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THE SPAGHETTI BOWL REVISITED IN THE CONTEXT OF CORRUPTION: UNDERSTANDING HOW CORRUPT COUNTRIES COULD SUBVERT THE WTO'S RULE-ORIENTED SYSTEM THROUGH PREFERENTIAL TRADE AGREEMENTS

PAUL SARLO*

> I am still convinced that it is in the national interest of every trading nation to abide by the rules, which were accepted as valid for good times and bad. One of the major benefits of international [trade] is that [it] offer[s] equal opportunities and require[s] . . . . [t]hose who believe in the open trading system . . . [to] correct those rigidities in their economic and social systems which obstruct . . . economic growth . . . .[1]

> Bribery and corruption have become a scourge on international trade. [They have] literally become an epidemic . . . . [They have] a deleterious effect on trade and create[] unfair and unbalanced situations.[2]

I. INTRODUCTION

Coined by Professor Jagdish Bhagwati of Columbia University, the term "spaghetti bowl"[3] refers to the proliferation of free trade agreements—the nearly two hundred regional and bilateral trade agreements that exist today and that comprise a "maze of free-trade areas . . . and customs unions . . . ."[4] Sanctioned under the World Trade Organization ("WTO") Charter, in particular under Article XXIV of the General Agreement on Tariffs and Trade ("GATT"), free trade agreements arise when "countries extend [their] preferences in different directions."[5] In more direct terms, countries engage a particular country or region with which they would like to trade, at the exclusion of all other countries or regions. Free trade agreements are, therefore, also known as "preferential trade

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1. Press Release, Address by Arthur Dunkel, GATT Director-General at "Ostasiatisches Liebesmahl," GATT/1312 at 7 (Mar. 5, 1982) (alteration in original).

2. *The Future of U.S. Trade Policy: Perspectives from Former U.S. Trade Representatives: Hearing before U.S. S. Comm. on Fin.*, 110 Cong. 17 (2008) [hereinafter *Future of U.S. Trade Policy*] (statement by Mickey Kantor, Former U.S. Trade Rep. and Sec'y of Com.) (alteration in original).

3. JAGDISH N. BHAGWATI & ANNE O. KRUEGER, *U.S. Trade Policy: The Infatuation Free Trade Areas, in* THE DANGEROUS DRIFT TO PREFERENTIAL TRADE AGREEMENTS 1, 2 (1995).

4. Caroline Freund, *Third-Country Effects of Regional Trade Agreements*, *in* PREFERENTIAL TRADE AGREEMENTS: A LAW AND ECONOMICS ANALYSIS 40, 40 (Kyle W. Bagwell & Petros C. Mavroidis eds., 2011); MATTHIAS HERDEGEN, PRINCIPLES OF INTERNATIONAL ECONOMIC LAW 191 (2013).

5. BHAGWATI & KRUEGER, *supra* note 3, at 2.

agreements" ("PTAs"). Because these agreements depend on national preferences,[6] the reasons countries enter into them are not always clear—one country's motivation for seeking a PTA may be different from another's. The WTO Charter does not require countries to disclose their rationales for entering into a PTA. In fact, the lone condition tied to a PTA is that it must liberalize substantially all the trade between the constituent territories,[7] meaning that it must account for the bulk of their trade.[8]

While many scholars have considered the theory, consequences, and positives and negatives of PTAs,[9] few have addressed the reasons why countries pursue them and why they pick the partners they do.[10] Indeed, authors of recent literature on PTAs implicitly assume that these agreements are similar.[11] But in today's age, when culture, goods, and money "cross borders more than at any time in history,"[12] PTAs are more likely to be some of the most diverse instruments in the world, rather than near facsimiles of each other. To be sure, the majority of them vary not only in content but also in form, reflecting "sharp differences in the objectives of the countries seeking them."[13] These objectives include increased market access, the implementation of domestic policy reform, the creation of leverage in bilateral or multilateral bargaining power, and the formation of strategic linkages, some of which may be related to national security.[14] But this list is hardly exhaustive, considering the profound differences in national institutions, economic conditions, and socioeconomic backgrounds around the world.

This Article proposes that some countries could have far more nefarious objectives in their pursuit of PTAs—corruption—and that corrupt schemes involving PTAs could threaten the rule-oriented infrastructure of the WTO and the

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6. Professor Bhagwati writes "[f]ree trade areas are inherently *preferential*" and "[e]conomists interested in the quality of public discourse should perhaps take a pledge henceforth to rename free trade areas as 'preferential' trade areas." *Id.* (emphasis in original).

7. General Agreement on Tariffs and Trade art. XXIV, Oct. 30, 1947, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT] *available at* http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf; *see also* HERDEGEN, *supra* note 4, at 191 (discussing the scope of preferential trade agreements).

8. HERDEGEN, *supra* note 4, at 191.

9. JOHN H. JACKSON, WILLIAM J. DAVEY, & ALAN O. SYKES, JR., THE LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 540 (6th ed. 2013); *see also* BHAGWATI & KRUEGER, *supra* note 3, at 3-18 (highlighting the problems with preferential trade agreements).

10. JACKSON, DAVEY, & SYKES, *supra* note 9, at 540.

11. John Whalley, *Why Do Countries Seek Regional Trade Agreements?*, *in* THE REGIONALIZATION OF THE WORLD ECONOMY 63, 63 (Jeffrey A. Frankel ed., 1998), *available at* http://www.nber.org/chapters/c7820.pdf.

12. CENTER FOR TRANSNATIONAL LEGAL STUDIES LONDON, http://ctls.georgetown.edu/about.html (last visited Sept. 8, 2013) (statement by Professor David Luban, Georgetown Law); *but see World Economy:_The Gated Globe*, ECONOMIST, Oct. 12, 2013, at 23, *available at* http://www.economist.com/news/special-report/21587384-forward-march-globalisation-has-paused-financial-crisis-giving-way ("After two decades in which people, capital and goods were moving ever more freely across borders, walls have been going up . . . . Governments increasingly pick and choose whom they trade with . . . .").

13. Whalley, *supra* note 11, at 70.

14. *Id.* at 71-73.

efficacy of the WTO as a free-market force. The term "corruption" is an amorphous one, encompassing a range of behaviors and activities,[15] so this Article defines it broadly as "the misuse of public power for private gain."[16] While scholars have agreed that corruption creates an "awkward disruption of trade," an interference with the laws of free trade and liberal expansion, they have not identified the ways in which the WTO's rule-oriented system is vulnerable to corrupt schemes.[17] Because corruption can undermine international trade, an understanding of how it could infiltrate and operate within the WTO's rule-oriented system is the first step toward stopping it. The purpose of this Article therefore is to build that understanding and to argue that PTAs could serve as the launching pad for corrupt practices among WTO Members, particularly among the developing countries where corruption has long been rife. This Article does not address whether the WTO should serve as an international watchdog of corruption, adopt rules for the curtailment of corruption, or enforce those rules—propositions to which scholars have already devoted ample attention.[18]

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15. *See, e.g.*, Kate Gillespie & Gwenn Okruhlik, *The Political Dimensions of Corruption Cleanups: A Framework for Analysis,* 24 COMP. POL. 77, 77 (1991) (discussing the debate among scholars who seek to define "corruption"); *see also* SUSAN ROSE-ACKERMAN, CORRUPTION: A STUDY IN POLITICAL ECONOMY 4 (1978) (describing the multitude of activities that fall within the ambits of corruption); *What is Corruption?*, BUS. ANTI-CORRUPTION PORTAL, http://www.business-anti-corruption.com/about/what-is-corruption.aspx (last visited Sept. 15, 2014) ("Although there are several conventions dealing with corruption and bribery, there is no single globally accepted definition of corruption and bribery."); a definition of corruption appears in no piece of U.S. legislation.

16. Kevin E. Davis, *Does the Globalization of Anti-Corruption Law Help Developing Countries?*, INTERNATIONAL ECONOMIC LAW, GLOBALIZATION, AND DEVELOPING COUNTRIES 283, 284 (Julio Faundez & Celine Tan eds., 2010) (NYU Ctr. for L., Econ. and Org., Working Paper No. 09-52) *available at* http://ssrn.com/abstract=1520553. *See also* Stefan Voigt, *When Are Judges Likely to Be Corrupt?*, *in* GLOBAL CORRUPTION REPORT 24, 24 (Diana Rodriguez & Linda Ehrichs eds., 2007). Corruption does of course flourish in the private sector too, but this Article focuses on corruption in the public sector because governments are heavily involved in the creation of PTAs. *See generally* Philip M. Nichols, *Corruption in the World Trade Organization: Discerning the Limits of the World Trade Organization's Authority*, 28 N.Y.U. J. OF INT'L L. & POL'Y. 711, 758 (1996) (noting that bribery is prevalent in the private sector). *See also* FRANK VOGL, WAGING WAR ON CORRUPTION: INSIDE THE MOVEMENT FIGHTING THE ABUSE OF POWER 12 (2012) ("Corruption of course exists beyond the realms of public officials. Corrupt practices of diverse kinds are pursued solely among diverse enterprises, without involvement of public officials, and do have severe consequences. My concern in this book, however, centers on the abuse of governmental power . . . .").

17. ABDULHAY SAYED, CORRUPTION IN INTERNATIONAL TRADE AND COMMERCIAL ARBITRATION 13 (2004) (citing Fredrik Galtung, *Corruption: The Achilles Heel of Development, in* LA CORRUPTION L'ENVERS DES DROITS DE L'HOMME 259, 270 (Marco Borghi & Patrice Meyer-Bische eds., 1995)); Nichols, *supra* note 16, at 712 ("Transnational bribery directly—and negatively—affects trade . . . ."). *See also Future of U.S. Trade Policy*, *supra* note 2, at 17 ("Bribery and corruption have become a scourge on international trade. It has literally become an epidemic . . . . [It] has a deleterious effect on trade and creates unfair and unbalanced situations.").

18. *See, e.g.*, Nichols, *supra* note 16, at 768-84 (arguing "the World Trade Organization is the entity that could best provide international coordination of efforts to control transnational bribery."). *See also* Philip M. Nichols, *Outlawing Transnational Bribery through the World Trade Organization*, 28 L. & POL'Y INT'L BUS. 305, 378-80 (1997) (calling for the WTO to require its Members to adopt measures against corruption); Padideh Ala'i, *The WTO and the Anti-Corruption Movement*, 6 LOY. U.

Part II of this Article describes the transnational anti-corruption regime and identifies how corruption is a detriment to trade from a theoretical and an empirical perspective. Part III presents the ways in which PTAs are susceptible to corruption and contends that the manipulation of PTAs could compromise the WTO's rule-oriented system. To make this case, this Part uses Dr. Robert Klitgaard's famous metaphorical formula for corruption and argues that PTAs in the hands of corrupt countries can embody all the variables that make a business transaction or an agreement vulnerable to corrupt practices: (1) monopoly power, (2) discretion by officials, and (3) lack of accountability.[19] Part IV concludes that corruption could play a part in the pursuit of PTAs by infamously corrupt countries, and may have been doing so for years.

II. BACKGROUND: AND OVERVIEW OF TRANSNATIONAL ANTI-CORRUPTION REGIME AND THE DETRIMENT OF CORRUPTION ON TRADE

This Part traces the historical events that have prompted the development of today's transnational anti-corruption regime. It then describes the WTO's lack of involvement to date in this regime. Assessing the effect of corruption on trade, this Part next assembles a list of the most corrupt WTO Members, and identifies how corruption among WTO Members disrupts trade, stunts economic growth, and threatens the welfare of society, both in theoretical and empirical terms.

A. The Transnational Anti-Corruption Regime

In the 1970s, the Watergate scandal brought legislative developments in anti-corruption to the fore in the U.S. Investigations uncovered evidence that many U.S. companies had made illicit contributions to President Nixon's committee for reelection and used offshore subsidiaries to hide their payments.[20] These proceeds, however, were a mere fraction of the bribes that hundreds of American companies had paid to foreign officials to secure business abroad.[21] In response to these companies' efforts to obtain business abroad through bribery, President Carter signed the Foreign Corrupt Practices Act ("FCPA")[22] into law.[23] By the late 1990s, European leaders began to recognize corruption as a wide-scale problem

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OF CHI. INT'L L. REV., 259, 278 (2008) (concluding "[t]he WTO can be most effective in combating corruption indirectly through its many provisions that mandate transparency").

19. ROBERT KLITGAARD, RONALD MACLEAN-ABAROA, & H. LINDSEY PARRIS, CORRUPT CITIES: A PRACTICAL GUIDE TO CURE AND PREVENTION 25-26 (2000).

20. VOGL, *supra* note 16, at 161.

21. *Id.* "The SEC found that over four hundred other companies had paid hundreds of millions of dollars in bribes to foreign officials to gain business advantages." THE CRIMINAL DIVISION OF THE U.S. DEP'T OF JUSTICE & ENFORCEMENT DIV., U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE FOREIGN CORRUPT PRACTICES ACT 3 (2012), *available at* http://www.justice.gov/criminal/fraud/fcpa/guide.pdf.

22. *See* 15 U.S.C. §§ 78m, 78dd-1, 78dd-2, 78dd-3, 78ff (2012) [hereinafter FCPA Articles]. Backed by civil and criminal penalties, the FCPA prohibits U.S. companies from making corrupt payments to foreign officials to secure or retain business. *Id.*

23. VOGL, *supra* note 16, at 159.

from which their countries were not immune.[24] "A tidal wave of . . . corruption [swept] across the Eurasian landmass, threatening to overwhelm the region's . . . market[s] . . . ."[25] Indeed, a third of Italy's legislators had become the subject of anti-corruption investigations at one point.[26] The pervasiveness of corruption extended to other regions, too.[27]

To curb abuses of power, members of the international community collaborated to usher in an anti-corruption regime,[28] under which the most prominent measures against corruption are the Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention") and the U.N. Convention Against Corruption ("UNCAC").[29] Each convention requires countries to enact laws similar to the FCPA, including criminal penalties for the bribery of foreign officials.[30] The majority of WTO Members has signed and ratified the U.N. Convention, though only some have ratified the OECD Convention.[31] The efficacy of these conventions and the anti-corruption regime as a whole depends on whether countries enforce their anti-corruption laws—only four of the forty-one parties to the OECD Convention actively enforced their anti-corruption laws in the past year.[32] Along with the enforcement of anti-corruption

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24. Davis, *supra* note 16, at 283, 287.

25. Ariel Cohen, *Crime Without Punishment*, 6 J. Democracy 34, 34 (1995).

26. David Nelken, *The Judges and Political Corruption in Italy*, 23 J.L. & SOC'Y 95, 97 (1996).

27. Third-world countries, or economies that are in transition, are often replete with corruption. *See* Nichols, *supra* note 16, at 760, 773.

28. *See* Davis, *supra* note 16, at 287 (describing the anti-corruption regime as a "mass movement").

29. *See id.* at 283, 287 (describing the OECD Convention as the "first and most notable success" of the international anti-corruption movement and the U.N. Convention as the "culminat[ion]" of the movement).

30. U.N. Convention Against Corruption, art. 16, ¶¶ 1-2, Dec. 9, 2003, 2349 U.N.T.S. 41 (entered into force Dec. 14, 2005) [hereinafter U.N. Convention] *available at* http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf; Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. 1, ¶¶ 1-4, Dec. 17, 1997, 37 I.L.M. 1 (1998) (entered into force Feb. 15, 1999) [hereinafter OECD Convention] *available at* http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

31. Only 41 states are signatories on the OECD convention, contrasted with the 160 WTO Members and the 140 signatories to the UN convention. *See* WORLD TRADE ORGANIZATION, *Understanding the WTO: Members and Observers*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Sep. 16, 2014); ORG. FOR ECON. CO-OPERATION AND DEV., *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Ratification Status as of 21 May 2014*, http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf (last visited Sep. 16, 2014); UNDOC, *United Nations Convention against Corruption Signature and Ratification Status as of 5 September 2014*, https://www.unodc.org/unodc/en/treaties/CAC/signatories.html (last visited Sep. 16, 2014).

32. FRITZ HEIMANN ET AL., EXPORTING CORRUPTION, PROGRESS REPORT 2013: ASSESSING ENFORCEMENT OF THE OECD CONVENTION ON COMBATING FOREIGN BRIBERY 5 (2013), *available at* http://www.transparency.org/whatwedo/pub/exporting_corruption_progress_report_2013_assessing_enforcement_of_the_oecd (finding enforcement remains "robust" in Germany, Switzerland, the United Kingdom, and the U.S.).

laws, the discouragement of business with highly corrupt countries is a principle objective of parties in the anti-corruption regime.[33] Governments therefore may take to cutting off trade to corrupt countries, with the hope that "economic incentive created by the threat of isolation . . . will encourage corrupt states to take steps to reduce corruption."[34]

B. The WTO and Anti-Corruption

Although a host of international organizations have united to curb corruption,[35] the WTO is not one of them, despite the disruptive effect that corruption has on trade.[36] Some scholars have suggested the WTO's Agreement on Government Procurement ("GPA") falls under the panoply of the anti-corruption movement,[37] but this agreement is geared toward only a few industrial countries,[38] not the developing nations that are rank with corruption. In addition, while the WTO has primed "the further elimination . . . of measures distorting international competition" as an issue for future rounds of negotiations, corruption appears unlikely to be within the scope of these discussions.[39] Despite the WTO's hands-off approach toward corruption, some scholars have argued that the WTO is the international organization most capable of reining in corruption:

> [WTO] membership encompasses most of the world's trade. It also can facilitate enforcement of its requirements. Those two facts, combined with the almost fifty years of institutional experience in international commercial regulation that it inherits from the GATT qualify the World Trade Organization as the entity that could best . . . [provide international coordination of efforts to] control transnational bribery.40

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33. *See* Davis, *supra* note 16, at 293 ("many aspects of the transnational anti-corruption regime . . . discourage firms from doing business . . . with corrupt [countries]").

34. *Id.*

35. The World Bank and International Monetary Fund, for example, are among the international organizations that have contributed to the "mass movement" against corruption. *Id.* at 287.

36. *See, e.g.*, SAYED, *supra* note 16, at 13 (describing the "awkward disruption of trade" for which corruption is responsible).

37. *See, e.g.*, Davis, *supra* note 16, at 287.

38. JACKSON, DAVEY, & SYKES, *supra* note 9, at 241. As of 2014, the parties to the GPA are Armenia, Canada, the 28 member states of the European Union, Hong Kong, China, Iceland, Israel, Japan, Republic of Korea, Liechtenstein, Netherlands on behalf of Aruba, Norway, Singapore, Switzerland, Chinese Taipei, and the United States. *See also* WORLD TRADE ORGANIZATION, *Agreement on Government Procurement, Parties, Observers and Accessions*, http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm.

39. HERDEGEN, *supra* note 4, at 176 (noting the negotiations following the Doha Declaration pertaining to international competition are most likely to focus on export subsidies for agricultural products and electronic commerce).

40. Nichols, note 16, at 783. *See also* Ala'i, *supra* note 18, at 259-60 ("[F]rom the perspective of the . . . anti-corruption movement, the WTO . . . provides a comparatively successful forum for . . . good governance . . . such as transparency."); Nichols, *supra* note 18, at 378 (calling for the WTO to require its Members to adopt anti-corruption measures).

Even while arguing that the WTO should espouse the anti-corruption regime, one scholar warns, however, that the WTO is without the power or the resources to "solve all of the world's woes, nor should it try."[41] The fact that the WTO is only "an infant organization, and . . . will be asked to deal with so many of the world's problems, should lead to caution in the selection of what issues the Organization chooses to address."[42]

C. The Adverse Effects of Corruption on Trade

Many of the developing countries that hold membership in the WTO are notorious for being the most corrupt in the world. According to Transparency International, ninety-seven of the WTO's 159 members, over sixty percent, have "serious" levels of corruption.[43] Transparency International ranks the levels of public-sector corruption in countries by using a Corruption Perceptions Index ("CPI"), a measurement that ranges from a scale of zero to one hundred, with zero being the most corrupt.[44] The table below lists some of the WTO's most corrupt Members.[45]

RANK	WTO MEMBER	CPI
1	Myanmar	15
2	Burundi	19
2	Chad	19
2	Haiti	19
2	Venezuela	19
3	Zimbabwe	20
4	Democratic Republic of Congo	21
5	Tajikistan	22
5	Cambodia	22

41. Nichols, *supra* note 16, at 713.

42. *Id.* at 713-14.

43. Transparency Int'l, *Corruption Perceptions Index 2012*, http://www.transparency.org/cpi2012/results (last visited Sept. 16, 2014) (finding a "serious corruption problem" when a country scores less than 50 on the Corruption Perceptions Index).

44. *Id.*

45. This table uses the 2012 CPI listed for each country on Transparency International's website. Tajikistan is the newest Member of the WTO, having acceded in March 2013. Myanmar, the most corrupt country in the table, became a Member in January 1995. *See Understanding the WTO*, *supra* note 31.

5	Angola	22
6	Guinea	24
7	Paraguay	25
8	Papua New Guinea	25
8	Guinea-Bissau	25
9	Ukraine	26
9	Congo Republic	26
9	Central African Republic	25
9	Cameroon	26
9	Bangladesh	26
10	Pakistan	27
10	Nigeria	27
10	Nepal	27
10	Kenya	27
10	Azerbaijan	27

The prevalence of corruption among WTO Members disrupts trade from both a theoretical perspective and an empirical perspective.

D. The Disruption of Trade from a Theoretical Perspective

From a theoretical perspective—a multi-disciplinary view that combines economic theory, social theory, ethics, and law to determine what comprises the problem of corruption in international trade—corruption is virulent to trade because it undermines its function as a medium for expansion and growth.[46] The purpose of trade is the exchange of goods and services between producers and traders based on competition,[47] which is healthy because it creates the incentive to produce high-quality products and reduce prices.[48] In a corrupt country, however, producers and traders make decisions based not on competition but on the

46. SAYED, *supra* note 17.
47. *Id.* at 13.
48. *Id.*

superiority of the bribe.[49] Rather than sparking competition for quality products, trade sinks into "a contest for the highest bribe-payer to get a governmental order, [an] . . . 'underground auction' among bidders."[50] In short, corruption bastardizes the decision-making process by which producers and traders choose goods and services.[51]

Because of the poor quality of imported goods that countries receive under corrupt public-procurement contracts, citizens become victims of the open-trading system rather than beneficiaries. They are robbed of the "equal opportunities"[52] that the system is supposed to provide to them under the WTO Charter: "Ministers affirm that the establishment of the [WTO] reflect[s] the widespread desire to operate in a fairer . . . multilateral trading system for the benefit and welfare of their peoples."[53] In addition, because the bribes that corrupt governments pay to secure public contracts—contracts for trade or any other purpose—tend to be expensive, the cost of public services increases,[54] and the taxpayer bears this cost.[55] Those who disrupt trade through corrupt schemes therefore do so at the expense of society, which suffers "privation," or the pain that results from not possessing certain types of pleasures.[56]

E. The Disruption of Trade from an Empirical Perspective

Among the WTO Members that have serious levels of corruption, or low CPIs, the privation of society often manifests itself as penury. In Nigeria—a nation that has one of the lowest CPIs in the world and that has been a Member of the WTO since the WTO's inception—the corruption that underlies the country's most significant trading industries has left its citizens in destitution.[57] The world's eighth largest exporter of oil, Nigeria has earned more than $400 billion from oil in recent decades.[58] But the wealth that Nigeria has derived from its oil has gone to

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49. Nichols, *supra* note 16, at 772 (citing FRITZ F. HEIMANN, SHOULD FOREIGN BRIBERY BE A CRIME 9 (1994); Mark B. Bader & Bill Shaw, *Amendment of the Foreign Corrupt Practices Act,* 15 N.Y.U. J. INT'L L. & POL'Y. 627, 627 (1983)).

50. SAYED, *supra* note 17, at 15 (citing Karen Mills, *Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto*, 5 INT'L ARB. L. REV. 126, 127 (2002)).

51. Nichols, *supra* note 16, at 769.

52. Dunkel, *supra* note 1, at 7.

53. Marrakesh Declaration Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

54. SAYED, *supra* note 17, at 15 (citing Galtung, *Corruption: The Achilles Heel of Development*, *supra* note 18, at 265).

55. *Id.* at 14-15; *see also* Transparency Int'l, *supra* note 43 (describing corruption as a "dirty tax" on the poor and vulnerable).

56. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 37 (1780).

57. Despite a GDP estimated at US$502 billion, approximately 62% of Nigerian citizens live in extreme poverty. *See* CIA WORLD FACTBOOK, *Nigeria*, https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html (last accessed Sep. 16, 2014).

58. PETER MAASS, CRUDE WORLD: THE VIOLENT TWILIGHT OF OIL 55 (2009).

one percent of its population.[59] Ninety percent of its citizens live on less than two dollars a day and twenty percent of children die before their fifth birthday.[60] Peculated by the country's "presidents, generals, executives, middlemen, accountants, bureaucrats, [and] policeman," Nigeria's riches from its oil exports have been lost to a corrupt government, whose perverse use of trade flouts the WTO Charter and has transformed "a once healthy country, and the people who live[] there, into a specimen of rot."[61]

III. SUBVERTING THE WTO'S RULE-ORIENTED SYSTEM: PTAS AS INSTRUMENTS OF CORRUPTION

Many have hailed the rule-oriented system of the WTO as its crown jewel.[62] One author lauds this rule-oriented system because it continued to function well even during the crucible of the financial crisis, while the financial system tottered on the brink of ruin: "The confidence that this set of rules can withstand even exogenous shock like a financial crisis must be seen as the ultimate validation of the role that rules can play."[63] But the world was not without regulatory rules that governed the financial sector in the years that preceded the crisis—financial institutions simply managed to subvert them in underhanded ways.[64] Like these financial institutions, corrupt WTO Members can surely uncover ways to contravene the rules that apply to them, if doing so would result in greater profits. Indeed, corruption loves complex rules and regulations, particularly those under which officials have ample discretion.[65]

This Part contends that the WTO's rule-oriented system is subject to circumvention through corrupt practices. It begins by drawing parallels between

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59. *Id.*

60. *Id.*

61. *Id.* at 54-55.

62. *See, e.g.*, R. Michael Gadbaw, *Systemic Regulation of Global Trade and Finance: A Tale of Two Systems*, 13 J. INT'L ECON. L. 551, 569-70 (2010); *see also* JACKSON, DAVEY, & SYKES, *supra* note 9, at 540 ("Some have suggested that [the WTO's rule-oriented structure] is the most significant result of the Uruguay Round, and that it is part of a series of circumstances . . . that may be the most profound change in international economic institutions since the Bretton Woods Conference of 1944.").

63. Gadbaw, *supra* note 62, at 568.

64. In the years leading up to the financial crisis, the largest investment banks convinced the Securities and Exchange Commission (SEC) to relax its oversight and permit them to take on greater debt, during a fifty-five-minute meeting at the SEC; mortgage lenders managed to switch regulators so that they could come under the supervision of agencies that received funds from banks; and Freddie Mac and Fannie Mae spent millions to lobby members of Congress in exchange for slack capital-reserve requirements. Daniel Kaufmann, *Corruption and the Global Financial Crisis*, FORBES (Jan. 27, 2009), http://www.forbes.com/2009/01/27/corruption-financial-crisis-business-corruption09_0127corruption.html. *See also* INSIDE JOB (Sony Pictures Classics Oct. 8, 2010) (providing a narration of each of these occurrences in greater detail). The financial sector also managed to convince Congress to repeal the U.S. Banking Act of 1933, popularly known as the Glass-Steagall Act, which limited affiliations between commercial and investment banks. *See generally, e.g.*, CHARLES H. FERGUSON, PREDATOR NATION: CORPORATE CRIMINALS, POLITICAL CORRUPTION, AND THE HIJACKING OF AMERICA 44, 48, 52, 118, 152, 249 (2012).

65. KLITGAARD, MACLEAN-ABAROA, & PARRIS, *supra* note 19, at 26.

the characteristics that underlie corrupt transactions and those that underlie PTAs. Using Dr. Robert Klitgaard's famous heuristic formula for corruption, this Part then argues that PTAs—as conduits for corrupt purposes—can embody all the variables of a corrupt scheme: (1) monopoly power, (2) discretion by officials, and (3) lack of accountability.[66]

A. The Characteristics of Corrupt Schemes

Corruption is difficult to detect and fight because it often occurs in the context of a free-market transaction; that is, the parties involved in the bribe enter into a personal exchange or bargain.[67] Because of the free-market nature of corrupt activities, their victims suffer no immediate harm—unlike with other crimes, like extortion, for example—and therefore no incentive exists for anyone to report wrongdoing.[68] The premise of the bribe or transaction itself is the transfer of a benefit to a government official[69] in exchange for "some form of preferential treatment."[70] According to Dr. Robert Klitgaard, a formula that summarizes a corrupt transaction is: C = M + D – A, in which the variables C, M, D, and A stand for "corruption," "monopoly power," "discretion by officials," and "accountability," respectively.[71]

B. How the Characteristics of Corrupt Schemes Pertain to PTAs

In principle, PTAs are vulnerable to corrupt schemes because they themselves are free-market transactions; they can and do occur behind closed doors and far from the eyes and ears of multilateral negotiators.[72] Parties can also easily manipulate them into a corrupt exchange because they are "inherently preferential,"[73] and by definition, "some form of preferential treatment" lies at the

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66. *Id.* at 25-26.

67. Daniel Schneider, Assistant Professor, Am. Univ. School of Int'l Serv., Lecture at Am. Univ. Washington Coll. of Law: Doing Business in the U.S.: The Legal Anti-Corruption Framework (June 24, 2013).

68. *Id.*

69. Although bribery does of course occur in the private sector, this Article focuses on bribery in the public sector because governments are heavily involved in the creation of PTAs. *See generally* Nichols, *supra* note 16, at 758 (noting bribery is prevalent in the private sector).

70. *Id.* at 757.

71. KLITGAARD, MACLEAN-ABAROA, & PARRIS, *supra* note 19, at 26-27. In addition to these variables, the equation can contain the variable "T," which accounts for the lack of transparency that often accompanies corrupt practices: C = M + D – T – A. *See id.* at 32.

72. *Cf.* SAYED, *supra* note 17, at 13 (asserting countries involved in multilateral trade negotiations "have far more bargaining power" because they negotiate together rather than individually). In comparison to the comatose-like state of the Doha Round, however, the high turnout of PTAs over the past several decades indicates that bilateral negotiations constitute a more efficacious and expeditious form of free-market bargaining. *See* Hyeran Jo & Hyun Namgung, *Dispute Settlement Mechanisms in Preferential Trade Agreements: Democracy, Boilerplates, and the Multilateral Trade Regime*, 56 J. OF CONFLICT RESOL. 1041, 1042 (2012) (noting PTAs "have increased dramatically in the past several decades").

73. *See* Jagdish Bhagwati, *The WTO's Agenda: Environmental and Labour Standards, Competition Policy and the Question of Regionalism* 2 (Columbia U., Discussion Paper No. 725, Apr.

heart of every corrupt transaction.[74] In fact, countries that enter into PTAs routinely agree to transfer a benefit in exchange for preferential treatment: a country exports a particular good to another country in return for more moderate tariffs, which are cheaper than the tariffs that non-preferred countries must pay.[75] While the number of countries—*if any*—that have based their PTAs on corrupt schemes is a matter of pure speculation, these agreements nevertheless are inherently prone to manipulation, the full extent of which requires an analysis under Dr. Klitgaard's formula.

C. PTAs and Monopoly Power: Corrupt Conglomerates

Although the reasons why countries enter into PTAs are not always clear,[76] these agreements nevertheless have certain characteristics and effects that could entice countries to enter into them: they lower the barriers to trade for their members and raise the barriers to trade for nonmembers—resulting in not only preferential treatment of members but also discriminatory treatment of nonmembers.[77] For governments that participate in the transnational anti-corruption regime, they may have commitments against associating with corrupt countries,[78] based on which they would have an incentive to shun relations in trade with them. In other words, governments that adhere to the anti-corruption regime may have policy reasons to exclude highly corrupt countries from their PTAs—most likely in the hope that the "economic incentive created by the threat of economic isolation . . . will encourage corrupt states to take steps to reduce corruption."[79]

1995) *available at* http://academiccommons.columbia.edu/download/fedora_content/download/ac:100120/CONTENT/econ_9495_725.pdf.

74. Nichols, *supra* note 16, at 757 (describing the features of a corrupt transaction).

75. Professor John H. Jackson and his colleagues describe this dynamic well in the context of the North American Free Trade Agreement ("NAFTA"); "[S]uppose that prior to NAFTA, the United States imports significant quantities of winter vegetables from Mexico because Mexico produces them efficiently and transport costs are low. After NAFTA, tariffs on these goods fall, and imports [from Mexico] rise. . . . Mexico [now] enjoys preferential access to the United States and is able to outcompete [non-preferred countries] for that reason." JACKSON, DAVEY, & SYKES, *supra* note 9, at 536. *See also* Bhagwati, *supra note* 71, at 32 ("trade barriers are lowered for members [of PTAs]").

76. *See, e.g.*, Whalley, *supra* note 11, at 70-74 (describing the different reasons that can compel countries to pursue PTAs).

77. Bhagwati, *supra* note 73, at 32.

78. *See* Nancy Dunne, *Kantor Calls for Bribery Action*, FIN. TIMES (London), July 26, 1996, at 3. ("The commerce secretary said that business leaders he had met say corruption in international trade is their number one concern."). *Cf.* Davis, *supra* note 16, at 303 ("There is . . . evidence bearing on the claim that the anti-corruption regime will . . . discourag[e] . . . business in or with corrupt states."); Daniel Fisher, *The Most Corrupt Countries*, FORBES (Nov. 1, 2010), http://www.forbes.com/2010/11/01/most-currupt-countries-2010-business-beltway-currupt-countries_slide_3.html (noting the U.S. prohibits investment in Myanmar because of its high levels of corruption).

79. Davis, *supra* note 16, at 293.

In a possible move to counteract discriminatory treatment by anti-corruption-oriented countries infamously corrupt countries may have resorted to forging PTAs among themselves—erecting corrupt conglomerates, or affiliations among the most corrupt countries in the world that constitute monopolies.[80] The definition of a monopoly is a complex on, but in the context of international trade a monopoly could constitute the combination of two or more countries with the power to control market prices and engage in exclusionary behavior. [81] Some PTAs in existence today exclude most countries that are active in the anti-corruption regime and that have respectable rankings in Transparency International's Corruption Perception Index. One illustration, among a legion of others,[82] is the Common Market for Eastern and Southern Africa ("COMESA"),[83] which consists of twenty-one nations and twenty WTO Members.[84] The table below lists the COMESA's members along with their respective CPIs.[85]

Rank	COMESA Member	CPI
1	Sudan	13
2	Burundi	19
3	Zimbabwe	20
4	The Democratic Republic of Congo	21
4	Libya	21
5	Angola	22
6	Eritrea	25
7	Kenya	27
8	Comoros	28
9	Uganda	29
10	Egypt	32
10	Madagascar	32
11	Ethiopia	33
12	Djibouti	36
13	Malawi	37
13	Swaziland	37
13	Zambia	37

80. For the purpose of this paper, a "corrupt conglomerate" constitutes two or more countries in a PTA that combine for an average CPI below fifty.

81. 117 AMERICAN JURISPRUDENCE PROOF OF FACTS 391, §49 (3d ed. 2010).

82. To view a list of the dizzying array of PTAs in existence today, and the corrupt conglomerates among them, *see Global Preferential Trade Agreements Database*, THE WORLD BANK, http://wits.worldbank.org/gptad/library.aspx (last visited Sept. 13, 2014).

83. Treaty Establishing the Common Market for Eastern and Southern Africa, Nov. 5, 1993, 2314 U.N.T.S. 265 [hereinafter COMESA].

84. South Sudan, which is a member of COMESA, is not included in the table because it does not have a CPI on Transparency International's website. It is, however, one of the most corrupt nations in the world. *See, e.g.*, Fisher, *supra* note 78.

85. This table uses the CPI listed for each country on Transparency International's website. *See* Transparency Int'l, *supra* note 43.

14	Seychelles	52
15	Rwanda	53
16	Mauritius	57

The average CPI among these nations is thirty-two—an abysmally low number. On paper, perhaps only a few other affiliations in the world bring the term "corruption" to mind as instantaneously as the affiliations that comprise the COMESA. Some of those other affiliations, regrettably, come from other PTAs under which a cadre of similarly corrupt countries has united.[86] In addition to their abilities to exclude undesirable countries from their agreements, these conglomerates often induce unfair market prices for non-members because corruption results in higher tariffs and non-tariff barriers.[87] With their power to participate in exclusionary behavior and to inflate market prices, these conglomerates have the very characteristics of monopoly-like entities.

D. PTAs and Discretion by Officials: The Folly of Choice of Law Provisions

Because PTAs are free-market transactions, they allow notoriously corrupt governments not only to enter into them but also to have authority to arrange their very terms. As members of the WTO, these governments have carte blanche to create any agreement they like within the framework of the WTO—a $500 billion industry at their fingertips.[88] They even have license to craft their PTAs so that they can sidestep the WTO's rule-oriented system, placing themselves under the auspices of their own laws instead.[89] In other words, they are free to devise their own mechanisms for enforcement,[90] which allow them to resolve their disputes under so-called PTA law, not under the supervision of the WTO's dispute-settlement system—the "real teeth" of the WTO.[91] This type of freedom invites

86. *Supra* note 82.

87. Subhayu Bandyopadhyay & Suryadipta Roy, *Corruption and Trade Protection: Evidence from Panel Data* 2-3 (Fed. Res. Bank of St. Louis, Research Div., Working Paper No. 2007-022A, 2007), *available at* http://research.stlouisfed.org/wp/2007/2007-022.pdf (citing YOUNG LEE & OMAR AZFAR, DOES CORRUPTION DELAY TRADE REFORM? (2002)); *see also Future of U.S. Trade Policy*, *supra* note 2, at 17 (a statement by Mickey Kantor asserting corruption "creates unfair and unbalanced situations [in trade]").

88. *See generally* Nichols, *supra* note 16, at 714-15 (noting membership allows a country to participate in "a regime that will increase global income by as much as five hundred billion dollars").

89. *See* Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 art. XXIV:6, ¶ 12, Apr. 1, 1994, General Agreement on Tariffs and Trade 1994 55 U.N.T.S. 194 [hereinafter Understanding of Art. XXIV] *available at* http://www.wto.org/english/docs_e/legal_e/10-24.pdf (providing "the Dispute Settlement Understanding *may* be invoked with respect to any matters arising from the application of those provisions of Article XXIV relating to [PTAs]") (emphasis added).

90. JACKSON, DAVEY, & SYKES, *supra* note 9, at 556.

91. Nichols, *supra* note 16, at 737; *see also* JACKSON, DAVEY, & SYKES, *supra* note 9, at 283 (noting Annex 2 of the WTO Agreement contains the WTO's dispute-settlement rules); Gadbaw, *supra* note 62, at 569 (describing Article XXIII of the GATT as the source of recourse for a WTO Member whose benefits have been nullified or impaired, "whether by a violation of the agreement, any measure, or any other situation").

unfettered corruption in trade because it could mean that countries with corrupt courts will have no one to answer to for their misdeeds. "Ultimately, the success of [national dispute resolution systems] depends on whether the courts of the Member States are . . . free from corruption,"[92] which plagues the judiciaries in the countries of far too many WTO Members and causes judges themselves to support illicit practices.[93]

Although the WTO does make all PTAs available for public consumption,[94] transparency regarding what an agreement contains is not the same as transparency regarding what the members of an agreement actually do.[95] In recent years, for instance, China has demonstrated how agreements involving issues of trade can become subservient to corrupt interests. Before inviting China to accede to the WTO in December 2011, a Working Party examined China's request to become a WTO Member;[96] corruption in China—namely in the form of piracy,[97] or intellectual property theft—was a concern for the Working Party:

> Some members of the Working Party further urged China to ensure the vigorous application by Chinese authorities of the enforcement legislation in order to considerably reduce the existing high levels of copyright piracy and trademark counterfeiting. Action should include the closure of manufacturing facilities as well as markets and retail shops that had been the object of administrative convictions for infringing activities.98

In response, Chinese officials assured the Working Party that China's measures for fighting piracy are severe:

> The representative of China stated that the measures for cracking down on intellectual property piracy were always severe in China. In judicial aspects,

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92. DAVID A. GANTZ, REGIONAL TRADE AGREEMENTS: LAW, POLICY AND PRACTICE 378 (2009).

93. *See also* Joseph Muraya, *East Africa: Police, Judiciary Most Corrupt in East Africa*, ALLAFRICA (Nov. 22, 2013), http://allafrica.com/stories/201311230150.html (reporting that East Africa's judiciary comprises some of the most corrupt public officials in the region). *See generally, e.g.*, Mary Noel Pepys, *Corruption within the Judiciary: Causes and Remedies*, GLOBAL CORRUPTION REPORT 2007: CORRUPTION IN JUDICIAL SYSTEMS, *supra* note 16, at 3 ("In many . . . countries, judicial corruption is a systemic problem . . . The judicial system may be structured to foster corruption. The external pressures on a judge to act unethically are greater, and the risks of being caught and punished are lower."); Brent T. Yonehara, *Enter the Dragon: China's WTO Accession, Film Piracy and Prospects for the Enforcement of Copyright Laws*, 9 UCLA ENT. L. REV. 389, 408 (2002) (noting corruption in China's judiciary);

94. *See* Transparency Mechanism for Regional Trade Agreements, ¶ A(2) WT/L/671 (Dec. 18, 2006) (providing "the WTO Secretariat . . . will post [PTAs] on the WTO website . . .").

95. As the cliché goes: actions speak louder than words.

96. Working Party Report, *Report of the Working Party on the Accession to China*, WT/ACC/CHN/49 (Oct. 1, 2001) [hereinafter *Report of the Working Party*], *available at* http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/ACC/CHN49.doc.

97. Piracy is a form of corruption—rather than just illegality—because it breeds the abuse of public power, namely the willful failure of officials to enforce laws. *See infra* notes 102-05 (citing sources that support the proposition that piracy is a form of corruption).

98. *Report of the Working Party*, *supra* note 96, at 60.

> courts at all levels were continuously paying attention to the trial of IPR cases. As for administration aspects, the administrative authorities at all levels were putting emphasis on strengthening anti-piracy work. . . . in a bid to ensure that the legal environment of China would be able to meet the requirements for enforcing the [WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)]. 99

Days later the Ministerial Conference granted accession to China, which in return had consented to enforce laws in protection of Trade-Related aspects of Intellectual Property Rights, or TRIPS.[100]

Despite China's commitment to the eradication of piracy, its piracy rate has now reached almost ninety percent,[101] and this past summer, during an unprecedented summit with the president of China, President Obama even "confronted [President] Xi with specific evidence of intellectual property theft the U.S. says is coming from China."[102] With its astronomical piracy rate, China is likely in violation of TRIPS.[103] China's assurances to the Working Party now have the appearance of rhetoric, which has given way to the financial boon and political security that piracy affords to local merchants and local officials, respectively:

> Local level leaders are evaluated by the economic performance of their local political units and counterfeiting can be a boom to the local economy. The trade in counterfeit goods can absorb large numbers of unemployed workers, generate substantial revenues, provide tax revenues, and support other legitimate industries such as warehouses, hotels, restaurants, and nightclubs in the local economy.104

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99. *Id.* at 62.

100. The Ministerial Conference, *Protocol on the Accession of the People's Republic of China*, WT/L/432 ¶ 2(A)(2) (Nov. 23, 2001), *available at* http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/L/432.doc.

101. Chun-Hsien Chen, *Explaining Different Enforcement Rates of Intellectual Property in the United States, Taiwan, and the People's Republic of China*, 10 TUL. J. TECH. & INTELL. PROP. 211, 211 n.2 (2007) (citing BUS. SOFTWARE ALLIANCE & INT'L DATA CORP., THIRD ANNUAL BSA & IDC GLOBAL SOFTWARE PIRACY STUDY 4 (2006), *available at* http://www.bsa.org/~/media/Files/Research%20Papers/GlobalStudy/2005/IDC_Global_Software_Piracy_Study_2005.pdf).

102. Gillian Wong, *Leak of NSA Programs Tests US, China Ties*, YAHOO! NEWS (June 10, 2013), http://news.yahoo.com/leak-nsa-programs-tests-us-china-ties-110817133.html. The U.S. believes that China has engaged in phony sting operations through which the government has targeted only "minor players," not the major manufacturers of pirated products. Alexander C. Chen, *Climbing the Great Wall: A Guide to Intellectual Property Enforcement in the People's Republic of China*, 25 AIPLA Q.J. 1, 32 (1997). Even when officials do target and shut down major factories, they spring back into business in a matter of months, or new ones appear.

103. Oliver Ting, *Pirates of the Orient: China, Film Piracy, and Hollywood*, 14 VILL. SPORTS & ENT. L.J. 399, 408 nn.40-41 (2007) (explaining why China is in violation of its TRIPS agreement) (citing INT'L INTELLECTUAL PROP. ALLIANCE, COPYRIGHT ENFORCEMENT UNDER THE TRIPS AGREEMENT 3-4 (2004), *available at* http://www.iipa.com/rbi/2004_Oct19_TRIPS.pdf).

104. DANIEL C.K. CHOW, THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA IN A NUTSHELL 446 (Thomson Reuters, 2d ed. 2009) (2003).

Even the judiciary is not immune from the corrupt influence of piracy. Because local officials have the authority to "confer power and reject officials"[105] and because judges are beholden to these local officials for funding, salaries, and continued employment,[106] they relent to pressure that the government places on them—pressure that results in their willful failure to enforce anti-piracy laws.[107]

In large part, the central government in Beijing is responsible for the corrupt practice of piracy in China because it has given local governments *discretion* to enforce intellectual property laws as they see fit,[108] much like the WTO gives countries discretion to negotiate and enforce their PTAs as they see fit.[109] The countries, for example, that are parties to the Southern Common Market ("MERCOSUR") Agreement—Argentina, Brazil, Paraguay, and Uruguay—have used their discretion to adopt a "system for the settlement of disputes . . . ."[110] Their judiciaries, however, are so corrupt that they have undermined procedural processes that are essential to the resolution of disputes among the MERCOSUR's members.[111] The MERCOSUR is "one of the most . . . important regional trade agreements ever concluded,"[112] but its members will not have harmony in their dispute resolution systems if their courts remain corrupt.[113]

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105. Yonehara, *supra* note 93, at 415 n.217 (citing Julia Cheng, *China's Copyright System: Rising to the Spirit of TRIPS Requires an Internal Focus and WTO Membership*, 21 FORDHAM INT'L. L.J. 1941, 1986 (1998)).

106. *Id.* at 408 ("[J]udges [can] have strong personal ties with their local communities. . . . [and] [l]ocal enforcement authorities are usually beholden to the same local officials who control the purse strings to their offices and are allowing the piracy to continue.") (citing Scott J. Palmer, *An Identity Crisis: Regime Legitimacy and the Politics of Intellectual Property Rights in China,* 8 IND. J. GLOBAL LEGAL STUD. 449, 465-66 (2001)).

107. *See generally* CHOW, *supra* note 104, at 448 ("judges may be beholden to the local governments that appointed and may face pressures to protect the local trade in counterfeit and pirated goods"); Amanda S. Reid, *Enforcement of Intellectual Property Rights in Developing Countries: China as a Case Study*, 13 DEPAUL-LCA J. ART & ENT. L. & POL'Y 63, 93 n.182 (2003) (citing KLITGAARD, MACLEAN-ABAROA, & PARRIS, *supra* note 19, at 40).

108. Yonehara, *supra* note 93, at 415 n.216 (citing Cheng, *supra* note 105, at 1985-986).

109. *See* BHAGWATI & KRUEGER, *supra* note 3, at 2 (describing PTAs as inherently preferential instruments—meaning that governments have the discretion to choose the countries with which they would like to pursue agreements); *see also* GATT, *supra* note 7, at art. XXIV,¶ 8 (stating countries that pursue PTAs need only concern themselves with one restrictive precondition: PTAs must liberalize "substantially all the trade between the constituent territories"); Understanding of Art. XXIV, *supra* note 89, at art. XXIV:6,¶ 12 (providing "the Dispute Settlement Understanding *may* be invoked with respect to any matters arising from the application of those provisions of Article XXIV relating to [PTAs]") (emphasis added); JACKSON, DAVEY, & SYKES, *supra* note 9, at 556 (noting members of a PTA are free to devise their own mechanisms for enforcement).

110. Treaty Establishing A Common Market Between The Argentine Republic, The Federative Republic Of Brazil, The Republic Of Paraguay and The Eastern Republic Of Uruguay, Mar. 26, 1991, 30 I.L.M. 1041 [hereinafter MERCOSUR].

111. GANTZ, *supra* note 92, 365-378.

112. *Id.* at 365.

113. *Id.* at 378.

E. PTAs and Lack of Accountability: No Heed to the Possibility of Corruption

Although no uniform definition of the term "accountability" exists in the literature or lexicons that address corruption, a strong indication of accountability, or the lack thereof, is the type of company that a person chooses to keep—or for WTO Members, the countries with which they do business.[114] Indeed, under the FCPA,[115] which has become a model for nations that have sought to enact anti-corruption laws,[116] parties must perform due diligence on partners with which they engage in business, or else risk complicity for their corrupt activities.[117] Based on the FCPA's standards, the accountability of WTO Members that enter into PTAs is dubious because some of the PTAs in existence are conglomerates of the most corrupt countries in the world. In addition, PTAs among corrupt conglomerates lack provisions that address corruption,[118] whereas countries on the frontline of the

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114. "Do not be misled: '[b]ad company corrupts good character.'" 1 *Corinthians* 15:33 (New Int'l Version). In similar terms, Julio Rojas, CEO Standard Chartered Bank in the Americas, once said "[w]ho you choose *not* to do business with sends a very strong message about corruption." THE WORLD BANK GROUP & INTEGRITY VICE PRESIDENCY, ANNUAL REPORT: FINDING THE RIGHT BALANCE 16 (2012) (emphasis in original) (quoting Julio Rojas), http://siteresources.worldbank.org/EXTDOII/Resources/WBG_IntegrityReport2012.pdf.

115. FCPA Articles, *supra* note 22.

116. *See, e.g.*, Peter J. Henning, *Dealing with the Foreign Corrupt Practices Act*, N.Y. TIMES (Mar. 4, 2013), http://dealbook.nytimes.com/2013/03/04/dealing-with-the-foreign-corrupt-practices-act/?_r=0.

117. FCPA Articles, *supra* note 22, at § 78dd-2(a); THE CRIMINAL DIVISION OF THE U.S. DEPARTMENT OF JUSTICE AND THE ENFORCEMENT DIVISION OF THE U.S. SECURITIES AND EXCHANGE COMMISSION, A RESOURCE GUIDE TO THE FOREIGN CORRUPT PRACTICES ACT, *supra* note 21, at 60.

118. *Compare* COMESA, *supra* note 83 (containing no anti-corruption provisions), *and* MERCOSUR, *supra* note 110 (containing no anti-corruption provisions) *with* United States-Morocco Free Trade Agreement art. 18.5(1)-(5), June 15, 2004, 44 I.L.M. 544 *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/morocco/asset_upload_file939_3855.pdf (containing comprehensive provisions against corruption). The anti-corruption provisions under Article 18.5 of the United States-Morocco Free Trade Agreement state:

> ARTICLE 18.5: ANTI-CORRUPTION
>
> 1. The Parties reaffirm their continuing resolve to eliminate bribery and corruption in international trade and investment.
>
> 2. Each Party shall adopt or maintain the necessary legislative or other measures to establish that it is a criminal offense under its law, in matters affecting international trade or investment, for:
>
> (a) a public official of the Party or a person who performs public functions for the Party intentionally to solicit or accept, directly or indirectly, any article of monetary value or other benefit, such as a favor, promise, or advantage, for himself or for another person, in exchange for any act or omission in the performance of his public functions;
>
> (b) any person subject to the jurisdiction of the Party intentionally to offer or grant, directly or indirectly, to a public official of the Party or a person who performs public functions for the Party any article of monetary value or other benefit, such as a favor, promise, or advantage, for himself or for another person, in exchange for any act or omission in the performance of his public functions;
>
> (c) any person subject to the jurisdiction of the Party intentionally to offer, promise, or give any undue pecuniary or other advantage, directly or indirectly, to a foreign official, for that official or for another person, in order that the official act or refrain from acting in relation to the performance of

anti-corruption regime have long ago recognized the need to expand the coverage of trade agreements to cover issues relating to corruption.[119] Many PTAs among corrupt conglomerates also do not mandate that national tribunals or panels must publish their decisions—a lack of transparency that is typically a red flag for corruption and invites corruption in judiciaries.[120] For the countries that have formed corrupt conglomerates through PTAs, even the suggestion that they are unaware they have made bedfellows with historically corrupt partners is naive; a more realistic view is that they are aware but have no fear they could be investigated or held accountable by the WTO.

IV. CONCLUSION AND SOLUTION

The spaghetti bowl of PTAs is complex not only because of the many strands within it but also because of the countless reasons that countries form these strands. Although PTAs serve legitimate interests of parties in international trade, they may also serve illegitimate interests because they are instruments that are vulnerable to corruption. Parties can arrange PTAs so they take on all the variables in Dr. Klitgaard's formula: monopoly power, discretion by officials, and lack of accountability. These agreements therefore could be attractive to corrupt governments that seek to perpetrate corrupt schemes involving the vast network of countries in the WTO, but beyond the WTO's oversight. Indeed, corrupt practices could very well be playing some role in the formation of PTAs between countries today, and may have been doing so for years. Although the variables in Dr. Klitgaard's formula do not equate to a smoking gun, they probably are tantamount to a preponderance of the evidence: if a business transaction or agreement embodies the three variables, then corruption is more likely than not to exist.

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official duties, in order to obtain or retain business or other improper advantage in the conduct of international business; and

(d) any person subject to the jurisdiction of the Party to aid or abet, or to conspire in, the commission of any of the offenses described in subparagraphs (a) through (c).

3. Each Party shall make the commission of an offense described in paragraph 2 liable to sanctions that take into account the gravity of the offense.

4. Each Party shall strive to adopt or maintain appropriate measures to protect persons who, in good faith, report acts of bribery described in paragraph 2.

5. The Parties recognize the importance of regional and multilateral initiatives to eliminate bribery and corruption in international trade and investment. The Parties shall work jointly to encourage and support appropriate initiatives in relevant international fora.

United States-Morocco Free Trade Agreement art. 18.5(1)-(5), June 15, 2004, 44 I.L.M. 544 *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/morocco/asset_upload_file939_3855.pdf.

119. *Trade Protection and Enforcement: Hearing before the H. Appropriations. Comm., Subcomm. on Commerce, Justice, State, & the Judiciary, 104th Cong.* (May 8, 1996) ("We aim to expand the coverage of trade agreements to address . . . bribery and corruption.") (statement by Charlene Barshefsky, Former U.S. Trade Rep.).

120. *See* Voigt, *supra* note 16, at 297 ("If judicial decisions, as well as the underlying reasoning, need to be published, expected corruption levels are lower.").

While anti-corruption has yet to come to the fore of the WTO's agenda, the WTO has the power to restrain corruption that thrives under PTAs. The most obvious step that the WTO can take to thwart corruption is the negotiation of a multilateral agreement against corruption, one that carries the consequence of retaliatory measures under the GATT. The negotiation of multilateral agreements among the WTO's Members, however, is likely to be too idealistic in light of the Doha Round's failure, which may now signal that multilateralism is a bygone era in the WTO.[121] A more practical solution may simply require the WTO to become vocal regarding the ill effects of corruption on trade and the relationship between PTAs and corruption. In past years, the WTO has used its flagship publication, *World Trade Report*, to report on issues that are on the vanguard of international trade—like the effect that trade can have on the world's water resources—but regarding which the WTO has neither specific agreements nor rules.[122]

The WTO can and should issue a report on the effects of corruption on trade and provide insights regarding how PTAs can become breeding grounds for corruption. On a broad level, the report must urge members of the WTO to ratify, implement, and—most importantly—enforce the UNCAC and the OECD Convention through their domestic legal systems. With regard to PTAs in particular, the report should encourage Members to incorporate anti-corruption provisions into these agreements, provisions that not only contain commitments against corruption but also require arbitral tribunals to apply rules of law from countries with strong anti-corruption statutes. While the report would not equate to a promulgation of anti-corruption rules or agreements within the WTO's framework, it would place pressure in the form of public shame on Members to implement appropriate anti-corruption measures in the context of trade—a common tactic behind the enforcement of today's anti-corruption conventions.[123]

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121. *See, e.g.*, Jagdish Bhagwati, *Doha Round: Failure of Talks Means World Lost Gains that a Successful Treaty Would Have Brought*, ECON. TIMES (June 1, 2012), http://articles.economictimes.indiatimes.com/2012-06-01/news/31959341_1_ptas-wto-multilateral-trade ("The Doha Round, the latest phase of multilateral trade negotiations, failed in November 2011, after 10 years of talks, despite official efforts by many countries, including the UK and Germany, and by nearly all eminent trade scholars today.")

122. WTO SECRETARIAT, WORLD TRADE REPORT 2010: TRADE IN NATURAL RESOURCES 3-5 (2010) *available at* http://www .wto.org/english/res_e/booksp_e/anrep_e/world_trade_ report10_e.pdf ("Natural resources tend to be concentrated in relatively few locations around the world. This makes for profitable trading opportunities among nations. At the same time, because natural resources are so crucial to many economic activities, adequate access to them is regarded as a vital national interest everywhere. Those who possess natural resources may not always wish to trade them, but rather to harness them domestically . . . . [S]upply or demand for natural resources . . . can become a source of political tension.").

123. *See, e.g.*, The OECD WORKING GROUP ON BRIBERY, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN SOUTH AFRICA 5-76 (2014), *available at* http://www.oecd.org/daf/anti-bribery/SouthAfricaPhase3ReportEN.pdf (providing a scathing review of South Africa's compliance with the OECD Convention).

THE OPTIMAL USE OF COMPARATIVE LAW

SHAI DOTHAN*

I. INTRODUCTION

One of the arguments for the use of comparative law by national courts is that learning from the experience of other nations can improve the quality of the legal decisions made by national courts. This argument has been advanced by Eric Posner and Cass Sunstein[1] using the Condorcet Jury Theorem, which proposes that if a decision is made by a number of independent "jurors," that decision is likely to be a correct decision—and, therefore, a decision worth following.[2] Applied to comparative law, the theorem suggests that if a number of individual states reach the same legal decision, that decision is probably a correct decision and, therefore, a decision worth following.

Yet there is a problem with this argument, as Posner and Sunstein themselves acknowledge: if states learn from each other's law, their decisions are no longer independent and therefore the theorem's condition of independent "jurors" is no longer met.[3] In fact, in learning from states in other parts of the world, states may fall prey to information cascades in which they harmfully follow each other's lead without analyzing any new information. With that risk in mind, Posner and Sunstein argue that states who want to support the global interest and provide new information on how to improve the law should not imitate others.[4] But while Posner and Sunstein's framework answers the problem of information cascades, it

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1. Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 136 (2006).

2. *Id.*

3. *Id.* at 163.

4. *Id.* at 163-164.

does so at the expense of maximizing the benefits to be gained from comparative law—namely, allowing all states to learn from each other's experiences.[5]

This paper suggests an alternative framework, one which recovers the benefits of comparative law without risking the development of information cascades. At the heart of this alternative framework is the doctrine of Emerging Consensus, currently used by the European Court of Human Rights ("ECHR"). Under this doctrine, the ECHR examines whether a particular practice has been outlawed by a critical number of states; if so, the ECHR declares that practice to have violated the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").[6] In other words, the ECHR aggregates the preferences of a wide range of states, each of which has already made an independent decision. The resulting rule allows for the benefits of comparative law—because all states can then adopt the ECHR's rule—without the risk of information cascades, since the rule was based on the "emerging consensus" of states who had already made their decisions independently.

The remainder of this paper examines the benefits of the Emerging Consensus framework and proposes solutions for the obstacles facing international and regional courts who might wish to apply it—namely, that strategic behavior by states may prevent these courts from reaching good decisions and that these courts may have other motivations, which prevent them from directly applying Emerging Consensus.

To set up this examination, Part II introduces the argument for the use of comparative law by national courts, noting both the position advanced by Posner and Sunstein as well as the problem of information cascades. Part III then outlines the doctrine of Emerging Consensus and Part IV explains why implementing the doctrine may facilitate better decision-making than simply relying on national courts to use comparative law. Part V suggests doctrinal tools that can ensure the successful use of Emerging Consensus. Part VI addresses the problem of states engaging in strategic behavior that can hinder the effective use of Emerging Consensus and offers some solutions to this problem. Part VII addresses the problem of regional and international courts like the ECHR possibly having motivations other than applying Emerging Consensus correctly. Part VIII concludes by highlighting some of the institutional advantages of international courts over national courts.

II. THE ARGUMENT FOR THE USE OF COMPARATIVE LAW BY NATIONAL COURTS

A. Posner and Sunstein's Argument

Posner and Sunstein start from the intuition that states can learn from each other's experience and use the decisions of other nations to improve their own.[7]

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5. *Id.*

6. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

7. Posner & Sunstein, *supra* note 1, at 136.

They use the Jury Theorem, originally invented by the 18th century French philosopher Nicolas de Condorcet, to discipline this intuition.[8] The Jury Theorem is a simple mathematical model that suggests that if a series of jurors decide by majority vote between two answers—one of which is false and the other true—and every juror has a probability of more than 50% to reach the correct result, then the greater the number of jurors, the more likely it is that the decision of the group will be correct.[9] As the size of the group increases, the chances of reaching the correct result approaches 100%.[10]

Posner and Sunstein synthesize three conditions that are necessary for the practice of comparative law to lead to good results under the Jury Theorem.[11] First, the decisions of the foreign states must sincerely reflect their choices, which are based on private information.[12] Second, the foreign states must be sufficiently similar to make learning from them useful.[13] Third, the foreign states must have decided independently, rather than mimicking the decisions of other states.[14] Posner and Sunstein indicate when these conditions are likely to hold and when they are unlikely to hold.[15] They argue that following the Jury Theorem can often lead to superior results on factual questions, such as which penalty system would prevent crime more effectively, as well as on moral questions, such as which penalty system is morally justified.[16] This paper will focus on the third condition for the applicability of the theory—the requirement that the decisions of different nations must be independent from each other.

B. The Limitations of National Courts

Under the framework presented by Posner and Sunstein, national courts should learn from the experiences of other national courts because these other courts made their decisions based on valuable information.[17] But if national courts mimic each other and do not decide independently, their decisions do not reveal any new information as to what is the correct result.[18] Courts that follow each

8. *Id.*
9. *Id.* at 141.
10. *Id.*
11. *Id.* at 144.
12. *Id.*
13. *Id.*
14. *Id.* at 144-45.
15. *Id.* at pts. II-IV.
16. *Id.* at 149-54.
17. National courts may follow the decisions of other legal bodies, besides courts, within foreign states, such as the parliament's statutes or even the executive's decisions and regulations. Similarly parliaments or executives may choose to follow the judgments of foreign national courts as they set policy. Because in many of the situations discussed by the ECHR, which deals with the interpretation of the limits of protection of human rights, national courts are the ultimate arbitrator within the state and in the interest of simplicity, the paper refers interchangeably to the decision of national courts and of states.
18. This problem may be less severe if courts do not just follow each other but instead try to learn from the arguments used by other courts. But this is a different use of comparative law than the one studied by Posner and Sunstein. *See infra* note 255 and accompanying text. Any reference to

other's decision may form a "cascade." Posner and Sunstein distinguish between two kinds of cascades—reputational and informational.[19] A reputational cascade is formed when decision makers follow each other not because they think this will lead to a better result, but because they are afraid that their reputation will be damaged if they decide differently from the others.[20] An informational cascade is formed when decision makers try to learn from the decisions of others in an attempt to improve their own decisions, but because each decision maker followed other decision makers, no individual decision provides any new information.[21] Reputational cascades may or may not occur depending on states' interests. Informational cascades, however, pose a much greater challenge to Posner and Sunstein's argument, which they clearly acknowledge. Posner and Sunstein's normative claim is that courts should learn from each other in order to reach better results; but if all courts learn from each other, their decisions are not independent and other courts should not learn from them.[22] This framework, therefore, fails to provide a universal rule that can guide courts on how to make good decisions.

If courts in different states tend to behave differently from each other, Posner and Sunstein's framework can still lead to some valuable normative suggestions. For instance, if some courts are known to decide independently, other courts can learn from these independent choices in order to improve their own decisions. On the other hand, the more courts that follow this suggestion, the lower the quality of information other courts can obtain from looking to comparative law, since fewer courts would decide independently. Therefore, courts who want to help other courts make good decisions should not follow the decisions of other courts—but if all courts were not to follow others, no one will gain the benefits of relying on comparative law.[23] If states clearly diverge in their use of comparative law, a stable equilibrium may theoretically be reached in which some states decide independently and other states learn from their experience. But, if states differ from each other in their propensity to apply comparative law, they may be different in other respects as well. If states are fundamentally different, they should not learn from each other since they are not sufficiently similar to comply with the conditions of the Jury Theorem.[24]

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comparative law in this paper is only to the act of following the law adopted by a majority of foreign states or national courts, even though there are many other potential uses of comparative law (for example, courts can learn from the decision of a minority of courts because it is based on valid arguments or use comparative law only as an inspiration to find ways to improve their doctrine).

19. Posner & Sunstein, *supra* note 1, at 161.

20. *Id.* at 162-63.

21. *Id.* at 161-62.

22. *Id.* at 163.

23. *Id.* at 164.

24. The decision to apply comparative law is a second-degree doctrinal choice—it chooses a method on how to choose what law will apply in certain conditions. Nevertheless it is still a doctrinal choice and therefore the logic presented by Posner and Sunstein applies to it, namely, states can learn from the decisions of other states on the question whether to use comparative law. If states will imitate each other's decision on whether to apply comparative law, all states will either apply comparative law—leading to an information cascade, or decide not to apply comparative law, in which case its

If national courts do not just follow the final decisions reached by other states, but instead try to evaluate the ultimate reasons that led to those states' decisions, then national courts may be able to discern whether the states' decisions reflect new information or whether they are simply an imitation of the decisions of other states. If the court can expose all the relevant arguments on the subject, however, there is no real need for it to follow the majority of states—the court can simply assess the arguments according to their own merits. The problem is that often the real grounds for the decisions of other courts or states and the information that guided it are hidden or unclear.[25]

To a certain extent, many states probably exercise some measure of independent discretion when they decide to adopt a legal regime, or at least when they decide to adhere to it after it was adopted. Because informational cascades do not occur immediately, states may have time to test legal regimes independently and render learning from their experience a fruitful exercise. Under these conditions, national courts can gain some informational advantage from comparative law. International courts, however, can sometimes exceed these benefits. They can set a doctrine that, if followed by all states, will prevent informational cascades altogether. This paper argues that this is one way to account for the doctrine of Emerging Consensus applied by the ECHR.

III. THE DOCTRINE OF EMERGING CONSENSUS

The Emerging Consensus doctrine directs the ECHR to consider current views on human rights protection as it interprets the Convention.[26] There are three common interpretations of the doctrine: (1) as a direction to the ECHR to follow the laws of European states, (2) as a direction to the ECHR to follow the views of experts, (3) and as a direction to the ECHR to consider the views of the European public.[27] According to recent empirical evidence, the ECHR in fact applies a version of the first interpretation of the doctrine—if the majority of European states protect a certain human right, the ECHR will read the Convention as ensuring protection of this right and will find states that infringe this right in violation of the Convention.[28]

Emerging Consensus allows the ECHR to learn from the experience of European states and follow what seems to be the norm among the majority of these

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benefits will not be realized. States can be different from each other in their propensity to use comparative law, for instance some national courts will not have the facilities to conduct comparative research and will therefore make independent decisions. Other states may learn from these decisions, but only if they are sufficiently similar to the condition of that state. If a state is unable to conduct comparative research it may also be poor or underdeveloped, for instance, lowering the benefit of any attempt of more developed states to learn from its decisions.

25. Posner & Sunstein, *supra* note 1, at 146, 164.

26. *See* Laurence R. Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 26 CORNELL INT'L L.J. 133, 139-140 (1993).

27. *Id.* at 139.

28. Laurence R. Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 68 INT'L ORG. 77, 106 (2014).

states. This norm will then be applied to all states, which then must adhere to the new standard of human rights protection discovered by the ECHR. The doctrine is a key tool that allows the ECHR to interpret the Convention in an evolutionary manner, which improves human rights protection over time, because it allows the ECHR to follow progressive tendencies within European States.[29]

Emerging Consensus implies that the ECHR should strive to harmonize how human rights are protected in different states in Europe. The doctrine is balanced, however, by an underlying principle of the convention system—the principle of subsidiarity. This principle implies that states should be given leeway to decide the degree of protection they grant to different human rights.[30] This leeway is reflected in another doctrine adopted by the ECHR—the Margin of Appreciation. The Margin of Appreciation directs the ECHR to defer to the state's decision and not to find it in violation of the Convention, unless the violation of the right exceeds a certain latitude of choice granted to the states.[31] The greater the degree of European consensus that a certain right should be protected, however, the narrower will be the willingness of the ECHR to defer to the state, and the narrower the latitude of choice it will be granted under the Margin of Appreciation doctrine.[32]

IV. THE BENEFIT OF EMERGING CONSENSUS—PREVENTING CASCADES

Emerging Consensus allows the ECHR to learn from the experience of all European states. The ECHR can use this doctrine to find out what the majority of states in Europe choose to set as their laws. According to the Jury Theorem, this majority approach is likely to be a good legal solution.[33] After the ECHR discovers this legal solution, it can set it as a standard that all European states must follow; otherwise, the ECHR will find them in violation of the Convention. In order for the ECHR to gain the most information from the laws of different European states, these states should decide independently from each other and only conform to the ECHR's judgment after it was given.[34]

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29. *See* Helfer, *supra* note 26, at 134; Tyrer v. United Kingdom, 26 Eur. Ct. H.R. 31, ¶ 31 (1978) (stating the ECHR should interpret the Convention according to present conditions including the current laws in European states).

30. *See* Tomer Broude & Yuval Shany, *Introduction to* THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY 1, 6 (Tomer Broude & Yuval Shany, eds., 2008), *available at* xa.yimg.com/kq/groups/23157333/794364126/name/shitfting.

31. *See* Dickson v. United Kingdom, 2007-V Eur. Ct. H.R. 99, ¶ 77.

32. *See* Eyal Benvenisti, *Margin of Appreciation, Consensus and Universal Standards*, 31 NYU J. INT'L L. & POL. 843, 851 (1999); Helfer, *supra* note 26, at 140.

33. *See* Posner & Sunstein, *supra* note 1, at 136.

34. If each of the states chooses between more than two options the majority's decision may lack transitivity. This problem and ways to resolve it are discussed in Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 107-110 (1986). It will not be discussed further here. *See* Shai Dothan, *Comparative Views on the Right to Vote in International Law: The Case of Prisoners' Disenfranchisement*, *in* COMPARATIVE INTERNATIONAL LAW (Anthea Roberts et al. eds, Forthcoming

States may not want to decide independently for their own reasons, some of which are discussed in Part VI. Similarly, the ECHR may fail to apply Emerging Consensus correctly for its own reasons, some of which are discussed in Part VII. These parts also suggest ways to counter these problems. Emerging Consensus has a key advantage over the use of comparative law by national courts, however. It provides a universal rule that can lead to optimal results if followed by the ECHR and the states—that is, if states decide independently and the ECHR applies Emerging Consensus correctly. Because under Emerging Consensus as it is presented here states should decide independently, an informational cascade is prevented. Because the ECHR learns from the experience of the states and applies the majority's decision across Europe, the benefits of the Jury Theorem are fully realized.

In contrast, no universal rule can guide national courts that apply comparative law themselves. If they learn from each other, they will create an informational cascade; if they do not learn from each other, they will not realize the benefits of the Jury Theorem. Because only a universal rule can be applied by courts without them bearing prohibitive costs to uncover the decision-making processes of every other foreign court, the doctrine of Emerging Consensus is better than the application of comparative law by national courts. It guides all states in a way that can lead to optimal results if followed by those states.[35]

V. MECHANISMS TO ENSURE THE SUCCESS OF EMERGING CONSENSUS

If all the states in Europe have the same propensity to adopt good laws and if the ECHR is able to survey all of their national laws, the best results under the Jury Theorem will be achieved by following the majority of states. Yet, these two conditions will often not apply. Some states may be more likely to make good law than others and the ECHR may be able to study only the laws of a limited number of states because of its limited resources. Under these constraints, the ECHR should try to survey only the laws of states that are likely to make better law, or at least try to give their laws greater weight.

Oxford Univ. Press 2015) (analyzing situations in which this problem should limit the use of the Emerging Consensus Doctrine).

35. Posner and Sunstein address the issue of decisions by international courts and even speak specifically about the ECHR but without discussing Emerging Consensus. Their paper views the decision of the international court as reflecting the agreement of states that ratified the treaty which formed the court. If many states ratified the treaty they argue that this should count as a vote of many states which is likely to be correct under the Jury Theorem. If states joined the treaty for ulterior reasons that have nothing to do with a mutual choice to adopt a specific rule and if the ECHR decides based on the views of the judges instead of the prescriptions in the treaty then the decision of the ECHR should count for less than a vote of all the states in Europe. *See* Posner & Sunstein, *supra* note 1, at 165-166. The theory presented here, however, does not focus on the agreement of states to join the treaty, but on the ability of the ECHR to learn from the individual decisions of all European states under Emerging Consensus. It therefore does not suffer from the shortcomings presented by Posner and Sunstein.

If the ECHR judges choose which states to learn from, they may manipulate this choice according to the result they want to reach.[36] However, to the extent that the ECHR judges do not manipulate their choice, but rather try to learn as much as they can from the states, choosing to survey the laws of only a few states may be very efficient, because under the Jury Theorem the informational value added from each new state surveyed declines steeply as the number of surveyed states increases.[37] If the ECHR already surveyed a substantial number of states for a particular case, it can gain very little from looking at the laws of even more states. If the ECHR wants to make as many good choices as possible under a resource constraint, it should survey a few states in as many cases as possible, instead of surveying all states in only a few cases.

Posner and Sunstein argue that national courts that cannot survey the laws of all states should focus on states that provide their populations with the highest standards of living, as those states are more likely to make better laws.[38] The ECHR can similarly rely on the relative success of states when it decides which states should count more for the purpose of identifying an Emerging Consensus. It may be very problematic, however, to decide what factors are the most relevant to judge the success of states. Should the happiness of the population be more important than the strength of the economy? Should the protection of political rights matter more than the protection of social rights? Furthermore, the position of the ECHR is especially difficult compared to that of national courts that apply comparative law. National courts make decisions that affect their own states and are under no obligation not to discriminate between the states that they learn from. The ECHR judgments set human rights standards for all of Europe[39] and if the ECHR appears biased in favor or against learning from the laws of certain states, this can seriously damage its legitimacy. Therefore, the ECHR may have to hide the fact that it gives greater weight to the laws of certain states and use its legal reasoning to give the impression that the laws of all states are treated equally.

Bearing in mind that the ECHR may have to conceal the fact that it gives different weights to the laws of different states, it may want to consider other factors when it decides on these relative weights. One important factor is the nature of the state's political system. Democracies, for example, often make decisions by majority rule and involve a large group of decision makers, either directly or through representative organizations. Therefore, according to the logic that underlies the Jury Theorem, their decisions are more likely to be correct than those of non-democracies.[40] A similar conclusion can be reached without the Jury Theorem, as many consider democracy the best system of government because of its ability to restrain corruption by checks and balances.[41] Another important factor is the size of the state. Democracies with bigger populations integrate the

36. *See infra* Part VII.
37. *See* Posner & Sunstein, *supra* note 1, at 169.
38. *See id.* at 174-75.
39. *See* Karner v. Austria, 2003-IX Eur. Ct. H.R. 199, ¶26.
40. *See* Posner & Sunstein, *supra* note 1, at 159.
41. *See* THE FEDERALIST NO. 51 (James Madison).

wisdom of more people than less populous democracies. Their decisions should therefore usually be better according to the Jury Theorem. More populous states face greater legal coordination challenges and may be able to invest more resources in improving their laws. These are additional reasons why their laws should be given a greater weight.

The ECHR can distinguish between the laws of different states not only by the different qualities of the state itself but also by the quality of the process that led to a specific legal rule. If a law was adopted after a long and serious deliberation, the ECHR may want to pay special attention to it when it discovers an Emerging Consensus, as it is more likely to be a good law. If a law seems to gain the approval of a substantial majority of the population within a state, it is more likely to be correct than a law that was accepted by a narrow margin. Certain laws and certain legal issues may be very salient in some states, but considered unimportant in other states.[42] States that view a certain law as especially important should be given more weight. A more problematic situation arises when one state recently changed its laws to deal with a certain issue while another state deals with the same issue based on an old legal provision. It may be beneficial to give the more veteran law a greater weight because the state that uses it probably applied it successfully for a long time without a need for a revision. On the other hand, the new law, even if it was not actually tested, was adopted after a recent deliberation that took current conditions into account. The relative merits of the test of time and of fresh deliberation probably differ across different issues.

Emerging Consensus retreats when the state's practices are given a Margin of Appreciation.[43] The boundaries of the Margin of Appreciation allotted to the state exceed the realms of this paper.[44] Nevertheless, the considerations mentioned above for giving a greater weight to the state's decisions when finding an Emerging Consensus support the conclusion that the state made good law and therefore also militate in favor of granting it a larger Margin of Appreciation. As a result, the ECHR should be more careful not to find violations in states that are democratic and populous, that reach a decision based on a careful deliberation and by a substantial majority, and that view the relevant issue as especially salient.

If a certain state in Europe is fundamentally different from the others in a way that is relevant to the legal issue at stake, its legal choices provide the ECHR with

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42. *See* Frederick Schauer, *Forward: The Court's Agenda and the Nation's*, 120 HARV. L. REV. 4, 14-20 (2006) (suggesting empirical methods to establish what are the most salient issues on a nation's agenda—the issues discussed on the first page of major newspapers and public opinion polls).

43. *See supra*, Part III.

44. *See generally* Benvenisti, *supra* note 32 (arguing that states should be granted a narrower margin of appreciation when they suffer from democratic failures and do not properly represent their citizens); Andreas von Staden, *The Democratic Legitimacy of Judicial Review Beyond the State*, 10 INT'L J. CONST. L. 1023, 1042 (2012) (arguing that the ECHR actually does grant a larger margin of appreciation to states with well-functioning democratic mechanisms); Shai Dothan, *Three Interpretive Constraints on the European Court of Human Rights*, *in* THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS: CONTESTATIONS AND DEFERENCE (Machiko Kanetake & André Nollkaemper, eds.) (forthcoming 2014) (explaining when the ECHR should follow Margin of Appreciation, the text of the Convention, and Emerging Consensus).

little information about the appropriate legal rule for the rest of Europe. Such a state violates the similarity condition that underlies the Jury Theorem's logic. The ECHR should give less weight to the choices of this state when it shapes Emerging Consensus. At the same time, however, the experience gained from other European states may not be relevant for the unique conditions this state faces—it should therefore be granted a larger Margin of Appreciation.

For example, in the *Sahin* case,[45] a female Muslim student, who viewed it as her religious duty to wear a headscarf, argued that the regulations in a Turkish university that forbade her from wearing the headscarf violated her freedom of religion protected by the Convention.[46] She argued that no single other European country forbids the wearing of headscarves at universities, and, therefore, an overwhelming consensus against Turkey's practices exists in Europe.[47] Yet the ECHR decided that Turkey is too different from the other states to merit requiring it to conform to the European consensus.[48] Turkey is inhabited predominantly by Muslims, it has a unique history of secularism, and it fears the rise of Islamic extremists.[49] All these facts set Turkey apart from the rest of Europe. Thus, because Turkey is different than the other states in Europe, it was granted a Margin of Appreciation and was not found in violation.[50]

By the same logic, one can also argue that the practices of Turkey should not be considered when determining European consensus on issues that pertain to religious rights. Turkey's problems regarding issues that deal with religion are simply too different from the ones faced by the rest of Europe, which renders learning from Turkey in these matters a useless exercise. In fact, the ECHR noted in the *Sahin* case that attitudes towards religious symbols are diverse across all of Europe, implying that this is an issue in which differences between all European states are relatively large.[51] In such issues, where European states are dissimilar, the adoption of the same policy by the majority of the states in Europe does not necessarily indicate that it is a good policy. States may fare better under different policies due to the large differences between them.

VI. HOW STRATEGIC BEHAVIOR BY STATES CAN INTERFERE

For all European states to gain the maximum benefit from Emerging Consensus, each of the states must decide independently. Under certain conditions, however, states may not decide independently and choose to serve a different, conflicting interest.

One reason that states may fail to decide independently is that the laws adopted in one state can create externalities on other states. If the laws adopted by

45. Sahin v. Turkey, 2005-XI Eur. Ct. H.R. 178.

46. *Id.* ¶ 70.

47. *Id.* ¶ 100.

48. *Id.* ¶¶ 114-16.

49. *Id.* ¶ 115.

50. *Id.* ¶¶ 114-23. *See also Id.* ¶ 3 (Judge Tulkens, dissenting) (rejecting the use of the Margin of Appreciation).

51. Sahin v. Turkey, 2005-XI Eur. Ct. H.R. 178, ¶ 109.

one state damage the interests of another state, the second state may respond by adopting legal regimes that prevent this damage, even if the laws do not promote the state's interest when considered in isolation. Alternatively, if states can gain by conforming to the laws adopted by other states, they may change their laws from what suits their isolated interests in order to coordinate with other states. These types of problems may prevent states from deciding independently. Such problems are relevant to many areas of the law, but they are usually less acute in regards to issues that relate to human rights where positive and negative externalities between states are rarer.[52]

Yet in issues of human rights another problem may arise—the decisions of a state may not represent the interests of all the state's citizens, but instead cater to the interests of certain segments of society that possess greater political power.[53] In these situations, the decisions of states may not be optimal, either in terms of morality or in terms of efficiency. However, for the Jury Theorem logic to work, the states' decisions do not have to reach perfect results. As long as the decision of the state is better than a coin toss, when deciding between two options, following the decisions of a majority of states will lead to better results the larger the group of states surveyed. While states often suffer from democratic failures that lead to sub-optimal decision-making, their decisions are probably better than random in most cases. States' decisions may be worse than random if they are all consistently discriminating against a certain group. But even if one state discriminates against a certain group, other states may not discriminate against the same group. Therefore, the laws chosen by the majority of the states will not be systematically biased against a certain group and the laws of each state will usually be better than a random choice.

This part explores two other possible interests that can lead states to not decide independently: states can try to learn from each other in order to adopt the correct law even before the ECHR intervenes or states can try to conform in advance to what they predict will be the Emerging Consensus discovered by the ECHR in order to prevent the ECHR from finding them in violation of the Convention. This part will also investigate ways that can allow the ECHR to shape states' incentives so that they will be more likely to decide independently.

A. If States Want to Reach Correct Decisions Fast

If all states decide independently, the ECHR can apply Emerging Consensus to reach the best legal rules. These rules can then be followed by all the states in

52. *See* Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L L. 907, 920 (2005).

53. *See* Benvenisti, *supra* note 32 (arguing that states may misrepresent minorities and prevent them from having real political power); Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167 (1999) (arguing states can be captured by small and powerful interest groups); Shai Dothan, *In Defence of Expansive Interpretation in the ECHR*, 3 CAMBRIDGE J. INT'L. & COMP. L 508 (2014) (arguing the ECHR is normatively justified in expansively interpreting the obligations of states under the Convention, because the states' convention obligations do not necessarily reflect the views of their citizens due to democratic failures).

Europe. This process takes time, however, and may not be completed until several years have passed. States take time to develop their legal systems and address new issues and the ECHR takes time to issue its judgments and to discover an Emerging Consensus. In the meantime, states may be faced with legal problems that require an immediate solution. States can make the laws to address these problems independently. If they do so, this will serve the European interest of allowing the ECHR to learn from the independent choices of all European states. If states decide independently, however, they will not learn from the experience of other states and may reach inferior choices compared to the choices they would have made if they used comparative law to learn from other European States. States that decide independently may therefore be left with inferior legal regimes; at least until the ECHR discovers an Emerging Consensus on this issue and the states follow its judgment. If states care more about making the right legal choices in the short term than about serving the long-term European interest, they will use comparative law to learn from the states around them and will not decide independently. If many states do not decide independently, the ECHR would not be able to use Emerging Consensus to reach good legal rules. Furthermore, states that use comparative law to learn from each other may be learning from states that did not decide independently themselves and were subject to informational cascades.

The ECHR can try to mitigate this problem by giving states an incentive to decide independently and wait for its implementation of Emerging Consensus. One way to do that is by accelerating the decision-making process within the ECHR. If states know that the ECHR is likely to set the new doctrine by Emerging Consensus very quickly, they may be more willing to settle for the inferior solutions they can reach independently in the interim, since these solutions can soon be replaced by the superior doctrine set by the ECHR. Yet this solution may be practically difficult because the ECHR needs to handle a very large number of cases[54] and because it may require time to conduct a careful comparative research. Another problem which may arise is that new legal problems may not be resolved by all states at the same time, which means the ECHR may need to wait until enough states have made their own choice regarding the issue before it can set a clear, consensual doctrine.

Another practical way to increase the willingness of states to decide independently is to show the states that the ability of the ECHR to use comparative law is vastly superior to their own. If states are convinced that when the ECHR finds Emerging Consensus, it uses comparative law in a professional manner that ensures the best legal rule will be adopted, they may be more willing to decide independently, knowing that their legal solutions will be replaced by the best possible legal rule once the ECHR makes its decision. National courts that apply

54. Despite the fact that the ECHR accelerated its disposal of cases, which allowed it to decrease its backlog of pending cases in 2013, the backlog still remained close to a hundred thousand cases at the end of that year. *See* EUROPEAN COURT OF HUMAN RIGHTS, ANALYSIS OF STATISTICS 2013, at 4 (2014) *available at* http://www.echr.coe.int/Documents/Stats_analysis_2013_ENG.pdf.

comparative law need to conduct expensive research. If they are convinced that the ECHR can undertake this research better than they can, and that they will eventually be able to learn from its superior decisions, they may make an independent decision and avoid the costs of comparative research.

The ECHR may be concerned that if it finds a state in violation of the Convention that state would fail to comply with the judgment or severely criticize the court. In extreme situations, the state may even attempt to change the Convention or to leave the court's jurisdiction.[55] Similarly, the court may be concerned that deciding against the current of public opinion would damage its public support within European states, which, in turn, would make future state actions against the court easier.[56] These fears may lead the ECHR to delay a violation finding against the state for years, until the issue becomes less salient or until the relevant state and the public within it view such a decision more favorably.[57] In the meantime, states that do not use comparative law may be stuck with an inferior regime and thereby incentivized not to decide independently.

The formal rules of the Convention do not allow the ECHR to avoid deciding cases, except under certain technical conditions that usually assure the case does not concern a severe violation of human rights.[58] But the ECHR can still decide not to decide a case by determining that it lacks jurisdiction over it.[59] By strategically manipulating the rules of jurisdiction, the ECHR can avoid dealing with sensitive issues until it feels it can do so with little fear of backlash. For example, in the 2001 *Bankovic* case,[60] the applicants argued that seventeen

55. *See* Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631, 656-68 (2005); Jacob Katz Cogan, *Competition and Control in International Adjudication*, 48 VA. J. INT'L L. 411, 420-26 (2008); *see also* SHAI DOTHAN, REPUTATION AND JUDICIAL TACTICS: A THEORY OF NATIONAL AND INTERNATIONAL COURTS, 87-102 (2015) (discussing harmful responses that states can use against international courts when they disagree with their judgments).

56. *See* Erik Voeten, *Public Opinion and the Legitimacy of International Courts*, 14 THEORETICAL INQUIRIES L. 411, 418-19 (2013) (showing how public support for the ECHR in the United Kingdom has declined in response to controversial judgments it issued, facilitating actions against the court).

57. *See* Shai Dothan, *How International Courts Enhance their Legitimacy*, 14 THEORETICAL INQUIRIES L. 455, 475 (2013).

58. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, art. 35(3), Nov. 4, 1950, E.T.S. No. 005 [hereinafter Convention] ("The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: a. the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or b. the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.").

59. *See* Alec Stone Sweet & Helen Keller, *The Reception of the ECHR in National Legal Orders, in* A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS 3, 4 (Helen Keller & Alec Stone Sweet eds., 2008) (stressing that the ECHR decides the scope of its own jurisdiction, a power referred to as Kompetenz-Kompetenz).

60. Bankovic v. Belgium, 2001-XII Eur. Ct. H.R. 333.

European states that were members of NATO[61] violated the Convention by killing civilians in a NATO airstrike in Yugoslavia.[62] The ECHR decided that it did not have jurisdiction to decide the case because the attack took place outside of the territories of states that were members of the Convention.[63]

This decision was severely criticized as digressing from the court's previous judgments on the issue of jurisdiction.[64] Only ten years after *Bankovic,* in the *Al-Skeini*[65] and *Al-Jedda*[66] judgments, the ECHR reverted to its old doctrine on extraterritorial jurisdiction and decided that states which exercise control over territories that do not belong to any Convention state are nonetheless subject to the ECHR's jurisdiction.[67] *Al-Skeini* and *Al-Jedda* dealt with violations of human rights committed by British forces in occupied Iraq.[68] The ECHR may have reasoned that criticizing military actions in Iraq in 2011 would lead to much less resistance than criticizing the actions of NATO in Yugoslavia in 2001, both because in 2011 public opinion shifted strongly against the war in Iraq, and because in 2001 public opinion supported the use of military force due to the beginning of the War on Terror.[69] However, the result of this strategy, besides the harmful ambiguity that it added to the ECHR's doctrines on jurisdiction, is that the states were deprived of the guidance of the ECHR on extra-territorial military actions for a whole decade. This gave states an incentive to look around them and to try to learn from the other states how to shape their policy on the issue instead of deciding independently.

Another possibility available for the ECHR in such sensitive cases is to tweak its decision and digress from the true Emerging Consensus so as not to find states in violation and not to provoke them into harming the court. However, this may lead the ECHR to adopt doctrines that are inferior to the genuine application of Emerging Consensus, thereby giving states an incentive not to wait for its decision and to use comparative law to adopt good policies by themselves.

The Margin of Appreciation doctrine applied by the ECHR can sometimes mitigate these problems. According to this doctrine, the ECHR allows the states

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61. These states were Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom. *Id.* ¶ 3.

62. *Id.* ¶ 28.

63. *Id.* ¶¶ 54-82.

64. *See* Alexandra Ruth & Mirja Trilsch, *Bankovic v. Belgium (Admissibility)*, 97 AM. J. INT'L L 168, 172 (2003); Alexander Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, 14 EUR. J. INT'L L. 529, 545 (2003). Previous ECHR judgments on extraterritorial jurisdiction include: Loizidou v. Turkey (Preliminary Objections), 310 Eur. Ct. H.R. 23-24 (1995); Loizidou v. Turkey, 1996-VI Eur. Ct. H.R. 2234-35; Cyprus v. Turkey, 2001-IV Eur. Ct. H.R. 25.

65. Al-Skeini v. United Kingdom, 53 Eur. Ct. H.R. 18 (2011).

66. Al-Jedda v. United Kingdom, 53 Eur. Ct. H.R. 789 (2011).

67. *See Al-Skeini*, 53 Eur. Ct. H.R. ¶¶ 130-50; *Al-Jedda*, 53 Eur. Ct. H.R. ¶¶ 74-86.

68. *Al-Skeini*, 53 Eur. Ct. H.R. ¶¶ 33-71; *Al-Jedda*, 53 Eur. Ct. H.R. ¶¶ 8-15.

69. *See How International Courts Enhance their Legitimacy*, *supra* note 57, at 475-76.

some leeway in making their own policies without finding them in violation.[70] This doctrine allows the ECHR to indicate that a European consensus has emerged and to offer to the states a rule that they can follow, while at the same time avoiding a direct finding of violation against the state whose conduct is in question. Because the ECHR avoids finding the state in violation when it grants the states a Margin of Appreciation, it is less likely to provoke the state into undertaking harmful responses against it. This increases the willingness of the ECHR to give its judgment, indicating what is the Emerging Consensus, earlier. Consequently, states that expect the ECHR to decide quickly and provide them with guidance would be more willing to make their policies independently. Similarly, the ability to avoid harmful responses by states by granting them a Margin of Appreciation allows the ECHR to identify the true European consensus without manipulating it, thereby reaching the optimal rule and giving states a greater incentive to wait for its decision and not to use comparative law themselves.[71]

While a quick and high-quality decision by the ECHR applying Emerging Consensus may incentivize states to decide independently, it may also damage states' incentives to invest in adopting good legal rules. Since the states know that the ECHR will soon provide them with good legal solutions, they may rationally decide not to invest resources in finding the best legal solutions on their own. States may decide to cut the budgets of national courts and transfer the resources they need to make good laws elsewhere. If all states make this rational calculation and do not invest the necessary resources to adopt good laws, the ECHR will follow a majority of states, each of which has a relatively low probability of reaching the correct result. Yet as long as the states' decision is better than a random decision, the majority of a substantial group of states, such as the forty-seven states of the Council of Europe, will still reach the correct result with a high probability.

If the analysis undertaken here is widely accepted, then national courts that use comparative law instead of making independent decisions will be branded as damaging the general European interest. This can damage the legitimacy of these national courts in the eyes of other courts. In order to avoid this damage to their international legitimacy, national courts may stop using comparative law, even if this means they will adopt inferior laws.

In a recent empirical study, Laurence Helfer and Erik Voeten find evidence that the ECHR tracks the policy of the majority of states in Europe regarding the protection of people with minority sexual orientations.[72] Their research suggests that states often change their policies by following the judgments of the ECHR

70. *See* Dickson v. United Kingdom, 2007-V Eur. Ct. H.R. 99, ¶¶ 41, 77-78.

71. *See* Shai Dothan, *Why Granting States a Margin of Appreciation Supports the Formation of a Genuine European Consensus* (unpublished draft) (on file with the author) (suggesting that granting states a Margin of Appreciation, even when doing so would lead to bad policy outcomes in specific cases, can help create the appropriate preconditions for the formation of a genuine European consensus).

72. Helfer & Voeten, *supra* note 28, at 106.

instead of following what seems to be the majority of the other states in Europe prior to the ECHR's judgment.[73] This study provides some evidence that the ECHR applies emerging consensus properly by following the majority of states. It also supports the conclusion that states acknowledge this fact and are consequently willing to decide independently until the ECHR makes its judgment, exposes the emerging consensus, and allows the states to follow it.

B. If States Fear Overruling by the ECHR

When the ECHR finds that a state violated the Convention, this state suffers a reputational damage. When the reputation of a state is damaged, other states view it as more willing to disregard its international commitments. The state may partly rebuild its reputation by complying with the judgment of the ECHR but some damage to its reputation may remain.[74] States may want to avoid this reputational damage and try to prevent a decision that they violated the Convention. The states can expect that the ECHR will use Emerging Consensus to determine which states do not conform to the European consensus and find these states in violation of the Convention. In order to prevent a finding of violation against them, states may try to predict what doctrine the ECHR will discover by Emerging Consensus and conform to it in advance, before the ECHR has a chance to make its decision. In that case, states will not make law independently. Instead, they will try to foresee what the majority of European states will set as the law and conform to this standard.

States that try to foresee the emergence of a consensus will not make the law which they think is best; instead, they may try to foresee what the majority of states will think is the best law. However, all states are expected to make the same calculation and conform to what they think the majority think is the best law. As a result, the states would try to predict not what the majority of states think is the best law, but instead what the majority of states think that the majority of states think is the best law. This attempt to foresee what other states that behave strategically will do, which was termed "Beauty Contest" after a similar metaphor used by Keynes, can be extended infinitely.[75] The majority of states may end up coordinating in this process of prediction around certain legal solutions that most of the states would deem inferior if they made an independent decision.

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73. *Id.*

74. *See* REPUTATION AND JUDICIAL TACTICS: A THEORY OF NATIONAL AND INTERNATIONAL COURTS, *supra* note 55 (analyzing the reputational incentives of the states facing judgments by international courts); Shai Dothan, *Judicial Tactics in the European Court of Human Rights*, 12 CHI. J. INT'L L. 115, 118-19 (2011).

75. *See* JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT INTEREST AND MONEY 156 (1936) (describing a contest in which readers of a newspaper must vote for the six prettiest photographs from a group of a hundred photographs of women and win a prize if they choose the photographs chosen by the majority of readers; in such a situation readers do not decide according to their own perceptions of beauty but rather according to what the majority thinks that the majority thinks is beautiful).

In such a scenario, it is possible that states would choose legal solutions because they appear unique in a certain sense and therefore can serve as focal points for coordination.[76] As an example, if one state significantly improves the status of transsexuals, this decision may appear very salient precisely because it cuts against the laws of most European states. This salience makes it likely that each state will expect all the others to conform to this new law, which will lead, in turn, to a decision by the ECHR that this is the Emerging Consensus. States may therefore change their laws and grant the same rights to transsexuals to avoid a finding of violation against them. Absurdly, states adopted this legal solution precisely because it is salient and it gained its salience by cutting against what the majority of states would prefer if they made an independent decision.

If states behave in this manner, the ECHR will not be able to find the best legal solution by following the majority of the states. The ECHR must therefore attempt to alleviate the fear of states that it will find them in violation of the Convention if they fail to discern and to conform in advance to an Emerging Consensus. One way the ECHR can accomplish that is by not finding a state in violation before issuing a warning in a judgment that an Emerging Consensus has formed and future deviations from it would lead to a ruling against the states. If states know they will not be subject to a severe reputational sanction if they fail to predict the elusive European consensus, and they will receive a fair warning in case their conduct does not conform to it before finding a violation, they will be more likely to stick to their sincere choices of the best legal rules. Sincere and independent choices by the states will allow the ECHR to learn profitably from the states' decision-making when it uses Emerging Consensus. After the ECHR issued a warning and gave states enough time to change their laws accordingly, it may start to find states that do not conform to its rulings in violation of the Convention.

The series of ECHR judgments that indicated disagreement with the United Kingdom's practices regarding transsexuals many years before the United Kingdom was found in violation may have served as such a mechanism of warning. In the *Rees* case,[77] decided in 1986, the ECHR decided that the practice of issuing transsexuals a birth certificate which includes their sex at birth and preventing them from marrying a person of their opposite current sex does not violate the Convention.[78] Yet already in this judgment the ECHR indicated that it was aware of the suffering of transsexuals and called for a review of the legal provisions in light of scientific and societal changes.[79] Over the next fifteen years, the ECHR issued increasingly severe criticism of the United Kingdom that warned an Emerging Consensus was forming against its practices. In the *Cossey* case[80] the ECHR pointed again to the seriousness of the problems faced by transsexuals and to the need to keep the issue under review;[81] in the *Sheffield and Horsham* case[82]

76. *See* THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 94 (1963).
77. Rees v. United Kingdom, 106 Eur. Ct. H.R. (ser.A) ¶¶ 44-47 (1986).
78. *Id.* ¶ 46.
79. *Id.* ¶ 47.
80. Cossey v. United Kingdom, 184 Eur. Ct. H.R. (ser. A) ¶ 42 (1990).
81. *Id.*

the ECHR indicated a growing displeasure with the United Kingdom's practices.[83] Furthermore, the court stressed in this judgment that only four out of thirty-seven European states studied prevented the reassignment of sex in birth certificates, indicating a clear Emerging Consensus against the United Kingdom, but still not finding it in violation of the Convention.[84] Finally, after warning the United Kingdom for about fifteen years that its practices digressed from the Emerging Consensus, the ECHR decided that the United Kingdom's system of birth certificates and marriage regulation violated the Convention in the *Goodwin* case,[85] decided in 2002.[86]

The Margin of Appreciation doctrine can help the ECHR to issue a warning to the state that its practices contradict the European Consensus without finding it in violation. If the court rules that the state's behavior contradicts the European Consensus, but its actions should be granted deference based on the Margin of Appreciation doctrine, it does not brand the state as a violator of its commitments. Therefore, the state would not suffer significant reputational damage and it would receive a fair warning that in the future, similar conduct may lead to a finding of violation.

This suggests that the boundaries of the Margin of Appreciation should be broadened compared to the boundaries that should be set if states are considered not to respond strategically to the ECHR's judgments. Even if the ECHR is convinced that the European consensus reflects a superior policy to the policy adopted by the state it should sometimes grant states a Margin of Appreciation, as a way to alleviate their fear of being found in violation in case they do not conform to the European consensus prior to the court's ruling and to give states an incentive to decide independently.[87]

VII. HOW STRATEGIC BEHAVIOR BY THE ECHR CAN INTERFERE

National courts that apply comparative law are often accused of not really attempting to discover the laws of the majority of states on which to base their decisions, but rather making their decision for their own reasons and afterwards using states with similar laws to support that decision.[88] Similar accusations can easily be lodged against an international court such as the ECHR. If the judges look only at a biased sample of the states, their decision will not enjoy the informational benefits of the Jury Theorem.

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82. Sheffield v. United Kingdom, 1998-V Eur. Ct. H.R. 84.

83. *Id.* ¶ 60.

84. *See id.* ¶¶ 20-37.

85. Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R. 26, ¶104.

86. *See* Beate Rudolf, *Constitutional Developments—European Court of Human Rights: Legal Status of Postoperative Transsexuals*, 1.INT'L J. CON. L. 716 (2003) (providing more information on this development).

87. *See Why Granting States a Margin of Appreciation Supports the Formation of a Genuine European Consensus*, *supra* note 71.

88. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 598 (2003). *See also* Posner & Sunstein, *supra* note 1, at 138-39.

One way to address this problem is to try to limit the discretion the ECHR judges have when they choose the states from which they learn under Emerging Consensus. If judges cannot choose the states to which they refer and if they study the laws of these states correctly, then their judgments will accurately reflect the collective wisdom of the states instead of their own discretion. A simple way to limit the judges' discretion is to direct them to survey the laws of all the states in Europe when they engage in Emerging Consensus. This may be practically difficult, however. There are currently forty-seven states in the European Council and studying all of their laws carefully may prove too much of a burden for the ECHR, which operates under a severe resource constraint.[89] As Part V argued, the ECHR can make good decisions with limited resources if it will ignore the laws of some states or give them only a lower weight compared to the weight it gives to other states.

ECHR judges can be prevented from cherry-picking the laws of states that suit their own wishes even if they do not have to survey all states, but only a certain predetermined group of states. Part V suggested several characteristics of states to whose practices the ECHR should give greater weight in its decision—namely, states that are especially successful, democratic and populous. If a group of states with these attributes is identified, the ECHR can gain a great amount of information at a comparatively low cost by looking only to the laws of these states. States that are excluded from this group, however, will view the ECHR as biased against them and may fiercely resist this policy. This policy may therefore be impossible because the ECHR is concerned with preserving the support of all the states in Europe. The ECHR may want to stress that the group of states that it looks to is diversified and includes states from different systems, which accurately represent all the states in Europe. To the extent that the ECHR can do this credibly, it may thwart some accusations of bias, but choosing these representative states may be very difficult. There is also another problem—the successful states to which the ECHR looks may simply be too different from the other states to render learning from them a useful exercise. The Jury Theorem only supports Emerging Consensus when states are similar. When states are different, even if they possess excellent decision-making skills, their policies should not be followed by the rest of Europe.

An alternative way to address this problem may try to identify the true reasons behind the ECHR decision-making. If the real motivations that make the ECHR decide in a certain way are discovered, doctrinal mechanisms can try to counter these motivations to the extent that they make the ECHR abandon the correct application of Emerging Consensus. The literature regarding judicial behavior distinguishes between three types of theories:

1. *Legal Models*—judges try to uphold the law in their judgments;
2. *Attitudinal Models*—judges follow their own policy preferences;

89. *See* ANALYSIS OF STATISTICS 2013, *supra* note 54 and accompanying text.

3. *Strategic Models*—judges try to promote their policy preferences strategically, by changing their behavior to counter the expected responses of other actors.[90]

This paper will briefly address each of these theories and try to suggest methods to prevent the ECHR, if it acts under each of these theories, from subverting the informational benefits gained from Emerging Consensus.

A. Legal Models

According to legal models, judges apply the law as accurately as they can without serving any policy preferences.[91] The main challenge that the proponents of this model face is defining the law that judges apply in their judgments. The ECHR is tasked with applying the Convention. Yet, the ECHR has often indicated that it will apply the rules of the Convention in an evolutionary manner[92] and try to effectively protect the rights enshrined in it.[93] The ECHR also applies a teleological interpretation that looks to the object and purpose of the Convention and not only to its text.[94] Although these doctrines give the ECHR substantial discretion, the text of the Convention guides the ECHR in its judgment, and this guidance may sometimes contradict the European consensus on certain issues. Consequently, if the ECHR follows the legal model, it may follow the text of the Convention instead of the views of the majority of states at the time of the judgment. The text of the Convention may only reflect the views of the states in the past, when they joined the convention system. In the meantime, the views of the majority of the states may have changed or adapted to changing circumstances, but due to the requirement that every amendment of the Convention (as opposed to additions to it, which can be accomplished by an additional protocol) requires the unanimous support of the states, the text of the Convention may remain the same.[95] Moreover, states may have ratified the Convention for ulterior reasons or agreed to certain provisions only as a compromise in return for other benefits.[96] In these

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90. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 44-114 (2002).

91. *See* Howard Gillman, *What's Law Got to Do with It?: Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making*, 26 L. & SOC. INQUIRY 465, 485-86 (2001) (presenting two views of legal models: the first views the law as an effective constraint on judges that makes their judgments accurately conform to the law, the second views judges as trying to honestly apply the law as they perceive it to be). My focus here is on the first interpretation since my paper is focused on the actual content of judgments and not on the perceptions of judges.

92. *See* Tyrer v. United Kingdom, 26 Eur. Ct. H.R. 31, ¶ 15-16 (1978).

93. *See* Soering v. United Kingdom, 161 Eur. Ct. H.R 34, ¶ 88 1989).

94. *See* François Ost, *The Original Canons of Interpretation of the European Court of Human Rights, in* THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS: INTERNATIONAL PROTECTION VERSUS NATIONAL RESTRICTIONS 283, 292 (Mireille Delmas-Marty ed., 1992)

95. *See Defence of Expansive Interpretation in the ECHR*, *supra* note 53, at 519.

96. *See* Posner & Sunstein, *supra* note 1, at 168. *See also* ED BATES, THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS—FROM ITS INCEPTION TO THE CREATION OF A PERMANENT COURT OF HUMAN RIGHTS 92-93, 95, 100 (2010) (arguing states concerned with maintaining their sovereignty, primarily the United Kingdom, used the attempt to reach unanimity in

situations, the judges who follow the legal model and apply the text of the Convention instead of learning from the current choices of states will not gain the decisional benefits of the Jury Theorem.

However, the behavior of judges who apply the legal model can easily be corrected by changing the Convention. If the Convention is amended to include a specific requirement that judges apply Emerging Consensus, then legalist judges will follow this requirement and reap the benefits of the Jury Theorem. While the ECHR is not formally bound to its previous judgments, it has often indicated that it will not digress from them without good reason.[97] If judges follow this accepted doctrine, even a series of judgments that indicates the importance of applying Emerging Consensus can improve the chances of its use by legalist judges.

B. Attitudinal Models

According to attitudinal models, judges have certain policy preferences that they follow in their judgments.[98] While, according to attitudinal models, the law itself can have an effect on the result, these models claim that judges make some choices based on considerations of policy.[99] These choices cannot be easily manipulated by changing the Convention or the content of the court's judgments. However, those who select the judges may select them based on the policies they will promote on the bench. Therefore, the rules that determine the selection of judges to the ECHR and to the panels on the court can shape the court's judgments in a direction that supports the Jury Theorem logic.

According to the current rules on the selection of judges to the ECHR, each state in the European Council submits a list of three candidates to become ECHR judges to the European Parliamentary Assembly, which selects one judge from the list.[100] If states only select candidates whose policy preferences fully concur with their own,[101] then the judges on the ECHR should accurately represent the views of the states in Europe. In that case, the majority of the judges on the court shall enjoy the same decision-making benefit as the majority of the states. However, since judges make decisions in panels which are supposedly random, besides one judge who sits in respect to the state whose conduct is in question,[102] there is some

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the negotiations prior to the first signing of the Convention to impose a relatively weak and partial version of the Convention on the majority of the states).

97. *See* Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R. 26, ¶ 74.

98. *See* SEGAL & SPAETH, *supra* note 90 at 86.

99. *See, e.g.*, Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2156 (1998).

100. *See* European Convention on Human Rights art. 20, 22, Nov. 4, 1950, 213 U.N.T.S. 221..

101. *See* Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 AM. POL. SCI. REV. 417, 431 (2008) (providing evidence ECHR judges sometimes act as policy seekers and their policy views may be foreseeable by the selecting states). Realistically speaking, states probably cannot select judges that concur with their policy views on every possible issue. The issues under the ECHR's jurisdiction are simply too numerous and complex to expect that a qualified candidate would correspond to her state's views on every point. Yet states may certainly foresee the candidates' policy views on some key issues and select them accordingly.

102. *See* European Convention on Human Rights art. 26(4), Nov. 4, 1950, 213 U.N.T.S. 221.

uncertainty whether the result reached by the panel will reflect the views of the majority of judges on the court. As the size of the panel increases this uncertainty would decrease since the majority of judges on the panel would be more likely to reflect the majority of judges on the court.[103] Therefore, to the extent that judges make decisions based on policy preferences and to the extent that the states select judges that concur with their preferences, the ECHR should prefer to decide as many cases as possible in the Grand Chamber, consisting of seventeen judges, instead of in smaller panels, such as Chambers of seven judges, three judges Committees and single judges Formations. However, the more judges who sit on the panel, the greater the costs in judicial time of each judgment. This policy recommendation can therefore put another strain on the ECHR's resources. The limited resources of the ECHR are the reason that Protocol 14, which went into force in 2010, amended the Convention furthering precisely the opposite policy—shifting greater responsibilities to smaller panels.[104]

C. Strategic Models

Strategic models include every theory that claims courts change their decisions strategically in order to counter the expected responses of other actors.[105] The final result that the court wants to achieve by its strategic behavior may vary from one theory to another.[106] It is possible, for instance, that the ECHR wants all states to follow the Emerging Consensus in Europe, but is afraid that if it issues a judgment based on Emerging Consensus some states may fail to comply. In that case, the ECHR may conclude that states' actions would come as close as possible to following Emerging Consensus if its judgment would reflect a compromise. The ECHR may issue a judgment that does not follow Emerging Consensus fully but comes close to its prescriptions if it is more likely to be complied with than a judgment that follows exactly the doctrine.

Under these conditions, the best way to ensure that the ECHR decides based on Emerging Consensus is to remove the fear of noncompliance that motivates its strategic behavior. For example, if the Committee of Ministers of the Council of Europe, which is tasked with enforcing the ECHR's judgments,[107] would grow in efficiency and power, it could reduce the fear that states would fail to comply with ECHR judgments. This would give the strategic court a reason to decide based on Emerging Consensus alone without any strategic compromise. Similarly, if states expect a substantial reputational sanction for noncompliance, they would be more likely to comply and a strategic ECHR would, in turn, be more likely to adhere to

103. *See* Menachem Mautner, *Luck in Courts*, 9 THEORETICAL INQUIRIES L. 217, 224 (2007).

104. *See* European Convention on Human Rights Protocol 14, May 13, 2004, C.E.T.S. 194. (Protocol 14 allowed Committees of three judges to declare admissible and decide on the merits cases that are clearly well founded; it also allowed single-judge formations to reject clearly inadmissible cases).

105. *See* Lee Epstein, Jack Knight & Andrew D. Martin, *The Political (Science) Context of Judging*, 47 ST. LOUIS U. L. J. 783, 798 (2003).

106. *See id.*

107. *See* European Convention on Human Rights art. 46(2), Nov. 4, 1950, 213 U.N.T.S. 221.

Emerging Consensus without strategically deviating from it.[108] Furthermore, improving the chances of compliance would also serve the ultimate end of making states behave according to Emerging Consensus.

It is possible that the ECHR serves other goals besides promoting the adherence of states to Emerging Consensus and does so strategically. In that case, different systems to constrain the ECHR's decision-making may theoretically be used to increase the chances that it would conform to Emerging Consensus.

VIII. CONCLUSION

This paper argues that if Emerging Consensus is applied correctly by the ECHR, it can lead to better legal results than the application of comparative law by national courts. Emerging Consensus allows the ECHR to learn from the experience gained by national legal systems. As long as national courts that set the law in European states decide independently, they can enjoy the benefit of an informed decision by the ECHR without falling prey to information cascades that plague the use of comparative law by national courts. If states—or the ECHR itself—follow their own interests and digress from the prescriptions of the theory described here, doctrinal and practical solutions can be devised to counter these tendencies and increase the chances that states and the ECHR would follow the prescriptions of the theory.

The ECHR's unique institutional position allows the formulation of rules for judicial decision-making that can be followed equally by all national courts and still lead to the adoption of good laws. The paper argues that national courts should decide independently from each other, but should follow the ECHR's judgments if they either find certain practices in violation of the Convention or warn that such a finding is imminent in the future. This may be just one example of a situation in which international courts can help to overcome problems of decision-making by national courts. International courts may draw information from other sources besides national courts, such as from Non-Governmental Organizations or their own professional research. After consulting information from multiple sources, some of which are inaccessible to national courts, these international courts can make an informed decision that the states under their jurisdiction and their courts should follow.

Just as the ECHR's position as a supranational court gives it advantages in decision-making over national courts, federal courts may have a similar advantage over state courts. The analysis in the paper suggests that when federal courts, such as the United States Supreme Court, learn from the laws of the states within the federation they can provide the entire federal system with the decisional benefits of the Jury Theorem. Federal courts can do that without requiring the states within

108. *See Judicial Tactics in the European Court of Human Rights*, *supra* note 74 (arguing if the ECHR would have a high judicial reputation this would improve the chances of compliance by states and would, in turn, allow the ECHR a greater ability to pursue its preferences).

the federation to learn from each other's laws and to inevitably cascade one after the other.[109]

The paper also demonstrates the benefits that international courts generally can gain by learning from national courts and their collective experience. Other international courts, such as the International Court of Justice or the International Criminal Court may also gain these benefits if they use comparative law and learn from the vast experience of national courts across the world. This paper therefore joins the international law theorists who argue that using comparative law is beneficial, yet it suggests that it is international, regional, or federal courts that can optimally use comparative law, not national courts.

109. *See State Law as "Other Law" Our Fifty Sovereigns In the Federal Constitutional Canon*, 120 HARV. L. REV. 1670, 1671 (2007) (showing the United States Supreme Court learns from state laws as it develops its doctrines).

ICONGRAPHY OF TORTURE: GOING BEYOND THE TORTUOUS TORTURE DEBATE

DR. THOMAS W. SIMON*

> Do you understand the process? The harrow begins to write; when it has finished writing the first draft on the man's back, the cotton layer rolls and slowly heaves the body to one side in order to make more room for the harrow. In the meantime the places where the wounds have been inscribed settle against the cotton, which, because of its special preparation, immediately stops the bleeding and clears the way for the script to sink in more deeply. Here, as the body continues to turn, the serrated edge of the harrow tears the cotton from the wounds, flings it into the pit, and the harrow gets back to work. And so it goes on writing, more and more deeply, for twelve hours. During the first six hours the condemned man lives almost as he did before, except that he is in pain.[1]

I. INTRODUCTION

The torture debate is seriously misguided. It has transformed torture from a universally condemned crime to a regrettable but sometimes necessary state function. This Article attempts to put torture back to where it should have remained, namely, among other universally prohibited acts such as genocide and crimes against humanity. To define torture we need look no further than iconographic images of torture, such as the following rendering of Kafka's Harrow:

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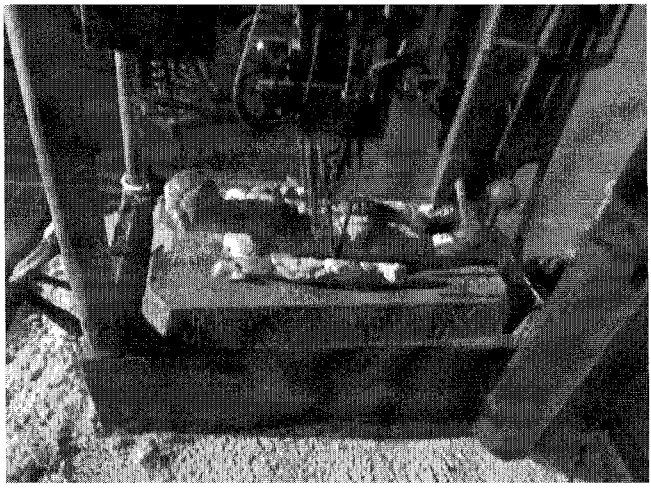
1. FRANZ KAFKA, *In the Penal Colony, in* KAFKA'S SELECTED STORIES 44 (Stanley Corngold ed. 2007).



Kafka's Harrow, Prague[2]

Yet, despite the power of an image like this, torture receives countless further nuanced analyses.

The United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment defines torture as:

> Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[3]

Torture seems to involve any number of elements that cry out for definition and differentiation: severe pain, physical pain, suffering, mental pain, mental suffering, cruel treatment, inhuman treatment, and degrading treatment. Yet, participants in the debate should resist this lure, which proves difficult to do. Lawyers and philosophers have dominated the torture debate. This should not be surprising since both are heavily invested in the distinction drawing business. Find a distinction; argue a case. Find a distinction; publish an article. Yet, these distinction-infested debates have hindered rather than moved the torture debate forward.[4] Participants in the torture debate have fallen into a definitional-

2. Photo: Kafka's Harrow (Thomas Simon) (owned by author).

3. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Torture Convention].

4. *See, e.g.*, Office of the High Comm'r on Human Rights, Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies (2011), http://www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf

distinction trap. Does torture include physical and mental pain? Is there a difference between torture and cruel, inhuman, or degrading treatment? Does a torture prosecution require a showing of general or specific intent? These questions raise interesting academic issues. However, they only muddy the waters of the torture debate.

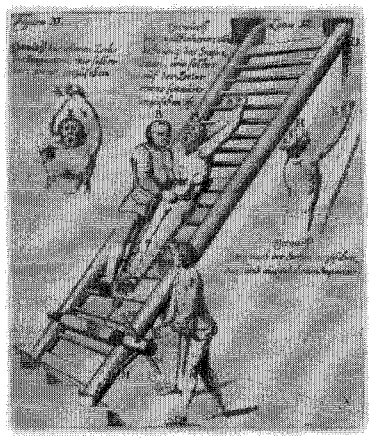
The torture debate also manifests a flawed view of international criminal law. International criminal law is not national criminal law writ large. Using national law as a model has disastrous consequences for international criminal law. For example, intent plays a very different role in international criminal law than it does in national criminal law. Overall, international crimes lack nuanced particularity. International criminal law represents the international community's attempt to provide a focus on the grave breaches, the systematic and widespread atrocities, clearly reprehensible acts, etc. Making fine-tuned distinctions steers attention away from the big picture.

Keeping the focus on the big picture does not imply throwing away all distinctions. It is how best to make use of those distinctions that is in question. International criminal law does not consist of a conceptual pie that divides neatly into finely grained, detailed, distinct slices. Instead, international criminal law focuses on a set of egregious, central, core wrongs, and injustices. A crime consists of a "mental" component (the *mens rea*) and an act (the *actus reus*). At this stage, let us focus on criminal acts. The core *actus reus* of the international crime of genocide, for example, is killings. The core *actus reus* of torture, as argued below, is pain.[5] However, finding a better way of interpreting the claim that the basic act of torture consists of the infliction of pain can help avoid the definitional trap. The strategy is to start with those acts, as represented by, for example, the image of Kafka's Harrow, that almost everyone would agree constitute torture. Then, other acts are evaluated according to how closely they visually and conceptually resemble the core act of torture as represented by the iconographic image.

The infliction of pain lies at the heart of the wrongfulness of torture. The "severe pain" referred to in the Torture Convention is Inquisitorial pain, that is, the brutal pain similar in kind to that inflicted on victims during the Middle Ages and depicted in Medieval engravings of the rack (see illustration below). Refined legal or philosophical distinctions impede rather than move the torture debate forward. As this Article demonstrates, the following icon of the rack used during the Inquisition will do better than Kafka's imaginary Harrow.

("Many acts, conducts or events may be viewed as torture in certain circumstances, while they will not be viewed as torture in some other situations. In fact, there is no single definition [of torture] existing under international law. . . It should be recalled that usually in legal dispositions, torture is linked with cruel, inhuman and degrading treatment or punishment or ill-treatment. Torture is not an act in itself, or specific type of acts, but it is the legal qualification of an event or behaviour, based on the comprehensive assessment of this event or behaviour. Therefore, the difference between these different qualifications, torture, cruel, inhuman and degrading treatment or punishment or ill-treatment depends on the specific circumstances of each case and is not always obvious.").

5. *See infra* Section III.



Medieval Rack[6]

Part II introduces this novel iconographical approach to torture, whereby the rack of the Inquisition serves as the icon for determining which acts constitute torture. Part IIA shows how icons serve as moral and legal templates for evaluating purported harms. Holocaust icons help to determine which acts qualify as acts of genocide. Similarly, the icon of the Inquisition's rack should serve as an icon for assessing what acts qualify as torture. Yet, not every icon is created equal. Some icons, such as the Chinese practice of death by a thousand cuts, should be rejected as inappropriate. Part IIB demonstrates how to use the iconographical method to determine whether certain acts of neglect qualify as child abuse.

Part III examines the *actus reus* and *mens rea* elements of the crime of torture. Part IIIA defends the claim that, just as killing constitutes the core act of the crime of genocide, so pain makes up the core act of torture. This section shows how an iconographic approach helps to undermine some troublesome categories of acts that allegedly do not rise to the level of torture, including psychological pain and mental suffering as well as cruel, inhuman, and degrading treatment. Part IIIB defends the claim that the institutional intent of the state is the *mens rea* element of torture. It further rejects attempts to establish specific intent as the *mens rea* of torture. Finally, Part IV, building on the previous claims, makes arguments for treating torture as a universal prohibition without any exceptions.

II. ICONOGRAPHY

According to the anthropologist Clifford Geertz, the law is "part of a distinctive manner of imagining the real."[7] Images play a crucial role in law.

6. Photo: TORTURE: A COLLECTION 4 (Sanford Levinson ed., 2006) (photo originally an engraving appended to the Austrian Empire's 1769 Criminal Procedure Code).

7. CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 184 (3rd ed. 1983) (promoting symbolic anthropology, which examine the interpretation of symbols).

Images, models, metaphors, and exemplars also have played and play an important role in science. Not only propositions but also certain kinds of pictures used in science can have truth-value.[8] The billiard-ball model of gas, the double-helix model, the solar system model of the atom—all of these models proved crucial to science.[9]

Icons are symbolic, pictorial, paradigmatic representations.[10] They are, in part, short hands for descriptive and prescriptive statements. These statements include both descriptions of historically situated events and historical narratives that tie together similar events. Moreover, the statements also are prescriptive that is, moral judgments of condemnation. Yet, these icons are more than just statements. They have a critical emotive content. They represent and trigger a deep-seated moral revulsion. A photograph of a mass grave provides a paradigmatic example of an icon that typically provokes a universal condemnation. The short hand feature of icons is not just a convenience; it marks a virtue of icons. A demand to spell out the statements connected with an icon represents a moral failing. The need to persuade someone of the immorality of mass graves indicates something amiss. This is not to say that there is never a need to defend or expand upon an icon through commentary, but we also need to recognize how deeply embedded some icons are and should be in our moral fabric.

Icons are akin to paradigms (basic standards of judgment). Theorists of justice have difficulties agreeing on paradigms.[11] Theorists of injustice should not have the same difficulties. It would be odd indeed to publish a book on the pros and cons of genocide, a paradigm of injustice if ever there was one. Paradigms, in general, anchor interpretations but are themselves not immune to interpretation and reinterpretation.[12] Paradigms of injustice, however, are more deeply embedded than other ones.

Icons are pictorial in the way that some examples of photojournalism have become iconic. Nick Ut won a Pulitzer Prize for his photo of a screaming girl (Phan Thi Kim Púc) being burned alive from napalm during the Vietnam War.[13] There has been a longstanding dispute about the efficacy and ethics of photojournalism.[14] In an earlier work, Susan Sontag warned of the public becoming anesthetized by these images[15] but later made a much more sympathetic

8. Laura Perini, *The Truth in Pictures*, 72:1 PHIL. SCI. 262, 274 (2005).

9. *See generally*, THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (3 ed. 1962); MARY HESSE, MODELS AND ANALOGIES IN SCIENCE (1963); MICHAEL WEISBERG, SIMULATION AND SIMILARITY: USING MODELS TO UNDERSTAND THE WORLD (2013).

10. *See* HANDBOOK OF VISUAL ANALYSIS 73 (Theo van Leeuwen & Carey Jewitt eds., 2001).

11. *See* THOMAS W. SIMON, DEMOCRACY AND SOCIAL INJUSTICE: LAW, POLITICS, AND PHILOSOPHY 21 (1995).

12. RONALD DWORKIN, LAW'S EMPIRE 72 (1986).

13. DENISE CHONG, THE GIRL IN THE PICTURE: THE STORY OF KIM PHUC, THE PHOTOGRAPH, AND THE VIETNAM WAR 76 (2000).

14. Eamonn Carrabine, *Just Images: Aesthetics, Ethics, and Visual Criminology*, 52 BRIT. J. CRIMINOLOGY 463, 463 (2012).

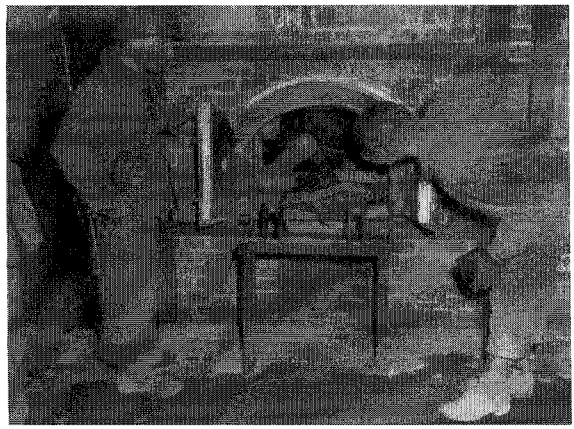
15. SUSAN SONTAG, ON PHOTOGRAPHY 20 (1977).

case for them.[16] The use of icons in law avoids these controversies since they do not involve a public display of the images but a judicial and moral use of them.

Academic debates also use images or icons. Images play a role in law.[17] These images and icons, as argued below, do and should play a determinative role in the torture debate.[18] However, anyone perusing any law or philosophy journal would have difficulty finding even a diagram to say nothing of a picture. Yet, if the commentators used pictures more often, the torture debate would have an entirely different character, especially if they carefully deployed certain icons. Icons can serve as the crucial moral models in debates over torture.

A. Iconographies of Genocide, Torture, and Execution

1. Icons of the Holocaust: Gas Ovens and Cattle Cars



Gas Ovens at Bergen-Belsen[19]

Moral models, particularly in the form of images, have played an important role in the progressive development of the law and morality. The Holocaust has served as a normative template against which to examine subsequent mass atrocities.[20] It was the Holocaust that led Raphael Lemkin, the Jewish Polish jurist who first coined the term genocide, to lobby successfully for the passage of the Genocide Convention.[21] The Holocaust does and should serve as the primary

16. SUSAN SONTAG, REGARDING THE PAIN OF OTHERS 105 (2004).

17. Adam L. Rosman, *Visualizing the Law: Using Chats, Diagrams, and Other Images to Improve Legal Briefs*, 63 J. LEGAL EDUC. 70, 70 (2013).

18. *See infra* Section III(A)(3).

19. Photo: Gas Ovens at Bergen-Belsen (on file with author with permission from the United States Marine Corps).

20. ALVIN H. ROSENFELD, THE END OF THE HOLOCAUST 167 (2011).

21. RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS 79 (2005).

reference point for any historical, sociological, legal, philosophical or any other scholarly examination of genocide.

The Holocaust has had an enormous impact on the world. Images of the Holocaust have been critical for assuring its lasting impact as a paradigm of injustice. These images have stirred deep-seated reactions of revulsion at the enormity of this injustice in every generation since. One iconic image of the Holocaust is pictures of Jews packed into cattle cars on their way to the death camps.

Pulling Jews Already Dead from a Still Traveling Train in Romania[22]

While pictures of gas ovens and cattle cars have become iconic for the Holocaust, they have not become icons of genocides in general, in part because gas killings and cattle car deportation were particular marks of the Holocaust. However, pictures of emaciated, starving Jews looking forlornly past the barbed wire enclosure, as discussed below, have become icons of the Holocaust as well as of other genocides.

22. Photo: Pulling Jews already dead from a still traveling train in Romania (Public Domain), *available at* http://en.wikipedia.org/wiki/Holocaust_train.

Young Survivors behind a Barbed Wire Fence in Buchenwald Concentration Camp[23]

These images are not simply evocative. They provide a moral template that has helped to bring similar incidents within the folds of genocide, as happened with the war in Bosnia. "The scenes of emaciated and terrified men confined to detention camps in north-western Bosnia and Herzegovina, first discovered by Western reporters in the summer of 1992, indelibly reminded the international public of images last seen in Europe during the Holocaust."[24] The reporting and pictures used by Roy Gutman and made by Patrick Robert, and others helped to mobilize a humanitarian intervention in Bosnia.[25]

Making a case for the pivotal role of these iconic images in moral and legal debates does not mean that there are no problems with these iconographies.[26] The use of every icon must be a subject of close scrutiny and vigorous critique. Some raised serious questions about the icons of the Bosnian war, including critics who accused Gutman of having staged his photograph of Bosnians behind barbed wire in order to have it published on the cover of *Time* magazine.[27] Yet there seems to be little evidence of that, especially as the images used by Gutman reflected a grim, gruesome reality that also was captured by other photographers, such as Patrick Roberts.[28]

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23. Photo: Young survivors behind a barbed wire fence in Buchenwald concentration camp (on file with author with permission from Dodge-Chrome, Inc.).

24. Christian Axboe Nielsen, *Surmounting the Myopic Focus on Genocide: The Case of War in Bosnia and Herzegovina*, 15:1 J. GENOCIDE RES. 21, 24 (2013).

25. *See* ROY GUTMAN, A WITNESS TO GENOCIDE: THE 1993 PULITZER PRIZE-WINNING DISPATCHES ON THE "ETHNIC CLEANSING" OF BOSNIA 126 (1993).

26. *See infra* Section II(A)(3).

27. Thomas Deichmann, *The Picture that Fooled the World*, 97 LM (formerly LIVING MARXISM) 24-31 (1997), *available at* http://www.slobodan-milosevic.org/fooled.htm.

28. David Campbell, *Atrocity, Memory, Photography: Imaging the Concentration Camps of Bosnia—The Case of ITN Versus Living Marxism, Part 1*, 1:1 J. HUM. RTS 1, 1 (2002).

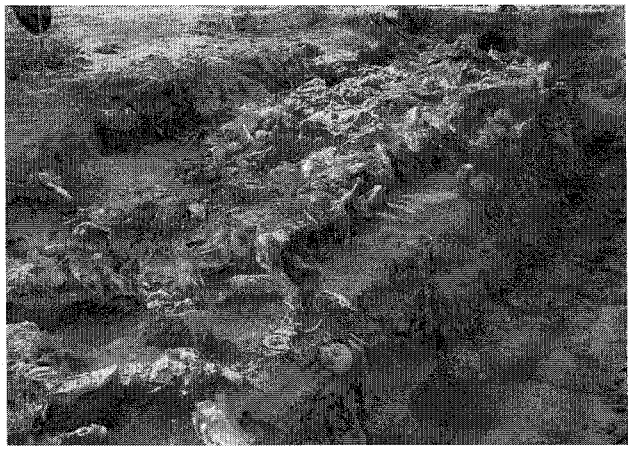
Bosniak Prisoners behind a Barbed Wire of the Manjaca Concentration Camp near Prijedor, Bosnia[29]

An even more important icon and finding for both the Holocaust and the Bosnian war were mass graves. Mass graves have proven to be a critical piece of the evidence needed to substantiate the legal charges of not only crimes against humanity, but also of genocide.

A German Policeman Shoots Individual Jewish Women who Remain Alive in the Ravine after the Mass Execution (1942, Main Commission for the Investigation of Nazi War Crimes)[30]

29. Photo: Bosnian Genocide (Patrick Robert/Corbis Sygma August 1992) (on file with author with email permission from Patrick Robert (June 18, 2014, 18:44 EDT)).

30. Photo: *A Holocaust Photo Essay*, MODERN AM. POETRY, http://www.english.illinois.edu/maps/holocaust/photoessay.htm.



Exhumation site of Bosnian Genocide victims in the Cancari Valley in eastern Bosnia near Srebrenica (International Criminal Tribunal for the Former Yugoslavia)[31]

Consider further whether the same or similar icons applied to the later war in Kosovo. One of the difficulties faced by those who wanted to justify the humanitarian intervention in Kosovo was the lack of gruesome depictions.[32] Admittedly, the massacre of forty-five civilians at Racak triggered NATO involvement.[33] However, there has been sparse evidence in the form of mass graves or other iconography.[34]

Finally, images also can serve as reminders of where horrific massacres did take place in, for example, Srebrenica during the Bosnian war. As the following images demonstrate, abandoned shoes from the Holocaust have become icon of for the mass killings in Bosnia.

31. Photo: *Photos of Srebrenica: From Mass Murder to Genocide (1992-1995)*, WE REMEMBER THE BOSNIAN GENOCIDE, 1992-95, http://bosniangenocide.wordpress.com/2012/07/02/photos-of-srebrenica-from-mass-murder-to-genocide-1992-1995 ("8,000 mean boys were lined up and executed after the fall f Srebrenica in July 1995").

32. Roland Paris, *Kosovo and the Metaphor War*, 117:3 POL. SCI. Q. 423, 423-50 (2002).

33. MARC WELLER, THE CRISIS IN KOSOVO, 1989-1999: FROM THE DISSOLUTION OF YUGOSLAVIA TO RAMBOUILLET AND THE OUTBREAK OF HOSTILITIES 333-35 (1999).

34. *Kosovo assault 'was not genocide'*, BBC NEWS (Sept. 7, 2001), http://news.bbc.co.uk/2/hi/europe/1530781.stm (The U.N. sponsored Supreme Court of Kosovo found, "[there] had been a 'systematic campaign of terror, including murders, rapes, arsons and severe maltreatments.' Crimes against humanity and war crimes did take place, it said, but 'the exactions committed by Miloševicé's regime cannot be qualified as criminal acts of genocide, since their purpose was not the destruction of the Albanian ethnic group . . . but its forceful departure from Kosovo.").

Sorting the Shoes of the Victims in Auschwits[35]

Shoes Representing the Number Massacred at Srebrenica[36]

This analysis demonstrates the use and power of iconic images in discussions and debates over international crimes. It has shown that icons do and should play an important role in the moral and legal assessment of crimes against humanity and genocide. The next section makes a case for icons to play an even stronger and more determinative role in debates over torture. One reason for the difference is, as shown below, torture has had a longer history than genocide as a widely

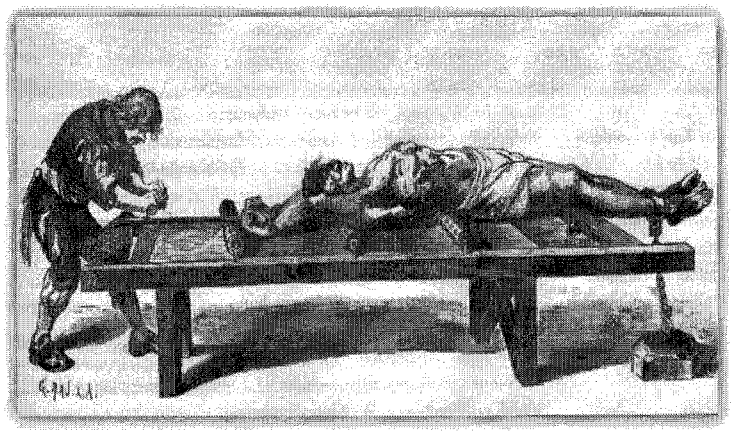
35. Photo: Sorting the Shoes of Victims in Auschwitz, The Beate Klarsfeld Foundation (on file with author with permission from Beate Klarsfeld).

36. Photo: Shoes representing the number massacred at Srebrenica (Nada Dzubur/Center for Political Beauty) (on file with author with email permission from Philipp Ruch, founder of Pillar of Shame (April 17, 2014, 3:04 EDT)).

recognized evil. The international community has only relatively recently come to treat genocide as a universal wrong.[37] Torture, fortunately (conceptually) and unfortunately (historically) has had a much longer legacy.

2. Icon of Torture: The Rack and The Inquisition

The Inquisition is to torture what the Holocaust is to genocide. The Inquisition has supplied critical icons of torture, such as the rack shown below.[38]



Medieval Rack Illustration[39]

Actually, there were three inquisitions. The first, the Medieval Inquisition (1184), attacked heresies, particularly the dualist beliefs of the Cathars and the Waldensians in southern France.[40] A 1215 papal bull, *Ad Extirpanda*, issued by Pope Innocent IV, outlined the circumstances and methods for the Dominicans to extract confessions through torture.[41] The Spanish Inquisition (1478-1834), initiated by King Ferdinand II of Aragon and Queen Isabella I of Castile, began with a focus primarily on *conversos*, Jews who converted to Catholicism but who had allegedly lapsed back into their former Judaic beliefs and Jewish practices.[42]

37. WILLIAM SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIMES OF CRIMES 91 (2000).

38. *See* Alfred W. McCoy, *Beyond Susan Sontag: The Seduction Of Psychological Torture*, *in* SCREENING TORTURE: MEDIA REPRESENTATIONS OF STATE TERROR AND POLITICAL DOMINATION 109, 115 (Michael Flynn & Fabiola F. Salek eds., 2012) (stating the Inquisition also may have marked a theological shift from the life to the death of Jesus).

39. Photo: Medieval Rack (Public Domain), *available at* http://en.wikipedia.org/wiki/Torture#mediaviewer/File:Streckbett.jpg.

40. 1 HENRY CHARLES LEA, A HISTORY OF THE INQUISITION OF THE MIDDLE AGES 82 (1887).

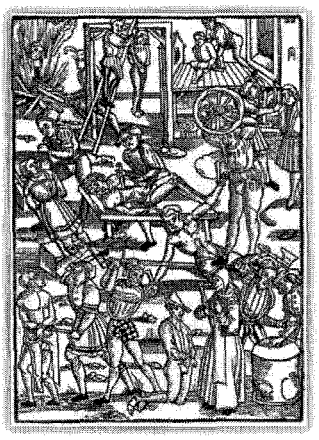
41. *Id.* at 337.

42. 2 HENRY CHARLES LEA, A HISTORY OF THE INQUISITION OF THE MIDDLE AGES 186, 288 (1901).

Finally, the Roman Inquisition, through the Congregation of the Holy Office established by Pope Paul III in 1542, targeted Protestant heretics.[43]

Historical accounts of atrocities typically go through a revisionist period, where previous accounts are criticized as exaggerated.[44] Perhaps secular authorities engaged in more brutality than the religious ones during the same period. Indeed, European secular courts carried out a brutal regiment of torture, particularly after the Church abolished trial by ordeal in 1215.[45] These and other historical revisions are important, especially since Protestants have had a stake in exaggerating the torments of the Catholic Inquisitions.[46] However, no one has challenged the barbarity of using torture devices during the Inquisition. Therefore, these revisions have not undermined the case for using devices from the Inquisition as icons of torture.

Pictures and descriptions of the torture implements used to extract confessions during the Inquisition create an almost universal reaction of disgust.



Medieval Torture Devices[47]

Three methods stand out. First, the *strappado* (pull, or *garrucha*, pulley, in Spanish), the "Queen of Torments,"[48] where the accused, with hands tied behind the back, is raised by ropes and pulleys.[49] The weights would suspend the victim

43. Benjamin D. Wicker, *Status: Inquisition in the Catholic Church*, CATHOLIC EDUCATION RESOURCE CENTER, http://www.catholiceducation.org/articles/history/world/wh0029.html.

44. CLAUDIA CARD, THE ATROCITY PARADIGM: A THEORY OF EVIL (2002).

45. JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN RÉGIME (2012).

46. HENRY KAMEN, THE SPANISH INQUISITION: A HISTORICAL REVISION (1998).

47. Photo: Medieval Torture Devices (Public Domain), *available at* http://en.wikipedia.org/wiki/Torture.

48. CULLEN MURPHY, GOD'S JURY: THE INQUISITION AND THE MAKING OF THE MODERN WORLD 90 (2012).

49. *See* Father Angelo Clareno, *A Catholic Inquisition Torture Session* (1304 A.D), http://www.corvalliscommunitypages.com/Europe/jesuits_saints_inquisition_reformation/an_inquisitio

up to five degrees of duration and severity.[50] With the *proto* (colt or rack), the torturer tied the victim's limbs to a frame, and then pulled in opposite directions until the joints became dislocated.[51] Finally, the *toca* (cloth) or *interrogation o mejorado del aqua* (otherwise known today as waterboarding) "simulates" drowning.[52] This also was called the submarine in medieval times.[53] More recently, former United States Vice President, Dick Cheney, referred to it as a "dunk in the water."[54]

Image of a Woodcut Depicting "Toca" or Waterboarding[55]

These icons, particularly the rack, have served and should continue to serve even more in the future as normative templates in judicial decisions. Images from the Inquisition provide the paradigm, exemplars, and models of what is clearly prohibited as torture. When the United States Supreme Court, to take a most notable example, has had to interpret the cruel and unusual punishment provision

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n_torture_session.htm (last visited Sept. 16, 2012) ("The torturer entered with his assistants and tied the prisoner's hands behind his back. Then he had him raised up by means of a pulley attached to the roof of the house, which was very high. After the prisoner had hung there for an hour the rope was released suddenly. The idea was that, broken by the intense pain, he would be defeated and confess that he had once been a heretic. After he had been raised and suddenly dropped many times they asked whether he would confess that he was or had been a heretic. He replied, I'm a faithful and catholic Christian, always have been, and always will be. If I said anything else to you shouldn't believe me, because I would only have said it to escape the torture. Let this be my perpetual confession to you, because it's the truth. Anything else would be a lie extorted by torture.").

50. *See* JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 43 (1993). This may have something to do with the origin of the phrase "the third degree," a euphemism for brutal police interrogation techniques.

51. MURPHY, *supra* note 48, at 93.

52. *Id.*

53. *Id.*

54. *Id.*

55. Photo: *Toca* or waterboarding (Public Domain), *available at* http://www.npr.org/templates/story/story.php?storyId=15917081.

of the Eighth Amendment, it has often invoked images of the Inquisition. In the case of *In re Kemmler*, the Court found that the Eighth Amendment prohibited Congress from allowing punishments such as "burning at the stake, crucifixion, breaking on the wheel, or the like."[56] In *Brown v. Mississippi*, the Court asserted that, "the rack and torture chamber may not be substituted for the witness stand."[57] In *Ashcraft v. Tennessee*, the Court found that, "state and federal courts, textbook writers, legal commentators, and governmental commissions consistently have applied the name of 'inquisition' to prolonged examination of suspects conducted as was the [36 hour] examination [interrogation] of Ashcraft."[58] In *Chamber v. Florida*, the Court found that, "the rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross questioning, and other ingenious forms of entrapment of the helpless or unpopular had left their wake of mutilated bodies and shattered minds along the way to the cross, the guillotine, the stake and the hangman's noose."[59]

Invoking images of the Inquisition does not just provide vivid pictures. These images lie at the heart of the decisions to abhor torture. Most importantly, these references serve as normative templates. But they do not draw a bright line around those inflictions of pain severe enough to qualify as torture. Instead, they mark out a category that takes in anything resembling it. *Blackburn v. Alabama*, which is worth quoting at length, best exemplifies this approach:

> Since *Chambers* v. *State of Florida,* 309 U. S. 227, 60 S.Ct. 472, 84 L.Ed. 716, this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition. A number of cases have demonstrated, if demonstration were needed, that the efficiency of the rack and the thumbscrew can be matched, given the

56. In re Kemmler, 136 U.S. 436, 446 (1890).

57. Brown v. Mississippi, 297 U.S. 278, 285-86 (1936).

58. Ashcraft v. Tennessee, 332 U.S. 143, n.8 (1944) ("State and federal courts, textbook writers, legal commentators, and governmental commissions consistently have applied the name of 'inquisition' to prolonged examination of suspects conducted as was the examination of Ashcraft"). See, e.g., Pound (Cuthbert W.), *Inquisitorial Confessions*, 1 CORNELL L. Q. 77; Chambers v. Florida, 309 U. S. 227 (194); Bram v. United States, 168 U. S. 532, 544 (1897); Brown v. Walker, 161 U. S. 591, 596 (1896); Counselman v. Hitchcock, 142 U. S. 547, 573 (1892); cf. Cooper v. State, 86 Ala. 610, 611 (1889). In a case where no physical violence was inflicted or threatened, the Supreme Court of Virginia expressly approved the statement of the trial judge that the manner and methods used in obtaining the confession read 'like a chapter from the history of the inquisition of the Middle Ages.' Enoch v. Commonwealth, 126 S.E. 222, 225 (Va. 1925); and see Cross v. State, 221 S.W. 489 (Tenn. 1920). The analogy, of course, was in the fact that old inquisition practices included questioning suspects in secret places, away from friends and counsel, with notaries waiting to take down 'confessions', and with arrangements to have the suspect later affirm the truth of his confession in the presence of witnesses who took no part in the inquisition. See *Inquisition Definition,* ENCYC. BRITANNICA, http://www.britannica.com/EBchecked/topic/288915/inquisition (last visited Nov. 19, 2014). "In the more serious offenses the party suspected is arrested, he is placed on his inquisition before the chief of police, and a statement is obtained . . . . Where the office of the district attorney is in political harmony with the police system, the district attorney is generally invited to be present as an inquisitor." 2 WHARTON'S CRIMINAL EVIDENCE 1021-22 (11th ed. 1935).

59. Chambers v. Florida, 309 U.S. 227, 237-38 (1940).

> proper subject, by more sophisticated modes of 'persuasion.' A prolonged interrogation of an accused who is ignorant of his rights and who has been cut off from the moral support of friends and relatives is not infrequently an effective technique of terror. Thus the range of inquiry in this type of case must be broad, and this Court has insisted that the judgment in each instance be based upon consideration of '[t]he totality of the circumstances.' *Fikes* v. *Alabama,* 352 U. S. 191, 197.[60]

Similarly and more recently, in *Pennsylvania v. Muniz*, the Court found that the privilege against self-incrimination "was designed primarily to prevent 'a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality.'"[61] In the words of legal theorist Seth Kreimer, these modern techniques lie far too close to the Inquisition's rack and screw.[62]

This does not mean that courts should set up a continuum beginning with Inquisitorial torture and ending with torture lite.[63] The now infamous Bybee memo characterized torture as suffering "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."[64] Another Bybee memo proclaimed that waterboarding does not "inflict actual physical harm" but only "controlled acute episodes."[65] Notice, however, that the methods permitted and promoted by the Bush administration included waterboarding, one of the classic methods of Inquisitorial torture.[66] In other words, the problem is not that the icon method permits "torture creep," where the baseline moves from "never" to "rarely" to "whenever needed."[67] Rather, the difficulty lies with the Bush Administration having one and only one icon of severe physical impairment. Instead they should have started with the iconic rack, which includes the full panoply of torture methods, including waterboarding, used by the Inquisitorial. In fact, the Bush administration used most of the primary Inquisition methods:[68] Manadel al-Jamadi received the *strappado*,[69] Khalid Sheik

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60. Blackburn v. Alabama, 361 U.S. 199, 206 (1960).

61. Pennsylvania v. Muniz, 496 U.S. 582, 596 (1990) (quoting Ullmann v. United States, 350 U.S. 422, 428 (1956)).

62. Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278, 289 (2003).

63. *See* Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1703 (2005) (critiquing the analysis of torture on a continuum).

64. Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep't. of Justice, to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation under 18 U.S.C. § § 2340-2340A (Aug. 1, 2002), *reprinted* in MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR 115 (2004).

65. Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep't of Justice, to John Rizze, Acting General Counsel of the Central Intelligence Agency, Interrogation of al Qaeda Operative (August 1, 2002).

66. ELIZABETH SWANSON GOLDBERG, BEYOND TERROR: GENDER, NARRATIVE, HUMAN RIGHTS 213 (2007).

67. MURPHY, *supra* note 48, at 87.

68. JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS 171 (2008).

Mohammad[70] and Abu Zubaydah Husayn[71] the *toca*. A condemnation of the Medieval *proto* (rack) entails an outright moral rejection of the Medieval *toca* (cloth used in waterboarding) because of the moral equivalence of the two methods. Similarly, the Bush Administration's outlawing of torture causing serious bodily harm entails, what should have been, its rejection of waterboarding.

3. Inappropriate Icons: Death by a Thousand Cuts

As noted above, the icons for torture have a history, a use subject to criticism and change. However, the choice of icons is far from arbitrary. Not all icons are created equal. The choice and use of an icon can be criticized and rejected. Consider the Chinese practice of *lingchi chusi* or death by a thousand cuts, used in the West as an icon of torture in the East.[72] Before a crowd of Beijing onlookers, a few soldiers performed *lingchi* on Wang Weiqin:

> Two soldiers brought forward the basket holding the knives that the procedure required. Others stripped the victim and bound him by his queue to a tripod in such a way that the front of his body was fully exposed to the state executioner and his assistant. The executioner began by slicing off pieces of flesh from the convict's breasts, his biceps, and his upper thighs.[73]

The Lingchi of "Pseudo-Fuzhuli"[74]

69. Jane Mayer, *A Deadly Interrogation. Can the CIA Legally Kill a Prisoner?*, NEW YORKER, Nov. 14, 2005, at 44, 44, *available at* http://www.newyorker.com/magazine/2005/11/14/a-deadly-interrogation.

70. Randall Mikkelson, *CIA Says Used Waterboarding on Three Suspects*, REUTERS (Feb. 5, 2008, 6:13 PM), http://www.reuters.com/article/2008/02/05/us-security-usa-waterboarding-idUSN0517815120080205.

71. Case of Husayn (Abu Zubaydah) v. Poland, Application No. 7511/13, Judgment, (Eur. Ct. H.R. July 24, 2014), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146047.

72. TIMOTHY BROOK ET AL., DEATH BY A THOUSAND CUTS 2 (2008).

73. *Id.* at 1.

First, note that this report, like so many by Western commentators, invariably takes practices of *lingchi* out of context.[75] Perhaps the following factors might modify reactions to the case of Wang Weiqin. *Lingchi* is misnamed "death by a thousand cuts."[76] The process did not involve one thousand cuts on a fully conscious victim.[77] After four slices, the executioner put Wang to death with a swift stab to the heart.[78] Further, this case involved multiple killings by the accused. Wang and his gang killed twelve members of another family (Li Jichang), including a three year old, in a revenge feud.[79] Only the subsequent suicide of Li's wife prompted the authorities to pursue Wang.[80] Also, at the time of the execution, Wang probably had been heavily sedated with opium, one of the strongest painkillers.[81] Finally, soon after Wang's execution, on April 24, 1905, the Chinese government abolished *lingchi* and other forms of cruelty.[82] All of these factors show the importance of context when making judgments. They do not, however, undermine the overall condemnation of the practice.

More importantly, throughout the nineteenth and twentieth century, writers used *lingchi* as an icon of Chinese cruelty and barbarity.[83] The authors of *Death by a Thousand Cuts* document the many inappropriate uses of this icon in the West.[84] For example, Western portrayals would show the victim tied to a cross.[85] The Chinese never used the Roman/Christian cross for executions.[86]

74. Photo: The Lingchi of "Pseudo-Fuzhuli" (name and date unknown), *reprinted in* GEORGES BATAILLE, LES LARMES D'EROS X (2004).

75. JAMES ELKINS, THE OBJECT STARES BACK 110 (1996).

76. BROOK ET AL, *supra* note 72, at 2.

77. ELKINS, *supra* note 75.

78. BROOK ET AL, *supra* note 72, at 1.

79. *Id.* at 2.

80. *Id.* at 3-4.

81. *Id.* at 2.

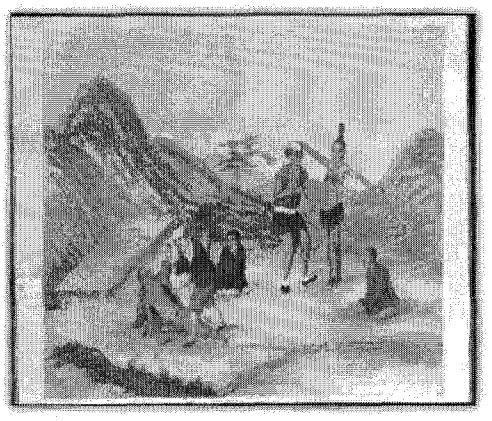
82. *Id.* at 28.

83. SIR HENRY NORMAN, THE PEOPLE AND POLITICS OF THE FAR EAST 224-25 (1895).

84. BROOK ET AL, *supra* note 72.

85. *Id.* at 204.

86. *Id.*



Lingchi illustration[87]

Archibald Little, a British onlooker, described Wang's "pieces of flesh, as cut away, being thrown to the crowd, who scrambled for the dreadful relics."[88] While these accounts bolstered the European belief in Chinese cruelty and barbarity, even Little's account, in the end based on hearsay, proved inaccurate.[89] These constructions were symptomatic of Westerners reading their own sense of execution into the Chinese context. Executions in the West, contemporaneous with the use of *lingchi*, were imbued with Christianity.[90] They inflicted suffering on the victim and stimulated a cathartic reaction in the onlookers.[91] In contrast, Chinese executions were ritualized enforcements of the law, meant to teach a lesson rather than to lead to redemption.[92]

For purposes of this analysis, the most important problem is that Westerners used *lingchi* as an icon for cruel torture, when it served no such purpose in China.[93] First, *lingchi* was a form of execution, not of torture, although no one could deny that it involved torment.[94] Second, magistrates in China could and did torture, but the law regulated the implements of torture.[95] The lawful implements consisted of only a few, namely, the baton (*xunzhang*, distinguished from the *zhang* or interrogation stick) as well as the finger (*zanzhi*) and ankle (*jiagun*) presses.[96]

87. Photo: Lingchi illustration (Bibliotheque Nationale de France), *reprinted in* BROOK ET AL., *supra* note 72 at 205.

88. BROOK ET AL., *supra* note 72 at 211.

89. *Id.*

90. *Id.* at 210.

91. *Id.* at 207.

92. *Id.* at 220.

93. *Id.* at 9.

94. *Id.* at 2.

95. *Id.* at 43.

96. *Id.*

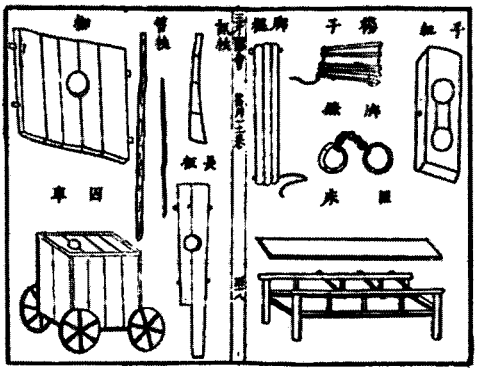


Figure 8. Selected implements of torture in the Ming dynasty, from Wang Qi (ed.), *Sancai tuhui* (illustrated compendium of heaven, earth, and human).

Ming Dynasty torture implements: wooden manacles, finger press, ankle press, fetters, "box-bed," interrogation baton, light and heavy flogging sticks, cangue, prisoner's card, restraining board.[97]

These last two were reserved for adult males accused of robbery or homicide, for which the penalty was exile or death,[98] but they could be used no more than twice without special authorization.[99] Compare the Chinese implements of torture with the following list of torture devices used during the Inquisition: "Head crushers, skull-splinters, wrist and leg irons, chain scourges, saws, hanging cages, the *guillotine*, spiked necklaces, self-mortification belts, the oral, rectal, and vaginal pear, the chastity belt, breast rippers . . . ."[100]

Yet, Western commentators avoided these cross-cultural comparative inventories. When they did undertake a single comparison, it was to the detriment of China. George Mason, author of *The Punishments of China* (1801) even mistakenly identified the Chinese ankle press with the Inquisition's rack.[101] When magistrates, in actuality, began to use something resembling the rack, that is, the box bed (*xiachuang*), Emperor Kangxi, in 1679, explicitly forbade its use.[102]

This brief excursion into Orientalism should at least demonstrate how to reject a purported icon of torture. Still, however persuasive readers might find *Death by a Thousand Cuts*, they should not suspend critical judgment. Admittedly, the authors do little in the form of explicit judgment, seeming to describe rather than prescribe. Yet, they assume judgmental inferences from their

97. Photo: Ming Dynasty torture implements: wooden manacles, finger press, ankle press, fetters, "box-bed," interrogation baton, light and heavy flogging sticks, cangue, prisoner's card, restraining board, (Wang Qi (ed), *Sancai Tuhui*), *reprinted in* BROOK ET AL., *supra* note 72, at 45.

98. BROOK ET AL., *supra* note 72, at 47.

99. *Id.*

100. Maria Antónia Lima, *The Dark Side of the Mediterranean—Expressions of Fear From the Inquisition to the Present*, BABILÓNIA NO. 8/9, 141, 143 (2010) (describing an exhibition of torture instruments presented in Evora in 1994).

101. BROOK ET AL., *supra* note 72, at 172.

102. *Id.* at 48.

readers.[103] Even a through deconstruction of Western depictions of Chinese practices should not deter a condemnation of *lingchi*, which even as a form of execution was torture.

Finally, critics may charge the portrayal of the rack as an alleged universal icon of torture with Orientalism, for it treats a Western European technique as universal. In China, until recently, cinematic representations of torture were commonplace, whereas sex was taboo.[104] Chinese torture icons, at least those appearing in films, consist mostly of chains and whips.[105] However, most Chinese would have few objections to using the rack as a universal icon, especially since it helps expose problems in the West.[106]

B. Iconographic Method: Child Abuse

1. Physical Abuse and Neglect

An analogy with child abuse will help to clarify how to use these moral icons in legal and moral disputes. Child abuse consists of distinct types of harms: physical abuse, emotional abuse, neglect, and sexual abuse.[107] The case of Mary Ellen Wilson makes an excellent candidate for the icon of child abuse. The child welfare literature places the discovery of child abuse in the United States around the 1870's.[108] The training manual for Court Appointed Special Advocates in child abuse cases begins with the case of Mary Ellen, the "discovery case."[109]

In 1866, Mary Ellen Wilson, slightly over the age of one, was indentured to Mary Connolly, who had divorced her daughter's biological father and remarried.[110] Mary Ellen's caretakers, Mary and Francis Connolly, whipped her daily and periodically maimed her with scissors.[111] Mrs. Etta Wheeler, a sweet-faced missionary, uncovered the case and, in desperation, approached Henry Bergh to help rescue Mary Ellen.[112] The history of the animal welfare movement, oddly enough, provides additional context for the case. In 1866, Henry Bergh, a member of the landed aristocracy, founded the American Society for the Prevention of

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103. *Id.* at 211-13.

104. Chris Berry, *Lust, Caution: Torture, Sex, and Passion in Chinese Cinema*, *in* SCREENING TORTURE: MEDIA REPRESENTATIONS OF STATE TERROR AND POLITICAL DOMINATION 71, 79 (Michael Flynn & Fabiola F. Salek eds., 2012).

105. *Id.* at 80-81.

106. Jérôme Bourgon, *Obscene Vignettes of Truth. Construing Photographs of Chinese Executions as Historical Documents*, *in* VISUALIZING CHINA: 1845-1965, at 39, 89-90 (Christian Henriot & Wen-hsin Yeh eds., 2013).

107. Melinda Smith & Jeanne Segal, *Child Abuse & Neglect*, HELPGUIDE.ORG, http://www.helpguide.org/mental/child_abuse_physical_emotional_sexual_neglect.htm (last updated July 2014).

108. John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 449-50 (2008-2009).

109. CHILD WELFARE TRAINING INST., EVOLUTION OF FEDERAL CHILD WELFARE LEGISLATION (2007), *available at* http://php.ipsiconnect.org/CWTI/Law/textOnlyLaw.html.

110. *Id.*

111. CHILD WELFARE TRAINING INST., *supra* note 109.

112. Myers, *supra* note 108, at 451.

Cruelty to Animals ("ASPCA"), the first organization of its kind anywhere.[113] Although reluctant to divert resources away from animal welfare, Bergh eventually became convinced to intervene on behalf of Mary Ellen, whom he reportedly acknowledged as a "little animal, surely," and he allowed his staff to undertake an investigation.[114] Elbridge T. Gerry, grandson of James Madison's vice-president and counsel for ASPCA, filed a petition on Mary Ellen's behalf.[115]

Judge Abraham Lawrence of the New York Supreme Court was involved in sentencing Mary Connolly to one year of hard labor for criminal assault and battery, a lesser crime than the felonious assault charge in the initial indictment.[116] He gave custody of Mary Ellen to The Sheltering Arms, an institution for dependent children.[117] Elbridge T. Gerry went on to help organize the New York Society for the Prevention of Cruelty to Children ("NYSPCC"), incorporated in 1875.[118] The NYSPCC's board included some of America's wealthiest men (having excluded women until 1921).[119] Bergh also played a pivotal role in the founding of the child welfare movement.[120]

Making physical abuse the paradigm of child abuse does not privilege that form of abuse. Rather, it helps to resolve disputes over other forms of child abuse. While sexual abuse receives the most newspaper coverage in the US,[121] neglect far outstrips the other forms of child abuse.[122] Rates and incidences of physical and sexual abuse have decreased dramatically throughout the United States.[123] Neglect may have declined but not as rapidly or significantly as physical and sexual abuse.[124]

Before examining similarities between assessments of child abuse and torture, it is important to address, however briefly, a critical dissimilarity between the two forms of injustice. Recently, the Center for Constitutional Rights took the Holy See to task for failing to mention, in its Initial Report to the Committee Against

113. CHILD WELFARE TRAINING INST., *supra* note 109.

114. JOHN E.B. MYERS, CHILD PROTECTION IN AMERICA: PAST, PRESENT, AND FUTURE 30 (2006).

115. *Id.*

116. *Id.* at 33.

117. *Id.*

118. *Id.* at 35.

119. *Id.*

120. Myers, *supra* note 108, at 452.

121. Thomas Hove, Hye-Jin Paek, Thomas Isaacson & Richard T. Cole, *Newspaper Portrayals of Child Abuse: Frequency of Coverage and Frames of the Issue* 16 MASS COMMC'N & SOC'Y 89, 91 (2013).

122. U.S. DEP'T OF HEALTH AND HUMAN SERV. CHILDREN'S BUREAU, CHILD MALTREATMENT 2012 xi (2013), *available at* http://www.acf.hhs.gov/sites/default/files/cb/cm2012.pdf;
National Child Abuse Statistics, Child Abuse in America, CHILDHELP.ORG, tlb. Types of Child Abuse in 2012, http://www.childhelp.org/pages/statistics (last visited July 29, 2014) (stating the year 2012 saw 78.3% neglect, 18.3% physical abuse, and 9.3% sexual abuse).

123. David Finkelhor, Lisa Jones, Ann Shattuck & Kei Saito, UPDATED TRENDS IN CHILD MALTREATMENT, 2012, at 2 (2013).

124. National Academy of Sciences, *Rates of Physical and Sexual Abuse Have Declined, But Not Child Neglect*, SCI. DAILY (Sept. 12, 2013), http://www.sciencedaily.com/releases/2013/09/130912143940.htm.

Torture[125], the sexual abuse inflicted by its priests.[126] The Center then contended that sexual abuse is torture, which is in keeping with the position previously adopted by the Committee Against Torture.[127]

Contrary to the Center and the Committee, an implication of the analysis of this Article, set forth more fully below,[128] is that generally speaking, sexual abuse, however egregious, is not torture. First of all, the sexual abuse engaged in by priests did not fulfill the purpose requirement under the Torture Convention.[129] Other than their own sexual satisfaction, it is doubtful whether priests had any other institutional purposes when carrying out their morally reprehensible acts. The Shadow Report tried to dodge this objection by noting that, unlike torture, the charge of cruel, inhuman, and degrading treatment does not require proof of a purpose.[130] But the Report cannot have it both ways, for then it has admitted that sexual abuse is not torture. More importantly, and, again, as argued more fully below, pain lies at the core of torture,[131] whereas sexual abuse may not involve any pain whatsoever.[132] This is not to condone any form of sexual abuse. Conflating sexual abuse and torture does not bolster the perceived harm status of either one. Rather, it diminishes the likely perceived impact of both.

It would take a separate book to unravel the complexities of child abuse.[133] However, returning now to the similarities, child abuse presents some of the same

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125. *See* Comm. against Torture, Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Initial Reports of States Parties Due in 2003, The Holy See, U.N. Doc.CAT/C/VAT/1 (Dec. 7, 2012).

126. CTR. FOR CONSTITUTIONAL RIGHTS, SHADOW REPORT 2 (Apr. 2014) [hereinafter THE SHADOW REPORT] (prepared for the 52nd Session of the United Nations Committee Against Torture in Connection with its Review of the Holy See).

127. Comm. Against Torture, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment 2, ¶ 22, UN Doc. CAT/C/GC/2 (Jan. 24, 2008).

128. *See infra* Section III.

129. *See* Torture Convention, *supra* note 3 ("[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person *for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind* . . . ." (emphasis added)).

130. In addition, this Article attempts to conflate torture with cruel, inhuman, and degrading treatment. *See infra* Section III(A)(3)(a).

131. *See infra* Section III(A)(1)(b).

132. Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 688 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998), http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf, *adopted in* Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶¶ 478-79 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998), http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf. The Trial Chamber in the Akayesu case (the first to successfully prosecute an individual for rape) defined sexual violence as "any act of a sexual nature which [sic] is committed on a person under circumstances which [sic] are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which [sic] do not involve penetration or even physical contact." *Id.*

133. *See* David Pimentel, *Criminal Child Neglect and the 'Free Range Kid': Is Overprotective Parenting the New Standard of Care?*, 2012 UTAH L. REV. 947 (2012). Unfortunately, Pimentel concludes an otherwise insightful article with lame recommendations to have the law provide guiding factors for parents in raising their children.

difficulties as torture. Most importantly, it is amenable to the same iconography approach advocated in this Article. Physical abuse, as represented by the icon of Mary Ellen Wilson, serves as the paradigm, the normative template for child abuse.

Mary Ellen McCormack[134]

When neglect can be shown to resemble physical abuse, then, if criminal prosecution is justified for physical abuse, it should be equally justified for similar cases of neglect as it would be for the following case:

> One of the most severe child abuse cases of the last few years comes out of Plant City, Florida, where in 2005 Plant City Police entered into a child abuse investigation and found a "feral" child. The girl, 7-year-old Danielle, was found naked in a dark closet. Her hair was matted and covered with lice and she was lying on a moldy mattress surrounded by bugs. She had sores, rashes, and bug bites covering her skin.
>
> She was wearing a diaper that was full of urine and feces and dirty diapers covered the floor of the trailer in which the family lived. Feces covered the walls of the trailer and cockroaches were everywhere. The girl weighed only 48 pounds and was unable to eat solid food. She spent a great deal of time recovering in the hospital.[135]

Similarly, when examining torture, courts (and analysts) should compare the image of Inquisition torture with that of the current practice being called into question. The presumption should be that the practice looks like Inquisition torture. The burden then falls on the alleged perpetrator to show that the practice is

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134. Photo: Mary Ellen McCormack, (Public Domain), *available at* http://en.wikipedia.org/wiki/Mary_Ellen_Wilson.

135. *Make Sure You Know the Cases of Child Abuse*, LAWS.COM, http://children-laws.laws.com/child-abuse/cases-of-child-abuse (last visited Sept. 29, 2014).

nothing like those practices conducted during the Inquisition, that is, that it more closely resembles *de minimis* harm. The Court in *McKune v. Lile* adopted this strategy: "Determining what constitutes unconstitutional compulsion involves a question of judgment: Courts must decide whether the consequences of an inmate's choice to remain silent are closer to the physical torture against which the Constitution clearly protects or the *de minimis* harms against which it does not."[136]

Child Abuse—Real Neglect[137]

Child neglect statutes are notoriously vague, giving room for the prosecution of *de minimis* harm for neglect.[138] The courts have adjudicated a number of questionable cases of neglect. For example, Dr. Bobbie Sweitzer, an anesthesiologist at Massachusetts General Hospital, left her one and four year-old daughters in her Porsche after cracking the car window and activating the alarm system.[139] She ran into Sam's Club to drop off some film, leaving her girls out of her sight for 20 to 30 seconds.[140] She returned home to find that she had been

136. McKune v. Lile, 536 U.S. 24, 41 (2002).

137. Photo: Child Abuse—Real Neglect (Santa Rosa County Florida Sheriff's Office), *available at* http://www.northescambia.com/2012/01/child-neglect-arrest-photos-released-of-filth-in-jay-home.

138. *See also* 705 ILL. COMP. STAT. 405/2-3(1)(d)(2013) (Illinois law defines a neglected minor, in part, as "any minor under the age of 14 years whose parent or other person responsible for the minor's welfare leaves the minor without supervision for an unreasonable period of time without regard for the mental or physical health, safety, or welfare of that minor."). *See also MD. CODE ANN., FAM. LAW*§ 5-801(a) (LexisNexis 2014) ("A person who is charged with the care of a child under the age of 8 years may not allow the child to be locked or confined in a dwelling, building, enclosure, or motor vehicle while the person charged is absent and the dwelling, building, enclosure, or motor vehicle is out of the sight of the person charged unless the person charged provides a reliable person at least 13 years old to remain with the child to protect the child.").

139. Robin Estrin, *Don't Let Sleeping Tots Lie, Parent Learns*, LOS ANGELES TIMES (Apr. 6, 1997), http://articles.latimes.com/1997-04-06/news/mn-45952_1_parent-learns.

140. *Id.*

reported to the Department of Social Services for child abuse.[141] It took eight months and $15,000 in fees to "clear" her name.[142] In another case, parents in Indiana were convicted for loosely tapping their children's arms and legs while playing a hostage game with their children.[143] Bridget Kevane, a literature professor at Montana State University, was charged with neglect for leaving her three children and their two friends (ranging in age from 3 to 12) at the mall for a few hours.[144]

Sheridan Small in Car Seat[145]

These cases of alleged neglect look nothing like the physical abuse suffered by the likes of Mary Ellen, and therefore, the courts should have dismissed them as constituting *de minimis* harm.[146]

The same type of analysis, recommended here for child neglect cases, should guide determinations of what constitutes torture. In *Wilson v. Seiter*, an inmate claimed that the following constituted cruel and unusual punishment: "overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms,

141. *Id.*

142. *Id.*

143. Gross v. State, 817 N.E.2d 306, 307 (Ind. Ct. App. 2004).

144. Judith Warner, *Dangerous Resentment*, N.Y. TIMES (July 9, 2009, 9:00 PM), http://opinionator.blogs.nytimes.com/2009/07/09/dont-hate-her-because-shes-educated/?_php=true&_type=blogs&_r=0.

145. Photo: Sheridan Small in car seat (Dr. Bobbie Sweitzer) (on file with author with Email Permission from Dr. Bobbie Sweitzer (April 25, 2014, 09:21 EDT)).

146. Admittedly, recent cases of children dying in locked cars have come to light, but, on closer examination, these cases look like the case of Mary Ellen. *See* Deborah Hastings, *22 Month-Old Georgia Boy Left to Die in Hot Car had Scratches on Face and Head*, N.Y. DAILY NEWS (July 5, 2014, 12:00 PM), http://www.nydailynews.com/news/national/22-month-old-ga-boy-died-hot-car-scratches-head-article-1.1855937 (explaining how Cooper Harris, who died of hypothermia after his father locked him in the car, had abrasions over his body).

unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates."[147] While the Justices disagreed over the majority's intent requirement in prison conditions cases, they concurred, in effect, finding that these conditions constituted only *de minimis* harms.[148]

With torture, the strategy is similar to that in child abuse cases. First, start with those acts such as the intentional infliction of pain that almost everyone would agree constitutes torture. Then, evaluate other acts such as waterboarding according to how closely they resemble the core act of torture. Following this method, there would be little doubt that practices such as waterboarding qualify as torture.

III. ELEMENTS OF TORTURE

A. Actus Reus

1. Core Acts

Crimes consist of a criminal or guilty act (*actus reus*) carried out by a criminal or guilty mind (*mens rea*). Statutes in national criminal law systems categorize different crimes and list the elements that prosecutors need prove for each crime.[149] The crime of murder may include the following: killing with intent to kill, killing with intent to cause grievous bodily harm, killing recklessly, and killing in the course of committing a felony (the felony murder rule).[150] Each category of murder involves killing. There are greater and lesser instances of the same act, that is, of killing.

International criminal law has similarities and dissimilarities to national criminal law. Compare the crimes of genocide in international law[151] and murder in national law.[152] Both include acts of killing. However, a national law on murder distinguishes between various kinds of killing[153] whereas the Rome Statute does not distinguish types of killings under the crime of genocide.[154] This Section begins with an analysis of the core act of genocide before demonstrating that the crime of torture also has a core type of act, namely, the infliction of pain. If a case can be made that the crime of genocide has a core *actus reus*, then that should

147. Wilson v. Seiter, 501 U.S. 294, 296 (1991).

148. *Id.* at 306.

149. *See generally* PHILIP E. CARLAN ET. AL., AN INTRODUCTION TO CRIMINAL LAW 5 (2011) (explaining in New York State, First Degree Grand Larceny is the stealing of property that exceeds one million dollars and carries a sentence not to exceed twenty-five years, whereas Fourth Degree Grand Larceny consists of stealing property that exceeds one thousand dollars with a sentence not to exceed four years imprisonment).

150. AN INTRODUCTION TO CRIMINAL LAW, *supra* note 149, at 77.

151. *See* Rome Statute of the International Criminal Court art. 6, *opened for signature* July 17,1988, 2187 U.N.T.S. 3 (entered into force July 1, 2002) [hereinafter Rome Statute].

152. *See* CARLAN ET. AL., *supra* note 149 at 77.

153. Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 120-21(2004) (giving the example that only some common law jurisdictions such as California recognize the felony murder rule, making participants in a felony liable for murder even if unintentional).

154. Rome Statute, *supra* note 151 at art. 6(a).

make it easier to accept the claim that torture has a core *actus reus*. However, before proceeding, it is important to note a difference between analyses of genocide and of torture.

While killing is the core *actus reus* of genocide, it is not the sole *actus reus*. Genocide is the killings of "national, ethnical, racial, or religious groups."[155] In other words, for killings to qualify as genocide, the prosecutor must not only establish that killings occurred, but also that the victims came from certain types of groups. This is why iconography has a limited utility in depicting the *actus reus* in genocide cases. An icon will not provide a complete depiction of the *actus reus* since it generally does not readily identify the victim group. In contrast, a single icon such as the Inquisitorial rack does fully capture the *actus reus* of torture. With respect to the *actus reus*, a prosecutor in a torture case does have to prove anything about the nature of the victim, only the infliction of pain. Nevertheless, despite this dissimilarity, genocide and torture each have core acts. As argued below, the core wrong of genocide is killings. Analogously, the core wrong of torture is inflicting pain.

a. Genocide: Killing

The two major international treaties on genocide agree on the five types of acts that constitute genocide. Article II of the Genocide Convention (1948) specifies five types of acts (a-e) that constitute genocide:

(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.[156]

Article 6 of The International Criminal Court repeats the acts listed in the earlier Genocide Convention:

(a) Genocide by killing.
(b) Genocide by causing serious bodily or mental harm.
(c) Genocide by deliberately inflicting conditions of life calculated to bring about physical destruction.
(d) Genocide by imposing measures intended to prevent births.
(e) Genocide by forcibly transferring children.[157]

This may seem like a further difference between the crime of genocide and torture. The *actus reus* of genocide seems to come in a variety of types of acts,

155. Convention on the Prevention and Punishment of the Crime of Genocide art. II, *adopted* Dec. 9, 1948, S. TREATY DOC. No. 81-15, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].

156. *Id.*

157. Rome Statute, *supra* note 151.

ranging from killings to sterilizations. Within the Torture Convention or other laws on torture, the most plausible interpretation would not find a comparable range of acts, only a single type, namely, the infliction of pain.[158] However, as agued below, this turns out not to be a difference at all. Genoicde, like torture, has a single prototypical *actus reus*, namely, killings, even if the laws do (mistakenly!) recognize variations on that *actus reus*.[159]

Since there are five acts listed, a key question is whether each act independently would qualify as an act of genocide, as some commentators contend,[160] or whether one of these acts is more important than the other acts, as maintained by this Article. For example, is "killing members of the group" and "imposing measures intended to prevent births within a group" both equally genocide acts? In short, are killing and sterilization legally and morally on par? The way to answer these questions is first to note that the acts (a) through (e) appear in a particular order, an order that is legally and morally relevant. "Genocide by killing" appears first on these lists and on all national codifications because it alone constitutes the core ingredient of genocide.

Notice that, among the five listed acts, (a) is the only lethal, physical act. All of the others are non-lethal acts. That priority ranking reflects the judgment that, in general, lethal acts are worse than non-lethal ones. Otherwise, the lethal act of killing would be legally and morally comparable to any one of the other four non-lethal acts. This would lead to the bizarre conclusions that the Nazis' sterilization campaign against the "mentally defective' should rank on the same level of severity and gravity as the Holocaust killings.

If we have successfully argued for demanding that the crime of genocide minimally and centrally include acts of killing, we will have accomplished a great deal. Rather than extending the notion of genocide to include cultural genocide and other non-lethal acts, as many have proposed, this narrow definitional interpretation places killing as the core act of genocide.[161] The other non-lethal acts listed in Article II of the Genocide Convention and in the ICC's Articles occur on the list along with the lethal act of killing because they often occur in concert with these killings.[162] More importantly, for purposes of this Article, we now have a precedent for arguing that torture has a core *actus reus*, namely, the infliction of pain.

b. Torture: Inflicting Pain

The infliction of pain lies at the heart of torture. What is the wrong in torture? To some, the quest to find the wrong in torture would seem easy. The proverbial

158. Torture Convention, *supra* note 3.

159. Etymology provides a further important clue for finding the basics of a genocide act. Given the word's derivation from the Latin *caedere* ("to kill"), whatever else genocide encompasses, it should include the act of killing. ADAM JONES, GENOCIDE: A COMPREHENSIVE INTRODUCTION 8 (2006).

160. GENOCIDE IN INTERNATIONAL LAW: THE CRIMES OF CRIMES, *supra* note 8, at 452 (2000).

161. *See* Alison Palmer,*Ethnocide in*, GENOCIDE IN OUR TIME 1 (Michael N. Dobkowski & Isidor Walliman eds., 1992).

162. THOMAS W. SIMON, THE LAWS OF GENOCIDE: PRESCRIPTION FOR A JUST WORLD 56 (2007).

common person might start by noting, first of all, that torture hurts. The Inquisition rack icon captures the underlying phenomenology of torture, namely, the inflicting of pain. As argued throughout this Article, that simple and insightful claim seems to have eluded jurists and philosophers.

Opponents of torture find any number of things wrong with torture, over and above the infliction of pain. Surprisingly, few torture opponents seem content with finding that the wrong of torture lies in inflicting pain. They think that something more than pain must be a stake in torture. Parry, for example, sees torture in terms of asymmetrical power relations.[163] Most opponents of torture see it as a violation of the individual's autonomy or agency—in short, torture undermines the very identity that makes the individual human. According to Wisnewski, "[r]ather than being inflicted on the body, torture comes to be directed first and foremost at the agency of the victim."[164] For Shue torture not only undermines agency, it turns such agency against itself.[165] Davis sees torture as some sort of endurance test: "torture is the intentional testing of a sentient, helpless being's ability to bear physical suffering against that being's will and indifferent to its welfare."[166] Sussman takes these philosophical/psychological harms to an existential extreme when he proclaims that "torture turns out to be not just an extreme form of cruelty, but the pre-eminent instance of a kind of forced self-betrayal [colluding against oneself], more akin to rape than other kinds of violence characteristic of warfare or police actions."[167]

Yet, just as physical pain does not accompany every instance of torture, autonomy or agency also are not always lost through torture. In fact, many torture victims not only come through the horror as fully intact human beings, but many report never succumbing to a point where they entirely abandoned their autonomy or agency.[168] In a recent article, Luban and Shue unwittingly admit this: "Allowing the state to use severe mental pain or suffering is allowing them to employ an inherently awful tool . . . —the experience of severe mental pain or suffering—that is capable *sometimes* of attaining an awful goal: destroying the psychological identity of its target."[169] So, is torture only wrong when it destroys human identity, which it only does sometimes? The wrong of torture is the intentional (and actual) infliction of pain on a person within a political and legal context.

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163. John T. Parry, *What Is Torture, Are We Doing It, and What If We Are?*, 64 U. PITT. L. REV. 237, 249 (2003) (for Parry torture occurs "against a background of total control and potential escalation that asserts the state's dominance and unsettles or destroys the victim's normative world").

164. J. JEREMY WISNEWSKI, UNDERSTANDING TORTURE 10 (2010).

165. Henry Shue, *Torture*, 7 PHIL. & PUB. AFF. 124 (1978).

166. Michael Davis, *The Moral Justifiability of Torture and Other Cruel, Inhuman, or Degrading Treatment*, 19 INT'L J. APPLIED PHIL. 161, 167 (2005).

167. David Sussman, *What's Wrong with Torture?*, 33 PHIL. & PUB. AFF. 1, 4 (2005).

168. Harvey M. Weinstein, *Victims, Transitional Justice and Social Reconstruction: Who is Setting the Agenda?*, *in* JUSTICE FOR VICTIMS: PERSPECTIVES ON RIGHTS, TRANSITION AND RECONCILIATION 161, 169 (Inge Vanfraechem, Antony Pemberton & Felix Mukwiza Ndahinda eds., 2014).

169. David Luban & Henry Shue, *Mental Torture: A Critique of Erasures in U.S. Law*, 100 GEO. L.J. 823, 860 (2012) (emphasis added).

These characterizations of torture highlight something often inadvertently overlooked in discussions of torture. Most analysts focus on the victim and not on the perpetrator.[170] They zero in on what torture does to the victim. Obviously, any moral assessment must ultimately include what torture does to the victim. However, it should be just as obvious that law and morality should point their accusing fingers at the perpetrator. A perpetrator-centered analysis initially avoids a problem that can easily get the victim-oriented approach off the track. The former delays a debate over whether to subjectively or objectively assess a victim's pain and suffering. Initially, we do not need to care about whether the victim just happens to have an extreme tolerance for pain. What matters is that the perpetrator *intended* to inflict the pain.

3. Icons and Distinctions

a. Cruel, Inhumane, or Degrading Treatment

Statutes[171] and courts[172] distinguish torture from cruel, inhuman, or degrading treatment. Jeremy Waldron has attempted further to distinguish inhuman from degrading treatment.[173] A victim-oriented sense of the former is "treatment which cannot be endured in a way that enables the person suffering it to continue the basic elements of human functioning."[174] Degrading treatment includes four kinds of outrages to human dignity: bestialization, instrumentalization, infantilization, and demonization.[175] Indeed, these might differ from each other in significant ways. Yet, it is important not to see them as less severe than physical pain.[176] The important thing is to see how they connect to the icon of torture, the infliction of pain in ways similar to the use of the rack in the Inquisition.

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170. *See, e.g.*, Anthony Cullen, *Defining Torture in International Law: A Critique of the Concept Employed by The European Court of Human Rights* 34 CAL. W. INT'L L.J. 29, 33 (2003) ("The experience of the victim is of primary consideration in determining acts that constitute torture.").

171. Torture Convention, *supra* note 3, art. 16, ¶ 1, at 116 ("Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined."); Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Nov. 4, 1950, 513 U.N.T.S. 222 ("No one shall be subject to torture or to inhuman or degrading treatment or punishment"); S. AFR. CONST., § 12(1), 1996 ("Everyone has a right to freedom and security of the person, which includes the right . . . not to be tortured in any way; and . . . not to be treated or punished in a cruel, inhuman or degrading way."); New Zealand Bill of Rights Act 1990, cl. 9 ("Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.").

172. *See, e.g.*, Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A), at 110-11, 111 n.12 (1978).

173. Jeremy Waldron, The Coxford Lecture, *Inhuman and Degrading Treatment: The Words Themselves*, 23 CAN. J. L. & JURIS. 269 (2010).

174. *Id.* at 280.

175. *Id.* at 282. (citing a case where degrading treatment is found even where the victim is not aware of it); *see also* R v. Gen. Med. Council, [2004] EWHC (Admin) 1879, [2005] Q.B. 424, at ¶ 178.

176. *Cf.* Bernhard Schlink, *The Problem with Torture Lite*, 29 CARDOZA L. REV. 85, 86 (2007) ("Whatever the wording, the distinction between torture and cruel, inhuman and degrading treatment is one of intensity. Intensity is also the crucial factor in the book's second distinction, the one between cruel, inhuman, and degrading treatment or treatment that shocks the conscience, and highly coercive interrogation techniques deemed acceptable . . . .").

In a study of survivors of the Bosnian war, the researchers noted that, "physical pain per se is not the most important traumatic stressor in survivors of torture."[177] Jessica Wolfendale makes a strong case that so-called "torture lite" methods can be even crueler than direct physical torture techniques, since the former provides a moral distance between perpetrator and subject, thereby allowing the victim to feel more responsible and the perpetrator less responsible.[178] However, in keeping with the analysis presented in this Article, we can conclude that she wrongly accepts the suggestion that the distinction between torture and torture lite depends on an understanding of violence as primarily physical. Torture as paradigmatically physical does not provide more distance—rather, it provides a critical connection.

Thus, arguing for the centrality of physical pain for the act of torture does not entail claiming physical pain as a necessary element of the act of torture. Whatever distinctions made among these experiences, it is critical to note not so much how they differ from physical pain but how closely connected they are to physical pain. Metaphors prove telling in this debate. Waldron partially captures my position of erecting "a sort of *cordon sanitaire* around the much more important prohibition on torture—a 'fence around the wall,' designed not just to keep police, spies, and interrogators from crossing the torture threshold but to keep them from even approaching it."[179]

British forces subjected Irish Republican Army suspects to five methods: protracted standing, hooding, subjection to loud noises, sleep deprivation, and food and drink restrictions.[180] While the European Commission on Human Rights found that these practices amounted to torture,[181] the European Court of Human Rights disagreed but found that they were inhuman and degrading.[182] The Supreme Court of Israel found similar Israeli interrogation techniques—shaking, waiting in Shabach position,[183] tightening of handcuffs, sleep deprivations—

177. Metin Başoğlu, et al., *Torture vs Other Cruel, Inhuman, and Degrading Treatment: Is the Distinction Real or Apparent?*, 64 ARCH. GEN. PSYCHOL. 277, 284 (2007) ("[A]lthough there is evidence that torture leads to PTSD in some cases, many people survive extremely severe torture in relatively good psychological health and never develop PTSD. Conversely, some survivors develop PTSD after ostensibly milder forms of ill treatment or psychological stressors that do not involve physical torture.").

178. Jessica Wolfendale, *The Myth of "Torture Lite"*, 23 ETHICS & INT'L AFF. 47, 56 (2009).

179. JEREMY WALDRON, TORTURE, TERROR, AND TRADE-OFFS: PHILOSOPHY FOR THE WHITE HOUSE 277, 278 (2010).

180. Andrew Mumford, *Minimum Force Meets Brutality: Detention, Interrogation and Torture in British Counter-Insurgency Campaigns*, 11 J. MIL. ETHICS 10, 17 (2012).

181. Ireland v. United Kingdom, App. No. 5310/71, 512 Y.B. Eur. Conv. On H.R., 378 (Eur. Comm'n on H.R.).

182. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) ¶ 165 (1978). Recently, however, the European Court of Human Rights found that waterboarding constituted torture. *See* Case of Husayn v. Poland, App. No. 7511/13, EUR. CT. H.R. (July 24, 2014), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146047.

183. Joseph Lelyveld, *Interrogating Ourselves*, N.Y. TIMES, June 12, 2005, http://www.nytimes.com/2005/06/12/magazine/12TORTURE.html?pagewanted=all&_r=0 ("[I]n which the detainee was hooded and placed on a low chair with a seat tilting down, pitching him forward while

unnecessary and unlawful, but refused to label them as torture.[184] As argued above, the key move to have these techniques qualified as torture is to show that these diverse techniques are very much like being subjected to the medieval rack.[185]

b. Mental Suffering

Those who participate in the torture debate could use a basic course in neuroscience. The discussions suffer, if I can use that word advisedly, from a focus on only a narrow piece of the neurophysiology of pain. Many analysts become stymied after they provide an initial exposition of what they call "physical pain." Pustilnik, for example, notes that victims of waterboarding report that it was not physical pain that they felt.[186] What the victims are reporting is that waterboarding is not the same type of pain as they receive when their skin nociceptors respond to intense mechanical stimulation.[187] That does mean that it is not painful.

Luban and Shue claim "[b]ombarding prisoners with earsplitting, culturally repugnant rock music for hours on end" would certainly count as mental suffering although some might discount it as constituting physical pain."[188] Contra Pustilnik, these prisoners might not report their experiences of loud noise as the same as their experience of pain from physical stimuli, but they would still label them as painful.[189] Expectations also affect hearing pain.[190]

As examples of experiences that are physical suffering but not pain, Luban and Shue list "freezing cold, unbearable heat, itching, nausea, paralysis," aching all over, inability to breathe.[191] If commentators stay focused on monomodal nociceptors, then they miss the richness of the neurophysiology of pain.[192] There

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his arms were tightly handcuffed behind him in an unnatural, contorted way so that they had to support his weight, for two or three hours at a stretch.").

184. HCJ 5100/94 The Public Committee Against Torture in Israel v. The Government of Israel, 53(4) P.D. 817 (1999).

185. *See supra* Section II(A)(2).

186. Amanda C. Pustilnik, *Pain as Fact and Heuristic: How Pain Neuroimaging Illuminates Moral Dimensions of Law*, 97 CORNELL L. REV. 801, 825 (2012).

187. Dan Jones, *Beyond Waterboarding: The Science of Interrogation*, 205 NEW SCIENTIST 40 (2010).

188. Luban & Shue, *supra* note 169, at 829.

189. *Contra* Pustilnik, *supra* note 186, at 825 n.93 (citing John T. Parry, *Escalation and Necessity: Defining Torture at Home and Abroad in* TORTURE: A COLLECTION 145, 147-48 (Sanford Levinson ed., 2004). *See* Aage R. Møller, *Similarities Between Chronic Pain and Tinnitus*, 18 AM. J. OTOLOGY 577-88 (1997).

190. *See* Alan Lockwood et al., *Tinnitus*, 347 N. ENG. J. MED. 904 (2002).

191. Luban & Shue, *supra* note 169, at 828.

192. *Pain Receptor*, PSYCHOLOGYCS, http://www.psychologycs.com/pain-receptor.htm (last visited Sept. 19, 2014) ("Any of the free nerve endings located throughout the body that function as sensory receptors, transmitting sensations of pain in response to noxious stimulation, one type (the monomodal nocireceptor) being a thinly myelinated delta fibre that responds to severe mechanical deformation, the other (the polymodal nocireceptor) being a C fibre that responds to mechanical deformation, excessive heat or cold, and irritant chemical stimulation, and is responsible for the axon reflex.").

are different kinds of nociceptors, including skin and visceral ones.[193] The neurophysiology of painfully cold sensations is complicated. It involves a molecular thermoreceptor called transient receptor potential melastatin 8 ("TRPM8"), which "express markers of nociceptors as well as non-nociceptors and have axonal properties indicative of both Aδ- and C- fibers."[194] A singular focus on simplified pain pathways can prevent recognizing the rich array of pain experiences and the similarities among these.

There is an iconography of pain at work here. Almost every discussion of pain uses the image of pain originating from something like a hammer causing injury to the hand.[195] If that is the sole image or primary icon, then other pathways are either ignored or treated as problematic. Whereas diagrams of sensory pain beginning in the hand abound, it is difficult to find any diagrams of pain stemming from loud noises or excessive cold.[196] A person's report of pain stemming from a hammer blow to the hand will differ from reports of pain from excessive noise or cold. Those differences, however, do not create different, and thereby problematic, categories of pain. Their neural circuitries are similar enough, especially in the context of the torture debate.

B. Mens Rea

The Inquisition rack icon captures the *actus reus* of torture. Yet, its use does not give a full account of torture, which also includes a mental element not captured by the icon. However, there is a distinct time advantage to using icons if only for determining the *actus reus*. Judges and juries would not take a great deal of time to compare the icon of torture to an incident under examination. Similarly, an iconographic approach should short-circuit the plentiful academic debates over the acts of torture. The attention, then, should shift away from the now readily recognized act of torture to the perpetrator. That is where the legal and academic focus should be.

All of the characterizations of torture considered so far highlight something often inadvertently overlooked in discussions of torture. Most analysts focus on the victim and not on the perpetrator.[197] They myopically set their sights on what torture does to the victim. Obviously, any moral assessment must ultimately include what it does to the victim.[198] However, it should be just as obvious that law and morality should point the accusing fingers at the perpetrator. What seems

193. *Id.*

194. Yoshio Takashima et al., *Diversity in the Neural Circuitry of Cold Sensing Revealed by Genetic Axonal Labeling of Transient Receptor Potential Melastatin 8 Neurons*, 27 J. NEUROSCIENCE 14147, 14148 (2007).

195. A Google search for images of pain pathways will yield countless numbers of diagrams of simple physical pain pathways.

196. *See* Møller, *supra* note 189, at 118, 199 (showing an example of the diagrams).

197. Cullen, *supra* note 170 ("The experience of the victim is of primary consideration in determining acts that constitute torture.").

198. Amnesty Int'l, *Amnesty International Report 1984*, at 286, AI Index POL 10/004/1984 (May 1,1984) (the 1984 Second Amnesty Report (at 10) was and remains one of the few that describes the training of torturers in Greece).

to matter the most for legal and moral analyses is that the perpetrator intended to inflict the pain. Yet, as shown below, once again, nuanced distinctions about the perpetrator's intent have clouded the torture debate.

1. Intent

a. Specific Intent

The United States issued an Understanding to the Torture Convention ("U.S. Understanding"), specifying that "intentionally inflicted" meant, "specifically intended."[199] An analysis of a recent attempt to defend this illustrates the extent to which these efforts and the position of the United States are misguided. In an article ironically entitled "Tortured Reasoning," the authors set out to show that a torture conviction requires that the accused inflicted pain or suffering for a purpose prohibited by the Convention.[200]

Indeed, Article 1 of the Torture Convention states,

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[201]

First, the article's authors confuse intent and motive, specific intent and special intent. The crime of genocide requires a special intent or motive.[202] Similarly, the Torture Convention lists a series of plausible institutional purposes or motives.[203] The phrase "for such purposes" indicates examples to follow for illustrative purposes. Interestingly, the purposes listed are activities and functions

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199. CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT, S. EXEC. REP. 101-30, at 9 (1990) (the Convention Against Torture ("CAT") was adopted into U.S. law through the Foreign Affairs Reform and Restructuring Act, Pub. L. No. 105-277, § 2242, 112 Stat. 2681. The implementing regulations are at 8 C.F.R. §§ 208.16-208.18 (2014)).

200. Oona Hathaway, et al., *Tortured Reasoning: The Intent to Torture Under International and Domestic Law*, 52 VA. J. INT'L L. 791, 795 (2012).

201. Torture Convention, *supra* note 3, art. 1, at 114.

202. Alexander K. A. Greenwald, Note, *Rethinking Genocidal Intent: The Case for Knowledge-Based Interpretation*, 99 COLUM. L. Rev. 2259, 2264 (1999).

203. *See* Torture Convention, *supra* note 3, art. 1, ¶ 1, at 114 ("[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person *for such purposes* as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind." (emphasis added)).

typically carried out by a state.[204] Therefore, it is a misreading of the plain language to attribute a requirement of specific purposes enumerated in the Convention.

Second, another plausible reading of the intent requirement is to distinguish deliberate from accidental acts. In a deportation case, the U.S. Third Circuit Court of Appeals read the intent requirement contained in the implementing regulations promulgated pursuant to the Torture Convention, not as a specific intent requirement but as simply excluding "severe pain and suffering that is the unintended consequence of an intentional act."[205] The Court concluded that the intent requirement "distinguishes between the suffering that is the accidental result of an intended act, and suffering that is purposefully inflicted or the foreseeable consequence of deliberate conduct."[206]

Third, the U.S. Understanding is either misleading or effectively empty. Regarding the former, the U.S. Understanding is a backhanded way of getting in a narrower interpretation of torture under the guise of special intent. According to State Department testimony, "the original [transmittal] package proposed an understanding to the effect that, in order to constitute 'torture,' 'an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering.'"[207] It was this severe sense of torture that the U.S. lobbied for during the drafting of the Torture Convention, a sense rejected by Convention.[208] Alternatively, the Senate Executive Report explained, "[b]ecause specific intent is required, an act that results in unanticipated and unintended severity of pain and suffering is not torture for the purposes of this Convention."[209] This only rules out unanticipated or unintended acts, and the notion of special intent is not needed for that.[210]

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204. *See id.* ("[W]hen such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a *public official* or other person acting in an *official capacity*." (emphasis added)).

205. Zubeda v. Ashcroft, 333 F.3d 463, 473 (3rd Cir. 2003).

206. *Id.*

207. *Convention Against Torture: Hearing Before the S. Comm. on Foreign Relations*, 101st Cong. 9 (1990) (Prepared Statement of Abraham D. Sofaer, Legal Adviser, Department of State).

208. Manfred Nowak, *What Practices Constitute Torture?: US and UN Standards*, 28 HUM. RTS. Q. 809, 821 (2006).

209. S. EXEC. REP. 101-30, *supra* note 199, at 14.

210. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Human Rights Council, ¶ 34, U.N. Doc. A/HRC/13/39/Add.5 (Feb. 5, 2010) (by Manfred Nowak) [hereinafter Special Rapporteur Report] (this would indeed exclude the following hypothetical case offered by the U. N. Special Rapporteur: "A detainee who is forgotten by the prison officials and suffers from severe pain due to the lack of food is without doubt the victim of a severe human rights violation. However, this treatment does not amount to torture given the lack of intent by the authorities.").

Fourth, the notion of specific intent has proven problematic even in U.S. criminal law. It was dropped completely in the 1981 Model Penal Code.[211]

Fifth, the idea of special intent lends itself to narrow interpretations. U.S. immigration courts, whose decisions the authors (Hathaway, Nowlan, and Spiegel) cite approvingly, have used this narrow reading in its removal cases.[212] However, this sense of special intent is not the same as the sense of special intent defended by the authors. It is yet another problematic sense, namely that in removal cases the petitioner needs to prove that he or she has been specifically targeted for torture upon return to his or her country.

The specific intent reading should be rejected. However, that rejection should not result in shifting the focus back to the victim.[213] Replacing the specific intent requirement with some other such as foreseeability will not resolve the problem.[214] The solution is to recognize the ambiguous role that intent plays in the Torture Convention, both designed to capture the mental state of individual state agents as well as the goals and policies of the state.

b. Institutional Intent

People are more likely to escape prosecution in international law for killing a thousand individuals than they would in national (municipal) law for killing one individual.[215] The justifications for this odd situation lie within the notion of criminal intent. An analysis of intent also will help clarify another paradox in international law. Individuals who directly carry out mass killings are less likely to face prosecution in an international criminal court than are officials far removed from the actual killings.[216] Resolving these paradoxes, however, depends upon a radical rethinking of the idea of intent in international criminal law. The need for this reassessment becomes apparent upon thinking about another troubling feature of international criminal law. To appreciate the problem, consider the following hypothetical questions. How would prosecutors have charged Adolf Hitler under the current genocide statute that requires proof of intent? Would they have to prove that Hitler had nearly six million intentional states of mind that led to the killing of nearly six million Jews? Something is wrong here. Obviously, there is a need to reevaluate the notion of intent in international law. As we shall see criminal intent in international law, unlike its counterpart in national law, has little to do with individual minds and a great deal to do with organizational policies.

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211. *See generally* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681 (1983) (discussing the changes between common law criminal elements and the 1981 Model Penal Code).

212. *Matter of J-E-*, 23 I&N Dec. 291, 300-01 (B.I.A. 2002).

213. Mary Holper, *Specific Intent and the Purposeful Narrowing of Victim Protection Under the Convention Against Torture*, 88 OR. L. REV. 777, 779 (2009) (noting the U.S. reservation "shifted the focus in [Torture Convention] protection cases off the victim and onto the alleged torturer." (alteration in original)).

214. *Id.*

215. Hitomi Takemura, *Big Fish and Small Fish Debate: An Examination of Prosecutorial Discretion*, 7 INT'L. CRIM. L. REV. 677, 680 (2007).

216. THE LAWS OF GENOCIDE: PRESCRIPTION FOR A JUST WORLD, *supra* note 162, at 62.

Before proposing a new sense of intent for international criminal law, we need to show why the International Criminal Court should retain any sense of intent. The case for keeping an intent requirement begins with acknowledging the inevitable comparative judgments about the seriousness of crimes in any criminal justice system. No matter how distasteful it might seem, jurists and non-jurists judge some injustices as worse than other wrongs. We might say, for example, that we condemn all killings. However, we do not hesitate to judge the brutal slaying of a child as worse than the compassionate hastening of a cancer patient's death. These often unexamined, comparative judgments—particularly when seriously made in legal and moral debates—have important consequences for social policy. For many of the reasons set forth throughout our investigation, we regard intentional crimes as worse than non-intentional ones. If we rely on (often without debate) these comparative assessments, then we are more likely to approve of devoting more resources to the prosecution of those accused of committing intentional killings.

For murder convictions, national criminal laws require not only that defendants committed a criminal act but also that they had a "criminal mind."[217] To convict someone of murder under national criminal law, prosecutors must prove that the accused intentionally committed the act.[218] To convict someone of genocide, should international criminal law requires prosecutors to meet the same intent standard or, given the extreme nature of the crime of genocide, should it abolish the intent requirement altogether?.[219] Adopting the latter, strict liability approach would be a serious mistake. Stripping the element of intent from the crime of genocide would deflate the extreme moral condemnation that the crime of genocide warrants. However, if we keep the intent requirement for genocide, we can only do so if we accept a radically different sense of intent than the one used in national criminal law systems.

The idea of criminal intent in international law should not mirror the sense of intent that is so central to national criminal law. In the latter, a murder conviction requires that the accused individual had intent to commit the crime.[220] Cases of genocide involve more than one individual who commits the crime. It might seem appropriate, then, to require proof of intent for each one of these individuals. Yet, this move would seriously distort the nature of genocide. Genocide is not simply killings carried out by many individuals. Genocide is far more insidious than mass killing. It takes far more than the combined intents of a number of individuals to accomplish genocide. Genocide requires considerable organization. Genocide requires institutionalized organization. Acts of genocide involve institutions and organizations, typically governmental institutions and state organizations.[221] To capture the underlying horror of the crime of genocide, international criminal law needs to adopt a more institutionalized sense of intent, which we can label as

217. PHILIP L. REICHEL, COMPARATIVE CRIMINAL JUSTICE SYSTEMS 72 (1994).

218. *Id.*

219. THE LAWS OF GENOCIDE: PRESCRIPTION FOR A JUST WORLD, *supra* note 162, at 68.

220. REICHEL, *supra* note 217, at 72.

221. THE LAWS OF GENOCIDE: PRESCRIPTION FOR A JUST WORLD, *supra* note 162, at 63-64.

institutional intent. As we shall see this institutional sense of intent makes more sense when interpreted not as a state of mind but as an organizational policy.

When we interpret criminal intent as organizational policy, we resolve many of the oddities created by appropriating the idea of individual intent from national criminal law into international criminal law. Most importantly, if convictions for acts of genocide require prosecutors to prove individual intent, then prosecutors will have a difficult time separating the little fish from the big ones.[222] A small town café owner who suddenly mutated into a militant Bosnian Serb (Tadic) should not have the same degree of criminal responsibility for the acts, however vicious, that he committed as should the leaders of the militant factions that directly encouraged and guided the commission of them (Karadzic).[223] Otherwise, if prosecutors persistently and fully applied the idea of individual intent in these cases, then they would have to call for harsher punishment of the little fish than for the big fish since it is more difficult to establish individual intent for the big ones than for the little ones. In contrast, if prosecutors sought proof of institutional intent, then they would have to make the big fish the primary targets of their indictments.

Admittedly, the choice of institutional over individual intent also has disadvantages. It would lead to situations where prosecutors might let the little fish escape criminal responsibility entirely. In other words, the individuals closest to the criminal acts, that is, the little fish who actually carried out the horrifying deeds of slaughtering massive numbers of people, would most likely not face prosecution under international law. This dilemma warrants serious attention, which must await some further discussion. At this stage, suffice it to say, that we resolve the problem within the analysis of the appropriate punishments for the crime of genocide.

For international humanitarian crimes, individual intent and collective structure merge in the following way. The intent element for genocide applies to individuals in their capacity within authoritative structures.[224] The placement of intent within an authoritative structure moves the international crime of genocide away from the common understanding of crimes in national systems. States commonly construct relevant authoritative structures embedded within organizations.[225] The idea of authoritative structure helps to de-individualize the crime of genocide. In national criminal law, individuals have responsibility for murder in their capacities as individuals with a particular mental state.[226] In international law, individuals should have responsibility for genocide in their capacities as leaders and members of organizations.[227] Legal suits against organizations serve as a good analogue in state criminal systems. A suit against a

222. Takemura, *supra* note 215, at 684.

223. THE LAWS OF GENOCIDE: PRESCRIPTION FOR A JUST WORLD, *supra* note 162, at 64.

224. Thomas. W. Simon, *Defining Genocide*, 15 WIS. INT'L. L.J. 243, 248 (1996).

225. NINA H.B. JORGENSEN, THE RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES 112 (2000).

226. REICHEL, *supra* note 217, at 72.

227. THE LAWS OF GENOCIDE: PRESCRIPTION FOR A JUST WORLD, *supra* note 162, at 136.

corporation might include a named individual both in the person's individual capacity and in her or his role within the organization.

For the crime of genocide, the "perpetrator" must have the requisite *mens rea*, but this mental state differs from the mental state required for individual criminal responsibility in state criminal law systems. The *mens rea* for individual responsibility has a relatively direct connection to the criminal act. A national criminal court wants to determine whether the accused thought about the act. The *mens rea* for genocide has a less direct, more mediated connection to the criminal act. An international criminal court should focus on determining not just whether the accused thought about the criminal act but whether the accused planned or knowledgeably acted according to a preconceived plan developed within an (often state sponsored) organization.[228]

The *mens rea* for genocide includes a knowledge test.[229] The defendants must have had the requisite intent in the sense that they had or should have had knowledge of the alleged crime.[230] The jurisprudence on intent for the crime of genocide has taken some odd turns on the knowledge issue. In *Akayesu*, the Tribunal for Rwanda made a questionable distinction between knowledge and intent.[231] Supposedly, under the Court's interpretation, individuals could know that their acts contributed to the destruction of a group and yet not have the intent or specific goal of destroying the group.[232] The intent requirement for the crime of genocide goes beyond a determination of an individual's actual or imputed knowledge. Courts should assess the individual's knowledge according to how the individual functioned within an organizational structure.[233] The structure consists of policies formulated according to procedures set forth in an organization. For example, presumptions about an individual's knowledge would vary according to the individual's formal and actual role in the organization.

Earlier we called this different kind of intent that underlies genocide's *institutional intent* to distinguish it from individual criminal intent and other forms of intent. An alternative idea of *structural intent* proves inadequate for a number of reasons. The term "structure" in the phrase "structural violence" refers to causal factors found in society.[234] Although the idea of structure meshes well with the emphasis on organizations, it does not adequately convey the necessary sense of agency. In fact, under some interpretations, use of the concept of structural intent would permit the complete abandonment of the ideas of agency and individual

228. William A. Schabas, *State Policy as an Element of International Crimes*, 98 J. CRIM. L. & CRIMINOLOGY 953, 966-67 (2008).

229. Alexander K. A. Greenawalt, *Rethinking Genocidal Intent: The Case for a Knowledge Based Interpretation*, 99 COLUM. L. REV. 2259, 2283 n.118, 2284-88 (1999).

230. *Id.*

231. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 520 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998), http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf.

232. *Id.* ¶ 541.

233. THE LAWS OF GENOCIDE: PRESCRIPTION FOR A JUST WORLD, *supra* note 162, at 73.

234. Paul Farmer, *On Suffering and Structural Violence: A View from Below*, 125 DAEDALUS 261, 261-62 (1996).

responsibility.[235] Similarly, the concept of collective intent is too diffuse and does not capture the highly structured forms of organization at work in genocide cases.

Scholars should pay closer attention to how to make sense of intent in cases of crimes like genocide. The laws of genocide require intent for a conviction.[236] The intent in question does not reduce to an individual intent or to the intent of a specified number of individuals. A determination of the intents of individual perpetrators, although relevant, does not determine the prosecution of individuals for the crime of genocide. A successful prosecution of an individual for the crime of genocide must prove the individual's complicity in the forming something more akin to a collective intent.[237]

Institutional intent for genocide forms roughly in the following way. First, consider that what makes a heinous act particularly reprehensible is it stemming from a well-formed but loathsome viewpoint and judgment about groups. This perception then begins to gel into an irrational disdain and completely unfounded hatred towards a group. The developing belief-system starts to combine with less spiteful but related past negative judgments about the targeted group.[238] When isolated harmful acts against members of the targeted group begin to recur with increasing frequency, an institutional intent may start to become evident. At first, the perpetrators appear to act independent of an external direction. However, it soon becomes clear that state-sponsored organizations are fomenting, directing, and solidifying the focus and structure of this hate. To summarize, we propose adopting the idea of corporate intent into international criminal law.

It might seem odd to devote so much space to a discussion of genocide in an Article on torture. However, one goal of this Article is to move the legal analysis of torture closer to that of genocide.

2. The State as Perpetrator

The analysis should focus not on an individual torturer but on the state as a torturer. William Schabas has made a compelling case for substituting state policy for the intent, *mens rea* requirement for the crime of genocide.[239] The Torture Convention occupies a middle position between individual and state criminal responsibility in that it make states indirectly responsible by holding its agents

235. THE LAWS OF GENOCIDE: PRESCRIPTION FOR A JUST WORLD, *supra* note 162, at 73.

236. Kai Ambos, *What Does "Intent to Destroy" in Genocide Mean?* 91 INT'L REV. RED CROSS 833, 834-35 (2009).

237. THE LAWS OF GENOCIDE: PRESCRIPTION FOR A JUST WORLD, *supra* note 162, at 73-74.

238. Robert J. Sternberg, *A Duplex Theory of Hate: Development and Application to Terrorism, Massacres, and Genocide*, 7 REV. GEN. PSYCHOL. 299 (2003).

239. *State Policy as an Element of International Crimes*, *supra* note 228, at 971 ("[If] there exists a State policy . . . then the inquiry shifts to the individual, with the central question being not the individual's intent, but rather the individual's knowledge of the policy. Individual intent arises, in any event, because the specific acts of genocide, such as killing, have their own mental element, but as far as the plan or policy is concerned, knowledge is the key to criminality.")

individually responsible.[240] Unfortunately, international law does not yet have mechanisms for state criminal responsibility.[241]

The torture debate is about states and about the law. There are many troubling things about the torture debate. Most analysts focus on the victim and not on the perpetrator.[242] Obviously, any legal and moral assessment must ultimately include what it does to the victim. However, it should be just as obvious that law and morality should point their accusing fingers at the perpetrator (the *mens rea*). But who is the perpetrator? What really matters, legally and morally, is not even that an individual perpetrator intended to inflict pain, but that a state perpetrator implemented a policy to carry out acts that constitute universal prohibitions in international law. In short, as an international crime, torture has close affinities to genocide. It is that analogy that should redirect the torture debate.

IV. UNIVERSAL WRONGS

Where an issue appears in an argument—its argument-place—affects the analysis of an issue. If an article begins with an assessment of the various arguments presented by those who deny the Holocaust, then the presenter has elevated the status of Holocaust denial. If, however, the presenter first provides a detailed, well-documented account of the litany of Holocaust horrors, then a footnote on Holocaust denial towards the end of the piece gives denial little credence. Similarly, the torture debate has become skewed by giving prominent argument-place to those who try to justify torture.[243] This observation, of course, does not excuse authors from the challenging task of demonstrating that torture constitutes a universal wrong. It merely highlights the difficulty readers should have in giving credence to torture justifications after having been persuaded by the iconography of torture.

A. Torture as a Peremptory Norm[244]

240. The Coxford Lecture, *supra* note 173, at 270 n.6.

241. *See* Aditi Bagchi, *Intention, Torture, and the Concept of State Crime*, 114 PENN. ST. L. REV. 1, 4 (2009) (advocating to abandon the intent requirement altogether for holding states responsible for the crime of torture).

242. Lisa Yarwood, *Defining Torture: The Potential for Abuse*, 2008 J. INST. JUST. INT'L STUD. 324, 328 (2008).

243. MATTHEW H. KRAMER, TORTURE AND MORAL INTEGRITY: A PHILOSOPHICAL ENQUIRY 243 (2014).

244. *See* Universal Declaration of Human Rights, art. 5, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug 12, 1949, 75 U.N.T.S. 135; European Convention on Human Rights, art. 3, Nov. 4, 1950, 213 U.N.T.S. 222; International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966, 999 U.N.T.S. 171; Inter-American Convention on Human Rights, art. 5, Nov. 22, 1969, 1144 U.N.T.S. 123; African Charter on Human and People's Rights, art. 5, Jun. 27, 1981, 1520 U.N.T.S. 217; Committee on Civil and Political Rights, General Comment 20, ¶ 3, U.N. Doc HRI/GEN/1/Rev. 1 at 30 (1992); First U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Standard Minimum Rules for the Treatment of Prisoners, art. 31-34, 1955.

What did the drafters of the Torture Convention have in mind?[245] The immediate impetus for moving forward with the Torture Convention came from the efforts of Amnesty International. In its 1973 Report, it clearly recognized the gravity of torture in that there was no act that was "more a contradiction of our humanity than the deliberate infliction of pain by one human being on another, the deliberate attempt over a period of time to kill a man without his dying."[246] Article 2 of the Torture Convention states unequivocally that, "[n]o exceptional circumstances whatsoever . . . may be invoked as a justification of torture."[247] This absolute prohibition remained throughout the drafting stage of the Torture Convention.[248]

"Why, then, given the rhetorical, moral, and legal status of this prohibition, is torture being debated?"[249] Why, indeed?[250] Even the most jaded pessimist (I hope!) would have difficulty imaging a newly emerging, widespread debate among scholars and the public over whether emergency conditions justify genocide. In a disagreement with Mother Teresa, who contended that abortion was genocide, Elie Weisel quipped that at least abortion was debatable.[251]

The Torture Convention prohibits torture absolutely: "No exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture."[252] However, the "no exceptional circumstances" provision does not apply within the Torture Convention to cruel, inhuman, or degrading treatment.[253] Yet, the absolute ban on both practices remains intact if the Torture Convention is read in conjunction with the International Covenant on Political and Civil Rights because under Article 4 of the Covenant, neither torture nor cruel, inhuman, or degrading treatment can be justified by a public emergency.[254]

B. Justifications: Unjustifiable and Unjustified Acts

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245. *See generally* Mathew Lippman, *The Development and Drafting of the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, 17 B. C. INT'L & COMP. L. REV 275 (1994) (unfortunately, not a very revealing piece).

246. Amnesty Int'l, *Report on Torture*, at 21, AI Index ACT 40/001/1973 (Jan. 1, 1973).

247. Torture Convention, *supra* note 3, art. 2.

248. Iveta Cherneva, *The Drafting History of Article 2 of the Convention Against Torture*, 9 ESSEX HUM. RTS. REV. 1, 7-8 (2012).

249. Rosemary Foot, *Torture: The Struggle over a Peremptory Norm*, 20 INT'L. REL. 131, 132 (2008).

250. *See* Omer Ze'ev Bekerman, *Torture: The Absolute Prohibition of a Relative Term: Does Anyone Know What is in Room 101?*, 53 AM. J. COMP. L. 743 (2005).

251. Elie Wiesel & Merle Hoffman, *I am against Fanatics*, *in* ON PREJUDICE: A GLOBAL PERSPECTIVE 546, 549-50 (Daniela Gioseffi ed., 1993).

252. Torture Convention, *supra* note 3, art. 2, ¶ 2, at 114.

253. Torture Convention, *supra* note 3, art. 16, ¶1, at 116 ("Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.").

254. *See* J. HERMAN BURGERS & HANS DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE 124 (1988).

Genocide and torture do differ, but not in a way that undermines the universal prohibition, the preemptory norm status of torture. Some acts are unjustifiable while others are unjustified. An act is *unjustifiable* if there is no coherent possible world where someone could or would defend the act in terms of some rationally defensible moral theory.[255] An act is *unjustified* if there are no actual circumstances under which that acts would be justified within some defensible moral theory.[256] Genocide is unjustifiable. There are not any hypothetical circumstances that provide an exception to the universal prohibition against genocide. Unlike almost any other crime, genocide is an irrevocable status crime.[257] In an act of genocide, people are killed for what (whom) they are perceived to be, that is, for their group membership and not for any act that they have allegedly committed or are about to commit. This makes genocide unjustifiable.

Torture comes very close to genocide in that it is difficult to conceive of actual circumstances where it would be justified. However, torture is not unjustifiable. As the Ticking Bomb scenario[258] indicates, there are hypothetical circumstances that might justify torture. However, torture is unjustified; that is, there are no actual circumstances that would constitute exceptions to the universal ban on torture.[259]

Take the following theoretically plausible examples of morally reprehensible acts. First, newborn babies could be strapped to car bumpers to reduce traffic accidents and fatalities. Second, the twin experiments, conducted by Dr. Mengele, the Nazi physician, during World War II yield life-saving results.[260] Third, Wang Weiqin's killings of the Li family members stopped the cycle of revenge killings.[261] These acts might constitute acceptable exceptions in some possible world, but they should not qualify as exceptions in this world. These acts, like some situations with torture, constitute hypothetical circumstances that should be legally excluded if there are any hopes of making this a moral world.

Genocide is unjustifiable in that it does not admit any exceptions, even hypothetical ones. Torture is unjustified in that it does not admit any practical

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255. Thomas W. Simon, *Genocide, Evil, and Injustice: Competing Hells*, *in* GENOCIDE AND HUMAN RIGHTS, A PHILOSOPHICAL GUIDE 65 (John K. Roth ed., 2005).

256. *Id.*

257. *See* THE LAWS OF GENOCIDE: PRESCRIPTION FOR A JUST WORLD, *supra* note 162, at 84.

258. *Defusing the Ticking Bomb Scenario: Why we must say No to torture, Always*, ASS'N FOR PREVENTION TORTURE (2007), http://www.apt.ch/content/files_res/tickingbombscenario.pdf ("Suppose that a perpetrator of an imminent terrorist attack, that will kill many people, is in the hands of the authorities and that he will disclose the information needed to prevent the attack only if he is tortured. Should he be tortured?").

259. Henry Shue, *Torture in Dreamland: Disposing of the Ticking Bomb*, 37 CASE W. RES. J. INT'L L. 231, 231 (2006).

260. LUCETTE. M. LAGNADO, CHILDREN OF THE FLAMES: DR. JOSEF MENGEL AND THE UNTOLD STORY OF THE TWINS OF AUSCHWITZ (1992) (explaining Mengele would perform massive blood transfusions from one twin to another).

261. BROOK ET AL., *supra* note 72, at 249.

exceptions. The Ticking Bomb scenario mistakenly treats torture as an act that includes hypothetical exceptions.

To justify torture involves finding situations where torture becomes permissible. The Ticking Bomb has become an icon in the torture debate.[262] The issue of justifications appears at the end of this Article, which is exactly where it should appear overall in the torture debate. Questions of justification have a far lesser impact when they appear after the iconography of torture has done its work. Permitting the Ticking Bomb scenario to sit at the table will result in, what one commentator describes as perpetrators hearing ticking bombs everywhere.[263]

V. CONCLUSION

"Law is not brutal in its operation. Law is not savage. Law does not rule through abject fear and terror, or by breaking the will of those whom it confronts. If law is forceful or coercive, it gets its way by non-brutal methods, which respect rather than mutilate the dignity and agency of those who are its subjects."[264]

There are many troubling things about the torture debate. Most analysts focus on the victim and not on the perpetrator. Obviously, any legal/moral assessment must ultimately include what it does to the victim. However, it should be just as obvious that law and morality should point their accusing fingers at the perpetrator (the *mens rea*). But who is the perpetrator? What really matters, legally and morally, is not even that an individual perpetrator intended to inflict pain, but that a state perpetrator implemented a policy to carry out acts that constitute universal prohibitions in international law. In short, as an international crime, torture has close affinities to genocide. It is that analogy that should redirect the torture debate.

Iconography provides a way to reorient the torture debate to its original, saner grounds. The rack has served, serves, and should serve more prominently as the icon of torture. It clearly highlights the central wrong of torture—an institutional or state agent inflicting physical (in a broad sense) pain on a helpless individual. A prosecutor or judge needs only to compare pictures of water boarding or other ingenious devices to the rack icon to determine their obvious similarity. Torture is not a matter of subtle definitional distinctions. Torture is a blatant, odious scourge that is easy to recognize with open eyes, unobscured by conceptual nuances.

The circle of international crimes has an affinity with the circle of rights. In recent centuries, the circle of rights has expanded dramatically. For many past centuries, a narrowly circumscribed circle of rights excluded certain groups, including slaves and women. That circle has expanded to include these and other groups. Some continue to advocate for expanding the circle even farther to include animals. International law continues to expand the circle of universal, exceptionless prohibitions, beginning with genocide and reaching out to torture.

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262. Michael Dorf, *Renouncing Torture*, *in* THE TORTURE DEBATE IN AMERICA 247, 250 (Karen J. Greenberg ed., 2006).

263. *Id.*

264. *Torture and Positive Law: Jurisprudence for the White House*, *supra* note 63, at 1726.

Unfortunately, the current debates over torture represent a backlash against this expansion. Indeed, one very troubling thing about the torture debate is that it is still being debated.

BETTING ON BOWLERS: THIS JUST ISN'T CRICKET

*Erin Gardner Schenk**

I. INTRODUCTION

Traditionally, the idiom, "this just isn't cricket," refers to something awry or dishonorable.[1] The expression derives from the strict code of sportsmanship that gave cricket the badge of being the "gentlemen's sport." However, stemming from the increasingly immense popularity of Indian cricket throughout the last century, sports betting—an illegal pastime under India's gambling laws—has also become a huge industry.[2] Because punters[3] often wager enormous sums of money, corruption within the sport of cricket, in the forms of match-fixing and spot-fixing,[4] has become increasingly problematic.[5] In response to this corruption, many Indians advocate for the legalization of gambling, including sports betting, arguing that legalization would remove the incentive to bet on the black market

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1. *Not Cricket Definition*, OXFORD DICTIONARIES: LANGUAGE MATTERS, http://www.oxforddictionaries.com/definition/english/not-cricket (last visited Sept. 17, 2014) ("Something contrary to traditional standards of fairness or rectitude").

2. *See* ASSER INT'L SPORTS LAW CTR., SPORTS BETTING: LAW AND POLICY 444 (Paul M. Anderson et al. eds., 2012) (stating recent estimates suggest bets placed on a One Day International match being played anywhere in the world top US$150 million). *See also* SIR PAUL CONDON, INT'L CRICKET COUNCIL, REPORT ON CORRUPTION IN INTERNATIONAL CRICKET 4 (2001), *available at* http://www.icc-cricket.com/about/47/anti-corruption/reports.

3. Betting is also called "punting," and those who place the bets are often called "punters." The terms will be used interchangeably throughout this paper.

4. *Spot-fixing Definition*, OXFORD DICTIONARIES: LANGUAGE MATTERS, http://www.oxforddictionaries.com/us/definition/english/spot-fixing (last visited Sept. 17, 2014) (Spot-fixing is the predetermination by a player, for the benefit of a better, of how a particular play will occur, in exchange for a payout to the player).

5. CHRISTIAN KALB, INT'L SPORTS FED'NS, INTEGRITY IN SPORT: UNDERSTANDING AND PREVENTING MATCH-FIXING 5, 7, 13 (2011), *available at* http://www.sportaccord.com/multimedia/docs/2013/03/2013-02_-_SportAccordIntegrityReport_UpdatedFeb2013.pdf.

and would generate revenue in the form of gambling taxes.[6] Based on two underlying factors—India's deep, historical ties both to cricket and to England, its former colonizer that brought the sport to the subcontinent, as well as the similarities in the two countries' common law legal systems—Indian pro-legalization advocates look to the United Kingdom's[7] recent legalization of gambling as a model for what they argue India should do.[8]

However, this paper asserts the United Kingdom's gambling laws would not successfully translate into Indian culture due to disparities in the two nations' religious compositions, political landscapes, and legal enforcement mechanisms. Specifically, Section II of this paper provides background as to the relationship between the U.K. and India. It also includes information about the history of cricket and the environment of the sport, both of which are foundational to an understanding of India's current push for gambling legalization. Section III examines the gambling laws in the U.K. and in India, as well as the evolution and progression of those laws. Section IV examines the religious, political, and socio-economic situation in the U.K., and Section V examines those same three indicia as they pertain to India. These cultural features serve as the framework for understanding each nation's current position regarding the legality of gambling. Section VI then analyzes the differences between the two nations, as detailed in Sections IV and V, and evaluates the prudence of any impending decision to legalize gambling in India. Ultimately, the paper concludes in Section VII with the author's assertion that India's response should not be to legalize gambling, but rather to reaffirm and reinforce its current laws to include increased penalties for infractions, while fostering administrative transparency and improving enforcement mechanisms.

II. BACKGROUND

Scholars are uncertain as to cricket's origins.[9] However, cricket undisputedly and swiftly assumed a position of significance in domestic English high society as

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6. *See* Usman Rangeela, *CBI Chief's Suggestion to Legalise Gambling is Valid*, TIMES OF INDIA (Nov. 19, 2013, 8:56 AM), http://timesofindia.indiatimes.com/sports/cricket/ipl/news/CBI-chiefs-suggestion-to-legalise-gambling-is-valid/articleshow/26019464.cms.

7. For the purpose of this paper, the term "England" will encompass the present-day United Kingdom, and the two terms may be used interchangeably.

8. *See, e.g.*, Rohani Mahyera, Comment, *Saving Cricket: A Proposal for the Legalization of Gambling in India to Regulate Corrupt Betting Practices in Cricket*, 26 EMORY INT'L L. REV. 365, 370-71 (2012).

9. *See The History of Cricket*, NAT'L LIBR. AND INFO. SYS. AUTHORITY OF TRIN. AND TOBAGO, http://www.nalis.gov.tt/Research/SubjectGuide/Sport/Cricket/tabid/181/Default.aspx?PageContentMode=1 (last visited Sept. 17, 2014) (showing the origin of the name has two explanations: first, the name may come from the Anglo-Saxon word, "*cricce*," meaning "crooked staff," as it is believed the original cricket bats resembled modern day hockey sticks rather than their current shape; second, the name may have come from a church stool, known as a "*krickstoel*" in Flanders and a "cricket" in England, the shape of which the early wickets significantly resembled. Documentation also exists as to a game called "*criquet*" in northeast France in 1478; however it is unknown whether this resembled the modern sport of cricket).

well as in its colonial interests.[10] By the eighteenth century, wealthy English landlords often hosted matches amongst their leaseholders and the country folk.[11] The first documented organized county match-up was a Kent-Surrey match in 1709, and evidence indicates that heavy betting existed even in the earliest matches.[12] Not long thereafter, in 1721, the first cricket match in India was documented on the western coast near Kutch.[13]

Since its independence from England in 1947,[14] India has expended extensive efforts on distancing itself from England's former colonial influence.[15] Despite these efforts and despite the colonial origins of Indian cricket,[16] the popularity of the sport has soared amongst the Indian people since the mid-twentieth century.

From the early days, the idiom, "this just isn't cricket"—referring to something that lacks honor, propriety, or fairness[17]—developed from the fastidious attention supporters paid to the technique with which a player executed each move in what would come to be known as a true "gentleman's sport."[18] British aristocrats who cultivated the sport permitted no cheating and no bodyline bowling.[19] Cricket has long been a self-governing activity with its own set of laws.[20] In fact, the expectation of honor was so deeply ingrained that if an umpire

10. Furthermore, sport in Britain, generally, has always been a keystone of the fortress of global influence and acceptance Britain has enjoyed in recent history; cricket is no exception. *See* SPORT IN BRITAIN: A SOCIAL HISTORY 3 (Tony Mason ed. 1989).

11. *The History of Cricket*, *supra* note 9.

12. Marcus K. Williams & Rex Alston, *Cricket History: The Early Years*, ENCYCLOPEDIA BRITANNICA: ACAD. EDITION, http://www.britannica.com/EBchecked/topic/142911/cricket/30478/The-early-years (last visited Sept. 17, 2014).

13. *History*, BOARD OF CONTROL FOR CRICKET IN INDIA, http://www.bcci.tv/about/2014/history (last visited Sept. 17, 2014).

14. Indian Independence Act, 1947, 10 & 11 Geo. 6, c. 30, § 1 (Eng.), *available at* http://www.legislation.gov.uk/ukpga/1947/30/pdfs/ukpga_19470030_en.pdf.

15. Recent nationalistic efforts include reversion to former Indian names of streets, cities, and states.

16. In fact, India joining the ranks of the elite test clubs in 1932, followed by its first cricket match at Lord's in London, attended by over 24,000 fans, including the King of England (then Emperor of India), is cited as being one of the major turning points in Indian nationalism that eventually lead to its independence. Ravi Shastri, *Story of Cricket: Asia's New Found "Religion"*, BBCWORLDSERVICE.COM, http://www.bbc.co.uk/worldservice/specials/1157_cricket_history/page6.shtml (last visited Sept. 17, 2014).

17. *Not Cricket Definition*, *supra* note 2.

18. Rajeshwari Singh, *Why is Cricket Called a 'Gentleman's Game'?*, TIMES OF INDIA (Apr. 17, 2011, 05:49 AM), http://articles.timesofindia.indiatimes.com/2011-04-17/open-space/29427254_1_cricket-bodyline-bowling-english-aristocrats.

19. *Bowl Definition*, CAMBRIDGE DICTIONARIES ONLINE, http://dictionary.cambridge.org/dictionary/british/bowl_3 (last visited Sept. 17, 2014) (Bowl, in the context of cricket, means "to throw a ball towards a batsman (the player who hits the ball) using a vertical circular movement of the arm while running").

20. *See Introduction: MCC and the Laws of Cricket*, LORD'S: THE HOME OF CRICKET, http://www.lords.org/mcc/laws-of-cricket/introduction (last visited Sept. 27, 2014).

mistakenly failed to call a batsman out,[21] the batsman was expected to walk[22] of his own volition.[23]

That expectation of propriety notwithstanding, one drastic change in cricket in recent years is the evolution of its faster-paced versions, One Day International[24] cricket and Twenty20[25] cricket, which have transformed cricket from an elitist sport to one that is enjoyed by the masses. These newer forms of cricket offer swifter spectator gratification than the traditional form, "Test" cricket, in which matches span up to five days, incorporate planned pauses for "tea,"[26] and are played in classic white cricket flannels.[27] The concept of Twenty20 cricket originated in 2003 when the England and Wales Cricket Board was faced with replacing the one-day Benson and Hedges Cup.[28] Twenty20 cricket is a substantially condensed (one innings[29] [sic] per team, each innings consisting of twenty overs[30]) and colorfully-clad version of cricket.[31] The launch of international Twenty20 cricket, as well as the Indian Premier League ("IPL"), which followed in 2008,[32] has drastically changed the face of cricket in India.

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21. ROBERT EASTAWAY, CRICKET EXPLAINED 133 (1992) (first published in Great Britain as *What Is a Googly*, Robson Books Ltd.) ("Out[:] end of batsman's innings because he is bowled, caught [sic] etc., at which point he has to leave the field [also dismissed and many other colloquialisms]").

22. *Id.* at 141 ("Walk (*vb*) batsman decides he is out before waiting for the umpire's decision (very honourable [sic] thing to do").

23. *Id.*

24. India played its first One Day International tour in 1974. *See India Tour of England, 1974: Scorecard*, ESPN CRICINFO, http://www.espncricinfo.com/columns/engine/match/64951.html (last visited Sept. 27, 2014); *When India Played First-ever ODI Series*, NEWSCHOUPAL.COM (Oct. 14, 2011), http://newschoupal.com/2011/10/14/when-india-played-first-ever-odi-series.

25. *See Records: Twenty20 Matches*, ESPN CRICINFO, http://stats.espncricinfo.com/pak/engine/records/index.html?class=6 (last visited Sept. 27, 2014).

26. *See* INT'L CRICKET COUNCIL, STANDARD TEST MATCH PLAYING CONDITIONS, at Law 3.14 (2013), *available at* http://icc-live.s3.amazonaws.com/cms/media/about_docs/524ac43be2aca-Standard%20Test%20Match.pdf ("Change of Intervals: If play has been suspended for any reason other than normal intervals for 30 minutes or more prior to the commencement of the scheduled or rescheduled tea interval on that day, the tea interval shall be delayed for 1/2 hour.").
Cricket "tea" generally connotes a light snack, which formerly incorporated actual tea and fingerling sandwiches, but which has currently become far more functional in nature, for the players, meaning primarily nutritional staples and supplements. *See* Elaine Lemm, *How to Prepare the Perfect Cricket Tea*, ABOUT.COM, http://britishfood.about.com/od/diningdrinkingtradition/ss/The-Perfect-Cricket-Tea.htm (last visited Sept. 27, 2014).

27. *See* SAILESH S. RADHA, FIVE DAYS IN WHITE FLANNELS: A TRIVIA BOOK ON TEST CRICKET 105 (2009).

28. CRICKETING CULTURES IN CONFLICT: WORLD CUP 2003 169 (Boria Majumdar & J. A. Mangan eds., 2004).

29. "Innings" is the proper singular form of the noun when referring to the play time of one single player.

30. EASTAWAY, *supra* note 21, at 133 ("Over (*n*) set of six balls bowled by one bowler. No balls and wides do not count towards the over").

31. JAMES ASTILL, THE GREAT TAMASHA: CRICKET, CORRUPTION, AND THE SPECTACULAR RISE OF MODERN INDIA xii (2013).

32. *Indian Premier League: How it all Started*, TIMES OF INDIA (Apr. 2, 2013, 10:34 AM), http://timesofindia.indiatimes.com/ipl/ipl-history/Indian-Premier-League-How-it-all-started/articleshow/19337875.cms.

Indians have worshiped Twenty20 cricket from the moment India defeated archrival Pakistan and won the inaugural International Cricket Council ("ICC") World Twenty20 tournament in September of 2007.[33]

Although the advent of Twenty20 cricket itself is not the source of cricket corruption in India,[34] the influx of extremely wealthy investors in Twenty20 cricket—including movie stars and entrepreneurs otherwise unrelated to the sport[35]—has created an environment ripe for corruption.[36] Additionally, with the shortened format of the Twenty20 cricket match and, consequently, the dramatically increased viewership as compared to that of Test cricket, came the increased opportunity for spot-betting.[37]

Ultimately, although the landscape of the game has changed significantly, the popularity of cricket has only grown.[38] Furthermore, the degree to which Indians hold the sport sacred is exhibited by famous and recently-retired[39] Indian cricketer Sachin Tendulkar's nomination by Indian President Pranab Mukherjee to the Rajya Sabha, India's upper house of Parliament,[40] based on Tendulkar's "special knowledge or practical experience in respect of such matters as literature, science, art and social service."[41] Tendulkar was also conferred with the Bharat Ratna,

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33. *Id. See also ICC World Twenty20: 2007/08 Results*, ESPN CRICINFO, http://www.espncricinfo.com/twenty20wc/engine/series/286109.html (last visited Sept. 27, 2014).

34. CONDON, *supra* note 3, § 2, ¶ 69 (stating the ICC Anti-Corruption division also cites the advent and increased availability of mobile phones as a contributing factor to recent cricket corruption); *The Cronje Chronicles: A Timeline of the Hansie Cronje Match-fixing Episode from 2000 and the Impact on the Players Named*, ESPN CRICINFO (July 22, 2013), http://www.espncricinfo.com/ci/content/story/654219.html (representing that cricket corruption existed before Twenty20 cricket as well).

35. *See* discussion *infra* Part V.C.2.

36. ASTILL, *supra* note 31, at xiii-xiv.

37. Usman Rangeela, *CBI Chief's Suggestion to Legalise Gambling is Valid*, TIMES OF INDIA (Nov. 19, 2013, 8:56 AM), http://timesofindia.indiatimes.com/sports/cricket/ipl/news/CBI-chiefs-suggestion-to-legalise-gambling-is-valid/articleshow/26019464.cms ("[G]ambling on horse racing and cricket in particular grew manifold when limited-overs cricket became a rage following India's World Cup victory in 1983.").

38. ASTILL, *supra* note 31, at xii (stating cricket is recent and continuing rise in prominence developed in conjunction with the proliferation of technology throughout the country, generally, and especially to rural areas; James Astill, Political Editor and Bagehot columnist for the Economist, estimates that in 1989, just under twenty-five years ago and the first year Sachin Tendulkar—the most famous Indian cricketer and one of the most famous Indians—began playing the sport, only thirty million Indian households had televisions; now, however, that number has grown to more than 160 million households with televisions).

39. *See* Annie Gowen, *Sachin Tendulkar, India's 'God of Cricket,' Retires*, WASH. POST (Nov. 14, 2013), http://www.washingtonpost.com/world/asia_pacific/sachin-tendulkar-indias-cricket-god-retires/2013/11/14/98355548-4d49-11e3-bf60-c1ca136ae14a_story.html.

40. The Rajya Sabha is also called the Council of States. The other house of Indian Parliament is called Lok Sabha, or the Council of Ministers. YOGENDRA NARAIN, AN INTRODUCTION TO THE PARLIAMENT OF INDIA 21-22 (4th ed. 2007), *available at* http://rajyasabha.nic.in/rsnew/Parliament_of_India.pdf (explaining the relationship between the two houses).

41. *See* Sportsmail Reporter, *Top Honour for Tendulkar: Legendary Batsman Sworn into Indian Parliament*, MAIL ONLINE, http://www.dailymail.co.uk/sport/cricket/article-2154388/Batsman-Sachin-

India's highest civilian honor, "in recognition for [his] contribution to [Indian] society."[42] These distinctions show not only the respect Tendulkar has personally earned from his nation, but more importantly, the tremendous degree to which the sport of cricket is revered in India.

III. THE LAWS ON GAMBLING IN THE U.K. AND IN INDIA

Even though the very concept of gambling is said to have originated in India[43] with a game involving tossing the Vibhitaka seed to see on which side it would land,[44] India's modern laws prohibit operating, funding, or even being present in a "gaming-house."[45] Gambling is currently illegal in India, with the exceptions of casinos in two states[46] (Goa[47] and Sikkim[48]), horse betting, and certain (usually government-operated) state lotteries.[49] In a recent decision in the High Court of Judicature at Madras, the judge, prior to holding rummy for stakes to be illegal, observed, "the [gambling] activities which have been condemned in this country from ancient times appear to have been equally discouraged and looked upon with

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Tendulkar-sworn-Indian-Parliament.html (last updated June 4, 2012, 4:23 PM) (stating out of the 250 members of Parliament, Tendulkar is the first athlete to be nominated as a Member of Parliament).

42. *Sachin Tendulkar and CNR Rao Conferred Bharat Ratna*, TIMES OF INDIA (Feb. 4, 2014, 12:08 PM), http://timesofindia.indiatimes.com/sports/series-tournament/bharat-ratna-sachin-tendulkar/top-stories/Sachin-Tendulkar-and-CNR-Rao-conferred-Bharat-Ratna/articleshow/29849599.cms.

43. *The History of Gambling in India*, CASINOONLINE.NET.IN, http://casinoonline.net.in/history (last visited Sept. 27, 2014).

44. ENCYCLOPAEDIA OF THE HINDU WORLD 306 (Ganga Ram Garg ed., vol. 2 1992) ("The dice appear normally to have been consisted [sic] of small nuts called vibhīdaka or vibhītaka. . . . Later oblong dice with four scoring sides were used.").

45. Public Gambling Act, No. 3 of 1867, §§ 4, 8, INDIA CODE (1993), *available at* http://indiacode.nic.in.

46. *See* INDIA CONST. art. 246, list 2, §§ 34, 62 (representing that states are permitted by the Constitution of India to legalize gambling within their own territories; however, currently, only Goa and Sikkim have elected to legalize gambling beyond state lottery).

47. K.C.D. Gangwani, *The Goa, Daman and Diu Public Gambling Act, 1976*, *in* 3 MANUAL OF GOA LAWS: M TO Q 937, 946-47, para. 13A (2011), *available at* http://goaprintingpress.gov.in/uploads/Public%20Gambling%20Act.pdf ("(1) Notwithstanding anything contained in this Act, the Government may authorised any game of electronic amusement/slot machines in Five Star Hotels {and such table games and gaming on board in vessels offshore as may be notified} subject to such conditions, including payment of such recurring and non-recurring fees, as may be prescribed[;] (2) [t]he provisions of this Act [prohibiting and punishing gambling] shall not apply to any game authorised under sub-section (1).").

48. Sikkim Regulation of Gambling (Amendment) Act, 2005, No. 23 (India), *available at* http://districtcourtsnamchi.nic.in/laws/gambling%20act%20%28amended%29.pdf ("In the said notification, after third paragraph, the following paragraph shall be inserted, namely: 'The State Government may by rule regulate gambling in a manner as it may be considered expedient and the rule may relate to the following, namely- (1) The rule may provide for place or time or days or area where such gambling may be allowed[;] (2) [t]he rule may provide for procedure for obtaining license for such gambling house.'").

49. Ashish Roy, *Goverment Issues List of Legal Lotteries*, TIMES OF INDIA (Nagpur) (Jan. 9, 2011, 5:18 AM), http://articles.timesofindia.indiatimes.com/2011-01-09/nagpur/28355708_1_illegal-lotteries-lottery-tax-lottery-market.

disflavour [sic] in England, Scotland, the United States of America[,] and in Australia . . . ."[50] However, this statement appears on the surface to be untrue, at least in recent years, since the U.K.'s Parliament passed a bill legalizing most forms of gambling.[51]

A. Gambling Laws in the U.K.

The U.K. Parliament recently passed the Gambling Act, 2005 ("U.K. Act"), legalizing gaming, betting, and participation in a lottery.[52] The U.K. Act also established the Gambling Commission[53] and tasked the commission with regulating commercial gambling in the U.K.[54] However, the evolution of England's gambling laws was a slow process, and the U.K. Act was a departure from the U.K.'s history of prohibiting gambling or only permitting it in specific instances.

The Unlawful Games Act 1541 [sic][55] ("1541 Act") initially banned gambling in the U.K. because King Henry VIII believed the popularity of such games was distracting men from the focus of perfecting military skills and protecting the realm.[56] The scope of this ban was broad, even including tennis and "bowls."[57] Because of the stringent nature of the 1541 Act, it was often ignored; therefore, the Gaming Act, 1739 was specifically designed to target lack of enforcement (especially in Ireland) by imposing penalties on any judiciary members, or "Justices of the Peace" that turned a blind eye to enforcement of the laws.[58]

Largely because the very sweeping prohibitions of the 1541 Act banned healthy and otherwise legitimate sporting activities and because of the lack of reverence paid to the previous laws, 1844 saw the Select Committees of the House of Lords and House of Commons appointed to holistically examine existing gambling laws.[59] Very shortly thereafter, the Gaming Act, 1845[60] repealed previous enactments prohibiting games of skill.[61] However, it also relieved courts

50. Dir. Gen. of Police v. Mahalakshmi Cultural Ass'n, W.A.No.2287 of 2011 (Madras H.C.) ¶ 17 (Mar. 22, 2012), *available at* http://indiankanoon.org/doc/61898553.

51. *See* Mahyera, *supra* note 8; Jay Sayta, *Time Ripe for Gambling Law Reforms*, STATESMAN (Sept. 12, 2013), http://www.thestatesman.net/news/17204-time-ripe-for-gambling-law-reforms.html.

52. Gambling Act, 2005, c. 19, Part 1, § 3 (U.K.).

53. *Id.* Part 2, § 20.

54. *Who We Are*, GAMBLING COMMISSION, http://www.gamblingcommission.gov.uk/ (last visited Sept. 27, 2014).

55. U.K. laws are titled with only the name of the act and the year. *See generally UK Public General Acts*, LEGISLATION.GOV.UK, http://www.legislation.gov.uk/ukpga (last visited Oct. 6, 2014).

56. Anderson et al., *supra* note 2, at 608.

57. *Id. See The Online Guide to Traditional Games: Bowls*, TRADGAMES.ORG.UK, http://www.tradgames.org.uk/games/Bowls.htm (last visited Sept. 27, 2014) (stating bowls was a game involving the bowling of small wooden balls, knocking opponent's balls out of the way in an attempt to be nearest to a "jack," or target ball; it is the sport upon which the Italian "*Bocce*" is based).

58. Anderson et al., *supra* note 2, at 608.

59. *Id.* at 609.

60. *Id.* Notably for pro-legalization advocates, the U.K. Gaming Act, 1845 uses similar language permitting games of skill as does India's Public Gambling Act, 1867.

61. *Id.*

of any obligation to "tak[e] any cognizance" of a claim for money based on a wager, essentially rendering bets unenforceable.[62]

England's focus also shifted from individual prohibition, although that paradigm remained in place, to prohibition on the availability of gaming opportunities.[63] In addition to making wagers unenforceable, the Gaming Act, 1845 also "suppressed" gaming houses.[64] Finally, the Betting Act, 1854 formally made the act of private bookmaking illegal, reduced the proof required to show that an establishment was a gaming house, and increased the penalties for an infraction.[65] Even despite the Street Betting Act, 1906,[66] which made loitering in the streets for the purpose of betting illegal, all of these pieces of legislation had the unforeseen effect of sending gaming into the streets and onto the black market, handing gambling over to the control of the criminal world.[67]

Although each one of England's laws reflected tangible societal problems at the time it was enacted, collectively, the laws were slow to adapt and largely reactionary. Believing the successful creation of effective turn-of-the-century legislation required a revised and holistic approach, the U.K.'s Members of Parliament decided to form a committee, the Gambling Review Body,[68] to examine the overall climate of the country and make official recommendations.[69] The result of the assessment was a 2001 recommendation to overhaul most of the U.K.'s past legislation with new, comprehensive legislation that would legalize gambling[70]—the 2005 U.K. Act—and to create the U.K. Gambling Commission in order to regulate the soon-to-be legal pastime.[71]

Finally, on May 14, 2014, a new addition to the U.K. Act received Royal Assent and became an Act of Parliament.[72] The new law, the Gambling (Licensing and Advertising) Act 2014 ("2014 Gambling Act"), which took effect on

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62. *Id.*

63. *See id.* at 609-10.

64. *Id.* at 609.

65. *Id.*

66. *Id.*

67. *Id.* at 613 ("Although reasonable enforcement of the Betting Act (U.K.) 1853 and the Street Betting Act (U.K.) 1906 was possible; in practice, the legislation lacked public support, was outmoded, and even promoted an amount of underground, unregulated wagering.").

68. SIR ALAN BUDD, GAMBLING REVIEW BODY: GAMBLING REVIEW BODY REPORT, at Chairman's Introduction, 8, § 2.2 (2001) (stating the Gambling Review Body was "commissioned by the Home Office, but, following changes in departmental responsibilities after the General Election, it[s review] is being submitted to the Department of Culture Media and Sport;" furthermore, the Gambling Review Board states "[w]e have been asked to make recommendations for the kind and extent of regulation appropriate for gambling activities in Great Britain").

69. *Id.* at Chairman's Introduction.

70. Gambling Act, 2005 § 5 ("The [Gambling] Act [2005] repeals the Betting, Gaming and Lotteries Act 1963 (c.2), the Gaming Act 1968 (c.65) and the Lotteries and Amusements Act 1976 (c. 32)").

71. *Id. See infra* note 74 (following the March 2002 publication of *A Safe Bet for Success*, the government's official response to the Gambling Review Body's report, a new bill legalizing gambling was drafted in 2004).

72. Gambling (Licensing and Advertising) Act, 2014, c. 17 (U.K.).

November 1, 2014, requires all operators or advertisers in the British market to hold a U.K. Gambling Commission license; contribute to research, education, and treatment of gambling addiction; and protect children and vulnerable adults.[73] Another key feature of the 2014 Gambling Act is its fifteen percent Point of Consumption Tax, which will apply to all wagers placed by punters within the U.K.'s borders, regardless of the operator's location.[74] The act also discourages corruption in sport by forcing overseas operations to report suspicious betting patterns involving British customers.

B. Gambling Laws in India

1. General Prohibition on Gambling

The Constitution of India divides the power for making statutes into three lists based on the activity regulated: List I enumerates activities to be regulated by the Centre, or national government; List II activities are to be regulated by each state; and List III activities are matters on which the Centre and the state may concurrently regulate.[75] Betting and Gambling fall on List II; however, several states have enacted a verbatim version of India's Public Gambling Act, 1867 ("Public Gambling Act"), and most other states have adopted their own state gambling acts that were heavily drawn from and contain language substantially similar to the prohibitions contained in the Public Gambling Act.[76] Notably, many of the preambles of these state gambling acts unequivocally caution against the moral and social ills of gambling, including the Preamble to the Assam Gaming Act, which states, "gambling and betting on games and sports have widely spread throughout the state causing debasement of public morality and wide spread [sic] exploitation and threat to peace and order."[77] Although states are free to depart

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73. *Queen's Speech 2013: Gambling (Licensing and Advertising) Bill*, POLITICS.CO.UK, http://www.politics.co.uk/reference/queen-s-speech-2013-gambling-licensing-and-advertising-bill (last visited Sept. 27, 2014).

74. Sajid Javid & HM Treasury, *Gambling Tax: New Rules and Sanctions to Prevent Avoidance by Gambling Companies*, GOV.UK (Aug. 16, 2013), https://www.gov.uk/government/news/gambling-tax-new-rules-and-sanctions-to-prevent-avoidance-by-gambling-companies.

75. Anderson et al., *supra* note 2, at 444.

76. *See, e.g.*, Dir. Gen. of Police v. Mahalakshmi Cultural Ass'n, W.A.No.2287 of 2011 (Madras H.C.) ¶ 14 (Mar. 22, 2012), *available at* http://indiankanoon.org/doc/61898553 (referencing the Hyderabad Gambling Act). *See also* Exec. Club formed by Lalitha Real Estates Pvt. v. A.P., 1999 Crim.L.J. (Andhra H.C.) 35 (Aug. 10, 1998) ("The definition of common gaming house in Hyderabad Gambling Act is more or less is the same as in the Act of 1974. Both the Acts, it appears, mainly borrowed the provisions from the Public Gambling Act, 1867 . . . .").

77. Anderson et al., *supra* note 2, at 445 (quoting as the text cited the Preamble). *See also id.* at 444 (stating notably, although eventually reaching the conclusion that sports betting, including cricket betting, is not prohibited under India's laws, or alternatively if it is, it should not be, as it constitutes a game of skill). The author of that chapter, Vidushpat Singhania, expressly states that in analyzing sports betting, he is "avoiding a discussion on moral codes, social views and religious beliefs." *Id.* These are the very aspects of Indian culture that this author asserts prevent the U.K.'s gambling legalization from working in the Indian paradigm. *Id.* The interconnectedness of moral codes, social views, and religious beliefs with what Mr. Singhania calls "the legal position [on gambling] in India," is

from India's Public Gambling Act, and although certain states have done so, for the purpose of this paper, the Public Gambling Act represents the general consensus of Indian law.[78]

The Public Gambling Act, in pertinent part, states:

> Whoever, being the owner or occupier, or having the use, of any house, walled enclosure, room or place situated within the limits to which this Act applies, opens, keeps or uses the same as a common gaming-house; and whoever, being the owner or occupier of any such house, walled enclosure, room or place as aforesaid, knowingly or willfully permits the same to be opened, occupied, used or kept by any other person as a common gaming-house; and whoever has the care or management of, or in any manner assists in conducting, the business of any house, walled enclosure, room or place as aforesaid, opened, occupied, used or kept for the purpose aforesaid; and whoever advances or furnishes money for the purpose of gaming with persons frequenting such house, walled enclosure, room or place; shall be liable to a fine not exceeding two-hundred rupees, or to imprisonment of either description,' [sic] as defined in the Indian Penal Code (45 of 1860), for any term not exceeding three months.[79]

The act also punishes anyone who is found in a gaming house:

> Whoever is found in any such house, walled enclosure, room or place, playing or gaming with cards, dice, counters, money or other instruments of gaming, or is found there present for the purpose of gaming, whether playing for any money, wager, stake or otherwise, shall be liable to a fine not exceeding one hundred rupees, or to imprisonment of either description,' [sic] as defined in the Indian Penal Code (45 of 1860), for any term [ ] not exceeding one month and any person found in any common gaming-house during any gaming or playing therein shall be presumed, until the contrary be proved, to have been there for the purpose of gaming.[80]

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evidenced by numerous references in India's gambling statutes and related judicial decisions, several of which Mr. Singhania quotes or cites in his chapter. *Id.*

78. Jay Sayta, *Legality of Poker and Other Games of Skill: A Critical Analysis of India's Gaming Laws*, 5 NAT'L U. JURID. SCI. L. REV. 93, 94 (2012) ("Almost all states, with the exception of Goa and Sikkim, have prohibited all forms of gambling, betting and wagering or have continued to enforce the pre-independence legislations enacted by the British rulers that banned gambling."). Notably, the author's argument is that it is not only the "pre-independence legislations," i.e. "British policy," that has influenced the prohibition on gambling in India, but also the Indian culture, of its own volition, even though Mr. Sayta does not advocate for cricket betting in this article, specifically, but rather focuses on poker.

79. Public Gambling Act, No. 3 of 1867, § 3, INDIA CODE (1993), *available at* http://indiacode.nic.in.

80. *Id.* § 4.

2. Exceptions to India's Rule

The Public Gambling Act does not prohibit "any game of mere skill . . . ."[81] Currently, the only sports betting activity that is legal under this game of skill exception in India is horse betting.[82] The courts have held that a horse better's decisions require skill because they are based on a number of factors, including the horse's pedigree, his upbringing and training, the competition, and the weather conditions.[83] Indian courts have not yet held that cricket-betting rises to the same level of skill, and therefore, cricket betting remains prohibited.

However, some evidence exists that the tide is turning, if only at a glacial pace, and recent debate over what constitutes a "game of skill" has made this framing of the issue the battle cry of pro-legalization advocates.[84] Notably, two of the few material state law deviations from the Public Gambling Act are the acts of Assam and Orissa, neither of which provides any exception for games of skill.[85] For the majority of states with gambling acts containing such a provision, an appeal is currently pending before the Supreme Court of India from the Madras High Court that would help elucidate the issue by deciding whether rummy is one such game of skill.[86] The Madras High Court controversially[87] held that rummy is a legal game of skill that does not attract the attention of the Madras City Police Act, 1888 ("Chennai City Police Act") [88] *unless* the game is being played for stakes or for a profit as to the owner of the facility, in which case, the premises upon which the rummy is being played is an illegal gaming-house under the

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81. *Id.* § 12 ("Act not to apply to certain games—Nothing in the foregoing provisions of this Act contained shall be held to apply to any game of mere skill wherever played.").

82. K.R. Lakshmanan v. Tamil Nadu, A.I.R. 1996 S.C. 1153 (India), *available at* http://indiankanoon.in/doc/1248365.

83. GAMING LAW: JURISDICTIONAL COMPARISONS 147 (Julian Harris ed., 2012).

84. *See generally id.*

85. *Legality of Poker and Other Games of Skill: A Critical Analysis of India's Gaming Laws*, *supra* note 78, at 98 n.33.

86. Sajai Singh & Yajas Setlur, *Supreme Court to Decide Whether Rummy for Stakes is a Skill-based Card Game or a Criminal Offence*, ECON. TIMES (Oct. 19, 2014, 3:40 AM), http://articles.economictimes.indiatimes.com/2014-10-19/news/55197230_1_rummy-mahalkshmi-cultural-association-criminal-offence.

87. Jay Sayta, *Recent Madras HC Decision Outlaws Rummy for Profit, Decision Based on Fallacious Interpretation*, GAMBLING LAWS IN INDIA (Mar. 28, 2012), http://glaws.in/2012/03/recent-madras-hc-decision-outlaws-rummy-for-profit-decision-based-on-fallacious-interpretation/ ("This decision of the Madras HC is a clear U-turn from an earlier decision of the Andhra Pradesh High Court," Mr. Sayta also states, "[t]he court in this instance tried to play the moral police and cited religious scriptures and other treatises in justifying the ban on rummy for stakes."). Although, notably, Mr. Sayta seems to advocate, in his published article, for the legalization of poker and does not extend his analysis of gambling to cricket betting.

88. Chennai, formally named Madras, is a city in the Indian state of Tamil Nadu. The "Madras City Police Act, 1888" is Chennai's adopted criminal code. *See* Dir. Gen. of Police v. Mahalakshmi Cultural Ass'n, W.A.No.2287 of 2011 (Madras H.C.) ¶ 4 (Mar. 22, 2012), *available at* http://indiankanoon.org/doc/61898553 (reflecting the court specifically refers to the "Chennai City Policy Act, 1888").

Chennai City Police Act.[89] A recent Karnataka High Court decision quashed criminal charges against nineteen petitioners accused of playing rummy under Sections 79 and 80 of the Karnataka Police Act, 1963, which punish keeping a gaming house and being present in a gaming house for the purpose of gaming, respectively.[90] The court noted that the petitioners were playing rummy and that money was found and seized; however, the court did not specify whether petitioners were playing for stakes as between the players. Rather, the court only held that "[t]he game of Rummy with cards is not a game of chance but a game of skill," and that "[t]he collection of commission from the members of a club playing Rummy does not make it a gambling house."[91] The same Karnataka High Court also recently held that poker is a game of skill and is, therefore, legal for "recreational" purposes but did not address playing poker for "commercial" purposes.[92] The discord within India's judicial system, observed in combination with the extensive number of gambling cases before the court in recent years, indicates the need for a clear expression of the law going forward. Generally, the courts seem hesitant to broadly interpret game of skill exceptions, and they also seem unwilling to address the issue of gambling for stakes. However, as discussed in the following section, one thing is certain: even if the Supreme Court of India continues to hold gambling for stakes to be illegal, the practical difficulties of detecting and intercepting online gambling activity will persist and will continue to affect enforcement.

3. The Modern Realities of Online Betting

The proliferation of the internet has provided a fertile ground for a new way of gambling. Although online gambling is growing exponentially worldwide, the laws concerning online gambling are generally outside the scope of this paper.[93]

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89. *Id.* ¶ 1 (discussing the Madras High Court decision (the decision being appealed to the Supreme Court of India), where the Honorable Justice D. Murugesan quoted Saint Thiruvalluvar from the 934th couplet of Thirukkural (a work from c. 30 B.C., considered to be one of the Tamil "books of law" aimed at promoting order amongst people), which described the evils of gambling as follows: "There is nothing else that brings (us) poverty like gambling which causes many a misery and destroys (one's) reputation.").

90. Criminal Petition, Kirana v. Karnataka (2014) (No. 7648/2013), *available at* http://judgmenthck.kar.nic.in/judgments/bitstream/123456789/917391/1/CRLP7648-13-07-01-2014.pdf.

91. *Id.*

92. Writ Petition, Indian Poker Ass'n v. Karnataka (2013) (WP Nos. 39167 to 39169), *available at* http://judgmenthck.kar.nic.in/judgments/bitstream/123456789/902507/1/WP39167-13-08-10-2013.pdf.

93. *See* Ola O. Olatawura, *Why There May Not Be an Extraterritorial Sport Right to Online Gambling*, 27 LOY. L.A. INT'L & COMP. L. REV. 371 (2005) (providing a more comprehensive look at arguments concerning the legality of extraterritorial online betting in general). Bear in mind, however, legislation may have changed since the article's original publication, e.g., India's implementation of the Information Technology (Intermediaries guidelines) Rules, 2011, which attempt to place the burden of legality of online activity (including gaming) on intermediaries, broadly defined to include, "internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes . . . ." *See* Information Technology (Intermediaries Guidelines) Rules, 2011, Gazette of India, Part II, section III(i) (Apr. 11, 2011), *available at*

However, it is worth noting that websites like Bet365.com[94] allow players to use major credit cards to pay in their home currency (including Indian Rupees), thereby largely skirting the Public Gambling Act. The stakes are high: the maximum one-time deposit Bet365.com allows is ₹99,999, or approximately US$1,600.[95] Other websites, such as IndioCasino.com[96] allow payment in Rupees via a banking or brokerage websites such as EntroPay or Skrill, creating only one additional step over Bet365.[97]

In a Delhi district court decision in September of 2012, Judge Ina Malhotra held that online games, even "games of skill" like chess, poker, bridge and rummy, are illegal under the Public Gambling Act, as well as the Information Technology Act, 2000,[98] and are not protected as trade or commerce under Article 19(1)(g) of the Constitution of India.[99] However, the effect of the decision is limited and is not binding on other Indian courts. Additionally, even a binding decision would not alleviate the practical difficulty of regulating online gambling in India.

To summarize, India's laws prohibit most forms of gambling, including sports betting. However, the law provides for certain exceptions, such as permitting games of mere skill,[100] including horse betting.[101] Furthermore, states are expressly permitted to legislate and make their own policies on "[b]etting and gambling[,]"[102] which two states have done, leading to numerous waterfront casinos in the states of Goa and Sikkim.[103] Furthermore, in recent years, the courts have seemed willing to consider carving out exceptions to this general prohibition through their determinations as to what activities qualify as games of mere skill.

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http://www.ijlt.in/pdffiles/IT-(Intermediary%20Guidelines)-Rules-2011.pdf; *see also* The Information Technology Act, No. 21 of 2000, ch.1(2)(w), INDIA CODE (1993), vol. X, *available at* http://indiacode.nic.in/.

94. *Promotions*, BET365, http://casino.bet365.com/home/en (last visited Sept. 27, 2014).

95. According to the exchange rate of August 25, 2014, US$1.00 is equivalent to 60.46 Indian Rupees.

96. *Promotions*, INDIOCASINO, http://www.indiocasino.com/banking.php (last visited Sept. 27, 2014).

97. SKRILL, https://www.skrill.com/en/ (last visited Sept. 27, 2014); NETELLER, http://www.neteller.com/us/ (last visited Sept. 27, 2014).

98. *Games Offered by Websites Involving Money Can't be Legal: Court*, ECON. TIMES (Sept. 4, 2012, 6:29 PM), http://articles.economictimes.indiatimes.com/2012-09-24/news/34062085_1_online-games-websites-delhi-court.

99. INDIA CONST. art. 19, §§ 1, (1)(g) ("All citizens shall have the right— (g) to practise any profession, or to carry on any occupation, trade or business.").

100. Public Gambling Act, No. 3 of 1867, § 12, INDIA CODE (1993), *available at* http://indiacode.nic.in ("[The a]ct not to apply to certain games—Nothing in the foregoing provisions of this Act contained shall be held to apply to any game of mere skill wherever played.").

101. K.R. Lakshmanan v. Tamil Nadu, A.I.R. 1996 S.C. 1153, 5-6, 13 (India), *available at* http://indiankanoon.in/doc/1248365.

102. INDIA CONST. art. 246, list 2, § 34.

103. Gangwani, *supra* note 47; Sikkim Regulation of Gambling (Amendment) Act, 2005, sec. III.

IV. THE U.K.'S CULTURAL PERSPECTIVE ON GAMBLING

Due to India's historical ties with England and the extensive similarities of their legal systems, Indian pro-legalization advocates often cite the U.K. as an indicator of future success should gambling be legalized in India. However, despite the two nations' similarities, this author concludes certain distinct and deep-set cultural disparities prevent the U.K.'s gambling legislation from being translatable to India. For the purpose of this analysis, those cultural distinctions are divided into one section addressing England's religious and socio-political viewpoints, followed by one comparative section addressing the religious, social, and economic considerations in India.

A. The U.K.'s Religious Viewpoint

Although the potential for excessive gambling has long been recognized, many of England's most influential and respected leaders historically embraced the institution of gambling. Furthermore, religion in England may even be largely responsible for the proliferation of gambling. For instance, Ordericus Vitalis, the English Benedictine monk who lived from around 1075-1143 A.D., tells us that "clergymen and bishops [were] fond of dice-playing."[104] Additionally, the Christian Army, under the command of Richard the First of England, permitted gambling amongst its knights and clergymen.[105] However, they were required to exhibit restraint while doing so: the archbishops of the army levied a fine against anyone who lost more than twenty shillings in one day.[106]

From gambling's first appearance in the U.K., the church, followed by the crown and the nobility, embraced the concept readily. For instance, the first public lottery in England was drawn in 1569, having been organized at the Queen's order, the revenues of which were to be "converted towardes the reparation of the havens and strength of the Realme, and towardes such other publique good workes."[107] Notably, the lottery was not sufficiently popular initially, such that the Queen solicited support in the form of a recommendation from the Lord Mayor and circulars from two other lords.[108] Therefore, the perception began at an early stage that the crown and the church backed the lottery.

B. The U.K.'s Socio-Political Viewpoint on Gambling

The English populous has historically perceived gambling as being a sign of wealth and societal importance. His Royal Highness Frederick Louis, Prince of Wales, frequented early cricket matches for the purpose of placing bets on them.[109] Additionally, Georgiana, Duchess of Devonshire, famously and regularly hosted gambling evenings, "turn[ing] Devonshire House into London's most exclusive

104. JOHN ASHTON, THE HISTORY OF GAMBLING IN ENGLAND 12-13 (1898).
105. *Id.* at 13.
106. *Id.*
107. *Id.* at 223.
108. *Id.*
109. Simon Gardiner, *On the Front Foot Against Corruption*, 15 SPORT & L.J. 16, 16 (2007).

gambling club, even charging professional faro dealers fifty guineas a night, illegally, for the right to set up tables there."[110] At one point, she had accumulated a gambling debt of 3,000 pounds, which is roughly the equivalent of US$297,000 in the modern economy.[111] Yet the Duchess' debt paled in comparison to that of her confidante and prominent English politician, Charles Fox, whose gambling debts passed 140,000 pounds, or nearly US$14 million by modern equivalents.[112] Georgiana's sister, Harriet, Lady Duncannon, was also a compulsive gambler.[113] The history of gambling in England repeatedly indicates that the wealthy and aristocratic individuals glamorized gambling as a pastime, and although its attractiveness eventually permeated all walks of life, the vestiges of the aristocracy's approval prevented the activity from developing the social scorn that it has in other parts of the world, namely India.[114]

Nonetheless, the history of gambling in the U.K. is admittedly not without corruption. Documentation of lottery-tampering dates back to 1775.[115] That year, two "Blue Coat boys" (who drew the lottery tickets) appeared before a magistrate for having rigged the selection of winning tickets in exchange for money and meals.[116]

Additionally, one can detect some shift in the perception of gambling in England in recent years, some of which is attributable to the proliferation of electronic gambling sources. Such Fixed Odds Betting Terminals make gambling readily available to pedestrians provide no human influence that might otherwise indicate to the gambler that he should stop betting.[117] In addition to discussion over Fixed Odds Betting Terminals,[118] the only major political resistance to the 2005 U.K. Act was regarding the number and location of super-casinos to be permitted by the bill.[119] Additionally, some groups call for increased cautionary advertising, especially increasing the protection of young people and minorities.[120] However, once the Members of Parliament reached a compromise on these issues,

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110. Francine du Plessix Gray, *The High Life: Sex and Gambling in Eighteenth-century England*, NEW YORKER (2000), *available at* http://www.amanda-foreman.com/new-yorker.shtml (reviewing AMANDA FOREMAN, GEORGIANA: DUCHESS OF DEVONSHIRE (1998)).

111. *Id.*

112. *Id.*

113. *Id.*

114. *See id.*

115. ASHTON, *supra* note 104, at 231.

116. *Id.* at 231-33.

117. *See generally* GERDA REITH, RESEARCH ON THE SOCIAL IMPACTS OF GAMBLING 64-66, 101 (2006), *available at* http://www.gla.ac.uk/media/media_34552_en.pdf.

118. *Michael Connarty MPUrges Fixes Odds Betting Terminals Review*, MICHAEL CONNARTY: LABOUR MP FOR LINLITHGOW & EAST FALKIRK CONSTITUENCY, http://www.mconnartymp.com/michael-connarty-mp-urges-fixed-odds-betting-terminals-review.html (last visited Dec. 2, 2013).

119. *Climbdown Saves Super Casino Plan*, BBC NEWS, http://news.bbc.co.uk/2/hi/uk_news/politics/vote_2005/frontpage/4412949.stm (last updated Apr. 5, 2005) [hereinafter *Climbdown*].

120. REITH, *supra* note 117, at 64-69.

the bill generally enjoyed widespread and bi-partisan support.[121] While Parliament took care to address at least some of the practical and socio-economic considerations of legalized gambling, no moral or religious considerations controlled the discussions, and the author has found no evidence that parties attempted to use gambling as a tool to create political leverage.[122]

V. INDIA'S CULTURAL OPPOSITION TO GAMBLING

In contrast to the U.K.'s historically accommodating coexistence with the concept of gambling, India's sentiment, as a nation, historically tends toward intolerance thereof.[123] For example, the Supreme Court of India noted that, "[g]ambling activities . . . were considered to be a sinful and pernicious vice by the ancient seers and law-givers of India . . . ."[124] Contrary to the outspoken writers advocating for gambling legalization in India, this author asserts that because of India's religious denunciation of gambling; its lack of political acceptance of gambling; and its general lack of transparency and enforcement mechanisms, which would magnify the difficulty of effectively regulating legalized gambling, the time is not yet ripe for India to legalize gambling.

A. Religious Opposition by Both Hinduism and Islam

The two major religions of Hinduism and Islam together encompass the vast majority of the Indian population,[125] and each of these religions significantly restricts, admonishes against, or unequivocally prohibits gambling.[126]

1.The Mahābhārata

The Mahābhārata is one of two great epic Sanskrit poems,[127] which, according to Hindus, provide vital information on both morality (*dharma*) and history (*itihasa*).[128] The Mahābhārata is extremely lengthy,[129] and the storyline is very involved. However, one of the most famous events of the plot centers around

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121. *Climbdown, supra* note 119.

122. *Id.*

123. *Legality of Poker and Other Games of Skill: A Critical Analysis of India's Gaming Laws*, *supra* note 78, at 93 ("The law and the judiciary, in modern times, have looked at card games as a pernicious and immoral activity.").

124. Bombay v. R. M. D. Chamarbaugwala, A.I.R. 1957 S.C. 699 (India), *available at* http://judis.nic.in/supremecourt/imgs1.aspx?filename=654.

125. *Religion*, GOV'T OF INDIA: MINISTRY OF HOME AFF., http://censusindia.gov.in/Census_And_You/religion.aspx (last visited Sept. 27, 2014) [hereinafter *Census*] (according to the official 2001 Census of India, 80.5% of the country's population professes Hindu faith, while 13.4% professes Islam; therefore, the two religions together account for 93.9% of the Indian population).

126. QUR'AN Al-Baqarah, 2:219-20; QUR'AN Al-Ma'idah, 5:90-91.

127. B.A. van Nooten, *Introduction* to WILLIAM BUCK, THE MAHABHARATA, at xiii (1973) (referring to Ramayana as the other great Sanskrit epic).

128. Wendy Doniger, *Mahabharata*, ENCYCLOPEDIA BRITANNICA: ACAD. EDITION, http://www.britannica.com/EBchecked/topic/357806/Mahabharata (last visited Sept. 27, 2014).

129. *See id.* (stating the Mahābhārata totals almost 100,000 couplets and approximates seven times the length of the Iliad and Odyssey combined).

gambling and the pervasive ills thereof.[130] In the epic, two sides of one family were at odds with each other based on each side's belief that its respective father should rule the kingdom (essentially the Kauravas, sons of Dhritarashtra, and the Pandavas, sons of Pandu, were warring first-cousins).[131] In a very famous passage of the Mahābhārata, the animosity between the two sides peaked when Duryodhana, eldest and leader of the Kaurava side of the family, challenged Yudhishthira, the eldest son of the Pandava side of the family, to a dice game.[132] By that time, Yudhishthira was the ruler of the land, and the stakes of the game escalated quickly to include the control of the kingdom and the servitude followed by exile of Yudhishthira himself, his four brothers, and their common wife, Draupadi.[133] Yudhishthira lost the dice game, costing his side of the family great humiliation, and eventually culminating in a devastating war.[134]

a. Diwali

Worth conceding is the limited, legal acceptance of gambling on Diwali,[135] one of the most widely-celebrated and most jovial Hindu holidays. Diwali is the festival of lights and new beginnings, and, specifically in northern India, Diwali is the start of a new business and accounting year.[136] Following the examples of the Goddess Pārvati, who gambled with her companion, Lord Shiva, on Diwali, Hindus often gamble on Diwali to symbolize taking calculated risks.[137] Many Hindus believe Diwali gambling invokes Lakshmi, the goddess of wealth.[138] However, Hindus heavily emphasize restraint, both in the calculated nature of the risk and in the limitation of the activity to only one day.[139] Limited Diwali gambling is considered auspicious and reflects the maxim, "nothing ventured;

130. Nooten, *supra* note 127, at 95-105.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. Jay Sayta, *Gamblers on Police Radar this Diwali, but Private Gambling Not Illegal as per Numerous Court Rulings*, GAMBLING LAWS IN INDIA (Nov. 2, 2013), http://glaws.in/2013/11/gamblers-on-police-radar-this-diwali-but-private-gambling-not-illegal-as-per-numerous-court-rulings ("[G]ambling in a private enclosure where there is no invitation to members of the public at large and where there is no element of 'profit or gain' for the owners . . . of the premises is not illegal.").

136. TANENBAUM, WORKPLACE: FACT SHEET, DIWALI (2013), *available at* https://www.tanenbaum.org/sites/default/files/Diwali_Fact_Sheet_2013.pdf ("Many Hindus will start the new business year at Diwali, and will pray to the goddess Lakshmi for a financially successful year."); *Diwali*, BBC: RELIGIONS, http://www.bbc.co.uk/religion/religions/hinduism/holydays/diwali.shtml (last updated Oct. 20, 2010) ("Business people regard it as a favourable day to start a new accounting year because of the festival's association with Lakshmi, the goddess of wealth.").

137. In fact, the saying goes that one who does not gamble on Diwali is foolish (literally, he will be reborn as a donkey) because he is too afraid to try anything new. K. K. Aggarwal, *Diwali Gambling*, ITIMES (Oct. 27, 2012, 1:58 PM), http://ww.itimes.com/blog/diwali-gambling.

138. *The Tradition of Gambling in Diwali*, INDIA TRIB., http://www.indiatribune.com/index.php?option=com_content&view=article&id=4228:the-tradition-of-gambling-in-diwali-&catid=114:youth&Itemid=478 (last visited Sept. 27, 2014).

139. *Id.*

nothing gained." Such gambling, however, is entirely distinguishable from and arguably completely contrary to gambling as a habit or a vice.

2. The Qur'an

Around thirteen percent of India is Muslim, making Islam the second most prominent religion in India.[140] For this portion of India's population, the prohibition of gambling is direct and emphatic. Unlike the Hindu texts, which discourage gambling indirectly through moral and religious parables, the parallel Muslim belief is based on an explicit and indisputable prohibition on gambling in the religion's primary text. The Qur'an, believed by Muslims to be the direct words of Allah to the prophet Mohammed and, therefore, the supreme source of religion, states, "intoxicants, and gambling, and the altars of idols, and the games of chance are abominations of the devil; you shall avoid them, that you may succeed. The devil wants to provoke animosity and hatred among you through intoxicants and gambling . . . ."[141] This admonition is not only clear but also adamant. The Qur'an calls gambling, "*Ithm al-kabir*," meaning, "a very great sin."[142] This is a severe phrase reserved for reference to only two concepts: gambling and drinking alcohol.[143]

Between the Hindu majority and the strong Muslim minority, more than ninety-three percent of India's population professes a religion that at least indirectly and often explicitly prohibits gambling.[144] The author concedes that religion is an individual practice and that each person may follow the letter of the religious law to a different extent. However, regardless of whether individual Hindus or individual Muslims chose to gamble in secret, the well-known fact that gambling is frowned-upon by both religions would likely undermine the success of any systematic overhaul of India's gambling legislation in the near future.

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140. *Census, supra* note 125.

141. RASHAD KHALIFA, QURAN—THE FINAL TESTAMENT—AUTHORIZED ENGLISH VERSION, *Sura Al-Maeda* 5:90-91 (Islamic Productions, 2003), *avalable at* http://www.feedbooks.com/userbook/3968.pdf.

142. *Fourteenth Greater Sin: Gambling*, AL-ISLAM.ORG, http://www.al-islam.org/greater-sins-volume-1-ayatullah-sayyid-abd-al-husayn-dastghayb-shirazi/fourteenth-greater-sin (last visited Sept. 27, 2014).

143. *Id.*

144. Q. S. KHAN, HOLY VEDAS AND ISLAM 7 (2011) (quoting Rig Veda 10-34-3: "Every breath curses a gambler. His wife deserts him, and no one lends money to a gambler." Also quoting Rig Veda 10-34-13: "[o]h gamblers, do farming and quit gambling, and remain satisfied with whatever you earn through farming."); MANUSMRITI: THE LAWS OF MANU, ch. 9, verses 221-22 (George Bühler trans., 1886) ("Gambling and betting let the king exclude from his realm; those two vices cause the destruction of the kingdoms of princes. Gambling and betting amount to open theft; the king shall always exert himself in suppressing both (of them).").

B. Political Dynamics

Gambling enjoys very little support in the world of Indian politics. Although India has a multi-party political system, two predominant national[145] political parties exist: the Bharatiya Janata Party ("BJP") and the Indian National Congress ("Congress").[146] A new state party entered the scene in 2012: the Aaam Aadmi political party, whose primary battle cry is anti-corruption.[147] Although the BJP is widely considered to be philosophically conservative and is said to have an "ideological opposition to casinos,"[148] various parties have succeeded in using the issue of gambling as a tool with which to shame the other. For example, while discussing whether to grant a permit for a new offshore casino in Goa, a representative of the Aaam Aadmi Aurat Against Gambling[149] reminded the BJP spokesperson "that the same party led a protest against the casinos headed by the present chief minister Manohar Parikar, who was then the leader of the opposition."[150] Another Indian news source notes, "[b]oth the Congress and the BJP were equally responsible for promoting casinos in Goa, although both parties opposed these when in opposition . . . ."[151] Regardless of where any given party truly stands on the prudence of expanding gambling in India, both parties' repeated choice to use the gambling issue against the other as a means of political leverage

145. *See* Press Release, Press Info. Bureau: Gov't of India Election Comm'n, Dynamics of Elevation of Political Parties to State or Nat'l Party (Mar. 8, 2014), *available at* http://pib.nic.in/newsite/PrintRelease.aspx?relid=104537 (stating in order for a "state" party to attain "national" status, it must fulfill one of the following three conditions: "[(1)] The party wins 2% of seats in the Lok Sabha (11 seats) from at least 3 different States. [(2) a]t a General Election to Lok Sabha or Legislative Assembly, the party polls 6% of votes in four States and in addition it wins 4 Lok Sabha seats. [(3) a] party gets recognition as State Party in four or more States").

146. *See List of Participating Party and Seats Contested by them in Loksabha 2014*, ELECTION COMM'N OF INDIA, http://eci.nic.in/eci_main1/GE2014/Party_Contested_GE_2014.xlsx (last visited Sept. 27, 2014); *see also Congress Hails India Poll Victory*, BBC NEWS, http://news.bbc.co.uk/2/hi/south_asia/7962722.stm (last updated May 16, 2009) ("India's two main parties, Congress and the Bharatiya Janata Party (BJP), had 145 and 138 seats respectively in the outgoing 543-seater lower house of parliament.").

147. *See Why are We Entering Politics?*, AAM AADMI PARTY, http://www.aamaadmiparty.org/page/why-are-we-entering-politics (last visited Sept. 27, 2014); *see also Manifesto—Sports, Culture and Media*, AAM AADMI PARTY, http://www.aamaadmiparty.org/manifesto-sports-culture-and-media (last visited Sept. 27, 2014) ("1. Keeping corrupt [sic] and criminals out of sports administration by ensuring that individuals who have charges framed against them by any court shall not be allowed to contest and/or hold any elected office in any National Sports Federation (NSF).").

148. Jay Sayta, *BJP Sweeps Goa Polls, Change of Government likely to have an Adverse Impact on the Casino Industry*, GAMBLING LAWS IN INDIA (Mar. 6, 2012), http://glaws.in/2012/03/bjp-sweeps-goa-polls-change-of-government-likely-to-have-an-adverse-impact-on-the-casino-industry/.

149. AAAAG is an anti-gambling group.

150. *AAAAG Flays BJP over Casinos*, TIMES OF INDIA (Goa) (Aug. 11, 2013, 2:16 AM), http://articles.timesofindia.indiatimes.com/2013-08-11/goa/41294128_1_casinos-bjp-spokesperson-flays.

151. *Both Congress, BJP Responsible for Goa Casinos*, INDIA TV NEWS (Panaji) (Apr. 18, 2013, 3:47 PM), http://www.indiatvnews.com/politics/national/both-congress-bjp-responsible-for-goa-casinos-9564.html.

is indicative of the unlikelihood that gambling will enjoy any significant political support approximating the predominantly non-partisan agreement to legalize gambling in the U.K. in 2005.

C. *Economic and Practical Considerations*

1.Corruption in Society and in the Government, in General

Payment of "grease money" in order to ensure the accomplishment of regular, everyday tasks has become a near certainty in India, namely in the urban areas.[152] One non-profit organization[153] estimates the average bribe paid by an urban Indian in one year to be ₹26,932, currently approximately US$450.[154] The total estimated amount of bribe money paid per year is ₹6,29,675, or approximately US$129 billion.[155] Examples of typical bribes paid, as cited by this organization, include bribes to register property, obtain a passport, obtain a driving license, or escape a traffic citation.[156] This atmosphere of corruption is pervasive, having been prevalent long before India's independence from England,[157] and having only increased from 1947 through the late twentieth century's "License Raj" period.[158] Overcoming corruption in India would require a complete cultural revolution. Such a drastic change would likely involve increased wages overall in order to combat income inequality, as well as greater criminal liability for corrupt officials. However, as the situation stands, bribes remain an integrated part of urban Indian daily life.

2.Betting and Bowling: Behind the Scenes

Since most gaming and gambling is illegal in India, and since a great deal of betting still takes place there, logic dictates the conclusion that the betting industry exists primarily on the black market. More specifically, bribes and the sport of cricket have become inextricably linked in recent years, largely due to the

152. TRANSPARENCY INT'L, CORRUPTION PERCEPTIONS INDEX 2012 (2012), *available at* http://www.transparency.org.ro/politici_si_studii/indici/ipc/2012/CPI2012_map%20and%20country%20results.pdf (reflecting that India recently ranked 94th out of 176 nations assessed for transparency).

153. I PAID A BRIBE, http://www.ipaidabribe.com (last visited Sept. 27, 2014).

154. Damayanti Datta, *The Bribe Republic: How Rampant Bribery is Corroding India's Core*, INDIA TODAY (July 12, 2013), http://indiatoday.intoday.in/story/bribery-in-india-bribe-republic-anti-corruption-bureau/1/291074.html.

155. *Id.*

156. *Id.*

157. Beina Xu, *Governance in India: Corruption*, COUNCIL ON FOREIGN REL., http://www.cfr.org/corruption-and-bribery/governance-india-corruption/p31823 (last updated Sept. 4, 2014) ("Corruption in India can be traced back the country's colonial past, analysts say. The British Raj period, beginning in 1858, excluded Indian citizens from political participation by dividing the country into districts with provincial governments controlled by a commissioner.").

158. *Id.* ("After India gained independence in 1947, the new regime implemented heavy economic regulations intended to develop domestic markets . . . The policy limited foreign investment and stifled competition, and bribery became part and parcel to doing business.").

influence of urban organized crime leaders, such as Dawood Ibrahim [Kaskar].[159] Through their intricate and extensive crime rings, often in Mumbai or Delhi, these leaders orchestrate cricket betting and spot-fixing, receiving immense payouts, almost always remaining undetected, and sometimes remaining outside of India altogether.[160] Forbes listed Dawood Ibrahim as the fifty-seventh most powerful person in the world in 2011 and the sixty-third in 2010,[161] and his net worth is estimated to be around US$15 billion.[162] Although he provides only one example, he illustrates the point that such wealthy, powerful, and determined forces as are behind illegal cricket-betting would very likely not cease their black market activities even if gambling were to be legalized.

As another example, on October 14, 2013, police in the state of Andhra Pradesh arrested three people and confiscated approximately ₹6,000 in cash and twelve mobile phones after tips that the three were taking bets on the India-Australia one-day cricket series.[163] Another very recent instance of cricket corruption involved three Rajasthan Royals players—S. Sreesanth, Ajit Chandila, and Ankeet Chavan, as well as fifteen bookies and famous Indian actor, Vindoo Dara Singh.[164] Delhi police arrested the players for spot-fixing in two matches in May of 2013. They have been banned from cricket and are under criminal investigation.[165] Police charged Vindoo Dara Singh with illegal betting; however, they also believe he was passing information to bookies from within a cricket team.[166]

Ultimately, the size, organization, and power of the individuals and organizations deeply entrenched in the world of cricket-betting will likely preclude the legalization of gambling from affecting illegal activities of this magnitude. Comprehensive and continued pushes for transparency, both in Indian government and within the Board of Control for Cricket in India ("BCCI"),[167] will be required in order to motivate players not to succumb to the temptation of corruption, and significantly greater penalties will be required before organized criminals will be financially motivated to cease their cricket-betting and spot-fixing activities.

159. Shoaib Ahmed, *How Exactly does Betting in Cricket Work?*, IBN LIVE (May 22, 2013, 1:08 PM), http://ibnlive.in.com/news/cricketnext/how-exactly-does-betting-in-cricket-work/393184-78.html.

160. *Id.*

161. *World's Most Powerful People*, FORBES, http://www.forbes.com/profile/dawood-ibrahim-kaskar/ (last visited Sept. 1, 2014).

162. Qaswar Abbas, *The Sultan doesn't Live Here Any More*, INDIA TODAY (May 27, 2011), http://indiatoday.intoday.in/story/dawood-ibrahim-white-house-in-clifton-road-karachi/1/139562.html.

163. *Three Held for Betting on India-Australia Cricket Match*, HINDU BUS. LINE (Oct. 14, 2013), http://www.thehindubusinessline.com/news/three-held-for-betting-on-indiaaustralia-cricket-match/article5233268.ece.

164. Rashmi Rajput, *IPL Betting Case: Police Present Sides before Panel*, THE HINDU (Nov. 7, 2013), http://www.thehindu.com/todays-paper/tp-national/ipl-betting-case-police-present-slides-before-panel/article5324003.ece.

165. *Id.*

166. *Id.*

167. *See generally* BOARD OF CONTROL FOR CRICKET IN INDIA, http://www.bcci.tv (last visited Sept. 27, 2014).

Therefore, unlike valid arguments in favor of the legalization, government regulation, and taxation of other types of criminal activities, the oft-relied-upon argument that gambling legalization will eliminate criminal gambling activity is, unfortunately, flawed. The error lies in the underlying premise that the organized and powerful criminal forces that drive illegal gambling in India would legitimize their betting circles if gambling became legal. This argument is simply not persuasive.

VI. AN ANALYSIS OF THE FUTURE OF GAMBLING IN INDIA

A. The Significance of the Legalization Debate

A survey by the Federation of Indian Chambers of Commerce and Industry ("FICCI")[168] of 200 businesses reported that seventy-four percent of respondents believe that "legalizing sports betting will help curb match fixing problem."[169] Eighty-three percent of respondents agreed that regulating sports betting with proper laws was better than banning it, and sixty-eight percent indicated that betting in sport could be controlled.[170] However, popular opinion in favor of gambling legalization does not equate to the prudence thereof. Rather, the issue of whether to legalize gambling requires careful consideration of the likely effects of any such decision.

1. The High Financial Stakes

The FICCI estimates that the illegal Indian cricket-betting industry is worth ₹12-20,000 annually, or around US$3 billion.[171] Negativity in cricket could seriously affect India's financial situation domestically, its perception globally, and therefore, its ultimate growth as a world power. For instance, Lalit Modi, who created the IPL, the Indian Premier [Cricket] League in 2008 (which is currently valued at US$4 billion),[172] had previously entered into a distribution agreement with ESPN in 1994.[173] Modi is also the President and Managing Director of Modi

168. *See generally* FED'N OF INDIAN CHAMBERS OF COM. & INDUSTRY, http://www.ficci.com (last visited Sept. 27, 2014).

169. Rama Lakshmi, *India Considers Legalizing Sports Gambling as Way to Curb Match-fixing*, WASH. POST (Jun. 25, 2013), http://www.washingtonpost.com/blogs/worldviews/wp/2013/06/25/india-considers-legalizing-sports-gambling-as-way-to-curb-match-fixing.

170. Steven Patterson, *Sports Betting Regulation Discussed in India*, INNOVATE GAMING (Nov. 4, 2013), http://www.innovategaming.com/legalising-sports-betting-india.

171. *See* FED'N OF INDIAN CHAMBERS OF COM. AND INDUSTRY, FICCI REPRESENTATION TO GOVERNMENT ON GIVING INDUSTRY STATUS TO SPORTS SECTOR 6 (2012), *available at* http://www.ficci.com/SEdocument/20206/sports-ficci-to-govt.pdf; *see also FIIs Pump Rs 20,000 Crore in Debt Market in May, Best Show in 29 Months*, DECCAN CHRON. (June 8, 2014, 11:06 AM), http://www.deccanchronicle.com/140608/business-economics/article/fiis-pump-rs-20000-crore-debt-market-may-best-show-29-months (reflecting that as of June 2014, 20,000 crore Rupees is equivalent to approximately US$3.35 billion).

172. Lalit K. Modi, *About LKM*, LALITMODI, http://www.lalitmodi.com/about.php (last visited Sept. 27, 2014).

173. *Id.*

Enterprises,[174] which formed a partnership with Walt Disney in 1993.[175] "Through a series of innovative partnerships with leading global brands and broadcasters including Nike, Sahara, Sony, ESPN and Viacom, Indian cricket's revenues increased seven fold between 2005 and 2008."[176] As evidenced by these examples, the interconnectedness between the world of Indian cricket and enormous financial investments is undeniable.

Furthermore, the financial repercussions of even losing a cricket match, much less unearthing a deep-rooted scandal, affect the Indian economy in tangible ways. For instance:

> if a spectator . . . watches his team lose an international one-day match he will feel pessimistic and hence end up selling more (or buying less) stocks than what otherwise would have been the case based on a cognitive analysis of the stock market. Because a one-day cricket match is such a substantial event in India and affects the mood of so many people, the optimism or pessimism caused by the result of the game may be large enough to make the market swing in an upward or downward direction . . . .[177]

Most notably, "[because] people put a bigger emphasis on losses, the downward movement in the market following a loss should be much larger than an upward swing following a victory."[178] Ultimately, be it directly through foreign investment or indirectly through the market, cricket's effect on the Indian economy is undeniable.

2. The Effect of Corruption on India's Prominence as a Global Cricket Power

Cricket unifies the former commonwealth nations under a banner of tradition and honor. The U.K. Deputy High Commissioner to Sri Lanka, Robby Bulloch, recently remarked, "[t]his extraordinary game . . . unites a disparate group of cricket-mad nations as one of the more curious and positive legacies of Britain's colonial past."[179] If England and other commonwealth cricket nations in which gambling is legal believe their gentlemen's sport is rigged by illegal betting and match- and spot-fixing in India, playing against Indian teams will become less desirable. For example, Shaun Tait—Australian cricketer and teammate of the

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174. *Modi Enterprises*, MODI.COM, http://www.modi.com/our-brands.html (last visited Sept. 27, 2014).

175. *About LKM*, *supra* note 172.

176. *Id.*

177. Vinod Mishra & Russell Smyth, *An Examination of the Impact of India's Performance in One-day Cricket Internationals on the Indian Stock Market* 18 PACIFIC-BASIN FIN. J. 319, 322 (2010), *available at* http://ac.els-cdn.com/S0927538X10000181/1-s2.0-S0927538X10000181-main.pdf?_tid=a03c3a2c-4db1-11e4-979a-00000aab0f01&acdnat=1412638782_f2b36d7a847d06dd54ea570889b280fe.

178. *Id.*

179. Robbie Bulloch, *Cricket and the Commonwealth*, FOREIGN & COMMONWEALTH OFFICE BLOG (Oct. 2, 2012), http://blogs.fco.gov.uk/robbiebulloch/2012/10/02/cricket-and-the-commonwealth.

three Rajasthan Royals being investigated for spot-fixing on May 5, 2013—considered taking legal action[180] after numerous media sources reported that he, alongside his Royals teammates, was involved in cricket corruption in the form of spot-fixing.[181] Delhi Police officials eventually determined Tait was not involved.[182] Although this is only one instance, if the risk of association with the IPL, or even with Indian cricket players on U.K. or Australian teams, becomes a professional liability, such a risk will seriously impact the desirability of playing with Indian cricketers or even playing matches in India. Recognizing the impact of a negative global perception of Indian sport, India's legislature has recently drafted two proposed bills—the Draft National Sports Development Bill, 2013,[183] proposing an Appellate Sports Tribunal and a Sports Election Commission, and the Prevention of Sporting Fraud in Sport Bill, 2013, increasing organizational responsibility for corrupt acts[184]—likely in an effort to bolster India's sporting reputation.

In addition to the financial effects a negative perception could have on Indian cricket, the risk of association with corrupt cricketers stands only to isolate the subcontinent from the other commonwealth cricket organizations, rather than to serve as a unifying factor, as Indian cricket has done in the past.

B. Alternatives to Legalizing Gambling

1. Increased Transparency

This author asserts that the legalization of gambling in India is not the appropriate response to the systemic issue of illegal gambling. The legalization

180. *Angry Tait Slams Incorrect Spot-fixing Reports*, ABC.NET.AU (May 17, 2013, 11:49 AM), http://www.abc.net.au/news/2013-05-17/shaun-tait-speaks-on-india-scandal/4695394 ("I'm in discussions with my manager and legal representatives to examine how this episode unfolded and any further action I may take.").

181. Richard Earle, *How False IPL Match-fixing Innuendo Made Shaun Tait's Life a Living Hell*, DAILY TELEGRAPH (Nov. 9, 2013, 12:00 AM), http://www.dailytelegraph.com.au/sport/cricket/how-false-ipl-matchfixing-innuendo-made-shaun-taits-life-a-living-hell/story-fni2fnmo-1226756071630.

182. Rakesh Ramachandran, *Spot Fixing: Sreesanth Arrested*, EAST HAM MALAYALEE CRICKET CLUB (May 19, 2013, 10:39 PM), http://emccuk.com/index.php/achievements/8-latest-leauge-news/128-spot-fixing-sreesanth-arrested ("[When a]sked whether Australia's Shaun Tait or any other player is involved, [Delhi Police Commissioner] Kumar said[,] '[w]e have no such evidence. According to us, Shaun Tait is not involved.'").

183. Press Release, Gov't of India Ministry of Skill Dev., Entrepreneurship, Youth Affairs & Sports, Draft Nat'l Sports Dev. Bill, 2013 (July 10, 2013), *available at* http://pib.nic.in/newsite/erelease.aspx?relid=97118. A revised version of a bill was initially drafted in 2011.

184. Desh Gaurav Sekhri, *A Critique of India's 'Prevention of Sporting Fraud Bill, 2013'*, LAW IN SPORT (Jan. 22, 2014), http://www.lawinsport.com/articles/anti-corruption/item/a-critique-of-india-s-prevention-of-sporting-fraud-bill-2013 ("Section 8 of the Anti-fixing bill sets out offences by companies or association of individuals, unequivocally putting the onus of sporting fraud in the context of companies, on the entire company especially the persons in charge of and/or responsible to the company for the conduct of business of the company.").

approach treats illegal gambling as the problem instead of acknowledging that it is merely the symptom of widespread corruption and economic inequality. Ultimately, the time is not yet ripe for generalized gambling legalization in India. Rather than removing the laws prohibiting gambling, India should make more specific laws with stricter penalties, while simultaneously focusing on improving administrative transparency and law enforcement mechanisms.

Outlets currently exist through which gambling occurs, albeit in limited quantities, including legal outlets such as horse-track betting and limited "holiday" casino gambling, as well as currently illegal but nonetheless growing outlets like online betting.[185] Based simply on the availability of such opportunities, this author believes gambling and punting will inevitably continue to occur. However, India, a religious country with foundational beliefs in the prohibition of gambling, is not yet ready for its government to universally approve the practice. Much like gambling is permitted once a year on Diwali because it symbolizes enjoying an activity in moderation without over-indulgence therein, gambling in India should remain limited to its current confines.

Furthermore, the inefficacy of an enforcement system does not convincingly suggest that the removal of that system altogether would prove to be a better alternative.[186] In fact, illegal cricket-betting is not the underlying problem; rather, it is merely the symptom of a deeper, systemic problem—widespread corruption based on economic inequality. Greater transparency in every aspect of Indian administration is required for bribes and corruption to cease, and such transparency will not occur immediately or even swiftly. However, until India reaches a place of economic equilibrium in which a person in a position of power stands to gain no significant advantage from accepting a bribe, enforcement is unlikely as to both existing and future laws. A severe disincentive—such as political scorn or an increase in the penalty for receiving a bribe—will be required to make corruption economically unviable.[187]

For the same reasons, legalizing gambling would not eliminate illegal betting. Rather, the wealthiest punters would continue to accept the risks associated with illegal betting because the likelihood and severity of negative consequences is significantly lower than the potential financial gain.[188] Instead of deterring the deep-pocketed punter, bookmaker, or organized crime leader, who is the true driving force behind cricket corruption, the government would be condoning, in a very public way and on a large scale, an activity traditionally scorned by India's religion, politics, and society.

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185. *See* BUDD, *supra* note 68; *see also Queen's Speech 2013*, *supra* note 73.

186. *See* A. Mitchell Polinsky & Steven Shavell, *The Theory of Public Enforcement of Law*, 1 HANDBOOK L. & ECON. 403, 441 (2007), *available at* http://www.law.harvard.edu/faculty/shavell/pdf/07-Polinsky-Shavell-Public%20Enforcement%20of%20Law-Hdbk%20LE.pdf.

187. *Id.*

188. *Id.*

As to cricket, the ICC, formerly housed in London and now housed in Dubai, administers the regulation of cricket at the international level.[189] In 2000, the ICC set up the Anti-Corruption Unit (renamed the Anti-Corruption Unit and Security Unit in 2003) to combat the growing threat of illegal gambling and match fixing.[190] Critics maintain, however, that implementation attempts have been weak at best.[191] One sports blogger recently noted, "[t]he BCCI has announced a slew of measures to clean up the game in India. These are expected to be implemented as early as the week after never."[192] This sardonicism may not be a vehicle universally shared amongst cricket fans; the skepticism, however, is relatively widespread. More optimistic individuals also believe a successfully implemented increase in transparency in sport will help India rise globally as an economic powerhouse.[193]

2. Increased Judicial Participation

To clarify, it is not the author's assertion that gambling legalization in India will never be appropriate, but rather that the time is not ripe for such legalization until the country achieves a significantly increased level of economic stability and a thorough evolution of its traditional socio-political oppositions to gambling. Furthermore, even if legalization does occur, a statutory overhaul would not be the ideal method. One major benefit of a common law legal system, such as India's, is its ability to adapt to societal changes and evolving cultural norms while not adapting too abruptly. If the Indian courts continue to interpret the current laws more broadly, cautiously legalizing specific categories of gambling activities,[194]

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189. Williams & Alston, *supra* note 12.

190. *Anti Corruption Overview*, INT'L CRICKET COUNCIL, http://www.icc-cricket.com/about/46/anti-corruption/overview (last visited Sept. 27, 2014) ("The unit was set up in 2000 following a corruption crisis which represented the gravest challenge it had faced since the Packer Revolution of the 1970s and the Bodyline series of the 1930s. Cricket's reputation and integrity were tarnished and in danger of being destroyed. Decisive action was called for in the wake of match-fixing allegations and revelations about South Africa captain Hansie Cronje and the captains of India and Pakistan, Mohammed Azharuddin and Salim Malik. Eventually all three were banned for life from international cricket. Other players were suspended, fined and warned about their future conduct following judicial and Board enquiries in several major cricket countries. . . . [F]rom July 2003, the Anti-Corruption Unit was renamed as the ICC Anti-Corruption and Security Unit.")

191. Indo-Asian News Service, *ICC Anti-Corruption Officer's Links with Indian Bookie Alleged*, NDTV SPORTS, http://sports.ndtv.com/cricket/news/224497-icc-anti-corruption-officers-links-with-indian-bookie-alleged (last updated May 21, 2014) ("As the International Cricket Council (ICC) reviews the role of its Anti-Corruption and Security Unit (ACSU), a top officer of the unit was reportedly found having links with an Indian bookie during the ICC World Twenty20 in Dhaka in March-April this year."); Ross McNaughton, *ICC Units Draw Criticism*, 3NEWS.CO.NZ (May 16, 2014, 5:21 PM), http://www.3news.co.nz/sport/icc-units-draw-criticism-2014051617.

192. Sidin Vadukut, *Fighting Corruption? Look to American Sport*, ESPNCRICINFO (Sept. 3, 2013), http://www.espncricinfo.com/blogs/content/story/667587.html.

193. Dinesh Narayanan, *Vinod Rai: Exposing Corruption*, FORBES INDIA (Dec. 29, 2010), http://forbesindia.com/article/person-of-the-year-10/vinod-rai-exposing-corruption/20742/1.

194. *See* Dir. Gen. of Police v. Mahalakshmi Cultural Ass'n, W.A.No.2287 of 2011 (Madras H.C.) ¶ 24 (Mar. 22, 2012); Writ Petition, Indian Poker Ass'n v. Karnataka (2013) (WP Nos. 39167 to 39169), ¶ 3 *available at* http://judgmenthck.kar.nic.in/judgments/bitstream/123456789/902507/1/WP39167-13-08-10-2013.pdf.

this will give society and the economy time to steadily and more successfully adjust to legalization.

C. *Lessons from the U.K.*

Notably, even after the 2005 U.K. Act legalized gambling generally, illegal betting still occurs in the U.K.[195] Despite the historical penchant for gambling and for cricket amongst England's elite social classes, the relatively low occurrence of corruption within the U.K., and the U.K.'s sophisticated legal sports betting framework, cricket corruption still lurks in the shadows.[196] Observers cite low pay for local cricketers combined with an increasingly large international television viewership (especially in India) as the combined root of the problem.[197] Therefore, in concluding this paper, it seems worth noting that, while pro-legalization advocates in India point to the U.K. as an example of a legal gambling system that works, experts in the U.K. seem to point fingers at India as the underlying reason for the flaws in their would-be perfect U.K. betting system. Furthermore, on a cautionary note, the true repercussions of legalized gambling in the U.K. are only now surfacing.[198] This paper is written less than one decade after legalization in the U.K.; therefore, any conceptual failures in the system and any unexpected societal consequences may yet remain undetected.[199]

As was the case in eighteenth-century England, gambling in modern day India is the gin of the aristocracy, and exposure to its dangers should remain limited to those wealthy enough to cover the immense financial costs and risks associated with gambling. The fact that the law cannot yet create an effective disincentive for those wealthy enough to bear the risks of gambling does not mean the costs of that activity should be passed on to and borne by India's citizenry as a whole. Legalizing gambling in India would merely send a signal that the government sanctions the activity but would fail to combat the underlying problem. The more appropriate response would be to reform India's gambling laws to include increased penalties, while universally supplementing legal enforcement mechanisms. In sum, while respectfully disagreeing with the pro-legalization stance taken by Ranjit Sinha, the director of India's Central Bureau of Investigation ("CBI"), this author does agree with one portion of Mr. Sinha's recent statement that, "[l]aws should be strictly enforced and absence of enforcement does not mean that laws should not be made."[200] The author fully

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195. Owen Gibson, *Global Illegal Betting Market Threatens Heart of Domestic Cricket*, GUARDIAN (Jan. 12, 2012, 3:38 PM), http://www.theguardian.com/sport/2012/jan/12/illegal-betting-threatens-domestic-cricket (discussing the story of "Mervyn Westfield, the former Essex fast bowler, [who] dramatically admitted to accepting £6,000 to give away a predetermined number of runs in the first over of a Pro40 match at Durham in September 2009 . . .").

196. *See id.*

197. *See id.*

198. *See* CONNARTY, *supra* note 118.

199. *See id.*

200. Joanna Sugden, *CBI Director's Rape Reference Backfires*, WALL ST. J.: INDIA REAL TIME (Nov. 13, 2013, 2:29 PM), http://blogs.wsj.com/indiarealtime/2013/11/13/cbi-directors-rape-reference-backfires.

agrees with the seemingly minority opinion of S. N. Srivastava, special commissioner of the Delhi City Police, who aptly observed, "[b]etting is still not seen as a behavior that enjoys social approval . . . . Should we legalize it only because we are not able to enforce the ban fully? The country is not ready."[201]

VII. CONCLUSION

Ultimately, the author asserts that, rather than using the U.K. as a model for legalizing gambling in India, the proper response is for India to focus its efforts on three goals: reformed gambling laws with stricter penalties, administrative transparency, and general enforcement of all laws. Although significant similarities exist between the U.K. and India, even more prevalent are the cultural differences that would prevent the U.K.'s system of legalized gambling from effectively translating to India. Therefore, India should not cater to the exceedingly wealthy, powerful, and often highly organized criminals for whom it will remain economically opportunistic to disregard any gambling law, be it a prohibition or a regulation. If India acquiesces to such pressures, it will merely open the floodgates for exponentially intensified law enforcement problems by placing increased pressure on the already strained enforcement mechanisms currently in place. Ultimately, before deciding on the issue of gambling legalization, India should heed the cautionary words of Arjuna just before the fateful dice game depicted in the Mahābhārata: "take care. A river in flood will overturn every tree that grows beside it."[202]

201. Lakshmi, *supra* note 169.

202. WILLIAM BUCK, THE MAHABHARATA 96 (1973).

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