.Y. TIMES, Mar. 9, 2009, at A1.

192. *See* Stolberg, *supra* note 191 (stating that President Obama left the question of whether to appeal the Dickey Amendment up to Congress, and that he would "ask the National Institutes of Health to come up with new stem cell research guidelines within 120 days").

193. Gardiner Harris, *Some Stem Cell Research Limits Lifted*, N.Y. TIMES, Apr. 17, 2009, at A13.

194. *See id.* (explaining that the Guidelines proposed by the NIH would not fund therapeutic cloning).

195. Rob Stein, *US Set to Fund More Stem Cell Study*, WASH. POST, Dec. 3, 2009 ("Some proponents of the research criticized the guidelines for not going further and allowing, for example, federal funds to be used to create embryos . . . by cloning techniques. Federal funds are also still barred by Congress from being used to create the cell lines.").

producing marketable products, and because of the lack of consistent regulation and oversight associated with private and state funding.[196]

In the United Kingdom, as with research involving embryo destruction, the government's commitment to scientific progress has prevailed over moral objections and fear of misuse. Original opponents of therapeutic cloning have been quelled by the scientific community's willingness to undergo strict oversight and regulation.[197] Further, the HFE Act and implementing regulations protect against abuse and work to ensure that all research in this regard is necessary to achieve a specific goal designated as worthy.[198] As with hESC research on existing embryos, the Parliament took a utilitarian approach, recognizing that the moral status of the embryo was not an issue it could reach a consensus on, and instead chose to focus on how best to promote this worthy science while providing some moral boundary and guarding against misuse.[199] Unlike the U.S. presidents, Prime Minister Blair assertively called on the nation to remain a world leader in promoting this science, reminding the Parliament and the public of these goals.[200] The government's uniform and consistent endorsement of such research is instrumental in keeping the United Kingdom at the forefront.

V. CHIMERAS

A. *The United States*

The United States has seen significant attempts at preventing the use of chimeras in research, whether publicly or privately funded.[201] However, no prohibitions have yet been enacted on the creation of chimeras with private funds. Two bills were introduced in Congress in 2005, referred to as the Brownback Bills and officially titled the Human Chimera Prohibition Act of 2005; however, both have yet to come to a vote.[202] While the Food and Drug Administration has asserted controversial jurisdiction over cloning,[203] it has not yet extended its reach to chimeras.[204]

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196. *See supra* § III(A) (detailing these problems with respect to hESC research).

197. Nicholas Wade, *Stem Cell Studies Advance in Britain*, N.Y. TIMES, Aug. 14, 2001, http://www.nytimes.com/2001/08/14/us/stem-cell-studies-advance-in-britain.html.

198. *See* Human Fertilisation and Embryology Act, 2008, c. 22, sched. 2, § 6(3A)(1)(a) (U.K.) (stating that the HFE Act is only authorized to grant licenses for research that is "necessary or desirable" for any of the principle purposes delineated in the HFE Act, such as providing treatment services).

199. *See* House of Lords Debate, *supra* note 184 (expanding the use of stem cells beyond infertility research, to research on serious genetic diseases such as Parkinson's).

200. Gaby Hinsliff, *Blair to Defy Bush Over Stem Cells*, GUARDIAN, July 30, 2006, at 7, http://www.guardian.co.uk/science/2006/jul/30/genetics.usnews.

201. Stephen R. Munzer, *Human-Non Human Chimeras in Embryonic Stem Cell Research*, 21 HARV. J.L. & TECH. 123, 155 (2007) (stating that the President's Council on Bioethics, for example, recommended a prohibition on production of a hybrid human-animal embryo).

202. Human Chimera Prohibition Act of 2005, S. 659, 109th Cong. (1st Sess. 2005) (last major congressional action: referral to S. Comm. on the Judiciary on Mar. 17, 2005); Human Chimera Prohibition Act of 2005, S. 1373, 109th Cong. (1st Sess. 2005) (last major congressional action: referral to S. Comm. on the Judiciary on July 11, 2005).

203. *See* Munzer, *supra* note 201, at 163 (citing Gregory N. Mandel, *Gaps, Inexperience, Inconsistencies, and Overlaps*, 45 WM. & MARY L. REV. 2167, 2209, n. 229 (2004) (explaining that FDA has

Under the draft NIH Guidelines, federal funding is explicitly prohibited for research in which human stem cells are introduced into non-human primate embryos,[205] as well as research involving the breeding of animals where the introduction of hESCs or human induced pluripotent stem cells may have contributed to the germ line, even if the original cells were derived in a way consistent with the Guidelines.[206]

B. The United Kingdom

Regarding the use of chimeras, the United Kingdom has taken a progressive lead as usual.[207] In 2007, the HFEA held a public consultation on the scientific, ethical, and social implications of creating human-animal embryos in research, focused on gathering information and providing a "forum for the public to engage in an informed debate."[208] As a result, the HFEA issued a report in which it determined that "hybrid research should be allowed to move forward, with caution and careful scrutiny."[209] The HFEA provided that in order to qualify for a license, researchers will have to "demonstrate, to the satisfaction of an HFEA license committee, that their planned research project is both necessary and desirable. They must also meet the overall standards required by the HFEA for any embryo research."[210] On January 17, 2008, the HFEA announced its approval of two applications to carry out research using human-animal embryos.[211]

C. Comparison of Policies Relating to Research on Chimeras

Similar to therapeutic cloning, the United States refuses to provide federal funding for research involving chimeras.[212] It has so far left the possibility open to private and state investors to undertake research using this technology.[213] Again, the

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exerted authority over transgenic animals)).

204. Kopinski, *supra* note 26, at 620 (citing ERIK PARENS & LORI P. KNOWLES, REPROGENICS AND PUBLIC POLICY: REFLECTIONS AND RECOMMENDATIONS 17, 12 (The Hastings Ctr. 2003), *available at* http://www.thehastingscenter.org/uploadedFiles/Publications/Special_Reports/reprogenetics_and_public_policy.pdf).

205. NIH Proposed Guidelines, *supra* note 78, § IV, para. A.

206. *Id.*

207. *See* Belew, *supra* note 111, at 480 ("For the past fourteen years, the United Kingdom has had a progressive and well-developed embryonic research licensing and regulatory regime.").

208. Shirley Harrison, *Foreword* to HUMAN FERTILISATION AND EMBRYOLOGY AUTHORITY, HYBRIDS AND CHIMERAS: A REPORT ON THE FINDINGS OF THE CONSULTATION (2007), *available at* http://www.hfea.gov.uk/docs/Hybrids_Report.pdf.

209. *Id.*

210. HUMAN FERTILISATION AND EMBRYOLOGY AUTHORITY, HYBRIDS AND CHIMERAS: A REPORT ON THE FINDINGS OF THE CONSULTATION § 7.3 (2007), *available at* http://www.hfea.gov.uk/docs/Hybrids_Report.pdf [hereinafter HYBRIDS AND CHIMERAS: A REPORT].

211. HFEA Statement on Licensing of Applications to Carry Out Research Using Human-Animal Cytoplasmic Hybrid Embryos (Jan. 17, 2008), http://www.hfea.gov.uk/418.html.

212. NIH Proposed Guidelines, *supra* note 78, § IV, para. B.

213. Kopinski, *supra* note 26, at 631 (citing THE PRESIDENT'S COUNCIL ON BIOETHICS, REPRODUCTION AND RESPONSIBILITY: THE REGULATION OF NEW BIOTECHNOLOGIES 132 (2004), *available at*_http://www.bioethics.gov/reports/reproductionandresponsibility/_pcbe_prepub_reproduction_

federal government has witnessed stunted attempts to take the extreme position of banning chimera research altogether.[214] The United States has failed to coordinate a utilitarian solution to opposing viewpoints, and thus by default pursues a sort of middle ground, whereby chimera research is permitted on a private and possibly state level, but not truly encouraged, funded, or regulated on the federal level.[215] Again, the political and regulatory uncertainty in the United States and the upstream nature of possible scientific advancement mean that the lack of federal funding will significantly hamper potential developments utilizing chimera research.

The United Kingdom, in contrast, has again taken a committed stance to further research involving chimeras within certain constraints designed to overcome moral concerns. As with the debates following the Warnock Report, the government embraced public disagreement and provided a forum for discussion, allowing the public to voice concerns and express sentiments.[216] Leaders again focused on gathering information and ensuring that debates were informed, rather than simply unapprised expressions of moral feeling, and the HFEA reached a pragmatic decision based on these debates.[217] The United Kingdom again relies on the careful oversight of the HFEA,[218] an impartial body composed of medical professionals as well as laypersons, and requires researchers to demonstrate that their projects are both necessary and desirable, assuring others that this research is conducted for only worthy pursuits.[219] This approach recognizes both the economic and medical promise of encouraging research which utilizes new techniques such as chimeras. The government's stance also pursues consistent encouragement of this science while retaining a high level of control against abuse.[220]

VI. FACTORS BEHIND DIFFERENCES IN U.S. AND U.K. POLICY

A. *Cultural, Political, and Healthcare Climates*

Studying the factors behind the divergent systems in the United States and the United Kingdom may help us understand each country's developments and shed light on whether it would be feasible for the United States to adopt some of the features of the U.K.'s progressive system. Many speculative reasons have been

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and_responsibility.pdf).

214. *Id.* at 644.

215. *Id.* at 642–43 (explaining the absence of legislation regarding chimeras).

216. *See* Harrison, *supra* note 208 (describing the design of a forum for the public to engage in an informed debate regarding the use of human-animal embryos for research purposes).

217. *See* HYBRIDS AND CHIMERAS: A REPORT, *supra* note 210, §§ 4.10–4.14 (discussing the debates and polls necessary to make decisions).

218. Harrison, *supra* note 208.

219. *See* Human Fertilisation and Embryology Authority, Human Embryo Research, http://www.hfea.gov.uk/119.html (last visited Jan. 31, 2009) (explaining that the HFEA initiates a peer review process to determine whether the proposed research meets statutory requirements, and that the research using human embryos fulfills the statutory aims and objectives).

220. *See* Human Fertilisation and Embryology Authority, Authority Paper—Licensing of Embryo Testing, http://www.hfea.gov.uk/docs/AM_Item_12_March09.pdf.pdf (last visited Jan. 29, 2010) (stating the primary advantages and disadvantages of the HFEA approach).

advanced—this analysis focuses on the more prominent differences likely to have played a role.

The disparities in the economic and healthcare climates between the two countries are a major cause of the differences. In the realms of healthcare and biotechnological innovation, the United States has a long history of a free market approach, delegating risk and reward to private actors rather than the state.[221] The United Kingdom, in contrast, has celebrated its culture of state responsibility in these realms and is committed to taking care of its citizens—including taking responsibility for innovations.[222]

A related reason for the differences may be seen as cultural. While the debate in the United States has revolved primarily around the moral status of the embryo, the main consideration in the United Kingdom has been a concern over unsupervised research.[223] Indeed, this fear led the Warnock Commission to consider violations of regulations serious enough to call for not just loss of funding, but criminal sanctions.[224] The scientific community's assent to undergo strict regulation is a significant factor permitting progressive allowance of research in the United Kingdom.[225] "Ceding oversight to a licensing agency went against the grain for many scientists, but by surrendering this ground, and then demonstrating though the VLA that oversight could work, the science lobby was able to quell public fears about unsupervised research."[226]

Finally, political environments vary largely between the dual-party system of the United States and the parliamentary system of the United Kingdom. In the United States, "[a]greement can be very difficult to achieve when the White House and Congress, or the House and Senate, are controlled by different parties. Even when the political branches are controlled by the same party, party discipline is generally weaker in parliamentary systems like Great Britain's."[227] Additionally, party control stayed considerably more stable during the relevant time period in the United Kingdom than in the United States, allowing for movement in one direction.[228]

B. Similar Concerns and Different Solutions

It is worth noting that policymakers in both countries have recognized a special moral status for the embryo between that of a fully formed human and a cluster of

221. Sheila Jasanoff, *Trading Uncertainties: The Transatlantic Divide in Regulating Biotechnology*, 6 CESIFO DICE REP. 36, 38 (2008).

222. *Id.*

223. The Administration's Human Embryonic Stem Cell Research Funding Policy, *supra* note 32; *see* HYBRIDS AND CHIMERAS: A REPORT, *supra* note 208, §§ 3.2, 3.4 (discussing U.S. restrictions on research); *see also id.* § 3.1 (discussing U.K. restrictions on research).

224. *See* WARNOCK, *supra* note 98, paras. 11.18–11.22 (recommending that any unauthorized use of an in vitro embryo, either without license or beyond fourteen days after fertilization, would constitute a criminal offense).

225. Riley & Merrill, *supra* note 72, at 48–49.

226. *Id.*

227. *Id.* at 6–7.

228. *Id.*

cells.[229] Scientific and ethical inquiry committees and political representatives in both countries have recognized that the public's views vary between two extremes: that of utmost regard for the status of an embryo and that of a social obligation to utilize medical potential to do good.[230] However, the United States and the United Kingdom differ greatly in their handling of this universal impasse and their consequent approaches toward political treatment.[231]

The United Kingdom has reacted to this inherent dilemma by side-stepping the moral debate and instead working toward a utilitarian approach that binds all. After accepting that an embryo has a special moral status, deserving of some, but not absolute protection,[232] policymakers addressed concerns over moral issues by increasing centralized regulatory oversight.[233] Scientists and researchers accepted that they must cede to this oversight in order to obtain funding and continue scientific advancement. In addition, the United Kingdom bestowed ultimate oversight and control on an independent body comprised of medical specialists to provide valuable insight, as well as significant lay representation to maintain the public's trust.[234]

The United States has instead responded to the ethical quandary by imposing restrictions on federal funding, generally leaving it up to states and private organizations to make their own determinations on otherwise unfunded activities and research.[235] This is consistent with a general U.S. pattern of leaving regulation to individual states and industries to handle according to their divergent convictions.[236]

Many hail the U.K.'s progressive approach toward stem cell research technology, claiming that its policies will allow it to "take the global lead in biomedical technology."[237] Some advocate that the United States should adopt a similar system, or at least move in the direction of expanding government regulation and vesting control in one independent body.[238] They argue that the lack of regulations puts the United States at a technological and economic disadvantage,[239] leaves an undesirable patchwork of state regulation,[240] and permits abuse.[241] Many,

229. *Id.* at 16, 24, 44.

230. *Id.* § 4.

231. *See* Jasanoff, *supra* note 221, at 37–39 (outlining the differences between the U.S.'s market- or product-based approach and the more regulatory, process-driven approach taken by the United Kingdom).

232. WARNOCK, *supra* note 98, paras. 11.17–11.18.

233. *See* WARNOCK, *supra* note 98, paras. 13.2–13.3 (discussing need for moral and ethical constraints through centralized regulation); Riley & Merrill, *supra* note 72, at 51–52 (crediting the Warnock Report as influencing HFEA).

234. CODE OF PRACTICE FOR THE USE OF HUMAN STEM CELL LINES, *supra* note 140, para. 6.3, at 11.

235. Rewerski, *supra* note 5, at 420 (citing JUDITH A. JOHNSON & ERIN WILLIAMS, CONG. RES. SERV., CRS REPORT FOR CONGRESS NO. RL31015, STEM CELL RESEARCH 13 (2004)).

236. Jasanoff, *supra* note 221, at 38.

237. Luk, *supra* note 5, at 526.

238. *See generally* Franco Furger & Francis Fukuyama, *A Proposal for Modernizing the Regulation of Human Biotechnology*, 37 HASTINGS CENTER REP. 16, 16–20 (2007) (proposing a new federal regulatory system utilizing more specific instructions by Congress and the establishment of a new independent, accountable, and authoritative regulatory agency).

239. *See, e.g.*, Stevens, *supra* note 2, at 645–49 (cautioning that countries which will benefit from scientific advance are the ones who encourage, rather than hinder its progress, and describing problems experienced by researchers in the United States due to the lack of federal funding and benefits of relocating in the United Kingdom).

240. *See, e.g., id.* at 645, 651 (discussing legislation by some states to ban embryonic stem cell research, and its risk to universities within one of those states).

however, maintain that due to the philosophical, political, legal, and healthcare climate differences between the two countries, the British system is simply not feasible in the United States.[242] Still, if the United States wants to stay competitive in this field and benefit from hESC research, the federal government needs to actively support this science.

VII. CONCLUSION

As embryonic stem cell research continues to progress, nations must address challenging moral and logistical issues arising from new technologies. The United States employs a decentralized system with little federal regulatory authority and broad discretion left to states and private entities. In contrast, the United Kingdom utilizes a centralized, independent body, enabling it to act more quickly and predictably. The United Kingdom has become a world leader in stem cell research, with a progressive stance towards the development of revolutionary techniques. U.S. policy has progressed more slowly, with shifting and unpredictable policy decisions by the government. While the U.S. government has not directly hindered hESC research, it has not acted to significantly advance it.

To some, it may seem counterintuitive that the United Kingdom, with its stringent regulatory and licensing standards, would be more effective at encouraging research than the United States and its relatively lax, unrestrictive approach. However, considering the state of the science in this field, the level of uncertainty created by the lack of uniformity and oversight, and the benefits of comprehensive regulation, the federal government needs to play an active role in this area if it wants to see real, competitive progress.

Wholesale adoption of the U.K. regulatory model may be infeasible in the United States, given the inherent differences in the cultural, political, and medical climates of the two countries. Nevertheless, if the United States wishes to advance hESC research, both to improve medical treatment and to stay competitive internationally, it should take some cues from the history and policy of the United Kingdom. The United States must vest more control, or at least influence, in independent, accredited scientific bodies and take a more progressive stance that encourages hESC research.

241. *See, e.g., id.* at 649–50 (describing potential examples of abuse made possible by unregulated private funding, including cloned embryo implantation).

242. *See generally* Riley & Merrill, *supra* note 72 (concluding that the two countries' political, legal, and medical landscapes differ in ways that would make operation of the British system in the United States challenging and even imprudent); John A. Robertson, *The Virtues of Muddling Through*, 37 HASTINGS CENTER REP. 26, 26 (2007) (arguing that our "nonsystem" system works as well as policy proposals to create a national entity to oversee the assisted reproduction field).

How Property Rights Are Affected by the Texas-Mexico Border Fence: A Failure Due to Insufficient Procedure

NICOLE MILLER*

Abstract

The project pursued in this paper is a normative and positive discussion of the procedural failings of the Department of Homeland Security (DHS) in acquiring property for construction of the Texas-Mexico border fence. The factual situation is unique and informs what the procedure ought to be, why, and how existing procedure has been insufficient, and the degree to which process may mitigate the damage to property rights and the secondary harms that result from threats to such rights.

SUMMARY

* J.D. candidate at The University of Texas School of Law (2010). B.A., Interdisciplinary Studies in the Humanites, with Honors, Stanford University (2005). Nicole would like to thank Professor Jane Cohen, Professor Dan Rodriguez, Denise Gilman, Joyce Men, and the *Texas International Law Journal.*

I. INTRODUCTION

In 1996, the U.S. government ordered the construction of a border fence between the United States and Mexico to reduce illegal entry of people and narcotics from Mexico into the United States. With that mandate, Congress gave the Attorney General—and later the Secretary of Homeland Security—authority to seize, if necessary, private property through eminent domain. That mandate has resulted in the construction of an eighteen-foot high fence at certain segments of the U.S.-Mexico border, intersecting the private property of landowners, many of whose families have held the land for generations.

This paper examines how the Department of Homeland Security (DHS) has implemented its construction mandate, looking specifically at the impact on private property rights and the secondary harms that result from threats to those rights. The focus of this paper is not to challenge the value of the policy choice of the border fence itself, but rather to evaluate and question the process by which the DHS has acquired property in execution of this mandate and how it has decided where along the border to construct segments of the fence. This paper concludes that the policies employed by the DHS, as well as the Congressional mandate, lack sufficient procedural safeguards to protect the rights of property owners.

Congress has mandated that the DHS construct 700 miles of fencing along the U.S.-Mexico border, 370 miles of which were to be completed by the end of 2008. However, the DHS Secretary has exclusive discretion to determine the location of the fencing, the process by which those location decisions are to be made, and how the land for the border fence is to be acquired.

While detailed policies and procedures exist to measure the impact of government actions on the environment or Native American lands, no similar processes have been established to measure the impact of government actions on property owners or property rights. Indeed, there are no standard or formal procedures by which the land acquisition process should proceed. All of these factors contribute to insufficient due process for property owners at the Texas-Mexico border.

Although Congress has required border fencing along the Mexican border in California, Arizona, New Mexico, and Texas, the focus of this paper is on Texas because of the consequences of some of the takings of private property there.[1] The federal government, through the DHS and in the interest of national security, has:

1. Most of the land along the border in California, Arizona, and New Mexico was designated as

(1) acquired private property, on which landowners reside;

(2) built an eighteen-foot tall steel fence along only some segments of the border, but not on others;

(3) severed properties in some instances, thereby leaving portions of a single property on separate sides of the fence; and

(4) in the process, has separated families, cultures, and land.

These features have particular relevance when evaluating and characterizing the procedural failures of the border fence project, the harms that have resulted, and the normative solutions.

In the Section II of this paper, I will explain the legislative background of the Border Fence, as well as provide information on the formation and reorganization of the DHS, the agency responsible for executing the border fence project. The internal structure of the DHS can offer a positive explanation of its capacity to provide due process. In the Section III of this paper, I will offer evidence of the means by which the DHS has carried out the subject mandate—how it has acquired property, how it has interacted with property owners, and how property rights were violated and the harms that resulted in those instances. In the Section IV of this paper, I will characterize those particular dealings as procedural failings and offer suggestions for the types of procedures that need to be implemented. I will explore the harms caused to property owners because of the absence of sufficient safeguards, and I will offer suggestions on the types of procedures that should be implemented. My solutions include two categories: reason-giving and negotiation procedures.

II. STATUTORY BACKGROUND OF THE BORDER FENCE AND THE DEPARTMENT THAT MUST IMPLEMENT IT—THE DHS

A. Border Fence Enabling Legislation and Source of Land Acquisition Authority

Responsibility for the construction of the border fence is vested in the U.S. Border Patrol, which is a division of U.S. Customs and Border Protection (CBP), an agency within the DHS.[2] In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which as originally enacted required the Attorney General (AG) to construct fencing in the border area near San Diego, California.[3]

The actual construction of the fence has been implemented under an agreement between CBP and the U.S. Army Corps of Engineers (Corps).[4] Under this

federal property by President Theodore Roosevelt, under the "Roosevelt Reservation." Consequently, the scope of government takings was far less significant and prevalent than it is at the Texas border. CHAD C. HADDAL, YULE KIM, & MICHAEL JOHN GARCIA, BORDER SECURITY: BARRIERS ALONG THE U.S. INTERNATIONAL BORDER, CONG. RESEARCH SERV., RL 33659, at 17–18 (Mar. 16, 2009) [hereinafter CRS REPORT].

2. *Id.* at 1.

3. Omnibus Consolidated Appropriations Act, of 1997, Pub. L. No. 104-208, 110 Stat. 3009-546, Div. C, § 102 (B)(1).

4. CRS REPORT, *supra* note 1, at 18.

agreement, after CBP acquires the land, the Corps conducts engineering studies for the construction and in some instances actually provides the manpower for construction.[5] At other times the military or state National Guards have provided the labor.[6] Since 2008, however, private contractors have been responsible for constructing the fence.[7]

IIRIRA gives the Secretary[8] authority to "contract for or buy any interest in land, including temporary use rights, adjacent to or in the vicinity of an international land border when the [Secretary] deems the land essential to control and guard the boundaries and borders of the United States."[9]

The Fifth Amendment Takings Clause requires: 1) a government taking of private property be for a "public use," and 2) the government pay the property owners "just compensation."[10] Under IIRIRA, Congress established an explicit "public use" for the construction of the border fence: to "guard the boundaries and borders of the United States against the illegal entry of aliens."[11] This public use justifies granting the Secretary authority to "commence condemnation proceedings" if the landowner and Secretary are "unable to agree upon a reasonable price."[12]

In 2005, Congress passed the Secure Fence Act of 2006, which expanded fence construction beyond California and identified the exact locations of fencing in "priority areas" along the Texas and Arizona borders.[13] In December 2007, Congress again amended IIRIRA with the passage of the Consolidated Appropriations Act of 2008 ("the 2008 Act").[14] This Act repealed the language directing construction at five specified segments along the border, and instead provided a general mandate to install fencing where it "would be most practical and effective."[15] Thus, the 2008 Act grants the Secretary full discretion to decide where along the U.S.-Mexico border to construct fence segments.[16] The 2008 Act required, however, no less than 700 miles of fence on the southern border, of which 370 miles were to be completed by December 2008.[17]

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5. *Id.* at 20.

6. *Id.*

7. *Id.* at 20–21.

8. After the DHS was reorganized under the Homeland Security Act of 2002, authority over the border fence was vested in the Secretary of Homeland Security, as opposed to the Attorney General. The language of IIRIRA was amended by the Consolidated Appropriations Act of 2008 to refer specifically to the Secretary of the DHS when vesting authority for the border fence. Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, 121 Stat. 1844.

9. 8 U.S.C. § 1103(b)(1) (2008).

10. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

11. 8 U.S.C. § 1103(a)(5) (2008).

12. Omnibus Consolidated Appropriations Act of 1997 § 102(d)(3).

13. *See* Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638, § 3(1)(B)(ii), (indicating exact location of reinforced fencing in the Rio Grande Valley, e.g., "15 miles northwest of the Laredo, Texas, port of entry to 15 miles southeast of the Laredo, Texas, port of entry").

14. Consolidated Appropriations Act of 2008 § 564.

15. *See id.* § 564(2)(A) (amending how the Secretary should carry out subsection (a) of 8 U.S.C. § 1103); 8 U.S.C. § 1103 note (b)(1)(B).

16. *See* Consolidated Appropriations Act of 2008 § 564 (listing the powers and authority of the Secretary of Homeland Security in constructing border fence segments).

17. *Id.* § 564(a)(2); 8 U.S.C. § 1103 note (b)(1)(A)(C) (2009).

When fence construction was delayed in California because of environmental concerns, Congress passed the Real ID Act of 2005, which amended the IIRIRA to include an expanded waiver provision that would allow the Secretary to waive laws and requirements if necessary to facilitate a faster construction of the fence.[18] The current waiver provision provides:

> Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to *waive all legal requirements* such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section. Any such decision by the Secretary shall be effective upon being published in the Federal Register.[19]

This waiver provision constitutes a large grant of authority and discretion to the DHS Secretary when executing fence construction. In Hidalgo County, Texas, Secretary Chertoff waived twenty-seven laws, ranging from environmental protections to procedures regulating Native American territory and burial grounds.[20] Additionally, the Real ID Act expressly limits judicial review of DHS waivers to constitutional violation claims, restricting appellate review of those claims to grants of certiorari by the U.S. Supreme Court.[21] This restriction effectively denies claimants any cognizable appellate review due to the extremely limited number of cases accepted by the Supreme Court. While the waiver provision does not permit the DHS to circumvent the constitutional limits on government takings under the Fifth Amendment,[22] it has functioned to restrict process in the DHS's policies of land acquisition of certain areas along the border.[23]

B. Formation and Structure of the DHS Can Explain Challenges in Executing Border Fence Mandate

One way to understand the DHS's land acquisition policies along certain areas of the border is to view the Department's actions as a function of its organizational structure. Cohen, Cuellar, and Weingast have studied the reorganization of the DHS and concluded that the creation of this new Department has resulted in a "net

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18. CRS REPORT, *supra* note 1, at 5–7 (stating that the scope of the new waiver expansion is substantial, and while "Congress commonly waives preexisting laws ... the new waiver provision uses language and a combination of terms not typically seen in law").

19. 8 U.S.C. § 1103 note (c) (2009) (emphasis added).

20. *See generally* CRS REPORT, *supra* note 1, at 49–50 (listing in Appendix K all the legal requirements waived by Chertoff in Hidalgo County pursuant to Real ID Act of 2005).

21. 8 U.S.C. § 1103 note (c)(2)(C) (2009).

22. *See* Williams v. Rhodes, 393 U.S. 23, 29 (1968) (stating that the powers of "Congress or the States ... to legislate in certain areas ... are always subject to the limitations that they may not be exercised in a way that violates other specific provisions of the Constitution").

23. Several cases have challenged the constitutionality of the waiver provision and the restriction of judicial review under the Real ID Act, but to date the Fifth Circuit has not agreed with that position nor has the Supreme Court granted certiorari. *See* Defenders of Wildlife and the Sierra Club v. Chertoff, 527 F. Supp. 2d 119 (D.D.C. 2007); Save Our Heritage Org. v. Gonzales, 533 F. Supp. 2d 58 (D.D.C. 2008) (finding the DHS's waiver authority to be constitutional); County of El Paso v. Chertoff, 2008 LEXIS 83045 (W.D. Tex. Aug. 29, 2008) (holding that DHS's waver authority is constitutionally valid).

loss in the efficiencies associated with homeland security."[24] They attribute this result to the internal management failures and coordination deficiencies of the Department.[25] Indeed, even the Government Accountability Office (GAO), as recently as September of 2009, reported to Congress that the DHS was burdened by managerial and leadership challenges, explaining that the "failure to effectively address the DHS's management challenges and program risks could have serious consequences for our national security."[26]

On March 1, 2003, pursuant to the Homeland Security Act, the DHS was completely restructured to absorb twenty-two existing agencies, with a combined quarter of a million federal employees, all refocusing their collective mission to one of national security.[27] However, the newly organized civilian agency incorporated a vast array of agencies ranging from the U.S. Coast Guard to the INS, many of which had existing legacy mandates and functions not even tangentially related to national security.[28]

The stated purpose for this colossal centralization was to increase communication between various agencies that have a role in national security.[29] In fact, it had the opposite effect, making "it harder for organizational leaders to master their organization, to understand its separate parts, and to understand the complex ways in which better coordination can be achieved."[30] These structural complexities of the new DHS can affect its capacity to implement negotiation and transparency in its land acquisition dealings at the border.[31] Additionally, these internal challenges, which insert an even larger wedge between the Department's leadership and its policies,[32] explain why certain border community members have found the DHS to be particularly unresponsive to their circumstances, failing to communicate effectively with them.[33]

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24. Dara Kay Cohen, Mariano-Florentino Cuellar & Barry R. Weingast, *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673, 751 (2006) [hereinafter Cohen et al.].

25. *Id.*

26. *Despite Progress, DHS Continues To Be Challenged in Managing Its Multi-Billion Dollar Investment in Large-Scale Information Technology Systems: Hearing Before the Subcomm. on Government, Management, Organization, and Procurement, of the H. Comm. on Oversight and Government Reform*, 111th Cong. 2 (2009) (statement of Randolph C. Hite, Director Information Technology Architecture and System Issues).

27. Cohen et al., *supra* note 24, at 676; *see* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (restructuring DHS to absorb other agencies, such as The U.S. Customs Service, The Immigration and Naturalization Service, U.S. Coast Guard, and the U.S. Secret Service); Department of Homeland Security, History: Who Became Part of the Department?, http://www.dhs.gov/xabout/history/editorial_0133.shtm (last visited Feb. 17, 2010).

28. Cohen et al., *supra* note 24, at 691, 696–97.

29. Department of Homeland Security, "Strategic Plan: One Team, One Mission, Securing Our Homeland," http://www.dhs.gov/xabout/strategicplan/ (last visited Feb. 18, 2010).

30. Cohen et al., *supra* note 24, at 710.

31. *Id.* at 710–11 (discussing a range of possible consequences for the complex bureaucratic structure of the new DHS).

32. *See id.* at 743 (arguing that "[w]hen an agency is saddled with such a massive panoply of bureaucratic units and missions, the nature of its expertise becomes far less obvious").

33. *See* Margo Támez, *Open Letter to Cameron County Commission*, 2 CRIT 110, 121–22 (2009) [hereinafter *Open Letter*] (comparing the government's recent efforts with prior efforts to remove Texas Apache peoples from their lands and arguing that "the amnesia which infects government policies today is incapable of making 'sense' or 'logic' of why the river-based peoples are the most highly resistant to these modern racist policies").

Another feature of the DHS reorganization involved adding new layers of hierarchy by replacing bureau chiefs with department heads and political appointees.[34] The structural changes create uncertainty for bureaucrats about their future career, causing many to leave the agency, or even worse, to have very little stake in the work they perform.[35] As bureaucrats leave the Department, institutional memory and expertise leave with them.[36]

The combination of this diminished expertise and a more detached bureaucracy is consistent with the perceptions of certain border stakeholders—that the DHS's reliance on its technical expertise is insufficient to justify DHS decisions to place the fence at some segments of the border and not at others.[37] This combination reveals both the drawbacks of imbuing the DHS Secretary with total waiver authority under the Real ID Act[38] and the rationalization for having a waiver provision to enable the gargantuan new Department to execute its border mandates.[39]

Although the DHS has become an amalgamation of so many diverse agencies, the DHS is charged with the overarching role of guarding national security. This national security role, and its close connection to crisis and emergency offers a positive explanation for why the DHS may be more inclined to be less engaged with the public and more guarded with its information. While the Department is legally a civilian agency, its function in securing the borders is a hybrid of a civilian and a

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34. Cohen et al., *supra* note 24, at 714, 729.

35. *Id.* at 711–12, 718.

36. *See id.* at 753 (asserting that "[i]t is difficult to accept that [former Secretaries] Ridge or Chertoff were simultaneously experts in customs interdiction, disaster response, and technical cyber-security"); *see also* National Commission on the Public Service, Leadership for America: Rebuilding the Public Service 17 (1989) (The Commission found that the growth in presidential appointees "year after year inevitably discourage[s] talented men and women from remaining in the career service, or entering in the first place. The ultimate risk is reduced competence among careerists and political appointees alike." *Id.* at 18. The Commission further concluded "excessive numbers of political appointees serving relatively brief periods may undermine the President's ability to govern, insulating the Administration from needed dispassionate advice and institutional memory." *Id.* at 7.).

37. *See* Cohen et al., *supra* note 24, at 744 (explaining that "the case for deferring to expertise is stronger when the interpretation itself is coming from officials directly involved in policymaking (such as Coast Guard officials) rather than higher-level political appointees (such as the Secretary or General Counsel of DHS)"); *see, e.g.*, LEAH NEDDERMAN ET AL., UNIVERSITY OF TEXAS WORKING GROUP ON HUMAN RIGHTS & THE BORDER WALL, VIOLATIONS ON THE PART OF THE UNITED STATES GOVERNMENT OF THE RIGHT TO PROPERTY AND NON-DISCRIMINATION HELD BY RESIDENTS OF THE TEXAS RIO GRANDE VALLEY 11–13 (2008) [hereinafter WORKING GROUP: PROPERTY] (articulating the Working Group's concern with the DHS rationale for the fence location).

38. *See Open Letter*, *supra* note 33, at 110, 120 (daughter of displaced landowner stating that the "rupture of over 35 Constitutional and Federal laws of the [U.S.] by one individual agency is nothing less than a mutiny from within the United States"); Press Release, Defenders of Wildlife, Faith, Human Rights, Environmental Leaders Applaud Congressional Efforts to Restore Rule of Law in Borderlands, Jun. 23, 2009, http://www.defenders.org/newsroom/press_releases_folder/2009/06_23_2009_coalition_applauds_congressional_efforts_to_restore_rule_of_law_in_borderlands.php (announcing that twenty-seven members of Congress sent a letter to Secretary Napolitano, urging her to abandon the waiver policy created by the Real ID Act).

39. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-555, Div. C, § 102(c) (granting the Attorney General waiver authority to the extent "necessary to ensure expeditious construction of the barriers"). After the DHS overhaul in 2003, the waiver provision was expanded. Secretary Chertoff waived 112 laws during fence construction from 2005 through 2008, whereas fence construction that began in California in 1996 proceeded without the execution of any waivers. CRS REPORT, *supra* note 1, at 5, 7–8, 43–53, apps. H–L (2009).

military agency.[40] For instance, just like the civilian Department of the Interior or the Department of Transportation,[41] the DHS must acquire private property in order to fulfill its Congressional orders.[42] However, unlike those agencies, the DHS is not acquiring land for a road or fire station, but rather to secure the U.S. borders, a role akin to that of the Department of Defense. The DHS's quasi-military function suggests why its actions in certain cases, with respect to land acquisition at the border, have involved fewer procedural safeguards than government takings in other civilian contexts.

This dichotomy of roles is further complicated by the eminent domain jurisprudence itself, which distinguishes between situations where the government is acting in a military, as opposed to a civilian, capacity. In the military context, the Government does not owe compensation to a landowner when private property is destroyed by an act of military necessity during war.[43] However, in all other civilian contexts, the Fifth Amendment requires the government to pay "just compensation" when private property is seized for a "public use."[44]

C. *Status of the Fence Construction*

The most recent government reports on the status of the fence construction were issued in June 2009. Those reports explain that 633 miles of the original 700-mile fence mandate were constructed and that twenty miles of fence remain to be built in the Rio Grande Valley.[45] Secretary Napolitano has indicated that she will not stop the remaining construction because contracts have been made and the project is nearing to a close.[46] However, Congress has decided not to appropriate new funds for continuation of the border fence project beyond the original construction mandate.[47]

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40. *See* Department of Homeland Security, Department Subcomponents and Agencies, http://www.dhs.gov/xabout/structure/ (last visited Feb. 17, 2010) (listing the different resources and agencies DHS utilizes); STEVE BOWMAN, HOMELAND SECURITY: THE DEPARTMENT OF DEFENSE'S ROLE, CONG. RESEARCH SERV., RL 31615 (May 14, 2003) (explaining how the Department of Defense helps DHS fulfill its military functions).

41. *See* Department of the Interior, What We Do, http://www.doi.gov/whatwedo/ (last visited Feb. 17, 2010) ("The U.S. Department of the Interior uses sound science to manage and sustain America's lands, water, wildlife, and energy resources, honors our nation's responsibilities to tribal nations, and advocates for America's island communities.").

42. *See* 8 U.S.C. § 1103(b) (2009) (granting the Secretary authority to "contract for or buy any interest in land").

43. *See* United States v. Pac. R.R., 120 U.S. 227, 234 (1887) (explaining that the "destruction or injury of private property in battle, or in the bombardment of cities and towns, and in many other ways in the war, had to be borne by the sufferers alone, as one of its consequences"); El-Shifa Pharm. Indus. Co. v. United States, 55 Fed. Cl. 751, 764 (Fed. Cl. 2003) (holding that the "[Takings] [C]lause applies to the civil functions of Government and not to the military").

44. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

45. U.S. GOV'T ACCOUNTABILITY OFFICE, SECURE BORDER INITIATIVE: TECHNOLOGY DEPLOYMENT DELAYS PERSIST AND THE IMPACT OF BORDER FENCING HAS NOT BEEN ASSESSED 20, 21 (2009) [hereinafter GAO REPORT: DELAYS].

46. *See* Stephanie Simon, *Border-Fence Project Hits a Snag*, WALL ST. J., Feb. 4, 2009, http://online.wsj.com/article/SB123370523066745559.html (reporting that Secretary Napolitano has given no sign of stopping the remaining fence construction).

47. Gary Martin, *Border Fence Funds Pulled At Request of Lawmakers*, HOUSTON CHRON., Oct. 9, 2009, at A3.

Since then, no new information about the status of the fence in terms of actual mileage or location of either remaining or completed fence has been made publically available or been provided to border stakeholders after their numerous Freedom of Information Act requests.[48] This absence of information is consistent with the general lack of transparency that has characterized much of the fence construction.[49]

III. LAND ACQUISITION AT THE TEXAS-MEXICO BORDER

A. *Due Process Requirement and Takings*

The U.S. Supreme Court has articulated the purpose of the compensation requirement for government takings as follows: "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[50] This "public goods" argument is even more valid in the context of the border fence, where the benefit—national security—is dispersed widely over the whole nation, and the costs are concentrated on only a few landowners. This dynamic of particularly broad benefits and concentrated costs can substantiate the normative argument that the federal government should have a greater sensitivity to the costs borne by private property owners as a result of the government takings for a border fence and should compensate them accordingly.[51]

Due process is owed to citizens by the federal government under the Fifth Amendment. The Court has articulated the following analysis to determine which procedures are required by due process:

> [C]onsideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[52]

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48. *See, e.g.*, Complaint, Gilman v. Dep't of Homeland Security, No. 1:2009CV00468 (D.D.C. Mar. 11, 2009) (requesting information about fence locations and maps pursuant to the requests made under the Freedom of Information Act on April 11, 2008); *see generally* Department of Homeland Security, More on the Southwest Border Fence, http://www.dhs.gov/files/programs/gc_1207842692831.shtm (last visited Feb. 13, 2010).

49. *See* discussion *infra* Section III.

50. Armstrong v. United States, 364 U.S. 40, 49 (1960).

51. I do not offer this in the "Procedural Solutions" part of this article, *infra*; however adjusting compensation to reflect particular harms is not precluded because it is one of the terms that could result from the negotiation process I advocate for between the DHS and the landowners.

52. Mathews v. Eldridge, 424 U.S. 319, 335 (1976); *see also* Goldberg v. Kelly, 397 U.S. 254, 262–71 (1970) (holding that due process under the circumstances of the case "require(s) that a [welfare] recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend").

The 2008 Act itself, which establishes the DHS's fence construction mandate, includes a "consultation" requirement, providing that the Secretary: "[S]hall consult with . . . States, local governments, Indian tribes, and property owners in the United States to minimize the impact on the environment, culture, commerce, and quality of life for the communities and residents located near the sites at which such fencing is to be constructed."[53]

As part of this requirement, the 2008 Act makes explicit that nothing in the legislation shall be "construed to . . . affect the eminent domain laws of the United States or of any State."[54] The import of this language suggests that Congress recognized the potential for the fence to infringe on property rights and to have immediate consequences for the people living along the border. The consultation provision further demonstrates that Congress specifically intended that some sort of process be developed by the DHS to confront and engage these issues.

Consistent with Congress's intention that the DHS enact procedural safeguards with respect to fence construction, I suggest two categories of process that the DHS should provide to both private property owners at the border and members of the surrounding communities.[55] The two procedures, which are explained in Section IV, are characterized as "negotiation" and "reason-giving." These two processes involve informational feedback loops that require the DHS to gather, coordinate, understand, apply, and disclose information both to and from the agency (through its hierarchical ladder) as well as to and from the private property owners and relevant communities. However, these normative solutions may be difficult to implement when combined with the positive understanding of the DHS's structural weaknesses.[56]

B. Limited Due Process in the DHS's Land Acquisitions[57]

The government's takings of private property at the border have come in two phases. The first consists of the temporary easement to survey the land and

53. 8 U.S.C. § 1103 note (b)(1)(B) (2009).

54. *Id.* (b)(1)(C)(ii)(II).

55. *See* Complaint para. 6, Texas Border Coal. v. Napolitano, No. 08CV00848, 2008 WL 2259965, at *2 (D.C.C. May 15, 2009) (asserting that "[a]s a matter of Fifth Amendment due process and fundamental fairness, and to avoid arbitrary decision-making, plaintiffs . . . are entitled to know the rules, guidelines, instructions, directives or policies relating to the process of negotiation required by § 102 of the IIRIRA and how the government will arrive at its position of fixed price for the property interest sought from plaintiffs . . . both to survey and eventually to actually build a border wall.").

56. *See supra* Section II(B).

57. At some time during the summer of 2009, the DHS provided some clear and publicly available information on their website indicating information about what types of fence would be used, some of the factors they consider when choosing fence location, and measures they have employed to engage the community and the stakeholders. This information is an improvement on the very limited information that was previously available to property owners, either publicly or upon request. However, at the time such information was published, only twenty miles of fence remained to be completed along the Texas-Mexico border. Therefore, almost all of the fence in this region has proceeded without access to this information. Consequently, the analysis of this paper is concerned primarily with the DHS's policies up until the summer of 2009; *see, e.g.*, Complaint, Gilman v. Dep't of Homeland Security, No. 1:2009CV00468 (D.C.C. Mar. 11, 2009) (requesting information about fence locations and maps pursuant to the requests made under the Freedom of Information Act on April 11, 2008); *see generally* Department of Homeland Security, More on the Southwest Border Fence, http://www.dhs.gov/files/programs/gc_1207842692831.shtm. (last visited Feb. 13, 2010).

determine if and where to place the fence.[58] The second is the process of the permanent title transfer of property planned for occupation by the border fence.[59] Both of the phases have involved instances of inadequate process by the DHS.[60]

In the summer of 2007, DHS agents served hundreds of property owners in South Texas with letters requiring a signature to establish a "voluntary right of entry" onto their land by government officials for site assessment and survey.[61] These waivers indicated that the government would have a six-month right-of-way onto the private land to "move structures and vegetation, store vehicles and equipments and bore holes in the property."[62] The letter threatened suit if the property owners did not sign the attached waiver.[63] These letters did not include an offer to pay for either the use of the land or for any property damage incurred as a result of such use.[64] In addition, the letters did not disclose the right of the property owners to negotiate a price or additional terms.[65] Many landowners did sign these letters, however, fearing suit by the federal government and never understanding that the law provided them with the right to negotiate.[66] Another hundred or so landowners did not sign the waiver, an act resulting in condemnation proceedings against the landowners, filed by the DHS.[67]

The procedural failings in construction of the border fence were captured in a complaint filed by the Texas Border Coalition (TBC)[68] against Secretary Chertoff, asserting:

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58. Complaint para. 23, *Texas Border Coal.*, 2008 WL 2259965.

59. *Id.* para. 24.

60. *See id.* para. 6 (asserting that Secretary Chertoff has "failed to issue or make known to border property owners any rules, guidelines, instructions, directives or policies relating to the process of negotiation required by § 102 of the IIRIRA or how the government will arrive at its position on a fixed price for the property interest sought").

61. *See* United States v. Muniz, 540 F.3d 310, 311 (5th Cir. 2008) (explaining how the DHS agents sought right of entries); *see also* Reply Brief of Appellants at 7–9, United States v. Muniz, 540 F.3d 310 (5th Cir. 2008) (No. 08-40372) (discussing the voluntary rights of entry); Working Group: Property, *supra* note 37, at 8 (noting that the Secure Fence Act of 2006 and the Consolidated Appropriations Act of 2008 will affect the fate of "hundreds of property owners in South Texas").

62. WORKING GROUP: PROPERTY, *supra* note 37, at 14. The "Working Group" referenced throughout this paper is a "multi disciplinary collective of faculty and students at The University of Texas at Austin, which has gathered to analyze the human rights impact of the construction of the border wall on the Texas/Mexico border . . . In May 2008, a delegation of the Working Group traveled to the Rio Grande Valley area of the Texas/Mexico border to conduct fact finding regarding the impact of the border wall on human rights and to speak with individuals affected by the construction of the wall." Press Release, University of Texas Working Group on Human Rights & The Border Wall, UT Working Group Alleges Texas/Mexico Border Wall Violates Human Rights (June 13, 2008), http://www.utexas.edu/law/news/2008/061608_working_group.html.

63. Reply Brief of Appellants at 8, *Muniz*, 540 F.3d 310 (5th Cir. 2008) (No. 08-40372).

64. *Id.* at 9.

65. *Id.*

66. *See Cases Against Border Landowners Prepared*, USA TODAY, Jan. 9, 2008, http://www.usatoday.com/news/nation/2008-01-09-border-fence_N.htm (noting that the government sent out 135 letters directing landowners to comply, but only 33 complied).

67. *See* Howard Witt, *U.S. Fence Creates River of Ill Will on Texas Border*, CHI. TRIB., Jan. 16, 2008, http://www.chicagotribune.com/news/chi-080115fence,0,6983165.story (noting that over 100 landowners refused to comply); Department of Homeland Security Office of Inspector General, *Progress in Addressing Secure Border Initiative Operational Requirements and Constructing the Southwest Border Fence*, Apr. 2009, http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_09-56_Apr09.pdf.

68. The TBC identifies itself in the Complaint it filed against Secretary Chertoff as a "group of cities,

> As a matter of Fifth Amendment due process and fundamental fairness, and to avoid arbitrary decision-making, plaintiffs and their putative class members are entitled to know the rules, guidelines, instructions, directives or policies relating to the process of negotiation required by § 102 of the IIRIRA and how the government will arrive at its position of fixed price for the property interest sought from plaintiffs and putative class members both to survey and eventually to actually build [the] border wall.[69]

Under the IIRIRA Congress specifically grants the Secretary authority to "buy any interest in land, including *temporary use rights* . . . as soon as the lawful owner of that interest fixes a price for it and the [Secretary] considers that price reasonable."[70] The statute also stipulates that the Secretary can commence a condemnation proceeding "[w]hen the [Secretary] and the lawful owner . . . are *unable to agree* upon a reasonable price."[71] The language not only demonstrates that the DHS can pay for easements on the property, but that the process should include a negotiation between the DHS and landowner in which they can attempt to "agree upon a reasonable price" for the government's use rights.

In defending its efforts to negotiate, the federal government has argued that the request for a "voluntary right of entry" actually constituted an offer of payment in the sum of zero dollars because a temporary easement was valueless.[72] By March 2008, when many of the condemnation proceedings for temporary easements were well on their way, and the landowners had filed countersuits, the DHS began offering Defendant-landowners $100 for unlimited use of the land during a three or six-month period.[73] The DHS made these post-hoc payment offers to comply with IIRIRA, which the U.S. District Court has explained requires a bona fide attempt at negotiation that can be satisfied by post-suit negotiations.[74]

With respect to the "consultation" requirement added by the 2008 Act, the U.S. District Court for the Southern District of Texas has held that the federal government's failure to consult is not a defense to the taking, but may be a "condition prior to entry onto the property after the taking has been completed."[75]

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counties, Chambers of Commerce, and Economic Development Commissions located proximate to the border between the United States and Mexico in the State of Texas." Many of the city and county member entities own property on the border along the path where the United States has built or intends to build the fence. Complaint para. 1, *Texas Border Coal.*, 2008 WL 2259965, at *1–2. Members of the TBC have traveled to Washington regularly to lobby the federal government to change its policies regarding the Border Fence construction. *See* Sylvia Moreno, *In Texas, Frustration Over Senate Impasse*, WASH. POST, June 11, 2007; Gary Martin, *Border Officials Ask Congress to Stop Pedestrian Fence*, HOUSTON CHRON., Sept. 9, 2009 http://blogs.chron.com/txpotomac/2009/09/border_officials_ask_congress.html (discussing the TBC's lobbying efforts).

69. Complaint para. 6, *Texas Border Coal.*, 2008 WL 2259965, at *2.

70. 8 U.S.C. § 1103(b) (2009) (emphasis added).

71. *Id.* (emphasis added).

72. Brief of the Appellee at 45, *Muniz*, 540 F.3d 310 (5th Cir. 2008) (Nos. 08-40372, 08-40373).

73. Reply Brief of Appellants at 10, *Muniz*, 540 F.3d 310 (5th Cir. 2008) (No. 08-40372).

74. *See* United States v. 1.04 Acres of Land, More or Less, Situated in Cameron County, 538 F. Supp. 2d 995, 1010–14 (S.D. Tex. 2008) (finding that 8 U.S.C. § 1103(b)(3) "requires the Government to put forth a bona fide effort to negotiate with the landowner"). However, the Fifth Circuit has not reviewed the latter interpretation because efforts to appeal have been unsuccessful based on the fact that the circuit courts can only review final orders, of which the possession orders have not been deemed to be. *See* United States v. Muniz, 540 F.3d 310, 312–14 (5th Cir. 2008) (per curiam).

75. 1.04 Acres, 538 F. Supp. 2d at 1014; *see* 8 U.S.C. § 1103 note (b)(1)(C) (requiring the Secretary to

Despite the District Court's interpretation that IIRIRA requires negotiation, the court made clear that the rules guiding this negotiation have not been set by the statute, and was therefore unwilling to read the consultation provision as guiding the structure of these required negotiations.[76] Because no formalized rules exist, either by statute or case law, dictating the form of negotiation required for property takings in this context, the DHS has proceeded to fulfill its construction mandates, at times without meaningful process.

For instance, when the District Court issued its final possession order for the property of Eloisa Támez, it said that prior to the government actually exercising its right of possession, the government must resolve "steps [it] will take to minimize the impact on the environment, culture, commerce and quality of life for the Defendant."[77] However, days after the Order, the DHS's contractors appeared on Támez's land and completed the fence within twenty-four hours, without any kind of consultation.[78]

In one instance in which the DHS did create a procedure to comply with the consultation requirement, the procedure failed in substance, providing insufficient due process to protect the property interests of border community members.[79] Here, the DHS, in December 2007, held a single town meeting in Brownsville at which armed guards from the CBP patrolled the meeting, and government officials entered comments from the participants into a computer.[80] The meeting constituted insufficient process because the government did not provide a "forum or time to make public comments, to exchange information between the DHS and the community or ... to ask questions directly."[81] Active public participation and exchange between interest groups is necessary in order for this community meeting to constitute a meaningful procedural protection for the private property interests of those living along the border.

C. *Decisions About Fence Location*

The process adopted by the DHS in the planning and construction of the border fence often lacked transparency. In addition to insufficient public participation and negotiation at both the individual and community level, the DHS did not publish comprehensive maps indicating its construction plans until the summer of 2009,

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"consult with ... States, local governments, Indian tribes, and property owners in the United States to minimize the impact on the ... quality of life for the communities and residents located near the sites at which such fencing is to be constructed").

76. *See* 1.04 Acres, 538 F.Supp.2d at 1010 note 9 (holding that 8 U.S.C. § 1103(b)(3) "does not prescribe or require a particular negotiation procedure").

77. Possession Order in Civ. Act. B-08-351, United States v. Támez-Plata, 333 Fed. Appx. 841 (5th Cir. 2009).

78. Kevin Sieff, *Border Fence Fight Persists,* BROWNSVILLE HERALD, Apr. 23, 2009, http://www.brownsvilleherald.com/news/tamez-97265-property-order.html (reporting that construction of a fence on condemned border property was completed within 24 hours); E-Mail from Margo Támez to Denise Gilman (April 26, 2009, 11:15 AM) (on file with author) (stating that "the decision makers' in D.C. refused the gate issue, in a 5 minute conversation with the U.S. attorney," despite the court consultation order).

79. WORKING GROUP: PROPERTY, *supra* note 37, at 19.

80. *Id.*

81. *Id.*

when only twenty miles of fencing remained.[82] Consequently, landowners did not have sufficient notice about which properties or locations were going to be directly impacted by the fence, since fencing is to be placed only along certain segments of the border.[83]

There are justifications for the government's lack of transparency, such as the national security sensitivity of this information and the highly technical nature of determining what topography is appropriate for a border fence. However, without explanations about how the DHS has made its decisions about fence location, the DHS's choices after the initial surveyal process suggest uncomfortable results—the wealthy and the well-connected have fared better in the DHS's takings. The following anecdotes demonstrate these dichotomies.

The property of Eloise Támez, age 72, whose land has been in her family for centuries, was seized by the federal government for construction of the border fence.[84] However, the River Bend Resort and Country Club, which lies only a couple of miles southeast of the Támez property, has not been similarly burdened by any fence construction.[85] Had the fence been extended from Támez's property to the resort it would have severed the golf course from the rest of the resort.[86] Because the federal government did not sufficiently explain the basis of its decisions about fence location, from the standpoint of this property owner, the government appears to value one set of attachments to the land more than the other.

Similarly, in the border town of Granjeno, the DHS planned to install the fence on the private property of Daniel Garza, age 76.[87] They chose, however, not to extend the fence through the adjacent property, owned by Dallas billionaire Ray L. Hunt, whose property has been designated for a large-scale development project.[88] Other details that bear on a potential bias include that Mr. Hunt is a friend of President Bush, was a Bush appointee to the Foreign Intelligence Advisory Board, and donated $35 million to Southern Methodist University for President Bush's library.[89]

Landowners in Eagle Pass, Texas were also concerned with these apparent inequities and brought an equal protection suit against the government. Plaintiffs asserted that the government discriminated against them on the basis of race and wealth, explaining that the government has applied the congressional border fence mandate to their property but not to the 55,000 acres of land owned by Bill Moody, a

82. DENISE GILMAN, WORKING GROUP ON HUMAN RIGHTS AND THE BORDER WALL, OBSTRUCTING HUMAN RIGHTS: TEXAS-MEXICO BORDER WALL: BACKGROUND AND CONTEXT 7 (2008) [hereinafter WORKING GROUP: BACKGROUND]; *see* Department of Homeland Security Webpage, Southwest Border Fence, http://www.dhs.gov/files/programs/border-fence-southwest.shtm (displaying a map noting the current status of the border fence project, posted in August 2009) (last visited Feb. 14, 2010).

83. *Id.* at 6–9.

84. WORKING GROUP: BACKGROUND, *supra* note 82, at 8; Melissa Del Bosque, *Holes in the Wall: Homeland Security Won't Say Why the Border Wall is Bypassing the Wealthy and Politically Connected*, TEXAS OBSERVER, Feb. 22, 2008, at 2–3 [hereinafter *Holes*]; *see* United States v. 0.26 Acres of Land, No. B-08-351, (S.D. Tex. Apr. 16, 2009) (granting the plaintiff (U.S. government) an estate in fee simple and a right to possession in a possession order).

85. WORKING GROUP: PROPERTY, *supra* note 37, at 12; *Holes*, *supra* note 84, at 2.

86. WORKING GROUP: PROPERTY, *supra* note 37, at 12.

87. *Id.*

88. *Id.*

89. *Id.*

wealthy, neighboring rancher.[90] The Plaintiffs complained that the government bypassed Moody's land after engaging him in negotiation, a procedure which the government did not similarly extend to the Plaintiffs.[91]

In each of these cases, the affected landowners feel particularly targeted by the federal government. Even if the government's reasons for choosing to construct the fence at some locations but not at others are perfectly justified, without a process that provides for transparency and communication between property owners and the government, the DHS's land acquisition will maintain an appearance of impropriety.

D. Dignitary Harms to Landowners

The DHS's land acquisitions have resulted in some landowners feeling disparaged by making them feel like outsiders who are less worthy of government protection. To this end, Margo Támez[92] has said that Secretary Chertoff publically labeled border landowners like her mother, who have not voluntarily sold their land to the DHS, as "resisters," "dissenters," and "refusers."[93] She argues that Chertoff's conduct implies "that we are somehow of a low moral quality."[94] Professors Nadler and Diamond have researched the link between property rights and psychology, concluding that a property owner's resistance to a government taking of property is often a largely psychological response.[95] Nadler explains that there are two sets of reasons why landowners may resist selling their property to the government, having nothing to do with economic rent-seeking.[96]

The first reason is a result of the subjective value that the landowners attach to their property, separate and apart from any financial value.[97] For instance, landowner Margo Támez explains that her community's resistance to the fence construction is not at all about increasing the financial gain from sale of the land, but about "preserving [their] land-based culture."[98]

The second reason has to do with "dignitary harms," meaning "emotional reactions like outrage, resentment, and insult, that result from the perception of being unfairly targeted or treated by the government."[99] In the context of the border fence, property owners would suffer dignitary harms resulting from their perception (whether true or not) that the federal government has specifically targeted their property for fence construction, while relieving wealthy property owners of this

90. Complaint at 2–6, Herrera v. United States, No. 2:08-cv-00070-AML (W.D. Tex. Oct. 8, 2008).

91. *Id.* at 5.

92. Margo Támez is daughter of Eloisa Támez, one of the above-described landowners, whose family has held title to her border property since the 1700s.

93. *Open Letter*, *supra* note 33, at 119.

94. *Id.*

95. *See generally* Janice Nadler & Shan Seidman Diamond, *Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment and Taker Identity*, 5 J. OF EMPIRICAL LEGAL STUD. 73 (2008), *available at* http://www.americanbarfoundation.org/publications/192 (finding that "the strength of the owner's ties to the property . . . had strong effects on perceptions of the propriety of giving up the property").

96. *Id.* at 10.

97. *Id.*

98. *Open Letter*, *supra* note 33, at 119.

99. Nadler & Diamond, *supra* note 95, at 11.

burden. For instance, in her letter to the County Commissioners, Margo Támez characterizes the government's actions with respect to border community landowners as "de-humanizing."[100]

Additionally, Nadler's experiments indicate that the strength of the owner's ties to the property, including how long the property had been held by the family, strongly effects the landowner's willingness to sell at any price.[101] This resistance to selling the property is not a demonstration of "hold-outs" (refusing to sell in order to get more money from the government), but rather is an example of a "holdin."[102] In these instances, compensation is never capable of accounting for the subjective valuations of the property because no amount of money would have been sufficient to compensate for the loss.[103]

These non-financial reactions of landowners resulting from eminent domain are important to consider when evaluating DHS procedures for land acquisition because they bear on the efficacy of various government procedures to acquire land for the border fence. For instance, for some property owners whose harms cannot fully be compensated by the fair market value of the land, a land acquisition procedure that involves negotiation and reason-giving may reduce impressions that the government has targeted them and their land. However, for some landowners, no form of process can overcome or undo any or all of these harms since "long term home ownership may instill an entitlement and provoke an outrage that cannot be avoided with even the most democratic decision making process."[104]

IV. PROCEDURAL SOLUTIONS

I suggest two categories of process that the DHS could implement in order to overcome their procedural shortcomings (described in Section III *infra*): "reason-giving" and "negotiation." In the former, the DHS explains the basis of its decisions about fence location to border property owners and members of the affected communities; in the latter, the DHS engages in a standardized negotiation process with those stakeholders at specified times during fence planning and construction. These proposals are not mutually exclusive; in fact, the efficacy of each is enhanced if both processes are in place. Reason-giving can mitigate the dignitary harms described in Section II. Negotiation is an individually tailored process between the federal government and the affected landowners, and as such it depends on the government taking account of landowners' subjective valuation and attachments to their properties.

A. Reason-Giving

Reason-giving in the administrative law context "requires that agencies specifically explain their policy choices, their consideration of important aspects of

100. *Open Letter*, *supra* note 33, at 120.

101. Nadler & Diamond, *supra* note 95, at 4.

102. Gideon Parchomovsky and Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics,* 92 CAL. L. REV. 77, 83 (1992).

103. Nadler & Diamond, *supra* note 95, at 3–4.

104. *Id.* at 41.

the problem, and their reasons for not pursuing viable alternatives."[105] Reason-giving involves a two-step process of fact-finding and public disclosure because information must be collected and analyzed before it can be used to disclose reasons that explain a decision. There are several benefits to this procedural device. For instance, "a decisionmaker required to give reasons will be more likely to weigh pros and cons carefully before reaching a decision."[106] In addition, this process can "[enhance] democratic influences on administration by making government more transparent."[107]

Reason-giving because of the necessary fact-finding involved is a particularly valuable approach to reforming the DHS's actions with respect to the border fence construction. The DHS's purpose, to guard national security, may contribute to its lack of transparency, both because of the security sensitivity of the information involved and the difficulty in quantifying the perceived security benefits of DHS actions.[108] If the DHS publicly disclosed its reasons for its border fence decisions, this increased vetting and transparency could result in a "closer alignment with the public's desired balancing of security with civil liberties" and "improve the quality of the rules themselves."[109] However, even if the substance of the rules does not change, disclosure implicates due process protections that are independently beneficial for the property owners involved.

1. How to Implement Reason-Giving for Land Acquisition at the Border

In the interest of protecting private property rights of the landowners affected by the border fence, fact-finding (necessary for reason-giving) could culminate in a "takings impact analysis." In the environmental context, procedures exist to ensure that the government takes into account the impact of their decisions on the environment. For instance, the National Environmental Policy Act is a statute that requires agencies to prepare an environmental impact statement for all legislation that affects the quality of the human environment.[110] The rationale for such a procedure is that by "requiring the agencies to explore, consider, and publically describe the adverse environmental effects of their programs, those programs would undergo revision in favor of less environmentally damaging activities."[111] Similarly, a

105. Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952, 972 (2007) (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 47–48 (1983)).

106. Nadler & Diamond, *supra* note 95, at 41.

107. Martin Shapiro, *The Giving Reasons Requirement*, 1992 U. CHI. LEGAL F. 179, 180 (1992).

108. Robert L. Strayer, *Making the Development of Homeland Security Regulations More Democratic*. 33 OKLA. CITY U. L. REV. 331, 334 ("[T]he key border security initiatives lack rigorous analysis concerning the benefits and costs of new rules, and suffer from insufficient consideration of alternative policies. These policy decisions fail to provide the transparency necessary to engage the public and relevant interest groups in the decision-making process.").

109. *Id.*

110. *See* National Environmental Policy Act, 42 U.S.C. § 4332(C) (2008) (requiring an environmental impact statement for "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment"); *see also* CRS REPORT, *supra* note 1, at 43 (listing basic procedural requirements of statutes and processes that were waived by Secretary Chertoff, including certain legal requirements of NEPA and the Endangered Species Act).

111. Joseph L. Sax, *The (Unhappy) Truth About NEPA*, 26 OKLA. L. REV. 239, 240 (1973).

"takings impact statement" would force the federal government to understand how individual property owners are affected by proposed actions at the border.

In the takings context, this analysis should include information that may ultimately take into account both the subjective and objective impact of the fence on a given property. The analysis could contain information about the demographics of the property owners—their income, nationality, employment, languages spoken, how long they have held title—as well as information about how the fence would physically impact the property and structures that exist on it.

2. Benefits of Reason-Giving for Land Acquisitions at the Border—Applying the Process to the Facts

This process of deliberate and publicly disclosed fact-finding can ensure that the DHS takes certain desired factors into account. At several segments, the border fence bisects private property, leaving landowners with no access to their property on the other side of the fence.[112] Although the DHS has stated that it would provide access gates (in fact, the final possession order in the Támez condemnation suit required such access), to date the DHS has neither explained how nor when it will construct these gates.[113] Fact-finding could have led to plans for access gates or constructing the fence so that it would not sever a single property.

Additionally, public disclosure involved in reason-giving can ensure that information on which the DHS bases its decision is accurate and up-to-date. For instance, during the only town hall meeting conducted by the DHS in Brownsville, The University of Texas at Brownsville (UTB) was made aware for the first time that the proposed location of the fence would intersect its property, cutting off a significant portion of the property from the main campus.[114] Also at this meeting, UTB officials learned that the DHS had been preparing its proposals based on outdated versions of campus maps, significantly underestimating the amount of UTB land that would be affected by the location of the fence.[115] Therefore, public disclosure can improve the data the DHS uses to make its decisions, potentially resulting in an improvement of the decisions themselves.

However, reason-giving does have its limitations. For instance, in evaluating the value of publicly disclosing environmental impact statements, Joseph Sax explains that "ordinary householders have no expertise, little money, and even less knowledge as to where to find experts or even the literature upon which to raise appropriate questions."[116] He does offer that if such disclosure procedures were to be effective, the government agency would need to find ways to "assure each [party] equivalent degrees of political and economic power."[117] His suggestions include

112. WORKING GROUP: BACKGROUND, *supra* note 82, at 8–9.

113. *See* E-Mail from Margo Támez to Denise Gilman (Apr. 26, 2009, 11:15 AM) (on file with author) (stating that "'The decision makers' in D.C. refused the gate issue, in a 5 minute conversation with the U.S. attorney," despite the court consultation order). According to Denise Gilman, access gates have not been constructed on any properties along the border. Interview with Denise Gilman (Apr. 25, 2009).

114. WORKING GROUP: PROPERTY, *supra* note 37, at 19–20.

115. *Id.*

116. Sax, *supra* note 111, at 246.

117. *Id.* at 248.

giving direct money subsidies, granting enforceable legal rights, and engaging in extensive public opinion campaigns.[118]

A proponent of reason-giving also recognizes the drawbacks of this procedure, acknowledging that "giving reasons requires decisionmakers to decide cases they can scarcely imagine arising under conditions about which they can only guess, in a future they can only imperfectly predict."[119] He also disclaims that giving reasons is a way of committing a person or institution to a particular outcome that can "reduce the reason-giver's freedom of decision in future cases."[120]

Although these criticisms are reasonable, forcing the DHS to explain the reasons and bases for its decisions is a value in and of itself—it is a way for the reason-giver to show respect to the subjects of the decision, making sure they "feels more a part of the decision."[121] While reason-giving may not ultimately change where the border fence is placed, the ensuing disclosure and transparency can mitigate the dignitary harms that result from the perception that decisions about fence placement are arbitrary and capricious.[122]

B. Negotiation Procedures

1. The Benefits of Negotiation

An effective negotiations process requires both individual and group negotiations. From a procedural and process standpoint, many of the circumstances around the government's efforts to secure temporary easements along the border in Texas have been troublesome.[123] The government's initial notice letters to property owners were coercive. As discussed in Section III of this paper, the evidence suggests that these letters were often distributed without any human contact or discussion. By omitting information about the legal right to payment for temporary use or the landowner's rights to negotiate on terms, the DHS took advantage of its unique bargaining position, as an agent of the federal government who has the power to threaten eminent domain.

The GAO has reported that the costs of construction have increased because of the shortened timeline under which the remaining parts of the border fence mandate need to be completed.[124] One of the reasons the DHS is working under such an accelerated timeline now is the extreme difficulty it has found in acquiring land in

118. *Id.*

119. *See* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 658 (1995).

120. *Id.* at 657.

121. *Id.* at 658.

122. *See id.* at 657–58 (requiring decision-makers to offer reasons will "drive out illegitimate reasons when they are the only plausible explanation for particular outcomes").

123. *See* Complaint para. 6, *Texas Border Coal.*, 2008 WL 2259965, at *2 (asserting that Secretary Chertoff has "failed to issue or make known to border property owners any rules, guidelines, instructions, directives or policies relating to the process of negotiation required by § 102 of the IIRIRA or how the government will arrive at its position on a fixed price for the property interest sought"); *supra* Section III.

124. RICHARD B. STANA, U.S. GOV'T ACCOUNTABILITY OFFICE, SECURE BORDER INITIATIVE: OBSERVATIONS ON DEPLOYMENT CHALLENGES 16 (2008).

the Rio Grande Valley area of Texas.[125] Many of these landowners have refused to sell their property, resulting in ninety-six litigation claims brought by the government there.[126] By June 29, 2009, thirty-nine cases were unresolved, only seven of which involved properties required for completion of the fence.[127] The other thirty-two properties have been sought by the DHS for future fencing needs and fence operation and maintenance.[128]

Since rising costs are directly tied to time delays,[129] the United States could have potentially saved money by instigating more negotiations earlier to avoid prolonged civil suits and to achieve greater buy-in from the border constituents. The government widely employs negotiations with stakeholders when designing environmental protection regulations that amount to government takings of private property.[130] In this context, proponents of negotiations have argued that rules developed with stakeholder input "enjoy greater legitimacy . . . and increase chances of compliance while reducing the risk of judicial challenge."[131] Additionally, because of the one-on-one nature of negotiations, this process results in information-sharing between the parties.[132] These characteristics of negotiation would impact costs and time delays associated with land acquisition.

These benefits of legitimacy, compliance, information-sharing, and reduced litigation would be beneficial in the DHS's dealings at the border fence as both cost-saving mechanisms that reduce litigation as well as decisional improvements. For instance, negotiation proponents suggest that agency rules promulgated without negotiation, and therefore without informational exchanges, "[encourage] regulated parties to assume extreme positions in court challenges."[133] Property owners at the border have fostered these "extreme positions" in equal protection lawsuits in which they assert that the DHS's land acquisition policies have discriminated against Mexican and indigent landowners in favor of those that are Caucasian and wealthy.[134] If the DHS engaged stakeholders individually through negotiations to correct potential misinformation, it could not only reduce these lawsuits, but also lessen landowners' resistance to acquisition itself, thereby, reducing the number of condemnation suits.

However, negotiation itself may be a time-consuming process that could cause delays and thereby also impose additional costs on the DHS. One study has concluded that negotiated rulemaking resulted in "modest savings of time" and

125. *Id.* at 1, 15–17.

126. GAO REPORTS: DELAYS, *supra* note 45, at 20.

127. *Id.*

128. *Id.*

129. *See id.* at 21 (explaining that the increased costs are one of several consequences of a "compressed timeline").

130. *See, e.g.*, Shi-Ling Hsu, *A Game-Theoretic Approach to Regulatory Negotiation and a Framework for Empirical Analysis,* 26 HARV. ENVTL. L. REV. 33, 34–37 (2002) (applying game theory to agency negotiations that have been pervasive in the environmental context since the Clinton Administration).

131. *Id.* at 37.

132. *Id.* at 77.

133. *Id.* at 37.

134. *See, e.g.*, Complaint at 1–5, Herrera v. United States, No. 2:08-cv-00070-AML (W.D. Tex. Oct. 8, 2008) (comparing treatment of Mexican landowners to treatment of a wealthy Caucasian landowner) (citing Philip J. Harten, *Assess the Assessors: The Actual Performance of Negotiated Rulemaking*, N.Y.U. ENVTL. L.J. 32, 41–44 (2000)).

found little evidence that negotiation results in less litigation.[135] However, critics of that study claim that these results are based on a flawed research methodology.[136] Furthermore, one scholar, who himself is not a proponent of negotiations, has warned that since there have only been two empirical studies on negotiated rulemaking no conclusions can be drawn on the effectiveness of this procedural device.[137] But even if the negotiation does not result in agreed upon terms, negotiation can nonetheless be valuable because it "may have narrowed the issues and facilitated the exchange of valuable information."[138]

A recent empirical study which applied game-theory to analyze the effects of negotiation confirmed the normative belief that negotiation results in benefits for both the regulator and the regulated—information-sharing and a legitimacy benefit in which the regulated are more likely to comply with the government rule.[139] Information-sharing and stakeholder cooperation, are both benefits of negotiation that can reduce landowners' resistance to the acquisition, thereby producing less resistance to government decisions.

2. The Substance of Negotiation at the Border

The Working Group has pointed to the success of the negotiation between UTB and the DHS to demonstrate the full import of negotiation and why they believe negotiation can be both a successful remedy and a procedure that needs to be implemented.[140] The agreement between the parties includes promises from the DHS to:

> (1) "[C]onsider the University's unique status as an institution of higher education and will take care to minimize impact on its environment and culture."[141]
>
> (2) "[C]onduct investigations to minimize the impact of any tactical infrastructure on commerce and the quality of life for the communities and residents located near the University,"[142] and
>
> (3) "[C]oordinate all entry to the campus and give prior notice of all activities on campus to campus police."[143]

The negotiated terms demonstrate that in this particular instance, the DHS was willing to look at the way the fence would impact an individual property holder, based on the context of who that landowner was, in an effort to mitigate the harm

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135. Hsu, *supra* note 130, at 40 (citation omitted) (citing Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1309 (1997)).

136. *Id.*

137. *Id.* at 39.

138. *Id.* at 42.

139. *See id.* at 40 (reporting the results of the Kerwin & Langbein study); *see generally* Freeman & Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60 (2000) (describing the benefits of negotiation).

140. WORKING GROUP: PROPERTY, *supra* note 37, at 16.

141. *Id.* (citing the agreement negotiated between DHS officials and attorneys for the UT system in March 2008).

142. *Id.*

143. *Id.*

from the federal government's land acquisition. However, in this case, the property holder was The University of Texas, a large and powerful entity, with a substantial bargaining position.

The lack of formal and consistent negotiations led Margo Támez, the daughter of a border landowner whose land was condemned for fence construction, to prepare a consultation outline to guide negotiations between particular impacted landowners and the DHS.[144] This guideline, while not exhaustive, offers solutions to improve DHS's land acquisitions which have suffered from limited due process considerations. The proposal incorporates the needs of community members in the border town of El Calaboz in making specific requests of the federal government.[145] Those requests include site-visits by federal government officials in the presence of the landowners, their attorneys, and other experts.[146] Other requests include face-to-face meetings between the individual landowner and the federal government, in the presence of attorneys and experts, which would be mediated by a judge.[147]

The purpose of these one-on-one negotiations would be "to determine a mutually acceptable location and form of construction of border fencing . . . as well as a mutually agreeable time frame for construction . . . given the unique impacts on culture and indigenous rights implicated. . . ."[148] Another request is that twenty-four hour access gates be placed on each of the properties, enabling affected property owners to reach the other side of their land without restrictions.[149] Additionally, Támez requests that the government repair and compensate the landowners for damages incurred to the property as a result of the construction.[150]

These suggested negotiation guidelines would facilitate the government's understanding of the intangible and dignitary harms caused by severing a property with an eighteen-foot metal fence. In addition, the guide proposes information-sharing about the people from whom the government is taking property.[151] Such information could be useful to the DHS not only to gain cooperation for its decisions, but also for its patrolling and maintenance efforts once the fence is erected, since the interaction between these stakeholders may extend beyond the initial construction. Throughout the consultation proposal, its preparers request that the DHS negotiate with affected landowners as they have with some of the other more powerful stakeholders such as UTB.[152]

One drawback of the extensive public involvement advocated for, both by this paper and the Támez consultation proposal, is the limitation and usefulness of information provided to landowners as the result of a negotiation. Individual

144. *See generally,* Margo Támez, *Consultation in the Matter of U.S. Condemnation & Possession of Customary Lipan Apache Lands in El Calaboz Rancheria* 15–18 (Apr. 23, 2009), http://www.scribd.com/doc/14595657/Tamez-Consultation-Mtamez-Version-5-2009Apr23.

145. *See generally id.* (noting individuals and groups who were consulted).

146. *Id.* at 15–16.

147. *Id.* at 16.

148. *Id.*

149. *Id.*

150. Támez, *supra* note 144, at 17.

151. *See id.* at 18 (requesting "understanding between the U.S. government and land owners to provide specific mechanisms, procedures, rules, and regulations to enact cultural trainings of [CBP] personnel about Lipan Apache customary uses of the impacted lands").

152. *See generally id.* at 15–18 (asking the government to "[c]onstruct a wall with similar features at the University of Texas at Brownsville").

landowners may not have the ability to interpret this information or effectively negotiate for their interests since language and resource limitations may exist.[153]

While this characterization may generally be true, in many circumstances landowners do have people they can call upon to advocate on their behalf. For instance, Texas Rio Grande Legal Aid, the Working Group on Human Rights, the Texas Border Coalition, and many other public interest lawyers throughout the country have dedicated their time to advocate for the rights of affected landowners, even without the presence of detailed negotiation procedures.[154] These groups could similarly be engaged if formal negotiations were required and implemented by the DHS.

Despite these informational asymmetries, there is great value to instilling trust of the federal government in this country's residents living on the U.S. border with Mexico. There is no reason that the government, who requires this land for the border fence, needs to approach the acquisition process as an adversary of the landowners. While concerns about holdouts or other collective action problems do exist, the federal government should consider the interests of property owners at the border. Many of these property owners will be affected by the fence even after their land is taken by voluntary sale or condemnation, and after the fence is constructed, because the areas surrounding the fence will be patrolled, monitored, maintained, and repaired by the DHS throughout the anticipated future.

V. CONCLUSION

While President Obama's budget included money for tactical infrastructure, such as lighting and roads, it did not include any funding to extend the border fence beyond the 700 miles already planned or constructed.[155] However, just because the border fence may not be extended under the auspices of the current Obama administration, the implementation of the existing mandate is still steeped with problems. Just one week after news about the border fence budget cuts became public, Brownsville residents wrote to President Obama, seeking his intervention on border fence policies, stating that "officials of your administration, in their zeal to satisfy the goals of the previous administration, are out of control. They [are] bullying local landowners and officials, violating the law and court orders as if they were former Secretary of Homeland Security Michael Chertoff armed with legal

153. *See* Sax, *supra* note 111, at 246 (explaining that "we have no established mechanisms to assure that members of the public have the professional resources to operate as knowledgeable and informed participants").

154. *See* Press Release, Texas Rio Grande Legal Aid, Border Wall Testimony on November 13, 2008 (Nov. 17, 2008), http://trla.wordpress.com/2008/11/17/border-wall-testimony-on-november-13-2008/#more-750; The Working Group on Human Rights and the Border Wall, The Bernard and Audre Rapoport Ctr. for Human Rights and Justice, The Texas-Mexico Border Wall, http://www.utexas.edu/law/academics/centers/humanrights/borderwall/analysis (last visited Jan. 18, 2010) (discussing the Working Group on Human Rights' consultation of border landowners about the border wall); Texas Border Coalition, About Us, http://www.texasbordercoalition.org/index.php?option=com_content&task=view&id=27&Itemid=43 (last visited Jan. 18, 2010) (discussing the Texas Border Coalitions' goals with regard to the individuals living on the Texas-Mexico border).

155. Stewart Powell, *Border Fence Funds Hit a Wall Border: Reversing Bush's Policy Obama Budget Includes Nothing to Extend Barrier Beyond 670 Miles Built or Planned*, HOUSTON CHRON., May 8, 2009, at A1.

supremacy to waive any law."[156] This reaction simply reiterates the sentiment that unless and until standardized procedures for land acquisition and fence planning are developed, the rights of property owners at the Texas-Mexico border will continue to hang in the balance.

There are approximately 2,000 miles of border between the United States and Mexico,[157] leaving over 1,300 miles of unfenced border after completion of the current construction mandate. Although the current 700-mile mandate is near completion, the potential for a future administration to resume such a fencing strategy remains possible, and therefore the insistence of procedural safeguards for government takings in this context persists as an important policy goal to be discussed and developed.

The success of any of the procedures suggested in this paper ultimately depends on reducing or repealing the waiver provision of the Real ID Act. Because even if the legislature does adopt laws or require regulations creating extensive procedures for DHS actions at the border, such safeguards are meaningless when an appointed Secretary has the authority to waive them by her free will alone.

156. Emma Perez-Trevino, *Resident's Seek Obama's Intervention*, BROWNSVILLE HERALD, May 21, 2009, http://www.brownsvilleherald.com/news/border-98230-resolution-city.html.

157. United States-Mexico Border Health Commission, The United States-Mexico Border Region at a Glance, http://www.nmsu.edu/~bec/BEC/Readings/10.USMBHC-TheBorderAtAGlance.pdf (last visited Jan. 18, 2010).

It's Time to Leave the Troubles Behind: Northern Ireland Must Try Paramilitary Suspects by Jury Rather Than in Diplock-type Courts

LISA MIRIAM JACOBS*

SUMMARY

I. INTRODUCTION

Severe civil strife, known as the Troubles, has plagued Northern Ireland throughout its history and continues to be a problem today. In certain cases between 1973 and 2007, terrorism suspects were tried in controversial Diplock courts with a

* J.D. candidate at The University of Texas School of Law (2010).

single judge sitting as the trier of both law and fact.[1] Though Diplock courts were technically abolished in 2007, Northern Ireland continues to allow non-jury trials of suspected members of paramilitary organizations that are similar to the old Diplock courts.[2] The power to refer paramilitary suspects to non-jury, Diplock-type trials was extended for two years in 2009 and still exists today.[3]

More than half of the murders that occurred during the Troubles remain unsolved.[4] In an attempt to heal the wounds of past terrorism, the police department formed the Historical Enquiries Team (HET), a task force that is reinvestigating unresolved terrorism-related deaths.[5] These investigations have resulted in criminal trials of some terrorism suspects, and there will likely be more prosecutions as the investigations progress.[6] In addition to cases referred for prosecution by the HET, cases may reach the Diplock-type courts through an alternate route: the Director of Public Prosecution may certify any case for trial in a Diplock-type non-jury court if it is related to terrorism.[7] For Northern Ireland to become a peaceful democracy, these cases must be tried by jury, rather than in non-jury trials reminiscent of the flawed Diplock court system.

II. DIPLOCK COURTS: AN UNFAIR MEANS

A. *A Brief History of the Diplock Courts*

In 1973 jury trials for crimes connected to terrorist activity were abolished as a result of Lord Diplock's report, which cited concerns of juror intimidation and "the danger of perverse convictions by partisan jurors."[8] Lord Diplock believed that jurors would be incapable of performing their civic duty if they feared terrorist attacks.[9] One commentator has echoed Lord Diplock's concerns, stating, "the effects of intimidation, or popular support for violence, or both, may result in

1. John D. Jackson, *The Restoration of Jury Trial in Northern Ireland: Can We Learn From the Professional Alternative?*, 2001–2002 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 15, 16 (2001–2002) [hereinafter Jackson, *Restoration of Jury Trial*] (citing COLM CAMPBELL, EMERGENCY LAW IN IRELAND, 1918–1925 (1994)).

2. The Justice and Security (Northern Ireland) Act 2007, ch. 6, *available* at http://www.opsi.gov.uk/acts/acts2007/pdf/ukpga_20070006_en.pdf [hereinafter Justice and Security Act].

3. The Justice and Security (Northern Ireland) Act 2007 (Extension of Duration of Non-Jury Trial Provisions) Order, 2009, SI 2009/2090, art. 2, para. 1, *available at* http://www.opsi.gov.uk/si/si2009/pdf/uksi_20092090_en.pdf [hereinafter Justice and Security Order 2009] (extending the Act until July 31, 2011).

4. *Troubles Murder Review Announced*, BBC NEWS, Mar. 8, 2005, http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/4327359.stm.

5. NORTHERN IRELAND AFFAIRS COMMITTEE, POLICING AND CRIMINAL JUSTICE IN NORTHERN IRELAND: THE COST OF POLICING THE PAST, 2007–8, H.C. 333, at 10, *available at* http://www.parliament.the-stationery-office.co.uk/pa/cm200708/cmselect/cmniaf/333/333.pdf.

6. Freedom of Information Request, Police Service of Northern Ireland, Request no. F-2009-00016, Historical Enquiries Team, http://www.psni.police.uk/historical_enquiries_team.pdf (last visited Feb. 27, 2010).

7. Justice and Security Act 1(2)–1(10).

8. COMMISSION ON LEGAL PROCEDURES TO DEAL WITH TERRORIST ACTIVITIES IN NORTHERN IRELAND, REPORT OF THE COMMISSION TO CONSIDER LEGAL PROCEDURES TO DEAL WITH TERRORIST ACTIVITIES IN NORTHERN IRELAND, 1972, Cmnd. 5185, at 17.

9. *Id.*

witnesses refusing to come forward and juries in the clearest cases refusing to convict."[10] Criminal jury trials were replaced in some instances by the Diplock court system, where a single judge sits as the trier of both law and fact.[11]

Diplock trials were used for about one-third of all serious cases in Northern Ireland until the end of the 1990s.[12] Procedurally, the Director of Public Prosecutions (DPP) was responsible for determining whether an incident warranted criminal prosecution. If the DPP decided a case should go to the courts, the Attorney General then made the decision whether to try the suspect(s) by a jury or in a Diplock court.[13] The Northern Ireland Human Rights Commission was concerned with the amount of power vested in the DPP, particularly the DPP's ability to conduct a non-jury trial without showing a risk of interference with the administration of justice.[14] The Diplock court system procedures also allowed the police department to improperly participate in the decision regarding when a suspect was to be tried by a Diplock judge rather than a jury.[15]

B. Abuse in the Diplock Court System

Judges in Diplock courts applied a lower standard of admissibility, which resulted in many Diplock court cases relying on coerced confession evidence that would have been held inadmissible in a jury trial.[16] At one point, 90 percent of Diplock cases relied on confessions obtained through "intensive interrogations" as primary evidence.[17] Opportunities to obtain coerced confessions were increased in the Diplock court context by the Detention of Terrorists (Northern Ireland) Order 1972, which allowed suspects to be detained for twenty-eight days without a hearing or access to counsel.[18] This process of internment, the arrest and detention of

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10. Kevin Boyle, *Human Rights and the Northern Ireland Emergency*, *in* HUMAN RIGHTS IN CRIMINAL PROCEDURE, 144, 153 (John A. Andrews ed., 1982).

11. John D. Jackson et al., *The Jury System in Contemporary Ireland: In the Shadow of a Troubled Past*, *in* WORLD JURY SYSTEMS 283, 303 (Neil Vidmar ed., 2000) [hereinafter Jackson et al., *The Jury System*] (discussing the existence of property qualifications for jury service).

12. *Id.*

13. Carol Daugherty Rasnic, *Northern Ireland's Criminal Trials without Jury: The Diplock Experiment*, 5 ANN. SURV. INT'L & COMP. L. 239, 244–46 (1999) (citing Government of Ireland Act 1920, 10 & 11 Geo. 5 c. 67).

14. NORTHERN IRELAND HUMAN RIGHTS COMMISSION, SUBMISSION TO THE UNITED NATIONS' HUMAN RIGHTS COMMITTEE UNDER THE INTERNATIONAL COVENANT OF CIVIL AND POLITICAL RIGHTS, art. 14, paras. 61–62 (May 2008).

15. *See id.* (arguing that in order for a trial to be conducted without a jury, the DPP should apply to a judge of the Crown Court and present reasons why the trial should be conducted without a jury); John D. Jackson & Sean Doran, *Conventional Trials in Unconventional Times: The Diplock Court Experience*, 4 CRIM. L.F. 503, 506–07 (1993) (explaining a tendency of judges in Diplock courts to prefer the police's evidence over the defendant's evidence) (citing KEVIN BOYLE ET AL., TEN YEARS ON IN NORTHERN IRELAND: THE LEGAL CONTROL OF POLITICAL VIOLENCE 98 (1980)).

16. Jackson, *Restoration of Jury Trial*, *supra* note 1, at 17; Rasnic, *supra* note 13, at 249.

17. Brian McGiverin, *In the Face of Danger: A Comparative Analyisis of the Use of Emergency Powers in the United States and the United Kingdom in the 20th Century*, 18 IND. INT'L & COMP. L. REV. 233, 268 (2008).

18. Detention of Terrorists (Northern Ireland) Order, 1972, SI 1972/1632 (N. Ir. 15), art. 4; *see also* Brice Dickson, *The Detention of Suspected Terrorists in Northern Ireland and Great Britain*, 43 U. RICH. L. REV. 927, 932 (2009).

individuals suspected to be members of illegal paramilitary groups, affected 1,981 people.[19]

One of the most disturbing Diplock practices was the use of "supergrass" witnesses.[20] Supergrass witnesses were paramilitary members who were induced to provide uncorroborated testimony against alleged co-conspirators in exchange for promises that they themselves would not be prosecuted.[21] Frequently, one supergrass would testify against a large number of defendants in a group trial, turning the criminal trial into a spectacle rather than a true implementation of justice.[22] From 1981 to 1983 alone, approximately six hundred suspects were prosecuted based on information provided by only twenty-five supergrasses from Protestant and Catholic paramilitary groups.[23] Of these twenty-five witnesses, a startling fifteen later retracted their testimonies.[24]

C. *Purported Safeguards Within the Diplock Court System*

The purported safeguards within the Diplock court system included: (1) the requirement that the judge support a conviction with an articulated reason, and (2) the guaranteed right of the defendants to appeal the decision.[25] In practice, these were insufficient safeguards to provide adequate justice to Diplock court suspects and revealed further weaknesses within the system.

First, the guidelines for the judge's articulated reason were vague.[26] Judges were not required to make reference to problematic points of law in case of an appeal.[27] Conversely, in a jury trial, the judge must instruct the jury of "every relevant aspect of the law or to give a full and balanced picture of the facts for decision by others."[28] Jury trial judges must effectively explain to the jury the pertinent facts of the case and how to use the law to render a decision. In contrast, Diplock judges could deliver a judgment and then give any reason, without having to comply with specific guidelines. In practice, this results in a Diplock judge communicating less information about the case than he would if it were a jury trial. These vague guidelines, combined with the fact that at least at the outset of the Troubles the majority of judges were Protestant,[29] created the potential for partisan decision-making.

Second, though the right to appeal helped protect many defendants, it highlighted the weaknesses of the Diplock system compared to jury trials. The

19. Martin Melaugh, *Internment—Summary of Main Event*, CAIN WEB SERVICE, http://cain.ulst.ac.uk/events/intern/sum.htm (last visited Feb. 27, 2010).

20. Rasnic, *supra* note 13, at 249.

21. *Id.*

22. *Id.* at 250.

23. *Id.*

24. *Id.*

25. Northern Ireland (Emergency Provisions) Act, 1996, c. 22, §11(5)–(6); *see also* John D. Jackson & Sean Doran, *Judge and Jury: Towards a New Division of Labour in Criminal Trials*, 60 MOD. L. REV. 759, 774 (1997) [hereinafter Jackson & Doran, *Judge and Jury*].

26. Jackson, *Restoration of Jury Trial*, *supra* note 1, at 21.

27. *Id.*

28. *Id.* at 21 (quoting Regina v. Thompson [1977] 74 N. Ir. L.R. 83 NICA (Crim) (N. Ir.)).

29. JACKSON & DORAN, JUDGE WITHOUT JURY: DIPLOCK TRIALS IN THE ADVERSARY SYSTEM 30 (1995).

Diplock convictions had a higher appellate reversal rate compared to jury convictions.[30] This suggests that the Diplock system improperly convicted a higher proportion of innocent suspects than jury trials. While the guaranteed appeal was a beneficial safeguard, the higher reversal rate suggests that there were flaws within the Diplock system itself.

D. Theoretical Problems with Diplock Courts

There are many theoretical problems with non-jury Diplock courts. For example, Diplock courts do not allow the judge to play an unbiased umpire role.[31] In a jury trial, judges act as gatekeepers of inadmissible evidence by withholding irrelevant and misleading information from the jury. In a Diplock court, judges are aware of all evidence, regardless of its admissibility. It is unlikely that a judge could "truly disregard an accused's confession in his decision-making just because the confession was held inadmissible."[32] Therefore, judges might let inadmissible evidence influence them in the courtroom. This would be less of a concern in a jury trial, because jurors would not know about the existence of such inadmissible evidence.

Another problem with single-judge Diplock trials is the potential for case-hardening, the principle that over time "judges become more cynical of defense claims of innocence and more prosecution prone in their decisions."[33] A judge who sees many similar cases might begin to treat those cases alike, rather than basing his decision on the facts of each case independently. Quantitative data supports this possibility: Diplock acquittals "decreased from 53% in 1984 to 29% in 1993."[34] In contrast, acquittal rates for criminal trials by jury remained steady, at 49 percent in 1984 and 48 percent in 1993.[35]

Abolishing Diplock-type courts and reinstating jury trials for all offenses could help the Northern Irish regain faith in their government. Juries promote democracy because participation makes citizens more likely to perceive their government and judiciary as fair and just.[36] The jury system can help shield judges from political interference by limiting the judge's decision-making power and reducing the influence of outside political pressure on judicial decisions.[37] Furthermore, a jury

30. Rasnic, *supra* note 13, at 253. *But see* Jackson, *Restoration of Jury Trial*, *supra* note 1, at 21 ("[T]he evidence does not suggest that Diplock judgments are easier to appeal than jury verdicts where judicial directions to a jury are scrutinized with equal care.").

31. Rasnic, *supra* note 13, at 252.

32. *See* Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1323 (2005) (discussing a study which found that judges are "unwittingly influenced by inadmissible information and that they cannot ignore it much of the time").

33. Michael P. O'Connor & Celia M. Rumann, *Into the Fire: How to Avoid Getting Burned by the Same Mistakes Made Fighting Terrorism in Northern Ireland*, 24 CARDOZO L. REV. 1657, 1697–98 (2003) (noting the "unacceptable rate of miscarriages of justice," which resulted in many Diplock convictions being overturned on appeal).

34. Rasnic, *supra* note 13, at 252.

35. *Id.*

36. *See* Valerie P. Hans, *Citizens as Legal Decision Makers: An International Perspective*, 40 CORNELL INT'L L.J. 303, 306 (2007) (citing studies of the United States showing a positive relationship between jury participation and perceptions of the judiciary).

37. Richard O. Lempert, *The Internationalization of Lay Legal Decision-Making: Jury Resurgence*

composed of a representative group of citizens is more likely to reach a verdict grounded in evidence and supported by legal experts.[38]

Without a voice in the political process, the people of Northern Ireland may feel powerless and hopeless.[39] Denying citizens "genuine access, participation, responsibility, and ownership in the political process" is risky because "powerlessness is the seedbed of violence."[40] Terrorist violence in Northern Ireland was likely fueled in part by the fact that the people had no legitimate political means to seek change. In this respect, change could begin by ending these Diplock-type non-jury trials.

III. PROBLEMS OF DIPLOCK COURTS PERSIST

A. *The HET Program*

In 2005, the Northern Ireland police department created the Historical Enquiries Team, a task force dedicated to addressing the 3,268 unresolved deaths that occurred in 2,516 incidents of terrorism from 1969–1988.[41] So far the HET reports have attributed 2,158 deaths to Republican (Catholic) paramilitary groups and 1,099 to Loyalist (Protestant) paramilitary groups.[42] Additionally, the HET has found fifty-four cases with evidence of illegal police involvement in these deaths, and up to three hundred more cases support the same contention.[43] Not surprisingly, some find the HET process controversial because it is accountable to and dependent upon the very police force it claims to be investigating.[44] Further, the Northern Ireland Human Rights Commission expressed concern about the Minister of State's broad discretion to terminate, without reason, inquiries into improper police involvement at any point during such investigations.[45]

The HET functions as a sort of truth commission, tasked with providing information about unresolved cases to families of victims.[46] Though there are doubts

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and Jury Research, 40 CORNELL INT'L L.J. 477, 481 (2007).

38. Hans, *supra* note 36, at 307–08.

39. Kathleen P. Lundy, *Lasting Peace in Northern Ireland: An Economic Resolution to a Political and Religious Conflict*, 15 NOTRE DAME J.L. ETHICS & PUB POL'Y 699, 710 (2001).

40. John Paul Lederach, *Beyond Violence: Building Sustainable Peace, in* BEYOND VIOLENCE: THE ROLE OF VOLUNTARY COMMUNITY ACTION IN BUILDING A SUSTAINABLE PEACE IN NORTHERN IRELAND 7, 14 (Arthur Williamson ed., 1994), *available at* http://www.community-relations.org.uk/fs/doc/Beyond_Violence.pdf.

41. NORTHERN IRELAND AFFAIRS COMMITTEE, POLICING AND CRIMINAL JUSTICE IN NORTHERN IRELAND: THE COST OF POLICING THE PAST, 2007–8, H.C. 333, ev 2, *available at* http://www.parliament.the-stationery-office.co.uk/pa/cm200708/cmselect/cmniaf/333/333.pdf.

42. *Id.* at 8.

43. NORTHERN IRELAND HUMAN RIGHTS COMMISSION, *supra* note 14, art. 6, para. 25.

44. *See, e.g.*, Press Release, Relatives for Justice, Enquiries Report, http://www.relativesforjustice.com/enquiries-report_2.htm (last visited Feb. 28, 2010) ("[Relatives for Justice] have always maintained that the HET process is not an independent one given that it is accountable to the PSNI Chief Constable.").

45. JOINT COMMITTEE ON HUMAN RIGHTS, SCRUTINY: FIRST PROGRESS REPORT, FOURTH REPORT, 2004-5, H.C. 224, H.L. 26, para. 2.15, *available at* http://www.publications.parliament.uk/pa/jt200405/jtselect/jtrights/26/26.pdf.

46. Vincent Kearney, *Verdict Raises Cold Case Questions*, BBC NEWS, Jan. 28, 2008,

as to how many prosecutions will result from HET investigations,[47] securing prosecutions is definitely part of the ultimate goal of these investigations.[48] These terrorism-related cases could then be referred to non-jury trials that are based on the old Diplock court system.[49]

B. Diplock-type Courts Today

The use of Diplock-type courts is not limited to cases referred by the HET. As a result of the Justice and Security (Northern Ireland) Act 2007, Diplock courts were technically abolished.[50] This Act, however, preserved the ability to try certain cases in non-jury courts procedurally similar to the old Diplock courts. Under the Act's authority, between July 2007 and July 2009 the DPP issued certificates for forty-one cases to be tried by Diplock-type non-jury courts.[51] In this regard, Diplock-type courts still exist in Northern Ireland. Retaining Diplock-type courts is a hindrance of Northern Ireland's goal of democratic peace.

The Justice and Security (Northern Ireland) Act sets forth a statutory test to be used to determine whether a criminal case should be referred to the new Diplock-type courts.[52] However, the test is very broad and limits the DPP's discretion very minimally, requiring only that the defendant or offense itself have some connection to a "proscribed organization," or that the offense be related to "religious or political hostility."[53] Further, the DPP must only "suspect" that the test is met, and that "there is a risk that the administration of justice might be impaired if the trial were to be conducted with a jury."[54] These very minimal requirements ensure that little can be done to prevent the DPP from sending a case to the Diplock-type courts once it has been asserted that there is some connection to terrorism.

IV. OLD DIPLOCK COURTS AND NEW DIPLOCK-TYPE COURTS COMPARED

The old Diplock courts and the new Diplock-type courts share many similarities in structure and the types of cases referred. Diplock courts were intended for paramilitary-related crimes, as are the new Diplock-type courts.[55] As in the old

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http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/7213760.stm.

47. *See* DENIS BOYD & SEAN DORAN, THE VIABILITY OF PROSECUTION BASED ON HISTORICAL ENQUIRY: OBSERVATIONS OF COUNSEL ON POTENTIAL EVIDENTIAL DIFFICULTIES, HEALING THROUGH REMEMBERING para. 5.1 (2006), *available at* http://healingthroughremembering.info/images/pdf/The%20Viability%20of%20Prosecution.pdf (explaining that uncertainty exists regarding the prosecution of past offenses).

48. Kearney, *supra* note 46.

49. Boyd & Doran, *supra* note 47, para. 4.13.

50. Press Release, Northern Ireland Office, Northern Ireland Becoming a More Normalised Society-Hain (Nov. 27, 2006), *available at* http://www.nio.gov.uk/media-detail.htm?newsID=13803; *see also* Justice and Security Act.

51. 712 PARL. DEB., H.L. (5th ser.) (2009) GC 218–19.

52. *Id.* 1(2)–1(4).

53. *Id.* 1(1)–1(6).

54. *Id.*

55. 712 PARL. DEB., H.L. (5th ser.) (2009) GC 218–19.

Diplock court system, referral of cases to Diplock-type courts is in the hands of the DPP.[56]

Additionally, these new Diplock-type trials have all of the same theoretical problems as the old Diplock courts. Single-judge criminal trials are vulnerable to the concerns discussed above, including case-hardening, partisan decision-making, and the improper consideration of evidence that would not have been admitted in a trial by jury.[57] As Baroness Harris of Richmond argued in 2009 when Diplock-type trials were extended for an additional two years, the retention of Diplock-type trials is highly controversial:

> Northern Ireland is not experiencing an emergency as defined by Article 15 of the ECHR, and to continue to trial provisions in Northern Ireland as if there were an emergency perpetuates a lack of confidence in the rule of law. It may be argued that judges sitting alone can impartially and independently hold trial and therefore non-jury trials are not a breach of the right to a fair trial, but jury trials are inexorably linked to the common law system in legislation, so non-jury trials undermine this principle and weaken public confidence in the justice system and the overall peace process in Northern Ireland.[58]

Non-jury Diplock-type courts are arguably harmful to the confidence of the Northern Irish in their criminal justice system. Retaining the use of these trials could hold Northern Ireland back from becoming a more normalized democracy.

On the other hand, there is now a statutory test that must be met in order for a case to be tried in the new Diplock-type courts.[59] Unfortunately, this four-part test is minimal and easily satisfied for terrorist-related crime. Also unique to the new Diplock-type system is the requirement that the DPP consider alternatives to the non-jury trial—such as screening the jury from the public—before issuing a certificate for a Diplock-type trial.[60] The DPP is not required to defer to those alternatives, though, and if the four-part test is met, the DPP has discretion to refer the case to a Diplock-type court regardless of the available alternatives.[61]

Fortunately, some of the actual abuses in the old Diplock courts are no longer a concern with the new Diplock-type courts. For example, the use of uncorroborated supergrass witnesses, which were a "main feature that marked 'the Diplock court's blackest phase,'" is no longer permitted.[62] Another significant improvement in Northern Ireland's justice system is that internment and extended detention without trial is no longer permitted.[63] While these are certainly improvements in the criminal justice system, they do not overcome the remaining defects in the amended Diplock-type court system. With the same department referring the same genre of criminal

56. *See* Justice and Security Act, art. 1(2) (explaining that the Director of Public Prosecutions has the authority to issue a certificate for a non-jury trial).

57. O'Connor & Rumann, *supra* note 33, at 1697–98 (citing the increasing cynicism of judges and the admission of coerced confessions as pitfalls in the non-jury system); Rasnic, *supra* note 13, at 252.

58. 712 PARL. DEB., H.L. (5th ser.) (2009) GC 221.

59. Justice and Security Act, arts. 1(2)–1(4).

60. 712 PARL. DEB., H.L. (5th ser.) (2009) GC 219.

61. *Id.*

62. Rasnic, *supra* note 13, at 249–50.

63. Melaugh, *supra* note 19.

cases to the same type of one-judge criminal court, Diplock-type court procedures are simply too analogous to the old Diplock courts to be considered a successful change.

V. ALTERNATIVES TO THE DIPLOCK-TYPE COURTS ADDRESS THE PROBLEMS

Diplock courts were initially intended to address concerns of jury intimidation and the risk of perverse verdicts.[64] Commentators are split regarding whether juror intimidation was a significant problem in Northern Ireland when Lord Diplock came out with his original report.[65] Regardless of whether and to what extent juror intimidation did exist, replacing juries with one judge did not solve the problem of intimidation of the court's decision-maker. Judges have been subject to terrorist threats and attacks throughout the years.[66] In 2009, threats became so severe that some Northern Irish judges required 24-hour police security.[67] Threats against judges invade their daily lives and put the safety of their families at risk. One Belfast judge moved out of his house after a pipe bomb was found near his home on the day he jailed men for plotting to kill police officers.[68] In fact, one could argue that judge intimidation has more damaging potential than jury intimidation, because judges try multiple cases throughout their careers and are therefore subject to long-term social and political pressures. On the other hand, jurors are not voluntarily in the courtroom and may be less prepared to deal with such pressures.

Regardless, potential threats against jurors was an insufficient reason to limit jury trials; the government had the ability to adequately protect those participating in the political process through jury reform. Jury reform could have limited the potential for intimidation by making jurors anonymous, which is the standard practice in Northern Ireland today.[69] Judges, on the other hand, have no option of anonymity and are therefore much more difficult to protect from intimidation in the courtroom.

The risk of "perverse verdicts" was another justification given for not fully abolishing the Diplock courts in favor of a return to jury trials.[70] Perverse verdicts are recognized by the Irish legal system as occurring when juries return favorable

64. STEVEN C. GREER & ANTHONY WHITE, ABOLISHING THE DIPLOCK COURTS 25 (1986); *In re* McParland [2008] NIQB 1, paras. 5, 6 (Crim) (N. Ir.).

65. GREER & WHITE, *supra* note 64, at 78; Laura K. Donohue, *Symposium: Global Constitutionalism: National Security and Constitutional Protection: Terrorism and Trial by Jury: The Vices and Virtues of British and American Criminal Law*, 59 STAN. L. REV. 1321, 1329 (2007); Brian P. Lenihan, *Unsound Method: Judicial Inquiry and Extradition to Northern Ireland*, 34 B.C. L. REV 591, 613 (1993).

66. *Dissident Threat to NI Judges*, BBCNEWS, Nov. 10, 2009, http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/8351344.stm.

67. *Id.*

68. *Judge Sells Belfast Home Over Dissident Terror Threat*, BBCNEWS, Dec. 14, 2009, http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/8411843.stm.

69. NORTHERN IRELAND OFFICE, REPLACEMENT ARRANGEMENTS FOR THE DIPLOCK COURT SYSTEM, RESPONSE TO THE PUBLIC CONSULTATION (2006) (noting broad support for restricting access to juror information); Justice and Security Act, arts. 10, 13 (outlining the restrictions on the disclosure of juror information).

70. *In re* McParland [2008] NIQB 1, paras. 5, 6 (Crim) (N. Ir.).

verdicts for defendants in spite of evidence to the contrary.[71] However, fears of perverse verdicts are not erased once one replaces a jury with a judge, who may be influenced by his own political and religious ideals. Further, a historic imbalance in the religious composition of the judiciary caused a "widespread" perception of judicial prejudice among Catholics.[72]

Widening the jury pool to include a cross-section of citizens from several regions throughout Northern Ireland could help diminish the possibility of perverse verdicts based on religious and political ideals. Since Protestants and Catholics typically live in segregated neighborhoods, ensuring that jurors are selected from regions where both religions are represented would help to ensure that jury panels represent a proper cross-section of Northern Ireland, consisting of both Catholics and Protestants.[73] Potential jurors could be required to swear an oath that they will convict a suspect who they believe is guilty, even if they share their religious or political ideals. Jurors who refuse to swear that they can do so can be removed from the jury panel for cause.[74] Jury panels consisting of both Catholics and Protestants can instill a sense of community and create a more cohesive Northern Ireland by bringing strangers from across the country to meet face-to-face to work together towards a common goal.[75]

VI. CONCLUSION

The Northern Irish public is frustrated by continued delays in criminal justice reforms carried out for political leverage.[76] Diplock courts were not abolished until 2007, and this abolition appears to have been strictly in name, since the government has retained the authority to refer cases to Diplock-type courts. In 2009, the government again postponed reform when it extended the DPP's power to refer suspects to Diplock-type courts for an additional two years.[77]

The HET's purpose in rehashing past murders is to bring justice to the victims, their families, and the country as a whole. This transition cannot be made if paramilitary suspects are prosecuted in Diplock-type trials, because the new Diplock-type system is too reminiscent of the old discriminatory Diplock court system that the Northern Irish do not trust. In many ways, new Diplock-type courts and the old Diplock courts are different only in name.

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71. D.P.P. v O'Shea [1982] I.R. 384, 438 (Ir.) ("Both judges and legislators have accepted that while a jury, properly instructed by the trial judge, have no right to bring in a verdict for the accused which is against the evidence, yet they have a power to do so; and that the risks inherent in any efforts at controlling the exercise of that power would not be warranted.").

72. Rasnic, *supra* note 13, at 252.

73. Jackson et al., *The Jury System*, *supra* note 11, at 313; *see also* NORTHERN IRELAND EXECUTIVE OFFICE OF THE FIRST MINISTER AND DEPUTY FIRST MINISTER, LABOR FORCE SURVEY 2005 RELIGION REPORT 7 (2007) (stating the population in Northern Ireland is fairly evenly split between Protestants (53 percent) and Catholics (40 percent)).

74. *See* Jackson et al., *The Jury System*, *supra* note 11, at 310 (discussing the wide scope of peremptory challenges available to both parties).

75. *See* JEFFREY ABRAMSON, WE, THE JURY 182–83 (1994) (explaining the value of face-to-face interaction between jurors in a community).

76. *See Northern Ireland: A Report by a Mission of the Committee on International Human Rights*, 59 THE RECORD 314 (2004) (discussing consensus views on the shortcomings of the criminal justice system, specifically the concern that political issues are forestalling the reforms).

77. *Id.*

Northern Ireland does not need Diplock-type courts because jury reforms can address the problems that Diplock courts were meant to avoid. The reasons for suspending the jury system in the first place, namely the threat of jury intimidation and perverse verdicts, lacked force because jury reforms could have eliminated these concerns. Reforms such as providing anonymity to jurors, removing jurors for cause if they refuse to prosecute suspects who share their political and religious alliances, and obtaining jurors from a proper cross-section of the country, could help strengthen the jury system and increase fairness in Northern Ireland's criminal justice system.[78] Granting lay people power in their criminal justice system is crucial for Northern Ireland to meet its goal of normalization and to bring a sense of justice to those who have been wronged.

78. NORTHERN IRELAND OFFICE, *supra* note 69, para. 2.7 (stating that "there was broad support for restricting the amount of juror information made available."); *id.* para. 2.8 (listing out-of-town juries as a proposed juror-protection measure); *see id.* para. 2.9 (advocating the use of stand-by only where justice requires).


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