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UNTOLD TRUTHS: THE EXCLUSION OF ENFORCED STERILIZATIONS FROM THE PERUVIAN TRUTH COMMISSION'S FINAL REPORT

Jocelyn E. Getgen

[pages 1–34]

Abstract: This Article argues that the exclusion of enforced sterilization cases from the Peruvian Truth Commission's investigation and Final Report effectively erases State responsibility and decreases the likelihood for justice and reparations for women victims-survivors of State-sponsored violence in Peru. In a context of deep cultural and economic divides and violent conflict, this Article recounts how the State's Family Planning Program violated Peruvian women's reproductive rights by sterilizing low-income, indigenous Quechua-speaking women without informed consent. This Article argues that these systematic reproductive injustices constitute an act of genocide, proposes an independent inquiry, and advocates for a more inclusive investigation and final report for future truth commissions whose goals include truth, accountability, and justice for all victims-survivors of state-sponsored violence. Leaders responsible for the enforced sterilization of more than 200,000 Peruvian women, including former President Alberto Ken'ya Fujimori, must be held accountable for past violations in order to fully realize future reconciliation and justice in Peru.

THE COMPLICITY AND LIMITS OF INTERNATIONAL LAW IN ARMED CONFLICT RAPE

John D. Haskell

[pages 35–84]

Abstract: The inauguration of the International Criminal Court and the proliferation of criminal tribunals over the last twenty years are often pre-

sented as historic and progressive moments in the trajectory of international law's response to victims of rape in armed conflicts. However, these moments may signal not only inclusion, but also repression. They signal not just progress, but also a renewed rhetorical and institutional legitimization of colonialism. Historicizing the advent of the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the Former Yugoslavia, and the International Criminal Court, this Article examines some ways that international law obfuscates its complicity in armed conflict rape, looking particularly at calls within the profession for greater efficiency, nation-state security, and reparations for victims. In doing so, this Article grapples with questions concerning the limits and alternatives to our current legal imagination towards rape in armed conflict.

NOTES

Unnecessary Deaths and Unnecessary Costs: Getting Patented Drugs to Patients Most in Need

Erin M. Anderson

[pages 85–114]

Abstract: Medical epidemics that are constrained in the developed world are wrecking havoc on developing countries, which are bearing the brunt of HIV/AIDS, malaria, tuberculosis, and other infectious diseases. Because medicines used to treat these conditions are patented, they are expensive and inaccessible to poor countries. In 1994, the United Nations established a system of international patent protection through the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), and simultaneously tried to accommodate its commitment to making life-saving pharmaceuticals available to developing countries. When TRIPS failed to accomplish this goal, Article 31bis, an amendment to TRIPS, was introduced in 2003, seeking to make it easier for developing countries to acquire low-cost drugs. However, the amendment has been criticized and has largely gone unused. This Note addresses ways in which Article 31bis can be employed to deliver treatment to the neediest. In particular, this Note advocates that, whether or not the amendment is used, life-saving drugs must be provided at low-cost to developing countries.

Parents Involved in Community Schools v. Seattle School District No. 1: The Application of Strict Scrutiny to Race-Conscious Student Assignment Policies in K–12 Public Schools

Nicole Love

[pages 115–150]

Abstract: Schools nationwide have used race-conscious student assignment policies to combat the resegregation of K–12 public schools. However, the Court in *Parents Involved in Community Schools v. Seattle School District No. 1* dealt a disheartening blow to school districts concerned about their racial diversity, holding that certain race-conscious student assignment policies violated the Equal Protection Clause of the Fourteenth Amendment. The Court applied strict scrutiny in reaching this conclusion, contrary to the original intent of the drafters of the Fourteenth Amendment and the Court's jurisprudence in desegregation cases. This Note examines the relationship between segregation, desegregation, and resegregation in America's public schools and the Fourteenth Amendment. This Note argues that the Court erred in analyzing the race-conscious assignment policies under strict scrutiny for two reasons. First, the drafters of the Fourteenth Amendment did not intend for the Amendment to be "color-blind." Second, race-conscious assignment policies should be analyzed as an extension of the Court's desegregation jurisprudence, not as an extension of the Court's affirmative action jurisprudence.

Breaking the Chains: Combating Human Trafficking at the State Level

Stephanie L. Mariconda

[pages 151–188]

Abstract: Human trafficking is a modern form of slavery. Many individuals fall prey to this flourishing industry after being lured from their homes by the promise of economic opportunity. Upon relocation, these victims are forced to work under the darkest conditions in countries around the world, including the United States. This Note explores the problem of trafficking in the United States and the efforts being exerted to combat it at the federal and state levels. Massachusetts State Senator Mark C. Montigny recently introduced a comprehensive bill that would complement and improve upon federal efforts to prosecute perpetrators of human trafficking and provide services to their victims. Ultimately,

given the clandestine nature of the industry and the minimal effect the federal legislation has had, this Note urges Massachusetts to adopt Senator Montigny's bill to fight human trafficking effectively on the local level, and for other state legislatures quickly to follow suit.

Resisting the Path of Least Resistance: Why the Texas "Pole Tax" and the New Class of Modern Sin Taxes Are Bad Policy

Rachel E. Morse

[pages 189–221]

Abstract: Sin taxes—traditionally levied on alcohol and tobacco—are inherently regressive and disproportionately burden the poor, yet they are firmly entrenched as a practice and offer a quick fix in times of fiscal need. Opponents to this method of generating revenue cite its regressive nature and argue that sin taxes are paternalistic and bad social policy. Others disagree, contending that smokers need every incentive to quit, or that alcoholics should be required to mitigate the social costs of their habit. In recent years, a new class of sin taxes has reached deeper into popular culture than ever before, confusing the basic role of the tax system with the improper role of government as social engineer. This Note argues that the use of new sin taxes must be curbed in order to protect the political and socio-economic minorities who consistently face a disproportionate burden under every new sin tax.

UNTOLD TRUTHS: THE EXCLUSION OF ENFORCED STERILIZATIONS FROM THE PERUVIAN TRUTH COMMISSION'S FINAL REPORT

Jocelyn E. Getgen*

Abstract: This Article argues that the exclusion of enforced sterilization cases from the Peruvian Truth Commission's investigation and Final Report effectively erases State responsibility and decreases the likelihood for justice and reparations for women victims-survivors of State-sponsored violence in Peru. In a context of deep cultural and economic divides and violent conflict, this Article recounts how the State's Family Planning Program violated Peruvian women's reproductive rights by sterilizing low-income, indigenous Quechua-speaking women without informed consent. This Article argues that these systematic reproductive injustices constitute an act of genocide, proposes an independent inquiry, and advocates for a more inclusive investigation and final report for future truth commissions whose goals include truth, accountability, and justice for all victims-survivors of state-sponsored violence. Leaders responsible for the enforced sterilization of more than 200,000 Peruvian women, including former President Alberto Ken'ya Fujimori, must be held accountable for past violations in order to fully realize future reconciliation and justice in Peru.

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> *"[E]very society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed . . . ."*[1]

Introduction

Does time heal all wounds? Can a transitioning democratic society move forward without fully facing the human rights violations that plague its past? Or can only truth and justice reconcile large-scale abuses? Difficult lessons from the recent past have taught societies and nations that legitimate democracies require political and personal accountability reinforced by the rule of law.[2] International human rights treaties thus impose upon states a duty to investigate, criminally prosecute, and punish perpetrators of crimes against humanity.[3] Although state actions taken in response to gross violations of human rights are never truly adequate when communities, families, and individuals suffer irreparable harms, inaction is invariably worse.[4] A state's failure to respond appropriately and justly to gross human rights abuses can give victims the sense that their perpetrators emerged either victorious or with clean hands.[5]

The Peruvian government's response to twenty years of human rights abuses from 1980 to 2000 included creating a truth commission with a broad mandate to "promote national reconciliation, the rule of justice and the strengthening of the constitutional democratic regime."[6] By forming the Peruvian Truth and Reconciliation Commission (*CVR*),[7] the State initiated a process of achieving national reconciliation through an attempt to correct the historical record, provide a collective memory and preserve the possibility of criminal accountability and justice.[8]

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[1] Geoffrey Robertson, Crimes Against Humanity: The Struggle for Global Justice 328 (The New Press 2006) (1999) (quoting the IAC Annual Report 193 (Sept. 26, 1986)).

[2] *See* John Borneman, Settling Accounts: Violence, Justice, and Accountability in Postsocialist Europe 3 (1997).

[3] *See* Robertson, *supra* note 1, at 327–28.

[4] *See* Martha Minow, Breaking the Cycles of Hatred: Memory, Law, and Repair 15–16 (2002).

[5] *See id.* at 16.

[6] Supreme Decree 065–2001-PCM art. 1 (June 2, 2001) (Peru).

[7] *Comisión de la Verdad y Reconciliación.*

[8] *See* Amnesty Int'l, *Peru: The Truth and Reconciliation Commission—A First Step Towards a Country Without Injustice*, AI Index AMR 46/003/2004, 1–2 (Aug. 2004); Priscilla B. Hayner, Unspeakable Truths: Facing the Challenge of Truth Commissions 24–31 (2002) (discussing the basic objectives of a truth commission: "to discover, clarify, and for-

In many respects, the *CVR* is a model for future truth commissions that strive to end impunity, attend to the needs of victims, initiate state investigations and systemic reforms, gain a critical perspective to confront internal conflict, and condemn individuals and institutions for abuses.[9] Although this Commission serves as an ambitious and inclusive mechanism for accountability and truth-telling, it fails to provide a record and voice to more than 200,000 marginalized, indigenous Quechua-speaking women in Peru who were victims of a State-sponsored enforced sterilization campaign.[10] The exclusion of large-scale reproductive rights abuses committed against the poorest and most marginalized sectors of Peruvian society demonstrates a weakness of the *CVR*, impedes justice for these individuals, and provides further lessons for truth commissions of the future.[11] With large-scale human rights abuses occurring in conflicts and transitioning regimes around the world—the internal and international conflicts in Iraq, for example[12]—the transitional justice community must responsibly ensure that the collective memory includes all victims and that their voices are not

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mally acknowledge past abuses; to respond to specific needs of victims; to contribute to justice and accountability; to outline institutional responsibility and recommend reforms; and to promote reconciliation and reduce conflict over the past"); Minow, *supra* note 4, at 24–27. *See generally* Richard A. Wilson, The Politics and Reconciliation in South Africa: Legitimizing the Post-Apartheid State (2001) (describing the truth-telling and reconciliation functions of the South African Truth and Reconciliation Commission).

[9] *See* Comisión de Entrega de la Comisión de la Verdad y Reconciliación, Hatun Willakuy: Versión Abreviada del Informe Final de la Comisión de la Verdad y Reconciliación 433–65 (2004); Truth and Reconciliation Comm'n, Final Report, General Conclusions *passim* (2003) *available at* http://www.cverdad.org.pe/ingles/ifinal/conclusiones.php [hereinafter Final Report].

[10] Amnesty Int'l, *supra* note 8, at 19–20. *See generally* Final Report, *supra* note 9. These women predominantly lived in rural areas in the Andes and Peruvian Amazon. Amnesty Int'l, *supra* note 8, at 20.

[11] *See* discussion *infra* Part III.

[12] *See, e.g.*, M. Cherif Bassiouni, *Postconflict Justice in Iraq*, 33 Hum. Rts. 15 *passim* (2006) (highlighting the violent and widespread conflict in Iraq and advocating for a post-conflict justice strategy that includes prosecution of offenders, a victim compensation scheme, the creation of a historic commission, and revamping the Iraqi legal system); Jennifer Moore, *Collective Security with a Human Face: An International Legal Framework for Coordinated Action to Alleviate Violence and Poverty*, 33 Denv. J. Int'l L. & Pol'y 43 *passim* (2004) (finding a legal obligation to promote human security in certain international human rights documents and arguing that security will not be established until political and civil liberties and secure and basic economic and social needs are met); NGO Coordination Comm. in Iraq & Oxfam Int'l, *Rising to the Humanitarian Challenge in Iraq*, Briefing Paper 105, July 2007, *available at* http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/18_07_07_oxfam_iraq.pdf (calling for an increase in humanitarian assistance to the people of Iraq and estimating that eight million Iraqis are in need of emergency aid).

silenced in the future processes of truth and reconciliation.[13] Furthermore, with Peru's current step toward accountability and transitional justice—the trial of former President Alberto Ken'ya Fujimori—advocates and other members of civil society must push for reproductive justice for the victims-survivors of enforced sterilization in Peru in order to move toward truth, justice, and reconciliation for all.[14]

This Article argues that the exclusion of enforced sterilizations cases in the *CVR*'s investigation and Final Report effectively erases State responsibility and greatly decreases the likelihood that Peru will seek justice for the victims of these violations of reproductive rights. Part I provides an overview of the sharp cultural and economic divides in Peruvian society, examines the history of violent conflict in Peru from 1980 to 2000, and recounts how healthcare providers violated Peruvian women's reproductive rights when they sterilized low-income, indigenous Quechua-speaking women either against their will or without informed consent through the State's Family Planning Program. Part II discusses the creation and implementation of the *CVR* through its executive mandate. Part III challenges the reasons for excluding these cases in the Commission's investigation and Final Report and also examines the effects of these omissions. Part IV proposes an independent inquiry with regard to these abuses and advocates for a more inclusive investigation and final report for future truth commissions whose goals include truth, accountability, and justice.

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[13] *Cf.* David M. Crane, *White Man's Justice: Applying International Justice After Regional Third World Conflicts*, 27 Cardozo L. Rev. 1683, 1684 (2006) (advocating for victims' central role in the truth, reconciliation, and justice process). *See generally* Kader Asmal et al., Reconciliation Through Truth: A Reckoning of Apartheid's Criminal Governance (1997) (discussing the need for reconciliation through collective memory and corrective action); James L. Gibson, Overcoming Apartheid: Can Truth Reconcile a Divided Nation? (2004) (discussing the truth and reconciliation process of transitional justice in South Africa); Ruti G. Teitel, Transitional Justice (2000) (discussing various concepts of transitional justice and the rule of law in times of political change); Ruti Teitel, *The Law and Politics of Contemporary Transitional Justice*, 38 Cornell Int'l L.J. 837 (2005) (reviewing contemporary developments in transitional justice).

[14] *See supra* notes 8, 12; Fujimori on Trial: Accountability in Action, http://fujimorion trial.org (last visited Nov. 24, 2008) (providing news and analysis regarding the Fujimori trial).

I. The Paths to Violent Conflict

A. *Indigenous Peoples in Peruvian Society*

Tawantinsuyu's[15] destruction and Peru's birth began when the Spanish Conquistadors invaded Incan lands, captured the last Incan ruler, Atahualpa, and massacred thousands of Incan warriors in the Andean city of Cajamarca in 1532.[16] During the first one hundred years of colonial rule and oppression in Peru, the indigenous population in the Andes region plummeted from nine million to six hundred-thousand people.[17] From this swift defeat and near destruction of the highland indigenous peoples of Peru emerged the myth of the "vanquished race": that the Incas and their descendants lacked decision-making ability and individual initiative and, thus, "could or should be exterminated, 'civilized,' instructed, or saved."[18]

Spanish colonial rule guaranteed impoverishment and death for many indigenous Peruvians and perpetuated the fragmented and divided structures that continue to exist in Peruvian society today.[19] First, a geographical divide exists between the coastal region—predominately urban, white and Spanish-speaking—and the highlands—mostly rural, indigenous and Quechua-speaking.[20] In addition, the coastal region boasts an overwhelming majority of the nation's wealth and political power, and, as a result, political and economic programs in past regimes have largely ignored or neglected the needs of the indigenous peoples in the highlands and rainforest regions.[21] Moreover, there are racial and ethnic gaps that divide Peruvian society among groups of Spanish descent (*criollos*), mixed Spanish and indigenous descent (*mestizos*), indigenous of Andean origin who have moved to the urban cen-

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[15] *Tawantinsuyu* is the name of the pre-colonial Incan Empire. Encyclopedia Britanica, Scurlock—Tirah IX, 845 (15th ed. 1983).

[16] *See* The Peru Reader: History, Culture, Politics 81, 102–06 (Orin Starn et al. eds., 1995).

[17] *Id.* at 82.

[18] *Id.* at 81–82.

[19] *See id.* at 112; Americas Watch, Peru Under Fire: Human Rights Since the Return to Democracy 1 (1992).

[20] Americas Watch, *supra* note 19, at 1; Carlos Iván Degregori, Comm'r, Peruvian Truth & Reconciliation Comm'n, Questions of Violence and Racism in a Diverse Society: The Findings of the Peruvian Truth and Reconciliation Commission, Address at Cornell Law School (Nov. 28, 2005) (transcript available with the author).

[21] Americas Watch, *supra* note 19, at 1.

ters of the country (*cholos*) and indigenous who continue to live a more traditional way of life in the highlands (*indígenas*).[22]

Although today indigenous groups are beginning to organize politically and socially to demand individual and collective rights from the State,[23] invidious discrimination and economic, cultural and social divides still exist at all levels of Peruvian society.[24] In Peru, indigenous peoples continue to be seen as second-class citizens, a racist view established through these divides, their situations of extreme poverty, and the inadequate access to basic health care and education.[25]

B. *Twenty Years of Violent Internal Conflict in Peru*

1. Setting the Stage for State-Sponsored Violence

Before the Peruvian government committed more than 200,000 enforced sterilizations against indigenous Quechua-speaking women through its Family Planning Program during the 1990s, the internal conflict between insurgent groups and the State created an environment of fear in which few openly questioned government policies.[26] At first, violence in Peru erupted in 1980 when the Maoist armed government opposition group, the Shining Path,[27] initiated a political, "popular" war against the State.[28] At that time, Peru had begun its tran-

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[22] *See* Maria Elena García, Making Indigenous Citizens: Identity, Development, and Multicultural Activism in Peru 27–29 (2005); Degregori, *supra* note 20.

[23] *See generally* García, *supra* note 22 (discussing the issues surrounding indigenous mobilization and citizenship in Peru).

[24] *See* Americas Watch, *supra* note 19, at 1–3; Enrique Mayer, The Articulated Peasant: Household Economies in the Andes 322 (2002); Degregori, *supra* note 20.

[25] *See* Americas Watch, *supra* note 19, at 1–3; Mayer, *supra* note 24, at 322–23; Degregori, *supra* note 20.

[26] *See* Eduardo González Cueva, *The Peruvian Truth and Reconciliation Commission and the Challenge of Impunity*, *in* Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice 70, 71–72 (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006); Degregori, *supra* note 20.

[27] *Sendero Luminoso.*

[28] *See* Steve J. Stern, *Introduction to Part III*, *in* Shining and Other Paths: War and Society in Peru, 1980–1995, at 262–63 (Steve J. Stern ed., 1998); Degregori, *supra* note 20 (arguing that the *CVR*'s final report highlighted the political will of the Shining Path rather than digging deeper into the "structural violence" and poverty of the State). Although the *CVR*'s report acknowledged that these structural concepts formed the background of the conflict, the concepts alone were not seen as enough to explain the extent of the violence suffered. *See* Degregori, *supra* note 20. In addition, many social movements of the time used the structural factors and widespread poverty to justify violence. *See id.* The Shining Path actually argued that the State and the Peruvian people should not chastise the group for killing some reactionaries when many more multitudes of people were

sition from a military regime to a civilian democracy; however, the Maoist faction did not participate in the left's incorporation into the political system.[29] Instead of taking part in elections, Shining Path members launched their communist-Maoist campaign by attacking the voter registration office in Chuschi, a small town in the central highlands of the Ayacucho province, before dawn on Election Day in 1980.[30] This political spark ignited a fire in a country with great disparity between rich and poor, abject rural poverty, geographic exclusion in the Andes and Amazon regions, and invidious discrimination and racism among ethnic and racial groups.[31]

Next, the absence of a strong, unchallenged democratic transition, combined with the presence of the revolutionary movement of the Shining Path, caused the government to react with authoritarian rule and military force, which then served to escalate the initial outbreaks of violence.[32] Fernando Belaúnde's newly-elected government, in response to increasing social unrest, imposed states of emergency in departments throughout the country.[33] In addition, the Armed Forces used racial profiling and killed indiscriminately in areas of conflict with the Peruvian government's knowledge and acquiescence.[34] In this context, the Shining Path gained support and momentum as some rural peasant communities began to view the guerillas as the lesser of two evils during the beginning of the armed struggle.[35]

At first, certain peasant communities, such as those in the district of Chuschi, also backed the Shining Path's efforts because the Shining Path's short-term goals aligned with their own: to drive out enemies in their towns who were gaining power, to establish better-quality

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dying of hunger and malnutrition each day in Peru. *See id.*; González Cueva, *supra* note 26, at 71.

[29] Anna-Britt Coe, *From Anti-Natalist to Ultra-Conservative: Restricting Reproductive Choice in Peru*, 12 Reprod. Health Matters 56, 59 (2004); *see* Gustavo Gorriti, The Shining Path: A History of the Millenarian War in Peru 10–11 (Robin Kirk trans., The University of North Carolina Press 1999) (1990).

[30] Gorriti, *supra* note 29, at 17; Billie Jean Isbell, *Shining Path and Peasant Responses in Rural Ayacucho, in* The Shining Path of Peru 77, 89–90 (David Scott Palmer ed., 2d ed. 1994).

[31] *See* Degregori, *supra* note 20.

[32] *See id.*; González Cueva, *supra* note 26, at 71–72 (noting that "[t]he combined action of guerilla organizations, military units and local self-defense groups acting under the command, or with the acquiescence of the state" actually caused the bulk of the deaths that the *CVR* estimates occurred during the whole twenty-year period).

[33] *See* Americas Watch, *supra* note 19, at 6.

[34] *See* Degregori, *supra* note 20.

[35] *See id.* The slogan at the time was that the "Shining Path has one thousand eyes and one thousand ears," while the State fights blindly. *Id.*

schools, and to end government corruption.[36] To some communities, the revolution and "New Peru" meant that they would finally free themselves from abusive bureaucrats and public officials and return to the consensus framework with which traditional authorities governed in the past.[37] In time, however, the Shining Path began to reorganize peasant communities toward its ideology of a "future without distinctions" in class or wealth and to assume authoritarian power over them; as a result, the Andean people came to see the Shining Path as nothing more than new oppressors.[38] "[I]nstead of becoming the revolutionary vanguard in the communities, Shining Path [was] perceived . . . as a new form of *ñaqa*, the supernatural being that robs body fat" in Andean mythology to pay off a debt.[39] The Shining Path eventually lost what little peasant community support it had, and Andean citizens complied with military orders to organize civil defense patrols in order to resist the efforts of Shining Path insurgents.[40]

The Shining Path focused its class war in the countryside, the "principal theater" of its actions, and complemented these efforts by supporting armed strikes and mobilizations in the city.[41] At first, the Shining Path's motives remained a mystery to most urban Peruvians; the cryptic messages— "Teng Hsiao-ping, son of a bitch"—wrapped around dead dogs hanging from streetlamps in Lima seemed to them to border on insanity.[42] Soon, however, the dynamite attacks and killings intensified, and the uprising turned into a bloodbath that could no longer be underestimated or ignored.[43]

While the Armed Forces devised new strategies to defeat the Shining Path, the nation's social and political composition shifted under the structural factors of a modernizing Peru.[44] First, a significant number of Peruvians migrated from the rural areas to the cities, largely due to the development of a market economy, increased transportation, and as displaced persons of the armed conflict.[45] In addition, the relatively

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[36] Isbell, *supra* note 30, at 89–90.

[37] *Id.*

[38] *See id.* at 90–92.

[39] *Id.* at 92.

[40] *See id.* at 79–80, 87.

[41] Gorroti, *supra* note 29, at 68.

[42] *Id.* at 76, 78.

[43] *See id.* at 94–95, 104. The Shining Path developed the idea of the "quota": the willingness and expectation of its members to sacrifice their own lives when asked to do so by the party. *Id.* at 104.

[44] *See* Degregori, *supra* note 20.

[45] *See id.* The number of *desplazados* (internally displaced persons) exceeded 600,000 at the height of the armed conflict. *Id.*

independent media and political and social organizations proved that some level of democracy existed and fostered a rejection of the totalitarianism of the Shining Path movement.[46] Finally, in 1992, the Peruvian police antiterrorism unit captured Abimael Guzmán, the leader of the Shining Path, who subsequently negotiated peace accords with the Fujimori government and facilitated the fast demoralization and defeat of Shining Path sympathizers.[47]

Guzmán's capture followed Alberto Fujimori's election in 1990 and "self-coup" (*autogolpe*), which abruptly ended the rule of law in 1992.[48] Fujimori implemented a strategy to combat an economic crisis and government subversion; he suppressed civil liberties and eroded political institutions and notions of accountability.[49] Then, when faced with congressional opposition to his oppressive measures, he joined forces with the military, suspended the Constitution, censored the media, dissolved the National Congress, and incapacitated the judiciary.[50] Even after the capture of the leading subversives and the awareness of a crumbling insurgency, Fujimori's repressive authoritarian regime used public fear and isolated incidences of violence to justify continued human rights abuses and political suppression throughout the 1990s.[51]

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[46] *See* Americas Watch, *supra* note 19, at 3 (describing the media as investigators, "informal ombudsmen," and as a channel for opinion and information in Peruvian society); Degregori, *supra* note 20. In addition, the Shining Path did not have an alternative to offer the peasant populations after the destruction of the "old order." Degregori, *supra* note 20. Most significantly, the movement ignored the needs of the peasant families in the Andes. Degregori, *supra* note 20.

[47] *See* Degregori, *supra* note 20; González Cueva, *supra* note 26, at 72; *see also* Stern, *supra* note 28, at 297.

[48] *See* González Cueva, *supra* note 26, at 72; Stern, *supra* note 28, at 417; *see also* Interview with Eduardo González Cueva, Senior Associate, International Center for Transitional Justice, former Director, Public Hearings and Victims and Witnesses Protection Unit, Peruvian Truth and Reconciliation Commission, in N.Y., N.Y. (Oct. 27, 2005) [hereinafter González Cueva Interview].

[49] Final Report, *supra* note 9, § II(D); *see* Catherine M. Conaghan, Fujimori's Peru: Deception in the Public Sphere 29, 252–53 (2005).

[50] *See* Kent Anderson, *An Asian Pinochet?—Not Likely: The Unfulfilled International Law Promise in Japan's Treatment of Former Peruvian President Alberto Fujimori*, 38 Stan. J. Int'l L. 177, 180–81 (2002); González Cueva, *supra* note 26, at 72.

[51] *See* Anderson, *supra* note 50, at 181; González Cueva, *supra* note 26, at 73; González Cueva Interview, *supra* note 48.

2. State-Sponsored Enforced Sterilizations Under the Family Planning Program: "Voluntary" Surgical Contraception (*Anticoncepción Quirúrgica Voluntaria—AQV*)

Three months after President Fujimori took office in 1990, he announced a "birth control policy" as a way to bring equal access to contraception for the nation's poor.[52] At that time, however, high inflation, a lack of public funding, a focus on the internal conflict, and legal barriers in place against sterilizations forced the government to proceed slowly despite its support for reforms in family planning programs in Peru.[53] Fujimori's reelection gave his regime a strong mandate for implementing its plans, and in 1995, Congress approved a modification of the National Population Law of 1985 to permit sterilization as a family planning method.[54] At the same time, Fujimori garnered support from feminists and advocates for the rights of women when, in 1995, he attended and spoke in Beijing at the Fourth International World Conference on Women.[55]

In 1996, after finding an inverse relationship between population growth and economic growth, Fujimori's administration quietly implemented a demographic policy for population control.[56] A stable economy and widespread political support allowed Fujimori's regime to openly confront the Catholic Church and its strong political positions with regard to reproductive rights and choice.[57] Additionally, interna-

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[52] Carlos E. Aramburu, Politics and Reproductive Health: A Dangerous Connection 7 (2002), *available at* http://www.cicred.org/Eng/Seminars/Details/Seminars/Bangkok2002/03BangkokAramburu.pdf; Carlos Cáceres et al., *Sexual and Reproductive Rights Policies in Peru: Unveiling False Paradoxes*, *in* SexPolitics: Reports from the Front Lines 127, 137 (Richard Parker et al. eds., 2006). The traditional demographic argument was coupled with the argument advocating for equal rights, which focused on individual and family rights. Aramburu, *supra*, at 8.

[53] *See* Aramburu, *supra* note 51, at 8.

[54] *See id.* at 7–8.

[55] *See* Maruja Barrig, The Persistence of Memory: Feminism and the State in Peru in the 1990s, Civil Society and Democratic Governance in the Andes and the Southern Cone Comparative Regional Project 12–13 (1999).

[56] *See* Subcomisión Investigadora de Personas e Instituciones Involucradas en Acciones de Anticoncepción Quirúrgica Voluntaria [Sub-Comm'n to Investigate People and Insts. Involved in Voluntary Surgical Contraception Proc.], Informe Final Sobre la Aplicación de la Anticoncepción Quirúrgica Voluntaria 11 (2002) [hereinafter *AQV*]; Cáceres et al., *supra* note 52, at 138; Coe, *supra* note 29, at 61.

[57] *See* Coe, *supra* note 29, at 59 (asserting that when Fujimori first took power, he faced many challenges, including violent internal conflict, a weak economy, and inflation. To address these concerns, Fujimori needed the backing of the Catholic Church (which opposed modern contraceptive methods)); Comité de America Latina y el Caribe para la Defensa de los Derechos de la Mujer [Latin American and Caribbean Commit-

tional and domestic pressures existed to address the widening gap among socio-economic classes of Peruvians; thus, Fujimori's government promoted contraceptive services to "the most deprived sectors of society" in a stated effort to alleviate poverty on a massive scale.[58]

During this time, Fujimori continued to actively promote universal access to contraception for women.[59] His political discourse invoked principles of social justice and human rights; his rhetoric even included using the reproductive justice movement's language, stating that "poor women deserved the same opportunity as wealthier women to regulate their fertility, and [that] all women had the right to control their bodies and use contraceptives if they wished."[60] With Fujimori's control over Congressional action, the Ministry of Health soon drafted its first comprehensive reproductive health program.[61] Additional government measures—including creating agencies and passing laws—also stressed the importance of equality between men and women.[62]

The government's aggressive Family Planning Program focused on increasing the number of sterilizations performed on Peruvian women and specifically targeted the low-income, indigenous women at the margins of society.[63] Moreover, government officials determined annual numeric goals and targets for the sterilization programs and initiated an obligatory quota system for health care providers to meet as program employees in order to remain employed, obtain monetary compensation, or receive a promotion.[64] Later investigations revealed that health care provider practices included compensating women and subjecting them to aggression, intimidation, and

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tee for the Defense of Women's Rights] (CLADEM) & Ctr. for Reprod. L. and Pol'y (CRLP), Silence and Complicity: Violence Against Women in Peruvian Public Health Facilities 36 (1999) [hereinafter CLADEM & CRLP].

[58] Amnesty Int'l, *supra* note 8, at 20. *See* Coe, *supra* note 29, at 59. A Program Manager at the Ministry of Health made the following statement in 1998:

> The fertility rate among poor women is 6.9 children—they are poor and are producing more poor people. The president is aware that the government cannot fight poverty without reducing poor people's fertility. Thus, demographic goals are a combination of the population's right to access family planning and the government's anti-poverty strategy.

Coe, *supra* note 29, at 61–62.

[59] Coe, *supra* note 29, at 60; *see* Cáceres et al., *supra* note 52, at 138.

[60] Coe, *supra* note 29, at 60; *see* Cáceres et al., *supra* note 52, at 138–39.

[61] Coe, *supra* note 29, at 60.

[62] *Id.* at 61.

[63] *Id.* at 62; *see* Amnesty Int'l, *supra* note 8, at 20; Cáceres et al., *supra* note 52, at 138.

[64] *See* Amnesty Int'l, *supra* note 8, at 20; Cáceres et al., *supra* note 52, at 140; CLADEM & CRLP, *supra* note 57, at 63; Coe, *supra* note 29, at 62.

humiliation—all measures that did not include informed consent.[65] For example, health care providers denied women their fundamental rights to informed consent when professionals pressured women to undergo surgical sterilization during "Tubal Ligation Festivals" and at locations designated for food aid distribution.[66] Some providers offered women surgical sterilization as the only free method of contraception available.[67] Other health workers did not provide women with information regarding other available birth control methods and many times deliberately gave inaccurate information about the risks and consequences of surgical sterilization procedures.[68] Some women even reported that professionals in clinics and hospitals intimidated them as they sought medical attention for abortion complications.[69]

The practice of State-sponsored enforced sterilization also caused numerous deaths due to medical negligence and malpractice.[70] Human rights groups brought one illustrative case, *María Mamérita Mestanza Chávez v. Perú*, to the Inter-American Commission on Human Rights when a thirty-three-year-old, low-income, illiterate woman with seven children died after a coerced surgical sterilization procedure.[71] Health officials falsely accused Mestanza of violating the law by having more than five children and threatened to report her to the authorities if she did not submit to surgical sterilization.[72] Health care providers succeeded in coercing Mestanza to undergo a tubal ligation procedure and failed to examine her prior to the surgery.[73] Following the tubal ligation procedure, the health center released Mestanza

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[65] *See* Coe, *supra* note 29, at 62. Coe treads lightly on blame when talking about the abuses that occurred. *See id.* She shows how sterilization was promoted through services that withheld temporary methods of birth control, such as injections and birth control pills. *Id.* She does conclude by saying that "[b]latant deception, economic incentives and threats were also used," but she does not mention the extent of the abuses. *See id.*

[66] *See* Cáceres et al., *supra* note 52, at 140; CLADEM & CRLP, *supra* note 57, at 63–64 (information taken from collective interviews of health care providers).

[67] *See* CLADEM & CRLP, *supra* note 57, at 63–64.

[68] *See id.*

[69] *See id.* at 64.

[70] *See* Cáceres et al., *supra* note 52, at 140; Gonzalo E. Gianella, *¿Por qué Tendría que Haber Sucedido de Otro Modo? Notas Sobre Esterilizaciones y Genocidio en el Perú*, Ciberayllu, Aug. 30, 2004, http://www.andes.missouri.edu/andes/Ciberayllu.shtml.

[71] María Mamérita Mestanza Chávez v. Perú, Case 12.191, Inter-Am. C.H.R., Report No. 71/03, OEA/Ser.L/V/II.118, doc. 70 rev. 2 (2003). *See* Ctr. for Reprod. Rts., Briefing Paper: Reproductive Rights in the Inter-American System for the Promotion and Protection of Human Rights 15 (2002), *available at* http://www.reproductiverights.org/pdf/pub_bp_rr_interamerican.pdf. [hereinafter Ctr. for Reprod. Rts.].

[72] *See* Ctr. for Reprod. Rts., *supra* note 71, at 15.

[73] *See id.*

even though they were aware that she suffered from serious complications as a result of the surgery.[74] A few days later, Mestanza's partner attempted to seek emergency medical care from physicians at the health center, but the physicians refused and reassured him that the effects of the anesthesia had not yet worn off.[75] As a result, Mestanza died in her home nine days after her surgical sterilization.[76]

Coerced and forced sterilization practices contradict Peru's constitutional and legal protections for its citizens.[77] At first, human rights activists and non-governmental organizations criticized the government's focus on high numeric goals that were bound to lead to abuses, as the practices were extremely secretive.[78] Later, women's advocacy groups documented the specific instances of abuse and sent their findings to the Public Ombudsman on Women's Rights.[79] Finally, in December 1997, *La República*, one of Peru's major newspapers, reported an independent investigation and detailed findings on the population policy implementation that shocked the public.[80]

Once the general public became aware of the extent of Fujimori's demographic policy, a heated debate ensued.[81] The Ombudsman's office released a report in 1998 of its findings of abuse and recommended reforms in the government's family planning programs.[82]

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[74] *See id.*

[75] *See id.*

[76] *See id.*

[77] *See* Coe, *supra* note 29, at 62. These acts could be considered genocide, as will be discussed herein. *See infra* notes 135–171 and accompanying text. The Convention on the Prevention and Punishment of the Crime of Genocide defines genocide to include measures intended to prevent births within the group committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. The difficulty with proving these sterilizations as genocide is proving the specific intent to destroy the Quechua people. *See* Genocide Convention, *supra*; *see also* Part III(B), *infra*, for further discussion.

[78] *See* Coe, *supra* note 29, at 63.

[79] *See id.* Today, groups of victims-survivors exist to provide support and document the abuses. *See* Emily Koren, *Contra Su Voluntad*: The Involuntary Sterilizations of Peru's Family Planning Program International Human Rights Advocacy Report 8 (May 22, 2008) (unpublished report, The Center for International Human Rights Advocacy at the University of Denver) (on file with the author). For instance, *La Organización de Mujeres Esterilizadas Contra Su Voluntad* (The Association of Women Sterilized Against Their Will) provides support to more than 1000 women members in the Cusco region. *Id.*

[80] *See* Coe, *supra* note 29, at 63. The title of the article was "Ligations in exchange for food." *Id.* at 63 n.38.

[81] *Id.* at 63.

[82] *Id.*; Defensoría del Pueblo, Serie Informes Defensiorales No. 7, Anticoncepción Quirúrgica Voluntaria I: Casos Investigados por la Defensoría del Pueblo (1998).

Other organizations then backed the report and also pressured the Peruvian government to take action to reform its policies.[83] In March 1998, the Ministry of Health agreed to make changes and reform sterilization services; it eliminated the quotas and implemented new counseling guidelines, a consent form, a three-day waiting period before the procedure, a day to recover in a hospital after the surgery, and certification of health care facilities and physicians.[84] Additionally, in 2001, the Peruvian government agreed to settle the case pending in the Inter-American Commission on Human Rights by compensating María Mestanza's family and by taking responsibility for violating individual human rights, including the rights to life, physical integrity and humane treatment, equal protection, and the right to be free from gender-based violence.[85] As part of the settlement, the government promised to investigate other enforced sterilization cases and to punish those who had violated Peruvian and international law.[86] At the time of this writing, however, the Peruvian government has not fully complied with its commitments under the Mestanza settlement.[87]

II. The Peruvian Truth and Reconciliation Commission: Its Mandate and Findings

Soon after the government reformed its Family Planning Program, Peru's transition to democracy began in September 2000.[88] This regime change was not due, however, to public outrage at the atrocities committed during Fujimori's regime, but was largely the result of televised videos that uncovered a political corruption scandal and implicated high-level government and military officials, including the head of Peru's intelligence service, Servicio de Inteligencia Nacional (*SIN*), Vladimiro Montesinos.[89] Fujimori fled the country in November 2000 and resigned as president via fax from Japan.[90] Thus, unlike the Chil-

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[83] Coe, *supra* note 29, at 63.

[84] *Id.*

[85] Ctr. for Reprod. Rts., *supra* note 71, at 16.

[86] *Id.*

[87] Inter-Am. Comm'n on Hum. Rts., Annual Report of the IACHR 2007: Status of Compliance with the Recommendations of the IACHR (2007), http://www.cidh.org/annualrep/2007eng/Chap.2.htm.

[88] *See* Conaghan, *supra* note 49, at 227–34.

[89] *See id.* at 228.

[90] *See* González Cueva, *supra* note 29, at 74. In the end, Congress did not accept Fujimori's letter of resignation and declared him morally unfit to serve as president. Conaghan, *supra* note 49, at 241.

ean or El Salvadoran transitions, Peru's was a total regime collapse without a negotiated arrangement, peace accord, or guarantee of impunity.[91] The peaceful transition to Valentín Paniagua's interim government and the favorable conditions for democratic transition—the complete collapse of authoritarian rule and the absence of a powerful insurgency—provided an opportunity to critically examine the past and to establish a legitimate democratic regime that would guarantee future individual and collective human rights—including reproductive rights—in Peru.[92]

In response to public and social group pressure, the newly-formed government established the Peruvian Truth and Reconciliation Commission (*CVR*)[93] in June 2001 to investigate human rights abuses committed during the twenty-year internal conflict.[94] The *CVR*—composed of ten men, two women, and one Quechua-speaker[95]—was responsible for determining the conditions that precipitated the violent conflict, assisting with judicial investigations, drafting reparations proposals, and recommending reforms.[96] Specifically, the *CVR* mandate charged the Commission with "clarifying the process, facts and responsibilities of the terrorist violence and human rights violations produced from May 1980 to November 2000, whether imputable to terrorist organizations or State agents, as well as proposing initiatives destined to affirm peace and harmony among Peruvians."[97] This broad and inclusive directive included interpreting and writing the collective memory of the historical period and fact-finding in individual cases.[98] The mandate also allowed the Commission to determine the appropriateness of identifying perpetrators who violated criminal law on condition that the responsibilities for such actions would be presumptive and were meant to assist

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[91] González Cueva, *supra* note 26, at 73–74. Fujimori, unlike Pinochet, was an exile without credibility or impunity. *See* Robertson, *supra* note 1, at 332–39.

[92] *See* Supreme Resolution 304–2000-JUS. (2000) (Peru); González Cueva, *supra* note 26, at 74–76.

[93] *Comisión de la Verdad y Reconciliación del Perú.*

[94] *See* Hayner, *supra* note 8, at 260.

[95] *See* Degregori, *supra* note 20. The one Quechua-speaker was Alberto Morote Sánchez, a former Rector of the University of Huamanga in Ayacucho. Comisión de la Verdad y Reconcilación, Nuestra Labor: Comisionado, http://www.cverdad.org.pe/lacomision/nlabor/comisionado.php (last visited Nov. 1, 2008); Sabrina Marian Reisinger, Truth, Race and Reconciliation; Ayacucho and the Peruvian Truth and Reconciliation Commission (Nov. 8, 2005) (unpublished M.S. thesis, Florida State University), http://etd.lib.fsu.edu/theses/available/etd-11082005-203231/.

[96] Hayner, *supra* note 8, at 260–61.

[97] Supreme Decree 065–2001-PCM art. 1, *translated in* González Cueva, *supra* note 26, at 75.

[98] *See* Supreme Decree 065–2001-PCM art. 2; González Cueva, *supra* note 26, at 75.

the Public Prosecutor[99] and the courts in their constitutionally granted duties.[100]

One example of the expansive nature of the *CVR* mandate is the Commission's sweeping subject-matter jurisdiction.[101] The list of crimes included the phrase "and other serious injuries" after the crime of torture, and the phrase "[o]ther crimes and serious violations of the rights of individuals" to possibly include further abuses of State power, such as sex crimes, forced internal displacements, due process violations and genocide.[102] Similarly, the decree authorized the *CVR* to focus on "[v]iolations of the collective rights of the country's Andean and native communities."[103] Moreover, the mandate broadly defined personal jurisdiction to leave open the possibility to examine acts committed by State agents, members of "terrorist organizations" and members of paramilitary organizations.[104] This grant of jurisdiction was in direct opposition to Fujimori's 1995 amnesty laws and signified a possible end to the impunity that security forces had enjoyed under Fujimori's regime.[105]

The *CVR* embarked on the country's largest and most ambitious human rights project in Peruvian history and clarified the magnitude

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[99] *Ministerio Público.*

[100] González Cueva, *supra* note 26, at 75, 80; González Cueva Interview, *supra* note 48.

[101] *See* Supreme Decree 065–2001-PCM art. 3. "The Truth Commission shall focus its work on . . .

(a) Murders and kidnappings;
(b) Forced disappearances;
(c) Torture and other serious injuries;
(d) Violations of the collective rights of the country's Andean and native communities;
(e) Other crimes and serious violations of the rights of individuals."

Id., *translated in* González Cueva, *supra* note 26, at 92.

[102] *Id.*; González Cueva, *supra* note 26, at 76 (noting that the question as to what law to apply was hotly debated in the Commission's Working Group). The Ministry of Justice included the application of International Human Rights Law and International Humanitarian Law. *See* González Cueva, *supra* note 26, at 76. The representatives of the security forces rejected the inclusion of the laws of war, as these laws would implicitly give the twenty-year conflict internal armed conflict status. *See id.*

[103] Supreme Decree 065–2001-PCM art. 3, *translated in* González Cueva, *supra* note 26, at 92.

[104] *Id.* arts. 1 & 3; González Cueva, *supra* note 26, at 76. Later talks would apply the "paramilitary groups" category to the several death squads that emerged during the two decades of conflict either indirectly or directly under the auspices of the Armed Forces. *See* González Cueva, *supra* note 26, at 76.

[105] *See* Law 26479 of June 14, 1995 (Peru); Law 26492 of June 28, 1995 (Peru); González Cueva, *supra* note 26, at 72–73; González Cueva Interview, *supra* note 48.

of the atrocities committed by and against fellow Peruvians.[106] The Commission's findings in its August 2003 Final Report included statistics showing that almost 70,000 people were killed or "disappeared," and of those, more than ninety percent came from the eight poorest Andean and Amazonian regions.[107] In addition, more than seventy percent of victims spoke Quechua as their native language.[108] Thus, the findings demonstrated that victims of the armed conflict were overwhelmingly low-income, rural, indigenous peasants with little or no political or economic power in Peruvian society.[109]

As for those responsible for the conflict and its outcomes, the *CVR* promoted a comprehensive and inclusive notion of accountability.[110] The Final Report found State limitations in protecting fundamental rights of its citizens and securing the public order, as well as breaches of the constitutional order and rule of law in numerous moments of crisis throughout the internal conflict.[111] Although the two terrorists groups—the Shining Path and the Túpac Amaru Revolutionary Movement (*MRTA*)—carried the bulk of the responsibility for systematic abuses and violence during the armed conflict, the Report also held state, political, and social entities responsible for many of the gross human rights violations.[112]

III. Truth Omissions from the *CVR*'s Final Report

A. *Broad Mandate, Restricted Interpretation*

Even with the *CVR*'s comprehensive and inclusive notions of accountability, various organizations criticized and questioned the Commission's decision to exclude cases of violations with ambiguous or tan-

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[106] *See* Degregori, *supra* note 20. The *CVR* collected nearly 17,000 testimonies from across the country, conducted almost 2000 interviews and talked to the main national political and military leaders during the years 1980–2000. *Id.*

[107] *See* Degregori, *supra* note 20.

[108] *Id.* The Final Report also gives the astonishing statistic that according to the 1993 census, only sixteen percent of the Peruvian population were native Quechua-speakers. Final Report, *supra* note 9, at I(6). Also, the people from these regions together represent only nine percent of the income of all Peruvian families. Amnesty Int'l, *supra* note 8, at 15.

[109] *See* Final Report, *supra* note 9, at I(6); Degregori, *supra* note 20.

[110] *See* Final Report, *supra* note 9, *passim* (holding accountable the Shining Path, the *MRTA*, Peruvian police and Armed Forces, self-defense committees, the various government parties in power during the conflict, the Peruvian legislature and judiciary, trade organizations, the educational system, the Church, human rights organizations, and the media).

[111] *See id.* at I(10)–(11).

[112] *See id.* at II–V.

gential relations to the armed conflict in the Final Report.[113] Without a general policy to guide decision-making among the Commission's regional offices, Commissioners drew different lines as to which cases to investigate and publish under the mandate.[114] As a result, cases such as those of the enforced sterilizations during the Fujimori regime were not considered in the context of insurgency or counter-insurgency and thus were seen by some of the Commissioners as outside of the Commission's mandate and not included in the *CVR*'s Final Report.[115]

Because the Executive gave the *CVR* a sufficiently broad mandate to include State-sponsored enforced sterilizations, the Commission's omission was a self-imposed, interpretive—albeit inattentive— restriction on the Commission's investigation and Final Report.[116] Of course, truth commissioners must make certain choices as to which cases commissions investigate and report as a result of time constraints, resource limits, insufficient information, unreliable evidence, repetition of wrongs already documented elsewhere, and political pressures.[117] Reports should not, however, exclude cases of gross human rights violations if the effects are to perpetuate discrimination, racism, and classism as well as to impede justice, including reproductive justice, for victims.[118] Rather, commissioners should make a careful and conscientious effort to investigate and report abuses committed against the most disenfranchised members of society, especially when their mandate so requires, but even when it is ambiguous.[119] In the case of the *CVR*, its

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[113] *See* Amnesty Int'l, *supra* note 8, at 19–20; interview with Carlos Iván Degregori, former Commissioner of the Peruvian Truth Commission, in Ithaca, N.Y. (Nov. 28, 2005) [hereinafter Degregori Interview].

[114] *See id.*

[115] *See* Gianella, *supra* note 70, at 3; Guilia Tamayo, *Metas que Matan*, http://w3.desco.org.pe/publicaciones/QH/QH/qh111gt.htm (last visited Oct. 10, 2008). During separate interviews, two of the Peruvian Truth Commission's Commissioners, Salomón Lerner Febres and Carlos Iván Degregori, stated that they did not think that these enforced sterilization cases were within the Truth Commission's mandate. However, after looking at the text of the mandate once more, each one remarked that these cases could have been included in the mandate and that they were overlooked due to a lack of time and resources. Degregori Interview, *supra* note 113; Interview with Salomón Lerner Febres, former President of the Peruvian Truth Commission, in Lima, Perú (June 15, 2006) [hereinafter Lerner Febres Interview].

[116] *See* Supreme Decree 065–2001-PCM; Degregori Interview, *supra* note 113; Lerner Febres Interview, *supra* note 115.

[117] *See* Hayner, *supra* note 8, at 73.

[118] *See id.* at 24–31, 73; Amnesty Int'l, *supra* note 8, at 1–2, 19–20.

[119] *See* Supreme Decree 065–2001-PCM, *passim*; Amnesty Int'l, *supra* note 8, at 19–20.

mandate's broad language required an investigation of enforced sterilizations.[120] Priscilla Hayner argues that:

> [T]he practice of rape and other sexual crimes should be fully acknowledged in a commission's report where it is believed such a practice was widespread. If a truth commission does not take special care in addressing this issue, it is likely that it will remain largely shrouded in silence and hidden from the history books—and also likely that few policy, educational, or reparatory measures will be put in place to assist past victims, increase the public understanding of the issue, or reduce the prevalence of sexual abuse in the future.[121]

In the cases of enforced sterilizations, the *CVR* did not make such a conscientious, inclusive effort.[122] As a result, impoverished, indigenous Quechua-speaking women continued to face multiple layers of discrimination—including social, racial, and gender discrimination—first as victims and later as unrecognized victims of State repression and denial of basic human rights during the twenty-year internal conflict.[123] Thus, the omission of enforced sterilization cases excluded women who were already members of socially and politically marginalized groups and greatly decreased their chances for truth, accountability, and justice in Peruvian society.[124]

The *CVR* Commissioners could give reasons for excluding enforced sterilization cases from their investigation and report, such as the mandate's restriction or the repetition of other investigations or reports, but none should outweigh the reasons to include such widespread, State-sponsored violations of reproductive rights as part of Peru's official collective memory.[125] First, Commissioners did not see enforced sterilizations as an included crime in the Truth Commission's mandate.[126] In contrast to the *CVR*'s inclusive mandate, the mandate of the South Afri-

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[120] *See* Supreme Decree 065–2001-PCM, *passim.*

[121] HAYNER, *supra* note 8, at 78–79.

[122] *See id.*; FINAL REPORT, *supra* note 9, *passim.*

[123] *See* Amnesty Int'l, *supra* note 8, at 19–20.

[124] *See id.* at 1–2, 19–20; HAYNER, *supra* note 8, at 24–31; MINOW, *supra* note 4, at 24–27.

[125] *See* Degregori Interview, *supra* note 113; Lerner Febres Interview, *supra* note 115. In speaking with *CVR* Commissioners, they defended their non-inclusion of the enforced sterilizations cases by pointing to the separate investigations and reports written on the subject. *See* Degregori Interview, *supra* note 113; Lerner Febres Interview, *supra* note 115. This, however, is not a valid reason for exclusion because all cases of violence reported by the Commission required an independent and effective investigation as well. *See* Supreme Decree 065–2001-PCM arts. 1–3.

[126] *See* Degregori Interview, *supra* note 113; González Cueva Interview, *supra* note 48.

can Truth and Reconciliation Commission (TRC) did not cover all of the abusive practices of apartheid, especially with regards to detention without trial, racial segregation, and the practice of "forced removals" of blacks to barren lands.[127] Failing to include these and other apartheid practices in the final report, even where justified because the practices were already well-documented, "prevented many South Africans from seeing their own personal experience reflected in the commission's work."[128] Despite its restrictive mandate, the South African TRC held institutional hearings and found fault with some social and institutional structures of the apartheid system.[129] This limited investigation, however, did not counter the South African TRC's inclusion of mostly extreme violence to the exclusion of a comprehensive investigation and report on the widespread State-sponsored systematic abuses committed against many Africans.[130] This exclusion, as a result, hindered the TRC's goal to ensure social justice for the African majority.[131]

Unlike the South African TRC, however, the Peruvian *CVR*'s executive mandate did not limit the scope of investigations or reports to exclude enforced sterilizations.[132] In fact, it specifically endorsed a broad mandate which could have included systemic abuses such as coerced surgical sterilizations.[133] Although the *CVR*'s Final Report did recognize the rights of women and the gross violations of human rights—including finding rape to be an instrument of torture— committed against women largely by the Peruvian Armed Forces, it still fell short by excluding gross, systematic human rights abuses of enforced sterilizations against mainly low-income, indigenous Quechua women.[134] Because the decree did not make distinctions between those human rights violations directly related to insurgency or counter-insurgency measures and those violations tangentially related, the Commissioners should not have made such distinctions that have led to the exclusion of more than 200,000 cases of enforced sterilizations from the Commission's Final Report.[135] In doing so, the Commission allowed Lima, the capital city and center of political discourse and pub-

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[127] *See* HAYNER, *supra* note 8, at 73; WILSON, *supra* note 8, at 34.

[128] HAYNER, *supra* note 8, at 73.

[129] *See* WILSON, *supra* note 8, at 35–36.

[130] *See id.* at 35.

[131] *See id.*

[132] Supreme Decree 065–2001-PCM art. 3.

[133] *Id.*

[134] *See* Amnesty Int'l, *supra* note 8, at 18, 19–20; FINAL REPORT, *supra* note 9, at III(A)(46).

[135] *See* Supreme Decree 065–2001-PCM arts. 1 & 3; Amnesty Int'l, *supra* note 8, at 19–20; González Cueva, *supra* note 26, at 78.

lic opinion, to remain "emotionally distant" from these victims of State-supported violence and helped to further alienate many victims from the *CVR*'s work.[136] In this regard, the *CVR* helps to perpetuate and legitimize physical, racial, and class divides in Peruvian society and impedes public support for accountability and reproductive justice through the rule of law.[137]

Additionally, the *CVR* Commissioners' reasoning did not apply in all cases since they were inconsistent when they investigated and published other crimes Fujimori committed—largely in the context of political corruption and authoritarian rule—during his regime that may not directly relate to the insurgency or counter-insurgency.[138] Because incontrovertible evidence that demonstrated high levels of state and political corruption naturally affected Peruvians with economic and political power, public outrage and media coverage demanded that the *CVR* investigate and record those atrocities.[139] Therefore, those abuses of power became part of the historical record, and efforts today continue to push for accountability and criminal responsibility for the corruption crimes that Fujimori committed against Peruvians.[140] In the end, this inconsistency and selective treatment of cases demonstrates that, at least for the excluded victims of enforced sterilization, the truth-seeking process cannot be seen as "more than the reconfiguration of government pacts or domination between elites."[141] As a result, in this version of reconciliation, the same speakers are speaking and the same voiceless victims are silenced.[142]

B. *Enforced Sterilizations of Quechua Women as Genocide*

1. The Elements of Genocide

When a Congressional subcommittee investigated cases of enforced sterilizations and issued its report, it accused the Fujimori regime of committing genocide against the Quechua people through the

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[136] Degregori, *supra* note 20.

[137] *See id.*

[138] *See* Final Report, *supra* note 9, at III(D); González Cueva, *supra* note 26, at 78.

[139] *See* Conaghan, *supra* note 49, at 229; Kimberly Theidon, Entre Prójimos: El Conflicto Armado Interno y la Política de la Reconciliación en el Perú 256 (2004).

[140] *See* Raúl Rosasco, *Y Después de la CVR ¿Qué?: Informe Seminal Sobre las Reacciones al Informe Final de la CVR y los Avances Respecto a sus Recomendaciones*, Nov. 14–20, 2005, at 3.

[141] Theidon, *supra* note 139, at 256 (author's translation).

[142] *Id.*

Family Planning Program.[143] There are arguments for and against classifying these cases of enforced sterilizations as acts of genocide, and these arguments will be discussed below.[144] Ultimately, however, the victims of these human rights abuses need an impartial, independent investigation to take these issues out of the political realm and into the discourse of individual and collective reparations as well as reproductive justice.[145]

First, the term "genocide" combines the Greek word *genos* (race or tribe) with the Latin suffix *-cide* (killing), and is the intentional killing, destruction or extermination of groups or members of a group.[146] The crime of genocide is recognized as part of customary international law and a part of *jus cogens*, the body of peremptory international norms.[147] In addition, Article II of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 defines genocide as follows:

> [A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.[148]

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[143] *AQV*, *supra* note 56, at 108.

[144] *See infra* notes 135–171 and accompanying text.

[145] *See infra* Part III(D).

[146] Antonio Cassese, International Criminal Law 127 (2d. ed. 2008); Kriangsak Kittichaisaree, International Criminal Law 67–68 (2001).

[147] Kittichaisaree, *supra* note 146, at 67. Under customary international law, the United Nations summit in September 2005 adopted the Outcome Document, which affirms that every state is responsible for protecting its citizens from genocide, war crimes, ethnic cleansing, and crimes against humanity. William A. Schabas, *Genocide, Crimes Against Humanity, and Darfur: The Commission of Inquiry's Findings on Genocide*, 27 Cardozo L. Rev. 1703, 1703 (2006).

[148] Genocide Convention, *supra* note 77. The Convention does prohibit genocide in times of war, in times of peace and holds perpetrators (and other participants) of genocide criminally responsible, while holding the state responsible as well. *See id.*

The definition deliberately omits acts of cultural and political genocide, and the Convention provides an ineffective enforcement through domestic trials in the state where the genocide occurred.[149] Much progress, however, has occurred at the international level to prosecute and punish perpetrators of genocide. For example, the statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC) provide for criminal action against perpetrators of genocide.[150] The *ad hoc* tribunals in the former Yugoslavia, Rwanda, and Sierra Leone have tried individuals charged with genocide and have delivered landmark decisions that shape the evolving standards and norms for this crime against humanity.[151]

In order to prove genocide, victims must fall under one or more of the definition's enumerated groups.[152] To determine whether an enumerated group exists in a particular case, a court may analyze subjective criteria, objective criteria, or both.[153] In a subjective analysis, the court "tak[es] into account the relevant evidence and the political and cultural context of the society concerned" on a case-by-case basis.[154] For instance, in the case of Rwanda, the court examined the perceptions of Hutu and Tutsi members as well as Rwandan authorities adopted from colonial rule that Hutus and Tutsis belonged to two distinct ethnic groups.[155] Alternatively, the court may use objective facts that indicate a population is a group with a distinct identity, such as state recognition or customary practices.[156] In the case of Rwanda, the government required every citizen to carry identity cards displaying their ethnic identity as Hutu, Tutsi, or Twa, and the country's legislation at the time referred to citizens by their respective ethnic groups.[157]

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[149] *See* Cassese, *supra* note 146, at 130–32. Cultural Genocide is destroying a group's language or culture. *Id.* at 130. Political Genocide is exterminating a group based on political grounds. *Id.*

[150] *Id.* at 132.

[151] *Id. See generally* Prosecutor v. Jelisić, Case No. IT 95-10, Judgment (Dec. 14, 1999), *aff'd*, Case No. IT 95-10-A (July 5, 2001); Prosecutor v. Kayishema & Ruzindana, Case No. ICTR 95-1-T, Judgment (May 21, 1999); Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment (Sept. 2, 1998).

[152] *See* Kittichaisaree, *supra* note 146, at 69.

[153] *Id.* at 70–71.

[154] *Id.* at 71 (citing Prosecutor v. Rutaganda, Case No. ICTR 96-3, Judgment, ¶ 55 (Dec. 6, 1999)).

[155] *Id.*

[156] *See id.* There were objective indicators in the Rutaganda case, such as identity cards carried by the Tutsi population as well as the fact that customary determination of group membership was patrilineal. *Id.*

[157] Kittichaisaree, *supra* note 146, at 71.

In addition, a perpetrator commits genocide through the definition's enumerated discriminatory acts or omissions with the necessary *mens rea*.[158] These acts or omissions, however, do not necessarily involve the actual extinction or annihilation of the group, and motive is not an element of the crime of genocide.[159] Thus, the individual accused of genocide must have either known or should have known that "his act [or omission] would destroy, in whole or in part [the] protected group."[160] In contrast to the crime against humanity of persecution, which requires a discriminatory intent, genocide requires that the prosecution prove the accused possessed the specific intent to destroy a particular group beyond a reasonable doubt.[161]

In order to prove genocidal intent, the prosecution must show that the accused wanted either to destroy a large number of group members or to exterminate a limited number of group members selected because their annihilation would greatly impact the group's survival.[162] Thus, killing or sterilizing a large number of women group members who are of child bearing age can be considered genocide even though they do not comprise a large percentage of the group's population.[163] Also, the accused must form his specific intent to commit genocide before acting in furtherance of the genocidal intent.[164]

Although the crimes committed must demonstrate genocidal intent, the prosecution can prove the element of intent by inferring from "facts such as words or deeds or a pattern of purposeful action that deliberately, consistently, and systematically targets victims on account of their membership of a particular group while excluding the members of other groups."[165] Evidence to construct genocidal intent may include the general context of other acts committed against the same group, the physical targeting of the group, the extent of bodily injury, the methodical nature of planning, and the scale of actual or attempted de-

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[158] *Id.* (citing *Akayesu*, Case No. ICTR 96-4-T, ¶ 497; *Jelisic*, Case No. IT 95-10, ¶ 62). Thus, failing to stop a massacre when the individual had the means and notice to stop it could be regarded as genocide. *See id.*

[159] *Id.* at 71, 76; *see* Steven R. Ratner & Jason S. Abrams, Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy 29 (2d ed. 2001).

[160] Kittichaisaree, *supra* note 146, at 72 (quoting *Akayesu*, Case No. ICTR 96-4-T, ¶ 520).

[161] *Id.*

[162] *Id.* at 73.

[163] *See id.*

[164] *Id.* (citing *Kayishema & Ruzindana*, Case No. ICTR 95-1-T, ¶ 91).

[165] Kittichaisaree, *supra* note 146, at 74.

struction of the group.[166] In the end, even though it is difficult to prove genocidal intent in the case of an individual backed by the State, proving the required specific intent for genocide is somewhat easier than originally anticipated through the use of circumstantial evidence.[167]

2. Applying the Elements of Genocide Under the Convention to the Case of Enforced Sterilizations in Peru

A strong case can be made that the enforced sterilizations of more than 200,000 low-income, indigenous Quechua-speaking women were acts of genocide.[168] First, the indigenous Quechua-speaking women are members of two protected groups enumerated in the definition of genocide since the Quechua people are a distinct racial and ethnic group in Peru.[169] The indigenous Quechua people objectively belong to a racial group since they share common, constant, and hereditary features, and are an ethnic group since they are "a community of persons linked by the same customs, the same language and the same race."[170] Additionally, from a subjective analysis, the racial and ethnic divides among *criollos*, *mestizos*, *cholos*, and *indígenas* in Peruvian society also contribute to the notion that the Quechua people are a distinct cultural group.[171] Although the overt motive behind Fujimori's Family Planning Program was to curb population growth and to alleviate poverty on a massive scale, it is clear that because motive is not an element of genocide, indigenous Quechua women would not lose their protected group status.[172] In other words, their protected status as members of a racial or ethnic group would override their status as a member of a particular social demographic.[173] Therefore, the motive of population control would not negate an intention to prevent births within the

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[166] *Id.*

[167] *See id.* at 74–75.

[168] *See* Genocide Convention, *supra* note 77, art. II; Ratner & Abrams, *supra* note 159, at 33–35.

[169] *See* Genocide Convention, *supra* note 77, art. II.

[170] *See* Ratner & Abrams, *supra* note 159, at 33 (quoting Stéfan Glaser, Droit International Pénal Conventionnel 111–12 (1970), *translated and quoted in* Study of the Question of the Prevention and Punishment of the Crime of Genocide, prepared by Nicodéme Ruhashyamiko, July 4, 1978, UN Doc. E/CN.4/Sub.2/416, at 15–16).

[171] *See* Degregori, *supra* note 20.

[172] *See* Coe, *supra* note 29, at 56, 61; *cf.* Ratner & Abrams, *supra* note 159, at 35. These authors speak of "political groups" and do not speak specifically of poverty as a group. Ratner & Abrams, *supra* note 159, at 35. The same could be said for poverty as a status incidental to (and not overriding) a group's protected status. *See* Ratner & Abrams, *supra* note 159, at 35.

[173] *See* Ratner & Abrams, *supra* note 159, at 33–35.

group.[174] As a result, one could prove that Fujimori's Family Planning Program intended to prevent births among the Quechua people, despite his alleged motives.[175]

Next, those individuals responsible for orchestrating enforced sterilizations against indigenous Quechua women arguably acted with the necessary *mens rea* to commit genocide since they knew or should have known that these coercive sterilizations would destroy, in whole or in part, the Quechua people.[176] Highly probative evidence with which one could infer genocidal intent would include the Family Planning Program's specific targeting of poor indigenous women and the systematic nature of its quota system, articulated in the 1989 Plan for a Government of National Reconstruction, or "Plan Verde."[177] Specifically, the Plan stated that it was necessary to quickly curb population growth and mandate treatment for the "surplus beings [through a] generalized sterilization use among those culturally backward and impoverished groups."[178] The Plan continued by arguing that because those individuals from the targeted areas possessed "incorrigible characters" and lacked resources, all that was left was their "total extermination."[179] Seeking out particular groups to sterilize in violation of reproductive rights and imposing upon health care providers an obligatory quota system which caused coercive practices demonstrate a destructive pattern on the part of government officials to prevent births within the

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[174] *See id.*

[175] *See id.*

[176] Kittichaisaree, *supra* note 146, at 72 (quoting *Akayesu*, Case No. ICTR 96-4-T, ¶ 520).

[177] *See Historia de una Traición: Muchos Misterios Quedarán Revalados al Conocerse el Plan Militar que Se Consolidó el 5-IV-92*, at 9 (1993), http://www.resistencia.org/documentos/el_plan_verde/historia_de_una_traicion.pdf (last visited Oct. 24, 2008); Amnesty Int'l, *supra* note 8, at 20.

[178] *Historia de una Traición*, *supra* note 177, at 9 (author's translation). The Plan reads in Spanish:

> Ha quedado demonstrado la necesidad de frenar lo más pronto posible el crecimiento demográfico y urge, adicionalmente, un tratamiento para los excedentes existentes: utilización generalizada de esterilización en los grupos culturalmente atrasados y económicamente pauperizados . . . . Los métodos compulsivos deben tener solo cáracter experimental, pero deben ser norma en todos los centros de salúd la ligadura de trompas . . . . Hay que discriminar el excedente poblacional y los sectores nocivos de la población. Para estos sectores, dado su cáracter de incorrigibles y la carencia de recursos . . . solo queda su exterminio total.

Id.

[179] *Id.*(author's translation).

indigenous Quechua-speaking population.[180] Moreover, under Fujimori's population control program, there existed a clear pattern of victims—namely poor, indigenous Quechua-speaking women—a high level of planning at the state level through the formal Family Planning Program, and a large number of victims considering that in 1993 only a fifth of Peru's population spoke Quechua or other native languages.[181]

On the other hand, there are legal and practical concerns with classifying the enforced sterilization of Quechua women as an act of genocide.[182] For example, one could argue that the State did not administer population control and family planning programs to Quechua women to the exclusion of other racial and ethnic groups from enforced sterilization procedures.[183] This argument is weak, however, because perpetrators of genocide can theoretically have the specific intent to destroy more than one protected group under the auspices of a single State-sponsored plan to eradicate poverty and curb population growth through sterilization procedures.[184] Also, as a practical matter, conservative groups in Peru and abroad who oppose contraception and reproductive choice for women have capitalized on the classification of the Voluntary Surgical Contraception program as an act of genocide.[185] As a result, international human rights advocates who promote accountability and justice for crimes against humanity and genocide must make strategic choices since their decisions and actions could negatively affect future reproductive rights, choice, and health among Quechua women who have already been victims of State-enforced sterilization campaigns.[186]

C. *Enforced Sterilizations as Violations of Individual Human Rights*

Aside from the viable claim that the systematic enforced sterilizations against Quechua women constituted an act of genocide, these actions also implicate numerous violations of other human rights, includ-

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[180] *See id.*; Amnesty Int'l, *supra* note 8, at 20.

[181] Amnesty Int'l, *supra* note 8, at 15.

[182] *See id.*, at 20; *see AQV*, *supra* note 56, at 108.

[183] *See* Amnesty Int'l, *supra* note 8, at 20. Indigenous Amazonian women were also among those who reported enforced sterilization procedures. *Id.*

[184] *See* Kittichaisaree, *supra* note 146, at 72–75.

[185] *See AQV*, *supra* note 56, at 108; Cáceres et al., *supra* note 52, at 143. Within a year of Toledo's election into presidency, a conservative Catholic Opus Dei physician was appointed as Health Minister of Peru, and later went on to become the country's Prime Minister. Aramburu, *supra* note 52, at 11.

[186] *See* Amnesty Int'l, *supra* note 8, at 20; *AQV*, *supra* note 56, at 108; Cáceres et al., *supra* note 52, at 143.

ing reproductive rights, under national, regional, and international law.[187] Legal instruments that obligate Peru to protect women against enforced sterilization include, but are not limited to, the Peruvian Constitution,[188] the American Convention on Human Rights (American Convention),[189] International Covenant on Civil and Political Rights (ICCPR),[190] the International Covenant on Economic, Social and Cultural Rights (ICESCR),[191] and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[192] The protective provisions enumerated within these instruments include those that protect the right to personal autonomy, privacy, bodily integrity, and autonomous decision-making in women's reproductive lives.[193]

For instance, the Peruvian Constitution guarantees all Peruvians the right to dignity; life; moral, psychological, and physical integrity; liberty and security of the person; and to be free from all forms of violence and from torture, inhuman, or degrading treatment.[194] Thus, the State has the duty to respect, protect, and fulfill these rights through national laws and legal mechanisms to investigate and punish violations. In the case of enforced sterilizations, the Peruvian government has enacted laws to protect women; however, these laws are not enforced and violators continue to enjoy impunity from punish-

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[187] *See, e.g.*, *infra* notes 188–192.

[188] Constitución Política del Perú [Political Constitution of Peru] [hereinafter Peruvian Constitution].

[189] Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention]. In addition, the Convention of Belem do Pará protects women against all forms of violence, including violence within the health care system. *See* Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June 9, 1994, 33 I.L.M. 1534 [hereinafter Convention Belem do Pará].

[190] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

[191] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

[192] Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]. The Declaration on the Elimination of Violence Against Women recognizes "that some groups of women, such as women belonging to minority groups, *indigenous women*, refugee women, migrant women, women living in rural or remote communities, destitute women, women in institutions or in detention, female children, women with disabilities, elderly women, and women in situations of armed conflict, are especially vulnerable to violence." Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, ¶ 7, U.N. Doc. A/RES/48/104 (Feb. 23, 1994) (emphasis added).

[193] *See supra* notes 172–176.

[194] *See* Peruvian Constitution, *supra* note 188, at ch.1, arts. 1, 2-1, 2-24(a), 2-24(h).

ment.[195] Even though abuses such as enforced sterilizations have been documented, public authorities have dismissed the violations as isolated incidents, and health care professionals paternalistically defend their actions as beneficial to their patients and "intended to avoid greater injury to the patient."[196] In light of these protections, women victims of enforced sterilizations have viable claims at the national level to remedy the wrongs committed against them.[197]

Many of these national protections, however, are unenforceable or inaccessible to the low-income women-victims of the Voluntary Surgical Contraception program.[198] Thus, complaints to regional or international human rights bodies are also valid and actionable claims.[199] The American Convention, for example, protects individuals' rights to life; personal integrity; health; to provide free and informed consent; privacy; equality; and non-discrimination.[200] Public health care providers violated these rights when they performed unnecessary surgery on women-victims without obtaining informed consent, as well as when, in certain circumstances, they failed to perform preliminary examinations or to give post-operative care, which ultimately led to death and disability for women-victims.[201]

Under the ICCPR, Peru has committed itself to respect, protect and fulfill its citizens' civil and political rights, including the rights to life, non-discrimination, gender equality, liberty, personal security,

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[195] *See, e.g.*, General Law on Health arts. 4, 6, 15, 26, 27 & 40 (promulgated by Legislative Decree No. 26842, July 15, 1997) (protecting rights to life and health); Peruvian Penal Code art. 376 (promulgated by Legislative Decree No. 635, Apr. 3, 1991) (abuse of authority). There is no crime of infliction of suffering on patients by health care providers. *See* CLADEM & CRLP, *supra* note 57, at 42–43.

[196] CLADEM & CRLP, *supra* note 57, at 43.

[197] *See generally* Peruvian Constitution, *supra* note 188; General Law on Health, *supra* note 195; Peruvian Penal Code, *supra* note 195.

[198] *See* CLADEM & CRLP, *supra* note 57, at 41–48. *See generally* Ctr. for Reprod. Rts. & Demus: Estudio para la Defensa de los Derechos de la Mujer, Women of the World: Laws and Politics That Affect Their Reproductive Lives, Latin America and the Caribbean 170–92 (1997); Ctr. for Reprod. Rts. & Demus: Estudio para la Defensa de los Derechos de la Mujer, Women of the World: Latin America and the Caribbean Progress Report 2000, at 83–102 (2001) (reporting on the laws regarding reproductive health and lives of women in Peru).

[199] *See* American Convention, *supra* note 189, arts. 4, 5, 7, 11 & 24. In order for a complaint to be admissible, the applicant must prove that she has exhausted all local remedies or that special circumstances exist that make exhaustion of local remedies impossible. For a more complete explanation, see Thomas Buergenthal, *The U.N. Human Rights Committee*, 5 Max Planck Y.B. of U.N.C. 341, 364–81 (2001); Velásquez Rodríguez, Inter-Am. Ct. H.R. (Ser. C) No. 4. (July 29, 1988).

[200] *See* American Convention, *supra* note 189, arts. 4, 5, 7, 11 & 24.

[201] *See* Ctr. for Reprod. Rts., *supra* note 71, at 12–16.

and privacy, along with freedom from torture and cruel, inhuman or degrading treatment.[202] Additionally, the ICESCR protects the rights to non-discrimination, equality, and health.[203] Similarly, under the CEDAW, Peru guarantees rights to women that protect against enforced sterilization under Articles 5, 12, and 16, which are further articulated in General Recommendations 19, 21, and 24.[204] For example, in General Recommendation 19, the CEDAW Committee asks States to take measures to "prevent coercion in regard to fertility and reproduction."[205] All of these State duties at international law give individual women-victims of enforced sterilizations the ability to hold the Peruvian government responsible for the human rights violations committed against them.

The Peruvian government officially acknowledged State responsibility for violations of international law under the American Convention when it settled the case of *María Mamérita Mestanza Chávez v. Perú*.[206] Specifically, the settlement agreement recognized State violations of the victim's rights to life, physical integrity, humane treatment, equal protection of the law, and freedom from gender-based violence.[207] Although settlement agreements with the Inter-American Commission on Human Rights are not binding jurisprudence at international law, these recognitions of State responsibility are highly persuasive admissions to use in any further legal action at the regional or international levels.[208] Moreover, the Peruvian government undertook to investigate and punish those responsible for the violations as well as to reform legislation and create procedures to handle patient complaints within the health care system.[209] As a result, ongoing rights violations are occurring as long as

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[202] *See* ICCPR, *supra* note 190, arts. 2, 3, 6, 7, 9 & 17.

[203] *See* ICESCR, *supra* note 191, arts. 2, 3 & 12.

[204] *See* Comm. on the Elimination of Discrimination Against Women [CEDAW], *Report of the Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 24*, ¶ 22, U.N. Doc. A/54/38/Rev.1 (Jan. 1, 1999); Comm. on the Elimination of Discrimination Against Women [CEDAW], *Report of the Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 21*, ¶ 22, U.N. Doc. A/49/38 (Jan. 1, 1994); Comm. on the Elimination of Discrimination Against Women [CEDAW], *Report of the Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 19*, ¶ 22, U.N. Doc. A/47/38 (Feb. 19, 1993) [hereinafter CEDAW General Recommendation 19].

[205] CEDAW General Recommendation 19, *supra* note 204.

[206] *See* María Mamérita Mestanza Chávez v. Perú, Case 12.191, Inter-Am. C.H.R., Report No. 71/03, OEA/Ser.L/V/II.118, doc. 70 rev. 2 ¶¶ 1, 14 (2003).

[207] *See id.*; Ctr. for Reprod. Rts., *supra* note 71, at 16.

[208] *See* American Convention, *supra* note 189, at art. 48.

[209] *See* Ctr. for Reprod. Rts., *supra* note 71, at 16–17.

Peru fails to implement these changes and denies women-victims their rights at national, regional, and international law.[210]

D. *The Need for an Independent and Impartial Investigation*

The *CVR* Commissioners recognized that other bodies within Peru's government and civil society either had conducted or were in the process of conducting their own investigations and reports on the cases of enforced sterilizations.[211] Although a Congressional subcommittee and numerous activist groups investigated and published testimonies and cases condemning the State's Family Planning Program and its health care providers, members of each of these bodies had a specific political or social interest in advocating certain positions and conclusions.[212] In contrast, the *CVR* was in a unique and disinterested position to evaluate, as it could have based "conclusions and recommendations on a close study of the record, while standing as an independent institution separate from the systems under review."[213] Opinion polls in Lima confirmed the public confidence in the performance of the *CVR* and the positive impact the public saw the Final Report have on Peru.[214] In addition, most individuals opined that the government should implement the *CVR*'s recommendations for reparations, reform, and justice.[215] The *CVR*'s widespread public support and overall legitimacy helped create some institutional momentum to keep the possibility of criminal justice and accountability open for the future, but only for those cases investigated and reported.[216] Thus, the exclusion of State-sponsored enforced sterilizations in the Final Report effectively impeded future criminal judicial action for thousands of marginalized Quechua women in Peru.[217]

The conservative Congressional Committee members who submitted the final report on conclusions and recommendations in cases of State-led enforced sterilization campaigns have politicized these human rights abuses and have used human rights language to strategically restrict reproductive choice for Peruvian women through repeals of laws that make surgical sterilization a legal option for reproductive choice in

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[210] *See id.*
[211] González Cueva, *supra* note 26, at 83–89.
[212] *See* CLADEM & CRLP, *supra* note 57, at 7.
[213] *See* HAYNER, *supra* note 8, at 29.
[214] *See* Amnesty Int'l, *supra* note 8, at 27.
[215] *See id.*
[216] *See id.*
[217] *See id.*

Peru.[218] As mentioned above, these conservatives are utilizing their investigation and report on human rights abuses to recommend committing further human rights abuses against women.[219] During the Toledo regime, reproductive rights and health advances had nearly halted.[220] For example, new policy initiatives stress abstinence-only methods for sexually transmissible infection (STI) prevention and natural methods for family planning.[221] In addition, government agencies have stopped promoting gender equality and sexual education, and health officials have prevented access to services and information on modern methods of contraception.[222] These programs and future strategies have further subordinated women in Peruvian society and have increased reliance on natural reproductive methods and unsafe abortions.[223]

Including the cases of enforced sterilizations in the *CVR* Final Report or even creating a separate impartial truth commission investigating and reporting these State-sponsored abuses could have served to prevent claims of genocide from instilling fear and causing a conservative backlash in reproductive rights issues.[224] In addition, including these cases in the Commission's report could have created a legitimate independent declaration of human rights abuses as acts of genocide and as individual violations of reproductive choice and health.[225] Moreover, including these cases could have kept these human rights atrocities out of the political arena and in the hands of the victims who deserve retribution, reparations, and reconciliation.[226] Although including these abuses would not have guaranteed a tangible victory for the victims or their families, it would have constituted a moral, symbolic victory for low-income, rural Quechua women and a step forward in an uphill battle for recognition as Peruvian citizens.[227] Though the Peru-

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[218] *See AQV*, *supra* note 56, *passim*; CLADEM & CRLP, *supra* note 57, at 7; Coe, *supra* note 29, at 65.

[219] *See AQV*, *supra* note 56, *passim*; CLADEM & CRLP, *supra* note 57, at 7; Coe, *supra* note 29, at 65.

[220] *See* Coe, *supra* note 29, at 65.

[221] *Id.*

[222] *Id.* For example, HIV prevention was part of a "Risk Reduction" program that also included malaria, dengue and other infectious diseases. *Id.*

[223] *Id.* Coe argues that U.S. policy shifts toward the far right have also threatened reproductive rights in Peru. *Id.*

[224] *See* Cáceres et al., *supra* note 52, at 144–48; *see also, supra*, notes 211–223 and accompanying text.

[225] *See* Amnesty Int'l, *supra* note 8, at 27; Hayner, *supra* note 8, at 29. These are the two main arguments put forth by investigations and advocates. *See, e.g.*, Cáceres et al., *supra* note 52, at 147–48, 162–63.

[226] *See* CLADEM & CRLP, *supra* note 57, at 7.

[227] *See* Amnesty Int'l, *supra* note 8, at 19–20; *supra* notes 8 and 12.

vian government has issued a public apology for its mass sterilization campaign, excluding these cases from any commission of inquiry greatly reduces the possibility of individual accountability for the perpetrators and justice for the victims of enforced sterilizations in Peru.[228]

Conclusion

A distinctive feature of truth commissions is their focus on victims, reconciliation, and healing as well as their reporting to create a framework to ensure transitional justice as a mechanism to deal with a nation's past human rights abuses.[229] One problem, however, is that truth-telling can never be comprehensive enough to encompass all of the competing perceptions of past events.[230] In addition, healing and justice—especially in the field of reproductive rights and justice—seem incompatible and unworkable where victims have no political power or economic means to reconcile and rebuild their communities.[231] Complex analyses by truth commissions, however, can produce a record and collective memory to prevent future human rights violations, and the exclusion of certain abuses creates a void in the attempt at finding truth, reconciliation, and justice for transitional states.[232]

For more than 200,000 indigenous Quechua-speaking women in Peru, time has not healed their wounds of the past. These individuals deserve a legitimate, independent, and thorough investigation of the human rights abuses committed against them. Even if a lack of resources impedes the possibility for adequate monetary reparations or legal action for reproductive justice, a good faith inquiry to uncover the truth and an acknowledgement of past wrongs would constitute an important symbolic victory for indigenous rights, reproductive rights, and human rights for the indigenous Quechua peoples of Peru. Restoring dignity and recognizing individual rights of Quechua women could succeed as a step toward bridging the economic, racial, and ethnic divides that continue to perpetuate inequality, discrimination, and hatred among Peruvians.

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[228] *See AQV*, *supra* note 56, at 108; Coe, *supra* note 29, at 65; *supra* notes 8 and 12. For a discussion on the issues and problems surrounding reparations and public apologies, see generally Minow, *supra* note 4.

[229] *See* Martha Minow, Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence 60–61 (1998).

[230] *See id.* at 62.

[231] *See id.* at 63.

[232] *See id.* at 78–79; Jeremy Sarkin & Erin Daly, *Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies*, 35 Colum. Hum. Rts. L. Rev. 661, 665 (2004).

Official acknowledgment of the truth is extremely powerful in the healing process, especially in an atmosphere previously dominated by official denial.[233] If this is the case, then no official acknowledgment of truth after official denial can be equally powerful in impeding reconciliation and healing. When truth commissions deprive certain individuals or groups of the opportunity to have their stories entered into the historical record, they effectively—even if inadvertently—deny victims access to the public and political discourse and leave victims disempowered in their struggle for justice and accountability. Future truth commissions, thus, should ensure that the marginalized victims in society do not remain silenced and alienated in the creation of the historical record and collective memory. When forgotten, history does have a tendency to repeat itself.

[233] *See* HAYNER, *supra* note 8, at 27.

THE COMPLICITY AND LIMITS OF INTERNATIONAL LAW IN ARMED CONFLICT RAPE

John D. Haskell*

Abstract: The inauguration of the International Criminal Court and the proliferation of criminal tribunals over the last twenty years are often presented as historic and progressive moments in the trajectory of international law's response to victims of rape in armed conflicts. However, these moments may signal not only inclusion, but also repression. They signal not just progress, but also a renewed rhetorical and institutional legitimization of colonialism. Historicizing the advent of the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the Former Yugoslavia, and the International Criminal Court, this Article examines some ways that international law obfuscates its complicity in armed conflict rape, looking particularly at calls within the profession for greater efficiency, nation-state security, and reparations for victims. In doing so, this Article grapples with questions concerning the limits and alternatives to our current legal imagination towards rape in armed conflict.

"We think that justice is very important, but at the moment, it is meaningless."

—M.K., Rwandan rape survivor[1]

Introduction: Progress or Paternalism?

The standard account of the history of international law in the context of widespread rape in armed conflicts envisions that international law operates as a flexible process to: 1) restore peace and secu-

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[1] Human Rights Watch, Struggling to Survive: Barriers to Justice for Rape Victims in Rwanda 36 (2004) [hereinafter Hum. Rts. Watch, Struggling to Survive], *available at* http://www.hrw.org/en/reports/2004/09/29/struggling-survive.

rity to armed conflict situations;[2] and 2) define the terms and methods by which women may be integrated into the international legal framework. In other words, modern international law is characterized principally in its struggle, or project, to bring order to chaos and inclusion to those on the peripheries.

This Article posits that each legal restructuring to bring order and inclusion is accompanied by a simultaneous act that instills new imbalances and forms of exclusion.[3] The standard approach denies these excluded experiences or "realities" (what Nathaniel Berman characterizes as "a series of catastrophes and mutations") to maintain that international law is somehow linked to civilization, to freedom and democracy, and to modernity.[4] Against civilization, barbarianism—the wars of succession in the former Yugoslavia, the 100-day "genocide" in Rwanda,[5] the ongoing armed conflicts and butchery in

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[2] *See* S.C. Res. 1503, U.N. Doc. S/RES/1503 (Aug. 28, 2003). The Resolution reads in part: "[c]ommending the important work of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in contributing to lasting peace and security in the former Yugoslavia and Rwanda and the progress made since their inception . . . ." *Id.* It continues to discuss recent changes to be implemented in trying the accused; however, there is no language attempting to define the ultimate objective, or "important work" of the international tribunals aside from "contributing to lasting peace and security in the former Yugoslavia and Rwanda." *See id.* Here, it may be relevant in the overall scheme of the analysis to pause for a moment and consider the implications of this choice in words. In short, the structure and language of Resolution 1503 boldly suggests that mass rape in armed conflicts is prosecuted not in the interests of justice for the victims so much as it is in the interests of ensuring the stability and welfare of the mentioned states ("lasting peace and security"). *See id.* This will be discussed more in Part II.

[3] For a thorough treatment of this idea in other contexts see Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 Harv. Int'l L.J. 1, 7, 21 (1999) (stating, for example, that "positivists were engaged in an ongoing struggle to define, subordinate, and exclude the uncivilized native" while asserting itself as a set of techniques, or "doctrines that could coherently account for native personality"; and also, that "[l]egal science in the latter half of the nineteenth century was conceived of . . . as a struggle against chaos"); *see also* Nathaniel Berman, In the Wake of Empire, Presentation at the American Society of International Law's 93rd Annual Meeting (March 1999), *in* 14 Am. U. Int'l L. Rev. 1515, 1521, 1523, 1531, 1553 (1999) (analogizing Caribbean history to international legal history in order to characterize the history of international law as "phase[s] of repression," observing that "decolonization was only the end of a specific form of imperial domination, one that only took definitive shape in the late 19th century," and stating that "each gesture of greater inclusion in the 'international legal community' has been accompanied by a gesture of exclusion").

[4] *See* Berman, *supra* note 3, at 1523.

[5] *See* Robert Murtfeld, Lemkin's Genocide, Presentation at the International Law Association (British Branch) Spring Conference, "Tower of Babel—International Law in the 21st Century: Coherent or Compartmentalised?" (Mar. 3, 2006) (on file with author)

the Sudan. Against freedom and democracy, empire—often projected onto the former Soviet Union or the western international order before de-colonization. Against modernity, the past—a term of dark ambivalence and vague foreboding, the signaling of a return to nature, to the primitive, to empire—in short, to a time when the world was ruled and defined by strength not morals, by the sword rather than the pen, by fear instead of enlightenment. International law constantly speaks in the language of the past and the future; the way forward is always to elevate international law above politics and local ambitions. International law is, in essence, presented as a dynamic emancipation project whereby international law has been reborn and the role of law, and implicitly western civilization, redeemed from the horrors of its past.

Yet there is also anxiousness, or ambivalence, within the discipline and the international community at large as to international law's purpose and practicality.[6] The proclamation that the International Criminal Court (ICC) symbolizes a "historical development" rings shrill, perhaps too insistent on its place and character, especially when only a handful of cases have been successfully prosecuted by either the International Criminal Tribunal for the Former Yugoslavia (ICTY) or the International Criminal Tribunal for Rwanda (ICTR).[7]

(challenging the concept of "genocide" as it functions on a moral and pragmatic level within the international human rights scheme and with international lawyers).

[6] *See id.* (describing calls for "coherency" and "compartmentalization" of international law as "anxious"). In fact, the tendencies are not so much alternatives, but moments in a process whereby international lawyers rationalize the horrors of their discipline with their own sense of right and wrong, and of purpose. Specifically, international lawyers compartmentalize, or distance, the horrors from their profession to present international law with a coherent history and purpose—that being, a story of the few bringing order and civilization to the many. To some extent, the narrative carries with it a missionary zeal, a duty to bring light to darkness, to right the wrong. Indeed, the current mindset of international legal enthusiasts and skeptics is still conditioned by the Old Testament and Judeo-Christian doctrinal traditions. *See* John Haskell, From the Sacred to the Secular . . . And Back Again?: The Dynamic of Self-Determination from Genesis to Modern International Law, Presentation at the International Law Association (British Branch) Spring Conference, "The Tower of Babel—International Law in the 21st Century—Coherent or Compartmentalised?" (Mar. 3, 2006) (on file with author) (tracing how the notion of difference developed in the creation account of Genesis and throughout the Old Testament (a "doctrine of difference")—from light and darkness to the lineage of Adam and Satan to Israel and enemy nations to Gentiles becoming spiritual Israel and non-Christians—affects how we currently understand genocide, civilization, and the way forward).

[7] *See* Ivan Simonovic, *The Role of the ICTY in the Development of International Criminal Adjudication*, 23 Fordham Int'l L.J. 440, 447–48 (quoting former ICTY Prosecutor Justice Louise Arbour's explanation that the ICC courts are forced to be selective in their prosecutions because of limited resources); Press Release, Women's Caucus for Gender Justice,

Ultimately, the ICC looks as if it will operate as a more symbolic, rather than practical, institutional functionary. These voices loudly clamor that they represent something new, or are at least at odds with the past, when at the same moment the structural continuity in power and rhetoric today is strikingly reminiscent of the past.

For example, jurists in the nineteenth century were preoccupied with the problem of how to justify colonial expansion. The answer came in what Antony Anghie calls "the dynamic of difference," whereby jurists, "using the conceptual tools of positivism, postulated a gap, understood principally in terms of cultural differences, between the civilized European and uncivilized non-European world."[8] Once this gap was established, international law "proceeded to devise a series of techniques for bridging this gap—of civilizing the uncivilized."[9] Implicit in this arrangement was the notion that civilization was a known commodity, a set of pre-determined and neutral characteristics that international jurists could use to gauge and determine other communities' and peoples' levels of and capacity for civilization, and hence the degree to which such groups might partake in the benefits, protections, and obligations afforded through formally recognized legal identity within the emerging global western order. Through "powerful evocations of the backward and barbaric," international law was able to confirm "the incongruity of any correspondence between Europe and these societies," thereby justifying the continued exclusion of non-European peoples from international law.[10] In other words, international law became the process by which uncivilized, non-European peoples were re-imagined, assimilated, and commonly subordinated into a Eurocentric web of ambiguous power relations among European states and other colonial territories.[11]

In the same way, the modern international law project concerning rape in armed conflict also establishes a similar tension between the

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International Criminal Court is Here! Rome Statute Enters into Force (July 1, 2002), *available at* http://www.iccwomen.org/wigjdraft1/Archives/oldWCGJ/news/prjuly1.htm (expressing excitement over the "historic" nature of the development of the ICC courts).

[8] Anghie, *supra* note 3, at 5.

[9] *Id.*

[10] *Id.* at 29.

[11] *Id.* at 25, 29 (noting how positivists saw law both as "the creation of unique, civilized, and social institutions" and the means by which states "could be[come] members of 'international society'"); *see also* David Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 17 Quinnipiac L. Rev. 99, 119 (1997) (observing that "international lawyers" in the nineteenth century "would increasingly think of a single, universal, international legal fabric ordering relations among civilized and uncivilized states").

civilized and the uncivilized, albeit in slightly modified language. Pursuant to the rights that are guaranteed to women in international human rights instruments, the rape victim (the "uncivilized," or other) is given a legal identity invoking all the duties and protections of the international legal framework (the "civilized"). Thus, international law is presented as the means by which women acquire their identity—as new members within civilization, and hence entitled to human dignity, self-determination, and justice. In this sense, the current conception of international law is rooted in, or at least mimics, a past where international law explicitly served the colonial ambitions of European nation-states. And, just as colonized peoples often found themselves no better off after their encounters with nineteenth century colonial powers, the needs and restitution of raped women in armed conflicts have not been a reality despite the attention of international law.

In this Article, I look at how the conceptual identities and practical realities of raped women are subordinated, and sometimes excluded completely, in the common dialogue among international scholars concerning rape in armed conflict and the modern reform framework implemented by the ICTY, ICTR, and ICC. I argue that these moments of exclusion call into question the very legitimacy and standard depiction of international legal history evolving through struggle and recollection from a patriarchal, colonial past to a more pluralistic, humanitarian liberal-modernist regime.[12]

This Article also addresses the periodic permutations of the legal order, but not as developments or setbacks that may be measured and plotted in some grand, comprehensive timeline. Instead, these changes should be understood as incoherent responses by the post-World War II legal order to the widespread rape of women in armed conflicts that has occurred and continues to occur with frequency and severity. International law's efforts to provide a structure to dispense justice and restitution for raped women in armed conflicts are recognized to generate simultaneously new forms of "alienation and subordination" that

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[12] In critiquing the way the standard account approaches the history of international law in regards to rape in armed conflict, however, I do not want merely to establish another narrative to counter the dominant approach. To do so would only adopt the same myth, or idea, that the "shapeless mass of undigested and sometimes inconsistent rules" within international law can be sculpted into some coherent and chronological narrative of inclusion and progress. *See* Anghie, *supra* note 3, at 19 (quoting Thomas Lawrence, The Principles of International Law 94 (1895)). Also, it would ignore that inherent in any attempt to produce a narrative, the actual stories and experiences of the survivors and their families in these situations are subordinated to the purposes and structural needs of the narrative structure.

deny any sense of "empowerment" to either the rape victims, or women in general.[13] In other words, rather than being acts augmenting the inclusion and representation of rape victims (and, as often asserted, all women) within the "contemporary vocabulary of human rights, governance, and economic liberation," international law commonly and tragically operates to efface the identities, histories, and claims of rape victims.[14]

I. Defining Rape in Armed Conflicts

A. *The Concept of the "Unprecedented"*

The efforts to define rape in the Rome Statute[15] and the case history within the International Criminal Tribunals in the Former Yugoslavia (ICTY) and Rwanda (ICTR) are often asserted as proof that women are finding unprecedented inclusion into the international legal order. According to the standard narrative, this period of "unprecedented" inclusion was inaugurated with the international community's shock over the severe and distinct character of the mass rapes that occurred in the wars of succession in Yugoslavia (1992–94) and the 100-day genocide in Rwanda (1994).[16]

Just as nineteenth century jurists employed a "series of [legal] techniques" to the "postulation of a gap" between civilized (European) countries and uncivilized (non-European) countries, modern legal practitioners and scholars present the armed conflicts in Yugoslavia and Rwanda as "unprecedented" to postulate a gap between armed conflict situations and international law before and after the early 1990s and to juxtapose the rights of raped women in armed con-

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[13] *See id.* at 70.

[14] *See id.* at 80; Berman, *supra* note 3, at 1547 (describing this as a process whereby inclusion means "internalization, displacement, and transformation" for subjects on the peripheries of the international community).

[15] *See* Rome Statute of the International Criminal Court, art. 5, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (giving the ICC jurisdiction over the crime of genocide, crimes against humanity, war crimes, and the crime of aggression); Frances Pilch, *The Crime of Rape in International Humanitarian Law*, 9 USAFA J. Legal Stud. 99, 109–11 (1999). The statute includes as crimes against humanity: "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence." Rome Statute, *supra*, art. 7(1)(g).

[16] Pilch, *supra* note 15, at 106–07 (noting that the mass rape in Yugoslavia and the genocide in Rwanda facilitated the establishment of tribunals to try rape crimes).

flicts situations before the "intervention" of international law with the rights of raped women under the international legal order.[17]

Presenting the early 1990s as "unprecedented," jurists establish the notion that international legal history may be divided into two periods: the first period rooted in patriarchal sentiments and extending to the last decade of the twentieth century; the second period, a modern and increasingly pluralistic, gender-sensitive institution. For example:

> The [United Nations Secretary General] Kofi Annan asserted at the close of the Rome Conference that only a few years ago nobody would have thought the Rome outcome possible. It is only now, at the turn of the millennium, and after numerous large scale atrocities, that the momentum has swung forcefully behind the need to reign in impunity for gross atrocity and for the international community to take seriously the need for structures to enforce the law all too often violated.[18]

This historical approach is echoed throughout legal scholarship in strikingly uniform language. Again, in line with the standard narrative, another writer states:

> Undoubtedly, the single greatest impetus in the development of international humanitarian law concerning rape and sexual violence came as a result of the events in the former Yugoslavia and the formation and record of the ICTY. *These events marked a turning point in the international understanding of rape in armed conflict and a quantum leap in the criminalization of rape and sexual violence.*[19]

Pursuant to the dominant narrative, the unique, or unprecedented, nature of the wars in the former Yugoslavia and the genocide in Rwanda are made the catalyst by which international law and "womankind" become more attuned to one another. In doing so, an explicit gap is established between international law before and after the early 1990s, whereby: 1) the past is largely irrelevant (except as a means of charting international legal history as a story of growing inclusion and sensitivity to women by the international community); and 2) any current defects are not due to any fundamental attribute of international

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[17] *See* Anghie, *supra* note 3, at 5, 25, 29.

[18] Timothy L. H. McCormack & Sue Robertson, *Jurisdictional Aspects of the Rome Statute for the New International Criminal Court*, 23 Melb. U. L. Rev. 635, 638–39 (1999).

[19] Pilch, *supra* note 15, at 101–02 (emphasis added).

law, but only the lingering shadows of a receding patriarchal, imperialist past. In short, by labeling these two events "unprecedented," international law provided itself with a story, characters, and an alibi: the story is about international law as a universalist, humanitarian enterprise; the characters are women in general and pluralists pitted against international law's patriarchal past, the interests of nation-states in preserving the full benefits of their sovereignty, and "uncivilized" moments, such as armed conflicts; and the alibi is that international legal history, as a "drama of social evolution," is not a perfect science, but rather a struggle towards greater rights and sensitivities, wherein its failures are necessarily learning moments for not only international law, but also the entire international community (representative of humanity).[20]

To support the notion that the conflicts in the former Yugoslavia and Rwanda are "unprecedented," or at least exceptional, as far as armed conflicts go, international legal commentators generally rely on the brutality and multiplicity of rapes that have occurred in both regions. These rapes are claimed to be especially egregious since they were not only attacks against women, but also used "as an instrument of . . . 'ethnic cleansing'" and as a method of "torture, reward and a boost to soldiers' morale . . . 'to ensure that the victims and their families would never want to return to [the] area.'"[21] In other words, as Todd Salzman explains, "the Bosnian conflict brought the practice of rape

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[20] *See* Kennedy, *supra* note 11, at 101 (explaining that mainstream international lawyers view their progress as slow and gradual, but "part of a drama of social evolution").

[21] Pilch, *supra* note 15, at 102 (quoting Catherine N. Niarchos, *Women, War, and Rape: Challenges Facing the International Triubnal for the Former Yugoslavia*, 17 Hum. Rts. Q. 649, 658 & n.54 (1995)). What is particularly interesting about this statement is the idea that these rapes are elevated to a "new level." *See* Todd A. Salzman, *Rape Camps as a Means of Ethnic Cleansing: Religious, Cultural, and Ethical Responses to Rape Victims in the Former Yugoslavia*, 20 Hum. Rts. Q. 348, 349 (1998). Hence, it is "exceptional," or "unprecedented," because they "involve a public component" and represent "deliberate attacks on specific populations" in that they "bring shame upon the nation, the people, or the family." *See* Kristen Boon, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and Consent*, 32 Colum. Hum. Rts. L. Rev. 625, 631–32 (2001). This idea is repeated in other works as well. *See, e.g.*, Pilch, *supra* note 15, at 102–03 ("[W]hat is happening here is first a genocide, in which ethnicity is a tool for political hegemony: the war is an instrument of the genocide; the rapes are an instrument of the war." (quoting Catharine MacKinnon, *Rape, Genocide, and Women's Human Rights*, *in* Mass Rape: The War Against Women in Bosnia-Herzegovina 187 (Alexandra Stiglmayer ed., 1994))). Pursuant to this approach, it is not the act of rape itself, but its threat to the "nation" and "people" that entitles heightened awareness by the international community. In practical and theoretical terms, this attitude subordinates the hardships and suffering of rape victims and their right to peace and justice by requiring an additional level of intent to qualify for the full benefits of inclusion in the international legal order.

with genocidal intent to a new level," which he notes "[c]aused an outcry among the international community . . . [because] these violations were not random acts . . . [but] an assault against the female gender, violating her body and its reproductive capabilities as a 'weapon of war.'"[22]

Some writers have gone further and drawn a connection between German and Japanese atrocities in World War II and the atrocities of Serbian forces in the Yugoslavian wars and Hutu militias in Rwanda. For example, speaking of the conflicts in Bosnia and Rwanda, Kelly Askin states that "a number of reports . . . exposed a calculated system of . . . rape . . . and other atrocities unseen in Europe since the Nazi holocaust of World War II."[23] Likewise, Catharine MacKinnon describes the armed conflict in the former Yugoslavia, stating that "[t]his war is to everyday rape what the Holocaust was to everyday anti-Semitism."[24]

These attempts to link the Holocaust with the events in Yugoslavia and Rwanda are problematic on two counts. First, the project of equating these events seems prone to inaccuracy and generalization. Can we really reduce the complexity and diversity of victims' experiences in World War II with the equally diverse and complex experiences of women in Yugoslavia and Rwanda? Why would we want to make this analogy anyway? What purpose does it serve? Is there truly a universally shared experience? And if there is not, then upon what basis can we justify humanitarian intervention and the promotion of liberal international legal norms? Second, we may ask how the genocidal events in Yugoslavia and Rwanda can be "historic" and "unprecedented" moments, yet also find their identity rooted, to some degree, in the Nazi program in World War II. In other words, how can these events be both "unprecedented" and "analogous"?

This persistence in analogizing the atrocities in World War II with the armed conflicts in Yugoslavia and Rwanda is predicated on the needs of the standard international legal narrative. The end of World War II is often associated with the birth of the U.N. and the phenomena of individual human rights and the augmentation of international

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[22] Salzman, *supra* note 21, at 349. Again, his choice to characterize rape as "an assault against the female gender" offers an interesting glimpse at how the activity by the international legal order in relation to women raped in the crisis in Yugoslavia is projected, or universalized, into a grander story of all womankind making strides forward. *See id.*

[23] Kelly D. Askin, *A Decade in Human Rights Law: A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003*, 11 HUM. RTS. BRIEF 16, 16 (2004).

[24] Catharine A. MacKinnon, *Crimes of War, Crimes of Peace*, 4 UCLA WOMEN'S L.J. 59, 65 (1993).

actors and institutions. By attaching Yugoslavia and Rwanda to the events in World War II, the standard account suggests that these recent armed conflicts are also a monumental break from the past. It endorses international legal history as "memorabilia" of moments that intimates a larger story of how international law brings the benefits of civilization (expressed in terms such as human rights, self-determination, and modernization) to groups and individuals held out as previously beyond the peripheries of the international community.[25] In other words, the analogy allows international law to see itself as undergoing a process of "renewal," whereby it is able to shed its past—excusing its wrongs by addressing each instance only in what may be learned and how it can be remedied.

By breaking from the past, the story shifts from inspecting how the international community and its normative valuations may have contributed to these various moments of crisis to focusing on how international law can formulate a solution. Consequently, here, we see another "gap" is being created in the way the narrative link between World War II and the armed conflicts in Yugoslavia and Rwanda distances the international community from being implicated in these situations and preserves the characterization of international law as a pluralistic, humanitarian project. In silencing the past, the international order washed its hands of any guilt.

B. *The International Community's Complicity in the Former Yugoslavia and Rwanda: A Brief History*

1. The Former Yugoslavia

The armed conflicts in Yugoslavia and Rwanda and the responses by the international legal order in the 1990s, however, were both shaped, in part, by their entanglements much earlier in the twentieth century. In Yugoslavia, for example, the roots of the conflict extended back at least to the Allied power's creation of the Kingdom of the Serbs,

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[25] This notion of "memorabilia" comes from a lecture by Professor Catriona Drew in the course, Colonialism, Empire and International Law, at the School of Oriental and African Studies, University of London. What we observe is that this conception of international law as an evolving process or standardization of liberal humanitarian values and principles of legal (and, theoretically political) egalitarianism is dependent on international jurists being able to chart a progressive, linear journey by international lawyers and western powers. This historical map-making dominates the psychology of international legal scholarship concerning rape in armed conflicts.

Croats, and Slovenes as a sovereign state in the wake of World War I.[26] The territory was prone to internal ethnic conflict, "[p]opulated as it was by sundry antagonistic communities of widely divergent cultures, who worshipped in several different religions, had inherited eight legal systems from their former sovereignties, and wrote the basic Serbocroatian language in two orthonographies."[27] In 1929, the state's name was changed to Yugoslavia.[28] The new state experienced "intense nationalist strife among its various ethnic groups in the 1920s and 1930s."[29] Then, in 1941, the Nazis invaded, which in turn led to the creation of Croatia and Serbia, which served largely as puppet states.[30] Later, that same decade, the Germans were expelled and Soviet troops installed Josip Broz Tito as the new leader of the country, which consisted of six primary republics and two autonomous regions.[31]

During Tito's regime, ethnic tensions were largely mediated; however, the breakdown of the former Soviet Union sparked ethnonationalistic fervor in the republics of Slovenia, Croatia, Macedonia, and Bosnia-Herzegovina, as well as among ethnic Serbs (under the leadership of Slobodan Milosevic) who were encouraged and financed by the state of Serbia to fight against the other republics for a united Yugoslavia under the Serbian flag.[32] The ethnic turmoil was further exasperated by the fact that the 1992 Arbitration Committee, in its opinions in the Conference on Yugoslavia, relied heavily on defining the states along Soviet-sponsored territorial borders and referred problems of ethnic conflict to the prescription of minority rights protection, reminiscent of the interwar regime under the League of Nations.[33]

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[26] *See* James R. McHenry III, Note, *The Prosecution of Rape Under International Law: Justice That Is Long Overdue*, 35 VAND. J. TRANSNAT'L L. 1269, 1280 (2002) (arguing that the conflict might even be traced back further to "relations among ethnic groups, first within the larger Ottoman Empire and then later as a mix of sovereign states, such as Serbia and Montenegro").

[27] *Id.* at 1280–81 (quoting JOSEPH ROTHSCHILD, EAST CENTRAL EUROPE BETWEEN THE TWO WORLD WARS 202 (1974)).

[28] *Id.* at 1281.

[29] *Id.*

[30] *Id.*

[31] McHenry, *supra* note 26, at 1281.

[32] *Id.* at 1281–82.

[33] *See generally* Arbitration Committee of the Conference on Yugoslavia (Badinter Arbitration Committee) Opinion Nos. 2–3, *reprinted in* Alain Pellet, *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples*, 3 EUR. J. INT'L L. 178, 183–85 (1992) (concluding that "the Serbian population in Bosnia-Herzegovina and Croatia is entitled to all the rights concerned to minorities and ethnic groups" and that the boundaries between Croatia and Serbia "may not be altered except by agreement freely arrived at").

Moreover, in spite of brewing ethnic hostilities, the European community initiated measures to attempt and preserve a "united" Yugoslavia. In 1991, the European Union Council of Ministers set up a conference explicitly with the aim of keeping Yugoslavia united.[34] The conference was followed shortly afterwards by "economic deterrence in the concurrent aims of keeping the republics from claiming independence and preventing the Serbian government from using military force to enforce unity," as well as periodic threats from the European Community that it would deny EC membership to any newly declared independent states emerging from the Yugoslavian conflict.[35] Despite these measures and threats, Bosnia-Herzegovina, Croatia, and Slovenia achieved recognition as independent republics in 1992.[36]

In response to the political recognition of these republics by the international community, the Serbian and Croatian governments incurred intense assaults within Bosnia-Herzegovina, framing their invasions as "an attempt to protect [their] minority populations in the various republics and to retain [their] hold over portions of the land."[37] The invasion carried out by the Serbian forces was particularly brutal and severe. Hence, while Croatian and Serbian soldiers attacked the local Bosnian Muslim population, it is generally accepted among the international legal order that the Serbian crimes were "more widespread and involved larger numbers of people."[38]

In the name of "ethnic homogeneity," according to the U.N. Special Rapporteur on Human Rights, between 1992 and 1994, as many as 20,000 women were raped in the ensuing conflict.[39] Many of these

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[34] Karina Michael Waller, *Intrastate Ethnic Conflicts and International Law: How the Rise of Intrastate Ethnic Conflicts Has Rendered International Human Rights Laws Ineffective, Especially Regarding Sex-Based Crimes*, 9 Am. U. J. Gender Soc. Pol'y & L. 621, 637 (2001).

[35] *Id.*

[36] *Id.*

[37] *Id.* at 637–38; *see also* McHenry, *supra* note 26, at 1282 (reporting that Croatia invaded Bosnia-Herzegovina on the grounds that twenty percent of the Bosnian population was ethnically Croatian).

[38] *See* McHenry, *supra* note 26, at 1282. Thus, when the international community stepped in, it primarily focused its resources on women raped by Serbian forces—the experiences of women raped by Croatian forces, to some degree, received a subordinate status compared to the other victims. *See id.*

[39] *See* Jocelyn Campanaro, Note, *Women, War, and International Law: The Historical Treatment of Gender-Based War Crimes*, 89 Geo. L.J. 2557, 2570 (2001) (citing *Preliminary Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery, and Slavery-Like Practices During Periods of Armed Conflict*, U.N. ESCOR, Hum. Rts. Comm., 48th Sess., Provisional Agenda Item 15, U.N. Doc. E/CN.4/Sub.2/1996/26 (1996)). Other statistics have placed the number of women raped at approximately 50,000. *See* Shana Swiss & Joan E. Giller, *Rape as a Crime of War—A Medical Perspective*, 270 JAMA 612, 613 (1993), *available at* http://

women were subjected to "gang rapes, multiple rapes, vaginal and anal rapes, fellatio and public rapes,"[40] often "as part of a deliberate system of ethnic cleansing [of Bosnian Muslims]" in which women became the principal "vehicles utilized to humiliate, subordinate, or emotionally destroy entire communities; to cause chaos and terror; to make people flee; and to ensure the destruction or removal of an unwanted group by forcible impregnation by a member of a different ethnic group [primarily Serbian]."[41]

Government officials ("from police officers to high ranking officials")[42] and, in some cases, U.N. peacekeepers were reported to have participated in the rapes.[43] "Rape camps" were established to cater to the soldier populations.[44] According to one correspondent within the conflict, there were "reports of UN troops participating in raping Mus-

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www.womens-rights.org/publications/jama93.html (noting that estimates of women raped in Bosnia "fluctuated widely from 10,000 to 60,000"); Marius van Niekerk, Report to the World Veterans Federation's Committee on African Affairs, *Breaking the Silence—Why Do Soldiers Rape in War?* (1999), http://www.saveterans.org.za/breakingthesilence.htm (stating that the armed crisis in Yugoslavia resulted in 50,000 victims who were raped in front of their family members).

[40] Kelly D. Askin, *Developments in International Criminal Law: Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 Am. J. Int'l L. 97, 119 (1999) (discussing specifically certain crimes charged in the *Foca* case, but also asserted more generally).

[41] Campanaro, *supra* note 39, at 2569–70; *see, e.g.*, MacKinnon, *supra* note 24, at 67. MacKinnon notes that the Serbian soldiers impregnate the Bosnian women on the belief: 1) that the rape will shame the women and child as "dirty and contaminated" by their families and culture; and 2) that it will cause the children born from Bosnian women to "rise up and join their fathers" because the "sperm carries all the genetic material [from the Serbian father]." *See* MacKinnon, *supra* note 24, at 67. MacKinnon holds this second notion as the "ultimate racialization of culture, the (one hopes) final conclusion to Nazism: now culture is genetic." *Id.* Here, again, we see the narrative connection being drawn between the World War II era and the armed crisis in the former Yugoslavia (and, as this Article posits, the standard approach's set-up for representing international law as part of a universal project). *See id.*

[42] *E.g.*, Dean Adams, Comment, *The Prohibition of Widespread Rape as a Jus Cogens*, 6 San Diego Int'l L.J. 357, 382 (2005).

[43] *E.g.*, MacKinnon, *supra* note 24, at 67. Sometimes the women know their assailants. *See, e.g.*, 2 Helsinki Watch, War Crimes in Bosnia-Hercegovina 21, 182 (1993) (quoting one woman who testified that "she recognized two of the soldiers who came into the room . . . looking for women . . . [and] testified that the two men had been her highschool [sic] teachers").

[44] Maria B. Olujic, *Women, Rape, and War: The Continued Trauma of Refugees and Displaced Persons in Croatia*, 13 Anthropology E. Eur. Rev. 40, 40 (1995), *available at* http://condor.depaul.edu/~rrotenbe/aeer/aeer13_1/Olujic.html (noting that these makeshift brothels were generally given names that either signified the establishment as a place for "weary travelers in the Balkans" (such as "Vilina Vlas," meaning "Nymph's Hairdressers," and "Kafana Sonja," meaning "Coffeehouse Sonja") or "suggest[ed] the modern, Western lifestyle" (such as "Laser" and "Fast Food Restaurant")).

lim and Croatian women from the Serb rape/death camps. Their presence has apparently increased trafficking in women and girls through the opening of brothels, brothel-massage parlors, peep-shows, and the local production of pornographic films."[45] There was also "[a] former United Nations Protection Force (UNPROFOR) commander reportedly accept[ing] offers from Serbian commanders to bring him Muslim girls from the camps for orgies."[46] In many of these camps, the "majority of female victims have died, either from gunshots, bleeding as a consequence of gang rape, or by suicide motivated by shame."[47]

These atrocities finally prompted the U.N. to act in 1992 through a series of Security Council Resolutions condemning the armed conflict.[48] In October 1992, Resolution 780 expressed the international community's "grave alarm at continuing reports of widespread violations of international humanitarian law . . . reports of mass killings and the continuance of the practice of 'ethnic cleansing.'"[49] Resolution 780 also authorized a Commission of Experts to investigate and submit reports on the alleged human rights violations.[50] The outcome of these reports led the Security Council to conclude that the Serbian forces practiced a policy of ethnic cleansing; furthermore, rape and sexual assaults were included as part of this policy's implementation.[51] Resolution 770 allowed governments to take "all measures necessary" to bring an end to the human rights abuses.[52]

The Security Council Resolutions, however, were not meaningfully enforced, and consequently were "seemingly inconsequential to the warring parties" and "[i]n some instances, the Resolutions only

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[45] MacKinnon, *supra* note 24, at 67 (citing Letter from [name withheld] to Author (Oct. 13, 1992)).

[46] *Id.* MacKinnon also briefly mentions an interview with Ragib Hadzic, head of the Center for Research on Genocide and War Crimes, to state that "General MacKenzie visited the 'Sonje' restaurant in Dobrinia, which was a brothel and had become a wartime rape/death camp. He reportedly loaded four Muslim women in his UNPROFOR truck, and drove away. The women have never been seen again." *Id.* at 67–68 n.24.

[47] Olujic, *supra* note 44, at 40.

[48] Waller, *supra* note 34, at 647.

[49] S.C. Res. 780, U.N. Doc. S/RES/780 (Oct. 6, 1992) (requesting the "Secretary-General to establish . . . an impartial Commission of Experts to examine and analyse . . . its conclusions on the evidence of grave breaches of the Geneva Convention").

[50] *Id.*; *see* Waller, *supra* note 34, at 647–48.

[51] Waller, *supra* note 34, at 648.

[52] S.C. Res. 770, U.N. Doc. S/RES/770 (Aug. 13, 1992) (calling "States to take . . . all measures necessary to facilitate . . . the delivery . . . of humanitarian assistance to Sarajevo and wherever needed in other parts of Bosnia and Herzegovina"); *see also* Waller, *supra* note 34, at 649–50 (noting that Resolution 770 does not reach the level of authorizing states to use force to dispel human rights abuses).

served to increase the hostilities that caused the massacre of thousands of Bosnian Muslims."[53] In Security Council meetings, China and Russia proved reluctant to endorse any military force against the Serbs "for fear that such action would create a dangerous precedent for them."[54] The United States was also opposed to intruding into the Yugoslavian armed conflict. One clear reason for this hesitation in responding to the atrocities in the former Yugoslavia is that the United States has always been remiss to ratify any international human rights instruments for fear it might "jeopardize" its sovereignty and Constitution.[55] Another possible reason may be that the turmoil surrounding the breakup of the former Soviet Union and the conflict in Somalia had put a damper on the United States's desire to involve itself in any precarious military operation.[56] Expressing the United States's seeming exhaustion abroad, President William J. Clinton told the U.N. in his 1999 address, that "some are troubled that the United States and others cannot respond to every humanitarian catastrophe in the world. We cannot do everything, everywhere."[57] Thus, in 1993, pursuant to Resolution 827, the Security Council decided against military intervention and in favor of establishing the ICTY.[58]

2. Rwanda

The notion that the establishment of the ICTY was a step forward in ensuring humanitarian protection for all women was challenged within a year of its inception; in 1994, Rwanda broke out in civil war. In a period of approximately one hundred days, Hutu forces wiped out somewhere between 600,000 and 800,000 Tutsi in a full scale extermination campaign.[59]

While the genocidal campaign officially began when Rwandan President Habyarimana's airplane was shot down on April 6, 1994 and extremist Hutu claimed that Tutsi were responsible, the origins of the

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[53] *See* Waller, *supra* note 34, at 650.

[54] *Id.* at 652.

[55] *See id.* at 656–57.

[56] *See id.* at 656.

[57] *See id.*

[58] *See* S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) (declaring the establishment of an "international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law in the territory of the former Yugoslavia").

[59] Askin, *supra* note 23, at 16 (stating that "between April 7th and mid-July 1994, some 700,000 men, women, and children were systematically slaughtered"); *see also* Hum. Rts. Watch, Struggling to Survive, *supra* note 1, at 7 (estimating that at least 500,000 died).

conflict stretch much further back.[60] Hutu and Tutsi are the two principal ethnic groups in Rwanda.[61] Prior to the late nineteenth century, the Tutsi exercised minority rule over the Hutu population through a caste system.[62] The distinctions between the two groups, however, were not rigid or categorically ethnic—wealthy Hutu could undergo a ceremony to become Tutsi.[63] Similarly, Tutsi could become Hutu if they fell into poverty.[64] Thus, to some extent, the classifications were chiefly related to wealth and status, not ethnicity; moreover, ethnic divisions were blurred by the fact that both groups spoke the same language and practiced the same religion.[65]

In the early years of the twentieth century, Belgium colonizers encouraged "a historical myth of differences between Hutu and Tutsi in order to control the majority Hutu and institutionalize minority rule."[66] This myth proposed that "Tutsi were a Nilo-Hamitic race from Egypt and Ethiopia who naturally ruled over the Bantu Hutu."[67] The notion of racial difference was also promoted through the colonial practice of measuring each person's nose to determine their group identity.[68] Furthermore, the Belgium colonizers issued identity cards that marked the local population as Hutu or Tutsi—Tutsis enjoying privileges generally denied to Hutu peoples, such as the right to go to school or enter the civil service.[69]

Minority rule, however, is difficult to maintain. In 1959, Hutu discontent escalated into open revolt against the Tutsi aristocracy.[70] The establishment of a Hutu-led government in 1961 did little to lessen

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[60] Alexandra A. Miller, Comment, *From the International Criminal Tribunal for Rwanda to the International Criminal Court: Expanding the Definition of Genocide to Include Rape*, 108 Penn St. L. Rev. 349, 350 (2004). Even though no one claimed responsibility and there was no convincing proof of guilt, the Rwandan radio blamed the Rwandan Patriotic Front, primarily consisting of Tutsi refugees, for the shooting. *See id.* at 350 n.3. Other allegations have also been made that members of Habyarimana's Presidential Guard shot down the airplane. *Id.*

[61] *Id.* at 351.

[62] *Id.* at 352.

[63] *Id.*

[64] *Id.*

[65] Miller, *supra* note 60, at 351–52.

[66] *Id.* at 352. This may be inaccurate, to some degree, as to whether Belgian colonizers really "institutionalized" these differences, or if they were already firmly in place, albeit lacking any violent element (that is, the fact that there was an official ceremony by which Hutu could become Tutsi may be seen as an "institutionalized" difference). *See id.*

[67] *Id.* at 352.

[68] *Id.* at 352 n.24.

[69] *Id.*

[70] Miller, *supra* note 60, at 352.

pressure on the Tutsi population.[71] By 1964, approximately 10,000 Tutsi had been killed, while hundreds of thousands more were forced to flee the country.[72] Things worsened in the 1970s when Major General Habyarimana, a Hutu senior army commander, led a successful coup against the government: the Mouvement Revolutionnaire National pour le Developpement (MRND).[73] The new government, led by President Habyarimana and a small inner circle, the Akazu, initiated a policy of "Hutu Power," which essentially stood for "the Hutu need to rid Rwanda of Tutsi entirely."[74] By late 1990, the MRND had reduced the Tutsi population in Rwanda to nine percent.[75]

In 1991, due to increasing international and political pressure, as well as the invasion of the Rwandan Patriotic Front (a group of Tutsi refugees demanding repatriation) in Northern Rwanda, the MRND was reduced to a minority party and a new, less militant Hutu government was established.[76] Habyarimana and his followers, however, secretly organized a plan to retake control, primarily premised once again on the concept of "cleansing" of Tutsi from Rwanda to mobilize support.[77]

The international community was aware of Habyarimana's plans. Indeed, there was ample evidence of an imminent genocide. For example, between October 1990 and February 1994, "Hutu Power" loyalists massacred thousands of Tutsi.[78] Also, in 1990, *Kangura* (Wake Up!), a newspaper sympathetic with Habyarimana, published the "Hutu Ten Commandments," which became "the Hutu manifesto" with calls to "stop having mercy on the Tutsi."[79] In response to the escalating anti-Tutsi sentiment, however, the international community was largely silent.

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[71] *Id.*

[72] *Id.*

[73] *Id.* at 352–53.

[74] *Id.* at 353 & n.31.

[75] Miller, *supra* note 60, at 353.

[76] *Id.*

[77] *Id.* at 353–54.

[78] *See id.* at 353 n.31. Even as a new government came into power, the MRND did not stop its "Hutu power" mission. Indeed, Habyarimana and his forces began to focus even more intently on carrying out a program of genocide against the Tutsi, possibly believing it was their best opportunity to regain power. *Id.* at 353–54. Thus, in the early 1990s, "Hutu power" loyalists established a youth militia, the Interahamwe, to "facilitate the cleansing of Tutsi from Rwanda," distributed weapons to Hutu civilians, supported the preparation of extermination lists, and assassinated certain political figures. *Id.* at 354 (citing Prosecutor v. Nyiramasuhuko & Ntahobali, Case No. ICTR 97-21-I, Indictment (Jan. 3, 2001)).

[79] *Id.* at 353 n.34.

When Habyarimana's airplane was shot down on April 6, 1994, Hutu leaders incited the militia and public to "hunt down and quash" the Tutsi.[80] The international community again did not intervene. Instead, the U.N. ignored the pleading of UNAMIR commander, General Romeo Dallaire, to supply more forces and actually reduced its presence in Rwanda from 2500 to 270 peacekeepers during the first three weeks of the genocide.[81] Pursuant to U.N. orders, these troops abandoned outposts, which had been protecting fleeing Tutsi. In one case, "almost one hundred Belgian peacekeepers abandoned approximately two thousand unarmed Rwandan citizens in one of these outposts. As the soldiers left through one gate, the killers entered through another. More than one thousand unarmed civilians died in that slaughter."[82] Over the next one hundred days, according to an estimate by the U.N. Special Rapporteur on Rwanda, "at least 250,000 women were raped."[83] These women were subjected to "individual rape; gang-rape; rape with sticks, guns, or other objects," often by "relatives, neighbors, teachers, employers, domestic servants, police, and soldiers in the Rwandan Defense Forces."[84] Rwandan officials "sanctioned and encouraged this violence," even dispensing propaganda, often in the form of pornography, which presented Tutsi women as "sexual temptresses."[85]

The severity of the rapes "wrought devastating medical and psycho-social consequences on Rwandan women."[86] For example, Human Rights Watch reports that:

> women and girls contracted sexually transmitted diseases, including HIV/AIDS; faced unwanted pregnancies and health complications resulting from botched abortions; and suffered sexual mutilation and other injuries, such as fistulas, uterine problems, vaginal lesions, and scarring. Ten years

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[80] *See, e.g.*, Askin, *supra* note 23, at 16.

[81] Miller, *supra* note 60, at 351.

[82] *See id.* at 351 n.12.

[83] Hum. Rts. Watch, Struggling to Survive, *supra* note 1, at 7. Other reports put the number of women raped as high as 500,000. *See* Stephanie Wood, *A Woman Scorned for the "Least Condemned" War Crime: Precedent and Problems with Prosecuting Rape as a Serious War Crime in the International Criminal Tribunal for Rwanda*, 13 Colum. J. Gender & L. 274, 285 (2004).

[84] Hum. Rts. Watch, Struggling to Survive, *supra* note 1, at 7, 12.

[85] *See* Wood, *supra* note 83, at 284–85. Tutsi women were also portrayed as spies who would "dominate and undermine Hutu men." *Id.* at 284–85 n.55.

[86] Hum. Rts. Watch, Struggling to Survive, *supra* note 1, at 8 (noting that these rapes were carried out "on the basis of . . . [the women's] ethnicity . . . as an effective method to shame and conquer the Tutsi population").

> after the events, victims of sexual violence [in Rwanda] . . . are still haunted by the abuse and remain traumatized, stigmatized, and isolated.[87]

According to one source, seventy percent of these rape survivors are HIV positive,[88] which may under-represent the number of victims due to the social stigma attached to women who have been raped.[89] One widowed woman, a rape survivor in Rwanda, explains that "[o]ur past is so sad. We are not understood by society . . . We become crazy. We aggravate people with our problems. We are the living dead."[90] Another woman, also a woman raped and widowed during the genocide, accounts that "[w]hen they kill your husband and children and then leave you, it is like killing you. They left us to die slowly. I wish every day that I was dead."[91]

The international order, however, remained reluctant to characterize these rapes, as well as other atrocities, in such a way to warrant intervention even though "all understood the gravity of the crisis within the first twenty-four hours."[92] More than two weeks after the beginning of the genocide, the Secretary General of the U.N. acknowledged the conflict, but "portrayed the attackers as independent actors rather than a group following a government-directed program."[93] Likewise, a day before the Secretary General's remarks, the U.S. Ambassador to Rwanda, David Rawson, "characterized the slaughter as tribal killings

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[87] *Id.* The report also notes that Rwanda's National Population Office estimated that 2000 to 5000 children were born out of rapes during the armed conflict. *Id.*

[88] *See* Wood, *supra* note 83, at 286.

[89] *See* Binaifer Nowrojee, Human Rights Watch, Shattered Lives: Sexual Violence During the Rwandan Genocide and Its Aftermath 1, 72–75 (1996); Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 Geo. Wash. L. Rev. 51, 66–69 (2002) (discussing how women with sexual histories, including rape victims, are perceived as unchaste and without legal redress for sexual assault).

[90] Nowrojee, *supra* note 89, at 73.

[91] *Id.* at 74–75; *see* Adams, *supra* note 42, at 381 (observing that "[t]hose not murdered immediately following the heinous acts were permitted to live so they would 'die from sadness'").

[92] Miller, *supra* note 60, at 362 (quoting Alison Des Forges, Leave None to Tell the Story: Genocide in Rwanda 595). Miller also points out that during the first few weeks of April 1994, a number of international organizations understood the gravity of the situation. *Id.* Thus, for example, Oxfam called the atrocities, "genocidal slaughter"; the International Committee of the Red Cross declared it "had rarely seen a human tragedy on the scale of the massacres." *Id.*

[93] *Id.* at 362–63.

rather than genocide."[94] Finally, on November 8, 1994, the U.N. acted; pursuant to Resolution 955, the Security Council created the ICTR.[95]

C. *The Rome Statute: A Step Forward?*

Rape continues with impunity in armed conflicts around the world, as well as within the former Yugoslavia and the countries surrounding Rwanda. In Kosovo, for example, reports estimate that between 750 to 1000 women continue to be trapped in brothels.[96] Likewise, in 2000, the Council of Europe adopted Resolution 1212, which suggests that rape is still used in Kosovo as a "systematic war crime" and constitutes a crime against humanity.[97] These allegations are even more disturbing in light of reports by female trafficking victims that they were sometimes forced to provide free sexual services for local police officers, members of the North Atlantic Treaty Organization (NATO), and officials from the International Police Task Force (IPTF).[98]

Widespread rape is also present in armed conflicts in Sierra Leone, Sri Lanka, Iraq, Sudan, and the Democratic Republic of Congo (DRC), all countries that have recognized a number of human rights instruments and conventions.[99] Rebel fighters in Sierra Leone, for example, have been reported to brand women, making it difficult for their victims to be accepted back into the community.[100] In the DRC, Amnesty International reports that since 2002, approximately forty rapes occur every day in the Uvira area.[101] Hundreds of allegations have also surfaced since 2001 alleging widespread rape in Sri Lanka by offi-

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[94] *Id.* at 363.

[95] *See* S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) (declaring the establishment of an "international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda").

[96] Tina R. Karkera, Comment, *The International Criminal Court's Protection of Women: The Hands of Justice at Work*, 12 Am. U.J. Gender Soc. Pol'y & L. 197, 218–19 (2003).

[97] *See* Eur. Parl. Ass., 2000 Sess., Res. No. 1212 (April 3, 2000) (calling on member states to ratify the Treaty on the Statute of the International Criminal Court).

[98] *See* Human Rights Watch, World Report 2002: Federal Republic of Yugoslavia 385 (2002) [hereinafter Hum. Rts. Watch, Federal Republic of Yugoslavia] (noting that trafficking continued to "surge into 2001"); Human Rights Watch, World Report 2002: Women's Human Rights 541–43 (2002) [hereinafter Hum. Rts. Watch, Women's Human Rights]; Karkera, *supra* note 96, at 219.

[99] *See, e.g.*, Adams, *supra* note 42, at 374–80.

[100] Jennifer Friedlin, *Experts Make Treatment of Wartime Rape a Priority*, Women's E News, Jan. 16, 2005, http://www.womensenews.org/article.cfm/dyn/aid/2146/context/cover.

[101] Media Briefing, Amnesty International, Making Violence Against Women Count: Facts and Figures—A Summary (Mar. 5, 2004), *available at* http://www.amnesty.org/en/library/asset/AC777/034/2004/en/dom-ACT770342004en.pdf.

cers within the Sri Lankan Army, Navy, and police force.[102] Rape is also used as a "widespread and sometimes systematic . . . weapon of war" in Sudan.[103] Likewise, the U.S. Department of States reports that in Iraq:

> The Iraqi Government uses rape and sexual assault of women to achieve the following goals: to extract information and forced confessions from detained family members; to intimidate Iraqi oppositionists by sending videotapes showing the rape of female family members; and to blackmail Iraqi men into future cooperation with the regime. Some Iraqi authorities even carry personnel cards identifying their official "activity" as the "violation of women's honor."[104]

Indeed, the ICC was established in large part as a response to the failures of the ITCY and ICTR. Like the ICTY and ICTR, the ICC and its founding document, the Rome Statute, are generally heralded as a "historic development" and a "coming of age . . . [bringing] a fundamental change for women."[105] The Rome Statute, like the ICTR and ICTY Statutes, does not specifically define rape; however, the elements of rape are included in the Elements of Crimes, which acts as an interpretive guide for ICC judges.[106] The two basic elements are:

> 1) The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body; [and]

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[102] Adams, *supra* note 42, at 376.

[103] *See* Alexis Masciarelli & Ilona Eveleens, *Sudanese Tell of Mass Rape*, BBC News, June 10, 2004, *available at* http://news.bbc.co.uk/2/hi/africa/3791713.stm.

[104] Fact Sheet, U.S. Dep't of State Office of Int'l Women's Issues, Iraqi Women Under Saddam's Regime: A Population Silenced (Mar. 20, 2003), *available at* http://www.state.gov/g/wi/rls/18877.htm; *see also* Valerie Oosterveld, *When Women Are the Spoils of War*, Unesco Courier, *available at* http://www.unesco.org/courier/1998_08/uk/ethique/txt1.htm (last visited Nov. 21, 2008) (estimating that Iraqi soldiers raped at least 5000 Kuwaiti women during the Iraqi invasion of Kuwait). All of these countries, however, have adopted a number of international human rights instruments that prohibit rape. *See* Adams, *supra* note 42, at 374–80. That widespread rape continues in these regions with impunity may call into question the legitimacy of the current formalistic fetish with legal language and provisions rather than addressing political and social realities.

[105] *See, e.g.*, Press Release, Women's Caucus for Gender Justice, *supra* note 7.

[106] *See* Rome Statute, *supra* note 15, arts. 7(1)(g), 9(1) (declaring that the Elements of Crimes "assist[s] the Court in the interpretation and application of articles 6, 7, 8," which includes the interpretation of "rape" in article 7(1)(g)); *see also* Boon, *supra* note 21, at 644.

> 2) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such persons or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.[107]

This definition, like the recent ICTY decision in *Prosecutor v. Furundzija*, recognizes consent as an affirmative defense rather than an element of rape.[108] According to Rule 70 of the ICC's Rules of Procedure and Evidence: "[c]onsent cannot be inferred by reason of any words or conduct of a victim . . . or taking advantage of a coercive environment undermin[ing] the victim's ability to give voluntary and genuine consent."[109] The language is also significantly gender-neutral, as evidenced in the Elements of Crimes that "the concept of 'invasion' is intended to be broad enough to be gender-neutral."[110] At the same moment, however, rape is still understood to require "penetration."[111]

Article 7(g) of the Rome Statute specifically enumerates rape as a crime against humanity and article 8(b)(xxii) deems it a violation of the laws and customs of war.[112] Furthermore, the Statute notes that rape in armed conflict is also a grave breach and violation of article 3 common to the four Geneva Conventions.[113] The language of the Statute also implies that rape will be considered a crime against humanity and a war crime whether the armed conflict is "international" or "internal."[114]

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[107] *See* International Criminal Court, Elements of Crimes, art. 7(1)(g)-1, Sept. 10, 2002, ICC-ASP/1/3 (Part II-B).

[108] *See* Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Trial Chamber Judgment, ¶ 271 (Dec. 10, 1998) (stating that the defense of consent was not raised to counter the elements of rape).

[109] *See* International Criminal Court, Rules of Procedure and Evidence, R. 70, Sept. 10, 2002, ICC-ASP/1/3 (Part II-A).

[110] *See* International Criminal Court, Elements of Crimes, *supra* note 107, art. 7(1)(g)-1 n.15.

[111] *See id.* art. 7(1)(g)-1 (defining rape as when the "perpetrator invaded the body of a person by conduct resulting in penetration").

[112] *See* Rome Statute, *supra* note 15, arts. 7(g), 8(b)(xxii) (listing rape as a "crime against humanity" and a "war crime").

[113] *See id.* arts. 8(2)(b)(xxii), 8(2)(e)(vi). In light of case judgments in the ICTY and ICTR, rape most likely will also be inferred in the Statute's prohibitions against genocide in article 6. *See id.* art. 6(b).

[114] *See id.* arts. 7(2)(a), 8(2)(b), 8(2)(c). Judge McDonald, President of the ICTY, also has argued that "the dichotomy that characterizes international humanitarian law—whether the conflict is international or internal—is untenable at the end of the twentieth century." *See* Gabrielle K. McDonald, *The Eleventh Annual Waldemar A. Solf Lecture: The Changing Nature of the Laws of War*, 156 MIL. L. REV. 30, 34–35 (1998).

Thus, pursuant to the Rome Statute, rape may be a crime against humanity when it forms "part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[115] Whereas "widespread" relates to the scale of the attack, requiring a large scale action against multiple victims, "systematic" implies premeditation by an organized group, enforcing a common policy.[116] By allowing the attack to be "widespread" *or* "systematic," rather than requiring both conditions, the Rome Statute is broadening international law's perception of rape.

The Rome Statute's language, however, is deceivingly broad. In particular, article 7(2)(a) clarifies "attack directed against any civilian population" to mean "a course of conduct involving the multiple commission of acts . . . pursuant to or in furtherance of a State or organizational policy to commit such attack."[117] By equating "attack" with "a State or organizational policy," the Statute renders the choice between "widespread" and "systematic" meaningless, ensuring that a crime against humanity will actually require that rape is not only widespread during an armed conflict, but also that it be "systematic"—that is, a State or group policy.[118]

These "gaps" in the international community's perception of the nature and gravity of rape, as well as the almost complete lack of enforcement that will be shown in Part II, call into question the general acclaim that they represent, in any real sense, a break from the past. Indeed, while rape was not given an explicit definition long before the late 1990s, communities (both national and international) have been aware of occurrences of rape in armed conflicts, adopted a number of laws condemning it as illegal, and, in some instances, even prosecuted individuals on charges of rape during wartime.[119]

Thus, for example, Homer's *Iliad*, Poussin's 1637 masterpiece, *Rape of the Sabine Women*, and various passages from the Old Testament all provide "testaments to the tragedy of rape in historical and cultural

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[115] *See* Rome Statute, *supra* note 15, art. 7(1).

[116] *See* McCormack & Robertson, *supra* note 18, at 654.

[117] *See* Rome Statute, *supra* note 15, art. 7(2)(a).

[118] *See* McCormack & Robertson, *supra* note 18, at 654 (observing that the Rome Statute actually "raises the threshold requirements" for rape to constitute a crime against humanity).

[119] *See* Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 Berkeley J. Int'l L. 288, 299 (2003) (noting that rape has been acknowledged for centuries and was prohibited in war by custom before it was ever codified).

memory."[120] Also, in the 1300s, Italian jurist, Lucas de Penna, "urged that wartime rape be punished as severely as peacetime rape."[121] Similarly, the sixteenth century jurist, Alberico Gentili, upon analyzing the literature of wartime rape, concluded that "it was unlawful to rape women in wartime, even if the women were combatants."[122] Here, Gentili's position that even women who are combatants should be contemplated under provisions acknowledging and punishing rape represents a broader vision of international protection than currently provided for in international law concerning rape in armed conflicts.

The first documented account of an individual being charged for rape in wartime occured in 1474 when Peter van Hagenbach, a knight and military officer, was charged with rape and sentenced to death by an international military court consisting of twenty-seven judges.[123] In 1863, instructions signed by President Abraham Lincoln to Union forces in the Civil War, commonly referred to as the Lieber Code, contained two provisions concerning rape in armed conflict: Article 44 declared that "all rape . . . [is] prohibited under the penalty of death,"[124] and Article 47 asserted that rape is "not only punishable as at home, but in all cases in which death is not inflicted, the severer punishment shall be preferred."[125] Only eleven years later, in 1874, suggestions began to surface calling for an international criminal tribunal, primarily from the non-government community.[126] By the First International Peace Conference in the Hague in 1899, governments had begun discussing this idea,[127] culminating in the declaration by the 1907 Hague Conventions and Regulations that sexual violence was

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[120] *See, e.g.*, Pilch, *supra* note 15, at 100; *see also* Joshua H. Joseph, *Rethinking* Yamashita*: Holding Military Leaders Accountable for Wartime Rape*, 28 Women's Rts. L. Rep. 107, 108–09 (2007) (quoting passage from *Zechariah* 14:2 (King James) as an example of rape in the Old Testament).

[121] Askin, *supra* note 119, at 299.

[122] *Id.*

[123] *Id.*

[124] *See* Francis Lieber, The Lieber Code of 1863: Instructions for the Government of Armies of the United States in the Field, General Order No. 100, art. 44 (Apr. 24, 1863), *available at* http://avalon.law.yale.edu/19th_century/lieber.asp#sec1 (recommending that rape be punished by death "or such other severe punishment as may seem adequate for the gravity of the offense").

[125] *Id.* at art. 47 (saying that rape "committed by an American soldier in a hostile country . . . are not only punishable as at home, but in all cases in which death is not inflicted the severer punishment shall be preferred").

[126] McCormack & Robertson, *supra* note 18, at 637.

[127] *See id.*

prohibited under the principle that "family honour and rights . . . must be respected."[128]

While only minimally enforced, the War Crimes Commission, established by the major allied powers after World War I, also produced a list of thirty-two non-exhaustive violations, including "rape" and "abduction of girls and women for the purpose of forced prostitution."[129] In contrast, neither the Charter for the International Military Tribunal at Nuremberg (IMT) nor the Charter for the International Military Tribunal for the Far East (IMTFE) specifically mentioned "rape" or "sexual assault."[130] The IMTFE, however, did include rape within the crimes charged in the indictments.[131] Similarly, the Nuremberg Tribunal contemplated rape as a form of torture stating that "[m]any women and girls in their teens were separated from the rest of the internees . . . and locked in separate cells, where the unfortunate creatures were subjected to particularly outrageous forms of torture. They were raped, their breasts cut off . . . ."[132] Another transcript of the Nuremberg Tribunal reported that "women were subjected to the same treatment as men. To the physical pain, the sadism of the torturers added the moral anguish, especially mortifying for a woman, or a young girl, of being stripped nude by her torturers. Pregnancy did not save them from lashes."[133]

Furthermore, the Allied Powers also erected a second series of military trials at the conclusion of the Nuremberg and Tokyo trials, conducted under the authority of Control Council Law No. 10 (CCL10).[134]

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[128] *See* Askin, *supra* note 119, at 300 (quoting Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 3 Martens Nouveau Recueil (ser. 3) 461, art. XLVI).

[129] *Id.* (citing U.N. War Crimes Commission, 13 Law Reports of Trials of War Criminals 122, 124 (1949); History of the U.N. War Crimes Commission 34 (United Nations War Crimes Commission, ed. 1948); Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference (Mar. 29, 1919), *reprinted in* 14 Am J. Int'l L. 95, 114 (1920)).

[130] Askin, *supra* note 119, at 301.

[131] *See* Campanaro, *supra* note 39, at 2563.

[132] *See* 7 Trial of the Major War Criminals Before the International Military Tribunal 494 (1947) [hereinafter Nuremberg Trials]; Campanaro, *supra* note 39, at 2560.

[133] 6 Nuremberg Trials, *supra* note 132, at 170. However, the recognition that rape may constitute torture is compromised in the Nuremberg Tribunal's depiction of rape victims as "unfortunate creatures." *See* 7 Nuremberg Trials, *supra* note 132, at 494.

[134] *See* Campanaro, *supra* note 39, at 2565 (citing Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945 [hereinafter CCL10], *in* 3 Official Gazette of the Control Council for Germany 49 (1946)).

Under CCL10, rape was explicitly listed as a crime against humanity.[135] CCL10 also expanded the reach of these courts to prosecute any person who committed a crime—not just those in authority.[136] The courts, however, never included rape within any indictment issued.[137]

These documents—the Charters for the IMT and IMTFE, as well as CCL10—question not only the generally accepted notion that the ICTY, ICTR and ICC represent any real "historic" break from the past, but also question the claim that international law may be seen as an enterprise, a project comprised of various stages, and marked by dates or events that chart international law's development, or learning. More specifically, we might pose the question: do international human rights laws concerning rape in armed conflict have any significant merit or value? Can these definitions and new methods of criminalizing rape be recognized as having substance if they are not enforced in any meaningful way? In short, movement may not necessarily equal progress.

II. Is International Law Part of the Problem? Three Challenges to Liberal Humanitarianism in Practice

The ICTY and ICTR have not successfully prosecuted many cases on charges of rape.[138] As of 2008, out of eighty-six total cases that have crossed before the ICTY, only seventeen alleged any form of sexual assault.[139] Furthermore, in the handful of cases which have received judgments, the guilty are often selected to serve their terms concurrently and enjoy the possibility of an early release two-thirds of the way through their sentence.[140] Thus, for example, in *Furundzija*, even though the court found the accused guilty of rape and torture, it opted

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[135] *See* CCL10, *supra* note 134, art. II (defining "Crimes against Humanity").

[136] *See id.*

[137] *See* Patricia Viseur Sellers, *Rape Under International Law*, *in* War Crimes: The Legacy of Nuremberg 159, 162 (Belinda Cooper ed., 1999).

[138] *See* ICTY Cases and Judgments, http://www.un.org/icty/cases-e/index-e.htm (last visited Nov. 18, 2008).

[139] *See id.* The number charges of rapes is based on the number of instances where rape appears as a "Count" in these indictments. Evidence of rape in the fact findings was not considered a formal allegation of rape. *See id.*

[140] *See, e.g.*, *Furundzija*, Case No. IT-95-17/1-T, ¶¶ 292–296 (holding that the sentence for rape should be "serve[d] concurrently with the sentence imposed for torture"); Case Information Sheet: "Lasva Valley" (IT-95-17/1) Anto Furundzija, *available at* http://www.un.org/icty/cases-e/cis/furundzija/cis-furundzija.pdf (mentioning Furundzija was released after serving a little over six years of a ten year sentence).

to allow him to serve both convictions at the same time.[141] The President of the ICTY granted him early release in August 2004.[142]

In comparison, of seventy-four indictments issued by the ICTR, only twenty-eight involved any charge of rape or sexual violence.[143] Indeed, in the much heralded *Akayesu* case, despite documentation from human rights and women's organizations of "extensive evidence of rape and other forms of sexual violence throughout Rwanda," the ICTR only amended the indictment to include allegations of rape when a witness testified on the stand concerning her rape experiences.[144] In response, Judge Navanethem Pillay encouraged the court to convene the trial until the Office of the Prosecutor could "investigate the sexual violence charges and consider amending the indictment."[145] The *Akayesu* judgment was the only successful guilty verdict for rape charges or sexual violence between 1998 and 2002.[146] Three years later, only two other cases resulted in a guilty verdict concerning rape.[147]

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[141] *See Furundzija*, Case No. IT-95-17/1-T, ¶¶ 292–296.

[142] Case Information Sheet: "Lasva Valley," *supra* note 140.

[143] *See* ICTR, Status of Cases, http://69.94.11.53/ENGLISH/cases/status.htm (last visited Nov. 6, 2008). The number of charges of rapes is based on the number of instances where rape appears as a "Count" in these indictments. Evidence of rape in the fact findings was not considered a formal allegation of rape. *See id.*

[144] *See* Askin, *supra* note 119, at 318–19 & n.146 (noting that "[d]ozens of women's rights activists, human rights organizations, academics, and international lawyers faxed letters to the Tribunal urging it not to exclude the gender-related crimes"); *see also* Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgement, ¶¶ 416–417 (Sept. 2, 1998) (mentioning that the indictment changed once witness came forward with evidence describing rape).

[145] Askin, *supra* note 119, at 318–19; *see Akayesu*, Case No. ICTR 96-4-T, ¶ 417 (finding that it is in the interest of justice for there to be an investigation upon presentation of evidence of sexual violence). It is perhaps also not coincidence that Pillay was the only woman on the bench in the *Akayesu* case. *See* Askin, *supra* note 119, at 318. In fact, a woman sat on the bench in the majority of allegations and convictions of rape in the tribunals. *See id.* at 296 (noting that the increased presence of women in "decision-making positions" has been crucial in the development in the recognition of gender crimes").

[146] Gaëlle Breton-Le Goff, Coalition for Women's Human Rights in Conflict Situations, *Analysis of Trends in Sexual Violence Prosecutions in Indictments by the International Criminal Tribunal for Rwanda (ICTR) from November 1995 to November 2002* (2002), http://www.coalitiondroitsdesfemmes.org/site/advocacyDossiers/rwanda/rapeVictimssDeniedJustice/analysisoftrends_en.php (noting only four indictments included sexual violence charges between 1998 and 2002).

[147] *See* Binaifer Nowrojee, United Nations Research Institute for Social Development, "Your Justice Is Too Slow": Will the ICTR Fail Rwanda's Rape Victims? 3 (2005) (noting that other than *Akayesu*, a rape conviction was only upheld for Laurent Semanza as of April 2004); Rebecca L. Haffajee, Comment, *Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory*, 29 Harv. J.L. & Gender 201, 210–12 (explaining that the definition of rape was re-expanding in leading to a rape conviction in *Prosecutor v. Muhimana*).

The ICC also appears to be reluctant to bring charges of rape and sexual violence. Since its birth in 2002, the ICC only opened investigations in four areas: in the Democratic Republic of Congo, the Republic of Uganda, Darfur, and the Central African Republic.[148] Yet there have been many armed conflicts since the mid-1990s, and in a number of these conflicts, women were raped, often in large numbers.[149] The ICC's reach into only four situations suggests that widespread rapes occurring in other armed conflicts are somehow less important, at least on a pragmatic level. The ICC's limited scope is also evidenced by the fact that the Commission only named fifty-one individuals as suspects of grave international crimes in Darfur, though reports suggests that many times that number were sexually assaulted and raped.[150]

This Part examines some of the possible reasons why the ICC, the ICTY, and the ICTR have failed to effectively prosecute rape allegations or ameliorate the conditions for women in armed conflict situations. This Article contends that these events, these failures in vision and practice, call in to question the general exuberance of the legal community to represent the ICC, ICTY, and ICTR as somehow a "historic," or "unprecedented," break from the past. This Article bridges this distance, or "gap," established by the standard account in the focus on the before and after of the early 1990s. In doing so, this Article will untangle the rape experiences and events occurring in the former Yugoslavia and Rwanda from the oppressive mantle of the general insistence that international legal history tells the story of international law as a pluralistic, humanitarian project.[151]

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[148] International Criminal Court, Situations and Cases, http://www.icc-cpi.int/cases.html (last visited on Nov. 6, 2008).

[149] van Niekerk, *supra* note 39.

[150] *See* Press Release, International Criminal Court, List of Names of Suspects in Darfur Opened by the ICC OTP (Apr. 11, 2005), http://www.icc-cpi.int/press/pressreleases/101.html; *see also, e.g.*, Human Rights Watch, Five Years On: No Justice for Sexual Violence in Darfur 10–11 (2008), *available at* http://www.hrw.org/reports/2008/04/06/five-years (reporting that just between October 2004 and February 2005, the humanitarian organization Médecins sans Frontieres treated almost 500 women as rape victims, which is likely a fraction of the actual number because rape is underreported).

[151] *See, e.g.*, Susan W. Tiefenbrun, *The Paradox of International Adjudication: Developments in the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the World Court, and the International Criminal Court*, 25 N.C. J. Int'l L. & Com. Reg. 551, 561 (2000) (stating that the "dazzling array of newly-created and reformed international tribunals in the twentieth century is testament to the unprecedented expansion of the international judiciary and the development of serious interest in the commitment to the protection of human rights").

A. *Colonialism and the State*

One of the principal obstacles facing the effective enforcement of international human rights laws concerning rape in armed conflict is the legal profession's continued adherence to the notion that state sovereignty (the preservation of states' territorial and administrative identity) is the guiding principle of international law. This deference of human rights atrocities to national interests and independence is rooted in, or at least mimics, nineteenth century jurists' conception of international law. In the nineteenth century, the full rights of nation-states, expressed in the term "sovereignty," was crystallized as a doctrine, in large part, to facilitate colonial ambitions among the Western-European nation-states.[152] The colonial project required that international law generate a "continuous construction of difference" in an "endless task of [Western European institutions and values] becoming universal."[153] In short, the late nineteenth century was a period of imperialism, and it was within this soil that the Western nation-state came to full fruition, juxtaposed against its non-European counterparts, as the central tenet of international law.

The Mandate System under the League of Nations did not fundamentally challenge the notion of "state sovereignty" or the underlying gap created by nineteenth century jurists between the "civilized" and "uncivilized" countries. Recognizing that "the well-being and development of such peoples form a sacred trust of civilization," the Mandate Article provided for a three-tiered system of state administration.[154] The mandate territories were "classified according to their degree of advancement."[155] The victorious Western European countries were designated as mandatory powers, enjoying "broad powers" in the mandate territories.[156] In no small part, the power relationships and assignment of peoplehood, identity and progress under the colonial framework had survived, continuing to reinforce disparities of power between European and non-European states in the name of

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[152] *See* Antony Anghie, *Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations*, 34 N.Y.U. J. Int'l L. & Pol. 513, 514 (2002) (stating that "[u]p to the beginning of the twentieth century, sovereign states were the only actors recognized by international law").

[153] *Id.* at 519.

[154] *Id.* at 524–25.

[155] *Id.* at 525.

[156] *See id.* at 526–27 (referring to Article 23 of the League of Nations Covenant, which explained that the "broad powers" of the mandatory countries "dealt with issues ranging from labor standards and traffic in women and children to trade in arms and ammunition").

extending benevolent protection and guidance to less stable territories.

State sovereignty was given priority under the U.N. Charter again on the postulation of a gap. This gap was not between "civilized" versus "uncivilized," or "mandatory powers" versus "mandate territories," but instead centered on the "images of the relationship between war and peace . . . associated with an image of the [international] institution as the opposite of the social breakdown of war."[157] The emphasis on law as the method of providing order to "social breakdown" is expressed in the general assumption that the ICTY, ICTR, and ICC are bulwarks against the atrocities of wars that occur outside the core nation-states of the international order. In essence, the current approach continues the hierarchal sets of relationships between America and Western European states and the rest of the world, and continues its support for the status quo, for a return to order, to "normality"—in short, to securing and maintaining relationships rooted in a colonial past.

Thus, under the current international legal order, the U.N. Security Council has been afforded a wide range of powers to "determine and respond to threats to international peace."[158] Article 29 of the U.N. Charter, for example, authorizes the Security Council to initiate "such subsidiary organs as it deems necessary for the performance of its functions."[159] Furthermore, article 24(1) provides:

> In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.[160]

These provisions effectively allow the five nation-state members of the Security Council significant input regarding international law's conception of what constitutes a legitimate threat to international peace and security, which territories are included within the international order, and how disturbances should be addressed. Furthermore, article 42 of the U.N. Charter authorizes the Security Council to "impose its decisions through the use of force where necessary to

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[157] *See* David Kennedy, *The Move to Institutions*, 8 Cardozo L. Rev. 841, 846 (1987).

[158] *See* McCormack & Robertson, *supra* note 18, at 640.

[159] *See* U.N. Charter art. 29.

[160] *Id.* art. 24, ¶ 1.

restore international stability."[161] In this framework, the focus on rape victims in armed conflict is displaced by the needs of securing the nation-state framework, and more specifically, the hierarchal structure of these nations within the international community. America and Western European countries continue to define the contours of not only international law, but also what constitutes civilization.

Thus, for example, Security Council Resolution 808 recognizes that the ICTY is legally founded pursuant to Chapter VII of the Charter of the U.N., which allows the Security Council to take forceful measures to "maintain or restore international peace and security."[162] In other words, the ICTY is constitutionally-attuned to human rights interests, such as rapes in armed conflict, only to the degree they correspond with the ICTY's principal mission to instill peace and the conditions of civilization.[163]

The ICC is also tethered to the authority of the Security Council and its constituents. Under article 13 of the Rome Statute, the ICC may only exercise jurisdiction over situations that are referred to the Office of the Prosecutor by: 1) a State-party to the statute; 2) the U.N. Security Council acting under Chapter VII of the Charter to the U.N.; or 3) the Prosecutor acting *proprio motu*—on their own initiative.[164] The discretion of the State-parties and the Prosecutor, however, is only permitted if the territory in which the crime occurred or in which the perpetrator is a national has consented to the jurisdiction of the Court.[165] The jurisdictional reach of the states or Prosecutor, therefore, does not cover situations where atrocities are being committed in a non-consenting

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[161] McCormack & Robertson, *supra* note 18, at 640; U.N. Charter art. 42 (declaring that when measures in article 41, such as "complete or partial interruption of economic relations," are ineffective, the actions that are available to the Security Council expand to include "demonstrations, blockade, and other operations by air, sea, or land").

[162] *See* U.N. Charter art. 39 ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security"); S.C. Res. 808, U.N. Doc. S/RES/808 (Feb. 22, 1993) (deciding that an "international tribunal shall be established for the prosecutions of persons responsible for serious violations of international humanitarian law committed in the territory of former Yugoslavia").

[163] Likewise, Security Council Resolution 1503 applauds the ICTR and ICTY not for their prosecution of human rights abuses or ensuring justice, but "in contributing to the lasting peace and security in the former Yugoslavia and Rwanda and the progress made since their inception." *See* S.C. Res. 1503, *supra* note 2.

[164] *See* Rome Statute, *supra* note 15, art. 13 (providing the jurisdictional limits of the Rome Statute).

[165] *See id.* art. 12 (stating that only countries who "become a Party to this Statute" are subject to the Court's jurisdiction).

state by that state's actors, which may often be the case. The Security Council, however, according to article 12(2) of the Rome Statute, is not subject to these restrictions so long as the members on the Security Council are exercising their discretionary powers in the interests of the "maintenance of international peace and security."[166] In aspiring to "peace" and "security," the Rome Statute also gives the Security Council the right to halt any ICC investigation or proceeding for a period of one year.[167] Pursuant to article 16, the Security Council can renew its veto powers at the end of each year period indefinitely, or alternatively, reinstate an investigation that it has put on hold.[168] In effect, the Rome Statute constitutionalizes the preeminence of the Security Council, and implicitly, the authority of its constituent nation-states and their interests.

Indeed, the United States has openly challenged the notion of the Court's role extending beyond the consent of either the Security Council or the consent of the involved states. During the negotiations over the Rome Statute, for example, the head of the U.S. delegation stated:

> It is simply and logically untenable to expose the largest deployed military force in the world, stationed across the globe to help maintain international peace and security and to defend U.S. allies and friends, to the jurisdiction of a criminal court the U.S. Government has not yet joined and whose authority over U.S. citizens the United States does not yet recognize. . . . The theory that an individual U.S. soldier acting on foreign territory should be exposed to ICC jurisdiction if his alleged crime occurs on that territory . . . [is] nonsensical.[169]

Even more blatantly, in 2003, the U.S. representative to the Security Council pronounced that the "ICC is not the law" since the "fundamental principle of international law [is] the need for a State to

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[166] *See* U.N. Charter, art. 24, para. 1; Rome Statute, *supra* note 15, art. 12(2). *But see* McCormack & Robertson, *supra* note 18, at 640–42 (arguing that the requirement of a resolution to veto an investigation or proceeding reduces the power of individual nation states).

[167] *See* Rome Statute, *supra* note 15, art. 16 (stating "[n]o investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months . . . in a resolution . . . [that] has requested the Court to that effect").

[168] *See id.*

[169] McCormack & Robertson, *supra* note 18, at 644 (quoting David Scheffer, *Developments in International Criminal Law: The United States and the International Criminal Court*, 93 Am. J. Int'l L. 12, 18 (1999)).

consent if it is to be bound."[170] In explaining the role of the ICC in relation to the mission of the U.N. Security Council, the representative continued:

> We all know that United Nations operations are important if the Council is to discharge its primary responsibility for maintaining or restoring international peace and security. We also all know that it is not always easy to recruit contributors, and that it often takes courage on the part of political leaders to join military operations established or authorized by the Council. It is important that Member States not add concern about ICC jurisdiction to the difficulty of participating.[171]

In other words, the political needs of the Security Council in "maintaining or restoring international peace and security" trump any concerns over human rights abuses. Indeed, the statement implicitly acknowledges that these atrocities will occur in these "military operations"—why else would the ICC add "concern" and "difficulty" to political leaders joining? In this context, provisions concerning rape in armed conflict, as well as human rights in general, are made instruments to the political aims and efforts of the Security Council. In short, rape may continue, in large part, with impunity.

To achieve its aims, the United States has taken a number of measures. In 2002, it passed the American Servicemembers' Protection Act (ASPA), barring U.S. participation in U.N. peacekeeping operations unless the president can "certify to Congress that U.S. service members are protected" from ICC jurisdiction.[172] In addition, the United States actively negotiates bilateral agreements with ICC parties pursuant to which they agree not to surrender U.S. nationals to the ICC without U.S. consent.[173] By June 2003, thirty-eight states had "publicly announced the signing of such agreements with the United States," while a

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[170] U.N. S.C., 58th Sess., 4772 mtg. at 23, U.N. Doc. S/PV.4772 (June 12, 2003).

[171] *Id.*

[172] *Contemporary Practice of the United States Relating to International Law: U.S. Bilateral Agreements Relating to ICC*, 97 AM. J. INT'L L. 200, 201 (Sean D. Murphy ed., 2003) [hereinafter *U.S. Bilateral Agreements Relating to ICC*]; *see* American Servicemembers Protection Act of 2002 (ASPA), 22 U.S.C. § 7424 (Supp. V 2005) (restricting U.S. peacekeeping operations in a country subject to the Rome Statute unless the President receives Congressional permission).

[173] *U.S. Bilateral Agreements Relating to ICC*, *supra* note 172, at 202. These bi-lateral agreements are expressly allowed under article 98(2) of the Rome Statute. *See* Rome Statute, *supra* note 15, at art. 98(2) (declaring that a "Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements").

number of other states signed such agreements confidentially.[174] In July 2003, the United States suspended all military assistance to thirty-five states that refused to enter into similar agreements.[175] Moreover, the ASPA originally prohibited any military assistance to the majority of states that have ratified the ICC treaty, although this was repealed in 2008.[176] Finally, in 2002 and 2003, the United States also prompted the other governments on the Security Council to invoke article 16 and request the ICC delay investigations and proceedings for the year.[177]

The presence of armed conflicts and documentation of widespread rape in a number of these countries that have agreed not to turn U.S. soldiers over to the ICC questions whether international human rights are actually "universal" in the sense that they apply to all nations, and not just those countries which remain outside the core fraternity of nation-states or are unwilling to follow their directives.[178] Just as the notion of civilization and development legitimized colonial ambitions in the nineteenth century and the interwar period, the duty to bring peace and order to armed conflicts that threaten the

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[174] *U.S. Bilateral Agreements Relating to ICC*, *supra* note 172, at 201. Among the "publicly announced" countries are: Afghanistan, Albania, Azerbaijan, Bahrain, Bolivia, Bhutan, Bosnia and Herzegovina, Democratic Republic of the Congo (DRC), Djibouti, Dominican Republic, East Timor, El Salvador, Gabon, Gambia, Georgia, Ghana, Honduras, India, Israel, Madagascar, Maldives, Marshall Islands, Mauritania, Micronesia, Nauru, Nepal, Palau, Philippines, Romania, Rwanda, Sierra Leone, Sri Lanka, Tajikistan, Thailand, Tonga, Tuvalu, Uganda, and Uzbekistan. *Id.* at 711 n.14–15 (citing Press Release, U.S. Dep't of State, State Department Lists Countries Who Have Signed Article 98 Agreements (June 12, 2003), *available at* http://www.state.gov/r/pa/prs/ps/2003/21539.htm).

[175] *Id.*; Presidential Determination No. 2003–27 (July 1, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/07/print/20030701.html). The author lists three countries the U.S. has suspended all military assistance to for not signing these bilateral agreements: Colombia, Croatia, and Ecuador. *Id.*

[176] *See* ASPA § 7426 (repealed 2008) (establishing that "no United States military assistance may be provided to the government of a country that is a party to the International Criminal Court").

[177] S.C. Res. 1487, U.N. Doc. S/RES/1487 (June 12, 2003) (declaring that the ICC "shall . . . not commence or proceed with investigation or prosecution of any such case" for a 12 month period). The proposal resulted in a 12–0 verdict in favor of the Security Council adopting a resolution to delay ICC investigations and proceedings for a second year in a row (France, Germany, and Syria abstaining).

[178] Another obstacle facing U.S. and U.N. military forces being prosecuted for rape charges is that the "culprits are [the] international peace-keeping officers" so that there is "often . . . no official record of their involvement." Karkera, *supra* note 96, at 224. If involvement is discovered, the officer is repatriated for administrative action. *Id.* There is rarely, however, official proof of an officer's role; in essence, the current policy "leaves the international officers free from prosecution." *See id.* at 224–25 (discussing the context of trafficking in Kosovo).

international order justifies soldiers and other personnel endorsed by the Security Council to act with a great deal of immunity.

As international legal purveyors and practitioners, we might ask ourselves how deep this critique runs. In other words, is international law's problem one of principally outside political interests or is the problem more fundamental to the discipline? Could it be that the very concepts we so often hold up to battle "injustice" are actually part of a continuing model of colonial domination and empire building?

This questioning may also apply to us on a more personal level. Have we really become more enlightened in both our perception and intervention into the peripheries of our world? After all, did not international lawyers in the late nineteenth century feel civilized and morally correct? Did not the Berlin Conference look to the well-being and material benefit of the "African" peoples? And again, did not international lawyers in the interwar period under the Mandate System celebrate their invention of ethnic minority rights? And what do we imagine international lawyers felt about themselves and the discipline after the defeat of Hitler and the establishment of the U.N. and the foundational tenet of self-determination? Did these lawyers also place the massacre of the Algerian people by French military with the independence of France in the same evaluation of history and their discipline? Did the decolonization process illuminate the danger when international lawyers turn uncritical to the enlightened morality and truth of their calling or merely that international law is a story of progress? And if decolonization was a story of progress, what about the fact that many of those very same decolonized countries now suffer from deep internal and external strife and siege, continuing to operate largely as a market for cheap labor and natural resources for Western interests? In what ways might our very conceptions of human rights, self-determination, sovereignty, or even the nation-state model be a continuation of empire, and ourselves, in our thinking and actions, as colonialists?

B. *Western Efficiency*

A number of policies in the late 1990s that aimed to make the tribunals more "efficient" and "professional" have undermined the credibility of the court and its effectiveness in redressing rape victims.[179] The majority of these policies were implemented shortly after the replace-

[179] *See* Breton-Le Goff, *supra* note 146.

ment of Chief Prosecutor Louise Arbour in 1999 with Swiss prosecutor Carla Del Ponte. Under the post-1999 regime, the ICTR's Office of the Prosecutor underwent a "restructuring plan,"[180] in which the Investigations Division was "totally reorganized" to "streamline" the Tribunal from existence by 2010.[181]

Thus, in 2001, one of the principal investigation teams assigned to sexual violence was dismantled.[182] Without field workers and investigators readily available for rape victims and aware of their needs, the ICTR was unable to encourage rape victims to step forward as witnesses.[183] As a result, since 2001, the ICTR has experienced a sharp decrease in incriminations for sexual violence in its initial indictments.[184] In addition, sexual violence and rape indictments were purposely left out of a number of indictments on the grounds that they would expend too much of the tribunal's resources and time and they are often tainted by less than "fully substantiated" evidence.[185] Yet, this tendency to produce less than "fully substantiated" evidence was itself the product of those very policies meant to "streamline" the prosecution process in the name of "efficiency."

To ensure "professionalism" and guarantee that the ICTR was able to wrap up its activities by 2010, the Tribunal focused on finding ways to "avoid the additional delays caused by preparing the cases, amending the indictments, and the swarm of procedural motions and interlocutory appeals that such an intervention generates."[186] Rape cases, however, were notoriously difficult to prove due to the fact that the events had occurred years beforehand.[187] Likewise, limiting the ability of prosecutors to amend their indictments (such as in lieu of witness testimony) ignored the fact that amending indictments had proven an essential tool of the tribunal in bringing attention to rape crimes. Charges of rape, for example, had to be amended into the original indictments in a number of ICTR cases, including *Bagilishema* (1995), *Akayesu* (1996), *Bagosora* (1996), *Nsengiyumva* (1996), and *Musema* (1996).[188] In

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[180] *Id.* (noting that this policy was in line with Resolution 1503's Completion Strategies adopted by the Security Council in 2003); *see also* S.C. Res. 1503, *supra* note 2.

[181] *See* S.C. Res. 1503, *supra* note 2.

[182] *See* Breton-Le Goff, *supra* note 146.

[183] *See id.*

[184] *See id.* (arguing that this decline "attest[ed] to a declining interest in this issue").

[185] *See id.* (noting that the Rules of Procedure and Evidence were amended to this effect in July 2002).

[186] *See id.*

[187] *See* Breton-Le Goff, *supra* note 146.

[188] *See id.*

at least one case, the judges did not initiate an investigation into allegations of rape even though witnesses testified to sexual violence.[189] In another case, the accused were not indicted for acts of sexual violence despite documentation by women's non-governmental organizations in Rwanda that they had occurred.[190] By discouraging the "preparing" of cases and "amending" indictments, these new policies implicitly operated to exclude rape victims from the Tribunal's proceedings.

In an effort to "streamline" prosecutions, the ICTR and ICTY have also adopted other administrative strategies. For instance, in response to criticism that the tribunals moved too slowly, at the end of the twentieth century, the Offices of the Prosecutors began attempting to merge cases and try the accused as a group.[191] By grouping the cases, however, rape and sexual violence indictments dropped.[192] In fact, rape indictments have occasionally been used as bargaining chips whereby the accused agrees to a guilty plea concerning certain charges, on the condition that the sexual violence or rape charges are dismissed.[193] For example, in the *Serushago* case, the ICTR withdrew its rape count in exchange for the accused admitting guilt on a number of other non-related charges.[194] In this context, victims become expendable and "deliberately sacrificed on the altar of judicial expediency."[195] This was explicitly admitted by the current Registrar of the ICTY, Hans Holthuis, as he stated during his address to the Hague:

> The aim of joining these cases is to substantially reduce the length of proceedings by *inter alia* reducing the length of the prosecution case, reducing the number of witnesses, avoiding the repetition of evidence, avoiding the overlap of wit-

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[189] *See* Prosecutor v. Kayishema & Ruzindana, Case No. ICTR 95-1-A, Judgment, ¶¶ 299, 547 (June 1, 2001) (finding evidence of rape in the witness testimony, but rape was never charged or found).

[190] *See* Breton-Le Goff, *supra* note 146 (stating that accused Joseph Kanyabashi and Elie Ndayambaje were documented to have planned acts of sexual violence, but they were not charged with such in their final indictment).

[191] *Id.*

[192] *See id.* (concluding that the policy of grouping cases in the *Media* and *Cyangugu* cases led to indictments without the mentioning of sexual violence despite witnesses testifying that it occurred).

[193] *See id.* (construing that rape indictments get thrown out for the purposes of "judicial expediency").

[194] *See* Prosecutor v. Serushago, Case No. ICTR 98-39-S, Sentence, ¶ 4 (Feb. 5, 1999) (stating that the Prosecutor was authorized to withdraw the rape count in exchange for a guilty plea).

[195] *See* Breton-Le Goff, *supra* note 146.

> ness testimony, and reducing the expense of witnesses traveling repeatedly to The Hague for testimony.[196]

Furthermore, both tribunals have made clear that their prosecutors will only indict high level offenders, which also hinders the successful prosecution of armed conflict rape. In 1998, for instance, the Chief Prosecutor of the ICTY stated her strategy was centered on "maintaining an investigative focus on persons holding higher levels of responsibility, or on those who have been personally responsible for the exceptionally brutal or otherwise extremely serious offences."[197] Under this approach, however, prosecutors in the ICTY are forced to draw lines between "exceptionally brutal" crimes and "lesser" crimes, lines which may not actually exist, legal fictions to once again "postulate a gap"—here, between those crimes that deserve to be addressed by the international community and other crimes that are somehow less demanding on the international conscience, and hence, relegated to the domestic courts.[198]

The decision to relinquish cases to the domestic courts has been widely supported throughout the international community and especially by women's non-governmental organizations in Rwanda and the Security Council.[199] Pursuant to Resolution 1503, the ICTR and ICTY are to conclude trials of first instance by the end of 2008, and conclude any appeals by the end of 2010 (this directive is commonly referred to as the "Completion Strategies").[200] Thus, in June 2005, the Chief Prosecutor for the ICTR, Justice Hassan B. Jallow, stated that he was "pleased to report progress . . . [in the] strategy of referral of cases to national jurisdiction [as] endorsed by the Security Coun-

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[196] Hans Holthuis, Registrar, International Criminal Tribunal for the former Yugoslavia, Address by the Registrar, Hans Holthuis (June 23, 2005), *available at* http://www.http://www.un.org/icty/pressreal/2005/speech-HH-e.htm. In similar fashion, the ICTR asserted, in its Sixth Annual report, that "[s]ome trials are finalized within a few months, where, for instance, the defence is willing to make admissions to narrow the disputed issues." *See* The Secretary-General, *Sixth Annual Report of the International Criminal Tribunal for Rwanda*, ¶ 41, *delivered to the Security Council and the General Assembly*, U.N. Doc. A/56/351, S/2001/863 (Sept. 14, 2001).

[197] *See* Sean D. Murphy, *Developments in International Criminal Law: Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 Am. J. Int'l L. 57, 59 n.4 (1999) (quoting Press Release, Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, Statement by the Prosecutor Following the Withdrawal of the Charges Against 14 Accused, ICTY Doc. CC/PIU/314-E (May 8, 1998), *available at* http://www.un.org/icty/pressreal/p314-e.htm).

[198] *See id.*

[199] *See* Breton-Le Goff, *supra* note 146.

[200] *See* S.C. Res. 1503, *supra* note 2.

cil."[201] By May 2005, the ICTR handed over approximately forty-five cases, most of which were still in only the investigation stage, to the national Rwandan courts.[202] Non-governmental organizations advocating on behalf of women's rights in Rwanda applauded this shift, not in the name of "streamlining" the cases (though they did criticize the slow pace of the Tribunal's proceedings), but in hope that the local courts may more adequately address the specific needs and protection of the raped women in their population.[203]

Unfortunately, the ICTR was discredited by the fact that at least forty-one defense investigators working for the Tribunal were wanted or under investigation by the Government of Rwanda and various women's rights organizations for crimes related to the 1994 genocide.[204] Furthermore, the ability of these investigators to gain access to rape victims in private settings not only questioned the "possibility of rendering an impartial and truthful justice," but perhaps more importantly, the ICTR's guarantee to protect rape victims and witnesses.[205] For example, shortly after giving testimony in the *Akayesu* and *Ruta-*

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[201] Justice Hassan B. Jallow, Prosecutor, Int'l Crim. Trib.l for Rwanda, Statement by Justice Hassan B. Jallow, Address to the U.N. Security Council (June 13, 2005), *available at* http://69.94.11.53/ENGLISH/speeches/jallow130605.htm.

[202] *Id.*

[203] *See* Breton-Le Goff, *supra* note 146.

[204] *See* Sheenah Kaliisa, *Genocide Survivors' Association Reaffirms Its Suspension of Cooperation with the ICTR*, INTERNEWS, Feb. 28, 2002, *available at* http://listserv.acsu.buffalo.edu (follow Public List Archives hyperlink, then follow JUSTWATCH-L hyperlink, then follow Search Archives hyperlink, then search Subject Contains "Genocide Survivors'") (mentioning the example of Simeon Nshamihigo, an ICTR investigator, who was wanted by the Government of Rwanda since 1996, but was only suspended from work and put on trial in 2001). The author also notes the pernicious irony of such a situation: contributions from the international community to the ICTR for the purpose of investigating and prosecuting actors in the 1994 genocide are, in fact, being paid out to the very individuals the ICTR is supposed to be investigating. *Id.*

[205] Statistics concerning investigators in the field are revealing. In 1996, for example, Human Rights Watch reports that only four out of thirty ICTR investigators were female. NOWROJEE, *supra* note 89, at 95. Similarly, despite the U.N. goal of equal representation in professional and higher level posts, as of 2004, only one of fifteen ICJ judges was female, only three of sixteen ICTR judges were female, and only one female judge resided on the ICTY. Wood, *supra* note 83, at 305 n.195 (citing Angela E.V. King, Opening Remarks, Fair Representation: The ICC Elections and Women (January 29, 2003), *available at* http://www.un.org/womenwatch/osagi/statements/Panel-ICC.html). *But see* Press Release, International Criminal Court, State Parties to International Criminal Court Elect Final Four Judges; In Total, 18 Selected, Requiring 33 Ballots Over Four Days (Feb. 7, 2003), *available at* http://www.un.org/News/Press/docs/2003/L3026.doc.htm (announcing that ten of eighteen of the judges selected for the ICC are women).

ganda judgments, two female witnesses were assassinated.[206] Also, in 1997, a *Washington Post* editorial reported that "Hutu extremists murdered a witness, her husband and seven children after she appeared before the U.N. trials and was promised protection."[207]

Despite the fact that these threats to witnesses were a "reoccurring problem," in 2000 the ICTR dismantled many functions of its Support Programme for Witnesses and Potential Witnesses, including the complete abandonment of "rehousing [projects], development assistance and reconciliation."[208] Ironically, the very policies meant to facilitate more successful prosecution of rape crimes ended up discouraging the victims to come forward. In effect, rape victims in Rwanda were silenced.

In early 2002, the associations for genocide widows (AVEGA) and genocide survivors (IBUKA) suspended cooperation with the ICTR, and issued a statement that they were "disillusioned with [its] functioning."[209] Shortly afterwards, the Rwandan government joined the boycott.[210] Rape victims and witnesses were encouraged to find legal recourse through the national courts.[211] However, the problem with this change was that the "already feeble national justice system" had been decimated by the genocide in 1994.[212] It was not ready to handle the more than 120,000 persons in custody on charges related to the genocide. By the end of the genocide, Rwanda "counted only twenty judicial personnel responsible for criminal investigations and only nineteen lawyers";[213] by the end of 1997 that number had only risen to a total of

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[206] Breton-Le Goff, *supra* note 146. According to a report issued by IBUKA in 2002, this appears to be a "reoccurring problem," as such threats were also reported by IBUKA in 2002. *Id.*

[207] *See* Nasser Ega-Musa, Op-Ed., *Another Failure of Justice in Africa*, Wash. Post, Mar. 6, 1997, at A21 (noting that "[a]nother tribunal witness was killed with his family . . . last December").

[208] *See* Breton-Le Goff, *supra* note 146; *Women's Human Rights, in* Human Rights Watch, World Report 2000, at 450 (2002). For instance, protection of female witnesses often ceases at the Rwandan border. *See* International Federation for Human Rights (IFHR), Victims in the Balance: Challenges Ahead for the International Criminal Tribunal for Rwanda 10 (2002), *available at* http://www.iccnow.org/documents/FIDHrwVictimsBalanceNov2003.pdf.

[209] Kaliisa, *supra* note 204 (paraphrasing statement made by Rwandan women's rights groups, IBUKA and AVEGA, on Jan. 24, 2002 and Feb. 27, 2002).

[210] Breton-Le Goff, *supra* note 146.

[211] *See id.* (suggesting that Rwandan women are encouraged to seek justice at gacaca trials rather than through the ICC).

[212] *See* Hum. Rts. Watch, Struggling to Survive, *supra* note 1, at 13.

[213] *See id.*

448 judges serving in national courts.[214] To respond to this backlog of cases, the Rwandan government adapted a "community conflict resolution mechanism, known as gacaca, to the pursuit of genocide prosecutions."[215] In 2001, the Organic Laws of January 26, 2001 Setting Up "Gacaca Jurisdiction" and Organizing Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed between October 1, 1990 and December 21, 1994 (2001 Gacaca Laws) established approximately 11,000 gacaca courts.[216]

The gacaca and Rwandan national courts (also known as classical courts), however, in their pursuit to bring justice to rape victims may actually be excluding them from the judicial process. In fact, the traditional gacaca court system—on which the modern gacaca system is based—was essentially a "more informal dispute resolution mechanism."[217] The current system, which departs from the traditional gacaca system with more comprehensive procedural powers to prosecute, and punish genocide crimes, still is aimed to "enlist active popular participation in public hearings as a means to facilitate truth-telling, accountability, and national reconciliation."[218] To this end, until 2004 legislative reforms, rape survivors were required under the gacaca system to testify either publicly or by a written statement before an assembly of a minimum of one hundred community members.[219] This public component may very well discourage female victims from stepping forward to testify due to the social stigma and personal nature attached to rape.[220]

The gacaca system also presents significant procedural obstacles to women coming forward to testify. There are seven pretrial phases undertaken by the gacaca courts.[221] During the sixth stage, pursuant to the 2001 Gacaca Laws, rape witnesses must either testify in front of the general commission or by camera before the accused and a panel of

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[214] *See id.*

[215] *Id.* at 15.

[216] *Id.* (citing Organic Law No. 40/2000 of Jan. 26, 2001 Setting Up "Gacaca Jurisdictions" and Organizing Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Between Oct. 1, 1990 and Dec. 31, 1994, *available at* http://www.inkiko-gacaca.gov.rw/pdf/lawmodified.pdf).

[217] Hum. Rts. Watch, Struggling to Survive, *supra* note 1, at 15.

[218] *Id.*

[219] *Id.* at 21.

[220] *Id.* at 25 (quoting a number of women discussing their experiences in front of the tribunal). One rape victim testified that "[s]ome people in the crowd were whispering that the women were lying." *Id.* Another woman notes, "after I spoke in front of the assembly, [community members] snickered and whispered." *Id.*

[221] *Id.* at 15.

nineteen judges.[222] Once the rape survivors have undergone the seven stages, they are then sent to the national courts, the Tribunals of First Instance, where they must again participate in retrying the accused.[223] Furthermore, while the current 2004 Gacaca Laws prohibit individuals accused of rape to be eligible for a provincial release, the law does not prohibit such individuals from being released if "they were never formally accused" or "did not subsequently confess to rape."[224] In a number of situations, accused persons have also been freed because "authorities did not register the rape charges" even though the sexual violence survivors had told the police of the crime.[225] Moreover, the gacaca laws require that any rape case that had not already proceeded to the Tribunals of First Instance had to be readmitted to the gacaca system by the rape survivor, who is then obligated to revisit all seven pretrial stages.[226]

These changes have produced few rape indictments or judgments.[227] According to a survey by Human Rights Watch of one thousand cases, "only thirty-two [cases] included charges of rape or sexual torture."[228] In another survey, Lawyers Without Borders reported that of "1051 persons tried on charges of genocide or related crimes in 1999," only "forty-nine persons were prosecuted for rape or sexual torture, nine of whom were convicted of some form of sexual violence."[229] Likewise, between its inception in June 2002 and September 2004, the gacaca courts only registered approximately 134 cases including rape or sexual torture indictments out of more than 3000 non-sexual violence crimes.[230] Moreover, a number of rape witnesses have reported being threatened, and sometimes attacked after testifying in the gacaca proceedings.[231]

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[222] Hum. Rts. Watch, Struggling to Survive, *supra* note 1, at 15. However, under the 2004 Gacaca Laws, a woman may testify on camera and the tape is then "secretly" transferred to the prosecutor's office. *Id.* at 28. The problem here is that it may be too little too late. These reforms come ten years after the rapes have occurred. Many of the victims and rapists are now dead or undetectable.

[223] *Id.* at 16.

[224] *Id.* at 17 n.56.

[225] *Id.*

[226] *See id.* at 15.

[227] Hum. Rts. Watch, Struggling to Survive, *supra* note 1, at 18.

[228] *Id.*

[229] *Id.* at 19 n.65.

[230] *Id.* at 22. The report notes that these statistics are incomplete because two provinces did not report their case summaries. *Id.* at 22 n.77.

[231] *Id.* at 28.

C. *Reparations*

The need for reparations in countries that have been ravaged by armed conflict rape is great. In the late 1990s the U.N. Development Program reported that "women's work burden was 113 percent that of men" in the 130 least-developed countries.[232] In Rwanda, approximately sixty percent of the country is below the national poverty line, wherein women are at a particular disadvantage.[233] A 2001 survey conducted the Rwandan Ministry of Health and the National Population Office found that approximately thirty-six percent of Rwandan families are headed by a woman.[234] Ninety-seven percent of Rwandan women "provide for themselves and their families through subsistence agriculture."[235] Despite recent property law reform, women are "denied equal rights to land," and are often forced into prostitution to support themselves.[236]

Rwanda also continues to lack adequate health care services. The Rwandan government estimates there are only 300 doctors in the country.[237] The United Nations Children's Fund (UNICEF) reports that eighty-eight percent of women must walk more than one hour to reach the nearest health center.[238] Many of these women, however, are either too sick to make the journey or cannot afford to sacrifice time from subsistence farming and child care. Furthermore, under the current regime, women are required to pay for public transportation to the health center, and unless they qualify for assistance, women must also pay for any necessary services and medication.[239] Thus, for example, the Rwandan government estimated in 2004 that, while approximately 75,000 Rwandans are in need of antiretroviral (ARV) therapy (many of them rape survivors), only 3524 Rwandans are actually being treated with the necessary medications.[240]

However, these desperate economic and health conditions have been largely ignored by the Tribunals or the ICC. The Statutes of the ICTR and ICTR clearly deny victims any right to reparations. The ICTY

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[232] *Women's Human Rights*, *supra* note 208, at 447.

[233] Hum. Rts. Watch, Struggling to Survive, *supra* note 1, at 10 n.15.

[234] *Id.* at 10–11.

[235] *Id.* at 11.

[236] *Id.*

[237] *Id.* at 38–39.

[238] Hum. Rts. Watch, Struggling to Survive, *supra* note 1, at 38.

[239] *Id.* at 40.

[240] *Id.* at 42 n.166. ARV is the classification of drugs generally used to treat HIV. *Id.* at 37.

Statute, for example, states that "[t]he penalty imposed by the Trial Chamber shall be limited to imprisonment . . . [i]n addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired during criminal conduct, including by means of duress, to their rightful owners."[241]

In 2000, ICTY and ICTR judges issued an official announcement to explain the reason the Tribunals do not offer women reparation, stating that "[t]he judges agree with the principle of compensation for victims but believe that the responsibility for processing and assessing claims for compensation should not lie with the Tribunal but other agencies within the United Nations systems."[242] In other words, the economic chaos that rape victims often experience is essentially political, not legal, and hence outside the realm of international law. The judges had postulated a difference or gap: the desperate economic and health conditions of rape survivors should be contemplated separately from the legal redress issue. This approach has also been adopted at the national levels. In Rwanda, for example, the national courts have been remiss to execute any judgment including damages for the victims.[243]

On the other hand, the Rome Statute of the ICC explicitly allows for civil damages to be awarded in international criminal cases, as article 75 states:

> The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims.[244]

While this represents the first time the international community has officially recognized the legal right of rape victims to seek reparations, when the perpetrator is unable to satisfy the declared damages, the victim's only recourse is to apply for reparations through a Trust

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[241] *See* Statute of the International Tribunal for the Former Yugoslavia, 32 I.L.M. 1192, adopted by S.C. Res 827, U.N. SCOR, 48th Sess., 3217th mtg., art. 24, U.N. Doc. S/RES 827 (May 25, 1993) (establishing penalties and factors the Trial Chamber may use in setting penalties for ICTY convictions).

[242] Breton-Le Goff, *supra* note 146, n.92.

[243] *Id.* n.90.

[244] *See* Rome Statute, *supra* note 15, art. 75 (permitting reparations to be granted in international criminal cases).

Fund.[245] For these women, their day in court becomes their "justice," in essence, a legal fiction offered as compensation for their experiences. Moreover, the Rome Statute's language restricting the Court to contemplating civil damages only "upon request" or "in exceptional circumstances," suggests that somehow reparations are still secondary to judicial proclamations of innocence or guilt.[246]

In addition to being disadvantaged by the limited availability of reparations, rape victims are required to overcome a series of procedural obstacles to "request" reparations. First, rape victims must "send a written application to the Court Registrar and more precisely to the Victims' Participation and Reparation Section [VPRS]."[247] In turn, the VPRS must then "submit the application to the competent Chamber which decides on the arrangements for the victims' participation in the proceedings."[248] At this point, the Chamber will decide on the merit of victims' claims based on the amount of evidence the women provide to prove "they are victims of crimes which come under the competence of the Court in the proceedings commenced before it."[249]

These procedural and evidentiary requirements will undoubtedly bar many women from the legal process, especially rape victims. Few women will be able to offer physical proof of rape or present witnesses due to the fact that many of these witnesses are either dead or unwilling to come forward. More importantly, these requirements suggest that the economic and health conditions of Rwandan and Bosnian women are not a legal concern, but still political. Constraining the scope of reparations to a relative minority of women from these countries suggests that the economic and health conditions of the majority of these women is outside the aims or ambitions of law. Those women who do not meet the conditions of the ICC are essentially considered not to be victims—at least not in a legal sense. The provisions for reparations within the Rome Statute end up excluding, in ideological and practical terms, the survivors for which these provisions are supposed to be structured.

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[245] *See id.* (allowing the court to "make an order directly against a convicted person specifying appropriate reparations" while also allowing the court to order the award of reparations through the Trust Fund "where appropriate").

[246] *See id.*

[247] International Criminal Court, Participation of Victims in Proceedings, http://www.icc-cpi.int/victimsissues/victimsparticipation.html (last visited Nov. 2, 2008).

[248] *Id.*

[249] *Id.*

Furthermore, the administrative powers allotted to the ICC in dispersing any contributions or awards for victims may be detrimental to the well-being of rape victims in armed conflicts. To administer reparation awards and contributions, article 79 of the Rome Statute establishes a "Trust Fund . . . for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims."[250] The Trust Fund is administered by the Registry.[251] The Fund is also supervised by an independent Board of Directors.[252] Among its powers, the Board has discretion over whether or not the Victim's Trust Fund will accept various voluntary monetary contributions.[253]

The Court has the option of granting individual or collective reparations.[254] In practice, the ICC has indicated that it will most likely favor group trials, once again in the name of "efficiency," as it has declared that "[i]n order to ensure the efficiency of proceedings, particularly in cases where there are a large number of victims, the competent Chamber may ask victims to choose a shared legal representative."[255] This is significant because in cases where "collective reparations" are in order, the Victim's Trust Fund may order that reparations be paid not to the actual survivors, but instead to "an inter-governmental, international, or national organization."[256]

The characterization of the administrative organ overseeing reparations as a "Trust Fund" reinforces the notion of women as "wards" under the protection of the Board of Directors and the ICC Registry. The message is that women are essentially unsuitable to be entrusted with the money themselves even though the funds were the direct product of these women's testimony and structured upon the intent of dispersing these funds to the victims. The current policy alienates in its very attempt to assist. Moreover, the ICC policy reproduces colonial relationships through the very acts that are supposed to be signaling the inclusion of women more fully into the international order and a

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[250] *See* Rome Statute, *supra* note 15, art. 79.

[251] International Criminal Court, Trust Fund for Victims, http://www.icc-cpi.int/vtf.html (last visited Nov. 2, 2008).

[252] *Id.*

[253] *Id.*

[254] International Criminal Court, Rules of Procedure and Evidence, *supra* note 109, R. 98(3) (permitting a court to grant collective reparations when appropriate).

[255] International Criminal Court, Participation of Victims in Proceedings, *supra* note 247.

[256] International Criminal Court, Rules of Evidence and Procedure, *supra* note 109, R. 98(4) ("[F]ollowing consultation with interested States and the Trust Fund, the Court may order that an award for reparations be made through the Trust Fund to an intergovernmental, international, or national organization approved by the Trust Fund.").

more responsible version of state sovereignty (that is, pluralistic, non-imperialistic international legal order). Women are once again subordinated to the needs of the dominant international legal narrative.

Conclusion: We, the Victors . . .

The standard approach views the U.N. regime established in the wake of World War II and de-colonization as monumental moments in the history of international law wherein international law shrugged off the lingering colonialist ambitions of nation states and absolute sovereignty in favor of a pluralistic, liberal, humanitarian character. As Antony Anghie explains:

> This development in turn is the basis of the claim—fundamentally important to the contemporary discipline of international law and its legitimacy—that international law is truly universal, open, and cosmopolitan because it extends sovereignty to all states without making the invidious cultural distinctions between the civilized European and the uncivilized non-European that had served in the nineteenth century to exclude non-Europeans from the realm of sovereignty while subjecting them to colonialism.[257]

The common reliance on treating the armed conflicts in Yugoslavia and Rwanda as moments which are distinct and "unprecedented" serves to justify the authority of international law in remedying the problem—international law is given a new subject to carry out its project to universalize international legal structures and their normative rules and techniques. In turn, this demands novel legal techniques and institutions (the ICC, ICTY and ICTR) to deal with this unprecedented, aberrational moment.

This Article challenges this notion of the "unprecedented" to question the legitimacy of the dominant vision of international law as pluralistic and humanitarian. In both theoretical and practical terms, women continue to be excluded from the protection and guarantees of the international legal community. On the one hand, notions of community and the individual are displaced by the principle of the impregnability of state sovereignty and the interests of the pre-eminent nations in maintaining "peace and security" in the international order. On the other hand, women are subordinated to the necessities of the

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[257] Anghie, *supra* note 152, at 514.

international legal narrative and its underlying assumption that international law is a project of inclusion (universalization) and modernization (order, and implicitly, civilization).

However, the reality is that women cannot be lumped together in a homogenous "womanhood" anymore than the various occurrences whereby international law has been forced to reorganize itself due to unstable power relations can be drawn together in a clearly defined linear evolution. I have argued in this Article that each attunement, or act of inclusion, on the part of international law to women in raped conflicts (and projected to all women) corresponds with a simultaneous act of exclusion, which merely reemphasizes uneven relationships which are rooted in a patriarchal, colonial past.[258] Specifically, in this Article, the inability of rape victims in armed conflicts to achieve virtually any real address by the international community is seen as a challenge to the legitimacy of international law and its grand narrative, or project.

Dislocating raped women in armed conflicts from the structure of the standard international legal history does not end the problem with international law, but only raises new questions. How, for instance, can we "bring these perspectives together in a way that would not create a new grand narrative that would simply be the mirror image of the canonical story?"[259] In other words, can we discuss these occurrences in such a way that actually allows them an autonomous voice and at the same time resist the temptation to transform these "obliquely related" events into justifications of international law merely re-organized with a "new" purpose, or project?[260] In short, how do we extricate our "knowledge" from the confines of legal analysis and revision? And, perhaps more importantly, is it enough for "history's victors [to] muster the courage to look frankly, painfully, at the horrors of its own past?"[261] Where does such recognition leave us? After all, what does it mean to be heard?

The current moment is plagued by this tension between the humanist and the realist within each of us: on the one hand, the desire to do something, on the other hand, the uncomfortable suspicion that benevolence is merely refurbished colonialism. My suspicion is

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[258] *See* Berman, *supra* note 3, at 1523 (explaining that every attempt to bring others into the international community can be construed as a patriarchal attempt to exclude these same individuals or groups).

[259] *Id.* at 1552.

[260] *See id.*

[261] *Id.* at 1554.

that often we tend to isolate these traits as two distinct personalities, and then pick allegiances. Or, as in Nathaniel Berman's opinion, we assume the "critical" talk of the morning, but after lunch is out of the way, the humanitarian emerges because it is time to be practical and get something done. The challenge to legitimacy seems unable not to pose its own counter-project of legitimacy—the realist becomes the dreamer, the "critical genealogist" changes into the "institutional functionalist." There is no escape from the shadows of colonialism. Reform—no matter how progressive or attuned to the peripheries—remains a postscript to colonialism, tainted with its imagination, and harnessed by its imperialist relationships of power. At the end of the day, we are where we started: left to choose between a gullible picture of international law marching forward, or being left out of the actual application of power, relegated to the remote theoretical outposts of international law (and principally, academia).

In this conception of competing personalities, we cannot escape the traditions of empire. But why must the "humanist" be gullible? Why must the "humanist" forever be like Coleridge's ancient mariner doomed to spend eternity repeating his story of woe as repentance for his pride? Likewise, why must the "realist" critique remain at the peripheries of reform? It may be that the tension between the humanist and the realist is essentially not a problem of reform and the stigma of colonialism, but instead the inability of our imagination. Just as we must dissolve the barriers between the stories of Western inclusion and non-Western exclusion, we must also reconcile the "humanist" and the "realist," not as two competing or contradicting personalities, but as complimentary aspects of the reformer's psychology: our "humanist" attributes sparking our desire for action, our "realist," or "genealogist" attributes informing our method of understanding and change.

By blurring the lines, the realist is no longer banished to theory; the humanist is no longer constrained by the auspices of colonialism. There is no longer a realist or a humanist, but only a critical humanist: the realist and the humanist working together to re-imagine how we understand not only the world at large, but the world at home. The critical humanist employs "humanist" tendencies to engage in the struggles of humanity while invoking the critic, or "realist," to constantly challenge his or her assumptions and move from the general and abstract to the specific, actual workings of power.

In centering law in the actual workings of power, law merges openly with the political and social spheres. Focused on the ground level, on the realities of specific communities and peoples, legal knowledge and techniques may be freed from the high walls of the legal pro-

fession. Legal knowledge becomes social knowledge. It is concerned with specific, local, immediate issues of specific, local peoples—health care, education, welfare—without seeking to attach any grand story or ultimate vision of the future. It allows knowledge and reform to move outside of law and enjoy a free and open range of discourse and possibility.

What I propose is that the realist no longer falls back into the obscurity and moral solitude of legal theory and pessimism—essentially, abstraction and inaction—but instead, embraces what is at the root of the humanitarian impulse: to take responsibility for our beliefs, to test our convictions against the costs we are willing to assume ourselves. It is one thing to face up to the colonialism of the past; it is another thing to place oneself in the driver's seat. The history of the tribunals and criminal courts are not only a lesson in the limits of our ability to reach out; rather, the chief obstacle we face may be that age-old fear of difference, the first and last defense to any self-critique, to any challenge of our own identities, our own reality and sense of right and wrong. For Berman, the realist can only function in the morning before the pens come out because the realization of the realist's challenge—that the current individual human rights regime is perhaps irreconcilably mired in racist and colonial mentality—deals a potentially critical blow to the moorings of the international legal order and dislodges it upon the open seas towards Africa, Asia, and South America.[262] It is the not the fear of the "other," but what the "other" might show us about ourselves and our most cherished ideas, that prompts our insecurity about the way forward. It exposes that we may rely on pre-written scripts, that the words we speak and feelings we share are not our own, but rise out of the tribal mysticism and patriarchal irrationality of our past. In Rilke's poem, the *Archaic Torso of Apollo*, one who views the chiseled torso of the deity is transfixed by its message—you must change your life.[263] Quite simply, our refusal may be that it would disrupt the convenience of our daily routines.

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[262] *See id.* at 1552.

[263] *See* Rainer Maria Rilke, *Archaic Torso of Apollo, in* The Essential Rilke 33 (Galway Kinnell & Hannah Lieberman eds. & trans., 1999).

UNNECESSARY DEATHS AND UNNECESSARY COSTS: GETTING PATENTED DRUGS TO PATIENTS MOST IN NEED

Erin M. Anderson*

Abstract: Medical epidemics that are constrained in the developed world are wrecking havoc on developing countries, which are bearing the brunt of HIV/AIDS, malaria, tuberculosis, and other infectious diseases. Because medicines used to treat these conditions are patented, they are expensive and inaccessible to poor countries. In 1994, the United Nations established a system of international patent protection through the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), and simultaneously tried to accommodate its commitment to making life-saving pharmaceuticals available to developing countries. When TRIPS failed to accomplish this goal, Article 31bis, an amendment to TRIPS, was introduced in 2003, seeking to make it easier for developing countries to acquire low-cost drugs. However, the amendment has been criticized and has largely gone unused. This Note addresses ways in which Article 31bis can be employed to deliver treatment to the neediest. In particular, this Note advocates that, whether or not the amendment is used, life-saving drugs must be provided at low-cost to developing countries.

Introduction

The poorest regions of the world have the highest concentrations of people with treatable diseases such as HIV/AIDS, tuberculosis, and malaria.[1] Each year in developing countries, approximately three mil-

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[1] *See* UNAIDS & World Health Org., AIDS Epidemic Update 2 (2005), *available at* http://www.who.int/hiv/epi-update2005_en.pdf; World Health Org., Public Health, Innovation and Intellectual Property Rights: Report of the Commission on Intellectual Property Rights, Innovation and Public Health 2–3 (2006) [hereinafter WHO, Public Health], *available at* http://www.who.int/intellectualproperty/documents/thereport/ENPublicHealthReport.pdf; World Health Org., Towards Universal Access: Scaling Up Priority HIV/AIDS Interventions in the Health Sector: Progress Report 5 (2007) [hereinafter WHO, Towards Universal Access], *available at* http://www.who.int/hiv/mediacentre/universal_access_progress_report_en.pdf. Treatable diseases are also referred to as diseases of poverty, since they are most prevalent in poor countries but

lion people die from HIV/AIDS, two million from tuberculosis, and one million from malaria.[2] Over two-thirds of all people infected with HIV live in sub-Saharan Africa.[3] Seventy-two percent of the worldwide fatalities caused by HIV/AIDS occurred in this region.[4]

One reason for the disproportionate concentration is that one third of the world's population—close to two billion people—lacks regular access to essential medicines.[5] In the poorest regions, such as parts of Africa and Asia, approximately ninety-four percent of the inhabitants fall into this category.[6] In low- and middle-income countries, a full seventy-two percent of people have no access to antiretroviral treatments.[7] A report by the World Health Organization (WHO) found that average per capita spending in low-income countries is one hundred times *less* than what is spent in high-income countries.[8] Furthermore, WHO reported that only fifteen percent of the world's population consumed up to ninety percent of all available pharmaceuticals.[9]

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have often been cured or significantly combated in developed regions. *See* WHO, Public Health, *supra*, at 2.

[2] WHO, Public Health, *supra* note 1, at 8. Comparatively, in developed countries in 2002 approximately 49,000 people died of HIV/AIDS, 49,000 of tuberculosis, and 150 of malaria. World Health Org., *Revised Global Burden of Disease (GBD) 2002 Estimates: Estimates by Level of Development: Mortality,* 2002, http://www.who.int/healthinfo/bodgbd2002revised/en/index.html (last visited Oct. 10, 2008) [hereinafter WHO, *Revised GBD 2002*]. The World Bank classifies developing countries as having either low- or middle-incomes per capita. WHO, Public Health, *supra* note 1, at 2. Low-income countries have a per capita income of less than $825 and middle-income countries have a per capita income of $3255. *Id.*

[3] UNAIDS & World Health Org., *supra* note 1, at 10.

[4] *Id.*

[5] World Health Org., WHO Medicines Strategy: Countries at the Core 2004–2007, at 3 (2004) [hereinafter WHO, WHO Medicines Strategy]; Bill Clinton, *My Quest to Improve Care*, Newsweek, May 15, 2006, at 50.

[6] WHO, WHO Medicines Strategy, *supra* note 5, at 3.

[7] WHO, Towards Universal Access, *supra* note 1, at 5. In December 2006, only two million of the seven million people suffering from HIV/AIDS in low- and middle-income countries received treatment. *Id.*

[8] WHO, WHO Medicines Strategy, *supra* note 5, at 3. Approximately four hundred dollars are spent per person in high-income countries as compared to four dollars per person in low-income countries. *Id.* It is important to note the interrelationship between health and wealth: an abundance of poor health contributes to status as a poor country, just as being a poor country translates into high concentrations of poor health. *See* Robert Langreth, *The Rwanda Cure*, Forbes, Oct. 29, 2007, at 142. For example, in examining the relationship between malaria and poverty, economist Jeffrey Sachs declared that a severe malaria problem reduced a country's economic growth by 1.3 percentage points per year. *Id.*

[9] WHO, WHO Medicines Strategy, *supra* note 5, at 15.

Studies show that improved access to medications would drastically alleviate the disproportionate death tolls in developing countries.[10] One set of researchers estimates that antiretroviral medicines (combined with comprehensive treatment programs) could save between 5.8 and 10.1 million lives in sub-Saharan Africa by 2020.[11] That is, between sixteen and twenty–five percent of deaths caused by HIV/AIDS could be averted.[12] It is further estimated that up to 10.5 million lives could be saved annually by providing existing medicines, commonplace in the developed world, that treat infectious diseases, maternal and perinatal conditions, childhood diseases, and noncommunicable diseases.[13] Another study found that of the 9.7 million deaths per year worldwide of children under the age of five years old, six million could be prevented using existing technologies.[14] As an example, generic antibiotics could cure almost all of the 1.8 million who die every year from bacterial pneumonia.[15] Further, the measles vaccination—which was invented over forty years ago and has proven safe and reliable—can reduce the 390,000 deaths per year that that infliction causes.[16] As it stands, over ninety-five percent of measles deaths occur in developing countries.[17]

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[10] *See* WHO, Public Health, *supra* note 1, at 8; John Salomon et al., *Integrating HIV Prevention and Treatment: From Slogans to Impact*, 2 PLoS Medicine 50, 52 (2005), *available at* http://medicine.plosjournals.org/archive/1549–1676/2/1/pdf/10.1371_journal.pmed.0020016-S.pdf; Michael Westerhaus & Arachu Castro, *How Do Intellectual Property Law and International Trade Agreements Affect Access to Antiretroviral Therapy?*, 3 PLoS Medicine 1230, 1232 (2006).

[11] Salomon et al., *supra* note 10, at 53.

[12] *Id.*

[13] WHO, WHO Medicines Strategy, *supra* note 5, at 13. Another example is examination of the town of Mayange, Rwanda. Langreth, *supra* note 8. Until 2006, over 100 children per year under the age of five were dying in their homes because they could not afford the town's eighteen-bed clinic. *Id.* In 2007, a functioning health center was started to provide basic services such as generic antibiotics, rehydration fluids for diarrhea, malaria medicines, insecticide-treated bed nets, and AIDS drugs. *Id.* As a result, in 2007, only twenty-eight children under the age of five died. *Id.*

[14] Langreth, *supra* note 8.

[15] *Id.*

[16] *Id.*; Muhammad Saleem, *Measles Still a Leading Cause of Death Among Children*, Bus. Recorder, Mar. 1, 2008, *available at* http://www.brecorder.com (search "Measles Still a Leading" and follow hyperlink) ("Measles vaccination, one of the most cost-effective public health interventions, is available for preventing death caused by the disease."). The measles vaccination was invented in 1963. Langreth, *supra* note 8.

[17] Saleem, *supra* note 16.

There are many reasons why developing countries are unable to obtain the medicines their people need.[18] Among the leading factors are high costs.[19] Cutting-edge drugs are usually patented and are therefore prohibitively expensive because the patent-holder is free to price the drug without limits.[20]

Patents on pharmaceuticals in the international arena are generally governed by the World Trade Organization's (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[21] This agreement confers on the patent owner a series of traditional intellectual property rights (IPRs), one of which is a twenty-year license to prevent third parties from making, using, offering for sale, selling, or importing the patented product or process.[22] Because this grants a two-decade monopoly to the patent holder, the drugs can be sold at lucrative prices free from competition and allegations of anti-

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[18] Langreth, *supra* note 8. Columbia professor Joshua Ruxin, who runs the clinic in Mayange, lamented that "the hardest truth for people to come to terms with is that the practical solutions are already out there, but they are not being applied." *Id.*

[19] *See* WHO, Towards Universal Access, *supra* note 1, at 61. In developing countries, medicines account for twenty-five to seventy percent of total health expenditures. WHO, WHO Medicines Strategy, *supra* note 5, at 14. In most high-income countries, medicines only account for fifteen percent of health care costs. *Id.* There is, however, existing literature that argues that patent protection is not the number one impediment to accessing antiretroviral drug treatment in African countries. Amir Attaran & Lee Gillespie-White, *Do Patents for Antiretroviral Drugs Constrain Access to AIDS Treatment in Africa?*, 286 JAMA 1886, 1890 (2001). "It is doubtful that patents are to blame for the lack of access to antiretroviral drugs in most African countries." *Id.*

[20] *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C, arts. 27–34, Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter TRIPS]; Frederick M. Abbott & Jerome H. Reichman, *The Doha Round's Public Health Legacy: Strategies for the Production and Diffusion of Patented Medicines Under the Amended TRIPS Provision*, 10 J. Int'l Econ. L. 921, 971 (2007) (noting the theory that there is no incentive to set low prices because there is no competition).

[21] TRIPS, *supra* note 20, at 27–34. The WTO is an international organization governing trade laws globally. *See generally* WTO, www.wto.org, (last visited Oct. 10, 2008). As of July 2008, 153 countries were members. *Id.* The TRIPS agreement covers the seven principal facets of intellectual property: copyright, trademark, geographical indications, industrial designs, patents, layout designs of integrated circuits, and undisclosed information including trade secrets. J. Michael Finger, *The WTO's Special Burden on Less Developed Countries*. 19 Cato J. 425, 429 (2000) *available at* http://www.cato.org/pubs/journal/cj19n3/cj19n3–9.pdf. Additionally, TRIPS requires some protection of plant varieties. *Id.*

[22] TRIPS, *supra* note 20, arts. 28(1)(a) and 33.

trust violations.[23] However, such right results in high prices which in turn prevent poor countries from purchasing the patented drugs.[24]

To accommodate needy countries to which IPRs have a detrimental effect, TRIPS carves out certain exceptions.[25] Article 31—titled, Other Use Without Authorization of the Right Holder—confers to a member-state the right to use "the subject matter of a patent without the authorization of the right holder."[26] Under Article 31(f), a WTO member may bypass a patent holder's rights in order to create low-cost generic drugs under a set of conditions, most notably that "such use shall be authorized predominantly for the supply of the domestic market" of that member.[27]

Such a provision sounds promising, but, unfortunately, the limitation of this exception, that domestic production can only be for domestic use, has proven unworkable for most developing countries that are the neediest.[28] A member-state is only permitted to bypass the patents of its own domestic rights holders and subsequently distribute and use the products domestically.[29] Yet most countries in need do not have pharmaceutical manufacturers within their borders.[30] And those member-countries that are home to manufacturers are forbidden from exporting them.[31] In 2003, the WTO General Council set out to address this paradox and proposed an amendment to Article 31.[32] The amendment, Article 31bis, allows developed countries to export to developing countries where there is a national health problem.[33]

This Note examines the palpable conundrum of developing countries that are overcome with death and suffering induced by an inability both to treat diseases that are treatable in the developed world and to

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[23] *See id.*; Bruce H. Schneider & Matthew W. Siegal, *New Challenges of Proving "Market Power" in Patent Tying Cases*, 18 PRAC. LITIGATOR 13, 18(2007) *available at* http://files.aliaba.org/thumbs/datastorage/lacidoirep/articles/PLIT_PLIT0703-SCHNEIDER-SIEGAL_thumb.pdf.

[24] WHO, TOWARDS UNIVERSAL ACCESS, *supra* note 1, at 6.

[25] TRIPS, *supra* note 20, art. 30.

[26] *Id.* art. 31.

[27] *Id.* art. 31(f).

[28] *See* World Trade Organization, Declaration on the TRIPS Agreement and Public Health of 14 November 2001, WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2002) [hereinafter Doha Declaration].

[29] TRIPS, *supra* note 20, art. 31(f).

[30] WHO, PUBLIC HEALTH, *supra* note 1, at 120, 152.

[31] TRIPS, *supra* note 20, art. 31(f).

[32] World Trade Organization (WTO) General Council, Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, ¶ 2, WT/L/540 (Aug. 30, 2003) [hereinafter WTO General Council].

[33] *See id.*

obtain medications that could easily be made available. Part I highlights the concentration of treatable diseases in developing countries and explores why these regions are unable to access fundamental treatments. Part II outlines the United Nations' (U.N.) process of establishing a system of international patent protection through TRIPS, while simultaneously trying to accommodate its commitment to making life-saving pharmaceuticals available to developing countries. Part III outlines the progression of Article 31bis, an amendment to TRIPS that seeks to make it easier for developing countries to acquire low-cost drugs.[34] This section also looks at why the amendment is not being used. Part IV explores ways in which Article 31bis can be employed, directly and indirectly, to get treatment to the people who need it most. In particular, this Note advocates that in order to treat curable disease, developing countries must be able to afford the treatment that has proven to be life-saving in developed parts of the world.

I. How Patent Law Affects World Health

A. *The Disparity in World Disease*

People in developing countries are dying in large numbers from diseases and medical conditions that have proven to be preventable or treatable in developed countries.[35] In these countries, over half of all deaths are caused by communicable maternal, perinatal, and nutritional conditions.[36] Thirty-four percent of all deaths are caused by infectious and parasitic diseases, such as HIV/AIDS.[37] In comparison, infectious and parasitic diseases—diseases that usually can be easily treated or prevented—account for only two percent of deaths in devel-

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[34] "Bis" means two times in number or amount. Oxford Latin Dictionary 234–35 (1983). In this context, Article 31bis is a provision that comes after Article 31. Press Release, World Trade Org., Members OK Amendment to Make Health Flexibility Permanent (Dec. 6, 2005) [hereinafter WTO Dec. 6, 2005], *available at* http://www.wto.org/english/news_e/pres05_e/pr426_e.htm.

[35] *See* Salomon et al., *supra* note 10, at 54.

[36] WHO, *Revised GBD 2002*, *supra* note 2. Communicable maternal, perinatal, and nutritional conditions include: infectious and parasitic diseases, respiratory infections, maternal conditions (including maternal hemorrhage, maternal sepsis, hypertensive disorders, and obstructed labor), perinatal conditions (including low birth weight, and birth asphyxia/trauma), and nutritional deficiencies (including protein-energy malnutrition, vitamin A deficiency, and iron-deficiency anemia). *Id.*

[37] *Id.* Infectious and parasitic diseases include tuberculosis, STDs, diarrheal diseases, childhood cluster diseases (including pertussis, poliomyelitis, diphtheria, measles, and tetanus), meningitis, and hepatitis B and C. *Id.*

oped countries.[38] Instead, the top trigger of death in developed countries, answering for eighty-six percent of all deaths, is noncommunicable diseases, including cardiovascular disease and cancers, conditions that have limited or no prevention or treatment.[39]

B. *Accessibility of Medicines for Treatable Conditions*

People in developing countries are dying from treatable diseases because they cannot access the medicines that are needed to prevent or remedy these conditions.[40] Domestic conditions, such as poverty and insufficient health infrastructure, poor drug quality, inadequate national health policies, understaffed clinics and hospitals, lack of political commitment, and under-financing of treatment programs are commonly-cited obstacles that inhibit access.[41]

Cost is the forefront barrier to accessing necessary medicines.[42] Developing countries simply cannot afford innovative medicines.[43] It is lack of competition, more often than not, which drives up prices, and it is patent law that confers monopolistic rights to the creators of these medicines, thus allowing the creators to set prices without restraint.[44] Absent patent rights, patent-holders would be constrained by antitrust laws that prohibit monopolies and artificial price-setting.[45] Competitors could acquire or reverse-manufacture recipes for drugs and introduce competition to the market, thus driving down prices.[46]

Examining current AIDS treatment in developing countries illustrates one aspect of the patent problem.[47] First-line AIDS drugs, therapy that was first introduced over fifteen years ago, have improved and

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[38] *Id.*; Salomon et al., *supra* note 10, at 54.

[39] WHO, *Revised GBD 2002*, *supra* note 2.

[40] *See* Westerhaus & Castro, *supra* note 10, at 1232. There are other reasons that developing countries suffer the most from infectious diseases, including the lack of sanitary conditions that facilitate the spread of communicable disease. Mary Gail Hare, *Carroll Relief Group Receives $25 Million; U.S. Grant to Support Health Care in Congo*, BALT. SUN, Aug. 11, 2001, at 1A.

[41] Attaran & Gillespie-White, *supra* note 19, at 1890; Westerhaus & Castro, *supra* note 10, at 1232.

[42] *See, e.g.*, WHO, PUBLIC HEALTH, *supra* note 1, at 112.

[43] Attaran & Gillespie-White, *supra* note 19, at 1891; Westerhaus & Castro, *supra* note 10, at 1232. Ghana, Nigeria, and Tanzania have annual national health care budgets of only eight dollars or less per capita. Attaran & Gillespie-White, *supra* note 19, at 1891.

[44] *See* Abbott & Reichman, *supra* note 20, at 971.

[45] Thomas Chen, *Exclusivity Periods and Authorized Generic Drugs*, HEALTH LAW WEEK, Nov. 9, 2007, at 33; *see* Schneider & Siegal, *supra* note 23, at 18.

[46] Abbott & Reichman, *supra* note 20, at 927–28.

[47] *See* Lara Santoro, *Forget the Patents on AIDS Drugs: Third World Nations Have the Right, and the Duty, to Produce Generic Versions*, L.A. TIMES, Oct. 9, 2007, at 17.

extended the lives of countless citizens in developing countries.[48] But, over the years, many AIDS patients have developed resistance to the old antiretrovirals and now require newer, updated drugs.[49] Unfortunately, second- and third-line AIDS drugs are presently protected by patents and are essentially inaccessible to patients who cannot pay the exorbitant costs.[50] Without access to these successive drugs, people die while waiting for patents to expire.[51] Buddhima Lokuge, the United States manager of Doctors Without Borders, characterizes such a situation as "starting from zero again," since the earlier, first-line treatment went to waste because the subsequent treatments are not available to these patients for financial reasons.[52]

II. The International Approach to Patented medicines

A. *The Push for International Patent Regulation*

One reason pharmaceutical patent holders set prices high is because there is a market that is willing, and financially able, to buy.[53] Partially as a result of patent protection permitting high prices, many poor countries have refused to recognize pharmaceutical patent rights altogether.[54] Some of these are countries only marginally concerned with patent protection because little research and development, an activity IPRs seek to ensure, occurs within their borders.[55] However, one effect of such disregard for patents is to make patent-holders resistant to sell

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[48] *Id.*

[49] Mark A. Wainberg & Gerald Friedland, *Public Health Implications of Antiretroviral Therapy and HIV Drug Resistance*, 279 JAMA 1977, 1977 (1998).

[50] Alexander G. Higgins, *Canada Tells WTO It Will Be First to Export Cheap, Generic AIDS Drugs*, Oct. 5, 2007, http://www.aegis.com/news/ads/2007/AD072099.html.

[51] WHO, Public Health, *supra* note 1, at 112; *see* Wainberg & Friedland, *supra* note 49, at 1980. Strict adherence to antiretroviral therapy is essential to successful treatment. Wainberg & Friedland, *supra* ntoe 49, at 1980. Using less than effective combinations also lowers achievement rates. *Id.*

[52] Santoro, *supra* note 47.

[53] Abbott & Reichman, *supra* note 20, at 971. Patent holders can set high prices because there is lack of competition, and there is a market of affluent persons, even in developing countries, that makes their businesses profitable. *Id.*

[54] *See* Carlos M. Correa, Trade-Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement 271 (2007). Prior to 1994, approximately fifty countries did not recognize IPRs with respect to medicines. *Id.* Other countries recognized patent rights on the *process* of making the medicine, but not on the resulting *product. See, e.g.*, *Parliament Amends Patent Law*, Facts on File World News Digest, Mar. 31, 2005, at 215B1.

[55] *See* Raj Bawa, *Nanotechnology Patent Proliferation and the Crisis at the U.S. Patent Office*, 17 Alb. L.J. Sci. & Tech. 699, 713 (2007).

their medicines in these countries.[56] Such holders have argued that future research and development will be stifled because their companies will be unable to recover costs.[57] Though international patent protection dates back to the 1883 Paris Convention, it was not until a century later that the international community's interest in worldwide standards of patentability—commonly known as patent law harmonization—piqued.[58] Prior to this time, developed countries had little interest in working with the World Intellectual Property Organization (WIPO), the entity entrusted with facilitating harmonization.[59]

However, due to the growing disregard for patent rights, large multinational corporations (MNCs) began to lobby for international protection, looking for tight regulation and strict standards, while developing countries argued for minimal provisions.[60] The MNCs of the developed countries made headway on their quest when, in the mid-1980s, the U.N. publicized its intention to revise the existing international trade agreement, the General Agreement on Tariffs and Trade (GATT), and received universal support.[61]

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[56] Bernard Pécoul et al., *Access to Essential Drugs in Developing Countries: A Lost Battle?*, 281 JAMA 361, 365 (1999).

[57] Correa, *supra* note 54, at 275. Companies were also worried about parallel importation, which occurs when a manufacturer sells a drug to poor country *A* for price *X*, and *A* sells the drug to developed country *B* for a price slightly higher than *X*, but less than *Y*, which is the amount the manufacturer charges *B* for the same drug. *See* Sisule F. Musungu & Cecilia Oh, Comm'n on Intellectual Prop. Rights, Innovation & Pub. Health (CIPRIH), The Use of Flexibilities in TRIPS by Developing Countries: Can They Promote Access to Medicines? 27 (2005).

[58] Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention]; Robert P. Merges et al., Intellectual Property in the New Technological Age 346 (2007). The Paris Convention chiefly concerned mapping out procedures for filing for patent protection in multiple countries. Paris Convention, *supra*, art. 4.

[59] Merges et al., *supra* note 58, at 346. Western businesses considered the WIPO to be unfriendly to their interests. *Id.* The WIPO was established in July 1967 as a specialized agency of the U.N. World Trade Org., Frequently Asked Questions About TRIPS in the WTO, http://www.wto.org/english/tratop_e/trips_e/tripfq_e.htm (last visited Oct. 10, 2008) [hereinafter WTO, FAQs]. Its objective is "to promote intellectual property protection throughout the world through cooperation among states and, where appropriate, in collaboration with any other international organization." *Id.*

[60] *See* Jason Nardi, *The TRIPS Traps for Health and Knowledge*, Inter. Press Serv. News Agency, Dec. 19, 2005, *available at* http://www.ipsnews.net/news.asp?idnews=31487. Multinational pharmaceutical corporations, often based in the United States or Western Europe, played a significant role in the development of international law. *Id.* Some activists claim that the resulting international agreement "was introduced against the will of developing countries, under the pressure of multinational companies from the U.S. and Japan." *Id.*

[61] *Id.* The resulting international agreement was developed according to the model of existing patent rights in industrialized, developed countries. Finger, *supra* note 21, at 430.

B. *The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)*

In late 1993, at the end of the Uruguay Round of negotiations on this matter, representatives announced both the creation of the World Trade Organization (WTO) and the implementation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[62] The objective of the WTO, an organization established to replace the GATT, is to "help trade flow smoothly, freely, fairly and predictably."[63] The purpose of TRIPS is to "contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."[64]

TRIPS—which came into force on January 1, 1995—provides strong protection for all types of IPRs, including copyrights, trademarks, industrial designs, patents, and undisclosed information.[65] The agreement requires members to comply with certain minimum standards for the protection of IPRs, but members are free to implement laws that give more extensive protection.[66] Obligations apply equally to all member-states, but developing and least-developed countries have

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This places a burden on developing countries in the form of implementation costs (or, alternatively, building a defense against adopting it). *Id.* at 430–31; MERGES ET AL., *supra* note 58, at 346. The GATT was instituted in 1947 and did not cover IPRs in its framework. WTO, FAQs, *supra* note 59.

[62] TRIPS, *supra* note 20; MERGES ET AL., *supra* note 58, at 347.

[63] World Trade Org., The WTO in Brief (2007), *available at* http://www.wto.org/english/res_e/doload_e/inbr_e.pdf.

[64] TRIPS, *supra* note 20, art. 7.

[65] WTO, FAQs, *supra* note 59. *See generally* TRIPS, *supra* note 20, art. 7. Important provisions of TRIPS, as it relates to patents, include: testing patent applications for both the presence of an inventive step and industrial application, including almost all commercial fields within the ambit of patentable subject matter (including pharmaceutical patents), including the right of the patent-holder to control the market for imports of the patented product, and eliminating the practice of granting compulsory licenses for patented technology. *Id.* arts. 27–28. These changes most affected the laws of developing countries. MERGES ET AL., *supra* note 58, at 347. Important provisions of TRIPS that conflicted with U.S. law include: extending the patent term to twenty years (as opposed to seventeen), opening up the "first-to-invent" system by allowing members of the WTO to introduce evidence of inventive acts in their home country for purposes of establishing priority, and expanding the definition of infringement to include acts of unauthorized offering for sale and importing. *Id.*

[66] Finger, *supra* note 21, at 430; WTO, FAQs, *supra* note 59. TRIPS is often characterized as a "minimum standards" agreement. *Id.* This means that each member must institute *at least* the specified levels of protection, but is free to provide more protection. Finger, *supra* note 21, at 430.

been permitted extra time to implement the changes.[67] With regards to patents, one of the key purposes in creating TRIPS was to recognize the interest for patent protection for food, beverage, and medicinal products.[68] The resulting TRIPS provisions on patents, set out in Articles 27–34, are largely a result of the pharmaceutical industry's ability to convince lawmakers to link intellectual property and trade matters.[69]

C. *Article 31: Compulsory Licensing*

TRIPS has significant ramifications for pharmaceutical companies.[70] Principally, it *requires* patent protection for pharmaceuticals, a right that drug-makers in certain countries did not previously have.[71] Moreover, TRIPS significantly extends the period under which drugs are inaccessible to those in developing countries.[72] Such protection, while hailed by patent-holders, has had devastating effects on some countries.[73] A study that looked at the impact of introducing patents on four domestic antibiotics in India (which recently had to come into international compliance) found that the total annual welfare losses would be nearly $305 million, a loss caused by price increases and access limits.[74] Fortunately for these countries, in the midst of these rights, TRIPS provides an important exception to patent protection for pharmaceuticals.[75] Article 31 allows temporary suspension of

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[67] MERGES ET AL., *supra* note 58, at 347. Least-developed countries have until 2016 to make the transition. Westerhaus & Castro, *supra* note 10, at 1230–31. "Least developed" countries are designated based on U.N. indicators including income, nutrition, health, education, literacy, and economic vulnerability. *Id.* The criteria for this designation are available at http://www.un.org/special-rep/ohrlls/ldc/ldc%20criteria.htm. *Id.* at 1235 n.5. Industrial countries had until January 1996 to conform to TRIPS' standards, and developing and transition economies had until January 2000. Finger, *supra* note 21, at 429 n.2. The WTO has 109 developing and transition economy members. *Id.* at 435.

[68] CORREA, *supra* note 54, at 271.

[69] TRIPS, *supra* note 20, arts. 27–34; CORREA, *supra* note 54, at 271.

[70] *See* TRIPS, *supra* note 20, arts. 27–34.

[71] *Id.* art. 27; CORREA, *supra* note 54, at 271. When TRIPS was negotiated, about fifty countries did not grant patent protection to pharmaceuticals. *Id.*

[72] TRIPS, *supra* note 20, art. 33; Peng Jiang, Comment, *Fighting the Aids Epidemic: China's Options Under the WTO TRIPS Agreement*, 13 ALB. L.J. SCI. & TECH. 223, 228–29 (2002).

[73] *See* Shubham Chaudhuri et al., *The Effects of Extending Intellectual Property Rights Protection to Developing Countries: A Case Study of the Indian Pharmaceutical Market* 35 (Nat'l Bureau of Econ. Research, Working Paper No. 10159, 2003), *available at* http://www.nber.org/papers/W10159.

[74] *Id.*

[75] TRIPS, *supra* note 20, art. 31.

a patent holder's claims in cases of national or extreme emergency.[76] Such an exception is known as a compulsory license.[77] Compulsory licensing—authorization by a government to use a patented product absent an owner's permission—is one way to ensure availability of cutting-edge drugs in nations that are unable to afford them.[78]

Certain conditions accompany such use.[79] The proposed user must "[make] efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time."[80] Yet, "in the case of a national emergency or other circumstance of extreme urgency" the above-mentioned requirement may be bypassed, as long as the right holder is "notified as soon as reasonably practical."[81]

Unfortunately, Article 31 also imposes a condition that has rendered the provision essentially useless to many developing countries.[82] Article 31(f) limits use to situations "predominantly for the supply of the domestic market of the Member authorizing such use."[83] That is, a country may issue a compulsory license only to a domestic manufacturer.[84] This creates a precarious situation, because the countries that need the drugs the most are countries that do not have manufacturing capabilities.[85] Under this provision, compulsory export licenses cannot be conferred upon non-domestic suppliers, and manufacturers in one country cannot infringe on a patent in order to supply another country in need.[86] Accordingly, Article 31 has not been used by those who need low-cost drugs the most.[87]

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[76] *Id.* art. 31(b).

[77] *Id.*

[78] James Packard Love, Knowledge Ecology Int'l, Recent Examples of the Use of Compulsory Licenses on Patents 2 (2007), *available at* http://www.keionline.org/misc-docs/recent_cls_8mar07.pdf.

[79] *See* TRIPS, *supra* note 20, art. 31(b).

[80] *Id.*

[81] *Id.* Additionally, the scope and duration of use must be limited to the purpose for which it was authorized and use must be non-exclusive and non-assignable. *Id.* art. 31(c)–(e).

[82] *See* Nardi, *supra* note 60.

[83] TRIPS, *supra* note 20, art. 31(f).

[84] *See id.*

[85] Matthew Royle, *Compulsory Licensing and Access to Drugs*, Pharma Marketletter (U.K.), Dec. 17, 2007 (on file with author).

[86] *See* TRIPS, *supra* note 20, art. 31(f).

[87] *See* Nardi, *supra* note 60.

D. *The Doha Declaration of 2001*

In 2001, the WTO took initial steps to respond to the problem Article 31(f) posed.[88] On November 14, following the WTO's Ministerial Conference at Doha, Qatar, the Declaration on the TRIPS Agreement and Public Health was issued.[89] This is colloquially referred to as the Doha Declaration.[90] The Doha Declaration did not set out specific solutions, but rather publicly recognized problems and uncertainty with TRIPS and committed to developing remedies.[91] The ministers agreed that TRIPS should be interpreted and implemented in a way that supports public health.[92] In addition, they committed the WTO to creating flexibility for countries unable to manufacture pharmaceuticals domestically.[93] Paragraph six of the Declaration reads:

> We recognize that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002.[94]

In making this declaration the WTO ministers took the opportunity to encourage member-states' right to make use of Article 31, and reiterated their prerogative to circumvent patent rights in order to secure better domestic access to necessary medicines.[95]

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[88] *See* Doha Declaration, *supra* note 28, ¶¶ 4, 6.
[89] *Id.* ¶¶ 1–7.
[90] *Id.*
[91] *Id.*
[92] *Id.* ¶ 4.
[93] Doha Declaration, *supra* note 28, ¶ 5.
[94] *Id.* ¶ 6.
[95] *Id.* ¶¶ 4–6. Paragraphs four and five read:

> 4. The TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all. In this connection, we reaffirm the right of WTO Members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.
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> 5. Accordingly and in the light of paragraph 4 above, while maintaining our commitments in the TRIPS Agreement, we recognize that these flexibilities include: (a) In applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular,

E. *The Waiver of 2003*

Two years later, on August 30, 2003, the WTO General Council announced a solution.[96] The solution, in the form of an interim waiver, allows developed countries to export medicines to needier countries with national health problems.[97] Article 31bis, eponymously "Paragraph Six," amends Article 31 to allow compulsory export licenses for "products of the pharmaceutical sector needed to address the public health problems."[98]

In contrast with Article 31(f)—which restricts compulsory licenses to internal use—Article 31bis authorizes a developed member-state to compel compulsory licenses from its own manufacturers, create generic versions of medications, and export those medications to countries in need.[99] An exporting member must devise a license designating that it will: produce only the amount necessary to meet the needs of the importing member, export the entirety of the production to the specified country, clearly identify products as generic versions under this exception (including distinguishing the products through special packaging, coloring, and/or shaping), post on a website the quantities being supplied to each destination and the distinguishing features of the generic product.[100]

On its end, an importing member must specify the names and expected quantities of product needed and, if the desired medicine is patented in its territory, confirm that it has issued a compulsory li-

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> in its objectives and principles; (b) Each Member has the right to grant compulsory licences [sic] and the freedom to determine the grounds upon which such licences [sic] are granted; (c) Each Member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency; [and] (d) The effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each Member free to establish its own regime for such exhaustion without challenge, subject to the MFN and national treatment provisions of Articles 3 and 4.

Id. ¶¶ 4–5.

[96] WTO General Council, *supra* note 32. The WTO Director-General praised the result, commenting that "it proves once and for all that the organization can handle humanitarian as well as trade concerns." Press Release, World Trade Org., Decision Removes Final Patent Obstacle to Cheap Drug Imports (Aug. 30, 2003) [hereinafter WTO Aug. 30, 2003 Press Release], *available at* http://www.wto.org/english/news_e/pres03_e/pr350_e.htm.

[97] WTO Aug. 30, 2003 Press Release, *supra* note 96.

[98] WTO General Council, *supra* note 32.

[99] *Id.*

[100] *Id.* ¶ 2(b)(i)–(iii).

cense.[101] In addition, an importing member-state must fulfill one of two conditions: it must be a least-developed country, or it must make a convincing case that it has insufficient or no manufacturing capacity for the product it seeks.[102] All WTO members are eligible to import medicines under Article 31bis.[103]

The provision immediately, however, was resisted.[104] Right away, twenty-three members, all developed countries, voluntarily vowed not to use the system to import.[105] Others committed to only using the provision in real emergencies.[106] Some developed countries urged instituting constraints on the scope of covered diseases.[107] The United States, for one, specifically sought to restrict application to HIV/AIDS, malaria, tuberculosis, and a few other specific diseases.[108] The European Commission suggested making a list of "grave" public health problems.[109] Pharmaceutical companies generally oppose compulsory licensing, claiming that it hurts research and development for new medicines.[110]

Conversely, developing countries worked to expand the definition of eligible diseases and treatments.[111] This time, the developing countries were most successful in negotiations.[112] The resulting waiver defined the covered subject matter broadly, and permitted compulsory licensing for all products in "the pharmaceutical sector needed to address the public health problems as recognized in paragraph 1 of

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[101] *Id.* ¶ 2(a)(i), (iii).

[102] *Id.* ¶ 2(a)(ii).

[103] WTO General Council, *supra* note 32, ¶ 1(b).

[104] *Id.*; Abbott & Reichman, *supra* note 20, at 933.

[105] WTO General Council, *supra* note 32, ¶ 1(b). These countries are: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, the United Kingdom and the United States. *Id.* n.3.

[106] WTO Aug. 30, 2003 Press Release, *supra* note 96. These countries include: Hong Kong, Israel, Korea, Kuwait, Macao China, Mexico, Qatar, Singapore, Chinese Taipei, Turkey, and the United Arab Emirates. *Id.*

[107] Abbott & Reichman, *supra* note 20, at 936.

[108] *Id.*

[109] *Id.* This idea failed, in part, because it could be arbitrary for trade officials to decide which diseases were covered and which were not. *Id.*

[110] *Id.* at 953–54.

[111] Abbott & Reichman, *supra* note 20, at 953–54

[112] *Id.* at 937. The scope of medications and treatments covered in the pending amendment is broad. WTO General Council, *supra* note 32, ¶ 1(a).

the Doha Declaration."[113] Paragraph 1 has no limitation on specific diseases or medicines.[114]

The United States also advocated that the waiver "not be [used] for commercial gain."[115] This, too, was rejected by developing countries.[116] The WTO chair of the General Council did, however, issue a statement that, "members recognize that the system that will be established by the Decision should be used in good faith to protect the public health and . . . not be an instrument to pursue industrial or commercial policy objectives."[117]

F. *The Amendment of 2005: Article 31bis*

On December 6, 2005, the waiver became the first-ever amendment to TRIPS.[118] Designated as Article 31bis, and alternatively identified as a "Protocol Amending the TRIPS Agreement," the amendment will be permanently attached to the TRIPS agreement following Article 31 once it is duly accepted.[119] It will be accepted when two-thirds of WTO-members ratify it.[120]

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[113] Abbott & Reichman, *supra* note 20, at 937.

[114] WTO General Council, *supra* note 32, ¶ 1(a). Paragraph 1 of the Doha Agreement reads, "[w]e recognize the gravity of the public health problems afflicting many developing and least developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics." Doha Declaration, *supra* note 28, ¶ 1.

[115] Abbott & Reichman, *supra* note 20, at 946.

[116] *Id.*

[117] *Id.* at 945–46.

[118] WTO Dec. 6, 2005, *supra* note 34 (noting that the proposed amendment marked "the first time a core WTO agreement [was] amended"); World Trade Organization, Amendment of the TRIPS Agreement, Decision of Dec. 6, 2005, WT/L/641, (Dec. 6, 2005) [hereinafter WTO Decision of Dec. 6, 2005]. The amendment is a compromise among members representing interests of 1) researching and developing, 2) manufacturing and developing, 3) prescribing and treating, and 4) advocating on behalf of patients. Abbott & Reichman, *supra* note 20, at 984.

[119] WTO Decision of Dec. 6, 2005, *supra* note 118; WTO Aug. 30, 2003 Press Release, *supra* note 96.

[120] World Trade Org., Members Accepting Amendment of the TRIPS Agreement, http://www.wto.org/english/tratop_e/trips_e/amendment_e.htm (last visited Oct. 10, 2008) [hereinafter WTO, Members Accepting Amendment]. In April 2008, Taiwan was the latest to approve the amendment. Ben Shankland, *TRIPS Amendment to Ease Generic Drug Exports Gets Cabinet Approval in Taiwan*, World Markets Research Centre, Apr. 3, 2008 (on file with author). The country still needs to adopt it. *Id.* The proposed amendment was initially open for acceptance until December 1, 2007. WTO Decision of Dec. 6, 2005, *supra* note 118. The final date was later amended to December 31, 2009. World Trade Org., Decision of the General Council of 18 December 2007, Amendment of the TRIPS Agreement—Extension of the Period for the Acceptance by Members of the Protocol Amending the TRIPS Agreement, WT/L/711 (2007) [hereinafter WTO, Extension for Acceptance].

III. Use of the Amendment

A. *Adoption and Creation of Corresponding Legislation*

Member-states have slowly, but gradually, adopted the amendment.[121] By August 2008, forty-four WTO member-states—approximately twenty-nine percent—had ratified Article 31bis.[122] Canada, in May 2004, was the first to implement law to carry out the amendment's mission.[123] The Canadian government passed *An Act to Amend the Patent Act and Food and Drug Act*, legislation authorizing Canada's Commissioner of Patents to grant compulsory licenses permitting the manufacture and export of low-cost versions of patented pharmaceuticals.[124] To facilitate this task, the Act established a legal framework, titled Canada's Access to Medicines Regime (CAMR), which took form the following year.[125]

CAMR's goal is to facilitate timely access to generic, low-cost versions of patented drugs to least-developed and developing countries, to fight HIV/AIDS, malaria, tuberculosis, and other diseases.[126] In keeping with the WTO decision's guidelines, CAMR strives to present a process that is as transparent as possible.[127] It defines safety, effectiveness, quality, and issuance requirements for drugs to be exported.[128]

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[121] *See* WTO, Members Accepting Amendment, *supra* note 120.

[122] *Id.* In ascending order, member-states who have accepted the amendment are as follows: United States (December 2005), Switzerland (September 2006), El Salvador (September 2006), Republic of Korea (January 2007), Norway (February 2007), India (March 2007), Philippines (March 2007), Israel (August 2007), Japan (August 2007), Australia (September 2007), Singapore (September 2007); Hong Kong (November 2007), China (November 2007), the twenty-seven European Communities (November 2007), Mauritius (April 2008), Egypt (April 2008), Mexico (May 2008) and Jordan (August 2008). *Id.* Because less than half the necessary member-states had endorsed the waiver, the WTO extended the deadline from December 2007 to December 2009. WTO, Extension for Acceptance, *supra* note 120. The document granting the extension explains that acceptance by two-thirds of members "is taking longer than initially foreseen." *Id.*

[123] Canada's Access to Medicines Regime (CAMR), Background, http://camr-rcam.hc-sc.gc.ca/intro/context_e.html (last visited Oct. 10, 2008) [hereinafter CAMR, Background].

[124] *Id.*

[125] Douglas Clark & Brigitte Zirger, Government of Canada, Canada's Access to Medicines Regime—Consultation Paper 2, (2006), http://camr-rcam.hc-sc.gc.ca/review-reviser/camr_rcam_consult_e.pdf. The act is also known as "Bill C-9" and the "Jean Chrétien Pledge to Africa." CAMR, Background, *supra* note 123; Clark & Zirger, *supra*, at 13 n.3.

[126] CAMR, Background, *supra* note 123.

[127] Canada's Access to Medicines Regime (CAMR), Features of the Regime, http://camr-rcam.hc-sc.gc.ca/intro/regime_e.html (last visited Oct. 10, 2008) [hereinafter CAMR, Features of the Regime].

[128] *Id.*

Generally, it limits eligible pharmaceuticals to the World Health Organization's Model List of Essential Medicines, but reserves the right to add products to the list.[129] CAMR permits exportation to all countries, regardless of WTO-member status.[130] In order to distinguish them from the patented versions sold in Canada, CAMR requires that the generic drugs be distinguished by special markings, coloring, and labeling.[131] If the cost of the resulting generic product turns out to be more than twenty-five percent of the cost of the patented version in Canada, the framework authorizes patent holders to challenge a compulsory license in court.[132] It also sanctions Health Canada to expeditiously review requests for the drugs in order to avoid delay in emergencies.[133]

Norway, the Netherlands, India, Korea, and China followed suit.[134] In June 2006, the European Union (EU) passed Regulation 816/2006.[135] Article One of Regulation 816/2006 similarly "establishes a procedure for the grant of compulsory licenses in relation to patents concerning the manufacture and sale of pharmaceutical products, when such products are intended for export to eligible importing countries in need of such products in order to address public health problems."[136] Article Four permits exportation of generic versions of patented medications to all countries with insufficient manufacturing capacity and any country recognized by the U.N. as being a least-developed country (LDC).[137]

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[129] *Id.* An up-to-date version of the World Health Organization's Model List of Essential Medicines is available at http://www.who.int/medicines/publications/essentialmedicines/en/. The concept of essential drugs came about in the 1970s, and the first list was published in 1975. WHO, WHO Medicines Strategy, *supra* note 5, at 16.

[130] *See* CAMR, Features of the Regime, *supra* note 127.

[131] *Id.*

[132] *Id.*

[133] *Id.* Health Canada is Canada's federal health department. Government of Canada, About Health Canada, http://www.hc-sc.gc.ca/ahc-asc/index_e.html (last visited Oct. 10, 2008).

[134] Clark & Zirger, *supra* note 125, at 21. Norway passed legislation in June 2004, the Netherlands in December 2004, India in January 2005, Korea in December 2005, China in January 2006, and the EU in June 2006. *Id.* Switzerland drafted an amendment in November 2005, but it was never enacted. *Id.*

[135] Council Regulation 816/2006, Compulsory Licensing of Patents Related to the Manufacture of Pharmaceutical Products for Export to Countries with Public Health Problems 2006 O.J. (L 157) 1.

[136] *Id.* at 2.

[137] *Id.* at 3. The U.N. List of LDCs is available at http://www.un.org/special-rep/ohrlls/ldc/list.htm.

B. *Use*

Despite the handful of countries that have adjusted or created domestic laws to comply with the amendment, and even more that have articulated support for it, to date, only two sets of countries have chosen to make use of Article 31bis.[138]

1. Canada and Rwanda

On July 19, 2007, Rwanda took the first step in the Article 31bis process and informed the WTO of its intention to import compulsory-licensed pharmaceuticals for public health reasons.[139] In September 2007, Canada became the first country to issue a compulsory export license and granted Apotex, a Canadian generic drug manufacturer, permission to supply TriAvir, a combination AIDS drug, to Rwanda.[140]

In keeping with the conditions of the Canadian legislation, Apotex reported failed attempts at negotiations with TriAvir's patent holders, but will go forward with the license, and pay nominal royalties, which are calculated based on the value of the medication and Rwanda's ranking on the U.N. Human Development Index (UNHDI).[141] If the patent-holder is dissatisfied with the amount paid or any of the other

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[138] *See* Sarah Hiddleston, *Manufacture of Patented Drugs for Export Under Study*, HINDU (India), Feb. 24, 2008, at 9.

[139] Royle, *supra* note 85. An estimated 2.1 percent of Rwandans are infected with HIV. Higgins, *supra* note 50. The Rwandan government used the World Bank model forms to issue its notification. Abbott & Reichman, *supra* note 20, at 941–42.

[140] John Boscariol, *Canada Is First to Grant WTO Compulsory Licence for Export of Generic Drug*, MONDAQ BUS. BRIEFING, Nov. 2, 2007, *available at* http://www.mondaq.com/article.asp?articleid=53944. Apotex plans on distributing 250,000 doses. TriAvir is a fixed-dose, three-combination cocktail consisting of zidovudine, lamivudine, and nevirapine. *Id.* Britain's GlaxoSmithKline owns the patents on the first two antiretrovirals; Germany's Boehringer Ingelheim owns the third. *Id.* Apotex's website documents its mission and posts the statement:

> In the quest to bring quality affordable medications to the world, Apotex was the only company to research and develop a Canadian made triple combination AIDS drug under Canada's Access to Medicines Regime (CAMR). As part of our objective to give back to our communities we decided that we would offer Apo-TriAvir on a "not for profit" basis to countries that would apply through the CAMR. Why are we doing this? It's the right thing to do to alleviate human suffering and save the lives of thousands of people who would otherwise die without access to life saving medicines.

Apotex.com, http://www.apotex.com/apotriavir/abouttriavir.asp (last visited Oct. 10, 2008). The company plans to import around 260,000 packs of TriAvir over the span of two years. Royle, *supra* note 85. The generic version will be called Apo-triAvir. Boscariol, *supra*.

[141] Boscariol, *supra* note 140. Rwanda has a low UNHDI ranking, so the royalties paid will likely be low. *Id.*

terms of the license, it may appeal to the Federal Court to terminate the license.[142] To ensure a successful appeal, the patent-holder must demonstrate that the relevant medication had been re-imported to Canada, exported to a country other than Rwanda, or prove that the generic drug is being sold for greater than twenty-five percent than the cost of the patented original.[143] CAMR seeks to guarantee that generic exports are not commercial in nature; that is, the generic manufacturer must not be making a business out of its right to the compulsory license.[144] Furthermore, Apotex is obligated to report to the patent-holder the quantity of medication in each export and the name of the parties that will handle the medication when it is delivered to the receiving country.[145] In September 2008, Apotex was set to send seven million doses of the generic drug.[146]

2. India and Nepal

In early 2008, Nepal became the second country to apply for an import-license under Article 31bis.[147] Indian drug-manufacturer Natco Pharma responded, and sought out a compulsory license to produce generic versions of two anti-cancer drugs.[148] Natco has proposed to manufacture 45,000 doses of the drugs, and, subject to Article 31(h), remunerate the patent-holders a five percent royalty.[149] The Indian government is currently considering the matter.[150] At the end of February 2008, the proceedings were indefinitely postponed to permit one of the patent-holders the opportunity to lobby for the right to attend the full hearing.[151] As of early April, the hearing was still delayed.[152] It is

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[142] *Id.*

[143] *Id.*

[144] Clark & Zirger, *supra* note 125, at 6.

[145] Boscariol, *supra* note 140.

[146] *TRIPS Mechanism Set to Fail as Apotex Ships ARV*, Pharma Marketletter, Sept. 23, 2008 (on file with author).

[147] Hiddleston, *supra* note 138.

[148] *Id.* The two drugs are erlotinib, owned by Swiss company Roche, and sunitinib, owned by the U.S. company Pfizer. *Id.*

[149] *Id.*; TRIPS, *supra* note 20, art. 31(h).

[150] Hiddleston, *supra* note 138. In India, compulsory licenses are governed by S.92A of the Patent Act, which provides that a license will be issued to supply medicines "to any country having insufficient or no manufacturing capacity in the pharmaceutical sector for the concerned product to address public health problems." S.92(A)(1), The Patents (Amendment) Act, 2005, No. 15, Acts of Parliament, 2005.

[151] *"Secret" Compulsory License Hearings in India for Roche's Tarceva Under TRIPS Rule*, Pharma Marketletter, Mar. 18, 2008 (on file with author).

[152] *See id.*

likely that the license will be granted if Natco shows that Nepal lacks the local manufacturing capacity to produce generic drugs and if its order request clearly articulates that the drugs will be used for emergency need.[153]

C. *Disuse*

1. Alternatives

The majority of member-states are not seeking to use Article 31bis.[154] A country in need that does not use the TRIPS provision has limited options in procuring low-cost, life-saving drugs.[155] One option is to solicit drugs from countries that are not WTO-members and do not have patent protection for pharmaceuticals.[156] In November 2006 and May 2007, Thailand and Brazil, respectively, took steps to import efavirenz, a cocktail to treat AIDS symptoms, from India to supply 200,000 people for five years.[157] However, this practice cannot continue much longer, as India is a WTO member and, under international law, must comply with the TRIPS terms in the near future.[158]

A second option is to make use of domestic manufacturers' patented products by using the already-accepted Article 31 to issue compulsory licenses.[159] In January 2007, Thailand granted its drug manufacturers the rights to produce generic versions of Kaletra, an AIDS drug.[160]

2. Obstacles

Countries may not be utilizing the TRIPS provision because of the obstacles it involves.[161] In the aftermath of Canada's application process, the Canadian firm Apotex has been openly critical of the procedure for obtaining a compulsory export license.[162] It says the

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[153] *Id.*

[154] *See* WTO, Members Accepting Amendment, *supra* note 120.

[155] *See, e.g.*, Royle, *supra* note 85; Abbott & Reichman, *supra* note 20, at 950–51.

[156] Abbott & Reichman, *supra* note 20, at 950–51.

[157] Royle, *supra* note 85. Merck & Co. holds the efavirenz patent. *Id.* The waiver decision did not apply to the government-issued licenses issued by Brazil and Thailand. Abbott & Reichman, *supra* note 20, at 950–51.

[158] Westerhaus & Castro, *supra* note 10, at 1233.

[159] Santoro, *supra* note 47.

[160] *Id.* Abbot Laboratories owns the patent for Kaletra. *Id.*

[161] *See, e.g.*, Royle, *supra* note 85.

[162] *Id.*

system was "unnecessarily complex," that it "did not adequately represent the interests of those who required treatment, and that the process delayed the act of supplying for over a year.[163] On the other side, one of the patent-holders issued a press release announcing that it "not only does not object to the grant of this authorization under Canada's Access to Medicines Regime but does support the CIPO (Canada Patent Office) decision in this respect."[164]

But bad press from those who have used Article 31bis is not enough to explain why countries are not issuing compulsory licenses.[165] Developing countries may lack the legal and technical expertise necessary to draft appropriate legislation in compliance of TRIPS.[166] Membership in the WTO requires that member-states adhere to all major WTO treaties, including TRIPS.[167] In order to take advantage of TRIPS's exceptions, a member-state must construct its own laws to come into compliance with the other terms of TRIPS.[168] For example, to comply with TRIPS, the United States had to increase its term of patent protection from seventeen years to the twenty years mandated by TRIPS.[169] The agreement gives countries, depending on their levels of economic development, a certain term of years in which to comply with TRIPS's requirements, and some still have not crafted the required legislation.[170]

WTO rules might be unmanageable and too complicated for poor countries to interpret and utilize.[171] The process for issuing a compulsory license is arduous, as evidenced by Apotex's public comments.[172] First, there must be a national emergency, a term which the WTO does not define.[173] Once an emergency has been identified, the country must request a license from the patent-holder and attempt to agree on licensing terms.[174] Many patent-holders have traditionally taken advan-

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[163] *Id.*

[164] Higgins, *supra* note 50.

[165] *See, e.g.*, John Zarocostas, *WTO to Offer Its Trademark Expertise*, J. Com., Jul. 24, 1998, at 3A.

[166] *Id.*

[167] WTO, FAQs, *supra* note 59.

[168] *See id.*

[169] Love, *supra* note 78, at 3.

[170] TRIPS, *supra* note 20, art. 65.

[171] Westerhaus & Castro, *supra* note 10, at 1232.

[172] TRIPS, *supra* note 20, art. 31(b).

[173] *Id.*

[174] *See* Steven Seidenberg, *Drug Companies Lobby to Stall WTO's New Compulsory License Provision*, Inside Counsel, Feb. 2008, at 20.

tage of this requirement and stretched negotiations on for years.[175] If no agreement is reached, the country must jump through substantial administrative hoops before it can issue a compulsory license.[176]

The exact procedures of issuing a compulsory license remain unclear.[177] As evidenced by international disapproval when Thailand tried to navigate the exception, countries seem to have little support in figuring out the rules and processes.[178] Many of the provisions are undefined, and, until recently, have gone untested.[179] For example, the term "developing country" remains without a universal definition: EU Commissioner Peter Mandelson argued that Thailand did not fit into this category, but the issue was never concretely resolved.[180]

3. Resistance

Experience shows that when a country does decide to invoke Article 31, it is received with animosity.[181] When Thailand issued a compulsory license in 2007, both the United States and the European Union condemned its actions, censuring the country and putting it on a "priority watch list."[182]

Furthermore, countries, developed and developing alike, don't want to make enemies of powerful drug companies.[183] MNCs are powerful international entities that bring jobs and economic stabil-

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[175] *Id.*

[176] *Id.*

[177] *See* Westerhaus & Castro, *supra* note 10, at 1231.

[178] *See id.*

[179] *Id.*

[180] *European Parliament in Push for Greater Access to Generic Drugs*, World Generic Mkts., Nov. 7, 2007; Santoro, *supra* note 47; Westerhaus & Castro, *supra* note 10, at 1231.

[181] *See* Santoro, *supra* note 47.

[182] *Id.* The U.S. Trade Representative stated that:

> [I]n Thailand, in late 2006 and 2007, there were further indications of a weakening of respect for patents, as the Thai government announced decisions to issue compulsory licenses for several patented pharmaceutical products. While the United States acknowledges a country's ability to issue such licenses in accordance with WTO rules, the lack of transparency and due process exhibited in Thailand represents a serious concern. These actions have compounded previously expressed concerns such as delay in the granting of patents and weak protection against unfair commercial use for data generated to obtain marketing approval.

Abbott & Reichman, *supra* note 20, at 954.

[183] Santoro, *supra* note 47; Seidenberg, *supra* note 174.

ity.[184] To cross them might mean losing them.[185] Developing countries and least-developed countries are resistant to bypassing patents of powerful pharmaceuticals because they do not want to scare them off or detract future investors.[186] Governments of countries plagued with disease are faced with a double-edged sword.[187] They feel the need to help their people, yet do not want to blacklist themselves with corporations that could affect their economic sustainability in the future.[188]

Pharmaceutical companies have many reasons to feel threatened by compulsory licensing.[189] One concern is that countries that take advantage of compulsory licensing will resell the drugs in developed countries to make a profit instead of providing them to their own people.[190] Pharmaceutical companies are also concerned that if manufacturers lower their prices in some countries, political pressure will mount in developed countries for the companies to lower their prices to comparable levels.[191] Additionally, companies fear that once one developing country uses Article 31, many other countries will follow suit, and create a domino effect of issuing cheap medicines.[192] Seventy percent of the world's forty million people currently infected with HIV/AIDS live in Africa, a continent full of countries eligible to use Article 31.[193] Pharmaceutical companies worry that if one African country successfully navigates the exception, the rest will follow.[194]

IV. How to Get Drugs to Countries in Need

Rwandan Jennifer Uwimana is just one success story that shows the life-saving effects of accessing necessary treatments.[195] In 2006, at age one, Uwimana suffered from AIDS and tuberculosis and weighed

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[184] H.D.S. Greenway, Op-Ed., *Globalism Reaches Deep into Our Lives*, Boston Globe, May 17, 2002, at A19.

[185] Jerome H. Reichman & Catherine Hasenzahl, *Non-Voluntary Licensing of Patented Inventions: Historical Perspective, Legal Framework Under TRIPS, and an Overview of the Practice in Canada and the USA* 6 (2003), *available at* http://www.ictsd.org/pubs/ictsd_series/iprs/CS_reichman_hasenzahl.pdf.

[186] Seidenberg, *supra* note 174.

[187] *See* Santoro, *supra* note 47.

[188] *Id.*

[189] Seidenberg, *supra* note 174.

[190] *Id.*

[191] *See id.*

[192] Santoro, *supra* note 47; Seidenberg, *supra* note 174.

[193] Santoro, *supra* note 47; Seidenberg, *supra* note 174.

[194] *See* Santoro, *supra* note 47; Seidenberg, *supra* note 174.

[195] Langrath, *supra* note 8.

just forty percent of normal weight.[196] Because her mother was able to get Uwimana to a clinic, the toddler now has a healthy weight and receives treatment for her HIV infection.[197]

A. *Lower Drug Prices*

The cost of treatments for infectious diseases must be reduced.[198] New York University economist William Easterly believes millions of people every year in developing countries are not dying from infectious diseases such as malaria and tuberculosis, but rather from conditions that do not have scientific names such as lack of basic prerequisites necessary for delivering care.[199] In order to get the international community to take these conditions seriously, Easterly wants to assign important-sounding Latin names to situations such as "missing health worker," or "stolen drugs."[200] Another killer, that he does not mention, might as well be "expensive treatments."[201]

To ease pain and suffering, drugs need to be made more affordable.[202] There are many cases that prove that infectious diseases can be eradicated through providing adequate medication to those in need.[203] The program of major pharmaceutical giant, Merck, to tackle onchocerciasis (river blindness which is spread by black flies in parts of Africa) has treated over 530 million cases with its antiparasitic ivermectin, and has prevented 40,000 cases per year.[204] The efforts of the Carter Center to confront cases of Guinea worm (a parasite that slowly burns through the skin) have reduced the number of infections from 3.5 million in 1986 to 25,000 in 2007.[205] However, there are only so many private donors and good-will grants.[206] A more comprehensive plan must

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[196] *Id.*

[197] *Id.*

[198] *See* Attaran & Gillespie-White, *supra* note 19, at 1891. Poor countries cannot pay for treatments. *Id.* Indeed, even if antiretroviral drug prices continue to decline, the poorest nations still will not be able to afford them. *Id.*

[199] Langrath, *supra* note 8.

[200] *Id.*

[201] *See id.*

[202] Attaran & Gillespie-White, *supra* note 19, at 1891.

[203] *See* Langrath, *supra* note 8.

[204] *Id.*

[205] *Id.*

[206] *See* WHO, WHO Medicines Strategy, *supra* note 5, at 57. Private sources of funding have become more important in the past decade, but countries with high HIV/AIDS mortality are still incapable of spending the necessary amount on medicines. *Id.*

be established to ensure the availability of low-cost generic medications.[207]

B. *Recognize That Compulsory Licensing Does Not Stifle Innovation*

A fundamental theory of patent law is to provide market-driven incentives, that is, full economic rewards, to a creator in order to get him or her to devote time and money to developing an innovative product.[208] Pharmaceutical manufacturers argue that compulsory licensing undermines the production of new drugs by stifling innovation.[209]

At first glance, this assertion makes sense.[210] However, it has frequently proven to be a weak argument.[211] First, studies demonstrate that there is no uniform decline in scientific innovation when compulsory licensing is put in play.[212] Second, more than half of all retroviral drugs, such as the one replicated by Thailand, were researched completely on funding from U.S. grants.[213] In the United States, pharmaceutical companies receive extensive tax breaks on research and development of medicines.[214] These studies have revealed that pharmaceutical companies actually spend seventy-five percent less than what they claim to spend in order to create a drug.[215] Furthermore, of the twenty-one most influential drugs introduced between 1965 and 1992, only five were developed entirely by the private sector.[216] Third, current patent protection has not created incentives to develop drugs most needed by developing countries, such as medicines to treat malaria and tuberculosis.[217]

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[207] *See id.*

[208] Merges et al., *supra* note 58, at 127. The U.S. Constitution and U.S. case law frequently emphasize the incentive theory. *Id.* at 11.

[209] Westerhaus & Castro, *supra* note 10, at 1232.

[210] *See* Merges et al., *supra* note 58, at 10–17.

[211] *See* Colleen Chien, *Cheap Drugs at What Price to Innovation: Does the Compulsory Licensing of Pharmaceuticals Hurt Innovation?*, 18 Berkeley Tech. L.J. 853, 876–78 (2003).

[212] *Id.* at 877.

[213] Santoro, *supra* note 47.

[214] *How Much Does It Really Cost to Manufacture a Drug?*, Guardian (London) (Special Supplement), Feb. 18, 2003, at 10.

[215] *Id.*

[216] Cong. Budget Office, Research and Development in the Pharmaceutical Industry 27 n.1 (2006), *available at* http://www.cbo.gov/ftpdocs/76xx/doc7615/10–02-DrugR-D.pdf.

[217] Attaran & Gillespie-White, *supra* note 19, at 1890; Pécoul et al., *supra* note 56, at 364.

Indeed, between 1975 and 1997, only 13 out of 1223 new drugs were specifically targeted towards diseases disproportionately affecting developing countries.[218] There is little economic incentive to cater to antiretroviral drug research in developing countries as opposed to more profitable markets such as that of the United States.[219] Other reasons large pharmaceutical companies have little interest in patent protection in the developing world are costs of litigation and poor judicial systems.[220]

In a study published in 2003, attorney Colleen Chien explored whether past compulsory licenses over drugs were accompanied by a reduction in innovation, and found that in five of the six cases she studied, there was no measurable decline.[221]

Furthermore, the argument that patents are provided to encourage innovation and ensure further research and development is getting in the way of accomplishing the purpose for which these medicines should be created.[222] That is, medicines should be made to treat sickness and disease. But if these same medicines are unavailable to those who can most benefit from them (because of high costs or other factors), the reasons for their existence cease to matter.[223]

Existing research suggests that two factors must be present for compulsory licenses to affect innovation: predictability of the license being granted and the significance of the market affected by the license.[224]

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[218] Pécoul et al., *supra* note 56, at 364. Two of the thirteen were updated versions of existing treatments. *Id.* Only four of the thirteen were direct results of research and development by the pharmaceutical industry. *Id.*

[219] Attaran & Gillespie-White, *supra* note 19, at 1890. The African pharmaceutical market is only 1.1% of the global market. *Id.* The market share of antiretroviral drugs sold to the poorest third of the world is a mere 0.5%. *Id.*

[220] *Id.*

[221] Chien, *supra* note 211, at 856–57. Chien studied six cases in which the Federal Trade Commission (FTC) issued compulsory pharmaceutical licenses in the 1980s and 1990s for antitrust purposes. *Id.* at 880–81.

[222] *See* Correa, *supra* note 54, at 275; Merrill Goozner, The $800 Million Pill: The Truth Behind the Cost of New Drugs 237 (2004). In November 2001, the Tufts University Center for the Study of Drug Development, predominantly funded by the pharmaceutical industry, released an estimate that the average cost of a new drug was $802 million. Goozner, *supra.* The researchers attribute this price to the cost of research and development. *Id.*

[223] *See* Westerhaus & Castro, *supra* note 10, at 1232.

[224] Chien, *supra* note 211, at 880. These factors are necessary, but not sufficient. *Id.* at 881.

C. *Encourage Compulsory Licensing*

Compulsory licensing is one way, both directly and indirectly, to advance access to medicines.[225] Directly, compulsory licensing bypasses a patent holder's IPRs and allows for cheaper, generic versions to be manufactured.[226] Rwanda and Canada, and most recently, Nepal and India, have sought to use this route of obtaining affordable medications.[227] Indirectly, compulsory licensing often forces patent-holders to lower their prices significantly in order to remain the sole provider of a medicine.[228] In some cases, the pending amendment worries pharmaceutical companies.[229] As a result, backed by the threat of compulsory licensing, poorer governments have been enabled to negotiate lower prices with drug companies.[230] Thailand, for example, was able to produce low-cost generic drugs by dishonoring a patent.[231] By doing so, multinational pharmaceutical companies dropped their prices significantly.[232]

Another sixty WTO members are still required to ratify Article 31bis, but, along with the rest of Article 31, it has potential to increase drug accessibility.[233]

D. *Follow the Lead of Canada*

Canada appears to be an achievable prototype to follow since the country has a vibrant history of freely and comprehensively issuing

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[225] *See* Abbott & Reichman, *supra* note 20, at 953; *Activists Say Thai Generic Drugs Scheme "Beacon" for Poor*, Nov. 24, 2007, *available at* http://www.essentialaction.org/access/index.php?/archives/90-Thai-Generic-Drugs-Scheme-a-Beacon-for-Poor-Activists.html.

[226] *Activists Say Thai Generic Drugs Scheme "Beacon" for Poor, supra* note 225.

[227] Hiddleston, *supra* note 138; Higgins, *supra* note 50.

[228] *See* Abbott & Reichman, *supra* note 20, at 953. After the Thai government issued a public use license for Merck's efavirenz, Merck reduced its price from double the generic cost to only twenty percent more than the generic cost. *Id.*

[229] Seidenberg, *supra* note 174.

[230] Abbott & Reichman, *supra* note 20, at 953.

[231] Sarah Boseley, *Trade Terrorism: U.S. Attempts to Stop Developing Countries Producing Cheap AIDS Drugs Have Become a Political Bomb*, GUARDIAN (London), Aug. 11, 1999, at 18.

[232] *Id.* In 1992, the AIDS drug zidovudine cost $324 per dosage in Thailand. *Id.* By 1995, the manufacturer reduced it to $87. *Id.* Similarly, once three Thai companies began making a generic version of fluconazole (an antibiotic used to treat meningitis), Pfizer dropped its price of the brand version from $14 a dose to $1 a dose. *Id.*

[233] *See European Parliament in Push for Greater Access to Generic Drugs, supra* note 180. Fifty-six member-states were needed as of March 2008. *Id.*; WTO, Members Accepting Amendment, *supra* note 120.

compulsory licenses on patented pharmaceuticals.[234] Studies show that innovation in Canada has not been curbed, and, in the past century, the country has been able to build a strong domestic generic drug industry in order to stop patent abuse.[235] Making use of its history in dealing with patent-holders and generic manufacturers, in implementing the provisions of Article 31bis, the Canadian government engaged in meaningful discussions with major players that would be affected by its decision.[236]

The United States's experience with compulsory licenses is markedly different.[237] In a 1980 decision, the Supreme Court noted that usage of compulsory licensing in the American patent system was rare and was never widely adopted.[238] That said, the United States frequently uses compulsory licensing as a remedy to antitrust violations.[239] The United States has also threatened to use Article 31 many times in the past.[240] And the United States is an important player in the pharmaceutical world. In the 1990s, one half of the global pharmaceutical innovation, 370 new drugs, was created by U.S. industry.[241]

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[234] *See* Chien, *supra* note 212, at 876; Reichman & Hasenzahl, *supra* note 185, at 20. Throughout the twentieth century, Canada had a policy of encouraging local manufacture of patented products. Reichman & Hasenzahl, *supra* note 185, at 20. Prior to the 1930s, local licensing had to occur within two-years after the patent was issued. *Id.* The 1935, 1970, and 1985 revisions of the Patent Act loosened this policy a little in favor of patent protection, but still liberally granted compulsory licenses in the face of any patent abuse. *Id.* Reasons for this policy included "made-in-Canada for Canada" pride and an interest in promoting the public interest, even at the expense of patent rights. *Id.*

[235] Chien, *supra* note 212, at 876. In a 1985 comparison of research and development intensities in Canada to intensities in other small, developed countries, the Eastman Commission found that compulsory licensing did not significantly affect innovation under Canada's system. *Id.* at 877. Instead, lack of Canadian patent protection had minimal influence on research and development. *Id.*

[236] CAMR, Features of the Regime, *supra* note 127; *see* Clark & Zirger, *supra* note 125, at 12.

[237] *See* Reichman & Hasenzahl, *supra* note 185, at 21.

[238] Dawson Chemical Co. v. Rohm & Haas Co., 448 U.S. 176, 215 & n.21 (1980).

[239] Correa, *supra* note 54, at 313. *See, e.g.*, United States v. Nat'l Lead Co., 332 U.S. 319 (1947); Hartford-Empire Co. v. United States, 323 U.S. 386 (1945).

[240] Love, *supra* note 78, at 3–4. In 2001, Department of Health and Human Services (DHHS) Secretary Tommy Thompson threatened to use a compulsory license to authorize imports of generic ciprofloxacin to be used against a possible anthrax attack. *Id.* at 3. In November 2005, DHHS Secretary Michael Levitt testified before Congress that he had required the patent owners of Tamiflu, an avian flu medication, to make their drug available in bulk in the United States should there be a pandemic. *Id.* In a case that came to a head in 2007, Zoltek Corporation, who holds a patent on a process for making material used in F-22 fighter jets, complained that the United States government was importing the product from an unlicensed manufacturer abroad and not paying royalties to Zoltek. *Id.* at 3–4.

[241] Goozner, *supra* note 222, at 7.

Conclusion

Millions of lives are unnecessarily lost every year because of the price of medications. With studies that show that compulsory licensing does not significantly inhibit innovation or production, these prices are unnecessarily high as well. In order to improve world health, all countries with people suffering from treatable diseases *must* be able to afford medicines that can save their lives. Though the United States, for one, has always used a market-based approach in encouraging the creation of new medicines, financial reward is not the only inducement that incentivizes innovation. In an essay and art contest—titled, What I Really Want That Money Can't Buy— "an overwhelming number [of entrants] identified world peace as the number one thing they want that money can't buy."[242] Improving the quality of life and ultimately saving lives for the people of just one African country suffering from treatable diseases is enough to qualify as creating world peace.

The privately-funded and good-will projects that have been carried out show that putting medications into the hands of sick people *will* save lives. Small pox has been eradicated and measles is at an all-time low.

The lobbying powers of pharmaceutical companies will always be mammoth and intimidating. It is up to the developed countries, such as the United States, to issue compulsory licenses and help provide for suffering people. Developing countries will understandably be hesitant in standing up to these interests, and it is up to the wealthier and more influential to care for those in need.

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[242] Betsy Taylor, What Kids Really Want That Money Can't Buy: Tips for Parenting in a Commercialized World 110 (2004). Over 1700 entries were considered in the contest. New American Dream, Essay/Art Contest, http://www.newdream.org/kids/contest.php (last visited Oct. 10, 2008).

PARENTS INVOLVED IN COMMUNITY SCHOOLS v. SEATTLE SCHOOL DISTRICT NO. 1: THE APPLICATION OF STRICT SCRUTINY TO RACE-CONSCIOUS STUDENT ASSIGNMENT POLICIES IN K–12 PUBLIC SCHOOLS

Nicole Love*

Abstract: Schools nationwide have used race-conscious student assignment policies to combat the resegregation of K–12 public schools. However, the Court in *Parents Involved in Community Schools v. Seattle School District No. 1* dealt a disheartening blow to school districts concerned about their racial diversity, holding that certain race-conscious student assignment policies violated the Equal Protection Clause of the Fourteenth Amendment. The Court applied strict scrutiny in reaching this conclusion, contrary to the original intent of the drafters of the Fourteenth Amendment and the Court's jurisprudence in desegregation cases. This Note examines the relationship between segregation, desegregation, and resegregation in America's public schools and the Fourteenth Amendment. This Note argues that the Court erred in analyzing the race-conscious assignment policies under strict scrutiny for two reasons. First, the drafters of the Fourteenth Amendment did not intend for the Amendment to be "colorblind." Second, race-conscious assignment policies should be analyzed as an extension of the Court's desegregation jurisprudence, not as an extension of the Court's affirmative action jurisprudence.

Introduction

Each autumn, children across the country prepare for a new school year. They gather their books, grab their lunch bags, and wave goodbye to summer as they head off to school. In Jefferson County, Kentucky, Joshua McDonald was preparing for his first day of kindergarten.[1] Joshua and his mother Crystal Meredith had just moved into a

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[1] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2750 (2007).

new school district and missed the assignment period.[2] Joshua was assigned to attend Young Elementary, but Ms. Meredith tried to transfer him to Bloom Elementary, located much closer to their home.[3]

There was space available at Bloom, but her request for transfer was denied.[4] The school's policy on assignments was based first on the availability of spaces and then on racial guidelines.[5] "If a school has reached the 'extremes of the racial guidelines,' a student whose race would contribute to the school's racial imbalance will not be assigned there."[6] Bloom had reached the extremes.[7] Ms. Meredith received a letter stating that "[t]he office of student services disapproved the transfer request" because of its "adverse effect on desegregation compliance."[8] Joshua was not permitted to attend Bloom because of his race.[9] The year was 2002.[10]

Similarly, across the country in Seattle, Washington, Andy Meeks was preparing to enter ninth grade.[11] Jill Kurfirst, Andy's mother, at-

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[2] *Id.* Students are first designated a "resides" school based upon the students' geographic locations within the district. *Id.* at 2749–50. Elementary schools are grouped into clusters to facilitate integration. *Id.* Each May, the district permits parents of kindergartners, first-graders, and students new to the district to submit school preferences among the schools in the cluster. *Id.* at 2749. Students who do not submit a preference are assigned to their "resides" school. *Id.*

[3] *Id.* at 2750.

[4] *Id.*

[5] *Id.* at 2749–50. Jefferson County adopted a voluntary student assignment plan in 2001 after the district court dissolved a 1975 desegregation decree. *Id.* at 2749; Hampton v. Jefferson County Bd. of Educ., 102 F. Supp. 2d 358, 360 (2000). The decree was initially entered after a federal court, in 1973, found that Jefferson County had maintained a segregated school system. *Hampton*, 102 F. Supp. 2d at 360. It was operable in Jefferson County until 2000, when the district court found that "the district had achieved unitary status by eliminating '[t]o the greatest extent practicable' the vestiges of its prior policy of segregation." *Id.*

[6] *Parents Involved*, 127 S. Ct. at 2749–50. The adopted voluntary student assignment plan required that all nonmagnet schools maintain a black enrollment of fifteen to fifty percent. *Id.* at 2749 (citing McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 839–40 (W.D. Ky. 2004)). A school is deemed to have reached the "extremes" of these racial guidelines when the black enrollment is outside of this range. *See id.* Students may request transfers for any number of reasons, and may be denied because of a lack of available space or on the basis of the racial guidelines. *Id.* at 2750.

[7] *Id.* at 2750.

[8] *Id.*; *see* Nina Totenberg, *Supreme Court to Weigh Schools' Racial Plans*, (National Public Radio broadcast Dec. 4, 2006), *available at* http://www.npr.org/templates/story/story.php?storyId=6567985.

[9] *Parents Involved*, 127 S. Ct. at 2750.

[10] *Id.*

[11] *Id.* at 2748.

tempted to enroll him at Ballard High School.[12] The school had a special Biotechnology Career Academy.[13] Ms. Kurfirst and Andy's teachers thought the smaller program and hands-on instruction would help Andy continue to progress, despite his attention deficit hyperactivity disorder and dyslexia.[14] The district had a policy that permitted incoming ninth graders to rank the local high schools in order of preference.[15] Andy was accepted into the program and Ms. Kurfirst ranked Ballard first.[16] Despite his acceptance into the biotechnology program, Andy was not permitted to attend.[17]

Ballard High School was oversubscribed, so the district employed a series of "tiebreakers" to determine who would be assigned to each school.[18] Because Andy did not have any siblings attending Ballard, the first tiebreaker, the school administrators then considered the racial composition of the school and the race of the applicant, the second tiebreaker.[19] Since Ballard was not within the district's overall white to nonwhite racial balance, the district did not assign Andy because his race did not "serve to bring the school into balance."[20] He was denied assignment to Ballard High School because of race.[21] The year was 2000.[22]

Fifty years prior, in Topeka, Kansas, Linda Brown prepared for her third grade year at Monroe Elementary School.[23] Monroe was one of the four elementary schools that Linda, a black student, was permitted to attend.[24] Topeka, like cities in seventeen other states across

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[12] *Id.*

[13] *Id.*

[14] *Parents Involved*, 127 S. Ct. at 2748.

[15] *Id.* at 2746–47. Seattle School District No. 1 adopted the student assignment plan at issue in 1998. *Id.* at 2746. Under the plan, incoming ninth graders rank, in order of preference, their choices of school among any of the ten high schools within the district. *Id.* at 2746–47.

[16] *Id.* at 2748.

[17] *Id.*

[18] *Id.* at 2747. A school is considered oversubscribed when too many students list it as their first choice. *Id.*

[19] *Parents Involved*, 127 S. Ct. at 2747, 2748. The third tiebreaker is the geographic proximity of the school to the student's residence. *Id.* at 2747.

[20] *Id.* at 2747–48.

[21] *Id.*

[22] *Id.* at 2747.

[23] Paul E. Wilson, *The Genesis of* Brown v. Board of Education, 6 KAN. J.L. & PUB. POL'Y 7, 10, 11 (1996). *See generally* Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483 (1954).

[24] *See* Wilson, *supra* note 23, at 17.

the country, operated a state-sanctioned segregated school district: all white children attended one set of schools and all black children attended another.[25]

Linda's father, Oliver Brown, wanted Linda to attend Sumner Elementary School, located much closer to the Brown residence.[26] On enrollment day, Mr. Brown and Linda walked a few blocks to Sumner Elementary School to request that she be admitted.[27] Linda waited outside Principal Frank Wilson's office.[28] Principal Wilson had been expecting such an encounter.[29] He had been warned by Kenneth McFarland, the school's superintendent, that the local NAACP chapter would seek to enroll black students in schools reserved for white children.[30] Principal Wilson listened politely, but immediately refused.[31]

Topeka's Board of Education was authorized by statute to segregate their public schools by race.[32] Eight-year old Linda was not permitted to attend the "white only" Sumner Elementary School solely because of the color of her skin.[33]

Although occurring approximately fifty years apart, Joshua, Andy, and Linda were all denied enrollment at the public school of their choice because of race.[34] What distinguishes Joshua's and Andy's denial from that of Linda Brown? First, the color of their skin: Joshua and Andy are both white; Linda was black.[35] Second, Joshua's and Andy's school assignments were made in an effort to maintain diversity in their schools.[36] Linda's was denied in an effort to maintain segregation.[37]

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[25] *See id.* at 13.

[26] *See id.* at 10–11.

[27] *See id.* at 11.

[28] Jean Van Defender, *Capturing Forgotten Moments in Civil Rights History (Oral Histories)*, Brown Q. (1999), *available at* http://brownvboard.org/brwnqurt/03-1/03-1a.htm.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *See* Kan. Gen. Stat. § 72–1724 (1949) (repealed 1953) (permitting, but not requiring, cities with a population of more than 15,000 to maintain separate school facilities for black and white students); Van Defender, *supra* note 28; Wilson, *supra* note 23, at 9.

[33] *See* Van Defender, *supra* note 28; Wilson, *supra* note 23, at 11.

[34] *See Parents Involved*, 127 S. Ct. at 2748, 2750; *Brown I*, 347 U.S. at 488.

[35] *See Parents Involved*, 127 S. Ct. at 2748, 2750; *Brown I*, 347 U.S. at 387; NAACP, Briefing Points: Supreme Court School Desegregation Cases, http://www.naacp.org/advocacy/education/Information (last visited Nov. 15, 2008).

[36] *See Parents Involved*, 127 S. Ct. at 2755.

[37] *See Brown I*, 347 U.S. at 387–88.

After a dramatic increase in integration during the civil rights era, there has been a national trend toward the resegregation of America's public schools since the early 1990s.[38] Segregation has adverse affects on the educational development of students by undermining the benefits of diversity.[39] However, the Supreme Court held in both Joshua's and Andy's cases that the use of race as a factor in school assignment, even for purposes of increased diversity, violated the Fourteenth Amendment to the Constitution.[40]

The Equal Protection Clause of the Fourteenth Amendment states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[41] The landmark case of *Brown v. Board of Education*, decided in 1954, held that Sumner Elementary School's segregation was a denial of the equal protection of the laws, a violation of the Fourteenth Amendment.[42] The Supreme Court ruled that school districts had to allow black children, and all other "children of the minority group," to attend the same schools as white children.[43]

Similarly, in *Parents Involved in Community Schools v. Seattle School District No. 1*, and companion case *Meredith v. Jefferson County Board of Education*, both decided in 2007, the Supreme Court held that the plans of the two school districts violated the Fourteenth Amendment by using race as a factor in school assignment.[44] The Supreme Court held that schools could not artificially manufacture diverse student populations by considering race in school assignment.[45]

Parents Involved is the latest decision in the Court's jurisprudence dealing with race-conscious policies in education.[46] The decision in

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[38] *See* Anurima Bhargava et al., Still Looking to the Future: Voluntary K–12 School Integration 10–15 (2008), *available at* http://www.civilrightsproject.ucla.edu/research/deseg/still_looking_to_the_future_integration_manual.pdf.

[39] *See Parents Involved*, 127 S. Ct. at 2820–21 (Breyer, J., dissenting); *Brown I*, 347 U.S. at 494–95; Bhargava et al., *supra* note 38, at 17–22.

[40] *See Parents Involved*, 127 S. Ct. at 2746, 2764 (plurality opinion).

[41] U.S. Const. amend. XIV, § 1.

[42] *See Brown I*, 347 U.S. at 495; Wilson, *supra* note 23, at 11.

[43] *See Brown I*, 347 U.S. at 493.

[44] *See Parents Involved*, 127 S. Ct. at 2746 (plurality opinion).

[45] *See id.* at 2746.

[46] *See id.* at 2738, 2746; James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 Harv. L. Rev. 131, 131 (2007). It is the third case involving race-conscious policies in education decided in the last five years, representing a marked increase in the level of attention paid by the Court to integration and affirmative action. *See generally Parents Involved*, 127 S. Ct. at 2746 (holding race-conscious assignment program unconstitutional); Grutter v. Bollinger, 539 U.S. 306, 343–44 (2003) (holding affirmative action program at University

Parents Involved is a continuation of the Court's consistent disfavor of continued desegregation efforts and racial classifications, even when benign.[47] Although the Court acknowledged the importance of diversity in education and did not foreclose the use of race-conscious assignment plans, *Parents Involved* has "severely limited the very tools school districts need to achieve integration and avoid segregation."[48] The Court's application of strict scrutiny adopted the jurisprudence of "strict in theory, but fatal in fact" from affirmative action cases and applied it to race-conscious assignment policies.[49]

This Note argues that the *Parents Involved* Court should not have applied strict scrutiny to analyze the race-conscious student assignment plans for several reasons.[50] First, the Constitution is not colorblind: the Fourteenth Amendment's Equal Protection Clause neither proscribes nor compels a strict scrutiny analysis for all racial classifica-

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of Michigan Law School constitutional); Gratz v. Bollinger, 539 U.S. 244, 250–251 (2003) (holding undergraduate affirmative action policy at University of Michigan unconstitutional). Despite opportunities to hear other cases involving affirmative action in education, the Court has repeatedly declined. *See, e.g.*, Comfort v. Lynn Sch. Comm., 418 F.3d 1, 6 (1st Cir. 2005); Hopwood v. Texas, 236 F.3d 256 (5th Cir. 2000). Until *Grutter* and *Gratz* were decided in 2003, the Supreme Court had not dealt with voluntary affirmative action in education for twenty-five years. *See Grutter*, 539 U.S. at 322; *Gratz*, 539 U.S. at 244.

[47] *See Parents Involved*, 127 S. Ct. at 2738, 2746; Philip C. Aka, *The Supreme Court and Affirmative Action in Public Education, with Special Reference to the Michigan Cases*, 2006 BYU Educ. & L.J. 1, 69 (2006); Lia B. Epperson, *True Integration: Advancing* Brown*'s Goal of Educational Equality in the Wake of* Grutter, 67 U. Pitt. L. Rev. 175, 176 (2005); *see also* Adarand Constructors v. Pena, 515 U.S. 200, 224, 226 (1995) (holding that strict scrutiny applies when analyzing all policies that involve racial classifications, whether benign or invidious); Missouri v. Jenkins, 515 U.S. 70, 96, 98 (1995) (holding that efforts to reduce segregation resulting from housing segregation were beyond the scope of Court's authority); Freeman v. Pitts, 503 U.S. 467, 495 (1992) (holding school districts could be released from desegregation decrees despite persistence of segregation in schools); Bd. of Educ. v. Dowell, 498 U.S. 238, 250 (1991) (holding incremental release from desegregation decrees permissible when the school had complied in good faith with the order, even if segregation still existed).

[48] *See Parents Involved*, 127 S. Ct. at 2738, 2755; *id.* at 2791 (Kennedy, J., concurring); *id.* at 2820–21 (Breyer, J., dissenting); Press Release, Civil Rights Project, Court Decisions: Race-Conscious Admissions Policies Challenged: University Of Michigan's Affirmative Action Under Fire (June 28, 2007), *available at* http://civilrightsproject.ucla.edu/policy/court/michigan03.php.

[49] *See Parents Involved*, 127 S. Ct. at 2817–18 (Breyer, J., dissenting); *see, e.g.*, *Adarand*, 515 U.S. at 210, 239.

[50] *See Parents Involved*, 127 S. Ct. at 2751–52.

tions.[51] Second, race-conscious student assignment policies should be analyzed as an extension of the Court's desegregation jurisprudence because they are distinguishable from affirmative action programs.[52]

Part I of this Note chronicles the Court's jurisprudence on race-conscious policies in education in four phases: desegregation, resegregation, affirmative action, and the standards of review. Part II provides an overview of the *Parents Involved* decision as it relates to the strict scrutiny standard used to analyze race-conscious policies. Part III argues that the Court has erred in applying strict scrutiny analysis to the race-conscious student assignment policies at issue.

I. Affirmative Action and Race-Conscious Assignment Policies: Past and Present

A. *The Evolution of Desegregation Jurisprudence*

It was not until the Court's 1954 landmark decision in *Brown v. Board of Education* that black citizens began to make headway toward equality in the wake of *Plessy v. Ferguson*.[53] In *Brown*, the Court unanimously concluded that "in the field of public education the doctrine of 'separate but equal' has no place."[54] Segregating schools based solely on race violated the Equal Protection Clause because it deprived minority children of equal education opportunities.[55]

While *Brown* made state-imposed segregation unconstitutional, the Court permitted segregated schools to desegregate "with all *deliberate*

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[51] *See* U.S. Const. amend. XIV, § 1; *Parents Involved*, 127 S. Ct. at 2815, 2817 (Breyer, J., dissenting) (citing *Adarand*, 515 U.S. at 218); *see, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

[52] *See* Girardeau A. Spann, The Law of Affirmative Action 11 (2000); Deborah N. Archer, *Moving Beyond Strict Scrutiny: The Need for a More Nuanced Standard of Equal Protection Analysis for K Through 12 Integration Programs*, 9 U. Pa. J. Const. L. 629, 646–47 (2007).

[53] *See* Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 494–95 (1954); Plessy v. Ferguson, 163 U.S. 537, 544 (1896); Aka, *supra* note 47, at 26–27. Holding that a Louisiana law mandating segregated railroad cars did not violate the Equal Protection Clause of the Fourteenth Amendment, the *Plessy* Court upheld the doctrine of "separate but equal." *See Plessy*, 163 U.S. at 544, *overruled by Brown I*, 347 U.S. at 495. The Court stated that the purpose of the Fourteenth Amendment was undoubtedly to enforce the absolute equality of the two races before the law; but, "in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social . . . equality . . . ." *See id.*

[54] *Brown I*, 347 U.S. at 486, 495.

[55] *See id.* at 493.

speed."[56] Many school districts interpreted this as a license to continue segregating, at least until the mid-1960s and early 1970s.[57] In fact, it was not until 1968, fourteen years after deciding *Brown* that the Court held that schools were required "to convert *promptly* to a system without a 'white' school and a 'negro' school, but just schools."[58]

In 1971, the Court in *Swann v. Charlotte-Mecklenburg* ruled that district courts had the authority to mandate desegregation plans.[59] The lower courts could use racial classifications to determine student assignments, assuming the classifications were directly related to achieving the goal of desegregation.[60] Schools could no longer satisfy *Brown* by permitting black students to attend previously "white only" schools but by assigning students, based on race, to separate schools.[61]

The scope of *Brown* was further extended in *Keyes v. School District No. 1*.[62] The *Keyes* Court held that even in the absence of statutory segregation, it would only be common sense to conclude there was a dual school system when "school authorities . . . carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities."[63] After *Keyes*, schools that had not operated a statutory dual system could still "have an affirmative duty 'to effectuate a transition to a racially nondiscriminatory school system,'" if the plaintiff could prove that segregated schools existed and were

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[56] *See* Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 301 (1955) (emphasis added).

[57] *See* BHARGAVA ET AL., *supra* note 38, at 6.

[58] *See* Green v. County Sch. Bd., 391 U.S. 430, 442 (1968) (emphasis added). The Court in *Green* placed on the public schools the "affirmative duty to take whatever steps might be necessary" to eliminate the effects of prior discriminatory conduct "root and branch." 391 U.S. at 437–38; Kevin Brown, *The Constitutionality of Racial Classifications in Public School Admissions*, 29 HOFSTRA L. REV. 1, 69 (2000). The school district's student assignment plan permitting parents to choose their child's school did not result in desegregation and was unacceptable. *See Green*, 391 U.S. at 437–38. The Court required a plan "that promises realistically to work, and promises realistically to work *now*." *Id.* at 439.

[59] *See* 402 U.S. 1, 15 (1971); BHARGAVA ET AL., *supra* note 38, at 6; Victor Goode, *Affirmative Action and School Choice: The Courts and the Consideration of Race*, 169 PLI/NY 7, 18 (2007).

[60] *See Swann*, 402 U.S. at 24–25; Goode, *supra* note 59, at 18. Although classifications based solely on race typically violate the Equal Protection Clause, the Court recognized that a student's race must be considered to achieve integration. *See Swann*, 402 U.S. at 24–25.

[61] *See Swann*, 402 U.S. at 15 (citing *Green*, 391 U.S. at 437–38); *Brown I*, 347 U.S. at 495.

[62] *See* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 213–14 (1973); *Brown I*, 347 U.S. at 495.

[63] *See Keyes*, 413 U.S. at 213–14; Goode, *supra* note 59, at 15.

"maintained by intentional state action."[64] By defining *de jure* segregation in this manner, the Court could now reach schools outside the South that had employed segregation policies.[65] Unfortunately, this case also established the distinction between *de jure* segregation and *de facto* segregation.[66]

Some schools voluntarily chose to adopt race-conscious assignment plans to foster integration and to avoid mandatory court-ordered desegregation.[67] For example, in Georgia, the Clark County Board of Education student assignment plan relied upon geographic attendance zones drawn by the district to increase racial diversity.[68] Challenged by parents, the voluntary program was upheld in *McDaniel* and remains good law.[69]

However, by the mid-1970s the Court began to limit the scope of permissible desegregation efforts.[70] Urban schools in Detroit, Michigan, had been involved in purposeful discrimination, which resulted in a majority of minority students.[71] The lower court's remedy involved busing students from the urban Detroit districts to adjacent suburban school districts.[72] The Supreme Court struck down this plan, holding that only the districts that had committed the constitutional violation would be ordered to remedy the segregation.[73] This excluded the sub-

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[64] *Keyes*, 413 U.S. at 198, 203.

[65] *See* BHARGAVA ET AL., *supra* note 38, at 6. School segregation can be *de jure* or *de facto*. *Id.* at 5. The Court has defined *de jure* segregation as "a current condition of segregation resulting from intentional state action." *Keyes*, 413 U.S. at 205–06. The "differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is purpose or intent to segregate." *Id.* at 208. Schools previously segregated by law have a "duty and responsibility . . . to take all steps necessary to eliminate the vestiges of the unconstitutional *de jure* system." Freeman v. Pitts, 503 U.S. 467, 485 (1992). Unlike *de jure* segregation, *de facto* segregation does not have authority of law, but results from other influences such as housing patterns. BHARGAVA ET AL., *supra* note 38, at 5. School districts are not required to attempt to remedy racial imbalance "when the imbalance is attributable neither to the prior *de jure* system nor to a later violation by the school district but rather to independent demographic forces." *Freeman*, 503 U.S. at 493.

[66] *See Keyes*, 413 U.S. at 203.

[67] *See e.g.*, McDaniel v. Barresi, 402 U.S. 39, 40–41 (1971).

[68] *See id.* at 40.

[69] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2761 (2007) (distinguishing *McDaniel* as limited to instances of *de jure* segregation); *McDaniel*, 402 U.S. at 40, 42.

[70] *See* Milliken v. Bradley, 418 U.S. 717, 752 (1974); BHARGAVA ET AL., *supra* note 38, at 7.

[71] *See Milliken*, 418 U.S. at 724–26.

[72] *See id.* at 734; Goode, *supra* note 59, at 16.

[73] *See Milliken*, 418 U.S. at 752.

urban districts from being involved in the remedy, effectively ending integration efforts in Detroit.[74]

Despite initial resistance to integration and the court-imposed limitations on permissible integration programs, the country saw dramatic increases in integration across the country.[75] Unfortunately, integration may have peaked immediately following the civil rights era.[76]

B. *The Resegregation of America's Public School System*

During the civil rights era, the percentage of black students in white-majority schools in the South increased from two percent to thirty-three percent.[77] The high watermark for desegregation occurred in the late 1980s, when forty-four percent of black students attended white-majority schools.[78] However, in the early 1990s, the Court began to relax desegregation standards, initiating the resegregation of America's public schools.[79]

School systems that had complied in good faith with earlier desegregation orders and had eliminated, to the extent practicable, the traces of the prior *de jure* segregation were released from court supervision beginning in 1991 in *Dowell*.[80] The following year, in *Freeman v. Pitts*, the Court authorized an incremental release from certain aspects of earlier imposed desegregation decrees when the district could demonstrate "good-faith compliance . . . over a reasonable period of time" despite continuing disparities in areas such as faculty and quality of education.[81] By 1995 the Court sought to end federal court supervision of desegregation orders.[82] In *Jenkins*, the Court ruled that some racial

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[74] *See id.*

[75] *See id.*; Gary Orfield & Chungmei Lee, Civil Rights Project, Racial Transformation and the Changing Nature of Segregation 13 (2006), *available at* http://www.civilrightsproject.ucla.edu/research/deseg/racial_transformation.pdf.

[76] *See* Orfield & Lee, *supra* note 75, at 13; Epperson, *supra* note 47, at 182.

[77] *See* Orfield & Lee, *supra* note 75, at 13.

[78] *Id.*

[79] *Id.*; *see, e.g.*, *Freeman*, 503 U.S. at 485 (1992) (holding that the "district court may relinquish its supervision and control over those aspects of a school system in which there has been compliance with a desegregation decree if other aspects of the system remain in noncompliance").

[80] *See* Bd. of Educ. v. Dowell, 498 U.S. 237, 249–50 (1991); Bhargava et al., *supra* note 38, at 9.

[81] *See Freeman*, 503 U.S. at 483, 485, 490, 492; Bhargava et al., *supra* note 38, at 9.

[82] *See* Missouri v. Jenkins, 515 U.S. 70, 88 (1995).

disparities, in areas such as academic achievement, are beyond the authority of federal courts to address.[83]

The Court's holdings in *Dowell*, *Freeman*, and *Jenkins* led to resegregation for black students in all regions and at all levels: national, regional, and district.[84] Since the early 1990s the level of desegregation for black students declined to its lowest level in the last thirty years.[85] In the 2004–2005 school year, nearly forty percent of black and Latino students attended schools with minority populations representing ninety-nine to one hundred percent of the student body as a whole.[86] In every region of the country, there were more black students attending segregated schools in 2003 than in 1988.[87] Studies show a clear pattern of growing racial isolation.[88]

C. *Affirmative Action in Higher Education:* Bakke, Grutter, *and* Gratz

In the atmosphere of integration during the late 1960s and early 1970s, many institutions of higher education adopted affirmative action admissions programs in search of a more diverse and integrated student body.[89] The Court, however, restricted such integration efforts in 1979 when it confronted the issue of affirmative action programs in

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[83] *See id.* at 101–02.

[84] *See id.* at 73, 80–82, 103; *Freeman*, 503 U.S. at 490; *Dowell*, 498 U.S. at 249–50; Bhargvava et al., *supra* note 38, at 11; Orfield & Lee, *supra* note 75, at 9.

[85] *See* Bhargava et al., *supra* note 38, at 10–11.

[86] *Id.* The face of segregation in America has also changed during this time. *See* Bhargava et al., *supra* note 38, at 10; Gary Orfield & Chungmei Lee, Civil Rights Project, Historic Reversals, Accelerating Resegregation, and the Need for New Integration Strategies 15–17 (2007). While segregation was historically regarded as an issue between black students and white students, the racial compositions of public schools in 2007 was vastly different, with Latino students representing the largest minority group in public schools. Orfield & Lee, *supra*, at 15–16. In the late 1960s eighty percent of students attending public schools were white. *Id.* at 15. As of 2005, that percentage had dropped to fifty-seven percent. *Id.* at 16. Latino students represent the largest minority group, twenty percent, and black students comprise seventeen percent of our nation's public schools. *Id.* Asians now represent eight percent of public school enrollment. *Id.* Overall, students of color currently comprise over forty percent of all U.S. public school students, more than double the share of students in the 1960s. *See* Bhargava et al., *supra* note 38, at 10.

[87] Bhargava et al., *supra* note 38, at 12; Orfield & Lee, *supra* note 86, at 16.

[88] *See, e.g.*, Bhargava et al., *supra* note 38, at 11–13; Orfield & Lee, *supra* note 86, at 16.

[89] *See* Grutter v. Bollinger, 539 U.S. 306, 323 (2003); Martha S. West, *The Historical Roots of Affirmative Action*, 10 La Raza L.J. 607, 619 (1998).

higher education for the first time in *Regents of University of California v. Bakke*.[90]

At issue in *Bakke* was an affirmative action admissions program at the University of California at Davis Medical School.[91] The school earmarked sixteen out of the one hundred available seats for members of minority groups.[92] A panel convened specifically to review minority applicants to fill those sixteen seats, meaning that minority and white applicants were assessed separately.[93] Justices Stevens, Burger, Stewart, and Rehnquist struck down the policy as a violation of Title VII of the Civil Rights Act.[94] Justice Powell concurred in the outcome, but wrote separately, authoring what has become "the touchstone for constitutional analysis of race-conscious admissions policies."[95]

In his opinion, Justice Powell stated that that a diverse student body is a constitutionally-permissible goal, but he rejected rigid quotas.[96] His views on race-conscious policies served as the model for universities across the country.[97] Undoubtedly, Justice Powell influenced the admissions policies of the University of Michigan Law School and University of Michigan College of Literature, Science, and the Arts that came under attack in 2003.[98]

In *Grutter v. Bollinger* and *Gratz v. Bollinger*, both decided in April 2003, the Court addressed the issue of affirmative action in public

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[90] *See* 438 U.S. 265, 271 (1978). The Court was first presented with the issue of affirmative action in 1974 in *DeFunis v. Odegaard*, but dismissed the case as moot because the plaintiff was already in his last year of school. *See* 416 U.S. 312, 316, 320 (1974); Aka, *supra* note 47, at 34.

[91] *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 271, 274–75 (1978).

[92] *Id.* at 275.

[93] *See id.* at 274–75.

[94] Civil Rights Act of 1964, 42 U.S.C. § 2000d (1964); s*ee Bakke*, 438 U.S. at 421 (Stevens, J., concurring). These justices did not address the constitutional issue of whether the program was a violation of the Equal Protection Clause. *See* U.S. Const. amend. XIV, § 1; *Bakke*, 438 U.S. at 411, 421.

[95] *See Grutter*, 539 U.S. at 323; *Bakke*, 438 U.S. at 269.

[96] *Bakke*, 438 U.S. at 311–12, 315 ("The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics [than racial or ethnic origin].").

[97] *See Grutter*, 539 U.S. at 323; *Bakke*, 438 U.S. at 269; Civil Rights Project, Joint Statement of Constitutional Law Scholars, Reaffirming Diversity: A Legal Analysis of the University of Michigan Affirmative Action Cases 3–4 (2003) *available at* http://www.civilrightsproject.ucla.edu/policy/legal-docs/diversity_reaffirmed.pdf.

[98] *See Grutter*, 539 U.S. at 311, 323; Gratz v. Bollinger, 539 U.S. 244, 251 (2003); *Bakke*, 438 U.S. at 269; Civil Rights Project, *supra* note 97, at 3–4.

higher education for the first time since *Bakke*.[99] The University of Michigan Law School used a comprehensive approach, considering the candidates' race as a "plus factor" in the holistic and "individualized consideration of each and every applicant."[100] The University of Michigan undergraduate college, however, automatically awarded twenty points to underrepresented minority applicants based solely on race.[101] The twenty points had "the effect of making 'the factor of race . . . decisive' for virtually every minimally-qualified underrepresented minority applicant."[102] By upholding the admissions policy of the Law School in *Grutter* and striking down the policy of the undergraduate college in *Gratz*, the Court clarified the acceptable role of affirmative action in higher education.[103] Educational institutions are "not barred from any and all consideration of race when making admissions decisions."[104] In the context of admissions, that consideration must be flexible and individualized as opposed to mechanistic.[105]

The Court's decision in *Grutter* is particularly significant because it acknowledges that attaining a diverse student body is a compelling state interest in the context of higher education.[106] Until this time, remedying past discrimination had been the only recognized justification for race-based governmental action.[107] The Court gave significant deference to the Law School's judgment that a diverse student body was essential to its educational mission.[108] The benefits of diversity were praised as substantial, noting that diversity promotes "cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races."[109]

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[99] *See Grutter*, 539 U.S. at 323; *Gratz*, 539 U.S. at 249–50; *Bakke*, 438 U.S. at 271.

[100] *Grutter*, 539 U.S. at 334.

[101] *Gratz*, 539 U.S. at 271–72.

[102] *Id.*

[103] *See Grutter*, 539 U.S. at 333–34, 343; *Gratz*, 539 U.S. at 272–74.

[104] *See Gratz*, 539 U.S. at 298 (Ginsburg, J., dissenting).

[105] *See Grutter*, 539 U.S. at 334, 337.

[106] *See Grutter*, 539 U.S. at 328; *see also Parents Involved*, 127 S. Ct. at 2753 (recognizing *Grutter*'s holding that diversity in higher education is a compelling government interest).

[107] *Compare Grutter*, 539 U.S. at 328 (holding diversity as a compelling interest), *with* Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (stating that unless classifications based on race are "strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility").

[108] *Grutter*, 539 U.S. at 328.

[109] *See id.* at 330 (internal quotations omitted).

By distinguishing the policy in *Gratz* from that in *Grutter*, the Court carved out an acceptable form for affirmative action programs in higher education.[110] The policy in *Grutter* was narrowly tailored to further the compelling governmental interest of attaining a diverse student body because it used race as a "plus" factor that was considered alongside other factors in an individual assessment of each applicant.[111] In contrast, the policy that was struck down in *Gratz* automatically awarded an underrepresented minority applicant twenty points—one-fifth of the points needed to guarantee admission to the University.[112] This policy was too mechanistic for the Court because, by awarding those points, the school did not consider an applicant's "individual potential contribution to diversity."[113]

D. *Strict Scrutiny Jurisprudence with Regard to Race*

In *Grutter* and *Gratz*, the Court held that all instances of race-based affirmative action are to be reviewed with strict scrutiny.[114] Statutes restricting the exercise of fundamental rights under the Equal Protection Clause are "constitutional only if they are narrowly tailored measures that further compelling governmental interests."[115] Although strict scrutiny is now the accepted constitutional standard, the Court initially struggled to reach that conclusion.[116] For years, the Court was split on whether affirmative action policies should be reviewed under the same standard as invidious race categorizations.[117] Now, not only is strict scrutiny the accepted standard of review, but it has evolved into a "strict in theory, but fatal in fact" analysis.[118] Until *Grutter*, the Court had never

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[110] *See Grutter*, 539 U.S. at 337; *Gratz*, 539 U.S. at 270, 271.

[111] *See Grutter*, 539 U.S. at 334.

[112] *See Gratz*, 539 U.S. at 270.

[113] *See id.* at 273–74 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978) (internal quotations omitted)).

[114] *See Grutter*, 539 U.S. at 327; *Gratz*, 539 U.S. at 270.

[115] Adarand Constructors, v. Pena, 515 U.S. 200, 227 (1995).

[116] *See Grutter*, 539 U.S. at 326; *Adarand*, 515 U.S. at 221.

[117] *Compare Adarand*, 518 U.S. at 224, 226–27 (holding all racial classifications, whether benign or invidious, subject to review under strict scrutiny), *with* Metro Broad. v. FCC, 497 U.S. 547, 564–65 (1990) (holding benign race-conscious measures are analyzed under an intermediate standard of review).

[118] *See Parents Involved*, 127 S. Ct. at 2817–18 (Breyer, J., dissenting); Archer, *supra* note 52, at 644 n.98; Luis Fuentes-Rohwer & Guy-Uriel E. Charles, *In Defense of Deference*, 21 Const. Comment. 133, 159 (2004).

upheld an affirmative action policy in the face of a strict scrutiny analysis.[119]

Initially, *Plessy*'s separate but equal doctrine of race-based classifications was upheld in the face of Equal Protection Clause challenges if the classifications were "reasonable, . . . enacted in good faith for the promotion for the public good, and not for the annoyance or oppression of a particular class."[120] The Court moved away from this rational basis approach during the civil rights era.[121] Laws utilizing race-based classifications would be upheld "only if [they were] necessary, and not merely rationally related, to the accomplishment of a permissible state policy."[122] This era of case law laid the groundwork for a strict scrutiny analysis.[123]

A plurality opinion in *Bakke* suggested that strict scrutiny was the proper standard of review.[124] Justice Powell's decisive fifth vote to strike the affirmative action program called for "the most exacting judicial examination," thus implying that racial classifications should be reviewed under strict scrutiny.[125] Some consider *Bakke* to be the first use of strict scrutiny in reviewing race-based affirmative action programs.[126]

Over the following decade, the Court could not come to a consensus on the proper standard, despite some Justices' consistent support for strict scrutiny.[127] It was not until 1989 that a majority of the Court analyzed race-based affirmative action measures under strict scrutiny.[128] In *J.A. Croson Co.*, the Court held that strict scrutiny is the applicable standard when reviewing all governmental classifications by

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[119] *See Grutter*, 539 U.S. at 326; Fuentes-Rohwer & Charles, *supra* note 118, at 159; *see, e.g.*, *J.A. Croson Co.*, 488 U.S. at 511.

[120] *See Plessy*, 163 U.S. at 550.

[121] *See* McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (holding race-based policies subject to the "most rigid scrutiny"); Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1277 (2007).

[122] *See McLaughlin*, 379 U.S. at 196.

[123] *See McLaughlin*, 379 U.S. at 196; Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Fallon, *supra* note 121, at 1277.

[124] *See Bakke*, 438 U.S. at 271, 357 (Brennan, J., concurring in judgment and dissenting in part, joined by White, Marshall, & Blackmun, JJ.).

[125] *See id.* at 291, 305 (Powell, J., concurring); Goode, *supra* note 59, at 23.

[126] *See, e.g.*, Fallon, *supra* note 121, at 1278.

[127] *See Adarand*, 515 U.S. at 221; *see, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 496, 519 (1980) (failing to reach majority consensus on the proper standard of review).

[128] *See J.A. Croson Co.*, 488 U.S. at 493, 520.

race, whether remedial or benign.[129] Applying strict scrutiny, the Court struck down a city ordinance that obligated preference for minority business enterprises.[130] The Court held that remedying societal discrimination was not a sufficient compelling interest under strict scrutiny.[131] Therefore, voluntarily-adopted race-conscious remedies would be considered presumptively invalid.[132]

In *Adarand Constructors v. Pena*, decided in 1995, the Court affirmed and expanded the standard by holding that federal affirmative action programs must also be analyzed under strict scrutiny.[133] Although the Court acknowledged the unfortunate reality of societal discrimination, it nevertheless struck down the federal affirmative action program.[134] Since *Adarand*, the Court has uniformly applied the standard of strict scrutiny to racial classifications, both benign and invidious.[135]

Race-based affirmative action policies analyzed under strict scrutiny have almost always been held unconstitutional.[136] Despite the Court's insistence otherwise, a strict scrutiny review of racial classifications may indeed be "strict in theory, but fatal in fact."[137] In reality, only one affirmative action admissions program has ever survived this exacting standard.[138]

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[129] *See id.* The Court stated, "there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *See id.* at 493.

[130] *See id.* at 477–78.

[131] *See id.* at 499 ("While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia."); *see also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.").

[132] *See J.A. Croson Co.*, 488 U.S. at 493; Brent E. Simmons, *Reconsidering Strict Scrutiny of Affirmative Action*, 2 MICH. J. RACE & L. 51, 55 (1996).

[133] *See Adarand*, 515 U.S. at 224, 227 (overruling Metro Broad. v. FCC, 497 U.S. 547, 564–65 (1990)).

[134] *Id.* at 237.

[135] *See id.* at 226–27; *see, e.g.*, *Parents Involved*, 127 S. Ct. at 2764–65.

[136] *See, e.g.*, *J.A. Croson Co.*, 488 U.S. at 493; Goode, *supra* note 59, at 27.

[137] *Grutter*, 539 U.S. at 326; *see Parents Involved*, 127 S. Ct. at 2817 (Breyer, J., dissenting).

[138] *Grutter*, 539 U.S. at 326; *see, e.g.*, *Gratz*, 539 U.S. at 270.

II. *Parents Involved:* Race-Conscious Assignment Policies in K–12 Schools

A. *A Blow to* Brown *?*

Parents Involved marked the first time the Court considered the constitutionality of voluntary race-conscious assignment policies in K–12 schools.[139] Jefferson County and Seattle School District both asserted that the "educational and broader socialization benefits [that] flow from a racially diverse learning environment" are a compelling state interest.[140] Chief Justice Roberts dismissed the school district's claims of a compelling government interest despite broad language extolling the benefits of diversity in *Grutter.*[141]

Despite a plurality of Justices striking down the policies, five of the Justices agreed that diversity in primary and secondary education is a compelling state interest.[142] According to Justice Kennedy, "[i]n the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition."[143] Justice Breyer posits, "[i]f an educational in-

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[139] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2754 (2007); Epperson, *supra* note 47, at 212. Justice Roberts, writing for the Court, did not decide "whether racial diversity in schools in fact has a marked impact on test scores and other objective yardsticks or achieves intangible socialization benefits." *See Parents Involved*, 127 S. Ct. at 2755. However, the compelling interest asserted by the schools was not included in either category of previously-recognized compelling government interests of remedying the effects of *de jure* segregation or diversity in higher education. *See id.* at 2752–53, 2754.

[140] *See Parents Involved*, 127 S. Ct. at 2755.

[141] *See id.* at 2754 (limiting *Grutter* to the unique context of higher education); Grutter v. Bollinger, 539 U.S. 306, 330 (2003).

[142] *See Parents Involved*, 127 S. Ct. at 2797, 2835 (Breyer, J., dissenting). Justices Roberts, Scalia, Thomas, Alito, and Kennedy held the race-conscious student assignment plans unconstitutional because they were not narrowly tailored to the compelling government interest. *See id.* at 2755 (plurality opinion); *Parents Involved*, 127 S. Ct. at 2791 (Kennedy, J., concurring). Justice Kennedy, although holding that the policies were not narrowly tailored, believed that "[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue." *See Parents Involved*, 127 S. Ct. at 2789, 2791 (Kennedy, J., concurring). Justices Breyer, Stevens, Souter, and Ginsburg dissented, holding that the policies were narrowly tailored to achieve a compelling government interest. *See id.* at 2835 (Breyer, J., dissenting).

[143] *See id.* at 2792 (Kennedy, J., concurring).

terest that combines [remedial, educational, and democratic] elements is not 'compelling,' what is?"[144]

By striking down such policies, the Court severely limited the ability of elementary and secondary schools to adopt integration initiatives voluntarily.[145] Upholding a similar policy, the Massachusetts District Court stated that

> [t]o say that school officials in the K–12 grades, acting in good faith, cannot take steps to remedy the extraordinary problems of *de facto* segregation and promote multiracial learning, is to go further than ever before to disappoint the promise of *Brown*. It is to admit that in 2003, resegregation of the schools is a tolerable result, as if the only problems *Brown* addressed were bad people and not bad impacts.[146]

In 2003 the Massachusetts court understood that to strike down race-conscious student assignment policies would be contrary to *Brown*; yet in 2007 the Supreme Court's holding that schools cannot voluntarily adopt race-conscious assignment policies for the purpose of increasing integration has rendered the promise of *Brown* unfulfilled.[147]

B. *Standard of Review: "Strict in scrutiny, but fatal in fact"*

The *Parents Involved* plurality disagreed with Justice Breyer's dissent as to the proper standard of review for race-conscious assignment policies.[148] This is not surprising given the Court's history of debate and disagreement on the issue.[149] Despite no majority holding, five Justices analyzed the race-conscious assignment policies with strict scrutiny.[150]

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[144] *See id.* at 2823, 2835 (Breyer, J., dissenting).

[145] *See id.* at 2746 (plurality opinion); *id.* at 2833–34 (Breyer, J., dissenting).

[146] Comfort v. Lynn Sch. Comm., 263 F. Supp. 2d 209, 228, 271, 280 (D. Mass. 2003) (upholding the constitutionality of a school assignment policy that accounted for the "the racial composition of the sending and receiving schools and the student's race").

[147] *See Parents Involved*, 127 S. Ct. at 2800–01, 2836–37 (Breyer, J., dissenting); *Comfort*, 263 F. Supp. 2d at 271.

[148] *See Parents Involved*, 127 S. Ct. at 2751 (plurality opinion); *id.* at 2817–20 (Breyer, J., dissenting).

[149] *See, e.g.*, Metro Broad. v. FCC, 497 U.S. 547, 564, 565 (1990), *overruled by* Adarand Constructors v. Pena, 515 U.S. 200, 227 (1995).

[150] *See Parents Involved*, 127 S. Ct. at 2751 (plurality opinion); *id.* at 2789 (Kennedy, J., concurring).

Chief Justice Roberts, writing for the plurality, affirmed strict scrutiny as the proper standard of review.[151] Citing *Adarand*, *Grutter*, and *Gratz*, the Court held, "the school districts must demonstrate that the use of individual racial classifications in the assignment plans here under review is 'narrowly tailored' to achieve a 'compelling' government interest."[152] The Court simply accepted the standard as well-established, reflecting a color-blind interpretation of the Constitution.[153] Justice Roberts made his opinion clear, stating "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[154]

Justice Thomas, endorsing a strict scrutiny analysis, repeatedly criticized Justice Breyer's approval of race-conscious assignment policies because such policies undermine the requirements of a color-blind Constitution.[155] Likewise, Justice Kennedy saw no need to defend the strict scrutiny standard, merely stating, "[t]hese plans classify individuals by race and allocate benefits and burdens on that basis; and as a result, they are to be subjected to strict scrutiny."[156] However, Justice Breyer's dissent explicitly denied that "*Adarand*, *Gratz*, and *Grutter*, or any other—has ever held that the test of 'strict scrutiny' means that all racial classifications—no matter whether they seek to include or exclude—must in practice be treated the same."[157]

Instead, Justice Breyer proposed a "contextual approach" to scrutiny.[158] Justice Breyer cited *Grutter* for the proposition that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause."[159] He reasoned that the Court should not treat dissimilar race-based decisions as though they were equally objectionable because the context at issue in *Parents Involved* aims to increase diversity, does not stigmatize or exclude, and does not impose burdens

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[151] *See id.* at 2751 (plurality opinion).

[152] *See id.* at 2752; Grutter v. Bollinger, 539 U.S. 306, 326 (2003); Gratz v. Bollinger, 539 U.S. 244, 270 (2003); *Adarand*, 515 U.S. at 227.

[153] *Parents Involved*, 127 S. Ct. at 2751, 2767–68.

[154] *See id.* at 2768.

[155] *See id.* at 2768; *id.* at 2782, 2787–88 (Thomas, J., concurring) ("Most of the dissent's criticisms of today's result can be traced to its rejection of the color-blind Constitution.").

[156] *Id.* at 2789 (Kennedy, J., concurring).

[157] *Id.* at 2817 (Breyer, J., dissenting).

[158] *See Parents Involved*, 127 S. Ct. at 2819 (Breyer, J., dissenting). Justice Stevens, also in dissent, faulted the plurality's strict scrutiny standard and asserted that "a rigid adherence to tiers of scrutiny obscures *Brown*'s clear message." *See id.* at 2799 (Stevens, J., dissenting).

[159] *See id.* at 2818 (Breyer, J., dissenting) (quoting *Grutter*, 539 U.S. at 327 (2003)).

unfairly upon members of one race.[160] Race-conscious assignment programs can be distinguished from the other contexts where one or more of these negative features were present.[161]

Justice Breyer agreed that race-conscious programs need to be examined carefully, but that "the law requires application here of a standard of review that is not 'strict' in the traditional sense of that word."[162] By failing to consider context, he reasoned, the plurality misinterpreted the Court's jurisprudence on the issue and transformed "the 'strict scrutiny' test into a rule that is fatal in fact across the board."[163]

III. The Court Erred in Applying Strict Scrutiny

A. *The Legislative History of the Fourteenth Amendment Does Not Support Application of Strict Scrutiny*

Application of strict scrutiny in the context of race-conscious assignment policies is inconsistent with the legislative history of the Fourteenth Amendment.[164] Although the Fourteenth Amendment is consistently heralded as "the cornerstone of color-blind constitutionalism," its origins show that it is far from color-blind.[165] Despite Chief Justice Roberts's contemporary argument that "[t]he 14th Amendment prevents states from according differential treatment to American children on the basis of color or race," the Reconstruction Congress passed the Fourteenth Amendment with the specific intent of aiding Blacks and creating equality.[166] Holding that the Constitution is color-blind and

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[160] *See id.*

[161] *See id.* at 2818 (citing as examples of negative features of race-conscious programs *Gratz*, 539 U.S. at 244; Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1977), Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 294, 483 (1954)).

[162] *See id.* at 2819.

[163] *See Parents Involved*, 127 S. Ct. at 2817–18.

[164] *See* U.S. Const. amend. XIV, § 1; Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2815 (2007) (Breyer, J., dissenting).

[165] *See* U.S. Const. amend. XIV, § 1; Strauder v. West Virginia, 100 U.S. 303, 310 (1879) (holding that a West Virginia statute "discriminating in the selection of jurors . . . against negros because of their color, amounts to a denial of the equal protection of the laws to a colored man"); James D. Anderson, *Race-Conscious Educational Policies Versus a "Color-Blind Constitution": A Historical Perspective*, 36 Educ. Researcher 249, 254 (2007).

[166] *See* U.S. Const. amend. XIV, § 1; *Parents Involved*, 127 S. Ct. at 2767 (plurality opinion) (internal quotations omitted); Brief for Historians as Amici Curiae in Support of Respondents at 5–6, 17–19, *Parents Involved*, 127 S. Ct. 2738 (2007) (No. 05–908) [hereinafter

applying strict scrutiny to race-conscious student assignment policies, the *Parents Involved* Court incorrectly ignored the historical context in which the Fourteenth Amendment was enacted.[167]

The Fourteenth Amendment was enacted primarily for the protection of Blacks.[168] The Reconstruction Congress intended to incorporate "blacks into the civic, economic, and political mainstream in American society," not to prohibit race-conscious measures adopted to further that end.[169] At the time, only state actions that discriminated against Blacks would come within the Amendment's purview.[170]

The historical context in which the Amendment was enacted reveals the "true spirit and meaning of the amendments."[171] The Reconstruction Congress diligently sought to enact race-conscious legislation in pursuit of equality.[172] In the years immediately preceding the ratification of the Fourteenth Amendment, Congress enacted the Civil Rights Act of 1866 and the Freedmen's Bureau Act, race-conscious legislation for the benefit of Blacks.[173] In enacting this legislation, Congress specifically sought to aid the integration of Blacks into white society.[174]

Congressman Bingham, who would later author the Equal Protection Clause of the Fourteenth Amendment, did not object to the racial distinctions in the Freedmen's Bureau Act.[175] Objectors argued that the

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Brief for Historians]; Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754 (1985).

[167] *See* U.S. CONST. amend. XIV, § 1; Brief for Historians, *supra* note 166, at 5–6; Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 280 (1997).

[168] *See* U.S. CONST. amend. XIV, § 1; *Strauder*, 100 U.S. at 307, 310.

[169] *See* Brief for Historians, *supra* note 166, at 2; Mark Strasser, *The Invidiousness of Invidiousness: On the Supreme Court's Affirmative Action Jurisprudence*, 21 HASTINGS CONST. L.Q. 323, 338 (1994).

[170] *See* U.S. CONST. amend. XIV, § 1; *Strauder*, 100 U.S. at 307.

[171] *See Strauder*, 100 U.S. at 306.

[172] *See* Brief for Historians, *supra* note 166, at 2, 21; *see, e.g.*, Civil Rights Act of 1866, ch. 31, 14 Stat. 27; Act of Dec. 5, 1865, ch. 90, 13 Stat. 507.

[173] *See* U.S. CONST. amend. XIV, § 1; Brief for Historians, *supra* note 166, at 21, 22, 23. "[T]he Civil Rights Act of 1866 itself contained facially race-conscious provisions to guarantee enforcement of civil rights for blacks." Brief for Historians, *supra* note 166, at 23; Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

[174] Civil Rights Act of 1866, ch. 31, 14 Stat. 27; Freedmen's Bureau Act of July 16, 1866, ch. 200, 14 Stat. 173; Strasser, *supra* note 169, at 338.

[175] U.S. CONST. amend. XIV, § 1; Freedmen's Bureau Act of July 16, 1866, ch. 200, 14 Stat. 173; Saunders, *supra* note 167, at 279; Schnapper, *supra* note 166, at 777. In considering the Fourteenth Amendment, the Joint Committee on Reconstruction rejected a proposed amendment providing that "[a]ll laws, state or national, shall operate impartially

bill only benefited Blacks to the detriment of whites, but proponents of the bill emphasized that the distinctions were entirely proper.[176] The Freedmen's Bureau was formed both to assist Blacks in bettering their own position and to provide relief, but not to discriminate unfairly.[177]

Congress believed this legislation to be so important that after President Andrew Johnson's first veto, it passed a new version of the bill that contained four additional race-conscious provisions.[178] Although again vetoed by the President, the House and the Senate voted to override, creating the Freedmen's Bureau.[179] That the Acts were passed despite explicit objections to the enactment of legislation specifically drafted for the benefit of Blacks provides even greater support for the proposition that the Fourteenth Amendment was never intended to be color-blind.[180]

Meanwhile, the President had also vetoed the Civil Rights Act of 1866.[181] President Johnson believed that the Act provided for Blacks at the expense of white citizens.[182] Nevertheless, Congress voted to override the President's veto, enacting the Civil Rights Act of 1866.[183]

The history and debate surrounding the enactment of this legislation provide strong evidence that Congress "could not have intended [the Fourteenth Amendment] generally to prohibit affirmative action for blacks or other disadvantaged groups."[184] Numerous history scholars believe Congress passed the Fourteenth Amendment to "ensure the

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and equally on all persons without regard to race or color." *See* Saunders, *supra* note 167, at 276. Also, by a vote of seven to thirty-eight, the following amendment was rejected: "That no State . . . shall, by any constitution, law, or other regulation whatever . . . make or enforce in any way, or in any manner recognize any distinction between citizens . . . on account of race or color or previous condition of slavery." Saunders, *supra* note 167, at 276 n.135.

[176] *See* Freedmen's Bureau Act of July 16, 1866, ch. 200, 14 Stat. 173; Schnapper, *supra* note 166, at 756, 764, 766, 767, 774.

[177] Freedmen's Bureau Act of July 16, 1866, ch. 200, 14 Stat. 173; *see* Schnapper, *supra* note 166, at 768.

[178] *See* Schnapper, *supra* note 166, at 769, 771–72.

[179] *See* Freedmen's Bureau Act of July 16, 1866, ch. 200, 14 Stat. 173; Cong. Globe, 39th Cong., 1st Sess. 1287, 3842, 3850 (1866); Schnapper, *supra* note 166, at 775.

[180] *See* Freedmen's Bureau Act of July 16, 1866, ch. 200, 14 Stat. 173, Schnapper, *supra* note 166, at 756, 764, 766, 767, 774.

[181] *See* Civil Rights Act of 1866, ch. 31, 14 Stat. 27; 8 Compilation of the Messages and Papers of the Presidents 3610–11 (1914); Schnapper, *supra* note 166, at 771.

[182] *See* Civil Rights Act of 1866, ch. 31, 14 Stat. 27; Schnapper, *supra* note 166, at 771.

[183] *See* Civil Rights Act of 1866, ch. 31, 14 Stat. 27; Schnapper, *supra* note 166, at 771.

[184] Schnapper, *supra* note 166, at 754.; *see* U.S. Const. amend. XIV, § 1.

constitutionality of these two statutes and to write them into the fabric of the Constitution."[185] It would be incongruous to conclude that Congress would adopt such remedial legislation—the Freedmen's Bureau Act and the Civil Rights Act of 1866—while simultaneously enacting a color-blind Amendment.[186]

Another concern of the Reconstruction Congress was public education.[187] Contrary to the plurality's recent holding in *Parents Involved*, the Fourteenth Amendment, as originally intended, did not bar states and localities from engaging in voluntary integration efforts.[188] Many members of Congress actually supported race-conscious school policies in several states within a year of enacting the Fourteenth Amendment.[189] In total, the Freedman's Bureau was involved in the establishment or support of 4300 schools of all levels.[190]

From 1868 to 1887, while states were enacting race-conscious legislation to pursue integration, there were no constitutional challenges.[191] As a time when the level of federal monitoring of state action was extremely high, Congress was aware of the states' use of race-conscious criteria and did not did not take any action that would express con-

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[185] Brief for Historians, *supra* note 166, at 18; *see* U.S. CONST. amend. XIV, § 1; Civil Rights Act of 1866, ch. 31, 14 Stat. 27; Freedmen's Bureau Act of July 16, 1866, ch. 200, 14 Stat. 173.

[186] *See* Civil Rights Act of 1866, ch. 31, 14 Stat. 27; Freedmen's Bureau Act of July 16, 1866, ch. 200, 14 Stat. 173; Schnapper, *supra* note 166, at 789, 791.

[187] *See* David Tyack & Robert Lowe, *The Constitutional Moment: Reconstruction and Black Education in the South*, 94 AM. J. OF EDUC. 236, 237 (1986).

[188] *See* U.S. CONST. amend. XIV, § 1; *Parents Involved*, 127 S. Ct. at 2746 (plurality opinion); Brief for Historians, *supra* note 166, at 6.

[189] *See* U.S. CONST. amend. XIV, § 1; Brief for Historians, *supra* note 166, at 6; Brief for Historians of the Civil Rights Era William H. Chafe et al. as Amici Curiae Supporting Respondents at 7, *Parents Involved*, 127 S. Ct. 2738 (2007) (No. 05–908) [hereinafter Brief for Historians of the Civil Rights Era].

[190] *See* Brief for Historians of the Civil Rights Era, *supra* note 189, at 7. For example, Congress incorporated and funded Howard University and Berea College, both utilizing policies focused on desegregation. *See* Brief for Historians, *supra* note 166, at 12. Although the final version of the Civil Rights Act of 1875 did not include a mandatory school integration provision, as advocated by some members of Congress, several states took note of the congressional support and passed legislation integrating their schools. *See* Civil Rights Act of 1866, ch. 31, 14 Stat. 27; Brief for Historians, *supra* note 166, at 8, 11. From 1866 to 1887 Rhode Island, Michigan, Connecticut, New York, Nevada, Illinois, California, Pennsylvania, New Jersey, Louisiana, South Carolina, and Ohio adopted legislation to integrate schools. *See id.* at 8, 11.

[191] *See* Strauder v. West Virginia, 100 U.S. 303, 306 (1879); Brief for Historians, *supra* note 166, at 12.

cern.[192] Thus, Congress impliedly affirmed the states' use of racial considerations in pursuing the goal of integration.[193]

In his *Parents Involved* dissent, Justice Breyer recognized this original understanding: the legal principle "that the government may voluntarily adopt race-conscious measures to improve conditions of race even when it is not under a constitutional obligation to do so" is predicated upon this "well-established legal view of the Fourteenth Amendment."[194] He acknowledged that the Equal Protection Clause does not require that minorities and non-minorities be treated the same when remedying distinct disadvantages.[195] And the Fourteenth Amendment does not require that the two be treated differently in pursuit of equality.[196] Through its application of strict scrutiny, and its effectual per se proscription to race-conscious measures, the Court has undermined the fundamental remedial objectives of the Fourteenth Amendment.[197] Application of strict scrutiny to race-conscious student assignment plans is at odds with the legislative intent of the Reconstruction Congress.[198]

B. *Desegregation and Affirmative Action Are Distinct and Separate Categories*

The Court's desegregation jurisprudence affirms the consideration of race in desegregating public schools.[199] Since race-conscious

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[192] Brief for Historians, *supra* note 166, at 12.

[193] *See id.*

[194] *See Parents Involved*, 127 S. Ct. at 2814, 2815 (Breyer, J., dissenting) (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1970)).

[195] U.S. Const. amend. XIV, § 1; *see* Brent E. Simmons, *Reconsidering Strict Scrutiny of Affirmative Action*, 2 Mich. J. Race & L. 51, 72 (1996).

[196] *See* U.S. Const. amend. XIV § 1; Simmons, *supra* note 195, at 72.

[197] *See Parents Involved*, 127 S. Ct. at 2815, 2817–18 (Breyer, J., dissenting); Simmons, *supra* note 195, at 82.

[198] *See Parents Involved*, 127 S. Ct. at 2815 (Breyer, J., dissenting); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1195 (9th Cir. 2005) (Kozinski, C.J., concurring); Schnapper, *supra* note 166, at 789, 791.

[199] S*ee, e.g.*, N.C. State Bd. of Educ. v. Swann, 402 U.S. 43, 46 (1971) ("Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy."); *Swann*, 402 U.S. at 16 ("School authorities . . . might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole."); *see also Parents Involved*, 127 S. Ct. at 2811–12, 2817–18, 2834–35 (Breyer, J., dissenting); Brief for the NAACP Legal Defense & Education Fund, Inc. as Amicus Curiae in Support of Respondents at 9, 10, *Parents Involved*, 127 S. Ct. 2738 (2007) (No. 05–908) [hereinafter Brief for NAACP].

assignment policies are extensions of desegregation policies and distinguishable from affirmative action programs, the Court erred in applying the strict scrutiny standard from affirmative action jurisprudence.[200] Constitutional challenges to desegregation policies and affirmative action programs are based on the Equal Protection Clause of the Fourteenth Amendment.[201] Despite this commonality, the Court has appropriately analyzed desegregation cases differently from cases of affirmative action.[202] The harms associated with merit-based selection processes in affirmative action cases, used to justify the use of strict scrutiny, are not present in cases of desegregation or race-conscious student assignment policies.[203] Therefore, race-conscious student assignment policies should be analyzed consistently with desegregation case precedent.[204]

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[200] *See Parents Involved*, 127 S. Ct. at 2809, 2817, 2818, 2831–32 (Breyer, J., dissenting); Brief for Historians of the Civil Rights Era, *supra* note 189, at 21, 22; Archer, *supra* note 52, at 647–48.

[201] *See* U.S. Const. amend. XIV, § 1; Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 How. L.J. 1, 83 (1995); *see, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 476–77 (1989); Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 495 (1954).

[202] *Compare* McDaniel v. Barresi, 402 U.S. 39, 41 (1971) ("The Clarke County Board of Education, as part of its affirmative duty to disestablish the dual school system, properly took into account the race of its elementary school children in drawing attendance lines."), *with* Adarand Constructors v. Pena, 515 U.S. 200, 227 (1995) ("[W]e hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."); *see also Parents Involved*, 127 S. Ct. at 2817–18 (Breyer, J., dissenting); Brief for NAACP, *supra* note 199, at 5–6; Archer, *supra* note 52, at 639; Goodwin Liu, Seattle *and* Louisville, 95 Cal. L. Rev. 277, 311 (2007).

[203] *See Parents Involved*, 127 S. Ct. at 2818–19 (Breyer, J., dissenting); Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After* Adarand *and* Shaw, 149 U. Pa. L. Rev. 1, 20–22 (2000). Rubin identifies five harms that may accompany the use of racial classifications of historically disadvantaged groups; (1) the risk that racial classification is intended to harm an unpopular group and are employed for "no reason other than racial hostility"; (2) risk that race is used to "reward the members of (at least ordinarily) one's own racial group," leaving members of the "out group" to feel they are less than full members of the polity; (3) risk that race "is being used for reasons that reflect nothing more than erroneous stereotypes"; (4) risk that the use of race "may perpetuate a negative racial stereotype"; (5) risk that decisions based on race may "deny a person treatment as an individual in a way that other sorting mechanisms do not." Rubin, *supra*, at 20–22. Opponents of affirmative action criticize such programs because they allocate resources to minorities and harm "innocent whites" by replacing the concept of merit with quotas. Spann, *supra* note 201, at 12.

[204] *See Parents Involved*, 127 S. Ct. at 2811–12, 2817–18 (Breyer, J., dissenting); *McDaniel*, 402 U.S. at 41; Archer, *supra* note 53, at 639; Kevin G. Welner, *K–12 Race-Conscious Student Assignment Policies: Law, Social Science, and Diversity*, 76 Rev. Educ. Res. 349, 366–69 (2006).

However, in analyzing the race-conscious assignment policies in *Parents Involved*, Chief Justice Roberts cited prior affirmative action cases for the proposition that all racial classifications are subject to strict scrutiny.[205] Despite stressing that "[c]ontext matters" when analyzing racial classifications under the Equal Protection Clause, the *Parents Involved* Court ignored the distinction between desegregation and affirmative action in race-conscious policy precedent.[206] By disregarding this distinction and applying strict scrutiny to the race-conscious assignment policies in *Parents Involved*, the Court inappropriately conflated two distinct lines of cases: desegregation cases and affirmative action cases.[207]

1. Prior to *Parents Involved*, Desegregation Cases Have Never Been Analyzed with Strict Scrutiny

The Court has never applied strict scrutiny in the context of school desegregation.[208] The unanimous *Brown* Court did not apply "rigid scrutiny" in analyzing the constitutionality of the segregation policy, despite the Court's previous declaration in *Korematsu v. United States* that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and are subject to "the most rigid scrutiny."[209] From the landmark desegregation case of *Brown* to *Missouri v. Jenkins*, the Court never referenced, implied, or held that strict scrutiny would be the appropriate standard of review in desegregation cases.[210]

Before *Parents Involved*, the Court's history of applying strict scrutiny to racial classifications in educational policies had been appropri-

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[205] *See Parents Involved*, 127 S. Ct. at 2751–52 (plurality opinion) (citing Grutter v. Bollinger, 539 U.S. 306, 326 (2003), *Adarand*, 515 U.S. at 227, Fullilove v. Klutznick, 448 U.S. 448, 537 (1980)).

[206] *See id.* at 2754 (plurality opinion) (quoting *Grutter*, 539 U.S. at 327); *id.* at 2817–18 (Breyer, J., dissenting) (quoting *Grutter*, 539 U.S. at 327).

[207] *See id.* at 2761–65 (plurality opinion); *id.* at 2817–18 (Breyer, J., dissenting); Brief for NAACP, *supra* note 199, at 5–6; Archer, *supra* note 52, at 648, 650; *see, e.g.*, *Adarand*, 515 U.S. at 227; *Brown I*, 347 U.S. at 495.

[208] *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 89 (1995) (relying on good faith to determine whether school had complied with desegregation order); *Swann*, 402 U.S. at 16 (recognizing broad discretionary powers of schools to implement race-conscious desegregation policies); *see also Parents Involved*, 127 S. Ct. at 2816–17 (Breyer, J., dissenting); Brief for NAACP, *supra* note 199, at 5–6; Archer, *supra* note 52, at 648.

[209] *See Brown I*, 347 U.S. at 495; Korematsu v. United States, 323 U.S. 214, 216 (1944) (upholding government policy that required the internment of Japanese-Americans).

[210] *See generally Jenkins*, 515 U.S. at 73; *McDaniel*, 402 U.S. at 40; *Brown I*, 347 U.S. at 486.

ately confined to affirmative action cases.[211] The affirmative action cases "dealt not with the constitutional viability of integrative, race-conscious public school student assignments, but instead with policies and programs that considered race among other factors in the distribution of what the Court deemed to be legally cognizable burdens and benefits."[212]

Affirmative action policies were initially introduced in the context of employment, requiring government contractors to take affirmative action to eliminate the use of race considerations in hiring decisions.[213] Such affirmative action programs are criticized because they "can foster a sense that, without help, its beneficiaries are unable to compete."[214] This is because these selection processes involve the distribution of a limited resource.[215] In distributing those resources, the institutions engage in a merit-based competition.[216] Because selection is merit-based,

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[211] *See, e.g.*, *Grutter*, 539 U.S. at 311, 326 (applying strict scrutiny to law school admissions policy); *Adarand*, 515 U.S. at 205–10, 227 (applying strict scrutiny to affirmative action employment program); *J.A. Croson Co.*, 488 U.S. at 477–83, 493 (applying strict scrutiny to affirmative action employment program); *see also Parents Involved*, 127 S. Ct. at 2816–17 (Breyer, J., dissenting); Brief for NAACP, *supra* note 199, at 5–6; Archer, *supra* note 52, at 639, 648, 650.

[212] *See* Archer, *supra* note 52, at 639; *see, e.g.*, *Adarand*, 515 U.S. at 205 (describing the contract terms that provide additional compensation to contractors who hired small businesses operated by "socially or economically disadvantaged individuals"); *J.A. Croson Co.*, 488 U.S. at 477 (describing the Minority Business Utilization Plan that "required prime contractors to whom the city awarded construction contracts to subcontact at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises").

[213] *See* Samuel Leiter & William M. Leiter, Affirmative Action in Antidiscrimination Law and Policy: An Overview and Synthesis 40 (2002); Archer, *supra* note 52, at 646–47. President John F. Kennedy issued Executive Order 10,925 in March 1964, requiring federal contractors to stop discrimination and "take affirmative action to ensure that applicants are employed and that employees are treated . . . without regard to their race, creed, color, or national origin." *See* Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 6, 1961). President Lyndon B. Johnson extended the requirement of affirmative action to all federal employment following the enactment of the Civil Rights Act of 1964. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000d (1964); Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965); West, *supra* note 89, at 613. Executive Order 11,246 required "equal opportunity in Federal employment for all qualified persons" and "prohibit[ed] discrimination in employment because of race, creed, color, or national origin . . . ." Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965).

[214] *See* Rubin, *supra* note 203, at 33.

[215] *See* Archer, *supra* note 52, at 639; Welner, *supra* note 204, at 366–67.

[216] *See* Archer, *supra* note 52, at 653; Liu, *supra* note 202, at 300; Welner, *supra* note 204, at 366–67. This competition is a zero-sum game: an applicant is either admitted or rejected. *See* Archer, *supra* note 52, at 652; Welner, *supra* note 204, at 366–67. In this context,

rejection carries a stigma.[217] That stigma may burden white and minority students alike.[218] It is the possibility of this stigma resulting from selection (or non-selection) that triggers strict scrutiny analysis in affirmative action cases.[219]

Although *Gratz*, *Grutter*, and *Bakke* all dealt with race-conscious policies in education, they are not desegregation cases; they are clear affirmative action cases.[220] Selection into a college, university, or graduate program is a merit-based decision.[221] Just as an employer has limited hiring needs, a university only has a limited enrollment; therefore, the number of available spots is a limited resource.[222] The Massachusetts District Court recognized this difference when it upheld a student race-conscious assignment policy in *Comfort v. Lynn School Committee*.[223] Even though the K–12 schools throughout the district offered varying academic programs, the education at each school for any given level was comparable.[224] However,

> this is not a case, as in *Adarand*, *Bakke*, or *Grutter*, in which the [school district], in the distribution of limited resources, gives preference to some persons on the basis of race. Students like the plaintiffs may not be able to attend the specific school

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there is an outright denial of opportunity to some applicants. *See* Archer, *supra* note 52, at 652; Welner, *supra* note 204, at 366–67.

[217] *See* Liu, *supra* note 202, at 300; Welner, *supra* note 204, at 366–67.

[218] *See* Rubin, *supra* note 203, at 38, 39; Spann, *supra* note 201, at 311; Welner, *supra* note 204, at 366.

[219] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1194 (9th Cir. 2005); Welner, *supra* note 204, at 366–67.

[220] *See Parents Involved*, 127 S. Ct. at 2817, 2818–19 (Breyer, J., dissenting); Grutter v. Bollinger, 539 U.S. 306, 311, 314–17, 329 (2003); Gratz v. Bollinger, 539 U.S. 244, 249–50, 256 (2003); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 274–75 (1977); Spann, *supra* note 52, at 3.

[221] *See* Archer, *supra* note 52, at 653; Welner, *supra* note 204, at 367.

[222] *See* Archer, *supra* note 52, at 652.

[223] *See* Comfort v. Lynn Sch. Comm., 263 F. Supp. 2d 209, 215 (D. Mass. 2003). The district court distinguished *Adarand*'s affirmative action program, where "the Court subjected a racial *classification* to strict scrutiny," from Lynn's race-conscious assignment policies, where race is merely considered but "no preference is given to members of one race over another." *See id.* at 244–45 (citing *Adarand* 515 U.S. at 204). The district court further noted that other courts have similarly held that "where differential treatment does not favor members of one race over another, there is no racial classification, *Adarand* is inapposite, and strict scrutiny does not apply." *See id.* at 244.

[224] *See id.* at 245.

> they want, but no student is advantaged over another on the basis of race.[225]

In contrast, primary and secondary public education is not a limited resource distributed on the basis of merit.[226] Because attendance is compulsory for all K–12 students, school assignment is fundamentally a sorting process.[227] As a sorting process, assignment decisions "do not reflect judgments about the merit, qualifications, or talents of individual children."[228] When viewed in this manner, "there is no risk, as there is in the context of affirmative action, that a government body taking account of race is acting on the basis of a belief that blacks are less able than whites or inherently in need of assistance."[229] So, while a student may not be assigned to his or her first choice K–12 school, assignment to a second or third choice school does not carry the same stigma as rejection from a position awarded on the basis of merit.[230]

One instructive comparison for this race-conscious sorting process is electoral redistricting.[231] While districting policies are not completely analogous to parental choice plans, both are essentially non-merit based sorting processes.[232] As such, there is no stigma attached to selection or non-selection in either context.[233] In cases of electoral redistricting, strict scrutiny is not applied unless "race was the predominant factor motivating the legislature's decision."[234] Despite the command of *Adarand* that all racial classifications automatically be analyzed under strict scrutiny, the sorting process of electoral redistricting proves that

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[225] *See id.*

[226] *See Parents Involved*, 127 S. Ct. at 2918–19 (Breyer, J., dissenting); *Parents Involved*, 426 F.3d at 1181; *Comfort*, 263 F. Supp. 2d at 245; Brief for Respondents at 5, Meredith v. Jefferson County Bd. of Educ., No. 05–915 (2007); Welner, *supra* note 204, at 366–67.

[227] *See* Liu, *supra* note 202, at 301; Welner, *supra* note 204, at 366–67.

[228] *See* Liu, *supra* note 202, at 300.

[229] *See* Rubin, *supra* note 203, at 39.

[230] *See Parents Involved*, 127 S. Ct. at 2818 (Breyer, J., dissenting); *Parents Involved*, 426 F.3d at 1194; Rubin, *supra* note 203, at 39.

[231] *See* Liu, *supra* note 202, at 301.

[232] *See id.*

[233] *See* Rubin, *supra* note 203, at 38.

[234] *See* Miller v. Johnson, 515 U.S. 900, 916 (1995).

this is not the case.[235] Similarly, the sorting policies at issue in *Parents Involved* should not have been subject to strict scrutiny.[236]

2. Deference: Desegregation Jurisprudence

In desegregation cases the Court has shown great deference to local school authorities and has emphasized the discretionary authority of local school boards in matters of educational policy setting.[237] These cases have stood for the principle that schools can adopt voluntary race-conscious policies to remedy *de facto* discrimination.[238] The Court's current "strict in theory, but fatal in fact" approach, used to invalidate voluntary race-conscious assignment policies in K–12 schools, is inconsistent with "[a] longstanding and unbroken line of legal authority" endorsing this principle.[239]

In support, Justice Breyer cited the Court's continued deference to the authority of local school boards dating back to *Brown*.[240] The Court has repeatedly recognized the broad authority of local schools in formulating and implementing educational policies.[241] It has long been observed that "local autonomy of school districts is a vital national tradition."[242]

In *Swann*, the Court held that district courts were authorized to mandate desegregation policies, but that their authority was limited to situations where schools had first failed to meet their obligation to

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[235] *See Adarand*, 515 U.S. at 227; Archer, *supra* note 52, at 655; Liu, *supra* note 202, at 303; *see, e.g.*, *Miller*, 515 U.S. at 916.

[236] *See Parents Involved*, 127 S. Ct. at 2818–19 (Breyer, J., dissenting); *Parents Involved*, 426 F.3d at 1181; *Comfort*, 263 F. Supp. 2d at 245; Brief for Respondents at 5, Meredith v. Jefferson County Bd. of Educ., No. 05–915 (2007); Welner, *supra* note 204, at 366–67.

[237] *See, e.g.*, Freeman v. Pitts, 503 U.S. 467, 490 (1992); Bd. of Educ. v. Dowell, 489 U.S. 237, 248 (1990); *Swann*, 402 U.S. at 16; *see also Parents Involved*, 127 S. Ct. at 2801, 2811–12 (Breyer, J., dissenting).

[238] *See* N.C. Bd. of Educ. v. Swann, 402 U.S. 43, 45 (1971) ("[S]chool authorities have wide discretion in formulating school policy, and that as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements."); *see also Parents Involved*, 127 S. Ct. at 2811–12, 2814, 2836 (Breyer, J., dissenting).

[239] *See Parents Involved*, 127 S. Ct. at 2811, 2817 (Breyer, J., dissenting).

[240] *See id.* at 2811–15, 2836; Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 299 (1955) ("School authorities have the primary responsibility for elucidating, assessing, and solving these [violations of the Equal Protection Clause] problems.").

[241] *See Swann*, 402 U.S. at 16; *N.C. Bd. of Educ.*, 402 U.S. at 45.

[242] *See Freeman*, 503 U.S. at 490 (citing Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 410 (1977)).

desegregate.[243] Even after lower courts found that the board had failed to meet its obligation, the board was still able to choose which of three policies to adopt, or to come forward with a new plan of its own.[244] This principle has been accepted by lower courts and the federal government.[245] The Court emphasized that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of educational process."[246]

The "resegregation" cases beginning in the 1990s relied upon this principle in lifting desegregation orders, despite findings of *de facto* desegregation.[247] Because of the value placed upon local control of educational decisions, the Court intended not only "to remedy the violation" of the Equal Protection Clause but also "to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution."[248] Releasing school districts from portions of desegregation decrees, but not others, the Court stated that "[p]artial relinquishment of judicial control . . . can be an important and significant step in fulfilling the district court's duty to return the operations and control of schools to local authorities."[249]

Moreover, recognizing the authority of local school boards, the Court has previously encouraged, not condemned, voluntary action to remedy both *de jure* and *de facto* discrimination.[250] Although a federal

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[243] *See Swann*, 402 U.S. at 15.

[244] *See id.* at 11.

[245] *See Parents Involved*, 127 S. Ct. at 2811–12, 2813–14, 2816 (Breyer, J., dissenting); *Swann*, 402 U.S. at 16; Brief for NAACP, *supra* note 199, at 10.

[246] Milliken v. Bradley, 418 U.S. 717, 741–42 (1973) (emphasizing that the District Court could not force local school district A into a mandatory busing program with a neighboring school district B which had engaged in *de jure* segregation, where that school district A had not engaged in such activity).

[247] *See, e.g.*, *Jenkins*, 515 U.S. at 102; *Freeman*, 503 U.S. 489–90; *Dowell*, 498 U.S. at 248.

[248] *See Jenkins*, 515 U.S. at 102 (quoting *Freeman*, 503 U.S. at 489).

[249] *See Freeman*, 503 U.S. at 489.

[250] *See Parents Involved*, 127 S. Ct. at 2810–11, 2812 (Breyer, J., dissenting) (citing *McDaniel*, 402 U.S. at 41); Archer, *supra* note 52, at 644. Further defining the scope of the federal courts remedial powers, the Court has stated,

> [t]hese specific educational remedies, although normally left to the discretion of the elected school board and professional educators, were deemed necessary to restore victims of discriminatory conduct to the position they would have enjoyed in terms of education had these four components been

court cannot intervene where a district has eliminated the vestiges of *de jure* segregation (while *de facto* segregation still exists), a school district is not so limited.[251] In *Keyes*, Justice Powell specifically stated that "[s]chool boards would, of course, be free to develop and initiate further plans to promote school desegregation" beyond what the court has ordered because "[n]othing in this opinion is meant to discourage school boards from exceeding minimal constitutional standards in promoting the values of an integrated school experience."[252] This statement makes clear that the Court did not intend to limit a local school district's authority to remedy *de facto* segregation.[253]

Prior to *Parents Involved*, the Court had never addressed the constitutionality of voluntary race-conscious assignment policies in K–12; however, an illustrative case on this matter involved the same school district more than two decades earlier.[254] In *Washington v. Seattle School District No. 1*, the Court held that the Fourteenth Amendment could be used to defend a mandatory busing program from attack by the State.[255] The Seattle school board voluntarily adopted a busing program to reduce racial isolation in district schools.[256] In response, a community organization called Citizens for Voluntary Integration Committee (CiVIC) opposed the plan by drafting Initiative 350, enacted in 1978.[257] The Initiative's sole purpose was to make illegal mandatory busing for purposes of integration.[258] The Court held Initiative 350 unconstitutional because it served to "[disadvantage] those who

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provided in a nondiscriminatory manner in a school system free from pervasive *de jure* racial segregation.

See Milliken, 433 U.S. at 282.

[251] *See Parents Involved*, 127 S. Ct. at 2810–11, 2812, 2814–15 (Breyer, J., dissenting); Keyes v. Sch. Dist. No. 1, 412 U.S. 189, 242 (1973) (Powell, J., concurring); Archer, *supra* note 52, at 644.

[252] *See Keyes*, 412 U.S. at 242 (Powell, J., concurring) (holding "where no statutory dual system has ever existed, plaintiffs must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action").

[253] *See Parents Involved*, 127 S. Ct. at 2791 (Kennedy, J., concurring); *id.* at 2811–15 (Breyer, J., dissenting); Brief for NAACP, *supra* note 199, at 9–11.

[254] *See Parents Involved*, 127 S. Ct. at 2746 (plurality opinion); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 459 (1982); Archer, *supra* note 52, at 636–37, 649.

[255] *See Washington*, 458 U.S. at 459, 487.

[256] *See id.* at 461. The school was not under a mandatory desegregation decree and the Court did not address whether the school had engaged in *de jure* segregation. *See id.* at 464 n.8.

[257] *See id.* at 461–63.

[258] *Id.* at 463.

would benefit from laws barring" *de facto* desegregation.[259] Moreover, the Initiative undermined the school board—"those who . . . would otherwise regulate student assignment decisions"—and it "[burdened] all future attempts to integrate Washington schools in districts throughout the State."[260] The Court stated that "in the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process."[261]

Although the Court analyzed Initiative 350's constitutionality, not that of the voluntary busing program, it noted that decisions about such programs were squarely within the authority of the local school boards.[262] This meant that Seattle could continue its voluntary race-conscious assignment policy, even though such a program could not have been ordered by a federal court.[263] Therefore, the Court implied that race-conscious policies adopted by a school board, even in the absence of *de jure* segregation, were permissible.[264]

Washington was decided just four years after *Bakke*, yet the Court made no mention of affirmative action, nor did it question the constitutionality of Seattle's race-conscious assignment policy.[265] At no time when addressing issues of desegregation had the Court treated the issue as one of affirmative action.[266] By contradicting the principle that school officials have greater authority to foster racially integrated

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[259] *See id.* at 475.

[260] *See Washington*, 458 U.S. at 475, 483 (internal quotations omitted).

[261] *See id.* at 474.

[262] *See id.* at 479–80. The Court stated:

> [b]efore adoption of the initiative, the power to determine what programs would most appropriately fill a school district's educational needs—including programs involving student assignment and desegregation—was firmly committed to the local board's discretion. The question whether to provide an integrated learning environment rather than a system of neighborhood schools surely involved a decision of that sort.

Id.

[263] *See Parents Involved*, 127 S. Ct. at 2830, 2831 (Breyer, J., dissenting); *Washington*, 458 U.S. at 459, 487; Brown, *supra* note 58, at 10.

[264] *See Parents Involved*, 127 S. Ct. at 2830, 2831 (Breyer, J., dissenting); *Washington*, 458 U.S. at 481–82, 487.

[265] *See generally Washington*, 458 U.S. 457; *Bakke*, 438 U.S. at 268.

[266] *See, e.g., Washington*, 458 U.S. at 487; *see also* Brief for NAACP, *supra* note 199, at 5.

student bodies than federal courts, the *Parents Involved* Court broke long-standing, clear precedent.[267]

Conclusion

The *Parents Involved* Court had the opportunity to affirm the promise of *Brown v. Board of Education* and to provide to all students the opportunity to learn in a racially-diverse environment. Instead, the *Parents Involved* plurality took the harsh position that integration and racial diversity, and the benefits that flow from that diversity, cannot be pursued voluntarily by local school districts. In reaching this conclusion, the Court mistakenly applied the strict scrutiny standard of review.

Applying strict scrutiny conflicts with the original intent of the Fourteenth Amendment; application of a "fatal in fact" standard of analysis is inconsistent with the Equal Protection Clause. It unnecessarily and inappropriately conflated the Court's affirmative action and desegregation jurisprudence by failing to account for the relevant differences between the K–12 sorting assignment policies and merit-based selection affirmative action programs. By applying strict scrutiny, the Court disregarded the context of K–12 schools and failed to give the proper deference, as compelled by precedent established in desegregation case law, to the authority of local school boards.

The Court's ruling in *Parents Involved* has taken from schools "the instruments they have used to rid their schools of racial segregation, instruments that they believe are needed to overcome the problems of cities divided by race and poverty."[268] The *Parents Involved* plurality is best summarized by Justice Breyer in his dissent. Speaking of the plurality that held the policies unconstitutional, he wrote:

> It misapplies the relevant constitutional principles, it announces legal rules that will obstruct efforts by state and local governments to deal effectively with the growing resegregation of public schools, it threatens to substitute for present calm a disruptive round of race related litigation, and it undermines *Brown*'s promise of integrated primary and secondary education that local communities have sought to make a

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[267] *Parents Involved*, 127 S. Ct. at 2811, 2817–18 (Breyer, J., dissenting); Archer, *supra* note 52, at 644.

[268] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2837 (2007) (Breyer, J., dissenting).

reality. This cannot be justified in the name of the Equal Protection Clause.[269]

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[269] *Id.* at 2800–01.

BREAKING THE CHAINS: COMBATING HUMAN TRAFFICKING AT THE STATE LEVEL

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Abstract: Human trafficking is a modern form of slavery. Many individuals fall prey to this flourishing industry after being lured from their homes by the promise of economic opportunity. Upon relocation, these victims are forced to work under the darkest conditions in countries around the world, including the United States. This Note explores the problem of trafficking in the United States and the efforts being exerted to combat it at the federal and state levels. Massachusetts State Senator Mark C. Montigny recently introduced a comprehensive bill that would complement and improve upon federal efforts to prosecute perpetrators of human trafficking and provide services to their victims. Ultimately, given the clandestine nature of the industry and the minimal effect the federal legislation has had, this Note urges Massachusetts to adopt Senator Montigny's bill to fight human trafficking effectively on the local level, and for other state legislatures quickly to follow suit.

Introduction

In Laredo, Texas, a twelve-year-old Mexican girl, identified as S.A.D., was found shackled to a chain link fence behind the home of Warren and Sandra Bearden.[1] She had deep lacerations on her wrists and ankles where the chains had been attached, cuts and bruises on her face and body from being beaten, and her skin was severely burned after being left in the sun for days.[2] She suffered from such extensive malnourishment and dehydration that doctors were convinced that she

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[1] Gilbert King, Woman, Child for Sale: The New Slave Trade in the 21st Century 5–7 (2004). The police discovered the child when they responded to a 911 call placed by a neighbor who heard strange noises coming from the Beardens' backyard. *Id.* at 6–7. During the proceedings, the victim was only referred to by her initials, S.A.D. Laurel Almada, *Bearden Denies Abuse Allegations*, Laredo Morning Times, Oct. 18, 2001, at 1A.

[2] King, *supra* note 1, at 6; Laurel Almada, *Officer Cries on Stand in Bearden Trial*, Laredo Morning Times, Oct. 16, 2001, at 1A.; Stephanie Armour; *Some Foreign Household Workers Face Enslavement*, USA Today, Nov. 19, 2001, at 1A.

would not have survived another week if she had been left in the conditions in which she was found.[3]

The sordid details of S.A.D.'s situation were revealed upon her discovery.[4] The Beardens met S.A.D. while they were on vacation in Veracruz; Sandra Bearden was herself a Mexican citizen.[5] The Beardens made S.A.D. an offer that seemed too good to refuse: in exchange for working as a maid in their home, she would receive food, clothing, an education, and medical care.[6] Mrs. Bearden explained to S.A.D.'s family that she would give their daughter the opportunity to achieve the American dream.[7] After being smuggled into the United States, however, S.A.D.'s reality failed to match her expectations.[8] She was locked up outside after finishing her chores each day.[9] She was beaten regularly with a belt, a broomstick, a glass, or a skillet.[10] Mrs. Bearden sprayed mace in her eyes when she appeared tired.[11] S.A.D. was starved so often that she resorted to eating dirt to survive.[12] Instead of finding the American dream, S.A.D. found hell on earth.[13]

Mrs. Bearden was found guilty of five counts of injury to a child, one count of abandoning a child, and one count of aggravated kidnapping.[14] Mr. Bearden was also charged with child endangerment, but S.A.D.'s parents did not wish to proceed with his prosecution.[15] S.A.D.'s story made national headlines because of the severity of Mrs. Bearden's actions and because the atrocities took place in an unlikely location: suburban America.[16] However, her story is not rare; thou-

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[3] *Police: Woman Chained 12-Year-Old Maid to Backyard Pole*, CNN.COM, May 14, 2001, http://archives.cnn.com/2001/US/05/14/chained.girl.

[4] *See* KING, *supra* note 1, at 5–7.

[5] *Id.* at 5.

[6] *See id.* at 5–6.

[7] *Id.* at 6.

[8] *See id.* at 5–6; *Police: Woman Chained 12-Year-Old Maid to Backyard Pole*, *supra* note 3.

[9] Armour, *supra* note 2.

[10] KING, *supra* note 1, at 7; Laurel Almada, *Child Testifies of Abuse*, LAREDO MORNING TIMES, Oct. 17, 2001, at 1A.

[11] KING, *supra* note 1, at 6; Armour, *supra* note 2.

[12] Armour, *supra* note 2.

[13] *See* KING, *supra* note 1, at 6–7; Armour, *supra* note 2.

[14] Bearden v. Texas, No. 04-02-00019-CR, 2003 WL 202684 at *1 (Tex. Crim. App. Jan 31, 2003); Laurel Almada, *Bearden Sentenced to 99 Years*, LAREDO MORNING TIMES, Oct. 20, 2001, at 1A.

[15] Jeorge Zarazua, *Judge Dismisses Felony Charge; Victim's Family Satisfied with Laredo Wife's Conviction*, SAN ANTONIO EXPRESS-NEWS, Aug. 23, 2002, at 5B. S.A.D.'s parents believed that Mr. Bearden never abused the child and may not have even known about the abuse, as he was a truck driver who was not in the home very often. *Id.*

[16] KING, *supra* note 1, at 7.

sands of individuals in the United States have their own horrific stories of victimization and abuse stemming from trafficking and exploitation.[17] The human trafficking industry claims victims from varying cultures, geographic locations, and age groups; each one equally deserves to have their story told.[18]

Human trafficking threatens health, security, human rights, and fair labor standards on both the international and domestic level.[19] Currently, human trafficking is the third largest criminal industry in the world behind drug and arms trafficking, generating approximately $9.5 billion in profit annually.[20] It affects an astounding number of people: the State Department estimates that 800,000 people are trafficked across international borders each year.[21] If that figure included victims who are trafficked within the internal borders of a

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[17] *See id.*

[18] *See id.* at 7–8; U.S. Dep't of State, Trafficking in Persons Report 4 (2007) [hereinafter TIP Report 2007], *available at* http://www.state.gov/g/tip/rls/tiprpt/2007/.

[19] Trafficking Victims Protection Act (TVPA) of 2000, 22 U.S.C. § 7101(b)(3) (2000); King, *supra* note 1, at 15–16; U.S. Dep't of State, Trafficking in Persons Report 4 (2008) [hereinafter TIP Report 2008], *available at* http://www.state.gov/g/tip/rls/tiprpt/2008/; TIP Report 2007, *supra* note 18, at 5; *see* Joan Fitzpatrick, *Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking*, 24 Mich. J. Int'l L. 1143, 1147 (2003).

The distinction between human smuggling and human trafficking must be understood, as these terms are incorrectly used interchangeably. Sheldon X. Zhang, Smuggling and Trafficking in Human Beings: All Roads Lead to America 106 (2007). Human smuggling involves illegal immigrants who willingly and voluntarily pay a fee to be transported to a different country. *See id.* "[T]he relationship between migrants and offenders (the smugglers) usually ends on arrival in the destination country. The criminal's profit is derived from the process of smuggling the migrant alone." Kevin Bales & Steven Lize, Trafficking in Persons in the United States 11 (Mar. 2005) (unpublished report) *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/211980.pdf. In contrast, human trafficking "is smuggling *plus* coercion or deception at the beginning of the process and exploitation at the end." *Id.* While smuggling victims have consented to the activity, trafficking victims "have either never consented or, if they initially consented, their consent has been negated by the coercive, deceptive or abusive actions of the traffickers." U.S. Dep't of State, Trafficking in Persons Report 18 (2004) [hereinafter TIP Report 2004], *available at* http://www.state.gov/g/tip/rls/tiprpt/2004/.

[20] U.S. Dep't of State, Trafficking in Persons Report 13 (2006) [hereinafter TIP Report 2006], *available at* http://www.state.gov/g/tip/rls/tiprpt/2006/; David Batstone, NOT for Sale: The Return of the Global Slave Trade—and How We Can Fight It 3–4 (2007); Zhang, *supra* note 19, at 106.

[21] TIP Report 2007, *supra* note 18, at 8. *But see* Zhang, *supra* note 19, at 108 (noting other organizations have estimated between one and four million people are victimized annually). Data on the number of trafficking victims varies greatly due to the clandestine nature of the industry and the failure of victims to come forward. Susan W. Tiefenbrun, *The Domestic and International Impact of the U.S. Victims of Trafficking Protection Act of 2000: Does Law Deter Crime?*, 2 Loy. Int'l L. Rev. 193, 193 n.2 (2005).

country, it would skyrocket even higher.[22] Although it is unclear precisely how many victims are trafficked into the United States from abroad, Congress has approximated that anywhere from 14,500 to 50,000 individuals are brought into the United States per year, making it a coveted destination country.[23] Because of this popularity, the United States must exert greater efforts on both the state and federal levels to effectively stop this flourishing industry.[24]

Moreover, the United States must continue to fervently combat human trafficking to protect those who are targeted and fall victim to this ever-growing industry.[25] The practice of human trafficking "is an ongoing, underground, and brutal exploitation of men, women and children. It is a hidden crime that preys on the most vulnerable—the poor, the uneducated, children, and especially, the impoverished immigrant seeking a better life."[26] Many of the victims come from the third-world after being offered the opportunity to obtain an education, a steady income, or the ability to provide a better life for the families they leave behind.[27] The victims come to achieve the American dream of success and opportunity, but, in reality, experience an American nightmare of exploitation and degradation.[28] The fundamental rights and freedoms of these individuals must be fought for and protected at every level of government.[29]

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[22] *See* TIP REPORT 2007, *supra* note 18, at 8.

[23] 22 U.S.C. § 7101(b)(1) (reporting that 50,000 victims are smuggled into the United States annually); TIP REPORT 2004, *supra* note 19, at 23 (reporting approximately 14,500 to 17,500 individuals have been smuggled into the country); U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 7 (2003) [hereinafter TIP REPORT 2003], *available at* http://www.state.gov/g/tip/rls/tiprpt/2003 (estimating that between 18,000 and 20,000 individuals are brought into the United States annually); KING, *supra* note 1, at 19 (reporting the CIA has estimated 50,000 people are being trafficked into the U.S. each year); *see also* ZHANG, *supra* note 19, at 115; Polaris Project, Transnational Trafficking into the U.S., http://www.polarisproject.org/content/view/61/82/ (last visited Oct. 8, 2008). There has been little explanation for the disparity in official government estimates. *See* Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337, 343–44 (2007).

[24] *See* Sally Stoecker, *Human Trafficking: A New Challenge for Russia and the United States*, *in* HUMAN TRAFFIC AND TRANSNATIONAL CRIME: EURASIAN AND AMERICAN PERSPECTIVES 13, 24 (Sally Stoecker & Louise Shelley eds., 2005).

[25] *See id.*

[26] Bales & Lize, *supra* note 19, at 6.

[27] KING, *supra* note 1, at 2. *See* Michael Payne, *The Half-Fought Battle: A Call for Comprehensive State Anti-Human Trafficking Legislation and a Discussion of How States Should Construct Such Legislation*, 16 KAN. J.L. & PUB. POL'Y 48, 49 (2006).

[28] KING, *supra* note 1, at 6–8.

[29] *See* TIP REPORT 2007, *supra* note 18, at 5.

This Note will argue that additional measures must be taken on the state level to effectively combat human trafficking in the United States. Specifically, this Note will examine and advocate for the legislation that has been proposed by State Senator Mark C. Montigny of Massachusetts. Part I will detail the different industries that take advantage of human trafficking in the United States: sexual enslavement, domestic servitude, and forced labor. This section will also analyze how the human trafficking industry operates, and the effects it has on its victims, to better understand what state-level legislation will need to accomplish. Part II will explain the federal legislation that is currently in place that is used to combat human trafficking, including the Mann Act, the Trafficking Victims Protection Act (TVPA) and its subsequent reauthorization acts, and the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act).[30] Finally, Part III will discuss the merits of state anti-trafficking legislation, analyze Senator Montigny's bill in detail, and urge the Massachusetts State Legislature to pass the bill immediately. Moreover, this Note encourages all states that lack comprehensive anti-trafficking legislation to look to the Massachusetts bill for guidance when updating or drafting their own statutory scheme.

I. The Inner Workings of Human Trafficking

> *It is hard for many Americans to believe that slavery still exists on a grand scale in the world, let alone that it may have a foothold in their community.*[31]

A. *Industries that Benefit from Human Trafficking in the United States*

Many different industries in the United States profit from the exploitation of human trafficking victims.[32] Accordingly, it is important to analyze these industries to better understand how to effectively combat

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[30] White–Slave Traffic (Mann) Act, 18 U.S.C. §§ 2421–2427 (2000); TVPA of 2000, ch. 28, 114 Stat. 1464 (codified as amended at scattered sections of 18, 22 U.S.C. (2000)); Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109–164, 119 Stat. 3558 (codified as amended at scattered sections of 18, 22, 42 U.S.C. (Supp. V 2005)) [hereinafter TVPRA of 2005]; Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108–193, 117 Stat. 2875 (codified as amended at scattered sections of 8, 18, 22 U.S.C. (Supp. III 2003)) [hereinafter TVPRA of 2003]; Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108–21, 117 Stat. 650 (relevant sections codified as amended at 18 U.S.C. § 2423).

[31] Batstone, *supra* note 20, at 228.

[32] *See* TIP Report 2007, *supra* note 18, at 4; Fitzpatrick, *supra* note 19, at 1149.

human trafficking through state statutory schemes.[33] Specifically, the provisions focusing on victim protection must be drafted to effectively encompass as many types of trafficking victims as possible, which can only be accomplished after gaining a thorough understanding of human trafficking and the economies it fuels.[34] This analysis is also needed to generate awareness.[35] Victims of human trafficking are living amongst us, without our knowledge, yet are very much in need of our help.[36] State legislation aims to heighten public awareness to improve detection of trafficking and deter its development, but success will remain unrealized if ordinary citizens are completely unaware of human trafficking and how it operates.[37]

1. Sexual Exploitation

The most notorious industry that benefits from human trafficking is the sexual slavery industry.[38] Roughly eighty percent of transnational human trafficking victims are women.[39] This high percentage can be attributed to sexual slavery's position as the most prominent form of slavery in the world.[40]

Sexual exploitation has surfaced in several different forms, but the general methods of exploitation remains the same.[41] The women are promised a better life through high-paying job offers or educational

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[33] TIP Report 2007, *supra* note 18, at 4; Fitzpatrick, *supra* note 19, at 1149, 1164.

[34] *See* Hussein Sadruddin et al., *Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses*, 16 Stan. L. & Pol'y Rev. 379, 385 (2005); Theresa Barone, Comment, *The Trafficking Victims Protection Act of 2000: Defining the Problem and Creating a Solution*, 17 Temp. Int'l & Comp. L.J 579, 592, 594 (2003).

[35] *See* Batstone, *supra* note 20, at 7; Free the Slaves & Human Rights Ctr., Hidden Slaves: Forced Labor in the United States 5 (2004), *available at* http://www.hrc.berkeley.edu/pdfs/hiddenslaves_report.pdf.

[36] *See* Batstone, *supra* note 20, at 7; Free the Slaves & Human Rights Ctr., *supra* note 35, at 5.

[37] *See* Batstone, *supra* note 20, at 7. Free the Slaves & Human Rights Ctr., *supra* note 35, at 5.

[38] *See* Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 Fordham L. Rev. 2977, 3027 (2006).

[39] TIP Report 2008, *supra* note 19, at 7; TIP Report 2007, *supra* note 18, at 8.

[40] TIP Report 2007, *supra* note 18, at 27.

[41] *See id.* at 26–27; Bales & Lize, *supra* note 19, at 24. There are additional ways that individuals end up being trafficked into the sex industry. Tala Hartsough, Note, *Asylum for Trafficked Women: Escape Strategies Beyond the T Visa*, 13 Hastings Women's L.J. 77, 85 (2002). Sometimes, the "girls might be sold by their parents to a broker." *Id.* (quoting Kevin Bales, Disposable People: New Slavery in the Global Economy 18 (1999)). In other situations, women are aware that they will become prostitutes, but have no idea of how extreme the situation will be. *Id.*

opportunities.[42] However, once they leave their homes, they are forced into any number of commercial sex industries, including: "prostitution, pornography, stripping, live-sex shows, mail-order brides, military prostitution and sex-tourism."[43]

The subservience of these victims is maintained by the traffickers' use of a number of control mechanisms.[44] Debt bondage is commonly used; many women are forced by their captors to pay off a "never-ending cycle of debt," which includes the cost of the trip and the everyday expenses—food, medicine, toilet paper, condoms—that they incur.[45] Additional amounts are added to the outstanding balance for insubordination or underperformance.[46] Moreover, the women are given little (if any) money for services rendered and are forbidden from keeping track of their debt, giving their captors increased control over their freedom.[47]

In addition to financial restrictions, the women are limited by many other control mechanisms devised by their captors.[48] They are often subjected to intense physical and sexual violence.[49] Their physical movement is severely restricted: they are either under constant surveillance and/or they are moved around frequently to disorient them.[50] They are kept in isolation from the rest of society, and in extreme situations, from each other.[51] The women are also threatened

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[42] TIP REPORT 2007, *supra* note 18, at 8; TIP REPORT 2003, *supra* note 23, at 6; Bales & Lize, *supra* note 19, at 24. Some of the employment opportunities that the women are offered to capture their interest include working as a babysitter, housekeeper, seamstress, waitress or model. TIP REPORT 2008, *supra* note 19, at 8; TIP REPORT 2003, *supra* note 23, at 6.

[43] U.S. DEP'T OF HEALTH & HUMAN SERVS., Sex Trafficking: Fact Sheet (2008), http://www.acf.hhs.gov/trafficking/about/fact_sex.html (last visited Oct. 8, 2008) [hereinafter HHS, Sex Trafficking]; *see* TIP REPORT 2007, *supra* note 18, at 8, 10; Bales & Lize, *supra* note 19, at 38.

[44] U.S. DEP'T OF HEALTH & HUMAN SERVS., Human Trafficking: Fact Sheet (2008), http://www.acf.hhs.gov/trafficking/about/fact_human.html (last visited Oct. 8, 2008) [hereinafter HHS, Human Trafficking]; *see* Janice G. Raymond & Donna M. Hughes, *Sex Trafficking of Women in the United States: International and Domestic Trends* 59–68 (2001), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/187774.pdf.

[45] TIP REPORT, 2007, *supra* note 18, at 26. The women were also often overcharged significantly for food and necessities. *See* Bales & Lize, *supra* note 19, at 43. In one case, the girls that had been trafficked into prostitution were charged seven dollars for a bottle of hydrogen peroxide and three dollars for every sanitary napkin they needed. *Id.*

[46] HHS, Human Trafficking, *supra* note 44.

[47] *See* Bales & Lize, *supra* note 19, at 39, 43.

[48] *See* Raymond & Hughes, *supra* note 44, at 59–68.

[49] KING, *supra* note 1, at 50–51; Raymond & Hughes, *supra* note 44, at 61–62.

[50] Raymond & Hughes, *supra* note 44, at 57; *see* Bales & Lize, *supra* note 19, at 47–48.

[51] Raymond & Hughes, *supra* note 44, at 64–65.

with deportation, as their captors usually maintain possession of their travel and identity documents.[52] Finally, it is not uncommon for the captors to threaten to harm their families back home.[53]

Many unsuspecting girls fall victim to this industry in pursuit of a better life.[54] The Cadena-Sosa family operation illustrates how the human trafficking preys on the unsuspecting and ambitious.[55] The women of the Cadena family traveled to Mexico from their homes in Florida to obtain the girls.[56] They told the families they needed waitresses for their restaurant or nannies for their children and promised to pay wages of hundreds of dollars per week.[57] However, once they were in Florida, the girls were beaten, raped, and informed of their actual occupation.[58] They were dispersed among several brothels located near migrant camps and forced to "service" the migrant workers.[59] The girls were responsible for paying off a two-thousand dollar smuggling fee, plus their everyday expenses; they earned seven dollars for every person serviced.[60] The girls worked for six days a week, twelve hours a day.[61] One of the victims recalled, "[w]e mostly had to serve thirty-two to thirty-five clients a day. Our bodies were utterly sore and swollen."[62] Resistance was met with beatings, rape, confinement, and threats directed at their families back home.[63] The operation finally came to an end when two of the girls escaped, found the Mexican consulate in Miami and contacted the FBI.[64] Shortly afterwards,

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[52] *See* Free the Slaves & Human Rights Ctr., *supra* note 35, at 5; Bales & Lize, *supra* note 19, at 37, 39. The women are also told that the police will either physically harm or deport them in an effort to dissuade them from seeking assistance. Bales & Lize, *supra* note 19, at 38–39.

[53] Bales & Lize, *supra* note 19, at 39.

[54] *See* King, *supra* note 1, at 16–17.

[55] *See* Anthony M. DeStefano, The War on Human Trafficking: Human Policy Assessed 1–5 (2007); King, *supra* note 1, at 26–30.

[56] DeStefano, *supra* note 55, at 2; King, *supra* note 1, at 27.

[57] King, *supra* note 1, at 27. The families were also explicitly promised that the girls could return to Mexico if they were unhappy with their work. *Id.* at 27–28.

[58] *Id.* at 28.

[59] DeStefano, *supra* note 55, at 3; King, *supra* note 1, at 28.

[60] DeStefano, *supra* note 55, at 3; King, *supra* note 1, at 28. The men were charged twenty dollars for fifteen minutes with the girls, of which seven dollars went towards paying off the smuggling debt. DeStefano, *supra* note 55, at 3. However, the cost of food and phone cards to call home was added to the outstanding debt. *Id.*

[61] King, *supra* note 1, at 29 (quoting "Maria," one of the victims of the operation).

[62] *Id.*

[63] *See id.*

[64] DeStefano, *supra* note 55, at 4.

six brothels were raided.[65] Eight members of the Cadena-Sosa family were convicted, while seven fled to Mexico and avoided prosecution.[66]

2. Domestic Servitude

The domestic service industry is another sector that utilizes victims of human trafficking.[67] These victims are persuaded to accept these positions in a similar manner to those trapped in sexual enslavement: they are promised any combination of stable wages, medical benefits, or an education.[68] After the domestic servants arrive in the United States, their travel and identity documents are confiscated and they are kept against their will in their captor's home.[69] Their captors pay them trivial wages for their services.[70] Their workday is seemingly endless: some domestic servants work eighteen hour shifts, while others are on call at all times.[71] Moreover, they are often intentionally isolated from the outside world; in addition to being confined to the house, they are prohibited from talking to neighbors or guests, making phone calls, or writing to their families.[72]

Domestic servitude can be found in any town in America, as it is estimated to be the second largest industry to benefit from human trafficking in the United States.[73] It was found unexpectedly in Laredo, Texas in 2001 when S.A.D. was found chained in the Bearden's backyard.[74] It was also found in Boston's backyard in

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[65] KING, *supra* note 1, at 26.

[66] *Id.* at 29–30. Because these individuals pled guilty, there was no trial. DESTEFANO, *supra* note 55, at 5. The exact details regarding what happened to the girls once the brothels were raided are not clear. *See generally* DESTEFANO, *supra* note 55; KING, *supra* note 1.

[67] *See* FREE THE SLAVES & HUMAN RIGHTS CTR., *supra* note 35, at 15; TIP REPORT 2007, *supra* note 18, at 13.

[68] *See* TIP REPORT 2007, *supra* note 18, at 8.

[69] *See id.* at 13; Bales & Lize, *supra* note 19, at 38.

[70] *See* HUMAN RIGHTS WATCH, SWEPT UNDER THE RUG: ABUSES AGAINST DOMESTIC WORKERS AROUND THE WORLD, 35–36 (2006), *available at* http://hrw.org/reports/2006/wrd0706/wrd0706webwcover.pdf.

[71] *See* DESTEFANO, *supra* note 55, at 76–77; HUMAN RIGHTS WATCH, *supra* note 70, at 39.

[72] *See* TIP REPORT 2007, *supra* note 18, at 13.

[73] *See* DESTEFANO, *supra* note 55, at 76; FREE THE SLAVES & HUMAN RIGHTS CTR., *supra* note 35, at 16; *see also* TIP Report 2008, *supra* note 19, at 6 (detailing the story of a thirty-two year old Mexican male who was forced into domestic servitude in San Diego, California); Corey Kilgannon, *Long Island Couple Are Convicted of Enslaving 2 Domestic Workers*, N.Y. TIMES, Dec. 18, 2007, at B3 (detailing the convictions of a married couple residing in Long Island, New York as a result of forcing two Indonesian women with expired visas to work as their domestic servants for five years).

[74] *See supra* notes 1–15 and accompanying text.

2006.[75] In Winchester, Massachusetts, Hana F. Al Jader was arrested for enslaving two Indonesian women.[76] These women were promised good wages in exchange for cooking, cleaning and providing care to Ms. Jader's husband.[77] When they arrived, however, their passports were confiscated and they were told that if they tried to quit, they would be responsible for the cost of their transportation to the United States.[78] The women were required to be on-duty twenty-four hours a day and were paid only three-hundred dollars a month.[79] They were discovered when one of the women managed to flee the house and obtained assistance.[80] Jader plead guilty to federal visa fraud and harboring an alien.[81] She was sentenced to two years of probation—the first six months constituting home confinement—to be followed by deportation to Saudi Arabia.[82] Jader was also ordered to pay a $40,000 fine and $207,000 in restitution to her former servants, and perform 100 hours of community service.[83]

3. Forced Hard Labor

Forced labor, which involves the exploitation of vulnerable, lower-class workers by employers, is also prevalent in the United States and fueled by the human trafficking industry.[84] Specifically, the agricultural sector and factory sweatshops benefit greatly from the services provided by trafficking victims.[85] The recruitment of these work-

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[75] *See* DeStefano, *supra* note 55, at 76–77 (explaining Hana Al Jader's case); Stephanie Ebbert & Scott Goldstein, *Forced-Labor Charges for Saudi Prince's Wife*, Boston Globe, Mar. 31, 2005, at B3 (detailing Hana Al Jader's case).

[76] DeStefano, *supra* note 55, at 76–77. Al Jader was a Saudi-Arabian princess who had homes in both Arlington and Winchester. *Id.*

[77] *See id.* at 76. Ms. Al Jader's husband was in a serious car accident in 1991 and required constant care. Shelley Murphy, *Princess Spared Prison on Immigration Charges*, Boston Globe, Dec. 22, 2006, at B4.

[78] DeStefano, *supra* note 55, at 76–77.

[79] *Id.*; Ebbert & Goldstein, *supra* note 75. Al Jader lied on the immigration forms for her servants, stating they would be paid $1500 per month and would be required to work for eight hours a day, five days a week. *Id.*

[80] DeStefano, *supra* note 55, at 77.

[81] *Id.*

[82] Murphy, *supra* note 77.

[83] *Id.*

[84] TIP Report 2007, *supra* note 18, at 18. *See* U.S. Dep't of State, Trafficking in Persons Report 15 (2005) [hereinafter TIP Report 2005], *available at* http://www.state.gov/g/tip/rls/tiprpt/2005/; Terry S. Coonan, *Human Rights in the Sunshine State: A Proposed Florida Law on Human Trafficking*, 31 Fla. St. U. L. Rev. 289, 290 (2004).

[85] Free the Slaves & Human Rights Ctr., *supra* note 35, at 16–18; *see* Bales & Lize, *supra* note 19, at 53.

ers typically occurs in the developing world and, predictably, begins with a promise of a better life.[86] Upon their arrival in the United States, the workers are usually oppressed through one of two systems: debt bondage or involuntary servitude.[87] Debt bondage requires the employee to repay her employer for the cost of entering the country and any additional living costs incurred.[88] This system is often manipulated by employers, who alter the terms of their agreements with the victims or undervalue the services that apply toward the reduction of the victims' debt.[89] Involuntary servitude restricts the workers' freedoms through fear: the workers are told that escaping would result in physical harm or severe legal consequences.[90]

The workers' freedom is further restricted in a number of ways by their employers.[91] The workers are usually kept completely dependent on the traffickers for all of their basic necessities.[92] It is also common practice for employers to either underpay their workers or issue a check for legal minimum wage, but cash it themselves and keep any amounts owed.[93] The workers never receive an explanation of their legal rights in the United States.[94] Finally, in addition to exploiting the naiveté of the workers, the traffickers use and threaten to use physical and sexual abuse to ensure compliance.[95]

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[86] *See* Human Rights Ctr., Freedom Denied: Forced Labor In California 10–11 (2005), *available at* http://www.hrcberkeley.org/download/freedomdenied.pdf. The recruiters are often from the same geographic area, or are at least of the same ethnic background, as the individuals they are seeking to recruit. *Id.*

[87] *See* TIP Report 2007, *supra* note 18, at 18–19.

[88] *See id.* at 18; TIP Report 2005, *supra* note 83, at 15.

[89] *See* TIP Report 2005, *supra* note 83, at 15; U.S. Dep't. of Health & Human Servs., Labor Trafficking: Fact Sheet (2008), http://www.acf.hhs.gov/trafficking/about/fact_labor.html (last visited Oct. 8, 2008) [hereinafter HHS, Labor Trafficking]. The manipulation of the debt bondage system often significantly extends the duration of a victim's employment with the employer. TIP Report 2005, *supra* note 84, at 15.

[90] *See* TIP Report 2007, *supra* note 18, at 18.

[91] *See* Human Rights Ctr., *supra* note 86, at 12, 23; DeStefano, *supra* note 55, at 73; Bales & Lize, *supra* note 19, at 43.

[92] *See* Human Rights Ctr., *supra* note 86, at 12. Such necessities include food, shelter, cash, and medical attention. *Id.*; *see also* DeStefano, *supra* note 55, at 73 (detailing the addition of charges for food, housing, electricity, and transportation to and from work to the debt owed by a trafficker in New York).

[93] *See* Bales & Lize, *supra* note 19, at 43.

[94] *See* Human Rights Ctr., *supra* note 86, at 23.

[95] *See id.* at 12; *see also* DeStefano, *supra* note 55, at 73 (explaining that a trafficking victim, who was forced to work on a farm in New York, was beaten with brass knuckles for complaining about the living conditions provided for his pregnant wife and five-year-old daughter, in particular a trailer they shared with five other migrant workers).

One story that highlights the profitability of forced hard labor is that of Johannes Du Preez.[96] Du Preez owned Newton Granite & Marble, which produced kitchen and bathroom countertops.[97] Du Preez needed workers to work long hours and engage in a large amount of heavy lifting.[98] Consequently, he hired hundreds of individuals from South Africa and Zimbabwe by promising them visas.[99] When his workers arrived in the United States, Du Preez told them they were indebted to him for the cost of their immigration documents and housing expenses, and if they failed to comply he would turn them in to the immigration authorities.[100] His workers labored endlessly, cutting and polishing granite and marble.[101] In November 2005, after immigration agents raided his factory, Du Preez pled guilty to conspiracy and harboring aliens, but subsequently disappeared.[102]

B. *Factors Contributing to the Development of Human Trafficking*

As illustrated above, trafficking occurs in many cultures and serves many different purposes.[103] However, there are common factors that have contributed to its development.[104] One such factor is demand: a global market exists for cheap, exploitable labor in prostitution, sex tourism, mail-order brides, child pornography, agricultural labor, factory labor, and domestic servitude.[105] Moreover, human trafficking, to its perpetrators, is nothing more than a business endeavor.[106] Those who engage in trafficking are simply fulfilling market demands.[107]

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[96] *See* DeStefano, *supra* note 55, at 71–72.

[97] *Id.* at 71. Many of these countertops were sold to major retailers, such as to Home Depot, located across the southeastern United States. *Id.*

[98] *See id.*

[99] *See id.* Du Preez was able to get the workers into the United States under a special visa program reserved for managers and executives. *Id.*

[100] *Id.* Du Preez also encouraged the spouses of those who were already employed to work to reduce the outstanding debt. *Id.*

[101] *See* DeStefano, *supra* note 55, at 71.

[102] *Id.* at 72.

[103] *See* Bales & Lize, *supra* note 19, at 7; *supra* notes 32–102 and accompanying text.

[104] *See* Bales & Lize, *supra* note 19, at 7.

[105] TIP Report 2004, *supra* note 19, at 19–20; Free the Slaves & Human Rights Ctr., *supra* note 35, at 1, 14–15; Bales & Lize, *supra* note 19, at 8 ("Demand for trafficked labor exists in the American economy. There are citizens and others in the United States who are willing to exploit other human beings in this way.").

[106] *See* Kevin Bales, Ending Slavery: How We Free Today's Slaves 1–2 (2007); TIP Report 2004, *supra* note 19, at 19–20.

[107] *See* TIP Report 2004, *supra* note 19, at 19–20; Hartsough, *supra* note 41, at 83 ("'Most slaveholders feel no need to explain or defend their chosen method of labor recruitment and management. Slavery is a very profitable business, and a good bottom line

The industry of human trafficking also thrives because there is an endless supply of victims.[108] Individuals end up as victims of human trafficking due to a combination of factors, the most significant being hopeless poverty.[109] Many individuals who end up as victims accept an initial offer of employment to provide themselves or their families with a better life; they have no viable employment or educational opportunities in their own hometowns.[110] In other heartbreaking situations, victims are unwittingly sold by their families or significant others out of desperation.[111]

Trafficking is a lucrative endeavor.[112] It has been estimated that human trafficking generates about seven to ten billion dollars annually.[113] Moreover, if the sale of trafficked individuals and the value of their labor or services are evaluated together, then the human trafficking industry generates approximately thirty-two billion dollars annually.[114] It is also fairly common for traffickers to exploit the individuals and then re-sell them to a new, different employer.[115] With such a high prospect of amassing large amounts of wealth, it is clear why many individuals are eager to get involved in the business of trafficking in persons.[116]

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is justification enough.'") (quoting KEVIN BALES, DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY 10 (1999)).

[108] *See* TIP REPORT 2004, *supra* note 19, at 19.

[109] *See id.*; Stacey Mathews, Comment, *International Trafficking in Children: Will New U.S. Legislation Provide an Ending to the Story?*, 27 HOUS. J. INT'L L. 649, 661 (2005).

[110] *See* TIP REPORT 2004, *supra* note 19, at 19; TIP REPORT 2003, *supra* note 23, at 7, 9.

[111] *See* Hartsough, *supra* note 41, at 85.

[112] *See* TIP REPORT 2003, *supra* note 23, at 9.

[113] *Id.* "Traffickers may earn a few hundred to thousands of dollars for a trafficked child laborer and brothel owners may make a few thousand to tens of thousands of dollars for each woman forced into prostitution." *Id.*

[114] TIP REPORT 2008, *supra* note 19, at 34.

[115] TIP REPORT 2003, *supra* note 23, at 9.

[116] *See id.* One forced labor case that highlights how lucrative the use of trafficking victims can be is the Ramos case. *See* Bales & Lize, *supra* note 19, at 44. Brothers Juan and Ramiro Ramos recruited Mexican migrant workers in Arizona and transported them to Florida to work in their citrus orchards. DESTEFANO, *supra* note 55, at 74. These migrants were indebted to a smuggler for $250 for assistance crossing the border; the smuggler sold the migrants to the Ramos brothers for $1000 each. *Id.* The workers were responsible for the full "transporting fee" as well as transportation to work, living space, food and a check-cashing fee. *Id.*; Bales & Lize, *supra* note 19, at 55. Ultimately, they received about forty to fifty dollars a week, while the brothers kept over half of their wages. *See* Bales & Lize, *supra* note 19, at 44. As a result of this operation, the Ramos brothers made approximately three million dollars during a period of eighteen months. *Id.*

The involvement of organized crime also facilitates the development of the human trafficking industry.[117] "Traffickers have been compared to drug cartels in their ability to smuggle their goods across borders and utilize advanced communications to their benefit."[118] Crime networks of various forms, which range from gangs to entrepreneurial citizens, interact between countries to provide the markets with the resources they demand.[119] For example, "[a] club owner in Chicago can pick up the phone and 'mail-order' three beautiful young girls from eastern Europe. Two weeks later a fresh shipment of three Slavic girls will be dancing in his club."[120]

In addition, human trafficking would not be able to flourish if governments were willing and able to stop it; unfortunately, in many countries, both of these elements are often lacking.[121] Many governments in developing countries implicitly condone human trafficking when law enforcement agents voluntarily look the other way, as victims are smuggled across borders.[122] Other countries facilitate human trafficking by failing to criminalize it in all of its forms and variations.[123] On the other hand, there are countries that are genuinely interested in combating human trafficking, but lack the resources to effectively do so on the local level.[124] In addition, countries ravaged by armed conflict or

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[117] *See* TIP REPORT 2004, *supra* note 19, at 19; BATSTONE, *supra* note 20, at 171. Batstone explains that trafficking begins on a local level with local organizations. *Id.* However, these local organizations interact and communicate to traffic victims to locations where they are needed most. *See id.*

[118] Mathews, *supra* note 109, at 664. These organized crime networks assist with the falsification of travel and identification documents. Cynthia Shepard Torg, *Human Trafficking Enforcement in the United States*, 14 TUL. J. INT'L & COMP. L. 503, 506 (2006). In addition, these networks bribe public officials and law enforcement agents to smuggle individuals across international borders without detection. *Id.*

[119] *See* ZHANG, *supra* note 19, at 122; Mathews, *supra* note 109, at 663.

[120] BATSTONE, *supra* note 20, at 171.

[121] KING, *supra* note 1, at 20; TIP REPORT 2004, *supra* note 19, at 19; *see* Mathews, *supra* note 109, at 662, 663.

[122] Mathews, *supra* note 109, at 663. For example, the State Department has reported that Algeria has not taken any steps to punish traffickers of men and women and has failed to conduct any investigation on the trafficking of children. TIP REPORT 2007, *supra* note 18, at 53. In addition, Iran has not reported any prosecutions or convictions of traffickers or government officials facilitating trafficking. *Id.* at 120.

[123] *See generally* TIP REPORT 2007, *supra* note 18 (analyzing each country and pointing out which countries fail to criminalize all forms of trafficking). For example, to date, Algeria and Afghanistan do not prohibit all forms of trafficking in persons. *Id.* at 51, 53. Chad does not prohibit human trafficking at all. *Id. at* 78.

[124] *See id.* at 99 (explaining that Ethiopia lacks the resources to assist trafficking victims); Mathews, *supra* note 109, at 663.

political instability are too preoccupied to stop the extraction of victims from their countries.[125]

Finally, the industry of human trafficking continues to flourish, because of a lack of awareness.[126] "Trafficking victims are often ashamed or afraid to return home" if they have been unsuccessful, leaving their peers in the dark about any future threat of human trafficking.[127] Potential victims' families are enticed by the prospect of success when they hear about positive experiences of those individuals who previously accepted a similar offer of employment; they do not know enough to see through the facade being constructed by the traffickers.[128] Consequently, because these individuals are unaware of the dangers that await them, they have little trouble accepting a trafficker's offer.[129]

C. *Effects of Human Trafficking on Victims*

The effects of human trafficking weigh heavily on the physical and mental stability of its victims.[130] Physical injuries sustained range in severity from bruises and scars to broken bones and concussions.[131] Malnourishment and various diseases—including hepatitis, malaria, tuberculosis, and pneumonia—also threaten victims' health.[132] Many suffer from sexually transmitted diseases from being raped or working in the commercial sex industry.[133] Other female victims are found pregnant or infertile as a result of an abortion that went awry or "chronic untreated sexually transmitted infections."[134] Those who were forced to perform hard labor often suffer from "chronic back, hearing, cardio-

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[125] *See* TIP Report 2003, *supra* note 23, at 8.

[126] *Id.* at 7–8.

[127] *Id.*

[128] *See id.*

[129] *See id.*

[130] *See* TIP Report 2008, *supra* note 19, at 21; Sadruddin et al., *supra* note 34, at 405; HHS, Labor Trafficking, *supra* note 89; U.S. Dep't of Health & Human Servs., Resources: Common Health Issues Seen in Victims of Human Trafficking, http://www.acf.hhs.gov/trafficking/campaign_kits/tool_kit_health/health_problems.pdf (last visited Oct. 8, 2008) [hereinafter HHS, Resources]; HHS, Sex Trafficking, *supra* note 43.

[131] HHS, Labor Trafficking, *supra* note 89; HHS, Resources, *supra* note 130; HHS, Sex Trafficking, *supra* note 43.

[132] HHS, Resources, *supra* note 130; HHS, Sex Trafficking, *supra* note 43.

[133] HHS, Resources, *supra* note 130; HHS, Sex Trafficking, *supra* note 43.

[134] HHS, Resources, *supra* note 130; HHS, Sex Trafficking, *supra* note 43.

vascular or respiratory problems."[135] Finally, some victims suffer from drug and alcohol addictions.[136]

In addition to enduring physical injuries, many victims suffer from various mental illnesses.[137] It is not uncommon for victims to experience post-traumatic stress disorder, depression, disassociative disorders, or anxiety disorders.[138] Other victims suffer from traumatic bonding, otherwise known as "Stockholm Syndrome," which is "characterized by cognitive distortions where reciprocal positive feelings develop between captors and their hostages."[139] Some victims become unable to control their emotions as a result of living in a constant state of fear.[140] In addition, victims may experience culture shock because they find themselves in a society that is radically different from that of their home country.[141] Ultimately, those who are lucky enough to gain their freedom still have a long journey ahead of them before they are fully rehabilitated.[142]

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[135] HHS, Resources, *supra* note 130.

[136] *Id.*; HHS, Sex Trafficking, *supra* note 43. One explanation as to why trafficking victims suffer from these disorders declares:

> Human trafficking victims are often locked in situations that are almost impossible to escape. Even where escape is physically possible, victims may be psychologically incapable of escape due to their constant terror. This sense of having no control over one's safety, daily movement, or future makes victims particular vulnerable to traumatic stress disorders.

Sadruddin et al., *supra* note 34, at 405.

[137] *See* TIP Report 2008, *supra* note 19, at 21; Sadruddin et al., *supra* note 34, at 405; HHS, Labor Trafficking, *supra* note 89; HHS, Sex Trafficking, *supra* note 43.

[138] *See* TIP Report 2008, *supra* note 19, at 21; HHS, Labor Trafficking, *supra* note 89; HHS, Sex Trafficking, *supra* note 43.

[139] Sadruddin et al., *supra* note 34, at 404; HHS, Labor Trafficking, *supra* note 89; *see also* HHS, Sex Trafficking, *supra* note 43.

[140] Sadruddin et al., *supra* note 34, at 403–04.

[141] HHS, Resources, *supra* note 130.

[142] *See* TIP Report 2008, *supra* note 19, at 21; HHS, Labor Trafficking, *supra* note 89; HHS, Resources, *supra* note 130; HHS, Sex Trafficking, *supra* note 43.

II. Federal Legislation Combating Human Trafficking

> *From the day of our founding, we have proclaimed that every man and woman on this Earth has rights and dignity and matchless value. . . . [N]o one is fit to be a master and no one deserves to be a slave.*
>
> —President George W. Bush[143]

The federal government has passed several pieces of legislation to combat human trafficking, complementing the Thirteenth Amendment's general prohibition of slavery and involuntary servitude.[144]

A. *The Mann Act*

The Mann Act, formally known as the White Slave Traffic Act, is one of the nation's first anti-trafficking statutes.[145] The Mann Act prohibits the knowing transport of any individual in interstate or foreign commerce with the intent that the trafficked individual will engage in "prostitution, or in any sexual activity for which any person can be charged with a criminal offense."[146] In addition, the Mann Act prohibits the knowing persuasion, inducement, or coercion of any individual to travel in interstate or foreign commerce to engage in any illegal sexual activity.[147]

B. *The Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003*

The PROTECT Act complements and amends the Mann Act by giving law enforcement authorities valuable new tools to deter and punish those who engage in or facilitate sex tourism.[148] The PROTECT Act

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[143] President George W. Bush, Second Inaugural Address (Jan. 20, 2005) *in* 43 Wkly. Comp. Pres. Doc. 74 (2005).

[144] *See* U.S. Const. amend. XIII, § 1; Torg, *supra* note 118, at 506–07. The Thirteenth Amendment states, in relevant part: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII, § 1.

[145] *See* White-Slave Traffic (Mann) Act, 18 U.S.C. §§ 2421–2427 (2000), *amended by* 18 U.S.C. §§ 2421–2426 (Supp. V 2005); Mathews, *supra* note 109, at 671.

[146] 18 U.S.C. § 2421; *see* Torg, *supra* note 118, at 509. An actual or attempted violation of this provision is punishable by a maximum of ten years imprisonment, a fine, or both. 18 U.S.C. § 2421.

[147] 18 U.S.C. § 2422. An actual or attempted violation of this provision is punishable by a maximum of twenty years imprisonment, a fine, or both. *Id.*

[148] *See* Amy Fraley, Note, *Child Sex Tourism Legislation Under the PROTECT Act: Does It Really Protect?*, 79 St. John's L. Rev. 445, 456–59 (2005) (tracing the evolution of legislation that combats sex tourism). *See generally* PROTECT Act, 18 U.S.C. § 2423 (Supp. V.

criminalizes attempted and completed acts of sex tourism committed by United States citizens (or permanent residents) within the United States and abroad.[149] The maximum penalty for these crimes is thirty years.[150] The PROTECT Act also makes it a crime for an individual to arrange, induce, or procure a third party to travel in interstate or foreign commerce for the purpose of engaging in illicit sexual conduct in exchange for a commercial advantage.[151] Finally, the PROTECT Act increases the penalties for certain sexual offenses related to children.[152]

2005). Although the PROTECT Act made many advancements, only those relevant to human trafficking are discussed in this Note.

[149] 18 U.S.C. § 2423. Sex tourism "involves people who travel to engage in commercial sex acts with children." TIP Report 2008, *supra* note 19, at 14. The PROTECT Act specifically amends the criminal code and details sex tourism as follows:

> (b) Travel with Intent to Engage in Illicit Conduct.—A person who travels in interstate commerce or travels into the United States, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.
> (c) Engaging in Illicit Sexual Conduct in Foreign Places.—Any United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

18 U.S.C. § 2423(b)–(c); *see also* Mathews, *supra* note 109, at 693 (explaining the provisions of the PROTECT Act). For the purposes of the PROTECT Act, "illicit sexual conduct" is defined as "(1) a sexual act . . . with a person under 18 years of age that would be in violation of chapter 109A if the sexual act occurred in the special maritime and territorial jurisdiction of the United States; or (2) any commercial sex act . . . with a person under 18 years of age." 18 U.S.C. § 2423(f).

[150] 18 U.S.C. § 2423(b)–(c). The PROTECT Act increased this penalty from fifteen years. §§ 103(a)(2)(c), 105, § 2432(b)–(c), Pub. L. No 108–21, 117 Stat. 651-654. In addition, the Criminal Code has been amended to impose a "two strikes you're out" sentence: if an individual is convicted of transporting a minor for the purpose of engaging in any sexual activity which is a criminal offense, and he has an existing conviction, he must be sentenced to life imprisonment. *Id.* § 106 (codified at 18 U.S.C. § 3559).

[151] 18 U.S.C. § 2423(d).

[152] §§ 103, 105, 106, 117 Stat. at 652–55; *see* Torg, *supra* note 109, at 509–10. For example, the PROTECT Act created a minimum five-year sentence for individuals convicted of "knowingly transport[ing] an individual who has not attained the age of 18 years in interstate or foreign commerce . . . with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense. § 103(b)(2)(b) (codified at 18 U.S.C. § 2423(a)).

C. *The Trafficking Victims Protection Act*

The TVPA is the first piece of modern, comprehensive, federal legislation that combats human trafficking.[153] It aims to accomplish three main goals: prosecution of traffickers, prevention against the development of the industry, and protection of victims.[154]

1. Prosecution and Punishment

The TVPA provides for the punishment and prosecution of those who participate in trafficking in persons in a number of ways.[155] It alters the U.S. Criminal Code, creating new criminal offenses: (1) forced labor; (2) trafficking with respect to peonage, slavery, involuntary servitude, or forced labor; (3) sex trafficking of children or by force, fraud, or coercion; and (4) unlawful conduct with documents in furtherance of trafficking.[156] The Act also enhances the penalties for existing crimes related to trafficking: the minimum penalties have been increased to twenty years for crimes of peonage, enticement into slavery, and sale into involuntary servitude.[157] Moreover, if, during the commission of these crimes, there is actual or attempted murder, kidnapping, or aggravated sexual abuse, a life sentence is permitted.[158] The TVPA also created strict forfeiture and restitution provisions for those found guilty of the behavior criminalized under the section.[159] Finally, the TVPA

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[153] HHS, Human Trafficking, *supra* note 44; *see* Angela D. Giampolo, Note, *The Trafficking Victims Protection Reauthorization Act of 2005: The Latest Weapon in the Fight Against Human Trafficking*, 16 Temp. Pol. & Civ. Rts. L. Rev. 195, 198 (2006); Stephanie Richard, Note, *State Legislation and Human Trafficking: Helpful or Harmful?*, 38 U. Mich. J.L. Reform 447, 451 (2005). *See generally* TVPA of 2000, Pub. L. No. 106–386, § 112, 114 Stat. 1464, 1486 (codified as amended in scattered sections of 18 U.S.C.) (2000).

[154] Torg, *supra* note 118, at 503; Mathews, *supra* note 109, at 676.

[155] *See* TVPA of 2000, Pub. L. No. 106–386, § 112, 114 Stat. 1464, 1486 (codified as amended at scattered sections of 18 U.S.C.) (2000).

[156] 18 U.S.C. §§ 1589–1592 (2000); *see also* 22 U.S.C. § 7101(b)(14)–(15) (2000) (explaining the need to create new legislation to address the inefficiencies of existing legislation); *Developments in the Law—Jobs and Borders*, 118 Harv. L. Rev. 2171, 2192 (2005) (explaining the criminal provisions added by the TVPA).

[157] TVPA of 2000 § 112, 114 Stat. at 1486–90 (codified at 18 U.S.C. §§ 1851(a), 1583, and 1584).

[158] TVPA of 2000 § 112; *see also* Torg, *supra* note 118, at 507–08 (explaining the increase in penalties).

[159] 18 U.S.C. §§ 1593–1594; Bo Cooper, *A New Approach to Protection and Law Enforcement Under the Victims of Trafficking and Violence Protection Act*, 51 Emory L.J. 1041, 1050 (2002). The forfeiture provisions were bolstered by the TVPRA of 2005, which requires the forfeiture of any property used or intended to be used to commit or facilitate any violation of the TVPA or that was derived from proceeds made in violation of the chapter. TVPRA of 2005, 18 U.S.C. § 2428 (Supp. V 2005).

authorizes the President to sanction foreign individuals who play a significant role in a severe form of trafficking in persons or provides financial, technological, or material support to such an endeavor.[160]

The subsequent reauthorization acts also made changes that strengthened the federal government's prosecution efforts.[161] The TVPRA of 2003 made any trafficking offense a predicate offense for prosecution under the Racketeer Influenced Corrupt Organizations Act [RICO].[162] The TVPRA of 2005 extended the extraterritorial authority of the provisions to those employed by or accompanying the Federal Government outside the United States.[163]

Two final changes strengthened prosecutorial efforts by making them multi-facetted.[164] The TVPRA of 2003 created a private right of action: trafficking victims can now bring civil actions in federal district courts against perpetrators to recover damages and attorney fees.[165] The TVPRA of 2005 established a grant program to assist state and local law enforcement agencies efforts to establish, develop, expand their programs that investigate and prosecute those who engage in severe forms of trafficking in persons, commercial sex acts, and other related offenses.[166]

2. Prevention Efforts

The TVPA aims to prevent the expansion of human trafficking in two significant ways: the development of "programs to counteract the common reasons for victimization, and sanctions to motivate compliance with U.S. anti-trafficking standards."[167] To counteract the conditions which fuel the trafficking industry, the TVPA requires the President to implement international initiatives to enhance economic

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[160] 22 U.S.C. § 7108 (2000).

[161] *See* TVPRA of 2005, Pub. L. No. 109–164, § 103, 119 Stat. 3557, 3562–63; TVPRA of 2003, Pub. L. No. 108–193, § 5, 117 Stat. 2875, 2878.

[162] *See* TVPRA of 2003, § 5; Chacón, *supra* note 38, at 2992.

[163] 18 U.S.C. §§ 3271–3272 (Supp. V 2005).

[164] *See* 18 U.S.C. § 1595 (Supp. IV 2004); TVPRA of 2005, § 104 (codified at 42 U.S.C. 14044c (Supp. V 2005)).

[165] TVPRA of 2003, § 5 (codified at 18 U.S.C. § 1595 (Supp. IV 2004)); *see also Developments in the Law—Jobs and Borders*, *supra* note 156, at 2193 (explaining the creation of a private right of action for trafficking victims).

[166] 42 U.S.C. § 14044c (Supp. V 2005). Twenty-five million dollars was allocated to this initiative for the fiscal years of 2006 and 2007. *Id.* However, such grants can only be obtained if the state or local law enforcement agency works collaboratively with social service providers and relevant nongovernmental organizations. *Id.* § 14044c(b).

[167] *Developments in the Law—Jobs and Borders*, *supra* note 156, at 2189; *see* Cooper, *supra* note 159, at 1047.

opportunities for potential victims, including programs that provide job training and counseling to adults and programs to keep children in elementary and secondary schools.[168] The President must also devise and implement programs to heighten public awareness on the issue of human trafficking.[169]

As for sanctions, the TVPA permits the withholding of financial assistance to countries that do not adequately combat human trafficking within their own borders.[170] It also incorporates a provision into any agreement between a federal department or agency and a private entity terminating the agreement if the other party "(i) engages in severe forms of trafficking in persons or has procured a commercial sex act during the period of time that the grant, contract, or (ii) co-

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[168] 22 U.S.C. § 7104(a). The initiatives that were suggested within the text of the TVPA include:

> (1) Microcredit lending programs, training in business development, skills training, and job counseling; (2) programs to promote women's participation in economic decisionmaking; (3) programs to keep children, especially girls, in elementary and secondary schools, and to educate persons who have been victims of trafficking; (4) development of educational curricula regarding the dangers of trafficking; and (5) grants to nongovernmental organizations to accelerate and advance the political, economic, social, and educational roles and capacities of women in their countries.

Id. The President is required to consult with the appropriate nongovernmental agencies when devising these programs. *Id.* § 7104(f).

[169] *Id.* § 7104(b). No specific programs were enumerated in the provision to heighten public awareness; the provision merely states, "The President . . . shall establish and carry out programs to increase public awareness, particularly among potential victims of trafficking, of the dangers of trafficking and the protections that are available for victims of trafficking." *Id.*

[170] *Id.* § 7107. Whether countries are sanctioned is determined by the following process: the TVPA requires the Secretary of State to provide an annual report to Congress assessing every country's level of adherence to the "minimum standards for the elimination of trafficking" established by the Act. *Id.* § 7107(b); *see* Cooper, *supra* note 159, at 1048. The minimum standards require every country to (1) prohibit severe forms of trafficking in persons and punish those who engage in such action; (2) punish any trafficking involving sexual exploitation or kidnapping, or trafficking that results in a death to be treated as gravely as other sexual assault crimes in the country; (3) punish knowing acts of trafficking strongly enough to deter future attempts; and (4) make "serious and sustained efforts" to eliminate severe forms of trafficking in persons. 22 U.S.C. § 7106(a); Cooper, *supra* note 159, at 1048. Within the report required by the statute, different tiers indicate the various levels of compliance: the most compliant countries are listed in Tier 1, while the countries that fail to comply with or make "significant efforts" to comply with these standards are found in Tier 3. 22 U.S.C. § 7107(b). *See generally* TIP REPORT 2007, *supra* note 18. Ultimately, Tier 3 countries are denied nonhumanitarian, nontrade-related foreign assistance. 22 U.S.C. § 7107(a). Under this same system, the TVPA provides assistance to countries striving to meet the minimum standards of compliance. *Id.* § 2152(a); Cooper, *supra* note 159, at 1049.

operative agreement is in effect, or uses forced labor in the performance of the grant, contract, or cooperative agreement."[171]

3. Protection and Services for Victims

Finally, the TVPA and its reauthorizations strive to protect and provide assistance to victims of human trafficking both in the United States and abroad.[172] For victims in the United States to receive any benefits or services, they must meet certain eligibility requirements.[173] The first requirement mandates that an individual be successfully classified as a "victim of a severe form of trafficking in persons," which means the individual was subjected to either:

> (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
> (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.[174]

If the individual is under the age of eighteen and fits into the above classification, she is eligible for benefits and protection.[175] However, individuals above the age of eighteen must also be certified by the Secretary of Health and Human Services.[176] After an individual's eli-

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[171] 22 U.S.C. § 7104(g).

[172] *See id.* § 7105. For victims abroad, the Act requires the creation of programs to assist with the safe integration or reintegration of victims in their home countries. *Id.* § 7105(a)(1). It also provides support for nongovernmental organizations and protective shelters to provide legal and social services to victims and to create additional service centers. TVPRA of 2003, 22 U.S.C. § 7105(a)(1)(A)–(B), (D) (Supp. III 2003).

[173] 22 U.S.C. § 7105(b)(1)(A); *see* Ellen L. Buckwalter et al., *Modern Day Slavery in Our Own Backyard*, 12 Wm. & Mary J. Women & L. 403, 409 (2006); *Developments in the Law—Jobs and Borders*, *supra* note 156, at 2191.

[174] 22 U.S.C. §§ 7102(8), 7105(b)(1)(c).

[175] *Id.* § 7105(b)(1)(c).

[176] *Id.* § 7105(b)(1)(c), (e). This certification requires the person to be "willing to assist in every reasonable way in the investigation and prosecution of severe forms of trafficking in persons" and has either "made a bona fide application for a visa under section 1101(a)(15)(T) . . . [or] is a person whose continued presence in the United States the Secretary of Homeland Security is ensuring in order to effectuate prosecution of traffickers in persons." 22 U.S.C. § 7105(b)(1)(E)(i) (2000 & Supp. V 2005).

During the 2006 fiscal year, 214 certifications were issued to adults and 20 eligibility letters were issued to minors. U.S. Dep't of Justice, Assessment of U.S. Government Efforts to Combat Trafficking in Persons in Fiscal Year 2006 at 5 (2007) [hereinafter FY 2006 Assessment], *available at* http://www.state.gov/documents/organization/94809.pdf.

gibility is established, she must be informed of her rights and given access to translation services.[177] The victim is also entitled to a number of Federal and State benefits and services to the same extent that an alien admitted as a refugee would be.[178] If the victim is being held in custody, she must be kept in an appropriate facility and be granted access to medical care.[179]

The Act also provides assistance to trafficking victims at a more local level by creating a grant system for state and local governments and nonprofit nongovernmental organizations to expand or strengthen victim service programs.[180] The TVPRA of 2005 also requires the creation of a pilot program that establishes residential treatment facilities for juvenile victims of trafficking.[181]

Finally, the TVPA protects victims from criminal prosecution: it declares that "[v]ictims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked . . . ."[182] The act encourages "protecting rather than punishing the victims of such offenses."[183]

During the 2007 fiscal year, 270 certifications were issued to adults and 33 eligibility letters were issued to minors. U.S. Dep't of Justice, Assessment of U.S. Government Effort to Combat Trafficking in Persons in Fiscal Year 2007 at 4 (2008) [hereinafter FY 2007 Assessment], *available at* http://www.usdoj.gov/ag/annualreports/tr2007/agreporthumantrafficing2007.pdf. The total number of certification letters issued since the program was instituted is 1379. *Id.* However, the assessment fails to disclose how many applications, in total, have been filed, and how many individuals were denied certification. *See generally id.*

[177] 22 U.S.C. § 7105(c)(2).

[178] *Id.* § 7105(b)(1)(A). One significant benefit the TVPA provides for victims is the opportunity to remain in the country on a visa after being removed from the trafficking environment. 8 U.S.C. § 1101(a)(15)(T); 22 U.S.C. § 7105(e); Buckwalter et al., *supra* note 173, at 410. Once obtained, the holder of the "T visa" can maintain this status for four years and can apply for permanent residency after three years of residing in the United States. 8 U.S.C § 1184(o)(7)(A) ("An alien who is issued a visa or otherwise provided nonimmigrant status . . . may be granted such status for a period of not more than 4 years."); 8 U.S.C. § 1255(*l*)(1)(A) (2000 & Supp. V 2005) (detailing the process available to trafficking victims to become a permanent resident after residing in the United States for three years with a T visa).

[179] 22 U.S.C. § 7105(c)(1).

[180] *Id.* § 7105(b)(2).

[181] *Id.* § 14044b (Supp. V 2005).

[182] *Id.* § 7101(b)(19).

[183] *Id.* § 7101(b)(24).

III. State-Level Legislation Combating Human Trafficking in the United States

> *We must go beyond an initial rescue of victims and restore to them dignity and the hope of productive lives.*[184]

A. *The Need for State Legislation*

Despite the progress that has been made in combating human trafficking in the United States, state legislation is vital to successfully combat human trafficking.[185] The primary reason such legislation is necessary is because the federal statutory scheme is not effective on the local level.[186] For example, the Mann Act was not intended to combat human trafficking as it exists today; instead, it was intended to eliminate the "white-slave" trafficking within the United States.[187] Accordingly, it does not address trafficking on an international level.[188] In addition, it only addresses trafficking executed for sexual exploitation, and does not criminalize the trafficking of victims for domestic servitude or forced labor.[189] In addition, while the PROTECT Act is a more recent piece of legislation, it also has a very narrow scope with respect to trafficking: domestic and international sex tourism.[190] Ultimately, neither of these pieces of legislation makes significant inroads in the fight against all forms of human trafficking.[191]

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[184] TIP Report 2008, *supra* note 19, at 5.

[185] *See* Buckwalter et al., *supra* note 173, at 425.

[186] *See* Chacón, *supra* note 38, at 3017–20; Haynes, *supra* note 23, at 365–66; Susan Tiefenbrun, *The Saga of Susannah: A U.S. Remedy for Sex Trafficking in Women: The Victims of Trafficking and Violence and Protection Act of 2000,* 2002 Utah L. Rev. 107, 165–66.

[187] Mortensen v. United States, 322 U.S. 369, 377 (1944). The Court explained the goal of the Mann Act:

> Congress was attempting primarily to eliminate the "white slave" business which uses interstate and foreign commerce as a means of procuring and distributing its victims and "to prevent panderers and procurers from compelling thousands of women and girls against their will and desire to enter and continue in a life of prostitution."

Id. (quoting H. R. Rep. No. 61-47, at 10 (1910)).

[188] Mathews, *supra* note 109, at 671–72.

[189] *See* Torg, *supra* note 118, at 509.

[190] *See* PROTECT Act, 18 U.S.C. § 2423(a)–(e) (Supp. V 2005).

[191] *See* Torg, *supra* note 118, at 509, 510 (explaining that the Mann Act provides a framework to combat the transportation of individuals within the United States for engaging in criminal sexual activity, while the PROTECT Act aims to put an end to "child trafficking, child sex tourism, and other forms of child exploitation" in the United States and abroad); Mathews, *supra* note 109, at 671–72.

Furthermore, while the TVPA and its subsequent reauthorization acts have been heralded for making significant progress in the fight against human trafficking, they still have several shortcomings.[192] One criticism of the TVPA is that it lacks "an enforcement arm" to implement its provisions.[193] It has been labeled "top-heavy," as high ranking officials comprise the vast majority of those who understand how to identify and assist trafficking victims, and yet these individuals are the least likely to encounter such individuals.[194] This top-down approach is dangerous because not only will it permit perpetrators to remain free and victims to remain in danger, but also because "'[a] law without vigorous and effective implementation is worse than no law at all, because it lulls us into the false sense that we have done something to solve the problem.'"[195]

Another significant critique, which is also an unfortunate reality, focuses on the failure of the TVPA to provide relief to trafficking victims.[196] The number of victims who have been certified to receive federal protection and services is "stunningly low."[197] Since the TVPA was enacted in October 2000, only 1379 people have been certified.[198] This figure has a number of possible explanations: it can be attributed to poor implementation of the TVPA and a lack of public awareness about the Act's benefits.[199] In the alternative, the low number could be attributed to the fact that TVPA does not necessarily offer relief to all victims of all forms of trafficking.[200] Regardless of the cause of the problem,

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[192] *See* Barone, *supra* note 34, at 593–94; Chacón, *supra* note 38, at 3017–20; Haynes, *supra* note 23, at 365–66; Tiefenbrun, *supra* note 186, at 165–66.

[193] Tiefenbrun, *supra* note 186, at 165.

[194] Haynes, *supra* note 23, at 365–66; *see also* Coonan, *supra* note 84, at 294 (explaining that local law enforcement in Florida is relatively unfamiliar with the concept of human trafficking and the provisions of the TVPA).

[195] Susan W. Tiefenbrun, *Sex Slavery in the United States and the Law Enacted to Stop It Here and Abroad*, 11 Wm. & Mary J. Women & L. 317, 323 (2005) (quoting *Implementation of the Trafficking Victims Protection Act: Hearing Before the H.R. Comm. on Int'l Relations*, 107th Cong. 1 (2001) (statement of U.S. Representative Henry J. Hyde)).

[196] *See* Chacón, *supra* note 38, at 3018; Tiefenbrun, *supra* note 186, at 165. While there are a number of criticisms of the TVPA, only those within the scope of this Note will be addressed.

[197] Chacón, *supra* note 38, at 3018.

[198] *See* FY 2007 Assessment, *supra* note 176, at 1, 4. The Assessment fails to mention how many victims applied for certification, but were denied. *See generally id.*

[199] *See id.*; *see also* Chacón, *supra* note 38, at 3018–19 (explaining that the Department of Justice has attributed the low numbers resulted to problems of outreach); Tiefenbrun, *supra* note 186, at 165 (criticizing the TVPA's lack of an enforcement arm).

[200] *See* Barone, *supra* note 34, at 592, 594. For example, because relevant provisions only extend to victims of "severe forms of trafficking," the TVPA denies protection and services to individuals who are well-deserving of such assistance, but do not meet the spe-

the effect remains clear: the protection and services provided for in TVPA are not reaching those who are in dire need of assistance.[201]

State legislation, if drafted correctly, can also bolster the federal legislation combating all forms of trafficking in many ways.[202] For example, states can implement local law enforcement training on how to recognize and appropriately respond to issues related to human trafficking.[203] This training is crucial because local law enforcement agents are far more likely to come across human trafficking than federal-level authorities.[204] Moreover, knowledgeable law enforcement agents would serve as a deterrent, dissuading traffickers from bringing victims into the country.[205]

Another benefit of state anti-trafficking legislation would be the criminalization of human trafficking at the state level, which would facilitate the prosecution of criminals in state court.[206] Without such legislation, prosecutors would be hard-pressed to find suitable charges for perpetrators of trafficking.[207] In addition, this access to state courts would provide quicker and more efficient remedies in many situations.[208] Furthermore, "a greater number of overall prosecutions will have a greater impact on a local level."[209]

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cific criteria of the provision. *Id.* In addition, "many of the most traumatized victims might be physically or psychologically incapable of providing cooperation with law enforcement and would thus be ineligible for any benefits" under the Federal statutory scheme. Sadruddin et al., *supra* note 34, at 395. In other situations, victims of less extreme forms of sex trafficking will be denied assistance under the TVPA. *See id.* at 408; Barone, *supra* note 34, at 592.

[201] *See* Chacón, *supra* note 38, at 3018.

[202] *See* Buckwalter et al., *supra* note 173, at 425–26.

[203] *See id.* at 425; Coonan, *supra* note 84, at 294.

[204] *See* Coonan, *supra* note 84, at 293–94. Local law enforcement authorities can encounter trafficking operations or victims of trafficking during the course of many of their routine responsibilities, including "vice raids, in crime scene investigations in immigrant communities, and even in domestic violence calls." *Id.* at 293.

[205] *See* Buckwalter et al., *supra* note 173, at 426.

[206] *See* Torg, *supra* note 118, at 512–13.

[207] *Id.* at 513. Torg notes that, without state legislation, prosecutors will charge traffickers with other crimes, including "prosecution, assault, or workplace violations" or decline to pursue the case altogether. *Id.*

[208] Buckwalter et al., *supra* note 173, at 425; Payne, *supra* note 27, at 59. Concerns have been raised that the federal authorities are not always willing or able to prosecute cases involving a small group of victims. Buckwalter et al., *supra* note 173, at 425; *see also* Coonan, *supra* note 84, at 294 (arguing that state legislation is needed because "federal resources are necessarily committed to countering terrorism . . . [and] it is inevitable that investigations of human trafficking situations will be relegated to a lower priority").

[209] Torg, *supra* note 118, at 513.

Moreover, state legislation will be able to respond to specific needs of its particular territory in an effective manner.[210] From the perspective of victim assistance, each state can design rehabilitative and social service programs specific to victims found within its jurisdiction.[211] In addition, different regions of the country utilize trafficking victims to fulfill different economic needs; accordingly, state legislation can be drafted to more effectively combat issues specific to the area.[212] State legislation would more effectively prevent the importation of trafficking victims along their individual borders.[213]

Finally, morality and empathy command the passage of such legislation: human trafficking "constitutes one of the most egregious and systematic human rights violations of the new century, and should be countered at every turn."[214] Ultimately, each state should aim to achieve as many of these objectives as possible to effectively combat human trafficking when drafting new legislation or amending existing legislation.[215]

B. *The Anti-Trafficking Legislation Proposed in Massachusetts*

In 2007, Massachusetts State Senator Mark C. Montigny introduced Senate Bill No. 97, An Act Relating to Anti-Human Trafficking and Protection.[216] The bill aims to provide additional protections and services to victims of human trafficking on the state level and criminalize distinct human trafficking related offenses.[217]

1. Services and Forms of Compensation Provided to Victims

The bill provides assistance directly to trafficking victims in a number of ways.[218] First, the bill provides funding for non-profit services offered to victims of trafficking through the establishment of a

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[210] *See* Buckwalter et al., *supra* note 173, at 426.

[211] *Id.* ("[W]arm clothing is not usually an urgent need for trafficking vitims in Hawaii, whereas it certainly is in Alaska. State laws can require that these needs take priority over others."); *See supra* notes 130–142 and accompanying text (explaining various physical and mental ailments experienced by trafficking victims).

[212] Buckwalter et al., *supra* note 173, at 426.

[213] Payne, *supra* note 27, at 59.

[214] Coonan, *supra* note 84, at 295.

[215] *See* Buckwalter et al., *supra* note 173, at 425–26, 428–29.

[216] *See* S. 97, 185th Gen. Court, Reg. Sess. (Mass. 2007).

[217] *See generally id.* In addition to Senate Bill 97, Senator Montigny has introduced Senate Bill No. 103, entitled, Resolve Studying Trafficking of Persons and Involuntary Servitude. *See* S. 103, 184th Gen. Court, Reg. Sess. (Mass. 2005).

[218] *See* Mass. S. 97, §§ 1, 9.

Victims of Human Trafficking Trust Fund.[219] This fund will be comprised of assets, proceeds from assets seized, and fines and assessments collected in accordance with the new state-level human trafficking crimes created by the bill.[220] Money from the fund will be awarded to non-profit and community-based programs that provide services to trafficking victims.[221] The non-exhaustive list of services that are entitled to funding include: "legal and case management services, health care, mental health, social services, housing or shelter services, education, job training or preparation, interpreting services, English-as-a-second language classes, [and] victim's compensation . . . ."[222]

Second, the bill creates a number of social services to be provided by directly by Massachusetts.[223] It requires the creation of a pilot program for a "human trafficking safe house" that will meet the needs of adult and child trafficking victims.[224] This house must have twenty-four hour security and a multilingual trauma staff, among other services.[225] The bill also requires the Department of Social Services to devise age-appropriate services for child victims of trafficking.[226]

Third, Senator Montigny's bill also provides monetary compensation to victims in direct and indirect ways.[227] It creates a tax deduction for any amount received by a victim for services rendered while in involuntary servitude, sexual servitude, or forced labor.[228] It mandates that the Attorney General's office compensate the victim for "the greater of the following: (1) the gross income or value to the defendant of the victim's labor or services or (2) the value of the victim's labor or services as guaranteed under the commonwealth's minimum wage and overtime provisions; whichever is greater, and interest."[229] It also pro-

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[219] *Id.* § 1.

[220] *Id.* The bill limits the amount of the fund that can be spent on administrative costs and forbids the money from being placed in the General Fund at the end of each fiscal year. *Id.*

[221] *Id.*

[222] *Id.*

[223] Mass. S. 97, § 9.

[224] *Id.*

[225] *Id.* The house must also have access to healthcare and mental health services and access to employment and educational services. *Id.*

[226] *Id.*

[227] *Id.* §§ 2, 9.

[228] Mass. S. 97, § 2; *see also* MASS. GEN. LAWS ch. 62, § 2 (2006) (listing current permissible tax deductions from gross income to which the bill would add a provision regarding trafficking victims).

[229] *See* Mass. S. 97, § 9.

vides for restitution from those convicted of human trafficking violations.[230]

2. Providing for a Private Right of Action and Amending the Criminal Code

The bill also seeks to empower victims to bring private rights of action for the human trafficking related offenses that have been committed.[231] The bill requires courts to advance the proceedings and give the victim a speedy civil trial upon motion.[232] It also prevents confidential communications made between the victim and her caseworker from being disclosed or subject to discovery without written consent of the victim.[233] The bill requires all victims to be provided with a copy of any

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[230] *Id.* Although this list is not exhaustive, restitution can be ordered for:

> (1) [L]ost income . . . (2) medical and related professional services relating to physical, psychiatric or psychological care; (3) physical and occupational therapy or rehabilitation; (4) necessary transportation, temporary housing, and child care expenses; (5) in the case of an offense resulting in damage or destruction of property, return of the property, or if return is impossible, impracticable or inadequate, payment of the replacement value of the property; (6) in the case of an offense resulting in death, or bodily injury that results in death, the costs and expenses of necessary funeral and related services; (7) [attorneys' fees] (8) compensation for emotional distress, pain, and suffering; (9) expenses incurred in relocating away from the defendant . . . ;(10) any other losses suffered by the human trafficking victim.

Id.

[231] *Id.* Section 9 of the Act contains the proposed chapter 265A of the criminal code: Sections 11 and 13 of this proposed chapter specifically create a private right of action for involuntary servitude, trafficking of persons for forced labor or services or sexual servitude. *Id.* § 9.

[232] *Id.* § 4.

[233] *Id.* § 6. For the purpose of this rule, a "confidential communication," is:

> Information transmitted in confidence by and between a human trafficking victim and a human trafficking victim's caseworker by a means which does not disclose the information to a person other than a person present for the benefit of the victim, or to those to whom disclosure of such information is reasonably necessary to the counseling and assisting of such victim. The term includes all information received by the human trafficking victim's caseworker which arises out of and in the course of such counseling and assisting, including, but not limited to, reports, records, working papers, or memoranda.

Id. A different rule exists for confidential communication during criminal cases: the communications shall be subject to discovery and admission as evidence only to the extent that it contains information that is exculpatory for the defendant. *Id.* The Court must review the information to determine whether the information is actually exculpatory before permitting discovery or introduction at trial. *Id.*

incident or police reports that relate to their cases.[234] In addition, it allows the victims to deliver their testimony at the civil trial by means of videoconference if they cannot attend in person due to their immigration status or undue financial or other hardship.[235]

On the other end of the spectrum, the bill also protects trafficking victims from prosecution in some ways, declaring that, "[a] human trafficking victim is not criminally liable for any sexual conduct for a fee or other thing of value committed as a result of, or incident or related to, being trafficked."[236] The bill also provides for the affirmative defenses of duress and coercion in all other prosecutions.[237]

Senator Montigny's bill also amends Massachusetts' criminal code to criminalize human trafficking as a separate offense.[238] Human trafficking is criminalized in three sections of the proposed chapter.[239] First, the crime of involuntary servitude was created, defined as the intentional subjecting of another person to forced labor or services.[240]

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[234] Mass. S. 97, § 8.

[235] *Id.* § 5. To utilize this method of videoconferencing during a civil trial, certain requirements must be met. *Id.* First, the testimony of the victim must be given under oath before an ambassador, a consular general, or any other respective designee in an embassy or consular office of the United States. *Id.* In addition, the defendant's counsel must have the opportunity to cross-examine the witness at the trial, either in person or through the videoconference. *Id.*

[236] *Id.* § 9.

[237] *Id.*

[238] *Id.*

[239] Mass. S. 97, § 9.

[240] *Id.* Involuntary servitude is punishable by a maximum fine of two thousand dollars and a minimum state imprisonment sentence of five years. *Id.* The maximum state sentence is twenty-five years. *Id.* Forced labor or services, for the purposes of the entire chapter, are defined as:

> (1) work of economic or financial value or (2) activities performed directly or indirectly, under the supervision of or for the benefit of another including, but not limited to, sexual conduct for a fee or other thing of values, sexually-explicit performances and involvement in the production of pornography. Such work or services shall have been obtained or maintained in whole or in part through:
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> (i) intimidation, fraud, duress or coercion;
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> (ii) psychological manipulation;
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> (iii) causing or threatening to cause injury to any person;
>
> (iv) physically restraining or threatening to physically restrain another person;
>
> (v) abusing or threatening to abuse the law or legal process by knowingly providing misinformation as to the adverse legal consequences of a person's actions including, but not limited to, threats of deportation;
>
> (vi) knowingly destroying, concealing, removing, confiscating or possessing any actual or purported passport or other immigration document, or any

Second, the crime of trafficking of persons for forced labor or services, or the intentional enticing, harboring, transporting or delivering another, with the intent that the person be subjected to forced labor or services, or intentionally benefiting financially or receiving anything of value, directly or indirectly, from such conduct was created.[241] Finally, the crime of procuring another for sexual servitude is defined as the intentional enticing, harboring, transporting, or delivering another, with the intent that the person engage in a sexually-explicit performance, the production of pornography or sexual conduct for compensation.[242] An additional state prison sentence of ten to fifteen years is required if the victim of any of the above crimes is under the age of eighteen.[243] Further state prison sentences are also required if any of the above crimes are committed by means of kidnapping, result in bodily injury or serious bodily injury to the victim, or results in the death of another.[244] Finally, additional penalties are required depending on the duration for which the victim was subjected to any of these crimes.[245] Moreover, the act requires restitution for victims and forfeiture of assets and property used to facilitate a violation of human trafficking.[246]

The act also criminalizes the behavior of those who indirectly participate in the trafficking industry.[247] If an individual engaging in sexual conduct for a fee and knows or has reason to know the other person is a victim of human trafficking, they are subject to criminal liability.[248] Business entities that knowingly aid or participate in human trafficking can lose their license and can be subject to civil liability.[249]

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other actual or purported government identification document, of another person;

(vii) the use of blackmail;

(viii) causing or threatening to cause financial harm or to use financial control over any person.

Id.

[241] *Id.* A violation of this offense is punishable by a maximum fine of two thousand dollars and carries a minimum imprisonment sentence of ten years. *Id.* The maximum sentence is twenty years. *Id.*

[242] *Id.* A violation of this offense is punishable by a maximum fine of two thousand dollars and carries a minimum imprisonment sentence of twenty years. *Id.* The maximum sentence is thirty years. *Id.*

[243] *Id.*

[244] Mass. S. 97, § 9.

[245] *Id.*

[246] *Id.*

[247] *Id.*

[248] *Id.*

[249] *See* Mass. S. 97, § 9.

3. Responsibilities Given to New and Existing Administrative Agencies

Finally, Senator Montigny's bill gives the Attorney General responsibilities to combat human trafficking.[250] The bill requires the Office of the Attorney General to create and distribute informational material to state and local employers who might encounter victims of human trafficking[251] The Attorney General is also responsible for generating an annual report on trafficking incidents within Massachusetts, which is to be distributed annually to various committees within the Legislature.[252]

The bill creates an Anti-Human Trafficking Task Force which has a number of significant responsibilities, including organizing data on the nature and extent of human trafficking, identifying federal, state and local programs that can provide benefits and services to victims, determining how to increase public awareness of human trafficking, and recommending educational and training opportunities for law enforcement and social service providers.[253] Twenty-six different state officials from various agencies and branches and representatives from non-profit agencies have been appointed to serve on the task force.[254] Overall, the Massachusetts bill makes great progress in the fight against human trafficking.[255]

C. *Contrasting the Proposed Massachusetts Legislation with Other States' Legislation*

Anti-trafficking laws on the state level are a relatively new phenomenon; before 2003, no state had any legislation on the issue.[256] As awareness of the human trafficking industry has disseminated, states responded by enacting various types of legislation to tackle the problem within their borders.[257] Thus far, Massachusetts has drafted the most

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[250] *Id.*

[251] *Id.*

[252] *Id.*

[253] *Id.* For a full list of responsibilities delegated to the task force include, see Section 9 of the proposed legislation. *See id.*

[254] Mass. S. 97, § 9. The force is required to publish their findings on an annual basis. *Id.*

[255] *See generally id.*

[256] Buckwalter et al., *supra* note 173, at 416; *see* Amy Farrell, *State Human Trafficking Legislation*, *in* Marshaling Every Resource: State and Local Responses to Human Trafficking 20 (Dessi Demitrova ed., 2007).

[257] Farrell, *supra* note 256, at 21. The Department of Justice has also drafted a model anti-trafficking criminal statute for states to adopt or consult for guidance when drafting their legislation. *Id.* at 22. *See generally* U.S. Dep't of Justice, Model State Anti-Trafficking Criminal Statute, *available at* www.usdoj.gov/crt/crim/model_state_law.pdf. In addition, a

comprehensive statutory scheme combating trafficking on the state level, as it not only criminalizes trafficking, but also contains provisions to protect victims and prevent the development of the trafficking industry.[258]

To date, thirty-three states have criminalized trafficking as a separate offense.[259] In some states, like Louisiana, this is the only mechanism provided by the state to combat human trafficking.[260] The criminalization of human trafficking and offenses related to human trafficking is but one component of Senator Montigny's comprehensive bill.[261] Moreover, the Massachusetts criminal definition of human trafficking is extremely expansive: it explicitly criminalizes the trafficking of individuals to perform forced labor or services, which encompasses any work of economic or financial value, and trafficking for sexual purposes, which includes sexually explicit performances and the production of pornography.[262] The criminal component of the bill is also progressive because it enhances punishment for the trafficking of minors.[263]

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number of non-profit organizations like the Polaris Project, have drafted model legislation to assist states with their efforts. Farrell, *supra* note 299, at 22. *See generally* POLARIS PROJECT, MODEL COMPREHENSIVE STATE LEGISLATION TO COMBAT TRAFFICKING IN PERSONS (2006), *available at* http://www.polarisproject.org/images/docs/Model-Comprehensive-State-Legislation.pdf.

[258] *See generally* S. 97, 185th Gen. Court, Reg. Sess. (Mass 2007).

[259] Polaris Project, U.S. Policy Alert on Human Trafficking (Dec. 2007), *available at* http://www.polarisproject.org/content/view/157 (follow 12/20/2007 hyperlink).

[260] *See, e.g.*, LA. REV. STAT. ANN. § 14:46.2 (2007); *see also* CTR. FOR WOMEN POLICY STUDIES, (2006) http://www.centerwomenpolicy.org/programs/trafficking/map/lawdetail.cfm?state=LA#14 (last visited Oct. 9, 2008) (indicating that H.B. 56 is the only bill that the Louisiana legislature passed to combat trafficking).

[261] *Compare* Mass. S. 97 *with* LA. REV. STAT. ANN. § 14:46.2 (2007) (noting Louisiana only criminalizes human trafficking, while the Massachusetts bill has numerous other components).

[262] *See* Mass. S. 97; *see also* Buckwalter et al., *supra* note 162, at 428 (urging states to draft criminal anti-trafficking legislation that encompasses all types of trafficking). In contrast, Texas originally criminalized trafficking when executed for the purposes of forced labor or services, but later amended its statutory scheme to criminalize trafficking for purposes of prostitution, as defined in § 43.02 of its Penal Code. TEX. PENAL CODE ANN. § 20A.01 (2007); S. 11, 80th Sess., Reg. Sess. (Tex. 2007).

[263] Mass. S. 97; Farrell, *supra* note 256, at 25; *see* Buckwalter et al., *supra* note 173, at 428. One criminal component the Massachusetts bill does not provide for is the criminal liability of business entities. *See* Farrell, *supra* note 256, at 25; *see generally* Mass. S. 97. In contrast, the Georgia criminal code declares:

> A corporation may be prosecuted under [Trafficking of Persons for Forced Labor or Sexual Servitude] for an act or omission constituting a crime under this Code section only if an agent of the corporation performs the conduct which is an element of the crime while acting within the scope of his or her office or employment and on behalf of the corporation and the commission

In addition, the legislation of some states—including the bill proposed by Massachusetts—extends beyond criminal provisions and provides services for trafficking victims.[264] Such provisions, although extremely necessary, still remain rare in state statutory schemes.[265] When included in a statute, such services are provided for in different ways, including specific enumeration of the required services.[266] The Massachusetts bill specifically creates one program: it requires the Executive Office of Health and Human Services to create a human trafficking safe house.[267] Other states have not specifically required such a program in their legislation.[268]

Another way services are provided for is through the creation of a state Task Force or Committee, which is given the responsibility of analyzing the problems posed by human trafficking within the state and devising the necessary social services and programs to eradicate those problems.[269] This is the method that Massachusetts opted to utilize for the creation of all social services other than the safe house.[270] The bill also establishes a Victims of Human Trafficking Fund, which will provide a source of funding for social services once they are established.[271]

> of the crime was either authorized, requested, commanded, performed, or within the scope of his or her employment on behalf of the corporation or constituted a pattern of illegal activity that an agent of the company knew or should have known was occurring.

GA. CODE ANN. § 16–5–46(g) (2007).

[264] *See* Mass. S. 97; *see also* CAL. WELF. & INST. CODE §§ 18945, 13283 (extending eligibility for social services to victims of trafficking) (West Supp. 2008); CAL. PENAL CODE § 1202.4 (West 2004) (providing for mandatory restitution to victims); CAL. CIV. CODE § 52.5 (2007) (providing victims of trafficking with a private right of action); N.J. STAT. ANN. § 52:4B-11(b)(13) (West Supp. 2007) (permitting compensation for trafficking victims).

[265] *See* Polaris Project, *supra* note 259 (reporting that as of December 2007, only fourteen states have enacted legislation providing victim protection and only twenty-four states have enacted legislation providing for either a Research Commission or a Task Force of some kind).

[266] *See* 720 ILL. COMP. STAT. ANN. 5/10A-10(f) (West Supp. 2007) ("Subject to the availability of funds, the Department of Human Services may provide or fund emergency services and assistance to individuals who are victims of one or more offenses defined in this Article 10A."); Buckwalter et al., *supra* note 162, at 429.

[267] Mass. S. 97 § 9.

[268] *Compare id.* (providing for the creation of a safe house) *with* 720 ILL. COMP. STAT. ANN. 5/10 A-10(f) (providing for "emergency services").

[269] *See, e.g.*, VA. CODE ANN. §§ 30–287 to –292 (West Supp. 2007); WASH. REV. CODE ANN. § 7.68.360 (West 2007) (creating a "work group to develop written protocols for delivery of services to victims of trafficking of humans"); Mass. S. 97.

[270] Mass. S. 97.

[271] *Compare* Mass. S. 97 (creating the Victims of Human Trafficking Fund) *with* CAL. WELF. & INST. CODE § 18945 (West Supp. 2008) ("Benefits and services under this division shall be paid from state funds to the extent federal funding is unavailable.").

Finally, the statutory schemes of a few states contain provisions that focus on preventing the development of the human trafficking industry within that particular state's borders.[272] At the state level, the most effective way to combat the spread of human trafficking is through the creation of knowledgeable law enforcement agencies and increasing public awareness about the inner-workings of human trafficking.[273] Some states, like Connecticut, simply require its task force to devise these programs without any formal requirements.[274] Other states, like Massachusetts and California, are a bit more concrete in terms of the standards and programs they would like devised.[275]

The main criticism of the Massachusetts Anti-Trafficking Task Force is that there are no concrete deadlines for when the Task Force's analyses must be completed and actual implementation of recommen-

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[272] *See, e.g.*, VA. CODE ANN. §§ 30–287 to –292 (2007) (establishing a human trafficking commission to prevent the progression of human trafficking within the state).

[273] *See* Buckwalter et al., *supra* note 173, at 426, 433–44 (stressing the significance of education and training for local law enforcement agencies and government officials); FREE THE SLAVES & HUMAN RIGHTS CTR., *supra* note 35, at 3 (urging the launch of public awareness campaigns in the United States); *see* Raymond & Hughes, *supra* note 44, at 11, 92 (stressing the value of increasing public awareness).

[274] CONN. GEN. STAT. ANN. § 46a-4b (West Supp. 2007) ("The Permanent Commission on the Status of Women, in conjunction with the Police Officer Standards and Training Council, shall develop a training program on trafficking in persons and make such training program available, upon request, to the Division of State Police within the Department of Public Safety, the office of the Chief State's Attorney, local police departments and community organizations.").

[275] *See* CAL. PENAL CODE § 13519.14 (West Supp. 2008); Mass. S. 97. The California Penal Code requires the creation of courses of instruction that:

> [S]tress the dynamics and manifestations of human trafficking, identifying and communicating with victims, providing documentation that satisfy the law enforcement agency endorsement (LEA) required by federal law, collaboration with federal law enforcement officials, therapeutically appropriate investigative techniques, the availability of civil and immigration remedies and community resources, and protection of the victim.

CAL. PENAL CODE § 13519.14. Senator Montigny's bill requires the task force to offer recommendations on training programs that focus on a non-exhaustive list of concerns, including:

> [M]ethods used to identify human trafficking victims including preliminary interviewing and questioning techniques, methods of protecting the special needs of women and child human trafficking victims, developments in state and federal laws regarding human trafficking, and methods to increase effective collaboration between state and local agencies, law enforcement, social service providers and non-governmental organizations . . . .

Mass. S. 97.

dations must begin.[276] The existence of social services and law enforcement protection at the local level are the heart of the state legislation; accordingly, the legislature should emphasize that these programs and protocols should be created as quickly and efficiently as possible.[277] The same criticism stands for the development of law enforcement training programs.[278] Notwithstanding this critique, the Massachusetts bill is comprehensive and progressive in contrast to the anti-trafficking statutory schemes of other states. The bill should be passed immediately and other states should quickly follow suit.

Conclusion

I am not for sale.
You are not for sale.
No one should be for sale.[279]

"Human trafficking is a pernicious new variation on the ancient theme of slavery and trading in human flesh."[280] As an industry, human trafficking claims the freedom of hundreds of thousands of individuals every year. That number is only growing. To properly frustrate the efforts of perpetrators and provide protection to victims, significant effort must be expended at the state and local level, in conjunction with the legislative measures already taken on the federal level. Moreover, such effort cannot be limited to only criminal provisions. To prevent the development of the human trafficking industry, public awareness programs must be developed and law enforcement and administrative agencies must be enlightened. To protect victims, social services must be offered liberally and private rights of action must be conferred without hesitation.

The Massachusetts bill accomplishes all of these goals and more; it stands as one of the most comprehensive anti-trafficking statutory schemes to date. Accordingly, this bill must be passed by the State Leg-

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[276] *Compare* Mass. S. 97(establishing the Anti-Trafficking Task Force and requiring the publication of an annual report on its findings) *with* Wash. Rev. Code § 7.68.360 (West 2007) (requiring the protocols to be created within one year of the creation of the "work group").

[277] *See* Buckwalter et al., *supra* note 173, at 433–34.

[278] *Compare* Mass. S. 97 (containing no deadlines) *with* Cal. Penal Code § 13519.14(a) (requiring implementation of law enforcement programs within two years of passage) (West Supp. 2008).

[279] Batstone, *supra* note 20, at 301.

[280] Coonan, *supra* note 84, at 301.

islature immediately, either in its current form or in a revised form with more concrete deadlines for program implementation. In addition, other states that have not yet adopted anti-trafficking legislation should quickly follow suit, using the Massachusetts bill as a guide. Moreover, if states have statutory schemes that do not address victim protection and prevention, such legislation should also be drafted and passed immediately, again using the Massachusetts bill as a model. The longer the delay in taking such action, the longer children like S.A.D. will remain chained outside. We must make it clear, for S.A.D.—and others like her—that slavery in any form is simply unacceptable.

RESISTING THE PATH OF LEAST RESISTANCE: WHY THE TEXAS "POLE TAX" AND THE NEW CLASS OF MODERN SIN TAXES ARE BAD POLICY

Rachel E. Morse*

Abstract: Sin taxes—traditionally levied on alcohol and tobacco—are inherently regressive and disproportionately burden the poor, yet they are firmly entrenched as a practice and offer a quick fix in times of fiscal need. Opponents to this method of generating revenue cite its regressive nature and argue that sin taxes are paternalistic and bad social policy. Others disagree, contending that smokers need every incentive to quit, or that alcoholics should be required to mitigate the social costs of their habit. In recent years, a new class of sin taxes has reached deeper into popular culture than ever before, confusing the basic role of the tax system with the improper role of government as social engineer. This Note argues that the use of new sin taxes must be curbed in order to protect the political and socio-economic minorities who consistently face a disproportionate burden under every new sin tax.

Introduction

> *In every community those who feel the burdens of taxation are naturally prone to relieve themselves from them if they can . . . . One class struggles to throw the burden off its own shoulders. If they succeed, of course it must fall upon others. They also, in their turn, labor to get rid of it, and finally the load falls upon those who will not, or cannot, make a successful effort for relief. This is, in general, a one-sided struggle, in which only the rich engage, and it is a struggle in which the poor always go to the wall.*[1]

In 2007, the Texas state legislature passed a law imposing a five dollar per-customer tax on strip clubs.[2] The tax, which went into effect on January 1, 2008, was expected to affect approximately 150

* Note Editor, Boston College Third World Law Journal (2008–2009).

[1] William B. Barker, *The Three Faces of Equality: Constitutional Requirements in Taxation*, 57 Case W. Res. L. Rev. 1, 3 (2006).

[2] Tex. Bus. & Com. Code § 47(B) (2008).

businesses in the state and generate an additional forty million dollars a year in revenue.[3] Although the proceeds were earmarked for a noble cause—a portion of the money was designated for use in funding programs for victims of sexual assault—the tax was decried as unconstitutional and discriminatory, and has met opposition from club owners, patrons, employees, and even some legal scholars.[4]

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[3] *See Texas Slaps "Pole Tax" on Strip Clubs*, Int'l Herald Trib. Online, Dec. 21, 2007, http://www.iht.com/articles/ap/2007/12/21/america/Texas-Strip-Club-Tax.php; Emily Ramshaw, *Strip Bars May Face State Fees*, Dallas Morning News, Feb. 13, 2007, at 1A. Although it is unknown exactly how many strip clubs exist in Texas, there are 152 "sexually oriented businesses" registered with the Texas Alcoholic Beverage Commission. *See* Ramshaw, *supra*. The revenue estimates are based on established figures from liquor sales and indicate that the registered clubs are host to approximately eight million visits a year. *See Texas Slaps "Pole Tax" on Strip Clubs*, *supra*.

[4] *See Texas Slaps "Pole Tax" on Strip Clubs*, *supra* note 3. Almost immediately after the law took effect, the Texas Entertainment Association—a business group comprised of adult entertainment and cabaret venues—filed suit, charging that the tax violates their First Amendment right to freedom of expression. *See Texas Strip Clubs Alter Argument Against $5-Per-Customer-Fee*, Dallas Morning News Online, Dec. 27, 2007, http://www.dallasnews.com/sharedcontent/dws/news/texassouthwest/stories/122807dntexstripclubfee.4c5a252.html. The plaintiffs won their first battle when, in March 2008, a Texas state district court judge ruled that the tax was unconstitutional. *See* Christy Hoppe, *Strip Clubs Still Might Have to Pay Disputed Fee*, Dallas Morning News, Apr. 18, 2008, at 3A. However, the state district court's judgment was automatically suspended when the Texas Attorney General's Office filed an appeal. *See id.* Subsequently, the Texas Comptroller mailed a letter explaining to strip clubs that their payments were still due. *See id.* The Supreme Court has held that nude dancing "is expressive conduct within the outer perimeters of the First Amendment." *See* Barnes v. Glen Theatre, 501 U.S. 560, 565 (1991). However, the Court has also upheld laws banning nudity, stating that while nude dancing is protected expression, it is "only marginally so," and there are different levels of protection due different forms of expressive conduct. *See id.*; *see also* City of Erie v. Pap's A.M., 529 U.S. 277, 278–79 (2000) (upholding a local ordinance making it illegal to knowingly or intentionally appear nude in public—thus effectively requiring nude dancers to wear, at minimum, pasties and a G-string—on the grounds that the ordinance was a valid content-neutral restriction on immoral conduct). In addition to the First Amendment, the tax is also being opposed on other grounds. *See* Corrie MacLaggan, *State Defends Strip Club Fee in Court Filing*, Austin Am. Statesman, Dec. 18, 2007, at B1. Laura Stein, a communications professor at the University of Texas has predicted the tax "is not going to stand or fall based on First Amendment questions. The stronger issue here is whether this is unfair taxation." *See id.* The suit also alleges that the law imposes an occupation tax in violation of the state constitution, and that it falsely suggests a connection between the adult entertainment industry and sexual violence. *See Texas Slaps "Pole Tax" on Strip Clubs*, *supra* note 3. Jonathan Turley, a constitutional law professor at George Washington University, has suggested the Texas tax could pave the way for punitive taxes in an array of unpopular or borderline arenas, going as far as to suggest that abortion could be made subject to a sin tax. *See Texas Strip Clubs Alter Argument Against $5-Per-Customer Fee*, *supra*; *Texas Slaps "Pole Tax" on Strip Clubs*, *supra* note 3. The club owners further allege that the tax will drive some smaller bars out of business. *See Texas Slaps "Pole Tax" on Strip Clubs*, *supra* note 3. Dawn Rizos, operator of the Dallas club, The Lodge, told the Associated Press she expects the tax "will kill some of the smaller clubs." *Id.* Chandra Brown, president of the company that owns Players, a small Amarillo

Dubbed the "Texas 'Pole' Tax," this levy on strip clubs is one of a new set of modern sin taxes that has been imposed on a wide range of activities in recent years.[5] Sin taxes—targeted excise taxes imposed on the sale of disfavored goods or services—are not uncommon; the United States has a history of taxing vices such as alcohol and tobacco in order to generate revenue in times of war, or to raise money for education.[6] Although sin taxes are generally proposed in times of fiscal need, lawmakers often justify them by citing moral concerns.[7] The argument posits that a given activity, such as smoking, is bad for society.[8] By raising taxes on cigarettes, lawmakers force smokers to internalize the costs of their habit and will perhaps discourage some people from purchasing cigarettes altogether.[9] But while discouraging anti-social or destructive behavior is a desirable goal, sin taxes are not

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club, stated that adding a five dollar tax to the existing four dollar cover that her club currently charges will "drive away customers and force the club to close." *Id.* Brown believes her customers can not afford the surcharge and will refuse to pay it. *Id.*

[5] *See Texas Slaps "Pole Tax" on Strip Clubs*, *supra* note 3. Other new taxes involve video games, junk food, bottled water, sugary soda and ammunition. *See* David Cox, Assemblymember Cox 5th District Report, Vol. 1, Issue 2, Apr. 2002 (listing new tax proposals in California, including an ammunition tax, proposed by state senator Don Perata (D-Oakland) that would place a five-cent tax on every cartridge or round of ammunition sold in the state); John P. Gamboa, *Sin Taxes Give the Market a Bad Rap*, DAILY AZTEC, Jan. 30, 2008, at A1, *available at* http://www.thedailyaztec.com/2.7447/1.794878 (describing proposals in New Mexico and Wisconsin to tax video games, TVs and electronics); Dan Shapley, *An Eco-Sin Tax on Bottled Water*, DAILY GREEN, Dec. 24, 2007, http://www.thedailygreen.com/environmental-news/latest/bottled-water-tax-47122402 (describing Chicago as "the first major U.S. city to tax bottled water," beginning in 2008); Robert A. Sirico, *Commentary: Twinkies, Smokes and Fries: The Fallacies of Sin Taxes*, BUDGET & TAX NEWS, Sept. 2006, *available at* http://www.heartland.org/policybot/results.html?articleid=19660 (describing recent proposals for "new and creative measures aimed at fatty snacks, fast food, and soft drinks"); John Skorburg, *Oakland Mayor Floats Sin Taxes on Junk Food and Drinking*, BUDGET & TAX NEWS, Feb. 2004, *available at* http://www.heartland.org/policybot/results.html?artId=14343 (referencing a recommendation by the mayor of Oakland, California, that the state address budget problems "by taxing behaviors such as drinking and eating junk food").

[6] *See* David J. DePippo, *I'll Take My Sin Taxes Unwrapped and Maximized, with a Side of Inelasticity, Please*, 36 U. RICH. L. REV. 543, 544 (2002); *Texas Slaps "Pole Tax" on Strip Clubs*, *supra* note 3.

[7] *See* Jendi B. Reiter, Essay, *Citizens or Sinners? The Economic and Political Inequity of "Sin Taxes" on Tobacco and Alcohol Products*, 29 COLUM. J.L. & SOC. PROBS. 443, 451 (1996); Skorburg, *supra* note 5.

[8] *See* Jeff Strnad, *Conceptualizing the "Fat Tax": The Role of Food Taxes in Developed Economies*, 78 S. CAL. L. REV. 1221, 1247 (2005) (describing a cigarette tax as a surrogate self-control device for smokers who know they should quit, but do not seem able to do so on their own).

[9] *See id.*

an appropriate remedy for societal ills.[10] Sin taxes are inherently regressive; they put a disproportionate burden on the poor, and they can create more problems than they solve.[11] Not only do sin taxes burden the individual consumer, but they also jeopardize small businesses and promote unfair competition, and can lead to downsizing and layoffs for workers.[12] In an effort to stamp out one particular activity, sin taxes may encourage smuggling and create violent black markets, especially when the item being taxed is available for less in a neighboring city or state.[13] There is often considerable class bias influencing the decision of which activities to tax; the bulk of things subject to this extra burden are those most popular with the poor and working classes.[14]

Although sin taxes burden the poor and working classes disproportionately, they tend to be billed as being for the greater good. Sin taxes are often linked to programs purported to cure the ills caused by the activity being taxed, and are widely accepted by the general public because they are indirect taxes that affect only a select minority.[15] When lawmakers impose a new sin tax, those who otherwise oppose taxation tend to look the other way.[16] Supporters of increased cigarette taxes, for example, argue that smoking imposes great costs on society, such as increased healthcare costs and harm done to those

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[10] *See* Phineas Baxandall, *Taxing Habits*, 13 Fed. Res. Bank of Boston Regional Rev. 19, 26 (2003); Robert A. Sirico, *Sin Taxes: Inferior Revenue Sources*, Budget & Tax News, July 2004, *available at* http://www.heartland.org/policybot/results.html?artId=15293.

[11] *See* Baxandall, *supra* note 10, at 26; Reiter, *supra* note 7, at 447; Sirico, *supra* note 10.

[12] *See* D. Dowd Muska, *Sin Tax Error*, Nev. J. (1999), *available at* http://nj.npri.org/nj99/05/feature2.htm (last visited Nov. 14, 2008); Sirico, *supra* note 10.

[13] *See* Muska, *supra* note 12. "In the late 1980s, Canada attempted a large luxury tax on cigarettes, only to find that a substantial and violent black market soon formed to supply smokers. Legal sales (and tax revenues) fell, while more money had to be re-routed to stop the criminal activity." *See Luxury Tax*, Investopedia, http://www.investopedia.com/terms/l/luxury_tax.asp (last visited Dec. 4, 2008).

[14] *See* Baxandall, *supra* note 10, at 26; DePippo, *supra* note 6, at 555; Reiter, *supra* note 7, at 454. Baxandall cites a 1990 study by Harvard Law School Professor Kip Viscusi in which Viscusi determines that the poor do smoke more than the affluent. *See* Baxendall, *supra* note 10. According to Viscusi's findings, over thirty percent of smokers earned less than $10,000 a year. *See id.*

[15] *See* Gamboa, *supra* note 5 (explaining that New Mexico's proposed "Leave No Child Inside" campaign includes a plan to spend money raised by the video game tax on outdoor education programs); *Texas Slaps "Pole Tax" on Strip Clubs*, *supra* note 3 (detailing the plan for money raised by the strip club tax to go towards helping victims of sexual violence). Discussed further in section IV, these links, while well-intentioned, are often misguided. *See* Gamboa, *supra* note 5.

[16] *See* Gamboa, *supra* note 5.

who are exposed to second hand smoke.[17] A tobacco tax forces smokers to help defray these costs that might otherwise fall to the state.[18] Proponents also argue that an extra charge for cigarettes might be the incentive an otherwise educated addict needs to finally quit her unhealthy habit.[19] And although sin taxes are not without problems, they are such an integral part of the revenue system that many state budgets are now largely dependent on the money they bring in.[20]

Yet while sin taxes are an established mechanism for solving budget crises and influencing behavior, commentators have long voiced concern about an eventual slide down a slippery slope into legislative abuse of the sin tax tool.[21] While sin taxes have increased over

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[17] *See id.* at 22.

[18] *See id.* Although supporters of tobacco taxes argue the revenue is needed to offset the public health costs placed on society by smokers, there is disagreement as to what those costs actually are. *See id.* By one estimate, the average external costs of a pack of cigarettes (such as additional medical care and reduced productivity) exceeds seven dollars a pack, more than the per-pack tax in any state. *See id.* (referencing numbers put forth by the Centers for Disease Control). But the Congressional Research Service, which takes into account in its calculations money saved on healthcare costs by smokers' shortened life spans, estimates that the per-pack societal costs of smoking is only thirty-three cents. *See id.*

[19] *See* Strnad, *supra* note 8, at 1246–47. Strnad suggests that cigarette taxes function "as a powerful self-control device," giving some smokers the extra incentive they need to kick the habit. *See id.* Strnad cites the practice of tearing up a dollar bill every time one reaches for a cigarette as a means of punishing oneself and training oneself not to smoke. *See id.* In effect, rather than tearing up a dollar, smokers are just giving it to the government. *See id.*

[20] *See* Baxendall, *supra* note 10, at 24. "Over the past several decades, with demands on state governments increasing and other taxes unpopular, state legislators once again looked to sin as a way to balance their budgets." *See id.* (discussing consistent increases in state tobacco taxes throughout history). State lotteries, one of the most lucrative methods of making money from vice, bring in approximately $400 million a year, more than alcohol and cigarette taxes combined. *See id.* at 26. Baxendall states that since 2001, "the allure of sin taxes has grown even greater . . . as state governments, facing sudden deficits, have needed new sources of funds." *See id.* Baxendall points to a Rhode Island measure that automatically raises the per-pack cigarette tax by ten cents every year, and to a recent Connecticut cigarette tax increase of sixty-one cents a pack. *See id.* During the 1990s, Baxendall observes, "legislators grew accustomed to the rising tax receipts . . . and committed state governments to higher spending levels. Some cut income taxes, tolls, or licensing fees, and many . . . let their rainy-day funds dwindle. When state revenues fell, states—required by law to balance their budgets—had to scramble to find money where they could." *See id.*

[21] *See Common Sense Says…*, Common Sense Found., May 2002, http://www.commonsense.org/?fnoc=./common_sense_says/02_may (last visited Nov. 14, 2008) (bolstering a 2002 argument that cigarette taxes unfairly burden the poor and are not the proper way to fix state budget problems by noting that, despite the belief held by supporters that cigarette taxes will improve public health, "many common behaviors give physicians fits, and we can't and shouldn't tax all of them. . . . Twinkies and fast food contribute to our nation's growing obesity, which weighs on our health care system, yet no one has proposed a French fry tax. Can that be far behind?"); Reiter, *supra* note 7, at n.67 (citing several proposals for sin taxes on fatty foods to encourage healthier lifestyles and replace tobacco tax

time, they have been generally limited to tobacco and alcohol.[22] Recently, a new class of sin taxes has appeared that reaches deeper into popular culture than ever before.[23] Proposed taxes on strip clubs, junk food, video games, sugary sodas, bottled water, and ammunition would bring with them all the traditional ills of sin taxes and would also confuse the appropriate role of the tax system with the improper role of government as social engineer.[24]

This Note will argue that the use of new sin taxes must be curbed in order to protect the poor and working classes, who are most adversely affected by each new tax. Part I will explain the basic requirement of fairness in taxation, and part II will supply a brief history of sin taxes in the United States. Part III will give an overview of the sin taxes that have emerged in the new millennium and will suggest that the tax system has reached a tipping point. Part IV will examine the reasons states are so quick to rely on sin taxes to fill budget gaps, and part V will fully discuss the harms caused by these taxes, arguing that they are inefficient and bad policy, even from the government's perspective. Part VI will suggest that moral policing is not the appropriate role for the tax system, and will suggest alternative approaches to solving state budget crises and ways to discourage unhealthy habits. This Note will conclude that where there is no system in place to monitor sin taxes' punitive and detrimental effects, they are the wrong tools for discouraging unpopular behavior. The practice of enacting new sin taxes should be curbed.

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revenue when the tobacco tax finally reduces tobacco consumption, Reiter asks: "Does anyone see a slippery slope?"); *Texas Slaps "Pole Tax" on Strip Clubs*, *supra* note 3 (quoting George Washington University constitutional law professor Jonathan Turley suggesting that acceptance of the Texas strip club tax could "expose any unpopular industry to punitive taxes. It could be abortion clinics").

[22] *See* Baxendall, *supra* note 10, at 20. "The term 'sin tax' . . . refers almost exclusively to taxes on tobacco, alcohol, and gambling." *See id.*

[23] *See* Gamboa, *supra* note 5; Sirico, *supra* note 5; *Texas Slaps "Pole Tax" on Strip Clubs*, *supra* note 3.

[24] *See* Muska, *supra* note 12 (calling sin taxes "the tool of choice for social engineers"); Cox, *supra* note 5; Gamboa, *supra* note 5; Sirico, *supra* note 5; Shapley, *supra* note 5; Robert A. Sirico, *The Sin Tax Craze: Who's Next?*, The Acton Institute, Apr. 28, 2004, www.acton.org/commentary/commentary_196.php (arguing that once a government begins taxing "morally ambiguous activities," it has crossed the line into "the business of protecting its citizens from themselves); Skorburg, *supra* note 5; *Texas Slaps "Pole Tax" on Strip Clubs*, *supra* note 3.

I. The Fairness Requirement in Taxation

To generate a steady and sustainable revenue stream, a tax system should be structured so that it can achieve three basic goals.[25] An ideal system will be efficient, wasting the fewest dollars possible; it will be simple, so that it is easy to administer; and it will be equitable.[26] Equity in taxation comes in two forms; horizontal equity requires treating alike taxpayers, such as those in the same income bracket, alike, while vertical equity prescribes levying taxes with an eye to taxpayers' ability to pay.[27] Because unfair excise taxes played an integral role in the American Revolution, many state constitutions, and indeed the federal Constitution, were drafted to include provisions guaranteeing equality in taxation.[28] Despite these provisions, the practical effects of modern American tax practices are not always fair.[29] In the arena of sin taxes particularly, excises placed on specific goods or services disfavored by the majority put a disproportionate burden on minority groups.[30] As legislatures become increasingly creative in designing sin taxes, the taxes target smaller and smaller groups, and any voices of protest are reduced to distant whispers.[31] At the same time, the majority hardly notices a new tax has been implemented, and so the inequities inherent in flat purchase point taxes do not register in the general social conscience.[32] Were new flat taxes to apply more broadly, advocates for the poor and disenfranchised certainly would take notice and object.[33]

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[25] *See* National Conference of State Legislatures, Principles of a High-Quality State Revenue System, http://204.131.235.67/programs/fiscal/fpphqsrs.htm [hereinafter NCLS, Principles of a High-Quality State Revenue System] (last visited Nov. 14, 2008).

[26] *See id.*

[27] *See* DePippo, *supra* note 6, at 562; NCLS, Principles of a High-Quality State Revenue System, *supra* note 25. The federal income tax system does match tax rate with ability to pay; the income tax is on a progressive rate schedule with the wealthier paying a higher proportion of their income in taxes. *See* NCLS, Principles of a High-Quality State Revenue System, *supra* note 25.

[28] *See* U.S. Const. art. I, § 8, cl. 1 ("Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises . . . but all Duties, Imposts and Excises shall be uniform throughout the United States"); Barker, *supra* note 1, at 13 ("Many state constitutions adopted provisions on equality, uniformity, or proportionality in tax over the course of the nineteenth century.").

[29] *See* Baxandall, *supra* note 10, at 26 (citing disproportionate burden sin taxes place on the poor).

[30] *See id.*

[31] *See id.* (noting that groups subject to sin taxes "may resent being singled out, but they are a minority who garner little sympathy").

[32] *See id.*

[33] *See id.*

In his writings on the constitutional requirements of equality in taxation, William Barker points to the inherent selfishness of man.[34] Barker notes the influence of John Locke on early American attitudes towards taxation, and specifically references the strongly held beliefs that "there should be no taxation without representation, and that the burden of taxation should be equally allocated among the citizens of a society."[35] Barker suggests that a properly functioning democratic government should further these aims.[36] He goes on to note, however, that given the opportunity, the wealthy will take advantage of any opportunity to shift the tax burden from themselves onto those who are less empowered.[37] Barker observes that "this is, in general, a one-sided struggle" by the rich, and that in the end, "the poor always go to the wall."[38] Although this imbalance in financial agility—and the ability of the rich to avoid or evade taxation—has existed throughout American history, it is unfair and irresponsible to perpetuate such discrepancies where they can be easily avoided.[39]

II. A Brief History of Sin Taxes

The use of sin taxes in the United States preceded the federal income tax system by over a century.[40] Before the sixteenth amendment was passed in 1913 authorizing the federal income tax, excise taxes were the government's primary source of revenue.[41] Initially implemented as temporary taxes during war time, sin taxes on alco-

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[34] *See* Barker, *supra* note 1, at 3.

[35] *See id.* at 2 (paraphrasing John Locke, The Second Treatise on Government 193 (Haffner Publ'g 1947) (1690)).

[36] *See id.*

[37] *See id.* at 3.

[38] *Id.* During Prohibition, the existing tax on alcohol, while remaining on the books, ceased producing revenue for the government. *See* Reiter, *supra* note 7, at 448. Historian John C. Burnham argues that one of the reasons the rich were in support of the repeal of Prohibition was because they realized a liquor tax would shift the revenue focus away from the income tax and place the burden back on the poor and middle class consumers of alcohol. *See id.* Reiter goes on to cite millionaire Pierre Du Pont, who suggested that the liquor tax would raise so much revenue there would no longer be a need for an income tax, "an outcome which obviously suited him quite well." *See id.* at 449.

[39] *See* Barker, *supra* note 1, at 3.

[40] *See* U.S. Const. amend. XVI (granting Congress the "power to lay and collect taxes on incomes"); Reiter, *supra* note 7, at 446 (discussing the early history of sin taxes in the United States).

[41] *See* DePippo, *supra* note 6, at 546.

hol and, later, tobacco proved so lucrative that the government came to rely on them full time.[42]

Ironically, one of the causes of the American Revolution had been the excise taxes imposed on the colonies by England.[43] Nevertheless, in 1790, Alexander Hamilton proposed a tax on whiskey to help repay the new nation's war debts.[44] Despite the tax, whiskey consumption remained relatively steady.[45] The demand for alcohol appeared inelastic; people bought the same amount, no matter the price.[46] Lawmakers took advantage of the inelasticity of demand and continued to impose excise taxes on alcohol.[47] To make the tax more palatable to the general public, politicians offered the justification that "sellers of such morally suspect products should give some of their profits back" for the common good.[48] Similar moral reasoning has been offered to generate support for sin taxes throughout American history.[49]

Despite their proffered justifications, however, sin taxes have historically burdened the poor.[50] In the late eighteenth century, a number of poor Midwestern distillers revolted against Hamilton's whiskey tax in what is popularly known as the Whiskey Insurrection.[51] The tax, which charged small-scale producers by the gallon but which allowed those who produced in volume to pay a discounted flat rate, affected the smaller producers disproportionately.[52] They rioted, and the whiskey tax was ultimately repealed in 1802.[53] The tax was reinstated as a

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[42] *See id.* Today, a single cigarette can yield almost eight cents for some state governments, and another two cents in revenue for the federal government. *See* Baxandall, *supra* 10, at 20.

[43] *See* Reiter, *supra* note 7, at 446.

[44] *See* DePippo, *supra* note 6, at 545.

[45] *See* Reiter, *supra* note 7, at 446.

[46] *See id.*

[47] *See id.*

[48] *See id.* at 444.

[49] *See* Strnad, *supra* note 8, at 1244 (discussing taxes on cigarettes and fatty food, both items which are argued to be at the center of self-control issues).

[50] *See* DePippo, *supra* note 6, at 546.

[51] *See id.*

[52] *See id.*

[53] *See id.* Rebellions against excise taxes are not uncommon in history. *See* Boston Tea Party Ship & Museum, http://www.bostonteapartyship.com/history.asp (last visited Apr. 4, 2008). In 1773, a group of American patriots, led by Samuel Adams and calling themselves the Sons of Liberty, rebelled against Britain's Tea Act of 1773. *See id.* On the evening of December 16, 1773, a large group of patriots stormed three ships that were docked in Boston Harbor and emptied 342 crates of tea in to the water. *See id.* The tea belonged to the British-owned East India Company, a company which had been effectively granted a monopoly in the colonies by exemption from an excise tax that still applied to American merchants. *See id.* Fueled by a deep and widespread discontent with a series of commercial

temporary measure during the War of 1812, but was repealed again in 1817.[54] It was not until the Civil War that alcohol taxes became a permanent fixture on the American tax landscape, but even then, only liquor was subject to taxation.[55] Beer and wine remained tax-free.[56]

Federal tobacco taxes also began as a temporary measure, but they too became permanent during the Civil War.[57] As with alcohol, the demand for tobacco products remained high, despite the increased cost to consumers.[58] In 1921, individual states began charging their own taxes on tobacco products, levying them on top of the existing federal tax.[59] Both the federal and state governments became accustomed to the revenue derived from tobacco taxes, and the money increasingly constitutes a large portion of most modern budgets.[60]

III. Atop the Slippery Slope: We Have Reached the Tipping Point

A 2006 Americans for Tax Reform study of state tax trends shows that over the preceding two and a half decades, states moved away from broad increases in income and sales taxes in favor of enacting more targeted excise taxes.[61] The new set of taxes goes beyond the traditional

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tariffs imposed on them by England, the patriots took a stand against taxation without representation. *See id.* The Boston Tea Party was a response not only to the British tea monopoly, but to a series of unfair excise taxes that included the Sugar Act of 1764, which taxed coffee, sugar, and wine; the Stamp Act of 1765, which taxed newspapers, playing cards and other printed materials; and the Townshend Act of 1767, which levied additional excises on goods such as paper, paints, glass, and tea. *See id.* As a major rebellion against unfair taxation, the Boston Tea Party is known for its significance in helping to start the American Revolution. *See id.*

[54] *See* DePippo, *supra* note 6, at 546.

[55] *See* Reiter, *supra* note 7, at 447. The effect of taxing hard liquor was that many people switched to hemp, opium, or moonshine. *See id.*

[56] *See id.*

[57] *See id.* at 445.

[58] *See id.*

[59] *See id.*

[60] *See* Reiter, *supra* note 7, at 446. In the 1950s, when cigarette smoking was at its height, state governments were unable to respond adequately to new medical information about the true dangers of smoking, due to their dependence on the revenue generated by tobacco taxes. *See id.* It was this dependence on sin tax money that prevented states from outlawing smoking outright, or taking bigger steps to curbing indulgence in the dangerous habit. *See id.* This moral hazard that confronts governments when they are forced to choose between a reliable revenue source and true furtherance of public health or welfare is discussed in Part V.

[61] *See* Sandra Fabry, *Newest Sin Tax Targets: Soft Drinks, Vending Machines, Drive-Throughs*, Budget & Tax News, Feb. 2007, *available at* http://www.heartland.org/publications/budget%20tax/article.html?articleid=20469 (last visited Nov. 14, 2008); Daniel Clifton &

evils of cigarettes and alcohol, and reaches farther into popular culture than ever before.[62] The Texas "pole tax," for example, is one of a new set of modern excise taxes, recently enacted or proposed, that target activities currently deemed undesirable.[63] In San Francisco, Mayor Gavin Newsom proposed a tax to be paid by the sellers of sugary soft drinks.[64] The revenue from the soft drink tax would go to a city initiative designed to encourage healthier eating and exercise.[65] Kelly Brownell, director of the Yale Center for Eating and Weight Disorders has long advocated for a federal "Twinkie tax" to be levied on junk food, with the revenues to be funneled into nutrition and exercise programs.[66] Chicago has just passed the first "eco-sin" tax, charging five cents per bottle on bottled water to encourage consumers to drink from the tap.[67] In 2008, California revived a 2003 bill that proposed to tax ammunition because it causes gun injuries.[68] And in Wisconsin, state senator Jon Erpenbach proposed taxing video games in order to raise money for the juvenile criminal justice system.[69]

Although sin taxes have always met both opposition and support, the arguments of the past tend to focus on alcohol and tobacco.[70] When an objector said, "but what's next, a fat tax?" supporters were

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Elizabeth Karasmeighan, Americans for Tax Reform, State Tax Trends over Twenty-Five Years: Tax Increases Down, Revenue Sources Shifting 5 (2006), *available at* http://www.atr.org/content/pdf/2006/august/081406pb-statetrends%20_2_.pdf. Between 2001 and 2005, tobacco tax increases constituted almost one third of all tax increases. *See* Clifton & Karasmeighan, *supra*.

[62] *See* Gamboa, *supra* note 5; Sirico, *supra* note 5; *Texas Slaps "Pole Tax" on Strip Clubs*, *supra* note 3.

[63] *See* Tex. Bus. & Com. Code § 47(B) (2008).

[64] *See* Jessie McKinley, *San Francisco's Mayor Proposes Fee on Sales of Sugary Soft Drinks*, N.Y. Times, Dec. 18, 2007, at A24.

[65] *See id.*

[66] *See* Muska, *supra* note 12.

[67] *See* Shapley, *supra* note 5. Note the circuitous irony of taxes both on sodas, to encourage people to be healthier, and bottled water, which at least one consumer says will drive her back to drinking cheaper sugar-filled drinks. *See id.*

[68] *See* Assemb. B. 2062, 2007–2008 Sess. (Cal. 2008); *'Sin' Taxes Create Moral Quandary*, Religion Link, May 19, 2003, http://www.religionlink.org/tip_030519c.php.

[69] *See* Mark Methenitis, *Wisconsin's Game Tax - Sin vs. Luxury vs. Lunacy*, Law of the Game, Dec. 26, 2007, http://lawofthegame.blogspot.com/2007/12/wisconsins-game-tax-sin-vs-luxury-vs.html (last visited Nov. 14, 2008). The Wisconsin video game tax could be labeled a luxury tax, a slightly less stigmatizing but still problematic levy. *See id.* Whether it is labeled a sin tax or a luxury tax, it still burdens the poor disproportionately. *See id.*

[70] *See* DePippo, *supra* note 6, at 544 (arguing for sin taxes only on items that have an inelasticity of demand and focusing on alcohol); Reiter, *supra* note 7, at 444 (examining the economic and political inequities of sin taxes on tobacco and alcohol products).

quick to dismiss the slippery slope threat.[71] Once upon a time, proponents of "serious" regulations would argue that "nobody would *ever* advocate a tax on fatty foods."[72] But in his discussion of a proposal to levy a sin tax on soda, Robert Murphy of the Mises Institute points out that some defend the taxes by saying, "We've done it with cigarettes."[73] Murphy goes on to suggest that "beyond the injustice of more looting every time you buy a soda, these proposals would be yet more precedent of *future* government invasions of liberty. In twenty years, when someone proposes that slothful television viewing be regulated, some scientist will no doubt say, 'We did it with Coke.'"[74] The threat of future government invasions of liberty has been echoed by economist Thomas DiLorenzo who said, "once it becomes 'legitimate' for government to protect individuals from their own follies, there is no way to establish limits to governmental power."[75] Sin taxes are "a dangerous harbinger of an ever-expanding Nanny State."[76]

This Nanny State may not be far off.[77] As state budgets grow to exceed the revenue generated from the established alcohol and tobacco taxes, lawmakers look elsewhere to supplement the state's income.[78] Paul Gessing, government affairs director at the National Taxpayers Union has suggested that as revenue from these traditional sin taxes becomes inadequate, states will seek out ways to extract money from smaller groups.[79] As the increase in creativity and the variety of sin tax proposals over the last two decades shows, states have

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[71] *See* Robert P. Murphy, *Soda and the Sin Tax*, Mar. 29, 2006, http://mises.org/story/2095.

[72] *See id.*

[73] *See id.* There have been numerous proposals for taxes on fatty foods, the most prominent of which is Yale University Rudd Center for Food Policy and Obesity director Kelly Brownell's infamous call for a national "Twinkie tax." *See* Joe Nocera, *Food Makers and Critics Break Bread*, N.Y. Times, Mar. 25, 2006, at C1.

[74] Murphy, *supra* note 71.

[75] *See* Muska, *supra* note 12.

[76] *See id.* On CNN's Crossfire in 2002, pro-sin tax Center for Science in the Public Interest director Michael Jacobson said, "we could envision taxes on butter, potato chips, whole milk, cheeses and meat." *See* Fabry, *supra* note 61. Taxes on staples such as the food items in Jacobson's lists would put a terrible burden on the poor who already spend a significantly greater proportion of their income on food. *See id.*

[77] *See* Muska, *supra* note 12.

[78] *See* Skorburg, *supra* note 5 (citing Oakland, California mayor Jerry Brown's 2004 proposal for a new junk food tax that would raise money for the city).

[79] *See* Sandra Fabry, *Reliance on "Sin" Taxes Draws Opposition*, Budget & Tax News, June 2005, *available at* http://www.heartland.org/policybot/results.html?articleid=17059.

already begun targeting smaller groups, marking the start of the slide down the slippery slope.[80]

IV. Why Use Sin Taxes?

A. *The Path of Least Resistance*

> *"Taxation," said King Louis XIV's financial minister, Jean-Baptiste Colbert, "is the art of trying to pluck the most feathers from a goose while producing the least hissing."*
>
> —Phinneas Baxandall[81]

Sin taxes are generally the easiest kinds of taxes to impose, and so they are often the first choice of lawmakers who are looking to close gaps in state budgets or make up deficits.[82] Sin taxes appeal to voters, the majority of whom will not be affected by any given tax.[83] Although they burden the poor and working classes disproportionately, they are indirect taxes that affect only one select minority at a time, and so they rarely face much opposition.[84] Concern for disparity in taxation is lost when the tax is a sin tax.[85] No one minds the small taxes on vices that do not affect them personally, and those who would otherwise oppose taxation tend to look the other way.[86] The smaller or more targeted the group who will be affected by the tax, the less chance there is for voter discontent.[87] Where general tax hikes were once the obvious solution to growing state budgets, voters in every state have taken to rejecting tax hikes, directly, by voter referenda, or indirectly, by voting legislators out of office.[88]

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[80] *See* Shapley, *supra* note 5; Sirico, *supra* note 5; Skorburg, *supra* note 5; *Texas Slaps "Pole Tax" on Strip Clubs*, *supra* note 3.

[81] Baxendall, *supra* note 10, at 26.

[82] *See* Clifton & Karasmeighan, *supra* note 61, at 2.

[83] *See id.* at 4 (arguing that "[b]y targeting their tax increases to narrower segments of the population, legislators divide taxpayers into smaller groups and minimize voter backlash"); Fabry, *supra* note 79.

[84] *See* Fabry, *supra* note 79.

[85] *See* Baxandall, *supra* note 10, at 26.

[86] *See id.*

[87] *See* Clifton & Karasmeighan, *supra* note 61, at 4.

[88] *See id.* at 2; Fabry, *supra* note 79. A number of states increased taxes during the recession in 1990. *See* Clifton & Karasmeighan, *supra* note 61, at 4. In New Jersey, Governor Jim Florio (D) raised income taxes, corporate taxes, and the sales tax, and then lost his bid for reelection in 1993. *See id.* at 2. In New York, incumbent Mario Cuomo lost the race for governor to George Pataki, where the campaign focused heavily on recent tax increases in the state. *See id.* State-wide tax hikes can also backfire by increasing "out-migration": the

Interestingly, sin tax proposals garner much more support when there is a connection between the thing being taxed and the use to which the tax dollars are put, then when there is no such nexus.[89] Lawmakers often propose to tie tax revenue to programs intended to cure the ills caused by the activity at issue, although these links are often misguided, or are at best, attenuated.[90] The Texas pole tax passed by overwhelming margins when the 2007 proposal included putting the proceeds towards supporting the victims of sexual assault; when an identical tax was proposed in 2004, with a plan to put the money into schools, the tax—then nicknamed "Tassels for Tots"—was dismissed as inappropriate.[91]

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exodus of older and wealthier taxpayers to states with lower tax rates. *See id.* at 3. When general tax rates increase too much, those whom are most affected tend to pick up and move to states where the high-income bracket taxes are more forgiving. *See id.* In response to the increasing out-migration trend in the 1990s, the states cut income taxes a total of 137 times in the second half of the decade. *See id.* The tax cuts reduced state revenue by almost $20 billion, leading many states to claim they were confronting the worst budget deficits since the Great Depression. *See id.*

[89] *See Texas Slaps "Pole Tax" on Strip Clubs*, *supra* note 3.

[90] *See id.* In 2003, California legislators justified a proposed ammunition tax by citing the costs of gun injuries. *See "Sin" Taxes Create Moral Quandary*, *supra* note 68. Although gun injuries would not be possible without bullets, ammunition is hardly the sole cause of gun-related problems. *See* Gamboa, *supra* note 5. California would be better served by enhancing education about gun safety or working to take illegal guns off the streets. *See id.* In New Mexico, lawmakers have proposed sin taxes on video games and televisions as part of a campaign entitled "Leave No Child Inside," which aims to use a sin tax to motivate children to go outside and play. *See id.* In his article on the proposed video game tax, Gamboa points out that according to the Entertainment Software Association, the average gamer is a thirty-three year old adult, not an elementary school child. *See id.* Gamboa concedes that obesity is a major public health problem that ought to be addressed, but he cautions that a video game tax would be misguided. *See id.* Gamboa suggests lawmakers should focus their attention on parenting and should facilitate education on how to better raise children. *See id.* If legislators are truly concerned about childhood obesity, a better tailored approach would be to increase requirements for physical education in schools. *See* Nat'l Ass'n of Children's Hospitals and Related Insts., Childhood Obesity Statistics and Facts (2007), *available at* http://www.childrenshospitals.net (search "childhood obesity statistics," follow hyperlink). As of January 2007, Illinois was the only state with a daily minimum requirement for physical education. *See id.*

[91] *See Texas Slaps "Pole Tax" on Strip Clubs*, *supra* note 3. Despite lawmakers' promises that the money from the tax will go towards helping rape victims, this is only a partial truth. Twelve million of the estimated forty million dollars the tax is expected to bring in have been earmarked for sexual violence programs—the state can do whatever it wants with the rest. *See* Ramshaw, *supra* note 3. In its report of a high-quality state revenue system, the National Conference of State Legislatures actually argues *against* earmarking tax revenue on the grounds that rigid budgets are more susceptible to disruption and collapse than those where allocation of funds is more flexible. *See* NCLS, Principles of a High-Quality State Revenue System, *supra* note 25.

Reverend Robert A. Sirico, president of the Acton Institute for the Study of Religion and Liberty has pointed out that high taxes on disfavored activities, such as smoking, drinking, and gambling appeal to voters who see the taxes as a way to discourage these objectionable activities.[92] The activities being targeted also tend not to have a lot of organized support.[93] Frequenters of strip clubs are unlikely to want their proclivities widely known—given the choice between protesting the tax for a chance to have it reduced, and keeping their strip club attendance private, many club-goers will choose to remain quiet and just pay the tax.[94] Lawmakers count on this lack of vocal opposition, and there is no strip club lobby in Washington to persuade them to act otherwise.[95] Across the board, activities subject to sin taxes carry (or acquire) a stigma that discourages consumers from objecting to the tax, and so these taxes slip by unchallenged.[96]

B. *Justifications for Taking the Path of Least Resistance*

In order to generate voter support, lawmakers tend to offer two justifications for imposing a sin tax—to raise money, and to correct morals.[97] Ironically, these justifications are at odds with one another; you *either* stamp out an activity, or you make money off of its continued consumption.[98] This conflict puts governments in the position of having to decide whether to encourage destructive behavior in order to maintain the same income levels, or to come up with more creative ways to balance tight budgets.[99] This moral hazard of governments indicates that legislators may not always be acting with their citizens'

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[92] *See* Skorburg, *supra* note 5.

[93] *See* Baxandall, *supra* note 10, at 26 (observing, "smokers may resent being singled out, but they are a minority who garner little sympathy"); Randy Dotinga, *Love the Sinner, Hate the Sin Tax*, WIRED MAG., Aug. 8, 2005, *available at* http://www.wired.com/politics/law/news/2005/08/68433 (describing the proposal of the Internet Safety and Child Protection Act of 2005, and observing "the adult industry has zero clout in Washington and is an easy target").

[94] *See* Dotinga, *supra* note 93.

[95] *See id.*

[96] *See* Baxandale, *supra* note 10, at 22 (stating that "sin taxes are levied on things that are fun"); Reiter, *supra* note 7, at 451 (observing that groups subject to sin taxes "may be among the few interest groups which no one dares to defend. The behavior of supposedly self-indulgent consumers may be demonized in order to justify balancing the budget on their backs").

[97] *See* Reiter, *supra* note 7, at 444 (arguing that the policy sin taxes "reveals a constant tension between fiscal and sumptuary goals").

[98] *See 'Sin' Taxes Create Moral Quandary*, *supra* note 68.

[99] *See id.*

best interests at heart, and is a compelling argument against allowing states to combine fiscal and social duties in one system.[100] The moral hazard presented by the power to impose sin taxes is discussed further in Part V.

1. The Moral Justification: When the Government Knows What's Best

Paternalism can be defined as "interference with a person's freedom of action out of a desire to protect that person's welfare, interests, or values (as perceived by the paternalistic actor.)"[101] Assume, for a moment, that a sin tax has truly been motivated by paternalistic concern for the individual.[102] In this scenario, the government's primary goal in enacting the tax is to protect its citizens from themselves, and any revenue generated is incidental.[103] To justify state paternalism, legal philosopher Ronald Dworkin offers the theory that each citizen is responsible for the well-being of all others and so should use his or her "political power to reform those whose defective practices will ruin their lives."[104] Critics argue this logic is flawed in at least two ways.[105] Paternalism interferes with liberty and personal autonomy, and it is also inefficient.[106] As Dworkin notes, "life ruination" is subjective; "it is difficult to imagine whether such a life could be called 'good' in the sense of 'beneficial' to the person living it, if she herself did not perceive it as such."[107] When a government imposes on its citizens choices that they would not make for themselves in the name of their own welfare, their priorities are unlikely to change to align with their new behavior.[108] This forced shift in behavior, unaccompanied by a true shift in personal preference or belief, interferes with the individual's liberty.[109] As Jendi Reiter states, "paternalistic taxation unjustifiably restricts the individual liberties which are essential to mature human development and to the legitimacy of the democratic process."[110] She notes that "since citizens'

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[100] *See id.*

[101] *See* Reiter, *supra* note 7, at 451.

[102] *See id.*

[103] *See id.*

[104] *See id.* (discussing Dworkin).

[105] *See id.*

[106] *See* Reiter, *supra* note 7, at 452.

[107] *See id.*

[108] *See id.* at 453.

[109] *See id.*

[110] *Id.* at 444. Reiter analogizes buying to voting and points out the importance of freedom to make choices in American tradition *See id.* at 457. She notes that American tradition is grounded in the principles of democracy and a free market government. *See id.*

ability to make . . . choices is the legitimating principle of democratic government," it is dangerous to assume government is acting appropriately when it "promote[s] a policy devoted to creating the appearance of rational decision-making at the expense of true reasoned choice."[111] Reiter argues that all citizens have a "human dignity interest" in choosing their own lifestyles.[112]

Reiter also argues that paternalism is inefficient in that it is bad for morale.[113] "Regardless of whether the subjective suffering of those stigmatized should constrain paternalistic policy choices, benefit to the community is probably insufficient to justify moralistic lifestyle regulation, for a community divided by blame lacks the cohesion and compassions necessary to solve social problems."[114] In other words, if people resent the restrictions placed on them by a society, they will not work together well to solve social problems.[115] Where state moralizing interferes with liberty and demoralizes the individuals it is designed to help, it creates a new set of problems.[116] Fortunately, sin taxes are never truly about morals.[117]

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[111] *See* Reiter, *supra* note 7, at 455.

[112] *See id.* at 456. Reiter cites Kant's categorical imperative and states, "people should be treated as ends in themselves because respect for persons entails respect for their ability to make value decisions." *See id.* at 457. Undervaluing the ability to make choice undervalues autonomy in general. *See id.*

[113] *See id.* at 453–54. Rather than resort to sin taxes, which are often rife with class bias, Reiter suggests lawmakers who are sincerely interested in curbing bad behavior and curing social ills should take a step back and consider the bigger picture. *See id.* at 454. She argues for considering "the social conditions which [keep] people down and [make] momentary gratification seem more attractive than a longer life of self-denial." *See id.* "Lower-income people, who spend more of their income on tobacco than professionals do may feel that their lives and their jobs are not satisfying enough for them to prioritize long-term longevity over smoking's short-term relief from tension." *Id.* "A more humane society would try to reduce the costs of quitting, rather than increase the costs of continuing to smoke." *Id.* Reiter suggests that if we are truly interested in the social welfare of people who we think make bad choices, we should make it *easier* for them to make good choices, such as helping people to quit smoking, rather than putting burdens on the choices they currently make. *See id.*

[114] *Id.* at 453–54.

[115] *See id.*

[116] *See* Reiter, *supra* note 7, at 454.

[117] *See* Baxandall, *supra* note 10, at 24 (discussing how, while tax rates on tobacco products were rising in the mid-1980s, their moderate success in reducing smoking "limited the proceeds going to state coffers"). Baxandall goes on to show that when revenue from cigarette taxes tapers off, states turn to gambling as another funding source. *See id.* States will make money through lotteries and profit-sharing agreements with "casinos, riverboats, and slot machines." *See id.* Casinos and lotteries are lucrative, and the taxes come with absolutely no pretense of aiming to reduce vice. *See id.*

2. It's All About the Money

Despite lawmakers' common contention that a given sin tax is for the greater good, on closer examination, these taxes reveal themselves to be almost exclusively fiscally motivated.[118] The items subject to sin taxes—taxes either enacted, or merely proposed—tend to be those with higher inelasticity of demand.[119] Historically, the federal government relied on alcohol and tobacco as sin tax staples; both are addictive goods that consumers will continue to purchase, even in the face of extremely high excises.[120] Today, the bulk of new sin tax proposals focus on fatty foods and soft drinks.[121] Food is certainly a necessity that consumers will not be able to give up, and while buyers have a choice in the kinds of food they buy, their choices are constrained by affordability and influenced by convenience, and it is unlikely that junk food will ever disappear entirely.[122]

An examination of the legislative history of various sin taxes will reveal that, no matter the justifications offered to the public, sin taxes are enacted when states are having budget crises and need money.[123] In 2004, the mayor of Oakland, California proposed taxing alcohol and junk food explicitly to solve the state's "budget woes."[124] This

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[118] *See* Skorburg, *supra* note 5. State cigarette taxes gained force as a powerful mechanism for generating revenue in the 1920s. *See* Baxandall, *supra* note 10, at 26. Unlike alcohol, which was seen as sinful, smoking became socially acceptable following World War I. *See id.* During the War, soldiers made cigarettes—the sales of which had been banned entirely in seventeen states in 1909—glamorous. *See id.* at 24. Soldiers were given cigarettes as part of their rations, and "a cigarette in the mouth became an identifying feature in patriotic depictions of the 'Yank.'" *See id.* Baxandall states: "[T]ellingly, the first state-level taxes on cigarettes were not passed at the height of anti-cigarette fervor at the beginning of the twentieth century, but in the 1920s, when cigarettes first became socially acceptable." *See id.* at 26. It was not until cigarette sales were significantly robust and steady that states deemed the activity one worth burdening. *See id.*

[119] *See* DePippo, *supra* note 6, at 568. DePippo cites the fact that rationales for the sin tax on alcohol have "come in and out of fashion over the history of the nation," but the tax itself remained, even during prohibition. *See id.*

[120] *See id.*

[121] *See* Fabry, *supra* note 61; Nocera, *supra* note 73; Skorburg, *supra* note 5.

[122] *See* Jane Wardle et al., *Sex Differences in the Association of Socioeconomic Status with Obesity*, 92 Am. J. Pub. Health 1229, 1229 (2002). Wardle et al. examine the reasons behind findings that individuals in lower-status socioeconomic groups are at higher risk of becoming obese. *See id.* The authors note that resources available to buy food are determined by income, and that "low-status jobs are associated with lack of autonomy, which might make it more difficult for one to manage time effectively to adopt a healthy lifestyle." *See id.* Where junk food is inexpensive and readily available, it is often the easiest choice for consumers who lack the means to make more deliberately healthful purchases. *See id.*

[123] *See* Clifton & Karasmeighan, *supra* note 61, at 3; Skorburg, *supra* note 5.

[124] *See* Skorburg, *supra* note 5.

candid proposal prompted a surprised remark from the Cato Institute's Radley Balko, who noted that politicians usually attribute their sin tax proposals to a desire to stop unhealthy behavior.[125] Balko marvels: "I've never before heard an elected official say that the real purpose is to raise money. That's a novel approach."[126] Balko goes on to note that sin taxes do make money for the state, and that he does not generally take a government at its word when officials say their primary purpose in passing a sin tax is to stop the behavior at issue.[127] "Sin taxes usually are proposed only when governments face large budget shortfalls."[128] Balko claims state and local governments are "addicted" to the revenue they generate from cigarette taxes and would take a hit if people stopped smoking.[129] Although the Oakland mayor's proposal did not materialize into law, it demonstrated that he thought the city needed higher taxes in some form to "put the state's financial house in order."[130] The proposal met opposition from Governor Arnold Schwarzenegger who believed California's financial problems are the result of overspending, and not under-taxation.[131]

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[125] *See id.*

[126] *See id.*

[127] *See id.*

[128] *See id.* New York State, under Governor Eliot Spitzer, implemented a tax on illegal drugs which is normally enforced when drug dealers are arrested. *See* Delen Goldberg, *Paying for Your Sins; Why Gov. Spitzer Wants to Raise Taxes—and Revenue—on New Yorkers' Guilty Pleasures*, POST-STANDARD (Syracuse, N.Y.), Feb. 2, 2008, at A1. Governor Spitzer also proposed that the state allow for more gambling, and that liquor stores be allowed to open seven days a week. *See id.* These proposals were clearly not about stamping out sin so much as about generating revenue for the state. *See id.* According to the Distilled Spirits Council, Sunday alcohol sales grossed over $92 million, giving the state over $14 million in sin tax revenue in 2006. *See id.*

[129] *See* Skorburg, *supra* note 5.

[130] *See id.*

[131] *See id.* Rather than jump to implement a new sin tax, legislators concerned with solving a state's budget problems must look to the cause of those problems. *See id.* Lawmakers should determine whether the budget shortfall has actually been caused by the external costs of the activity they propose taxing, or whether the state is just overspending, generally. *See id.* In 2003, general fund spending in all fifty states had increased by over 88% from 1990 levels, going from $274.7 billion a year to $518 billion. *See* Chris Edwards et al., *States Face Fiscal Crunch After 1990s Spending Surge*, 80 CATO INST. BRIEFING PAPERS 1–2, (2003); Fabry, *supra* note 79. Several state governors have been cited as seeing the problem as one of overspending as well. *See* Fabry, *supra* note 79. In his first address to California in 2004, Governor Schwarzenegger said: "We have no choice but to cut spending, which is what caused the crisis in the first place. If we continue spending and don't make cuts, California will be bankrupt." *See* Skorburg, *supra* note 5. Mississippi Governor Haley Barbour (R) promised to veto a fifty-cent cigarette tax increase that passed in the state legislature in 2005, stating that he "rejects tax increases as a matter of principle and sees the state's budget problems as being on the spending side." *See* Fabry, *supra* note 79. The state's cigarette tax would have risen from eighteen cents a pack to sixty-eight cents. *See id.* Governor

In 2005, the Mississippi Senate considered a bill to raise cigarette taxes.[132] Sen. Alan Nunnelee (R-Tupelo), chairman of the Senate Public Health Committee, decided not to bring the bill for a vote, saying:

> I'm not opposed to seeing the tax on cigarettes increase as long as it is offset by a tax cut elsewhere. So far, the proponents will not even consider a revenue-neutral cigarette tax bill, which I feel reveals their true motives. They want government to take in more money so they can spend it to buy constituencies.[133]

In other words, if legislators really were more concerned with stopping smoking than they were with raising money, they would provide a tax cut somewhere else to relieve the burden of a higher cigarette tax.[134] Failure to offset new tax burdens with reciprocal relief violates the principles of an equitable tax system.[135]

V. The Harms Caused by Sin Taxes

Sin taxes stray from the notion that an ideal tax system achieves equity by taxing people in proportion to their ability to pay.[136] A sin tax, like any flat point-of-sale tax, will consume a greater proportion of a poorer person's income, and is thus automatically regressive.[137] David DePippo points out that "after poorer taxpayers attempt to provide themselves with the basic necessities of life, they do not have any real tax-paying ability."[138] Elizabeth Whelan, president of the American Council on Science and Health has said that taxing food is an un-

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Barbour said that, "raising taxes is the enemy of controlling spending. [Between 1995 and 2005], Mississippi tax revenue . . . increased [by] 34%, but spending . . . increased [by] 50%." *See id.*

[132] *See* Fabry, *supra* note 79.

[133] *See id.*

[134] *See id.* One state which has supplemented new sin taxes with tax cuts elsewhere is West Virginia. *See* Fabry, *supra* note 61. In 2006, lawmakers in West Virginia passed a group of bills that raised the sales tax on vending machines and sodas to six percent, while dropping the food tax to three percent. *See id.*

[135] *See* NCLS, Principles of a High-Quality Revenue System, *supra* note 25.

[136] *See* DePippo, *supra* note 6, at 562.

[137] *See* Randy Balko, *Back Door Prohibition: The New War on Social Drinking*, 501 Pol'y Analysis 1, 6(2003); Skorburg, *supra* note 5. A regressive tax is one that causes low-income people to pay a larger percentage of their income in taxes than higher-income people do. *See* NCLS, Principles of a High-Quality Revenue System, *supra* note 25. By contrast, with a progressive tax rate structure, "taxes account for a higher proportion of income as income rises." *See id.*

[138] *See* DePippo, *supra* note 6, at 563.

scientific way to combat obesity, noting that people in lower income brackets spend a disproportionate amount of their income on food to begin with, and adding: "food obviously supports life."[139] It should be noted that sales taxes are automatically at least somewhat regressive, as they apply to everyone at the same rate, whereas some people have incomes so low that they do not pay income taxes at all.[140]

Sin taxes are also regressive in the manner in which they are selectively applied to only certain activities.[141] It is argued that "since lower-income citizens tend to smoke and drink more than the affluent," increases in liquor and tobacco taxes automatically place a greater burden on the poor.[142] Jendi Reiter and David DePippo both cite an unmistakable gloss of class bias in the process of choosing activities for taxation.[143] Reiter writes:

> There is nothing about dangerous sports like hang gliding or skiing which promotes the Protestant work ethic any more than smoking, drinking, or eating Big Macs, but these risky amusements are never singled out for social stigmatization because such sports have a classier, more sophisticated image than smoking and being overweight.[144]

DePippo echoes this idea, writing:

> One need only to look to the 'vices' chosen for taxation—smoking and drinking—to see that these activities pervade the daily lives of the lower classes. Activities traditionally engaged in by the middle and upper classes, such as skiing, are nary the subject of a sin tax, yet they are arguably just as physically dangerous.[145]

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[139] *See* Fabry, *supra* note 61.

[140] *See* Reiter, *supra* note 7, at 461 (discussing the safety-net for low income taxpayers that is built into the income tax system via the earned income tax credit). The earned income tax credit is an anti-poverty tool first established in 1975, whereby working taxpayers who earn less than a certain amount are eligible for a substantial offset to their social security taxes. *See It's Easier than Ever to Find out if You Qualify for EITC*, http://www.irs.gov/eitc (last visited Apr. 4, 2008). The tax credit is meant to help low-income individuals, and to provide incentive to work. *See id.*

[141] *See* DePippo, *supra* note 6, at 555; Reiter, *supra* note 7, at 454.

[142] *See* Muska, *supra* note 12. Robert Levy of the Cato Institute cites statistics: "more than half of any tobacco price increases will be paid by smokers with annual incomes under $30,000; only one percent will be paid by smokers earning more than $100,000." *See id.*

[143] *See* DePippo, *supra* note 6, at 555; Reiter, *supra* note 7, at 454.

[144] *See* Reiter, *supra* note 7, at 454.

[145] *See* DePippo, *supra* note 6, at 555.

In sum, poor people are more likely to consume the items being taxed, and in greater quantity.[146]

Sin taxes jeopardize small businesses.[147] Chandra Brown, president of Karpod Inc., one of the parties challenging the Texas "pole tax," has said of the customers who frequent Players, a small Amarillo club, "They won't pay it. They won't come in. They can't afford it."[148] Not only have small club owners in Texas expressed concern that the strip club tax will reduce patronage to the point of shutting down business, but the tax can hurt employees as well.[149] Even if they are not forced to close, smaller retailers and service providers whose businesses are subjected to a new sin tax inevitably lose customers.[150] In an interview, Elle, a 28-year old former dancer in Amarillo said she "worries the tax will hurt women like herself who work their way through college by stripping."[151] A sin tax creates a reduced supply of a product, driving some marginal sellers out of the market.[152] If demand for an item falls because the price exceeds what people are willing to pay, then manufacturing slows down and people lose jobs.[153] This phenomenon could happen with anything subject to a sin tax; lap dances, video games, or even bottled water.[154]

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[146] *See* Muska, *supra* note 12.

[147] *See Texas Slaps "Pole Tax" on Strip Clubs*, *supra* note 3.

[148] *See id.*

[149] *See id.*

[150] *See id.*

[151] *See id.* Even those taxes categorized as luxury taxes—facially designed to tax the rich—can have destructive consequences. *See* Muska, *supra* note 12. "For example, who is most harmed by a luxury tax placed on an expensive car—the buyer, who presumably has money to spare, or the middle-class worker who builds the car only to see sales fall when the luxury tax curbs demand?" *Luxury Tax*, Investopedia.com, http://www.investopedia.com/terms/l/luxury_tax.asp (last visited Nov. 16, 2008). One commentator described the Texas strip club tax as "an excellent example of the worst type of deceitful tax." *See Unfair Texas Strip Club Tax*, PRIBEK.NET, Dec. 22, 2007, www.pribek.net/2007/12/22/unfair-texas-strip-club-tax. He notes that while the tax money initially comes out of the pocket of the customer, the individual who is affected most is "the dancer, who makes, for practical purposes, all of her money from tips." *See id.* After paying the fee, the customer is "sitting there with five less dollars in his pocket." *Id.* Suggesting that this five dollars ultimately comes out of the dancer's tip, he notes that she "is paying five dollars in tax for every customer." *See id.* "You can try to solve a valid problem by [taxing] an 'industry' and justify the tax because that industry is unpopular to some, but in the end, all you accomplish is taxing the workers at the lowest rung of the ladder." *See id.*

[152] *See* James A. Sadowsky, *The Economics of Sin Taxes*, RELIGION & LIBERTY, Mar.–Apr. 1994, *available at* http://www.acton.org/publications/randl/rl_article_110.php.

[153] *See id.*

[154] *See* Gamboa, *supra* note 5; Sadowsky, *supra* note 152; Shapley, *supra* note 5; *Texas Slaps "Pole Tax" On Strip Clubs*, *supra* note 3.

Sin taxes further create unfair competition between businesses located near jurisdictional borders.[155] In 1998, California increased its cigarette tax by fifty cents a pack, marking the tax revenue for early childhood development programs.[156] Rather than pay the tax, California residents who lived near the border with Nevada—a state with significantly lower cigarette tax—merely went across state lines to buy cigarettes, leaving sales in California way down.[157] In January 1999, a Reno newspaper "reported that Nevada retailers along the border [had] seen cigarette sales boom."[158] Previously, in 1994, Michigan raised cigarette taxes by fifty cents.[159] The tax increase was followed by a twenty-one percent drop of taxable sales, while sales in neighboring states rose.[160]

Sin taxes can have opposite consequences from those their backers originally intended.[161] Instead of increasing revenue, they can reduce it.[162] Sin tax revenue is not sustainable—economists argue that sin taxes work only as temporary solutions to budgetary problems.[163] As demand for a product decreases, revenue will fall, and legislatures will be forced either to raise taxes or impose new ones to generate the money they were expecting.[164]

Sin taxes can also make "morally questionable" behaviors *more* appealing by making them forbidden, and they can increase the external costs of a sin, spreading them out to society as a whole.[165] Despite the argument that a sin tax serves to make consumers internalize some of the costs of their behavior, oftentimes the tax will have the practical ef-

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[155] *See* Muska, *supra* note 12; Shapley, *supra* note 5. In his discussion of the bottled-water tax in Chicago, Dan Shapley discusses the risk of Chicago residents going to grocery stores outside the city to buy water without having to pay the tax, and then buying their groceries while they are there. *See* Shapley, *supra* note 5. Shapley predicts that the bottled water tax will hurt grocery stores in Chicago in a more significant way than the law's drafters anticipated. *See id.*

[156] *See* Muska, *supra* note 12.

[157] *See id.*

[158] *See id.*

[159] *See* Sadowsky, *supra* note 152.

[160] *See id.*

[161] *See* Sirico, *supra* note 10.

[162] *See id.*

[163] *See* Ellen Scalettar & Shelley Geballe, *Sin Taxes: What Are They & What Are the Benefits and Harms from Imposing Them?*, CONN. VOICES FOR CHILD., Feb. 2005, available at http://www.ctkidslink.org/publications/bud05sintax02.pdf.

[164] *See id.*

[165] *See* Sirico, *supra* note 10. Sin taxes can also influence people to switch vices rather than give them up, such as drinking beer instead of liquor or switching to hard drugs. *See id.*

fect of externalizing costs.[166] When the price of an item increases substantially, it can induce people to shop on the black market.[167] For example, "because of high taxes, the bootleg cigarette market has thrived for decades in New York City, diverting millions of dollars from lawful businesspeople into the pockets of criminals and terrorist organizations."[168] This same risk of smuggling occurs any time alcohol taxes undergo an abrupt increase.[169] It is also true that the barriers to adolescents obtaining cigarettes are diminished when there is access to a robust underground market—young people are less likely to be de-

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[166] *See id.*

[167] *See id.*

[168] *See* Skorburg, *supra* note 5. New York City has the highest cigarette tax in the country. *See* Bruce Bartlett, Nat'l Center for Pol'y Analysis, *Cigarette Smuggling*, Brief Analysis No. 423, Oct. 30, 2002. New York State imposes a tax of $1.50 per pack, and then in 2002, the city raised its own tax from $0.08 to $1.50. *See id.* In the summer of 2008, the city raised its own tax again, to $2.75. *See* Kevin Sack, *States Look to Tobacco Tax for Budget Holes*, N.Y. Times, Apr. 21, 2008, at A14. This increase has brought the cost of a single pack of cigarettes in New York City to over $9.00. *See* Jacob Gershman, *Tax Hikes Seen in New York Budget*, N.Y. Sun, Mar. 31, 2008, at 1. In the face of this exorbitant sin tax, cigarette smuggling in New York is estimated to cost more than $1 billion a year. *See* Eric Lichtblau, *U.S. Arrests 10 as Members of Big Cigarette Smuggling Ring*, N.Y. Times, Jan. 29, 2004, at A24. There are two common methods of smuggling: bringing in counterfeit brand-name cigarettes from Asia, and importing cigarettes from other states and labeling them with counterfeit stamps. *See* Press Release, Office of Senator Herb Kohl, *Kohl, Hatch Introduce Bill to Halt Contraban Cigarette Trafficking Linked to Terrorist Funding*, (Apr. 4, 2008), *available at* http://kohl.senate.gov/press/060303.html; Jennifer Steinhauer, *Metro Briefing New York: Manhattan: Cigarette Bootlegging Charges*, N.Y. Times, Apr. 19, 2002, at B5. In 2007, counterfeit American cigarettes could be found for sale from street vendors and in variety stores in Chinatown for approximately $4.00 a pack, approximately half of the legal price. *See* Angelica Medaglia, *Cigarettes Are Costly, but Often Less So in Chinatown*, N.Y. Times, Sept. 18, 2007, at B2. In 2006, the New York Department of health conducted a survey of smokers in New York City, half of whom reported that they had purchased illegal cigarettes in the past year. *See* Medaglia, *supra.* In addition to lost revenue, cigarette smuggling creates other problems, among them increasing the availability of cigarettes to minors. *See* Press Release, NYS Tax and Finance, Brooklyn DA Extinguish Major Cigarette Smuggling Operation (1999), http://www.tax.state.ny.us/press/archive/1999/smuggle.htm (last visited Apr. 4, 2008). One high school student reported buying counterfeit Marlboros because he didn't want to ask his mother for the money to buy real ones. *See* Medaglia, *supra.* Cigarette trafficking is also increasingly becoming a source of funding for terrorist organizations. *See* Sari Horwitz, *Cigarette Smuggling Linked to Terrorism*, Wash. Post, June 8, 2004, at A1. The underground cigarette market in New York brings crimes and gang violence to already-overburdened urban areas, and to neighborhoods near schools. *See* Gregg M. Edwards, *SOAPBOX: Of Taxation and Inhalation*, N.Y. Times, Mar. 6, 2005, § 14NJ at 13. Fighting this criminal activity takes valuable police resources and places extra costs on the city. *See id.* These problems would not exist were it not for the tax policy's criminalization of cigarette sales. *See id.*

[169] *See* Sirico, *supra* note 10.

terred from smoking when the state cannot monitor and regulate sales.[170]

One potential consequence of placing an excessive tax on something consumers refuse to give up is an increase in smuggling and related violence, as shown by the high cigarette tax implemented in the 1980s in Canada.[171] During the 1980s and early 1990s, Canadian cigarette smuggling was a tremendous problem.[172] Cigarettes that were manufactured in Canada and exported to the United States were then smuggled back into Canada where the original wholesalers would sell them on the black market for a fraction of what the state would have them charge, but still at a considerable profit.[173] Smugglers crossed the border on snow mobile to avoid customs, and the situation resulted in considerable violence and gunplay.[174] In just three months—from November, 1993 to January, 1994—Canadian police made 125 arrests for possession of bootleg cigarettes, and in February, 1994, the police were engaged in a shoot-out on an Indian reservation (where cigarettes were also exempt from the national tax.)[175] The instant the Canadian government relented and cut the cigarette tax in half, the violence disappeared.[176]

The police power necessary to combat these underground markets is a large cost to society that lawmakers do not bargain for when they enact sin taxes.[177] Robert Sirico observes that black markets form, not in response to literal price, but as a function of the demand

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[170] *See* Muska, *supra* note 12 (noting "Canada found that the thriving black market generated by its tax hikes made it easier for underage smokers to get their nicotine fixes—no more shoplifting, no more fake IDs, no more waiting round in parking lots for someone's older brother").

[171] *See* Sirico, *supra* note 10.

[172] *See id.*

[173] *See id.* Legally, a case of cigarettes (50 cartons) costs $2500. *See id.* Smugglers would pay only $700 a case, and would then sell the cigarettes underground for twice that amount, a price still significantly below the legal price. *See id.* Elaborate smuggling schemes brought eighty percent of Canada's exported cigarettes back into the country for sale underground. *See id.*

[174] *See id.*

[175] *See id.*

[176] *See* Clyde Farnsworth, *Canada Cuts Cigarette Taxes to Fight Smuggling*, N.Y. TIMES, Feb. 9, 1994, at A3. Canadian Prime Minister Jean Chretien announced Canada "was slashing taxes on cigarettes to try to stamp out widespread smuggling from the US, where taxes [were] about one-fifth as high." *See id.*

[177] *See* Sirico, *supra* note 10. If the United States were to implement a nation-wide cigarette tax like Canada's, "tobacco would come across the borders" cheaply, somehow. *See id.* "Massive police power would have been expanded to prevent leakage," at both the Canadian and Mexican borders. *See id.* Sirico asserts that, "you can't stop the growth of an underground market." *See id.* Sin taxes "foster disrespect for the law." *See id.*

for a product.[178] High taxes on something people are willing to do without will not do much damage, but even a modest tax increase on a product that consumers value will incite them to fight the tax.[179] He writes: "The social consequences of even a small tax are to induce informal entrepreneurs into the market."[180] By contrast, if consumers are able just to give up the habit, such as they might with strip clubs in Texas, the tax harms small business owners and their employees.[181]

In addition to creating unnecessary costs for society, sin taxes distribute the burden disproportionately even amongst users of the taxed products, shifting the costs incurred by a few abusers onto the general consuming population.[182] Phinneas Baxandall points out that "only a fraction of those who drink abuse alcohol or suffer health problems, and many enjoy health benefits."[183] He goes on to observe that "the risks that drinkers pose to others may have less to do with how much alcohol they consume and more to do with how much they drive."[184] Not everyone should have to pay for the misuse of a few, especially when this burden falls largely on the poor.[185] In his paper, "Back Door to Prohibition: The New War on Social Drinking" the Cato Institute's Radley Balko claims that sin taxes "unfairly force all drinkers to pay for the societal costs" incurred by the small proportion who abuse alcohol.[186] He observes that "problem alcoholics are unlikely to stop drinking because of higher alcohol taxes, so low and middle income social drinkers bear the brunt of the tax."[187]Although consumers pay a per-bottle or per-drink flat tax for alcohol, the same drink poses a far different risk to "a twenty one-year-old college student whose weekly intake consists of seven beers while driving on Friday night," than it does to "a forty-year-old who drinks a beer each night with dinner."[188] Nevertheless, they are both charged the same penalty for purchasing alcohol.[189] Baxandall suggests a better way to address the harm done to society by alcohol abuse is through criminal

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[178] *See id.*
[179] *See id.*
[180] *See id.*
[181] *See* Muska, *supra* note 12.
[182] *See* Balko, *supra* note 137, at 6; Skorburg, *supra* note 5.
[183] *See* Baxandall, *supra* note 10, at 22.
[184] *See id.*
[185] *See* Balko, *supra* note 137, at 6.
[186] *See id.*
[187] *See* Skorburg, *supra* note 5.
[188] *See* Baxandall, *supra* note 10, at 24.
[189] *See id.*

sanctions, such as those imposed on drunk drivers.[190] He further notes that alcohol is known to have some health *benefits* for moderate drinkers.[191] Although it would be extraordinarily difficult to devise a tax scheme that accommodates those who are drinking for their health while penalizing those who's drinking has a negative effect on society, a sin tax that punishes all consumers alike is inefficient and unfair.[192] Jason Mercier, a budget analyst at the Evergreen Freedom Foundations has denounced sin taxes as morally wrong, insisting that "targeting one class of citizens to pay for the programs of another is . . . shortsighted."[193]

Finally, sin taxes are punitive.[194] They occasionally even impose a double penalty, as with New York State's tax on illegal drugs.[195] Under Governor Eliot Spitzer, the state imposed a "crack tax," generally collected when a drug dealer is arrested.[196] The law technically requires a dealer to buy stamps from the government before he sells drugs—much like the stamps cigarette retailers are required to purchase before they put cigarettes on the shelves.[197] In practice, however, once dealers are arrested, they are punished for not paying taxes on top of their punishment for dealing drugs.[198] Someone arrested in New York with twenty-seven pounds of marijuana would owe the state approximately $43,000 in taxes.[199] Ethan Nadelmann, executive director of the Drug Policy Alliance said:

> These tax stamp bills and laws smack of the gratuitous piling on of punitive sanctions that permeates the overall drug war. . . . More than half a million people come out of prison each year but face daunting prospects getting a fresh start, in part because they are obliged to pay fines, like this tax stamp, that end up causing far more harm than good.[200]

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[190] *See id.*

[191] *See id.* (listing medically recognized benefits of moderate alcohol consumption, including reduced risk of heart disease, stroke, and dementia).

[192] *See id.*

[193] *See* Fabry, *supra* note 79.

[194] *See* Fabry, *supra* note 61; Reiter, *supra* note 7, at 463.

[195] *See* Goldberg, *supra* note 128.

[196] *See id.*

[197] *See id.*

[198] *See id.*

[199] *See id.*

[200] *See* Goldberg, *supra* note 128.

Owing tens of thousands of dollars in taxes makes it harder for offenders to readjust to society when they are released from jail.[201] It should come as no surprise that the majority of convicted drug offenders come from disadvantaged backgrounds.[202] Indeed, with the arbitrary imposition of sin taxes, the poor do "go to the wall."[203] Compared to the series of ills caused by sin taxes, the benefits they create are minimal.[204]

VI. The Appropriate Role of the Tax System

Sin taxes create a moral hazard for the government, causing it first to label an activity as morally suspect, and then to develop a vested interest in people continuing the now officially sinful activity.[205] Robert Sirico suggests that sin taxes cause policy makers to "vacillate between wanting to discourage undesirable behavior and wanting to encourage it for revenue purposes."[206] In 2005, a bill was introduced in Congress that would have levied a twenty-five percent tax on internet pornography.[207] The bill, entitled the Internet Safety and Child Protection Act of 2005, met major opposition from the religious right.[208] Opponents argued that if the government stood to make money from adult websites, it would lack incentive to discourage the maintenance and patronage of such sites.[209] Rick Schatz, president of the National Coalition for the Protection of Children and Families said, "there would be concern that the government would change its focus to tax pornographic materials rather than control production and distribution."[210]

The moral hazard trap can be avoided if the government simply refrains from using the tax system to regulate morals, and leaves this duty to a more appropriate institution.[211] Sirico cautions against blurring the line between private morality and public policy.[212] He contends the job of discouraging unhealthy or dangerous behavior "is better left to the traditional institutions of family, church, and school."[213] When

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[201] *See id.*
[202] *See id.*
[203] *See* Barker, *supra* note 1, at 3.
[204] *See id.*; Sirico, *supra* note 10.
[205] *See* Dotinga, *supra* note 93; Fabry, *supra* note 79; Sirico, *supra* note 10.
[206] *See* Sirico, *supra* note 10.
[207] *See* Internet Safety and Child Protection Act of 2005, S. 1507, 109th Cong. (2005).
[208] *See* Dotinga, *supra* note 93.
[209] *See id.*
[210] *See id.*
[211] *See* Sirico, *supra* note 10.
[212] *See* Skorburg, *supra* note 5.
[213] *See* Sirico, *supra* note 5.

"politicians and bureaucrats" are "charge[d] with sanctioning sin in areas that are morally ambiguous," they face a conflict of interest, whereas more traditional community institutions do not.[214] Rather than permitting lawmakers to put themselves in the position of having to choose between stamping out sin and generating revenue for the state, the government should abstain from passing judgment altogether, and should not attempt to regulate legal activities on moral grounds.[215]

A more appropriate role would be to focus on controlling spending, or on how to better educate the public about the dangers of certain sinful activities.[216] Revenue can be raised in a number of other ways, some as simple as increasing income taxes.[217] If the government does not covertly desire a portion of the population to continue smoking or overeating in order to meet revenue projections, it will then be better situated to genuinely help reduce participation in those activities.[218] Grover Norquist, president of Americans for Tax Reform argues that even if one accepts obesity as a public health issue, rather than a personal one, "the tax code is not the place to try to solve this problem. The tax code should not be corrupted and used as a consumer control device, but solely as a means to raise revenue for necessary programs."[219]

Sirico argues the government should regulate crime, not vice.[220] Taxing an activity such as smoking, rather than simply outlawing it, indicates a judgment on the part of the government that smoking is "less morally justifiable" than other activities, but not so reprehensible as to be considered a crime.[221] By contrast, robbery or murder are unambiguously criminal.[222] Sirico argues that while there is no such thing as a "victimless" crime, civil authority is not the appropriate judge of all behavior.[223] He contends that morally ambiguous activities should be left to those "social institutions that are often more trustworthy in determining the limits of nonviolent behavior."[224] Allowing the community

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[214] *See id.*
[215] *See id.*
[216] *See id.*
[217] *See id.*
[218] *See* Skorburg, *supra* note 5.
[219] *See* Fabry, *supra* note 61.
[220] *See* Sirico, *supra* note 5.
[221] *See id.*
[222] *See id.*
[223] *See id.*
[224] *See id.*

to regulate behavior, rather than the state, which has impure and conflicted interests, will alleviate the problem of moral hazard.[225]

The National Conference of State Legislatures has taken the position that the revenue system should be economically neutral.[226] This goal cannot be achieved if tax policy is used to make budget decision and to influence behavior.[227] In her discussion of ways to mitigate the harm caused by second hand smoke, Jendi Reiter observes that there are plenty of ways to discourage disfavored activities that would "affect people equally, regardless of income" or socio-economic status.[228] She suggests second hand smoke can be combated through exercising "private property rights, informal social pressure, and environmental regulations" as well as through education and information-spreading, rather

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[225] *See* Sirico, *supra* note 5. Some states and communities are seeking to discourage sins such as smoking and unhealthy eating by implementing regulations that will function independently from the tax system. *See* H.B. 282, 2008 Leg., Reg. Sess. (Miss. 2008); Jim Buchta, *Condominium Owners Tell Smokers: Take It Outside*, Star Trib. (Minneapolis, MN), Feb. 14, 2008, at 1A; *Mississippi Pols Seek to Ban Fats*, The Smoking Gun.com, Feb. 1, 2008, http://www.thesmokinggun.com/archive/years/2008/0201081fat1.html. Residents of a condominium in Minneapolis recently voted to ban smoking in individual units, common areas, garages, and on private balconies. *See* Buchta, *supra*. Proponents of the ban argued that smoke from some units seeped through the walls into neighboring units and affected all residents, even non-smokers. *See id.* Over seventy-five percent of owners in the complex voted in favor of the ban, reflecting a slightly greater percentage than the number of smokers state-wide. *See id.* In fairness to current residents, the ban will only be binding on future buyers, but those new owners who break the rule—which was effective beginning May 1, 2008—will be subject to fines and other penalties. *See id.* Buchta notes that "such bans are becoming more common in rental housing, as concern spreads about the effects of secondhand smoke." *See id.* "Some say that Minnesota is on the cutting edge of what could become a nationwide trend." *See id.* In February, 2008, legislators in Mississippi introduced a bill that would prohibit restaurants in the state from serving obese customers. *See* H.B. 282, 2008 Leg., Reg. Sess. (Miss. 2008); *Mississippi Pols Seek to Ban Fats*, *supra*. The bill would require the Mississippi Council on Obesity to collaborate with the state's Department of Health in creating weight criteria guidelines, and would then bind restaurants to the newly established guidelines. *See* H.B. 282, 2008 Leg., Reg. Sess. (Miss. 2008). Whereas it has been suggested that the bill is too extreme to pass as-is, the proposal shows that there are legislative approaches to influencing behavior that do not involve the tax system, and that are clearly meant to discourage certain behaviors, rather than disguised to hide ulterior financial motives. *See Mississippi Pols Seek to Ban Fats*, *supra*; *see also* Douglas Glen Whitman & Mario J. Rizzo, *Paternalist Slopes*, 2 N.Y.U. J.L. & Liberty 411, 443 nn.86–87 (2007) (pointing to New York City's 2006 ban of most trans fats in restaurants and to a California city ban on outdoor smoking in public places).

[226] *See* NCLS, Principles of a High-Quality State Revenue System, *supra* note 25; Fabry, *supra* note 61.

[227] *See* Fabry, *supra* note 61.

[228] *See* Reiter, *supra* note 7, at 466.

than through a tax on cigarettes.[229] Reiter notes that these alternative methods would affect all smokers equally, regardless of their income.[230]

Critics of sin taxes have proposed a wide variety of non-tax solutions to the "moral" problems legislators purport to address through the tax system.[231] In North Carolina, in 2002, the Common Sense Foundation proposed that the state stop subsidizing tobacco companies that sell cigarettes in foreign markets.[232] The foundation claimed such a change would save the state over $8.7 million in lost tax revenue.[233] The foundation also proposed raising the corporate tax rate, rather than taxing the individual consumer.[234] The proposal referred to a 1991 corporate tax increase by the North Carolina general assembly during a then-budget crisis, and pointed out that the increase had hardly any effect on businesses.[235] The foundation also suggested that a universal healthcare system would save the state over $1 billion a year.[236] Elsewhere, the organization, Connecticut Voices for Children has suggested that "to counteract the regressive nature of sin taxes," the revenue generated could be used to provide tax-relief to low-income households.[237] Sin tax revenue could go towards increasing programs like the Earned Income Tax Credit or could be put towards a property tax or rent credit for those who qualify.[238] Other alternatives include increased education, tobacco control, and anti-smoking programs and campaigns.[239] Legislatures could also provide tax cuts elsewhere in state budgets to offset the burden of a new sin tax.[240] Reciprocal budget cuts would serve as an act of good faith to indicate a sincere desire to combat the targeted behavior, rather than a veiled attempt to raise money without alarming too many voters.[241]

At its most basic, states should control spending, rather than levying new taxes to make up the difference between budgets deficits and

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[229] *See id.*
[230] *See id.*
[231] *See Common Sense Says…*, *supra* note 21.
[232] *See id.*
[233] *See id.*
[234] *See id.*
[235] *See id.*
[236] *See Common Sense Says…*, *supra* note 21.
[237] *See* Scalettar & Geballe, *supra* note 163.
[238] *See id.*
[239] *See Common Sense Says…*, *supra* note 21.
[240] *See* Fabry, *supra* note 79.
[241] *See id.*

income stream.[242] Jason Mercier calls for a "uniform tax policy that treats all citizens equally."[243] He insists that lawmakers have no business as social engineers.[244] Mercier states: "Cherry picking 'sin' taxes and other revenue raising schemes deemed to be politically safe ignores the most important equation in budget sustainability: spending restraint and prioritization."[245]

Conclusion

Sin taxes, for all their historical weight, are unfair to the poor.[246] They place a disproportionate burden on minority groups who, repeatedly, are unable to advocate for themselves for better tax treatment.[247] In a political climate where public health and smart decision-making are valued, there are far better ways to influence public behavior than through taxes.[248] Although new excises may seem like an easy quick fix for legislators who need to balance budgets without upsetting voters, they are unwise policy and create more problems than they solve.[249] Sin taxes pose problems for the government as well as for taxpayers.[250] Furthermore, sin taxes violate the core principle of equity in taxation.[251]

The new rush of creative sin taxes is symptomatic of a fiscal system that has drifted too far over the line into social engineering.[252] When legislatures get comfortable with imposing taxes on new activities, their

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[242] *See* Clifton & Karasmeighan, *supra* note 61, at 6. The authors propose several methods by which states could reasonably curb spending. *See id.* They propose a "constitutional limit" that would require states to keep spending in line with the rate of population growth plus inflation, and thus entitlement programs, "such as free healthcare, increased public employee benefits, and state aid to localities" would not be implemented in times of economic growth, only to be revealed as unsustainable over the long term. *See id.* at 3, 6. The authors also propose "large scale reform of state pension and healthcare systems," and curbing "reliance on volatile revenue sources such as non-wage income including capital gains and dividends." *See id.* at 6. They contend that "removing capital gains revenue from the general budget," will increase states' ability to foresee budget patterns, thus reducing their appetite[s] for tax increases. *See id.*

[243] *See* Fabry, *supra* note 79.

[244] *See id.*

[245] *See id.*

[246] *See* Baxandall, *supra* note 10, at 1.

[247] *See id.*; Dotinga, *supra* note 93.

[248] *See Common Sense Says…*, *supra* note 21.

[249] *See* Baxandall, *supra* note 10, at 26; Sirico, *supra* note 10.

[250] *See* Sirico, *supra* note 10.

[251] *See* NCLS, Principles of a High-Quality State Revenue System, *supra* note 25.

[252] *See* Muska, *supra* note 12; Cox, *supra* note 5; Gamboa, *supra* note 5; Sirico, *supra* note 5; Sirico, *supra* note 5; Shapley, *supra* note 5; Skorburg, *supra* note 5; *Texas Slaps "Pole Tax" on Strip Clubs*, *supra* note 3.

proper role gets lost.[253] A mildly controversial tax can gain popular acceptance, and can then increase incrementally until it reaches extreme proportions.[254] With no established set of rules or guidelines to monitor the growth of the system, governments will slide down the slope so long warned about but not truly expected.[255] Governments must take responsibility for their spending and balance their budgets in a realistic way in order to prevent further abuse of the sin tax tool.[256]

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[253] *See* Sirico, *supra* note 5.

[254] *See* Murphy, *supra* note 71.

[255] *See Common Sense Says…*, *supra* note 21; Reiter, *supra* note 7, at 454F n.67; *Texas Slaps "Pole Tax" on Strip Clubs*, *supra* note 3.

[256] *See* Clifton & Karasmeighan, *supra* note 61, at 3, 5.