ARTICLES

THE ROLE OF HISTORY AND CULTURE IN DEVELOPING BANKRUPTCY AND INSOLVENCY SYSTEMS: THE PERILS OF LEGAL TRANSPLANTATION

Nathalie Martin

[pages 1–77]

Abstract: In this Article, Professor Nathalie Martin examines societal attitudes toward debt and financial failure in the context of two global trends, the liberalization of bankruptcy and insolvency laws, and the increased availability of consumer credit around the world. The Article begins with a description of the history of the U.S. economy, its risk-oriented capitalist ethos, its consumer culture, and its resulting consumer and business bankruptcy laws. The Article next briefly addresses the personal bankruptcy systems of Continental Europe, noting that in some places, U.S.-style bankruptcy systems have been enacted but not necessarily accepted. Professor Martin then discusses Japanese and Chinese cultural attitudes toward debt, and briefly discusses new laws being proposed or passed in Japan, Hong Kong, and mainland China, some of which are based in part upon U.S. laws. Based on this and other examples, she concludes that cultural attitudes play a tremendous role in the efficacy of bankruptcy and insolvency systems. She further concludes that, as more and more consumer and business credit becomes available around the world, the countries affected will need to enact effective and accepted discharge and fresh start principles, but that these systems cannot simply be transplanted from the United States. Such transplantation is likely to be ineffective and thus gradual education and changes in laws and credit availability will be needed in order to avoid the extensive social costs that could result from too much credit in systems that do not accept financial failure.

THE RIGHT TO FAMILY LIFE AND CIVIL MARRIAGE UNDER INTERNATIONAL LAW AND ITS IMPLEMENTATION IN THE STATE OF ISRAEL

Yuval Merin

[pages 79–147]
Abstract: The Article begins by analyzing the characteristics of the right to family life and examining various definitions of the “family” under international and Israeli law. It argues that the absence of a clear, standard definition for the “family” and the exclusion of “alternative” family bonds leads to an infringement of the rights of many who, in practice, conduct a family life. Following this discussion, the Article analyzes the degree of protection accorded to the family in various contexts including: the right of the family to social security; parent-child relations; immigration rights based on family ties; and the freedom to marry. The most severe limitation on the right to family life within Israel relates to the lack of an option to marry in a civil ceremony. While international law recognizes the imposition of certain limitations on the freedom to marry, the additional limitations on the right to marry imposed by Jewish religious law constitute a breach of Israel’s international commitments. The Article thus concludes that the only way to guarantee equality within the family context—and to ensure the right of every individual to marry, free of the shackles of religious law, as mandated by international law—is the introduction of civil marriage in Israel.

NOTES

CASTING A WIDER NET: ADDRESSING THE MARITIME PIRACY PROBLEM IN SOUTHEAST ASIA

Erik Barrios

[Pages 149–163]

Abstract: Because of the damage that maritime piracy inflicts on international trade and general safety, it has long been treated as a universal crime whose perpetrators were subject to punishment by any country that caught them. Piracy remains a serious threat to the international community in modern times, especially in Southeast Asia. Roughly 45% of the world’s commercial shipping passes through Southeast Asia, so the maritime attacks in this region cause billions of dollars in economic loss each year. These attacks have attracted additional attention due to the fact that they are now being committed by terrorists as well as traditional maritime bandits. This Note discusses the basis for punishing these attacks under international law, and considers whether the definition of piracy under international law can encompass these attacks.

ELIMINATING THE PROTECTIONIST FREE RIDE: THE NEED FOR COST REDISTRIBUTION IN ANTIDUMPING CASES

Elizabeth L. Gunn

[pages 165–178]

Abstract: U.S. antidumping laws exist so that domestic markets can protect themselves against foreign goods sold in the United States at less than fair market value. In an antidumping case, after the initial petition is filed, all costs of investigation and determination fall on the U.S. government. Those companies and markets alleged of dumping, however, must pay for their own defense, diverting money from industry development to defense of their actions. A majority of the antidumping cases filed
result in a de minimis or zero antidumping margin, but the costs of achieving such a result weigh heavily on the accused market. This Note explores the application and results of U.S. antidumping laws on U.S. and foreign companies and the distribution of costs in their application. Using the Salmon Case from Chile as an example, it argues that in order to eliminate frivolous and protectionist antidumping actions, the petitioners should bear the costs of investigation and discovery instead of the government.

PRE-DETERMINED: THE MARCH 23, 2003 CONSTITUTIONAL REFERENDUM IN CHECHNYA AND ITS RELATIONSHIP TO THE LAW OF SELF-DETERMINATION

Conor Mulcahy

Abstract: A common debate among legal scholars focuses on the extent to which the international legal principle of self-determination remains relevant in the post-colonial period. Even those commentators who consider it still to be a significant, active concept in public international law disagree over its actual content. While many suggest that peoples entitled to the right of self-determination have a right to secede and form their own state, scholars disagree as to the circumstances under which the right develops. This Note examines the current status of the law of self-determination in the particular context of Chechnya. It describes how, though the law of self-determination would not allow Chechnya to secede from Russia unilaterally, Russian abuses associated with the March 23, 2003 constitutional referendum in Chechnya violated Chechnya’s right to internal self-determination. Thus, the constitution is void under international law.

SOUR GRAPES: THE COMPROMISING EFFECT OF THE UNITED STATES’ FAILURE TO PROTECT FOREIGN GEOGRAPHIC INDICATIONS OF WINES

Mark Silva

Abstract: The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) is the first significant multilateral agreement to expressly provide global protection to geographic indications (GIs) of wine. Although the United States is a party to this agreement, this Note argues that it has failed to bring domestic legislation in conformity with the mandates of the TRIPS Agreement regarding wine. While this has benefited many domestic vintners at the expense of their foreign counterparts, this Note also argues that the same failure may ultimately result in the exploitation of U.S. vintners as well. This point is illustrated by the current situation faced by the Napa Valley Vintners Association. Hongye Grape Wine Co., a winery in Beijing, has applied to register the GI “Napa Valley” as a trademark for use on wines that will be made from Chinese grapes and sold in China. Given the United States’ unwillingness to protect foreign GIs domestically, however, this Note concludes that in
circumstances such as this, the United States cannot expect other countries to protect domestic GIs abroad.

REGULATING THE PRIVATIZATION OF WAR: HOW TO STOP PRIVATE MILITARY FIRMS FROM COMMITTING HUMAN RIGHTS ABUSES

Nathaniel Stinnett

[pages 211–223]

Abstract: Private Military Firms (PMFs) have recently stepped in to fill the growing global demand for temporary, highly-specialized military services. These private corporations can be a blessing to their client countries in that they offer many economic, military, and political benefits not ordinarily found in standing armies. However, PMFs fall within a gap in international law, which presumes and prefers a monopolization of force by state actors, thereby leaving no effective way to deal with those PMFs that commit human rights abuses. This Note traces the history of private militaries and the applicable legal standards and argues for a coordinated domestic approach among a handful of countries to legitimize and regulate PMFs.

TEMPORARY INTERSTATE TRANSACTIONAL PRACTICE IN THE UNITED STATES AND EUROPE—KEEPING UP WITH MODERN COMMERCIAL REALITIES

Alessandro Turina

[pages 225–236]

Abstract: The globalization of the financial markets and technological innovation have contributed to a broad geographical expansion of corporations’ areas of interest. Providers of legal services seek to break through established local barriers to practice law in order to better cater to their clients’ needs. The European Union has been increasingly liberalizing interstate transactional practice of law within its member States. In the United States, on the other hand, there is a lack of jurisprudence permitting such practice. This Note examines the limits imposed by past decisions of the U.S. Supreme Court in the area of interstate transactional practice and argues in favor of a more liberal approach, through an expansive application of the Privileges and Immunities Clause doctrine.
THE ROLE OF HISTORY AND CULTURE IN DEVELOPING BANKRUPTCY AND INSOLVENCY SYSTEMS: THE PERILS OF LEGAL TRANSPLANTATION

Nathalie Martin*

Abstract: In this Article, Professor Nathalie Martin examines societal attitudes toward debt and financial failure in the context of two global trends, the liberalization of bankruptcy and insolvency laws, and the increased availability of consumer credit around the world. The Article begins with a description of the history of the U.S. economy, its risk-oriented capitalist ethos, its consumer culture, and its resulting consumer and business bankruptcy laws. The Article next briefly addresses the personal bankruptcy systems of Continental Europe, noting that in some places, U.S.-style bankruptcy systems have been enacted but not necessarily accepted. Professor Martin then discusses Japanese and Chinese cultural attitudes toward debt, and briefly discusses new laws being proposed or passed in Japan, Hong Kong, and mainland China, some of which are based in part upon U.S. laws. Based on this and other examples, she concludes that cultural attitudes play a tremendous role in the efficacy of bankruptcy and insolvency systems. She further concludes that, as more and more consumer and business credit becomes available around the world, the countries affected will need to enact effective and accepted discharge and fresh start principles, but that these systems cannot simply be transplanted from the United States. Such transplantation is likely to be ineffective and thus gradual education and changes in laws and credit availability will be needed in order to avoid the extensive social costs that could result from too much credit in systems that do not accept financial failure.

Introduction

Does culture shape law or does law shape culture? Throughout history, culture has taken the leading role by informing society of

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what laws are necessary and appropriate. Today, however, global economics are rapidly changing the world, and credit—particularly consumer credit—is being offered in greater amounts and to greater numbers of people in more countries than ever before. Commercial borrowing is also on the rise. One question raised by these increases in debt is whether there will be sufficient safety nets in place to help people and entities that are unable to pay back all this new debt.

Many governments with developing economies are aware of the need for more forgiving insolvency systems, and are implementing such systems. In most cases, however, these new proposed systems do not arise from existing cultural conditions. Rather, the laws are transplanted from elsewhere and the cultural views are expected to change with the laws. Many new bankruptcy laws have been transplanted from the United States, which has a very different cultural attitude toward debt forgiveness. Although these imported systems have been strangely out of place in other societies, the transplantation continues. This Article raises the question of whether these attempts at transplan-

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5 See infra notes 392–414 and accompanying text.
tation are likely to create the desired results of fueling a market economy and promoting economic growth and well-being.

The current U.S. bankruptcy system grew directly out of the United States’ unique capitalist system, which rewards entrepreneurialism as well as extensive consumer spending. It makes sense that a society in which dollars rule would have a forgiving personal bankruptcy system in order to keep consumer spending high, and an equally forgiving business reorganization system to encourage risk taking and economic growth. Both systems are part of a larger scheme to keep economic players alive and active in the game of capitalism. U.S. bankruptcy systems are among the country’s few social programs and they address many of society’s ills. Thus, they are broad and form an integral part of the social system from which they sprung.

As globalization takes place, more and more countries believe that creating a viable bankruptcy system will help fuel a market economy.

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6 As one U.S. scholar recently noted:

[Each country gets the bankruptcy law it deserves. I think we deserve Chapter 11. Bankruptcy does not exist independent of the social system that exists in each nation. The United States has little in the way of government sponsored programs to compensate people for the dislocation caused by financial failure. So every financial problem, and that is not hyperbole, I think that’s almost true, every consequence of every financial problem is thrown into our bankruptcy system: environmental problems, mass tort problems, business failure problems, failure of companies properly to fund their retirement plans. Whatever the reason for financial failure, the only place we have to put it is bankruptcy.]


8 See infra notes 153–201 and accompanying text.

9 See generally Broude et al., supra note 6; see also Karen Gross, Failure and Forgiveness: Rebalancing the Bankruptcy System 93–98 (1997) (describing the incredible emotional benefits of bankruptcy, which in turn benefit the economy as well as the person’s well-being).

10 See Edward J. Balleisen, Navigating Failure: Bankruptcy and Commercial Society in Antebellum America 28 (2001). In the United States, we do not draw large distinctions between our forgiving “rescue” culture for businesses on the one hand, and for individuals on the other. Philosophically, every person is a potential entrepreneur.

11 See, e.g., Letter from Tarrin Nimmanahaeminda, Minister of Finance, & M.R. Chatu Mongol Sonakul, Governor, Bank of Thailand, to Michel Camdessus, Managing Director,
As a result, many countries have attempted to create a reorganization scheme for failing enterprises like Chapter 11 of the U.S. Bankruptcy Code (Chapter 11), in which existing management stays in place and manages the reorganizing company. These systems are perhaps the most common U.S. legal exports today. Many countries are also liberalizing their consumer bankruptcy systems. Because consumer credit has become much more available in Western Europe and Japan, as well as parts of the developing world, more forgiving bankruptcy systems are a necessity. They cannot be imported wholesale, however.

Insolvency systems profoundly reflect the legal, historical, political, and cultural context of the countries that have developed them. Thus, even countries that share a common legal tradition, such as the United States, England, Canada, and Australia, display marked differences in how they approach both business and personal bankruptcies. Countries with different legal traditions, such as those within Continental Europe and Japan, currently have even more divergent bankruptcy systems, though many are moving toward the U.S. models.

Given the vast cultural differences around the world, and the history of each country’s economy and attitudes about money and debt, there is no one-kind-fits-all bankruptcy system for enterprises or indi-

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12 See Jeffrey Davis, Bankruptcy, Banking, Free Trade, and Canada’s Refusal to Modernize Its Business Rescue Laws, 26 Tex. Int’l L. J. 253, 253–54 (1991). The rationale is that providing for rescue opportunities creates additional benefits to society not available in a liquidation-only system, such as greater return for unsecured creditors, an ability for equity holders to retain an interest in a viable company, saving jobs, allowing suppliers to survive, and allowing customers to continue receiving goods and services that may be in short supply. See id. Liquidation, conversely, can cause a domino of failure, unnecessarily harming everyone with whom the debtor does business. See id.

13 See infra notes 268–308 and accompanying text.


15 See Rafael Efrat, The Rise and Fall of Entrepreneurs: An Empirical Study of Individual Bankruptcy Petitioners in Israel, 7 Stan. J.L. Bus. & Fin. 163, 165–66 (discussing the need for a forgiving bankruptcy system once credit has been deregulated).


17 See infra notes 235–308 and 380–414 and accompanying text.
New insolvency systems must instead reflect how individual nations have experienced the growth of market economies, and how, philosophically, countries have viewed debt. Bankruptcy systems are social tools. As such, they are value-laden and must be drafted with care to reflect the particular values of a culture. Yet the extensive availability of credit requires a face-saving way out of financial failure. Providing such a way out is a challenge many nations will face as credit is used more extensively in the new modern economy. This Article attempts to aid this transition in some small way, by helping inform the decisions made within developing systems.

Part II of this Article explains the symbiotic relationship between capitalism and bankruptcy laws, the theories behind these laws, and the history and political systems upon which they are based. This Section also describes modern credit practices and attitudes toward debt and repayment. It then briefly describes the U.S. bankruptcy systems that developed out of this economic history.

Part III discusses divergent attitudes toward debt in other parts of the world, using England, parts of Continental Europe, and parts of East Asia as examples. While many of these countries and regions have imported U.S.-style bankruptcy laws to some extent, all have far less forgiving cultural views toward debt and debt forgiveness than does the United States. Given these pronounced differences in attitude, this Section concludes that the mere import of U.S.-style reorganization and personal debt forgiveness systems is unlikely to create the desired economic effect.

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18 A country should not simply reproduce Chapter 11, with its emphasis on the enterprise, the shareholders, and the creditors, in societies that place more value on employees and government debt than on payments to private creditors. Nor can one expect a society that deeply values a person’s word, and his or her honor, to readily accept the personal bankruptcy discharge, even if doing so would fuel an economy based on consumer spending.

19 See infra notes 30–106 and accompanying text.

20 See infra notes 107–149 and accompanying text. This Section discusses empirical research regarding the types of debts that U.S. citizens have, as well as the circumstances many individual debtors face, when they file for bankruptcy. It briefly examines business or corporate debt culture in the United States as well, concluding that there is little stigma associated with business failure in the United States, given the premium U.S. citizens place on entrepreneurialism and risk taking.

21 See infra notes 150–160 and accompanying text.

22 See infra notes 209–228 and accompanying text. This Article does not do a true comparison of different systems, though a recent book describes many consumer systems around the world and compares some of these systems as well. See Consumer Bankruptcy in Global Perspective (Johanna Niemi-Kiesiläinen et al., eds., 2003).

23 See infra notes 209–228 and accompanying text.

24 See infra notes 511–513 and accompanying text.
Part IV describes the global trend toward credit proliferation and concludes that countries must carefully examine cultural views and attitudes before allowing credit to spin out of control in their countries.25 If it is too late, and credit is already widely available despite very negative stigma toward failure, this Section advocates large-scale education efforts in order to keep people from becoming indigent, or even suicidal, following mounting debt.26 This Section ultimately concludes that while importing a more forgiving bankruptcy system may help stem these problems, without changes in cultural attitudes, these new laws may have little impact.27

I. Bankruptcy in the United States: History, Attitudes, and Law

This Section outlines the history of the United States’ growth economy and the unique entrepreneurial spirit that led to an equally unique bankruptcy system for both businesses and consumers.28 It also discusses the development of consumer and credit culture and the laws that have developed from these unique quirks of history.29

A. The History of the U.S. Economy: The Connection Between Bankruptcy Law and Capitalism

Relatively speaking, U.S. society can be characterized as capitalistic and consumeristic, although the extent to which the United States should embrace these two ideologues has been controversial throughout our history.30 Early discussions of bankruptcy policy were divisive, in part because early bankruptcy policy helped to shape the U.S. economic identity.31 The expansion of capitalism and spending resulted in some failure, followed by the creation of the first U.S.

25 See infra notes 514–523 and accompanying text.
26 See infra notes 514–523 and accompanying text.
27 See infra notes 514–523 and accompanying text.
28 One of the goals of this Section is to explain to foreign scholars who are studying the U.S. insolvency systems how the U.S. system came into being and how it fuels U.S. capitalism and entrepreneurialism.
29 See infra notes 107–201 and accompanying text.
31 See id. at 298.
bankruptcy system. This Section reviews the economic culture from which this bankruptcy system arose.

1. The Development of the United States’ Free-Market Economy.

Alex de Tocqueville’s “new model man” portrayed the American as a child of the commercial revolution that should progress quickly toward commercial and industrial maturity. This model saw economic prosperity, technical development, education, and expanded cultural opportunities as the lynchpins of a successful society. On the other hand, the agricultural sector of society rejected these big-business ideas as a threat to its ideal nation of small producers and laborers who earned an honest living working the soil. The agrarian sector saw the new merchant and financial capitalists as:

parasites who drop their buckets into wells dug by others. . . . Unbounded by any connection to honest labor, their profits could accrue to such a level as to enable the capitalist sector to upset the delicate counterpoise of interests that sustain a free and virtuous social order, and substitute a morally vacuous dynamic of market transactions and profit calculations that respects the social identity of neither person nor property.

In this context, the battle over appropriate bankruptcy laws began. The market capitalists saw the development of a credit-based economy as

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32 See id.
34 Sauer, supra note 30, at 291–92.
35 See id. at 292.
36 See id. at 292–93. These were the Jeffersonian Republicans, who later became Democratic Republicans, and then finally, modern-day Democrats. See DAVID A. SKEEL, JR., DEBT’S DOMINION 26 (2001).
37 Sauer, supra note 30, at 293. As Sauer notes, this view was not limited to purely southern agrarians. For instance, Benjamin Franklin wrote, “the only honest Way; wherein Man receives a real Increase of the Seed thrown into the Ground, in a kind of continual Miracle wrought by the Hand of God . . . as a Reward for his innocent Life and virtuous Industry.” Benjamin Franklin, Positions to Be Examined, in 16 FRANKLIN PAPERS 107, 109 (William Willcox ed., 1972). Thus, Franklin’s sentiments illustrate that upon this nation’s formation, mercantile capitalism (with its venture capitalists) was not an idea embraced immediately. See id.
absolutely essential. Conversely, the agrarian sector of society saw extensive credit as a vice. The more a person wished to create a free-market capitalist economy, the more he supported the free availability of credit, as well as a systematic means of dealing with financial failure.

By the early 1800s capitalist interests began to win out over agrarian interests, and a greater number of agrarians began producing food for sale rather than mere consumption. Artisans in turn moved away from customized markets and toward standardized goods for a larger market. More and more U.S. citizens entered business as merchants of one form or another. Burgeoning market-oriented production and surging demand for food and consumer goods fostered great economic growth. In the decades following the War of 1812, U.S. citizens produced more cotton, grain, livestock, textile goods, coal, and lumber than previously thought possible. A greater number of U.S. citizens began, at last, to have disposable income to spend on house wares, nicer homes, fancier furnishing and clothing, and unimproved land.

The expansion of the United States’ market economy, however, depended heavily upon “the credit system”– an intricate tangle of obligations that extended throughout the country’s financing, production, distribution, and consumption. The United States saw itself as a land of great potential, and was thus taken by optimism and a willingness to build and spend far beyond its actual wealth. Thus, the antebellum economy was structured as much around borrowed money and promises to pay, as it was around rivers, roads, and canals.

See Sauer, supra note 30, at 293–94.
See id. at 294–95. These were the Federalists, who later became the Whigs, who then became modern-day Republicans. See Skeel, supra note 36, at 26.
See Sauer, supra note 30, at 295. Much of this view was predicated on the intangibility of credit. See id. That is, as a primarily agrarian economy, where trade and commerce existed as a real exchange of goods, credit allowed one party to the transaction to cheat by receiving something for nothing. See id. In a sense, the idea of credit as a vice to these agrarians makes perfect sense as their time-frame within each commercial transaction was as limited as the perishability of the items they sold. Thus, selling on credit a perishable item that could never be repossessed likely influenced this view.
See Balleisen, supra note 10, at 26.
Id. at 26–27.
See id. at 27.
Id.
See id.
Balleisen, supra note 10, at 27.
Few merchants could enter business without credit. Entrepreneurs rarely paid rent, wages, supplies, or transportation costs in advance, nor did they demand cash from their own customers. A study of the court records of debtors who filed for bankruptcy under the Bankruptcy Act of 1841 shows that the use of credit was common by the mid-1800s. Indeed, many merchants not only paid debts many months after they were incurred, but also allowed their own customers to pay them under even slower payment schedules. Needless to say, this does not make particular business sense, but the free market economy was new and many wanted to participate.

The availability of credit was seen as central to reaching economic potential in a capitalist system. In fact, one scholar called “systemized credit” the one characteristic of capitalism that distinguishes it from all other economic orders and, as the Albany Republican Committee noted in 1837, “the credit system has extended our commerce all over the world—peopled our wilderness—built our cities and villages—founded our colleges and built our schools. It has given us national wealth and individual prosperity.” In short, credit was in large part what defined capitalism as well as wealth.
2. The Rationale and Political Milieu of Early U.S. Bankruptcy Law

While credit was seen as necessary, it also had its hazards. Where there is credit, there is also default, and the use of credit unquestionably made early U.S. citizens vulnerable to the shifting currents of the overall economy, and intricately tied them to the financial health of the firms with which they did business. This may explain why many early market capitalists in the United States favored a systematic and forgiving bankruptcy system to address the issue of default. Ironically, a system of distributing a debtor’s available assets and discharging his or her remaining debts was ultimately seen as a characteristic of economic modernity, “the result of the complex development to which modern society has attained.”

People took risks, and the bankruptcy system facilitated this risk by design. The drive to be self-employed, and thus to be successful in business, caused a great deal of financial failure in the mid-1800s. The economy was friendly to any capitalist effort, as the goal was to create a vibrant market economy as quickly as possible. As young men tried their luck at business, many learned about success, as well as failure, in the pursuit. Interestingly, early bankruptcy merchants included women as well as men, indicating that women participated in the marketplace even as early as the 1700s.

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54 “[Credit] is a kind of mercantile funding system, which enables [merchants] to enlarge their capital by anticipating the profits of their enterprises.” 38 ANNALS OF CONGRESS 1098 (1822) (remarks of Rep. Wood).

55 See BALLEISEN, supra note 10, at 31.

56 See Sauer, supra note 30, at 295–96. But see BALLEISEN, supra note 10, at 26–27. Thus, the division between agrarians and capitalists, and that between bankruptcy advocates and those against it, was predicated on a recognition of the potential for failure and the need to address such failure.

57 Sauer, supra note 30, at 296 & n.28.

58 BALLEISEN, supra note 10, at 15. The desire to go into business, despite inexperience and limited capital, made many early entrepreneurs vulnerable to financial failure. See id.

59 See id.

60 See id. at 18.

61 See Karen Gross et al., Ladies in Red: Learning from America’s First Female Bankrupts, 40 AM. J. LEGAL HIST. 1, 3–4 (1996). The stories of the women told in this article prove that women of the 18th and 19th centuries were indeed engaged in the commercial marketplace and the world of debt and credit. Some had children and some did not, and most were engaged in business of some sort. See id. at 16–18. Like the men, some failed, but in a sense this is evidence of their success. Id. at 36. They too were willing to take risks. See id.
A legal culture of tolerance toward non-payment developed, in order to encourage people to continue entrepreneurial pursuits.62 The relative lenience of U.S. bankruptcy law, as compared to law on the European continent, for example, shocked some, including Alex de Toqueville, who commented on the “strange indulgence” shown to bankrupts in the United States.63 He claimed that in this respect, “the Americans differ, not only from the nations of Europe, but from all the commercial nations of our time.”64

62 See Balleisen, supra note 10, at 16. Of course, this is just one side of the story, and the rosy one at that. See Bruce H. Mann, Republic of Debtors: Bankruptcy in the Age of American Independence 79 (2002) (chronicling the history, development, and ultimate abolition of debtors’ prisons in the United States, which originally were permitted in every state).

63 See Balleisen, supra note 10, at 13.

64 Id. at 13. Tolerance toward bankruptcy debtors was seen as a significant contributor to successful capitalism, as volatility in the free market was a fact of life. See id. at 18; see also Sauer, supra note 30, at 295. As during financial panics and depressions, bankruptcy helped problems percolate slowly through the system. More importantly, endemic insolvency and the ability of bankrupts to gain legal absolution from old debts “unleashed a range of economic energies.” As Balleisen explains:

Perhaps the most important connections between antebellum bankruptcy and the release of capitalist energy manifested themselves in post-failure career strategies. Not every former bankrupt sought a haven from risk after insolvency. Discharge from past obligations encouraged a number of highfliers to redouble their entrepreneurial efforts. These bankrupts typically sought to breach prevailing commercial boundaries, either by expanding the domain of market transactions, developing new products, or devising new methods of distribution. On occasion such efforts produced spectacular postfailure success; more commonly they led only to new accumulations of unpayable obligations. Collectively, the ventures of risk-taking former bankrupts helped to consolidate a business culture predicated on “creative destruction,” in which a multitude of entrepreneurs mounted ongoing assaults on prevailing forms of economic activity, at once seeking profits and envisioning, if not always realizing, a continuous process of social “improvement.”

Balleisen, supra note 10, at 19. A lenience toward debtors helped ordinary people create a market economy in the United States, and also caused some to rethink their role in the capitalist economy and thus to engage in valuable “capitalist adaptation.” Id. at 21.

Thus, bankruptcy’s historical popularity with the commercial classes is attributable to its ability to promote and foster commercial development in several ways. First, having an involuntary bankruptcy system in place makes it more efficient to collect and distribute assets and also serves a deterrent function of causing people to pay debts rather than lose assets. See Sauer, supra note 30, at 299. Both involuntary and voluntary bankruptcy save the costs of fighting among creditors and prevents state law collection efforts from eviscerating the debtor’s estate before it can be efficiently distributed. Preference laws, which require that creditors who received advantageous payments or property just prior to a bankruptcy to return it, discourage creditors from trying to gain such advantage while a debtor is insolvent. See id. Finally, by allowing a debtor to discharge most debts as long as he or she is
The U.S. system also developed from the country’s distinctive partisan political system, and the unique way that both debtor and creditor interests were balanced in that system, along with the early and prominent role of attorneys as the primary professionals in its development.\textsuperscript{65} In his account of the role of politics in the developing U.S. bankruptcy law, bankruptcy historian David Skeel explains that once creditor groups formed trade organizations that promoted the passage of a federal bankruptcy law, populist interests joined forces as well, forcing a compromise between debtor and creditor groups not seen in England or elsewhere.\textsuperscript{66} Because Republicans tended to favor creditor interests, and Democrats or Populists tended to favor debtor interests, the compromises that resulted were the product of the unique, U.S. two-party system.\textsuperscript{67}

Moreover, from the start, private attorneys played a very significant role in U.S. bankruptcy cases and in the reform process.\textsuperscript{68} As the law took shape, general practitioners began to specialize in bankruptcy cases, thereby perpetuating the system.\textsuperscript{69} As Professor Skeel recounts, “government agencies have a tendency to become self-perpetuating. Once Congress establishes a new agency and creates jobs for a group of new government officials, these same officials will later serve as the primary bulwark against elimination of the agency. In a sense, the agency becomes its own political constituency.”\textsuperscript{70} As Skeel explains, while the bankruptcy bar is private rather than governmental-run, it honest and cooperative, the debtor has every incentive to be honest and helpful and not hide assets. \textit{See id.} at 300.

Other more obvious financial benefits flow from a well-developed bankruptcy system as well. By limiting the financial exposure of individuals, risk-taking is encouraged and the economy can grow. \textit{See id.} Finally, and perhaps most obviously, by allowing an individual to discharge debts that are a burden, he or she can return to economic life, hire employees or be an employee, pay taxes, buy things, and otherwise fuel the economy. Such a system can keep that person “in play,” rather than leaving him or her economically dormant, imprisoned, and with a family supported by the state. \textit{See id.}

This Bankruptcy Act of 1898 was the precursor to the current U.S. system and the first systematic bankruptcy system of the nation. \textit{See id.} The history surrounding its enactment explains in some measure how the complex U.S. bankruptcy system developed so much earlier than all other systems of its kind around the world. \textit{See id.} at 300–01.

\textsuperscript{65} \textit{See Skeel, supra} note 36, at 2–4.
\textsuperscript{66} \textit{Id.} at 2.
\textsuperscript{67} \textit{Id.} at 16.
\textsuperscript{68} \textit{See id.} at 2.
\textsuperscript{69} \textit{See id.} at 92.
\textsuperscript{70} \textit{Skeel, supra} note 36, at 47.
has played an analogous, self-perpetuating role.\footnote{See id.} This is one explanation for why the system changes, but never by leaps and bounds.

Thus, a number of unique characteristics have created the U.S. bankruptcy system. These characteristics include a strong societal desire to create a commercial economy, a resulting extensive use of credit, a desire to balance creditor and debtor interests in developing the law, a unique two-party political system that helped create this balance, as well as a highly unusual and prominent role for private attorneys in the bankruptcy process.

3. The Rise in U.S. Consumerism

The above discussion focuses primarily on the development of business and commerce and the resulting business debt. Current U.S. attitudes toward personal or consumer bankruptcy, however, developed far more recently, under circumstances no less unique. The United States was pulled out of the Great Depression by World War II, which created jobs for virtually everyone who was not in the armed forces.\footnote{See John Henry Schlegel, Law and Economic Change in the Short Twentieth Century 15 (unpublished manuscript, on file with author).} Due to rationing of most consumer products, and stopped production for others, most people saved their wages.\footnote{Id.} After the war, the United States experienced a period of inflation, after which consumer demand for various household goods and services increased dramatically.\footnote{See id. at 18.} Three things fueled these increases in demand: a pent-up desire for things that were unavailable during the war, large savings accounts, and the baby boom.\footnote{See id.}

U.S. policy at the time promoted spending to the fullest extent possible. As one consultant announced shortly after the war, “the greatest challenge facing American business was convincing consumers that the hedonistic approach to life is a moral, not an immoral one.”\footnote{David Ray Papke, Discharge as Denouement: Appreciating the Storytelling of Appellate Opinions, in Narrative and the Legal Discourse 206, 214 (Papke ed., 1991) (quoting D. Miller & M. Nowak, The Fifties: The Way We Really Were 117 (1977)).} This strategy apparently worked well, as Americans began purchasing to be happy, and building social experiences around the act of acquiring.\footnote{See id.}
As inflation subsided, the housing and auto industries expanded and the United States began exporting a huge variety of goods, including farm products. This resulted in large trade surpluses since Europe and Japan, the main U.S. trade partners, had little to export.\(^7\) The economy grew in a strong and stable fashion in the early 1950s.\(^7\) Capital was plentiful, and consumer goods appeared everywhere in record numbers. Chains like Sears and Montgomery Ward sold products cheaply, and more and more household electronic goods were being manufactured.\(^8\)

U.S. citizens with ready cash on hand began to believe that they needed these gadgets, that they were a sign of modernity and prosperity, and that buying them would fuel the economy. Thus, a consumer class was born.

Since then, though the U.S. economy has sagged at various times, U.S. wages have made domestic production uncompetitive in many industries and thus upset trade balances.\(^8\) Still, consumer credit has been rising steadily for decades.\(^8\) Over time the United States has learned to consume too well. While it can manufacture and produce many products and services worthy of export, the voracious U.S. desire to consume makes it unlikely that Americans will ever produce as much as they use.\(^8\) As a culture, Americans love to spend, and are even encouraged to do so when the economy flags, despite record household credit and record low savings rates.

4. The Effect of Low Down Payment Home Loans on Consumer Spending Habits

Another historical event that drastically changed the debtor-creditor system in the United States was the home ownership pro-

\(^7\) See Schlegel, supra note 72, at 18.
\(^7\) Id.
\(^8\) See id. at 19.
\(^8\) See generally Matthew J. Slaughter, Multinational Firms and Wages in a Global Economy, available at http://www.dartmouth.edu/~glm/pdf/SageMJS.pdf (last visited Oct. 25, 2004) (noting that low-skill labor wages in the United States are much higher than similar skill labor wages elsewhere, and therefore, firms have a clear incentive to move those operations abroad which utilize low-skill labor).
gram introduced by President Roosevelt in the New Deal Legislation. Before 1930, home loans had short terms and were used primarily by the wealthy, because one was required to put down 50% of the purchase price in order to get a home loan. As a result of these conditions, only about 45% of the homes in the United States were owner-occupied. Roosevelt sought to foster stability and security during the depression by making it much easier for the average person to buy and keep a home.

This was accomplished through the formation of the Home Owners Loan Corporation (HOLC), the Federal Housing Administration (FHA), and the Department of Veterans Affairs (VA). The FHA, created by the National Housing Act of 1934, did not make mortgage loans but rather insured them. Because the FHA began insuring these loans, lenders were much more willing to make loans with lower down payments and at lower interest rates. This made mortgage loans more available to the middle class than ever before. Owning a home became a nearly universal dream for U.S. citizens after World War II. As late as 1940, half of all young adults between the ages of twenty and twenty-four lived with their parents. In the fifteen years following the war, home ownership shot

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85 Thomas W. Hanchett, The Other “Subsidized Housing:” Federal Aid to Suburbanization, 1940–1960s in From Tenaments to Taylor Homes 165 (John I. Bauman et al. eds., 2000).
86 Id.
87 Florence Wagman Roisman, Teaching About Inequality, Race, and Property, 46 ST. LOUIS U. L.J. 665, 676 (2002). Perhaps I should say that this legislation made it easier for the average white person to buy and keep a home. Numerous scholars have noted that at the same time that the FHA and VA reduced down payments under these programs, minorities were refused such loans and instead lived in stingy, alienating public housing projects, which hindered minority home ownership for the rest of this country’s history. See id.
90 See id. Troutt notes that between 1936 and 1941, new home owners increased from 332,000 to 619,000. See id.
up to 62%. No one individual was more responsible for this change than William Levitt, who built new Cape Cod homes and sold them for $7,990 in the late 1940s, with little or no money down and a 4.5% interest rate.

These events forever changed the face of U.S. consumerism and consumer credit. They ultimately revolutionized the home finance industry in three ways: by making 20% down payments the norm, rather than the previous 50% required; by stretching home loans out over twenty-five or thirty years, as compared to the three years at which commercial banks were lending; and finally, by amortizing the loans rather than having them end with balloon payments. As a result of these and other more recent changes, 68.6% of U.S. citizens now own their homes, a percentage higher than most other coun-

93 Id.
94 Id. William Levitt became:

the Henry Ford of home building by applying methods of mass production to housing. In the late forties, William Levitt embarked on the biggest private housing project in American history. Buying up 4,000 acres of potato fields in Hempstead, Long island, about 25 miles east of New York City, he started work on 17,500 homes in what was to be known as Levittown. To minimize costs, he broke down construction into 26 steps. Teams of workers executed specific tasks: bulldozing the land, paving the roads, pouring foundations, planting trees, joining the walls and roof, installing the plumbing and electricity, and painting. Every house was identical, one story high, covering 25 by 32 feet, with a living room, kitchen, two bedrooms and a bathroom. Those cape cod houses became the single most powerful symbol of the dream of upward mobility and home ownership for American families. With no down payment, a 30-year mortgage, and a tax deduction for interest payments, it was cheaper to buy a house in Levittown, where mortgage costs ran $56 per month, than to rent an apartment in New York, where apartment rentals averaged $93 per month.

Id.

95 E-mail from Polly Dwyer, President of Levittown Historical Society, to Frederick Hart, Professor Emeritus of Law, University of New Mexico School of Law (Jan. 11, 2003; 01:20:40 MST) (on file with author); see also John Cassidy, The Next Crash: Is the Housing Market a Bubble That's About to Burst?, The New Yorker, Nov. 11, 2002, at 123 (discussing the Levittown development project).
98 U.S. CENSUS BUREAU, HOUSING VACANCY SURVEY FIRST QUARTER OF 2004, available at http://www.census.gov/hhes/www/housing/hvs/q104tab5.html (last visited Nov. 8, 2004); see COASTAL BUSINESS, SUN-NEWS (Myrtle Beach, S.C.), Apr. 6, 2002, at D1 (reporting a 67.8% home ownership rate in April of 2002, and noting that the Great Plains and the Great Lakes region had a rate of 73.9% and 72.7% respectively but that the Pacific Coast had a rate of just 59.6%, showing a large variation across the country).
tries in the world. The New Deal Legislation unquestionably led to this result and, along with the advent of private mortgage insurance, now allows U.S. citizens to buy a home with 0% down. These conditions lead to a generally higher disposable income for U.S. citizens than most other citizens in the world.

Low down payment loans in the United States have led to another uniquely U.S. phenomenon, the home equity loan. Home equity loan indebtedness has substantially increased in a short period of time, from $60 billion in 1981 to $357 billion in 1991. These types of loans are pushed non-stop through the media in the United States, yet are virtually unheard of in Europe. In fact, European concepts of land ownership are completely different from U.S. concepts. The ownership of land and tenant rights in England had their origin in the feudal system imposed by William I with far more land owned publicly and far more people owning homes and businesses on leased land. Thus, in comparison to the United States, there are far fewer home equity loans in Europe and the rest of the world and thus less overall indebtedness.

99 New Zealanders purportedly have the highest home ownership rate at 71.2% with Australia in second place at 70.1%. See Australia Has World’s Second Highest Home Ownership Rate, Asia Pulse, Feb. 11, 2002. The United States is next at 67%, see Coastal Business, supra note 98, at D1, and England is next at 66%. See Roger Bootle, Not a Common European Home Economic Agenda, The Sunday Telegraph (London), Aug. 18, 2002. Continental Europe’s rate is currently 58%, but, of course, this number represents an average of a number of different rates across Europe. See id.

100 See, e.g., “0” Down, at http://www.newloan4you.com/0_down/0d1.html (last visited Nov. 9, 2004).

101 In many parts of Europe, a buyer seeking a loan from a lending institution is still expected to put down 50% in order to get a home loan. See, e.g., Broich, Bayer, von Rom, Restructuring & Turnarounds, at http://www.broich.de/eng/restructuring-and-turnarounds.htm (last visited Nov. 10, 2004).


103 A recent radio advertisement asks “Did you know that there currently is available over $30 billion in equity in American real estate?” It then admonishes listeners not to let this money waste and to call an 800 number immediately to get the cash they deserve out of their home.


105 See Nicola Clark, Frugal Europeans Hold up Recovery: Struggle Is on to Persuade Consumers to Spend Despite Economic Uncertainty, Int’l Herald Tribune, July 22, 2004, at 1 (stating that strict banking laws make it difficult, if not impossible, to extract added value from a
Lending found its true cornucopia in the United States, however, with the introduction of the charge card in the 1960s, followed by the credit card in the 1970s and 1980s. Since then, there has been no turning back.

B. Current U.S. Consumer Culture: Buying Happiness

U.S. citizens are considered profligate in their personal lives as well as their business lives, particularly in comparison to other world citizens. While the last subsection attempts to explain how these habits developed, this subsection examines how U.S. society views debt today, and what current legal, cultural, and economic factors have led to the country’s “compulsively” consumeristic behavior. It also examines the financial and other life conditions of most individual bankruptcy debtors in the United States and discusses whether there is a different bankruptcy or debt culture for U.S. business debtors, as compared to individual consumer debtors.

1. How and Why We Spend It: Let Us Count the Ways

Consumer spending is considered one of the most important indicators of economic health in the U.S. economy. Despite the

mortgage through a home equity loan). With this background, one can begin to understand how the U.S. bankruptcy system of debt forgiveness came into being. What is not clear is whether the countries that are importing aspects of the U.S. bankruptcy system actually need this system or will need it. Will they also become highly consumeristic because that is where globalization will take them? As stereotypes would have it; some Europeans are known for having one small closet filled with a few expensive pieces of clothing, whereas U.S. citizens prefer a huge closet full of moderately priced items, a reflection of differing consumer cultures. Not all Europeans are cut from the same spending mold, however. The Italians love beautiful things while northern Europeans would consider high-ticket fashion items to be highly unnecessary.

See Ronald J. Mann, Credit Cards and Debit Cards in the United States and Japan, 55 Vand. L. Rev. 1055, 1064 (2002). As Mann explains, American Express, Diners Club, and Carte Blanche first offered charge cards, which, as their name implies, had to be paid off each month. See id. The big profits occurred with the development of the credit card, and the resulting high interest rates to lenders. See id. These did not blossom until the 1970s and the 1980s in the United States, see id., and still have not done so throughout the rest of the world. See id. at 1056–57. Mann attempts to explain this phenomenon by examining the banking and lending systems of the United States versus other parts of the world, particularly Japan. See id.


Consumer spending is one of the major indicators by which the government and economists measure the strength of our economy. Consumer spending makes up about
credit industry’s claims that consumers are abusing credit, credit industry advertising encourages people to use as much credit as they can get, for every use imaginable or no particular use at all.\textsuperscript{110} Some advertisers rely on nostalgia to get people to borrow as much money as possible. For example, in a mailer for a home equity loan, United Pan Am Mortgage writes:

\begin{quote}
[r]emember the days when dad worked, mom managed the home, and there was still enough money for a house, cars, vacations . . . even college? It’s sure not like that anymore. Today, with single parents or even with both parents working, it’s hard to make ends meet, let alone have some of the good things life offers. We think you deserve more and we can help. . . . A friendly phone call will get the ball rolling on putting a lump sum in your pocket. That’s right—have the extra cash to make those home improvements you’ve been putting off, take that vacation you’ve been dreaming about, give yourself peace of mind, knowing your son or daughter’s tuition is covered.\textsuperscript{111}
\end{quote}

The advertisement goes on to tell the recipient whom to call to get a home equity loan to solve all of life’s problems, demonstrating that, despite popular belief, you can buy both happiness and peace of mind.\textsuperscript{112}

two-thirds of our gross domestic product, which is the broadest measure of economic health. See Gongloff, \textit{supra} note 7.

Consumer spending is widely believed to be a measure of overall consumer confidence. When a household is deciding what it can afford, it will look at probable future income as well as current income. If consumers are optimistic about the future economy, they will be inclined to spend their dispensable income. If, however, they do not believe that good times lay ahead, they are more likely to save their money. \textsc{Thomas Mayer et al., Money, Banking, and the Economy} 273 (1999).

\textsuperscript{110} One advertisement admonishes U.S. citizens to get the money they deserve by tapping into the $30 trillion dollars in equity currently available in U.S. real estate. No mention is made of the need to pay such funds back. In a title loan company advertisement, a woman finds that as long as she takes out a title loan, she has the money to go out to dinner after all. In another advertisement, Mr. T tells a huge, slovenly debtor that all his financial problems can be solved if he takes out a title loan. In a MasterCard advertisement, a man in a cubicle becomes ecstatic beyond words when he wins a trip to Hawaii from his benevolent credit card company. Businesses advertising on every network offer free credit for 6–12 months, as long as you spend a certain dollar amount, and even the government told U.S. citizens to go out and spend money last fall (despite high bankruptcy rates and low savings rates) in order to breathe life into the flagging economy.

\textsuperscript{111} Letter from United Pan Am Mortgage to Professor Frederick M. Hart (Sept. 30, 2002) (on file with the author).

\textsuperscript{112} \textit{See id.}
U.S. popular culture oozes with references to spending and happiness. In the tongue-in-cheek novel, *Shopaholic Ties the Knot*, Becky Bloomwood notes how her whole life will change when she and her beau own the vintage cocktail cabinet she spots in an antique shop:

> Just think, if we had one of these in the apartment it would change our lives. Every night Luke and I would mix martinis, and dance to old-fashioned songs, and watch the sun go down. It’d be so atmospheric! We’d have to buy one of those old-fashioned record players with the big horns, and start collecting 78s, and I’d start wearing gorgeous vintage tea dresses.\(^{113}\)

As a result of relentless and unyielding admonitions to spend, as well as other cultural factors, U.S. citizens have more debt of all kinds than all persons of all other parts of the world.\(^{114}\) Consumer debt, second mortgages, foreclosures,\(^{115}\) and personal bankruptcies are all at an all-time high.\(^{116}\) The average household carries $8,000 in credit card debt\(^{117}\) and record numbers of U.S. citizens now carry more than one mortgage.\(^{118}\) Between 1979 and 1997, personal bankruptcies in-

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\(^{113}\) Sophie Kinsella, *Shopaholic Ties the Knot* 8 (2002)

\(^{114}\) I respectfully disagree with Professor Ronald Mann’s conclusion that neither Japanese nor U.S. consumers are encouraged to over-extend. See Mann, *supra* note 106, at 1084 n.107 (citing Robert D. Manning, *Credit Card Nation: The Consequences of America’s Addiction to Credit* 3 (2002)). Mann proposes that U.S. society does not venerate those who rely on credit beyond their income. See id. Unfortunately, I believe that Manning is just a voice in the wilderness on this point, with U.S. media having won the war against sensible credit use.

\(^{115}\) Thomas A. Fogarty, *Home Foreclosures at 30-Year High*, USA Today, Sept. 11, 2002, at A1, available at http://www.usatoday.com/money/perfil/housing/2002–09–09-foreclosure_x.htm (last visited Dec. 4, 2004). Fogarty reports that during April, May, and June of 2002, 1.23% of all mortgages—or 640,000—were in foreclosure. See id. This is the highest rate recorded in the 30 years since this data has been kept, and is up from 1% just one year ago. See id.


\(^{118}\) See generally Riva D. Atlas, *Home Equity Borrowing Rises to Worrisome Levels*, N.Y. Times, Mar. 26, 2003, at C1 (stating that home equity loan levels have reached such a high level that consumer groups think many people will be unable to service these loans and will end up homeless). Some lenders, including Wells Fargo Bank, are even lending up to 100% of the home’s value, despite the fact that people often have insufficient income to service such loans. *Id.*
creased by more than 400%. The upsurge in the mid-1990s was particularly shocking because this was a period of widespread economic recovery. History partially explains why this debt picture looks so different from that of the rest of the world. Add a volatile economy and job market, and the credit industry’s voracious appetite for more lending, and the statistics are not surprising.

2. Personal Bankruptcy and Stigma in the United States

While some people insist that the stigma of bankruptcy is gone, empirical research suggests that it may not be that simple. In their empirical study, The Fragile Middle Class, scholars and empiricists Sullivan, Warren, and Westbrook conclude that bankruptcy is a treatment of a financial problem but is not itself the disease. They conclude that unemployment or underemployment, illness, and divorce are the primary causes of bankruptcy in the United States, but that huge amounts of consumer debt in general, and credit card debt in particular, lower U.S. citizens’ threshold for collapse when financial disasters strikes.

119 See Theresa Sullivan et al., The Fragile Middle Class 3 (2000). Since World War II, personal bankruptcies have steadily increased most years. “These increases accelerated during the 1980s and 1990s, frequently breaking records from quarter to quarter and year to year.” Id.

120 Id. As the authors state, financial collapse amidst all this prosperity was both mystifying and worrisome. See id.

121 See id. at 17. Department of Labor Statistics indicate that between 1995 and 1997, 8 million U.S. workers were displaced, and that by 1998, 50% were re-employed at their old salaries, 25% were earning 20% less, and the other 25% were still unemployed. See id.


123 See Sullivan et al., supra note 119, at 263.

124 See generally id.

125 See id. at 22. While only 10% of the consumers in the authors’ empirical study reported that consumer or credit card debt as the actual cause of their bankruptcy, in most cases, the debtor could have withstood the layoff, illness, or family breakup, if not for their crushing amounts of consumer debts. See id.
Credit card use in the United States has risen steadily every year since the cards were introduced.\textsuperscript{126} In the fifteen years from 1980 to 1995, the amount of outstanding revolving credit jumped sevenfold.\textsuperscript{127} Credit card debt doubled in just four years, from $211 billion in 1993 to $422 billion in 1997. Both the number of cards and the balances increased dramatically in this time period, yet 3.5 billion credit card solicitations were sent out thereafter in 1998, portending continuing increases.\textsuperscript{128} One historical event explains the rise in credit card debt, namely deregulation of consumer interest rates, which has made credit card lending more profitable than any other form of lending.\textsuperscript{129} The more cardholders a company has, the more money it makes, even if this is accomplished by lowering lending standards.\textsuperscript{130}

Sub-prime lending, meaning lending specifically to people who are living on the edge, is the most profitable niche in lending.\textsuperscript{131} Yet traditional banking has declined in profitability, making it necessary for lenders to make ends meet in other ways. A popular long-term strategy is to get college students hooked on credit cars early, giving away free t-shirts and requiring no income.\textsuperscript{132} Some 83% of undergraduate students have at least one credit card, a 24% increase since 1998, and 21% of undergraduates who have cards have high-level balances between $3,000 and $7,000.\textsuperscript{133}

The existence of all this consumer credit does not mean that people do not feel guilty when they fail to keep up with their payments.

\textsuperscript{126} See id. at 123.
\textsuperscript{127} See id. By the 1990s economists speculated that U.S. citizens could tolerate no more credit card debt. Since 1993, however, growth in credit card debt has been greater than any other type of consumer loan. See id.
\textsuperscript{128} The bankruptcy debtors in the study carried more credit card debt than the average U.S. citizen, but most are now carrying more than they can afford to repay. This is because there is virtually no limit to the amount of credit a person can obtain through credit cards. See id. The credit card industry did not grow to its current size by being cautious about distributing cards. See id. at 135. It grew because it distributed cards freely, and solicited new customers relentlessly, at a cost of $100 in solicitation for every new card member acquired in 1994. See id.
\textsuperscript{129} See id. at 135.
\textsuperscript{130} See id. at 123. Interest rates drive profitability, and interest payments account for more than 80% of the profits of credit card companies. The enormous profits available from people who charge up to the limit and pay only the minimum monthly payment make delinquent cardholders the most valued customers in the business. See id.
\textsuperscript{131} See id. at 135–36.
\textsuperscript{132} See id. 137.
Studies show that most people feel bad when they are unable to pay their debts,\(^{134}\) despite deep societal ambivalence about consumer debt.\(^{135}\) Economists recommend that increased consumption is necessary to economic growth.\(^{136}\) In mainstream U.S. news media, such as the *Wall Street Journal*, consumer spending is equated consistently with happiness and health.\(^{137}\) For example, in an article titled *Consumers’ Attitudes Brighten*, the author claims that “consumers’ spirits picked up a bit in early December, an encouraging sign for retailers hoping for a strong holiday season.”\(^{138}\) The story then claims that “consumer sentiment” and “consumer attitudes” have improved, causing economists to conclude that the waning economy might be improving.\(^{139}\)

The nature of the U.S. economic system, however, makes some financial failure a certainty. The dynamics of capitalism, combined with a thin social safety net, guarantee that some families will fail:

> [w]ithout universal health insurance to protect every family from the financial ravages of illness and without higher levels of unemployment compensation to cushion the effects of

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\(^{134}\) See Sullivan et al., *supra* note 119, at 139–40.

\(^{135}\) See id. at 23.


\(^{138}\) *Id.* This top financial newspaper often devotes an entire two-page spread to bankruptcy and consumer sentiments. For example, on Monday, December 16, 2002, the paper not only contained this story about whether consumer spending would be “bright” enough to give retailers a profitable Christmas season, but also included a comparison of Australian bankruptcy and U.S. bankruptcy, and an article about United Airlines’ request to borrow $2.4 billion from its union’s pension plan to fund its Chapter 11 activities. See *id.*; Sarah McBride, *Australia’s Tough-Minded Bankruptcies May Serve as Role Model*, *Wall St. J.*, Dec. 16, 2002, at A2; Susan Carey, *United Lobbies for More Savings from Its Unions*, *Wall St. J.*, Dec. 16, 2002, at A2.

\(^{139}\) See Ip, *supra* note 137, at A2. News stories of this kind equate good moods or spirits with high consumer spending, even though more personal financial failures occur after the holidays than at any other time of year. It is not surprising that we have as much debt as we do, when we are told that spending on consumer goods is critical to keeping our economy viable.
a layoff, each day, in good times and in bad, some families will fall over the financial edge. And in a market that provides virtually unlimited amounts of consumer credit, some people will accumulate a debt load that eventually takes on a life of its own—swelling on compound interest, default rates, and penalty payments until it consumes every available dollar of income and still demands more. Just as the poor will always be with us, so will the bankrupt middle class.140

A more protective consumer bankruptcy system seems to be directly related to the size of the social safety net and the availability of consumer credit.141 The United States admittedly offers more families sanctuary in bankruptcy, while at the same time offering a wide open consumer credit economy with no limit on lending or interest rates, and few protections from the economic consequences of other problems such as job loss, illness, accidents, and family breakdowns.142 None of this makes bankruptcy pleasant, although at least it is available.143

140 See Sullivan et al., supra note 119, at 3. Sullivan, Warren, and Westbrook uncover a few surprising facts about bankruptcy debtors in this study, including that bankruptcy rates are very similar across racial and ethnic lines, see id. at 41–47, that bankruptcy debtors come from a cross-section of occupations, see id. at 59, that debtors tend to be from the middle rather than the lower classes, see id. at 55, and that bankruptcy debtors are more likely to have attended college than the average citizen, see id. at 51–55. This last statistic can be read in several different ways. What the study actually showed was that bankruptcy debtors were more likely to have attended college than the general population, but less likely than average to have graduated from college. Thus, more went to college but fewer graduated. Is it possible that the study actually showed that bankruptcy debtors were more likely to try new things but less likely to stick with them? These are not the conclusions drawn by the authors, see id. at 55, but the numbers did suggest these alternative conclusions to me.

141 See id. at 259.

142 Whether these high levels of consumer bankruptcies are seen as a societal problem or not, it is clear that consumer bankruptcy is the ultimate free-market solution to bad debt. It forces individual creditors who have made voluntary decisions to lend to recoup the losses from bad loans out of the profits of the good ones. And recoup they have, earning the highest profits in lending history despite all the defaults. Bankruptcy is the market-driven choice to deal with privatized rather than socialized risk. See id. at 260–61. Moreover, while creditor-funded campaigns to restrict consumers’ access to bankruptcy have been both popular and successful in Congress, there have been no campaigns to restrict access to credit. That type of legislation would be seen as anti-capitalist and paternalistic. Many would say that individuals should be allowed to make their own choices about credit and should be responsible for their own decision-making and the resulting consequences.

143 Data collected by the Consumer Federation of America suggests that despite the constant barrage of solicitations, acceptance of new cards has finally stemmed to some extent. See Consumer Fed’n of Am., Credit Card Issuers Expand Marketing and Available Credit While Consumers Increasingly Say No, at http://www.consumerfed.org/081402bankruptcy_
While there may be more people filing for personal bankruptcy in the United States than ever before, the “sting of failure is still sharply felt by those who must publicly declare that they are bankrupt.”\textsuperscript{144} And, while some U.S. citizens may try to buck the trend and consume less, strong societal pressures keep most of Americans spending.\textsuperscript{145}

3. Business Bankruptcy and Stigma in the United States

When it comes to stigma, however, business bankruptcy in the United States is an entirely different matter.\textsuperscript{146} There seems to be less stigma associated with a failing business in the United States than with a personal bankruptcy, probably due to the U.S. notion that some risk is good and necessary to a well-functioning capitalist economy. The United States considers business failure to be negative but not morally wrong. Americans rarely throw corporate officers in jail for failing at

\textsuperscript{144} See Sullivan et al., supra note 119, at 260.


business. In fact, in some industries, like the high-tech or dot-com industries, going through a business failure actually can be seen as a badge of honor, proof that the entrepreneurs were willing to take the kinds of risks necessary to fuel capitalism.\textsuperscript{147}

In other industries, the United States seems to recognize as a society that one-time events can cause business failure, or that sometimes a change in market conditions cannot be predicted and is better softened by Chapter 11 if the company is at stake. In any case, Americans do not like business failure, but they find it more acceptable than personal bankruptcy.\textsuperscript{148} This distinction appears to be shared throughout most of the world. Unlike the rest of the world, however, the United States also recognizes that personal financial failure can be caused by business failure, and thus provides systems to help both failing businesses and failing individuals.\textsuperscript{149}

\textsuperscript{147} See Theresa Forsman, \textit{Failure as a Badge of Honor}, \textsc{BusinessWeek Online}, at http://www.businessweek.com/magazine/content/01_35/b3746632.htm (Aug. 27, 2001) (last visited Nov. 22, 2004).

\textsuperscript{148} This could also be due to the uniquely U.S. corporate concepts of limited liability, given that we tend to see businesses as entities separate and apart from their owners and managers. See Joseph A. McCahery, \textit{Comparative Perspectives on the Evolution of the Unincorporated Firm: An Introduction}, 26 \textit{J. Corp. L.} 803, 807 (2001) (discussing how some European scholars believe, for example, that extending limited liability to small firms will cause moral hazard and that as such, the costs of extending limited liability to such firms would outweigh the benefits to society of doing so).

\textsuperscript{149} Bi-partisan politics continue to play an important role in the development of bankruptcy laws, though in some respects these politics are counter-intuitive. The credit industry, particularly the consumer credit industry, has pushed tremendously in recent years for stricter bankruptcy laws for consumers that require larger paybacks on old debts. See Elizabeth Warren, \textit{The Changing Politics of American Bankruptcy Reform}, 37 \textit{Osgoode Hall L.J.} 189, 192–93 (1999). These sentiments, though not entirely partisan, are generally thought to be Republican or conservative sentiments. \textit{See id.} at 194. Underlying these views is a strong belief that individuals have overspent irresponsibly. \textit{Id.} at 195; \textit{see} Ame Wellman, \textit{Relief for the Poorest of All: How the Proposed Bankruptcy Reform Would Impact Women and Children}, 6 \textit{J.L. & Pol’y} 273, 274–75 (2002). Yet Republican or big-business interests, or even those interested in fueling the economy, have consistently admonished U.S. citizens to do the right thing and spend even more for the sake of economic growth. This seems inconsistent with the bankruptcy crack-down, given that the government officials who have admonished us to spend, as a group, know full well that most people now have more debt than they can repay and that savings rates are now negative in the United States. \textit{See} Lester C. Thurow & Basler Zeitung, \textit{Surprising 1998 American Economic Strength}, at http://www. com/articles/html/surprising.htm (Dec. 1998) (last visited Nov. 22, 2004) (reporting negative U.S. savings rates). Spending without going into debt is not an economic reality, yet we are still encouraged to do it. Moreover, the much-decried bankruptcy crack-down is most likely to hurt consumer credit interests rather than help them, when people reduce spending in reaction to the bankruptcy crack-down.

On the other side of this political coin, it is no less ironic. Very liberal persons, though certainly not all Democrats, favor debtor-oriented bankruptcy laws like the ones in place now.
C. Thumbnail Sketch of the U.S. Systems: Debt Forgiveness for Both Individuals and Business

The bankruptcy systems that have resulted from the history, politics, and culture discussed above are also unique. First and foremost, they allow each bankruptcy debtor a choice about whether to attempt to pay back creditors or to just give up and walk away from debt. This choice is generally not available in other parts of the world. Moreover, as discussed below, businesses that are reorganizing can continue to operate through a Chapter 11 reorganization proceeding that is not overseen by a court-appointed administrator.

1. Personal Bankruptcy in the United States: An Overview

Personal bankruptcies in the United States take one of two general forms. One can either give up all of one’s non-exempt assets in exchange for a discharge of all debts, or one can retain certain items that are exempt from the bankruptcy process. Exemptions are set forth in federal law, and some states may have additional exemptions.

See Warren, supra note 149, at 194 (noting that liberals have traditionally considered bankruptcy laws in the larger context of progressive social legislation). But, some of these people believe that excess spending on the part of U.S. citizens is so harmful to society that it could ultimately destroy the world and its resources. See id. at 195. While this would be deeply disturbing if true, the idea of not spending is almost incomprehensible to U.S. citizens. Clearly, U.S. citizens operate in a culture of consumption and spending unlike any other in the world. Kurt Richebächer, Consumption: Recovery Leader or Potential Profit-Killer?, GOLD DIG. (Nov. 3, 2003), at http://www.gold-eagle.com/gold_digest_03/richebacher110303.html (last visited Nov. 22, 2004).

150 Skeel, supra note 36, at 1–2.
151 See id.
152 See id.
153 In a Chapter 7 bankruptcy, an estate is created to collect and sell property to satisfy the debt of the debtor. But, a debtor can claim certain assets exempt from the bankruptcy estate not to be sold for the benefit of the creditors. “The historical purpose of these exemption laws has been to protect a debtor from his creditors, to provide him with the basic necessities of life so that even if his creditors levy on all of his nonexempt property, the debtor will not be left destitute and a public charge.” H.R. Rep. No. 95–595, at 126 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6087. In the United States, a debtor filing for bankruptcy may choose between the federal or state exemptions, see 11 U.S.C. § 522(b) (2000), if the state in which the debtor is filing has not “opted-out” of the federal bankruptcy exemption scheme. Some examples in the federal exemption system include the following: 1) up to $17,425 of equity in real or personal property used as a homestead; 2) up to $2,775 in one motor vehicle; 3) up to $9,300 in household furnishings; 4) up to $1,150 of jewelry; 5) up to $925 in any property (usually checking accounts), and if the debtor did not use the homestead exemption up to an additional $8,725; 6) up to $1,750 in professional books or tools of the trade; and the debtor’s right to receive payment for certain things such as social security, veteran benefits, and alimony (all the dollar figures are updated by the United States Congress periodically to reflect economic conditions; these values are current through 2003). State exemption schemes were developed not because of bankruptcy but because of collection laws. Because each state
change for an almost immediate discharge of most of one’s unsecured debts,\footnote{154} or one can choose to pay off creditors, either in whole or in part, over a period of three to five years, in which case one does not need to give up non-exempt assets as long as one pays at least the value of those non-exempt assets to creditors under the payout plan.\footnote{155} Again, the debtor, rather than creditors, makes this choice.\footnote{156} The payout-style bankruptcy also allows one to cure, stretch out, and sometimes reduce, secured debt that has gone into default, thereby forcing new payment terms on the secured creditor, who is precluded from repossessing his or her collateral as long as the plan payments are made.\footnote{157} Additionally, Chapter 7 bankruptcy is almost entirely non-interventionist because, assuming there is no objection from a creditor to a debtor’s discharge, the debtor is granted a discharge automatically.\footnote{158}

The U.S. personal bankruptcy system is unquestionably the most forgiving in the world, and strongly encourages persons who have failed financially to get back into the economy and try again.\footnote{159} In many states, the exemptions are extremely generous, sometimes allowing in-
dividual debtors an unlimited amount of equity in a home.\textsuperscript{160} Research suggests that states with higher exemptions, which allow an individual debtor to keep more assets free from creditor claims, have the highest levels of entrepreneurship in the country, again establishing the connection between business activity and an incentive to take risks.

2. The U.S. Business Reorganization Scheme and Its Rationale

The theory behind a Chapter 11 reorganization case in the United States is that a business enterprise\textsuperscript{161} is often worth more to a creditor alive than dead.\textsuperscript{162} In other words, a business may be able to pay creditors more by continuing to operate its business, paying creditors a distribution over time from its future profits, rather than simply liquidating its assets and paying creditors from the liquidation proceeds. Alternatively, a debtor can sell its business as a going concern while in Chapter 11, leaving enough time to sell property so that a good price can be realized for the business enterprise, and then use the proceeds to pay creditors through what is called a liquidating Chapter 11 plan.\textsuperscript{163} In either case, the business is operated for a time while in Chapter 11 in order to avoid the waste that could occur if a business with accumulated goodwill was simply liquidated at the first sign of financial failure.\textsuperscript{164}

\begin{footnotesize}
\begin{enumerate}[label=\textsuperscript{\arabic*}]  
\item \textit{See}, e.g., \textsc{Tex. Prop. Code Ann.} \textsection{} 42.002 (2003); \textsc{Fla. Stat. Ann.} \textsection{} 222.201 (2003) (allowing unlimited homestead exemptions in Texas and Florida, respectively).
\item Chapter 11 is available to corporations, partnerships, as well as individuals. 11 \textsc{U.S.C.} \textsection{} 109(d). Because it is complicated and expensive in terms of legal fees, an individual normally will file a Chapter 13 instead, if his or her debts fall within the debt limitations, namely, the debtor has noncontingent, liquidated, unsecured debts of less than $290,525 and noncontingent, liquidated, secured debts of less than $871,550. \textit{See} 11 \textsc{U.S.C} \textsection{} 109(e).
\item \textit{See} \textsc{Davis, supra} note 12, at 253.
\item \textit{See id.} at 256. In fact, the debtor is permitted to sell off its assets piecemeal in a Chapter 11, even before a plan is filed, despite the fact that the formal name of this chapter of the code is Reorganization. \textit{See id.} About 20–30\% of confirmed plans are liquidation plans. \textit{Id.}; \textit{see} E. \textsc{Flynn}, \textsc{Statistical Analysis of Chapter 11}, at 12 (1989).
\item The French commercial system takes actual steps to prevent companies from getting into too much financial trouble. Judges of the Commercial Courts have the power to summon the chief executive officer (CEO) of any company that appears to be in financial trouble. Once summoned, an informal hearing is held to discuss the information gathered by the court (the information is collected by the Clerk of the Court, who is also basically the Registrar of Companies, who has filed information, such as liens, mortgages, and preferences, on each company in the territory). The CEO is allowed to inform the judge of the types of measures the company is taking to right itself. After the hearing, the judge 1) can accept the measures discussed by the CEO; 2) gather more information concerning the company from many sources; 3) the CEO can file for a court agent to oversee the company; and 4) can urge the CEO to file for protection under French law. \textit{See} Broude et al., \textit{supra} note 6, at 536–39.
\end{enumerate}
\end{footnotesize}
For the benefit of stakeholders (such as creditors, equity holders, or owners) and employees, it is sometimes more efficient and less wasteful to allow the business to reorganize its affairs, either through restructuring its debt, by obtaining new equity owners, or both.\textsuperscript{165} While this theory is not without its critics,\textsuperscript{166} the overwhelming worldview today is that some system for “rescuing” ailing businesses is a pre-condition to maintaining a vibrant, capitalist economy.\textsuperscript{167}

The shocking difference between U.S.-style reorganization and most others around the world is that current management of the failing company normally stays in place with no administrator directly overseeing the system.\textsuperscript{168} The historical development of this unique

\textsuperscript{165} Sometimes equity is distributed to the unsecured creditor class under the plan of reorganization. See 11 U.S.C. § 1129(b)(2)(B) (describing how equity cannot retain the stock unless unsecured creditor classes are paid in full or accept the plan).


\textsuperscript{167} It is true that Chapter 11 fees are notoriously expensive. Enron attorneys had spent over $331 million dollars as of March 2003, and the company was still nowhere near confirming a plan at that time. See Kristen Hays, \textit{Enron Proposes New Pipeline Business}, ASSOCIATED PRESS, Mar. 19, 2002, available at 2003 WL 16151125; see also Lucian Ayre Bebchuck, \textit{A New Approach to Corporate Reorganization}, 101 HARV. L. REV. 775, 780–81 (1988) (describing the numerous costs and inefficiencies in the current Chapter 11 scheme). Also, in highly regulated industries with large infrastructures, critics have argued that the Chapter 11 of one player in a closed industry can be unfair and harmful to the other firms in the industry, and even weaken the other firms by allowing the company in bankruptcy to externalize pre-petition debts and undercut market prices, therefore recovering a greater market share. See Sarah McBride, \textit{Australia’s Tough-Minded Bankruptcies May Serve as Role Model}, WALL ST. J., Dec. 16, 2002, at A2.

\textsuperscript{168} See Metzger & Bufford, \textit{supra} note 4, at 153–54.

\textit{Legal & Business Forms—Chapter 11 Reorganization}, at http://www.legal-forms-kit.com/freelegaladvice/bankruptcy/8.html (last visited Jan. 11, 2005). While scholars have regularly noted that old management is often replaced with new management as the case proceeds, this is often because old management wishes to resign.
system derives from the first reorganizations in the railroad industry, one the first big businesses in the United States.\textsuperscript{169} At the time that Munroe Railroad and Banking, Co. defaulted on its obligations to its lenders, there was no mechanism in place to address this failure, other than the lender’s right to foreclose and the court’s equitable right to appoint a receiver to take over the debtor’s assets.\textsuperscript{170} Because piecemeal sale of the debtor’s assets would result in great financial loss to all, the court merged these two legal concepts and ordered that the lender sell the assets all at once, pursuant to a going concern sale, rather than piecemeal.\textsuperscript{171}

Amazingly, this tiny innovation in foreclosure practice, which took place in the narrow context of failing U.S. railroads, led to a new way of looking at reorganization and value. Lenders continued to threaten foreclosure, but did not always follow through. Moreover, courts began appointing a receiver in each case, who would watch over and protect the debtor’s property and request an injunction against creditor collection efforts.\textsuperscript{172} This process was known as equity receivership and allowed the business to continue in operation while the parties attempted to negotiate a favorable resolution of the debt.\textsuperscript{173} Ultimately, after many twists and turns, the current Chapter 11 system emerged from this humble start.

3. The Logistics of Chapter 11 Business Reorganization\textsuperscript{174}

Bankruptcy cases, of which Chapter 11 is one kind, are presided over by a specialized bankruptcy court that is part of the federal judicial scheme.\textsuperscript{175} The law in place is the Federal Bankruptcy Code,\textsuperscript{176} although some principles used in bankruptcy cases arise from state law.\textsuperscript{177} When an enterprise is in Chapter 11, it normally operates its own business through its pre-filing management.\textsuperscript{178} No trustee is or-

\begin{itemize}
\item \textsuperscript{169} Skeel, supra note 36, at 57.
\item \textsuperscript{170} See id.
\item \textsuperscript{171} Id.
\item \textsuperscript{172} Id. at 58.
\item \textsuperscript{173} Id.
\item \textsuperscript{174} Chapter 11 can also be used by individuals. See 11 U.S.C. § 109(d).
\item \textsuperscript{175} See generally 28 U.S.C. § 157(a) (2000) (establishing the bankruptcy court system).
\item \textsuperscript{176} 11 U.S.C. §§ 101-1330.
\item \textsuperscript{177} See, e.g., Butner v. United States, 440 U.S. 48, 55 (1979) (stating that “[u]nless a particular federal interest requires a different result, property interests are created and defined by state law”).
\item \textsuperscript{178} But see 11 U.S.C. § 1104(a). Although it is unusual, a party in interest may seek the removal of the debtor and have a trustee appointed by showing cause, such as fraud or
\end{itemize}
ordinarily appointed. As soon as a debtor files a voluntary Chapter 11 case, an automatic stay goes into effect, effectively stopping all collection activity against the debtor or any of its property of any kind. The stay is broad and powerful and even things that one would not think would be stayed are indeed stayed. For example, secured creditors are prohibited from taking any action to repossess collateral that they could repossess if not for the bankruptcy. Even the government is precluded from collecting on its claims. Virtually all enterprises, and even individuals, are eligible for Chapter 11 and there is no requirement that the debtor be insolvent in anyway.

mismanagement. See id. This is in order to protect interests of creditors and equity holders. See id.; see also In re Sharon Steel Corp., 871 F.2d 1217 (3rd Cir. 1989) (upholding, reluctantly, the trial court’s decision to appoint a trustee, because the debtor-in-possession had been unable to turn the company around, and because the debtor had conducted questionable transfers of property, had virtually violated its fiduciary duty by not pursuing claims to recover the transferred property, and had proven to be dishonest).

In the United States, the vast majority of cases filed under any chapter of the Bankruptcy Code are voluntary cases. See generally Nathalie Martin, ¿Qué Es La Diferencia?: A Comparison of the First Days of a Business Reorganization Case in Mexico and the United States, 10 U.S.-Mex. L.J. 73, 75 (2002).


See Martin supra note 179, at 75 (“There is a very broad, automatic stay granted in favor of the debtor. This stays virtually all collection activity that is out there, including . . . employee claims, labor claims, and every other type of lawsuit.”).

See 11 U.S.C. § 362(a)(3). For a secured creditor, any party in interest for that matter must ask the court for permission to lift the stay in order to proceed for repossession. The court will grant relief only in limited circumstances. See 11 U.S.C. § 362(d); see also Martin, supra note 179, at 81.

See Martin, supra note 179, at 79 (citing 11 U.S.C. § 362) (stating that even government entities must stop all collection efforts and can only maintain lawsuits against entities in bankruptcy if the issue affects health and public safety, which is interpreted very narrowly); see also In re Universal Life Church, Inc., 128 F.3d 1294, 1297 (9th Cir. 1997) (finding that the § 362(b)(4) police and regulatory exceptions to an automatic stay “refers to the enforcement of laws affecting health, welfare, morals and safety, but not regulatory laws that directly conflict with the control of the res or property by the bankruptcy court.”). The two tests to determine if a government action is a police and regulatory exception in nature are the “pecuniary purpose” test and the “public policy” test. Id. (citing NLRB v. Continental Hagen Corp., 932 F.2d 828, 833 (9th Cir. 1991)). “In the pecuniary purpose test, the court determines whether the government action relates primarily to the protection of the government’s pecuniary interest in the debtor’s property or to matters of public safety and welfare. If the government action is pursued solely to advance a pecuniary interest of the governmental unit, the stay will be imposed.” Id. (citations omitted).

See 11 U.S.C. § 109(d) (defining who can be a debtor under Chapter 11). Some examples of entities excluded from Chapter 11 are insurance companies, banks, savings banks, cooperative banks, savings and loan associations, building and loan associations, and homestead associations. Id. § 109(b). These exclusions include both domestic and foreign entities. Id.


See Martin supra note 179, at 77.
Chapter 11 can be used as a strategic measure to stop lawsuits, to stop foreclosures, or for whatever purpose the debtor chooses. Practically speaking, one of the most beneficial features of Chapter 11 is the captive audience that the debtor-in-possession has in its bankruptcy judge, who is available in record time to hear any emergency that could affect the debtor’s chances at rehabilitation.

The debtor’s goal in the case is to emerge from Chapter 11 with its debts restructured and also reduced in amount in most cases. This goal is achieved by obtaining approval of a Chapter 11 plan outlining how, to what extent, and over what time period debts will be repaid. Creditors are allowed to vote on the debt restructuring plan, thus allowing them to choose whether to go along with the debtor’s plan, propose their own plan, or choose to liquidate the debtor’s business. If the debtor can get most creditors to vote in favor of the plan, it can be forced on the dissenting creditors who also will be bound by it. Sometimes the debtor can approve a plan, even if most creditors vote against the plan, although this is rare.

Secured creditors are normally paid in full with interest up to the lesser of the amount of the loan or the value of the collateral. If the debt is undersecured, all the deficiency claims become unsecured claims. Some creditors, such as taxing authorities and employee

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187 See Maggs, supra note 122, at 685–86 (discussing how Texaco filed its Chapter 11 case in order to delay collection on Pennzoil’s $10.53 billion judgment, and ultimately to gain leverage to settle the judgment for $3 million).

188 For example, US Airways recently tried to have a bankruptcy court intervene in a labor dispute on an immediate and emergency basis. See Susan Carey, UAL Says It Must Cut Expenses by More Than $1.1 Billion a Year, Wall St. J., Sept. 20, 2004, at A8 (discussing how the bankruptcy court may intervene to grant emergency relief to the company).

189 See 11 U.S.C. § 1121(c)(2) (stating that the debtor has the exclusive right to file a plan for 120 days).

190 See id. § 1129(a)(8) (discussing creditors’ rights to accept or reject a plan); id. § 1126 (2000) (discussing how acceptance is accomplished); see also id. § 1121(c) (stating that any party in interest can file a plan, if certain criteria are met).

191 See id. § 1129(b)(2) (describing the process of forcing a plan on classes of secured and unsecured creditors); see also 11 U.S.C. § 1126 (describing when a class is deemed to have accepted a Chapter 11 plan).

192 See id. § 1129(a)(10) (discussing how a Chapter 11 plan can be forced on dissenting creditors, as long as at least one class of creditors votes yes).

193 See id. § 506(a).

An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor’s interest in the estate’s interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor’s interest or the amount so subject to setoff is less than the amount of such allowed claim.
claims, are entitled to special priority and must be paid in full in the plan. Unsecured creditors are often paid a distribution over time and are very rarely paid in full. The amounts not paid are discharged at the end of the case and never paid. There is no set amount of distribution that unsecured creditors must receive, but the debtor needs the unsecured creditors’ votes and thus often offers as much as it can afford to pay.

Existing equity can retain their ownership of the debtor firm, but only if the unsecured creditors agree, or if unsecured creditors are paid in full. In a sense, creditors get to choose, through their voting rights, whether to go along with the reorganization plan, or alternatively, to liquidate the debtor’s business. In reality, however, the debtor usually retains control over the case and the plan process throughout the case, and has the exclusive right to file a plan for at least the first four months of the case and often much longer. This leaves many creditors feeling like hostages in a debtor-friendly proceeding, but a case cannot go on forever. From this it seems clear that a business that is losing money will be liquidated almost immediately because the case is not likely to succeed at reorganization, and any delay will hurt creditors.

D. Conclusions About the U.S. Scheme and Its Societal Role

U.S. bankruptcy systems did not emerge randomly or in a vacuum, but through conscious modern and historical decisions about the role of credit and money in U.S. society. These attitudes and conditions are unique and are not present in other countries, including those countries currently adopting U.S.-style systems. This may limit the effectiveness of imported systems, and should lead countries that are adopting new systems to study other systems as well, and to consider local culture when enacting new laws.

Id.

195 See id. § 1129(a) (9).
196 See id. § 1141(d).
197 See id. § 1129(b) (2) (B) (i). But, if under a plan an unsecured creditor is impaired by the plan, the court can still approve the plan if it is shown that the unsecured creditor would receive as much under a Chapter 7 liquidation plan. See id. § 1129(a) (7) (A) (ii).
198 But see id. § 1129(a) (8) (stating that, if the creditor is not impaired by the plan and votes against the plan, the court can still verify the plan).
200 See id. § 1129(a) (11).
201 Id.
II. CROSS-CULTURAL ATTITUDES TOWARD DEBT: UNRIPE GROUND FOR TRANSPLANTATION

Around the world, people are less forgiving about debt forgiveness than they are in the United States. In some parts of the world, not paying debts is the ultimate disgrace. In other parts of the world, there simply is no personal bankruptcy system, and little in the way of business reorganization either. Despite this, many countries are starting to move toward a U.S. bankruptcy reorganization model for businesses, and some are also replicating forgiving personal bankruptcy laws. Given the unique cultural, economic, and historical development of the U.S. system, however, this may be impractical. This Section describes cultural attitudes toward debt in a few other parts of the world that are currently in the process of importing U.S.-style bankruptcy laws. It suggests that history cannot be the sole driving factor in determining which bankruptcy system and philosophy a country develops, by describing the very different system and attitudes of England, from which the original U.S. bankruptcy system arose. By way of further example, it then describes attitudes toward debt and bankruptcy in parts of continental Europe, as well as Japan, as a contrast to the U.S. attitudes previously discussed. The laws of these countries also are briefly examined in order to discuss the role of both transplantation, as well as local culture, in enacting such laws.

A. Historical Bankruptcy Perspectives Outside the U.S.: England as an Example

Because of its long history of commerce, England never had to sprint to catch up or otherwise create a quick market economy.

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202 See infra notes 235–308, and 380–513 and accompanying text.
203 See infra notes 415–421 and accompanying text.
204 See infra notes 235–267 and accompanying text.
205 See infra notes 268–317 and accompanying text.
206 See infra notes 268–308 and accompanying text.
207 Martin, supra note 16, at 367. England, as well as Canada and Australia, have relatively lenient personal bankruptcy systems by world standards. Id. at 367 n.1; see Efrat, supra note 3, at 88–90. Other countries that have more lenient personal bankruptcy systems, besides the United States, England, Canada, and Australia, include Hong Kong, New Zealand, Taiwan, Russia, Scotland, and the Netherlands. Martin, supra note 16, at 367 n.1. Virtually all of these countries impose a Chapter 13-like payment plan on at least some bankruptcy debtors before granting them a discharge. Id.
208 See infra notes 209–513 and accompanying text.
While, initially, U.S. and English bankruptcy laws were quite similar, by the 1800s, English law had a very different emphasis and flavor in regard to its treatment of debtors than early U.S. bankruptcy law. The first bankruptcy laws were created in 1543. The preamble to this law described the bankruptcy debtor as an anti-social, immoral character who regularly took advantage of others. The law itself was designed solely for the benefit of creditors and was virtually criminal in nature. Bankruptcy was something creditors did to the debtor, an involuntary social condition to which a naughty user of credit was subjected against his will. Not surprisingly, then, early English bank-

210 See Skeel, supra note 36, at 38 (stating that in the 1880s, English bankruptcy law was quite tough on debtors, who had to subject themselves to searching scrutiny and long discharge delays). English law was hardly unique at the time in its tough treatment of bankruptcy debtors. Common punishments around the world included forfeiture of all property, relinquishment of the consortium of a spouse, imprisonment, and death. Early stories claim that in Rome, creditors were permitted to carve up the body of a debtor. See Tabb, History of Bankruptcy, supra note 33, at 7.


212 See id. The Preamble stated that

[w]here divers and soondry persones craftelye obteyning into theyre handes greate substaunce of other mennes goods doo sodenlie see to partes unknowne or kepe theyre houses, not mynding to paie or restore to any of theyre creditours theyre debtes and dueties, but at theyre owne willes and pleasures consume the substaunce obteyned by credyte of other men, for theyre owne pleasure and delicate lyving, againste all reasone equity and good conscience.

Id.

213 See id.

214 See id.

In Parliament enacted the first English bankruptcy law, 34 & 35 Henry 8, chapter 4, entitled ‘An act against such persons as do make bankrupts.’ As the title indicates, the act was not passed with any heed for the interests of the debtor. Instead, it was intended to give creditors another collection remedy. The new remedy lay against all fraudulent and absconding debtors (but not merely unfortunate debtors), referred to throughout the act as ‘offenders.’ This act, along with all of the early bankruptcy laws, was quasi-criminal in nature, and provided for the imprisonment of the offender if necessary. A British commentator notes that ‘the law seems at that time to have been administered with considerable severity.’ Id. Under this act (and for almost three centuries hence) bankruptcy was purely involuntary as to the debtor. The right to commence a bankruptcy proceeding rested solely in the hands of the creditors of the debtor. This limitation was perfectly consistent with the rationale of the act, which was to protect creditors and thus facilitate commerce. Upon notice the various assets of the debtor were seized, appraised, and sold, and the proceeds were distributed pro rata to all creditors proving just claims.
Bankruptcy laws were filled with numerous penalties and punishments for non-payment, the most well known of which was to “suffer as a felon, without the benefit of clergy,” a polite phrase for the death penalty.\textsuperscript{215} While few were actually subject to death for failing to pay their bills, debtors’ prison was common,\textsuperscript{216} as was being shunned by society in Dickensian fashion.\textsuperscript{217}

There was no debtor discharge, though there was plenty of credit, even as early as the 1600’s.\textsuperscript{218} The first debtor discharge was introduced in the Statute of Anne in 1705, but this provision was only in place for three years.\textsuperscript{219} The debtor discharge later became part of the permanent law, but was granted upon application only, rather than automatically, after the debtor proved that he had been honest

\textit{Id.} at 329–30. The first voluntary bankruptcy law in England was passed in 1844 and applied to traders only. \textit{Id.} at 353. This was extended to non-merchants in 1861. \textit{See id.} at 354.


has something in it of Barbarity; it gives loose to the Malice and Revenge of the Creditor, as well as a Power to right himself, while it leaves the Debtor no way to show himself honest: it contrives all the ways possible to drive the debtor to despair, encourages no new Industry, for it makes him perfectly incapable of anything but starving.

\textit{Id.} Sentiments such as Defoe’s clearly show that society, as a whole, was conscious of the ill effect the law had on the average bankrupt. \textit{See id.}

\textsuperscript{216} See Tabb, \textit{History of Bankruptcy}, supra note 33, at 7.

\textsuperscript{217} For an example of England’s historical perception of bankruptcy in the nineteenth century, one should read Dickens’ \textit{The Little Dorrit}. \textit{See generally} CHARLES DICKENS, THE LITTLE DORRIT (Dodd, Mead 1951) (1857) (a story about a father and his family living and growing up in the Swansea debtors’ prison). Dickens’ tale is not unlike Defoe’s sentiment referred to \textit{supra} in note 215. Essentially, the bankrupt was treated like a leper, and the prison was like a leper colony. Mr. Dorrit finally gets out of prison after receiving a windfall in inheritance, spends it all, and then dies before being forced to return to debtors’ prison. The story’s main focus is on how bankruptcy impacts the family unit and how it is truly punitive in nature.

\textsuperscript{218} See Tabb, \textit{Evolution of Discharge}, supra note 33, at 330.

\textsuperscript{219} \textit{See id.} at 333. Tabb also notes that discharge was not automatic. The bankrupt needed to receive a “certificate of conformity.” To receive this, the bankrupt needed to surrender voluntarily to an examination by the court, to full disclosure, and to delivery of all the bankrupt’s assets to the court. The court maintained the power to deny the certificate, but this discretion was seldom used. What is interesting is that creditors at the time had no power to block the bankrupt’s receipt of the certificate. \textit{See id.} at 333–34. One could argue that this was one of the first pro-debtor bankruptcy laws, but as will be seen, the act lasted all but three years. \textit{See id} at 333.
and had cooperated with creditors.\footnote{220} Until 1705, a bankruptcy discharge was only available to merchants, as credit was seen as unnecessary and even a fraud if obtained outside the commercial context.\footnote{221} Unlike the early U.S. economic climate, in which every man was seen as a potential merchant who could help grow the economy, early English society accepted credit only as a necessary evil.\footnote{222} While laws themselves became more lenient over time, this attitude toward debt and credit never really changed.

B. Attitudes Toward Debt in England Today

Even today, English people are sensitive about financial failure.\footnote{223} They generally consider such failure to be a failure of character and consider it extremely negative if a person, or even a business, fails financially. Strictly personal bankruptcies, resulting from too much credit card debt or the loss of a job or good health, have been rare in the past because there was little consumer credit, and government programs helped people if they lost employment or needed health care.\footnote{224} Now there is more credit and more personal financial failure.

While England and Wales only had 0.47 personal bankruptcy filings for every 1000 individuals in 1997 (as compared to 5 personal bankruptcy filings for every 1000 that same year in the United States),\footnote{225} these are still considered major embarrassments, even if they result from the failure of a business.\footnote{226} Executives in a company that

\footnote{220} See id. at 339. This provision is still popular in the personal bankruptcy laws of many countries today.
\footnote{221} See Tabb, Evolution of Discharge, supra note 33, at 335–36.
\footnote{222} See Weisberg, supra note 211, at 66. As Professor Weisberg notes, in the United States, bankruptcy law was seen as a “robust, economical, and scientific instrument of commercial efficiency.” See id. In England, credit was morally tinged and represented false wealth to many people in the traditional land-based society. See id. at 13.
\footnote{223} See id.
\footnote{224} See James A. Morone & Janice M. Goggin, Health Policies in Europe: Welfare States in a Market Era, 20 J. Health Pol., Pol’y & L. 557, 558, 563 (1995) (noting that England currently has a state-run health care system, but that it and other similar European systems may soon be “Americanized”).
\footnote{225} See Efrat, supra note 3, at 100–01. English bankruptcy rates are higher than those in most other parts of Europe. See Michael Harrison, Personal British Bankruptcies Hit 10-Year High, The Fed. Cap. Press of Austl., Nov. 10, 2003, at A17 (stating that high rates of bankruptcy in Britain are the result of the explosion of consumer credit).
\footnote{226} As an example of how harsh the “bankrupt” was treated by the early British code, consider that a nonconforming bankrupt was subject to the death penalty and that to obtain a discharge the bankrupt had “to (i) secure a certificate of conformity from a majority of ‘bankruptcy commissioners,’ (ii) obtain such a certificate from four-fifths of creditors, in value and number, and (iii) swear that the creditor certificates ‘were obtained fairly and
fails can have a very difficult time finding another job and are often shunned socially. Thus, despite all the new credit available, the English marketplace comes down hard on those who have gotten into financial difficulty. The attitude is “once a bankrupt, always a bankrupt.” The government is likely to be unable to tell people how to think or whom to invite to parties, even through drastic legal change.

C. Attitudes Toward Debt in Continental Europe: Do the Laws Reflect Them?

Henry Kissinger once noted that when he wants to talk to Europe, he’s not sure whom to call. While this may be changing, now that the EU is working on unifying currency and laws, Europe still consists of many diverse cultures, has a huge variety of insolvency systems, and contains a host of diverging philosophies about debt.

As a rule, financial failure on the continent carries significantly more stigma than in the common law countries, and the personal bankruptcy laws are less forgiving than those in the common law countries. Reorganization laws are far more varied and reflect other societal concerns. European governments are attempting to reduce the negative stigma associated with business failure in order to fuel without fraud.” Peter V. Pantaleo, Basic Business Bankruptcy, PRACTICING L. INST., COMMERCIAL LAW AND PRACTICE COURSE HANDBOOK SERIES 7, 11 (1992).

See, e.g., David Gow, Former Alstom Chief to Return His £2.7 Million Pay-off, GUARDIAN UNLIMITED, at http://www.guardian.co.uk/executivepay/story/0,1204,1021483,00.html (Aug. 19, 2003) (last visited Nov. 22, 2004) (discussing the public disdain at a corporate officer who received a golden parachute before the company failed).

See Lucinda Kemeny & Garth Alexander, Blair Chases American Dream, TIMES (London), Feb. 18, 2001, at A1 (noting mantra of “once a bankrupt, always a bankrupt”). The United States did away with the word bankrupt in the 1978 Code, replacing it with the more genteel “debtor,” exactly because bankrupt carried such negative stigma. Donald R. Price & Mark C. Rahdert, Distributing the First Fruits: Statutory and Constitutional Implications of Tithing in Bankruptcy, 26 U.C. DAVIS L. REV. 853, 862 n.33 (1993) (stating that the 1978 Reform Act, which created the current Bankruptcy Code, does not refer to the word “bankrupt” but uses the more euphemistic word “debtor” instead).


See infra notes 230–307 and accompanying text.

See Efrat, supra note 3, at 100–101.

See infra notes 259–308 and accompanying text.
entrepreneurial spirit. Many countries, as well as lawmakers of the newly formed EU, are looking to the United States for ideas.

1. Continental Credit Use and Personal Bankruptcy Systems

Personal bankruptcy systems on the continent vary significantly, but have become far more forgiving in the past decade, following the deregulation of consumer credit. Consumer credit usage varies widely on the continent, with consumers in some countries such as Sweden using it heavily, while Italian and Greek consumers use it much less frequently. Overall, though, credit use is rising and savings rates on the continent are declining. European banking and economic officials have expressed concern over this trend. As a result, some have simply stepped up efforts to educate the public about the hazards of credit use. Others have liberalized bankruptcy and discharge laws, in order to ensure that social problems are not exacerbated by the increases in credit.

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234 Metzger & Bufford, supra note 4, at 153.

235 See Kilborn, *German Approach supra note 14, at 257; European Law on Consumer Overindebtedness, supra note 14, at 5–9.*

236 Eur. Credit Research Inst., *Consumer Credit in the European Union* (Feb. 2000), available at http://www.ciaonet.org/wps/gun01/gun01.pdf (last visited Dec. 4, 2004). “The weight of consumer credit is far higher in the U.S. economy than in the EU countries, including the UK.” *Id.* Because of large differences in the use of consumer credit observed across EU countries, however, it is hard to generalize about a European consumer credit use. *Id.*


240 See Efrat, supra note 15, at 166. Professor Efrat hypothesizes that the need for a fresh start policy is greater in societies where the government does not regulate credit rates or availability, where the government actively promotes entrepreneurship, where the welfare programs are small, and where private financial institutions have relatively lax standards for granting credit. *See id.* at 165–66. He argues that the U.S. fresh start policy is very justified in this context, and also that more countries should enact more lenient sys-
Not all European countries have forgiving bankruptcy systems, however, and some have no systems for consumers at all. For example, in the bankruptcy-restrictive countries of Italy and Greece, individuals generally are not eligible for bankruptcy protection unless they are engaged in business. In other words, there is simply no bankruptcy system for consumers. Even for individuals engaged in business, a discharge is not granted until many years after bankruptcy is declared, and in a handful of the most restrictive places, no discharge is granted unless creditors are ultimately paid in full. This is certainly an unusual interpretation of a discharge, at least from a U.S. perspective. The underlying theme of bankruptcy in these jurisdic-

tems of debt forgiveness as they move toward the United States regarding these factors. See id. at 167–68.

241 See Efrat, supra note 3, at 82–83 (describing how, in Italy and Greece, bankruptcy is available only to merchants or businesses). Under one scholar’s characterization of Continental systems, the most restrictive or “conservative” camp is comprised of systems that provide no debt forgiveness to consumers at all. Id. The “moderate” camp is comprised of nations that offer debt forgiveness to financially distressed consumers, but not as a matter of course, and the least restrictive or “liberal” camp, headed by the United States, consists of countries that provide a relatively prompt bankruptcy discharge as a matter of course. See id. at 84–87.


244 In a few of these places, such as Brazil and Venezuela, an individual is only eligible for bankruptcy if he or she is engaged in business activity as a merchant. In many of these places there is also little consumer debt available. Perhaps these laws make sense in their context. See Antonio Mendes, A Brief Incursion into Bankruptcy and the Enforcement of Creditor’s Rights in Brazil, 16 NW. J. INT’L L. & BUS. 107, 111 (1995); Efrat, supra note 3, at 84. In the Czech Republic, the debtor must enter into a settlement agreement with her creditors. See Helmut Gerlach, Bankruptcy in the Czech Republic, Hungary, and Poland and Section 304 of the United States Bankruptcy Code, Proceedings Ancillary to Foreign Bankruptcy Proceedings, 22 Md. J. INT’L L. & TRADE 81, 93 (1998). Conversely, Chile and Egypt offer the debtor no discharge at the conclusion of the proceedings. See Ricardo Sandoval, Chilean Legislation and Cross-Border Insolvency, 33 TEX. INT’L J. 575, 577 (1998).

245 See Efrat, supra note 3, at 84–85. Professor Efrat notes that, in these conservative nations, bankruptcy is a creditor-biased mechanism, more akin to a debt-collection proceeding that a debt-forgiveness framework. Thus, there is no need to discharge the debt. See id. at 84. In Italy, for example, discharge is for merchants only and it takes five years to get a discharge, while it takes ten years in Greece. See also WHITE & CHASE LLP, supra note 146, at 335.

246 The U.S. Bankruptcy Code of 1978 allows certain debts to be wholly or partially discharged.
tions is that bankruptcy is a creditor-oriented mechanism and is not designed to serve the interests of financially distressed consumers.\textsuperscript{247}

The lack of such a system could have grave societal implications in the face of consumer credit deregulation. In the past, countries without a personal bankruptcy system generally did not have access to consumer credit. This equilibrium is now out of balance. Where there is an economy with consumer credit, such as in Italy, there is simply no way out.\textsuperscript{248} If one gets in trouble with consumer debt, one remains in trouble, perhaps indefinitely.

Other European countries are more forgiving and provide some form of discharge. In Norway, Sweden, Denmark, Finland, Austria, Germany, France, Spain, and Portugal,\textsuperscript{249} the judge has the discretion to decide whether a discharge is justified.\textsuperscript{250} While the particular standard for granting a discharge varies from place to place, the burden is on the debtor to prove that the discharge is justified in moderate camp jurisdictions.\textsuperscript{251} In many places, the judge may grant a bankruptcy discharge only if the person is unable to pay the debts.\textsuperscript{252} For example, in Denmark, the debtor must be hopelessly indebted and the circumstances must justify granting a discharge.\textsuperscript{253} In Norway, a debtor must be permanently unable to pay.\textsuperscript{254} In Sweden, in order to get a full or partial

\textsuperscript{247} See Efrat, supra note 3, at 82–83. For example, one source claims that the purpose of Italian bankruptcy law is to satisfy the creditors’ rights and remove the insolvent company from the market. See Giorgio Cherubini, Recognition of an Insolvency Scheme of Arrangement in Italy 41, available at http://www.insol-europe.org/publications/cva_italy.pdf (last visited Dec. 4, 2004).

\textsuperscript{248} See Efrat, supra note 3, at 81.

\textsuperscript{249} See id. at 85–86. This category also includes the Asian countries of India, Pakistan, Japan, Singapore, and the Philippines, as well as Israel, South Africa, Kenya, and Uganda. See id.

\textsuperscript{250} See id. at 84. This attribute has a fundamental impact on debtors seeking relief, as they have the burden of convincing the judge to grant relief. Efrat reports that there are three basic reasons why debtors in this strata choose not to file for bankruptcy: social stigma, ignorance of debt forgiveness outcome, and the high costs and unpredictable results associated with convincing a judge. Id. at 86–87. This is an attribute of Indian law as well as the law of the Philippines, Singapore and Japan, and the African nations listed above. See id. at 85–86.

\textsuperscript{251} See id. at 84.

\textsuperscript{252} See id. at 86.

\textsuperscript{253} See Efrat, supra note 3, at 85; see also Hans Petter Graver, Consumer Bankruptcy: A Right or a Privilege? The Role of the Courts in Establishing Moral Standards of Economic Conduct, 20 J. Consumer Pol’y 161, 170 (1997).

\textsuperscript{254} See Efrat, supra note 3, at 85.
discharge, the debtor must affirmatively prove that “the debtor has no hopes of paying his or her debts in the foreseeable future.”

Most European laws grant a discharge of indebtedness only after a repayment plan, similar in some respects to Chapter 13 under U.S. law. In Germany, for example, the debtor must make an effort to increase his or her income for the benefit of creditors, and also must pay over all seizable income to creditors for six years. Moreover, creditors receive all of the debtor’s income over a certain amount, a provision that arguably creates the wrong incentives.

In all the systems discussed in this Section, there has been movement toward liberalizing the laws, though none are as forgiving as that of the United States, England, and the other common law systems. Until recently, it was not clear that the continent needed forgiving bankruptcy systems, given its extensive social systems and fairly rigid requirements for borrowing. But, extensive growth in consumer credit makes such debt forgiveness necessary, particularly in light of existing stigma about financial failure. Fortunately, as a whole, European governments seem interested in making sound public policy to protect citizens, and not merely to fuel economies for their own sake.

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257 See Kilborn, German Approach, supra note 14, at 280–81 (noting that a debtor cannot turn down employment and must work in a job outside the person’s field if that is all that is available).

258 See Paulus, supra note 256, at 144.

259 The debtor can keep 100% of the first $17,000 in income. See Kilborn, German Approach, supra note 14, at 286. After that, income is shared but the debtor can never keep more than about $27,500 per year. Id.

260 Martin, supra note 16, at 75.

261 See Efrat, supra note 3, at 96.

262 See Kilborn, German Approach, supra note 14, at 260–61; See Kilborn, French Law on Consumer Overindebtedness, supra note 14, at 5–9.

263 See Kilborn, German Approach, supra note 14, at 260–61; See Kilborn, French Law on Consumer Overindebtedness, supra note 14, at 5–9.
Hopefully these concerns will keep credit from proliferating beyond the respective systems’ ability to address failure in a constructive way. Some countries, such as Italy, have not yet balanced these concerns and may face social problems as a result.264

Scholar Jason Kilborn, who has studied and translated the new personal bankruptcy systems of France and Germany, has noted the deep resentment and distrust held by French and German citizens toward lenient consumer bankruptcy laws.265 While these attitudes will surely change over time, they reflect long-standing notions of immorality and personal responsibility,266 as well as different credit practices, both of which bear heavily on the acceptance of, and need for, consumer bankruptcy.267

2. European Reorganization Schemes: France and Germany as Examples

As with personal bankruptcy systems, not all continental countries have reorganization schemes. In fact, until recently, most countries did not have such a scheme.268 With the fall of communism and Europe’s desire to create a more competitive market economy, however, reorganization laws have become popular new legislation. Most of these systems are still very different from the U.S. Chapter 11 model.269 In most places, there is no “automatic stay” that protects the

264 See Efrat, supra note 3, at 82–83.
265 See Kilborn, German Approach, supra note 14, at 269. In a 1986 report regarding personal indebtedness, legislators acknowledged the need for a consumer bankruptcy discharge, but concluded that “a discharge after the Anglo-American model is out of the question.” Id. In discussing French attitudes, Professor Kilborn notes that the French word for business bankruptcy comes from the French word—faillite or the Latin word—fallere, which mean to cheat, deceive, or trick. Kilborn, French Law on Consumer Overindebtedness, supra note 14, at 1. The even more distrusted consumer bankruptcy process, a recent enactment in any event, was called a deconªture, meaning to “diminish by boiling down, or to squander.” Id.
266 When I say “personal responsibility,” I do not mean the notion that is floating around in the U.S. Congress today, namely that bankruptcy is a moral issue and that people should not take on more debt than they can afford to repay. See Todd J. Zywicki, The Past, Present, and Future of Bankruptcy Law in America, 101 Mich. L. Rev. 2016, 2025–27 (2003). Rather, I refer to the notion of whether society is already meeting one’s needs, through national health care, good benefits for the poor and unemployed, and so on.
267 Kilborn, French Law on Consumer Overindebtedness, supra note 14, at 5–9; Kilborn, German Approach, supra note 14, at 260–61. In each of these articles, Professor Kilborn chronicles the rise in consumer credit, as well as the resulting need for better personal bankruptcy protection.
268 See Martin, supra note 179, at 78.
269 See id.
debtor and its assets upon the filing. Additionally, in most places the debtor must be insolvent in order to apply for reorganization and also must have some likely chance of success at reorganizing. The stay, if there is one at all, normally kicks in after the court sorts out all of these problems and issues an order declaring the company in bankruptcy or reorganization.

Under most schemes, the debtor’s management is replaced with a neutral third party trustee, who will run the company while it is attempting to restructure and control the case and plan proposal process. In some reorganization schemes, secured creditors are not precluded or stayed from gaining possession of their collateral, and thus can thwart the reorganization process if they wish. For example, in the new EU Council Regulation of Insolvency Proceedings (IPR), the secured party retains the right to dispose of assets and obtain satisfac-

270 See id.
271 See id.
272 See id. at 82.
273 See, e.g., infra notes 277–308 and infra notes 402–430 and accompanying text.
274 Because of this, some scholars consider these composition systems rather than reorganization systems. Two economists recently completed a study of bankruptcy and insolvency laws and infrastructures around the world. See Clas Wihlborg & Shubhashis Gangopadhyay, *Infrastructure Requirements in the Area of Bankruptcy Law*, in *Brookings-Wharton Papers on Financial Services* 281 (Robert E. Litan & Richard Herring eds., 2001). Positioning that strong creditor remedies, as well as strong rehabilitation systems, should save more firms, they compared countries on several considerations, starting with whether a county’s laws could be considered more debtor friendly or more creditor friendly. See id. at 291. Their study actually purports to be much broader, studying the economic role of insolvency procedures and their affect on efficient allocation of resources, economic growth, and the depth and duration of financial strain. See id. at 284. They defined a creditor orientation as one that recognizes the claims of creditors to a great extent in insolvency, see id. at 295, and a debtor orientation as one that allows debtors to retain a stake or control in insolvency, see id. at 293, although no equity is left in the firm. See id. at 291. They also rated each country or region’s attitudes toward security, particularly floating liens that create a security interest in all cash flow generated by a business, and examined the scope of security interests under various countries’ laws. See id. at 294–95. They argued that countries that allow floating liens or charges and that position the secured creditor’s interests over unsecured claims of labor and the government, for example, should create more certainty for lenders and thus promote lending and growth. See id. at 295, 307. The authors note that, in Latin America, labor claimants are highly favored, which could explain why there is little lending in Latin America. On the other hand, the authors acknowledge that the same favoritism toward labor is present in France, see id. at 301, but there is no dearth of lending there.

Countries found to be very sympathetic to creditor interests in these ways were all the English common-law countries, including the United States, and Scandinavia. See id. at 296–97. Sympathetic countries include Germany, Japan, Netherlands, Switzerland, Scotland and South Africa. Countries hostile to security on these factors include Belgium, Luxemburg, Greece, Spain, and most of Latin America. See id. at 300.
tion from the proceeds of those assets.\textsuperscript{275} Indeed, in some countries, labor claims are so strong that they also are not stayed and can veto any plan the debtor proposes as well.\textsuperscript{276}

Many schemes, like the U.S. scheme, provide that creditors can vote on the plan of reorganization and thus decide if the business should be allowed to reorganize or should instead be liquidated.\textsuperscript{277} Many, though not all, countries’ laws also allow the majority to bind the dissenting minority to the terms of the plan.\textsuperscript{278} In some places, big institutional creditors, such as lenders and banks, control the case and essentially decide the business’s fate.\textsuperscript{279} In most places, secured creditor claims are not changed in either amount or payment terms, causing one scholar to conclude that these are not really Chapter 11-style reorganization schemes, but rather “composition” plans.\textsuperscript{280}

Compared to U.S. bankruptcy laws, many countries’ laws read like penal codes. Fraud and criminal activities are discussed at length, leaving one to believe that there is almost a presumption of criminal activity or fraud when a business fails to pay its debts.\textsuperscript{281} Other provisions suggest that limited liability is not as limited as it is in the United States; thus, more debts pass through to parents, owners, and even managers.\textsuperscript{282} Finally, in some countries, if the managers let the company run for longer than is reasonable without seeking rehabilitation assistance or closing down, the managers can be imprisoned for wasting creditors’ assets.\textsuperscript{283}

French reorganization law, at one end of the continuum, is considered the most rescue-oriented in the world, even more so than Chapter 11.\textsuperscript{284} The goal of the French system is not merely to facilitate


\textsuperscript{276} \textit{See id.} Lueke states that, with respect to secured interest, in cases opened under the IPR, the IPR provides that “[s]uch a right will not be affected by the opening of the proceeding.” \textit{Id.} at 386–87.

\textsuperscript{277} \textit{See id.}

\textsuperscript{278} \textit{See id.}


\textsuperscript{280} \textit{See id.}

\textsuperscript{281} \textit{See Martin, supra note 179, at 80.}

\textsuperscript{282} \textit{See id.}

\textsuperscript{283} \textit{See id.}

\textsuperscript{284} \textit{See Wihlborg & Gangopadhyay, supra note 274, at 293. Part of the reason it is considered more debtor friendly than U.S. law is because of the very strong rights of secured creditors under U.S. law, which are balanced by Chapter 11 and Chapter 7 bankruptcies. Secured creditors do not have these strong rights in France. \textit{Id.} at 296. In fact, French bankruptcy laws could be considered hostile to secured creditors.}
reorganization, but to encourage it, through early interventionist mechanisms that force or strongly encourage businesses to seek rehabilitation early enough that businesses and jobs are not lost.285 France has a strong history of state intervention into corporate affairs, which has carried over into modern reorganization laws.286 This process favors saving job-generating enterprises at almost any cost.287

German reorganization law lies at the other end of the spectrum in some respects. It now allows for, but certainly does not favor, the use of a debtor-in-possession. In 1999, Germany enacted rescue legislation, with the stated purpose of promoting reorganization over liquidation.288 Prior to this time, the only insolvency law used in Ger-

285 See Richard L. Koral & Marie-Christine Sordino, The New Bankruptcy Reorganization Law in France: Ten Years Later, 70 AM. BANKR. L.J. 437 (1996). The laws require greater financial reporting so that companies in distress are identified early, and the companies themselves recognize when they are in need of assistance. All financial reports are filed with the clerk of the Commerce Tribunal who, using computer programs designed to identify signs of weakness in a company, brings defaults to the attention of the president of the Commercial Tribunal. If the company does not address the defaults, the president of the Commerce Tribunal has the power to call the company’s President into chambers for a “frank personal discussion.” I can imagine that companies would prefer to avoid this discussion. Courts in the United States do not have the oversight ability given to the courts in France, and hence no early intervention. See id. at 446. The court can also arrange for mediation between the company and its creditors before judicial remedies are needed. See id.

286 See id. at 444. France has historically protected the rights of workers, which explains the involvement of the court in reorganization plans. Dating back to 1673 with the “Ordinance de Colbert” and the original Commercial Code of 1807, France has had an attraction for state intervention. The courts play a role much more inclined to protect the economic function of society, rather than a means for creditors to regain their debt.

287 See id.

288 The new German Insolvency Code explicitly states, in section 1, that one of the Code’s objectives is the reorganization of insolvent debtors. See Christoph G. Paulus, Germany: Lessons to Learn from the Implementation of a New Insolvency Code, 17 CONN. J. INT’L L. 89, 89–91 (citing the Insolvenzordnung [Insolvency Act], v. 5.10.1994 (BGB1. I S.2866), Section 1 [hereinafter “InsO”]) (2001).

Before we get too excited about this significant change, we should recognize that this does not mean reorganization in the U.S. sense of staying in business. Section 156(1) of the InsO states that “[a]t the report meeting the insolvency administrator shall report on the economic situation of the debtor and its causes. He shall assess any prospect of maintaining the debtor’s enterprise as a whole or in part, indicate any possibility of drawing up an insolvency plan and describe the effects of each solution on the satisfaction of the creditors.” See Paulus, supra note 256, at 148 n.49 (citing InsO, Section 156(1)). Section 157, however, states that “[a]t the report meeting the creditors’ assembly shall decide whether the debtor’s enterprise should be closed down or temporarily continued.” See id. at 148 n.50 (citing InsO, Section 157). Thus, a reorganization that leaves the debtors operations intact over the long haul seems outside the contemplation of this new law.
many was a liquidation statute, the *Konkursordnung*.\(^{289}\) While another prior law, the *Vergleichsordnung*, allowed rehabilitation,\(^{290}\) the concept of reorganizing rather than liquidating a troubled business had never really been accepted in German culture and thus the *Vergleichsordnung* was never used.\(^{291}\) Thus, prior to the adoption of the new German Insolvency Code (InsO), all businesses were simply liquidated.\(^{292}\)

German lawmakers, if not German society in general, now believe that liquidation is not the best solution to some industry or business problems.\(^{293}\) The enactment of the InsO was motivated by recessions and general problems with the economy, as well as the need to help acclimate and protect Eastern European individuals and businesses, who had been “overwhelmed by Western consumer standards.”\(^{294}\) Unlike most parts of the world, German insolvency cases are presided over by a specialized bankruptcy court.\(^{295}\) In most cases brought under the InsO, a trustee, called an administrator, operates the debtor’s business, although at least in theory, a debtor-in-possession is possible.\(^{296}\)

Reality may operate quite differently, however. Whatever the new Code actually says about the plan’s possible affect on creditors, creditors—particularly secured creditors—always have and still do control insolvency proceedings.\(^{297}\) In fact, although the new Code states that the administrator appointed in each case shall be independent and thus not biased toward any particular party in the case, prior to the

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\(^{289}\) See Paulus, *supra* note 256, at 142 (citing *Konkursordnung* [Bankruptcy Act], v. 10.2.1877 (RGBI. S.351)).

\(^{290}\) See *id.* (citing Verordnung über die Gesamtvollstreckung (Gesamtvollstreckungsverordnung) [Collective Enforcement Act], v. 6.6.1990 (GBI.DDR I S.285)).

\(^{291}\) See *id.* at 141–42.

\(^{292}\) See *id.*

\(^{293}\) See Paulus, *supra* note 256, at 149 n.13 (citing InsO, Section 1).

\(^{294}\) See *id.*, at 142. Professor Paulus explains in another article that “a few years after the wall came down, an enormous and politically significant number of East German households had become insolvent to a high degree due to common Western sales practices to which former GDR inhabitants had never been exposed before. Thus, the German legislature was bound to do something for the needs of these families.” Paulus, *supra* note 288, at 90.

\(^{295}\) See Broude et al., *supra* note 6, at 518–19. In fact, many of the important decisions made by the German Bankruptcy courts are actually delegated to a graduated law clerk who is paid less, and presumably has far less experience, than the judges themselves. See *id.* at 534–35.

\(^{296}\) See Paulus, *supra* note 256, at 146–47 (stating that a trustee that is independent of the interests of either the debtor or the creditors, is usually appointed in an InsO case for the purpose of running the debtor’s business, but that if the creditors still trust the debtor, “they may agree to the personal management of the debtor.”).

\(^{297}\) Wiliborg & Gangopadhyay, *supra* note 274, at 300.
enactment of InsO, it was common for the administrator to be chosen by the lead or primary secured lender in the case. This has not changed under the InsO. Thus, despite the technical requirement of an independent administrator, the main or lead bank can often choose an administrator who is friendly to its interests.

Additionally, despite clear language in the InsO stating that one purpose of the InsO is to “reorganize insolvent debtors,” this concept is far from universally accepted. One scholar wrote after the enactment of the InsO that German insolvency law does not favor rehabilitation over liquidation, and leaves that decision squarely in the hands of creditors. Even the explicitly provided-for reorganization contemplated by the InsO is not what a U.S. lawyer might picture; this is not a reorganization in which the business restructures its debts and continues in operation over the long haul. Section 157 of the InsO states that “[a]t the report meeting the creditors’ assembly shall decide whether the debtor’s enterprise should be closed down or temporarily continued.” Thus, a reorganization that leaves a debtor operational on a long-term basis appears outside the contemplation of this new law.

Finally, the debtor-in-possession provisions in the InsO are also likely to get little play. The concept of a debtor-in-possession has been criticized and mistrusted by most of German society for such a long time that it may never be unearthed regardless of what the law says. Professor Paulus tells an amazing story about the Holzman Construction Company bankruptcy, in which Holzman had the most experienced and well thought-of insolvency attorney appointed to the board of the company, so that they could go forward under the best of circumstances with the very first debtor-in-possession case under the new law.

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298 See Paulus, supra note 256, at 146 (citing InsO, Section 56(1)).
299 See Wihlborg & Gangopadhyay, supra note 274, at 301.
300 See Paulus, supra note 288, at 93 (noting that the largest creditors have the right to appoint an administrator that they choose and know and trust). As Professor Paulus explains, there is no particular reason why these big creditors should not have the right to work with someone whom they know and trust, given that they are the ones paying most for the debtor’s insolvency and thus have the most to lose. But:

this theoretical picture gets distorted when these creditors start to act irresponsibly, responsibility meaning here that they should keep in mind that they are given all these rights and powers in order to increase the efficiency of the new law, and not in order to achieve some windfall advantage.

See id.
301 Id. at 91–92.
302 See Paulus, supra note 256, at 148 n.50 (citing InsO, Section 157).
303 See Paulus, supra note 288, at 91.
The government was so opposed to the concept of a debtor-in-possession that they found a way to bail Holzman out completely so that there would be no bankruptcy and thus no debtor-in-possession. After this initial stage of rejecting the debtor-in-possession model, German companies (including Holzman itself) began to use the debtor-in-possession model, but it is still the very rare exception to the rule.

Again, history and culture may be more important in determining how cases are handled than the actual law. As one scholar notes, people who were accustomed to the old law are likely to stick to what they have become accustomed to and act as they always have, regardless of which law is on the books. Thus, two years after the InsO went in to effect, the new law is still widely objected to, if not ignored.

3. Conclusions About European Bankruptcy Laws and Culture

While one might predict that personal bankruptcy would carry more stigma than business bankruptcy in most of continental Europe (particularly since some countries do not permit a discharge for people who are just consumers), the line between individual financial failures and business ones is blurred on the continent. Failure is failure, pure and simple, and the stigma is significant.

Until recently, there was little consumer credit, and thus little need for a consumer bankruptcy system. This is all about to change as consumer credit becomes widely available to a huge percentage of the population over the next decade. This could leave many societies with excessive debt and no way to discharge it. Even if discharge systems are enacted, societal views about debt may keep them from being used. In many failed businesses throughout Europe, including England, the stigma is so pronounced that executives, and even employees and suppliers, often disappear entirely.

See id. at 91–92.
See id.
See Broich, Bayer, von Rom, supra note 101 (noting that debtors-in-possession are rare in Germany, though the law allows them).
See Paulus, supra note 288, at 90. As Paulus notes, in addition to ignoring concepts such as debtor-in-possession, and presumptions of rehabilitation over liquidation, courts and creditors interpret the new laws as narrowly, and as consistently, as possible with the law replaced. See id.
See id.
See Cullum et al., supra note 233.
Stephanie Gruner, Seeking a Second Chance: Is Failure Still a Dirty Word?, WALL ST. J., June 21, 1999, at A1. This makes more sense than one might think. In some countries, executives can be imprisoned for failing to stop operating a failing company as soon as it is
On the business side, European governments are already doing all that they can to enact rescue-style reorganization systems, in order to allow more failing businesses to survive in troubled times. As an official EU source stated:

Europe must re-examine its attitudes toward risk, reward and failure. Thus, enterprise policy must encourage policy initiatives that reward those who take risks. Europe is often reluctant to give a second chance to those entrepreneurs who failed. Enterprise policy will examine the conditions under which failure could acquire a less negative connotation and it could be acceptable to try again. It will encourage member states to review bankruptcy legislation to encourage risk-taking.

A recent EU study examined stigma and financial failure in the then fifteen EU member states, as well as the United States, to determine how to reduce stigma about financial failure, for the benefit of the overall EU economy. Given the extent of the negative stigma, the study concluded that, even if domestic legislators adopt laws that promote a fresh start, “there is a need to introduce a European cultural campaign promoting the fresh start . . . .”

Yet Europeans appear conflicted on whether to actually promote a fresh start. This study, as well as numerous other sources, focuses extensively clear that it is failing. In Germany, for example, one can be sent to jail for deliberately and recklessly keeping a company in operation once it is losing money. At A3. In other countries, there is personal liability to directors and officers of a company that is allowed to operate while it is losing money. Needless to say, laws like these do not encourage risk taking.

Tough attitudes toward financial failure make great sense in more socialist societies. The government protects people by at least providing the basic necessities of life. These basics are provided by taxing private industry enough to keep most people in the middle classes. None of this encourages entrepreneurialism nor necessitates a strong debt forgiveness system, though it does provide more safety nets than the U.S. system. As the EU embraces a more market-based economy, it will be interesting to see if attitudes change. It also will be interesting to see if average citizens become more forgiving, both in society and in business, in order to support and create a more market-based economy.

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311 See White & Chase LLP, supra note 146, at 31.

312 Id.

313 See id. According to this study, most EU member states have legal procedures aimed at rehabilitation, but they appear to be unsuccessful or unpopular with the business community, due to negative, complex, and expensive procedures, a lack of awareness of the options, as well as slow adaptation to new systems. Id. at 356.

314 Id. at 354. The study went on to say that “[i]n Latin countries, the word “faillite” (“fallimento”, “quiebra” . . .) holds a very negative connotation. It seems that these cultural elements would also require a sound reflection in order to involve these three communities.” Id.
sively on separating the fraudulent from the non-fraudulent debtors, and providing rehabilitation rights only for the worthy. There is no indication, however, that fraud will be a problem. While the goals of the EU in modernizing and liberalizing the insolvency laws of member countries seem sensible, it is unclear whether this will work. Long-held and strong cultural values may stand in the way, despite the best intentions of lawmakers. This has clearly been an impediment in Germany, where rescue culture has not been accepted in society. In France, by comparison, where rescue culture is entirely consistent with long-held beliefs about the importance of saving jobs, rescue culture and business reorganization has been well accepted and frequently utilized.

D. East Asian Bankruptcy Law and Culture: A Different World

Of all of the East Asian countries, Japan has borrowed the most from U.S. bankruptcy systems and also has developed the most complex bankruptcy systems. Its systems are thus discussed below in some detail. To a large extent, Japan’s attempted transplantations have failed to overcome strong cultural attitudes against bankruptcy. Hong Kong is less traditional and could probably accept modern bankruptcy laws much more readily. Ironically, it has not modernized its business bankruptcy laws due to its own unique cultural concerns. China’s proposed bankruptcy laws also borrow sig-

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315 See id. at 356; see also Bethany Blowers, The Economics of Insolvency Law; Conference Summary, FIN. STABILITY REV. 153, 153 (Dec. 2002), available at http://bankofengland.co.uk/conferences/fsr/fsr13.htm (last visited Nov. 22, 2004) (reciting the remarks of Paolo di Martino, an Italian attorney, stating that bankruptcy law must “be able to select between good and fraudulent debtors”).

316 The implication is that fraud in bankruptcy is a major issue, although there is no reason to believe that this is the case. Given the extremely small number of fraudulent debtors that are present even in the lenient U.S. system, this goal seems oddly misplaced. It continues to focus on the negative rather than promoting forgiveness and future economic activity. These goals seem particularly misplaced when compared to U.S. metaphors about the fresh start. For example in the famous case of Local Loan v. Hunt, the U.S. Supreme Court described the Bankruptcy Act as: “a new opportunity in life and a clear field for future effort unhampened by the pressure and discouragement of preexisting debt.” 292 U.S. 234, 244 (1934). Commentators have claimed that bankruptcy provides “the opportunity to free a family from living hell, permitting it to attain a new and brighter world, no longer oppressed by the clouds of fear, degradation, and discouragement . . . .” Papke, supra note 76, at 212.

317 See supra notes 284–287 and accompanying text.

318 See infra notes 380–414 and accompanying text.

319 See infra notes 415–421 and accompanying text.

320 See infra notes 426–464 and accompanying text.

321 See infra notes 453–463 and accompanying text.
nificantly from U.S. systems.\textsuperscript{322} These laws are far more lenient about business failure than existing Chinese laws.\textsuperscript{323} Given China’s traditionally communist economy, it faces unique challenges as it attempts to adopt bankruptcy laws that will promote a market-based economy.\textsuperscript{324} Given strong cultural beliefs that bankruptcy is bad luck and will follow a family forever,\textsuperscript{325} China may face problems similar to those of Japan in gaining acceptance of more lenient bankruptcy laws.

1. Japanese Bankruptcy Law and Culture

In the past few years, Japanese spending habits, as well as Japanese bankruptcy and insolvency laws, have gradually become more similar to their U.S. counterparts.\textsuperscript{326} Drastic measures have been taken to promote business rehabilitation in order to aid Japan’s ailing economy.\textsuperscript{327} Personal bankruptcy has also become more accessible.\textsuperscript{328} These are necessary developments, given that credit has recently become more available to the Japanese, which has in turn increased borrowing.\textsuperscript{329} Yet the Japanese avoid using these initiatives for cultural reasons.\textsuperscript{330}

a. Law and Japanese Culture

Western legal notions are unfamiliar to the Japanese mind, heart, and soul. Traditional Japanese culture emphasizes the group over the individual, similarity over difference.\textsuperscript{331} Thus, the Japanese feel that it is embarrassing and shameful to need to resort to the law.\textsuperscript{332} In fact, the Japanese believe that everyone would be better off if there was no

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\textsuperscript{322} See infra notes 465–510 and accompanying text.


\textsuperscript{324} See infra notes 464–509 and accompanying text.

\textsuperscript{325} See Pauline Ma, \textit{A New Chinese Bankruptcy System: Made for Business or for the State?}, 11 AUSTL. J. CORP. L. 192, 205 (2000).

\textsuperscript{326} See infra notes 380–414 and accompanying text.

\textsuperscript{327} See infra notes 392–414 and accompanying text.

\textsuperscript{328} See infra notes 380–391 and accompanying text.

\textsuperscript{329} See infra notes 359–379 and accompanying text.

\textsuperscript{330} See infra notes 359–379 and accompanying text.


\textsuperscript{332} See id. at 307.
law, and no need for the law. Naturally, then, use of the court system is viewed as a last resort. Informal mediation and negotiation is encouraged and used primarily for dispute resolution. If these tactics fail and formal proceedings are necessary, it is assumed that both parties will neither win nor lose. The objective of the court system is not to declare a winner or loser, but rather to construct a harmonious compromise for both parties.

Japanese culture has often been referred to as a culture of shame. This characterization encompasses everything from the adverse attitude toward the need for laws, to suicide over debts, and economic failure. In the 1990s, a new element was added into the mix of Japanese culture. The government and aristocracy began a campaign of kokusaika, meaning the internationalization of Japanese style and culture. This trend introduced more foreign influences into Japan than ever before. Yet cultural trends of other countries are never fully integrated into the cultural fabric of Japan. Instead, they maintain their foreignness and are even thought of as elite, exotic, and cosmopolitan.

With the modern trend of globalizing culture and business, Japan began in early 2001 to reform its bankruptcy laws. In the past, bankruptcy proceedings in Japan have taken place only after an extensive and informal process of confidential discussions with the court as to reorganization without insolvency. This included informal contact with creditors. The emphasis of these informal discussions was on rescue, not through any “formal legal process . . . [or] the application of an insolvency law.” Unfortunately for the individual or individuals

334 See Minami, supra note 331, at 305.
335 See Noda, supra note 333, at 303.
336 See id.
338 See id.
340 See id.
341 Id.
342 Id.
344 Id.
345 Id. at 158.
at the head of a financially troubled business, the culture of shame that pervades Japan makes bankruptcy a personal failure, not a business failure.\textsuperscript{346} This characterization of bankruptcy in Japan often leads to tragedy for the individual, be it suicide or isolation from family and community.\textsuperscript{347} Bankruptcy is a type of devastation not unlike “sickness, shipwrecks, fires, painful childbirth, and other vicissitudes.”\textsuperscript{348}

The reluctance of the Japanese to use the new formal insolvency law and their propensity for the more informal discussion is firmly rooted in the negative Japanese attitude toward law.\textsuperscript{349} As law and ethics are inseparable to the Japanese, a contract breach or a formal bankruptcy proceeding are as personal as character flaws.\textsuperscript{350} Rather than a legal system of rights and duties, the Japanese follow the concept of \textit{giri}.\textsuperscript{351} \textit{Giri} is loosely translated to mean “a duty or the state of a person who is bound to behave in a prescribed way toward a certain other person.”\textsuperscript{352} \textit{Giri} is not legally enforced, but socially and culturally enforced as part of personal honor.\textsuperscript{353} Again, the idea of shame or guilt attached to behaving in a way that is contrary to \textit{giri} builds the foundation of law and society in Japan.\textsuperscript{354} The well-known Japanese notion of “losing or saving face” also flows from the concept of \textit{giri}.\textsuperscript{355} Following \textit{giri} is thought to be intuitive, not learned, and therefore, formal rules of law are resisted by the Japanese as counter-intuitive.\textsuperscript{356} Lawyers themselves appear to play a different role in Japan than in the West, as the word lawyer in Japanese, \textit{bengoshi}, translates loosely as

\begin{itemize}
  \item \textsuperscript{347} See Associated Press, supra note 337.
  \item \textsuperscript{348} See Omamori-Good Luck Charms, at http://www.oren.jp/japan_22.htm (last visited Nov. 5, 2004). Perhaps while it is acceptable to the Japanese to transplant foreign popular cultural trends into their society, it is not, however, appropriate to transplant foreign systems of law into Japanese society. The new Japanese bankruptcy laws are based on the United Nations Commission on International Trade Law (UNCITRAL) model law. Kazuhiko Yamamoto, \textit{New Japanese Legislation on Cross-border Insolvency as Compared with the UNCITRAL Model Law}, 11 Int. Insol. Rev. 67, 69 (2002). The traditional foundation of Japanese aversion to law and the omni-present culture of shame may prevent the new system of law from ever being used by the Japanese in a way that is comparable to other countries.
  \item \textsuperscript{349} See Noda, supra note 333, at 302.
  \item \textsuperscript{350} See id. at 309.
  \item \textsuperscript{351} Minami, supra note 331, at 306.
  \item \textsuperscript{352} Id.
  \item \textsuperscript{353} Id.
  \item \textsuperscript{354} Id.
  \item \textsuperscript{355} Id. at 306–07.
  \item \textsuperscript{356} Minami, supra note 331, at 307.
\end{itemize}
mediator rather than litigator.357 The law itself is analogized to a sacred sword—it is displayed but preferably never used.358

b. Japan’s Economy and Spending Habits

While some U.S. citizens stereotype the Japanese as profligate spenders,359 in reality the Japanese are among the biggest savers in the world.360 Japan’s economy, the second largest in the world, began to fail in the early 1990s because of overall business failure that in turn threatened the entire banking system.361 This was caused in large part because the Japanese traditionally prefer saving over spending and have refused to buy commensurate with Japan’s growing economy.362 The Japanese government begged citizens to spend money to fuel their crashing economy.363 Unlike U.S. citizens, who were too happy to oblige when asked to do the same after September 11, 2001, the Japanese refused. As a group, they are less willing to spend, particularly in tough economic times marked by industry failures and job loss.364

Like U.S. spending habits discussed previously, these habits were created through historical events.365 After World War II, Japan built its

357 Id. at 314 n.93.
358 See Noda, supra note 333, at 302–03.
360 See Mann, supra note 106, at 1084 n.103 (noting that U.S. household savings rates now hover between 0% and 1%, but that the Japanese rates are around 28.5%). Other sources suggest that Japan’s savings rate is now around 11.2%, lower but still among the highest in the world, along with France at 15.6% and Belgium at 13.9%. See Mizen, supra note 2, at 2.
362 See id.
363 See id.
364 See, e.g., Japan Economy on Track for Another Grim Year, HONOLULU ADVERTISER, at http://www.honoluluadvertiser.com/specials/outlook2002/japan.shtml (Jan. 20, 2002) (noting the frugality of Japanese tourists in Hawai‘i due to the economic downturn in Japan). Banks even started lending at virtually no interest to try to get people to spend money and borrow money but to no avail. This is just too foreign for the Japanese who like to buy with cash but only if they feel comfortable with the amount they have saved. Because the economy was so soft, this refusal to spend at all made the economy screech to a halt. But see Mann, supra note 106, at 1086 (noting that despite these unquestionably high savings rates, Japan does have a great deal of consumer debt in its economy).
365 During the Tokagawa period (1603–1868), feudal lords exploited tenant’s surpluses and left tenants with very low standards of living. See Shin-Ichi Yonekawa, Recent Writing on
This was wildly successful, creating a large trade surplus with the United States, the world’s largest consumer, and creating a large middle class.\textsuperscript{367} Japan’s success in this area caused it to enter the stock or “value” market very late, and probably to enter this area too quickly, without public understanding or support of the financial industries upon which the value market is based.\textsuperscript{368} This created a bubble economy\textsuperscript{369} which burst in the 1990s, and the effects of which are still felt today.\textsuperscript{370}

This trend may be changing, however, particularly in the area of credit card use. The Japanese currently carry much more cash than U.S. citizens and do not use credit cards nearly as extensively.\textsuperscript{371} Additionally, while about half of all U.S. citizens carry a balance on their credit cards, only about 10\% of the Japanese do so.\textsuperscript{372} This is in part because most Japanese cards are not set up for this type of use. In most cases, the Japanese are required to decide at the checkout counter if they want to pay off the item in one billing cycle or carry the debt for a longer period.\textsuperscript{373} Recently, a new product was made available to the Japanese that did not require this up-front decision and disclosure, and thus allowed the customer to decide later if he or

\textit{Japanese Economic and Social History, in Econ. Hist. Rev. 107, 108 (1985).} Japan also engaged in non-agricultural endeavors in this period, including rice marketing and financing, land transport, and coastal shipping. \textit{Id.} at 109. During the Meiji period that followed (1868–1912), Japan attempted to nurture a modern industrial economy. \textit{Id.} at 110. This movement was drastically behind similar movements in the United States and Europe, however. \textit{Id.} It also had a different flavor, resulting from Marxist influences, that retained militaristic influences on industry. \textit{Id.} Although the resulting government-run businesses were not successful, this left valuable lessons for the more capitalist systems that followed. \textit{Id.} at 111.


\textsuperscript{367} See id.

\textsuperscript{368} See id.


\textsuperscript{370} See Thornton, \textit{supra} note 369.

\textsuperscript{371} See Mann, \textit{supra} note 106, at 1057.

\textsuperscript{372} See id.

\textsuperscript{373} See id. at 1074. Carrying a balance involves telling the sales clerk that the item will not be paid for immediately, a step many Japanese are unwilling to take for smaller purchases and even many larger purchases. In reality, then, most Japanese credit cards have been used like a U.S.-style debit card. \textit{See id.} at 1074–75.
she wanted to pay off the item or carry it as a balance. This financial product has been very successful for the issuers because a shocking 90% of the items purchased on these cards have not been paid off in a cycle, but instead carried as revolving credit. At least one scholar predicts that the use of revolving credit is likely to increase drastically as a result of the availability of this product.

Despite the past unwillingness of individuals to spend, Japanese businesses spent and borrowed extensively. Due to the lack of profits, and extremely lax banking regulations and borrowing requirements, many businesses are failing. After a record number of corporate bankruptcies, in 1996, the government embraced rescue culture with a vengeance, starting a rapid initiative to revamp business reorganization laws to make it easier to reorganize and keep a company from folding. The government planned to unfold a new reorganization law for smaller businesses in 2001, but as the economy continued to flag, it stepped up efforts and actually finalized and passed the new reorganization law ahead of schedule.

E. Personal Bankruptcy in Japan

As in many other parts of the world, bankruptcy was not initially available to individuals in Japan, but only to merchants. Eventually, a personal bankruptcy system was enacted that could be used by any natural person, whether a merchant or not. From the beginning, creditors in Japan had the right to decide whether to allow a merchant to stay in business or to liquidate his business. Today, individuals are able to obtain a discharge fairly routinely, causing at least

374 See id. at 1080.
375 See id. at 1081.
376 See Mann, supra note 106, at 1081.
378 See id. The theory behind changing the law was that if these companies could pay back their debts, rather than just ceasing operations, this might save the failing banks and the entire system. See id.
379 See id.
380 Doing Business in Japan § 7.01 (Zentaro Kitagawa ed., 2001). The system that was in place was simply a private agreement (kashi bunsan) between the obligor and his creditors. See id. The obligor was a social outcast, and not worthy of the usual social considerations due to a member of society. See id. Private agreements began in the 1600s and continued until 1867. See id.
381 Id. § 7.01[3] (2001); Bankruptcy Act, arts. 5, 12, 31, 33, 34, 42–44, 80–82.
382 Doing Business in Japan, supra note 380, § 7.01[2]
one scholar to conclude that Japanese personal bankruptcy law is not drastically different than personal bankruptcy law in the United States.\textsuperscript{383} But, in many ways, Japanese bankruptcy law is stricter than U.S. bankruptcy law. A bankruptcy case can be maintained only if the debtor is unable to pay debts as they become due.\textsuperscript{384} Moreover, the discharge is not automatic, but must be applied for.\textsuperscript{385} In addition, it takes ten full years to get the discharge, during which time the debtor is forbidden from many business activities, including being a director of a corporation or a kabushiki kaishi.\textsuperscript{386}

Personal bankruptcy is rare in Japan, with just 0.7 filings per 1,000 residents in 2000, compared to 5.2 filings per 1,000 residents in the United States.\textsuperscript{387} This is not surprising, given the spending habits of the Japanese,\textsuperscript{388} as well as the societal stigma assigned to such behavior. The social implications arising out of the bunsan, or customary law of insolvency, are clear from the expression chawah hitotsu ni hashi ichizen, which literally means “one rice bowl and one pair of chopsticks.”\textsuperscript{389} The phrase refers to the full exemptions to which a debtor was entitled under customary law.\textsuperscript{390} The phrase suggests that a person who has filed for bankruptcy is entitled to virtually nothing, and is

\textsuperscript{383} See Mann, supra note 106, at 1084–85.
\textsuperscript{384} See Doing Business in Japan, supra note 380, § 7.02.
\textsuperscript{385} Japanese law focuses on the civil law approach of accentuating the debtor’s insolvency to justify bankruptcy proceedings. Currently, Japanese law recognizes three bankruptcy causes: shiharai-funC (insolvency), shiharai-teishi (suspension of payments), and saimu-chCka (liabilities exceed assets). When a petition is filed with the clerk, the court does not confirm that there is in fact a cause that would support the petition. The obligor can rebut each type of cause if they do not want the bankruptcy adjudicated. For a more in depth overview of how Japanese Bankruptcy law operates and treats adjudication of Bankruptcy status see Asian Development Bank, Insolvency Law Reforms—Report on Japan, at http://www.insolvencyasia.com/insolvency_law_regimes/japan/index.html (last visited Nov. 22, 2004); Shinchiro Abe, Recent Developments of Insolvency Laws and Cross-Border Practices in the United States and Japan, 10 Am. Bankr. Inst. L. Rev. 47, 49–51 (2002). As in the United States, a trustee is appointed to take over all non-exempt assets. See Minhi shikkC HC [Civil Execution Act], Law No. 4 of 1979), arts. 131, 132, 152, 153, cited in Doing Business in Japan, supra note 380, § 7.06[1].
\textsuperscript{386} See Efrat, supra note 3, at 102. It will be granted, in the judge’s discretion, only if the judge finds that the debtor is honest and unable to pay his or her debts. See id. Grounds for denial of a discharge include fraudulent conveyances prior to the case and making false statements to the court. See Minji saisei ho [Civil Rehabilitation Act], Law No. 225 of 1999, arts. 366–69.
\textsuperscript{388} Efrat, supra note 3, at 100–01.
\textsuperscript{389} See Mann, supra note 106, at 1084.
\textsuperscript{389} See Doing Business in Japan, supra note 380, § 7.01[2].
\textsuperscript{390} See id.
“a disgraced person no longer worthy of the usual social consideration due a member of society.”

F. Japanese Reorganization Laws

Japan has a number of reorganization systems, and they are not mutually exclusive. This complex system includes the prior Composition Act, the Corporate Reorganization Act, and the recently enacted Civil Rehabilitation Act (CRA). Japan’s Commercial Code also provides for an out-of-court workout procedure known as a “Corporate Arrangement.” While the Corporate Reorganization Act was designed for large publicly traded companies, and while the Composition Act technically is the predecessor for the new CRA for small business reorganizations, a company need not be large to use the Corporate Reorganization Act, nor small to use the CRA. In fact, Japan’s massive Sogo Department Store recently filed a case under the CRA, probably because it is simply more debtor-friendly and easier to use than the Corporate Reorganization Act.

391 See id.
393 See Abe, supra note 392, at 36 n.6 (citing Wagi ho [Composition Act], Law No. 72 of 1922 [hereinafter Composition Act]. This was the reorganization law most often used before the recent enactment of the Civil Rehabilitation Act on Dec. 14, 1999. See Minji saisei ho [Civil Rehabilitation Act], Law No. 225 of 1999 [hereinafter Civil Rehabilitation Act]. For the statistical figures, see Anderson, supra note 392, at 360 (citing 1 Saiko Saibansho Jimu Somukyoku [Supreme Court General Secretariat], SHIHO TOKEI NENPO, Minji gyosei hen (Annual Report of Judicial Statistics, Civil and Administrative Cases Volume)) (1990–1999).
394 See Kaisha kosei ho [Corporate Reorganization Act], Law No. 172 of 1952 [hereinafter Corporate Reorganization Act]. The Corporate Reorganization Act has been described as a rigid and unforgiving process designed for the rehabilitation of large publicly-held corporations. See Theodore Eisenberg & Shoichi Tagashira, Should We Abolish Chapter 11? The Evidence from Japan, 23 J. LEGAL STUD. 111, 113–14 (1994).
395 See Civil Rehabilitation Act, supra note 393.
396 See Abe, supra note 392, at 36. This is essentially an out-of-court, private workout arrangement. Because it requires the approval of all creditors to the proposed workout plan, it is not used much. Id.
397 See Anderson, supra note 392, at 360–61 (stating that the CRA is best seen as an extension or revision of the Composition Act).
398 See id.
399 See id. at 363–64. The Corporate Reorganization Act had yet to be modernized when the CRA was enacted, making the CRA the most recent policy statement about business reorganization policy in Japan. See id.
Compared to both the Composition Act and the Corporate Reorganization Act, the CRA was a radical departure from existing law.\textsuperscript{400} Unlike virtually all other schemes in existence at the time outside the United States,\textsuperscript{401} the CRA does not contain an insolvency requirement.\textsuperscript{402} Like most other systems, a case will only be accepted if there is a chance of reorganization.\textsuperscript{403}

In theory, the business is run by a debtor-in-possession under the CRA.\textsuperscript{404} The extent to which the company is actually run by a debtor-in-possession, however, varies from district to district.\textsuperscript{405} In the Osaka and Sapporo districts, courts usually follow a U.S.-style reorganization scheme, leaving the debtor-in-possession in place and appointing overseers only as an exception.\textsuperscript{406} In Tokyo, however, courts generally follow the old Composition system and appoint a supervisor in every case.\textsuperscript{407} In Nagoya, courts seem to follow the English system and appoint examiners, including business professionals, such as accountants, to run the

\textsuperscript{400} See id. at 363.

\textsuperscript{401} See, e.g., Broude, et al., supra note 6, at 560 (stating that France also has no insolvency requirement).

\textsuperscript{402} See Civil Rehabilitation Act, art. 21. Now, a mere apprehension of either balance sheet or equitable insolvency is sufficient to allow one to file a successful petition. See id. The reason for the change was that the drafters wanted to avoid an insolvency requirement that could make it too late to rehabilitate. See Anderson, supra note 392, at 367.

\textsuperscript{403} See Civil Rehabilitation Act, arts. 21(1), 33. There must be a chance that the plan will actually be approved and a showing of good faith. See id. There is a time limit for filing a plan, but it is not a rigid one. See Anderson, supra note 392, at 391. Unlike the Composition Act, which requires a plan at filing, “the regulations accompanying the CRA provide that, unless special circumstances exist otherwise, a plan should be filed within two months of the deadline for submissions of proof of claim, that claims deadline generally being between two and four weeks after commencement.” Civil Rehabilitation Act, arts. 18(1), 84 (emphasis added). Furthermore, it is the court that determines the time frame for submitting a plan. “Debtor shall prepare and submit to the court a draft rehabilitation plan within the period stipulated by the court.” Anderson, supra note 392, at 391 (citing Civil Rehabilitation Act, art. 163(1)).

\textsuperscript{404} The court, however, has the discretion to appoint a dizzying variety of professionals in a case, including supervisors, examiners, trustees, receivers, representative officers, and creditors’ committees. See Anderson, supra note 392, at 373–79 (describing the role of each of these professionals in detail).

\textsuperscript{405} See id. at 373.

\textsuperscript{406} See id.

\textsuperscript{407} See id. The court can appoint a supervisor to monitor the debtor. The statute is vague in terms of the powers of the supervisor, other than that a supervisor will oversee the debtor and make sure the debtor does not undertake specific acts, as determined by the court, without the consent of the supervisor. Civil Rehabilitation Act, art. 54. The supervisor has two affirmative powers: 1) the court can grant the supervisor a right of avoidance to challenge fraudulent and refilling transfers, id., art. 56, and 2) the supervisor has a subpoena-like right to demand reports directly from the debtor and its officers and managers. Id., art. 59.
company in every case. Needless to say, there is still ambivalence in Japan about the concept of a debtor-in-possession, but this was a tremendous step toward embracing the debtor-in-possession concept.

Not long after the CRA was passed, the Corporate Reorganization Act was amended to make it more user-friendly as well. The most radical thing about the new Corporate Reorganization Act is that it binds both secured and unsecured creditors. Because of a strong belief in *betsujo ken*, or the right of separation for secured creditors, no prior Japanese bankruptcy or insolvency law had ever affected the rights of secured parties. Even the new CRA does not affect the rights of secured creditors, though it does allow debtors to reduce the debt owed on property by essentially paying its value into the court, thus wiping out the secured party’s security interest in that particular item.

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408 See id. The powers of the examiner are not as far reaching as those of the supervisor in that the examiner does not have the subpoena and avoidance powers. But, the examiner is capable of examining the debtor. *Id.*, art. 62). The major duty of the examiner is to provide a report to the court in a stipulated time. *Id.*

409 See Abe, *supra* note 392, at 36. The amendments to the Corporate Reorganization Act went into effect on April 1, 2003. *Id.*

410 Id.

411 See Civil Rehabilitation Act, art. 51; Anderson, *supra* note 392, at 380 n.148. But, the CRA does provide that a court can temporarily limit a secured creditor’s right to sell a debtor’s property at a judicial sale, if the debtor applies for such an order, pays the creditors potential costs up front, proves that the delay will not hurt the creditor, and also proves that the stay of such action is in the best interests of creditors. Civil Rehabilitation Act, art. 31(1)(2).

412 The debtor has the burden of proving that the creditor is not entitled to the asset or the stay, unlike under Section 362 of the U.S. Bankruptcy Code, in which the debtor gets an automatic stay and the creditor must prove a host of facts in order to get the stay lifted. See 11 U.S.C. §§ 362(d)(1), 362(d)(2). The narrowness of this exception demonstrates the powers of secured creditors in reorganization cases generally, including cases instituted under the CRA.

413 Civil Rehabilitation Act, art. 148(1). This essentially amounts to a redemption under U.S. bankruptcy law, see 11 U.S.C. § 722, and is always permitted in a Chapter 11 as well as a Chapter 7. Unfortunately, most U.S. debtors and, I suspect, Japanese debtors, do not have the cash to actually buy out the secured party’s interest in such collateral in most cases. While this is not a drastic displacement of the secured party’s rights by U.S. standards, and probably of little use to a cash-poor debtor, it is the first example in Japanese history of reducing a secured party’s claim in a bankruptcy case. See Anderson, *supra* note 392, at 384. This provision could be useful in Japan’s current deflationary and stagnant economy, where many types of collateral have not held their value. If nothing else, the provision may provide leverage—for the first time—against the secured party within a bankruptcy case. See id.

The amendments to the Corporate Reorganization Act made the process far simpler overall than it once was. See Abe, *supra* note 392, at 36 (stating that it was used between four and fifty-seven times per year during the past twenty years). The bankruptcy court
The passage of the CRA, as well as the recent amendments to the Corporate Reorganization Act, appear to be a successful attempt at liberalizing the law in order to promote rehabilitation. Having said that, one would assume that Japanese society now accepts business failure as part of life in Japan. This does not appear to be the case. Bankruptcy of any kind is still a major embarrassment. The government has recently gone so far as to promote the use of the CRA in a prime-time television show describing its many positive uses and attributes, which itself demonstrates society’s resistance to this idea.

G. When Law and Culture Clash: Debt and Suicide

At a time when the Japanese government is doing everything it can to reduce the stigma associated with financial failure, Japanese consumers finally appear to be loosening up and spending more. The use of revolving consumer credit appears to be on the rise, which may help fuel the economy. It also may result in more financial failures for consumers, which could actually cause more social problems.

Despite more consumer credit in the system, the Japanese have not relaxed their views on financial failure, for either businesses or consumers. Despite the huge amount of debt companies have taken out recently, stigma over a failed business is higher in Japan than virtually anywhere else in the world. Executives of failed companies in Japan often do more than disappear. Financial failure is the ultimate societal disgrace and suicide is a common way out. As higher consumer debt

need not find that a company has a prospect of reorganization under the new Corporate Reorganization Act, which is more favorable to debtors than the CRA, and which may facilitate earlier filings. The Corporate Reorganization Act also gives better protection for post-petition claims, thus promoting post-petition financing. See id. at 37. Finally, while the Corporate Reorganization Act is not a debtor-in-possession system per se, it does allow the court to appoint members of the debtor’s management in lieu of a trustee, meaning the debtor chief executive officer, its chief financial officer, etc. See id.

Anderson, supra note 392, at 363. It is hard to imagine the U.S. government doing such a show to promote the use of Chapter 11, but the Japanese economy is in deep trouble.

levels become more common, failures will increase and so may suicide rates. It is unclear whether merely liberalizing laws can stem this tide.\textsuperscript{416}

Japanese culture is complicated, with many unspoken rules and hierarchies.\textsuperscript{417} People have the expectation of being in the same job for life and cannot face job loss without losing face.\textsuperscript{418} Yet, saving face is the ultimate societal necessity. Neither law nor propaganda may be capable of changing these views. In most parts of Asia, including Japan, informal agreements are as enforceable as formal ones, if not more so.\textsuperscript{419} Explicit insolvency laws, like explicit contract laws, and explicit corporate and securities laws, play a far smaller role than those in the Western world.\textsuperscript{420} Informal insolvency procedures are often preferred to formal systems because the formal rules often conflict with the value systems of the society.\textsuperscript{421} Thus, simply changing the laws will not necessarily change financial and legal practices, or attitudes toward financial failure.

20190290. There are scores of newspaper articles reporting on this problem, although this story is among the most poignant. It ties the high suicide rates directly to the economic slump and outlines the government’s attempts to alleviate the problem through education. The article reports on Japan’s well-known tradition of life-time employment and company loyalty, as well as the trend toward suicide when job loss occurs. Japan’s suicide rate is the highest in the industrial world, over 80 per day. This source attributes a large portion of such deaths to financial problems, a phenomenon unknown to U.S. society. \textit{See id.}

\textsuperscript{416} Stigma can be explained by looking at psychological literature that claims that, the more a society values independence, the less worried it is likely to be about contract breaches in general, and failures to pay specifically. Cultures that highly value dependence over independence are more likely to want to keep their word at all costs as a way of saving face. Davangshu Datta, \textit{Uncertain Times}, \textsc{The BS Weekend}, October 26, 2002, \textit{available at} 2002 WL 100052313.

\textsuperscript{417} Milhaupt, \textit{supra} note 279, at 434–35.


\textsuperscript{419} \textit{See id.}

\textsuperscript{420} \textit{See id.}

\textsuperscript{421} \textit{See Wihlborg & Gangopadhyay, \textit{supra} note 274, at 305. For example, in Indonesia and Thailand, new restructuring laws and procedures were implemented after the Asian crisis. \textit{See id.} at 306. These new changes have had virtually no effect in assisting viable companies to restructure or in closing down nonviable firms, because there is a deep-rooted belief that creditors should not be able to take over firms that owner-managers have built up over time. \textit{Id.} This obviously creates no incentives for firms to attempt to improve their businesses as there is no way for a creditor to effectively foreclose on assets and no threat of take-over.}
1. Lesson from Hong Kong and China

Neither Hong Kong nor China has developed bankruptcy systems as elaborate as the Japanese bankruptcy laws. Hong Kong has a modern individual bankruptcy law, but does not have a business reorganization system. China has no personal bankruptcy system, but is developing a rescue system for ailing businesses. As is the case in Japan, cultural issues may keep the Chinese from using these new laws.

a. Hong Kong Bankruptcy Law and Culture

As one would expect from an English colony, Hong Kong’s insolvency laws have always looked somewhat similar to those of England. What is harder to anticipate is that Hong Kong still has no corporate reorganization process, and has taken few steps to modernize its business bankruptcy laws. Hong Kong’s current insolvency laws are based loosely on law from England that dates back to 1929. Not surprisingly, these laws are archaic, harsh, and pro-creditor.

Proposed changes to the Hong Kong insolvency laws dealing with corporate or business reorganization have failed to pass. Liquidation, which is referred to as “insolvency,” is the only option for corporations. For almost a decade, scholars and legislators have been attempting to pass a corporate rescue regime in Hong Kong, but to no avail. The scheme, named “provisional supervision,” was originally drafted to operate much like an English “Administration.”

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422 See infra notes 423–510 and accompanying text. Thus, there is much less to say about the bankruptcy laws of Hong Kong and China; see also Roman Tomasic et al., Insolvency Law Administration and Culture in Six Asian Legal Systems, 6 AUSTL. J. CORP. L. 248, 248 (1996) (noting that the Hong Kong and Chinese laws in place are old and their purpose is to kill the company, not revive it).


424 See Tomasic et al., supra note 422, at 252 (stating that China has no personal bankruptcy system). China is also developing a consumer culture. The Knight Ridder news service ran a recent story about Mercedes dealerships and Gucci stores popping up all over China. Tim Johnson, China: Asia’s New Money Machine, ALBUQUERQUE J., Feb. 15, 2004, at B8.

425 See infra note 484–493 and accompanying text.

426 See Burton, supra note 423, at 114.

427 Tomasic et al., supra note 422, at 255.

428 Burton, supra note 423, at 114.

429 Id. at 115; See Philip Smart & Charles D. Booth, Corporate Rescue: Hong Kong Developments, 10 AM. BANKR. INST. L. REV. 41, 42 (2002).

430 See Burton, supra note 423, at 114–15.

431 See id. at 115.
provisional supervision, a specialist or trustee runs the company and proposes a voluntary arrangement, that creditors vote upon within six months.432 As in an English Administration, creditors control the proceeding.433 None of the drafts of the yet-to-be-passed provisional supervision contemplate a debtor-in-possession system.434

The first drafts of the new procedure were vehemently opposed by labor groups, who currently receive the first dollars out of a liquidating company under the liquidation procedure set out in section 166 of the Companies Ordinance.435 These groups feared that the new provisional supervision would be less favorable to their interest and thus opposed the bill.436 Thereafter, in order to appease these interests, the draft law was changed to require any company in provisional supervision to pay off in full, in advance, all wage claims and severance payments for all workers laid off in the past, or to be laid off in the future, in the context of the reorganization.437 Many scholars and legislators see this requirement, which is still contained in the current proposed draft bill, as a major obstacle to successful rehabilitation, or even attempted rehabilitation.438

Another sticking point in the current legislation has been the treatment of secured creditors. In earlier drafts, secured creditors voted with all other creditors on the arrangement, and thus could be forced

432 Charles D. Booth, Hong Kong Corporate Rescue: Recent Developments, 15 AM. BANKR. INST. L. REV. 24, 24 (Nov. 2000). Interestingly, the bill provided that provisional supervision be available to both insolvent and solvent companies. Id.

433 See id.

434 See id.


436 Id.

437 Smart & Booth, supra note 429, at 43. The law actually requires such companies to “pay off in full (or set up a trust account with a licensed bank containing sufficient funds to pay off in full): (a) all wage claims owed to its employees; and (b) all entitlements arising under the Employee Ordinance (e.g. severance payments) owed to its ‘former employees.’” Id. Because the words “former employees” are interpreted narrowly, this requires companies to not only set aside the funds for those already laid off, but also to calculate and pay in advance the same amounts for workers that will be laid off in the restructuring effort. Id.

438 Electronic Interview with Charles D. Booth, Associate Dean, University of Hong Kong (Dec. 2, 2004). In compulsory liquidations, the workers’ main protection comes from what is called the “protection of wages on insolvency fund.” A possible solution to the current impasse, proposed by the Secretary for Financial Services and the Treasury in September of 2002, is to require that in a provisional supervision, companies be required to pay up front (or deposit in a trust account) an amount equivalent to the amount that would be payable by this fund in a compulsory liquidation, rather than to pay the entire amount of all entitlements in full. Id.
to accept a plan they did not like, and could lose the benefit of their superior position in their collateral.\textsuperscript{439} While the current draft no longer contains these disadvantageous provisions, the pendulum may now have shifted too far in the secured creditor’s favor.\textsuperscript{440} Secured creditors holding a security interest in all, or substantially all, of a debtor’s assets now have veto power over the provisional supervision and can, for four to seven working days following a petition, terminate the provisional supervision completely.\textsuperscript{441} None of this has become law, however, so all provisions are still up for grabs. Moreover, Hong Kong has a long history of handling insolvency and financial distress through informal means, such as out-of-court workouts, and this trend is likely to continue whether the provisional supervision passes or not.

While business bankruptcy law in Hong Kong has not been modernized, the bankruptcy process for individual debtors, which is called “bankruptcy,” has been relaxed and modernized.\textsuperscript{442} In the past, due to the discretionary discharge provisions, many debtors received no discharge and the shortest time in which one could obtain a discharge was eight years.\textsuperscript{443} For example, for the ten-year period from 1983 through 1992, roughly 2,400 people filed for personal bankruptcy in Hong Kong and only twenty-five received a bankruptcy discharge.\textsuperscript{444} In effect, the discretionary discharge made bankruptcy a life sentence for most.\textsuperscript{445} During the post-filing period and before a discharge, a debtor cannot obtain additional credit. Effective April 1, 1998, many, if not most, individual debtors can obtain a discharge within four years.\textsuperscript{446}

Unlike in some parts of East Asia, Hong Kong citizens have not been afraid to exercise their bankruptcy rights.\textsuperscript{447} In November of 2003, there were 939 bankruptcies in the City of Hong Kong.\textsuperscript{448} There

\textsuperscript{439} Id. at 42–43.
\textsuperscript{440} See id.
\textsuperscript{441} Id. Though exercising this veto power might cause the bank in question to suffer bad publicity, the current draft does allow a primary secured creditor to prevent a provisional supervision from happening. Id. at 44.
\textsuperscript{442} See Charles D. Booth & Philip St. J. Smart, Retroactive or Prospective?: Determining the Scope of Hong Kong’s New Insolvency Law, 8 Int’l Insol. Rev. 27, 32 (1999).
\textsuperscript{443} Id. The bill also provided that all bankrupts who were adjudicated bankrupt prior to April 1, 1998 would be discharged from bankruptcy on April 1, 1999. See id.
\textsuperscript{444} Id. at 32 n.24.
\textsuperscript{445} Id. at 32.
\textsuperscript{446} See id.
\textsuperscript{447} See Kelvin Chan & Chow Chung-yan, Bankruptcies Fall to Their Lowest Level in Two Years, S. China Morning Post, Dec. 20, 2003, at 3.
\textsuperscript{448} Id.
were 1,417 during October of the same year. 449 These numbers show that filings were down from the prior year, when there were 2,441 in November of 2002, and 3,193 in January of 2003. 450 These numbers are astronomical compared to the ten years prior to this time, showing an increase in filings of over 1,000%. 451 While some of this increase can be attributed to liberalization of the individual bankruptcy discharge, increases in consumer credit, particularly credit cards, may also explain these increases. 452 As of March of 2002, there were nearly 7 million residents of Hong Kong, and 9.38 million credit cards in circulation. 453

Culture appears to play a much smaller role in Hong Kong’s attitudes towards bankruptcy, especially compared to China. 454 Because Hong Kong laws are based on English law, the law lacks local culture elements unique to Hong Kong. 455 Although there are remnants of Chinese ideals in Hong Kong, such as the desire to pay creditors out of moral obligation, these Chinese traditions are diminishing due to the transient nature of Hong Kong’s population. 456 Moreover, most bankruptcies in Hong Kong involve foreign companies rather than purely Chinese ones. Assets in Hong Kong tend to be people, rather than large capital assets, and money goes in and out of Hong Kong quickly, requiring quick court action in bankruptcy cases. 457

Not surprisingly, then, filing for bankruptcy in Hong Kong does not carry as much stigma as in many other Asian countries, in part because Hong Kong’s community is internationally-oriented and tran-

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449 Id.
450 Id.
451 Id. As in the United States, there is some indication that filings increased after the discharge rules were liberalized in 1998, though the entire increase is unlikely to be attributable to this fact. Id.
453 Id. The authors note that this amounts to 1.34 credit cards per person. Id.
454 Tomasic et al., supra note 422, at 282–83.
455 Id. at 283.
456 Id.
457 Id. Often, the purpose of a bankruptcy in Hong Kong is to provide access to compensation for employees, following a business closure, from a wage insolvency fund. Id. at 282. Workers in Hong Kong tend to fall into two attitudinal categories based on their age. Those over 50 tend to be tied into Chinese culture and beliefs, and think of business relationships as long term commitments. Younger workers are often more influenced by Western culture, and rarely view business in this long-term way. They are not afraid to use the legal system if they think it will help them. Thus, the Confucian tradition is dwindling. Chinese influence is limited because most insolvency practitioners are trained in the British common law tradition. Id. at 283.
sient. Some large bankruptcies in the 1980s made the idea more common, and therefore more acceptable. Among the traditional Chinese people who live in Hong Kong, the stigma is still present, and bankruptcies from Chinese owned business are rare.

Like the mainland Chinese, Hong Kong citizens would rather avoid courts, preferring to work things out on their own. The robust Hong Kong economy also has made bankruptcy reform less of a necessity. When businesses do fail, the banks have been willing to bail many out. Many people believe, however, that reform is badly needed in Hong Kong. Moreover, Hong Kong citizens are more likely to embrace and to use modern bankruptcy laws than the citizens of either China or Japan. Confucianism and other traditional forces play a smaller role in modern, long-colonized, market-based Hong Kong.

b. Chinese Economics, Bankruptcy Law, and Culture

Unlike colonized Hong Kong, mainland China has a long history of economic and social isolation, and a history reaching as far back as 221 B.C., the year it gained its independence. China is also one of the world’s largest countries by land-mass, and is the world’s most populated country with a population of 1,298,847,624. In recent years, China has undergone a surprising shift from a state controlled economy to an economy where a growing percentage of enterprises are privately controlled. In fact, well over half of all China’s busi-

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458 Burton, supra note 423, at 117.
459 Id.
460 Id. The relationship between Hong Kong and China concerning bankruptcy is complicated. See id at 120. At the moment, China does not recognize Hong Kong bankruptcies. See id. China is now the biggest investor in Hong Kong, and as a result there is a large amount of money owed to Hong Kong from Chinese businesses. Id. at 116.
461 Tomasic et al., supra note 422, at 255–56.
462 Andrew Duncan, A Brief Overview of Insolvencies in Hong Kong, 30 BCD News & Comment 21 (1997).
463 Tomasic et al., supra note 422, at 256.
464 Id. at 282.
466 Id. (providing a July 2004 estimate).
nesses are now privately owned.468 Moreover, China is working hard to encourage foreign investment in its businesses.469

In the past, the communist government of China has fought to limit any capitalist influence in the economy.470 Now, due to a growing realization that capitalism may produce more efficiently in many sectors than the regime’s State Owned Enterprises (SOEs), the Communist Party of China is accepting and even encouraging capitalism.471

This acceptance of private enterprise did not occur suddenly. Through the assumption of power of the Communist Party until the 1980s, the authorities actively crushed capitalist enclaves.472 In 1982, the government “rehabilitated” capitalist entrepreneurs in an effort to increase economic activity.473 “At the 16th party congress, not only were the ‘red capitalists’ invited to join the Communist Party, some private entrepreneurs were even made delegates.”474 The Communist Party also vowed to “promote the healthy development of the non-public sector” and to “better safeguard private property.”475

China’s SOEs are concentrated in heavy industrial operations and have incurred large debt loads. These industries have been restructured with massive layoffs and corporate restructuring in an attempt to increase efficiency.476 Restructuring efforts are yielding limited results. Even with the Chinese government’s doubtful official statistics, the SOEs’ losses exceeded profits for the first time in 1996.477 Moreover, China’s large state banks have written off US$15.3 billion in non-performing loans to SOEs.478

468 See id.
470 See Allan Zhang, Hidden Dragon: Unleashing China’s Private Sector, at http://www.pwcglobal.com/extweb/newcтолth.nsf/docid/3D15C57A6D220BB985256CF6007B9607, (last visited Nov. 22, 2004). It is important to note that this data is provided by Pricewaterhouse-Coozers. The firm may have a pecuniary interest in portraying the investment climate in China as being better than it is in reality.
471 See id.
472 See id.
473 Id.
474 Id.
475 See Zhang, supra note 470.
476 Christopher A. McNally, China’s State-Owned Enterprises: Thriving or Crumbling? 1 (2002).
477 See id. at 1.
478 Id. at 5. This write off is a very small amount of the US $422 billion total non-performing loans that burden China’s state owned banks. See A $45 Billion Shot In The Arm,
Private enterprise is developing rapidly despite a difficult regulatory environment and continuing government discrimination. By 2002, the private sector generated around 60% of China’s output while using only 20% of the country’s resources. The SOEs produced only 40% of output while consuming 80% of resources. The private sector is producing eight out of ten new jobs. China’s overall economy is growing by 8% and this rate is expected to continue into 2005. The Chinese Communist Party is committed to maintaining this growth over the next two decades and the private sector will have to play an integral part in this growth.

Culture plays a substantial role in Chinese laws, especially its bankruptcy laws. Considering its population, China has a low level of reported commercial bankruptcies. In Chinese society the notion of bankruptcy has long been condemned as “bad luck,” meaning “broken fortune.” If a father owes a debt, his sons or grandsons would be responsible for it; bankruptcy implies a life of burden for generations to come.

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479 See Zhang, supra note 470.
480 Id.
481 Id.
482 A $45 Billion Shot In The Arm, supra note 484.
483 See Zhang, supra note 470. China will continue to depend on SOEs for a large part of its economic productivity. See id. But, private enterprise is an increasingly important part of the economy. China’s leaders are cognizant of the necessary role that these private businesses will have to play to maintain the country’s growth. See id.
484 See Ma, supra note 325, at 205.
485 See Feng Chen, Chinese Bankruptcy Law: Milestones and Challenges, 31 St. Mary’s L.J. 49, 60 (1999). “Bankruptcy law should play an important role in adjusting social structure, but bankruptcy cases are rarely in court in China.” Id. “The first bankruptcy case was heard in 1987.” Id. “In the first six months, there were 98 cases at the national level.” Id. Overall, 16,652 cases were heard by the court between 1986 and 1999. Id. Most of these cases involved privately-owned enterprises, collectively owned enterprises, and joint-venture enterprises. Id. A great disparity exists between failing enterprises and the number of bankruptcy cases filed. Id. “This disproportion may be attributed to three main factors: (1) immense pressure on government leaders, (2) strong opposition to bankruptcy from banks, and (3) an entrenched ‘reliance’ psychology in society.” Id. Chen describes reliance as a phenomenon where the working class is considered the “leading class” by society, and is thus entitled to be taken care of by the government, especially workers in SOEs. See id.
486 Ma, supra note 325, at 205.
487 Id.
The Chinese historically have a low regard or disbelief in judicial power.\textsuperscript{488} Creditors focus on \textit{guanxi} (relationships) as opposed to their entitlements to payment.\textsuperscript{489} As is further discussed below, bankruptcy cases in China have been controlled by the government, not by independent courts, causing citizens to distrust the system.\textsuperscript{490} Confucianism also continues to have great influence on commercial activities. Confucian ethical teachings include the following values, which are held in high respect by the average Chinese person and are visible in Chinese business practices and their use of law: \textit{Li}, includes “ritual, propriety, etiquette, etc.”; \textit{Hsiao}, “love within the family: love of parents for their children and of children for their parents”; \textit{Yi}, “righteousness”; \textit{Xin}, “honesty and trustworthiness”; \textit{Jen}, “benevolence, humanity towards others, the highest Confucian virtue”; and \textit{Chung}, “loyalty to the state”.\textsuperscript{491} Confucianism “encourages balance and harmony.”\textsuperscript{492} “Unless there is no other choice, people should keep their friendships and relationships intact,” rather than pursue court intervention; under Confucianism, it is also “anti-moral” to force a debtor into involuntary bankruptcy.\textsuperscript{493}

Socialism and communism also have a great affect on attitudes and culture in China and the resulting bankruptcy laws.\textsuperscript{494} The most developed and most significant Chinese Bankruptcy laws focus on

\textsuperscript{488} Id. at 206.
\textsuperscript{489} Id.
\textsuperscript{490} Id.
\textsuperscript{492} Ma, supra note 325, at 206.
\textsuperscript{493} Id. at 207. A challenge faced in drafting bankruptcy law in China is convincing creditors “that even though preserving harmonious relationships has been important, their economic interests might be better served if they resort to legal mechanisms” of bankruptcy. Id.
\textsuperscript{494} See id.
SOEs. It is very difficult to place an SOE into bankruptcy and government permission is needed. SOEs are property of the state, and bankruptcy is viewed as a leadership failure, a loss of face for the government. Yet, scores of SOEs operate at a loss. Naturally, if a large number of SOEs were to be closed down at one time, many people could simultaneously lose their jobs, and no national provision has yet been enacted to address this problem. If SOEs are given free access to bankruptcy, a domino effect is also feared because many SOEs are deeply indebted to one another.

Private enterprises are permitted to file a liquidation case, which can later become a reorganization case, under Chapters 16 and 19 of China’s Civil Procedure Law. If the case is accepted by the court, then a stay of collection efforts goes into effect. While all cases begin as liquidations, a case can proceed, through the actions of a Creditors Assembly, so that creditors can vote on a reorganization plan that will be approved if it is accepted by two-thirds of all unsecured creditors. Priority treatment is given to wage claims first, and then to taxes.

In 1986, China passed a controversial law that permitted the bankruptcy of SOEs. These cases all start as liquidations, but can then become reorganization cases. The goals in enacting this new law were

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496 Id. at 207.
497 Id. at 485, at 60.
498 Ma, *supra* note 325, at 208. Chinese workers are considered the leaders of the country. Id. at 7. Workers sacrifice higher earnings for years believing that they will receive 90% of their wage per year upon retirement. *Id.* If the SOE goes bankrupt, workers could lose everything. *Id.*; see Zhang & Booth. *supra* note 323, at 13 (describing SOEs as more like municipalities than private companies, where their workers are concerned).
500 Gebhardt & Olbrich, *supra* note 495, at 109. In the Shenzhen District, the debtor is eligible for bankruptcy if it has suffered serious losses or has been unable to pay its debts as they come due. Zhang & Booth, *supra* note 323, at 7.
502 Id. at 7.
503 Id.
505 Boshkoff & Song, *supra* note 323, at 360.
to encourage more efficient management of SOEs and to liquidate unprofitable businesses.\(^{507}\) Lawmakers continue to call for reform of this law, however, because it leaves the decision about whether a company can file for bankruptcy in the hands of the government, rather than courts or creditors.\(^{508}\) Courts are still not independent, and the community continues to have a lack of trust for judicial bodies.\(^{509}\) Moreover, despite the clear purpose of the new law, the government still views it as a loss of face if an SOE fails, and thus limits access to the new system.\(^{510}\) Clearly, the desire to compete in a global capital market cannot overcome ancient cultural and societal beliefs.

2. Conclusions About East Asian Bankruptcy Policies and Culture

As many traditional societies are learning, changing the law and getting people to use the new law, are two very different things. Japan, for example, pushed for early passage of its new Civil Rehabilitation Law, one of the few debtor-in-possession systems in the world. It was enacted ahead of schedule to try to help breathe life into Japan’s floundering economy. While it has been used to some extent, the government would like to see it used much more.\(^{511}\) Shame over debt is still prevalent. With more debt in the system, a recessionary economy, and more business failures, debt-related suicides have been on the rise.\(^{512}\) While Japan’s Economy Minister has called for a change in both laws and attitudes about debt repayment, it is far easier to change the laws than the attitudes.

\(^{507}\) See Zhang & Booth, supra note 323, at 2.

\(^{508}\) See Boshkoff & Song, supra note 323, at 361; Ma, supra note 325, at 206; see also Gebhardt & Olbrich, supra note 495, at 109–10 (discussing the need for reform); Zhang & Booth, supra note 323, at 2–3 (same).

\(^{509}\) Ma, supra note 325, at 206.

\(^{510}\) See id. at 207. Issues surrounding how fired employees will be taken care of also remain as stumbling blocks. Unlike U.S. bankruptcy law, which is non-judgmental about business bankruptcy, Chinese bankruptcy law attempts to lay blame for a business failure, or at least assess responsibility. Boshkoff & Song, supra note 323, at 361. The Chinese law allows criminal sanctions for poorly-managed enterprises. Id.

\(^{511}\) See Associated Press, supra note 337. In fact, Japanese businessmen are being strongly encouraged by the Japanese government to use this new law, both on television as well as on the web. It would be extremely hard to imagine the U.S. government promoting Chapter 11, yet there are cultural factors at work in Japan that make selling the new bankruptcy law necessary. The traditional Japanese shame culture prevails. Id.

\(^{512}\) Id. One of the most shameful things one can do is not pay one’s debts. See West, supra note 415. Suicide is often preferred to bankruptcy, even when the law is favorable to management and to business. Japan has one of the highest per capita suicide rates in the world. See id. at 9–10.
As China prepares to approve and unfold its reorganization scheme, it may be faced with similar problems. The Chinese also consider it a shameful thing to not pay one’s debts, a misfortune that would follow one for the rest of his or her life.\textsuperscript{513} Culturally, like the Japanese, the Chinese are taught to value relationships over money and self-promotion.

None of the Asian countries discussed have high corporate bankruptcy rates. The reasons are both cultural and opportunity-driven. Sometimes the law is not helpful. Much of the time, cultural factors make bankruptcy taboo. In China, businesses can continue to hide behind state ownership even if they are not profitable. No one loses face. Where this is unavailable, such as in Japan’s capitalist market, then suicide is one way out; for some it is preferable to using the new laws. Japan and other countries with a strong culture of shame must find a way to balance economic goals, such as fueling the economy through more and more credit, with the serious ramifications of overindebtedness. In the end, bankruptcy systems must be drafted to meet a country’s cultural, as well as economic, needs. Merely transplanting bankruptcy systems from other parts of the world, particularly culturally dissimilar places, is ineffective. The resulting laws are misunderstood, distrusted, and underutilized.

**Conclusion**

As the above discussion of U.S. policy demonstrates, bankruptcy’s fresh start, as well as the reorganization through a debtor-in-possession, grew from the roots of U.S. capitalism.\textsuperscript{514} First came the creation of an entrepreneurial economy, followed by an active consumer economy.\textsuperscript{515} The conditions for such a system were present from the beginning of the economy, and the bankruptcy systems grew directly from them.

Today, other countries are attempting to create more vibrant market-based economies, in part by developing new insolvency systems.\textsuperscript{516} At the same time, citizens of the world are also being exposed


\textsuperscript{514} See supra notes 30–83 and accompanying text.

\textsuperscript{515} See supra notes 34–83 and accompanying text.

\textsuperscript{516} Metzger & Bufford, *supra* note 4, at 153 (noting that when a country attempts to create a market economy, bankruptcy laws are among the first capitalist laws to be enacted).
to more and more credit—often more than they can back.517 One fairly obvious way to reduce the pain and suffering that could result from this new credit economy is to enact lenient discharge and reorganization laws to address the financial failure that will inevitably occur. This is certainly the global trend.518

This Article suggests that creating more forgiving insolvency systems may make economic and social sense, but still may not be accepted in some societies. On the other hand, attitudes toward bankruptcy in the United States changed once bankruptcy became more common, so perhaps long-held cultural views around the world will change as well. Only time will tell. In the meantime, governments and lawmakers must realize that imported bankruptcy systems are not being implanted on to blank cultural slates, such as the U.S. economy and social system of the 1700s and early 1800s. Many existing cultures are far more complicated. To those governments, I suggest the following cautious approach to developing new insolvency systems.

First, recognizing that new bankruptcy systems take some time to be accepted, governments and lawmakers should think very carefully and cautiously about how and when to deregulate credit systems. They should try to limit available credit to that which citizens can handle on their incomes, and not try to assume that extensive credit and purchasing power necessarily represents the good life. For a society that does not accept debt forgiveness, even if it is legally permissible, this could be a dangerous trap. The social consequences could include losing the family home, other possessions, and even family members themselves.

Second, assuming that it may be too late to carefully consider how credit is regulated, because it already has been extended in amounts higher than many can pay, governments and lawmakers should try to educate the public about responsible credit use, as well as the debt forgiveness benefits that the law provides. Such education is being attempted in both Europe and Japan, although many consumers report that they are unaware of the debt forgiveness now allowed by law. Others still refuse to use these laws because doing so is dishonorable.519 Education efforts should continue in an effort to destigmatize, as well as avoid isolation, voluntary exile, and suicide from over-indebtedness.

517 See supra note 2.
518 See Efrat, supra note 3, at 92–94.
519 See Business Suicides: Japan’s Death Trap, Bus. Week Online, at http://www.businessweek.com/print/magazine/content/02_22/b3785141.htm (June 3, 2002).
Finally, governments that are working on new bankruptcy systems should avoid the wholesale transplantation of any system, but in particular, should avoid transplanting U.S. systems without giving thought to the individual components of such laws. U.S. debt culture appears to be different from that of most of the rest of the world, and more moderate approaches may transplant with greater success. Transplanted aspects of U.S. bankruptcy law have been ignored in practice in Germany, Japan, Eastern Europe, Indonesia,\textsuperscript{520} and Thailand,\textsuperscript{521} as well as other parts of the world. They are simply too confusing, contextual, and complicated to make sense in their new homes, and also are based on social and cultural assumptions that the new host countries do not share.\textsuperscript{522} This causes more problems than it solves by suggesting that the social problems caused by over-indebtedness have been solved when they have not. Rather than import any systems wholesale, countries should attempt to borrow from many systems and ensure that the new law reflects both the economic needs of the society, as well as the unique cultural components of the society.\textsuperscript{523}

\textsuperscript{520} See Wihlborg & Gangopadhyay, supra note 274, at 306.

\textsuperscript{521} See id.

\textsuperscript{522} Good examples include the debtor-in-possession model now in place in Japan, Germany and Mexico, but not widely accepted in any of these places.

\textsuperscript{523} Examples of such cultural components include jobs in France, honor and saving face in Japan, and efficiency in Germany and Australia. Ripe areas for development based on cultural concerns include the breadth of the discharge, the breadth of the automatic stay, the priority scheme, and whether a repayment plan is required, as well as many other rich areas of discussion.
Abstract: The Article begins by analyzing the characteristics of the right to family life and examining various definitions of the “family” under international and Israeli law. It argues that the absence of a clear, standard definition for the “family” and the exclusion of “alternative” family bonds leads to an infringement of the rights of many who, in practice, conduct a family life. Following this discussion, the Article analyzes the degree of protection accorded to the family in various contexts including: the right of the family to social security; parent-child relations; immigration rights based on family ties; and the freedom to marry. The most severe limitation on the right to family life within Israel relates to the lack of an option to marry in a civil ceremony. While international law recognizes the imposition of certain limitations on the freedom to marry, the additional limitations on the right to marry imposed by Jewish religious law constitute a breach of Israel’s international commitments. The Article thus concludes that the only way to guarantee equality within the family context—and to ensure the right of every individual to marry, free of the shackles of religious law, as mandated by international law—is the introduction of civil marriage in Israel.

Introduction

International law recognizes the fact that the family plays an essential and central role in human society. The family is perceived to be “the natural and fundamental group unit of society and is entitled
to protection by society and the State.”

This outlook lies at the foundation of the broad protection granted to the family by international law. The right to family life, which has been recognized as a fundamental right in international law, is enunciated in all major international instruments and conventions and has also been the subject of a comprehensive discourse in various contexts of Israeli law.

This Article deals with the protection of the right to family life under international law and its implementation in Israel on three levels: protection of the family cell as a single unit (the right to establish a family and, in particular, the right to marry); protection of the individuals comprising the family unit (in particular, women and children); and protection of the family in special circumstances (such as immigration rights).

Israeli family law may be divided into two parts: the laws of marriage and divorce, which are governed exclusively by religious law, and most other aspects of family law (including maintenance, child custody, adoption, and succession), which are regulated by substantive

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2 See International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, art. 23(1), 999 U.N.T.S. 171, 179 [hereinafter Covenant on Civil Rights] (reiterating that which is stated in the Universal Declaration of Human Rights); see also International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 16, 1966, art. 10(1), 993 U.N.T.S. 3, 7 [hereinafter Covenant on Social Rights] (providing that “[t]he States Parties to the present Covenant recognize that . . . [t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society”). For similar sentiments, see the Declaration on Social Progress and Development, G.A. Res. 2542, U.N. GAOR, 24th Sess., Supp. No. 30, at 49, U.N. Doc. A/7630 (1969) (stating that the family is “[a] basic unit of society and the natural environment for the growth and well-being of all its members, particularly children and youth”), and the European Social Charter, Oct. 18, 1961, art. 16, 529 U.N.T.S. 89 [hereinafter European Charter]. Similar provisions may be found in various regional conventions, such as: American Declaration of the Rights and Duties of Man, May 2, 1948, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L/V/II.82 doc.6 rev.1 at 17 (1992) (Article VI: “Every person has the right to establish a family, the basic element of society, and to receive protection thereof”); American Convention on Human Rights, Nov. 22, 1969, art. 17(1), 9 I.L.M. 673, 680 (“The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.”); Banjul Charter on Human and Peoples’ Rights, June 27, 1981, art. 18(1), 21 I.L.M. 58, 61 (“The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical and moral health.”).
secular law. The major inconsistencies between Israeli family law and the provisions of international law relating to the right to family life are found in those areas governed by substantive religious law. Various international conventions that Israel has signed and ratified mandate the prohibition of discrimination on the basis of, inter alia, sex, national origin, race, and religion. Nevertheless, Israeli law regarding marriage and divorce, which is discriminatory in terms of the aforesaid categories, has not been affected by the ratification of international conventions. To a certain extent, this is because only customary international law automatically becomes part of Israeli law, whereas conventional international law, embodied by constitutive treaties, becomes part of Israeli law only if it is adopted or combined with Israeli law through legislation. While the Israeli government has ratified the international conventions discussed in this Article (some of which were ratified with specific reservations), they have not been incorporated into domestic legislation. Thus, they have no formal effect in the Israeli legal system and are not applied if they contradict Israeli law.

The rights and duties enumerated in these conventions, therefore, cannot be directly invoked by individuals and do not fall under the jurisdiction of Israeli courts. This Article argues that, although international conventions pertaining to the right to family life have not been incorporated into Israeli law, the Supreme Court of Israel (Supreme Court) should give proper weight to the right to family life as a fundamental human right, and that the Israeli legislature should take the necessary steps to bring Israeli family law into conformity with the precepts of international law.

Part I of the Article discusses the characteristics of the right to family life and examines various definitions of the “family” under international and Israeli law. It also examines what the right to family life encompasses and how it should be classified within the context of civil and political rights, on the one hand, and social and economic rights, on the other. It further argues that the right to family life should not be viewed as limited solely to one category of rights or an-
other, since it has the characteristics of both a positive social right as well as those of a negative civil right. Part II of the Article analyzes the degree of protection accorded to the family in various contexts, both in international and Israeli law, including the right of the family to social security, parent-child relations, and immigration rights based on family ties. This Part concludes that Israel provides adequate protection regarding most of these aspects of the right to family life, except for its discriminatory practices against Arab Israeli citizens and Palestinians in matters relating to immigration and family unification.

Part III of the Article discusses the freedom to marry and argues that Israeli law exhibits a particular difficulty in the equal application of the right to family life insofar as it relates to the right to marry because the laws of marriage and divorce in Israel are governed exclusively by religious law, which discriminates against various groups of the population (such as women, persons without a religion, and persons disqualified for religious marriage). International law, on the other hand, dictates the application of the right to marriage without discrimination. This Part concludes that the only way to guarantee equality within the family context—and to ensure the right of every individual to marry, free of the shackles of religious law, as mandated by international law—is the introduction of civil marriage in Israel.

I. Characteristics of the Right to Family Life

A. The Right to Family Life—A Fundamental Right

The right to family life is a fundamental right of the highest degree and has attained broad and comprehensive protection in international law. A first expression of the recognition of the right to family life as a basic human right, and of the protection of the family unit, may be found in Articles 12, 16, and 25 of the Universal Declaration of Human Rights, which state as follows:

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence. Everyone has the right to the protection of the law against such interference.

Article 16

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and
to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

2. Marriage shall be entered into only with the free and full consent of the intending spouses.

3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services . . . .

2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.7

Moreover, the right to family life is enshrined in a significant number of international and regional conventions that emphasize the centrality and social importance of the family unit, and which list the right to family life as a fundamental right. First and foremost, the right is enunciated both in the Covenant on Social Rights and in the Covenant on Civil Rights. Article 10(1) of the Covenant on Social Rights states that:

The States Parties to the present Covenant recognize that . . . [t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.8

Similar protection is granted to the institution of the family under Articles 17 and 23 of the Covenant on Civil Rights. These provisions state, respectively, as follows:

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7 Universal Declaration of Human Rights, supra note 1, art. 25, at 76.
8 Covenant on Social Rights, supra note 2, art. 10(1), 993 U.N.T.S. at 7. The Covenant was ratified by Israel in 1991.
Article 17
1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

Article 23
1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.  

Specific protection for children within the family context may be found in the Convention on the Rights of the Child. Likewise, the Convention on the Elimination of All Forms of Discrimination Against Women includes provisions that grant comprehensive protection to women in the context of the family. Among regional conventions, comprehensive protection for the family institution may be found in

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9 Covenant on Civil Rights, supra note 2, arts. 17, 23, 999 U.N.T.S. at 177, 179. The Covenant was ratified by Israel in 1991.

10 See Convention on the Rights of the Child, Nov. 20, 1989, art. 16, 1577 U.N.T.S. 43, 49 [hereinafter Convention on the Rights of the Child] (stating that “[n]o child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation,” and that “[t]he child has the right to the protection of the law against such interference or attacks”). The Convention was ratified by Israel in 1991.

11 See Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, art. 16, 1249 U.N.T.S. 13, 20 [hereinafter Convention on the Elimination of Discrimination Against Women]. The Convention was ratified by Israel in 1991; see also Convention on the Nationality of Married Women, Feb. 20, 1957, art. 3(1), 309 U.N.T.S. 66, 68. (stating that “[e]ach Contracting State agrees that the alien wife of one of its nationals may, at her request, acquire the nationality of her husband through specially privileged naturalization procedures; the grant of such nationality may be subject to such limitations as may be imposed in the interests of national security or public policy”).
the European Convention for Protection of Human Rights and Fundamental Freedoms.\textsuperscript{12}

The right to family life is also recognized as a fundamental constitutional right in Israeli law. The Israeli legislature has enacted various laws intended to encourage the family unit. For example, within the context of marriage, various provisions have been enacted to foster a caring and intimate relationship between spouses in order to sustain and nurture the family unit. The emotional relationship between the spouses is promoted, \textit{inter alia}, by the following: granting a right to sick leave in order to care for an ill spouse;\textsuperscript{13} giving preference to the request of a foreign spouse to immigrate to, and become naturalized in, Israel in order to live with his or her spouse;\textsuperscript{14} the lack of competence of one spouse to give evidence against the other spouse;\textsuperscript{15} and visitation rights in prisons.\textsuperscript{16} Similarly, the Supreme Court recognizes the right to family life as a “particularly important” fundamental right, pointing out

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\textit{Article 8}
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1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
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\item[14] The Nationality Law, 1952, 6 L.S.I. 50, § 7 [hereinafter Nationality Law] (providing that “[t]he spouse of a person who is an Israeli national or who has applied for Israeli nationality . . . may obtain Israeli nationality by naturalization”); see also The Law of Return, 1950, 4 L.S.I. 114, § 4A [hereinafter Law of Return]. In this matter, the Court has ruled that “an extension of the right of return to family members is intended to preserve the unity of the family, one member of which is Jewish.” H.C. 3648/97 Israel Stamka v. Minister of Interior, 53(2) P.D. 728, 755. Regarding limitations on rights of immigration and naturalization in Israel, in various contexts, see infra, Part III.D.
\item[15] See The Evidence Ordinance (New Version), 1971, 2 L.S.I. 198, § 3 (providing that “in a criminal trial a spouse shall not be competent to give evidence against the other spouse”).
\item[16] See Proposed Family Visits in Prison Facilities Law, 2003, at http://www.knesset.gov.il/privatelaw/data/16/1013.rtf (last visited Dec. 6, 2004) [Hebrew] (“[T]he link to the family unit is considered a basic human need, necessary to the prisoner and his family . . . these needs are among the minimal civilized human conditions of every prisoner who belongs to a family unit.”).
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that every individual has “a basic right to marry and to establish a family.”

The Supreme Court has emphasized the social importance of the family unit in a long series of judgments, adding that Israel is committed to protect the family unit under the aforementioned international conventions.

The Supreme Court has held that the right to family life—which encompasses the right of an individual to belong to a family unit, the right of a couple to marry and live together, the right to bear children, the right of parents to raise their children and care for them, and the right of children to grow up with their parents—is grounded in the constitutional rights to privacy, self-fulfillment, and dignity and liberty, as enshrined in the Basic Law: Human Dignity and Liberty (Basic Law). The Supreme Court stated that “[i]n an era in which ‘human dignity’ is a protected fundamental constitutional right, effect should be given to the aspiration of a person to fulfill his personal being, and for this reason, his desire to belong to the family unit that he considers himself part of should be respected.”

Nevertheless, although the case law has recognized the right to family life as a fundamental constitutional right, it has not been enshrined as a negative civil right in the Basic Law, nor as a positive social right in the Proposed Basic Law: Social Rights (Proposed Law), in its different versions. Among other things, the Proposed Law enumerates the right to education, the right to health, and the right to housing and social welfare, but surprisingly, does not include the right to family life.

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17 See Stamka, 53(2) P.D. at 781–82; see also C.F.H. 2401/95, Nachmani v. Nachmani, 50(4) P.D. 661, 683 (stating that “every person has the right to establish a family and to bear children”).

18 See, e.g., H.C. 639/91, Efrat v. Dir. of Population Registry at Ministry of Interior, 47(1) P.D. 749, 783 (discussing the essentiality of the family to the life of Israeli society).

19 Stamka, 53(2) P.D. at 787.


23 Even if we do not read a right to family life into the Basic Law: Human Dignity and Liberty, and even if it will not be enshrined in the Basic Law: Social Rights, then, as a basic human right, it is still appropriate to examine every provision that infringes on the right to family life according to the standards outlined in the limitation clause of the Basic Law. See H.C. 5016/96, Horev v. Minister of Transportation, 51(4) P.D. 1, 41–43. An English translation of this judgment may be found on the official website of the Israeli Judicial Authority at http://www.court.gov.il (last visited Jan. 12, 2005).
B. The Definition and Scope of the Right to Family Life

The right to family life, as indicated by the provisions of the aforementioned international conventions, encompasses the following: the right to marry; the right to be a parent; equality between the sexes within the family context; protection for children within the family context; and the family’s right to privacy. The right to family life also includes the right of individuals within the family not to be exposed to physical violence or verbal abuse, the right of family members to live together in the same country (“family unification”), the right of single-parent families and large families to receive state assistance, protection for working mothers and safeguards related to pregnancy and childbirth, the right to benefit from the educational and cultural resources of the state, the right to an adequate standard of living, and the right to family health services.\(^{24}\)

These rights are not based on a clear, standard definition of the term “family,” but rather derive from an individual examination of the various needs and functions of the family. Therefore, determining the scope of the right to family life, and identifying those persons entitled to benefit from it, mainly depends on the definition given to the term “family.” It appears impossible to find a single, clear, exhaustive, and standard definition for the concept of the “family,” whether in international law, comparative law, or Israeli law. Article 10(1) of the Covenant on Social Rights deals with “family rights,” but does not define what constitutes a “family”\(^{25}\) (although, a patriarchal view of the family institution may be inferred).\(^{26}\) Furthermore, a meticulous search of other

\(^{24}\) See supra Part I.A.

\(^{25}\) See Philip Alston, *The International Covenant on Economic, Social and Cultural Rights*, in U.N. CENTRE FOR HUMAN RIGHTS & UNITAR, MANUAL ON HUMAN RIGHTS REPORTING 39 at 57, U.N. Doc. HR/PUB/91/1, U.N. Sales No. E.91.XIV.1 (1991). The member states that are parties to the Covenant give substance and meaning to the term “family” as accepted in each and every country. See id. In the General Comment of the Human Rights Committee of 1990, it was noted “that the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition.” See U.N. GAOR Hum. Rts. Comm., Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies: General Comment 19, art. 23, 39th Sess., 1990, U.N. Doc. HRI/GEN/1 at 28 (1992) [hereinafter General Comment 19]. Even prior to this, the UN Human Rights Committee stated that the term “family” in this Covenant, as in other conventions, should be interpreted as including “[a]ll those comprising the family as understood in the society of the State party concerned.” U.N. GAOR Hum. Rts. Comm., Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies: General Comment 16, art. 17, 23d Sess., 1988, U.N. Doc. HRI/GEN/1 at 21 (1992).

\(^{26}\) Despite the existence of provisions that deal with equal rights for women, see infra, Part IV.C, the man is the universal subject of the Covenant. See Covenant on Social Rights,
international conventions, decisions of various international tribunals, and Israeli law—as well as the law of other legal systems—demonstrates that a satisfactory definition for this concept cannot be found. The lack of consensus regarding the definition of the family is not only evident in the legal realm, but also, and primarily, in the fields of sociology and anthropology. The nature and perception of “family” change from place to place and from time to time, and are dependent on points of view as well as on social and cultural conditions. Historically, the family has been defined as a permanent, monogamous, heterosexual institution based on marriage, including a clear division of gender roles. Determining who is a “family member,” who is a “spouse,” what is a “marriage,” and who is considered a “parent,” has long been based on widely accepted legal and social perceptions. Nevertheless, these perceptions have been questioned—mostly in the past few decades—as a result of social, legal, and political changes.

From a sociological point of view, it is customary to draw a distinction between the traditional, extended family and the modern, nuclear family, and between both of these and the post-modern family. The traditional family and the modern family are based on ties of blood and marriage, and differ in regard to the degrees of relation included in the definition of the terms. The post-modern family encompasses rela-

supra note 2, art. 11(1), 993 U.N.T.S. at 7 (providing that “[t]he States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family” (emphasis added). As such, the Covenant presumes that it is the man who requires an adequate standard of living for his family, an assumption based on the perception that it is the man who heads the family. Dianne Otto, “Gender Comment: Why Does the UN Committee on Economic, Social and Cultural Rights Need a General Comment on Women?”, 14 Canadian J. Women & L. 1, 19 (2002).

27 For different and varied definitions of the concept of the “family” in the fields of sociology and anthropology, see Rivka Bar-Yosef, Sociology of the Family in View of Social Changes and Biotechnological Innovations, 38(1) Megamot 5 (1996) [Hebrew].

28 See generally Nicholas Bala & Rebecca Jaremko Bromwich, Context and Inclusivity in Canada’s Evolving Definition of the Family, 16 Int’l J. L. Pol’y & Fam. 145 (2002) (arguing that the definition of family is not static).

29 See id. at 145.

30 See id.

31 See Zeev W. Falk, Marriage Law 11 (1983) [Hebrew]. The accepted definition of the family in the field of sociology, since the 1940s and up to this day and age, is that of Murdock, who defines the nuclear family as one that includes a married man and woman and their offspring. George Peter Murdock, Social Structure 1–2 (1949). But see generally Bar-Yosef, supra note 27 (arguing that Murdock’s model is incompatible with the characteristics of the post-modern family).

32 For a discussion of the characteristics of the post-modern family in Israel, see generally Sylvie Fogiel-Bijaoui, Families in Israel: Familism and Post-Modernism, in Sex, Gender and Politics 107 (1999) [Hebrew].
tions that are not based only on blood or marriage (such as unmarried heterosexual couples and same-sex partners), “absent” family relations (such as single-parent families), and the “bi-nuclear” family, where parents have separated and established new nuclear families.33 While, in reality, there is no denying the existence of many different types of family units, it would appear that Israeli law still essentially regards the nuclear family—based on a lawful marriage between a man and a woman who have common biological or adopted children—as the normative family model, and finds it difficult to recognize the wide variety of other family models that actually exist.34

As far as Israeli legislation is concerned, different definitions for the term “family” are found in various laws, with the scope of each definition varying depending on the purpose of the statute.35 Furthermore, since the definition of “family” is a functional, context-dependent definition, it is even possible to find different definitions for this concept within the same statute.36 Some statutes adopt a broad ap-

33 See generally id. (noting the presence of new family units in the post-modern world).

34 Such recognition finds only partial expression, mainly in the area of social rights. See, e.g., The Single-Parent Families Law, 1992, S.H. 147 (granting various benefits to a single-parent, such as preferential admissions to day-care centers or an increased state loan for housing purposes). In a similar fashion, same-sex partnerships have been accorded limited recognition that finds expression in the right of a same-sex partner to receive various employment benefits routinely granted to partners of a different sex. See H.C. 721/94, El Al Israel Airlines Ltd. v. Danielowitz, 48(5) P.D. 749. An English translation of this judgment may be found on the official website of the Israeli Judicial Authority at http://www.court.gov.il (last visited April 25, 2004). The legal conception of the nuclear family as the normative model up to the present day is reflected in the comments of Justice Porat in F.A. (Tel-Aviv) 10/99, Jane Doe v. Attorney General, Takdin (District Court) 2001(2) 125 [hereinafter Jane Doe]. The Justice refused to view a lesbian couple and their children as a family unit and to grant them second-parent adoption, ruling that “the children in question have mothers and no one has expressed any doubt as to their fitness to raise their children. Each one of the mothers chose to bring her children into the world without the participation of a man in her life. What is lacking for these children (if it is indeed lacking) is a father, but definitely not another mother.” Id. at ¶ 18 (emphasis added). This decision was recently overturned by the Supreme Court, which allowed for second parent adoption by a lesbian couple. See C.A. 10280/01, Yaros-Hakak v. Attorney General (not yet published; decided Jan. 10, 2005); see also B. Schereschewsky, FAMILY LAW 1 (4th ed., 1993) [Hebrew] (defining the institution of the “family” as follows: “A family for the purposes of family law means all those persons who are related to one another by blood or by marriage.”).


36 Compare, e.g., The Municipalities Ordinance (New Version), 1 L.S.I. 247, § 174A(g) (defining “family relation” as “a spouse; a parent; a son or daughter and their spouses; a
broach, while others adopt a narrow approach. Examples of a broad definition for the concept of the “family” may be found in the Prevention of Family Violence Law, 1991, and the Family Courts Law, 1995. The definition of a “family member” in these two statutes includes, inter alia, a “reputed spouse” (a category akin to common law spouses) and a former spouse, children (including the children of a spouse), a parent and the spouse of a parent, the parents of a spouse and their spouses, a grandfather and a grandmother, brothers and sisters, and brothers-in-law and sisters-in-law. This broad definition is not based only on marital relations and blood ties, but also on relations between reputed spouses and their families. On the other hand, there are statutes that adopt a narrow definition of a “family member.” The narrow definition is based solely on blood ties and marital relations, and does not include, for example, a reputed spouse, or even the family of a spouse. For example, the National Insurance Law (Consolidated Version), 1995 (National Insurance Law), provides that a “family member” only includes “one of the parents, a child, a grandchild, a brother or a sister.” Similarly, the Equal Opportunities in Employment Law, 1988, provides that a “family member” is “a spouse, a parent, a child, a grandchild, a brother, a sister, or a spouse of any of these.” Further narrow

brother or sister and their children; a brother-in-law or sister-in-law; an uncle or aunt; a father-in-law or mother-in-law; a son-in-law or daughter-in-law; a grandson or granddaughter; including step-relations or adoptive relations”), with id. § 235A(a) (defining “family member” as “a spouse, a child, a parent, a brother or sister, a grandson or granddaughter, a great-grandson or great-granddaughter”).

See Israeli Report to the U.N. Committee, supra note 35, ¶¶ 338–40 (discussing this distinction).


The National Insurance Law (Consolidated Version), 1995 S.H. 205, ¶ 1; see also The Planning and Building Law, 1965, 19 L.S.I. 330, ¶ 1 (containing an identical definition).

The Equal Opportunities in Employment Law, 1988, S.H. 38, ¶ 21(a)(1). For a similar definition, see The Victims of Road Accidents (Assistance to Family Members) Law, 2002, S.H. 130 (defining a “family member” as “a spouse, a child, a parent, a brother or a sister, or another family member who was dependent upon the road accident victim”).
definitions, to one degree or another, may be found in a long list of additional statutes.44

In contrast to the variety of statutory definitions of the “family,” it is difficult to find an attempt to define this concept in Israeli case law or legal literature.45 It seems that the courts, as well as most legal scholars, assume that the definition of the family is obvious; in fact, they appear to be referring to the nuclear family. For example, in Ofri v. Perlman, Justice Orr held that for the purposes of the matter in question “there is no reason to interpret this broad term, ‘family,’ the meaning of which is known to all, as if it only refers to this or that specific person.”46 Nevertheless, on this subject, the Israeli courts usually follow the lead of the legislature; in other words, when it comes to the meaning of the term “family,” the court adopts a functional approach, taking into account the purposes of the relevant statute.47

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44 See, e.g., The National Health Insurance Law, 1994, S.H. 156, § 8(7) (defining “family” as “[a]n individual and his spouse and their children up to the age of 18, or an individual and his children up to the age of 18”); The Fallen Soldiers’ Families (Pensions and Rehabilitation) Law, 1950, 4 L.S.I. 115, § 1; The Invalids (Pensions and Rehabilitation) Law (Consolidated Version), 1959, 13 L.S.I. 315, § 1; The Government Companies Law, 1975, 29 L.S.I. 162, § 17A(b); The Penal Law, 1977, Special Volume L.S.I. 50; The Political Parties Law, 1992, S.H. 190, § 28F; The Crime Victims’ Rights Law, 2001, S.H. 183, § 2; see also Proposed Basic Law: The Family, at http://www.knesset.gov.il/privatelaw/data/16/1013.rtf (last visited Jan. 12, 2005) [Hebrew] (defining “family” as follows: “(1) married couples; (2) unmarried adult couples unrelated by blood who live together in the same home, maintain a joint household and are mutually committed to a shared life; (3) an adult and a minor maintaining a joint household, where the adult is the parent or legal guardian of the minor”).

45 While it is extremely difficult to find a clear definition for the term “family” in Israeli case law and legal literature, a very comprehensive discussion may be found regarding the definition of the term “spouse,” which constitutes a basic element of the “family.” Opinions are divided on this subject and various questions remain unanswered, such as: for the purposes of family law, as well as in other legal contexts, should a common-law partner be included within the definition of the term “spouse” that appears in legislation?; or: is a same-sex partner also a “spouse” for the purpose of recognizing various rights emanating from this status? See C.A. 2000/97, Lindorn v. Karnit—Road Accident Victims Compensation Fund, 55(1) P.D. 12, 25–26; Danielowitz, 48(5) P.D. 749 at 785–86; Menashe Shava, The “Unmarried Wife,” 5 IYUNI Mishpat 484 (1973) [Hebrew].


47 See ISRAELI REPORT TO THE U.N. COMMITTEE, supra note 35, at 76, ¶ 341.
C. The Right to Family Life: A Social-Civil Right

Traditionally, international legal scholars have distinguished between the characteristics of the rights enunciated in the Covenant on Civil Rights and those enunciated in the Covenant on Social Rights.\(^48\) For example, Craig Scott has proposed the distinctions listed in the following table:\(^49\)

<table>
<thead>
<tr>
<th>Economic, Social, and Cultural Rights</th>
<th>Civil and Political Rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>Positive</td>
<td>Negative</td>
</tr>
<tr>
<td>Resource-Intensive</td>
<td>Cost-Free</td>
</tr>
<tr>
<td>Progressive</td>
<td>Immediate</td>
</tr>
<tr>
<td>Vague</td>
<td>Precise</td>
</tr>
<tr>
<td>Unmanageably Complex</td>
<td>Manageable</td>
</tr>
<tr>
<td>Ideologically Divisive/Political</td>
<td>Non-Ideological/Non-Political</td>
</tr>
<tr>
<td>Non-Justiciable</td>
<td>Justiciable</td>
</tr>
<tr>
<td>“Aspirations” or “Goals”</td>
<td>“Real” or “Legal” rights</td>
</tr>
</tbody>
</table>

The most prevalent distinction is that found in the first line of the table: it is customary to classify the rights enunciated in the Covenant on Social Rights as “positive” rights, which necessitate the intervention of state authorities for their implementation (such as providing minimal means of subsistence), and the rights enunciated in the Covenant on Civil Rights as “negative” rights, which mandate state noninterference, or an obligation to refrain from activity that may infringe on a right (such as freedom of expression).\(^50\) These distinctions have been criticized, and it has been argued that the differences between the two categories of rights are not at all obvious or unequivocal.\(^51\) Indeed,
there are political rights with characteristics found in the left column of the table (for example, affirmative action) and social rights with characteristics found in the right column of the table (for instance, the right of association and the right to strike). Furthermore, there are rights with characteristics in both columns of the table, their exact nature varying according to the context in which they are being discussed (like the prohibition against discrimination). In this regard, even if we ignore the criticism and adhere to the classic distinction between social rights and civil rights, we would find that the right to family life is enunciated in both the Covenant on Civil Rights and the Covenant on Social Rights, and also that this right, in its various aspects, has a mixed nature: both civil and social. Several aspects of the right to family life have more of a negative-civil nature than a positive-social nature. For example, the demand for recognition of the family’s right to privacy, right to marry, right to establish a family, and equal rights between the sexes within the context of marriage are all “legal” rights that may be implemented immediately, without an investment of resources, and


53 See Covenant on Civil Rights, *supra* note 2, arts. 17, 23, 999 U.N.T.S. at 177, 179; Covenant on Social Rights, *supra* note 2, art. 10, 993 U.N.T.S. at 7. It is interesting to note that the Covenant on Social Rights provides that “the widest possible protection and assistance should be accorded to the family.” Covenant on Social Rights, *supra* note 2, art. 10(1), 993 U.N.T.S. at 7. It is customary to interpret the term “protection” as an obligation on the part of the state to prevent interference, by third parties, with the family institution. According to this interpretation, then, the wording of Article 10 is narrow and only relates to the protection of the family in the sense of preventing interference, by certain individuals, with the right of other individuals to family life. See Craven, *supra* note 50, at 109. If that is the case, then the right to family life in the Covenant on Social Rights may be interpreted as a right that is mainly negative in character. Nevertheless, it should be remembered that, like the rest of the provisions in the Covenant, Article 10 is also subordinate to the general implementation clause, Article 2(1), which imposes positive obligations on the state. See Covenant on Social Rights, *supra* note 2, art. 2(1), 993 U.N.T.S. at 5. Indeed, Article 10 of the Covenant does not make use of the word “right,” and, therefore, *prima facie*, Article 2(1) does not apply to it. See *id.* This interpretation is unreasonable, and Article 2(1) should be read as also applying to Article 10 of the Covenant, both in view of the intention of the Covenant’s drafters to lay down binding legal obligations, and because it is not appropriate to interpret Article 10 in a different manner from the rest of the Covenant’s provisions, since Article 2(1) was designed to lay down the responsibility of the states regarding all provisions of the Covenant. Moreover, the Economic and Social Committee, in its guidelines for the submission of reports, expressly used the term “rights” when it referred to Article 10 of the Covenant. See Committee on Economic, Social and Cultural Rights, *supra* note 3, The Nature of States Parties Obligations (Art. 2, para.1 of the Covenant), Fifth Sess., 1990, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 45, U.N. Doc. HRI/GEN/1/Rev.1 (1994). Reporting Guidelines, UN Doc.E/1991/23, Annex IV, 97–9, UN ESCOR, Supp. (No. 3) (1991) [hereinafter “General Comment 3”]; Craven, *supra* note 50, at 135–36.
which mainly entail noninterference by the state in the individual’s freedom of choice.\textsuperscript{54} On the other hand, other aspects of the right to family life have more of a positive-social nature than a negative-civil nature, such as the family unit’s right to receive economic assistance and social welfare from the state (such as maternity insurance). Such rights necessitate positive intervention from the state, entailing an investment of resources, where both the manner and the rate of implementation depend on the economic capability of the state.\textsuperscript{55} In my view, it is not advisable to dissociate the civil characteristics from the social characteristics of the right to family life,\textsuperscript{56} since those are different aspects of the same material right. Therefore, for the remainder of this Article, I will discuss both the “negative” and the “positive” aspects of the right to family life.

II. PROTECTION OF THE RIGHT TO FAMILY LIFE IN VARIOUS FIELDS—INTERNATIONAL AND ISRAELI LAW

A. Protection of the Family Unit—General

The UN Committee on Economic, Social and Cultural Rights (UN Committee), which serves as a supervising body for the implementation of the Covenant on Social Rights, provides clarifications regarding the interpretation of various provisions in the Covenant (General Comments). Nevertheless, the right to family life, enunciated in Article 10, has yet to be discussed by the UN Committee or interpreted by international judicial tribunals.\textsuperscript{57} This is one of the rea-

\textsuperscript{54} See Hendriks, supra note 51, at 1133–34. Within the context of the right to privacy, as well as the right to equality, a guarantee of full enjoyment of the right necessitates the prior implementation of administrative safeguards, legal and otherwise, against the possibility of an infringement of this right. That is to say, the state must also take “positive” steps in order to guarantee the existence of a right that is, primarily, “negative.” See id.

\textsuperscript{55} See Craven, supra note 50, at 135.

\textsuperscript{56} It may be argued that, even though the right to family life is referred to in a similar fashion in both the Covenant on Civil Rights and the Covenant on Social Rights, these should not necessarily be viewed as overlapping references, but rather as referring to different aspects of the right. That is to say, the right should be interpreted according to the context in which it appears. Therefore, to the extent that the right to family life is mentioned in the Covenant on Social Rights, it should be interpreted as requiring economic support for the family unit (i.e., its interpretation should be limited to the socio-economic context); and when it appears in the Covenant on Civil Rights, it should be interpreted as referring to the civil characteristics of the right to family life.

\textsuperscript{57} An attempt to give substance to the right to family life may be found, primarily, in judgments of the European Court. For a discussion of this attempt, see infra text accompanying notes 69–70 and 128–32. Perhaps the lack of a special legal discussion regarding Article 10 of the Covenant by the UN Committee on Economic, Social and Cultural Rights
sons why the appropriate degree of protection for the family unit, mandated by the Covenant on Social Rights, has not yet been clarified. In any case, with respect to those matters that the UN Committee does publish a General Comment, its determinations are not considered a binding interpretation. Therefore, the interpretation of the Covenant is generally left to the discretion of the individual states.

In Israel, as in most countries, it is customary, in principle, to view the family cell as an independent unit immune from state interference. In the words of the Supreme Court, this approach is grounded in the recognition that the family is “the most basic and ancient social unit in human history which was, is, and will be the foundation that serves and ensures the existence of human society.”

The Supreme Court has further held that:

In principle, the autonomy to establish a family, to plan a family and to bear children is a matter of personal privacy. Human liberty encompasses the freedom of independent choice on matters of marriage, divorce, childbirth, and any other private matter within the sphere of personal autonomy . . . . The state does not interfere in this sphere except for reasons of special weight justified by the need to protect the right of the individual or a significant public interest. . . . The aspiration to minimize state involvement in relations within the family unit, whether by direct intervention or by means of the legal system, emphasizes the unit’s right to autonomy, which is protected from interference both in the relations between the family unit and the state, as well as in the relations between the different members of the family unit. The situations requiring intervention are usually sensitive and complex, and it is needed when a crisis in the family unit has occurred that calls for state intervention through

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60 C.A. 488/77, John Doe v. Attorney General, 32(3) P.D. 421, 434.
the courts in order to obtain a resolution that the parties themselves have failed to achieve.\textsuperscript{61}

The tendency to minimize state intervention in family relations is, therefore, grounded in recognition of the privacy and autonomy of the family.\textsuperscript{62} For example, the Supreme Court has ruled that “the parents are autonomous in reaching decisions in everything regarding their children—education, lifestyle, place of residence, and so forth, and the intervention of society and the state in these decisions is an exception that must be justified.”\textsuperscript{63} Nevertheless, there is a growing trend of increased state intervention into the family unit, as part of the democratization and individualization processes taking place in the modern family.\textsuperscript{64} Such intervention is considered justifiable when the familial environment becomes oppressive and coercive.\textsuperscript{65} For example, the Prevention of Family Violence Law allows for the issuance of a protection order prohibiting a person from entering a dwelling where a family member resides, from being found within a certain distance from such a dwelling, or from harassing a family member in any manner and in any place.\textsuperscript{66} Furthermore, the right to family life is not limited to state noninterference in family life or to intervention at a time of crisis. It also includes the need to support the family unit for the purpose of its subsistence, welfare, and development, as well as a demand that the state identify those persons who are entitled to benefit, without discrimination, from the definition of “family.”

I will focus below on the legal protection afforded the right to family life, to the extent that this relates to the entire family as a single unit. In this context, I will discuss several specific rights derived from the right to family life, where reference to the term “family” means the family in all its forms: the nuclear family, the extended family, and even “alternative” family ties. Nevertheless, most of the legal protection and recognition is granted to the nuclear family, whether in re-

\begin{itemize}
\item \textsuperscript{61} C.A. 5587/93, Nachmani v. Nachmani, 49(1) P.D. 485, 499, 501.
\item \textsuperscript{62} See \textit{id.}
\item \textsuperscript{63} C.A. 577/83, Attorney General v. Jane Doe, 38(1) P.D. 461, 468, 485 [hereinafter \textit{Jane Doe II}].
\item \textsuperscript{64} See Fogiel-Bijaoui, \textit{supra} note 32, at 109.
\item \textsuperscript{65} \textit{Id.} at 127.
\item \textsuperscript{66} The Prevention of Family Violence Law, 1991, S.H. 138, § 2. Another example is the power temporarily or permanently to remove children from the custody of their parents, by means of an adoption order pursuant to The Adoption of Children Law, 1981, 35 L.S.I. 360, and The Youth (Care and Supervision) Law, 1960, 14 L.S.I. 44.
\end{itemize}
garding to the relations between (heterosexual) spouses or the relations between parents and their children.

B. The Right of the Family to Social Security and Means of Subsistence

Article 25 of the Universal Declaration of Human Rights provides, among other things, that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family . . . [and] motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.”67 Article 11(1) of the Covenant on Social Rights similarly provides that

[t]he States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.68

Article 10(1) of this Covenant also mandates that the state accord protection and assistance to the family, to the widest extent possible, “particularly for its establishment and while it is responsible for the care and education of dependent children.”69 Sub-articles (2) and (3) add provisions requiring that special protection be granted to women and children as follows:

(2) Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

(3) Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely

67 Universal Declaration of Human Rights, supra note 1, art. 25, at 76.
68 Covenant on Social Rights, supra note 2, art. 11(1), 993 U.N.T.S. at 7.
69 Id. art. 10(1), 993 U.N.T.S. at 7.
to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labor should be prohibited and punishable by law. ⁷⁰

These provisions are designed to encourage the international community to continuously raise the standard of living of family members, ensure their economic well-being and social development, and create adequate conditions for the proper establishment and functioning of the family unit. ⁷¹ These declarations are highly significant in view of the tremendous resources at the disposal of the international community, on the one hand, and the great poverty suffered by many families throughout the world, on the other. ⁷² These provisions demonstrate that, within the context of the economic and social rights of the family, special emphasis has been placed on the protection and assistance that should be granted to working mothers. ⁷³ It appears that Israel, primarily through its social security system, affords extensive support and protection to working mothers during pregnancy, childbirth, and post-childbirth care. As mandated by Article 10(2) of the Covenant on Social Rights, the Employment of Women Law, 1954, (Employment of Women Law) grants women the right (as well as the obligation) to take paid maternity leave for a period of 12 weeks (while providing the opportunity for fathers to take half of the maternity leave in lieu of the mother); the statute further provides that an employer cannot dismiss a female employee during her pregnancy, save under a permit from the Minister of Labor and Social Affairs. ⁷⁴ The National Insurance Law provides a series of benefits under the heading “maternity insurance,” including free hospitalization for childbirth, maternity grants (and, if more than two children are born in a single birth, a maternity pen-

⁷⁰ Id. art. 10(2)–(3), 993 U.N.T.S. at 7.
⁷¹ See id.
⁷³ Convention on the Elimination of Discrimination Against Women, supra note 11, art. 11, 1249 U.N.T.S. at 18–19. The Convention deals with equal employment opportunities and is also designed to enable women to maintain their economic independence. Therefore, the international community recognizes that family responsibility does not need to adversely affect the equal opportunities of women within the context of the labor market.
sion), maternity allowances for working mothers during their maternity leave, and high risk pregnancy benefits.75

C. The Parent-Child Relationship

As discussed above, Article 10(3) of the Covenant on Social Rights provides, inter alia, that “[s]pecial measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation.”76 Additional comprehensive safeguards for children, within the context of the family, may be found in the Convention on the Rights of the Child. Article 5 of this Convention provides that “States Parties shall respect the responsibilities, rights and duties of parents . . . to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.”77 Article 18(1) further provides that:

States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.78

Israel grants various social benefits to families with children, including a children’s pension from the National Insurance Institute, and economic assistance for single-parent families, under both the Single-Parent Families Law and the Assurance of Income Law, 1980.79 Alongside the protection and assistance granted by the state to children, within the family context, the law recognizes the right to parenthood—a right leading to the imposition of various duties on parents vis-à-vis their children. The Supreme Court has recognized that “the right to parenthood is a fundamental human right to which

75 Regarding the history of maternity insurance in Israel, and for details about the level of benefits, see Israeli Report to the U.N. Committee, supra note 35, ¶¶ 257–262.
76 Covenant on Social Rights, supra note 2, art. 10(3), 993 U.N.T.S. at 7.
77 Convention on the Rights of the Child, supra note 10, art. 5, 1577 U.N.T.S. at 47.
78 Id. art. 18(1), 1577 U.N.T.S. at 50.
every individual is entitled.” In a similar fashion, the Supreme Court held that:

The right of parents to raise and educate their children as they see fit is a fundamental constitutional right, a natural right inherent in and stemming from the relationship between parents and their offspring. The family context does not stand apart from the constitutional system, but is an integral part thereof. Within the context of the family unit, parents are granted rights recognized and protected by constitutional law. The right of parents to have custody of their children and to raise them, with all this entails, is a natural and primary constitutional right—an expression of the natural connection between parents and their children.

As stated in the Israeli Report to the UN Committee on the Implementation of the Covenant on Social Rights, “the basic premise of the Israeli law is that the primary obligation to support the members of a family lies with the family itself.” This principle is enshrined, inter alia, in the Legal Capacity and Guardianship Law, 1962, which states that parents are the natural guardians of their minor children and, as interpreted by the courts, have “the right to fulfill their duties” vis-à-vis their children. Those duties include fulfilling their children’s needs and seeing to their education, their studies, and the preservation of their property. Nevertheless, when the need arises, and in accordance with the primary principle of the “best interests of the child,” various statutes grant the state authority to intervene in order to ensure the welfare of a minor. For instance, the state has the power to temporarily or permanently remove a child from the parents’ custody by means of an adoption order under the Adoption of Children Law and the Youth Law. Furthermore, the Penal Law imposes criminal sanctions on parents for neglecting, assaulting, or abusing their children, physically, emotionally, or sexually.

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81 C.A. 2266/93, John Does v. Richard Roe, 49(1) P.D. 221, 235 (hereinafter John Does) (citation omitted).
82 Israeli Report to the U.N. Committee, supra note 35, ¶ 361.
83 E.T. 1/81, Nagar v. Nagar, 38(1) P.D. 365, 393; John Does, 49(1) P.D. at 239–40.
84 See Israeli Report to the U.N. Committee, supra note 35, ¶ 361.
86 The “best interests of the child” principle also dictates, prima facie, that children not be harmed by the status or acts of their parents. Nevertheless, the application of religious
Just as various restrictions are placed on the right to marriage, so too are various restrictions placed on the right to parenthood (in its positive sense). Israel grants extensive recognition to the right to parenthood, insofar as it relates to married heterosexual couples, and even provides support and assistance to married couples unable to bear children. For example, the Adoption of Children Law states that “[a]n adoption shall only be made by a man and his wife jointly.” Similarly, the Surrogacy Agreements (Approval of Agreement and Status of the Child) Law, 1996, only allows a man and a woman who are a couple to benefit from surrogacy arrangements. The Supreme Court has refused to rule that these laws are discriminatory against unmarried persons. Therefore, unmarried couples (or, in the case of surrogacy, those who are not reputed spouses), single persons, and law in matters of personal status, which I will discuss in more detail below, also harms certain groups of children as a result of the acts or status of their parents. Thus, for example, according to Jewish Law, a child born to a Jewish mother and a non-Jewish father is not legally related to the father; likewise, a child born to a married woman by a man who is not her husband is considered a mamzer (this term translates to English as “bastard,” and it refers to the offspring of a forbidden union), something that imposes serious limitations on the child’s legal capacity to marry, since a mamzer is forbidden to marry a Jew and may only marry another mamzer or a non-Jew. See Carmel Shalev, Freedom of Contract for Marriage and a Shared Life, in WOMEN’S STATUS IN ISRAELI LAW AND SOCIETY 459–60, 465, 479 (1995) [Hebrew].

87 The Adoption of Children Law, 1981, 35 L.S.I. 360, § 3.


89 See, e.g., H.C. 2458/01, New Family v. Approvals Comm. for Surrogate Motherhood Agreements, Ministry of Health, 57(1) P.D. 419 (holding that a single woman does not have a right to use the services of a surrogate mother under the Surrogacy Agreements Law). C.A. 1165/01, Jane Doe v. Attorney General, 57(1) P.D. 69 dealt with the question of whether the term “spouse” in Section 3 of the Adoption of Children Law also includes a common-law spouse. In the end, the question was left for further consideration, and the Court did not even rule that common-law spouses are entitled to jointly adopt a foreign child. See New Family 57(1) P.D. at 460. However, to the extent that this relates to second parent adoption, the Supreme Court has recently ruled that a partner of a same-sex couple has the right to adopt the biological child of the other. See Yaros-Hakak, supra note 34. Moreover, in H.C. 1779/99, Berner-Kadish v. Minister of Interior, 54(2) P.D. 368, the Court ordered the Ministry of Interior to register a lesbian couple as the dual mothers of the biological child of one of them, who was adopted by the other in California. A motion has been submitted for a further hearing of this decision, and it is pending before an expanded panel of the Supreme Court. Despite the recent recognition of same-sex second-parent adoption, unmarried couples and gay partners are still excluded from the right of jointly adopting an unrelated child.
same-sex couples may benefit primarily from the negative aspects of the right to parenthood, but not from its positive aspects.  

D. Immigration Rights and “Family Unification”

One of the areas which reflects the degree of commitment by the state to the right to family life is immigration policy. In this context, a distinction should be made between the immigration of all family members (usually, the migration of workers and their families from one state to another) and family unification (i.e., the immigration of one spouse in order to live together with the other spouse, or the immigration of children/parents in order to live with or near their parents/children). This Article will deal with the second type of immigration, family unification aimed at protecting the right to family life, in two main contexts: (1) the immigration rights of a foreign spouse, based on marriage; and (2) the immigration rights of foreign parents or children, based on the parent-child relationship.

1. Immigration Rights Based on Marriage

The principle whereby the state grants immigration rights to a foreign spouse does not stem from a duty on the part of the state vis-à-vis the foreigner, but rather from its obligation to recognize and enforce the right of a citizen to enjoy the benefits of family life in his or

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90 While joint adoption and surrogacy are largely restricted to a man and a woman who are a couple—thereby discriminating against single people—single women are no longer discriminated against as far as artificial insemination services are concerned. In 1997, the Supreme Court nullified a policy that discriminated against single women (including lesbians) in terms of unrestricted access to artificial insemination services, and equated between their rights with those of married women. See H.C. 2078/96, Weitz v. Minister of Health, Takdin (Supreme Court) 1997(1) 939. Therefore, the Supreme Court’s decision in New Family to not allow a single woman to avail herself of a surrogacy arrangement under the Surrogacy Agreements Law, is in conflict with its previous ruling in Weitz.

91 A discussion of the subject of the migration of workers with their families is beyond the scope of this Article. In this matter, there is a special convention that regulates the rights of the families of migrant workers. See International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, G.A. Res. 158, 45th Sess., U.N. Doc. A/RES/45/158 (1990).

92 In this context, I use the term “family unification” in its broad sense, i.e., every case involving the immigration of a person so that he or she may live in the same country together with his or her family members. Further on, I will discuss the meaning of the term in the Israeli context and its application in the Occupied Territories and within the borders of the State of Israel.
her own country. If the foreign spouse of a citizen is not permitted to immigrate, then, in effect, the citizen is forced to leave the country in order to realize his or her right to family life. Therefore, granting immigration rights to the foreign spouse primarily constitutes recognition of the right to family life of the spouse who is a citizen. The European Court of Human Rights (European Court) has long recognized that the right to family life enshrined in Article 8 of the European Convention may impose positive duties on the state in the field of immigration. Nevertheless, the European Court has allowed the state broad discretion to choose which foreigners will enter into, or be deported from, its territory, and greater weight is sometimes given to this prerogative than to the right to family life. 

The Supreme Court has also been asked to deliberate this issue in a series of cases. A comprehensive discussion regarding the discretion of the state in granting citizenship to the foreign spouse of an Israeli national is found in *Israel Stamka v. Minister of Interior*, which considered the reasonableness of the Ministry of Interior policy regarding the naturalization process for a non-Jewish foreign spouse married to a Jewish Israeli in a “mixed marriage.” Under this policy, which had been in effect since 1995, a non-Jewish foreign spouse, who had married a Jewish Israeli citizen while illegally staying in Israel, was required to leave the country for several months during which the Ministry of Interior would check whether it was a fictitious or a genu-

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97 See *Stamka*, 53(2) P.D. at 990.
ine marriage.98 Once the Ministry of the Interior determined that the marriage was authentic, the spouse would then be entitled to return to Israel in order to begin the naturalization process.99 The naturalization process itself lasted many years and was preceded by a trial period for permanent residence.100 The request for naturalization would only be discussed at the end of the trial period because marriage to an Israeli, in and of itself, does not grant a foreigner the right to naturalization (this lengthy process applies equally to a foreign spouse legally staying in Israel at the time that the marriage was performed).101 This policy was formulated as part of the discretion granted to the Minister of Interior by the Entry into Israel Law, 1952, (Entry into Israel Law) and the Nationality Law.102 Contrary to the wording of Section 4A of the Law of Return, the Supreme Court ruled that, in view of the purpose of this statute (i.e., to avoid splitting up the families of mixed marriages among the Jews of the Diaspora and to encourage their immigration to Israel), the foreign non-Jewish spouse was not entitled to the rights that the Law of Return and the Nationality Law grant to the spouse of a Jewish immigrant (to the extent that this relates to citizenship by right of return) because this arrangement is intended to apply to the family members of Jews prior to their immigration to Israel, and not to the foreign spouse of a Jew who is a citizen of Israel at the time of the wedding.103 Accordingly, it was ruled that Jews who are Israeli citizens could not impart a right of return to their non-Jewish spouses.104 In this way, the Supreme Court denied the foreign spouse the benefit of acquiring citizenship by right of return, which bestows social rights such as an “absorption package.”105 Nevertheless, the Supreme Court further ruled that the Ministry of Interior requirement, whereby the foreign spouse had to leave the country until the authenticity of the marriage could be determined, was “incompatible with the axioms of a democratic regime bent on

98 Id. at 783.
99 Id. at 783–84.
100 Id. at 763.
101 Id. Section 1 of the Nationality Law, which lists the different ways to acquire Israeli citizenship, does not count marriage to an Israeli national as one of them. See The Nationality Law, 1952, 6 L.S.I. 50, § 1.
103 Stamka, 53(2) P.D. at 760.
104 See id. at 764–66.
105 See id. at 760.
the preservation of civil rights.”106 This policy did not meet the test of proportionality and was therefore null and void.107 The Supreme Court based its ruling on the fundamental right to family life and, within its context, the right to marriage, as these are recognized by international law:

The Respondents did not properly weigh the individual’s right to marriage, and the grave harm to family life attendant upon the policy that they adopted for themselves. Regarding the harm to a fundamental right, our colleague, Justice Dorner, has said . . . :

“As regards the test for selecting the means that causes the lesser harm, which, as stated, is not an absolute test, the selection of the means will be affected by the right that is infringed. When this is a particularly important fundamental right, greater care will be taken in selecting the means that cause minimal harm, even where the cost of employing the means is substantial.” We should remember that the present case revolves around the fundamental right granted to the individual—every individual—to marry and to establish a family. Needless to say, this right has been recognized in international conventions accepted by all [. . . .] Indeed, the magnitude of the right and the powerful radiation that shines from within it, would dictate, as if of themselves, that the means chosen by the Ministry of Interior be milder and more moderate than the harsh and drastic action that it decided to take. And it is hard for us not to conclude that the Respondents completely disregarded—or gave minimal weight to—these fundamental rights of the individual to marry and to establish a family.”108

Insofar as it concerns the naturalization process, the Supreme Court has held that an immigrant who is a foreign spouse constitutes a special category, and therefore, his or her right to citizenship “is superior to the right of others.”109 This, too, is based on the recognition of the fundamental right to family life.110

106 Id. at 783.
107 See id. at 778.
108 Stamka, 53(2) P.D. at 781–82 (quoting HCJ 450/97 Tenufa Ltd. v. Minister of Labor and Welfare, P.D. 52(2) 433, 452).
109 Id. at 790.
110 See id.
The naturalization of a spouse is regulated by Section 7 of the Nationality Law under the heading “Naturalization of Husband and Wife.”111 According to this provision, “[t]he spouse of a person who is an Israeli national or who has applied for Israeli nationality and meets or is exempt from the requirements of Section 5(a) may obtain Israeli nationality by naturalization even if he or she does not meet the requirements of Section 5(a).”112 The main purposes of this provision, which allows flexibility in the requirements for a spouse’s naturalization, are to preserve the integrity of the family unit and avoid a disparity between the nationalities of the spouses.113 Nevertheless, the provision does not grant the spouse of an Israeli national automatic citizenship on the basis of marriage, since Section 5(b) of the Nationality Law—according to which naturalization is at the discretion of the Minister of Interior—also applies to the naturalization of a spouse.114 As Justice Cheshin explained in *Stamka*:

Section 7 of the Nationality Law upholds international commitments that Israel has undertaken, and according to which it is obligated to facilitate the naturalization of married women. In the language of Article 3(1) of the Convention on the Nationality of Married Women: “Each Contracting State agrees that the alien wife of one of its nationals may, at her request, acquire the nationality of her husband through specially privileged naturalization procedures; the grant of such nationality may be subject to such limitations as may be imposed in the interests of national security or public policy.” The wording of the Convention expresses a will to protect the rights of women, however, considering the principle of equality customary in our country, it may be said—in principle—that this right is also granted to men. The purpose of the statute—in Section 7—is to protect the rights of the spouse, which indicates that the Minister of Interior must incorporate this purpose in the policy established for implementing the provisions of Section 7.115

112 Id.
113 See *Stamka*, 53(2) P.D. at 790; H.C. 754/83, Rankin v. Minister of Interior, 38(4) P.D. 113, 117.
114 See H.C. 4156/01, Dimitrov v. Minister of Interior, 56(6) P.D. 289; *Rankin*, 38(4) P.D. at 113.
115 *Stamka*, 53(2) P.D. at 792.
Justice Cheshin further ruled that, indeed, Section 7 of the Nationality Law does not eliminate the discretion granted to the Minister of Interior under Section 5(b). Rather, Section 7 should be interpreted as granting special privileges based on marriage, in the sense that the Minister should exercise the discretion granted to him by Section 7, and, in worthy cases, waive any of the requirements listed in Section 5(a), in particular, the requirement of permanent residence in Israel. This ruling gives proper substance to Section 7, since its practical effect is to shorten the process by approximately six years and to ease significantly the naturalization of a foreign spouse.

Thus, in Stamka, the Supreme Court nullified the policy of the Ministry of Interior whereby a foreign spouse would be deported for several months while the authenticity of the marriage was determined, as well as its policy of commencing naturalization application hearings only after the period of time required to grant the foreign spouse permanent resident status had elapsed. The Supreme Court reasoned that these policies were extremely detrimental to the fundamental right to marriage and family life, while expressly recognizing the state’s commitment to protect the family unit in view of the norms of international law.

Even so, it would appear that the Supreme Court does not adopt a uniform stance concerning the fundamental right to family life in the realm of immigration law. Whereas, in Stamka, the Supreme Court granted a superior status to the right to family life, both rhetorically and in the application of the right to the facts of the case, it does not apply this insight to other judgments, even when recognizing “the

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116 See id. at 765.
117 See id. at 793. It should be noted that, following this case, the Ministry of Interior changed its policy. See H.C. 338/99, Sabri v. Minister of Interior, Takdin (Supreme Court) 1999(1) 154.
118 See Stamka, 53(2) P.D. at 793.
119 Following the decision in Stamka, the Ministry of Interior formulated a new procedure, in 1999, which shortened the period of time necessary to receive citizenship. According to this new procedure, during the trial period, the foreign spouse must extend his or her temporary resident permit each year. After the trial period, the foreign spouse receives Israeli citizenship without the interim stage of permanent residence. In this matter, the Supreme Court has recently rejected a petition in which it was asked to rule that the procedure for extending the permit of a temporary resident be performed every two years, instead of every year. See H.C. 7139/02, Abbas-Batza v. Minister of Interior, Takdin (Supreme Court) 2004(1) 1266. Nevertheless, in April 2003, the new policy of Interior Minister Avraham Poraz, to grant a temporary permit of stay for two years, came into effect. See Mazal Mualem, A Sympathetic Ear Can Make a Legal Difference, Ha’ARETZ ENGLISH EDITION, Apr. 7, 2003, available at http://www.hotelne.org.il/english/news/Haaretz040703.htm (last visited Jan. 12, 2005).
powerful radiation that shines” from within the right.120 This lack of uniformity is embodied in decisions of the Supreme Court regarding applications for family unification (i.e., applications seeking permission from Israel to bring a non-resident spouse into the region, so to cohabit permanently with a resident spouse) by residents of the West Bank and Gaza Strip.121 In Adel Ahmed Shahin v. Regional Commander of IDF Forces in the W. Bank, the applicants, who lived in the Occupied Territories, claimed that Israel’s refusal to permit women married to residents of the region to remain in the territories with their spouses was a violation of the principles of international humanitarian law.122 The petitioners relied on Article 27 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949, which states that “Protected Persons are entitled, in all circumstances, to respect for . . . their family rights.”123 Similar protection of the right to family life may be found in Article 46 of the Hague Regulations (IV) Respecting the Laws and Customs of War on Land, of 1907 (Hague Regulations), which provides that “[f]amily honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.”124 These two provisions require that the occupier protect the right to family life, but it is doubtful that they also mandate family unification in those cases where the marriage to a foreign resident took place after the occupation, since the separation of the family requesting to be united is not necessarily a result of the state of war and the occupation.125

The military government in the Occupied Territories limited the approval of family unification requests during the 1980s, since the military government no longer viewed such applications as authentic

120 Stamka, 53(2) P.D. at 782.
125 See Yoram Dinstein, Reunion of Families in the Administered Territories, 13 IYUNEI MISHPAT 221, 227 (1988) [Hebrew].
requests, but rather as “a means for immigration into the regions.”\textsuperscript{126} In order to attack this policy, the petitioners in \textit{Shahin} relied on two legal opinions by experts in international law. These experts argued that the military government’s refusal to permit family unification was in violation of aforesaid Article 27 of the Fourth Geneva Convention and Article 46 of the Hague Regulations.\textsuperscript{127} According to the legal opinion by Professor Brownlie of Oxford University, Israel is obligated to grant a permit of stay and permanent residence to the foreign spouses in the West Bank and Gaza Strip, for otherwise it is harming the “unity of family life,” in violation of Article 27.\textsuperscript{128} Brownlie concluded that this unjustified harm to family life constitutes a violation of a human rights norm that applies to Israel under customary international law.\textsuperscript{129} According to the legal opinion of Professor Shelton, from the University of Santa Clara, Israel is, indeed, entitled to regulate the entry into, and the stay of foreigners in, its territory, but this prerogative should not be abused and must be balanced against the right of the individual to marry and to establish a family.\textsuperscript{130} Shelton pointed out that, in certain circumstances, preventing the entry of a foreigner into the territory of the state constitutes a violation of the right to marry and to establish a family: “The right to marry and found a family is generally recognized in international law and has been applied to require permitted residence in a state of which an individual may not be a national. Denial of family unification amounts to an abuse of right in such situations.”\textsuperscript{131}

The Supreme Court rejected the conclusions reached in these legal opinions and ruled that both the Hague Regulations and the Fourth Geneva Convention “do not contain any explicit reference pertaining to family unification, in general, or to the right of foreign citizens to enter a militarily occupied area.”\textsuperscript{132} Moreover, the Court ruled that “general principles have not been formulated that create a bind-

\begin{itemize}
\item \textsuperscript{126} \textit{Shahin}, 41(1) P.D. at 214.
\item \textsuperscript{127} See id. at 202–04.
\item \textsuperscript{128} Id. at 202.
\item \textsuperscript{129} Id.
\item \textsuperscript{130} Id. at 204.
\item \textsuperscript{131} \textit{Shahin}, 41(1) P.D. at 204.
\item \textsuperscript{132} Id. at 208. Prof. Dinstein notes that it is puzzling that neither the petitioners nor the Court referred to the most relevant provision of humanitarian law in this matter, \textit{i.e.}, Article 74 of the First Protocol of 1977, annexed to the Geneva Conventions of 1949, which states that “[t]he High Contracting Parties and the Parties to the conflict shall facilitate in every possible way the reunion of families dispersed as a result of armed conflicts.” Indeed, Israel is not a contracting party to the Protocol; however, it has never objected to the aforesaid provision in Article 74. See Dinstein, \textit{supra} note 125, at 227–28.
\end{itemize}
ing, general customary norm regarding a militarily occupied area, and no precedents have been established in this field which serve as evidence of a general practice accepted as law.”

Therefore, in *Shahin*, the Supreme Court gave very little weight, if any, to the right to family life as a fundamental human right grounded in principles of international law. Indeed, the Supreme Court did note that “family unification is always considered an important humanitarian matter,” but added that the treatment of these matters has always been “on the basis of ad-hoc arrangements specific to the circumstances of each case, which have varied according to the security and political conditions at the time.”

The policy of the military government regarding family unification for residents of the Occupied Territories is similar, in one respect, to the Ministry of Interior policy within the borders of Israel up to the *Stamka* decision. This similarity is reflected in the fact that the Ministry of Interior, like the military government, did not view the marriage to a foreign spouse as a genuine marriage, but rather as a fictitious marriage designed to enable the foreign spouse to legally remain in Israel. Nevertheless, whereas the foreigner married to an Israeli national was required to leave the country for several months and was entitled to return to Israel afterwards and begin the naturalization process, the refusal to permit family unification for Arab residents of the Occupied Territories and their foreign spouses sealed the fate of their applications and caused a grave and irreversible harm to their right to family life. In contrast to *Stamka*—where the Supreme Court ruled that each case should be judged on its own merits, and nullified the general policy of deporting the foreigner from Israel until confirming the authenticity of the marriage—in *Shahin*, the Supreme Court ruled that an individual examination, on the merits, of each marriage-based family unification request in the Occupied Territories was not required. The military government was entitled to treat the family unification requests as a general “phenomenon” of mass immigration and to implement general measures applicable to most such requests, in view of the “state of war” in the Occupied Territories. Therefore, in view of the “general security, political and economic implications of

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133 *Shahin*, 41(1) P.D. at 210.
134 Id. at 209.
135 See *Stamka*, 53(2) P.D. at 767.
136 Compare id. with *Shahin*, 41(1) P.D. at 214–15.
137 *Shahin*, 41(1) P.D. at 215.
the phenomenon, and its consequences,” the Supreme Court approved the minimalist policy of the military government.138

Regarding family unification in Israel, as opposed to family unification in the Occupied Territories, Justice Cheshin said in Stamka:

Pertaining to the grant of rights to the foreign spouses, the parties’ counsels have used the term “family unification”; however, this is not the correct term, and we should clarify this at the outset. A distinction should be made between “family unification,” insofar as it relates to the Occupied Territories—and in that context, this is the correct term to use—and the use of the term and its application to the territory of the State [of Israel]. Prima facie, these matters are similar in nature, since both cases relate to the desire of family members to live together. However, despite the (partial) substantive identity between “family unification” in the Occupied Territories and “family unification” in Israel, there is no legal identity: the law is different, the competent authority is different, the nature of the right is different. We do not intend to go into detail in regard to arrangements for “family unification” in the Occupied Territories. Our only intention is to state that no inference can be made from these arrangements to the present case, just as no inference can be made from the present case to aforesaid arrangements. Each matter is a case unto itself.139

In this same judgment, Justice Cheshin added that:

The State of Israel recognizes the right of the citizen to choose a spouse according to his wishes and to establish a family in Israel together with that person. Israel is committed to the protection of the family unit under international conventions (see Article 10 of the Covenant on Economic, Social and Cultural Rights, 1966, and Article 23.1 of the Covenant on Civil and Political Rights, 1966); and even though these conventions do not dictate any given policy in the matter of family unification, Israel has recognized—has and does rec-

138 See id. at 214–15.
139 Stamka, 53(2) P.D. at 786. Regarding the use of the term “family unification” by the Supreme Court, in the context of Jewish residents of Israel, see, for example, H.C. 758/88, Kandel v. Minister of Interior, 46(4) P.D. 505, 518–20.
recognize—its obligation to provide protection to the family unit also by granting permits for family unification. In doing so, Israel has affiliated itself with enlightened nations, those states that recognize—subject to reservations regarding national security, public safety and public welfare—the right of family members to live all together in a territory of their choosing.\textsuperscript{140}

Despite the Supreme Court’s impressive rhetoric, the basic human right to family life (“the fundamental right acquired by the individual—every individual—to marry and to establish a family”) is in fact given different meanings in different contexts. While a Jewish Israeli citizen has the basic right to be united with a foreign spouse, an Arab resident of the Occupied Territories requesting to join a foreign spouse is at the mercy of the military government, which generally denies this right because of one security reason or another. This was the case in 1986 (in \textit{Shahin}) and remains the case up to this very day (the \textit{obiter dictums} in \textit{Stamka}). Therefore, and to the extent that it relates to the Occupied Territories, “the nature of the right [to family life] is different.”\textsuperscript{141} Still, neither in \textit{Stamka} nor in \textit{Shahin} does the Supreme Court explain the different nature of the right to family life in the Occupied Territories, or, more precisely, whether, apart from a declarative right, the residents of the Occupied Territories are granted any right whatsoever to family life. It seems that the Supreme Court has not given proper weight to the provisions of the first part of Article 27 of the Fourth Geneva Convention and Article 46 of the Hague Regulations, which expressly provide that, even in a time of war, the right to family life of the residents of the occupied region must be respected (even if these provisions are not interpreted as requiring family unification in the manner requested by the petitioners).\textsuperscript{142} This approach is puzzling in view of the Supreme Court’s assumption that “Israel respects the humanitarian principles in the laws of war and does not rely on the applicability, or lack thereof, of the Fourth Convention.”\textsuperscript{143}

In \textit{Shahin}, the Supreme Court added that the right to family life enunciated at the beginning of Article 27 of the Fourth Geneva Convention must be read together with the reservation at the end of said

\textsuperscript{140} \textit{Stamka}, 53(2) P.D. at 787.
\textsuperscript{141} See id. at 767.
\textsuperscript{143} \textit{Shahin}, 41(1) P.D. at 206.
provision, whereby “the parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.” The question is whether this reservation justifies the occupying state’s disregard for the rights of the residents of the occupied territory, rights enunciated at the beginning of the provision, especially since there must be a causal relation between the adoption of such measures of control and security and a state of war. In Shahin, the respondent argued that “the family unification phenomenon . . . has become a complicated and problematic issue with both political and security aspects—as a means of immigration into the regions.” It is highly doubtful that this argument can justify a policy that automatically rejects most applications for family unification based on marriage to foreign nationals, except in some special circumstances. Furthermore, as the Supreme Court has noted in a different context, national security “is not a magic word and its priority does not arise in every case and under all circumstances, and it is not identical at all levels of security and the harm thereto.”

The fundamental right to marriage, as discussed below, is one of the most basic expressions of the right to family life; it constitutes a right to establish a family, unlike derivative rights of lesser importance, such as the right of adult children to receive a permit of stay in order to live near their parents. A respect for the basic human right to family life should lead the courts to critically examine the discretion of the competent authorities and the reasonableness of their policies. Courts should hold, for example, that the rule of choice for family unification requests in the Occupied Territories be the opposite (whereby a hearing on the merits of each application is generally required, with automatic rejection only in exceptional cases).

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144 Id. at 209.
145 See id.
146 Id. at 214.
148 Regarding this right and its restriction, see infra, Part III.D.2; see also H.C. 1689/94, Harari v. Minister of Interior, 51(1) P.D. 15.
149 Israel has recently begun to apply this discriminatory policy between Jews and Arabs even within the borders of the State of Israel. On July 31, 2003, the Knesset enacted the Nationality and Entry into Israel (Temporary Order) Law, 2003, the provisions of which were laid down as a temporary order for a period of one year. Section 2 of the statute, under the heading “Restriction on citizenship and residence in Israel,” provides:

During the period in which this Law shall be in effect, notwithstanding the provisions of any law, including Section 7 of the Nationality Law, the Minister of Interior shall not grant citizenship to a resident of the region pursuant to the Nationality Law and shall not give a resident of the region a permit to re-
Even if one accepts the Supreme Court’s position—whereby, to the extent that it relates to the Occupied Territories, the right to family life does not need to be examined in isolation from the security background—it seems that it would have been appropriate for the Supreme Court to set a balance between the right of Israel to prevent the entry of foreigners into the Occupied Territories for security reasons and the right of the individual to marry and to establish a family. By adopting the arguments of the military government without reservations, the Supreme Court freed itself of the need to balance the different rights. Such a balance could have been expressed, as stated above, by requiring the military authorities to examine individually each request on the merits. It is true that the provisions of the aforesaid conventions do not mandate that Israel permit the entry of foreigners into the Occupied Territories, just as the state has wide discretion to prevent foreigners from settling in its own territory. Nevertheless, approval of a policy that sweepingly prohibits the immigra-

side in Israel pursuant to the Entry into Israel Law, and the regional commander shall not give such residents a permit to stay in Israel pursuant to the defense legislation in the region.

Id. According to this new law, the spouses of Israeli citizens will be unable to obtain citizenship, pursuant to Section 7 of the Nationality Law, on the basis of marital ties, when the foreign spouse is a resident of the West Bank or Gaza Strip. In this matter, the Association for Civil Rights has filed a petition that is pending before the Supreme Court, H.C. 7052, 7082/03, Ass’n for Civil Rights in Israel v. Minister of Interior. In this petition, it has been claimed that the reasoning of the Ministry of Interior, which relies on the “security risk” ostensibly posed by the Palestinian spouses, lacks an evidentiary basis, that the decision stems from illegitimate considerations—including a preservation of the demographic balance and a desire to avoid the payment of pensions and welfare benefits—and that it is invalid, being racist and discriminatory on the basis of national origin. There is no doubt that the new law severely infringes the right to family life of said couples.

150 For a similar criticism, see Dinstein, supra note 125, at 228–29, who notes that the Court has displayed “excessive willingness to avoid an individual examination of the specific cases of family unification on the ‘micro’ level,” adding that “concrete humanitarian problems cannot be resolved solely on the basis of general considerations.” Id.

151 Regarding the principle whereby the state has wide discretion to prevent foreigners from settling in its territory, see H.C. 482/71, Clark v. Minister of Interior, 27(1) P.D. 113, 117.

There is nothing special or extraordinary about Israel in regard to the entry of foreigners and their residence in the country. Generally, every country reserves for itself the right to prevent foreign persons from entering its territory or to deport them when they are no longer wanted there, for any reason—and even without giving a reason. From our easy access to English and American legal sources, we know that, in fact, such law does exist in those countries, and it is well-known that this state of affairs also exists in other nations.

Id.
tion of spouses into the Occupied Territories is tantamount to a disregard of the provisions of international humanitarian law regarding the right to family life.

Therefore, it is no wonder that the UN Committee has recently censured this discriminatory practice, stating that it is “concerned about the practice of restrictive family reunification with regard to Palestinians, which has been adopted for reasons of national security.”152 As such, the UN Committee has reiterated “its recommendation [to Israel] contained in paragraph 36 of its 1998 concluding observations that, in order to ensure equality of treatment and non-discrimination, the State party undertake a review of its re-entry and family reunification policies for Palestinians.”153

2. Immigration Rights Based on the Parent-Child Relationship

With respect to the right of children to settle in Israel by virtue of their parents being Israeli citizens, the Nationality Law grants citizenship on the basis of a family connection only to a child born in Israel to an Israeli citizen (or born abroad to a parent who, at the time, was an Israeli citizen) and to the spouse of an Israeli citizen.154 Apart from these categories, the law does not expand the circle of eligibility to other family members, such as children born to a foreign spouse within a previous marriage to a spouse who was not an Israeli citizen.155 Harari v. Minister of Interior concerned two Burmese nationals who had requested permission to remain in Israel in order to live together with their mother, who was an Israeli citizen.156 The Harari children were 19 and 21 years old at the time that the petition was

153 Id. ¶ 34.
154 See The Nationality Law, 1952, 6 L.S.I. 50, § 4(a), stating

[T]he following shall, from the day of their birth, be Israeli nationals by birth:
(1) a person born in Israel while his father or mother was an Israeli national;
(2) a person born outside Israel while his father or mother was an Israeli national—(a) by return; (b) by residence in Israel; (c) by naturalization; (d) under paragraph (1); (e) by adoption under Section 4(b)(1).

Id. This is different from Section 4A of the Law of Return, which expands the circle of eligibility for rights of “returnees” to also include other family members, such as the child and even the grandchild of a Jew. See The Law of Return, 1950, 4 L.S.I. 114, § 4(a).
156 See Harari, 51(1) P.D. at 17.
filed and, during their stay in Israel, their father, who lived in Burma, had passed away.\textsuperscript{157} Accordingly, in their petition, they claimed that they had no other home than their mother’s home in Israel.\textsuperscript{158} The Ministry of Interior does not give permits for permanent residence to foreign adults requesting to be near Israeli family members, except for elderly parents of Israeli nationals who remain alone and isolated in their country of residence.\textsuperscript{159} The Supreme Court approved this policy and ruled that adult children are not entitled to permanent residence in Israel simply because their mother is an Israeli national.\textsuperscript{160} The Supreme Court thus rejected the petitioners’ argument and held that—to the extent that it concerns adult children—the Basic Law does not mandate giving extra weight to the right of a mother and her children to live together.\textsuperscript{161}

The issue of the right of a parent to settle in Israel by virtue of the fact that his or her children are Israeli nationals has been deliberated more than once before the Supreme Court. In \textit{Kandel v. Minister of Interior}, the petitioners argued, \textit{inter alia}, that since their minor daughter was entitled to the visa of an \textit{oleh} (the Hebrew term for a Jewish immigrant to Israel), they too were entitled to settle in the country on the basis of \textit{oleh} status under the Law of Return, based on the daughter’s rights vis-à-vis the parents or the parents’ responsibilities vis-à-vis the daughter as her guardians.\textsuperscript{162} The Supreme Court rejected this argument, holding that a minor’s right also does not encompass the rights of the parents:

A minor’s place is with his parents—where they reside, he shall reside, and not the reverse. A minor is dependent on his parents—the parents are not dependent upon him. As guardians, they determine his place of residence—he does not determine their place of residence. This category—the parents of a child eligible under the Law of Return—is not included in the group of persons eligible under Section 4A(a).\textsuperscript{163}

\textsuperscript{157} See id.
\textsuperscript{158} See id.
\textsuperscript{159} See id. at 18–19.
\textsuperscript{160} Id. at 20.
\textsuperscript{161} See generally id. (interpreting the Basic Law).
\textsuperscript{162} See Kandel, 46(4) P.D. at 518.
\textsuperscript{163} Id.
In *Dimitrov v. Minister of Interior*, the petitioner was a foreigner married to an Israeli national, with whom he had a minor daughter, born in Israel. After the couple had separated, and at the request of the petitioner’s wife, the Ministry of Interior decided that, at the conclusion of the divorce proceedings, the petitioner would be deported from Israel. The petitioner requested to continue the naturalization process on the basis of his marriage, but the Supreme Court rejected this argument because of the disintegration of the marital relationship leading up to the petition. Another argument raised by the petitioner was that the Ministry of Interior was obliged to grant him permanent resident status, as the father of an Israeli national, under Section 2 of the Entry into Israel Law. The Ministry of Interior policy in this matter is to deny foreigners a visa for permanent residence in Israel, other than in exceptional cases and for special reasons. In the case in question, the Ministry of Interior had decided that there were no special humanitarian circumstances to justify granting a permit for permanent residence, since the girl was in the custody of her mother, and the petitioner would be allowed to enter Israel from time to time in order to visit her. The Supreme Court rejected the petition, holding that, in principle, the nationality of the child does not

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164 *Dimitrov, supra* note 114, ¶ 290.
165 *Id.*, ¶ 291.
166 In this context, the Supreme Court held that from the moment the marital relationship between the couple had, for all intents and purposes, broken down, there were no grounds for the acquisition of Israeli citizenship based on the citizenship of the Israeli spouse, since the rationale behind Section 7 of the Nationality Law, which allows for the facilitation of requests for naturalization on the basis of marriage, no longer existed. See *id.*, ¶ 7.
167 See *Dimitrov, supra* note 114, ¶ 293.
168 In accordance with this policy, the Ministry of Interior grants a visa for permanent residence only in exceptional cases, according to the following general criteria:

(a) To a spouse lawfully married to an Israeli national or to a permanent resident of the State of Israel, who is residing in Israel.

(b) To an elderly and isolated parent of a national or permanent resident of Israel, who has no other children or spouse outside of Israel.

(c) To a minor child, accompanying a parent who has obtained a right of permanent residence or citizenship in Israel, if this parent has lawful custody of the minor for a period of at least two years prior to their arrival together in Israel.

(d) In exceptional cases, for humanitarian reasons or when the State of Israel has a special interest in granting the permanent residence visa.

These criteria are internal Ministry of Interior guidelines that have not been published in official form. See A.P. 529/02, *Bornea v. Minister of Interior, Takdin (District Court)* 2003(3) 7058.
169 *Dimitrov, supra* note 114, ¶ 2.
suffice to grant permanent resident status to a foreign parent; only in exceptional cases, where special humanitarian circumstances exist, can a foreigner’s parenthood of a minor who is an Israeli national justify granting the parent the status of a permanent resident, but such circumstances did not exist in this case.\(^{170}\)

*Bornea v. Minister of Interior* involved a petition by a foreign worker illegally staying in Israel, whose marriage to an Israeli national had dissolved after a son was born to them; consequent to the breakup of the marriage, the Ministry of Interior decided to discontinue her naturalization proceedings.\(^{171}\) The petition raised the question of whether or not the naturalization proceedings of a foreign spouse should be terminated following the breakup of the marital relationship, when a child had been born to the couple, in Israel, during the period of their marriage.\(^{172}\) In this case, as in *Dimitrov*, the application was based on the connection between the parent and the child, and not on the marital relationship that had dissolved and which had been the basis for the approval of the original application for temporary residence.\(^{173}\) The petitioner argued, *inter alia*, that the right to family life establishes a right for the child to a relationship with both parents, and that the state should allow for the existence of an appropriate, regular, and continuous relationship between the child and his parents, and should not hinder this relationship, even if one parent is not an Israeli national and does not have a lawful status in Israel.\(^{174}\) The District Court, sitting as a court for administrative matters, interpreted the petition as a request to introduce a new criterion—the connection between a foreign parent and a child born out of a marriage to a spouse with Israeli nationality—in order to prevent the separation of the foreign parent from the child after the marriage had dissolved.\(^{175}\) In rejecting the petition, the District Court held that no distinction should be made between the acquisition of a status based on a parental connection under the Law of Return (the *Kandel* case), and a request for permanent residence or a grant of citizenship based on the same connection under the Entry into Israel Law or the Nationality Law.\(^{176}\) The District Court further ruled that the legal

\(^{170}\) *Id.* ¶ 9.

\(^{171}\) *Bornea*, *supra* note 168, ¶ 744.

\(^{172}\) See *id*.

\(^{173}\) See *id.* ¶ 757.

\(^{174}\) See *id.* ¶ 760.

\(^{175}\) See *id.* ¶ 16.

\(^{176}\) *Bornea*, *supra* note 168, ¶ 25.
right and the duty of the parent to raise the child do not supersede the right of the state to bar the foreign parent from obtaining permanent residence or Israeli citizenship solely on the basis of the parental connection. The Court stated:

Balanced against the interest of a child’s right to live in a country where both of his parents reside, so that they can both fulfill their duties to raise him, to educate him, to nurture him, and to support him, are the public interests and considerations of the state—national security, public safety, maintenance of public order, preservation of the character and culture of the nation, its identity, its Jewish and democratic nature, and even considerations of immigration policy based on economic and work force policy that will encourage the employment of the citizens and residents of the nation, ‘importing’ foreign laborers only when there is an absolute necessity.177

Therefore, in the conflict between the best interests of the child and Israel’s immigration policy, the District Court held that the state interest is preferred.

Time and again, it seems that these and other state interests prevail over the right to family life, without the latter receiving the proper consideration due to it as a fundamental constitutional right. In Bornea, the District Court did not properly consider the grave harm to the interests of the minor, the son of the petitioner, resulting from the negation of the petitioner’s lawful status in Israel, and which would apparently lead to a severance in the relationship between the petitioner’s son and his father. The ruling that, in the circumstances of the case, the state interest superseded the best interests of the child is puzzling, particularly in light of the principle set forth by the Supreme Court whereby “there is no judicial matter regarding minors where the best interests of the minor are not the paramount concern.”178 The Supreme Court has also ruled that the best interests of the child dictate that he or she be educated equally by both parents and not kept away from the father or mother, even when they live separately.179 The District Court, therefore, did not properly weigh the fundamental right to family life, which establishes a child’s right to grow up with his or her father and mother, as

177 Id. ¶ 31.
well as the right of parents to raise their children, as these rights have been recognized in both Israeli and international law. On more than one occasion, the Supreme Court has ruled that the right of parents to raise their children is a fundamental constitutional right:

No one disputes that the connection of the parent to his child is not only a duty but that it is also a right. The nature of this right is that the parents—and no one else—are entitled to fulfill the duties vis-à-vis the minor child. The legal right of the parent is that he, and nobody else, shall fulfill the duties vis-à-vis the child. This right of the parents is an important constitutional right, for it constitutes an expression of the natural connection—"the call of blood," in the words of Justice Cheshin . . . —between parents and their children.180

Furthermore:

It is the law of nature that a child be raised in the home of his father and mother: it is they who will love him, it is they who will nourish him, it is they who will educate him, it is they who will support him until he reaches adulthood. This is the right of a father and a mother, and this is the right of the minor. This right of a mother and a father has existed prior to statute and constitution. The law of nature is the law within our hearts. And even if these matters are stated in statute or constitution, they are none other than an echo of that same right from nature. Much ground water gives life to this right, and this is what sustains the forest of law that grows upon it. And the law of the land shall go in the wake of the law of nature.181

The family bond also establishes rights for the child:

These rights are also based on the duties of parents vis-à-vis their children—as expressed in written law—regarding custody, education, preservation of property, health, etc., as well as rights granted to a minor by the very fact that he is a minor, i.e., rights that recognize the state of the minor and his limitations and special needs . . . the duties of the parents, as

180 Jane Doe II, 38(1) at 466–67 (referring to Justice Cheshin’s opinion in in CA 50/55, at p. 799).
181 C.A. 3798/94, John Doe v. Jane Doe, 50(3) P.D. 133, 155 (internal citation omitted).
defined in the Legal Capacity and Guardianship Law, are no longer general obligations, but rather duties that establish collateral rights for the child. Noncompliance by parents with the duties they have vis-à-vis their children will be met with action by the state, as the entity that protects the child and his interests.  

In these cases, the infringement of the parent’s right to a family life with his or her children constitutes a grave harm, since one of the parents will be forced to sever himself or herself from the minor child. If the foreign parent is the custodial parent, then the right of the Israeli parent will be harmed; if the Israeli parent is the custodial parent, then the right of the foreign parent will be harmed.

These rights are also firmly enshrined in international law. Article 9(3) of the Convention on the Rights of the Child imposes a duty on the member states, inter alia, to “respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.” In a similar fashion, Article 10(1) provides for the child’s right to reunification with his or her parents and obliges the member states to allow the entry of the child, or his or her parents, into the member country for the purpose of realizing this right. Furthermore, Article 14(2) imposes a duty on the member states to respect the rights of the child and the rights of his or her parents, and Article 18(1) requires the member states to “use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.”

The European Court has ruled that the term “family life” includes the bond between parents and their minor children, a bond that does not cease in the event of a separation between the spouses: “[f]rom the moment of the child’s birth and by the very fact of it, there exists between him and his parents a bond amounting to ‘family life,’ even if the parents are not then living together.”

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182 John Does, 49(1) P.D. at 255.
183 See Bornea, supra note 168, ¶ 28.
184 Convention on the Rights of the Child, supra note 10, art. 9(3), 1577 U.N.T.S. at 47.
185 Id. art. 10(1), 1577 U.N.T.S. at 48.
186 Id. arts. 14(2), 18(1), 1577 U.N.T.S. at 49, 50.
Moreover, and despite the fact that the European Convention does not apply to Israel, it is noteworthy that several decisions of the European Court of Human Rights, handed down on the basis of Article 8 of the European Convention, the facts of which are similar to cases that have come before the Israeli courts. From these cases, it is possible to draw conclusions regarding the proper weight that should be given to the right to family life. *Berrehab v. The Netherlands* concerned a Moroccan national married to a Dutch woman, whose daughter was born in the Netherlands. As in the *Bornea* case, the father had been given a permit to stay in the Netherlands based on his marriage. When the couple divorced, the Dutch immigration authorities refused to extend the residence permit, and the father was subsequently deported. The European Court based its decision on the existence of a continuous and permanent bond between the father and his daughter, ruling that the deportation violated the provisions of the European Convention, and that the separation from the child forced on the parent constituted a violation of the “right to family life,” as specified in Article 8 of the European Convention. In a similar fashion, *Ciliz v. The Netherlands* concerned a Turkish national who had received permanent status based on his marriage to a Dutch woman, in the Netherlands, with whom he had a child who was a Dutch national. Following the couple’s divorce, the husband’s permit to stay was not extended. The petitioner argued that this decision prevented him from realizing his right to family life, as far as it concerned the relationship with his son. The European Court accepted his petition and ruled, *inter alia*, that:

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188 Id. at 323.
189 Id.
190 See id. at 329; Al-Nashif v. Bulgaria, 36 Eur. H.R. Rep. 37 (2002) (Eur. Ct. H.R.), at para. 114 of the judgment. (“However, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed in Article 8 § 1 of the Convention.”); see also Recommendation 4 of the Committee of Ministers to Member States on the Legal Status of Persons Admitted for Family Reunification, 790th Meeting of the Ministers’ Deputies, app. 3, at 36 (Mar. 26, 2002):

In the case of divorce, separation or death of the principal, a family member having been legally resident for at least one year may apply for an autonomous residence permit. Member states will give due consideration to such applications. In their decisions, the best interests of the children concerned shall be a primary consideration.

The essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective “respect” for family life . . . the instant case features both types of obligation: on the one hand, a positive obligation to ensure that family life between parents and children can continue after divorce, and, on the other, a negative obligation to refrain from measures which cause family ties to rupture.\textsuperscript{192}

The degree of recognition given to immigration rights based on family ties between parents and their children is weaker than the degree of recognition accorded to the immigration rights of a foreign spouse based on marriage. Nevertheless, it is not at all obvious why the strength of the bond between a minor and his or her parent is weaker than the bond between spouses; it seems only proper that the former right be accorded protection in the same manner and to the same degree as the latter.\textsuperscript{193} Since the Ministry of Interior and the courts in Israel have determined that the marital bond mandates the granting of residential status in Israel to a foreign spouse who is married to an Israeli citizen, there is no justification for a policy negating such status when the bond is parental. In this context, Israel should adopt the arrangement set forth by international law, whereby, in the case of a separation between a couple with common children, the state refrains from deporting a foreign parent and grants him or her lawful status as part of its commitment to protecting the bond between parent and child.

III. The Right to Civil Marriage in Israeli Law in View of International Law

A. The Right to Marriage and its Limitation

The right—or the “freedom”—to marry and to establish a family is a fundamental right of the highest order that has been recognized as a basic human right under international law. Article 16(1) of the Universal Declaration of Human Rights provides, \textit{inter alia}, that: “[m]en and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a fam-

\textsuperscript{192} \textit{Id.} ¶ 61.

\textsuperscript{193} See generally Briefs of The Association of Civil Rights, \textit{Bornea} (making a similar argument).
ily." Article 23(2) of the Covenant on Civil Rights states that: “[t]he right of men and women of marriageable age to marry and to found a family shall be recognized.” Article 10(1) of the Covenant on Social Rights reiterates what is stated in Article 23(3) of the Covenant on Civil Rights, whereby “[m]arriage must be entered into with the free consent of the intending spouses.” A combined reading of these provisions reveals the centrality of the right to marriage in the context of the right to family life. In the spirit of these documents, Israel, like most western nations, also grants the highest degree of protection and recognition to the traditional nuclear family, which is based on the heterosexual married couple and their children. In this context, it should be stressed that the issue of the right to marry also has far-reaching economic implications (e.g., tax benefits, national insurance rights, and pension rights). The provision or preclusion of economic benefits is a central means at the disposal of the state to direct individuals towards existing family models preferred by society. By granting a preferential status to the institution of marriage over other types of partnerships, the state expresses its position that the heterosexual marriage embodies the normative family unit deserving of various state benefits. Nevertheless, even within this narrow framework, the state imposes various limitations on the right to marry.

In most western countries, as in Israel, several explicit limitations on the right to marry are accepted as a matter of public policy. Three such limitations relate to the following: a minimum age for marriage, family relations between the spouses (a prohibition against incestuous marriages on grounds of both consanguinity and affinity), and the existence of a previous marriage (a prohibition of bigamy and polygamy). An additional prohibition relates to the sex of the spouses, (i.e., a prohibition of marriage between same-sex partners).

1. Minimum Age for Marriage

Even though the specific age varies from country to country, a limitation on the age for marriage is accepted in most western nations and is based, inter alia, on the notion that “the creation of a family unit with a formal, binding relationship requires personal maturity,

194 Universal Declaration of Human Rights, supra note 1, art. 16(1), at 74.
195 Covenant on Civil Rights, supra note 2, art. 23(2), 999 U.N.T.S. at 179.
196 Id. art. 23(3), 999 U.N.T.S. at 179; Covenant on Social Rights, supra note 2, art. 10(1), 993 U.N.T.S. at 7.
197 An additional limitation specific to Israel, which will be discussed further on in this Section, is the lack of a possibility to marry in a civil ceremony.
and, in a civilized society, one waits for the development of the personality—*i.e.*, attributes of mind and body—before permitting marriage.”

This limitation finds expression both in Article 16(1) of the Universal Declaration of Human Rights, which provides that “[m]en and women of full age . . . have the right to marry and to found a family” (emphasis added), and in Article 23(2) of the Covenant on Civil Rights, which states that the right to marry shall be granted to “men and women of marriageable age.” In a similar fashion, Article 16(2) of the Convention on the Elimination of Discrimination Against Women provides that “all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.”

The rationale behind these provisions is that the free consent of the marrying couple is a prerequisite for marriage, and that it is necessary to establish a minimum age in order to ensure that this consent is, in fact, given freely. Another reason is the need to guarantee stable married life and the view that such stability can only be guaranteed if the two spouses are mature enough to be fully aware of their obligations within the family context. The aforesaid conventions do not specify the minimum age required, with the understanding that each state will give substance to its obligation to set a minimum age for marriage in accordance with the accepted values of its own society.

The principle of a minimum age for marriage is also enshrined in the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, a special international convention which Israel has signed. This Convention reiterates the principle expressed in the Universal Declaration of Human Rights and states, in Article 2, that:

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198 C.A. 4736/94, Angel v. Attorney General, Takdin (Supreme Court) 1994(3) 319; see Shifman, *supra* note 46, at 150.
199 Universal Declaration of Human Rights, *supra* note 1, art. 16(1), at 74.
200 Covenant on Civil Rights, *supra* note 2, art. 23(2), 999 U.N.T.S. at 179.
203 See id.
States Parties to the present Convention shall take legislative action to specify a minimum age for marriage. No marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses.206

In Israel, this matter is regulated by the Marriage Age Law, 1950 (Marriage Age Law). Until 1998, this statute specified the age of seventeen as the minimum age of marriage for women.207 For men, however, no minimum age of marriage was specified.208 In order to address this disparity, the statute was amended so that its provisions limiting the marriage of young girls were applied equally to the marriage of young boys under the age of seventeen, out of the understanding that “the prevention of underage marriages is necessary for young boys to the same extent that it is required for young girls.”209 According to the amended statute, the performance of a marriage ceremony for a young boy or girl under the age of seventeen constitutes a criminal offense punishable by two years imprisonment.210 The statute does not annul the validity of underage marriages, but rather imposes criminal sanctions on the man or woman who marries the young girl or boy, on those persons who perform the ceremony, and on anyone who assists them.211 Nevertheless, Section 5 of the Marriage Age Law specifies two alternative grounds for a court to permit an underage marriage. The first case arises when a young girl has become pregnant by, or has given birth to the child of, the person she is asking to marry, or when a young boy wants to marry a woman who


207 See Marriage Age Law, 1950, 4 L.S.I. 158 (original version). As explained by Shalev, supra note 86, at 468, “[i]n effect, this norm prevents the marriage of young girls, which is permitted and accepted under traditional laws and customs according to which the marriage contract is entered into by the fathers of the bride and the groom.”

208 See Marriage Age Law, 1950, 4 L.S.I. 158 (original version).

209 See The Proposed Marriage Age (Amendment No. 4) (Marriage Age for a Young Boy) Law, 1998, H.C. 2728 (5758), 426. The Bill was passed by the Knesset on July 28, 1998.

210 See id.

211 The sanction does not have the force to annul the marriage, provided that it is valid under the personal law applying to the parties. Section 3 of the statute, id. at 426, provides grounds for dissolving a marital relationship that has been performed in violation thereof. See Shifman, supra note 46, at 150.
has become pregnant with, or has given birth to, his child.\textsuperscript{212} The second case, also applicable to both the marriage of a young boy and the marriage of a young girl, arises when the girl or boy has reached the age of sixteen and, in the court’s opinion, there are special circumstances that justify granting such permission. The statute does not specify, however, exactly what these “special circumstances” are.\textsuperscript{213} The Israeli Report to the UN Committee regarding the implementation of the Covenant on Social Rights indicates that, while the percentage of marriages between young girls under the age of 17 and adult men averaged about 48% between the years 1975–1979, by 1993 this number stood at about 10%.\textsuperscript{214} Nevertheless, the marriage of minors in Israel is still an ongoing phenomenon—albeit, on the decline—in spite of the Marriage Age Law and the criminal sanctions imposed therein.\textsuperscript{215}

2. Prohibition Against Incestuous Marriages on Grounds of Consanguinity and Affinity

Regarding the prohibition of marriage between persons related by blood or marriage, it is the applicable religious law that specifies the degrees of relation included in the prohibition.\textsuperscript{216} Nevertheless, the prohibition is not limited to religious law and should not be viewed only as a religious norm; it is accepted in all civilized societies and has rational justifications that suffice on their own.\textsuperscript{217} For instance, one of the explanations for this prohibition is based on genetics and the fear that children born to people who are related by blood

\begin{itemize}
\item \textsuperscript{212} See Proposed Marriage Age (Amendment No. 4) (Marriage Age for a Young Boy) Law, 1998, H.C. at 426–27.
\item \textsuperscript{213} See id. The Supreme Court has laid down various guidelines regarding such circumstances. Among other considerations, the Supreme Court has indicated the need for the young girl’s consent to marry, although this consent, on its own, does not suffice to justify granting permission. The Supreme Court has also noted that “the customs of the community to which the couple belongs, according to which the marriage of a young girl, not yet 17 years of age, is accepted, are not, in and of themselves, a sufficient reason for permitting the marriage. As we have seen, it is these very customs that the statute was intended to uproot.” Jane Doe III, 35(4) P.D. at 435–36.
\item \textsuperscript{214} Israeli Report to the U.N. Committee, supra note 35, ¶ 358.
\item \textsuperscript{215} See id.
\item \textsuperscript{216} See Shalev, supra note 86, at 471. In Jewish Law, incestuous marriages are null and void and the offspring are considered mamzerim (the plural form of the Hebrew term, mamzer; see definition given supra note 61).
\item \textsuperscript{217} Amnon Rubinstein, The Right to Marriage, 3 Iyunei Mishpat 433, 437–38 (1973) [Hebrew].
\end{itemize}
are liable to be afflicted with various genetic defects. Of course, the genetic fear does not justify prohibitions based on relations by marriage and, in this matter, it seems that the rationale stems from psychological and sociological considerations.

3. Prohibition of Bigamy

The prohibition against multiple marriages is designed to uproot customs accepted in traditional societies that harm the status of women. If we accept the definition of marriage as a permanent, exclusive relationship between two spouses, not only does this restriction do no harm to the right to family life, but it even reinforces the right. Section 176 of the Penal Law specifies bigamy as a criminal offense, whereby: “[a] married man who marries another woman, or a married woman who marries another man, is liable to imprisonment for five years.” Since matters of marriage and divorce in Israel are governed by religious law, the legislature cannot declare bigamous marriages void when such marriages are recognized by the relevant religious law (such as in a case where permission has been granted by a Rabbinical Court for the second marriage of a Jewish man). Nevertheless, the legislature does take steps to eliminate the phenomenon by means of criminal sanctions. Accordingly, Section 179 of the Penal Law states that the criminal prohibition does not apply to the second marriage of a Jewish man who has received permission to remarry from a Rabbinical Court (an option not available to a woman, who is an agunah, or “chained woman,” who, in Jewish Law, is bound in marriage by a husband who refuses to grant a divorce or is missing and not proved dead). Regarding persons who are not Jewish, Section 180 of the Penal Law provides that a second marriage shall not be deemed a violation of the prohibition of bigamy if the spouse by the earlier marriage is mentally ill or has been missing for a period of seven years under circumstances raising a reasonable presumption of death.

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218 See id. at 438–39.
220 See Shalev, supra note 86, at 469–70; Shifman, supra note 46, at 155 n.1.
221 Rubinstein, supra note 217, at 434–35.
223 Israeli Report to the U.N. Committee, supra note 35, ¶ 359.
224 See Shalev, supra note 86, at 469–70.
4. Prohibition of Marriage Between Same-Sex Partners

Until recently, the institution of marriage had been defined and perceived as being limited to the relationship between a man and a woman, without any need for explicit legislation prohibiting same-sex marriages. In the past, it was even argued that this was not to be viewed as a restriction on the freedom to marry, since, by its very definition, marriage was limited to partners of different sexes. So far, the only countries that have recognized same-sex marriages are the Netherlands, Belgium, Canada (in Ontario, British Columbia, and Quebec), and one U.S. state (Massachusetts), and in other countries throughout the world there is an ongoing legal and public struggle for such recognition.

Many countries recognize same-sex couples as a family and, in differing measures, extend various provisions to them that apply to married couples. The right to family life is not the exclusive domain of heterosexual society. Many gays and lesbians conduct a family life for all intents and purposes. Alongside the limited recognition granted by the Israeli Supreme Court to same-sex partnerships and the right to parenthood of gays and lesbians, the case law of the Family Court and the District Court negates such recognition. While restrictions as to the age for marriage, polygamous marriages, and marriages between relatives are rational and desirable, the restriction of marriage to heterosexual partnerships is unjustified and results from prejudice against gays and lesbians. Nevertheless, it seems that as long as religious law exclusively governs matters of marriage and divorce in Israel, the legislature cannot be expected to rec-


227 See Yuval Merin, Equality for Same-Sex Couples: The Legal Recognition of Gay Partnerships in Europe and the United States (2002) [hereinafter Merin, Equality for Same-Sex Couples]; Yuval Merin, Same-Sex Marriage and the Fallacy of Alternatives for the Legal Regulation of Gay Partnerships, 7 Hamishpat 253 (2002) [Hebrew]. Recently, the Massachusetts Supreme Judicial Court held that the prohibition of same-sex marriages fails the basic test of rationality, ruling that “[w]ithout the right to marry—or more properly, the right to choose to marry—one is excluded from the full range of human experience and denied full protection of the laws for one’s ‘avowed relationship’ . . . . Laws may not interfere directly and substantially with the right to marry.” Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 957 (Mass. 2003) (internal quotation omitted).

228 See generally Merin, Equality for Same-Sex Couples, supra note 227 (presenting a comparative study of legal regulation of same-sex partnerships worldwide).

229 Danielowitz, 48(5) P.D. at 781; Berner-Kadish, 54(2) P.D. at 368.

230 See, e.g., Jane Doe I, supra note 34.

ognize the rights of gays and lesbians to marry. If and when, however, the barriers to civil marriage are removed, as mandated by the international conventions that Israel has signed, then their restriction to heterosexual relationships may be considered illegitimate discrimination that violates the principle of equality.

In addition to the first three limitations on the right to marriage discussed above (a minimum age, the prohibition of the marriage of relatives, and the prohibition of bigamy)—restrictions which are accepted in all western nations and perceived of as legitimate in all civilized societies, and which are not to be viewed of as religious coercion—there are several additional limitations on the right to marry that are specific to Israel. Not only is the right to marriage not applied equally to all residents of the country, but there is also an inherent discrimination between men and women in the laws of marriage and divorce in Israel. These limitations stem from the application of religious law to matters of marriage and divorce and from the lack of civil marriage. In contrast to the Israeli legal situation, in most Western nations, the transition from religious law to the regulation of marriage as a secular civil right had begun in the 18th and 19th centuries with the end of the Church’s monopolistic jurisdiction and the introduction of civil marriage.232 Israel is one of the only democratic countries in the world where personal law is still exclusively governed by religious law.233 Section 2 of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953, (Rabbinical Courts Jurisdiction Law) provides that: “Marriages and divorces of Jews shall be performed in Israel in accordance with Jewish religious law.”234 The application of religious law to matters of marriage and divorce for Jews in Israel, and the lack of an option to marry in a civil marriage ceremony, constitutes a serious infringement of the right to family life, in general, and of the right to marriage, in particular. This infringement is further aggravated by the exclusive jurisdiction of the religious courts in matters of marriage and divorce—stitutions that completely exclude women. The absence of an option for civil marriage harms three

232 Rubinstein, supra note 217, at 433.

233 For a discussion of the historical reasons for the subordination of personal law to religious law, see Shava, supra note 46, at 69–75. For an analysis of the implications of the historical compromise regarding the status of women in Israel, see Judith Buber Agassi, The Status of Women in Israel, in The Double Bind: Women in Israel 210 (1994) [Hebrew].

234 Regarding the application of religious law to members of other religious communities in Israel, see Palestine Order in Council, arts. 52, 54, 64, in 2 Laws of Palestine 432–33, 435 (Mosen Doukhan ed., 1934).
main groups. First and foremost, the application of religious law to matters of marriage and divorce constitutes a violation of the principle of equality between the sexes, since many religious laws discriminate against women. Second, the lack of a civil arrangement for marriage also harms those persons who are unable to marry according to religious law (such as those persons who have no religion). Third, the religious monopoly also harms the freedom from religion of all those couples who do not want religious law to apply to their marriages.

B. The Laws of Marriage and Divorce in Israel: Discrimination Against Women and Additional Groups

1. Discrimination Against Women

Religious law—all religious law—is based on a patriarchal viewpoint and tradition, and, as such, discriminates against women. This discrimination is apparent, inter alia, in the subordination of women to the authority of men, in an unequal division of roles within the family, and in the perception that women possess a very limited social and personal status. Moreover, for Jews in Israel, the religious law that governs in matters of personal status is the law as interpreted by Orthodox Judaism, which leaves no room for a more lenient interpretation that is inclined to greater equality between the sexes, such as that of the Conservative or Reform Movements.

To the extent that it relates to the inequality between the sexes within the context of the laws of marriage and divorce, the Women’s Equal Rights Law, 1951, has merely declarative significance. The purpose of this statute is “to lay down principles for the guarantee of full equality between men and women,” and, indeed, the statute pro-

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235 See Frances Raday, On Equality, 24 Mishpatim 241, 266 (1994) [Hebrew]; Shalev, supra note 86, at 460.

236 Shalev, supra note 86, at 460; see, e.g., Psalms 45:14; Yebamot 17a: “The king’s daughter is all glorious within”; and Genesis Rabbah 18:1: “A woman’s place is in the home and a man’s place is out in the world.”


vides that “one law shall apply to men and women regarding any legal act; and any statutory provision that discriminates against a woman, as a woman, regarding any legal act, shall not be binding.”\textsuperscript{239} Nevertheless, the reservation in Section 5, whereby the statute “shall not affect any legal prohibition or permission relating to marriage or divorce,” in effect, renders it meaningless and actually reinforces the discrimination against women prevailing in religious law.\textsuperscript{240}

The laws of marriage and divorce regulate three different areas: (1) the manner of entering into a marriage, from the perspective of form and capacity; (2) the system of rights and duties constituting the substance of a marriage; and (3) the manner in which a marriage is dissolved.\textsuperscript{241} In all three areas, provisions of Jewish religious law are discriminatory against women.\textsuperscript{242} It suffices to give several examples from the field of divorce law applying to Jews in Israel, although similar problems also exist according to the religious law applying to other population groups in Israel (Christians, Muslims, and so forth). Discrimination against women in divorce law is expressed, primarily, in the fact that the grounds for divorce available to them are different and fewer than those available to men. A ground of action sufficient to obligate a wife to accept a \textit{get} (the writ of divorce), does not necessarily suffice to force the husband to deliver a \textit{get}.\textsuperscript{243} This results in an asymmetry between the husband and the wife in the grounds for obligating and compelling the delivery of a \textit{get}, something that acts to the detriment of the wife.\textsuperscript{244} It should be further noted that the Rabbinical Courts are

\textsuperscript{239} Id. § 1(A)(a).
\textsuperscript{240} Id. § 5. For a discussion of Section 5 of the statute and the background to its enactment, see H.C. 49/54, Melcham v. Sharia Judge, Aco Region, 8 P.D., 910, 916. Moreover, despite the fact that Section 8(b) of the statute provides that it is forbidden to dissolve a marriage against the will of the wife, this provision only applies in the absence of a judgment by a competent court. Therefore, if the precepts of religious law allow it, there is nothing in this provision to protect the woman. See \textsc{Amnon Rubinstein \& Barak Medina}, \textsc{1 Constitutional Law in the State of Israel} 316 (5th ed., 1997) [Hebrew].
\textsuperscript{241} Shalev, supra note 86, at 459–60.
\textsuperscript{242} Both marriage and divorce are, essentially, legal acts performed by the man, and not by the woman. The woman plays a passive role and is silent both during the marriage ceremony (in which the husband “purchases” the wife) and in the divorce ceremony (the consent of the husband is a condition without which there is no divorce). See \textsc{Rubinstein \& Medina, supra note 240}, at 316; Shalev, supra note 86, at 461. The wife owes the husband “her work”: household chores, care of the husband and the children, and additional work limited to the home. See Shalev, supra note 86, at 461; see also \textsc{Shahar Lifshitz}, \textsc{A Civil Reorientation in Israeli Family Law} 7 (2002); \textsc{Rosen-Zvi, supra note 46}, at 225–28.
\textsuperscript{243} \textsc{Rosen-Zvi, supra note 46}, at 138–39.
\textsuperscript{244} See \textsc{Rosen-Zvi, supra note 46}, at 138–39.
very reluctant to coerce a husband to deliver a get.\textsuperscript{245} Likewise, without having received a get from her husband, a woman is unable to obtain permission to remarry, whereas, in contrast, a husband is entitled to remarry by special permission of the Rabbinical Court.\textsuperscript{246}

The UN Committee has censured this discriminatory practice, stating that:

The Committee expresses concern about the fact that the Jewish religious courts’ interpretation of personal status law with respect to divorce is discriminatory as regards women, especially the regulation that allows the husband to remarry even when the wife is opposed to the divorce, whilst the same rules do not apply to the wife. . . . The Committee recommends that the State party take steps to modify the Jewish religious courts’ interpretation of the law concerning divorce to ensure equality between men and women, as provided for in article 3 of the Covenant.\textsuperscript{247}

Therefore, in contrast to men, women are sentenced to monogamy, since, according to Jewish Law, adultery is only forbidden to women (in the sense that a married woman, who has not received a get from her husband, is considered an adulteress if she has relations with another man). This monogamy is imposed upon her all the more forcefully by the rule providing that any child born to her from a man who is not her husband will be considered a mamzer (the offspring of a forbidden union).\textsuperscript{248} Therefore, frequently the option of a life as the reputed spouse of another man is also closed off to her, if she has not received a get from her husband. In contrast, the husband is not exposed to any sanction if he lives with another woman as his reputed spouse.\textsuperscript{249} Moreover, the relative bargaining power of the wife is inferior to that of the husband.\textsuperscript{250} The problem of aginut (the wife’s status as an agunah) leads to a situation in which the woman is sometimes willing to make significant economic concessions in order to be released from an extortionist spouse.\textsuperscript{251} Matters are further complicated

\textsuperscript{245} Id.
\textsuperscript{246} Id.
\textsuperscript{247} Concluding Observations, supra note 151, ¶¶ 23, 39.
\textsuperscript{248} Schereschewsky, supra note 34, at 59, 346.
\textsuperscript{249} Rosen-Zvi, supra note 46, at 137.
\textsuperscript{250} Id.
\textsuperscript{251} Another practice that may lead to the aginut of the wife, and which may serve as an opening for extortion on the part of others, is the religious rule whereby the rite of chalit-
by what is known as the “jurisdictional race,” i.e., the race between the spouses to file suit first, in the instance he or she prefers, either the religious court or the Family Court (generally, women prefer the Family Courts, while men prefer the Rabbinical Courts). This race is detrimental to the bargaining power of the parties, especially that of the economically weaker party which, in most cases, is the wife.

The property arrangements between the spouses prior to the divorce reflect further discrimination. On the subject of maintenance, despite the fact that the law applying in both the religious court and the Family Court is the same law—the personal law of the parties studies by the National Insurance Institute indicate that the level of maintenance payments in judgments by the Rabbinical Courts is thirty percent lower than that in those handed down by the civil courts.

The situation is no better concerning the division of property between separating spouses who have not made a property agreement. According to the resources-balancing arrangement laid down in the Spouses (Property Relations) Law, 1973, resources balancing only takes place upon the dissolution of the marriage as a result of a divorce or the death of one spouse. This arrangement leads to a problematic situation, potentially more harmful to women than to men, because women who are denied a get are unable to benefit from a resources-balancing arrangement, even when the marriage has been effectively over for many years. The later the resources balancing takes place, the greater the bargaining power of the husband.

*zah* is required in a case of *yibbum* (for an explanation of these terms, see *infra* note 264). For a discussion of this subject, see ROSEN-ZVI, *supra* note 46, at 252.

252 ROSEN-ZVI, *supra* note 46, at 142.

253 *Id.* Recently, Judge Granit of the Tel Aviv Family Court has relied on the Convention on the Elimination of Discrimination Against Women as an interpretive tool to justify nullifying the “jurisdictional race” and to grant the Family Court parallel jurisdiction to that of the Rabbinical Court, even when the husband has first filed suit for divorce in the Rabbinical Court and included (a good faith inclusion) the matter of maintenance payments. See Misc. Civ. Appl. (Tel Aviv) 10408/01, L.S. v. L.A., Takdin (Family Court) 2003(1) 126.

254 See generally The Family Law Amendment (Maintenance) Law, 1959, 13 L.S.I. 73 (dictating the applicable law for maintenance disputes).

255 SIVAN, *supra* note 237, at 17. For an analysis of the inferior economic status of women in the Israeli social reality and a discussion of the implications of this situation on their weaker bargaining power within the context of divorce negotiations, see ROSEN-ZVI, *supra* note 46, at 144–58.


257 See *id*.

2. Discrimination Against Additional Groups

In addition to the discrimination against women, the application of religious law in matters of marriage and divorce also discriminates against several other groups. The exclusive application of religious law leads to a situation in which persons belonging to these groups are completely unable to get married in Israel. The groups that are harmed include, first of all, those persons without a religion and those persons whose religious community is not recognized. Second, Israeli law does not permit mixed marriages, i.e., marriages between members of different religious communities (except for those isolated cases in which the personal law of both parties recognizes such marriages). Under Jewish Law, a marriage between a Jew and a non-Jew is void ab initio. The third group includes persons disqualified for religious marriage. Even when both spouses are Jewish, there are various prohibitions in religious law that limit their right to marry. Such couples are “disqualified for marriage” because they are unable to marry according to the laws of Israel. The impediments to marriage may be classified into three categories, according to their consequences:

(1) marriages that are void ab initio including, inter alia, the second marriage of a woman still considered to be married to her previous husband and incestuous relationships;
(2) doubtful marriages in which there is a question as to the validity of the marriage (which may arise, for example, in a case of a private marriage or a civil marriage that has been performed abroad), and where, be-

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259 This is the case, for instance, regarding members of the Protestant faith and the Karaite community. This also means that even a Jew who belongs to the Reform Movement cannot be married in Israel in a Reform ceremony that will be recognized by state authorities. See Shifman, supra note 237, at 13.

260 Rubinstein, supra note 217, at 440.

261 Shalev, supra note 86, at 472. Nevertheless, the secular legislature has provided for a way to dissolve mixed marriages in the Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 1969, 23 L.S.I. 274. This statute also applies to those persons without a religion or members of an unrecognized religious community. See id. Nevertheless, the civil courts and the religious courts of the Christian communities do not have the authority to dissolve the marriage of a foreign couple who are both members of a Christian community that has a competent religious court in Israel. This discrimination is unjustified and illogical. See Rubinstein & Medina, supra note 240, at 300; Menashe Shava, Rules of Jurisdiction and Conflict of Law in Matters of Dissolution of Marriage, 1 Iyunei Mishpat 125, 141–42 (1971) [Hebrew].

262 See Shalev, supra note 86, at 476.

263 See Shifman, supra note 46, at 199. A child born in consequence of such relations is considered a mamzer, who is forbidden to marry another Jew and is only permitted to marry another mamzer or a non-Jew. See Shalev, supra note 86, at 479.
cause of this doubt, the wife requires a *get* in order to remarry;\(^\text{264}\) and (3) prohibited marriages that are retroactively valid—this category (which results in the couple being forced to divorce one another) includes, *inter alia*, the prohibition against the marriage of a *Kohen* (a descendant of the ancient priestly caste) to a divorced woman, to a *chalutzah* (a widow released from a levirate marriage), or to a convert.\(^\text{265}\) These groups include about a quarter of a million immigrants from the CIS (the former Soviet Union) and many Ethiopian immigrants who are not Jewish, or whose Jewishness is questioned by the religious establishment.\(^\text{266}\) They, too, are unable to realize their right to marry and to establish a family in Israel.\(^\text{267}\)

These restrictions are just an example of the many limitations imposed by religious law, in general, and by Jewish Law, in particular. These and other restrictions cause grave harm to the freedom of the couple to marry and to establish a family. The solutions that exist in order to circumvent these prohibitions are limited and partial.\(^\text{268}\)

In addition to the discrimination against women and other groups that results from the restrictions imposed by religious law, its application in matters of marriage and divorce also does harm to the freedom of those Israeli citizens who do not want religious law to govern their personal status. The imposition of religious restrictions that entail the jurisdiction of Rabbinical Courts and the application of religious law in matters of marriage and divorce is incompatible with

\(^{264}\) See Shalev, supra note 86, at 477. A doubt also arises in the case of a childless widow who has married without the rite of *chalitzah*. The rules of *yibbum* (levirate marriage) and *chalitzah* are a further example of how religious law is more prejudicial to women than it is to men. Under these rules, when the husband dies childless and is survived by a brother, according to Jewish Law, the brother must marry the widow. If the brother does not wish to marry the widow, then, as long as he has not released her through the rite of *chalitzah*, the widow is forbidden from marrying another man. Even though regulations by the Israeli Rabbinate have ruled that the *yibbum* is forbidden (*i.e.* that the brother may not marry the widow), they still require the rite of *chalitzah* in order that the wife may remarry. This obligation makes the wife dependent upon the goodwill of her husband’s brother. See id.

\(^{265}\) For additional prohibitions included in this category, see Schereschewsky, supra note 34, at 56–60.


\(^{267}\) See id.

\(^{268}\) The mechanisms that enable, to one extent or another, the circumvention of religious law in matters of marriage and divorce, include marriage outside of Israel, private marriage ceremonies, a shared life as reputed spouses, and marital agreements. See Rubinstein, supra note 217, at 443–49.
freedom of conscience and freedom from religion.\footnote{Justice Landau in H.C. 80/63, Gurfinkel v. Minister of Interior, 17(3) P.D. 2048; Justice Berenson in H.C. 287/69, Miron v. Minister of Labor, 24(1) P.D. 337, 363. A discussion of the degree of harm to freedom from religion in the application of religious law in matters of marriage and divorce in Israel is beyond the scope of this article. Regarding this matter, see Rubinstein & Medina, supra note 240, at 190–95; Shifman, supra note 237, at 7–19.} Freedom of conscience and religion dictate that the individual has the legal and practical option to realize his or her rights—including the right to marriage—without being compelled to rely on religious norms, religious ceremonies, and religious authorities.\footnote{Rubinstein & Medina, supra note 240, at 193; see also Basheva E. Genut, Note, Competing Visions of the Jewish State: Promoting and Protecting Freedom of Religion in Israel, 19 Fordham Int’l L.J. 2120 (1996).}  

C. The Freedom to Marry without Discrimination—International Law  

The Universal Declaration of Human Rights, the Covenant on Civil Rights, and the Covenant on Social Rights all recognize the right to marry as a fundamental right.\footnote{In this matter, see supra Part IV. A.} Moreover, these three instruments lay down the principle of equality of rights between the sexes within the context of the institution of marriage, in the three areas discussed above: the creation of the marriage, the duties and rights during married life, and the dissolution of the marriage. The Universal Declaration of Human Rights provides, at the end of Article 16(1), that the spouses “are entitled to equal rights as to marriage, during marriage and at its dissolution.”\footnote{Universal Declaration of Human Rights, supra note 1, art. 16(1), at 74.} The Covenant on Civil Rights also provides for equality of rights within the context of marriage. According to Article 23(4), “States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.”\footnote{Covenant on Civil Rights, supra note 2, art. 23(4), 999 U.N.T.S. at 179.} In the Covenant on Social Rights, the requirement of equality of rights between the spouses arises both from Article 2(2), which provides that the rights enunciated in the Covenant be exercised without discrimination of any kind, including discrimination on the basis of sex, and from Article 3, which states the principle of equality between the sexes as follows: “[t]he States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Cove-
Another convention that also provides for equality of rights between the sexes within the context of the institution of marriage is the Convention on the Elimination of Discrimination against Women. Article 16(1) provides as follows:

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

The same right to enter into marriage;

The same right freely to choose a spouse and to enter into marriage only with their free and full consent;

The same rights and responsibilities during marriage and at its dissolution;

(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.275

In addition to the explicit prohibition of discrimination between the sexes within the context of marriage, these three instruments also provide for the prohibition of discrimination on the basis of national

274 Covenant on Social Rights, supra note 2, arts. 3, 2(2), 993 U.N.T.S. at 5, 5.
275 For a discussion of this provision, including the reservations of Israel, see infra, Part IV. D.
origin, race, and religion. Article 2(2) of the Covenant on Social Rights specifies an open list of prohibitions against discrimination (“or other status”), Articles 2(1) and 26 of the Covenant on Civil Rights lay down a prohibition of discrimination on the basis of race, religion, national origin “or other status,” and Article 16(1) of the Universal Declaration of Human Rights states that the right to marry shall not be limited “due to race, nationality or religion.”

These conventions do not define the nature of the marriage ceremony that is the subject of the right or the nature of the law that applies to marriage. In fact, in the wording of the international conventions, we do not find an explicit requirement for the implementation of civil marriage. Nevertheless, since these conventions forbid discrimination on the basis of sex, national origin, race, and religion in the implementation of the right to marriage, they should be interpreted as indirectly forbidding the exclusive application of religious law in matters of marriage and divorce. The General Comment of the Committee on Human Rights of 1990 expressly notes that “the right to freedom of thought, conscience and religion implies that the legislation of each State should provide for the possibility of both religious and civil marriages.” If that is the case, then the implementation of the provisions of the conventions necessitates the grant of a right to marriage without discrimination of any kind whatsoever. Therefore, the word “marriage” in the aforesaid conventions should be interpreted as referring to civil marriage.

D. The Laws of Marriage and Divorce in Israel in View of International Law

The laws of marriage and divorce in Israel are incompatible with the fundamental human right to marry and to establish a family as rec-

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276 Covenant on Social Rights, supra note 2, art. 2(2), 993 U.N.T.S. at 5.
277 Covenant on Civil Rights, supra note 2, arts. 2(1), 26, 999 U.N.T.S. at 173, 179.
278 Universal Declaration of Human Rights, supra note 1, art. 16(1), at 74.
279 See Covenant on Social Rights, supra note 2, art. 2(2), 993 U.N.T.S. at 5; Covenant on Civil Rights, supra note 2, arts. 2(1), 26, 999 U.N.T.S. at 173, 179; Universal Declaration of Human Rights, supra note 1, art. 16(1), at 74.
280 General Comment 19, supra note 25, art. 4.
281 See Marsha A. Freeman, The Human Rights of Women in the Family: Issues and Recommendations for Implementation of the Women’s Convention, in Women’s Rights, Human Rights: International Feminist Perspectives 149, 157 (Julie Peters & Andrea Wolper eds., 1995). Freeman bases the requirement for the implementation of civil marriage on Article 16(1) of the Convention on the Elimination of Discrimination Against Women. According to her approach, this provision requires that all couples be permitted to marry according to civil law, without any connection to their religion, origin or race. Id.
ognized and accepted in the international sphere.\textsuperscript{282} Israeli law in matters of marriage and divorce, therefore, gravely harms the possibility for many people to realize fully their right to family life. This law leads to an inequality in the legal status of men and women, and imposes arbitrary restrictions on various groups in the population, discriminating against them on the basis of religion, national origin, and race.

The ways in which Israel infringes on the right to marriage by applying religious law are as follows: (1) negation of the right to marry for persons without a religion and members of unrecognized religious communities; (2) restriction of the possibility for mixed marriages between spouses of different religions; (3) restriction of the right to marry for persons disqualified for religious marriage; and (4) a violation of the equality between women and men within the context of the institution of marriage.

The questions, therefore are, first, to what degree is Israel in breach of the provisions of Article 16(1) of the Universal Declaration of Human Rights, Articles 2(1) and 26 of the Covenant on Civil Rights, and Article 2(2) of the Covenant on Social Rights, to the extent that those provisions concern the prohibition against discrimination on the basis of national origin, race, and religion. And, second, to what degree is Israel in breach of the provisions of Article 16(1) of the Universal Declaration of Human Rights, Article 23(4) of the Covenant on Civil Rights, Articles 2(2) and 3 of the Covenant on Social Rights, and Article 16(1) of the Convention on the Elimination of Discrimination against Women, to the extent that those provisions concern the prohibition against discrimination on the basis of sex. It has been argued that Israel is in breach of Article 16 of the Universal Declaration of Human Rights only in those cases where the right to marry has been completely denied to certain groups (persons without a religion and members of unrecognized religious communities).\textsuperscript{283} It has been claimed that the prohibition of discrimination should only attach to the subjects of the right—men and women—and not to the right itself.\textsuperscript{284} This interpretation is unacceptable, since it is incompatible with the wording of this provision and is liable to render it meaningless.\textsuperscript{285} As for Article 16(1) of the Convention on the Elimination of Discrimination against Women and Article 23 of the Cove-

\begin{itemize}
\item \textsuperscript{282} See Rubinstein, \textit{supra} note 217, at 442 n.20.
\item \textsuperscript{283} See generally Y. Z. Blum, \textit{Israel Marriage Law and Human Rights}, 22 \textit{Ha'praklit} 214 (1966) [Hebrew].
\item \textsuperscript{284} See id.
\item \textsuperscript{285} See Rubinstein, \textit{supra} note 217, at 440–41.
\end{itemize}
nant on Civil Rights, Israel has given notice that it has reservations regarding these provisions, insofar as they are incompatible with the personal law binding upon the religious communities in Israel.286 These reservations run contrary to the subject matter and purpose of these instruments—the prevention of discrimination against women, even under the laws of personal status.287 Undoubtedly, in view of the aforesaid international instruments, any kind of discrimination in granting the right to marriage—on the basis of race, national origin, ethnicity, religion, and sex—is a breach of Israel’s international commitments. Therefore, it is not only the denial of the right to certain groups that constitutes a breach of the conventions that Israel has signed, but also the restriction for religious reasons, like the arrangements that discriminate against women in the context of the institution of marriage—all of these constitute illegitimate discrimination that gravely harm the individual’s right to marry.288 The aforesaid international instruments also provide for the right of equality between the spouses, not only in the creation of the marriage, but also in its dissolution. Therefore, the right to marry freely (free from the restrictions of religious law or, in other words, the right to civil marriage) also includes the right to civil divorce.

Israel is in breach of both the prohibition against discrimination between men and women, as well as prohibitions against discrimination on the basis of race, national origin, and religion, during all

286 See L.S., supra note 253.
288 One can argue that, in addition to the Universal Declaration of Human Rights and the Covenant on Civil Rights, Israeli law is also in conflict with Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), Annex, U.N. GAOR, 20th Sess., Supp. No. 14, art. 5, U.N. Doc. A/6014 (1966), which Israel has signed. This provision states that civil rights also include “the right to marry and choice of spouse.” This right is to be accorded to all citizens of the member states without discrimination on the basis of “race, colour, or national or ethnic origin.” Since the religious law applied in Israel adopts criteria of “national or ethnic origin”—such is the case, for example, when this law denies a person the right to marry only because of the fact that he or she was born to a non-Jewish mother—the right to equality, in accordance with the Convention, is infringed. See Rubinstein, supra note 217, at 443.
three stages of marriage: its creation, its content, and its dissolution. The right to marriage under international law should be interpreted as referring to the implementation of civil marriage. It is true that many countries that have signed these conventions recognize marriages that have been performed according to religious law. Except for Israel, however, all Western nations that have signed the conventions grant such recognition alongside the option of civil marriage. Moreover, the law that governs in these countries, both during the marriage and for the purpose of its dissolution, is the civil law. Accordingly, there is nothing illegitimate in the recognition of religious marriage as an additional way to form the marital bond, provided that the state also grants its citizens the right to civil marriage.

Ostensibly, it could be argued that the right to civil marriage, like other rights enunciated in the Covenant on Social Rights, is not an absolute but, rather, a relative right, since Article 4 provides that the member states are entitled to limit the rights enunciated therein by law “in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.” Therefore, prima facie, Israel could claim that, by implementing marriage according to religious law, it is limiting the right to civil marriage lawfully and in accordance with the Covenant. Such a claim would be untenable for several reasons. First, the relativity of the rights is expressed in their cost, and the principle of equality between the sexes is not diminished because of the relativity of the right. The responsibility of the member states to implement the rights is dependent on the amount of resources at their disposal, which has no relevance concerning the nature of marriage. Second, the Committee for the Implementation of the Covenant on Social Rights has interpreted Article 4 very narrowly. Third, even if such a claim was accepted, then the right to civil marriage arises from several other conventions that Israel has signed (the Covenant on Civil Rights and the Convention on the Elimination of Discrimination against Women).

289 Covenant on Social Rights, supra note 2, art. 4, 993 U.N.T.S. at 5.
290 See id.
292 Id.
293 The Covenant on Civil Rights also allows for a deviation from the principles stated therein because of the relativity of the rights. Thus, for example, Article 4 provides that the states may derogate from the principles of the Covenant on Civil Rights in a time of national emergency which threatens the existence of the nation. Even in such a situation,
Being well aware of the cultural, economic, and social differences between various nations, both the Covenant on Social Rights and the Covenant on Civil Rights set forth minimum standards of respect for human rights binding upon the states that have signed these conventions. International law, therefore, tries to achieve a consensus in regard to such a minimum standard for the recognition of basic social and civil rights, as reflected in the conventions regulating these matters. These conventions specify the lowest threshold for the degree of protection required of the states in the socio-political realm. Of course, the member states should aspire to the widest possible protection in these areas, but the states are not entitled to settle for less protection than that specified in the conventions. The lowest threshold, or the “minimum core,” of the right to family life is the right to marry freely, and, if we interpret “marriage” as “civil marriage,” then a state that does not grant its citizens the freedom to marry in a civil ceremony is in breach of the provisions of the Covenant on Civil Rights and the Covenant on Social Rights, as well as the provisions of the Convention on the Elimination of Discrimination Against Women. As to the pace and time for implementing the rights enunciated in the conventions, it is customary to differentiate between the Covenant on Civil Rights and the Covenant on Social Rights, since the former imposes obligations on the state that must be fulfilled immediately, while the latter sets standards that the state must aspire to realize, and where for some of the rights—those rights the implementation of which entails an investment of resources—the pace of implementation may be progressive. Nevertheless, where it is possible to grant the right without a need for resources—even when it is enunciated in the Covenant on Social

however, they are prohibited from discriminating on the basis of “colour, race, sex, language, religion or social origin.” Covenant on Civil Rights, supra note 2, art. 4, 999 U.N.T.S. at 174. The Covenant also includes provisions that allow the states to limit certain rights. For instance, Article 18, which deals with freedom of religion, provides that limitations may be placed on freedom of religion if they “are necessary to protect public safety...or the fundamental rights of others.” Covenant on Civil Rights, supra note 2, art. 18, 999 U.N.T.S. at 178. In any case, it seems that the clause in the Covenant authorizing the state to derogate from its provisions, or to limit various rights enunciated therein, does not permit derogation from or limitation of the right to marry on the basis of sex, national origin, religion, or race.


296 See generally Shany, supra note 291.

297 See Craven, supra note 50, at 136.
Rights—it must be granted immediately.298 Various aspects of the right to family life require the allocation of resources, such as the right of the family to social security and means of subsistence. Others, such as the right to be a parent (in its negative sense), do not impose any economic burden on the state. As stated, the right to marriage is both a civil and a social right, and a change in its manner of implementation (replacing religious marriage with civil marriage, or introducing civil marriage alongside religious marriage) does not necessitate an investment of resources. Accordingly, for this right, there is no reason to apply the progressive principle specified by the Covenant on Social Rights, and it should be dealt with as mandated by the Covenant on Civil Rights, by the absolute and immediate adoption of the measures necessary for its implementation.

A different question is whether there is a need for a legislative reform, or whether an Israeli court has the authority to invalidate the current arrangement regarding matters of marriage and divorce. First of all, the right to marry freely in Israel should be recognized as a part of the right to “human dignity and liberty” enshrined in the Basic Law of the same name. In the words of Professor Rubinstein: “[f]rom the perspective of the values of the state as a democratic country, it is hard to see what proper purpose is served by forcing the Jewish citizens of the state to be subject to Jewish Law in matters of marriage and divorce.”299 Nevertheless, in this context, it is not necessary to resolve the conflict between the values of Israel as a democratic country and its values as a Jewish state, since the “validity of laws” provision in the Basic Law precludes Section 1 of the Rabbinical Courts Jurisdiction Law from being declared unconstitutional.300 Moreover, on more than one occasion, the Supreme Court has ruled that the solution of the problem of the right to marriage in Israel is out of its hands:

It is obvious to anyone who follows the Knesset’s work and the positions of the various political parties that this issue is a major bone of contention among the Israeli public, and that there has not yet been a decision, with proper legal form, to introduce civil marriage. And who are we, as judges ordered

298 See id.; General Comment No. 3 of 1990, the Committee for Implementation of the Covenant on Economic, Social and Cultural Rights stated that there is an immediate obligation to adopt measures which do not entail significant financial cost. See generally General Comment 3, supra note 53; Shany, supra note 291.

299 Rubinstein & Medina, supra note 240, at 991.

300 See The Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953, 7 L.S.I. 139, § 1.
to distance ourselves from all political debate and argument, to take the place of the legislature and to decide on a question that divides the public?\textsuperscript{301}

Furthermore:

With all due respect to the struggle of the Petitioners and those groups that think like them regarding their right to marry in a non-religious context, their claim should be addressed to the proper [authority]—the legislature. There is no solution for their problem other than by means of civil marriage performed by the state without any consideration for the religious affiliation (or lack thereof) of the parties. The courts should not be asked to resolve this problem.\textsuperscript{302}

In \textit{Efrat}, Justice Barak ruled that:

In Israeli society, there is no consensus on this issue, and the Court cannot be expected to decide pronouncedly one way or the other. The Court crystallizes public policy as it is reflected, from its own objective perspective. Unequivocal decisions in this sensitive matter can only come from non-judicial entities. There are those who believe that the solution to the problem is the introduction of civil marriage . . . others believe that the solution is to be found in the field of Jewish law itself . . . in any event, the Court itself cannot and should not resolve the basic problem. The Court should not be expected to order the introduction of civil marriage, and the Court has consistently refused to do so.\textsuperscript{303}

\textsuperscript{301} C.A. 373/72, Tepper v. State of Israel, 28(2) P.D. 7, 15; see also Aharon Barak, \textit{Judicial Discretion} 213–14 (1987).

\textsuperscript{302} Id. at 13. Recently, the Supreme Court has ruled that a Jewish Israeli couple married in a civil ceremony outside of Israel have a maintenance obligation towards one another. \textit{See generally} C.A. 8256/99, Jane Doe v. John Doe, 58(2) P.D. 213 (addressing the issue). The Supreme Court did not deliberate the question of the validity of the marriage, and held that the maintenance obligation is grounded in contract law, by force of the agreement to marry in a civil ceremony outside of Israel. The Supreme Court reiterated its position, stating that the legislature should address this question and find a solution for it. \textit{See id.} at 229–30.

\textsuperscript{303} \textit{Efrat}, 47(1) P.D. at 788–89; \textit{see also} C.A. 450/70, Rogozhinsky v. State of Israel, 26(1) P.D. 129.
In view of these rulings, it seems that the demand for the introduction of civil marriage in Israel should be directed at the legislature.\textsuperscript{304} It is highly doubtful, however, that, in the current Israeli political framework, the legislature will be inclined to provide a comprehensive arrangement for civil marriage. At present, the apparent trend is a compromise whereby a quasi-marriage institution (a partnership registry) will be introduced that will only solve the problem of persons disqualified from religious marriage in Israel.\textsuperscript{305}

**Conclusion**

International law recognizes the right to family life as a fundamental right of paramount importance. The courts in Israel have also recognized the right to family life as a fundamental constitutional right. Nevertheless, as we have seen, in various contexts, proper weight has not been given to this basic right. The absence of a clear, standard definition for the “family” and the exclusion of “alternative” family bonds leads to an infringement of the rights of many who, in practice, conduct a family life. Thus, for instance, only married heterosexual couples are entitled to adopt a foreign child together and only a man and a woman who are a couple are entitled to use the services of a surrogate mother. As a result, the right to parenthood of unmarried couples (or couples who are not reputed spouses), including that of same-sex couples, is limited. Moreover, there is clearly a disparity in the manner of implementation of the right to family life between Jewish Israeli citizens, on the one hand, and Arab Israeli citizens and Arab residents of the Occupied Territories, on the other. This discrimination is primarily expressed in regard to the right to immigrate to Israel based on family ties and the right of residents of the Occupied Territories to family unification.

The most severe limitation on the right to family life within the borders of Israel relates to the lack of an option to marry in a civil ceremony. While international law recognizes the imposition of certain limitations on the freedom to marry (the age for marriage and prohibitions regarding incest and bigamy), the additional limitations

\textsuperscript{304} Regarding various proposals for legislative reform, see Sivan, supra note 237; Shifman, supra note 237, at 52–69.

on the right to marry, imposed by Israeli law, constitute a breach of Israel’s international commitments.

Making the right to marriage conditional on compliance with the requirements of a substantive religious law that does not recognize the marriages of persons without a religion, marriages between members of different religious communities, and even certain cases of marriage between members of the same religion, and which further lays down precepts that discriminate against women, is undoubtedly a violation of the international conventions and instruments discussed in this article. The only way to ensure equality within the family context in Israel, and by so doing to guarantee the right of every person to a marriage free from the fetters of religious law, is by legislative reform that would permit civil marriage. The proper arrangement would specify civil law as the exclusive substantive law applying in matters of marriage and divorce, and would allow a choice between a civil marriage ceremony and a religious marriage ceremony.
CASTING A WIDER NET: ADDRESSING THE MARITIME PIRACY PROBLEM IN SOUTHEAST ASIA

Erik Barrios*

Abstract: Because of the damage that maritime piracy inflicts on international trade and general safety, it has long been treated as a universal crime whose perpetrators were subject to punishment by any country that caught them. Piracy remains a serious threat to the international community in modern times, especially in Southeast Asia. Roughly 45% of the world’s commercial shipping passes through Southeast Asia, so the maritime attacks in this region cause billions of dollars in economic loss each year. These attacks have attracted additional attention due to the fact that they are now being committed by terrorists as well as traditional maritime bandits. This Note discusses the basis for punishing these attacks under international law, and considers whether the definition of piracy under international law can encompass these attacks.

Introduction

Piracy has posed a threat to all states’ maritime interests for nearly as long as people have sailed the oceans.1 States have long recognized the threat that piracy poses to political and commercial interests, as well as to human safety.2 Since pirates operate on the seas, the “great highway of all maritime nations,” and since piracy can inflict harm upon all states, international law treats piracy as a universal crime whose perpetrators are subject to punishment by any state that apprehends them.3

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1 See generally Alfred P. Rubin, The Law of Piracy 8 (Naval War College Press 1988) (discussing the ancient Roman belief in the “impropriety” of piracy and the threat that piracy might pose to the “new commercial and political order that could not countenance interference with trade in the Mediterranean Sea”).


3 See Annual Digest of Public International Law Cases: Years 1919–1922, at 165 (Sir John Fisher Williams & H. Lauterpacht eds., 1932); Paul Arnel, International Criminal Law and Universal Jurisdiction, 11 Int’l Legal Persp. 53, 60 (1999).
Piracy remains a serious threat to international commerce and safety in modern times, especially in Southeast Asia.\(^4\) Commercial ships in this region have always been particularly vulnerable to the maritime attacks that characterize piracy due to the narrow waterways and countless small islands that define the region’s geography.\(^5\) Nevertheless, there was a sharp increase in these attacks in the late 1990s following the massive unemployment and political instability caused by the Asian economic crisis.\(^6\) Indeed, in 2002, Southeast Asian waters played host to approximately 140 attacks.\(^7\)

The explosion of maritime violence in Southeast Asia is reason for serious international concern given the region’s significant role in international commerce.\(^8\) Roughly 45% of the world’s commercial shipping moves through the region’s waters, and the frequent attacks on commercial vessels passing through the region can hamper international trade and lead to severe economic loss.\(^9\) Indeed, maritime attacks in the region have caused an estimated $16 billion in economic loss over the past five years.\(^10\)

In addition, the possible links between the maritime attacks, local dissident groups, and terrorist groups such as al Qaeda justifies increased international attention.\(^11\) While violent dissident groups have

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\(^8\) See HERITAGE FOUNDATION, supra note 4.

\(^9\) See id.


existed in the region for centuries, the attacks of September 11, 2001 and the subsequent war on terrorism have focused increased attention upon possible links between al Qaeda and dissident groups in countries such as the Philippines, Malaysia, Indonesia, Singapore, and Thailand.\textsuperscript{12} Officials in Southeast Asia worry about the increased frequency with which these dissident groups have attacked maritime targets.\textsuperscript{13} Indeed, the International Maritime Bureau (IMB), an organization of the International Chamber of Commerce that tracks incidents of maritime crime throughout the world, reports the emergence in Southeast Asia of a “new brand of piracy” in which the attacks are motivated by political agendas rather than a traditional motive to rob.\textsuperscript{14} These attacks are consistent with the theory that terrorists in Southeast Asia have shifted strategies to encompass economic, as well as political and military, targets.\textsuperscript{15} Actual attacks by terrorists have thus far been limited to temporary seizures of vessels and crewmen, but officials express concern over the ease with which large vessels such as oil tankers could be hijacked and used as weapons with which to block commercial waterways or attack one of Southeast Asia’s numerous busy harbors.\textsuperscript{16} In addition to direct attacks, terrorists may also exploit the region’s maritime shipping activity to facilitate their operations in other parts of the world.\textsuperscript{17} For example, authorities suspect that terrorist groups have been using container ships to smuggle weapons, supplies, and even the terrorists themselves.\textsuperscript{18}

Thus, in addition to the usual concern over the threat to international commerce, apprehension about the possible connection between pirates and terrorists also draws attention to the problem of piracy in Southeast Asia.\textsuperscript{19} These magnified concerns highlight the

\textsuperscript{13} See Halloran, supra note 11; Yomiuri, supra note 11.
\textsuperscript{16} See Peril on the Sea, ECONOMIST, Oct. 4, 2003, at 5; Adam J. Young & Mark J. Valencia, Conflation of Piracy and Terrorism in Southeast Asia: Rectitude & Utility, 25 CONTEMP. SOUTHEAST ASIA 1, 32 (2003), at 2003 WL 5140196; Yomiuri, supra note 11 (discussing a tanker carrying liquefied petroleum gas as the “likeliest terrorist target”).
\textsuperscript{17} See Yomiuri, supra note 11 (describing anxieties about terrorists using container ships to smuggle people and explosives around the world).
\textsuperscript{18} Id.
\textsuperscript{19} See id.
need for more effective maritime law enforcement in the region, and have led scholars to examine the legal issues that may frustrate efforts to address these maritime attacks.\textsuperscript{20}

This Note discusses the basis under international law for punishing the maritime attacks in Southeast Asia, and considers whether the definition of piracy under customary international law encompasses these attacks. Part II of this Note outlines the current state of international law on piracy and other forms of maritime violence. This section also discusses the definition of piracy in the United Nations Convention on the Law of the Sea (UNCLOS); perhaps the most widely known definition of piracy in international law. This section further describes the Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (referred to herein as the “Rome Convention”), which addresses forms of maritime violence that are not encompassed by the UNCLOS definition. Part III discusses the shortcomings of UNCLOS and the Rome Convention when they are applied to the acts of maritime violence in Southeast Asia. Finally, Part IV examines possible solutions to these shortcomings. Part IV presents solutions proposed by scholars, discusses weaknesses in these proposals, and suggests a more readily applicable legal perspective to the Southeast Asian context.

\section{I. A Brief History of International Law Regarding Piracy and Maritime Violence}

Piracy became a crime under international law as seafaring became prevalent and international trade became a major part of all states’ economies.\textsuperscript{21} Early on, states recognized that piracy posed a threat to trade and the orderly functioning of the international community in general.\textsuperscript{22} Thus, the international community branded pirates as \textit{hostes humani generis} or enemies of the human race, and treated piracy as one of the few crimes over which universal jurisdiction applied.\textsuperscript{23} As such, piracy remains punishable by all nations,

\begin{flushright}
\textsuperscript{21} Id. at 259–60.
\textsuperscript{22} See id.
\textsuperscript{23} Williams & Lauterpacht, \textit{supra} note 3, at 165.
\end{flushright}
wherever the perpetrators were found and without regard to where the offense occurred.24

For centuries the international prohibition on piracy existed in varying definitions, but it was not until the international community adopted the Geneva Convention of the High Seas in 1958 that a definition was set forth in a major international instrument.25 UNCLOS, which was signed in 1982 and entered into force in 1994, identically restates the definition established in the Convention on the High Seas.26 According to the definition found in the Convention on the High Seas and UNCLOS, “piracy” consists of (1) illegal acts committed on the high seas (2) for private ends (3) by the crew or passengers of one ship against the crew, passengers, or property onboard another ship.27 The requirement that the acts be motivated for private ends restricts this definition to attacks committed with the intent to rob, and also limits the ability of states to claim universal jurisdiction over politically motivated attacks.28 This requirement reflects the states’ primary underlying concern about interference with commercial shipping and transportation, and underscores the states’ general unwillingness to assert jurisdiction over politically motivated acts that do not have a commercial aspect.29 To date, Indonesia, Malaysia, and the Philippines, the states most heavily impacted by piracy, are parties to UNCLOS and as such are bound by the rights and obligations of the UNCLOS definition of piracy.30 Many writers treat UNCLOS as a codification of the customary international law on piracy and consider all states, whether parties or not, as bound by the UNCLOS definition.31

24 See id.
27 UNCLOS, supra note 26, art. 101.
28 Garmon, supra note 20, at 265.
29 See id.
31 See Garmon, supra note 20, at 275 (suggesting that the law contained in UNCLOS would apply to non-signatories as well).
Soon after UNCLOS was adopted, it became clear that its conception of piracy did not cover many of the violent crimes committed on the seas.\textsuperscript{32} On October 7, 1985, four armed stowaways onboard the Italian cruise liner \textit{Achille Lauro}, hijacked the ship and killed one American passenger.\textsuperscript{33} The apparent political motivations for the attack, the location of the attack in Egyptian waters, and the fact that the attack originated from the target ship rather than from a separate ship, placed the attack outside the UNCLOS definition of piracy and, presumably, beyond the purview of universal jurisdiction.\textsuperscript{34} The United States, and other states that may have had an interest in prosecuting the attackers, were apparently left without the authority under international law to do so.\textsuperscript{35}

After the \textit{Achille Lauro} attack, the international community, through the UN and its International Maritime Organization (IMO), promulgated the Rome Convention, which established a legal basis for prosecuting maritime violence that did not fall within the UNCLOS piracy framework.\textsuperscript{36} The Rome Convention made it unlawful to seize or take control of a ship by force or the threat of force, to perform an act of violence against a person on board a ship if it is likely to endanger safe navigation of that ship, to destroy or damage a ship or its cargo if it is likely to endanger safe navigation, to place devices or substances on a ship that are likely to destroy that ship, to knowingly communicate false information to a ship that would endanger safe navigation, and to injure or kill any person in connection with any of the above acts.\textsuperscript{37} The Rome Convention authorizes and, under certain circumstances, requires party states to establish jurisdiction over the perpetrators, either extraditing the perpetrators to another interested signatory state or prosecuting the alleged offenders themselves.\textsuperscript{38} The state of which the perpetrator is a national, the state in whose territorial waters the act is committed, and the flag state of the ship against whom the act is committed are all required to take measures neces-
sary to establish jurisdiction over the offenses.\textsuperscript{39} Furthermore, a party state is permitted to exercise jurisdiction if the victim is a national of the state, if the perpetrator’s habitual residence is in the state, or if the act was committed in an attempt to compel the state to do, or abstain from doing, any act.\textsuperscript{40}

To date, Indonesia, Malaysia, and the Philippines, the states with the largest maritime presence and with the greatest potential to be affected by incidents of maritime violence covered by the Rome Convention, have neither ratified, nor even signed it.\textsuperscript{41} Unlike UNCLOS, there is no assumption that non-signatories would be bound by the terms of the Rome Convention; it is clearly not a reflection or codification of customary international law, but rather a relatively recent departure from it.\textsuperscript{42}

II. SHORTCOMINGS OF INTERNATIONAL LAW REGARDING PIRACY AND MARITIME VIOLENCE WITH RESPECT TO SOUTHEAST ASIA

A. The Limits of UNCLOS

The definition of piracy contained in UNCLOS excludes many of the types of maritime attacks that currently occur in Southeast Asia.\textsuperscript{43} In particular, UNCLOS requires that a crime occur on the high seas in order to be punishable as piracy.\textsuperscript{44} However, the majority of maritime attacks in Southeast Asia occur within a state’s territorial waters.\textsuperscript{45} Under UNCLOS, only the states in whose territorial waters the attacks occurred would be permitted to prosecute the offenders.\textsuperscript{46} Assuming such a state is willing to act, its efforts would be limited by UNCLOS rules regarding “hot pursuit” as applied to Southeast Asia’s geography.\textsuperscript{47} UNCLOS provides that a state may commence pursuit of an offending ship within its territorial waters, and continue into in-

\textsuperscript{39} See Rome Convention, \textit{supra} note 37, art. 6.
\textsuperscript{40} See \textit{id.}
\textsuperscript{41} See \textit{International Maritime Organization, Status of Conventions}, \textit{at} http://www.imo.org/includes/blastDataOnly.asp/data_id%3D8068/status.xls (last visited Nov. 20, 2004) [hereinafter \textit{Status of Conventions}].
\textsuperscript{42} See Garmon, \textit{supra} note 20, at 271.
\textsuperscript{43} See, \textit{e.g.}, \textit{id.} at 267 (noting how the UNCLOS definition is restricted to piracy taking place on the high seas and most incidents of piracy occur within territorial or port waters).
\textsuperscript{44} See UNCLOS, \textit{supra} note 26, art. 101.
\textsuperscript{45} See \textit{International Maritime Organization}, \textit{supra} note 7, annex 2.
\textsuperscript{46} Garmon, \textit{supra} note 20, at 264; see UNCLOS, \textit{supra} note 26, art. 101.
\textsuperscript{47} See UNCLOS, \textit{supra} note 26, art. 111.
ternational waters so long as the pursuit is uninterrupted. The right of hot pursuit ends, however, as soon as the fleeing ship enters its own or a third state’s territorial waters. These limitations on the states’ ability to pursue offenders are especially problematic in insular Southeast Asia, where the islands of multiple countries are densely packed within relatively small areas. With little international water separating neighboring states, fleeing ships can quickly escape into the territorial waters of another state and avoid capture and prosecution if the neighboring state is unwilling to act.

The requirement that an attack be motivated by private and material ends further limits UNCLOS’ applicability to Southeast Asia. Since UNCLOS excludes attacks that are politically motivated, it excludes acts of maritime terrorism that have become increasingly common in the region. Thus, maritime crimes committed by regional dissidents, including kidnappings of crewmen to put pressure on regional governments and environmental attacks involving hijacked oil tankers, are not punishable as piracy under UNCLOS.

The two-vessel requirement imposes a third limitation on the UNCLOS piracy provision’s usefulness. UNCLOS requires that perpetrators stage an attack from one vessel against the crew or passengers of another vessel in order for the attack to qualify as piracy. Thus, an attack on a ship committed by its crew, its passengers, or stowaways likely would be excluded even though the social and economic harm would be identical to an attack that satisfied all of the UNCLOS elements.

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48 Id.
49 Id.
50 See Zou Keyuan, Enforcing the Law of Piracy in the South China Sea, 31 J. Mar. L. & Com. 107, 111 (2000) (stating that most, if not all, of the South China Sea is located within the exclusive economic zone of one country or another).
51 See id.
52 See Garmon, supra note 20, at 265.
53 See id.
54 See id.; Economist, supra note 16, at 5.
55 See Halberstam, supra note 32, at 287 (noting how a perpetrator of maritime violence could be caught on the high seas, have the motivation found to be for “private ends,” yet still fail to qualify as a pirate because he did not act from one ship against another”).
56 See UNCLOS, supra note 26, art. 101.
57 See Halberstam, supra note 32, at 286–87.
B. The Limits of the Rome Convention

The Rome Convention was meant to fill these gaps left by the UNCLOS definition of piracy.\(^{58}\) In particular, the Rome Convention covers acts occurring in territorial waters and acts motivated for political ends, as well as eliminating the two-vessel requirement.\(^{59}\) While the Rome Convention would empower Southeast Asian states to act more decisively in responding to maritime attacks, none of the states in Southeast Asia that are especially hard-hit by these attacks, namely the Philippines, Malaysia, and Indonesia, have signed it.\(^{60}\)

The unwillingness of the region’s large insular states to join the Rome Convention can be explained in large part by the characteristic jealousy with which Southeast Asian states guard their political and territorial sovereignty.\(^{61}\) States in this region view the Rome Convention’s obligations concerning the extradition or prosecution of maritime criminals as an affront to their sovereignty because these provisions prescribe how states should deal with matters concerning their own territorial waters.\(^{62}\) The unwillingness to participate in the Rome Convention deprives the states in Southeast Asia of an important legal framework for dealing with the acts of maritime violence that do not fall within the UNCLOS definition of piracy.\(^{63}\)

Even if the major insular states in Southeast Asia were to join to the Rome Convention, the Convention has shortcomings that prevent it from completely covering all the acts excluded by UNCLOS.\(^{64}\) Although the Rome Convention’s definition of piracy covers attacks that do not fall within the UNCLOS definition, the Rome Convention’s provisions are only applicable within the jurisdictions of states party to it.\(^{65}\) Arguably, the scope of criminal attacks embraced by the Rome Convention’s definition of piracy includes acts that are not considered \textit{ergo omnes}, and therefore do not provide for universal jurisdiction.\(^{66}\) The acts within the Rome Convention’s definition of piracy are only punishable by the states that are party to the treaty, only if the perpetra-


\(^{59}\) See id.; Rome Convention, supra note 37, at art. 3.

\(^{60}\) See Keyuan, supra note 58, at 532; Status of Conventions, supra note 41.

\(^{61}\) See Young & Valencia, supra note 16 at 32.

\(^{62}\) See id.

\(^{63}\) See Keyuan, supra note 58, at 532.

\(^{64}\) See Garmon, supra note 20, at 272–73.

\(^{65}\) See id.

\(^{66}\) See id.
tors or victims are nationals of a party state, and only if the offending acts take place in a party state’s territorial waters or the offending vessel was scheduled to navigate through such waters. Furthermore, the decision by the parties to enforce the Rome Convention is ultimately discretionary. Even though a party may be obligated by the terms of the Rome Convention to act in response to an offense, the Convention does not provide for any sanctions against parties who fail to fulfill their treaty obligations. Thus, if a party authorized or obligated by the Rome Convention to act declines to do so, the purported attack may go unpunished and the other party states may have no recourse against that non-conforming state.

Thus, even if all relevant Southeast Asian states were to become party to the Rome Convention, the limitations of the Rome Convention and UNCLOS leave a regulatory gap through which certain acts of maritime violence could slip by unpunished. Terrorist acts occurring on the high seas, for instance, would fall outside of both the UNCLOS and Rome Convention frameworks.

III. TOWARD A MORE HISTORICALLY ACCURATE PIRACY FRAMEWORK

Scholars have proposed two solutions to provide for more effective legal coverage of the forms of maritime violence that occur in Southeast Asia. First, as suggested by Tina Garmon, the UNCLOS definition could be revised to include acts motivated by political objectives. This expansion would provide for increased jurisdiction over maritime terrorism on the high seas and would allow UNCLOS and the Rome Convention to work together more cohesively, “extending a blanket of enforcement jurisdiction” over all types of maritime violence. However, Garmon’s proposal seemingly would be ineffective in Southeast Asia, where none of the major insular states are party

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67 See id.; Rome Convention, supra note 37, art. 6.
68 Garmon, supra note 20, at 273.
69 See Rome Convention, supra note 37, art. 16 (providing a forum for dispute resolution between parties regarding issues arising out of the interpretation or application of the Convention, but providing no specific sanctions).
70 Garmon, supra note 20, at 273.
71 Id. at 275.
72 See id.
74 See Garmon supra note 20, at 275.
75 See id.
to the Rome Convention.\textsuperscript{76} Even if the UNCLOS party states were to agree to expand the definition of piracy to include politically motivated acts, Southeast Asia’s lack of participation in the Rome Convention leaves many violent acts uncovered by the proposed definition.\textsuperscript{77} For example, without the Rome Convention, Garmon’s expanded UNCLOS definition would not consider maritime attacks as “piracy” unless they occurred on the high seas or involved at least two vessels.\textsuperscript{78}

The second proposed solution suggests the use of regional treaties to combat piracy and other forms of maritime violence.\textsuperscript{79} A regional approach, as opposed to exclusive reliance on the broad-based UNCLOS, would allow smaller groups of states to create and enforce anti-piracy measures tailored to the unique situations of a given region.\textsuperscript{80} One example of a regional piracy initiative, suggested by Timothy Goodman, would designate joint patrol areas to coordinate the policing of the region’s waters by the signatories’ naval and police forces, and would employ uniform extradition procedures among the party states.\textsuperscript{81} A regional approach remains consistent with the purposes of UNCLOS, which permits two or more parties to conclude agreements that modify its provisions (effective only as between those concluding parties) so long as the modifications are not incompatible with UNCLOS’ object and purpose, and do not affect the enjoyment of other parties’ rights or obligations under the convention.\textsuperscript{82} Furthermore, regional agreements would make it easier to enforce the treaty obligations between the states.\textsuperscript{83} Although UNCLOS requires that states cooperate to the fullest extent possible in order to repress piracy, the large number of party states makes it difficult to ensure that all states are meeting their obligations.\textsuperscript{84}

In Southeast Asia, however, the concept of regional cooperation has always been problematic.\textsuperscript{85} As mentioned previously, the Southeast Asian states generally guard their territorial and political sover-

\textsuperscript{76} See Status of Conventions, supra note 41.
\textsuperscript{77} See id.; Garmon, supra note 20, at 275.
\textsuperscript{78} See Garmon, supra note 20, at 275.
\textsuperscript{79} See Goodman, supra note 73, at 156–57.
\textsuperscript{80} See id. at 157–58.
\textsuperscript{81} See id. at 159–60.
\textsuperscript{82} Id. at 158.
\textsuperscript{83} See id. at 156–57.
\textsuperscript{84} Goodman, supra note 73, at 156–57.
eighty with extreme jealousy. It is unlikely that Southeast Asian states would accept terms that would, for instance, allow neighboring naval forces to operate within their own territorial waters. As one official in Southeast Asia noted, “it would be very nice if [multilateral cooperation] could happen, but the issue of sovereignty in these countries [is] such that it won’t happen soon . . . [i]t’s a very, very sensitive issue.” Indeed, the limited efforts at cooperation in combating piracy in the past have been colored by the preoccupation with sovereignty. Southeast Asian countries have attempted joint patrols in the past, but their effectiveness has been limited by caveats preventing one state from operating in the territorial waters of another. Thus, although the states in the region, through the Association of Southeast Asian Nations (ASEAN), have paid lip service to preventing maritime attacks more effectively, and although news reports indicate that the ASEAN states are currently working towards implementing a new anti-piracy pact, it remains uncertain whether such steps will lead to meaningful cooperation that will effectively combat piracy in the region, or whether such measures will be largely diluted.

Rather than attempting to expand the UNCLOS definition or create problematic regional agreements, the legal perspective from which states view the concept of piracy should be adjusted. As stated previously, the UNCLOS would exclude many of the maritime attacks in Southeast Asia from its concept of piracy. Nevertheless, these excluded attacks would inflict the same degree of damage on international trade.

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86 Id.
88 Day, supra note 85 (quoting Pootengan Mukundan, Director of the International Maritime Bureau).
89 See Young & Valencia, supra note 16, at 38.
90 See id. at 38–39 (describing the “hands off” policy underlying a joint patrol agreement between Indonesia, Malaysia, and Singapore).
93 See generally Garmon, supra note 20, at 273 (discussing broadening the definition of piracy); Goodman, supra note 73, at 156-57 (discussing regional piracy charters and accords); Halberstam, supra note 32, at 272-76 (discussing the customary international law of piracy).
94 See Garmon, supra note 20, at 267.
which is the primary motivation for treating piracy as *ergo omnes*.95 Thus, the UNCLOS definition is too narrow to be considered the authoritative definition of piracy under customary international law.96

The actual practice of states and the writings of jurists in past centuries indicate that customary international law on piracy encompassed a broader scope of activity than the restrictive definition found in UNCLOS.97 When the international community first attempted to codify international piracy law, no clear consensus as to the meaning of piracy could be derived from the writing of jurists or the practice of states.98 While many scholars supported the restrictive view of piracy ultimately adopted in UNCLOS, and while many acts considered to be piracy fell neatly within this definition, the actual practice of many states reflected a conception of piracy that covered a broad range of activities that had an adverse effect upon states’ maritime interests.99 For example, the Norman Vikings in Western Europe and the Barbary Corsairs of the Mediterranean were considered pirates, yet much of their activity took place on coasts and territorial waters.100 British authorities in the 19th century cited piracy law as a justification to pursue maritime bandits led by local nobility in the Malay Peninsula, even though the acts of banditry occurred within territorial waters and were politically motivated.101 English courts upheld this broad reading of piracy law, and held that “piracy is any armed violence at sea which is not a lawful act of war.”102 U.S. courts have also been willing to apply the law of piracy broadly.103 The U.S. Supreme Court has held that to bring an act within the scope of piracy it is not necessary for either actual plunder or an intent to plunder (i.e., a private end) to exist; if one “sinks or destroys an innocent merchant ship, without any other object than to gratify his lawless appetite for mischief,” it is as much an act of piracy as an act of robbery on the high seas.104 In 1937, during the Spanish Civil War, nine states, including Bulgaria, Romania, and the USSR, treated acts of submarine warfare against merchant

95 See id.
96 See id.
97 See, e.g., Halberstam, supra note 32, at 272–73.
98 Rubin, supra note 1, at 321.
100 See Rubin, supra note 1, at 307.
101 Id. at xiii.
102 See Halberstam, supra note 32, at 273 (citing In Re Piracy Jure Gentium, 1934 App. Cas. 586, 598, reprinted in 3 BRIT. INT’L L. CASES 836, 842 (1965)).
103 Id. at 273–74.
104 Id. (citing United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210, 232 (1844)).
ships as piracy, notwithstanding the fact that such attacks reflected no intent to rob and often took place in territorial waters. The wide range of activity treated as piracy indicates a conception of piracy under customary international law that was broader and more flexible than the definition established by UNCLOS. Historically, states recognized that a wide variety of activity could cause the type of harm that justified treating piracy as a universal crime.

Thus, given the flexible manner in which piracy law has been applied previous to its adoption, UNCLOS should not be seen as having codified existing international law. Rather, UNCLOS presented a significant departure from what the international community accepted as piracy. As such, UNCLOS would be binding upon the countries that signed it, but would not reflect the customary international law binding upon the international community as a whole. While it is true that the provisions of a treaty can gradually gain such wide acceptance that they become part of customary international law, the fact that UNCLOS only gathered enough signatures to enter into force in 1994 weighs against such an argument in this case.

Thus, certain crimes that do not fall within UNCLOS should still be considered piracy. Southeast Asian states should be able to prosecute acts of maritime terrorism that would not otherwise satisfy the requirements of the UNCLOS framework, and those states could justify their actions by citing to the long existing customary practices of other states. Given such legal authority, the actions of Southeast Asian states taken against piracy would not be dependent upon their participation in any treaty, as all states may rely upon customary in-

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105 See Halberstam, supra note 32, at 280 (discussing the conclusion of the Nyon agreement of 1937); Rubin, supra note 1, at 295.
106 See Halberstam, supra note 32, at 273.
107 See generally id. (arguing that piracy has historically been seen as any act of violence, committed at sea or close to the sea, by persons not acting under proper authority).
108 See Halberstam, supra note 32, at 283; Samuel Pyeatt Menefee, Anti Piracy Law in the Year of the Ocean, Problems and Opportunity, 5 ILSA J. Int’l & Comp. L. 309, 313–14 (1999); Rubin, supra note 1, at 322 (discussing the new, narrow definition of piracy as de lege ferenda).
109 See id.
110 See Halberstam, supra note 32, at 283; Menefee, supra note 108, at 313–14; Rubin, supra note 1, at 322.
111 See Rubin, supra note 1, at 322.
112 See id.
113 See Halberstam, supra note 32, at 273.
114 See id.
ternational law when responding to attacks that threaten their maritime interests.\textsuperscript{115}

Southeast Asian states can respond to more incidents of maritime violence through reference to pre-UNCLOS customary international law than is currently possible relying solely upon UNCLOS as a legal basis.\textsuperscript{116} Given the concerns for piracy’s effect upon both international trade in Southeast Asia and the possible link between pirates and Southeast Asian terrorist groups, the international community would likely embrace a broader construction of international piracy law.\textsuperscript{117}

**Conclusion**

Maritime piracy remains a serious concern in Southeast Asia due to its threat to international commerce and human safety. Furthermore, the possible link between piracy and the numerous terrorist groups operating in Southeast Asia has placed even greater attention on piracy’s threat to the security of the region. International agreements that deal with piracy and other acts of maritime violence, such as UNCLOS and the Rome Convention, seem inadequate as a legal basis to protect the region from such acts. The definition of piracy found in UNCLOS is too narrow and does not encompass many acts that regularly occur in Southeast Asian waters. The lack of participation in the Rome Convention by the insular states in Southeast Asia makes the agreement virtually inapplicable in that region. The solution to the lack of coverage provided by these international agreements may lie in the customary law on piracy that existed prior to UNCLOS. The definition of criminal piracy, as evidenced by the historical practice and jurisprudence of states, was broader than the definition adopted by UNCLOS. As such, UNCLOS, which only entered into force in 1994, did not codify existing law, and acts of maritime violence that do not fall within UNCLOS may nonetheless constitute piracy. Thus, states in Southeast Asia may have a legal basis for prosecuting acts such as maritime terrorism as piracy, even though the same acts would not fall under the definition of piracy adopted by UNCLOS. Given the scope of international concerns over Southeast Asian piracy, it is likely that the international community would support the revival and readoption of the customary definition of piracy prior to UNCLOS.

\textsuperscript{115} See Garmon, supra note 20, at 273.

\textsuperscript{116} See id. at 273.

\textsuperscript{117} See Young & Valencia, supra note 16, at 43.
ELIMINATING THE PROTECTIONIST FREE RIDE: THE NEED FOR COST REDISTRIBUTION IN ANTIDUMPING CASES

ELIZABETH L. GUNN*

Abstract: U.S. antidumping laws exist so that domestic markets can protect themselves against foreign goods sold in the United States at less than fair market value. In an antidumping case, after the initial petition is filed, all costs of investigation and determination fall on the U.S. government. Those companies and markets alleged of dumping, however, must pay for their own defense, diverting money from industry development to defense of their actions. A majority of the antidumping cases filed result in a de minimis or zero antidumping margin, but the costs of achieving such a result weigh heavily on the accused market. This Note explores the application and results of U.S. antidumping laws on U.S. and foreign companies and the distribution of costs in their application. Using the Salmon Case from Chile as an example, it argues that in order to eliminate frivolous and protectionist antidumping actions, the petitioners should bear the costs of investigation and discovery instead of the government.

Introduction

Will Rogers once observed that “if the other fellow sells cheaper than you, it is called ‘dumping.’ Course, if you sell cheaper than him, that’s ‘mass production.’” 1 Dumping is a form of international price discrimination 2 that occurs when internationally traded goods are sold at less than fair market value (LTFV). 3 If a good is dumped into a

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country’s market it can harm that market by driving domestic competitors out of business.\textsuperscript{4} Antidumping (AD) laws, which have been referred to as domestic industry’s “Weapon of Choice for Protection,”\textsuperscript{5} allow for a legal response by the domestic government and industry to protect their businesses.\textsuperscript{6} At the same time, the laws allow for many protectionist actions.\textsuperscript{7}

In the United States, antidumping cases are jointly heard by the Department of Commerce (DOC) and the International Trade Commission (ITC).\textsuperscript{8} The majority of AD cases are initiated by petitions from “interested parties”\textsuperscript{9} and are subsequently investigated, decided, and paid for by the DOC and ITC.\textsuperscript{10} The petitioner’s only costs are the expenses incurred in the preparation of the petition and any additional information they choose to provide, whereas the accused companies must pay for all their defense costs, including translation of all documents to and from English.\textsuperscript{11}

In the eyes of domestic companies, AD laws effectively protect and guard against lower priced foreign competitors.\textsuperscript{12} But for foreign companies, especially those in developing industries and economies, such laws can create huge financial and legal burdens once a case against them is initiated.\textsuperscript{13} An example of the extreme social and economic effects an AD case can have on a developing economy are the accusations the Coalition for Fair Atlantic Salmon Trade (FAST) presented against the Association of Chilean Salmon and Trout Producers (Association) (the Salmon Case).\textsuperscript{14}

This Note explores the impact of U.S. antidumping cases on foreign markets and companies. Part I describes the current U.S. AD law as well as the companies and industries involved in the Salmon Case.

\textsuperscript{5} Id.
\textsuperscript{7} See id.
\textsuperscript{8} See WAYS AND MEANS, supra note 2, at 101, 102.
\textsuperscript{9} 19 U.S.C. § 1673a(b)(1) (1999); 19 C.F.R. § 207.10(a) (2003). In order for the case not to be terminated, the interested party must be representative of the industry as a whole. 19 U.S.C. § 1673a(c)(4).
\textsuperscript{10} See McGee, supra note 6, at 547.
\textsuperscript{11} See id. at 496, 536.
\textsuperscript{12} See McGee & Yoon, supra note 3, at 260. Whether those competitors actually are dumping or not is a separate consideration. See id.
\textsuperscript{13} See McGee, supra note 6, at 497–98.
\textsuperscript{14} See Fresh Atlantic Salmon from Chile, 62 Fed. Reg. 37027 (Dep’t of Commerce July 10, 1997) (initiation).
Part II examines how an AD case is decided, using the Salmon Case as an example, and compares the results of the Salmon Case to other dumping cases. Part III argues that in order to avoid negative and potentially protectionist effects caused by AD cases, petitioners, as opposed to the government, should be responsible for the costs incurred during the investigation and evaluation of their claims. Holding petitioners accountable for the costs of their cases will deter companies from filing petitions intended to merely use AD laws as a means of reducing foreign competition.

I. Background

A. History of U.S. Antidumping Laws

Antidumping laws emerged in the United States after World War I, with present day laws based on the Antidumping Act of 1921.\(^{15}\) Since their inception, AD laws have gone through a series of amendments; the most recent of which were adopted by Congress as part of the United States’ participation in the World Trade Organization (WTO).\(^{16}\) The most significant amendment from the WTO Uruguay Round Agreements is a sunset provision which requires that, after five years, the AD tariff level must be terminated unless the evaluating authority determines that there would likely be a continuation or recurrence of dumping.\(^{17}\) Today, the result of a negative AD determination is the assessment of a dumping margin (a company specific tariff placed on the type goods found to be sold under LTFV in the United States) against the foreign exporter.\(^{18}\) In light of the strict tariff agreements under the WTO, AD tariffs are one of the last and “most viable [bases] for imposing or preserving protective duties”.\(^{19}\)

In the United States, the evaluating authorities of AD cases are the DOC and ITC.\(^{20}\) Between 1990 and 2000, the DOC and ITC heard over 440 antidumping cases, terminating the investigation in 238 cases for lack of information or finding no material injury or dump-

\(^{15}\) See Ways and Means, supra note 2, at 101.

\(^{16}\) See id. at 102.

\(^{17}\) 19 U.S.C. §§ 1675(c), 1657a (1999); 19 C.F.R. § 207.60 (2003); Ways and Means, supra note 2, at 112.

\(^{18}\) 19 U.S.C. § 1673d(c) (1999); 19 C.F.R. § 351.211–212.

\(^{19}\) Cott, supra note 4, at 53.

\(^{20}\) See Ways and Means, supra note 2, at 101, 102.
ing.\textsuperscript{21} In other words, over half of the AD cases brought between 1990 and 2000 were against companies who were not harming U.S. industries and were selling goods at a fair market value.\textsuperscript{22}

B. Chilean Economy—Salmon’s Role

Traditionally, Chile has been known for its exportation of copper.\textsuperscript{23} Today, copper still plays a large role in the Chilean economy, but the country’s position on the world market has diversified.\textsuperscript{24} Part of this diversification is the growth of its fishing sector, including the export of fresh and chilled Atlantic Salmon.\textsuperscript{25} This growth was supported by the 1976 creation of the Office of the Sub-secretary of Fishing, part of the Chilean Ministry of Economics and Energy.\textsuperscript{26} The Sub-secretary is responsible for proposing and supporting legislation which pertains to the growth of fishing in Chile, as well as other industry support.\textsuperscript{27}

Since 1990, the fishing industry has accounted for between 10\% and 13\% of Chilean exports, and that percentage continues to grow.\textsuperscript{28} In 2002, the United States was the destination for 26.5\% of Chile’s fish exports, second only to Japan.\textsuperscript{29} The main fishing product exported to the United States from Chile is fresh and chilled Atlantic Salmon.\textsuperscript{30} These exports accounted for 17.1\% (or approximately $492

\begin{footnotesize}
\textsuperscript{22} See id.
\textsuperscript{25} See generally id.; see also Chile-info.com, Product Channels, Seafood, at http://206.49.217.77/servlet/NavigationServlet?page=product_channel&id_product_channel=57A470900000000100ADD4FB7C645424 (last visited Nov. 16, 2004).
\textsuperscript{26} See Subsecretaría de Pesca, Quienes Somos, at www.subpesca.cl/quienes.htm.
\textsuperscript{27} See id.
\textsuperscript{28} See Office of the Sub-secretary of Fishing of Chile, Chilean Fishing Sector 2002 Summary § 2, available at www.subpesca.cl/sector_r_en.htm [hereinafter Sub-secretary of Fishing Summary].
\textsuperscript{29} Id. § 4.1.
\textsuperscript{30} See id. § 4.2.
\end{footnotesize}
many)\textsuperscript{31} of the total value of exported fish in 2002, and 91.3% of total fresh and chilled Atlantic Salmon exported from Chile.\textsuperscript{32}

Many of the largest salmon exporters in Chile have business relationships with foreign investors, including U.S. corporations.\textsuperscript{33} The largest exporters are diverse companies that export over $100 million of fish products a year,\textsuperscript{34} while smaller corporations have less than $1 million of total exports per year.\textsuperscript{35} The named defendants in the Salmon Case were identified by the DOC as the five producers/exporters with the greatest export volume between the United States and Chile, accounting for slightly less than 50% of the total exports of Chilean fresh and chilled Atlantic Salmon.\textsuperscript{36}

C. U.S. Salmon Industry

The U.S. fishing industry accounts for 4% of total worldwide fishing, but only accounts for 0.5–0.6% of total U.S. GDP.\textsuperscript{37} Whereas fishing is the third largest export from Chile, it is not anywhere near the top of the U.S. export list.\textsuperscript{38} In 2002 the United States exported over $3.1 billion worth of edible fish, $468 million of which was salmon.\textsuperscript{39} All but approximately $24 million of those exports came from the

\textsuperscript{31} US Department of Commerce TradeStats Express, HS–03 Fish, Crustaceans & Aquatic Invertebrates—Imports from Chile, available at http://ese.export.gov/SCRIPTS/hsrun.exe/Distributed/ITA2003_NATIONAL/MapXtreme.htx;start=HS_newMap (last visited Nov. 16, 2004).

\textsuperscript{32} Sub-secretary of Fishing Summary, supra note 28, § 4.2.

\textsuperscript{33} See, e.g., Pesquera Eicosal Ltda., subsidiary of Stolt Sea Farm, available at www.stoltseafarm.com/chile/vision_1.html (last visited Nov. 16, 2004).

\textsuperscript{34} See e.g., Marine Harvest Chile S.A., available at http://206.49.217.77/servlet/NavigationServlet?page=ficha_empresa&id_exporter=13BB2C0800000098005404089A0CA7E1.


\textsuperscript{36} Fresh Atlantic Salmon from Chile, 63 Fed. Reg. 2664, 2666 (Dep’t of Commerce Jan. 16, 1998) (preliminary determination).


New England or the Pacific regions of the United States. Additionally, less than 5% of the salmon exports from those regions were of fresh-chilled Atlantic Salmon.

The Plaintiffs in the Salmon Case were located either in Maine, New Hampshire, or Washington, and as such were found to be representative of the New England and Pacific regions. The petitioners were found to be representative of 70% of total production of fresh Atlantic Salmon produced and sold domestically, thus having to compete with Chilean exports.

II. Discussion: The U.S. AD Case Process and the Salmon Case Example

A. U.S. Dumping Case Process

To begin an antidumping duty investigation, identical petitions must be simultaneously filed with the DOC and the ITC. The petition must include allegations and supporting documentation that the named imported goods are (or are likely to be) sold at LTFV in the United States and that an industry in the United States is either materially injured, threatened with material injury, or the establishment of an industry is materially retarded.

The DOC has created a twenty page form which identifies all the information that must be included to be a complete application. Petitioners are not required to provide any further information after the initial petition is filed, although they have the option to file additional briefs during the investigation process.

During the investigation of an antidumping petition, the DOC first determines if the good in question is being, or is likely to be, sold...
in the United States at LTFV. Additionally, the DOC has the burden
of determining whether or not the petitioners are representative of an
entire industry. Second, the ITC must determine that an industry in
the United States is materially injured, is threatened with material
injury, or that the establishment of an industry could be materially re-
tarded. If the DOC determines that LTFV sales exist, and the ITC
determines that a material injury exists, an antidumping duty is im-
posed on the goods in the amount by which the normal value (as de-
termined by the DOC) exceeds the export price (i.e., U.S. price).
During the process of the entire AD case, the DOC issues three de-
terminations and the ITC issues two; if at any point the ITC or
DOC’s determinations contradict the petitioner’s claims, the investi-
gation is terminated.

The investigations of petitioners’ claims by the DOC and ITC in-
clude the use of questionnaires to the parties, site visits, and other data
accumulation. All of the costs of information gathering are paid by
the U.S. government, while all of the costs of responding to requests for
information and documents are borne by the respondents. There
may also be hearings before the DOC and/or ITC where testimony and
arguments can be presented (at the cost of those wishing to be pre-
sent). If a country does not completely comply with the DOC and/or
ITC’s requests for information, then decisions issued will be based on
the “best information available” to the DOC and ITC at the time.
Normally the “best information available” is the information from the
initial petition and therefore is information biased against the defend-
ant country. More drastically, if a country refuses to comply with the
requests, the DOC interprets that refusal as a confession of guilt and

48 19 U.S.C. § 1637b(a) (1999); Ways and Means, supra note 2, at 102.
50 19 U.S.C. § 1637b(a); 19 C.F.R. § 351.205 (2003); Ways and Means, supra note 2, at 102.
52 A sufficiency of petition, preliminary determination, and final determination. See Ways and Means, supra note 2, at 105–09.
53 A preliminary determination and a final determination. See id.
54 19 U.S.C. §§ 1673a(c) (3), 1673b(a); 19 C.F.R. § 351.207(d) (2003).
56 See id.
57 See id.
58 See id.; McGee, supra note 6, at 499.
59 See McGee, supra note 6, at 499.
imposes the highest possible dumping margins.\textsuperscript{60} Dumping margins, also referred to as AD duties, “equal the amount by which the normal value of a good (i.e., the price in the foreign market) exceeds the export price (i.e., U.S. price) for the merchandise.”\textsuperscript{61}

If an affirmative determination of dumping is found, company specific tariffs are assessed against the defendant companies in the amount of the dumping margin.\textsuperscript{62} If the case is against an entire industry, but the case is determined upon representative companies, then an “all others” rate is created for the remainder of the companies from that industry in the defendant country.\textsuperscript{63} Two years after the initial application of tariffs, any party to the original case (domestic or international) can request an administrative review of the tariff amounts for any companies in the defendant industry.\textsuperscript{64} This request initiates a \textit{de novo} evaluation of the dumping margin, and if it is found to be different for the time period in question, it is then adjusted accordingly.\textsuperscript{65}

\textbf{B. The Salmon Case}

In June of 1997, eight U.S. salmon farmers filed an antidumping petition with the ITC and DOC alleging “that imports of fresh Atlantic salmon from Chile [were] being, or [were] likely to be, sold in the United States at less than fair value . . . and that such imports [were] materially injuring, or threatening material injury to, a U.S. industry.”\textsuperscript{66} On the basis of the petition, the DOC found that there was the possibility of sales of salmon from Chile in the United States at LTFV.\textsuperscript{67}

After issuing affirmative initial determinations, both the ITC and DOC performed independent investigations into the salmon market in the United States and Chile in order to establish whether there was a price difference and if that difference was materially injuring the U.S.

\textsuperscript{60} \textit{Id.}

\textsuperscript{61} \textit{Ways and Means, supra} note 2, at 102–03.


\textsuperscript{63} See 19 U.S.C. §§ 1673b(b) (3), 1673d(c) (5); \textit{Fresh Atlantic Salmon from Chile}, 63 Fed. Reg. 2664, 2671 (Dept. of Commerce Jan. 16, 1998) (preliminary determination). The Tariff Act directs the department to exclude all zero and \textit{de minimis} margins from the calculation of the “all others” rate. \textit{See id.} The all others rate is determined by taking the weighted average of all dumping margins for the represented companies which are not zero or under 0.5\% \textit{(de minimus)}. \textit{See id.}


\textsuperscript{65} \textit{Id.}

\textsuperscript{66} \textit{Fresh Atlantic Salmon from Chile}, 62 Fed. Reg. 37027, 37027 (Dep’t of Commerce July 10, 1997) (initiation).

\textsuperscript{67} \textit{Id.} at 37029.
market.\textsuperscript{68} The investigation included a selection of defendants by the DOC\textsuperscript{69} and issuance of initial and supplemental antidumping questionnaires, in English, to each named defendant.\textsuperscript{70} In its preliminary determination, the DOC published dumping margins based on the best (but not all) information available,\textsuperscript{71} and six months later, after site visits, hearings, and further investigations, in its final determination the DOC published the final dumping margins/tariff levels against the Chilean defendants.\textsuperscript{72} Soon after, ITC confirmed its preliminary decision that the dumping margins were materially injuring the U.S. market.\textsuperscript{73}

Directly following the final determination, the Association filed allegations that the DOC had made ministerial errors in its final determination.\textsuperscript{74} The DOC determined that errors were made and adjusted the dumping margins.\textsuperscript{75} The final margins for the case for the five named defendants were 0.16%, 1.36%, 2.23%, 5.44%, and 10.69%, with the “all others” rate at 4.57%.\textsuperscript{76}

After a final determination has been issued in an AD, companies represented in the case may file a request for an Administrative Review of the original decision.\textsuperscript{77} Between 2000 and 2002,\textsuperscript{78} the U.S. Atlantic Salmon industry petitioned for Administrative Reviews for specific companies under the final dumping margins.\textsuperscript{79} In all but two

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\textsuperscript{68} Fresh Atlantic Salmon from Chile, 63 Fed. Reg. 2664, 2664 (Dep’t of Commerce Jan. 16, 1998) (preliminary determination).
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\textsuperscript{69} Id. at 2664–65. The law requires that an individual dumping margin for each company be calculated by the DOC. See Id. at 2666. FAST alleged that the entire Chilean salmon industry was dumping its products in the US, in order to perform its investigation within the statutory time allowed, the DOC limited its investigation to the five producers/exporters of the greatest export volume. Id.
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\textsuperscript{70} Fresh Atlantic Salmon from Chile, 63 Fed. Reg. 2264, 2665 (Dep’t of Commerce Jan. 16, 1998) (preliminary determination).
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\textsuperscript{71} Id. at 2671.
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\textsuperscript{72} Fresh Atlantic Salmon from Chile, 63 Fed. Reg. 31411, 31411 (Dep’t of Commerce June 9, 1998) (final determination). The rates were to 0.21%, 0.24%, 1.36%, 8.27%, and 10.91%, the all others rate was 5.19%. Id. at 31437.
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\textsuperscript{73} Fresh Atlantic Salmon from Chile, 63 Fed. Reg. 40699, 40700 (Dep’t of Commerce July 30, 1998) (amend. final determination).
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\textsuperscript{74} Id.
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\textsuperscript{75} Id.
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\textsuperscript{77} 19 U.S.C. § 1675(a).
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\textsuperscript{78} The only years eligible for Administrative Reviews after the statutory delay and before the required sunset review. See id.
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\textsuperscript{79} Fresh Atlantic Salmon from Chile, 65 Fed. Reg. 48457, 48457 (Dep’t of Commerce Aug. 8, 2000) (preliminary results administrative review); Fresh Atlantic Salmon from Chile, 66 Fed. Reg. 18431, 18432 (Dep’t of Commerce Apr. 9, 2001) (preliminary results
cases, the review discovered a zero or *de minimis* dumping margin, with the two remaining margins at only 1.46% and 3.94%. All five of the original defendant companies were found to have *de minimis* margins in at least one of the Administrative reviews.

When the decision in the Salmon Case came up for its sunset review in 2003, the domestic interested parties who originally filed the dumping petition “expressed no interest in the continuation” of tariffs against the Chilean companies, and as a result all remaining tariffs were eliminated. In essence, the 1998 AD petition was no longer providing any protection to the U.S. fishing industry because the DOC had for the past three years consistently found zero or *de minimis* dumping margins for Chilean exporters.

**C. How the Salmon Case Compares to Other AD Cases**

When compared with most AD cases, dumping margins at all points in the Salmon Case seem insignificant. In 1990, FAST filed a petition with the DOC and ITC accusing Norway of dumping fresh and chilled Atlantic Salmon in the United States. In that case, final dumping margins were determined to be between 18.39% and 31.81% with an “all others” rate of 23.80% (over five times that of the Salmon Case).

administrative review); Fresh Atlantic Salmon from Chile, 67 Fed. Reg. 51182, 51182 (Dep’t of Commerce Aug. 7, 2002) (preliminary results administrative review).

80 Fresh Atlantic Salmon from Chile, 65 Fed. Reg. 78472, 78473 (Dep’t of Commerce Dec. 15, 2000) (final results administrative review); Fresh Atlantic Salmon from Chile, 66 Fed. Reg. 42505, 42505 (Dep’t of Commerce Aug. 13, 2001) (final results administrative review); Fresh Atlantic Salmon from Chile, 68 Fed. Reg. 6878, 6879 (Dep’t of Commerce Feb. 11, 2003) (final results administrative review).

81 See id.

82 Fresh Atlantic Salmon from Chile, 68 Fed. Reg. 51593, 51593 (Dep’t of Commerce Aug. 27, 2003).

83 See Fresh Atlantic Salmon from Chile, 65 Fed. Reg. 78472, 78473 (Dept’ of Commerce Dec. 15, 2000) (final administrative review); Fresh Atlantic Salmon from Chile, 66 Fed. Reg. 4205, 4205 (Dep’t. of Commerce Aug. 13, 2001) (final results administrative review); Fresh Atlantic Salmon from Chile, 68 Fed. Reg. 6878, 6879 (Dep’t of Commerce Feb. 11, 2003) (final results administrative review).


In a comparable case, decided in August of 2003, tariff rates of 36.84% to 63.88% were imposed on frozen fish fillets from Vietnam.\textsuperscript{87} These margins are large, but they are nowhere near the top levels of AD margins/tariff levels set by the DOC.\textsuperscript{88} For example, in May of 2003, dumping margins of 249.39% to 329.33% were imposed against saccharin from the People’s Republic of China.\textsuperscript{89}

It should also be noted that all DOC and ITC determinations are based on valuation of products in U.S. Dollars.\textsuperscript{90} As a result of the price conversion from, for example, pesos to dollars, any shifts in exchange rates can cause a company to be liable for dumping.\textsuperscript{91} This is due to the system of floating exchange rates which allows for exchange rates to vary on a daily basis.\textsuperscript{92} Consequently, through no fault of its own, a foreign exporter can be found to have dumped if exchange rates shift in the wrong direction; this is especially true for companies based in countries whose currency suffers frequent devaluation.\textsuperscript{93}

III. Analysis: Shifting Costs Would Drastically Decrease Protectionism

U.S. AD law enables U.S. industries to legally protect themselves against foreign competition.\textsuperscript{94} The actual process allows for the ultimate decision maker, a representative of the government of the petitioner, to burden defendants with enormous discovery requests, prescribe the time the defendants have to fulfill the request, and require the defendants to submit responses in English, normally their non-native language.\textsuperscript{95} As a result, most defendants immediately must seek expensive U.S. counsel to handle their defense (the Salmon Case cost

\textsuperscript{88} See e.g., Saccharin from the People’s Republic of China, 68 Fed. Reg. 27530, 27533 (Dep’t of Commerce May 20, 2003) (final determination).
\textsuperscript{89} Id.
\textsuperscript{90} See McGee, supra note 6, at 501–04.
\textsuperscript{91} See McGee & Yoon, supra note 3, at 273–74.
\textsuperscript{92} See id. at 274; see also generally N. David Palmeter, Exchange rates and Antidumping Determinations, 22 J. World Trade 73 (1988).
\textsuperscript{93} See generally Palmeter, supra note 92. Further, the DOC’s preferred source for daily exchange rates is the Federal Reserve Bank, but not all countries’ currencies are carried on that system. See Fresh Atlantic Salmon From Chile, 63 Fed. Reg. 2664, 2671 (Dep’t of Commerce Jan. 16, 1998) (preliminary determination). For example, daily exchange rates for Chilean pesos are not carried by the Federal Reserve. See id.
\textsuperscript{94} See McGee & Yoon, supra note 3, at 260.
\textsuperscript{95} See McGee, supra note 6, at 496.
Chilean exporters over $12 million in legal fees\textsuperscript{96}), while the petitioner is allowed to rely on the DOC and ITC to cover any costs of proceeding with the investigation.\textsuperscript{97} In essence, the AD laws replace the United State’s traditional adversarial system of justice with one that is inquisitorial.\textsuperscript{98}

AD laws protect domestic producers at the expense of citizens in both the United States and the accused country because competition decreases.\textsuperscript{99} Domestically, prices are necessarily higher for products protected by AD tariffs.\textsuperscript{100} Even more dramatic are the costs to the U.S. economy as a whole.\textsuperscript{101} A 1995 ITC report concluded that the cost to the U.S. economy of antidumping measures was significantly higher than the benefit to the protected industry.\textsuperscript{102}

Similarly, in the accused country, exports decrease and companies are required to spend time and resources on defending themselves against the charges, instead of focusing on research, development, or company expansion, which ultimately harms the economy.\textsuperscript{103} Additionally, there are social costs that accompany restrictions on trade, for example loss of jobs, slower industry growth, and negative feelings and opinions toward the United States.\textsuperscript{104} In Chile, the Salmon Case was called “a thorn in Chile’s side” which had “the makings of another bitter grudge for Chile against its top trade partner.”\textsuperscript{105}

Conversely, the only financial costs faced by the petitioners in an AD case, as stated previously, are those associated with preparing and filing the petition.\textsuperscript{106} Moreover, if AD tariffs are imposed, the petitioning industry can receive huge financial and market benefits even though the U.S. economy as a whole may suffer.\textsuperscript{107} A simple cost-benefit analysis reveals that there is little to lose and a great deal to gain

\textsuperscript{96}Grape Exporters Pleased with Dumping Decision but Say the Battle Isn’t over Yet, SANTIAGO TIMES, June 27, 2001, available at 2001 WL 5995737.
\textsuperscript{97}See id.
\textsuperscript{98}See id.
\textsuperscript{99}See McGee, supra note 6, at 491, 535–40, 559–60.
\textsuperscript{100}See id. By imposing tariffs on imported products, those tariffs are directly passed onto the consumer in the form of price increases. See id.
\textsuperscript{101}See McGee, supra note 6, at 535–40.
\textsuperscript{102}Corr, supra note 4, at 100.
\textsuperscript{103}See id. at 100–01; McGee, supra note 6, at 540.
\textsuperscript{104}See McGee, supra note 6, at 491, 535–40.
\textsuperscript{106}See McGee, supra note 6, at 536.
\textsuperscript{107}See Corr, supra note 4, at 101; McGee & Yoon, supra note 3, at 278.
for any single U.S. industry that can provide documentation which alleges dumping.  

In much the same way that the increased costs of an AD case cause foreign exporters to limit or eliminate their exports to the United States, if petitioners in AD cases had to pay the costs of investigating and hearing the cases, the total costs for the domestic industry would increase, and the resulting number of frivolous cases would decrease. Simple economics of supply and demand support the contention that as prices for goods or services increase, demand decreases. The same cost-benefit analysis applies here, and the resulting considerations for the use of AD laws would be drastically changed for companies facing potentially very high discovery costs.

It logically follows that, if costs were redistributed, AD cases would only be brought by companies who are facing real cases of dumping rather than those who are merely facing increased foreign competition. For example, FAST may have felt it necessary to seek protection against Norwegian competitors who were selling their products at a 30% dumping level, but would probably have seriously considered whether the benefits of a determination of a tariff at less than 5%, as was true in the Salmon Case, would have outweighed the costs of the AD investigation process.

**Conclusion: Shifting Costs—Little to Lose, Much to Gain**

A change in cost distribution in AD cases would not only benefit many developing economies by eliminating most, if not all, of the protectionist AD cases brought in the United States, but it would also lead to more competition and a more efficient U.S. market. As the current law stands, approximately half the antidumping petitions that are filed with the DOC and ITC do not end in dumping margins. In

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108 See Corr, supra note 4, at 54; McGee & Yoon, supra note 3, at 278.
109 See McGee & Yoon, supra note 3, at 276.
110 Although the DOC and ITC’s antidumping determination is not what one typically thinks of as a service, in this simple model it would follow the same general principles. See e.g., Basic Economic Theory: Supply, Demand and the Laffer Curve, available at http://home.rmci.net/cholton/ECON.HTM (last visited Nov. 16, 2004).
111 See, e.g., id.
112 Cf. McGee, supra note 6, at 535 (stating that many domestic importers may hesitate to do business with foreign suppliers for fear of AD duties).
113 Cf. id.
114 Cf. id.
115 See McGee & Yoon, supra note 3, at 277–78.
116 See USITC HANDBOOK, supra note 21, at E-4.
many other cases, including the Salmon Case, the dumping margins are small and on Administrative Review are revised to be zero or *de minimis*. In the Salmon Case, the parties who originally filed the petition had no interest in continuing the resulting margins when it came up for its sunset review. In essence, they had gotten the majority of the protectionist benefits of the law while Chilean exporters faced the yearly burden of denying the accusations. By redistributing costs to petitioners, cases like the Salmon Case would become economically inefficient for companies to file, and the benefits of the lower number of cases would be felt by both countries. AD laws would only be used when there is real need for protection against foreign companies intending to sell their products below fair market value and the likelihood of harm to the United States arises.

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117 See, *e.g.*, Fresh Atlantic Salmon from Chile, 65 Fed. Reg. 78472, 78473 (Dep’t of Commerce Dec. 15, 2000) (final results administrative review); Fresh Atlantic Salmon from Chile, 66 Fed. Reg. 4205, 4205 (Dep’t of Commerce Aug. 13, 2001) (final results administrative review); Fresh Atlantic Salmon from Chile, 68 Fed. Reg. 6878, 6879 (Dep’t of Commerce Feb. 11, 2003) (final results administrative review).
CONSTITUTIONAL REFERENDUM IN
CHECHNYA AND ITS RELATIONSHIP TO
THE LAW OF SELF-DETERMINATION

CONOR MULCAHY*

Abstract: A common debate among legal scholars focuses on the extent to which the international legal principle of self-determination remains relevant in the post-colonial period. Even those commentators who consider it still to be a significant, active concept in public international law disagree over its actual content. While many suggest that peoples entitled to the right of self-determination have a right to secede and form their own state, scholars disagree as to the circumstances under which the right develops. This Note examines the current status of the law of self-determination in the particular context of Chechnya. It describes how, though the law of self-determination would not allow Chechnya to secede from Russia unilaterally, Russian abuses associated with the March 23, 2003 constitutional referendum in Chechnya violated Chechnya’s right to internal self-determination. Thus, the constitution is void under international law.

Introduction

In late 2002, Russian President Vladimir Putin announced that the government would soon hold a referendum on a new Chechen constitution that would give the territory significant powers of self-government, albeit under the sovereign authority of the Russian Federation (Russia).1 The vote took place on March 23, 2003.2 Election results showed that the overwhelming majority of eligible voters in Chechnya voted to implement the constitution.3 Because the referendum took place during Russian military occupation of Chechnya,

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however, many Chechens and members of the international community questioned the validity of the vote.\textsuperscript{4} Both the decision by Russia to hold the referendum, and the questionable circumstances in which the vote was held,\textsuperscript{5} raised several questions regarding the operation of international law in the domestic sphere.

This Note addresses how the international legal principle of self-determination dictates that the new Chechen constitution is not valid. Part I discusses the historical background of the hostilities between Russia and Chechnya, focusing on the events leading up to the March 23, 2003 vote. Part II explores the law of self-determination and explains its relevance in the non-colonial context. Part III explains how the law, as applied to Chechnya before the March 23 referendum, did not afford any remedy to Chechens seeking independence from Russia. Part IV explains why Russia’s administration of the referendum caused that legal relationship to change.

I. A Bloody History of Rebellion

In order to analyze the legal implications of the March 23 referendum in Chechnya, it is necessary to understand the historical context of the territory’s current dispute with Russia. The Chechens, an indigenous people native to the North Caucasus, have been embroiled in conflict with Russia since the late 18th Century.\textsuperscript{6} The bloodshed began in 1783, when Russia attempted to invade the North Caucasus and declare sovereignty over the region.\textsuperscript{7} In a long guerrilla war that lasted for over half a century, the Chechens, together with their neighbors, the Ingush, successfully repelled the Russian invaders.\textsuperscript{8} Eventually, however, the sheer number of Russian soldiers overwhelmed the residents of the small territories, and in 1859, the Russian government claimed sovereignty over the peoples of the North Caucasus.\textsuperscript{9}

Chechen resistance to Russian rule continued into the early 20th Century.\textsuperscript{10} After the Russian Revolution broke out in 1917, the Chechens and their neighbors attempted to form an independent

\textsuperscript{4} See Chechnya Goes to the Polls, GUARDIAN UNLIMITED (Mar. 31, 2003), at http://www.guardian.co.uk/chechnya/Story/0,2763,926037,00.html (last visited Nov. 20, 2004).
\textsuperscript{5} See id.
\textsuperscript{7} See id.
\textsuperscript{8} See id.
\textsuperscript{9} Id.
\textsuperscript{10} See id.
autonomous republic. However, the Bolsheviks, the revolutionaries who seized control of the Russian government, soon installed a regime of military occupation and reasserted Russian dominance over the territories. Continued aversion to the Russian government caused some Chechens to support the invading German army during World War II. As a result, in 1944, the Soviet authorities ordered the forced deportation of the Chechens and the Ingush to Kazakhstan, where almost one-third of the displaced population died. Thirteen years later, the Soviet government reestablished the Chechen-Ingush Autonomous Soviet Socialist Republic and allowed the Chechens and Ingush to return to their homeland.

A resurgence of Chechen resistance occurred in the late 1980s during the waning days of the Soviet empire. As reform movements swept through Moscow, the Soviet government allowed a Chechen National Congress (CNC) to convene. The CNC immediately passed a resolution calling for the sovereignty of the Chechen-Ingush Republic. When the congress reconvened several months later under the leadership of Chechen nationalist Jokhar Dudaev, the CNC became more radical in its separatist goals. On August 19, 1991, Dudaev took advantage of the Soviet government’s focus on a failed reactionary coup in Moscow and organized protests of civil disobedience in the streets of the Chechen capital, Grozny. Dudaev amassed a National Guard in a few days and used it to storm the local arm of the Soviet government, the Chechen-Ingush Republic Supreme Soviet, forcing the officials there to sign an “act of abdication.” Eager to retain order, the Russian authorities dispatched several envoys to Grozny to establish a provisional government. The Chechens refused to recognize that government and, instead, elected Dudaev

11 See Kline, supra note 6.
12 See id.
13 See id.
14 Id.
15 Id.
17 Id.
18 Id.
19 See id.
20 See id.
21 See Kline, supra note 16.
22 See id.
He subsequently declared Chechnya to be a sovereign state. Although Russian president Boris Yeltsin threatened to use military force to reassert Russian power over the territory, the rest of the Russian government would not authorize such action.

Thus, between November, 1991 and the beginning of 1994, Chechnya was a de facto independent state. Russia refused to recognize Chechnya’s existence (and refused to let any other countries do so either) but otherwise did not meddle in Chechen affairs. Eventually, though, the Russian government used Chechen discontent with Dudaev’s rule as an opportunity to reassert its sovereignty over Chechnya, by supporting anti-Dudaev opposition forces financially and militarily. Toward the end of 1994, constant battles between the pro-Dudaev National Guard and the Russian-backed opposition forces raged in the streets of Grozny. Finally, on December 11, 1994, Yeltsin ordered Russian troops to invade Chechnya.

The war that transpired during the next two years was horrific and deadly for both sides of the conflict. The Russian attack caused the Chechen people to unite once again against their common enemy - the invader. The Chechen rebel army employed guerrilla warfare tactics in their attempt to drive off the Russians, but the constant bombing of Chechen cities by Russian planes devastated the country. Because Russia also suffered countless casualties in its young and inexperienced army, it eventually attempted to resolve the crisis. The negotiated peace plan called for Russian help in rebuilding Chechnya’s shattered infrastructure and increased governmental autonomy for the territory.

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23 Id.
25 See Kline, supra note 16.
27 Id.
28 Id.
30 Id.
31 See id.
32 Id.
33 See id.
34 See Graham, supra note 29.
35 See id.
The years immediately following the cessation of hostilities were disastrous for Chechnya.\footnote{36 \textit{See Fiona Graham, 1997–1999: Peace, Instability and Internal Unrest, TELEGRAPH.CO.UK, at http://www.telegraph.co.uk/news/main.jhtml?xml=/news/campaigns/chechnya/chechtimeline.xml (last visited Nov. 20, 2004).}} Plagued by a failing economy, unprecedented unemployment, and an irreconcilably damaged infrastructure, Chechnya became a haven for criminals and lawlessness.\footnote{37 \textit{Id.}} Simultaneously, a fundamentalist interpretation of Islam, known as Wahhabism, became popular among many Chechens.\footnote{38 \textit{Id.}} Constant fighting took place between forces loyal to the new Chechen president, Aslan Maskhadov, and those advocating for a more radical Islamist state.\footnote{39 \textit{See id.}}

Maskhadov soon became frustrated with Moscow’s continued indifference towards Chechnya.\footnote{40 \textit{See id.}} He proclaimed that Russia had defaulted on its promises under the peace treaty and refused to negotiate with Russia without a guarantee of Chechen independence.\footnote{41 \textit{See Graham, supra note 36.}} Additionally, the leaders of the more radical factions in Chechnya authorized terrorist actions in Russia, hoping to force the government to recognize Chechen sovereignty.\footnote{42 \textit{See id.}}

Constantly under threat of guerrilla attacks and distressed at the inability to access valuable Chechen oil reserves, the Russians reconsidered the possibility of invasion.\footnote{43 \textit{See id.}} When a group of apartments in Moscow were bombed in September of 1999, the Russian government blamed Chechen rebels, although the leaders of the Chechen resistance movement denied responsibility for the action.\footnote{44 \textit{See id.}} The newly-appointed Russian Prime Minister, Vladimir Putin, vowed to crush the Chechen insurgents and, on September 30, 1999, he ordered Russian ground troops into Chechnya.\footnote{45 \textit{See id.}}

Within several weeks, it was evident that the second Chechen war would closely mimic the first.\footnote{46 \textit{See Fiona Graham, 1999-Aug 2001: War Once More, TELEGRAPH.CO.UK, at http://www.telegraph.co.uk/news/main.jhtml?xml=/news/campaigns/chechnya/chechtimeline.xml (last visited Nov. 20, 2004).}} The warring factions within Chechnya again united against Russia, and the bombing of Grozny and other
towns caused an immense amount of destruction and death. Yet again, the Chechen rebels inflicted mass casualties on the invading Russian army. Concurrently, Chechens engaged in many terrorist and guerrilla attacks against Russian troops in Chechnya. However, the Russian army eventually sacked Grozny, and the Russian people elected Putin President of Russia for his tough policies regarding Chechnya. Putin appointed Islamic cleric Akhmed Kadyrov as chairperson of a new Russian-backed government in the republic and reasserted Russian dominance over the region.

Over the next two years, sporadic fighting between Chechen guerrillas and the occupying Russian troops continued. The international community accused the Russian military of terrorizing the civilian population of Chechnya and engaging in numerous human rights abuses, including secret arrests and “disappearances.” As more information regarding Russian atrocities emerged, Putin’s policies toward the troubled region became increasingly less popular in Russia and in the rest of the world.

After the September 11, 2001 terrorist attacks, Putin characterized the continuing Russian military actions in Chechnya as his country’s own “war on terrorism.” Accordingly, Western criticism of Putin’s actions decreased somewhat in 2002. The Russian government repeatedly claimed that the war in Chechnya was over, but frequent Chechen bombings of Russian targets indicated otherwise. The most shocking evidence of the war’s continued existence became known to the international community on October 23, 2002, when a group of Chechen

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47 See id.
48 See id.
49 See id.
50 See id.
51 See Graham, supra note 46.
52 See id.
53 See id.
56 See id. But see Jonathan Fowler, U.N. Panel Rejects Censure of Russia on Chechnya Abuses, WASH. POST, Apr. 17, 2003, at A15 (reporting that most of the countries supporting a resolution censuring Russian actions in Chechnya were from the West).
57 See Graham, supra note 55.
separatists took 700 people hostage at a Moscow theater. The Russian authorities pumped a gas through the theater’s vents to subdue the perpetrators and then raided the theater, but the gas killed over 100 of the hostages in the process. The incident was a gigantic embarrassment for the Putin administration and increased international pressure on the Russian government to find an alternate solution to the problems in Chechnya. Two weeks later, President Putin announced the government’s plan for a Chechen referendum.

Putin set the date of the vote for March 23, 2003. Very soon thereafter, international observers criticized the decision, arguing that the Chechens would be too afraid to vote against the constitution under the watchful eye of the Russian troops who occupied the territory. Notably, the chief negotiator regarding Chechen affairs for the Council of Europe, Lord Judd, resigned in protest when Russia insisted on holding the referendum on the proposed date.

Notwithstanding the critics’ disapproval of the timing of the referendum, the vote took place on March 23 as planned. In a decision that manifested Russia’s interest in the outcome of the referendum, Russia allowed the 36,000 Russian troops stationed in Chechnya to vote. An overwhelming 95.5% of the voters approved the constitution. Although most international bodies refused to send representatives to monitor the elections for fear that they would have to endorse the results, the few international observers who did scrutinize the electoral process found the outcome legitimate. In contrast, Human Rights Watch quickly questioned the validity of the election results:

58 Graham, supra note 3.
59 See id.
60 Id.; see Steele, supra note 1, at 17.
61 See id.
62 Walsh, supra note 2, at 17.
63 See Tom Parfitt, We’ll Not Vote in Your Referendum, Chechens Tell Russia, Daily Telegraph (London), March 16, 2003, at 34.
65 Nick Paton Walsh, supra note 2, at 17.
66 See Parfitt, supra note 63.
67 See Graham, supra note 3.
Official reports on the referendum described overcrowded polling stations, an unprecedentedly high turnout, and an enthusiastic and hopeful Chechen population demonstrating support for the initiative by dancing and singing in the streets. Reports by journalists and other observers who traveled to Chechnya independently contrasted sharply with this picture and cast doubt on the fairness of the electoral process. They reported only small numbers of voters at polling stations and noted that Grozny, the capital, was almost deserted (although some people in Grozny joined a demonstration against “disappearances”).

Despite the criticism by human rights groups, on April 16, the United Nations High Commission for Human Rights (UNHCHR) refused to adopt a resolution condemning Russian actions in Chechnya, a decision that further supported the validity of the March 23 referendum.

II. THE GREAT DEBATE OVER THE LAW OF SELF-DETERMINATION

International lawyers often refer to the concept of “self-determination of peoples” when discussing the emergence of new states. Although the term is prevalent in a host of international legal instruments, much of the analysis by international legal scholars regarding self-determination has focused on adequately defining it. One multilateral treaty described it as follows: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cul-

tural development.” However, defining exactly what “political status” means and understanding exactly how self-determination functions as a principle of international law is significantly problematic. Therefore, in order to comprehend the law as it applies to places like Chechnya today, it is necessary to examine the development of the doctrine.

Self-determination first took on significant meaning in international legal discourse during the formation of the United Nations (UN) in 1945. Chapter 11 of the UN Charter discussed the need for effective self-government in “non self-governing territories” (NSGTs), namely the colonies that were still in existence after the war. The UN Charter invoked the principle of self-determination in order to legitimize decolonization efforts. At that time, the UN did not intend for the principle to be legally binding; NSGTs needed to get permission from their colonizers in order to become independent. As the law developed, however, the international community began to recognize that NSGTs had an inherent right to self-determination. It is important to note that even after this momentous shift in state practice, the law of self-determination never guaranteed outright independence to NSGTs, but only sanctioned a right for some type of self-governance.

Nevertheless, a significant number of the new states that emerged in the second half of the 20th Century were former colonies. In addition, secession was the end result of the self-determination process for several of the NSGTs. Professor Grant described the reasoning behind this momentous shift in state practice as follows: “[NSGTs] had juridical status independent of their ‘metropolitan’ or ‘parent’ state. Therefore, to break them away from the metropole did not violate the

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73 ICCPR, supra note 72, art. 1, 999 U.N.T.S. at 173.
74 See Hannum, supra note 72, at 773–74.
75 See id.
77 See U.N. Charter art. 73; Grant, supra note 71, at 178.
78 See Grant, supra note 71, at 178.
79 See id. at 177; Hannum, supra note 72, at 775.
80 See Hannum, supra note 72, at 775; see generally Western Sahara, 1975 I.C.J. 12 (Oct. 16) (recognizing the right of NSGTs to self-determination).
82 See Grant, supra note 71, at 182–84.
83 See id.
territorial integrity of the metropole.”

Thus, state practice arguably made unilateral secession by an NSGT acceptable under international law.

Legal scholars disagree significantly about the relevance of self-determination as an international legal concept in the post-colonial period. The principal difficulty involved in contemporary interpretation of the doctrine is the inherent tension between a people’s right to determine their own interests and a state’s right to territorial integrity. UN General Assembly Resolution 2625 outlines the conflict by affirming the right of a people to determine its own political, social, and economic destiny, but it also warns that the right cannot “be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples . . . .”

Despite the resolution’s admonition, some experts believe that states should construe the right of self-determination to allow peoples who share a common cultural and ethnic background to have an inherent right to secede unilaterally from the states that govern them. Generally, however, the international legal community does not recognize that such a right exists under current international law. Commentators with views on the opposite extreme suggest that self-determination should only apply to colonies, and that to hold otherwise would destroy the venerable concept of territorial integrity. However, as Professor Hannum states, “[c]ementing the world’s frontiers forever is an overly conservative position.” Moreover, the inter-

84 Id. at 178.
85 See id. at 177. Grant notes, however, that “[s]tatehood since World War II . . . has been achieved through secession only rarely. Statehood through agreement by contrast has been prolific.” Id. at 175.
86 See, e.g., Cass, supra note 81, at 31; Grant, supra note 71, at 179; Hannum, supra note 72, at 776.
87 See Declaration on Friendly Relations, supra note 72, at 124.
88 Id.
89 See Hannum, supra note 72, at 776 (footnote omitted); Charney, supra note 76, at 457 (describing the debate).
90 Hannum, supra note 72, at 776 (“[S]elf-determination defined as the right to create a new state would necessarily imply a right to secession. However, no state, no foreign ministry, and very few disinterested writers or scholars suggest that every people has the right to a state, and they implicitly or explicitly reject a right to secession.”) (footnote omitted).
91 Charney, supra note 76, at 457 (describing the debate).
92 Hannum, supra note 72, at 776.
national support for states formed during the breakup of the former Yugoslavia, and the international community’s repeated call for an independent Palestine, arguably indicate a general *opinio juris* that self-determination can apply outside of the colonial context.\(^{93}\)

Many contemporary legal theorists posit that the correct interpretation of self-determination in the post-colonial era lies somewhere in between the extremes.\(^{94}\) These scholars argue that the law of self-determination should allow minority groups to have a significant degree of autonomy within their established state and should sanction unilateral secession only in very limited circumstances.\(^{95}\) This position seems to outline the current state of self-determination in the international legal system.\(^{96}\)

When the Canadian Supreme Court wrote its advisory opinion regarding the legality of possible secession by Quebec, it accepted this view as the definitive statement of self-determination law as it exists today.\(^{97}\) In response to the contention that the law allowed Quebec to secede, the Court stated the following:

> There is no necessary incompatibility between the maintenance of the territorial integrity of existing states, including Canada, and the right of a “people” to achieve a full measure of self-determination. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity.\(^{98}\)

The Court then outlined two exceptions to that pronouncement.\(^{99}\) It held that, in a non-colonial context, a people has a right to secede under international law if it is “subject to alien subjugation, domina-

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\(^{93}\) See *Cass*, *supra* note 81, at 33.

\(^{94}\) See, e.g., *Charney*, *supra* note 76, at 464; *Hannum, supra* note 72, at 776–77.

\(^{95}\) See, e.g., *Charney, supra* note 76, at 464; *Hannum, supra* note 72, at 776–77.


\(^{97}\) See *Secession of Quebec, [1998] 2 S.C.R.* at 276–91. Cf. *Charney, supra* note 76, at 467 (“Since the opinion was written in the context of the Canadian constitutional structure and the Supreme Court is an organ of the central government it may not be considered completely neutral on the subject. Nevertheless, the Court resorted to international law authorities . . . .”).

\(^{98}\) *Secession of Quebec, [1998] 2 S.C.R.* at 284.

\(^{99}\) See *id.* at 285–86.
tion or exploitation” or is “blocked from the meaningful exercise of its right to self-determination internally.”

III. ANOTHER WAR: THE BATTLE BETWEEN CHECHNYA AND TERRITORIAL INTEGRITY

Relying upon the current state of the law as expressed in the Se-cession of Quebec opinion, it is quite unlikely that international law would permit Chechnya to secede unilaterally from Russia. Despite the Chechens’ valid demand for rights as minorities, they are not under the control of a colonial power. Unlike NSGTs, Chechnya retains no juridical status of its own, and thus is linked inextricably to Russia. The Chechens would not be able to separate their territory from Russia without disrupting the integrity of Russia’s existing geographical structure. Thus, such actions would necessarily interfere with Russia’s right to territorial integrity.

Whether or not the exceptions to the law of self-determination are relevant to the situation in Chechnya is a more difficult question. International law may recognize a right to secession if the Chechens could show that they are victims of genocide, are “subject to alien subjugation,” or are blocked from internal means of self-determination.

The genocide exception does not apply to the situation in Chechnya. The Russian army inflicted heavy casualties upon the Chechen rebel army and civilian population in both wars, but the Russians did not do so without provocation. Moreover, the wars did not arise because of an explicit attempt by Russia to destroy the entire Chechen people.

On the other hand, one could argue that, because Chechnya was a de facto independent state from 1991 to 1994, the people of Chech-

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100 Id. at 285; see also Hannum, supra note 72, at 776–77 (recognizing an exception for victims of genocide and for groups that cannot achieve “a minimum level of minority rights” within the governmental structure of their state).
102 See id. at 285.
103 Cf. Grant, supra note 71, at 178.
104 See Declaration on Friendly Relations, supra note 72, at 124.
105 See id.
107 See id.
109 See Hannum, supra note 72, at 776–77.
110 See Graham, supra note 46.
111 See Hannum, supra note 72, at 776–77.
naya are “subject to alien subjugation, domination or exploitation outside a colonial context” and therefore are allowed to secede.\(^{111}\) However, the lack of the international community’s formal recognition of Chechnya during that time indicates that international law did not sanction the independence that Chechnya enjoyed during that period.\(^{112}\) Thus, because Chechnya was never actually independent under international law, it is unlikely that the “alien subjugation” exception applies.\(^{113}\)

The final exception to the general rule promoting the doctrine of territorial integrity arises when “the ability of a people to exercise its right to self-determination internally is somehow being totally frustrated.”\(^{114}\) Professor Hannum describes the circumstances of this exception’s application as follows:

The . . . exception might arise when a group, community, or region has been systematically excluded from political and economic power or when a minimum level of minority rights or a reasonable demand for self-government has been consistently denied. I want to emphasize that this exception would not apply when a central government refuses to agree to whatever the minority or the region wants. Rather, it would apply only when the central government has been so intransigent that, for example, it refuses to allow the minority to speak its own language, it excludes minority members from participation in the parliament, or it refuses to accede to demands for minimal local or regional power-sharing.\(^{115}\)

Although Chechens are certainly a minority voice in Russian government, they nevertheless have achieved a limited amount of representation.\(^{116}\) Russia’s willingness over the past twenty years to sanction the implementation of local governing bodies, such as the CNC, amounts to significant proof of the existence of Chechens’ access to internal self-determination.\(^{117}\) Although the Chechens may not have enough political support in the federal government to authorize their


\(^{112}\) See Kline, supra note 26. See also Charney, supra note 76, at 463 ("One has the sense that the international community accepted the view that Chechnya should remain a part of Russia.").


\(^{114}\) Id. at 286.

\(^{115}\) Hannum, supra note 72, at 777.

\(^{116}\) See Kline, supra note 16.

\(^{117}\) See id.
own independence though domestic law, they have the minimum amount of representation necessary to make the internal self-determination exception inoperable.\textsuperscript{118} Thus, because all of the exceptions are irrelevant to the situation in Chechnya, international law would not allow Chechnya to secede unilaterally.\textsuperscript{119}

IV. OPENING THE DOOR TO VALID SELF-DETERMINATION CLAIMS

Because Chechnya has no legal right to secede, the March 23 referendum was unnecessary; Russia had no legal obligation to hold the vote.\textsuperscript{120} As authorized by the UN Charter, Russia is entitled to defend any threat to its territorial integrity, because such is a matter of domestic concern.\textsuperscript{121} If Russia had not held the March 23 referendum, those Chechens seeking independence would have received no help from the law of self-determination.\textsuperscript{122}

However, even though international law did not direct Russia to hold a referendum in Chechnya, President Putin believed that doing so would be politically expedient.\textsuperscript{123} Therefore, against the chagrin of many members of the international community, Chechens (and soldiers of the Russian army who were occupying Chechen territory) went to the polls on March 23 and overwhelmingly approved a new constitution that supported Russian sovereignty over the region.\textsuperscript{124} If the international pundits were correct in identifying the election as a sham, the law of self-determination, previously unhelpful to the Chechens, actually becomes quite relevant to their future.

Although international law generally does not allow for unilateral secession in the non-colonial context, the law supports secession if it takes place through the existing constitutional structure of the state from which the territory wishes to secede.\textsuperscript{125} Thus, if the people of Chechnya were able to garner enough political support in the central government to pass a law allowing for Chechen independence, seces-

\textsuperscript{118} See Hannum, \textit{supra} note 72, at 777.
\textsuperscript{119} See \textit{Declaration on Friendly Relations, supra} note 72, at 124.
\textsuperscript{120} See id.
\textsuperscript{121} See U.N. Charter art. 2, para. 7 (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . . .”); see also Declaration on Friendly Relations, \textit{supra} note 72, at 124 (making a similar statement).
\textsuperscript{122} See Declaration on Friendly Relations, \textit{supra} note 72, at 124.
\textsuperscript{123} See Steele, \textit{supra} note 1, at 17.
\textsuperscript{124} See Walsh, \textit{supra} note 2, at 17.
\textsuperscript{125} See Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 295 (“[P]eoples are expected to achieve self-determination within the framework of their existing state.”).
sion in that context would be valid under international law. Although the March 23 referendum asked the Chechens if they wished to adopt a new constitution, the real issue at hand was whether a majority would surrender any hope for independence in exchange for the promise of stability. In other words, one could categorize the referendum as the most fundamental type of internal self-determination.

Admittedly, it is true that the referendum did not ask the Chechens whether they wanted to secede. However, the referendum did ask whether the Chechens desired to submit to Russian authority by approving the new constitution. Obviously, a person could not vote to be subject to Russian sovereignty and simultaneously support Chechen independence; the two positions are mutually exclusive. Thus, the referendum implicitly inquired if the voter supported Chechen independence.

In theory, by putting the question to a vote, the Russian government allowed the voters to use the existing Russian governmental structure to manifest their wishes. Consequently, because the referendum implicated internal self-determination issues, which are not subject to the limitations of territorial integrity, Russia forfeited its claims to the protection of the doctrine by holding the referendum. Still, if the vote had been fair, without Russian governmental influence, Chechens who voted against the constitution would have no remedy at international law. The will of the majority, properly expressed in a vote within the constitutional framework of the dominant state, is in accord with the fundamental principles of self-determination.

The problem, however, is that the election was not fair. With thousands of Russian troops in the streets, and the fear of future “disappearances” on their minds, many Chechens voted for the constitution because they feared that a “no” vote would bring violent reprisals from the Russian army. In addition, all members of the occupying

126 See id.
127 See Walsh, supra note 2, at 17.
129 See Steele, supra note 1, at 17.
130 See id.
131 See id.
132 See Walsh, supra note 2, at 17.
134 See id.
135 See id.
136 See id.
137 See Chechnya Goes to the Polls, supra note 4.
138 See id.
Russian military could vote.\textsuperscript{139} The few international observers who agreed to monitor the voting process affirmed the results, but many of them came from countries that have a questionable record of election abuses themselves.\textsuperscript{140} Indeed, many of the observers hailed from other former Soviet republics.\textsuperscript{141}

Some anecdotes by reporters illustrate the illegitimacy of the referendum.\textsuperscript{142} A reporter from the British newspaper \textit{The Guardian} walked into a polling location and cast a vote in favor of the constitution without having to present any identification.\textsuperscript{143} In addition, a journalist witnessed the Russian electoral commission representative at one polling booth write on a piece of paper the number of people who had voted.\textsuperscript{144} Out of 1,085 potential voters, 1,002 had voted by 6 p.m.\textsuperscript{145} However, the actual time was still only 3:45 p.m.\textsuperscript{146} Such practices certainly indicate a tainted election.\textsuperscript{147}

It is evident that the actions of the Russian government and military surrounding the March 23 referendum effectively blocked the Chechen people from meaningful exercise of their right to internal self-determination.\textsuperscript{148} The Russians were under no legal obligation to hold the referendum, but once they sanctioned the vote, they had a good faith duty to let the Chechens freely exercise their right to internal self-determination.\textsuperscript{149} Although it is quite possible that the majority of Chechens would support the establishment of the new constitution, the actions of the Russian government have made it impossible to know what the will of the Chechen majority actually is.\textsuperscript{150} As such, the international community should not accept the legality of the new constitution until the Russian military retreats from Chechnya and the Chechens hold a referendum that is genuinely free and fair.\textsuperscript{151}

\begin{itemize}
\item \textsuperscript{139} See id.
\item \textsuperscript{140} Uzzell, supra note 68.
\item \textsuperscript{141} Id.
\item \textsuperscript{142} See Walsh, supra note 2, at 17.
\item \textsuperscript{143} Id.
\item \textsuperscript{144} Id.
\item \textsuperscript{145} Id.
\item \textsuperscript{146} Id.
\item \textsuperscript{147} See Walsh, supra note 2, at 17.
\item \textsuperscript{148} See Secession of Quebec, [1998] 2 S.C.R. at 295; Chechnya Goes to the Polls, supra note 4.
\item \textsuperscript{149} See Secession of Quebec, [1998] 2 S.C.R. at 285–86; Chechnya Goes to the Polls, supra note 4.
\item \textsuperscript{150} See Walsh, supra note 2, at 17.
\item \textsuperscript{151} See id.
\end{itemize}
CONCLUSION

The law of self-determination, in a non-colonial context, is only narrowly operative. However, the people of a territory may secede if their parent country subjects them to genocide or other forms of significant subjugation, or if their parent country denies them the meaningful exercise of internal self-determination. The people of Chechnya do not fall into these categories, and therefore have no right to unilateral secession. However, the March 23 referendum opened the door to internal self-determination claims by Chechnya. The Russian government’s interference with the referendum breached its duties under the law of internal self-determination. Therefore, the constitution supposedly adopted by the Chechens is void.
SOUR GRAPES: THE COMPRIMISING EFFECT OF THE UNITED STATES’ FAILURE TO PROTECT FOREIGN GEOGRAPHIC INDICATIONS OF WINES

Mark Silva*

Abstract: The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) is the first significant multilateral agreement to expressly provide global protection to geographic indications (GIs) of wine. Although the United States is a party to this agreement, this Note argues that it has failed to bring domestic legislation in conformity with the mandates of the TRIPS Agreement regarding wine. While this has benefited many domestic vintners at the expense of their foreign counterparts, this Note also argues that the same failure may ultimately result in the exploitation of U.S. vintners as well. This point is illustrated by the current situation faced by the Napa Valley Vintners Association. Hongye Grape Wine Co., a winery in Beijing, has applied to register the GI “Napa Valley” as a trademark for use on wines that will be made from Chinese grapes and sold in China. Given the United States’ unwillingness to protect foreign GIs domestically, however, this Note concludes that in circumstances such as this, the United States cannot expect other countries to protect domestic GIs abroad.

Introduction

Many products consumers purchase each day identify themselves by referring to the geographic locations from where they originate.1 Products that typically incorporate geographic phraseology into their names include such things as cheeses, wines, and even potatoes.2 This

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popular practice, known as identifying products by using geographic indications (GIs), is an extremely valuable marketing tool in the present global economy. It allows products to be identified with the quality and reputation of a particular geographic region. Because of the latent value associated with this, countries throughout the world are attempting to negotiate trade agreements that ensure when a GI is used to identify a product, it accurately represents that product’s true place of origin.

So far, the most significant of these agreements has been the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), which provides protection for GIs generally and protection for GIs of wine in particular.

While the United States is a party to the TRIPS Agreement, it has not brought U.S. domestic law into conformity with its obligations under the TRIPS Agreement, especially with regards to the protection of GIs of wines. The European Union (EU), which was the driving force behind the TRIPS provisions governing GIs, has been stern in its criticism of the United States for its failure to abide by the TRIPS Agreement. The EU’s collective discontent merely echoes that of European vintners who have long complained about the use of European GIs such as Champagne and Chablis on U.S. wines.

Ironically, however, some U.S. vintners have recently found themselves in the shoes of their EU counterparts. A winery in Beijing,
Hongye Grape Wine Co. (HGW), has applied to register the term “Napa Valley” as a trademark for use on wines that will be made from Chinese Grapes and sold in China.\textsuperscript{11} In response, the Napa Valley Vintners Association (NVVA) has filed actions in Chinese court to prevent this registration.\textsuperscript{12}

This Note discusses whether the United States can protect the GIs of domestic vintners like the NVVA, given its current position with respect to the TRIPS Agreement and ongoing resistance to EU pressure for greater protection for GIs. Part II provides background on the development of GIs and their incorporation into the TRIPS Agreement. Part III examines the relevant TRIPS GI provisions and U.S. GI legislation, analyzing the legislation’s shortcomings with respect to the United States’ obligations under the TRIPS Agreement. This Note then briefly discusses the current situation faced by the NVVA as a result of HGW’s attempted registration of “Napa Valley” as a trademark. Finally, Part IV concludes that the United States needs to change its current position on the TRIPS Agreement if it is to be able to maintain a tenable position in protecting GIs that domestic vintners use in foreign markets.

I. Background

GIs have long been recognized as an effective method by which to identify goods that possess some unique qualities because of environmental factors, processing methods, or manufacturing skills specific to the region from where they originate.\textsuperscript{13} Wine is a quintessential example of a product that relies on a GI because, as it is well known, different environments produce different wine grapes and, thus, wines of different characteristics.\textsuperscript{14}

As particular regions, and their GIs, became associated with desirable products, competitors sought to exploit this recognition by marketing their products under the famed GIs.\textsuperscript{15} Consequently, in an effort to protect both consumers and legitimate producers from this type of false advertising, regulation of GIs emerged.\textsuperscript{16}

Because GIs are understood by consumers to denote the origin and quality of products, laws prohibiting the use of false GIs are intended to protect consumers from being misled into believing that

\textsuperscript{11} See Didier’s, supra note 10; Emert, supra note 9.
\textsuperscript{12} See Didier’s, supra note 10; Emert, supra note 9.
\textsuperscript{13} See Lindquist, supra note 1, at 312; Rangnekar, supra note 2, at 1.
\textsuperscript{14} See Maher, supra note 5, at 1884.
\textsuperscript{15} See id. at 1884.
\textsuperscript{16} See id. at 1885–86; Rangnekar, supra note 2, at 13, 14.
what they are buying is a genuine product with specific qualities, when in fact they are getting a mere imitation. Thus, the guarantees of origin provide consumers assurances against deception and confusion.

The producer-protection element has its basis in unfair competition. Since the price these products command can depend a great deal on where they originated, protection of GIs prevents imitators from free-riding on the reputation of genuine products. By assuring producers of their products’ unique identity, GIs can be used by producers as a way to market their products, limit the areas of production, and provide monopolistic protection to the regional notoriety.

Countries began protecting GIs as early as the 18th century, when trade began to expand and the value of GIs became apparent. Although some international agreements were consummated on the matter, on the whole, GIs received little international protection prior to the TRIPS Agreement. Moreover, none of the agreements specifically dealt with wine or spirits. The TRIPS Agreement is the first attempt at offering global protection for GIs both generally and for wine in particular.

The protection of GIs for wines was a very controversial issue during the negotiation of the TRIPS Agreement. The EU fought hard for this protection, pitting it against many of the other major wine producing countries in the World Trade Organization (WTO), including the United States. In the end, the EU’s persistence resulted in a provision which required WTO members to develop laws to prevent the use of GIs on wines that do not originate from the geographical area indicated. Debate still lingers, however, over how
much protection should be given to GIs that have long been used beyond their boundaries.29

The United States and the EU have been at the forefront of this long-standing debate.30 Having one of the most diverse portfolios of protected GIs, the EU has continually pushed the United States to comply with the TRIPS provisions on GIs since its passage.31 The EU has targeted the United States in particular because U.S. vintners continue to use a significant number of European GIs on wine produced in the United States.32 Instead of succumbing to the EU’s pressure, the U.S. Congress passed the Taxpayer Relief Act of 1997, which included provisions that further protected U.S. vintners’ use of European GIs in spite of the mandates of the TRIPS Agreement.33 The EU has insisted that the U.S. legislation violates the mandates of the TRIPS Agreement, but the United States has remained steadfast in its position.34

Now, years after shrugging off the concerns of the European vintners and passing legislation that undercuts the TRIPS Agreement, the United States is facing a situation where it is relying on adherence to TRIPS by China, another WTO member, to protect the interests of U.S. vintners.35 Because China only recently joined the WTO, it is still in the process of modifying a host of domestic laws in order to conform with WTO requirements.36 While China has stated its intention to fully comply with its international obligations, including the TRIPS Agreement, it is nonetheless an open question as to how China will handle HGW’s registration of “Napa Valley” as a trademark.37 The result of the NVVA actions in Chinese court will not be known for a while since Chinese courts usually take two years to rule on the validity of a trademark.38

29 Lindquist, supra note 1, at 310.
30 Id. at 310, 329.
31 See Lindquist, supra note 1, at 319; Rangnekar, supra note 2, at 11.
32 Lindquist, supra note 1, at 319–20.
33 See 26 U.S.C. § 5388(c); 27 C.F.R. § 4.24; Lindquist, supra note 1, at 310, 327.
34 See 26 U.S.C. § 5388(c); 27 C.F.R. § 4.24; Lindquist, supra note 1, at 329.
35 See Didier’s, supra note 10; Emert, supra note 9.
38 Emert, supra note 9.
II. Discussion

A. Geographic Indications and the TRIPS Agreement

The TRIPS Agreement contains three provisions that deal exclusively with GIs.\(^\text{39}\) Article 22 of the TRIPS Agreement provides general protection for GIs, Article 23 provides additional protection for GIs for wines and spirits, and Article 24 imposes an obligation on participating countries to further negotiate to increase protections for GIs for wines and spirits.\(^\text{40}\) In addition, Article 24 establishes exceptions to the general prohibitions.\(^\text{41}\)

1. Article 22—Protection of Geographical Indications

   Article 22 defines GIs as “indications which identify a good as originating in the territory of a [WTO] Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.”\(^\text{42}\) The Article requires member countries to provide legal means to prevent the use of any means in the designation or presentation of a good that indicates or suggests a false GI that would mislead the public as to its true geographical origin.\(^\text{43}\) In addition, members must refuse or invalidate the registration of a trademark that contains or consists of a GI that would mislead the public as to the true place of origin.\(^\text{44}\)

2. Article 23—Additional Protection for Geographic Indications for Wines and Spirits

   Article 23 requires member countries to enact laws that prohibit the use of false GIs on wines and spirits, even where the true origin of a good is indicated or the GI is accompanied by expressions such as “kind,” “type,” “style,” or the like.\(^\text{45}\) Furthermore, Article 23 allows for the refusal or invalidation of trademarks that contain or consist of GIs identifying wines or spirits when they do not originate in the place indicated.\(^\text{46}\) Article 23, however, is significantly different from Article

\(^{39}\) See TRIPS Agreement, supra note 6, arts. 22–24; Lindquist, supra note 1, at 316.
\(^{40}\) See TRIPS Agreement, supra note 6, arts. 22–24; Lindquist, supra note 1, at 316.
\(^{41}\) See TRIPS Agreement, supra note 6, arts. 22–24; Lindquist, supra note 1, at 316.
\(^{42}\) TRIPS Agreement, supra note 6, art. 22.
\(^{43}\) Id.
\(^{44}\) Id.
\(^{45}\) Id. art. 23.
\(^{46}\) Id. art. 23.
22 because it does not require that the trademark be misleading for
the provision to be invoked.\textsuperscript{47} Rather, it is only in the case of ho-
monymous GIs for wines or spirits that misconception in the public
eye is considered.\textsuperscript{48} Finally, Article 23 requires negotiations to be un-
dertaken in the Council of TRIPS (Council) to establish a multilateral
system of notification and registration.\textsuperscript{49}

3. Article 24—International Negotiations; Exceptions

Article 24 explicitly obligates member countries to enter into nego-
tiations aimed at increasing the protection for GIs for wines and spirits,
and, as a precautionary measure prevents member countries from using
the exceptions listed in Article 24 as an excuse to avoid further negotia-
tions.\textsuperscript{50} In addition, in order to protect the status quo in countries that
provide greater protection for GIs than what is called for under TRIPS,
Article 24 prohibits member countries from diminishing protection for
GIs that existed prior to the TRIPS Agreement coming into force.\textsuperscript{51}

Article 24 provides several exceptions to the general rules stated
in Articles 22 and 23.\textsuperscript{52} First, a member country does not need to pre-
vent the continued use of a GI of another member country identifying
wines or spirits if that GI has been used continuously by a national
of that country for (a) at least ten years prior to April 15, 1994, or (b)
in good faith prior to that date.\textsuperscript{53} Second, in the case of a good faith
application or registration of a trademark which incorporates a GI,
Article 24 provides that the validity or eligibility will not be prejudiced
if the trademark is acquired or registered (a) prior to the date of ap-
lication of its provisions, or (b) before the GI has been protected in
its country of origin.\textsuperscript{54} Finally, in the case where a GI has become a
common name for a good, or the GI has become synonymous with
the customary name of a grape variety within the country, that mem-
ber country does not need to protect the GI.\textsuperscript{55}

Article 24 also grants the Council the power to review implementa-
tion of these provisions from time to time and allows the Council to

\textsuperscript{47} See TRIPS Agreement, supra note 6, art. 23; Rangnekar, supra note 2, at 4.
\textsuperscript{48} TRIPS Agreement, supra note 6, art. 23; see Rangnekar, supra note 2, at 4.
\textsuperscript{49} TRIPS Agreement, supra note 6, art. 23.
\textsuperscript{50} Id. art. 24.
\textsuperscript{51} Id.
\textsuperscript{52} See id.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} TRIPS Agreement, supra note 6, art. 24.
take action (upon agreement) to facilitate and further the objectives of the Article.\textsuperscript{56} Thus, the Council is empowered to actively oversee compliance with these provisions.\textsuperscript{57} This oversight is minimal in practice, however, because the Council meets infrequently and takes only a minor role in resolving disputes.\textsuperscript{58} As a result, member countries are expected to comply with the Article’s provisions and carry out negotiations on their own initiative.\textsuperscript{59}

\textbf{B. Protection for GIs Under Current U.S. Legislation}

U.S. legislation, thus far, has fallen woefully short of incorporating the broad-based protections outlined in the TRIPS Agreement.\textsuperscript{60} Although Congress amended U.S. trademark law in 1996 so that it would comply with the TRIPS Agreement, it failed to do the same for existing Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) regulations dealing with GIs.\textsuperscript{61} In fact, not only did Congress fail to amend the ATF regulations, but it actually codified the portion of the ATF regulations that is in direct conflict with the GI provisions of the TRIPS Agreement.\textsuperscript{62} The present debate between the EU and the United States regarding GIs has its roots in these now codified ATF regulations.\textsuperscript{63}

1. 27 C.F.R. §§ 4.1, 4.24—ATF Regulations on Labeling and Advertising of Wine

The ATF regulates the use of GIs on wines in the United States through its control over labeling and advertising of wines.\textsuperscript{64} The regulations classify GIs as either generic, semi-generic, or non-generic, de-

\begin{flushleft}
\textsuperscript{56} See id.
\textsuperscript{57} See id.; Lindquist, \textit{supra} note 1, at 318.
\textsuperscript{58} Lindquist, \textit{supra} note 1, at 318.
\textsuperscript{59} Id.
\textsuperscript{61} See U.S.C. § 1052(a) (2000). Section 1052 provides that a trademark shall be refused if it consists of “a geographical indication which, when used on or in connection with wines or spirits, identifies a place other than the origin of the goods and is first used on or in connection with wines or spirits by the applicant on or after one year after the date on which the WTO Agreement enters into force with respect to the United States.” Id.; see 27 C.F.R. § 4.24. The relationship between trademarks and GIs is unsettled and will not be addressed in this Note. See RANGNEKAR, \textit{supra} note 2, at 7.
\textsuperscript{63} Lindquist, \textit{supra} note 1, at 325.
\textsuperscript{64} Id.; see 27 C.F.R. §§ 4.1, 4.24.
\end{flushleft}
pending on the significance of the geographic designation.\textsuperscript{65} How a GI is classified is important because the classification determines the level of protection the GI will receive.\textsuperscript{66}

Protection afforded to non-generic and generic GIs appear to be consistent with the mandates of the TRIPS Agreement.\textsuperscript{67} The ATF’s prohibition on the use of non-generic GIs is consistent with the TRIPS Agreement’s general prohibition of GIs that indicate a location other than a wine’s true origin.\textsuperscript{68} In the case of the ATF allowing the use of generic GIs, it is consistent with the TRIPS Agreement because such GIs have become a common name for a type of wine, and thus, they fall within the ambit of exemptions to the general prohibition.\textsuperscript{69} The inconsistencies with the TRIPS Agreement only arise with respect to the middle category, what the ATF considers to be semi-generic.\textsuperscript{70}

The ATF defines semi-generic GIs as those names that have retained their geographic significance, but at the same time, in a generic sense, describe types of wines.\textsuperscript{71} The ATF allows such semi-generic designations to be used to designate wines that do not originate from the location indicated by the GI so long as the actual place of origin appears in conjunction with the GI.\textsuperscript{72} The ATF gives sixteen examples of what it considers to semi-generic GIs.\textsuperscript{73} Fifteen of these GIs are European in origin.\textsuperscript{74} Included among them are the famous wine-producing regions of Champagne, Chablis, Burgundy, and Chianti.\textsuperscript{75} Thus, the ATF allows use of these GIs on American wines made

\textsuperscript{65} See 27 C.F.R. § 4.24.

\textsuperscript{66} See id.

\textsuperscript{67} Compare 27 C.F.R. § 4.24, with TRIPS Agreement, supra note 6, arts. 23–24.


\textsuperscript{69} Compare 27 C.F.R. § 4.24, with TRIPS Agreement, supra note 6, art. 24. Examples of geographical terms that the ATF considers as being generic GIs are “Vermouth” and “Sake.” See 27 C.F.R. § 4.24.

\textsuperscript{70} Compare 27 C.F.R. § 4.24, with TRIPS Agreement, supra note 6, arts. 23–24; see Lindquist, supra note 1, at 327.

\textsuperscript{71} Maher, supra note 5, at 1899; see 27 C.F.R. § 4.24.

\textsuperscript{72} See 27 C.F.R. § 4.24.

\textsuperscript{73} See id. (listing Angelica, Burgundy, Claret, Chablis, Champagne, Chianti, Malaga, Marsala, Madeira, Moselle, Port, Rhine Wine, Sauterne, Haut Sauterne, Sherry, and Tokay as semi-generic GIs).

\textsuperscript{74} See id.

\textsuperscript{75} See 27 C.F.R. § 4.24; Maher, supra note 5, at 1899.
from American grapes so long as the actual place of origin appears in conjunction with the semi-generic GI.\textsuperscript{76}

2. Codification of ATF Regulations

The U.S. Congress codified the ATF’s regulations regarding semi-generic classification of GIs in the Taxpayer Relief Act of 1997 in response to a strong lobbying effort by the U.S. wine industry.\textsuperscript{77} Like the ATF regulations, 26 U.S.C. § 5388(c) provides that semi-generic GIs may be used to designate wines of an origin other than that indicated by such name if the true place of origin is indicated in direct conjunction with the GI.\textsuperscript{78} Furthermore, Section 5388 lists exactly the same examples of semi-generic GIs as those listed in the ATF regulations.\textsuperscript{79}

III. Analysis

A. Shortcomings in the Current U.S. Legislation

The inconsistencies between the ATF regulations governing semi-generic GIs and the mandates of the TRIPS Agreement governing GIs of wines are glaring.\textsuperscript{80} First, Article 23 compels member countries to enact laws that prevent the use of GIs for wines not originating in the place indicated even where the true origin is indicated in conjunction with the GI.\textsuperscript{81} The framework contemplated by the TRIPS Agreement is fairly black and white.\textsuperscript{82} It divides GIs into two groups: terms that are generic and those that are not.\textsuperscript{83} In light of the purpose of the TRIPS Agreement (to offer increased protection for GIs of wines), it can only be assumed that GIs that retain geographic significance even when they arguably have a generic component fall into the latter grouping, and therefore should be prohibited.\textsuperscript{84} Thus, by allowing semi-generic GIs to be used when they appear in conjunction with the true place of origin, the ATF regulations are completely at odds with the intentions and spirit of the TRIPS Agreement.\textsuperscript{85}

\textsuperscript{76} See 27 C.F.R. § 4.24.
\textsuperscript{77} See 26 U.S.C. § 5388(c); Lindquist, supra note 1, at 327–29
\textsuperscript{78} See 26 U.S.C. § 5388(c).
\textsuperscript{79} See id.
\textsuperscript{80} Compare 27 C.F.R § 4.24, with TRIPS Agreement, supra note 6, arts. 23–24.
\textsuperscript{81} TRIPS Agreement, supra note 6, art. 23.
\textsuperscript{82} See id. arts. 23–24.
\textsuperscript{83} See id.
\textsuperscript{84} See id.
\textsuperscript{85} Compare 27 C.F.R § 4.24, with TRIPS Agreement, supra note 6, arts. 23–24.
ATF regulations do not incorporate any of the grandfather clauses of the TRIPS Agreement which allow the use of GIs only in particular circumstances.\textsuperscript{86} Nor do they have the ten year or good faith requirements.\textsuperscript{87} Thus, instead of allowing the use of protected GIs in limited circumstances, the ATF regulations allow \textit{any} U.S. vintner to use these semi-generic designations.\textsuperscript{88} The regulations make no distinctions between a vintner who used such a GI for fifty years and one who began using the GI a month ago.\textsuperscript{89}

Because the current ATF regulations were in place well before the TRIPS Agreement, these inconsistencies existed from the time the TRIPS Agreement came into force.\textsuperscript{90} The negotiations contemplated by the TRIPS Agreement along with the regulatory nature of the ATF, however, left open, in theory, the possibility of a relatively quick and easy resolution between the EU and United States to bring the U.S. regulations into compliance with the international obligations of the TRIPS Agreement; the ATF could have simply amended its regulations.\textsuperscript{91}

This is not the case anymore.\textsuperscript{92} By codifying the ATF regulations in 1997, the United States has created a much more pronounced rift between it and the EU.\textsuperscript{93} While this legislation was not a departure from the status quo, it now makes the status quo much more difficult to depart from.\textsuperscript{94} That is, the regulations that once could have been easily changed by the ATF now require Congressional action because they have been codified.\textsuperscript{95} Thus, U.S. compliance with the TRIPS Agreement will be much more difficult to accomplish.\textsuperscript{96}

By passing this legislation in spite of the TRIPS mandate that member countries enter into negotiations that attempt to \textit{increase} the protection of individual GIs under Article 23, the United States is showing that it is disingenuous about complying with its TRIPS obligations.\textsuperscript{97} As a result, its actions work to discredit any arguments the

\textsuperscript{86} See 27 C.F.R. § 4.24; TRIPS Agreement, supra note 6, art. 24.
\textsuperscript{87} See 27 C.F.R. § 4.24; TRIPS Agreement, supra note 6, art. 24.
\textsuperscript{88} See 27 C.F.R. § 4.24.
\textsuperscript{89} See id.
\textsuperscript{90} See id; Maher, supra note 5, at 1893–1894.
\textsuperscript{91} See 27 C.F.R. § 4.24; TRIPS Agreement, supra note 6, art. 24; Lindquist, supra note 1, at 329.
\textsuperscript{92} See 26 U.S.C. § 5388(c); Lindquist, supra note 1, at 329.
\textsuperscript{93} See 26 U.S.C. § 5388(c); Lindquist, supra note 1, at 327.
\textsuperscript{94} See 26 U.S.C. § 5388(c); Lindquist, supra note 1, at 332.
\textsuperscript{95} Lindquist, supra note 1, at 332.
\textsuperscript{96} See id. at 327.
\textsuperscript{97} See 26 U.S.C. § 5388(c); TRIPS Agreement, supra note 6, art. 23; Lindquist, supra note 1, at 332.
United States may advance claiming that its current laws are in conformity with the objectives of the TRIPS Agreement. To illustrate this point, take the most likely argument that the United States will make: the semi-generic GIs listed in the current legislation fall into the exception in Article 24 for GIs that have become customary terms for particular goods. As the ATF regulations and Section 5388(c) acknowledge, however, these GIs are far from being simply generic. They contain both a generic component in that they have come to identify a type of wine and they contain a non-generic component in that they are terms with geographic significance. Presented with these two competing aspects of a particular GI, if the United States was intent on upholding the spirit of the TRIPS Agreement, it would not place its thumb on the side of the GIs generic aspect to tip the scale in favor of lowering protection.

B. Hongye Grape Wine Co.

Since Chinese law is undergoing a vast makeover to comply with its WTO obligations, the laws regulating GIs have not yet settled. As a result, the attempted registration of “Napa Valley” as a trademark by HGW may not be an open and shut case.

If China complies fully with its obligations under the TRIPS Agreement, as it says it will, this situation is not likely to pose a terrible problem for the NVVA or the United States. A strict evaluation of this case under the mandates of the TRIPS Agreement will likely yield a favorable ruling for the NVVA. The fact that Western-style wines in general, including Napa Valley wines, are still a fairly new product in the Chinese market would preclude a Chinese court from holding that Napa Valley wines have become so pervasive in the Chinese wine industry, that now, the term “Napa Valley” has fallen into common

98 See 26 U.S.C. § 5388(c); TRIPS Agreement, supra note 6, art 23; Lindquist, supra note 1, at 332.
99 Lindquist, supra note 1, at 331.
102 See 26 U.S.C. § 5388(c); 27 C.F.R. § 4.24; TRIPS Agreement, supra note 6, arts. 23–24.
105 See TRIPS Agreement, supra note 6, arts. 23–24; WTO Report, supra note 37, at 55.
106 See TRIPS Agreement, supra note 6, art. 23.
usage for a type of wine in China. Furthermore, none of the grandfather clause exceptions would apply in this case because this is the first known attempt to register or use “Napa Valley” as a name for a wine produced outside of the United States using foreign grapes.

Even if China were to employ a law regarding GIs that was friendly to domestic producers, like the United States, the outcome is unlikely to change for much the same reason. The justifications the United States has used with respect to those European GIs that it classifies as being semi-generic are absent in this case. “Napa Valley” does not have the generic component in China that terms like Chianti or Champagne could arguably be said to have. Unlike the term “Napa Valley” in China, terms like Chianti and Champagne have been used for a significant length of time in the United States.

While either of these two possibilities would produce a satisfactory result for the United States and the NVVA, China may utilize regulations with respect to GIs that will lead to incoherent results that are contradictory to any semblance of compliance under the TRIPS Agreement. There are a number of reasons why this may occur. First, Chinese legislation tends to be drafted in vague terms that leave interpretive bodies (comprised of Chinese bureaucrats) with significant discretion in interpreting laws. Second, as a result of the ill defined power of China’s legislative bodies, sometimes overlapping and contradictory laws are passed at all levels of government. Lastly, a point closely related to the first, those that are vested with the broad discretion to interpret and implement laws tend not to be neutral. They are influenced by a range of extralegal factors, including the

108 TRIPS Agreement, supra note 6, art. 24 (allowing the use of the ten year exception and good faith exception only where registration and/or use preceded April 15, 1994); Emert, supra note 9.
109 See 26 U.S.C. § 5388(c); 27 C.F.R. § 4.24; TRIPS Agreement, supra note 6, arts. 23–24.
110 See Lindquist, supra note 1, at 313, 331.
111 See 26 U.S.C. § 5388(c); 27 C.F.R. § 4.24; Lindquist, supra note 1, at 313, 331.
112 See Lin, supra note 107; Lindquist, supra note 1, at 313 (describing the process by which some of these semi-generic names were introduced to the United States).
113 See Halverson, supra note 103, at 352-53 (discussing the skepticism expressed by scholars of Chinese law regarding China’s ability to meet its WTO obligations).
114 See id.
115 Id.
116 Id.
117 Id.
political pressure of the Chinese Communist Party, dependence on local governments for funding, financial interests in decisions at the local level, the pull of personal relationships, and outright corruption.\textsuperscript{118} The clear implication of all this is that there is no guarantee that China will live up to its obligations under the TRIPS Agreement and vindicate the American interests in this case.\textsuperscript{119} In fact, the confluence of strong local ties, broad discretion, and contradictory laws may result in a cold legal atmosphere for the NVVA.\textsuperscript{120}

Whatever the chances may be, if China fails to uphold its obligations under TRIPS and does not protect the GI “Napa Valley,” the United States will have to take some form of action if it wants to prevent erosion of the NVVA’s interests in China.\textsuperscript{121} The possible avenues of recourse available to the United States include pressuring China to comply with TRIPS (just as the EU has pressured the United States) and/or submitting the matter to the Council for resolution.\textsuperscript{122} In either case, however, given the cavalier attitude taken in the past by the United States in complying with the TRIPS Agreement, the forcefulness of the United States’ arguments will be severely limited.\textsuperscript{123} Credibility will naturally depend a great deal on the United States’ adherence to the spirit and goals of the TRIPS Agreement.\textsuperscript{124} Thus, it would be unrealistic for the United States to expect to pass opportunistic legislation to protect its own rights and then turn around and argue that others should not do the same.\textsuperscript{125}

\textbf{Conclusion}

To this day, the United States position with regard to GIs of wine and the TRIPS Agreement has been short-sighted. While many U.S. vintners benefit from the use of European GIs on their wines today, the tides are beginning to turn. As illustrated by HGW’s attempted registration of “Napa Valley” as a trademark, it is only a matter of time until the U.S. vintners eventually occupy the roles that their European counterparts have played for decades. If the Unites States hopes to prevent such a result, it must show that it is willing to play by the rules that it helped estab-

\textsuperscript{118} Halverson, supra note 103, at 353.
\textsuperscript{119} See id.
\textsuperscript{120} See id.
\textsuperscript{121} See Lindquist, supra note 1, at 319; Didier’s, supra note 10.
\textsuperscript{122} Lindquist, supra note 1, at 319, 320–23.
\textsuperscript{123} See id. at 330–332, 337.
\textsuperscript{124} See id. at 337.
\textsuperscript{125} See id. at 333–34.
lish. The United States must protect the use of foreign GIs in its domestic market. If this does not happen, the United States cannot expect, nor can it ask, other countries to respect the interests of U.S. vintners abroad.
Abstract: Private Military Firms (PMFs) have recently stepped in to fill the growing global demand for temporary, highly-specialized military services. These private corporations can be a blessing to their client countries in that they offer many economic, military, and political benefits not ordinarily found in standing armies. However, PMFs fall within a gap in international law, which presumes and prefers a monopolization of force by state actors, thereby leaving no effective way to deal with those PMFs that commit human rights abuses. This Note traces the history of private militaries and the applicable legal standards and argues for a coordinated domestic approach among a handful of countries to legitimize and regulate PMFs.

Introduction

Since the end of the Cold War, there has been an abundance of unemployed, highly-trained soldiers in the Developed World.1 Recently, the market has seen an increasing demand for such soldiers to support Developing World regimes that had hitherto relied upon their Cold War sponsors for military support.2 A similar demand also exists among Developed World armies, who now look to outsource many of their training and support needs.3 Private Military Firms (PMFs), which are “profit driven organizations that trade in professional services intricately linked to warfare,” have stepped in to fill these demands in the global security market.4 Offering services that range from operational
support and military training to strategic planning and even full-scale combat, PMFs bring their military expertise to places where Developed World armies are often loath to intervene.\(^5\)

Despite their widespread use, PMFs fall within a gap in international law, which presumes and prefers a monopolization of force by state actors.\(^6\) Indeed, although PMFs often perform the same tasks as state-sponsored militaries, the PMF corporate structure is a foreign concept to international law.\(^7\) Therefore, there is very little legal protection for the victims of PMF human rights abuses.\(^8\)

This Note focuses on how best to remedy PMF human rights abuses. First, it traces the long history of private, profit-driven militaries. In doing so, it discusses the reasons for the 20th Century’s historically aberrant, yet profound, distaste for private armies.\(^9\) Second, it discusses the inadequacies of existing international law when applied to PMFs as well as why the proposed remedies for these inadequacies are unworkable. Finally, this Note outlines a practical and effective method of legitimizing and regulating PMFs so as to retain their utility while minimizing their potential for criminal behavior.

I. History and Background

A. A History of Private Militaries

“As long as humanity has waged war, there have been mercenaries.”\(^10\) Indeed, the history of private militaries can be traced back at least 3,000 years, when Numidian mercenaries played a large role in Ramses II’s attack on Kadesh (1294 B.C.), and biblical King David’s mercenaries drove the Philistines from Israel (1000 B.C.).\(^11\) The ancient Greeks and Romans also relied heavily upon mercenaries, as did Emperor Justinian and William the Conqueror.\(^12\)


\(^7\) See Garmon, *supra* note 6, at 338–39.

\(^8\) See id.


\(^10\) Zarate, *supra* note 1, at 82.

\(^11\) Milliard, *supra* note 9, at 2.

\(^12\) Id.
The use of mercenaries continued unabated up through the modern era. In the Middle Ages, companies of fighting men offered their collective skills to whomever would hire them.\textsuperscript{13} During the Renaissance, Italy’s city-states contracted with freelance military commanders, or \textit{condottieri}, so as to deny military power to potential domestic rivals and to avoid disrupting “the productive economy by forcing normal citizens into military service.”\textsuperscript{14} Most of the forces used in the Thirty Years’ War (1618–1648) were privately contracted,\textsuperscript{15} and the British Crown famously hired Hessian soldiers to fight against George Washington’s troops in the American Revolutionary War.\textsuperscript{16} Indeed, “not until the Franco-German War of 1870 did the ‘nation-in-arms’ concept gain predominance in the world’s militaries,” after which armies built upon national loyalties quickly became the international norm.\textsuperscript{17}

Throughout the twentieth century, the international community further curtailed organized private armies.\textsuperscript{18} In particular, there was an extraordinary backlash against the individual, ad-hoc mercenaries, commonly known as \textit{les affreux} (“the dreaded ones”), who threatened the stability of many mineral-rich, post-Colonial African regimes.\textsuperscript{19} Indeed, during the 1960s and 70s, the governments of Zaire, Nigeria, Sudan, Guinea, Angola, Benin, the Comoro Islands, and the Seychelles were all seriously threatened by such mercenaries who usually hailed from these countries’ previous colonial occupiers.\textsuperscript{20} It is largely because of the abuses committed by these mercenaries and the significant threat they posed to post-Colonial independence that an international consensus developed condemning mercenarism.\textsuperscript{21}

\textbf{B. The Emergence of Private Military Firms}

For many reasons, today’s PMFs are quite different from \textit{les affreux} of a few decades ago or even today’s individual soldiers of fortune.\textsuperscript{22} As P.W. Singer of the Brookings Institution has characterized them,
Today’s PMFs represent the evolution of private actors in warfare. The critical analytic factor is their modern corporate business form. PMFs are hierarchically organized into incorporated and registered businesses that trade and compete openly in the international market, link to outside financial holdings, recruit more proficiently than their predecessors, and provide a wider range of military services to a greater variety and number of clients. Corporatization not only distinguishes PMFs from mercenaries and other past private military ventures, but it also offers certain advantages in both efficiency and effectiveness.23

Perhaps the greatest reason for the post-Cold War emergence of PMFs is the growing demand for private military expertise within the Developed World.24 Not only did the world’s armies shrink by more than 6 million people during the 1990s,25 but many Developed World governments also announced policies of non-intervention except in areas of vital national interest.26 Subsequently, PMFs have replaced many uniformed soldiers because they “can perform services which governments approve of, but hesitate to attempt themselves because of political, military or financial costs.”27 Indeed, PMFs have performed specialized tasks in every major post-Cold War American military operation; they have served as American proxies in places like Colombia and Liberia, and they even operate the computer and communications systems for the U.S. nuclear response at NORAD’s Cheyenne Mountain base.28

Developing countries also hire PMFs to fight the small-scale conflicts that do not attract the attention of militarily developed nations.29 Due to recent advances in weapons technology, “[a]lmost any group operating inside a weak state can now acquire at least limited military capabilities, thus lowering the bar for creating viable threats

23 Id.
24 See Howe, supra note 5, at 5–7.
25 Singer, supra note 3, at 193.
26 Howe, supra note 5, at 5 (referencing President Clinton’s Presidential Decision Directive 25 as an example of a trend towards policies of non-intervention).
27 Id.
28 Singer, supra note 3, at 188–89; see also US’s ‘Private Army’ Grows, CHRISTIAN SCIENCE MONITOR, Sept. 3, 2003, at 6.
29 Zarate, supra note 1, at 92.
to the status quo.”\(^\text{30}\) Since Developing World armies rarely have the ability to combat such threats, they hire PMFs to come to the rescue.\(^\text{31}\)

C. When PMFs Run Amok

Although it is clear that PMFs fill an important role in the global security market, it is also clear that PMFs do not always respect the international standards of armed conflict.\(^\text{32}\) For instance, in 1995, the government of Sierra Leone hired the South African PMF, Executive Outcomes (EO), to help subdue the rebellious Revolutionary United Front.\(^\text{33}\) EO quickly assumed control over all offensive operations and, when asked how to distinguish between civilians and rebels, EO commanders supposedly ordered their pilots to just “kill everybody.”\(^\text{34}\)

Another such example involves DynCorp, an American PMF currently active in Iraq.\(^\text{35}\) While working in the Balkans, several DynCorp employees allegedly ran a prostitution ring, selling the services of girls as young as twelve years old.\(^\text{36}\) Despite these wide-spread accusations, none of the accused DynCorp employees were brought to trial or disciplined in any way.\(^\text{37}\) Rather, DynCorp has addressed the issue by firing the whistle-blower who exposed the prostitution ring.\(^\text{38}\)

II. Discussion

A. Mercenary Restrictions do not Apply to PMFs

One way in which the international community has tried to restrict private militaries is by condemning mercenary activity.\(^\text{39}\) However, different states define “mercenary” in different ways, usually according to that state’s history as a client or victim of mercenaries.\(^\text{40}\) Largely because of these differences, it is unclear whether international law has

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\(^{30}\) Singer, \textit{supra} note 3, at 196.

\(^{31}\) See Zarate, \textit{supra} note 1, at 92.


\(^{33}\) See Heil, \textit{supra} note 32, at 297.

\(^{34}\) Garmon, \textit{supra} note 6, at 326.


\(^{37}\) \textit{Id.}

\(^{38}\) \textit{Id.}

\(^{39}\) See Zarate, \textit{supra} note 1, at 125–34.

\(^{40}\) See id. at 120.
settled upon a particular definition of “mercenary,” but scholars largely agree that none of the current definitions include PMFs. 

The two definitive documents restricting mercenary activity are the Additional Protocols to the Geneva Conventions of 12 August 1949 (Protocol I) and the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (UN Mercenary Convention).

Protocol I’s regulatory power is largely derived from its discouragement of mercenary activity by withdrawing eligibility for prisoner of war status. However, Protocol I’s definition of “mercenary” excludes military trainers, advisors, and support staff, thereby omitting the great majority of PMF activities. Furthermore, even those PMFs engaging in direct combat would likely escape Protocol I’s regulations in any one of three ways. First, if PMFs engage in combat while on a security detail, they would probably avoid the Protocol I requirement of involvement in “armed conflict.” Second, it is almost impossible to prove that a PMF employee’s motivation is financial gain, which is a requisite component of Protocol I’s definition of “mercenary.” Third, PMFs often fully integrate into a client’s armed forces, thereby avoiding mercenary classification under Protocol I.

Largely due to perceived inadequacies in Protocol I’s restrictions on mercenarism, the UN Mercenary Convention extended the Protocol I definition to cover all conflicts (beyond just international armed conflicts) and also added a second, more sweeping definition of mercenary activities. However, this second definition still does not apply to most

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41 See id. at 120–33.
42 See Zarate, supra note 1, 123-25; see also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 47, 1125 U.N.T.S. 3 [hereinafter Protocol I]. Article 47 defines a mercenary as any person who (1) fights abroad, (2) in combat, (3) is motivated by private gain paid substantially more than standing army combatants, (4) is neither a national nor resident of either Party, (5) is not a member of either Party’s armed forces, and (6) is not on official duty as a member of a non-Party State’s armed forces. See Protocol I, art. 47.
43 U.N. GAOR, 44th Sess., Supp. No. 43, U.N. Doc. A/RES/44/34 (1989) (entered into force Oct. 20, 2001) [hereinafter UN Mercenary Convention]. Article 1(2) of the UN Mercenary Convention includes the Protocol I definition, but adds that a mercenary is any person who (1) fights in all conflicts, (2) aimed at overthrowing or undermining a government or its State’s territorial integrity. Id. art. 1(2).
44 See Milliard, supra note 9, at 41.
45 See Zarate, supra note 1, at 123.
46 Id. at 124; see also Protocol I, supra note 42, art. 2(a).
47 See Milliard, supra note 9, at 59–61; Protocol I, supra note 42, art. 2(c).
48 See Zarate, supra note 1, at 124; Protocol I, supra note 42, art. 2(e).
49 See Milliard, supra note 9, at 57–58.
PMFs since it retains both the loophole for those combatants who integrate into a client’s armed forces and the problems associated with ascertaining a combatant’s motivation for fighting.\textsuperscript{50} Indeed, it is widely recognized that neither the Protocol I nor the UN Mercenary Convention’s definitions of “mercenary” cover a majority of PMF activity.\textsuperscript{51}

B. The Alien Tort Claims Act

Introduced in 1789, but rarely invoked over the next two centuries, the Alien Tort Claims Act (ATCA) gives aliens access to U.S. federal courts for violations of international law.\textsuperscript{52} The ATCA was passed to ensure that visiting diplomats could bring claims against the United States or U.S. citizens and have those claims heard in federal, rather than state, courts.\textsuperscript{53} More recently, however, U.S. courts have expanded the ATCA to cover claims for international human rights abuses occurring outside the United States.\textsuperscript{54}

The 1980 case of \textit{Filartiga v. Pena-Irala} ushered in this more expansive interpretation of the ATCA.\textsuperscript{55} In \textit{Filartiga}, the 2nd Circuit retained jurisdiction over an action where a Paraguayan citizen sued a former Paraguayan police officer for acts of torture committed in Paraguay.\textsuperscript{56} In doing so, the court read the ATCA both as an action-granting and a forum-granting statute, allowing U.S. district courts to hear any case in which an alien alleges a tort committed in violation of customary or treaty-based international law.\textsuperscript{57}

More recently, this trend has continued as U.S. district courts have expanded ATCA liability to cover individual war criminals in the Former Republic of Yugoslavia and political parties in Zimbabwe.\textsuperscript{58} Furthermore, in \textit{Iwanowa v. Ford Motor Company}, a district court found the Ford Motor Company liable for its use of slave labor during World War

\begin{footnotesize}
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\item \textsuperscript{50} \textit{Id.} at 59–62. \textit{See generally} UN Mercenary Convention, \textit{supra} note 43 (further constraining the integration of forces loophole by recognizing only those combatants who integrate with the armed forces of a state actor).
\item \textsuperscript{51} \textit{See Zarate, supra} note 1, at 123–25.
\item \textsuperscript{52} \textit{Garmon, supra} note 6, at 339; \textit{see also} 28 U.S.C. § 1350 (2000) (stating “district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).
\item \textsuperscript{53} \textit{Heil, supra} note 32, at 298.
\item \textsuperscript{54} \textit{Id.}
\item \textsuperscript{55} \textit{See Garmon, supra} note 6, at 339–40; \textit{see also} \textit{Filartiga v. Pena-Irala}, 630 F.2d 876 (2d Cir. 1980).
\item \textsuperscript{56} \textit{See Filartiga}, 630 F.2d at 878, 885.
\item \textsuperscript{57} \textit{Garmon, supra} note 6, at 339–40; \textit{see also} \textit{Filartiga}, 630 2d at 884–87.
\item \textsuperscript{58} \textit{See generally} Tachiona v. Mugabe, 169 F. Supp. 2d 259 (S.D.N.Y. 2001); \textit{see also} \textit{Kadic v. Karadzic}, 70 F.3d 232 (2d Cir. 1995).
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II, thereby holding that even corporations that work closely with state actors will be held liable under the ATCA for violations of international law.\footnote{See Garmon, \textit{supra} note 6, at 342–43; Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 439 (D.N.J. 1999).} This trend, from \textit{Filartiga} to \textit{Iwanowa}, has led some scholars to believe that PMFs can successfully be held liable under the ATCA.\footnote{See Garmon, \textit{supra} note 6, at 342–43. Garmon further asserts that the 9th Circuit, in \textit{Doe I v. Unocal}, has held corporations liable for aiding and abetting violations of international law. Therefore, even PMFs that only train and support forces that commit human rights abuses might still be liable under the ATCA. \textit{See id.} at 346–49.}

C. Domestic and International Regulatory Systems

Although some countries restrict mercenary activity and many countries forbid their citizens to enlist in foreign armies, very few countries have laws regulating PMFs.\footnote{\textit{See United Kingdom Foreign and Commonwealth Office, Private Military Companies: Options for Regulation} 39–43, Annex B (2002).} Legislation within PMF host countries usually takes one of three forms: (1) a complete ban upon any military activity other than in support of that country’s armed forces; (2) regulation or complete prohibition of mercenary activity, but no mention of PMF activity; or (3) explicit regulation of PMF activity.\footnote{\textit{Id.}} Of the eleven currently known PMF host countries, only the United States and South Africa explicitly regulate PMF activity.\footnote{\textit{Id.; see also} Listing of Private Military Firms and Country of Origin on the Public Integrity Website, at http://www.publicintegrity.org/bow/docs/bow_companies.xls (last visited Dec. 7, 2004) \textit{[hereinafter ICIJ]} The United States, United Kingdom, Canada, France, Israel, South Africa, Russia, Angola, Sierra Leone, Belgium, and Uganda currently host active PMFs. A handful of other countries may host PMFs, but it is undetermined whether the companies actually exist. \textit{Id.}}

The U.S. Arms Export Control Act (AECA) regulates the export of both arms and military services.\footnote{22 U.S.C. § 2752 (as amended 1999) \textit{[hereinafter AECA].}} Under the International Transfer of Arms Regulations (ITAR is the regulatory scheme which implements the AECA), all PMFs providing strategic, training, or maintenance advice to foreign forces must register with, and obtain a license from, the State Department.\footnote{\textit{See United Kingdom Foreign and Commonwealth Office, Private Military Companies: Options for Regulation} 39–43, Annex B (2002).} Additionally, the State Department must individually approve (after Congressional notification) each specific PMF contract in excess of $50 million.\footnote{\textit{Id.} at 39.}

Largely in response to the alleged atrocities of Executive Outcomes in Sierra Leone, South Africa passed the Regulation of Foreign
Military Assistance Act (FMAA) in September of 1998. Much like the American regulatory scheme, the FMAA establishes a licensing procedure for PMFs who wish to offer non-combat military services to foreigners. South Africa also explicitly bases its licensing decisions on principles of international law (including human rights law) and prohibits PMFs from acting as combatants in armed conflict.

Other suggested regulatory schemes consist of everything from a laissez-faire approach to an international regulatory system and even an outright ban on PMF activity. Laissez-faire proponents argue that market forces will drive PMFs to honor contracts, maintain a good reputation, and eschew human rights abuses. Those arguing for international regulation call for the United Nations to regulate PMFs through a scheme similar to the American and South African models. Lastly, those who wish to completely ban PMFs fear that any legitimation of PMF activity erodes sovereignty by destroying the monopoly of force by state actors and encouraging neo-colonialist incursions into Developing World conflicts.

III. Analysis

A. Banning PMF Activity is both Unwise and Unlikely

Since current international norms against mercenaries are considered either unenforceable or inapplicable to PMFs, some states and scholars have suggested either banning all PMF activity or broadening the Protocol I and UN Mercenary Convention definitions to cover PMF activity. Adherents to the latter approach aim to discourage PMF activity (as is done to mercenary activity) by explicitly withdrawing prisoner of war rights from their employees. However, such

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67 Id.
69 See United Kingdom Foreign and Commonwealth Office, supra note 61, at 40.
70 See Zarate, supra note 1, at 145–49 (discussing an outright ban of PMFs as well as the laissez-faire approach); see also Milliard, supra note 9, at 79–84 (promoting an international regulatory scheme).
71 See Zarate, supra note 1, at 148–49.
72 See Milliard, supra note 9, at 79–84.
73 See Zarate, supra note 1, at 145–46.
74 Id.
75 See id. (referencing the U.N. Special Rapporteur’s 1997 suggestions to expand the “mercenary” definition to include PMFs). The Protocol I definition of “combatant” probably includes PMFs, thereby granting them prisoner of war rights. See Protocol I, supra note 42, art. 43.
a sweeping condemnation of PMFs is unlikely to occur due to the wide-spread recognition of their utility.\textsuperscript{76}

Indeed, the almost universal (though often tacit) approval of PMFs is well-founded due to their economic, military, and political advantages.\textsuperscript{77} It is very expensive for governments to maintain standing armies because they demand housing, salary, and pensions.\textsuperscript{78} Moreover, standing armies contain specialists who remain on the pay-roll even when their specialty is not required.\textsuperscript{79} In contrast, PMFs are highly specialized and are paid only to perform specific tasks and then go home.\textsuperscript{80} For instance, rather than depend upon an expensive, standing army of security-conscious mail delivery soldiers, the U.S. military has hired Kellogg Brown & Root to provide postal services in Iraq.\textsuperscript{81}

PMFs also offer military advantages in that they consist of highly-trained military specialists (often from prestigious special-forces units of militarily advanced countries) who can assemble extraordinarily quickly.\textsuperscript{82} For instance, EO has a permanent staff of 30, but can “deploy a fully supported battalion of about 650 men within 15 days.”\textsuperscript{83} Since EO’s recent successes have earned it the distinction of the “most deadly and efficient force operating in sub-Saharan Africa today [aside from the South African army],” it certainly can offer significant military advantages over the standing armies of many client nations.\textsuperscript{84}

Finally, the political benefits of hiring PMFs are manifold. First and foremost, although the loss of a PMF employee is certainly a personal tragedy, the loss of a uniformed soldier almost always becomes a national tragedy, bringing significant political pressure to bear upon any government.\textsuperscript{85} Second, the governments of many conflict-ridden countries do not want to so empower their national armies as to risk a coup d’etat.\textsuperscript{86} Thus, PMFs offer a way to exercise force without strengthening potential domestic enemies.\textsuperscript{87} Lastly, economic concerns quickly become political concerns and money saved by not supporting a standing

\textsuperscript{76} See Howe, supra note 5, at 2–3.
\textsuperscript{77} Id. at 5–7.
\textsuperscript{78} Id. at 5.
\textsuperscript{79} Id.
\textsuperscript{80} See id.
\textsuperscript{82} See Howe, supra note 5, at 2, 5; Singer, supra note 3, at 193–94.
\textsuperscript{83} See Howe, supra note 5, at 5.
\textsuperscript{84} See Zarate, supra note 1, at 93.
\textsuperscript{85} See Singer, supra note 3, at 218.
\textsuperscript{86} See Howe, supra note 5, at 6.
\textsuperscript{87} See id.
army can often be spent on the very ills that created a client country’s instability in the first place.\textsuperscript{88} Indeed, PMFs offer so many economic, military, and political advantages to client states that banning or discouraging PMF activity would be unpopular, impractical, and universally harmful.\textsuperscript{89}

B. The ATCA Is an Inadequate Remedy for PMF Abuses

Even if a plaintiff shows both that a PMF has violated international law and that corporations are subject to the ATCA, she still must overcome a host of procedural hurdles.\textsuperscript{90} ATCA defendants often successfully use \textit{forum non conveniens}, exhaustion of remedies, comity, standing, and failure to join an indispensable party to stymie litigation.\textsuperscript{91} The ATCA also has a ten year statute of limitations, which would further limit claims only to those PMF abuses that are reported relatively quickly.\textsuperscript{92} Finally, personal jurisdiction in the United States over non-American PMFs (over two-thirds of the currently active total) could be established only if those defendants conducted “continuous and systematic business” within the United States.\textsuperscript{93} In short, the ATCA may be a useful weapon against a handful of rogue PMFs, but the law’s many procedural loopholes and wide inapplicability to most PMFs makes it a poor regulatory tool.\textsuperscript{94}

C. The Case for Coordinated Domestic Regulation of PMFs

The American and South African approaches to regulating PMFs are worthy of emulation, and a coordinated effort to establish similar regulatory schemes in the other nine PMF host countries would offer the best remedy for potential PMF abuses.\textsuperscript{95} Both the American AECA and the South African FMAA insist upon state licensing of all PMFs.\textsuperscript{96} These licensing systems promote PMF responsibility because the free market favors licensed respectability, and very few PMFs will risk crimi-
nal liability by evading their host country’s oversight.\textsuperscript{97} Any domestic regulation should also include the AECA’s notification requirements for most PMF contracts, since such notification precludes host governments from claiming ignorance of their PMFs’ actions.\textsuperscript{98} This, in turn, strengthens government oversight of PMFs and lessens the likelihood of their behaving in ways that would embarrass their host country.\textsuperscript{99} Finally, much like the FMAA’s licensing standards, domestic regulation should criminalize all PMF activity in violation of international law, thereby creating something akin to a criminal version of the ATCA in all PMF host countries.\textsuperscript{100}

Such a coordinated regulatory scheme would also overcome the failures of a laissez-faire approach.\textsuperscript{101} The mere fact that PMF abuses have occurred proves that market forces do not create sufficient incentives for good behavior.\textsuperscript{102} Indeed, since war is inherently dirty and PMFs are hired to win wars, it can be argued that there is actually a strong market incentive for PMFs to strive to win at any cost.\textsuperscript{103} On the other hand, regulation would redefine market incentives by conferring respect upon licensed PMFs, while leaving others in a shadow of illegitimacy and open to criminal prosecution for unlicensed operation.\textsuperscript{104}

Finally, due to the relatively small number of PMF host countries, coordinated domestic regulation offers an easier (and equally effective) alternative to an international regulatory scheme.\textsuperscript{105} Of the sixty-one currently active PMFs, twenty-four come from the United States and South Africa, while another twenty are based in the United Kingdom (which is currently considering enacting PMF regulations).\textsuperscript{106} Most of the remaining sixteen hail from Canada, France, Israel, and Angola, thereby making a fully international regulatory regime entirely superfluous.\textsuperscript{107} Furthermore, the likelihood of PMFs sprouting up in un-regulated countries is small since the supply of military ex-

\textsuperscript{98} See AECA, supra note 64.
\textsuperscript{99} See Int’l Alert, supra note 97, at 13–14.
\textsuperscript{100} See FMAA, supra note 68.
\textsuperscript{101} See Zarate, supra note 1, at 148–49.
\textsuperscript{102} See Singer, supra note 3, at 214–15.
\textsuperscript{103} See id.
\textsuperscript{104} See Zarate, supra note 1, at 148–49.
\textsuperscript{105} See ICIJ, supra note 63.
\textsuperscript{107} See PMF Active List, supra note 106; ICIJ, supra note 63.
pertise (and the demand for it) is largely concentrated in the eleven current PMF host countries.\textsuperscript{108}

**Conclusion**

In both the Developed and Developing Worlds, there is a growing need for inexpensive, specialized military expertise, and PMFs fill that need far better than standing armies. However, since current international and domestic laws do not adequately restrain PMFs from committing human rights abuses, the privatized military industry must be regulated in such a way that international norms are respected and protected. A coordinated domestic regulatory scheme (along the lines of those currently found within the United States and South Africa) would adequately solve this problem and would require the assent of only the eleven current PMF host countries, thereby offering the easiest and most effective remedy to PMF human rights abuses.

\textsuperscript{108} See Howe, supra note 5, at 2–3.
TEMPORARY INTERSTATE TRANSACTIONAL PRACTICE IN THE UNITED STATES AND EUROPE—KEEPING UP WITH MODERN COMMERCIAL REALITIES

Alessandro Turina*

Abstract: The globalization of the financial markets and technological innovation have contributed to a broad geographical expansion of corporations’ areas of interest. Providers of legal services seek to break through established local barriers to practice law in order to better cater to their clients’ needs. The European Union has been increasingly liberalizing interstate transactional practice of law within its member States. In the United States, on the other hand, there is a lack of jurisprudence permitting such practice. This Note examines the limits imposed by past decisions of the U. S. Supreme Court in the area of interstate transactional practice and argues in favor of a more liberal approach, through an expansive application of the Privileges and Immunities Clause doctrine.

Introduction

Globalization of the financial markets and the increasing enlargement of multi-national corporations’ areas of interest have created the need for legal services to break through traditionally established local barriers to practice.1 The United States’ economy and business, under major advancements in technology, is becoming increasingly global in nature.2 Law firms, in order to remain competitive and cater to their clients’ needs, must be able to operate in areas frequently far away from their headquarters.3 The tension between law firms’ need to break through local barriers to practice and the

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3 See Silver, supra note 1, at 1039.

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established legal limitations stifling this process resulted in the liberalization, within the last twenty-five years, of the rules governing interstate legal practice in the European Union (EU).4

The European Court of Justice (ECJ), through its jurisprudence, liberally interpreted the provisions of Articles 49 and 50 of the European Community Treaty (EC Treaty) and permitted lawyers to carry out interstate transactional practice with few limitations.5 On the other hand, in the United States, there is a lack of jurisprudence permitting such practice.6 Although the Supreme Court ruled that lawyers may invoke the protection of Article 4’s Privileges and Immunities Clause in cross-state practice, these decisions involved the rights of nonresident lawyers to be admitted to a particular state bar.7 The Supreme Court has not yet considered whether the Privileges and Immunities Clause would grant nonresident lawyers the right to provide temporary interstate transactional services in states where they are not admitted to the bar.8

The liberalization of interstate legal practice is an important goal to be accomplished if the legal profession wants to keep up with the globalization of the world economy.9 Countries around the world are already attempting to coordinate a common strategy to deal with a fu-


5 See Goebel, supra note 4, at 339. The European Community is at the core of the European Union and its original name was the European Economic Community when it was created by the Treaty of Rome on March 25, 1957. See id. at 307 n.2. The Treaty of Amsterdam significantly amended the EC Treaty, the EU Treaty and certain other documents, resulting in the renumbering of the articles as of May 1, 1999. See Goebel, supra note 4, at 307 n.2, citing Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1. Most recently the Treaty of Nice, signed at Nice on February 26, 2001, amended the EC Treaty, the EU Treaty and certain other documents. Treaty of Nice, Feb. 6, 2001, 2001 O.J. (C 80) 1. Reference to the numbering will be made with respect to the most recent consolidated version of the Treaty establishing the European Community, Consolidated Version of the Treaty Establishing the European Community, Dec. 24, 2002, 2002 O.J. (C 325) 1 [hereinafter EC Treaty].

6 See Goebel, supra note 4, at 340.


8 See Goebel, supra note 4, at 322.

9 See Davis, supra note 2, at 1340-41.
ture internationalization of the legal profession.\textsuperscript{10} For example, the General Trade Agreement on Trade in Services ("GATS") is one of a number of agreements that were reached in conjunction with the creation of the World Trade Organization in 1994.\textsuperscript{11} Legal services are among the trade issues covered by the GATS, and the agreement calls for member nations, including the United States, to develop rules that will make it possible for lawyers from one country to practice in other countries.\textsuperscript{12} Maybe it is time for the Supreme Court to adopt a more liberal jurisprudence along the lines of that adopted by the ECJ and reexamine the application of the Privileges and Immunities Clause to transactional interstate practice.\textsuperscript{13}

Part I of this Note describes to what extent the Supreme Court expressly applied the protection of the Privileges and Immunities Clause to interstate legal practice. The Note then addresses the lack of a settled jurisprudence dealing with cross-border transactional services by nonresident lawyers in jurisdictions where they are not licensed. The Note then briefly addresses three cases demonstrating the sanctions faced by lawyers engaged in transactional practice in states where they have not been admitted to the bar. Part II presents the status of the law addressing interstate transactional practice in the EU, highlighting the relevant provisions of the EC Treaty, as interpreted by the ECJ in its most important landmark cases. Part III argues that, in the interest of harmony among the legal systems, as demanded by the increasing globalization of the world’s leading economies, the Supreme Court should reexamine the limits imposed by past decisions in the area of transactional interstate practice and apply the Privileges and Immunities of Article 4 of the U.S. Constitution.

I. Interstate Legal Practice in the United States

A. Right of Nonresident Lawyers to Be Admitted to a State Bar: The Piper-Friedman-Barnard Trilogy

The U.S. Constitution does not contain an express statement setting forth the freedom to provide interstate professional services.\textsuperscript{14} "Since the founding of the Republic, the licensing and regulation of

\textsuperscript{11} See id.
\textsuperscript{12} See id.
\textsuperscript{13} See generally Goebel, supra note 4, at 345.
lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions.” Qualifications for admission to practice and the standards of professional conduct are established by the states. Consequently, the general rule of unauthorized practice of law is that only lawyers who have passed the bar in one state are authorized to practice law in that state.

Section 1 of the Fourteenth Amendment of the U.S. Constitution states that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States.” This passage, referred to as the Privileges and Immunities Clause, “was designed to ensure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.” When analyzing a claim under the Privileges and Immunities Clause, the courts adopt a two-step process. First, the court establishes whether the activity in question is “sufficiently basic to the livelihood of the nation” so as to fall within the scope of the protection of the Clause. Second, the court invalidates the discriminating conduct only if it concludes that the restriction is not closely related to the advancement of a substantial state interest.

The first case involving the application of the Privileges and Immunities analysis to interstate legal services was the landmark decision New Hampshire v. Piper. In that case, a Vermont resident brought an action against the New Hampshire Supreme Court challenging the residency requirement for admission to the bar. The Court struck down the residency requirement as violative of the Privileges and Immunities Clause. The Court reached its conclusion by applying a two-part analysis and reasoning that (i) the practice of law is important to the national economy and should be considered a fundamental right for the purposes of the Clause, and (ii) the residency requirement was not closely related to the advancement of a substantial state interest.

15 Id.
16 Id.
17 See Davis, supra note 2, at 1344.
18 U.S. Const. amend. XIV, § 1.
19 See Friedman, 487 U.S. at 64, quoting Toomer v. Witsell, 334 U.S. 385, 395 (1948).
20 See Friedman, 487 U.S. at 64.
21 See id. at 64–65.
22 See id. at 65.
23 See Piper, 470 U.S. at 275.
24 See id. at 275–77.
25 See id. at 288.
26 See id. at 281, 285.
The Court rejected the arguments that a nonresident lawyer would be less familiar with local rules or more prone to act unethically, and concluded that no substantial reason for the difference in treatment existed in this case.\textsuperscript{27}

In \textit{Virginia v. Friedman}, the court once again dealt with the Privileges and Immunities Clause in the context of interstate legal services.\textsuperscript{28} The issue before the Court involved the constitutionality of Virginia’s residency requirement imposed on out of state lawyers seeking admission to the Virginia bar on motion without sitting for the local bar exam.\textsuperscript{29} The Court struck down the residency requirement confirming the holding of \textit{Piper} that “the practice of law . . . is sufficiently basic to the national economy to be deemed a privilege protected by the Clause.”\textsuperscript{30}

Once again, under the second prong of the test, the Court failed to find a substantial state interest justifying discrimination against nonresident lawyers.\textsuperscript{31} In fact, the Court rejected the contentions that (i) only attorneys not admitted on motion would have a commitment to service and familiarity with Virginia law, and (ii) residency requirements facilitate enforcement of the full-time requirement of the regulation at stake.\textsuperscript{32}

Finally, in \textit{Barnard v. Thorstenn}, the Court held that the Federal District Court for the Virgin Islands could not impose a one-year residence requirement before admission to its bar.\textsuperscript{33} The Court confirmed that the practice of law is a privilege protected by the Privileges and Immunities Clause and the residency requirement was not substantially related to the state’s interest in assuring that counsel would be available for appearances on short notice and would maintain an adequate level of professional competence.\textsuperscript{34}

\textbf{B. Temporary Interstate Transactional Practice in the United States}

The \textit{Piper-Friedman-Barnard} trilogy of cases confirms that lawyers engaged in interstate practice may claim the protection of the Privileges and Immunities Clause when seeking admission to a particular

\begin{itemize}
  \item \textsuperscript{27} See \textit{id.} at 285–86.
  \item \textsuperscript{28} See \textit{Friedman}, 487 U.S. at 61.
  \item \textsuperscript{29} See \textit{id.}
  \item \textsuperscript{30} See \textit{id.} at 66.
  \item \textsuperscript{31} See \textit{id.} at 68.
  \item \textsuperscript{32} See \textit{id.} at 67–68
  \item \textsuperscript{33} See \textit{Barnard}, 489 U.S. at 549, 558–59.
  \item \textsuperscript{34} See \textit{id.} at 553, 557–58.
\end{itemize}
state bar. However, the Supreme Court has not expressed an opinion on whether the Privileges and Immunities Clause affords protections to lawyers engaging in temporary interstate transactional practice.

Global business needs and technological innovations facilitate a law firm’s ability to offer legal services to distant clients as efficiently as clients in the same community.

Under the current system, the participation of a corporate lawyer in closing activities taking place out of state may lead to sanctions by local courts for unauthorized practice of law. Imagine the following scenario: a client running a corporate business in Florida asks a New York business lawyer to come to Florida and advise him in issuing securities to some targeted clients residing in Florida. The client requests the advice of that particular lawyer because he is a specialist in this area of law. This type of transactional legal advice is commonly tolerated; nevertheless, it falls into an area of uncertainty from a doctrinal point of view.

Case law shows that if the New York lawyer decides to advise his Florida client from his New York office by means of e-mail, phone, or fax, he may dodge disciplinary sanctions, yet not with absolute certainty.

Should, however, the New York lawyer decide to embark on a business trip to Florida in order to be present at some negotiation

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35 Id. at 558–59; Friedman, 487 U.S. at 70; Piper, 470 U.S. at 288.
36 See Goebel, supra note 4, at 322.
38 See Goebel, supra note 4, at 327.
39 See id.
40 See Birbrower, Montalbano, Condon & Frank v. Superior Court, 949 P.2d 1, 5–6 (Cal. 1998) (holding that a New York law firm, which previously drafted for a California client a contract governed by California law, by offering legal services in connection with the drafted agreement, committed unauthorized practice of law and was barred from recovering legal fees). The California Supreme Court noted that, although very fact sensitive, advising a distant client through modern technological means can still trigger unauthorized practice of law. See id. at 5–6. Cf. Fought & Company Inc. v. Steel Engineering and Erection, Inc., 951 P.2d 487, 491-92. (Haw. 1998) (authorizing the payment of legal fees to an Oregon law firm engaged in the representation of a Hawaii client involved in litigation against the State of Hawaii). Even though the Oregon firm did not file for pro hac vice appearance and merely supervised the litigation, the Hawaii Supreme Court failed to adopt the Birbrower approach, stressing that the economy is transforming from local to global in nature. See Fought & Company, 951 P.2d at 497.
proceedings on behalf of his client, case law shows that he may incur sanctions for unauthorized practice of law.41

In summary, the ability of a lawyer to advise a client, even upon request, when physically present in a state where he is not licensed to practice, presents very serious concerns due to sanctions for unauthorized practice of law.42

II. Temporary Interstate Transactional Practice in Europe

In the EU, lawyers are free to offer interstate transactional legal services with few limitations.43 The free movement of goods, persons, services, and capital is a cornerstone of the 1957 EC Treaty.44

Article 49 of the EC Treaty provides for the abolition of restrictions on freedom to provide services within the Community whenever the provider of the service is established in a Member State different from the state of the recipient of the service.45 Article 50 states that persons providing services cannot be subject to discrimination on the basis of their nationality whenever the service provider is temporarily pursuing activities in a host state.46

The landmark case, Van Binsbergen v. Bestuur, discussed whether a Dutch lawyer authorized to handle administrative matters before Dutch tribunals could continue to do so after moving to Belgium.47

41 See Spivak v. Sachs, 211 N.E.2d 329, 331 (N.Y. 1965) (holding that a California lawyer who spent a couple weeks in New York advising a New York resident in connection with a Connecticut divorce proceeding resulted in unauthorized practice of law). The court reasoned that the relevant section of the New York criminal statute and its policy is aimed “to protect our citizens against the dangers of legal representation and advice given by persons not trained, examined and licensed for such work, whether they be laymen or lawyers from other jurisdictions.” Id.; see also Ranta v. McCarney, 391 N.W.2d 161, 162, 166 (N.D. 1986) (holding that a Minnesota tax lawyer who traveled several times to North Dakota to provide legal services to a client could not recover compensation for the services rendered in that state). The court in Ranta noted that the concept of legal practice included an attorney’s rendering of tax advice and negotiating the sale of a client’s business. See Ranta, 391 N.W.2d at 163.
42 See Birbrower, 949 P.2d at 5–6; Spivak, 211 N.E.2d at 331; Ranta, 391 N.W.2d at 166.
43 See Goebel, supra note 4, at 339.
44 See EC Treaty, supra note 5, art. 3.
45 EC Treaty, supra note 5, art. 49. In order to render Community law effective, the doctrine of direct legal effect of the EC Treaty was developed by the European Court of Justice. See Goebel, supra note 4, at 310 n.22. The doctrine states that some treaty articles are sufficiently precise in their articulation of rights that may be given immediate effect by member state courts. See id.
46 EC Treaty, supra note 5, art. 50.
The Dutch authorities claimed that residency was a requirement for the lawyer to continue his practice.\textsuperscript{48} The question before the ECJ was whether Articles 49 and 50 could have a direct legal effect in a national court proceeding providing immediate rights to the individuals.\textsuperscript{49} The ECJ concluded that Articles 49 and 50 do have direct legal effect in a way that nationals of Member States can rely upon them to perform professional services in any other Member State.\textsuperscript{50} The ECJ also established the principle that no Member State may discriminate against nationals of another state or apply its own nondiscriminatory rules regulating a profession unless the rules are justified by the general common good.\textsuperscript{51} In the case at bar, no “general good” was found in barring the Dutch lawyer from practicing before the Dutch tribunals while residing in Belgium, although Dutch professional responsibility regulations might govern the nonresident lawyer’s practice.\textsuperscript{52}

The value of this precedent is great in that it not only prevents discrimination based on nationality, but also bars the application of state rules unless they are objectively justified by the general interest.\textsuperscript{53}

The Van Binsbergen decision had a major impact on the Council Directive on lawyers’ freedom to provide services.\textsuperscript{54} The Council Directive is the legal cornerstone for the rights of lawyers to provide interstate services on a temporary basis throughout the Member States.\textsuperscript{55} It is noteworthy that Article 5 of the Council Directive sets forth a limit on cross border practice involving legal proceedings (presumably civil and criminal litigation before courts).\textsuperscript{56} In litigation activities, the state in which the lawyer desires to practice may require him to work in conjunction with a lawyer member of the local bar.\textsuperscript{57} However, by implication from Article 5, if a lawyer engages in transactional practice, he does not have to be associated with a local attorney.\textsuperscript{58}

\textsuperscript{48}\textit{See id.}
\textsuperscript{49}\textit{See id.}
\textsuperscript{50}\textit{See id.}
\textsuperscript{51}\textit{See id.}
\textsuperscript{54}\textit{See Goebel, supra note 4, at 311; Council Directive 77/249, 1997 O.J. (L 78) 17.}
\textsuperscript{55}\textit{See Goebel, supra note 4, at 311.}
\textsuperscript{56}\textit{See Council Directive, supra note 53, art.5.}
\textsuperscript{57}\textit{See id.}
\textsuperscript{58}\textit{See Goebel, supra note 4, at 313.}
The most important recent judgment applying the Council Directive is *Gebhard v. Milan Bar Council*. The ECJ indicated the proper guidelines to determine whether a lawyer is providing services on a temporary basis or is becoming established in a particular Member State. In that case, a German lawyer licensed to practice in Germany, moved his residence to Milan, opened his own office, and started representing German and Austrian clients in Italy with the aid of Italian lawyers. He also used the title “avvocato” on the letterhead of documents used for professional purposes and he appeared using the same title before the courts of Milan.

The ECJ held that the temporary nature of the provision of services at stake is to be determined in light of its duration, regularity, periodicity, and continuity. Also, the court stressed that the provider of services may equip himself in the state where he seeks to exercise, with the infrastructures necessary for the purposes of performing the services in question.

Although Gebhard’s practice ultimately was not found to be within the category of temporary interstate service provider, the ECJ offered an extensive interpretation of the rights to provide temporary interstate legal services as previously set forth in the Council Directive. Any lawyer or law firm from any Member State of the EU has a right to provide occasional, but not continuous, transactional legal service throughout any Member State of the EU as long as it is offered on a specific project.

III. Application of the Privileges and Immunities Clause to Temporary Interstate Transactional Practice in the United States

In this section, I suggest that courts might use the two-part analysis employed by the Supreme Court in *Piper, Friedman, and Barnard* to reach

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62 See id.
63 See id.
64 See id.
the conclusion that limiting temporary interstate transactional practice would violate the Privileges and Immunities Clause of Article 4.67

Under the test, courts must first determine whether the activity in question is sufficiently basic to the livelihood of the Nation so as to fall within the scope of the protection of the Clause.68 The Supreme Court held in Piper, and later confirmed in Friedman and Barnard, that the right to practice law is protected by the Privileges and Immunities Clause.69 Interstate transactional practice is an aspect of practicing law, and therefore is protected by the Privileges and Immunities Clause.70

Under the second part of the test, the issue is whether “(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State’s objective.”71

In order to assess the presence of a substantial reason for the difference in treatment, it is important to look at the policies that stand behind the line of cases limiting interstate transactional practice.72

These decisions, addressing interstate legal practice, emphasize the tension between the protection of economic efficiency on one side, and assurance of an ethical standard and representation from trained lawyers, on the other.73

It is clear that promoting a liberalization of the legal restriction to practice in an interstate context would cater to those business clients “which can utilize their customary counsel throughout their market, whenever the lawyers are deemed by the client to be competent.”74 Courts, however, seem to be more concerned about protecting the same clients against “the dangers of legal representation and advice given by persons not trained, examined and licensed for such work.”75 Courts, arguably, seem to agree on the underlying assumption that an out of state lawyer might end up harming the client’s interests because of lack of training or competence with the local substantive laws.76

Nevertheless, the Court has previously addressed these concerns in Piper, and later in Barnard, by holding that there is no evidence to

67 See Barnard, 489 U.S. at 552–53; Friedman, 487 U.S. at 64–66; Piper, 470 U.S. at 283–84.
68 See Friedman, 487 U.S. at 64–65; Piper, 470 U.S. at 279.
69 See Piper, 470 U.S. at 281; Barnard, 489 U.S. at 553; Friedman, 487 U.S. at 65.
70 See Piper, 470 U.S. at 281.
71 Piper, 470 U.S. at 284.
72 See Birbrower, 949 P.2d at 8; Spivak, 211 N.E.2d at 331.
73 See Birbrower, 949 P.2d at 6; Spivak, 211 N.E.2d at 331.
74 Goebel, supra note 4, at 340.
75 Spivak, 211 N.E.2d at 331.
76 See Goebel, supra note 4, at 342.
show that nonresidents might be less likely to keep abreast of local rules and procedures or practice law in a dishonest manner. There are no reasons why such a rationale could not be applied to temporary interstate transactional practice as well.

Furthermore, the discrimination practiced against nonresidents does not bear a substantial relationship to the state’s objective of assuring competent and honest representation to residents. In fact, states have other, less restrictive means available than declaring interstate transactional practice illegal. For example, a state may subject a practicing attorney, who seeks to advise clients inbound, to mandatory periodic legal education courses and apply to him the same ethical standards that already govern locally practicing attorneys.

In one case, a district court actually attempted to apply the Privileges and Immunities protection to the context of interstate transactional practice. The court in Spanos v. Skouras Theatres Corp. reasoned that protection of the right of a client to obtain services of the lawyer of his choice should be protected. The holding, however, was limited to the assistance of an out of state lawyer working in association with a local lawyer on a federal claim or defense.

**Conclusion**

In summary, the liberal approach adopted by the EU, with respect to temporary interstate transactional practice, appears to be more in consonance with modern commercial needs than the approach currently existing in the United States.

Maybe it is time for the U.S. courts to adopt a more liberal approach, with respect to cross-border transactional practice, through an application of the Privileges and Immunities Clause doctrine. The practice of law is a privilege under Article 4 jurisprudence and a few considerations seem decisive in undercutting states’ reasons for different treatment with respect to out of state transactional lawyers: (i)

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77. See Barnard, 489 U.S. at 555; Piper, 470 U.S. at 285.
78. See Goebel, supra note 4, at 341.
79. See Friedman, 487 U.S. at 68.
80. See Piper, 470 U.S. at 285 n.19.
81. See Friedman, 487 U.S. at 69.
83. See id.
84. See id. at 171.
85. See Davis, supra note 2, at 1341.
86. See Friedman, 487 U.S. at 66.
citizens have a right to secure the legal services that they prefer;\footnote{See Spanos, 364 F.2d at 170.} (ii) competent and ethical out of state lawyers are not to be presumed to fail to familiarize themselves with local substantive law where necessary;\footnote{See Barnard, 489 U.S. at 555.} and (iii) states’ barriers to interstate transactional practice create higher costs of representation for clients and represent economic protectionism of the local bar.\footnote{See Goebel, supra note 4, at 344.}

States have other less restrictive means available to achieve clients’ protection against unqualified and unprofessional conduct such as subjecting the out of state lawyer to local ethical rules.\footnote{See Piper, 470 U.S. at 284.} The EU approach indicates that the risks of disserving clients are minimal, and the undeniable advantages would accommodate modern clients’ increasingly diverse commercial needs.\footnote{See Goebel, supra note 4, at 344-45.}