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Mission Statement: *The Journal of International Media & Entertainment Law* is a semi-annual publication of the Forums on Communications Law and the Entertainment and Sports Industries of the American Bar Association and the Donald E. Biederman Entertainment and Media Law Institute of Southwestern Law School. The *Journal* provides a forum for exploring the complex and unsettled legal principles that apply to the international distribution of media and entertainment. The legal issues surrounding the creation and distribution of news and entertainment products on a worldwide basis necessarily implicate the laws, customs, and practices of multiple jurisdictions. The *Journal* examines the impact of the Internet and other technologies, the often-conflicting laws affecting media and entertainment issues, and the legal ramifications of widely divergent cultural views of privacy, defamation, intellectual property, and government regulation.

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VOLUME 3 NUMBER 1 2010

PUBLISHED BY THE AMERICAN BAR ASSOCIATION FORUMS ON COMMUNICATIONS LAW AND THE ENTERTAINMENT AND SPORTS INDUSTRIES AND THE DONALD E. BIEDERMAN ENTERTAINMENT AND MEDIA LAW INSTITUTE OF SOUTHWESTERN LAW SCHOOL

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Editor's Note

Regular readers of JIMEL may notice some changes with Volume 3, Issue 1. I report with considerable sadness the untimely passing of our founding editor, Professor David Kohler, in October 2009. This issue is dedicated to Professor Kohler. It is not an understatement to say that the Journal of International Media and Entertainment Law was the brainchild of Dave Kohler; all of us at the ABA Forum on Communications Law, at the ABA Forum on the Entertainment and Sports Industries, and at Southwestern Law School, hope that JIMEL will also be an enduring legacy to him.

This issue opens with a heartfelt testimonial to David Kohler with contributions from Lon Sobel, Kelli Sager, Lee Levine, Sandy Baron, Kyu Ho Youm, and Robert Lind. Claire Wright offers a prescriptive look at the public moral exception in WTO cases, arguing ultimately that a state should have a sovereign right to define its own public morals, as long as the moral belief is shared by a majority of its citizens. Itai Maytal provides a timely critique of the "multiple publication rule" in U.K. libel litigation by engaging the reasons U.S. courts supplanted it—despite some unsuccessful attempts to apply it in online defamation cases. Peter Bartlett expertly chronicles the evolution of Australian privacy protections from its common law origins to current legislative initiatives and proposed reform, with a nod to the impact of these laws on the press. Finally, James Windon examines the relative merits of the English and American rules for fee and costs allocation in defamation cases in light of the specific goals of substantive law.

With this Volume, JIMEL has become a peer-reviewed journal. After an initial screening, all submissions to the journal will be subject to detailed review by faculty members of our editorial board with appropriate scholarly specialty. In some instances, manuscripts will also be reviewed by practitioner members of the journal's editorial board. Upon conclusion of the peer review, authors may be required to make editorial changes as a condition for publication. Our objective here is to provide our readers with rigorous scholarship from authors around the world.

Moreover, JIMEL has added the following words below its masthead: International, Comparative, Local. These words underscore the broad mandate of the journal's topical coverage. While many of our subscribers view us as a faculty-edited journal on international and comparative

law, we also publish articles on domestic laws that address new developments of global relevance.

With that in mind, we are expressly inviting authors to submit scholarly articles on local U.S. law. This is less an expansion of our selection criteria than a clarification. Including articles on American law only strengthens our mandate to provide our growing trans-national readership with a diverse selection of topics from around the world.

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Remembering David Kohler

Lon Sobel,
Professor, Southwestern Law School:

At the start of 2010, Southwestern Law School hosted an on-campus gathering to honor Dave Kohler. A couple of hundred people or more battled their way through morning traffic to attend the event. The turnout, by itself, was a dramatic indication of the high regard in which Dave was held by so many.

It wasn't surprising that we all gathered to honor Dave. He had accomplished a remarkable amount in a too-short career. He had been a successful lawyer in private practice with a firm. He had been General Counsel of CNN—a very high pinnacle for a media lawyer. And on the academic side, Dave had been a law professor at Southwestern and the Director of the school's Biederman Entertainment & Media Law Institute. He had written columns for a legal newspaper and articles for law reviews. He even had co-authored a media law casebook. And he did all this over a period of time that most law professors would have used to write, at best, a couple of law review articles.

In other words, Dave had done a lot worth honoring. Ordinarily, I would have expected Dave to be sitting in the front row, smiling modestly and waiting to be given a plaque or engraved trophy. But Dave was not with us that day. The gathering in his honor was actually a Memorial Service, because cancer had recently taken him from his friends and colleagues, and, worse yet, from the woman and children to whom he was devoted husband and father.

Dave's loss was enough to make me question whether there is any Order or Reason in the universe. I don't know whether Dave would have shared my doubts, because we never talked about religion or spirituality. Instead, Dave and I talked about teaching and practicing law, and students, and our families and our hobbies. We were able to talk about all these things, usually over lunch, because for a half-dozen years, we were colleagues on the Southwestern Law School faculty. We spent most of our professional careers living and working on opposite coasts, in overlapping but not identical legal fields, so serendipity gets credit for our becoming Southwestern colleagues.

I first met Dave many years before either of us joined Southwestern. When we met, he was General Counsel of CNN, and I was teaching Copyright and Entertainment Law at another school and was moonlighting (and keeping a hand in the real world) as Counsel to a law firm that did litigation and risk assessment counseling to the Entertainment

Industry Division of Fireman's Fund Insurance. Fireman's Fund sells liability insurance to movie and television producers and distributors and to TV networks. The insurance covers claims for such things copyright and trademark infringement, defamation, privacy invasion, and right of publicity violations. Fireman's Fund's brokers were hoping to sell such a policy to CNN, and Dave was part of the CNN team that was deciding whether to buy it.

Dave left the cost of the premium to CNN's finance and risk management people, while Dave asked the Fund for a copy of the policy itself, so he could see exactly what coverage CNN would be getting.

The Fund happily sent Dave a copy of its "standard" entertainment industry liability policy. He studied the policy and then called the Fund to do something I had never before heard of anyone doing: he said he wanted to talk about the possibility of making several amendments to the language of the policy. The thought that an insurance policy was negotiable was a new concept for me. But Dave had sensed things correctly. When policies of that kind are sold to customers like CNN, the policy's terms may be "standard," but they're not set in stone. The Fund was happy to talk with him about changes. And because I had just recently rewritten the policy from top to bottom, at the Fund's request, to translate it into plain English, the Fund asked me to meet with Dave.

I went to the meeting with some reservations, because I felt that Dave was proposing to tamper with my "baby." (Yes, all authors—even those who write insurance policies—feel proprietary about their words.) Dave came to Los Angeles from Atlanta for that discussion, and that is when we met for the first time. Dave came thoroughly prepared. He had a dozen or so points he wanted to discuss and amendments he wanted to propose. He had specific language to suggest, and he had explanations for what his concerns were and why his proposed language would be better for CNN without being significantly less good for the Fund. So Dave and I dickered a little bit over the language, the way lawyers sometimes do just for fun. And he was so honest and forthright that it actually was fun.

My job was to tell the Fund's underwriters what additional risks Dave wanted the company to assume in return for the premium CNN had been quoted. And ultimately, the Fund did sell a policy to CNN containing exactly the terms that Dave had requested. The Fund actually got a couple of things from CNN in return for the policy. It got a premium, of course. But it also got Dave as CNN's General Counsel. That was valuable, because even though Dave wanted CNN to have insurance, he did not intend to abandon his usual legal clearance activities. So, as things turned out, the entire time the policy was in effect, there were no claims,

because Dave—in his capacity as CNN's General Counsel—headed off and avoided lawsuits that would have been covered by the policy if they had been made.

Because Dave was in Atlanta and I was in Los Angeles, our paths didn't cross again for several years. Eventually though, after the passing of Don Biederman, who was the founding Director of the Institute that now bears his name, Southwestern commenced a national search for Don's successor. The position came to Dave's attention, and it looked to him like a very good job, good enough, even, for him to uproot himself and his family and move them all across country so he could take the position, if it were offered to him.

In the course of doing his due diligence about Southwestern and the Institute, Dave discovered that I was a member of Southwestern's search committee. So he picked up the phone and called me to ask whether an inside candidate already had a lock on the job, and the search was just a formality, or whether the position was really open to all of those who might respond to the search. I assured Dave the search was a real one, and that there was no inside candidate. Thus assured, Dave tossed his hat into the ring.

The search resulted in a very large pool of capable, competent and outstanding applicants, some of whom were not only qualified but actually famous in the world of entertainment and media lawyering. Dave was selected from that huge pool of applicants, and he moved to Los Angeles to begin a new chapter in his career.

By the time Dave arrived in L.A., I was in Berkeley teaching entertainment and intellectual property law as a visitor at the law school that was then known as "Boalt Hall." While I was there, Dave did something that I can still picture today, as clearly as though it happened yesterday. I was preparing for class at my desk in the Craftsman style home for which Berkeley is famous and in which my wife and I were then living. An email from Dave popped up on my computer. It told me that as his first initiative as the Director of the Biederman Institute, Dave was planning an entertainment and media law summer abroad program to be held in the U.K. His email then went on to ask whether I'd be interested in teaching in the program, and even whether I'd like to be its Director. You have to love a man who makes you an offer like that, don't you? I responded "yes" immediately. And so began the years of our working together, Dave as the Director of the Biederman Institute with overall responsibility for everything the Institute does, and me as his man in place to run what is now Southwestern's London Entertainment & Media Law Summer Program.

Dave was a terrific Director of the Biederman Institute. He had a perfect understanding of the needs of a large organization like Southwestern. He understood how things ought and need to be done in such an organization. And he had a way of exercising his authority very gently. He never once said, "I'm in charge, and I need you to do this or not to do that," or anything like that. Instead, when he talked with me, he always said "Couldn't I ask you to do just this one thing, just this one time." So he always got me to do just what the institution needed, without his saying "Look, I'm the boss, so do it my way." His ability to do that was worth his writing a book for managers—something he didn't have a chance to do, so Dave's passing is a loss not just to legal education, but to business education as well.

I learned of Dave's medical condition shortly after he was diagnosed. He responded to the diagnosis in an amazing way. Though his illness was life-threatening from the start, and though his treatments were debilitating—chemotherapy always is—when he talked about his treatments and what they were doing to him, he talked about them as though they were something that that was interfering with his regular schedule at Southwestern, and the school was having to make adjustments he wished it didn't have to make—and that was about it. In other words, he talked about his treatments the way others might talk about a car that wouldn't start and needed to be fixed. That is what he was doing: he was getting himself fixed. And that was his outward attitude until the very end.

I talked to him by phone when he was in a hospital in Houston, which turned out to be his second-to-last hospitalization, and I asked why he had gone all the way to Houston for treatment. I said, "Certainly whatever protocols they're using in Houston are available here at USC," where he received his earlier treatments. "Oh," Dave answered, "I'm way beyond standard protocols. I'm now into experimental treatments." Coming from most patients, this would mean, "I'm at the end, and my doctors are taking pot-shots, hoping to get lucky." But Dave made this statement with a tone of voice that said, "Hey, the spring semester is about to begin, and I've got important things that need to be done at school. The standard protocols are taking too long to accomplish their mission. I need to get this taken care of immediately, so I've arranged to have some experimental treatments that are going to get this cleared up so I can be back at school for next semester." Those weren't his words, but they were the message conveyed by his tone. And then, indeed, from his hospital bed in Houston, what he wanted to talk about next were Biederman Institute activities that were on the calendar and then in the planning stage for the spring semester.

I'm going to miss Dave, as all his friends, family and colleagues will. There are two ways in which I almost physically feel his absence. Dave and I shared a lot of interests, in the law and other things too. I get emails and see newspaper articles about those things, and I find myself thinking "Oh, I wonder if Dave knows about this yet. I should send him these things." Once, after he had passed, I typed his email address in the "To" box of an email I was about to send, and then, just before I was about to click "Send," I realized with pain that he was no longer at the other end of his email address. The other way in which I feel his absence almost every day is that I still have his telephone number on my cell phone. My phone lists "Contacts" alphabetically by first name. So whenever I go to place a call to my wife Carol, I see Dave's name because it immediately follows hers. I cannot bring myself to take Dave's name off my cell phone, because if there is a Heaven, I know that he's there, making arrangements, probably figuring out how he can have some of his office artwork sent to him. And I feel that as soon as he gets situated and settled, he's going to call me. And when he does, I'll want my cell-phone to alert me that it's Dave who's calling.

Kelli Sager,
Partner, Davis Wright Tremaine:

In June 1994, when I first heard a radio report about a certain white Bronco leading a police chase, it never occurred to me that this was the beginning of a friendship that would last the next fifteen years. Dave Kohler already had been working at CNN roughly three years when Nicole Brown Simpson and Ron Goldman were murdered, and I'd worked with him a few times. But during the media explosion that surrounded the Simpson case, it seemed like I was talking to Dave at least once a week, and sometimes every day. CNN was heavily involved in covering the case from the beginning, and as everyone knows, there were a lot of media issues surrounding the case. But there also were a lot of behind-the-scenes issues about things that were unique to CNN's investigative work and coverage. It was a very intense time, but Dave always managed to inject some humor into the conversations.

I remember one occasion, after we had been talking about a Simpson-related legal issue, when Dave paused and said he had something else he needed to talk to me about. Then in this very serious voice, he said, "Listen, Kelli, I have to ask—do you believe in free speech?" I was a little taken aback by the question, and by his tone of voice. "Of course

I believe in free speech!" I said. "Great!!" Dave said. "I've told the Georgia State Bar that you'll come give one in Atlanta next month!" What could I say? I was caught—and Dave's joke became the opening line for my "free speech" in Atlanta.

Another example came during the height of the controversy about the media's use of hidden cameras. A lot of journalists—and their lawyers, like us—were quick to argue that using these hidden recording devices was an important part of good investigative reporting—and equally quick to assert that there was no reason for someone to object to being recorded, unless he or she intended to later lie about something they'd said. Dave was still at CNN at that point—and he was put in charge of moderating a panel on this topic at one of the annual media law conferences. At a cocktail reception the night before, Dave brought one of his colleagues from CNN with him—a woman reporter who was going to be on the panel the next day. He took her around and introduced her to everyone …we all had a few drinks, and chatted with her … but what we didn't know was that she was wearing a hidden recording device—and she was recording *everything* we all talked about at the cocktail party.

The next day, Dave started his part of the program by showing clips from these hidden recordings, and you could hear the collective gasp going through the audience as we all tried to remember exactly what we had said to this woman! It was Dave's sense of humor in action—but it was also his way of bringing home to all of us what it would feel like to find out that your own casual conversations had been recorded—a lesson that none of us have forgotten.

It many ways, it was only fitting that Dave Kohler became a media lawyer, because he loved a good story. Dave loved hearing good stories—particularly funny ones. And he loved telling funny stories, most of all when he was the target of the joke. One of my favorites involved an invitation that Dave had received to speak at a meeting of reporters and editors in another city. Dave, as usual, was running a little late, so when he got to the hotel conference center, he couldn't remember where the meeting was to take place, so he just went to the floor where all the meetings rooms were, and started walking around. Almost immediately, he saw a sign in front of one of the rooms that said: "Kohler Meeting." It seemed a bit terse, but he didn't think much about it, and he opened the door and walked in. There was a large conference table with a dozen or so men in dark suits sitting around it. They all looked up, and one of the men said, "Can we help you?" When Dave responded, "well, yes, I'm Dave Kohler," immediately, the men all jumped to their feet, and

hurried over to where Dave was standing, welcoming him, shaking his hand, offering him a drink—a very warm welcome. Then there was a pause, and one of the men asked, "but—what are you doing here?" And Dave suddenly realized that this was *not* a group of journalists at all—he'd stumbled into a meeting of key executives from the Kohler plumbing fixtures company, who thought that their founder's son had dropped by!

When Dave later told this story, he would laugh long and hard about how he had to show them a driver's license to prove that he wasn't some kind of industrial spy who had simply crashed their meeting.

Dave's laugh was actually one of the first things I noticed about him when we started working together. It was what one might call a "hearty" laugh; Dave would start laughing, and you couldn't help yourself, you had to laugh along with him. But his laugh wasn't the only thing that was contagious: Dave had an incredible amount of energy and enthusiasm that affected everyone around him. There were a lot of times when I would pick up the phone and hear Dave's voice on the other end, saying: "Hey, I have an idea I want to run by you—what do you think of THIS?" It might be about some new program for the Biederman Institute, or it might be an idea for a group of us to play golf at Pebble Beach—but whether it was work or play, you couldn't help but be caught up in his enthusiasm.

As a law student, I knew that going into private practice meant that eventually, I would be dealing directly with clients. What I did not know then was that lawyers who are very lucky get to work with people who are not just clients—they become very close friends. For me, Dave was one of those people. I am lucky to have known him, and he will be greatly missed.

Lee Levine,
Partner, Levine, Sullivan, Koch and Schulz:

Dave Kohler was truly one of a kind. During his distinguished career, he made a palpable impact on the field of media law as a practitioner, as a scholar, and as a teacher. I had the unique good fortune of observing up close his mastery of all three of these related, but very different disciplines.

Dave was a gifted lawyer. He, along with his mentor, the late Sandy Wellford, were the masterminds behind *Richmond Newspapers, Inc. v. Virginia*¸ the landmark Supreme Court decision articulating for the first

time that the press and public have a constitutional right, grounded firmly in the First Amendment, to attend criminal trials. In private practice, Dave was a leading media lawyer in Virginia, trying defamation and related First Amendment cases and scoring important victories for Virginia's newspapers, broadcasters and reporters.

Dave was also a committed and creative teacher. I had the privilege of teaching alongside him on two occasions. Once, he had succeeded in luring Justice Anthony Kennedy, who was scheduled to speak that evening at the dedication of Southwestern's magnificent building, to guest teach his media law class the preceding afternoon. He invited me to come along, mostly to listen to the Justice, but also to help him teach the class's second hour, when we picked up and expand on the themes Justice Kennedy had introduced. It was a magical experience.

In January 2009, Dave and I designed and taught an intersession course in Media Litigation at Southwestern. It was an intensive "boot camp" like experience, in which the small group of committed students who were not scared off by the workload, "litigated" a hypothetical news-gathering liability case from start to finish. In the space of one week, they drafted pleadings and discovery requests, took depositions, plotted trial strategy and briefed and argued substantive motions. Throughout the week, Dave shared with the students his unique insights, born of his experience in litigating real cases himself, serving as the General Counsel of a media company (CNN) embroiled in such litigation, and analyzing the law affecting the media as a professor at Southwestern. It was, once again, a magical experience.

Shortly before he passed, Dave and I published a case book entitled *Media and the Law*. We wanted to create a book that, like our Media Litigation course, provided a perspective on the law that was informed by our experiences as practicing lawyers. Although modesty precludes me from proclaiming it to be magical, the book—especially its initial chapters (which were largely the results of Dave's labors) does impart the unique insights that only someone with his diverse range of professional experiences could provide.

All that said, perhaps the best example of the contributions to the law that Dave's unique "skill set" enabled him to make came before he even decided to become a full time academic. It was 1995 and CBS had just been accused of pulling the plug on a piece about the Brown & Williamson Tobacco Company, the now-famous kerfuffle that led to the film "The Insider." Much of the media storm that followed focused on CBS's lawyers, who pundit after pundit accused of being the culprits who had "ordered" the journalists involved not to air the story.

At the time, Dave was Deputy General Counsel at CNN. He could easily have sat back and enjoyed the grief that a rival network's news operation was then experiencing. Instead, he set out to do his part to correct what he perceived as wrong-headed and counter-productive criticism of his professional colleagues, criticism that he knew "obscure[d] the really important issues" on which media lawyers, their clients and the public itself ought to be focusing.

So, Dave wrote a column in the *Wall Street Journal*, which is hands down the best piece I have ever read on how newsroom lawyers, at their best, are supposed to practice their craft. The guts of his description is worth quoting in full:

> Lawyers in a newsroom—as in other contexts—serve their clients by explaining the applicable legal rules and counseling them on likely risks. In my experience, the ultimate editorial decision in cases like this rests with journalists, and properly so. In practice, deciding whether to air a legally risky story is usually the product of a collegial process through which those involved—the correspondent, the producer, the lawyer, the news division president—discuss the relative merits of particular courses of action. While the network's lawyers are an easy target, they are the wrong one.[1]

The "right target," Dave explained in an insight as valid today as it was then, "is the uncertainty that pervades our current First Amendment jurisprudence," specifically the Supreme Court's failure to provide meaningful First Amendment protections for a claim ostensibly based on what a plaintiff's lawyer could plausibly allege was newsgathering *conduct* as opposed to the resulting editorial *content*. As Dave recognized some fifteen years ago, "[w]e may not like the message judges…are sending, but rather than shooting at those" lawyers who are duty bound to make sure their clients are fully informed about the state of the law, "we should focus on why the law has gotten this way and what can be done to change it."

This is the Dave Kohler I will always remember—loyal, honest, wise, constructive, fearless. He will be greatly missed.

Sandy Baron,
Executive Director, Media Law Resource Center:

What must be 8 years ago, the winter before David started at Southwestern Law School as Director of the Donald E. Biederman

1. Kohler, David. *Blame the Laws, Mr. Wallace, Not the Lawyers, Wall Street Journal* (*Nov. 21, 1995).*

Entertainment and Media Law Institute, he asked me if the Media Law Resource Center ("MLRC"), the not-for-profit media membership association at which I am executive director, would organize programs with him and the Institute if and when he came to Southwestern. He was anxious to ensure that if he took the post, he would be able to enhance the law school and the education of its students with new and creative programming and materials.

I was thrilled. I had known David for many years at that point. I was looking for a venue and a partner for MLRC in Los Angeles for the very purpose of producing a conference and other sessions here. And I could not imagine anyone I would want to work with more than David Kohler.

David and I go back two decades, to my tenure at NBC, and his at CNN. We talked to one another on a myriad of items that affected, or afflicted, our respective news operations. By the time I moved to MLRC, David was general counsel of CNN. And we talked even more frequently.

I am willing to concede that the topics that engaged us might not have universal appeal, but two television news lawyers can get pretty excited about such issues as surreptitious taping, contempt, and news pools, to name but a few that engaged us. But we did more than simply talk about them. Thanks to David's input and encouragement, in my first year at MLRC, then known as the Libel Defense Resource Center ("LDRC"), we published a thorough national report on the law concerning hidden microphones and cameras—a tremendous resource for other media lawyers who faced these issues on a regular basis. And other reports and articles, inspired by my conversations with David, followed over the years.

Of course, then there was the Tailwind story on CNN. Tailwind represented an in-house media counsel nightmare. David, however, rarely lost his sense of perspective, and maybe more importantly, his sense of humor about the matter. Having a story in your shop blow up in your face is one of the risks every in-house lawyer recognizes simply goes with the territory. It is valuable in such instances to have friends in the business with whom one can analyze the issues and weigh and evaluate the options.

David had plenty of such friends to draw upon. We valued our relationships with him because he was such a decent, smart, and compassionate man. He had great values, a practical and yet principled approach—no, those are not inconsistent—and a delightful sense of humor. Colleagues were drawn to him and more than willing to work

with him on even the most contentious of issues. He was a model of how one can be very smart and very effective and yet not lose or even remotely diminish one's strengths of character.

We shared a passion for television news. But David was hardly a man of a single passion. One might start, for example, with his passion for his children. As I told his sons a few months ago, I know of no man who had greater love for and pride in his children. They were a true center in his universe, and never far from his mind. After he met Patti, she too clearly had become a deep center in his life, someone he genuinely loved and whose partnership with him in life gave him great happiness and strength.

I will leave it to others to talk about his passion for golf. Suffice to note that David, an inveterate and accomplished story teller, could make even me, a non-golfer, laugh, over and over, at his favorite golfing tales. I will never hear of Pebble Beach without thinking of David.

And he displayed great pride and passion for his students at Southwestern. He jumped into his post at the law school and the Institute with such gusto that he really seemed to the academy born. Which takes me full circle to working with David. Who would not want to work with a man who has such energy and love and joy and commitment?

I think our best tribute to David is to continue to build on what he created at Southwestern and elsewhere. When he thought about the future, he always wanted it to be a richer environment. It is our job to make it so.

And while we can no longer do that job with David at our side, I doubt that I am alone in feeling that David hasn't altogether left us either. We all can still hear his voice and his laughter, and feel his energy. We need to commit, with his voice and laughter in our ears, and his energy in our hearts and minds, to simply not give up on the work and ideas and principles that we shared with him.

And with that, let us thank and bless him and his legacy always.

Kyu Ho Youm,
Professor and Jonathan Marshall First Amendment
Chair, University of Oregon School of Journalism
and Communication:

Perhaps I was among the late Professor David Kohler's more recent acquaintances in his professional life. I first came to know him slightly more than five years ago. It was on September 1, 2004, when I invited him to speak at a First Amendment conference at the University of

Oregon that would mark the 40th anniversary of the landmark U.S. Supreme Court case, *New York Times v. Sullivan*.[2] His paper, titled "Forty Years After *New York Times v. Sullivan:* The Good, the Bad, and the Ugly," was one of the best at the conference that the UO School of Journalism and Communication and the UO Law School hosted. His paper was published in the winter 2004 issue of *Oregon Law Review*.[3]

As the co-organizer of the *Sullivan* conference, I still fondly remember Professor Kohler's ultimate professionalism as a scholar-teacher. He was, more than anyone else, committed to making the First Amendment conference worth our time. Although the conference speakers were not expected to prepare formal papers, he was one of the few who had emailed me the final draft of his full-length paper well ahead of the conference. Undoubtedly his presence at the conference was a delight for me and others, including the invited judges, lawyers, academics, and journalists from the U.S. and abroad.

Professor Kohler and I kept in touch regularly. I found him exceptionally generous with his time and advice. Whenever I needed advice and directional suggestions relating to my teaching and research on First Amendment law, he was one of the first for me to call or email. He was always eager to help me in so many ways. In late 2007, for example, I was developing a comparative media law course. I was anxious to benefit from the experience of a media law professor at Columbia Law School. Instead of sending a "cold" email to the Columbia professor, I asked Professor Kohler to liaise with him for me. Professor Kohler was characteristically enthusiastic: "I know [him] well …. So I would be happy to make an introduction if you like. Just give me the word. He's a terrific guy who, I am sure, would be happy to help you…. I don't teach comparative media law—at least yet. Michael Epstein, another Southwestern faculty member, teaches that course at our London program. If you would like, I'd be happy to introduce you to him as well."

Whenever we attended the annual PLI (Practising Law Institute) Communications Law Seminar in New York, Professor Kohler and I would get together for a coffee or lunch if we could work out a time. I, of course, picked his brain as a fine First Amendment scholar with years of first-rate media law experience. And at one of my PLI socials with him, I learned of his important role in founding the *Journal of In-*

2. 376 U.S. 254 (1964).

3. *See* David Kohler, "Forty Years After *New York Times v. Sullivan:* The Good, the Bad, and the Ugly," 83 Or. L. Rev. 1203 (Winter 2004).

ternational Media and Entertainment Law as a joint publication of the ABA Forum on Communications Law and the Donald E. Biederman Entertainment and Media Law Institute of Southwestern Law School.

As a two-time contributor to the *Journal of International Media and Entertainment Law*,[4] I marveled at Professor Kohler's passion and commitment to making the new journal a worthy publication outlet for international and comparative media law practitioners and scholars. His professorial acumen, his single-minded determination, and his lawyerly tenacity were in no small measure instrumental in making the relatively new law review another media law journal to be reckoned with.

As a media law teacher-scholar, I consider Professor Kohler's untimely passing a tragic loss to the media law community, both legal and academic. His thoughtful scholarship through his publications in law and trade journals was considerably impactful. Most important, in 2009 he co-authored a media law text, *Media and the Law*, with the leading media attorney Lee Levine. The book of nearly 880 pages stands out from other nearly 30 media law texts, for it focuses more sharply on "the issues that are most likely to confront media lawyers and journalists in their everyday practices."[5] Also, what distinguishes *Media and the Law* from others is that it is the first of its kind as a law text that devotes a chapter of 68 pages to several key global media law issues. No doubt it deserves attention from whoever is interested in the real-world media law problems in the U.S. and abroad. Not surprisingly, I'm looking forward to reviewing the book for a major academic or professional journal.

Meanwhile, most striking about Professor Kohler as a person was his charming personality with a great sense of humor. In the fall of 2006, he was busy working on the second issue of the *Journal of International Media and Entertainment Law*. Unfortunately, he lamented in an email of October 6, 2006, two of the authors who had committed to writing for the Journal apparently disappeared on him. He queried about my possible interest in publishing an updated version of my conference paper on the *Yahoo!* case, reminding me of the en banc decision of the

4. "Commercial Speech and Freedom of Expression: The United States and Europe Compared," 2 J. INT'L MEDIA & ENT. L. 159-98 (2009) (with Bruce E.H. Johnson, a partner in the Seattle, Wash., office of DAVIS WRIGHT TREMAINE and co-author of *Advertising and Commercial Speech: A First Amendment Guide* [2009]); "International and Comparative Law on the Journalist's Privilege: The *Randal* Case as a Lesson for the American Press," 1 J. INT'L MEDIA & ENT. L. 1-56 (2006).

5. *Preface, to* David Kohler & Lee Levine, MEDIA AND THE LAW iii (2009).

U.S. Court of Appeals for the Ninth Circuit in the Internet hate speech case.[6]

"I can think of a million reasons you might prefer not to publish again with us—other commitments, preferences for another journal, etc.," Professor Kohler wrote in a compellingly ego-gratifying way. "Nevertheless, I thought I would at least ask our star author from the first issue."

Robert Lind,
Professor, Southwestern Law School
and Director, Biederman Institute:

Dave Kohler was hired in 2002 to become the Director of the Donald E. Biederman Entertainment and Media Law Institute. He brought an increased focus on the media law side of the BEMLI equation and strengthened our ties to publishers and broadcasters.

I did not know it at the time, but both Dave and I had been involved in some cases, of course on opposing sides. One involved the video of an interview with OJ Simpson. I had consulted with the producer of the project at its inception. CNN ran a promotional portion of the video without the telephone number used to order a copy. Another case involved George Holliday's video of the Rodney King beating. That case resulted in perhaps the only federal appellate decision to recognize an independent First Amendment defense to copyright infringement. Thankfully, it was an unpublished decision.

His arguments regarding these cases and others clearly demonstrated one truth about Dave Kohler and copyright: He never met a use he did not believe was fair. For a number of years the Institute was a co-sponsor of the Los Angeles County Bar Association's annual entertainment law conference. The Institute provided to students a collection of relevant articles and cases, the rights for which were not all cleared. During Dave's first year as Director, I inquired whether all of the conference materials had been cleared. Dave's response was, "What do you mean? Everything is protected by fair use."

However, the topic of fair use did manage to get Dave into trouble. A few years ago, the Media Law Resource Center conference, co-sponsored with BEMLI, dealt with the issue of user generated content. One of the

6. Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199 (9th Cir. 2006) (en banc), *cert. denied*, 547 U.S. 1163 (2006).

panelists showed "Jesus Christ: The Musical," a video using unauthorized music that was available on YouTube. The video depicted Jesus Christ strutting along Hollywood Boulevard to the strains of Gloria Gaynor's "I Will Survive". Only to be unexpectedly flattened by a bus. The predominantly Godless audience that attends these MLRC conferences howled with laughter.

The next day, Dave received an indignant letter from an attorney who had attended the conference. She complained about this "extremely offensive video" which was in "bad taste" and "disrespectful" to the attorney, and informed Dave that she would never attend another event at Southwestern and would try to persuade others to do the same. The situation provided an example of the cultural differences between entertainment and media attorneys in Los Angeles. An entertainment attorney would have responded with a terse note: "Hey Lady, go to hell," or words to that effect. But Dave Kohler, the consummate media attorney, dealt with it differently:

> I appreciate your email concerning the video *Jesus Christ: The Musical*, and truly regret that you were offended by its use at our program…The mashup in question was used to illustrate a number of difficult legal issues, including the vagueness of the fair use doctrine, what constitutes a transformative use and how the issue of market harm should be addressed in fair use analysis. The video was a particularly good educational vehicle precisely because its controversial and potentially offensive character made it unlikely that the copyright owner would have granted a license to use the copyrighted music that was central to the production. Because of this, the only real recourse available to the creators of such works is the fair use exception to copyright, and it was the implications of this state of affairs that was the panel's primary focus.

You have to admit, the man was smooth.

On another occasion, Dave asked Lon Sobel and me to review a draft of an article titled "This Town Ain't Big Enough for Both of Us—Or is it? Reflections on Copyright, the First Amendment and Google's use of Others' Content" that he was writing for the Duke Law & Technology Review. It commented on The Google Book Project litigation and the decision in Perfect 10 v. Google, another case for which I had provided assistance. In an email accompanying the draft Dave wrote: "OK Guys, be gentle. This is still rough. And, as you know, on matters of fair use, I'm something of a communist."

This spring semester has been somewhat tough for me. I've agreed to be the Director of BEMLI until a permanent director comes on this fall. I have tried my best to continue Dave's projects and plans for the Institute. A far more difficult chore, however, stems from the fact that I have Dave's son, Danny, in my copyright course this semester. That means I have the job of proving to Danny that there was something

wrong about his father's notion of fair use. We just can't have communists in copyright law.

Dave had a unique approach to Scholarship. Once I said goodbye to him in the parking lot as he and Lee Levine, Dave's good friend, were going to spend a week in Hawaii ostensibly to complete the manuscript of their Media Law casebook. I saw them leaving the Bullocks Wilshire Building that houses BEMLI, going to the car that would take them to the airport. Each was carrying a bag filled with golf clubs, but I couldn't detect a sheet of paper between them.

I was given a closer look into his authorship process when Dave asked Michael Epstein and me to co-author an article with him that dealt with the federalization of the right of publicity. As an author, Dave was meticulous. His approach to writing articles was to collect the entire universe of relevant cases and attempt to make sense of how the various cases dealt with the legal principle at issue. He would work through the decisions as though he was working through a logic puzzle. He would come to a conclusion that was technically correct, but always seemed to fall on the side of the media. We had surprisingly few disagreements about the content of the article. Those that remained were smoothed over with Dave's deft drafting and phrasing.

The most fun I had with Dave was when we would make presentations to bar associations or students. He was always willing to agree to disagree, but first he always sought common ground. I would always give him a bad time. But Dave would always give as good as he got.

Dave Kohler was proud to be a media attorney. He took seriously the media's role in educating the public and insuring that our electorate would be informed when making political and policy decisions. To that end, Dave made important advances for the Biederman Institute, particularly in the field of media law. We will make every effort to continue his work.

Censoring the Censors in the WTO: Reconciling the Communitarian and Human Rights Theories of International Law

By Claire Wright[1]

A large aggregate of men, healthy in mind and warm of heart, creates the kind of moral conscience which we call a nation. So long as this moral consciousness gives proof of its strength by the sacrifices which demand the abdication of the individual to the advantage of the community, it is legitimate and has the right to exist.[2]

It is better to be a slave in your homeland than a ruler in a foreign country.[3]

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1. Associate professor, Thomas Jefferson School of Law.

2. Ernest Renan, *What is a Nation?*, lecture at Sorbonne, March 11, 1882, in Discours et Conferences 277-310 (Paris, Calman-Levy 1887); at, also found in Becoming National: A Reader 41-55 (Geoff Eley & Ronald Grigor Suny eds. Oxford Univ. Press 1996).

3. Books Of Peoples Of The World: A Guide to Cultures 104 (Wade Davis & K. David Harrison, eds. (with Catherine Herbert Howell) National Geographic 2007) (revealing this Kazakh proverb).

Introduction

On December 21, 2009, the Appellate Body of the World Trade Organization (WTO) issued its decision affirming the great majority of the panel's conclusions and ruling in the U.S.' favor in the case of *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (*China—Media*).[4] Predictably, Hollywood media companies were elated with the Appellate Body's decision,[5] and Chinese authorities expressed great disappointment regarding it.[6] This case indirectly concerned China's comprehensive "prohibited content laws," specifically

4. WT/DS363/AB/R (adopted on Dec. 21, 2009). The Appellate Body's decision in this case hereinafter is specifically referred to as the "*China—Media Appellate Body Report*." The panel report in this case, WT/DS363/R, is specifically referred to hereinafter as the "*China—Media Panel Report*." As stated in the text, the case generally is hereinafter referred to as "*China—Media*" or the "*China—Media* case."

5. Joe Flint, *Hollywood's Push to Open Up China Gets a Big Boost from the WTO*, latimesblogs.latimes.com, *available at* http://latimesblogs.latimes.com/entertainmentnewsbuzz/2009/12/hollywoods-push-to-open-up-china-gets-a-big-boost-from-wto.html (accessed Dec. 23, 2009) (quoting the statement of Dan Glickman, Chairman and Chief Executive of the Motion Picture Association of America, that "[w]ith today's rejection of China's appeal, the WTO has taken a major step forward in leveling the playing field for America's creative industries seeking to do business in China").

6. Ian Johnson, *WTO Ruling May Not Alter Media Sector in China,* chinhdangvu.blogspot.com, Dec. 22, 2009, *available at* http://chinhdangvu.blogspot.com/2009/12/wto-ruling-may-not-alter-media-sector.html (accessed Dec. 23, 2009) (noting that "China said it regretted the ruling" and "didn't say if it would implement the ruling").

as they apply to foreign media products, such as feature films, home entertainment products, sound recordings, periodicals, newspapers, and books, and initially the case appeared to possess all the hallmarks of a Hollywood blockbuster itself. Media sources tended to portray the case as a "battle between free speech and political oppression" or a "clash between trade and morality," casting the U.S. or China as the Virtuous Superhero and the other as the Evil Empire.[7] In short, it appeared to be a morality play about the meaning of morality in the global age.

Such a culture clash[8] of epic proportions arguably is looming, as the next section of this article explains, but the reality of the *China—Media* case itself is more mundane. In this case, the U.S. did not directly challenge China's claim that it is entitled to conduct pre-importation reviews of the content of foreign media items under the "public morals exception" provided in Article XX(a) of the General Agreement on Tariffs and Trade 1994 (the GATT 1994)[9] or a similar provision in other WTO agreements.[10] Rather, the U.S. argued that, even assuming

7. *See, e.g., Bridges Weekly: WTO Rules Against Chinese Restrictions on Foreign Books, Movies, Music*, International Centre for Trade & Sustainable Development, ictsd.org, Sept. 7, 2009, *available at* http://ictsd.org/i/trade-and-sustainable-development-agenda/54208/ (accessed Dec. 17, 2009) [hereinafter "*Bridges Weekly*"].

8. The phrase "culture clash" is most commonly associated with political scientist Samuel P. Huntington's 1996 book THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER (Simon & Schuster 1996). In these works, Huntington argued that international politics would be dominated by conflicts between cultures, rather than conflicts between nations *per se*, in the era of globalization. *Id.* at 321. In recent years, this theory has been "highly controversial . . . as former U.S. President George Bush referred to this theory in a number of speeches as justification for the U.S.' military actions against various fundamentalist Islamic groups, such as Al Queda and the Taliban (in Afghanistan)." Claire Wright, *Reconciling Cultural Diversity and Free Trade in the Digital Age: A Cultural Analysis of the International Trade in Content Items*, 41 AKRON L. REV. 397, 478 (2008) [hereinafter "*Wright, Reconciling Cultural Diversity and Free Trade*"] (*citing* George W. Bush, President, Address to the Nation (Sept.11, 2006) (*transcript available at* http://www.whitehouse.gov/news/releases/2006/09/20060911-3.html)).

9. General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 179 (1999), 1867 U.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter "GATT 1994"]. Note that when paragraphs in the GATT 1994 are referred to, these paragraphs relate to the GATT 1994 itself. When Articles in the GATT 1994 are referred to, these articles relate to articles in the General Agreement on Tariffs and Trade 1947, Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter "GATT 1947], which was incorporated into the GATT 1994 per paragraph 1 of the GATT 1994.

10. The *public morals exception* is also found in a number of other WTO agreements, including Article XIV(a) of the General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 284 (1999), 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994)

that the public morals exception justifies China's pre-importation content review scheme, China's restrictions on U.S. companies' trading (importation) and distribution services regarding media items that have been *approved* for entry into China constitute a violation of China's commitment to liberalize those service industries[11] and furthermore such restrictions are not "necessary" to protect China's public morals.[12] China denied this allegation and claimed that the challenged restrictions are indeed justified under the public morals exception provided in Article XX (a) of the GATT 1994 on the ground that limiting U.S. companies' involvement in the importation and distribution of censor-approved U.S. media products *furthered* its pre-importation content review of those products.[13] Despite all the fanfare and drama that has played out on the world stage regarding this case, the Appellate Body's decision affirming the great majority of the panel's findings in the U.S.' favor was widely expected, apparently even in China.[14] In short, China's argument that Chinese entities must be involved in the importation and distribution of foreign media items that China has already determined are consistent with China's public morals in order to protect China's public morals is simply illogical.

A telling fact regarding China's rationale for restricting foreign involvement in the importation and distribution of media goods and services in China is that, shortly before China filed its appeal with the Appellate Body on September 22, 2009, a spokesperson for the Chinese Ministry of Commerce indicated that China was considering filing an appeal because

[hereinafter "GATS"], Article 27:2 of the Agreement on Trade-Related Aspects of Intellectual Property Protection, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, The Legal Texts: The Results Of The Uruguay Round Of Multilateral Trade Negotiations 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter the "TRIPS Agreement"] (concerning the issuance of patents), and Article XXIII:2 of the Agreement on Government Procurement, (Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 4B, 1915 U.N.T.S. 103 (1994) [hereinafter the "GPA"].

11. *China—Media Appellate Body Report, supra* note 4, at ¶¶ 1-3 (referencing China's Schedule of Specific Commitments under the GATS).

12. *Id*. at ¶ 4.319.

13. *Id*. at ¶ 7.

14. *See, e.g., Bridges Weekly, supra* note 7 (revealing that, following China's loss at the panel level, the state-owned newspaper indicated that China might file an appeal "although it quoted a trade lawyer as saying that such a move would have little chance of success"); John W. Miller, *China Cites 'Morals' in Its WTO Appeal*, wsj.com, Sept. 23, 2009, *available at* http://online.wsj.com/article/SB125363796886541247.html (accessed Dec. 22, 2009) (" 'Just like in the U.S. [*Gambling*] case, China must now prove its trade restrictions are necessary to protect public morals,' says Brendan McGivern, a Geneva-based trade lawyer for White & Case LLP. 'It will be a difficult argument to make.'").

"the country needed to protect its market for cultural products since the competitiveness of the domestic industry was 'still pretty weak'."[15] This comment suggests that China's primary motivation for restricting the importation and distribution of censor-approved foreign media items is the protection of its fledgling cultural industries, not its people's morals. Such a protectionist motivation would also help explain why counterfeit copies of foreign media items denied entry into China on account of their content nonetheless appear to circulate freely within China,[16] and, at least prior to the WTO panel's ruling in the case of *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*,[17] were denied protection under China's copyright laws.[18] While China's concern that its domestic cultural industries may find it difficult to compete against the tidal wave of foreign media items entering China is understandable, this concern with the quantity of foreign media items is not equivalent to a moral objection to the content of such items.[19]

15. *News and Analysis: 6.U.S. Wins on Key Points in China Media Market Access Case*, 13:3 INT'L CENTRE FOR TRADE & SUSTAINABLE DEV., Sept. 2009, *available at* http://ictsd.org/i/news/bridges/54365 (accessed Dec. 8, 2009).

16. *See, e.g., An Assault on Online Piracy in China: Public Morals and Private Property,* economist.com, Sept. 24, 2009, *available at* http://www.economist.com/businessfinance/displaystory.cfm?story_id=14517414 (accessed Dec. 7, 2009) (discussing how "[t]he government of China allows only a trickle of foreign films and television shows to be imported, claiming the restrictions are 'necessary to protect public morals'. Yet there is no better place in the world for fans of Western television and cinema to live than in China."); Ian Johnson, *WTO Ruling May Not Alter Media Sector in China*, chinhdangvu.blogspot.com, Dec. 22, 2009, *available at* http://chinhdangvu.blogspot.com/2009/12/wto-ruling-may-not-alter-media-sector.html (accessed Dec. 23, 2009) (noting that "almost any pornographic book or movie is already openly available in China in pirated form and the government does little to prevent this").

17. WT/DS362/R (adopted on Mar. 20, 2009). The WTO panel hearing this case found that China's failure to grant copyrights to the owners of foreign media items that are not approved for entry into China during the pre-importation content review process constituted a violation of China's commitments under the TRIPS Agreement. *Id*. at ¶ 7.139.

18. The U.S. Government has contended on a number of occasions that the rampant counterfeiting of U.S. media items in China is directly linked to China's failure to approve many U.S. media items for entry into China. *See, e.g., World Trade Organization Report Upholds U.S. Trade Claims Against China*, Press Release, Office of the U.S. Trade Representative, Dec. 8, 2009, *available at* http://www.ustr.gov/about-us/press-office/press-releases/2009/august/world-trade-organization-report-upholds-us-trade-cl (accessed Dec. 7, 2009) (Following issuance of the WTO panel decision in *China—Media Appellate Report, supra* note 4), U.S. Trade Representative and Ambassador Ron Kirk proclaimed "[t]his decision promises to level the playing field for American companies working to distribute high-quality entertainment products in China, so that legitimate American products can get to market and beat out the pirates.").

19. This concern was the impetus for UNESCO's adoption in 2005 of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, CLT-2005/Convention Diversite-Cult Rev. (adopted at Paris Oct. 20, 2005), *available at*

As is discussed in further detail in Section III of this article, the WTO free trade rules commit each WTO member to ensure that its laws and regulations provide minimum protection to intellectual property rights without regard to the nationality of the intellectual property rights owner or the property concerned[20] and do not restrict market access to the goods and services produced or offered by the nationals of the other WTO members.[21] In general, these commitments exist regardless of whether a WTO member possesses a domestic industry that offers a good or service that is similar or "like"[22] a good or service in another member, and this commitment not to discriminate in favor of a domestic industry producing or offering a "like" good or service is referred to as the "national treatment principle."[23] The public morals exception is incorporated into each of the major WTO agreements,[24] and, with respect to each such agreement, the exception excuses any government measure which is applied in a non-discriminatory manner[25] and is "necessary

http://portal.unesco.org/la/convetion_p.asp?order=alpha&language=E&KO=31038 (accessed Feb. 17, 2007), and the promoters of this Convention advocate the adoption of a more expansive cultural exemption in the WTO. Claire Wright, *Toward a New Cultural Exemption in the WTO*, chapter in MULTICULTURALISM AND INTERNATIONAL LAW (Sienho Yee & Jacques-Yvan Morin, eds. Brill 2009), at 656 (*citing* Michael Hahn, *A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law*, 9:3 J. OF INT'L ECON. L. 515-52 (Oxford Univ. Press, 2006), *available at* jiel.oxfordjournals.org/cgi/ content/full/9/3/515(accessed Feb. 18, 2007) and Sacha Wunsch-Vincent, THE WTO, THE INTERNET AND TRADE IN DIGITAL PRODUCTS: EC-US PERSPECTIVES 198, n. 149 (Hart Publishing 2006) (internal citations omitted.) [hereinafter "WUNSCH-VINCENT"].

20. TRIPS Agreement, Art. 1, ¶ 3; Art. 3, ¶ 1; and Art. 27, ¶ 1.

21. GATT 1994, Article XI. A WTO member's commitment not to restrict foreign service suppliers' access to its domestic market extends only to those specific service industries that it listed in its Schedule of Specific Commitments under the GATS. GATS, Art. XVI, ¶ 1.

22. A "like" good or service is defined differently in different WTO agreements and even in the different provisions of the same WTO agreement, and panels and the Appellate Body consider whether "imported and domestic products are 'like' on a case-by-case basis." *See, e.g., Japan—Alcoholic Beverages*, WT/DS10/AB/R (adopted on November 1, 1996) [hereinafter "*Japan—Alcoholic Beverage*"], at H.1(a) (citing *Report of the Working Party on Border Tax Adjustments*, BIS 18S/97, ¶ 18). As the Appellate Body in *Japan—Alcoholic Beverages* stated, the GATT 1947 panel that decided *Report of the Working Party on Border Tax Adjustments*, suggested "[s]ome criteria…for determining, on a case-by-case basis, whether a product is "similar": the product's end-uses in a given market; consumers' tastes and habits, which change from country to country; the product's properties, nature and quality." *Id*. The Appellate Body in *Japan—Alcoholic Beverages* also concluded that "[i]f sufficiently detailed, tariff classification can be a helpful sign of product similarity." *Id*.

23. GATT 1994, Art. III. As a WTO member was not required to liberalize any specific service industry, it also could agree to liberalize an industry to a limited extent, *e.g.*, by failing to commit to the national treatment principle with respect to that industry. GATS, Art. XVII, ¶ 1.

24. *Supra* note 22.

25. *See, e.g.*, GATT 1994, Art. XX (introductory or "chapeau" paragraph).

to protect public morals."[26] The term "public morals" is not defined in the WTO agreements. However, in the 2005 case of *U.S.—Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (*U.S.–Gambling*),[27] the Appellate Body adopted the definition of "public morals" which the panel in that case had set forth. That definition is "standards of right and wrong conduct maintained by or on behalf of a community or nation," and when the term "public morals" is used in this article, it possesses this definition.

Within the next few years, the WTO Dispute Settlement Body (the DSB)[28] most likely will be called upon to answer several further questions regarding the meaning of the public morals exception, including, most especially, the following three questions:

1. Is a WTO member entitled to determine its own moral code without reference to any other WTO member's moral code?
2. Can a WTO member's violation of the WTO rules be excused under the public morals exception if the member cannot prove that a majority of its citizens find the good or service in question to be morally offensive?
3. Can a WTO member rely on the public morals exception to ban or restrict entry to a foreign good or service based solely on its disapproval of one or more moral belief(s) held by one or more citizens in the exporting nation?

26. *See, e.g.*, GATT 1994, Art. XX, ¶ (a).

27. WT/DS285/AB/R (adopted Apr. 20, 2005). The Appellate Body's decision in this case hereinafter is specifically referred to as the "*U.S.–Gambling Appellate Body Report*." The panel report in this case, WT/DS285/R, is specifically referred to hereinafter as the "*U.S.–Gambling Panel Report*." As indicated in the text, the case generally is hereinafter referred to as "*U.S.–Gambling*" or the "*U.S.–Gambling* case."

28. The WTO members together are referred to as either the Ministerial Conference or the General Council when they meet for the purpose of handling the on-going business of the WTO. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 4 (1999), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter the "WTO Agreement"], Art. IV, ¶ 2. When all the members meet for the purpose of resolving a dispute regarding one of the multilateral agreements or when the signatories of a plurilateral agreement meet for the purpose of resolving a dispute regarding that agreement, they are referred to as the Dispute Settlement Body (the DSB). Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) [hereinafter the "DSU"], Art. 2, ¶ 2. However, the DSB delegates its power to resolve disputes in the first instance to three-person panels and the Appellate Body. *Id*. Panel members are selected from a list of governmental and non-governmental persons from the various WTO members who are knowledgeable in international trade law. *Id*. at Art. 8, ¶ 1. Every four years, seven judges are appointed to the Appellate Body, and three judges are chosen to hear

This article addresses the normative question of the proper scope of a morals exception to the WTO rules from the perspective of socio-economic legal theory[29] and this analysis concludes that each of the above-stated three questions is answered in the negative. It is important to emphasize that this conclusion does not require each WTO member to adopt a liberal democratic form of government. Such a requirement would contravene not only the *jus cogens* principle of the self-determination of peoples[30] but the rationale for inclusion of a morals exception in the WTO agreements in the first place. If a WTO member's form of government makes it difficult or impossible for it to rely on the public morals exception, this is a situation which the member alone has chosen. Moreover, WTO members with liberal democratic forms of government should not assume that their form of government automatically means that each law enacted by that government's legislature is supported by a majority of the people.[31] In other words, if the public morals exception to the WTO rules were to be interpreted or devised as suggested in this article,

each appeal. *Id*. at Art. 17, ¶ 1. Each person may be reappointed to the Appellate Body once. *Id*. at Art. 17, ¶ 2.

29. *See* text accompanying *infra* notes 375-92.

30. *Jus cogens* (Latin for "compelling law") refers to a peremptory norm of general international law, which "is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, Art. 53 (entitled "Treaties conflicting with a peremptory norm of general international law ('jus cogens')"), May 23, 1969, 1155 U.N.T.S. 331, 8 Int'l Legal Materials 679 (1969). Even "[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." *Id*.

31. Public choice theory "appl[ies] scientific economic methods to the "public choice behavior" of voters, party leaders, and other politicians, lobbyists, and bureaucrats." James Buchanan Center for Political Economy, *About Public Choice Economics, available at* www.gmu.edu/jbc/aboutpubchoic.html (accessed on Aug. 28, 2007). In general, public choice theory maintains "that markets are imperfect, but that alternative institutions (*i.e*., government) may also have defects." *Id*. In particular, James Buchanan's public choice theory helped demonstrate that an elected official in a liberal democratic government might choose to promote the interests of just a few individuals or groups that appear likely to be able to assist him or her be reelected. A good example of how lobbyists can disproportionately influence legislation in a liberal democratic government is the fact that, during the fall of 2009, both Democratic and Republican members of the U.S. Congress, when discussing a bill proposing the adoption of a national health care system, inadvertently argued "debate points" on the floor of the U.S. Congress that had been prepared by Genentech, one of the largest biotechnology companies in the world. *Lawmakers' health care speeches penned by Genentech lobbyists*, San Diego Union Trib., Nov. 15, 2009, at A8 ("In an interview, Rep. Bill Pascrell Jr., D-N.J., said: 'I regret that the language was the same. I did not know it was."). Another example of the influence of private interest groups' influence on the development of public policy in the U.S. was revealed in a Department of Health and Human Services study of 250 outside experts relied upon in 2007 by the Centers for Disease Control and Prevention (the CDC), the U.S. Government's top public health agency. This study concluded that almost none of these 250 outside experts had "properly or completely filled out forms

no WTO member's sovereignty would be infringed. To begin with, no nation is required to join the WTO. Furthermore, any WTO member is free to terminate its WTO membership, change its form of government, offer whatever evidence of its people's moral beliefs that it wishes in a WTO dispute proceeding, or simply decide to suffer trade sanctions in those cases in which the public morals exception would be unavailable on account of its form of government but it nonetheless wishes to retain the challenged trade restriction.

In summary, the socio-economic analysis presented in this article concludes that the WTO rules should contain a "morals exception" because no WTO member would agree to jeopardize its moral beliefs and hence its identity and security merely in order to maximize its citizens' wealth, which is the goal of participation in a free trade system such as the WTO regime. At the same time, this analysis reveals that, in order to rely on a morals exception to the WTO rules, a WTO member must prove that a majority of the citizens affected by a trade barrier enacted by the member actually hold the moral belief being ascribed to them,[32] because the moral beliefs of any group of people, including a nation[33] or a WTO member,[34] can only refer to the moral beliefs of the individual human beings who constitute that group.[35] This is the case, because any moral belief can only be devised, deciphered, understood, appreciated, or held by individual autonomous human beings.[36] To conclude otherwise would elevate form over substance and convert the principle of tolerance for divergent moral views, which underlies the public morals exception, into an instrument of intolerance. This analysis helps to define the proper boundary between private markets and public morals in the WTO system. More broadly, it suggests how the conflicting "communitarian"[37] vs. "cosmopolitan"[38] (or "human rights") theories of international relations and international law can be reconciled.

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in which they were required to state potential conflicts of interest." *Report Finds Health Agency Failed to Probe Experts' Ethics*, SAN DIEGO UNION TRIB., Dec. 19, 2009, at A8.

32. Text accompanying *infra* notes 46-61.
33. *See* text accompanying *infra* notes 45-61.
34. *See* text accompanying *infra* notes 45-50.
35. *See* text accompanying *infra* notes 45-60.
36. *See* text accompanying *infra* notes 550-61.
37. "The root of communitarian thought is that value stems from the community; that the individual finds meaning in life by virtue of his or her membership of a political community." CHRIS BROWN, INTERNATIONAL RELATIONS THEORY 55 (Columbia Univ. Press 1993). The communitarian view of international law shares many of the theoretical bases of the positivist theory of law generally. *See, e.g.*, Carlos Santiago Nino, *Positivism and Communitarianism: Between Human Rights and Democracy*, 7:1 RATION JURIS 14 (2007) *passim.*
38. "What is crucial to a cosmopolitan attitude is the refusal to regard existing political structures as the source of ultimate value.... [C]osmopolitanism is a universalist

Section II of this article discusses various government measures, which, if challenged in the WTO, could lead the government maintaining that measure to assert a defense under the public morals exception in which one or more of the above-stated questions is raised. Section III presents a history of the public morals exception, including a discussion of *China—Media*[39] and *U.S.–Gambling*,[40] the two cases to date in which a WTO panel or the Appellate Body has addressed the meaning of the public morals exception. Section IV reviews previous scholarship regarding the public morals exception. Section V presents a normative analysis of a morals exception to the WTO rules, based on socio-economic legal theory. Finally, Section VI concludes.

I. Potential WTO Cases in Which the Public Morals Exception Might be Clarified

In the next few years, the public morals exception is likely to be raised as a defense in a number of WTO cases, and in the panels and Appellate Body hearing these cases likely will be required to clarify both the "public component" and the "morals component" of this exception. At the same time, because the citizens of a nation theoretically can hold a moral belief that warrants the trade restriction in question and a member's reliance on the exception for protectionist reasons usually can be ascertained by whether it restricts a "like"[41] domestic good or service, the range of inquiries relevant to the "morals component" of the exception is likely to be limited.[42] As some commentators have argued, a WTO member can implement a measure that violates its market access commitment to the other WTO members, even in the absence of a protectionist motivation.[43] However, the temptation to defend a trade barrier on an insincere moral objection would at least appear to be naturally self-limiting due to the difficulty any WTO member would

principle [.]" *Id.* at 24. The human rights or cosmopolitan view of international law shares many of the theoretical bases of the natural law theory of law generally. *See, e.g.*, Robert Fine, Cosmopolitanism 22-28, 56-58 (Routledge 2008).

39. *Supra* note 4.

40. *Supra* note 27.

41. *Supra* note 23.

42. In other words, when a WTO member claims that a particular trade barrier is justified under the public morals exception, application of the National Treatment Principle should reveal any protectionist motivation for the restriction. This was illustrated in *U.S.–Gambling, supra* note 27, which is discussed further below in this section of the article.

43. *See, e.g.*, Kyle Bagwell, Petros C. Mavroidis & Robert W. Staiger, *It's A Question Of Market Access*, 96:1 A.J.I.L. 56, 75-76 (2002).

encounter in attempting to craft a specious moral objection without casting too wide an exclusionary net.

For the sake of argument, assume that an EC nation that has not justified its bans on various genetically-modified foods on the ground that they pose a health hazard[44] reinstates those bans and then attempts to excuse them under the public morals exception. This EC nation likely would find it very difficult to articulate a moral belief that would justify its exclusion of the genetically-modified foods in question but not any other item that it might wish to allow its nationals to import or produce (*e.g.*, a life-saving medication that contains a genetically modified ingredient). In other words, the difficulty of devising a sufficiently narrow but false moral objection to the entry of a foreign good or service would appear to outweigh the advantages of attempting to do so in most cases.[45]

At the same time, a number of cases are likely to arise during the next few years regarding the "public component" of the public morals exception, as the definition of "public morals" adopted by the Appellate Body in *U.S.–Gambling* and set forth above does not clarify precisely "whose moral beliefs" a WTO member is entitled to protect or what evidence a WTO is required to produce to prove those people's moral beliefs. In one manner or another, these cases are likely to present the three seminal questions stated in the introduction to this article. Moreover, it is highly likely that the U.S. will challenge a number of prohibited content laws in various countries. This is the case, because a number of WTO members maintain extensive censorship regimes[46] and the U.S. considers media goods and services to constitute its "comparative advantage"[47] in the global economy.[48]

44. For example, the panel in *EC—Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS292/R (adopted on November 21, 2006), concluded that France, Greece, Italy, Austria, Luxembourg, and Germany all maintained such bans. *Id.* at ¶¶ 4.2230, 4.570, and n.163.

45. It also is possible that a WTO member could enact a measure that banned a product such as paper towels, plastic bags, styrofoam cups, or any product with a "carbon footprint" larger than some stipulated maximum, purportedly because the product's alleged propensity to cause global warming offends its public morals. However, such a ban would almost certainly be excused under either the "health and safety exception" (found in ¶ (b) of Art. XX of the GATT 1994) or the "exhaustible natural resources exception" (found in ¶ (g) of Art. XX of the GATT 1994) in any case.

46. See text accompanying *infra* notes 50-72.

47. The comparative advantage theory of international trade (first proposed by British economist David Ricardo is discussed further below, in Section V of this article.

48. Edwin Baker, *An Economic Critique of Free Trade in Media Products*, 8 N.C. L. REV. 1357 (2000); Tech Law Journal, Tech Law Journal News (Mar. 11-15 2006), *available at* http://www.techlawjournal.com/home/newsbriefs/2006/03c.asp (accessed

As indicated in the above discussion of the *China—Media* case, a comprehensive set of Chinese laws prohibit the publication and dissemination of specified types of "content" and a number of U.S. foreign media products and services have been denied entry into China's market as a result. In fact, there are so many examples of banned or restricted U.S. media products in China that it is difficult to believe that the U.S. in the next few years will not challenge at least one of China's prohibited content laws as constituting a prohibited trade barrier,[49] and in response to the U.S.' allegations, China almost certainly would claim in such a WTO dispute proceeding that the law is justified under the public morals exception to the WTO rules. The Chinese Government's removal of information that it considers inappropriate that is posted on websites maintained by Google and other providers has been well-publicized.[50] In June of 2009, Google's "[s]earch functions and Gmail were inaccessible for more than an hour in a move seen by web watchers as a warning shot across the bows by China's censors . . . as [e]arlier in the day, the main state and communist party media—Xinhua and People Daily—condemned Google for providing links to pornographic websites through its search engine."[51] The

Dec. 27, 2009) (quoting U.S. Trade Representative Robert Portman to the effect that " '[w]e may not all be great fans of what comes out of Hollywood these days, but it's a comparative advantage we have. But in China there's very little market. Why? Because you can get it on the street for a fraction of the cost.' And, he said that the U.S. has a comparative advantage in music recordings, but cannot take advantage of that."); WUNSCH-VINCENT, *supra* note at 106 ("The U.S. has a comparative advantage in the production and export of content products (increasingly called core copyright industries in Washington DC).") (internal footnote omitted) (*citing* Office of the U.S. Trade Representative, 2001 Annual Report of the President of the United States on the Trade Agreements Program 2 (2002), *available at* http://www.ustr.gov/Document Library/Reports Publications/2002/ Section Index.html).

49. In fact, the Office of the U.S. Trade Representative reportedly is considering a petition filed by the First Amendment Coalition of California requesting that the U.S. initiate a challenge to China's internet censorship rules in the WTO. *Bridges Weekly: WTO Rules against Chinese Restrictions on Foreign Books, Movies, Music*, Int'l Centre for Trade & Sustainable Dev., ictsd.org, Sept. 7, 2009, *available at* http://ictsd.org/i/trade-and-sustainable-development-agenda/54208/ (accessed Dec. 17, 2009).

50. *See, e.g.*, Edward Cody, *For China's Censors, Electronic Offenders Are the New Frontier*, WASH. POST, Sept. 20, 2007, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/09/09/AR2007090901979.html (accessed Dec. 16, 2009); *Google Move 'Black Day' for China*, bbc.co.uk, Jan. 1, 2005, *available at* http://news.bbc.co.uk/2/hi/technology/4647398.stmGoogle (accessed Dec. 17, 2009); *China Blocks Google Services*, guardian.co.uk, June 24, 2009, *available at* http://www.guardian.co.uk/world/2009/jun/24/google-china-censors (accessed Dec. 17, 2009); Austin Ramzy, *China's New Domain-Name Limits: More Web Censorship?*, time.com, Dec. 18, 2009, *available at* http://www.time.com/time/world/article/0,8599,1948283,00.html (accessed Dec. 18, 2009).

51. Jonathan Watts, *China Blocks Google Services*, guardian.co.uk, June 24, 2009, *available at* http://www.guardian.co.uk/world/2009/jun/24/google-china-censors (accessed Dec. 27, 2009).

Government in fact even employs "virtual internet police"—a female cartoon character named An'an and a male cartoon character named Pingping—who pop up on an internet user's screen to warn the viewer that he or she might be viewing prohibited content and hence could be violating the law.[52] According to Zhao Hongzhi, the deputy chief of internet surveillance at Beijing's Municipal Public Security Bureau, these virtual officers are:

> "on watch for websites that incite secession, promote superstition, gambling and fraud…It is our duty to wipe out information that does public harm and disrupts social order."[53]

In addition, on June 8, 2009, the Chinese Government announced publicly that any computer sold in China on July 1, 2009 or thereafter must have a particular internet filtering software (which the Government calls the "Green Dam—Youth Escort" software (Green Dam software) as it is intended to protect children from pornography and other "vulgar content," according to the Government) installed on it.[54] While the publication or dissemination of lewd, obscene, pornographic, sexually suggestive, or vulgar material[55] is strictly prohibited in China and most countries in the world, including the U.S., ban child pornography[56] and

52. *See, e.g., Virtual Police Patrol China Web*, BBC News, Aug. 29, 2007, *available at* http://news.bbc.co.uk/2/hi/asia-pacific/6968195.stm (accessed Dec. 13, 2009).

53. *Id*.

54. Andrew Jacobs, *China Faces Criticism Over New Software Censor*, nytimes.com, June 10, 2009, *available at* http://www.nytimes.com/2009/06/11/world/asia/11censor.html?_r=1 (accessed Dec. 16, 2009) [hereinafter *Jacobs*]; Michele Maisto, *Chinese Green Dam Software Blocks Falun Gong and Other Content*, ewwk,.com, June 12, 2009, *available at* http://www.eweek.com/c/a/Desktops-and-Notebooks/Chinese-Green-Dam-Software-Blocks-Falun-Gong-and-Other-Content-785980 (accessed Dec. 17, 2009) [hereinafter "Maisto, *Chinese Green Dam*"]

55. *See, e.g., Freedom of Expression and the Internet in China: A Human Rights Watch Backgrounder*, 2001, *available at* http://www.hawaii.edu/hivandaids/Freedom_of_Expression_and_the_Internet_in_China.pdf (accessed Dec. 28, 2009 (citing, among other laws and regulations, *PRC Interim Regulations Governing the Management of International Computer Networks*, Legal Daily, Feb. 12, 1996, issued by State Council Order No. 195, signed by Premier Li Peng on Feb. 1, 1996, Art. 13; Management Measures of the PRC Regulations for the Safety Protection of Computer Information Systems, *in* Computers and Internet—Laws and Regulations, Falu Chubanshe, Beijing, 1999, at 99, Art. 5; PRC Telecommunications Regulations, Oct. 11, 2000, issued by State Council Order No. 291, signed by Premier Zhu Rongii on Sept. 25, 2000, of the People's Republic of China, Art. 57)*; see also Google to Cut China Porn Results*, bbc.co.uk, June 22, 2009, *available at* http://news.bbc.co.uk/2/hi/technology/8112549.stm (accessed Dec. 28, 2009).

56. *See, e.g.*, YAMAN AKDENIZ, INTERNET CHILD PORNOGRAPHY AND THE LAW: NATIONAL AND INTERNATIONAL RESPONSES 11 (Ashgate Pub., Ltd. 2008); Europa: Summaries of EU Legislation, *Combating the Sexual Exploitation of Children and Child Pornography, available at* http://eropa.eu., http://europa.eu/legitslation_summaries/justice_freedom_security/fight_against_trafficking_in_human_beings/l33138_en.htm (accessed Dec. 16, 2009).

other obscene material,[57] suspicion regarding the Government's true motives in requiring the installation of the Green Dam software abounds. This is the case, because independent tests of the Green Dam software revealed that it consistently censored information regarding the banned Falun Gong movement[58] and other politically-sensitive information in China[59] and even when users deleted the software from their computers, this action "fail[ed] to remove some log files, so evidence of users' activity remain[ed] hidden on the system."[60] Some commentators insisted that the "Green Dam is pure spyware."[61]

In fact, despite the fact that the Chinese Communist Party (CCP banned criticism of the Green Dam software[62] and instructed website companies to "block and delete any attacks (on the 'Green Dam' Filtering Software[,])"[63] a poll conducted via the website www.sina.com.cn revealed .that over 80% of "netizens" (citizens with access to the internet or "net") in China "expressed strong opposition to the mandatory installation of Green Dam."[64] Many of them are "angry over the possible privacy violations caused by Green Dam,"[65] and some are "questioning

57. In the United States, for example, "[t]ransmitting obscenity and child pornography, whether via the Internet or other means, is…illegal under federal law for both adults and juveniles." *Reno v. ACLU*, 521 U.S. 844, 878, n.44 (1997) (*citing* 18 U.S.C. §§ 1460-65 (criminalizing obscenity) and § 2251 (criminalizing child pornography)). Similarly, all U.S. states prohibit the creation, reproduction, publication, or distribution of child pornography, and the great majority of states also prohibit the distribution of obscenity. *See, e.g.*, Ronald J. Palenski, *State Laws on Obscenity, Pornography, and Harassmen*t, lorenavedon.com*, available at* http://www.lorenavedon.com/laws.htm (accessed Dec. 28, 2009). The U.S. Supreme Court has established a tripartite test that judges and juries are required to use to determine whether material is obscene. "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest[;]…(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24 (1973).

58. Maisto, *Chinese Green Dam, supra* note 54 (reporting that the University of Michigan's Computer Science and Engineering Division found that when the Green Dam software finds the words "Falun Gong," "the offending program is forcibly closed and an error image…is displayed[.]").

59. Loretta Chao, *U.S. Trade Officials Urge China to Revoke PC Rule*, Wall St.t J., June 25, 2009, at A20 (also reported on www.wsj.com on June 25 2009, *available at* http://online.wsj.com/article/SB (accessed Dec. 28, 2009) [hereinafter "Chao, *U.S. Trade Officials*"].

60. *Id*.

61. *China's "Green Dam" Censorware Controversy,* en.secretchina.com, July 5, 2009, *available at* http://en.secretchina.com/news/china_s_green_dam_censorware_controversy.html (accessed Dec. 30, 2009) [hereinafter "*China's Green Dam*"].

62. *Id*.

63. *Id*.

64. *Id*.

65. *Id*.

the government's purchase process, since the bidding process was not transparent and the software developer was also unknown in China."[66] Essentially, Chinese netizens argued that if protection of children from sexually explicit images is the goal of the Green Dam software, then the Government's requirement that the software be loaded on every new computer sold in China is both under-inclusive and over-inclusive. Specifically, the requirement is under-inclusive because the software fails to remove all such images.[67] On the other hand, requiring every purchaser to have this program installed on a new laptop is over-inclusive, as many purchasers do not even have children (and even users with children may wish to purchase a different filtering program to protect their children).[68] One netizen lamented that "[i]t seems Chinese authorities consider all Chinese netizens as 'children.'"[69]

Finally, after Chinese and foreign nationals voiced strong protests against the required installation of the Green Dam software, the Government announced on June 30 that the Green Dam software installation requirement was being postponed.[70] Most recently, the Chinese Government has announced that when the Green Dam software program has been perfected, the Government will no longer require that the software be installed on private citizens' computers (as opposed to computers made available to the general public, such as at an internet cafe).[71] However, if the Government continues to insist that every new computer sold in China as of a certain date must be sold with the Green Dam software pre-loaded (which software can then be disabled if the computer is for use in one's home), it could find itself on the receiving end of WTO dispute case initiated by the U.S. On June 24, 2009, "Commerce Secretary Gary Locke and U.S. Trade Representative Ron Kirk said in a letter to two Chinese ministries . . . that the requirement . . . could conflict with Beijing's World Trade Organization obligations."[72] While the U.S.

66. *Id*.

67. *Jacobs, supra* note 54.

68. *See, e.g.*, Itamar Medeiros*, Internet in China: Timeline of the Pre-Installed Internet Filter Required for All New Computers,* designative.info, July 11, 2009, *available at* http://designative.info/2009/07/11/internet-in-china-timeline-of-the-pre-installed-internet-filter-required-for-all-new-computers (accessed Dec. 28, 2009).

69. *China's Green Dam, supra* note 61.

70. Loretta Chao & Jason Dean, *Chinese Delay Plan for Censor Software*, WALL ST. J., July 1, 2009, at A1, *also reported on* www.wsj.com, *available at* http://online.wsj.com/article/SB124636491863372821.html (accessed Dec. 28, 2009) [hereinafter "Chao, *Chinese Delay Plan*"].

71. Shi Shan & Joshua Lipes, *China Backs Down on Software,* rfa.org, Aug. 14, 2009, *available at* http://www.rfa.org/english/news/greendam-08142009113834.html (accessed Dec. 28, 2009).

72. Chao, *U.S. Trade Officials, supra* note 59; s*ee also U.S. Trade Officials Say China Web Filter Breaks WTO Rules*, chinadigitaltimes.net, June 24, 2009, *available at* http://

Government at that time was particularly concerned about the short time that computer manufacturers had been given to complete installation of a "technically flawed" filtering program (apparently, defects in the software at that time could significantly impair the functionality of a user's computer), it also was concerned about the denial of manufacturer and consumer choice regarding filtering software.[73] Given that China is "the world's second-largest PC market in terms of shipments[,]"[74] any such issue which "could depress sales of PCs in China" would concern U.S. computer manufacturers, the U.S. Government indicated.[75]

In any case, if the Chinese Government's goal in requiring installation of the Green Dam software was to suppress Chinese citizens' criticism of the Government and the CCP, it appears to have failed to achieve this goal. In fact, as Rebecca MacKinnon, a journalism professor at the University of Hong Kong who studies Chinese internet trends, revealed, the main effect of the Green Dam software appears to have been a significant growth in netizens' "questions about government intrusiveness and censorship."[76] In particular, she explained, "searches for the term

chinadigitaltimes.net/2009/06/us-trade-officials-say-china-web-filter-breaks-wto-rules (accessed Dec. 28, 2009) (reporting the Wall Street Journal article). Interestingly, *The Wall Street Journal* reported that "[t]he prospect of winning such a case is murky, however, since the WTO allows countries to impose regulations to protect public morals, as China says it is doing here. Chao*, U.S. Trade Officials, supra* note 72. In addition, *The Wall Street Journal* reported that "U.S. officials from the State and Commerce departments, as well as U.S. Trade Representative officials based in Beijing, met . . . with officials from the MIIT and Ministry of Commerce to express concerns that Green Dam would restrict access to the Internet and infringe on 'internationally recognized rights to freedom of expression[.]'" *Id*.

73. *Jacobs, supra* note 54.

74. *See, e.g.*, Mark Drajem, *U.S. Protests Chinese Computer Censorship Regulations (Update 3)*, Bloomberg.com, June 24, 2009, *available at* http://www.bloomberg.com/apps/news?pid=20601103&sid=aPyLvZjHpSzg (accessed Dec. 28, 2009) (referring to U.S. officials' concerns with technical flaws in the Green Dam software and the denial of manufacturer and consumer freedom in the choice of filtering software used); Chao, *U.S. Trade Officials, supra* note 59 (noting U.S. officials' concern with the short notice computer manufacturers were given to install the software and indicating that software researchers claimed parts of the Green Dam software were copied from a software program produced in the U.S.).

75. At some point, the U.S. Government could also file a complaint against China in the WTO under the TRIPS Agreement on the ground that the Chinese Government's alleged infringement of a U.S. company's filtering software design in its development of the Green Dam software constituted a violation of China's commitments under the TRIPS Agreement. Wang Xing, *Green Dam Developers Face Copyright Suit*, People's Daily Online, June 18, 2009, *available at* http://english.peopledaily.com.cn/90001/90776/90882/6680841.html (accessed Dec. 28, 2009) (noting that the Solid Oak software company based in California had already "sent 'cease and desist' letters to Hewlett-Packaged and Dell to stop distributing computers containing the alleged copied software and said it was considering seeking an injunction in a U.S. court").

76. Chao, *Chinese Delay Plan, supra* note 59.

fan qiang, or 'climbing over the wall'—shorthand for circumventing China's 'Great Firewall' of internet censoring software—soared after news of Green Dam became public in early June."[77]

Other forms of media besides the internet are also required to comply with a comprehensive set of prohibited content laws in China. In November of 2008, for example, the Chinese State Administration of Radio, Film and Television banned the on-going operations of the U.S. music magazine *Rolling Stone*, after it had published just one issue.[78] There are conflicting reports regarding the reason for the shuttering of *Rolling Stone*, but "[a]rticles in the first Chinese edition of Rolling Stone about a rock star associated with the 1989 Tiananmen Square protests and a blogger who wrote about her sex life pushed the limits of what is permissible," the *Los Angeles Times* reported.[79] In another highly-publicized incident, after having repeatedly refused to permit the Rolling Stones rock group to perform in China, the Chinese Government in 2006 finally permitted the Stones to perform after they agreed not to perform their songs "Brown Sugar," "Honky Tonk Woman," "Beast of Burden" and "Let's Spend the Night Together," which the Government said contained "suggestive lyrics."[80] At the last minute, the Government also banned one of the Stones' newer songs (thought to be *Rough Justice*), for the same reason.[81]

Even if one personally agrees with the Chinese Government that some of the lyrics contained in the Rolling Stones songs that it banned are indeed suggestive or is at least sympathetic to the Government's view on this point,[82] Mick Jagger's sarcastic comment regarding this

77. *Id*.

78. Clifford Coonan, *China Reels in Foreign Footage, Variety*, Apr. 16, 2006, *available at* http://www.variety.com/article/VR1117941546.html?categoryid=19&cs=1 (accessed Dec. 28, 2009).

79. Mark Magnier, *Rolling Stone Silenced in China,* latimes.com, Mar. 30, 2006, *available at* http://articles.latimes.com/2006/mar/30/world/fg-sone30 (accessed Dec. 28, 2009); *see also* Carin Zissis, *Media Censorship in China*, Sept. 25, 2006, *available at* http://www.cfr.org/publication/11515/media_censorship_in_china.html (accessed Apr. 20, 2009).

80. Carol Kopp, *Stones Rock and Roll in Shanghai*, *CBS News*, Apr. 8, 2006, *available at* http://www.cbsnews.com/stories/2006/04/08/entertainment/main1482957.shtml (accessed Dec. 28, 2009) [hereinafter "*Kopp*"].

81. *Id*.

82. In fact, the National Football League in the U.S. found certain lyrics in the Stones' songs to be inappropriate for prime-time TV viewers when it silenced Jagger's microphone as he sang portions of three songs during the February 2006 Super Bowl half-time show, just two months before the Stone's concert in Shanghai. *Id*. Similarly, the Stones were forced to change the lyrics to some of the songs that they sang during their first performance on The Ed Sullivan Show in 1967. *Id*.

event after arriving in China for the concert—"I'm pleased that the Ministry of Culture is protecting the morals of the expat bankers and their girlfriends that are going to be coming"[83]—raises the question of just what "public" the Chinese Government's "prohibited content laws" are intended to protect. That is, Jagger essentially was questioning whether the Government's claim that the lyrics contained in the five above-mentioned songs offend the Chinese people's morals is credible, given that illegal copies of these songs have circulated in China for years, the under-18 set in China today doesn't even consider the Stones' music "hip enough" to warrant their patronizing the Stones' concert, and the great majority of the people expected to attend the Stones' concern were elderly, wealthy foreigners.[84]

If the U.S. were to directly challenge one of China's prohibited content laws in the WTO and China, then predictably were to raise a public morals defense to that challenge, the U.S. might argue that the prohibited content law in question doesn't implicate any moral concern. It is much more likely, however, that the U.S. would concede that it is possible that the Chinese people find the prohibited content in question to be morally objectionable and argue that the Chinese Government cannot *prove* that a majority of the Chinese people object to the prohibited content on moral grounds. A number of China's very broadly-stated prohibited content laws are particularly vulnerable to attack by another WTO member on this ground. Examples of such laws include prohibitions on the publication or dissemination of any information "that is prejudicial to public order,"[85] "that violates the Constitution or laws or the implementation of administrative regulations,"[86] "that incites the overthrow of the government or the socialist system,"[87] that incites division of the country,"[88] "that is harmful to national unity,"[89] "that destroys the order of society,"[90] "that injures the reputation of state organs,"[91] "that opposes

83. *Kopp, supra* note 80.
84. *Id*.
85. *See, e.g.*, PRC Interim Regulations Governing the Management of International Computer Networks, *Legal Daily*, February 12, 1996, issued by State Council Order No. 195, signed by Premier Li Peng on February 1, 1996, Art. 13.
86. *See, e.g.*, Management Measures of the PRC Regulations for the Safety Protection of Computer Information Systems, in Jisuanji Ji Wangluo—Falu Fagui, Computer & Internet—Laws And Regulations 99, Art. 5 (Balu Chubanshje Beijing 1999),
87. *Id*.
88. *Id*.
89. *Id*.
90. *Id*.
91. *Id*.

the basic principles established by the constitution,"[92] "that jeopardizes national security,"[93] "that reveals state secrets,"[94] "that subverts state power or undermines national unity,"[95] "that harms the prosperity and interests of the state,"[96] that undermines state religious practices or promotes cults and feudal superstitions,"[97] "that disturbs social order,"[98] or "that undermines social stability."[99]

Various of these prohibited content laws have been interpreted to prohibit the publication or dissemination of any information that "attacks China"[100] or "is inconsistent with the ideology of the CCP [Chinese Communist Party],"[101] and there can be no doubt that the Chinese Government interprets these laws in a very broad manner. Citing these laws, for example, the Government has tightly controlled or banned the publication and dissemination of information regarding the banned Falun Gong[102] movement,[103] the spread of the SARS virus throughout

92. *See, e.g.*, PRC Telecommunications Regulations, Oct. 11, 2000, Art. 57 (issued by State Council Order No. 291, signed by Premier Zhu Rongii on Sept. 25, 2000).
93. *Id*.
94. *Id*.
95. *Id*.
96. *Id*.
97. *Id*.
98. *Id*.
99. *Id*.
100. Congressional-Executive Commission on China 55-63 (2005) *available at* http://www.cecc.gov/pages/annualRpt/annualRpt05/CECCannRpt2005.pdf.
101. Const. P.R.C. pmbl. (amended 1982) (stating that the Chinese Communist Party has a preeminent role in Chinese political, economic, and social life).
102. The Government banned the Falun Gong movement itself on April 22, 1999, on the ground that it is a dangerous cult that "goes against the ethics, law and order of the human society but also gravely threatens people [sic] normal religious belief." *The 'Falun Gong' Cult's Self Exposure*, Embassy of the People's Republic of China in the United States of America, May 30, 2007, *available at* http://www.china-embassy.org/eng/zt/ppflg/t324778.htm (accessed Dec.17, 2009); *see also* John Pomfret & Michael Laris, *China Confronts a Silent Threat: Despite Arrests, Falun Gong Continues Peaceful Protests, Washington Post Foreign Service*, Oct. 30, 1999, *available at* http://www.rickross.com/reference/fa_lun_gong/falun126.html (accessed Dec. 17, 2009). In mid-April 2009, Jiang Yu, a spokesperson for the Chinese Foreign Ministry, explained that the Government was entitled to suppress the Falun Gong because it "emphasizes meditation and the paranormal over modern medicine. 'The Falun Gong cult violates human rights by controlling people's minds,' he said in response to a reporter's query." Andrew Jacobs, *China Still Presses Crusade Against Falun Gong,* nytimes.com, Apr. 27, 2009, *available at* http://www.nytimes.com/2009/04/28/world/asia/28china.html (accessed Dec. 17, 2009). Ironically, according to the website maintained by the exiled Falun Gong leader, Li Hongzhi, who now resides in New York City, when he first started the [Falun Gong meditation] movement, the Chinese Government "encouraged it, invited [him] to teach in government facilities, and praising the practice for the benefit it brought to public health and morality." *Why is the Chinese Communist Party Persecuting Falun Gong?,* falunifo.net, Sept. 27, 2009, *available a*t http://www.faluninfo.net/article/911 (accessed Dec. 17, 2009).
103. Maisto, *Chinese Green Dam, supra* note 54.

China,[104] the spread of the HIV/AIDS virus throughout China,[105] the collapse of numerous shoddily-constructed schools during the May 2008 earthquake in Sichuan Province,[106] the occurrence of egregious labor violations at Chinese factories,[107] and the production of unsafe foods and medicines for sale in China and other countries.[108]

The conviction and sentencing of Liu Xiaobo, one of China's leading dissidents also demonstrates how easily one can run afoul of the above-referenced prohibited content laws in China. When Liu, a former Beijing Normal University literature professor who previously had been imprisoned for 20 months for taking part in the 1989 pro-democracy protests in Tiananmen Square, was formally arrested in June of 2009, Xinhua, the state news agency, stated that he was being arrested for "alleged agitation activities aimed at subversion of government and overthrowing of the socialist system . . . [as well as] spreading rumours and defaming the government[.]"[109] On December 25, 2009, after Liu and his lawyers had been granted 14 minutes in which to present his

104. *Impact of SARS on China,* voanews.com, May 29, 2003, *available at* http://www.voanews.com/uspolicy/archive/2003-05/a-2003-05-29-5-1.cfm?moddate=2003-05-29 (accessed Dec. 16, 2009) (Voice of America interview of Gordon Chang, author of the book The Coming Collapse Of China, Nick Eberstadt, a scholar at the American Enterprise Institute, Michael Fumento, a senior fellow at the Hudson Institute, and Dr. Sandro Cinto, clinical assistant professor of internal medicine at the University of Michigan).

105. *See, e.g.*, Clifford Coonan, *Too Little, Too Late as China's AIDs Death Rate Explodes: Suppression of Health Information Has Helped Spread of Killer Disease*, The Independent News, Feb. 19, 2009, *available at* http://www.independent.co.uk/news/world/asia/too-little-too-late-as-china8217s-aids-death-rate-explodes-1625977.html (accessed Dec. 28, 2009).

106. *See, e.g., Man Gets 3-year Term for Earthquake Activism*, San Diego Union Trib., Nov. 24, 2009, at A9 (discussing how Huang Qi received a 3-year sentence for discussing on the internet poorly build schools that had collapsed and killed thousands of school children during the massive earthquake that occurred in Sichuan province in 2007).

107. Howard W. French, *Ideals and Reality Conflict on Chinese Child Labor,* nytimes.com, June 18, 2007 ("After the torrid initial burst of news reports [regarding how hundreds of people, including many children, had been forced to work essentially as slaves in the brick kilns of Shanxi Province], the government, through the Central Office of External Communication of the Communist Party, instructed the news media to stop reporting 'harmful information that uses this event to attack the party and the government,' China Digital Times reported.").

108. Richard Spencer & Peter Foster, *Chinese Ordered Cover-up of Tainted Milk Scandal,* telegraph.co.uk, Sept. 24, 2008, *available at* http://www.telegraph.co.uk/news/worldnews/asia/china/3074986/Chinese-ordered-cover-up-of-tainted-milk-scandal.html (accessed Dec. 28, 2009).

109. Malcolm Moore, *China Accuses Pro-democracy Activist Liu Xiaobo of Inciting a Rebellion,* telegraph.co.uk, June 24, 2009, *available at* http://www.telegraph.co.uk/news/worldnews/asia/china/5622683/China-accuses-pro-democracy-activist-Liu-Xiaobo-of-inciting-a-rebellion.html (accessed Dec. 29, 2009) [hereinafter "*Moore*"].

defense, he was convicted of "inciting subversion of state power" on the ground that he had co-authored, signed, and encouraged others to sign a document entitled "Charter 08 petition" as well as posted essays on-line that the Government considered to be "critical of the ruling Communist Party."[110] The written verdict in Liu's case states that Liu " 'had the goal of subverting our country's people's democratic dictatorship and socialist system . . . 'The effects were malign, and he is a major criminal.' "[111] Liu was then sentenced to 11 years' imprisonment.[112]

The Charter 08 petition is "a manifesto consciously modeled on the Charter 77 drawn up by Vaclav Havel in the former Czechoslovakia . . ."[113] "calling for legal reforms, democracy and protection of human rights in China."[114] For example, among other things, the petition advocates the abolition of one-party rule, the holding of multi-party elections on a regular basis, the establishment of an independent judiciary, and the implementation of the constitutional guarantees of the freedom of speech, freedom of assembly, and freedom of religion.[115] Ironically, under the heading of "[f]reedom of expression," Charter 08 states that "[t]he current provision of 'inciting subversion of state power' in the Criminal Law should be repealed and criminal punishment for speech should be eliminated."[116] This is, of course, the "crime" of which Liu

110. *See, e.g.*, Chris Buckley, *China Jails Dissident Liu Xiabo for 11 Years,* uk.reuters.com, Dec. 25, 2009, *available at* http://uk.reuters.com/articlePrint?articleId=UKTRE5BO02920091225 (accessed Dec. 28, 2009) [hereinafter "*Buckley*"]. Liu was convicted after a two-hour trial following a year of imprisonment in solitary confinement. He was permitted to be represented by a lawyer at trial, but Xinhua, the state news agency, had stated when he was formally arrested that Liu had 'confessed to the charge in preliminary police investigation.' " *Moore, supra* note 109; *see also* Macartney, *infra* note 113. At that time, Liu's lawyer implied that it was going to be difficult to devise a defense for Liu as "[t]he act of subversion involves writing articles or giving interviews and speaking freely . . . [and] Liu has confessed to this in the past." *Id.* Sam Zarifi, Director of Amnesty International's Asian Pacific Program, stated that "Liu Xiaobo's detention and trial shows the Chinese government will not tolerate Chinese citizens participating in discussions about their own form of government[.]"Jonathan Watts, *Chinese Human Rights Activist Liu Xiaobo Sentenced to 11 Years in Jail,* guardian.co.uk, Dec. 25, 2009, *available at* http://www.guardian.co.uk/world/2009/dec/25/chain-jails-liu-xiaobo/print (accessed Dec. 29, 2009) [hereinafter "*Watts*"].

111. *Buckley, supra* note 110.

112. *Id.*

113. Jane Macartney, *Chinese Dissident Liu Ziaobo Formally Arrested,* timesonline.com, June 25, 2009, *available at* http://www.timesonline.co.uk/tol/news/world/asia/article6566723.ece (accessed Dec. 29, 2009) [hereinafter "*Macartney*"].

114. *Charter 08, Human Rights in China*, Dec. 8, 2008, hrichina.org, *available at* http://www.hrichina.org/public/contents/press?revision%5fid=89851&item%5fid=85717 (accessed Dec. 29, 2009).

115. *Id.*

116. *Id.*

was convicted and for which he is being punished. After government officials from the U.S., the U.K., the EU, and the U.N. all expressed to the Chinese Government their great disappointment in Liu's conviction, spokeswoman Jiang Yu of the Chinese Foreign Ministry stated:

> These accusations are unacceptable. China is a country of rule of law. The fundamental rights of Chinese citizens are guaranteed by the law," she told a regular news conference.
>
> I want to stress that Chinese judicial bodies handle cases independently. Outsiders have no right to interfere. We oppose any external forces using this case to meddle in China's internal affairs or judicial sovereignty.[117]

The use of the phrase "democratic dictatorship and socialist system" in Liu's written verdict is so all-encompassing as to be almost meaningless. Furthermore, if Liu really were a major criminal, it would be logical for the Chinese Government to advertise his conviction and sentence as well as the content of the subversive Charter 08 petition so as to warn other citizens regarding the dangerous nature of such information and the punishment one can expect to receive for disseminating it. Yet, "Liu's lawyers have been warned not to discuss . . . [his] case [,]"[118] and "[t]he mainstream media have been forbidden to cover the subject [of the Charter 08 petition] and censors have blocked many related internet sites and articles. Many Chinese are unaware that it exists."[119] Perhaps Liu's conviction for "inciting subversion of state power" can only be understood as the U.K.'s *Guardian* newspaper has suggested—that "the crime of 'subversion' in China is simply a 'vaguely defined charge that CCP leaders often use to imprison political opponents.'"[120]

Not surprisingly, a great many U.S. artists' works have been banned in China under such broadly-stated prohibited content laws. In November 2008, for example, a newspaper published by the CCP criticized the latest album produced by the U.S. rock group Guns N' Roses entitled *Chinese Democracy* as "a venomous attack on the Chinese nation"[121]

117. *Blanchard, infra* note 120; *see also Marta Cooper, China Tells West: In Liu Xiaobo's Case, Don't Interfere,* shanghaiist.com. Dec. 16, 2009, *available at* http://virtualreview.org/china/zoom/1311800/china-tells-west-in-liu-xiaobos-case-dont-interfere (accessed Dec.29, 2009).

118. *Watts, supra* note 110.

119. *Id.*

120. *Id.*; *see also* Ben Blanchard, *China Warns West From Taking Up Dissident Case,* reuters.com, Dec. 15, 2009, *available at* http://www.reuters.com/assets/print?aid=USTRE5BE12C20091215 (accessed Dec. 29, 2009) (stating that "Chinese courts come under Communist Party control and rarely reject prosecution accusations, especially in politically sensitive cases[ ]") [hereinafter "*Blanchard*"].

121. *See, e.g.*, Katherine Thomson, *Chinese Media Blasts Guns N' Roses Album,* huffingtonpost.com, Nov. 24, 2008, *available at* http://www.huffingtonpost.com/2008/11/24/chinese-media-blast-guns_n_145948.html (accessed Dec. 28, 2009).

and then the Government banned the album.[122] However, Guns N' Roses has a huge fan base in China, as the popularity of its heavy metal protest music "soared in the wake of the 1989 Tiananmen Square crackdown on pro-democracy demonstrators."[123] Similarly, the Chinese Government banned U.S. writer Gordon Chang's 2001 book THE COMING COLLAPSE OF CHINA[124] because it was critical of China and the CCP.[125] The works of numerous other foreign authors and performers similarly have been banned or severely restricted in China,[126] despite the fact that "China's appetite for Western pop culture is growing rapidly,"[127] and accordingly the U.S. could very well decide to challenge one or more of these prohibited content laws in the WTO at some point.

In any such WTO case, China most likely would point to the fact that the prohibited content law being challenged is supported by the Chinese people as evidenced by the fact that it was enacted by the National People's Congress. However, this argument may be unpersuasive, given that delegates to the National People's Congress are required to be members of the CCP,[128] the CCP is the only political party that is permitted exist in China,[129] and the people's election of delegates to the National People's Congress could perhaps best be characterized as "indirect."[130]

122. *See, e.g.*, James T. Areddy, *Guns N' Roses' New Album Is Up Against a Chinese Wall, Wall St. J.*, Nov. 22, 2008, at A1, *also available on* wsj.com *at* http://online.wsj.com/article/SB122728243679848085.html (accessed Dec. 28, 2009) (explaining that an official at the China National Publications Import & Export (Group) Corp., part of the Chinese Ministry of Culture, told local record distributors that they shouldn't bother ordering the album because "[a]nything with 'democracy' in the name is 'not going to work[.'] ").

123. *Id*.

124. GORDON G. CHANGE, THE COMING COLLAPSE OF CHINA (Random House 2001).

125. *See, e.g.*, Alex Frew McMcMillan, *Writer Sees China's 'Coming Collapse*,' CNN.com, Mar. 29, 2002, *available at* http://edition.cnn.com/2002/BUSINESS/asia/03/25/hk.gordonchang/?related (accessed Dec. 13, 2009).

126. *See, e.g.*, David Browne, *Rock Tours Target China, Face Government Interference, Rolling Stone*, Iss. 1058, Aug. 7, 2009, *also available at* http://www.rollingstone.com/news/story/21896275/rock_tours_target_china_face_government_interference (accessed Dec. 28, 2009) (discussing the banning or censoring of various foreign singers' performances and the Chinese Government's new rule that "[i]f a performer breaks the law, as Björk technically did, . . . promoters will have to give the government half of the box-office receipts") [hereinafter "*Browne*"]; *Talk: Jung Change: Banned,* amnesty.org.uk, Oct. 30, 2007, *available at* http://www.amnesty.org.uk/evemnts_Details.asp?ID=531 (accessed Dec. 29, 2009) (stating that Jung Change, author of Wild Swans, and a critically acclaimed biography of Mao Zedong, Mao: The Unknown Story, has sold millions of books around the world by her work is still banned in her native China").

127. *Browne, supra* note 126.

128. Const. P.R.C. (amended 1982).

129. Const. P.R.C. pmbl. (amended 1982).

130. JIANG JINSONG, THE NATIONAL PEOPLE'S CONGRESS OF CHINA 559-60 (Foreign Languages Press 2003).

Moreover, the mere failure of the Chinese people to challenge the prohibited content law in question surely cannot constitute evidence that the prohibited content offends the Chinese people's moral beliefs, as the publication or expression of the view that the Chinese people do *not* support that prohibited content law could itself be "prohibited content" under China's prohibited content laws. For example, as noted above, criticism of the Green Dam software program is itself "prohibited content."[131] Hence, it would be completely circular for the Chinese Government to argue that the people's failure to criticize the Green Dam software constitutes proof that they find the information censored by that software program to be morally objectionable. Similarly, any information regarding the Charter 08 petition is banned. Accordingly, the Chinese Government's ban on such information would be completely self-legitimizing if the people's acquiescence in the ban constituted evidence that they oppose the censored information on moral grounds. In any case, individuals, of course, often act contrary to their personal moral beliefs (with such deviant behavior often referred to as a "sin"[132]) and the moral code of their community (with such deviant behavior usually being the *sina qua non* of a "crime"[133]), and accordingly a person's actions cannot constitute proof of either.[134]

131. *See* text accompanying *supra* notes 54-74.

132. "Sin." Merriam-Webster Online Dictionary (2009), Merriam-Webster Online, Dec. 17, 2009, *available at* http://www.merriam-webster.com/dictionary/sin (defining "sin" as "an offense against religious or moral law").

133. "Crime." Dec.*id. at* http://www.merriam-webster.com/dictionary/crime (defining "crime" as "an act or the commission of an act that is forbidden or the omission of a duty that is commanded by a public law and that makes the offender liable to punishment by that law…").

134. David Hume, A Treatise of Human Nature Being An Attempt to Introduce the Experimental Method of Reasoning into Moral Subjects 469 (John Noon London 1739-40) (explaining that one cannot derive an "ought" from an "is" statement"). This distinction between a community's code of conduct and a person's ability to conform his or her conduct to that code is the essence of a criminal law system (regardless of whether that code of conduct reflects, or is intended to impart, a community's moral beliefs). *See generally Theories of Criminal Law*, Stanford Encyclopedia of Philosophy, Apr. 14, 2008, *available at* http://plato.stanford.edu/entries/criminal-law (accessed Dec. 30, 2009). This distinction between one's beliefs and one's actions is illustrated in recent prosecutions for distribution of obscenity through the internet. For example, in a recent state obscenity prosecution in the State of Florida, the defense counsel attempted to submit "Google Trends" data (which shows the relative popularity of given search terms within a geographic area (*see* www.trends.google.com) for the local community to demonstrate that searches for sexually explicit material are very popular in that community and accordingly the material distributed by his client didn't violate "contemporary community standards" (as the definition of obscenity is dependent in part on contemporary community standards). *See* Matt Richtel, *What's Obscene? Google Could Have an Answer,* nytimes.com, June 24, 2008, *available at* http://www.nytimes.com/2008/06/24/technology/24obscene.html (accessed Dec. 30, 2009)

As stated above, many other WTO members in addition to China enforce strict censorship rules,[135] and, if any such rule were to be challenged as a prohibited trade barrier in the WTO, the nation in question likewise would almost certainly attempt to justify it under the public morals exception. Countries with large Muslim populations often prohibit any criticism or ridicule of the Islamic religion or the Islamic leadership as well as any product (including a media item) that is inconsistent with the Islamic religion. For example, Kuwait bans any expression or publi-

(discussing Lawrence Walters' intention to use such data to defend his client, McCowen, against an obscenity charge) [hereinafter "*Richtel*"]; *see also Google to Prove You're a Sex-Fiend In Court,* gawker.com*, available at* http://gawker.com/5019146/google-to-prove-youre-a-sex+fiend-in-court (accessed Dec. 30, 2009); Lawrence G. Walters, *Obscenity trial?,* newstatesma.com, July 7, 2008, *available at* http://www.newstatesman.com/law-and-reform/2008/07/obscenity-community-google (accessed Dec. 30, 2009) [hereinafter "*Walters*"]. However, Russ Edgar, the Florida state prosecutor in the case argued that "the popularity of sex-related Web sites had no bearing on whether Mr. McCowen was in violation of community standards. 'How many times you do something doesn't necessarily speak to standards and values,' he said." *Richtel, supra* note 134. Ultimately, Mr. McCowen accepted a plea deal and this case was dismissed. *See Walters, supra* note 134. In a federal obscenity case, *United States v. Extreme Associates*, 352 F. Supp. 2d 578 (W.D. Pa. 2005), *rev'd*, 431 F.3d 150 (3d Cir. 2005), the prosecutor, Mary Beth Buchanan, the U.S. Attorney for the Western District of Pennsylvania, made a similar point when she was interviewed on CBS' show *60 Minutes:* "Just because this material is available, and citizens tolerate it, doesn't mean that they accept it[.]" Rebecca Leung, *Steve Kroft Reports On A $10 Billion Industry,* cbsnew.com, Nov. 21, 3003, *available at* http://www.cbsnews.com/stories/2003/11/21/60minutes/main585049.shtml (accessed Dec. 30, 2009). The Third Circuit Court of Appeals in *Extreme Associates* rejected the defendants' claim that the material they distributed did not violate community standards in Western Pennsylvania because customers in that community received that material in the privacy of their own homes and thus couldn't violate any "public morality" or community standards." 431 F.3d at 160-62. Moreover, while this case has been appealed to the Eleventh Circuit Court of Appeals (*United States v. Little*, No. 08-15964), that Circuit is unlikely to reverse this particular holding of the District Court, although it might overturn McCowen's conviction on other grounds. *See* Alyson M. Palmer, *11th Circuit Obscenity Case Tests Community Standards on the Internet,* law.com, Oct.30, 2009, *available at* http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202435052384 (accessed Dec.30, 2009) (citing a 2004 decision of the Eleventh Circuit rejecting a challenge to an Alabama ban on sex toys on the ground that the U.S. Supreme Court (in *Lawrence v. Texas*, 539 U.S. 558 (2003)) had recognized a right to sexual privacy that should encompass the right to enjoy obscene materials in the privacy of one's own home. Finally, in a federal obscenity prosecution in Florida, Paul D. Little, otherwise known as Max Hardcore, was convicted of distributing obscenity and sentenced to four years in prison (*see United States v. Little*, No, 07-170, 2008 WL 151875 (M.D. Fla. Jan. 16, 2008)), even though his attorney, Jeffrey J. Douglas, demonstrated to the jury that "there were millions of Web pages discussing such material" and significantly fewer Web pages discussing subjects such as University of Florida quarterback Tim Tebow. *Richtel, supra* note 134.

135. *See, e.g.*, Jean-Paul Marthoz, *CPJ 2009 list of killed journalist*s, International Project on Human Rights and the Media, humanrightsmediprojecct.org, Dec. 21, 2009, *available at* http://www.humanrightsmediaproject.org/2009/12/cpj-2009-list-of-killed-journalists.html (accessed Dec. 21, 2009) (reporting that "[a]t least 68 journalists worldwide were killed for their work in 2009, the highest yearly tally ever documented by the Committee to Protect Journalists").

cation that "criticizes Islam, the emir, the constitution or the neutrality of the courts or public prosecutor's office."[136] It also forbids any expression or publication that constitutes an "incitement to acts that will offend public morality"[137] as well as any content that is offensive to "religious sensibilities, public morality, and the 'basic convictions of the state.'"[138] In fact, the 56 nations of the Organization of the Islamic Conference currently are lobbying a committee of the U.N. to adopt an "anti-blasphemy treaty" that would ban any criticism or mockery of a religious symbol or belief.[139] Recent examples of countries enforcing such laws include the refusal of several countries to permit the publication or dissemination of cartoons (originally published by the Danish newspaper *Jyllands-Posten* in 2005*)* that ridiculed the Prophet Mohammad[140] and the recent closure of a radio station in Saudi Arabia because it had broadcast an interview of a Saudi man "speaking frankly about sex and show[ing] off erotic toys," according to a spokesman for the Saudi Ministry of Culture and Information.[141]

Given the pervasive nature of such censorship restrictions in the world as well as the ubiquity of Western media products, it would seem only a matter of time before a WTO member challenging a particular prohibited content law in the WTO would argue that the nation enforcing that law cannot rely on the public morals exception because it cannot prove that a majority of the people in that nation hold the moral belief that it is asserting. For example, Kazakhstan (as well as Russia, Jordan, Kuwait, Bahrain, Oman, and Qatar[142]) *banned Borat*, British comedian Sacha Baron Cohen's satirical depiction of "a bumbling, boorish, anti-Semitic, homophobic and misogynistic Kazakh television reporter named Borat Sagdiyev."[143] However, at least some residents of Kaza-

136. U.S. Department of State, *Doing Business In: Kuwait, available at* http://ww.state.gov/g/drl/rls/hrrpt/2007/100599.htm (accessed Dec. 21, 2009).

137. *Id*.

138. *Id*.

139. *See, e.g., Anti-blasphemy Treaty Sought*, San Diego Union Trib., November 20, 2009, at A12.

140. *See, e.g.*, Austin Cline, *Danish Cartoons of Muhammad: We Have a Right to Criticize & Comment on Islam, available at* http://atheism.about.com/od/danishcartoonsofmuhammad/p/DanishCartoons.htm (accessed Dec. 21, 2009).

141. *Frank Sex Talk Gets Arab TV Office closed*, San Diego Union Trib., Aug. 10, 2009, at A9.

142. *Borat Banned in Russia and Elsewhere,* thefileroom.org*, available at* http://www.thefileroom.org/documents/dyn/DisplayCase.cfm/id/1035 (accessed Dec. 21, 2009).

143. Steven Lee Myers*, Kazahkstan Laughs As Its Officials Try to Ban Borat—Europe—International Herald Trib.,* nytimes.com*, available at* http://www.nytimes.com/2006/09/27/world/europe/27iht-borat.2952940.html?_r=1&pagewanted=print (accessed Dec. 21, 2009) [hereinafter "*Myers*"].

hkstan have managed to see the film on the internet or elsewhere and enjoyed it. One viewer even claimed that he found it to be "an antidote to the articles and broadcasts that appear in official state media, where Kazakhstan is forever harmonious and prosperous[ ]"[144] [and] [t]here is an unwritten rule that the president's personality is never criticized."[145]

Similarly, Cohen's latest film, *Bruno*, in which he appears as gay Austrian fashionista named Bruno, has been banned in Ukraine, according to its Culture Ministry, because

> "[t]he film contains unjustified showing of genital organs and sexual relations and shows homosexual acts and homosexual perversions in an explicitly realist manner. (It also contains) sadistic manifestations which could damage the morality of citizens."[146]

Malaysia likewise has banned the film.[147] According to a representative of the Malaysia Film Censorship Board, Bruno is:

> banned because the story is based on gay life . . . There are a lot of sex scenes . . . It's contrary to our culture. Gay sex, or 'carnal intercourse against the order of nature,' is punishable by up to 20 years in jail and whipping in Malaysia. Sex toys, politically incorrect comments and jokes about religion also irked the censors, she said.[148]

At the same time, a number of Malaysians, including some Muslims, have begun to question whether the Government of Malaysia is controlling their personal conduct too strictly, and one event that caused a fair amount of consternation at least among Malaysian youth was the Government's banning of Beyoncé Knowles' scheduled concert in Malaysia in the fall of 2009.[149] According to Nasruddin Hassan Tantawi, the youth chief of the Pan Malaysian Islamic Party (PAS) which supported the Government's action, explained that "[w]e are not against entertainment, but it's the way she performs—her gyrating moves on stage and her sexy outfits . . . It will erode the moral values of our young people."[150] Yet, Knowles' music is extremely popular in Malaysia, and

144. *Id*.
145. *Id*.
146. *Bruno Banned in Ukraine Over Morality Damaging,* entertainment.oneindia.in, July 16, 2009, *available at* http://entertainment.oneindia.in/hollywood/top-stories/scoop/2009/ukraine-ban-cohen-bruno-170709.html, (accessed Dec. 21, 2009).
147. Julia Zappei, *Sacha Baron Cohen's 'Bruno' Banned in Malaysia,* huffington post.com, Sept. 28, 2009, *available at* http://www.huffingtonpost.com/2009/09/28/sacha-baron-cohens-bruno-_4_n_302456.html (accessed Dec. 21, 2009).
148. *Id*.
149. *Beyonce Places Hold on Concert in Malaysia,* gossiponthis.com, October 21, 2009, available at http://gossiponthis.com/2009/10/21/beyonce-places-hold-on-concert-in-malaysia (accessed Dec. 21, 2009).
150. Graham Smith, *Beyonce Postpones Malaysian Concert Amid Fears of Muslim Protests Against Her* "*Sexy Outfits*," dailymail.co.ok, Oct. 20, 2009, *available a*t http://www.dailymail.co.uk/tvshowbiz/article-1221614/Beyonce-delays-amid-fears-Muslim-protests-sexy-outfits.html#ixzz0aNIXxZPi (accessed Dec. 21, 2009).

her latest album hit platinum sales there in October 2009, the very month in which she was scheduled to perform in Malaysia. As one Malaysian writer noted, though, for some Malaysians, "questions remain about whether Malaysia's conservative stance truly protects the sanctity of the country's culture, or is on the path to Taliban-land."[151]

In addition to ruling on whether a majority of a WTO member's population must support a moral belief asserted by a member attempting to justify a trade restriction under the public morals exception and if so, what evidence would be sufficient to establish their beliefs, WTO panels and the Appellate Body could be called upon to answer three other major questions regarding the public morals exception. These questions are: (1) Can a WTO member rely on the public morals exception to

151. Farrah Hamid, *Is Malaysia's "Boom Boom Pow" on Entertainment a Danger Zone?*, *elanthemag.com*, Sept/ 29, 2009, *available at* http://www.elanthemag.com/index.php/site/blog_detail/is_malaysias_boom_boom_pow_on_entertainment_a_danger_zone (accessed Dec. 21, 2009). As an aside, in October 2009, a Shariah (Muslim) court in Malaysia affirmed the caning of a young Muslim woman, Kartika Sari Dewi Shukarno, for drinking a beer in public. *Appeals Court Upholds Malaysia Woman's Caning for Drinking Beer, cnn.wire.blogs.cnn.com*, Sept. 21, 2009 *available a*t http://cnnwire.blogs.cnn.com/2009/09/29/appeals-court-upholds-malaysia-womans-caning-for-drinking-beer (accessed Dec. 21, 2009). While Islamic law bans the drinking of alcohol in public (Tom Henheffer, *Malaysian Model Caned for Drinking, mcleans.ca*, Oct. 22, 2009, *available at* http://www2.macleans.ca/2009/10/22/malaysian-model-caned-for-drinking (accessed Dec.21, 2009)) and 60% of Malaysia's population is Muslim (*Appeals Court Upholds Malaysia Woman's Caning for Drinking Beer, cnn.wire.blogs.cnn.com*, Sept. 21, 2009 *available a*t http://cnnwire.blogs.cnn.com/2009/09/29/appeals-court-upholds-malaysia-womans-caning-for-drinking-beer (accessed Dec. 21, 2009)), the general consensus in Malaysia (and certainly the members of a number of Muslim women's organizations in Malaysia) is that Ms. Shukarno's caning sentence was unnecessarily harsh. *See, e.g., Malaysia Delays Caning of Muslim Model for Drinking Beer Until After Ramadan, dailymail.co.uk*, Aug. 24, 2009, *available at* http://www.dailymail.co.uk/news/worldnews/article-1207643/Muslim-model-woman-Malaysia-caned-caught-drinking-beer.html (accessed Dec. 21, 2009); Julia Zappei, *Malaysia: Woman to Be Caned for Drinking Alcohol*, New Straits Times, July 22, 2009, *reprinted Muslim Women Living Under Muslim Law, wluml.org, available at* http://www.wluml.org/node/5443 (accessed Dec. 21, 2009); Tom Henheffer, *Malaysian Model Caned for Drinking, mcleans.ca, Oct. 22, 2009, available at http://www2.macleans.ca/2009/10/22/malaysian*-model-caned-for-drinking (accessed Dec. 21, 2009) ("According to Hamidah Marican, executive director of Sisters of Islam, which works to strengthen women's rights in Malaysia, 'Kartika's case…has caused damage to Malaysia's reputation as a model Muslim country."). Some of the people protesting Shukarno's sentence have noted that a man recently had been sentenced to only 30 days in prison for drinking alcohol in public. *See, e.g.*, Julia Zappei, *Malaysia: Woman to be Caned for Drinking Alcohol*, New Straits Times, July 22, 2009, *reprinted Muslim Women Living Under Muslim Law, wluml.org, available at* http://www.wluml.org/node/5443 (accessed Dec. 21, 2009). A Muslim supporter of Shukarno's sentence perhaps elucidated the Shariah court's motivation for imposing such a harsh sentence when he stated "Sharia in Malaysia is not strong, so maybe Kartika is the first person to help spark the needed change [.]" Henheffer, *Malaysian Model Caned for Drinking*, mcleans.ca, Oct. 22, 2009, *available at* http://www2.macleans.ca/2009/10/22/malaysian-model-caned-for-drinking (accessed Dec. 21, 2009).

restrict entry of a product or service in a specific local territory where a majority of the local population objects to that product or service on a moral ground, if only a minority of the national population objects to that product or service?; (2) Must adults who are officially or unofficially denied the right to vote in a WTO member that raises a public morals defense in a WTO dispute proceeding be taken into account in a determination of whether a majority of the people in that nation supports the moral belief being asserted by that member?; and (3) Can a WTO member rely on the public morals exception to justify a restriction imposed on a product or service from a particular nation that is based solely on a humanitarian (as opposed to a moral) concern for people living in that nation?

With respect to the first of these three questions, for example, seven Indian states banned the movie *The Da Vinci Code* on the ground that the movie's message that Jesus could have married Mary Magdalene and fathered a child with her and their descendants live today would offend their Christian populations.[152] The Supreme Court of India refused to approve a law banning the movie from all of India.[153] However, if India had instead imposed an import ban enforceable by customs officials only in the seven states in question and another WTO member had challenged that ban in the WTO, it isn't clear whether India could have prevailed under the public morals exception, even if it had been able to demonstrate that a majority of people living in those states would have been morally offended by the movie.

With respect to the second of these questions, consider the fact that, in Saudi Arabia, which joined the WTO in 2005,[154] women recently have been granted the right to shop unadorned by their burkas[155] and unattended by their husbands or other male family members[156] (assuming their husband or another male relative has granted them the permission to do so) in the many new shopping malls that are spouting up all around

152. *India court Blocks Da Vinci Ban,* news.bbc.co.uk, June 13, 2006, available at http://news.bbc.co.uk/1/hi/entertainment/5074578.stm (accessed Dec. 30, 2009); *see also Chinese Ban Da Vinci Code Movie*, BBC News, Aug. 6, 2006, *available at* http://news.bbc.co.uk/2/hi/entertainment/5059658.stm (accessed Dec. 21, 2009) (noting that the film also had been banned in Fiji, Pakistan, and some Indian states)).

153. *Id*.

154. World Trade Organization, *Members*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (accessed Dec. 17, 2009).

155. Ebey Soman, *The Head-covering of Muslim Women and the Issues and Controversies Surrounding It*, May 5, 2008, http://www.relijournal.com/Islam/The-Burqa-Facts—Issues.119799.

156. *Id*.

the country.[157] However, their right to vote on any matter, while technically acknowledged, is effectively denied.[158] If a WTO member initiated a case against Saudi Arabia in the WTO, claiming that Saudi Arabia's many import bans—on items such as nylons,[159] educational media items designed specifically for women,[160] cosmetics,[161] and various foreign movies[162]—violate the prohibition against quantitative restrictions in Article XI of the GATT 1994, Saudi Arabia almost certainly would attempt to justify the bans under the public morals exception in Article XX (a) of the GATT 1994. If Saudi Arabia, in order to establish its defense under this exception, were required to prove that a majority of its citizens, male and female, is morally offended by such products, it could find it difficult to do so,[163] given that women constitute 45.87% of the population,[164] and certainly the majority of consumers, in Saudi Arabia today.[165]

With respect to the third of these questions, in 1996, the Massachusetts legislature enacted a law prohibiting state agencies from purchasing goods or services from any company that did business with Myanmar (formerly Burma), with few exceptions.[166] According to pro-

157. *Id*.

158. Women in Saudi Arabia have legally been granted the right to vote. However, in recent elections, election organizers, perhaps at the behest of some government ministers, have claimed that it still isn't technically possible for women to vote on account of the need to segregate men and women in public (women are not permitted to be in the presence of a man who is not a relative). In addition, women are not permitted to drive or travel anywhere alone without a man's permission, so men have been able to effectively prevent women from exercising their right to vote in any case. Christine Lagario, *No Women allowed in Saudi Vote,* cbsnews.com, Feb. 4, 2005, *available at* http://www.cbsnews.com/stories/2005/02/04/eveningnews/main671873.shtml (accessed Dec. 21, 2009); *Saudi: Why We Punished Rape Victim*, CNN, Nov. 20, 2007, *available at* http://edition.cnn.com/2007/WORLD/meast/11/20/saudi.rape.victim/index.html (accessed Dec. 21, 2009).

159. John H. Donboli U Farnaz Kashefi, *Doing Business in the Middle East: A Primer for U.S. Companies*, 38 Cornell Int'l L.J. 413, 434 (2005).

160. *Id*.

161. *Id*.

162. *Id*.

163. This assumes that the Saudi measures at issue are not otherwise excused under Saudi Arabia's protocol of accession to the WTO. *See Member Information: Saudi Arabia,* wto.org*, available at* http://www.wto.org/english/theWTO_e/countries_e/saudi_arabia_e.htm (accessed Dec. 30, 1009).

164. The Cia World Factbook 2009, *Central Intelligence Agency* (Skyhorse Publ'g 2008).

165. Caryle Murphy, *Why, Despite a Head-to-toe Coverage Rule, Saudi Women Must Still Buy Their Underwear from a Man,* globalpost.com, Mar. 16, 2009, *available at* http://www.globalpost.com/dispatch/saudi-arabia/090313/your-shoe-size-maam-id-judge-you-c-cup (accessed Dec. 30, 2009).

166. An Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar), 1996 Mass. Acts 239, ch.130 (*codified at* Mass. Gen. Laws §§ 7:22G-7:22M, 40F1/2 (1997)).

ponents of the law, which was widely referred to as the "Massachusetts Burma Law,"[167] its purpose was to demonstrate Massachusetts' support for pro-democracy groups in Myanmar and encourage the restoration of democracy there.[168] As the U.S. had committed Massachusetts to complying with the Agreement on Government Procurement (the GPA),[169] the EC and Japan filed suit against the U.S. in the WTO, claiming that the Massachusetts Burma Law constituted a violation by the U.S. of commitments made to the EC and Japan under Articles VIII (b), X, and XIII of the GPA and no exception in the GPA addressed Massachusetts' concern.[170] Article VIII (b) of the GPA specifically states that "any conditions for participation in tendering procedures shall be limited to those which are essential to ensure the firm's capability to fulfil the contract in question."[171]

As Article XXIII of the GPA also provides a public morals exception to the commitments made by signatories to the GPA,[172] this dispute proceeding raised the question of whether a WTO member's "humanitarian concern" for the people of another WTO member can justify the former member's ban or limit on a product or service from the latter member under the public morals exception to the WTO rules, when people in the former member don't morally object to the product or service being restricted. After the U.S. Supreme Court struck down the Massachusetts Burma law on the ground that federal sanctions legislation regarding Myanmar preempted it,[173] the EC and Japan allowed their request for the establishment of a panel in the WTO proceeding to lapse.[174] Thus, the question of whether "humanitarian concerns" are encompassed with public morals exception to the WTO rules remains, and, given nations'

167. *See, e.g.*, International Law in Brief (Nov. 16-27, 1998): Judicial Decisions, National Foreign Trade Council v. Baker, No. 97 12042 (D. Mass. Nov. 4, 1998), asil.org, *available at* http://www.asil.org/ilib0111.cfm (accessed Dec. 30, 2009).

168. Dan Beeton & Ted Hobart, *What is the Massachusetts Law and Does It Matter?,* peaceworkmagazine.org, *available at* http://www.peaceworkmagazine.org/pwork/0300/0316.htm (accessed Dec. 30, 2009).

169. Note that the U.S. had committed that most, if not all, Massachusetts government entities would comply with the requirements of the GPA. *See* U.S. Schedule of Commitments under the GPA, App. 1, Anx. 2 ("Sub-Central Government Entities which Procure in Accordance With the Provisions of this Agreement"), at 3, *available at* http://www.wto.org/english/tratop_e/gproc_e/usa2.doc (accessed Dec. 24, 2009).

170. *See, e.g., U.S.—Measure Affecting Government Procurement*, WT/DS88, *available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds88_e.htm (accessed Dec. 21, 2009) [hereinafter "*U.S.—Burma*"].

171. GPA, *supra* note 10, Art. VIII (b).

172. *Id.* Art. XXIII.

173. Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000).

174. *U.S.—Burma, supra* note 170.

and their localities' propensity to utilize their trade laws to effect social change in other countries,[175] WTO panels and the Appellate Body can expect that they will have to provide an answer to this question within the next few years.

II. History of the Public Morals Exception

The WTO Agreement[176] that was negotiated during the Uruguay Round of Multilateral Trade Negotiations (the Uruguay Round)[177] and established the WTO[178] is considered to be the successor agreement to the 1947 General Agreement on Tariffs and Trade (the GATT 1947),[179][180] which became the de facto international trade agreement in 1947 after the U.S. Congress failed to ratify Havana Charter establishing the International Trade Organization (ITO).[181] The WTO Agreement was signed by 128 nations in 1994,[182] and, on January 1, 1995, the WTO commenced operations.[183] The GATT 1994 (which consists of the GATT 1947,[184] together with various protocols, amendments, and understandings regarding the GATT 1947 that had been entered

175. *See, e.g.*, Executive Order 13126, signed by President Clinton on June 12, 1999 (banning federal acquisitions of products produced with forced or indentured child labor, except from Mexico, Canada, and the signatories of the GPA, based on the uncertainty as to whether the North American Free Trade Agreement (NAFTA) and the GPA permitted such measures); Clif Burns, *More States Get into the Sanctions Business,* exportlaw.blog.com, Apr. 16, 2009, *available at* http://www.exportlawblog.com/archives/490 (accessed Dec. 30, 2009) (discussing state restrictions on trade with other countries and reporting that an article in the Abu Dhabi daily THE NATIONAL stated that more than 20 states in the United States have passed laws, or have legislation pending, to require state pension funds to divest stocks of companies doing business in Iran).

176. WTO Agreement, *infra* note 422.

177. *Id.*, Preamble, ¶ 4.

178. *Id*. Art. I.

179. GATT 1947, *supra* note 10.

180. Marrakesh Declaration of 15 Apr. 1994, ¶ 6, *available at* http://www.wto.org/english/docs_e/legal_e/marrakesh_decl_e.htm (accessed Dec. 30, 2009); Final Act Embodying The Results Of The Uruguay Round Of Multilateral Trade Negotiations, Apr. 15, 1994, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 2 (1999), 1867 U.N.T.S. 14, 33 I.L.M. 1143, Arts. 5-6 (1994) [hereinafter the "Final Act"].

181. ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY 11-30 (Lexis Law Pub. 1990); *see also From GATT to the WTO and Beyond Research Guide,* ll.georgetown.edu, Jan. 2007, *available at* http://www.ll.georgetown.edu/guides/FromtheGATTtotheWTO.cfm (accessed Dec. 30, 2009).

182. *GATT Members: The 128 Countries That Had Signed GATT by 1994,* wto.org, *available at* http://www.wto.org/english/theWTO_e/gattmem_e.htm (accessed Dec. 30, 2009).

183. Final Act, *supra* note 180, at ¶ 3.

184. Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter "GATT 1947"].

into by the parties prior to the signing of the WTO Agreement[185]), the General Agreement on Trade in Services (the GATS),[186] and the Agreement on Trade-Related Aspects of Intellectual Property Protection (the TRIPS Agreement)[187] are referred to as the three "pillar agreements" of the WTO system.[188] The GATT 1994 is the main agreement governing WTO members' trade in goods, and it is supplemented by a number of other agreements, each of which addresses either a specific issue concerning the trade in goods or a specific type of good.[189] As their names suggest, the GATS regulates members' trade in services[190] and the TRIPS Agreement governs the members' obligations regarding the protection of foreigners' intellectual property rights.[191]

The economic rationale underlying the WTO free trade system is discussed in greater detail in Section V of this article, but, in general, the WTO rules restricting governments' intervention in trade matters are intended to minimize consumers' costs and accordingly maximize their wealth in each of the WTO member countries.[192] From the inception of the GATT 1947, however, Article XXI excused "any action which [a contracting party] considers necessary for the protection of its essential security interests taken in time of war or other emergency in international relations . . . [or which is taken] in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security."[193] In addition, Article XX exempted several other types of government measures.[194] In particular, paragraph (a) of Article XX of the GATT 1947 exempted any measure which a nation applied in a non-discriminatory manner and which was "necessary to protect public morals."[195]

185. The GATT 1994 consists of: (a) the provisions of the Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194; (b) the provisions of legal instruments which entered into force under GATT 1947 before the date of entry into force of the WTO Agreement; (c) the Understandings on the interpretation of a number of GATT Articles, adopted at the end of the Uruguay Round; and (d) the Marrakesh Protocol to GATT 1994. GATT 1994, ¶ 1.

186. GATS, *supra* note 10.

187. TRIPS Agreement, *supra* note 10.

188. *See, e.g., TRIPS: FAQs,* wto.org*, available at* http://www.wto.org/english/tratop_e/trips_e/tripfq_e.htm (accessed Dec. 30, 2009).

189. *See, e.g.*, UNDERSTANDING THE WTO: THE AGREEMENTS, Overview: A Navigational Guide, wto.org*, available at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm (accessed Dec. 30, 2009).

190. GATS, *supra* note 10, at Art. 1, ¶ 1.

191. TRIPS Agreement, *supra* note 10, at Art. 1, ¶ 3.

192. *See* text accompanying *infra* notes 375-612.

193. GATT 1994, *supra* note 9, at Art. XXI.

194. *Id.*, Art. XX.

195. *Id.*, Art. XX, ¶ (a).

The language of the public morals exception contained in Article XX (a) of the GATT 1947 remained unchanged when the GATT 1947 was incorporated into the GATT 1994 at the commencement of the WTO.[196] In addition, Article XXIII of the GPA exempts any measure "necessary to protect public morals, order or safety"[197] and Article XIV (a) of the GATS exempts any measure "necessary to protect public morals or to maintain public order."[198] Similarly, Article 27 of the TRIPS Agreement allows an exception from the patentability of any invention if "necessary to protect ordre public or morality,…provided that such exclusion is not made merely because the exploitation is prohibited by their law."[199] However, none of the terms "public morals," "public order," and "order public" is defined in any of the WTO agreements,[200] although a footnote appended to the phrase "public order" in Article XIV (a) of the GATS states that "[t]he public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society."[201]

In addition, the negotiating history of the public morals exception contained in Article XX(a) of the GATT 1947 consists only of the fact that this exception appeared in the first draft of the Havana Charter prepared by the U.S. Government in December of 1945[202] and, during a meeting in New York City regarding this draft, the Norwegian delegate stated that it was his understanding that his country's restrictions on the importation, production, and sale of alcoholic beverages would be excused under the exception.[203] Stephen Charnovitz, in his 1998 article entitled *The Moral Exemption in Trade Policy*,[204] conducted an extensive study of the negotiating history of Article XX(a) of the GATT 1947 as well as prior trade treaties and concluded that "[t]he simplest explanation for why article XX(a) was not discussed is that the negotiators knew what it meant."[205] He clarified that the "negotiators knew that it was an amorphous term covering a wide range of activities that

196. *Id*,. ¶ 1.
197. GPA, *supra* note 10, at Art. XXIII, ¶ 2.
198. GATS, *supra* note 10, at Art. XIV (a).
199. TRIPS Agreement, *supra* note 10, at Art. 27, ¶ 2.
200. *U.S.–Gambling Panel Report, supra* note 27, at 6.460.
201. GATS, *supra* note 10, at Art. XIV (a), n. 5.
202. Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 Va. J. Int'l L. 689, 704 (1998) (omitting internal citations) [hereinafter "*Charnovitz*"].
203. *Id*. (citing Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, U.N. ESCOR, U.N. Doc. E/PC/T/34 (Mar. 5, 1947), at 31).
204. *Charnovitz, supra* note 202.
205. *Id*. at 704 (omitting internal citation).

provoked moral concerns by particular governments [ ]"[206] because a number of trade and commercial treaties prior to the GATT 1947 had contained some type of morals exception.[207]

Charnovitz pointed out, for example, that, in 1923, a number of nations had entered into the International Convention Relating to the Simplification of Customs Formalities,[208] which exempted any past or future treaty between two or more members relating to "the preservation of the health of human beings, animals, or plants . . . the protection of public morals or international security."[209] Similarly, he revealed, in 1927, several nations had entered into the International Convention for the Abolition of Import and Export Prohibitions and Restrictions,[210] which contained an exception "for moral and humanitarian reasons."[211] In fact, Charnovitz explained,

> After 1927, the moral and humanitarian exception became an established (but not universal) practice in commercial treaties. The phraseology in most treaties with this exception is: 'Prohibitions or restrictions imposed on moral or humanitarian grounds.' Other treaties provided that exceptions may be made 'on moral or humanitarian grounds.' One treaty provided an exception for the 'maintenance of public morality.' One treaty provided an exception for the 'protection of health and public morals.' Another treaty lacked a moral exception, but included an exception 'for putting into force of police or fiscal laws, including laws prohibiting or restricting the import, export or sale of alcohol or alcoholic beverages, of opium, cocoa leaf and their derivatives and other narcotic substances.'[212]

In addition to the fact that several treaties contained a general morals exception, a number of nations banned the importation of specific items pursuant either to a treaty or domestic legislation, prior to commencement of negotiations regarding the GATT 1947 in 1945. For example, in 1909, the U.S. "banned the importation of any film 'of any prize fight or encounter of pugilists' which may be used for purpose of public exhibition [,]"[213] and, in 1929, the U.S. Customs Service denied entry to Jean Jacques Rousseau's autobiography entitled CONFESSIONS on

206. *Id*. at 704, n.94.
207. *Id*. at 705-10.
208. International Convention Relating to the Simplification of Customs Formalities, Nov.3, 1923, 30 L.N.T.S. 373.
209. *Charnovitz, supra* note 202, at 705.
210. International Convention for the Abolition of Import and Export Prohibitions and Restrictions, Nov. 8, 1927, 46 Stat. 2461, 97 U.N.T.S. 393. The Convention did not go into force.
211. *Charnovitz, supra* note 202, at 706-707.
212. *Id*. at 709-10 (omitting internal footnotes).
213. *Id*. at 714 (citing An Act to Prohibit the Importation and the Interstate Transportation of Films or Other Pictorial Representation of Prize Fights, and for Other Purposes, July 31, 1912, 1, 37 Stat. 240 (repealed).)

the ground that it contained lewd or obscene material and accordingly was "injurious to public morality."[214] Trade in slaves, firearms, liquor, opium, obscenity, lottery tickets, and abortion-inducing drugs had also been banned or restricted by the time of the negotiations regarding the GATT 1947.[215] The U.S. had even banned the importation of the plumage of certain foreign birds in order to encourage the protection of those birds.[216]

Clearly, then, the public morals exception contained in the GATT 1947, and thereafter in the GATT 1994 and the other major WTO agreements, should be viewed as a continuation of a previous custom among nations rather than a novel concept first introduced in the GATT 1947. At the same time, it might very well be significant that the GATT 1947 negotiators adopted an exclusion for the protection of "public morals," when most prior treaties had exempted measures for the protection of "morals or humanitarian concerns.[217] This is particularly the case, given that, in the context of justifying a trade restriction, the phrase "public morals" appears to reference the morals of the human beings resident in the importing nation (as the definition of "public morals" adopted by the Appellate Body in *U.S.–Gambling* suggests) whereas the phrase "humanitarian concerns" appears to reference the welfare of human beings resident in the exporting nation.[218]

214. *The Online Books Page: Banned Books Online,* onlinebooks.library.upenn.edu, *available at* http://onlinebooks.library.upenn.edu/banned-books.html (accessed Dec. 21, 2009) (*citing* ANNE HAIGHT & CHANDLER GRANNIS, BANNED BOOKS (R. R. Bowker Company 1978).

215. *Charnovitz, supra* note 202, at 716-17.

216. *Id.* at 707 (*citing* Department of State, The Secretary of State to the Minister in Switzerland (Wilson), *in* Papers Relating to the Foreign Relations of the United States, 1937, at 257 (1942); ROBIN W. DOUGHTY, FEATHER FASHIONS AND BIRD PRESENTATION *passim* (1975)).

217. *Cf.* The well-established principle of statutory construction "inclusio unius est exclusio alterius," meaning "To express one thing is to exclude another." BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 432 (Oxford Univ. Press 2001); *see also* William N. Eskridge & Philip P. Frickey, *The Supreme Court 1993 Term: Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 97, 99 (1994) (referring to both the rule of "inclusio unius est exclusio alterius" and the principle that "[a] broad read-ing [ ] of statutory provisions [should be avoided] if . . .] the legislature] has specifically provided for the broader policy in more specific language elsewhere") (omitting internal citations); *Charnovitz, supra* note 202, at 716-17, n.168 (commenting that one writer (V.A. Seyid Muhammad in his book THE LEGAL FRAMEWORK OF WORLD TRADE (Stevens & Sons 1958) has suggested (without providing any supporting evidence) that the exclusion for humanitarian concerns was narrowed to the exception "relating to the products of prison labour" provided for in paragraph (e) of Article XX of the GATT 1947).

218. *See, e.g.*, definitions of "humanitarian" used as an adjective in text accompanying *infra* notes 202—217.

In any case, for the first 56 years after the GATT 1947 was signed by twenty-three nations at the conclusion of World War II,[219] no GATT or WTO panel addressed the meaning of the public morals exception to the WTO rules.[220] Then, in 2003, the twin-island nation of Antigua and Bermuda (Antigua) filed suit against the U.S. in the WTO, alleging that several U.S. state and federal laws prohibited Antigua from providing on-line gambling services to U.S. residents in violation of the U.S.' commitment to liberalize "[o]ther recreational services (except sporting)."[221] The U.S. had listed this service industry category in its GATS schedule without reservation or limitation.[222] The U.S.' response to Antigua's complaint was two-pronged. First, it claimed that this particular category in its GATS schedule did not include on-line gambling services.[223] Furthermore, it argued, even if this category did include on-line gambling services, the U.S.' legal prohibitions against on-line gambling had been enacted to "protect public morals or maintain public order" in the U.S. and therefore the U.S.' violation of its GATS commitment in this regard was excused under Article XIV (a) of the GATS.[224]

Specifically, Article XIV (a) of the GATS reads as follows:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary of unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption of enforcement by any Member of measures:
>
> (a) necessary to protect public morals or to maintain public order[.][225]

At the outset of the WTO panel's decision in this case, the panel found that the category of "[o]ther recreational services (except sporting)" in the U.S.' GATS schedule did indeed encompass on-line gambling services.[226] Consequently, it concluded that the several state and federal U.S. laws prohibiting on-line gambling services constituted a violation of the U.S.' commitment to allow foreign service providers to provide such

219. Douglas A. Irwin, Petros C. Mavroidis, and Alan Sykes, THE GENESIS OF THE GATT 101, *American La Institute Reporters Series on WTO Law* (Cambridge University Press 2009) [hereinafter "IRWIN"].

220. *U.S.–Gambling Panel Report*], *supra* note 27, at ¶ 6.460.

221. Id. at ¶¶ 1.2-1.4.

222. *Id*. at ¶ 3.30.

223. *Id*. at ¶ 6.38-6.40.

224. *Id*. at ¶ 6.457.

225. GATS, *supra* note 10, at Art. XIV (a). Again, appended to paragraph (a) of Article XIV of the GATS is a footnote 5, which reads: "The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society."

226. *U.S.–Gambling Panel Report, supra* note 27, at 6.134.

services, as set forth in the U.S.' Schedule of Specific Commitments under the GATS.[227] Turning to the U.S.' claim that this violation was excused under Article XIV (a) of the GATS, the panel next indicated that the public morals exception in Article XIV (a) of the GATS (with the exclusion of the reference to public order) also existed in Article XX (a) of the GATT 1994.[228] It then followed a standard treaty interpretation analysis of this exception[229] in accordance with the treaty interpretation rules established in the Vienna Convention on the Law of Treaties (the Vienna Convention).[230]

Articles 31 and 32, *inter alia*, of the Vienna Convention provide that

> Article 31
>
> General rule of interpretation
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[231]
>
> . . .
>
> Article 32
>
> Supplementary means of interpretation
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable.[232]

As is customary in WTO cases, the panel consulted the Shorter Oxford English Dictionary in order to ascertain the ordinary meaning of the terms "public morals" and "public order."[233] First, the panel pointed out that the word "public" is defined therein as "Of or pertaining to the people as a whole; belonging to, affecting, or concerning the community or nation."[234] Given this definition, the panel noted (almost apologetically) that it was its belief "that a measure that is sought to be justified

227. *Id*. at ¶ 6.454.
228. *Id*. at ¶ 6.460.
229. *Id*. at ¶ 6.459.
230. Vienna Convention on the Law of Treaties, Arts. 31-32, 23 May 1969, 1155 U.N.T.S. 331, 8 ILM 679 (1969).
231. *Id*. at Art. 31, ¶ 1.
232. *Id.*, at Art. 32.
233. *Id*. at ¶ 6.463.
234. *Id*. at ¶ 6.463 (citing The Shorter English Dictionary, 2002).

under Article XIV (a) must be aimed at protecting the interests of the people within a community or nation as a whole."[235] It then stated that the word "morals" was defined in the Shorter Oxford English Dictionary as "[…] habits of life with regard to right and wrong conduct."[236] Accordingly, it concluded that the ordinary meaning of the term "public morals" in the public morals exception to the GATS (and the WTO rules more generally) is "standards of right and wrong conduct maintained by or on behalf of a community or nation."[237]

The panel next indicated that the most appropriate definition of the word "order" offered in the Shorter Oxford English Dictionary is "A condition in which the laws regulating the public conduct of members of a community are maintained and observed; the rule of law or constituted authority; absence of violence or violent crimes."[238] The panel then elaborated that, in its view, the term "public order" in Article XIV (a) of the GATS refers to "the preservation of the fundamental interests of a society, as reflected in public policy and law[,]. . . . [and] [t]hese fundamental interests can relate, *inter alia*, to standards of law, security, and morality."[239] The panel also clarified that, while it considered "public morals" and "public order" to be "two distinct concepts in Article XIV (a) of the GATS [,] . . . both concepts "seek to protect largely similar values [.]"[240] Moreover, it noted, "the content of these concepts [of public morals and public order] for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values."[241]

As indicated above, the Vienna Convention treaty interpretation rules provide that, if the ordinary meaning of a treaty provision is neither ambiguous nor absurd, that ordinary meaning should be followed,[242] and, for this reason, the panel determined that the above-stated ordinary meanings of the terms "public morals" and "public order" should be followed in this case.[243] In its decision, the panel did not further address the "public aspect" of its definition of "public morals" to any greater extent. It simply noted that gambling and betting services have long

235. *Id*. at ¶ 6.463.
236. *Id*. at ¶ 6.464 (citing The Shorter English Dictionary, 2002).
237. *Id*. at ¶ 6.465.
238. *Id*. at ¶ 6.466.
239. *Id*. at ¶ 6.467.
240. *Id*. at ¶ 6.468.
241. Id. at ¶ 6.461.
242. *Supra* notes 230-232.
243. *U.S.–Gambling Panel Report, supra* note 27, at ¶¶ 6.465-6.467.

been considered by nations all around the world to implicate moral and public order concerns,[244] and then it reviewed the specific U.S. state and federal laws that Antigua was challenging to determine if the U.S. Congress, in particular, had enacted these laws in order to protect "public morals" and/or "public order." After reviewing a number of laws at length, the panel ultimately determined that the U.S. Congress had intended for three of the federal statutes that Antigua was challenging—the Wire Act,[245] the Travel Act,[246] and the Illegal Gambling Business Act,[247] read together with certain state laws—to "address concerns pertaining to money laundering, organized crime, fraud, underage gambling and pathological gambling."[248] As all of these situations involved violations of standards of right conduct, the panel concluded that these laws met the definition of "measures to protect 'public morals or public order.'"[249]

Finally, however, the panel ruled that the U.S. had failed to provisionally justify that any of these laws were "necessary to protect public morals and/or public order within the meaning of Article XIV (a)."[250] This was the case, according to the panel, because "the U.S. ha[d] declined Antigua's invitation to engage in bilateral and/or multilateral consultations and/or negotiations to determine whether there . . . [was] a way of addressing its concerns in a WTO-consistent manner."[251] In addition, the panel ruled that, given that the federal Interstate Horseracing Act (IHA) permitted domestic companies to provide on-line gambling services in connection with horse races, the U.S. had not met its burden of proving that its refusal to permit Antigua to provide such services did not "constitute 'arbitrary or unjustifiable discrimination . . . and/or a 'disguised restriction on trade' in accordance with the requirements of the chapeau of Article XIV."[252] In light of all of the above, the panel ordered the U.S. to bring its laws into compliance with its GATS commitments.[253]

The Appellate Body in this case affirmed parts of the panel's decision and reversed other parts. Specifically, it reversed the panel's conclusion that various U.S. state laws constituted a violation of the

244. *Id*. at ¶¶ 6.471-6.473.
245. 18 U.S.C. § 1084.
246. *Id.* § 1952.
247. *Id.* § 1955.
248. *Id*. at ¶ 6.486.
249. *Id.* at ¶ 6.481.
250. *Id*. at ¶ 6.535.
251. *Id*. at ¶ 6.533.
252. *Id*. at ¶ 6.607.
253. *Id*. at ¶ 7.5.

U.S.' GATS commitments[254] and it reversed the panel's conclusion that the U.S. had not met its burden of proving that the U.S. Congress' enactment of the Wire Act, the Travel Act, and the Illegal Gambling Business Act were "necessary" to "protect public morals or maintain public order" in the U.S. because the U.S. had not met with officials of Antigua or the international community to attempt to resolve the dispute informally.[255] However, it affirmed the following findings of the panel: (1) these three laws constituted a violation of the U.S.' GATS commitments;[256] (2) these laws were intended by the U.S. Congress to "protect public morals or maintain public order;"[257] and, (3) in light of the fact that the Interstate Horseracing Act permitted domestic companies to provide on-line gambling services, all of the federal laws in question arbitrarily and unjustifiably discriminated against Antigua within the meaning of the chapeau language of Article XIV (a) of GATS.[258] Most important from the point of view of this article, the Appellate Body agreed with the panel that the "public morals or public order exception" found in Article XIV (a) of the GATS had been derived from the "public morals exception" in Article XX (a) of the GATT 1947 and it adopted the panel's definitions of "public morals" and "public order" without further amendment or comment.[259]

Some commentators have lamented that the Appellate Body, in *U.S.–Gambling*, did not further clarify the meaning of the public morals exception to the WTO rules.[260] Nonetheless, the Appellate Body's endorsement of the panel's definition of "public morals" and "public order," as well as its possible endorsement of the panel's further statements regarding the public morals exception, are quite significant. The specific statements of the panel referred to are "a measure that is sought to be justified under Article XIV (a) must be aimed at protecting the interests of the people within a community or nation as a whole"[261] and "public morals" and "public order" in any WTO member can "vary in time and place, depending upon a range of factors, including prevailing social, cultural, ethical and religious values."[262] This is the case, because

254. *Id*. at ¶ 6.531.
255. *Id*.
256. *U.S.–Gambling AB Report, supra* note 27, at ¶ 373.
257. *Id*.
258. *Id*.
259. *Id*. at ¶ 296.
260. *See, e.g.*, Mark Wu, *Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine*, 33 YALE J. INT'L L. 215, 229 (Winter 2008).
261. *U.S.–Gambling Panel Report, supra* note 27, at ¶ 6.465.
262. *Id*, at ¶ 6. 461.

these statements could be interpreted to mean that a WTO member (if challenged on this point) must demonstrate that a majority of its citizens actually ascribe to the moral belief being asserted by a WTO member relying on the public morals exception to justify a violation of the WTO rules. Strictly from a linguistic perspective, the panel's statements don't have to be extended too far to arrive at such a "majority support requirement." For example, the Oxford English Dictionary (which the Appellate Body traditionally relies on to determine the ordinary meaning of a word or phrase in a WTO agreement)[263] defines the word "prevailing" to mean "As they exist" or "Which are predominant,"[264] and it furthermore defines the word "predominant" to mean "(1) Having supremacy or ascendancy over others; predominating'; or (2) Constituting the main or strongest element; prevailing."[265]

At the same time, it must be conceded that the above-quoted statements of the panel in *U.S.–Gambling* technically were dicta, as Antigua in that case had not argued that the U.S. state and federal laws prohibiting on-line gambling were not supported by a majority of U.S. or state citizens, as applicable. Accordingly, the Appellate Body in a future case

263. *See, e.g.*, James Bacchus, *Appellators: The Quest for the Meaning of And/Or* (expanded from remarks made at the annual luncheon of the Advisory Centre on WTO Law in Bellevue, Switzerland, at 12 (June 1, 2005), *available at* http://www.worldtradelaw.net/articles/bacchusappellators.pdf (accessed Dec. 31, 2009) (noting that "so often has the Appellate Body gone to the Shorter Oxford English Dictionary to seek the meaning of words that some have suggested that the Members of the Appellate Body may see the Shorter Oxford English Dictionary as one of the 'covered agreements' of the WTO treaty"). The Appellate Body, itself, however, has cautioned against relying too heavily on dictionary definitions of words. *Id*. at 12, n.33 (citing *See United States–Continued Dumping and Subsidy Offset Act of 2000*, WT/DS 217/AB/R (Jan. 27, 2003), ¶ 248, stating that "dictionaries are important guides to, not dispositive statements of, definitions of words appearing in agreements and legal documents." *See also United States—Final Counteracting Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS 257/AB/R/ (Feb. 17, 2004), ¶¶ 58-59).

264. "Prevailing." II New Shorter Oxford Dictionary 2347 (Lesley Brown ed. Clarendon Press 1993) (a definition which was cited, for example, by the panel in *Canada—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/R (adopted on Feb. 17, 2004, as modified by the Appellate Body report), ¶ 7.50, to clarify the phrase "prevailing market conditions" in Article 14 (d) of the WTO Agreement on Subsidies and Countervailing Measures (Apr. 15, 1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 275 (1999), 1867 U.N.T.S. 14 [not reproduced in I.L.M.] [hereinafter "SCM Agreement"]).

265. *See, e.g., Sit Kwok Keung vs. Commissioner of Inland Revenue*, Hong Kong Special Administrative Region, Court of First Instance, High Court Inland Rev. Appeal No. 1 of 2001, High Court Action File 644/2001, at 5, ¶ 15, *available at* http://legalref.judiciary.gov.hk/lrs/common/ju/ju_frame.jsp?currcount=0&changed_lan=&QS=&FN=&AH=&currpage=&DIS=22958 (accessed Dec. 31, 2009) (citing *The New Shorter Oxford English Dictionary* (1993)).

could disavow the above-mentioned statements of the panel and explain that it hadn't addressed those statements in *U.S.–Gambling* itself simply because those statements were not relevant to its resolution of the legal issues raised by the parties on appeal.

As indicated in the introduction to this article, the Appellate Body has just issued its decision[266] affirming the great majority of the panel's findings in the *China—Media* case.[267] The U.S. initiated this case against China in April of 2007, primarily alleging that a number of Chinese measures violated China's GATS commitments to liberalize its "trading service" and "distribution service" industries,[268] and the specific products at issue in the case were audio-visual items, including feature films, videos, sound recordings, and publications (*e.g.*, books, magazines, newspapers, and electronic publications).[269] The U.S. also claimed that, to the extent that any of the Chinese measures actually prohibits or restricts entry of a product, that measures also violates China's commitment not to impose quantitative restrictions, as set forth in Article XI of the GATT 1994 (with the exception of certain items identified in China's Protocol of Accession to the WTO).[270] However, as noted above, the U.S. in this case did not directly challenge China's asserted right to inspect the content of foreign media items before those items enter its territory to ensure that this content does not offend the member's public morals.[271] China, in turn, denied the U.S.' allegations, and it furthermore argued that its restrictions in any case were justified under the public morals exception to the WTO rules (specifically, Article XX (a) of the GATT 1994) because they furthered China's pre-importation review of the U.S. media products at issue.[272]

As stated above, in its ruling in *China—Media*, the panel concluded that, with respect to the great majority of the restrictions on trading (importation) and distribution rights challenged by the U.S., China had failed to establish that they were "necessary" to protect China's public morals as the products in question had already been approved by

266. *China—Media Appellate Body Report, supra* note 4.
267. *China—Media Panel Report, supra* note 4.
268. *See* World Trade Organization, *Dispute Settlement*, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm (accessed Feb. 18, 2009); *China—Media Appellate Body Report, supra* note 4, at ¶¶ 1-3.
269. *See* World Trade Organization, *Dispute Settlement*, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm (accessed Feb. 18, 2009).
270. *Id*.
271. Text accompanying *supra* notes 268-70.
272. *China—Media Appellate Body Report, supra* note 4, at ¶ 7.

Chinese authorities as being consistent with China's public morals.[273] According to the panel, China had not proven that the Chinese Government or Chinese-owned companies needed to import and distribute censor-approved U.S. media items in order to protect China's public morals.[274] Of course, given that the items in question had already been approved for entry in China's pre-importation content review program, the issue of whether the majority of China' people actually support China's the relevant prohibited content laws was not before the panel. On December 21, 2009, the Appellate Body ruled decisively in the U.S.' favor in this case, affirming the great majority of the panel's findings in the U.S.' favor and reversing one of the few findings of the panel in China's favor.[275]

In any case, as indicated above, within the next few years, the Dispute Settlement Body of the WTO likely will be called upon to clarify at least clarify the meaning of the public morals exception in future cases, and these cases are likely to be highly controversial. After all, the WTO rules themselves do not directly concern or prohibit members' suppression of political dissent or restriction of free speech[276] and a number of WTO members today[277] possess non-democratic forms of government.

III. Previous Scholarship Regarding the Public Morals Exception

Stephen Charnovitz' article *The Moral Exception in Trade Policy*,[278] which was discussed above, was the first major article to address the meaning of the public morals exception to the GATT /WTO rules. In

273. *China—Media Panel Report, supra* note 4, ¶¶ 8.1-8.4 *passim*.

274. *Id*.

275. *U.S.—Media Appellate Body Report, supra* note 4, at ¶¶ 412–17. Specifically, the Appellate Body reversed the panel's finding (set forth in paragraph 7.836 of the panel's report) that the State plan requirement in Article 42 of the Publications Regulation, which restricted the quantity, structure, and distribution of importation entities, is "apt to make a material contribution to the protection of public morals and that, in the absence of a reasonably available alternative, it can be characterized as 'necessary' to protect public morals in China." *Id*. ¶ 415 (b) (iii).

276. *See, e,g.*, Thomas Cottier*, The Legitimacy of WTO Law, Swiss National Centre of Competence in Research*, NCCR Trade Working Paper 2008/19, Nov. 2008, at 16, *available at* http://wti.nccr-trade.org/images/stories/publications/IP2/The_Legitimacy_of_WTO_Law_cottier_final%200808.pdf (accessed Dec. 31.2009) (commenting that "WTO rules…are not designed to steer domestic processes of distributive justice. This is partly due to the limits of international law, respecting all forms of government alike.").

277. *See* list of 153 current members of the WTO. *Understanding the WTO: The Organization, Members and Observers,* wto.org*, available at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (accessed Dec. 31, 2009).

278. *Charnovitz, supra* note 202.

addressing the scope of this exception, he essentially interpreted the exception in accordance with the above-discussed Vienna Convention rules.[279] However, he extended his analysis of the *travaux preparatoire* or "negotiating history" of the exception itself during 1945–1947 to encompass the negotiating history of morals exceptions contained in earlier trade and commercial treaties.[280] As indicated above, he presented a very thorough and insightful history of both the public morals exception in the GATT 1947 and the morals exceptions contained in these earlier treaties, and all subsequent scholars addressing the morals exception to a free trade regime have benefited greatly from his research. For example, many of the examples of products barred from entry by various nations prior to 1947, as well as examples of "morals exception language" incorporated in earlier treaties, discussed in Section III of this article were first discussed in Charnovitz' article.

In addition, in his article, Charnovitz provided a very useful distinction between a government measure used to protect the morals of the people in the importing nation and a government measure used to protect the morals of the people in the exporting nation.[281] He referred to the former as an "inwardly-directed measure" and the latter as an "outwardly-directed measure."[282] According to his classification scheme, a measure banning pornographic images on the ground that they endanger the morals of the people in the importing nation is an example of an inwardly-directed measure while a measure banning imports of a particular product from a particular nation on the ground that it is produced in an "unethical" or "inhumane" manner is an example of an outwardly-directed measure.[283] Charnovitz conceded, however, that some measures do not fit neatly into one category or the other.[284] By way of example, he noted that an import ban on products that have been produced by indentured children could be an "inwardly-directed measure" and/or an "outwardly-directed measure," depending on whether the importing nation's aim in enacting was to protect the morals of the people in the importing nation, the morals of the people in the exporting nation, or both.[285] Still, despite this limitation, his classification scheme greatly facilitates the analysis of a morals exception to a free trade system.

279. *Id*. at 699–718.
280. *Id*. at 705-18.
281. *Id*. at 695.
282. *Id*.
283. *Id*. at 695-97.
284. *Id*. at 695.
285. *Id*.

After the publication of Charnovitz' article in 1998 and before the publication of the Appellate Body's ruling in *U.S.–Gambling*,[286] a few other scholars published papers regarding the meaning of the public morals exception.[287] Typically, they likewise analyzed the public morals exception utilizing the treaty interpretation rules of the Vienna Convention.[288] Then, after the publication of the Appellate Body's decision in *U.S.–Gambling*, a number of scholars published papers specifically attempting to explain or critique the panel and/or Appellate Body's ruling(s) in that case.[289] A couple of the more comprehensive such works are discussed here in order to convey the types of analyses employed by previous authors as well as these scholars' general conclusions regarding the proper parameters of a morals exception to the WTO rules.

For example, in 2006, Jeremy Marwell published his note *Trade and Morality: The WTO Public Morals Exception after Gambling*.[290] As the title of his paper suggests, Marwell critiqued the decisions of the panel and the Appellate Body in *U.S.–Gambling*.[291] Rather than analyze the exception in accordance with the Vienna Convention rules of treaty interpretation[292] as the panel and Appellate Body had done, however, he noted his dissatisfaction with the Appellate Body's implicit suggestion "that States invoking a public morals defense will be expected to present evidence of similar practice by other states."[293] By this, Marwell meant that the panel in *U.S.–Gambling*, in addition to ascertaining the U.S. Congress had been motivated by moral concerns in enacting various bans on on-line gambling services, had indicated that numerous countries around the world throughout history have likewise considered gambling to be a moral concern and the Appellate Body had affirmed the panel's decision without suggesting that the panel's reference to other countries' treatment of gambling was irrelevant.[294] In this author's opinion, there is no evidence that the panel, in referring to other countries' treatment of gambling services, meant to suggest that these

286. *U.S.–Gambling Appellate Body Report, supra* note 27.
287. *See, e.g.*, Christoph T. Feddersen, *Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and "Convention" Rules of Interpretation*, 7 Minn. J. Global Trade 75 (1998).
288. *Id*. at 88-121.
289. *See, e.g.*, Miguel Gonzalez, *Trade and Morality: Preserving "Public Morals" WithoutSacrificing the Global Economy*, 39 Vand. J. Transnat'l L. 939 (2006).
290. Jeremy C. Marwell, Note, *Trade and Morality: The WTO Public Morals Exception After Gambling*, 81 N.Y.U. L. Rev. 802 (2006) [hereinafter "*Marwell*"].
291. *U.S.–Gambling, supra* note 27.
292. *Supra* note 230.
293. *Marwell, supra* note 290, at 818.
294. *Id*.

other countries' moral practices could be determinative on the issue of whether gambling was a moral issue in the U.S. This especially appears to be the case, in light of the panel's statement that "[m]embers should be given some scope to define and apply for themselves the concept of 'public morals'… in their respective territories, according to their own systems and scales of values.[295]

Marwell also indicated his disappointment that the panel and Appellate Body had only partially answered the two main questions regarding the public morals exception that the *U.S.–Gambling* case had raised.[296] According to Marwell, these two questions were:

> First, how should an international tribunal assess a country's assertion that an issue is legitimately a matter of "public morals," given that such interests are likely to be strongly held, geographically localized, and diverse across political boundaries? Second, assuming a particular regulation is legitimately related to public morality, on what basis can and should an international tribunal such as the WTO Dispute Settlement Body balance interests in regulating public morality against the rights of other Member States in trade liberalization?[297]

Marwell then set about answering these questions himself, and as he did so he repeatedly emphasized that, as the overall goal of the WTO rules is to discourage members from enacting protectionist measures (measures designed to protect to a domestic industry from foreign competition), the exception, if possible, should be interpreted so as to discourage protectionist abuse of the exception.[298]

With regard to the first question of how an international tribunal, such as the WTO, should assess a country's claim that a particular good or service implicates its "public morals," Marwell posited that such a claim could be tested against (a) the standards of right and wrong conduct that the 23 countries that negotiated and signed the GATT 1947 recognized as such (which Marwell referred to as the "originalist interpretation" on this issue); (b) the standards of right and wrong conduct to which the great majority of nations subscribe (which Marwell referred to as the "universalist interpretation" on this issue); (c) the standards or right and wrong conduct to which a large number of similarly situated nations subscribe (which Marwell referred to as the "moral majority or multiplicity interpretation" of this issue); or (d) the standards of right and wrong conduct to which the country in question alone subscribes (which Marwell referred to as the "unilateralist interpretation"

295. *Id*.
296. *Id*. at 805-06.
297. *Id*. at 805.
298. *See, e.g., id*. at 805-06, 826.

of this issue).[299] Marwell's choices (b) and (c) are largely founded on a "human rights" or "cosmopolitan" view of international law,[300] while his choice (d) is largely founded on a "communitarian" view of international law.[301]

Ultimately, Marwell concluded that his choice (d)—a unilateralist interpretation of the public morals clause—was the correct answer to this first question.[302] He stated that "[i]t is reasonable to assume that the basic purpose motivating the inclusion of the public morals clauses in GATT and GATS was to protect national autonomy on sensitive moral questions. . . ."[303] He also referenced the above-quoted statement of the *U.S.–Gambling* panel regarding how members should be granted the power to define their own moral standards as support for his conclusion.[304] However, Marwell himself did not further explore the nature of moral beliefs or tie the nature of such beliefs to the public morals exception.

Then, in answer to his second question, he concluded that WTO members' interests in regulating public morality would be properly balanced against the rights of other WTO members in trade liberalization so long as any WTO member defending a trade-restrictive measure under the public morals exception is required to produce substantial evidence of its asserted public morals concern[305] and furthermore is required to prove that its measure is the least trade-restrictive measure possible to protect its public morals concern and does not discriminate against providers of foreign goods and services.[306] The "least trade-restrictive requirement" is encompassed in the word "necessary" in the public morals exception[307] as well as the "chapeau language" of the public morals exception.[308] The "non-discrimination requirement," in turn, is incorporated in the "chapeau language" of the public morals defense.[309] The chapeau language limits the public morals defense to a government

299. *Id*. at 819-24.
300. *See supra* note 290.
301. *See supra* note 290.
302. *Id*. at 824.
303. *Id*. at 821.
304. *Id*. at 824.
305. *Id*. at 824-26.
306. *Id*. at 826, 836.
307. *China—Media Appellate Body Report, supra* note 4, at ¶¶ 239-242.
308. *Cf*. TRADE AND HUMAN HEALTH AND SAFETY 27 (George A. Bermann & Petros C. Mavroidis eds. 2006).
309. *See* GATT 1994, *supra* note 9, Art. XX; GATS, *supra* note 10, Art. XI. *See also U.S.—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998), at ¶ 120.

measure which is not "applied so as to constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on international trade . . ."[310]

Marwell did not address the question of whether a WTO member relying on the public morals exception must prove that a majority of its citizens hold the moral belief in question, but he did indicate that a member's moral beliefs need not be documented in a legislatively-enacted statute. In particular, he stated that WTO panels are entitled to consider any evidence submitted to it regarding a member's moral beliefs, as well as any other information " 'from any relevant source,'[311] including experts and 'any individual or body which it deems appropriate'[312] such as, for instance, religious or civil society organizations, public opinion firms, local government officials, and individual citizens."[313] Likewise, he maintained that panels can consider a wide range of information regarding a member's moral beliefs, including "historical practice, contemporary public opinion polls, results of political referenda, or statements of accredited religion leaders."[314] While it is true that panels are entitled to consider information from any relevant source on any issue, Marwell does not address the fact that the types of media he mentions may be more likely than a legislatively-enacted statute to reflect the moral beliefs of only the author of that media or a small segment of that WTO member's population. Given that his answer to the first question that he posed largely was based on his assertion that given that moral beliefs tend to be geographically localized and diverse from community to community[315] (*e.g.*, a nation as well as a sub-group within a nation), it seems that at least a brief discussion of the inherent limitations of using such secondary sources of a people's moral beliefs would have been in order.

Marwell also did not explicitly consider whether a WTO member should be able to rely on the public morals exception to enact an outwardly-directed government measure (again, according to Charnovitz' classification scheme, a measure that is targeted solely at the morals of the people of the exporting nation). An example of an outwardly-directed measure (sometimes referred to as a humanitarian measure) is an import ban on all goods and services from a particular nation on the ground

310. *Id*.
311. *Marwell, supra* note 290, at 825.
312. *Id*. at 825 *(citing DSU, supra* note 28, Art. 12).
313. *Id*. at 825.
314. *Id*. at 824-25.
315. *Id*. at 805.

that it permits slavery or denies or restricts women's political rights. However, Marwell discusses such measures and never indicates that the WTO members should be prohibited from implementing them, and therefore it can safely be assumed that he endorsed including such measures in his proposed interpretation of the public morals exception. Marwell's failure to address this last question is confusing, as it would seem that such measures permit a member to impose its moral views on the people of another nation, and, if this is the case, Marwell's apparent approval of such measures would appear to be inconsistent with his conclusion that each WTO member, in its sole and absolute discretion, is entitled to determine its own moral beliefs on an on-going basis.[316]

In his article, Marwell explained some of the denser aspects of the panel and Appellate Body's rulings in *U.S.–Gambling*.[317] In addition, he discussed a number of relevant factors that are relevant in an analysis of the proper parameters of the public morals exception to the WTO rules. Arguably, he even arrived at the correct conclusion to both of the major questions that he posed. At the same time, he relied very heavily on the panel and Appellate Body's rulings in *U.S.–Gambling* to answer the very questions that he maintained they had left unanswered, and, in general, his article would have benefited from a theoretical perspective that justified his conclusions, especially those that appear to be inconsistent.

Finally, in his own 2008 note *Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine*,[318] Mark Wu in general accepted Marwell's three main categories for interpretations of the public morals exception—originalist,[319] unilateralist,[320] and universalist[321]—as well as Marwell's premise that the exception should be interpreted so as to limit WTO members' protectionist abuse of it.[322] He also utilized Charnovitz' dichotomy of inwardly-directed government measures (which, again, are measures directed at the morals of the people of the importing nation, and which Wu referred to as a "Type I measures") and outwardly-directed govern-

316. *Id*. at 824.
317. *Supra* note 27.
318. Mark Wu, *Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine*, 33 Yale J. Int'l L. 215 (Winter 2008) [hereinafter *"Wu"*].
319. *Id.* at 218, 237-38, 244.
320. *Id*. at 233, 238, 240-41, 248.
321. *Id*. at 231, 232-33, 244.
322. *Id*. at 215-16, 232 (*citing Marwell, supra* note 290, at 824, 826), 237-38, 241, 243-44, 248.

ment measures (which, again, are measures directed at the morals of the people of the exporting nation, and which Wu broke down into "Type II measures" and "Type III measures"). A Type II measure, in Wu's terminology, is an outwardly-directed measure that is designed to protect people in the exporting nation who are directly involved in the good or service in question against a practice that the people of the importing nation find morally offensive.[323] An import ban on a product manufactured by child laborers would be an example of a Type II measure, Wu stated. On the other hand, a Type III measure, according to Wu, is an outwardly directed measure that is designed to protect the people of the exporting nation against a practice that the people of the importing nation find morally offensive but which is not directly involved in the good or service in question.[324] Wu noted that an example of a Type III measure would be an import ban on all products from the Sudan on account of its violation of human rights in the Darfur region.[325] As is discussed further below, Wu also set forth a fourth interpretation, which he labeled the "transnationalist interpretation,"[326] and he critiqued all four of these interpretations, as well as Marwell's interpretation, before he set forth his own interpretation of the public morals exception.

To begin with, Wu stated that a strict originalist interpretation—limiting the moral beliefs protected under the public morals exception to those that the 23 original GATT 1947 contracting parties accepted as such—possessed the advantage that a WTO member's moral claim could be tested against a strict standard, thereby limiting a WTO member's ability to utilize the exception for protectionist motives.[327] Ultimately, however, he concluded, however, that a strict originalist interpretation must be rejected, because it possesses several disadvantages, chief among them, according to Wu, being the fact that it is inconsistent with the fact that moral beliefs "vary in time and context, a fact that *U.S.–Gambling* itself recognized."[328] On the other hand, he argued, a strict universalist interpretation—limiting the moral beliefs protected under the public morals exception to those that are universally or near universally held by people around the world[329]—also must be rejected

323. *Wu, supra* note 318, at 235.
324. *Id*. at 235.
325. *Id*.
326. *Id*. at 240-42.
327. *Id*. at 237.
328. *Id*.
329. As indicated in connection with Marwell's article, a universalist interpretation of the exception is largely founded on a "human rights" or "cosmopolitan" view of

because "then the set of morals that would actually qualify might be so limited as to render the exceptions clause effectively useless . . . [as] [o]nly a handful of moral principles are widely shared in the international community—such as prohibitions against genocide, slavery, and execution of the mentally retarded."[330]

Wu indicated that he agreed with Marwell that a strict unilateralist interpretation must be rejected as well, because it "increases the possibility that some countries may advance their own political or protectionist agenda in the name of safeguarding morals."[331] In addition, Wu rejected Marwell's suggested interpretation, which he labeled "expansive unilateralism with evidentiary constraints."[332] With this label, Wu meant to convey that Marwell endorsed a unilateralist interpretation with respect to inwardly-directed government measures in general but also suggested that the exception could encompass outwardly-directed measures, a proposition which the Appellate Body has not explicitly endorsed to date.[333] The phrase "evidentiary constraints" was intended to indicate that Marwell insisted that his unilateralist interpretation be limited by the requirement that a WTO member relying on the public morals exception be required to verify that most of its people share the moral belief asserted through the submission of documents such as scholarly studies, opinion polls and affidavits of religious leaders referring to the belief.[334] Wu stated that the breadth of Marwell's interpretation could be narrowed considerably by limiting the evidence admissible regarding the moral beliefs of the population of the importing nation to statements made in legislatively-enacted statutes.[335] Even so, Wu maintained, Marwell's expansive unilateralism must be rejected because it would permit WTO members to utilize the public morals exception for any number of political and protectionist reasons, and as such, it "could gradually destabilize and politicize the international trade regime."[336]

As indicated above, Wu also considered what he labeled a "transnationalist interpretation" of the public morals exception.[337] Such

international law (*supra* note 290), while a unilateralist interpretation of the public morals exception is largely founded on a "communitarian" view of international law (*supra* note 290).

330. *Wu, supra* note 318, at 232 (omitting internal citations).
331. *Id*. at 238.
332. *Id*.
333. *Id*. at 242-43.
334. *Id*. at 238.
335. *Id*. at 239-40.
336. *Id*.
337. *Id*. at 240-42.

an interpretation, Wu posited, would encompass outwardly-directed measures (as Marwell's interpretation did, according to Wu) but would require that the WTO member at least demonstrate that "the public moral is shared widely by a group of similarly situated countries."[338] For example, Wu elaborated, "[a]s justification, countries could point to international agreements that endorse the moral principle, or to national restrictions in other similar countries, or even to rulings by transnational bodies such as the International Court of Justice (ICJ) or the International Criminal Court (ICC)."[339] Finally, though, Wu contended, a transnationalist interpretation still would permit WTO members to impose their own geopolitical agendas on the other members, just as Marwell's expansive unilateralist interpretation would.[340] In fact, according to Wu, a transnationalist interpretation of the public morals exception would even permit a WTO member to engage in protectionist behavior under cover of international norms,[341] and for both of these reasons, a transnationalist interpretation too must be rejected, Wu concluded.[342]

In proposing his own interpretation of the public morals exception, Wu distinguished between inwardly-directed measures and outwardly-directed measures. With respect to inwardly-directed measures, Wu proposed that a WTO member seeking to excuse a trade barrier under the public morals exception must demonstrate that the good or service being restricted falls within a category of goods or services that the drafters of the GATT 1947 recognized as implicating moral concerns, falls within a category of goods or services that implicates a *jus cogens* moral norm,[343] or falls within a category of goods or services that is widely recognized in the international community as implicating moral concerns.[344] Wu maintained that he wasn't simply combining an originalist interpretation with a universalist interpretation, because those interpretations concern specific moral beliefs while his interpretation concerns *categories* of goods and services that could have moral ramifications.[345]

338. *Id*. at 240.
339. *Id*.
340. *Id*. at 241.
341. *Id*.
342. *Id*. at 241-42.
343. A *jus cogens* norm is "a norm that is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Id*.
344. *Id*. at 243.
345. Id. at 243-44.

In addition, Wu agreed with Marwell that a WTO member relying on the public morals exception must satisfy the "necessity" test embedded in the exception[346] which would mean that it must prove that the measure is the least trade-restrictive measure available to protect the moral belief in question[347] and demonstrate that the measure satisfies the chapeau language[348] which requires that such a measure be applied equally to domestic and foreign producers.[349] Finally, with respect to inwardly-directed measures, Wu suggested that only "legislatively-enacted statutes passed through a legislative process" be accepted as evidence that the population of such a WTO member subscribes to the moral belief asserted.[350] He explained that while this evidentiary requirement didn't prevent a government from controlling its legislature, he maintained that it was an improvement over Marwell's evidentiary requirement because "by imposing a requirement for a legislative record, the test ensures that some modicum of debate occurs before a restriction is enacted and creates an evidentiary record for adjudicators to review in any potential litigation."[351]

With respect to outwardly-directed measures, Wu emphasized that he wasn't advocating that the public morals exception encompass such measures (of either Type II or Type III); rather, he claimed, in the event that the Appellate Body ever suggests such a measure could be excused under the public morals exception, he simply was suggesting three additional safeguards to employ in cases involving either type of outwardly-directed measure.[352] Specifically, he suggested that a WTO member defending such a measure under the public morals exception, in addition to the above requirements, should be required to (1) provide direct proof that is people care strongly about the moral issue asserted;[353] (2) demonstrate that the moral belief in question "has been explicitly endorsed by a majority of WTO members;"[354] and (3) illustrate that its measure is only "directed against countries that have already explicitly embraced this norm."[355] With respect to his first requirement, he clarified that what he meant was that "[s]imple enactment through a legisla-

346. Id. at 243.
347. *Supra* note 290, at 824-26.
348. *Supra* note 310.
349. *Wu, supra* note 318, at 243.
350. *Id*. at 243-44.
351. *Id*. at 244.
352. *Id*. at 245.
353. *Id*.
354. *Id*. at 245-46.
355. *Id*. at 246.

tive process is insufficient; the enacting government must also show, through opinion polls or a direct referendum, that a significant percentage of its citizens hold such moral views." Only in this way, he asserted, could the other WTO members be certain that "governments and legislatures cannot enact Type II and III restrictions that serve only the interests of their party constituents or special interests but. . .instead. . .are widely shared."[356]

Wu, like Marwell, offered no theoretical underpinning for his proposed interpretation of the public morals exception. For example, he didn't offer any rationale for categorically rejecting a unilateralist interpretation other than the mere suggestion that such an interpretation is impractical because WTO members could stretch the exception to an extent that eviscerates the WTO free trade rules.[357] Similarly, he didn't offer any rationale for combining three different sources of categories of goods and services that may implicate moral concerns for most or at least nations. Rather, it seems that his interpretation of the public morals exception is the result of an illogical compromise, to wit: "In exchange for the right to determine their own moral beliefs, WTO member nations will be permitted to protect their populations from a good or service falling into any one of *three* different sources of goods and services that are widely-held to implicate moral norms." Furthermore, each advantage or disadvantage that Wu offers regarding the various alternative interpretations of the public morals exception seems to be a restatement of the self-evident maxim that any limit on a nation's ability to define its own morals constitutes an infringement on its sovereignty or the self-evident maxim that any grant of power to a nation to determine its own moral beliefs constitutes an opportunity for it to enact a protectionist measure under cover of moral norms. Moreover, his proposed interpretation of the public morals exception seems preordained by his unswerving focus on preventing protectionist measures from masquerading as moral prohibitions rather than based on any jurisprudential rationale.

Wu's concern that the public morals exception not be permitted to swallow the WTO rules is evident throughout his analysis. For example, he required that any inwardly-directed measure satisfy the nondiscrimination requirement in the chapeau language of the exception itself.[358] Yet, he didn't explain why, in his opinion, this non-discrimi-

356. *Id*. at 245.
357. *Id*. at 238-39.
358. *Id*. at 243.

nation principle, which is intended to guard against protectionism, apparently fails in this regard so that the public morals exception, in his opinion, must also be interpreted so as to restrict WTO members to protecting their populations from a good or services that falls into a widely-recognized category of goods and services that implicate moral norms.[359] Wu even founded his conclusion that only legislatively-enacted statutes be accepted as proof of a people's moral beliefs on the "protection against protectionism advantage" that he claims his interpretation offers. Specifically, he stated that while his insistence that only legislatively-enacted statutes be accepted as proof a people's moral beliefs didn't prevent a government from controlling its legislature, "even in such states, this proposed limitation creates additional cost for enacting morality-based restrictions that will hopefully deter some (though, unfortunately, not all) *protectionist* measures."[360]

Wu's analysis is also simply confusing in several respects. For example, when setting forth his proposed interpretation with respect to inwardly-directed measures, he stated that legislatively-enacted statutes constitute evidence of the importing nation's population's support for a particular moral belief that is superior to evidence such as is revealed in "secondary" sources of the population's beliefs, such as public opinion polls.[361] Yet, when setting forth his proposed requirements with respect to outwardly-directed measure, he stated that legislatively-enacted statutes are insufficient evidence of a people's support for such a measure and thus a nation imposing such a measure must provide more direct evidence of its people's support, such as is revealed in public opinion polls.[362] It is difficult to understand how public opinion poll data can be an inferior source of evidence with respect to inwardly-directed measures but a superior source of evidence with respect to outwardly-directed measures. Similarly, Wu's discussion of why a WTO member should be able to enforce a trade barrier against a nation that is breaching a previous international commitment to follow or cease a particular practice also is unclear. He states that it is fair for an importing nation to enforce a trade barrier against such a breaching nation because the importing nation could have assumed that the breaching nation would respect its prior agreement and as a result granted market access or other concessions to that nation in trade negotiations which it otherwise would not

359. *Id*.
360. *Id*. at 244 (Emphasis added).
361. *Id*. at 243-44.
362. *Id*. at 245.

have, had it known that the breaching nation would breach that commitment.[363] He elaborates that limiting outwardly-directed measures to such situations where the affected nations are being penalized for failing to live up to their prior commitments "ensures that . . . the WTO regime [does not] . . . degenerate[ ] into a mechanism whereby countries seek to impose their moral norms on one another."[364] However, despite the assurances that Wu offers with respect to his proposed interpretation in connection with outwardly-directed measures, it appears that his interpretation would foster exactly the scenario he claims his interpretation would prevent, as his suggested requirements for outwardly-directed measures ultimately would require the DSB to enforce the "moral practices" that a challenging WTO member owes to a WTO member imposing an outwardly-directed measure.

Most important, Wu doesn't explain how "widely-held" categories of goods or services implicating moral norms would be determined, how broad or narrow such categories would be, or how these categories would really differ from moral norms themselves. For example, a category of goods theoretically implicating moral concerns could be categorized as broadly as "clothing" or as narrowly as "clothing demeaning to women, such as shoes for bound feet." Given that all goods traded between nations could be subsumed into just a few broad categories and Wu advocates an interpretation of the public morals exception that would limit WTO members' reliance on the exception for non-moral purposes, it would seem that Wu would favor more narrow categories of goods or services that could raise moral issues. However, it then isn't clear how a narrow category of such goods is distinguishable from a specific item that raises a moral concern. Finally, to the extent that Wu's suggested categories of goods and services raising morals concerns are determined to be nonsensical or co-existent with specific moral norms, there appears to be a disconnect between the two main prongs of his suggested interpretation of the public morals exception, as further explained below.

Again, Wu suggested that a WTO member should be permitted to protect, through its trade policies, only those categories of goods or services that twenty-three nations[365] agreed over 60 years ago had moral

363. *Id*.

364. *Id*. at 246.

365. "The GATT negotiations were successfully concluded on October 30, 1947, . . . [and] [i]ts original 23 members were: Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, Republic of China, Cuba, Czechoslovak Republic, France, India, Lebanon, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, South Africa, Southern Rhodesia, Syria, the United Kingdom, and the United States." DOUGLAS A. IRWIN,

implications when they negotiated and signed the GATT 1947, categories of goods or services that raise a *jus cogens* moral norm, or categories of goods or services that nations today widely agree have moral implications. At the same time, he insisted that any WTO member wishing to restrict entry to such a good or service must prove that its people consider the good or service to violate their moral norms.[366] Such a "local public support requirement" seems a logical limit to a unilateralist interpretation because the interpretation is premised on the specific moral beliefs of the people in the importing nation. However, such a requirement does not logically follow from an originalist or universalist interpretation, given that these interpretations are premised on the moral beliefs of people *other than* the population of the importing nation. In short, if a moral belief asserted by any particular WTO member must simply be sincerely held by that WTO member, then it is logical to require that member to prove that a majority of its population supports that belief, as it is those people's moral beliefs are determinative of the exception. On the other hand, if, as Wu suggests, a trade restriction on any good or service must be considered by the international community as a whole to raise moral concerns in order to be justified by the public morals exception, it is illogical to also require that member to prove that its people subscribe to that view, as their specific moral beliefs have already been determined to be irrelevant.

In essence, Wu's interpretation requires a WTO member to prove that any moral belief protected under the public morals exception is supported both "top down from the international community" and "bottom up from a WTO member's local population," and this requirement could render it almost impossible for many WTO members to ever avail themselves of the exception. For example, Saudi Arabia, which joined the WTO in 2005,[367] bans the importation of pork, because it "is said to contribute to lack of morality and shame…Muslims are forbidden by God to eat pork. This is detailed in some of the verses in the Quran."[368] Furthermore, the Quran serves as the constitution of Saudi Arabia,[369] so that Saudi Arabia is at least "a hybrid theocracy—a monarchy built on

Petros Mavroidis & Alan Sykes, The Genesis of the GATT 101 (Cambridge Univ. Press 2009).

366. *Wu, supra* note 318, at 243-44.

367. *Supra* note 154.

368. The Trade & Environment Database: Pork Import and Saudi Arabia, American.edu, *available at* http://www1.american.edu/TEC/saudipork.htm (accessed Jan. 1, 2010).

369. *Id*.

and maintained by a strict adherence to the religious rules set down by Mohammed for Arabia fourteen centuries ago"[370] Certainly, if another WTO member were to challenge Saudi Arabia's import ban on pork, Saudi Arabia undoubtedly would defend this ban under the public morals exception. However, it is not clear that the twenty-three original contracting parties to the GATT 1947, only three of which, Pakistan, Syria, and Lebanon, were predominantly Muslim nations,[371] considered "pork," or "animal products" or "food" to be a good or category of goods implicating moral issues. Wu himself stated that there is no evidence to suggest that these twenty-three nations considered specific religious restrictions to be encompassed within the public morals exception,[372] and Charnovitz, in his comprehensive review of the types of goods banned by these nations prior to their entering into the GATT 1947 did not list food items among them.[373] There certainly does not appear to be a *jus cogens* principle that recognizes "pork" or "animal products" or "food" as a category of goods implicating moral concerns. Finally, most nations today do not consider "pork" to raise moral concerns and it's not clear that they would agree that the category of "animal products" or "food" implicates moral concerns. Therefore, despite the fact that a majority of Saudi people appear to object to pork on moral grounds, under Wu's interpretation of the public morals exception, Saudi Arabia could find it difficult to justify its import ban on pork. Alternatively, even if most nations in the world find burkas (the head-to-toe garment worn by many Islamic women) to be morally offensive on the ground that these garments are demeaning to their female citizens, Wu's interpretation of the public morals exception would prevent the Government of Saudi Arabia from implementing a ban on burkas in conformity with this widely-held international moral norm (which, by definition, the international community would appear to applaud) because its own citizens most likely do not subscribe to this norm.

In summary, while previous scholars addressing the meaning of the public morals exception all directly or indirectly acknowledge that the overriding issue is where the boundary line should be drawn between the WTO free trade rules and the WTO members' different moral beliefs, for the most part they have not considered the latter in any depth. Rather, in general they have explored possible alternative interpretations

370. SANDRA MACKAY, THE SAUDIS: INSIDE THE DESERT KINGDOM 68 (W. W. Norton & Co. 2002).
371. *Supra* note 365.
372. *Wu, supra* note 318, at 223, 237-38.
373. *Charnovitz, supra* note 202, at 707, 714, 716-17.

of the exception and then indicated that each such alternative should be scrutinized with respect to its potential for protectionist abuse. Furthermore, presumably because they perceive the task they assigned themselves to be practical in nature, they have not employed any theoretical construct (other than perhaps an unstated "neo-classical"[374] or "law and economics" theory) to guide them in this effort. In contrast, this article considers not only the purpose of the WTO free trade rules but also the nature and import of nations 'moral beliefs to better understand the rationale for permitting WTO members to protect such beliefs in a free trade regime.

IV. Socio-Economic Analysis of the Public Morals Exception

A. Socio-Economic

As indicated above, previous scholarly analyses regarding the proper scope of the public morals exception have tended to assume that the purpose of the WTO rules is to discourage members' adoption of protectionist measures and then considered how the public morals exception can be limited so as to prevent WTO members' protectionist abuse of that exception. In contrast, utilizing a socio-economic perspective, this section of this article considers the normative question of whether the WTO rules should contain a morals exception of any kind, and, if so, what the parameters of that exception should be.

Socio-economics is an interdisciplinary field of study that developed toward the end of the twentieth century and is premised on the belief that the discipline of economics and study of competitive behavior must be considered in a "societal context that contains values, power relations, and social networks."[375] Generally speaking, socio-economists seek:

- to advance the understanding of economic behavior across a broad range of academic disciplines;
- to support the intellectual exploration of economic behavior and its policy implications within the context of societal, institutional, historical, philosophical, psychological, and ethical factors; and
- to balance inductive and deductive approaches to the study of economic behavior at both micro and macro levels of analysis.[376]

374. *See* text accompanying *infra* notes 389-470.

375. *About SASE: What is Socio-Economics, Society for the Advancement of Socio-Economics,* sase.org, *available at* http://www.sase.org/index.php?option=com_content&task=blogsection&id=5&Itemid=43 (accessed Dec. 12, 2009).

376. *Id.*

In the U.S. the law and socio-economics movement was launched in January 1996,[377] and it was officially recognized as a distinct theoretical approach to the study of law in 1997, when 120 law professors from over 50 U.S. law schools signed a petition to establish a separate section on Socio-Economics of the American Association of Law Schools (AALS).[378] The constitution of the AALS Section on Socio-Economics defines socio-economics, in part, as follows:

> Socio-economics begins with the assumption that economics is not a self-contained system, but is embedded in society, polity, culture, and nature. Drawing upon economics, political science, psychology, anthropology, biology and other social and natural sciences, philosophy, history, law, management, and other disciplines, socio-economics regards competition behavior as a subset of human behavior within a societal and natural context that both enables and constrains competition and cooperation. Rather than assume that the individual pursuit of self-interest automatically or generally tends toward an optimal allocation of resources, socio-economics assumes that societal sources of order are necessary for people and markets to function efficiently. Rather than assume that people act only rationally, or that they pursue only self-interest, socio-economics seeks to advance a more encompassing interdisciplinary understanding of economic behavior open to the assumption that individual choices are shaped not only by notions of rationality but also by emotions, social bonds, beliefs, expectations, and a sense of morality.[379]

Clearly, socio-economics overlaps with a number of other approaches to the study of law, including the law and society,[380] critical,[381] behavioral,[382] and law and psychology[383] legal theories.

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377. http://www.journaloflawandsocioeconomics.com (accessed Dec. 12, 2009).

378. Robert Ashford, *What Is the "New" Corporate Social Responsibility? The Socio-Economic Foundation of Corporate Law and Corporate Social Responsibility*, 76 Tul. L. Rev. 1187, 1187 (2002), *available at* http://scholar.google.com/scholar?q=info:NhAgvu_36psJ:scholar.google.com/&output=viewport&pg=1&hl=en&as_sdt=2000 (accessed Dec. 12, 2009); American Association of Law Schools, Section on Socio-Economics Newsletter, Dec. 2004, Number 24, p. 4, *available at* http://www.journaloflawandsocioeconomics.com/NL040908-7.pdf (accessed Dec. 12, 2009).

379. Association of American Law Schools, Section on Socio-Economics Newsletter: Annual Meeting Program, January 2008, Volume 28, p. 5, *available at* http://www.journaloflawandsocioeconomics.com/NL07-080101.pdf (accessed Dec. 12, 2009).

380. Law and Society theorists consider the social, political, economic and cultural context of laws and legal phenomena. Homepage: The Law and Society Association, lawandsociety.org, *available at* http://www.lawandsociety.org (accessed Dec. 12, 2009).

381. Critical theorists generally analyze a law or legal norm from the perspective of the different material factors (and, in particular, the power dynamics) influencing its development. *See, e.g.*, A DICTIONARY OF CULTURAL AND CRITICAL THEORY 122-24 (Michael Payne ed. 2005); Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 Phil. & Pub. Aff. 221 (1986).

382. Generally speaking, the behavioral analysis of the law refers to "the application of empirical behavioral evidence to legal analysis." Avishalom Tor, *The Methodology of the Behavioral Analysis*, 4 Haifa L. Rev. 237, 237 (2008).

383. The law and psychology approach to law "involves the application of scientific and professional aspects of psychology to questions and issues relating to law" (American Psychology-Law Society, *Careers in Psychology and Law: Overview of Psychology*

> Unique among interdisciplinary approaches, however, socio-economics recognizes the pervasive and powerful influence of the neoclassical paradigm on contemporary thought. Recognizing that people first adopt paradigms of thought and then perform their inductive, deductive, and empirical analyses, socio-economics seeks to examine the assumptions of the neoclassical paradigm, develop a rigorous understanding of its limitations, improve upon its complementary approaches that are predictive, exemplary, and morally sound.[384]

Socio-economics could be viewed as an attempt to correct or supplement the traditional University of Chicago-style "law and economics" approach[385] to the study of law,[386] which extended Adam Smith's classical economics[387] to a philosophy of "market fundamentalism." Market fundamentalism refers to the belief that markets automatically correct themselves and hence governments need never intervene in financial affairs,[388] and the economics underlying market fundamentalism often are referred to "neo-classical economics" to indicate their foundation in Smith's classical economics.[389] Traditional law and economics legal analysis considers whether a particular law will maximize "social welfare" or "efficiency"—generally defined as "overall wealth maximization of a society"[390]—as such a law is posited to be "just."[391] In particular, it is this "concept of efficiency as justice . . . that many of the critics of the Chicago approach to law and economics find so troubling."[392]

A socio-economic analysis is uniquely suited to consider the propriety and scope of a morals exception to the WTO free trade rules, as the goal of the international trade system since at least the signing

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and Law, available at http://www.ap-ls.org/academics/careersoverview.html (accessed Aug. 7, 2009)) "in order to increase the administration of justice in our society." THE CORSINI ENCYCLOPEDIA OF PSYCHOLOGY AND BEHAVIORAL SCIENCE 591 (W. Edward Craighead & Charles B. Nemeroff eds. Wiley 2000).

384. *Id.*

385. NICOLAS MERCURO & STEVEN D. MEDEMA, ECONOMICS AND THE LAW, SECOND EDITION: FROM POSNER TO POSTMODERNISM AND BEYOND 5, 54-55 (Princeton Univ. Press 2006) [hereinafter "*Mercuro*"].

386. JEFFREY L. HARRISON & MCCABE G. HARRISON, LAW AND ECONOMICS IN A NUTSHELL 3 (Thomson West 2007).

387. *See, e.g.*, ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Management Lab. Press 2008) [hereinafter "*Smith*"].

388. Bill Moyers Journal: Market Fundamentalism and the Madness of Crowds (Oct.10, 2008), *available at* http://www.pbs.org/moyers/journal/blog/2008/10/market_fundamentalism_and_the.html (accessed Dec. 13, 2009) (Prominent investor George Soros' attributing the current global economic crisis to this (unfortunately inaccurate) belief).

389. *Mercuro, supra* note 385, at 54-55.

390. STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 2-3 (Harvard Univ. 2004); ANTHONY OGUS, COSTS AND CAUTIONARY TALES: ECONOMIC INSIGHTS FOR THE LAW 27 (Hart Publ'g 2006); *Mercuro, supra* note 385.

391. *Mercuro, supra* note 385, at 60.

392. *Id.*

the GATT 1947 has been the maximization of its participants' wealth, as was discussed above in Section III. The remainder of this section explains classical trade theory and neo-classical trade theory, discusses what these trade theories teach regarding the propriety and proper scope of a morals exception to the WTO rules, and then considers both economic critiques of these trade theories as well as the teachings of the disciplines of law, sociology, cultural studies, philosophy, and psychology regarding this same question.

B. Classical Trade Theory

Adam Smith is the father of classical liberal economics,[393] which in general maintains that the citizens in any nation will maximize their wealth if the government refrains from interfering in transactions between the buyers and sellers of commodities.[394] He argued that, as any company naturally desires to obtain the highest possible price for any commodity and any consumer naturally desires to pay the lowest possible price for that same commodity, the price freely agreed upon by sellers and buyers for any commodity will most accurately reflect the value of that commodity to society.[395] In addition, he asserted, as producers are naturally selfish and wish to maximize their profits, if the government does not intervene in the marketplace, each producer will choose to specialize in that industry in which it is most efficient, and, as a result, each producer will be able to charge its customers the lowest possible price for each of its commodities.[396] It is for this reason, Smith posited, that the wealth of a nation would be maximized if the government refrains from intervening in commercial transactions.[397]

In his 1776 classic *The Wealth of Nations*,[398] Adam Smith set forth the basic parameters of his classical trade theory by extending his free trade principles for a nation to the international sphere. When Smith published *The Wealth of Nations*, he was reacting in particular to

393. *Smith, supra* note 387, at 3.

394. Smith emphasized in his writings how "systems of private property burden the poor." SAMUEL FLEISCHACKER, A SHORT HISTORY OF DISTRIBUTIVE JUSTICE 38 (Harvard Univ. Press 2004) [hereinafter "*Fleischacker*"]. However, he maintained that a private property system was superior to a communal property system, because, in his experience, "the poorest people in commercial societies [were] better off than the wealthiest members of egalitarian tribes." *Id*. at 39 (*citing Smith, supra* note 387, at 19-20 and ADAM SMITH, LECTURES ON JURISPRUDENCE 339 (R.L. Meek, D.D. Raphael & A.L. Macfie, eds. Oxford Univ. Press (1978)).

395. *Smith, supra* note 385, at 52-59.

396. *Id*. at 13-23, 345.

397. *Id*.

398. *Id*.

England's stringent corn laws which he explained had been designed to protect English corn farmers but ultimately ended up harming all non-English corn producers[399] as well as consumers everywhere.[400] Using these laws as an example of the unnecessary costs imposed on societies by government protectionist measures, he argued that the wealth of nations whose governments permit their combined sellers and buyers to engage in direct commercial exchanges with each other and refrain from imposing protectionist barriers likewise would be maximized.[401] Central to Smith's theory was his assertion that, in the absence of protectionist measures, the producers in each nation participating in a "free trade system" naturally would gravitate toward producing those goods, which they could produce more efficiently than producers in other nations.[402] Moreover, he contended, such a labor specialization scheme would avoid duplication of efforts among the participating nations and promote economies of scale (or lower average costs) as larger and larger quantities are manufactured by firms in a single nation.[403] All of these developments would redound to the benefit of consumers, according to Smith.[404] On account of his emphasis on producers in each nation specializing in those various goods that they can produce more efficiently than producers in other nations, Smith's theory of international trade has come to be referred to as the "theory of absolute advantage."[405]

It is important to understand that as paradigm-changing as Smith's theory of absolute advantage was, he was careful to point out that it only applied to "commodities" and not goods that implicated issues that citizens and their governments would consider to be unquantifiable. For example, Smith famously remarked in *The Wealth of Nations* that each nation is likely to consider that "defence . . . is of much more importance than opulence[.]"[406] Furthermore, it seems clear that Smith's theory of absolute advantage was directed primarily to developed nations, as his theory assumes that the producers in each participating nation produce at least one good more efficiently than producers in the other partici-

399. *Id*. at 385-414.
400. *Id*.
401. *Id*. at 326-78.
402. *Id*. at 346-47 & 359-70 *in passim*.
403. *Id*. at 13-20.
404. *Id*. at 18.
405. *See, e.g.*, STEVEN M. SHEFFRIN, ECONOMIC PRINCIPLES IN ACTION 443 (Addison Wesley Longman 2002).
406. *Smith, supra* note 385, at 352.

pating nations.[407] Clearly, Smith recognized that even a nation with a market economy occasionally experiences "market failures" which the national government must solve.[408]

In 1817, another British economist, David Ricardo, suggested a refinement to Smith's theory of absolute advantage in a treatise entitled *The Principles of Political Economy & Taxation*.[409] Specifically, Ricardo maintained that nations actually would obtain greater wealth the more they specialized their production in those few items that they produced more efficiently than they produced any other items.[410] In his famous example of his theory, Ricardo illustrated that if Portugal enjoyed an "absolute efficiency advantage" over Britain in the production of both cloth and wine but enjoyed a comparative efficiency advantage of wine over cloth, both countries fared better economically if Portugal produced only wine, Britain produced only cloth, and then each exchanged its production with the other.[411] In sum, Smith's theory of absolute advantage is based on comparative efficiency rates among nations, while Ricardo's theory of comparative advantage is based on comparative efficiency rates within each nation.

Ricardo's theory of comparative advantage answered a concern that various commentators had had regarding Smith's theory of absolute advantage, which was the fact that it didn't seem to incorporate the less developed countries.[412] Ricardo's theory of comparative advantage, in contrast, suggests that producers in the developed countries should be willing to cede to producers in the developing countries those commodities that they produce less efficiently than others because they would obtain the highest profits by doing so. This aspect of Ricardo's theory of comparative advantage—that all nations should benefit from participation in a free trade system—has made the theory of comparative advantage very popular with government officials and policy makers ever since Ricardo first proposed it in 1817. For example, former U.S.

407. *See, e.g.*, WILLIAM A. DARITY, JR., INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES (MacMillan Reference USA 2007) ("Because absolute advantage is determined by a simple comparison of labor productivities, it is possible for a nation to have absolute advantage in nothing.").

408. *Smith, supra* note 385, at 557.

409. DAVID RICARDO, THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION (J. M. Dent & Sons Ltd. 1911) [hereinafter "*Ricardo*"].

410. *Id*. at 82–87.

411. *Id*.

412. *See, e.g., Understanding The WTO: Basics, The Case For Open Trade*, *available at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact3_e.htm (accessed Feb. 16, 2010).

President Kennedy often urged nations—and especially the developing nations—to join the GATT 1947 system, explaining that one of the most important benefits of a free trade system is that "all boats rise when the tide's in."[413] In fact, despite its simplicity, flaws, and several anachronistic features,[414] Smith's theory of absolute advantage, as refined by Ricardo's theory of comparative advantage, often referred to as "classical trade theory,"[415] remains the main economic rationale for the WTO free trade rules today.[416]

The three "pillars agreements"[417] of the WTO free trade system are the GATT 1994,[418] which governs the trade in goods, the GATS,[419] which governs the trade in services, and the TRIPS Agreement,[420] which governs the protection of intellectual property rights. The GATS and TRIPS Agreement were added to the multilateral trading system at the commencement of the WTO in 1995,[421] and the GATT 1994 consists of the GATT 1947 plus various amendments and interpretations thereto entered

413. President Kennedy first used this statement in a speech delivered on October 15, 1960. He repeated this statement on August 17, 1962 (in Pueblo, Colorado following approval of the Frying Pan-Arkansas Project), on May 18, 1963, and on June 25, 1963. *See* John F. Kennedy Presidential Library & Museum, Quotations of President Kennedy, *available at* http://www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/Quotations+of+John+F+Kennedy.htm (accessed on Oct. 28, 2007); *see also* Richard L. Lesher, *All Boats Rise When The Tide's In*, THE HERALD, Nov. 1, 1978; Donald L. Evans, *Free Trade is Not a Zero-sum Game*, SAN DIEGO UNION TRIB., Sept. 2, 2007 (editorial by former U.S. Department of Commerce Secretary Don Evans lauding the signing of the U.S.-South Korea Free Trade Agreement and stating "[t]hat's the extraordinary and marvelous thing about free trade in a global economy—it's not a zero-sum game. Nations party to free-trade agreements win, and the generated economic gains accrue across all sectors of the participating economies."); Jean-Paul de Kervor, *Free-trade Pacts Benefit Everyone*, SAN DIEGO UNION TRIB., Nov. 20, 2007, at B7 (discussing Congress' approval of the U.S.-Peru free trade agreement and arguing that free trade agreements in general benefit all parties).

414. *See* text accompanying *infra* notes 461-85.

415. *See, e.g.*, Monetary Economics, www.ossfoundation.us, *available at* http://www.ossfoundation.us/projects/economy/history (accessed Feb. 15, 2010).

416. Christopher M. Bruner, *Culture, Sovereignty, and Hollywood: UNESCO and the Future of Trade in Cultural Products*, Texas Tech School of Law (2007) [hereinafter "*Bruner*"], *available at* http://law.bepress.com/expresso/eps/1972, at 78 (*quoting* RAJ BHALA, INTERNATIONAL TRADE LAW: CASES AND MATERIALS 9 (Michie 1996) (*in turn quoting* ROBERT GILPIN, THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS (Princeton Univ. Press 1987)).

417. *See, e.g.*, FLORIAN SPITZER, THE NON-VIOLATION COMPLAINT IN WTO LAW 5 (Tenea Verlag Ltd. 2004).

418. GATT 1994, *supra* note 9.

419. GATS, *supra* note 10.

420. TRIPS Agreement, *supra* note 10.

421. *Understanding the WTO: Basics, The Uruguay Round, available at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (accessed Feb. 16, 2010).

into prior to the establishment of the WTO.[422] The GATT 1947,[423] which was signed by twenty-three nations on October 30, 1947,[424] clearly was based on Smith and Ricardo's classical trade theory,[425] and, by 1986, when the Uruguay Round of Multilateral Trade Negotiations (Uruguay

422. The GATT 1994 consists of (a) the provisions of the GATT 1947, *supra* note 9,as amended by legal instruments which entered into force before the date of entry in force of the Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force Jan. 1, 1995) [hereinafter "*WTO Agreement*"]); (b) the provisions of legal instruments which entered into force under GATT 1947 before the date of entry into force of the WTO Agreement; (c) the Understandings on the interpretation of a number of GATT Articles, adopted at the end of the Uruguay Round; and (d) the Marrakesh Protocol to GATT 1994. GATT 1994, supra note 9, at ¶ 1.

423. GATT 1947, *supra* note 9.

424. *Fiftieth Anniversary of the Multilateral Trading System, WTO Press Brief*, www.wto.org, 1996, Release, *available at* http://www.wto.org/english/theWTO_e/minist_e/min96_e/chrono.htm (accessed Feb. 16, 2010).

425. At the Bretton Woods conference that took place toward the end of World War II in 1944, famed British economist John Maynard Keynes and U.S. Assistant Treasury Secretary Harry Dexter White strongly urged the nations in attendance to establish an International Trade Organization (ITO) based on Smith and Ricardo's free trade principles, an agency regulating international currency exchange (which ultimately became the International Monetary Fund), and an agency capable of extending loans for large national economic development projects (which ultimately became the World Bank). *See, e.g.*, Richard Toye, *The Labour Party's External Economic Policy in the 1940s*, 43 Historical J. 189 (Cambridge Univ. Press 2000) (*citing* KENNETH HARRIS, ATTLEE 275 (George Weidenfeld & Nicholson 1995); G. John Ikenberry, *A World Economy Restored: Expert Consensus and the Anglo-American Postwar Settlement*, 46 International Org. 289 (MIT Press 1992). They reported many economists' belief that the U.S.' enactment of the 1930 Smoot-Hawley Tariff Act had led other nations to enact similar protectionist measures, which, in turn, had caused consumer prices around the world to rise and the global economy to contract. This economic decline, they maintained, had made nations and citizens everywhere distrustful of each other and ultimately this negative atmosphere was a precipitating cause of World War II. *Id*. In a world with finite natural resources and a growing human population, they urged, it was imperative that nations abolish their trade barriers and allow each nation's economy to continue to grow. *Id*. When the U.S. Congress failed to approve the establishment of the ITO, the GATT 1947 became the default international trade agreement, and it incorporated many of the provisions of the ITO. SUSAN ARIEL AARONSON & JAMIE M. ZIMMERMAN, TRADE IMBALANCE 12-16 (Cambridge Univ. Press 2008). Interestingly, while Keynes and White clearly were strong advocates of free trade principles on the international level, they both also were advocates of a relatively interventionist government on the national level. Keynes, for example, after studying the Great Depression in great detail and concluding that the U.S. Government could have prevented the Great Depression had it intervened in the market sooner, famously promoted government monetary policies to stabilize the banking system and otherwise avert a recession in a market economy. *See, e.g.*, Axel Leijonhufrud, *Keynes and the Effectiveness of Monetary Policy*, 6 Economic Inquiry 97 (2007), *available at* http://www3.interscience.wiley.com/journal/119912768/abstract?CRETRY=1&SRETRY=0 (accessed Feb. 16, 2010). (To this day, government officials in the U.S. and elsewhere routinely point to Keynes' theories to justify their own monetary policies. *See, e.g.*, Joseph E. Stiglitz, *The Triumphant Return of John Maynard Keynes*, www.project-syndicate.org, Dec. 5, 2008 (stating "We are all Keynesians now" and discussing how, in the recent global economic crisis, "U.S. Federal Reserve Chairman Ben Bernanke has tried hard to avoid having the blame fall

Round) culminating in the establishment of the WTO was launched, 123 nations had already joined the GATT 1947.[426]

The main free trade disciplines in the GATT 1994 are Articles I, II, III, and XI. Article I requires each WTO member to respect the most favored nation (MFN) principle, meaning essentially that each WTO member is required to treat a product from any WTO member no less favorably than it treats the "like" good of any other WTO member or non-WTO member.[427] Similarly, Article III of the GATT 1994 requires each WTO member to respect the national treatment principle, meaning that each WTO member is required to apply to a foreign good internal laws and regulations that are no less favorable than the internal laws and regulations applied to a "like"[428] domestic good.[429] Article II prohibits

on the Fed for deepening this downturn in the way that it is blamed for the Great Depression, famously associated with a contraction of the money supply and the collapse of banks."). White was actually considered to be a political progressive, and, during the McCarthy era, he was even accused of being a Soviet Spy. *See, e.g.*, R. Bruce Craig, Treasonable Doubt 202 ("Like progressives across the nation, White abandoned the Democratic Party and looked to an alternative third-party movement to restore FDR's dream.").

426. For a history of the Uruguay Round generally, *see* http://www.wto.org/English/thetwto_e/whatitis_e/tif_e/fact5_e.htm (last accessed Feb. 10, 2010).

427. GATT 1994 Art. I.

428. Paragraph 2 of Article III of the GATT 1994 concerning fiscal measures has an interpretative note that explains that "[a] tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed." In any case, however, the WTO Appellate Body has ruled that, while no factor is conclusive, essentially the same types of factors are relevant in a determination of whether a foreign and a domestic good are "like" for purposes of the first sentence of paragraph 2 as are relevant in a determination of whether a foreign product and a domestic product are "DCS" for purposes of the second sentence of paragraph 2, although, in the context of paragraph 2, the category of "like products" is narrower than the category of "DCS products" and market factors such as the elasticity of customers' substitution of products may be more relevant with respect to DCS products. *Japan—Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted Nov. 1, 1996), at text accompanying notes 44-55 (*in turn citing* Report of the Working Party, *Border Trade Adjustments*, L/3464, GATT B.I.S.D. (18th Supp.)/97, Dec. 2, 1970, at ¶ 18. These factors are 1) the products' end-uses in a given market; (2) consumers' tastes and habits; and (3) the products' properties, nature and quality. *Id*. at text accompanying note 45. In addition, the "tariff classification of products can be relevant in determining what are 'like products'" (*id*. at H., Art. III. 2.1. First Sentence (a) "Like Products") and consideration of the "market place" and the "elasticity of substitution" are appropriate factors to consider with respect to DCS products (*id*. at text accompanying note 53). Finally, paragraph 4 of Article III of the GATT 1994 concerning non-fiscal measures forbids WTO members from implementing an internal law or regulation that favors a domestic product over a "like" foreign product, and the Appellate Body has likewise concluded that concluded that essentially the same types of factors are relevant in a determination of whether a domestic and foreign product are "like" in the context of paragraph 4 of Article III of the GATT 1994 as well. *See, e.g, EC—Asbestos*, WT/DS135/AB/R (adopted Apr. 5, 2001), at ¶¶ 101-102.

429. GATT 1994, *supra* note 9, at Art. III.

each WTO member from assessing a tariff rate on a foreign product that is in excess of the bound tariff rate for that product previously negotiated by that member.[430] Finally, Article XI, with few exceptions, prohibits a WTO member from imposing an import ban, quota, or other quantitative restriction on the importation or exportation of any good.[431]

Since its inception, however, the GATT 1947 recognized several exceptions. Smith's prediction that members of a free trade system would not jeopardize their national security in exchange for "opulence" found expression in the national security exception set forth in Article XXI.[432] Article XX contains ten other exceptions to the free trade disciplines.[433] For example, paragraphs (b), (f), and (g) of Article XX exempt government measures designed to protect human, animal or plant health, national treasures of artistic, historic or archaeological value, and exhaustible natural resources, respectively.[434] As discussed at length above, paragraph (a) of Article XX exempts any government measure "necessary to protect public morals."[435] Similar exceptions, including a public morals exception, were incorporated in the other major WTO agreements, including the GATS, the TRIPS Agreement, and the GPA.[436]

C. Neo-Classical Trade Theory

To begin with, it should be noted that neo-classical economic theory as distinct from classical economic theory generally refers to the extension of the classical economic theory or "free trade concepts" proposed by Smith and Ricardo "into a full-scale model of how an economy works"[437] by Alfred Marshall[438] and others. John Maynard Keynes, who is credited with having invented modern macroeconomics with the publication of his book *Theory of Employment, Interest and Money* in 1936,[439] rejected classical and neo-classical economic theory.[440] He

430. *Id*. at Art. II.
431. *Id*. at Art. XI.
432. *Id*. at Art. XXI.
433. *Id*. at Art. XX.
434. *Id*. at Art. XX (b), (f), and (g).
435. *Id*. at Art. XX (a).
436. GATS, *supra* note 10, at Art.s XIV, XIV *bis;* GPA, *supra* note 10, at Art. XXIII; TRIPS Agreement, *supra* note 10, at Art.s 27 (2), 73.
437. *Neo-Classical Economics*, www.economist.com, *available at* http://www.economist.com/research/economics/alphabetic.cfm?letter=N (accessed Feb. 18, 2010).
438. *Id*.
439. JOHN MAYNARD KEYNES, THEORY OF EMPLOYMENT, INTEREST AND MONEY (CreateSpace 2009) (originally published in 1936) [hereinafter "*Keynes*"].
440. Michelle Baddeley, *Keynes' Analysis of Rationality and Expectations*, chapter in KEYNES, POST KEYNESIANS AND POLITICAL ECONOMY 201 (Routledge 1999) (stating that "[i]n Keynes' approach, psychological forces play a crucial role in his analysis, and Keynes argues that it is psychology of actual behavior which vitiates classical and neoclassical analyses[ ]") (*citing Keynes, supra* note 439, at 170, 183).

argued that a government in liberal market economy should intervene in the market when the economy was slowing by decreasing taxes or providing stimulus funds, even if that meant operating at a deficit.[441] Keynes' interventionist liberal economic philosophy was so popular during the thirty years following World War II that U.S. President Nixon once remarked "I am now a Keynesian."[442]

Then, when inflation increased throughout the 1970s, many economists pointed to Keynesian economics as the cause,[443] and Milton Friedman and other "supply-side economists" at the University of Chicago initiated a resurgence of neo-classical economic theory[444] and a particularly vehement insistence that the market ultimately can be relied upon to correct any market failure.[445] As stated above, this incarnation of neo-classical economic theory sometimes is referred to as the philosophy of "market fundamentalism."[446] It also is sometimes referred to as "neo-liberalism" or "neo-liberal economics."[447] Unless otherwise noted, when the term "neo-classical economics" is used in this article, it refers to this more recent formulation of neo-classical economic theory.

Given the above, neo-classical trade theory holds that nations should participate in a free trade regime that countenances little, if any, interference from any participating national government.[448] It emphasizes each individual consumer's ability to register his or her consumption preferences through the "power of the purse" and essentially accords no weight to communal values.[449] For example, neo-classical trade theory pays very short shrift to the argument that an "infant industry" is an example of a market failure justifying the provision of domestic subsidies

441. Paul Davidson, The Keynes Solution: The Path to Global Economic Prosperity 5-18 (Palgrave MacMillan 2009) [hereinafter "*Davidson*"].

442. *See, e.g.*, Justin Fox, *The Comeback Keynes*, www.time.com (Oct. 23, 2008).

443. *See, e.g.*, Hunter Lewis, Where Keynes Went Wrong: And Why World Governments Keep Creating Inflation, Bubbles, and Busts *passim* (Axios Press 2009).

444. *Davidson, supra* note 441, at 3.

445. *See generally Redefining the Role of the State: Joseph Stiglitz on Building a "Post-Washington Consensus," An Interview with Introduction by Brian Snowden*, 2 World Econs. 45, 47 (July–Sept. 2001), *available at* http://www2.gsb.columbia.edu/faculty/jstiglitz/download/2001_World_Economics.pdf (accessed Feb. 19, 2010).

446. *See* text accompanying *supra* notes 387-92.

447. *See generally* David Harvey, A Brief History of Neoliberalism (Oxford Univ. Press 2005).

448. Milton Friedman, *The Case for Free Trade*, Hoover Dig. (Fall 1997) (*adapted from The Tyranny of Controls* in Free To Choose: A Personal Statement (Harcourt Brace Jovanivich 1980)), *available at* http://www.freerepublic.com/focus/f-news/1154295/posts (accessed Feb. 19, 2010)/.

449. *Id*.

to that industry.[450] In short, a "public morals" exception is anathema to neo-classical trade theory.

The WTO free trade rules were adopted during the height of popularity of neo-classical economic theory as reformulated by supply-side economists at the University of Chicago[451] and the "law and economies" legal theory, and some aspects of the WTO free trade rules arguably are based more on neo-classical trade theory than classical economic theory. For example, the stricter disciplines adopted in the WTO rules regarding a government's provision of domestic subsidies[452] appear to be more consistent with neo-classical economic theory than classical economic theory, as the latter holds that governments need to provide certain goods and services that private companies are unlikely to provide.[453] A similar argument could be made with respect to the fact that the developing nations were required to adopt all of the multilateral WTO agreements as a "single undertaking"[454] In contrast, the GATT 1947 rules, which clearly had been based on classical trade theory,[455] granted waivers to the developing countries on a fairly regular basis and otherwise extended various forms of special treatment to them.[456]

At the same time, it would be inaccurate to claim that the WTO free trade rules are primarily based on neo-classical trade theory. Not only did the WTO negotiators reaffirm Ricardo's classical theory of comparative advantage (and simultaneously reject the alternative "strategic

450. *Id*. ("Neo-classical economist Milton Friedman stating that [p]erhaps there may be some special reason why the original entrants [to a market] cannot recoup their initial losses even though it may be worthwhile for the community at large to make the initial investment. But surely the presumption is the other way around. . . . The infant industry argument is a smokescreen. The so-called infants never grow up."

451. *See, e.g.*, Henry C. K. Liu, *Too Big to Fail Versus Moral Hazard*, ASIAN TIMES ONLINE, www.atimes.com, Sept. 23, 2008.

452. Alan O. Sykes, *The Economics of WTO Rules on Subsidies and Countervailing Measures*, chapter in *The World Trade Organization: Legal, Economic and Political Analysis* 13 (John M. Olin Law & Economics Working Paper No. 186 2003) *available at* http://www.atimes.com/atimes/Global_Economy/JI23Dj14.html (accessed Feb. 16, 2010).

453. *See, e.g.*, Jeffrey T. Young, *Book Review, James R. Otteson, Adam Smith's Marketplace of Life, available at* http://eh.net/bookreviews/library/0778 (accessed Feb. 16, 2010) ("This . . . [concept] . . . is present in Smith and can be seen in his according the government the duty of providing public works that have net social utility, but negative private utility.").

454. Marjorie Florestal, *Technical Assistance Post-Doha: Is There Any Hope of Integrating Developing Countries Into The Global Trading System?*, 24 ARIZ. J. OF INT'L AND COMP. LAW 122, 125-26 (*citing* RAJ BHALA & KEVIN KENNEDY, WORLD TRADE LAW 14 (Lexis Law Publ'g 1998) [hereinafter "*Florestal*"].

455. *See* text accompanying *supra* notes 393-460.

456. *Florestal, supra* note 454, at 125-26.

trade theory"),[457] but, in adopting the GATT 1994, they also retained all of the exceptions to the GATT 1947 free trade disciplines set forth in Articles XX and XXI.[458] Clearly, the negotiators could have deleted some or all of these exceptions, but they did not. Moreover, they even included similar exceptions in the major new WTO agreements.[459] The WTO rules, then, are perhaps best described as being based on a combination of classical trade theory and neo-classical trade theory.

D. Lessons from Classical Trade Theory and Neo-Classical Trade Theory Regarding the Propriety and Proper Scope of a Morals Exception to the WTO Rules

1. VALUABLE INSIGHTS

Classical trade theory represented a significant advance in the understanding of the economics underlying international trade patterns and permitted the international community to migrate away from the trade theory of mercantilism, which advocated that each nation maximize its exports and minimize its imports. Prior to the publication of Smith's *The Wealth of Nations*,[460] most nations tended to pursue protectionist policies as a method of advancing mercantilism, and Smith's work demonstrated the fallacy of this view and the grave dangers of protectionism, at least with respect to established industries in developed nations.

Classical trade theory and neo-classical trade theories are based on "game theory" in mathematics.[461] Essentially, game theory teaches that, when attempting to predict the effects of a particular move by a single actor within a group, one must simultaneously take into account the likely counteractions of other actors within the group.[462] In the 2001 movie *A Beautiful Mind*, John Forbes Nash, Jr., a brilliant mathematician who revolutionized game theory (as played by the actor Russell Crowe) is depicted as developing his version of game theory by watching several of his fellow Princeton mathematics students all pursue the

457. Sonali Deraniyagala & Ben Fine, *New Trade Theory Versus Old Trade Policy: A Continuing Enigma*, www.soas.ac.uk, at 10, *available at* http://www.soas.ac.uk/economics/research/workingpapers/file28872.pdf (accessed Feb. 17, 2010) (article completed while Ben Fine was in receipt of a Research Fellowship from the UK Economic and Social Research Council (ESRC) under award number R000271046 to study "The New Revolution in Economics and Its Impact upon Social Sciences").

458. *See* text accompanying *supra* notes 9-10.

459. *See id*.

460. *Smith, supra* note 387.

461. HERBERT GINTIS, THE BOUNDS OF REASON: GAME THEORY AND THE UNIFICATION OF THE SOCIAL SCIENCES 36-37 (Princeton Univ. Press 2009).

462. *Id*. at 36 (stating that "John Nash showed that every finite game has a Nash equilibrium in mixed strategies[ ]" and further explaining Nash's "Existence Theorem").

same woman at a party.[463] Nash explains his epiphany to his friends essentially as follows: "If we all pursue the same woman at a party, she will be embarrassed in front of her friends and reject us all, and then all the other women at the party will reject us as well because they will be humiliated that none of us initially pursued them. Alternatively, if we decide ahead of time to pursue different women at the party, no woman will be embarrassed or insulted and, as a group, it will be much more likely that we will obtain dates with women at the party." In the context of trade dynamics, game theory provides a paradigm for understanding how a government measure designed to promote a particular domestic industry in a particular nation often harms more individuals than it helps in that nation and furthermore tends to cause other nations to likewise impose protectionist measures which ultimately causes consumer prices around the world to escalate and the global economy to decline.[464]

It is difficult to overstate the value of the "free trade concept" that underlies both classical trade theory and neo-classical trade theory. Clearly, the maximization of wealth is a worthy goal for the entire international community as well as for any individual nation, as wealth brings much-needed resources to desperate peoples and ultimately can permit them to be self-supporting and make significant contributions to society. Therefore, classical trade theory and neo-classical trade theory teach that it behooves any scholar addressing the propriety and proper scope of a morals exception to the WTO rules to pay heed to the very real danger of economic decline that protectionist trade policies generally can precipitate.

2. FLAWS IN THE CLASSICAL AND NEO-CLASSICAL TRADE THEORIES

i. Flaws in Neo-Classical Trade Theory

Any doubt that neo-classical economic theory in general was incorrect was eviscerated in the fall of 2008 as nation after nation had to provide bailout and stimulus funds to at least its financial industries following the collapse of the home mortgage system in the U.S. The theory that all human values can be quantified and that justice is "economic efficiency" was revealed to be incorrect. After the philosophy of market

463. *See, e.g.*, Laura Clifford, *Movie Review, A Beautiful Mind*, www.killermovies.com, Dec. 20, 2001, *available at* http://www.killermovies.com/b/abeautifulmind/reviews/h6h.html (accessed Feb.17, 2010).

464. *See, e.g.*, Hans Christoph Rieger, *Game Theory and the Analysis of Protectionist Trends*, 9 WORLD ECONOMY 171, *available at* http://www3.interscience.wiley.com/journal/119499208/abstract?CRETRY=1&SRETRY=0 (accessed Feb. 17, 2010).

fundamentalism was implemented in earnest in the U.S. and other countries in the early 1990s, it turned out to be the exception rather than the rule that wealthy companies and individuals "trickled down" any significant share of their economic prosperity to individuals and entities less wealthy than themselves, and in instead they took great advantage of weak or unenforced antitrust laws and the absence of financial regulations that tied financial risk to financial reward. As a result, during the last few decades and especially since the early 1990s, the poor have become significantly poorer and the rich have become significantly richer, both on the international level and the national level.[465] Moreover, inequality in the U.S. has become particularly pronounced,[466] with the wealth of the top one-tenth of one percent of the wealthiest Americans increasing by a multiple of seven since 1973.[467] Ultimately, the concentration of wealth became intolerable and imbalanced national economies began to collapse.

In summary, while market economies possess many advantages over planned economies, the global economic collapse that commenced in the fall of 2008 proved the philosophy of market fundamentalism and the "law and economics" legal theory wrong. In particular, the global economic crisis has clarified in a profound way that, due to the fact that there is no natural limit to human greed, markets are not self-correcting and accordingly governments of nations with market economies must always intervene in their markets in order to prevent the terrific disparities of wealth that can destroy their markets. In short, the lesson taught by the recent global economic crisis can be summed up as follows:

A morally bankrupt economic philosophy renders a society both immoral and bankrupt.

465. GREGORY CLARK, FAREWELL TO ALMS: A BRIEF ECONOMIC HISTORY OF THE WORLD 40-48 (Princeton Univ. Press 2007) (reporting that the disparity in income between the wealthiest and least wealthy nations in the world (a ratio of 50:1) had risen dramatically since 1800 (when this ratio was 4:1).

466. For example, inequality between the rich and the poor in the U.S. has increased to such an extent that Ben Bernanke, Chairman of the Federal Reserve, warned in 2007 that "[r]ising inequality is a concern. . . . The strength of the economy itself requires a belief in the broad American public that they are beneficiaries of a rising economy." Dean Calbreath, *Job Creation in County Takes Shape of Hourglass*, SAN DIEGO UNION TRIB. Sept. 2, 2007, at F1. Janet Yellen, president of the Federal Reserve Bank in San Francisco, voiced similar concerns regarding the fact that inequality in the U.S. is greater than in many other countries, including such nations as Japan, most European nations, Canada, Venezuela, Nicaragua, Uruguay, Zambia, Rwanda, the Ivory Coast, Turkey, and China. In particular, "[s]he warned that there are signs that the gap between rich and poor 'is intensifying resistance to globalization, impairing social cohesion and could ultimately, undermine American democracy.'" *Id.*

467. PAUL KRUGMAN, THE CONSCIENCE OF A LIBERAL 129 (W.W. Norton & Co. 2009).

Specifically with respect to neo-classical trade theory, as stated above, the WTO free trade rules were negotiated between 1986 and 1994 during the Uruguay Round, when the neo-classical economic theory and "law and economics" legal theory were at the height of their popularity, and some aspects of these rules in fact appear to be based more on neo-classical trade theory than classical trade theory.[468] Moreover, the ascendancy of market fundamentalism and "law and economics" legal theory likely bolstered government officials and scholars' claims that new exceptions should not be added to the WTO rules[469] and the existing exceptions should be interpreted very narrowly. As noted above, in particular a number of previous scholars addressing the proper scope of the public morals exception appear to have been pre-occupied with the potential for protectionist abuse of that exception to the point where they ignored almost completely other concerns and disciplines relevant to this issue.

Behavioral economists, who study how consumers' purchasing decisions are influenced by a range of factors in addition to product features and costs, have been most vocal in arguing that neo-classical trade theory places insufficient weight on non-economic factors, including, for example, a consumer's confidence that his or her local is growing, the purchasing decisions of a consumer's close family members and friends, and the cultural and moral beliefs of the consumer's local and national communities.[470] For example, behavioral economists would argue, neo-classical trade theory ignores or at least de-emphasizes the fact that a consumer in a foreign nation might decline to purchase an item (e.g., a bikini in the UAE[471] or a Muslim full-face veil in France[472])

468. *See* text accompanying *supra* notes 177-88.

469. *See, e.g.*, Alan Riding, *U.S. Stands Alone on UNESCO Cultural Issue*, N.Y. TIMES, Oct. 13, 2005, at B3 (reporting the isolation of the U.S. in voting against the UNESCO Convention on the Promotion and Protection of the Diversity of Cultural Expressions and the Bush administration's reasons for voting against it).

470. *See, e.g.*, Marshall Auerback, *Neo-Classical Economics Misses What Matters*, www.counterpunch,org, Oct. 8, 2009, *available at* http://www.counterpunch.org/auerback10082009.html (accessed Feb. 17, 2010); *see also generally* HANDBOOK OF COMTEMPORARY BEHAVIORAL ECONOMICS (Morris Altman ed. M.E. Sharpe, Inc. 2006).

471. Dana El Baltaji, *Paris Hilton Defies Dubai Bikini Ban*, www.kippreport.com, June 22, 2009, *available at* http://www.kippreport.com/2009/06/paris-hilton-defies-dubai-bikini-ban/ (accessed Feb. 18, 2010) (originally published in *Middle East Business News*); Zia Haq, *Burqa or Bikini, Don't Tramp on Bedrock Freedoms*, Jan. 31, 2010, blogs.hindustantimes.com, *available at* http://blogs.hindustantimes.com/they-call-me-muslim/2010/01/31/burqa-or-bikini-don%E2%80%99t-tramp-on-bedrock-freedoms/ (accessed Feb. 28, 2010).

472. *See* Edward Cody, *France Moves Toward Restricting Full-face Veils*, SAN DIEGO UNION TRIB., Jan. 17, 2010, at A12; *see also* Oumeima Naceri, *It's Like Asking*

solely because the item violates his or her moral beliefs. At the same time, behavioral economists' studies have revealed that peoples' consumption decisions do not always reflect their moral beliefs.[473]

Behavioral economists' critique of neo-classical trade theory and empirical studies of consumers' purchasing decisions are especially important to a socio-economic analysis of a morals exception to the WTO rules. Their critique reveals that companies should not even expect to be able to sell many copies of a good in a nation whose population that finds the good to be morally distasteful. This economics principle, of course, supports the inclusion of a morals exception to the WTO free trade rules. In addition, behavioral economists' finding that consumers' purchasing decisions do not always reflect their moral beliefs supports the conclusion that a value as important as one's moral beliefs cannot be summed up by his or her purchasing decisions and provides support for the view that any individual human being's moral beliefs can be revealed only by his or her explicit expression of those beliefs.[474]

ii. Flaws in the classical trade theory

To begin with, it is important to understand that other writers have inappropriately credited (or blamed) classical trade theory and classical economics more generally for a wide variety of policies and principles. For example, some writers have claimed or implied that Smith's laissez faire economic principles advocate a government's refusal to provide welfare programs for the poor.[475] To the contrary, Smith argued that governments should establish such welfare programs,[476] and he was especially concerned that members of the poorer classes would not be able to support themselves in a more and more mechanized society unless the government provided them with a basic education.[477] In addition, Smith supported progressive taxation systems as a method of funding social welfare programs.[478] Smith, in particular, was a fascinating character.

Us to Go Naked, TIME MAG., Feb. 1, 2010, at "Verbatim" (reporting the comments of "a 19-year-old Muslim, on a French proposal that would bar women from wearing full-body, face-covering robes in public").

473. *See, e.g.*, David K. Levine, *Is Behavioral Economics Doomed?*, Max Weber Lecture, June 8, 2009, *available at* http://levine.sscnet.ucla.edu/papers/behavioral-doomed.pdf (accessed Feb. 17, 2010).

474. *See* text accompanying *infra* notes 603-05.

475. *See, e.g.*, SAMUEL FLEISCHACKER, ON ADAM SMITH'S WEALTH OF NATIONS: A PHILOSOPHICAL COMPANION 145 (Princeton Univ. Press 2005) ("[C]ommentators who emphasize Smith's views on justice tend to see him as laying the groundwork for the modern libertarian critique of the welfare state."). [hereinafter "*Fleischacker*"].

476. *Id*. at 63.

477. *Smith, supra* note 387, at 601.

478. *Fleischacker, supra* note 475, at 63 (*citing Smith, supra* note 387, at 647).

Long before he was an economist, he was a philosopher,[479] and he was not concerned with making his ideas and theories fit seamlessly with anyone else's theories or political agendas.[480] In fact, given the multi-disciplinary and comprehensive nature of his research and theories, some socio-economists essentially view Smith as a socio-economist.[481]

At the same time, despite the tremendous value of classical economics and the concept of "free trade" in particular, economists and other commentators over the years have noted numerous simplifying assumptions, inaccurate aspects, and anachronistic features of classical trade theory. To begin with, many writers have argued that David Ricardo's theory of comparative advantage, which was based on only two countries and two products, was an unrealistically simple economic model of the global economy even in 1817 when he first proposed it.[482] In addition, classical trade theory assumes that factors of production do not cross international borders, when in fact today they do.[483] In today's world, where almost every factor of production is for sale to the highest bidder, the wealthiest companies in the world can be expected to purchase poor nations' factors of production rather than cede to poor nations the production of items incorporating those factors of production as classical trade theory assumes. Furthermore, classical trade theory didn't fully account for governments' creation and enforcement of intellectual property rights,[484] and the TRIPS Agreement even goes so far as to require each WTO member to enact and enforce specified minimum intellectual property protections.[485] As temporary monopolies granted to intellectual property owners naturally lead to concentrations of wealth, the developed WTO member nations' emphasis on enforcing

479. *See, e.g.*, Smith's book *The Theory of Moral Sentiments*, which he published in 1759. ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (Oxford Univ. Press 1978).

480. JERRY Z. MULLER, ADAM SMITH IN HIS TIME AND OURS 6 (Princeton Univ. Press 1995) ("[H]is mode of thought . . . cannot be characterized as either liberal or conservative, philosophical or economistic.").

481. Robert Ashford, *Socio-Economics—An Overview*, (July 4, 2007), available at http://ssrn.com/abstract=882751 ("Socio-economics approaches economic understanding much as Adam Smith did (before there were separate disciplines) with a foundation based on natural and moral philosophy.").

482. *See, e.g.*, Richard Caves, *Bertil Ohlin's Contribution to Economics*, SCANDANAVIAN JOURN. ECON. 80, 86–99 (1978).

483. *Id.*

484. *See, e.g.*, ERIK REINERT, HOW RICH COUNTRIES GOT RICH . . . AND WHY POOR COUNTRIES STAY POOR 111-14 (Public Affairs 2008). Note also that Adam Smith disfavored intellectual property protections. *Smith, supra* note 387, at 57(stating that "[a] monopoly granted either to an individual or to a trading company, has the same effect as a secret in trade or manufactures. . .The monopolists. . .sell their commodities much above the natural price[.]").

485. TRIPS Agreement, *supra* note 10.

intellectual property rights in recent years helps explain the development of enormous concentrations of wealth both across and within nations in recent years.

Another major flaw in the theory of comparative advantage is that it emphasizes that nations have "natural" advantages and disadvantages and in general ignores that nations also generally proceed through a series of economic development phases and developing nations simply are at an earlier step in their development than the developed nations. In other words, classical trade theory largely fails to take development economics into account.[486] Numerous economists over the years have pointed out various examples of this flaw. For example, Paul Collier in his book *The Bottom Billion*[487] discussed four different "development traps" that the poorest countries in the world need to escape or avoid before they can be expected to benefit from participation in a free trade system. Similarly, Joseph Stiglitz and Andrew Charlton in their book *Fair Trade For All: How Trade Can Promote Development*,[488] explained that the theory of comparative advantage is premised on employees in each citizens in each participating nation being fully employed (but in inefficient industries supported by protectionist measures), when, in fact, many citizens in the developing and least developed countries are not employed in any industries.[489]

The most comprehensive explanation of the various flaws in the international trade theory of comparative advantage has been expressed by proponents of the alternative "strategic trade theory," including Nobel-Prize winning economist Paul Krugman.[490] In a nutshell, strategic trade theory maintains that governments should be permitted to implement a trade barrier or provide government assistance if such a measure is necessary to promote a domestic industry that both promises significant returns and is suffering from one or more market failure(s).[491] In addition,

486. *See, e.g.*, Roger L. Martin, *What Innovation Advantage?*, *BusinessWeek*, Jan. 16, 2006, *available at* http://www.businessweek.com/magazine/content/06_03/b3967146.htm (accessed Feb. 17, 2010).

487. PAUL COLLIER, THE BOTTOM BILLION (Oxford Univ. Press 2007).

488. JOSEPH STIGLITZ & ANDREW CHARLTON, FAIR TRADE FOR ALL: HOW TRADE CAN PROMOTE DEVELOPMENT (Oxford Univ. Press 2005).

489. *Id.* at 26.

490. *See, e.g.*, STRATEGIC TRADE POLICY AND THE NEW INTERNATIONAL ECONOMICS (Paul R. Krugman ed. MIT Press 1998) [hereinafter "*Krugman*"].

491. *Id.* at 25 & 23-47 *in passim; see also* Jagdish Bhagwati & V. K. Ramaswami, *Domestic Distortions, Tariffs and the Theory of Optimum Subsidy*, 71 J. POLITICAL ECON. 44 (1963) (pointing out that the theory of comparative advantage assumes that a protectionist measure enacted by any participating nation in a free trade system will always have a negative economic effect on both that nation and the other participating

strategic trade theorists emphasize that industries in developing nations tend to suffer from one or more market failures, not the least of which often is being an "infant industry" that is attempting to compete against much more mature industries in other nations. In the years leading up to the Uruguay Round, Japan and the four "Asian tigers" of Taiwan, Hong Kong, South Korea, and Singapore had pursued such "strategic trade" policies with respect to their high technology industries to great success. Accordingly, during the Uruguay Round, a number of developing nations wishing to emulate their success proposed that the "strategic trade theory" be adopted as the economic underpinning of the WTO trade rules. However, numerous events in the 1980s and early 1990s conspired to reinvigorate the popular appeal of the theory of comparative advantage,[492] and the Uruguay Round negotiators ultimately rejected the strategic trade theory and affirmed classical trade theory as the basis of the WTO trade rules.

These critiques of classical trade theory are important in a socio-economic analysis of a morals exception to the WTO rules in that they reveal that not every protectionist measure will necessarily have negative economic consequences for the nation imposing the measure or the global economy. In fact, some of these critiques suggest that, if a specific industry in a specific nation is suffering one or more market failure(s), a protectionist measure may not harm more mature competing industries in other nations and furthermore may be necessary to promote the development of that specific industry. More particularly, these critiques teach that not every measure enacted by a WTO member nation to protect its people's morals will necessarily cause negative economic consequences, as a number of previous scholars addressing

nations in the system, when, in fact, the effects of any protectionist measure depend on the specific economic conditions that were in effect prior to the enactment of such a measure).

492. Chief among these events were the election of Margaret Thatcher as the Prime Minister of Britain in 1979, the election of Ronald Reagan as the President of the United States in 1980, the high tax rates and poorly performing economies in the U.S. and other Western nations, a decline in international trade and global economic growth, the rise of the economic philosophy of market fundamentalism and the "law and economics" legal theory, and the collapse of the Berlin Wall and the Soviet Union. *See, e.g.*, WILLIAM F. BUCKLEY, JR., THE FALL OF THE BERLIN WALL (Wiley 2004); *1979: Election victory for Margaret Thatcher*, BCC NEWS, May 4, 1979, *available at* http://news.bbc.co.uk/onthisday/hi/dates/stories/may/4/newsid_2503000/2503195.stm (accessed Feb.11, 2010), DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 1, 26 (Oxford Univ. Press 2005); Duane Swank, *The Spread of Neoliberalism: The U.S. Economic Power and the Diffusion of Market-Oriented Tax* Policy 4 (Center for European Studies, Working Paper No. 120 2004); Jack Kemp, *Staying on the Road to Prosperity*, SAN DIEGO UNION TRIB., Aug. 14, 2007, at B6.

a morals exception to the WTO rules appear to have assumed. In short, these critiques support the conclusion that, while these scholars' concern with WTO members' possible protectionist abuse of a morals exception is valid, their analyses essentially began and ended with this single concern. The remainder of this article, in contrast, considers the propriety and proper scope of a morals exception to the WTO rules from the perspective of several difference disciplines, which are relevant to this issue.

E. The WTO Rules Should Contain a Morals Exception that Recognizes Each WTO Member's Right to Define and Protect its Public Morals Because this Right is a Fundamental Component of Each Member's National Sovereignty

The WTO Agreement provides that "[a]ny State or separate customs territory possessing full autonomy in the conduct of its external commercial relations" is entitled to apply for membership in the WTO.[493] Although the WTO Agreement doesn't define the word "state," the Pan-American Convention on the Rights and Duties of States[494] stipulates that a state must possess (a) a permanent population; (b) a defined territory; (c) a government; and (d) the capacity to enter into relations with the other states,"[495] and the term "nation-state" also is often used to describe an entity that meets these four criteria.[496] The words "nation" and "people" also are often used to refer to an entity that meets these four criteria, but these words are also used more generally to refer to any group of people who share a common language and common culture.[497] Apparently because some nation-states are not members of the United Nations,[498] the WTO Agreement lists a "customs territory" (defined as

493. WTO Agreement, *supra* note 422, Art. XII (1).

494. The Montevideo Convention on the Rights and Duties of States was a treaty signed on December 26, 1933, during the Seventh International Conference of American States. The treaty sets out the definition, rights, and duties of statehood.

495. Montevideo Convention on the Rights and Duties of States, 49 Stat. 3097, Art. I, Dec. 26, 1933.

496. *See, e.g.*, Walter C. Opello, Jr. & Stephen J. Rostow, The Nation-State and Global Order: A Historical Introduction to Comtemporary Politics 3 (Lynne Rienner Publishers 2004).

497. *See, e.g.*, Arthur Goldhammer, *Translator's Note in* Alexis de Tocqueville, Democracy in Action (Arthur Goldhammer, trans. Library of America 2004) ("Tocqueville often uses the terms "nation" and "people" interchangeably[.]"); Matt Rosenberg, *Country, State, and Nation: Defining an Independent Country,* geographyabout.com*, available at* http://geography.about.com/cs/politicalgeog/a/statenation.htm (accessed Feb. 17, 2010); John J. Macionis, Society: The Basics, ch. 2, § 6e (Prentice Hall, Inc. 2001).

498. Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945, Chapter II, Art. 4 ("The admission of any . . . state

a land mass where the customs laws of a nation-state apply[499]) in addition to a "state" as an entity that is entitled to join the WTO,[500] and a few such customs territories, such as the Republic of China (Taiwan), the Government of Hong Kong, and the European Communities (EC), are WTO members.[501] In any case, although all WTO members meet the above-stated criteria for a "state," for the sake of convenience, the WTO members are referred to throughout this article as "nations."

As the acknowledged goal of the WTO rules is the maximization of its participants' wealth,[502] we can safely assume that each WTO member joined the WTO for this purpose. After all, no nation or other entity is required to join the WTO[503] and any WTO member is free to terminate its membership by providing the other members with six months' advance notice.[504] Accordingly, it stands to reason that the WTO members would have to consider any matter exempted from the WTO rules to be more important than the maximization of their wealth, and the one value that each WTO member indisputably agrees "trumps trade" is its own security. That is, it is inconceivable that any nation would join the WTO or remain a WTO member if, by doing so, it could jeopardize its continued existence. As noted above, even Adam Smith, the father of classical trade theory, alluded to this point in *The Wealth of Nations*, when he noted that all nations are likely to consider that "defense . . . is of much more importance than opulence."[505] Of course, Smith, in that particular passage, was referring to the threat posed to a nation by a physical invasion or attack by another nation, and an exception to the

to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.").

499. International Convention on the Simplification and Harmonization of Customs Procedures (Kyoto, 18 May 1973), Annex A.1, p. 6.

500. WTO Agreement, *supra* note 422, Art. XII (1); UNDERSTANDING THE WTO 3 (World Trade Org. 2008), *available at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf (accessed Feb. 17, 2010) ("[T]he words "country" and "nation" are frequently used to describe WTO members, whereas a few members are officially "customs territories", and not necessarily countries in the usual sense of the word . . . .").

501. World Trade Organization, *Members and Observers*, http://www.wto.org/english/theWTO_e/whatis_e/tif_e/org6_e.htm (accessed Feb. 11, 2010).

502. *See* text accompanying *supra* notes 191-92.

503. WTO Agreement, *supra* note 422, Art. XII (1).

504. *Id*. at Art. XV (1).

505. TRADE POLITICS: ACTORS, ISSUES AND PROCESSES 4 (Brian Hocking & Steve McGuire eds. Routledge 1999) (*quoting Smith, supra* note 387, at 352). On another occasion, Smith stated that "it is only by means of a standing army . . . that the *civilization* of any country can be perpetuated[.]" Paul B. Trescott, *Murray Rothbard Confronts Adam Smith*, 1 QUARTERLY J. OF AUSTRIAN ECON. 61 (1998) (*quoting Smith, supra* note387, at 545 (emphasis added)

WTO rules to account for such a physical threat to a WTO member is provided in Article XXI of the GATT 1994 as well as similar provisions in other WTO agreements.[506] As a nation's "security" is threatened at least as much by an attack on its "unique practices and beliefs" as by an attack on its "physical location on earth,"[507] this fact would argue in favor of a morals exception to the WTO rules.

In fact, it is the unique practices and beliefs of a nation, rather than its physical boundaries, that are *sui generis* of a nation. This is demonstrated by the fact that the earth's land masses today are organized primarily into "nation-states,"[508] but this arrangement did not commence in earnest until the Treaty of Westphalia was signed by various European nations in 1648.[509] Centuries ago, for example, the ancient Greeks organized themselves into city-states,[510] and, although experts believe that nation-states will continue to exist for the foreseeable future,[511] some people predict that the world's land masses someday will be organized into larger regional land masses that will better suit people's political needs at that time.[512] That is, any "nation" is an inanimate, mental construct, and the physical boundaries of any particular "nation"

506. GATT 1994, Art. XXI.

507. *See, e.g.*, Alexander Wendt, *Collective Identity Formation and the International State*, 88 AM. POL. SCI. REV. 384 (June 1994); Ronald L. Jepperson, Alexander Wendt & Peter J. Katzenstein, *Norms, Identity, and Culture in National Security*, in THE CULTURE OF NATIONAL SECURITY 52 (Peter J. Katzenstein ed. 1996); *see also* Alistair Boddy-Evans, *Quotes: Stephen (Steve) Bantu Biko*, About.com, *available at* http://africanhistory.about.com/od/bikosteve/p/qts_biko.htm (accessed Aug. 8, 2009) (Steve Biko, anti-apartheid activist in South Africa and founder of the Black Consciousness Movement, stating at a 1971 speech in Cape Town that "[t]he most powerful weapon in the hands of an oppressor is the mind of the oppressed."); JUNG CHANG, WILD SWANS: THREE DAUGHTERS OF CHINA 113 (Touchstone 2003) (stating that "this was one of the crucial factors in the Communists' victory. Their goal was not just to crush the opposing army but, if possible, to bring about its disintegration. The Kuomintang was defeated as much by demoralization as by firepower.").

508. *See, e.g.*, Shampa Biswas, *W(h)ither the Nation-state? National and State Identity in the Face of Fragmentation and Globalisation*, 16 GLOBAL SOC'Y 175, 177, 194.

509. P. Hirst, G. Thompson, *Globalisation, Governance and the Nation State*, in GLOBALISATION IN QUESTION: THE INTERNATIONAL ECONOMY AND THE POSSILITIES OF GOVERNANCE 171 (Polity Press 1996).

510. Walter C. Opello, Jr. & Stephen J. Rosow, THE NATION-STATE AND GLOBAL ORDER: A HISTORICAL INTRODUCTION TO CONTEMPORARY POLITICS 9 (Lynne Rienner Publishers 2004), *available at* http://www.rienner.com/uploads/47dea53755704.pdf (accessed Feb. 8, 2010).

511. *See, e.g.*, Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT'L L. 283 (2004) (arguing that nations will decline in importance over the next several years but continue to serve a valuable role for individuals in the international system).

512. *See, e.g.*, KENICHI OHAME, THE END OF THE NATION STATE: THE RISE OF REGIONAL ECONOMIES (1996) (asserting that the end of the "isms" allows more people to come forward to participate in history, and that they turn toward international bodies, rather than nation-states, for their needs).

tend to be unstable when they fail to coincide with the unique practices and beliefs of the people living therein.[513] As Ernest Renan wrote so eloquently in 1882:

> A nation is a soul, a spiritual principle. Two things, which in truth are but one, constitute this soul or spiritual principle. One lies in the past, one in the present. One is the possession in common of a rich legacy of memories; the other is present–day consent, the desire to live together, the will to perpetuate the value of the heritage that one has received in an undivided form…A nation's existence is, if you will pardon the metaphor, a daily plebiscite, just as an individual's existence is a perpetual affirmation of life.[514]

The Kenyan journalist Binyavanga Wainaina expressed this same idea more succinctly but no less eloquently:

> Nations are mythical creatures, gaseous, and sometimes poisonous. But they start to solidify when diverse people have moments when aspirations coincide.[515]

The United Nations Education, Science and Cultural Organization (UNESCO), which is the international agency dedicated to promoting the understanding and preservation of unique cultures worldwide defines a "culture" as:

> the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs.[516]

Cultural theorists also teach that no nation's culture remains static,[517] if for no other reason than the individual human beings who constitute that nation are affected by their personal experiences and likewise

513. *See, e.g., The breaking up of India,* bbs.chinadaily.com.cn, Jan. 21, 2010, *available at* http://bbs.chinadaily.com.cn/viewthread.php?tid=658814 (accessed Feb. 8, 2010) (revealing that following weeks of angry pro-independence protests, India's federal government agreed to the creation of a new state of Telangana in the Telengana region of Andhra Pradesh, but then announced that more consultations were needed).

514. ERNST RENAN, WHAT IS A NATION? (1882).

515. Binyavanga Wainaina, *Generation Kenya*, VANITY FAIR, July 2007, at 3.

516. UNESCO, Mexico City Declaration on Cultural Policies, World Conference on Cultural Policies (July 26, 1982-Aug. 6, 1982) at 1, *available at* http://portal.unesco.org/culture/en/files/12762/11295421661mexico_en.pdf/mexico_en.pdf (accessed Feb. 8, 2010). The U.N. Declaration on Cultural Diversity (adopted unanimously at U.N. Educ., Scientific, and Cultural Org. (UNESCO), General Conference, 31st Sess., (Nov. 2, 2001), *available at* http://unesdoc.unesco.org/images/0012/001271/127160m.pdf (accessed Feb. 11, 2010), incorporated this definition of culture, and then the 2005 U.N. Convention on the Protection and Promotion of Expressions of Cultural Diversity converted this Declaration into a binding treaty.

517. *See* PHILLIP D. CURTIN, THE WORLD & THE WEST: THE EUROPEAN CHALLENGE AND THE OVERSEAS RESPONSE IN THE AGE OF EMPIRE 73 (2000); WILLIAM A. HAVILAND, CULTURAL ANTHROPOLOGY 403 (1993).

make idiosyncratic contributions to their culture. Given this, it must be conceded that no nation on earth, no matter how isolated, can lay claim to possessing a "pure" or "authentic" national culture. For example, the Ndebele in South Africa wear garments decorated with what they describe as their "native jewelry."[518] The Ndebele, however, actually have imported this "native jewelry" from the Czech Republic since at least the early 1800s.[519] Similarly, during his non-violent protest against the British rule of India, Gandhi often complained that the British were destroying the Indian culture by permitting the importation of cheap rugs that competed with India's "native rug industry."[520] His argument, however, was significantly undercut by the fact that India clearly had stolen this "native rug industry" from Persia.[521] In 1972, distinctive Spondylus shells from the Aegean Sea were discovered in the tombs of elite members of the Cucuteni people who lived in what today is known as Varna, Bulgaria in approximately 4050 B.C.[522] At first, archaeologists were baffled by the presence of these shells in tombs located so far from the Aegean Sea, but researchers then discovered that ancestors of the Cucuteni people had migrated north to Bulgaria from the area of Greece and Macedonia on the Aegean Sea in approximately 6,200 B.C., which suggested that the Cucuteni people had acquired the prized Aegean shells from nomadic traders "[p]erhaps . . . [as] symbols of their [two-thousand-year-old] Aegean ancestors."[523]

Clearly, peoples around the world have been trading with one another for millennia, long before large land masses on the earth were even organized into nation-states. Moreover, any WTO member surely recognized when it joined the WTO (or the GATT 1947) that its culture could change dramatically as a result of its participation in a free trade system. This is the case, because such a system involves direct commercial exchanges between producers and consumers in each nation with foreign producers and consumers in many other nations whose populations follow a wide range of cultural practices and beliefs, and cultural theories generally numerous agree that any culture changes most dramatically when it is confronted by another culture.[524] For all of

518. Tyler Cowen, Creative Destruction: How Globalization is Changing the World's Cultures 8 (Princeton Univ. Press 2002).
519. *Id*.
520. *Id*. at 39.
521. *Id*. at 38-43, 64.
522. *See* John Noble Wilford, *First and Forgotten*, San Diego Union Trib., Dec. 7, 2009, at E1.
523. *Id*.
524. *Wright, Reconciling Cultural Diversity and Free Trade, supra* note 8, at 448 ("The field of cultural studies teaches that the most effective method of maintaining a

the above reasons, it should be clear that a nation's sovereignty is not founded on any particular practices or beliefs. Rather, it is founded on a nation's ability to define for itself on an on-going basis which particular practices and beliefs it wishes to follow,[525] and the peremptory international norm[526] of self-determination[527] protects every people's right to do so. Specifically, this principle, which has been documented in several international treaties and other agreements,[528] holds that "[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[529]

group's cultural norms is to isolate the group from other cultures. Throughout history, numerous group leaders have implemented isolationist policies designed to prevent cultural change. Such policies typically include the prohibition against crossing physical barriers, the banning of communication devices which would expose members to alien cultural norms, and severe punishments, such as "shunning," imposed for the violation of important cultural norms, especially the prohibition against contact with the outside world. The Amish, who follow a branch of the Quaker religion, and the Fundamentalist Latter Day Saints (FLDS), a fundamentalist Mormon sect, are modern-day examples of religious groups in the U.S. that maintain their cultural norms in large part by enforcing just such isolationist policies.") (citations omitted.).

525. While the parameters of "national sovereignty" often are debated, the concept of sovereignty of the nation-state was first established in the Treaty of Westphalia in 1648, which in particular recognized the power of nation-states over religious matters within their respective territories. Treaty of Westphalia, Oct. 24, 1648, *available at* http://avalon.law.yale.edu/17th_century/westphal.asp (accessed Feb.11, 2010); *see also* DANIEL PHILPOTT, REVOLUTIONS IN SOVEREIGNTY: HOW IDEAS SHAPED MODERN INTERNATIONAL RELATIONS 51-53 (Princeton Univ. Press 2001).

526. A peremptory norm of international law is "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Such a principle is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted." Lee M. Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. OF INT'L L. 741, 742, n. 6 (2003) (*quoting* Article 53 of the Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 UNTS 331 (the Vienna Convention). Even "[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." Vienna Convention, Art. 53.

527. ANTONIO CASSESE, SELF DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 171-72 (1999) ("At present the whole world community regards the principle [of self-determination] as of such importance as to rank among the norms of *jus cogens*.").

528. *See, e.g.*, Universal Declaration of Human Rights (Universal Declaration on Human Rights, G.A. Res. 217A, at arts. 18, 19, 27.1, and 28, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948); the International Covenant on Civil and Political Rights (International Covenant on Civil and Political Rights, 16 Dec. 1966, GA Res 2200 (XXI), UN GAOR, 21st Sess., Supp. No. 16, at 52, UN Doc A/6316 (1966) [hereinafter "*Covenant on Social and Political Rights*"]), and the International Covenant on Economic, Social and Cultural Rights (International Covenant on Economic, Social and Cultural Rights, 16 Dec. 1966, G.A. Res. 2200A, at 49, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) [hereinafter "*Covenant on Economic, Social and Cultural Rights*"]).

529. *Covenant on Civil and Political Rights, supra* note 528, at Art. 1.1; *Covenant on Economic, Social, and Cultural Rights, supra* note 528, at Art. 1.1.

This aspect of "national sovereignty" is directly analogous to the concept of "personal autonomy."[530] That is, most psychologists define "personal autonomy" or "personal identity" as "the capacity for self-direction,"[531] meaning that a person is "directed by considerations, desires, conditions, and characteristics that are not imposed from without but are part of what can . . . be considered one's authentic self."[532] More specifically, one is considered to possess an autonomous "personality" or "identity" if his or her psyche is both "self-regulating" and "self-liberating."[533] Furthermore, psychologists maintain that one of the most important aspects of personal autonomy is the ability to maintain control over one's self-definition.[534] In a similar manner, a nation which permits one or more other nation(s) to define for its citizens "good human behavior" and "bad human behavior" is permitting its sover-

530. The English word "autonomy" is derived from the Greek words "auto" for "self" and "nomos" for "law," so that in general an "autonomous person" is considered to be "one who gives oneself his own law" or is "free[ ] from external authority." New World Encyclopedia: *Autonomy*, www.newworldencylopedia.org, *available at* http://www.newworldencyclopeida.org/entry/Autonomy (accessed Feb. 17, 2010).

531. New World Encyclopedia: *Personal Autonomy-Psychology*, www.newworldencylopedia.org, *available at* http://www.newworldencyclopeida.org/entry/Autonomy (accessed Feb. 17, 2010).

532. *Id*.

533. Philip M. Davidson, *The Meaning of Autonomy in Psychological Theory, Education Resources Information Center*, Opinion Paper ED346959, 1991, *available at* http://www.eric.ed.gov/ERICWebPortal/custom/portlets/recordDetails/detailmini.jsp?_nfpb=true&_&ERICExtSearch_SearchValue_0=ED346959&ERICExtSearch_SearchType_0=no&accno=ED346959 (accessed Feb. 17, 2010) (summarizing psychologist Jean Piaget's theory of the personality set forth in JEAN PIAGET, THE MORAL JUDGMENT OF THE CHILD (The Free Press 1965)). Self-regulating" means that a person possesses the capacity to consciously choose his or her actions and take responsibility for the same. "Self-liberating" means that a person possesses the capacity to assert his or her own needs and desires. *Id*.

534. For example, perpetrators of domestic violence often attacks their victims' self-esteem because they consciously or unconsciously known that preventing their victims from being able to maintain control over their identities humiliates them and destroys their autonomy. *Surviving Domestic Violence*, www.saving-grace.org, *available at* http://www.saving-grace.org/CEDocuments/Downloads_GetFile.aspx?id=286865&fd=0 (accessed Feb. 17, 2010) (Most abusers verbally attack their partners in degrading, revolting ways . . . Perhaps the most common type of severe emotional abuse involves both public and private insults, humiliation and attempts to degrade. . . . [A victim should insist on his or her] right to autonomy (self direction)."); *see also* DONALD G. DUTTON, THE ABUSIVE PERSONALITY: VIOLENCE AND CONTROL IN INTIMATE RELATIONSHIPS 205-06 (Guilford Press 2007) (explaining that Jack Katz, in his book SEDUCTION OF CRIME: MORAL AND SENSUAL ATTRACTIONS IN DOING EVIL 114 (Basic Books 1988) "defines humiliation as a loss of control over one's identity["] and gives the example of "a husband [who] knows that others know he is a cuckhold, and he senses that they always will see him that way. Suddenly, he realizes that his identity has been transformed by forces outside his control some [sic] fundamental way. He has become morally impotent, unable to govern the evolution of his identity[.]").

eignty to be infringed and in so doing risks its domination by those other nation(s).[535]

Moreover, of all its various practices and beliefs, a nation holds most dear its moral practices and beliefs. This is the case, because such practices and beliefs go to the very essence of what it means to be human for the people constituting that nation.[536] As such, most nations express and enforce their moral beliefs in a "criminal" or "penal" code.[537] An example may help elucidate the difference between a typical "cultural norm" and a "moral norm." Assume that a particular nation's citizens eat food with chopsticks, and this is one of these people's defining cultural practices. If we further assume that the citizens of this nation follow this practice out of tradition or convenience rather than by proscription, one would not expect the nation to punish a person who uses a different eating tool or the citizens to be offended by the availability of foreign eating tools for sale in the domestic marketplace. In contrast, if we assume that the citizens follow this practice because it is part of their moral code, or "code of right and wrong behavior,"[538] then one would not be surprised if the nation punishes a person who uses a different eating tool or the nationals are offended by the availability of foreign eating tools for sale in the domestic marketplace. In just this manner, the citizens of every nation distinguish between foreign practices and beliefs that are merely "different" and foreign practices and beliefs that are "immoral" and accordingly contravene their identity.

In most nations, including the U.S., the government's enforcement of a national moral code has long been considered an important function of its "police power" as well as a critical aspect of its sovereignty.[539] Other

535. Simona Fuma Shapiro, *The Culture Thief*, J. OF NEW RULES PROJ. (2000), *available at* http://www.newrules.org/journal/nrfall00culture.html#sidebar (accessed Feb. 17, 2010) (quoting Francois Mitterand, former President of France in a 1993 speech regarding France's proposal that the Uruguay Round negotiators adopt a cultural exception to the WTO rules, to the effect that "[a] society which abandons the means of depicting itself would soon be an enslaved society.").

536. *See, e.g.*, Jeffrey Kluger, *What Makes Us Moral*, www.time.com, Nov. 21, 2007, *available at* http://www.time.com/time/specials/2007/article/0,28804,1685055_1685076_1686619-4,00.html (accessed Feb. 8, 2010); Ahmed Shawqi, verse in poem Nahj al Burdah? ("Nations endure for as long as do their morals; When their moral go away they too go away.")

537. *See* text accompanying *infra* note 561.

538. *See supra* note 535.

539. DAVID WATSON, THE CONSTITUTION OF THE UNITED STATES ITS HISTORY APPLICATION AND CONSTRUCTION, ch. XXV (Callaghan & Co. 1910), *available at* http://www.constitution.org/cmt/watson00.txt (accessed Feb. 11, 2010); *see also* Audley Sheppard, *Public Policy and the Enforcement of Arbitral Awards: Should there be a Global Standard?, available at* http://www.transnational-dispute-management.com/samples/freearticles/tv1-1-article_67.htm (accessed Feb. 19, 2010) (study conducted by

national government functions that are considered to derive from a nation's "police power" and likewise constitute significant components of a nation's sovereignty include the maintenance of public order, the protection of the health and safety of humans, plants, and animals, the conservation of exhaustible natural resources, the protection of treasures of historical, artistic, and archaeological value, and the distribution of goods in short supply.[540] All of these functions concern a government's power to regulate its own natural resources and the behavior of its own citizens, and numerous local governments all over the world perform such functions every day under the aegis of their more particular "police power."[541] The U.S. Supreme Court, for example, confirmed back in 1898 that "the states 'never surrendered the power to protect the public health, the public morals, and the public safety, by any legislation appropriate to that end'."[542]

In sum, this socio-economic analysis of a morals exception to the WTO rules reveals that a nation's right to exercise its police power and regulate its internal affairs is just as essential a component of its national sovereignty as its right to defend its natural resources and people against physical attack by another nation.[543] Accordingly, this socio-economic analysis concludes that the WTO rules should contain an exception permitting a WTO member to enforce its unique moral code within its own territory because a member's right to do so is a key element of its police power.[544] More specifically, this analysis

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the International Commercial Arbitration Committee of the International Law Association (ILA), stating that "[a]s all arbitration practitioners and scholars know, violation of public policy (or *order public*) of the enforcing State has long been a ground for refusing recognition/enforcement of foreign judgments and awards. . . . The ILA noted that the international public policy of any States includes: . . . fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned . . . [and] rules designed to serve the essential political, social or economic interests of the State, these being known as "lois de police" or "public policy rules" . . . [and the] category of fundamental principles . . . includes the proscription against activities that are *contra bonos mores*, [or "against good morals"], such as: piracy; terrorism; genocide; slavery; smuggling; drug trafficking; and paedophilia.").

540. *Id*.

541. *See, e.g.*, Miguel Gonzalez, *Trade and Morality: Preserving "Public Morals" Without Sacrificing the Global Economy*, 39 Vand. J. Transnat'l L. 939, 960-68 (2006) (reviewing numerous laws "protecting public morals" in the United States, Pakistan, Australia, Canada, Hong Kong, the U.K, and various Latin American countries).

542. *Id*. (*quoting* Mo., Kan. & Tex. Ry v. Haber, 169 U.S. 613, 625-26 (1898); *see also* New York State Liquor Authority v. Bellanca, 425 U.S. 714, 717 (1981) (*quoting* California v. LaRue, 409 U.S. 109, 114 (1972) (confirming that "each of the U.S. States is 'vested . . . with general police power' " 'over public health, welfare and morals.'"

543. *See* text accompanying *supra* note 541.

544. In fact, it is proffered that the ten exceptions contained Article XX of the GATT 1994 (and the similar exceptions contained in the other major WTO agreements) were

concludes that a unilateralist interpretation of the WTO public morals exception is correct and it rejects originalist,[545] unilateralist,[546] and transnationalist[547] interpretations of the exception.

It rejects an originalist interpretation, because this interpretation requires the WTO member nations (currently numbering 153) to respect the moral codes that twenty-three (typically other) specific nations followed in 1947. It likewise rejects a universalist interpretation, because such an interpretation does not permit each WTO member to alter its moral code however and whenever it wishes. Finally, it rejects a transnationalist interpretation"[548] (which would permit a WTO member to impose its moral beliefs on the nationals of an exporting nation through an outwardly-directed government measure so long as "the public moral is shared widely by a group of similarly situated countries[,]"[549] which Mark Wu proposed), because an importing WTO member's enforcement of its moral beliefs on the nationals of an exporting WTO member would infringe that second WTO member's sovereignty and ensuring that the particular moral belief being imposed on them is one that is "widely shared by a group of similarly-situated countries" would not ameliorate that infringement.

To clarify, the conclusion of the socio-economic analysis presented here would treat an "outwardly-directed" government measure that indirectly penalizes foreign nationals for their moral beliefs by restricting entry to a particular good or service that the nationals of the importing nation consider to be morally offensive—what Mark Wu refers to as "Type II outwardly-directed measures"—as indistinguishable from an inwardly-directed government measure. However, the conclusion of the

intended by the GATT 1947 contracting parties to encompass exactly this fundamental branch of national sovereignty, as these ten exceptions track almost exactly the typical government functions attributable to a government's "police power" (*see, e.g.*, David Watson, THE CONSTITUTION OF THE UNITED STATES ITS HISTORY APPLICATION AND CONSTRUCTION, ch. XXV. (Callaghan & Co. 1910), *available at* http://www.constitution.org/cmt/watson00.txt (accessed Feb. 11, 2010) and a draft multilateral trade agreement circulated by the Economic Committee of the League of Nations in 1927 contained ten very similar exceptions, explaining that "these exceptions 'have been admitted through long-established international practice . . . to be indispensable and compatible with the principle of freedom of trade.'" *Charnovitz, supra* note202, at 706 (*citing* International Convention For the Abolition of Import and Export Prohibitions and Restrictions, Nov. 8, 1927, 46 Stat. 2461, 97 L.N.T.S. 393 and explaining that the Convention ultimately did not go into force.)

545. *See* text accompanying *supra* notes 299-318.
546. *See* text accompanying *supra* notes 299-331.
547. *Wu, supra* note 318, at 240-242.
548. *Id*.
549. *Id*. at 240.

socio-economic analysis presented here would not permit a WTO member to impose an outwardly-directed measure that directly penalizes foreign nationals for their moral beliefs by restricting entry to all goods and services from that foreign nation on the ground that the nationals of the importing country disapprove of a particular moral belief held in the foreign country—what Wu refers to as a "Type III outwardly-directed measure"—as such a measure would infringe the sovereign right of the exporting WTO member to determine and enforce its own moral code. In other words, this analysis concludes that each WTO member's right to self-determination includes the unfettered right to protect its own people against morally-offensive foreign goods and services but does not include the right to impose its moral beliefs on the people of another WTO member as that act would violate the latter WTO member's own right to self-determination.[550]

Free Trade advocates should not object to the conclusion presented in this article regarding the proper scope of the public morals exception to the WTO rules, as any "protectionist abuse" of such a morals exception to the WTO rules can be avoided by the rigorous enforcement of the national treatment principle contained in the WTO rules generally (and furthermore incorporated in both the public morals exception itself and the chapeau language of the exception[551]). That is, so long as a nation similarly restricts any "like" domestic good or service, the trade measure in question cannot be considered "protectionist" by definition.[552] Moreover, any fear that the scope of the public morals

550. One could argue that imposing a moral belief on the nationals of the exporting nation in the situation described would be appropriate if that nation has signed an international agreement indicating that it holds that moral belief. In other words, one could argue that the exporting nation exercised its autonomous right to determine its moral beliefs when it signed that international agreement. This article does not purport to address this argument. However, issue of the significance in a WTO proceeding of a WTO member signing any non-WTO international agreement is far from clear. *See, e.g.*, Peter Van den Bossche, The Law and Policy of the World Trade Organization 59-63 (Cambridge Univ. Press 2008). In addition, the very fact that this issue is unresolved today, especially in light of the high value that the international community places on a nation's right to determine its own morals, would seem to strengthen the argument of an exporting nation today that its assent to any non-WTO international agreement should not be treated in a WTO proceeding as an automatic waiver of its right to determine (or change) any particular moral belief.

551. *See* text accompanying *supra* notes 22-258.

552. In fact, in 1927, the Economic Committee of the League of Nations circulated a proposed multilateral trade treaty containing a public morals exception which explicitly required a nation relying on the exception to establish that "the manufacture of and trade in the goods to which the prohibitions related are also prohibited or restricted in the interior of the country[ ]," (*Charnovitz, supra* note 202, at 706 (*quoting* International Convention for the Abolition of Import and Export Prohibitions and Restrictions, Nov. 8, 1927, 46 Stat. 2461, 97 L.N.T.S. 393, which ultimately did not go into effect), and

exception to the WTO rules proposed in this article would permit WTO members to abuse the exception for "political" reasons is answered by the conclusion of the next section of this article, which is that a nation's "moral code" only ever refers to the specific moral beliefs held by a majority of the citizens of that nation. Given this, it would be nonsensical to describe a WTO member's reliance on this morals exception as being "politically abusive." That is, a WTO member's enforcement of its people's moral code certainly could be described as "political," as any "polis," including a nation, is largely defined by its moral code, but a WTO member's enforcement of its own people's moral code could not be described as "abusive."

F. In Order to Defend a Trade Measure Under a Morals Exception to theWTO Rules, a WTO Member Should be Required to Prove that the Moral Belief in Question is Held by a Majority of its Citizens, as Evidenced by those Citizens' Articulated Moral Views Because Only Autonomous Human Minds Can Ever Discover, Devise, Adopt, or Hold any Moral Belief

As discussed in the previous section, over the millennia, human beings have voluntarily formed political units for two main purposes—to protect themselves against "outsiders" and share common values with their fellow "insiders."[553] These twin goals underlie the twin prongs of sovereignty for any such unit: the "defense power" and the "police power," respectively.[554] Moreover, one of the most important aspects of a nation's police power is its right to determine a "code of right and wrong human behavior" or "moral code,"[555] as a moral code defines for any group of people what it means to be human[556] and thereby establishes its identity.[557] Given that a nation's moral beliefs are at least as essential to its security as its military might[558] and furthermore each nation naturally considers its own security to be more important than its wealth,[559] in the previous section of this article, the socio-economic

perhaps the public morals exception in the WTO rules should be amended to explicitly refer to, and thereby clarify, the obligation to comply with the national treatment principle.

553. *See* text accompanying *supra* notes 593-95.
554. *See* text accompanying *supra* notes 505-41.
555. *Supra* note 552.
556. *See* text accompanying *supra* notes 138-39.
557. *See id.*
558. *See* text accompanying *supra* notes 50-55.
559. *See* text accompanying *supra* notes 432-505.

analysis employed in this article answered the normative question of whether the WTO free trade rules should contain a morals exception in the affirmative.[560] Furthermore, it concluded that each WTO member must be permitted to determine its own moral code on an on-going basis without exception or interference from any other WTO member.

The socio-economic analysis presented in this section furthermore concludes that, in order to establish a defense to a challenged trade measure under a morals exception, a WTO member should be required to establish that a majority of its citizens holds the specific moral belief that the nation claims to be protecting with that trade measure. As explained below, this conclusion follows from the fact that only an autonomous human brain can ever devise, discover, learn or subscribe to a moral belief, as the disciplines of psychology and neurobiology reveal.[561] That is, even though a moral code is essential for the formation and continuity of a nation,[562] a nation (as well as any subgroup within a nation, such as a political party, religious group, trade association or corporation) *per se* is an inanimate, mental construct.[563] Accordingly, as the moral code of any

560. *See* text accompanying *supra* notes 493-547.

561. *See* text accompanying *infra* notes 374-392. Of course, it is for this reason that societies, in their criminal codes, typically excuse the actions of minors and other individuals who do not possess the capacity for autonomous choice. *See, e.g., Criminal Attorney Information,* criminallawyergroup.com, 1997-2010, *available at* http://www.criminallawyergroup.com/criminal-attorney/comparing-children-in-past-to-present-the-crime-age-decreases-every-year.php (accessed Feb. 13, 2010) ("The general consensus is that children cannot be held accountable for their criminal behavior because they are unaware that what they are doing is necessarily wrong."); Model Penal Code § 4.01 (1) (proposed by the American Law Institute and adopted by approximately one-half of the U.S. States provides that "[a] defendant is not responsible for criminal conduct where (s)he, as a result of mental disease or defect, did not possess 'substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.'"); 18 U.S.C. § 17 (2009) (federal insanity defense requiring requires the defendant, by clear and convincing evidence, to prove that "at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts"); s*ee also* Markus Dirk Dubber, Victims in the War On Crime 259, 263 (New York Univ. Press 2006) [hereinafter "*Dubber*"] ("stating that "[h]umanity is not personhood. All persons are humans, but not all humans are persons. And humanity qualifies for victimhood but not for offenderhood…Without actual autonomy, committing a crime is impossible.").

562. *See* text accompanying *supra* notes 50-55.

563. Similarly, given the lack of free will of such groups, they cannot be held personally liable for their own criminal acts. *Dubber, supra* note 561, at 258 ("Only persons, defined as human beings endowed with the basic capacity for autonomy, can act… 'Entities,' corporate or not can't act."). Some governments hold some entities "liable for crimes committed by their agents and employees within the course and scope of their employment." Roger LeRoy Miller & Gaylord A. Jentz, Fundamentals of Business Law: Summarized Cases 127 (South-Western College/West 2008). Also, of course, individual human actors can be held responsible for moral infractions that they commit as representatives of the group. *Id.*

nation can only refer to the moral beliefs held in the autonomous minds of the specific individuals constituting that nation, and furthermore as such individuals' unanimous espousal of any moral belief is unlikely, a WTO member should be considered as having established a defense under a morals exception to the WTO rules if it proves that at least a majority of its citizens holds the particular moral belief in question.

Specifically, the fields of psychology and neurobiology teach that human beings are unique among animals in that newborn humans possess very little ability to survive on their own and they must learn their society's moral code in order to know how to behave in their society, whereas other animals are born possessing instincts that guide their behavior throughout their lives.[564] No human infant emerges speaking a particular language, practicing a specific set of cultural norms, or following any identifiable moral code, and of course it is human beings' ability to follow a moral code that most distinguishes human beings from other animals.[565] For the purposes of this article, the most important lesson imparted by the disciplines of psychology and neurobiology is that before a human infant can adopt a moral code, he or she must first develop an "autonomous personality" or "separate psyche."[566] A very condensed explanation for why the development of an autono-

564. *See, e.g.*, CARL NEUMANN DEGLER, IN SEARCH OF HUMAN NATURE: THE DECLINE AND REVIVAL OF DARWINISM IN AMERICAN SOCIAL THOUGHT (1992); Jeffrey Kluger, What Makes Us Moral, TIME, Nov. 21, 2007, at 53-59; Brain Handwerk, *Monkeys "Go on Strike" When They Sense Unfairness*, NAT'L GEOGRAPHIC NEWS, Nov. 13, 2007, *available at* http://news.nationalgeographic.com/news/2007/11/071113-monkeys.html; Are You Smarter Than a Five-Year-Old Chimp?, SAN DIEGO UNION TRIB., Dec. 4, 2007, at A2; Hillary Mayell, *Orangutans Show Signs of Culture, Study Says*, NAT'L GEOGRAPHIC NEWS, Jan. 3, 2003, available at http://news.nationalgeographic.com/news/2002/12/1220 021226 orangutan.html.

565. *See, e.g., Kluger, supra* note 564, at 53-59; *Can Animals Recognize Themselves in a Mirror?*, www.scienceillustrated.com, Jan./Feb. 2010, at 30; Andrew L. Linzey, *Adrian Morrison, Is it Ever Right for Animals to Suffer?*, SAN DIEGO UNION TRIB., Jan. 8, 2010, at B7. This distinction between humans and animals most likely also explains why different human groups are distinguished primarily on the basis of their distinct moral codes.

566. *See, e.g.*, Michael Myerhoff, *Understanding Newborn Characteristics and Development*, www.health.howstuffworks.com, *available at* http://health.howstuffworks.com/understanding-newborn-characteristics-and-development-ga.htm/printable (accessed Feb. 16, 2010); *Degler, supra* note 564; Kluger, *supra* note 564; *Are You Smarter Than a Five-Year-Old Chimp?*, SAN DIEGO UNION TRIB., Dec. 4, 2007, at A2; Hillary Mayell, *Orangutans Show Signs of Culture, Study Says*, NAT'L GEOGRAPHIC NEWS, Jan. 3, 2003, *available at* http://news.nationalgeographic.com/news/2002/12/1220 021226 orangutan.html. With few exceptions, most animals do not seem to recognize their own "self" in a mirror, engage in rational thought, or follow a moral code. *See, e.g., Degler, supra* note 564; *Kluger, supra* note 564; Handwerk, *supra* note 564; *Are You Smarter Than a Five-Year-Old Chimp?*, SAN DIEGO UNION TRIB., Dec. 4, 2007, at A2; *Mayell, supra*.

mous personality is a precondition to an individual's adoption of a moral code is that (1) an individual must develop a conscience before he or she can adopt a moral code;[567] (2) an individual must develop empathy before he or she can develop a conscience;[568] (3) an individual must develop an autonomous personality—and, in particular, the ability to recognize his or her emotions as his or her own—before he or she can develop empathy;[569] and (4) an individual must adopt a society's culture in order to develop an autonomous personality.[570]

When a human infant is born, he or she is psychologically merged with his or her surroundings, most particularly his or her primary caregiver.[571] Then, in the normal case, a child's autonomy is developed through a series of intricately intertwined appeals to both the emotional component and the rational component of his or her brain.[572] These appeals ultimately cause his or her brain to develop identifiable physical structures and an emotional capacity that did not exist at his or her birth.[573] More specifically, it is only after years of learning a language, learning and following his or her society's particular moral code, and actually exercising his or her autonomy that a human being finally develops an autonomous personality.[574] Sigmund Freud and

567. ENCYCLOPEDIA/CONSCIENCE, www.enotes.com, *available at* http://www.enotes.com/gale-psychology-encyclopedia/conscience/print (accessed Feb. 18, 2010) (defining conscience as "[t]he moral dimension of human consciousness, the means by which humans modify instinctual drives to conform to laws and moral codes[ ]").

568. *See, e.g.*, Jennifer Copley, *Why Most People Are Not Psychopathic,* 100suite101.com*, available at* http://personalitydisorders.suite101.com/article.cfm/why_most_people_are_not_psychopathic (accessed Feb. 17, 2010).

569. ALICE MILLER, THE UNTOUCHED KEY: TRACKING CHILDHOOD TRAUMA IN CREATIVITY AND DESTRUCTIVENESS 60 (1990)).

570. Both Sigmund Freud and Carl Jung, who proposed the two main theories of human psychological development, published specific works on the integral role that cultural norms play in the activation and development of the different components of an autonomous psyche. *See, e.g.*, SIGMUND FREUD, TOTEM AND TABOO (1998); MICHAEL ROTH, FREUD: CONFLICT AND CULTURE (1998); IRA PROGOFF, JUNG'S PSYCHOLOGY AND ITS SOCIAL MEANING (1999); CARL JUNG, MAN AND HIS SYMBOLS (Carl Jung, Joseph L. Henderson, Jolande Jacobi & Aneila Jaffe eds. 1968).

571. MARGARET S. MAHLER, FRED PINE & ANNI BERGMAN, THE PSYCHOLOGICAL BIRTH OF THE HUMAN INFANT SYMBIOSIS AND INDIVIDUATION 42 (Basic Books 2000).

572. *See, e.g.*, BRIGID DANIEL, CHILD DEVELOPMENT FOR CHILD CARE AND PROTECTION WORKERS 236 (Brigid Daniel, Sally Wassell & Robbie Gilligan eds. 1999).

573. NINA W. BROWN, COPING WITH INFURIATING, MEAN, CRITICAL PEOPLE: THE DESTRUCTIVE NARCISSITIC PATTERN 42 (2006); Elsa Sabath, *Origins, Boundaries, and Patterns of Co-Dependency: A Personal Reflection*, 9 ALCOHOLISM TREATMENT Q. 183 (1992); Patricia Evans, THE VERBALLY ABUSIVE RELATIONSHIP 162-63 (1992) (*citing* ALICE MILLER, THE UNTOUCHED KEY: TRACKING CHILDHOOD TRAUMA IN CREATIVITY AND DESTRUCTIVENESS 60 (1990)).

574. Wright, *Reconciling Cultural Diversity and Free Trade, supra* note 8, at 461-65; *Brain Development, Postnatal—A-l, available at* http://www.arlenetaylor.org/brain-references-menu/990-brain-development-postnatal-a-l (accessed Feb. 17, 2010).

Carl Jung, who proposed the two main theories of human psychological development,[575] referred to the process of a human being developing an autonomous personality as the "narcissistic" or "individuation process.[576] Today, psychologists and neurobiologists believe that this process on average is completed when a human being is approximately twenty-five years of age.[577]

Psychologists and neurobiologists acquired much of their understanding of humans' capacity to acquire a moral code by studying particular individuals who were not able to do so. Such studied revealed, for example that a child who is emotionally abused is rarely permitted to exercise his or her autonomy and his or her "own" hurt feelings and emotions often are not confirmed by any significant "other."[578] As a result, such a child often never learns to recognize his or her feelings and emotions, and ultimately it is a child's feelings and motions that define who "he" or "she" is.[579] Such a child's failure to comprehend the boundaries between "self" and "other" then significantly impairs the child's ability to take responsibility for "his" or "her" own actions as well as to appreciate the feelings and emotions of "others."[580] Consequently, his or her conscience is unlikely to fully develop, because the two key constituents of a conscience—empathy and the internationalization of his or her society's consequences for violating another

575. *See, e.g.*, Sigmund Freud, *Three Essays on Sexuality*, THE PELICAN FREUD LIBRARY (1977) (originally published in 1905) and CARL J. JUNG, PSYCHOLOGY OF THE UNCONSCIOUS (Dover Pubs. 2003) (originally published in 1916). Developmental psychologists today still tend to generally subscribe to either "Freudian psychoanalytical theory" or "Jungian psychoanalytical theory," with various deviations to account for more recent psychological studies and neurological discoveries. MARIO JACOBY, INDIVIDUATION AND NARCISSISM: THE PSYCHOLOGY OF SELF IN JUNG AND KOHUT ix-x, 33-40, 47-49 (Routledge 1991); Tom Colls, *Myths of the Mind*, BBC NEWS, TODAY PROGRAM, Oct. 28, 2009, *available at* http://news.bbc.co.uk/today/hi/today/newsid_8318000/8318707.stm (accessed Nov. 18, 2009); Kendra Van Wagner, *Freud and Jung*, psychology.about.com, *available at* http://psychology.about.com/od/sigmundfreud/ig/Sigmund-Freud-Photobiography/Freud-and-Jung.htm (accessed Nov.18, 2009).

576. *See, e.g.*, Nina W. Brown, *supra* note 573, at 42.

577. *See, e.g.*, Elizabeth Williamson, *Brain Immaturity Could Explain Teen Crash Rate*, WASH. POST, Feb.1, 2005, at A1. As an advertisement for Allstate automobile insurance jokingly asks, "Why do most 16-year-olds drive like they're missing a part of their brain?…Because they are."

578. W.R.D. FAIRBAIRN, PSYCHOLANALYSTIC STUDIES OF THE PERSONALITY (Routledge & Kegan Paul 1981) (first published by Fairbairn in 1952); *See, e.g*, Melanie Klein, *Some Theoretical Conclusions Regarding the Emotional Life of the Infant*, in ENVY AND GRATITUDE AND OTHER WORLDS 1946-1963 (Hogarth Press & Inst. of Psycho-Analysis 1975); *see also* DONALD G. DUTTON, THE ABUSIVE PERSONALITY: VIOLENCE AND CONTROL IN INTIMATE RELATIONSHIPS (Guilford Press 2007).

579. *See* text accompanying *supra* notes 575-78.

580. *Id.*

person's rights—have been compromised.[581] Finally, a person bereft of a conscience is unable to adopt a moral code.[582] Given this understanding of the human brain and mind, it is necessarily the case that the moral code of any group of human beings, including a nation, can be nothing other than the sum total of the specific moral beliefs held by the autonomous adult members of that group.

This analysis holds true, regardless of the type of political system or moral code[583] a nation possesses. As indicated above, the political system and government of China is very tightly controlled by the Chinese Communist Party.[584] Moreover, Confucian moral principles have been influential in China for over twenty-five hundred years,[585] and the particular Confucian concept of "li" or "natural order"[586] urges respect and appreciation for one's elders,[587] promotion of harmony in society,[588] and acceptance of the existing hierarchy within one's family and government.[589] Likewise, the authoritarian government of North

581. *See* text accompanying *supra* notes 565-78.

582. *See* text accompanying *supra* notes 567-75.

583. Today, moral philosophers generally categorize normative moral theories into three groups: (1) deontological theories, which are based on an application of one or more pre-established principle(s) (*e.g.*, John Rawls' egalitarian principles of liberal justice); (2) teleological theories, which are based on the consequences of a specific act (e.g., utilitarian theories of liberal justice that hold that a government action is just if it maximizes the utility or preferences of a majority of the people in society; and (3) virtue theories, which are based on widely-accepted personal virtues (*e.g.*, the principles of Confucianism, according to some). *Dewey's Moral Philosophy 11*, in Stanford Encyclopedia of Philosophy, *available at* http://plato.stanford.edu/entries/dewey-moral/#4 (accessed Jan. 31, 2008) (first published January 20, 2005).

584. *See* text accompanying *supra* notes 101-07.

585. *See, e.g.*, Annping Chin, The Authentic Confucius: A Life of Thought and Politics 6-12 (Scribner 2007) [hereinafter "*Chin*"].

586. *See, e.g.*, Jeffrey L. Richey, Teaching Confucianism 70 and *in passim* (Am. Acad. of Relig. 2008).

587. Confucius, Raymond Dawson, The Analects 4 (Oxford Univ. Press 2008) (translating Book 1, ¶ 11 of a summary of Confucius' teachings compiled by his disciples and known as The Analects) [hereinafter "*The Analects*"] ("When his father is alive, you observe a man's intentions. It is when the father is dead that you observe the man's actions. If for three years he makes no change from the ways of the father, he may be called 'filial.'")

588. *Id*. (translating Book 1, ¶ 12 of *The Analects*] ("In the practice of the rites harmony is regarded as the most valuable thing, and in the ways of the ancient kings this is regarded as the most beautiful thing. It is adopted in all matters, both small and great . . . .").

589. *Id*. at 44 (translating certain paragraphs of Book 13 of *The Analects*] ("Let a rule be a ruler, a subject a subject . . . ."). Note that various writers, as well as Chinese government officials, have argued that Confucianism has been misinterpreted to suggest unquestioning loyalty to the state. *Chin, supra* note 584, at 10 (discussing how "[i]n the 1910s and 1920s, under mounting pressure to transform their country into a modern nation-state, Chinese intellectuals and reformers openly debated the question of Confucius: . . . whether Confucian ethics were prone to being misused by the state and rulers . . . ."); *see also The Analects, supra* note 587, at 84 (referring to chapter 1, ¶ 11 of

Korea[590] promotes the ideology or moral code of "Juche,"[591] which has Confucian roots.[592] Juche discourages individualism and requires strict obedience to the state,[593] analogizing that the cells (the people) must work in harmony with the nerve center (the party) and the brain (the leader) of the "single body" of the state.[594] While North Korea currently is not a WTO member, China is, and it could claim in a WTO proceeding that a majority of its citizens have freely chosen to forfeit their right to independently choose their own moral beliefs and instead follow the dictates of the Chinese Government, the Chinese Communist Party, or Confucianism. Similarly, a WTO member with a predominantly Muslim population could claim that a majority of its autonomous adult citizens have freely chosen to follow the dictates of that member's government, a particular government leader, or a particular version of Islam.

To be sure, history, political science, and psychology all teach that human beings often choose to cede a fair amount of their autonomy in exchange for protection against outsiders and the social ties offered by a group.[595] In fact, human beings in even the most democratic nation willingly cede a portion of their personal autonomy in exchange for national security.[596] In addition, despite their autonomous nature,

The Analects and stating that "the proponents of the oppressive type of filial piety found in later China could take this chapter (one) as authority").

590. North Korea is not currently a WTO member. World Trade Organization, *Members and Observers*, http://www.wto.org/english/theWTO_e/whatis_e/tif_e/org6_e.htm (accessed Feb. 11, 2010).

591. Grace Lee, *The Political Philosophy of Juche*, 3 STANFORD J. E. ASIAN AFFAIRS 105, 105 (Spring 2003) [hereinafter "*Lee*"] (*citing* DON OBERDORFER, THE TWO KOREAS 401 (Addison-Wesley 1997), *available at* http://www.stanford.edu/group/sjeaa/journal3/korea1.pdf (accessed Feb.13, 2010).

592. *Lee, supra* note591, at 110; CHUL HO PARK, THE TRADITIONAL MORALITY OF TOTALITARIANISM, at 4, 7 (*citing* CHANIL AN, THE END OF JUCHE (Eulyu Press 1997) and stating that "[t]he hyo contents [specifically, the elements of obedience, friendship, persistence and attorney] of Juche Ideology might be rooted in Confucianism"), *available at* http://journals.isss.org/index.php/proceedings52nd/article/viewFile/938/369 (accessed Feb. 13, 2010).

593. Danton R. Ford, paper presented at Kyungnam University, *Democratic Capitalism and Juche: Common Values and Challenges*, at *available at* http://arts.monash.edu.au/korean/ksaa/conference/32dantonford.pdf (accessed Feb. 13, 2010).

594. *Id*. at 358-59.

595. Often, for example, a victim of domestic violence whose autonomy hasn't been eroded by the abuse and who possesses independent financial resources not infrequently still will freely choose to remain in a relationship with his or her abuser in order to maintain the marriage and family. *See, e.g., Eastside Domestic Violence Program: Why People Stay,* edvp.org*, available at* http://www.edvp.org/GetInformed/PeopleStay.aspx (accessed Feb. 16, 2010).

596. *See, e.g.*, Jan Loader & Neil Walker, *Necessary Virtues: The Legitimate Place of the State in the Production of Security*, in DEMOCRACY, SOCIETY AND THE GOVERNANCE OF SECURITY 165-95 (Jennifer Wood & Benoit Dupont eds. Cambridge Univ. Press 2006).

human beings are very social beings that yearn for community with, and acceptance by, other human beings,[597] and it is a moral code that serves to tie a group of autonomous human beings together into a community.[598] Some neurologists even claim that a person's neurobiology predisposes him or her to form communities and seek a meaning for human existence that is "higher" than the mere gratification of his or her personal needs and desires.[599] Furthermore, as discussed above, psychologists and neurobiologists teach that a human being cannot acquire an autonomous mind without first learning his or her society's moral code.[600] At the same time, though, psychologists and neurologists teach that a human being cannot freely adopt or internalize a moral code until he or she first acquires an autonomous personality, and the well-accepted hierarchy of human psychological needs first posited by Abraham Maslow maintains that the typical human being first seeks the satisfaction of his or her physical needs, including security, then seeks the comradery and esteem provided by a social group, and finally seeks the expression of his or her autonomy or individuality within the safety of a group.[601]

A human being, then, appears to be an enigma who proceeds through a series of complex psychological developments before he or she finally emerges as an autonomous individual but who exists on both a personal plane and a social plane and simultaneously seeks security, community, a sense of morality and autonomy throughout his or her life.[602] Psychol-

597. Evelin G. Linder, Making Enemies: Humiliation and International Conflict *passim* (Greenwood Press & Praeger Pubs. 2006).

598. *See, e.g.*, Dimitar Stankov, *The Moral Culture of the Person*, chapter in Vasil Prodanov, Morality and Public Life in a Time of Change: Bulgerian Philosophical Studies I, 95-103 (Vasil Prodanov, Asen Davidov & Mariia Stoianova eds. Paideia Publishers & Council for Research in Values and Philosophy 1994).

599. *See, e.g.*, D. Kapogiannis, A. K. Barbey, M. Su, G. Zamboni, F. Krueger & J. Grafman, *Cognitive and Neural Foundations of Religious Belief* (Proceedings of the National Academy of Sciences DOI: 10.1073/pnas.0811717106 (2009)); *Research Channel: Love, Belief, and Neurobiology of Attachment, available at* http://www.neuroeconomicstudies.org/press/tv?task=videodirectlink&id=13 (accessed Feb. 16, 2010) (interview of Dr. Paul Zak, founding director of the Center for Neuroeconomic Studies at Claremont Graduate University, discussing the role of oxytocin in forming social attachments and trust in humans); *see also* Stephen Larson, Fundamentalist Mind: How Polarized Thinking Imperils Us All 21–48 (Quest Books 2007).

600. *See* text accompanying *supra* notes 567-78.

601. Abraham Maslow, *A Dynamic Theory of Human Motivation*, in Understanding Human Motivation 26-46 (Chalmers L. Stacy & Manfred DeMartino, eds. Howard Allen, Inc. 1958).

602. Many adults today in fact contribute their autonomous personalities to any number of different "alterities" (s*ee* Elizabeth A. Povinellie, The Cunning Of Recognition: Indigenous Alterities And The Making Of Australian

ogy and neurobiology teach that, generally speaking, the distinction between a "top-down" national moral code and a "bottom-up" national moral code is false, because every nation's moral code is necessarily both "top-down" and "bottom-up." That is, every child in every nation must first learn a moral code from his or her family and society but he or she cannot internalize or freely adopt that moral code or any other until he or she first acquires an autonomous mind. Therefore, as stated above, the moral beliefs of a "nation" can only refer to the particular moral beliefs that a majority of the autonomous adult citizens constituting the nation have freely adopted. At the same time, the disciplines of psychology and neurobiology suggest that it is theoretically possible for an autonomous adult to freely decide to follow the moral dictates of a government, religion, or some other entity or person, without question throughout the remainder of his or her life. In other words, an autonomous adult arguably could freely decide to accept the moral dictates of another person or entity as his or her own moral beliefs.

In addition, in light of all of the above, it is clear that no person can know any other person's moral beliefs simply by witnessing that other person's actions. To begin with, history, religion, psychology, moral philosophy, and behavioral economics all reveal that people tend to act in accordance with their moral beliefs but sometimes they do not.[603] This concept was expressed by St. Augustine as early as 392 A.D., when he stated that "God is not the progenitor of evil things. . . . [E]vils have their being by the voluntary sin of the soul to which God gave free will."[604] More recently, as the internet search engine company Google argued in support of its refusal to produce data regarding its customers' internet usage during recent obscenity prosecutions in the U.S., that data might reveal its customers' violations of some pre-determined moral standard of their community but it cannot provide direct evidence of the moral standard of their community itself.[605] In addition, one cannot discern a person's moral beliefs from his or her actions, because people in

MULTICULTURALISM (Duke Univ. Press 2002)) or "concentric cultures" (*Wright, Reconciling Cultural Diversity and Free Trade, supra* note 8, at 443) on a daily basis.

603. *See* text accompanying *supra* notes 134-46; *see also* David K. Levine, *Is Behavioral Economics Doomed?*, Max Weber Lecture, June 8, 2009, *available at* http://levine.sscnet.ucla.edu/papers/behavioral-doomed.pdf (accessed Feb. 17, 2010) (the discipline of behavioral economics confirms that peoples' consumption decisions do not always reflect their moral beliefs).

604. ST. AUGUSTINE, PHILIP SCHAFF, ST. AUGUSTIN: THE WRITINGS AGAINST THE MANICHEANS AND AGAINST THE DONATISTS: NICENE AND POST-NICENE FATHERS OF THE CHRISTIAN CHURCH, Part 4, 119 (Kessinger Publ'g 2004).

605. *See* text accompanying *supra* notes 50-51.

particular societies are sometimes forced to act in ways that are contrary to their own moral beliefs. As Alfred Ayer famously remarked, "[w]hile moral rules may be propounded by authority the fact that these were so propounded would not validate them."[606] Finally, it's conceivable that a person's actions may appear "scripted" to an observer but in fact that person has freely chosen to unquestioningly follow a moral code prescribed by some particular other person or group. In short, as the Scottish philosopher David Hume stated in 1789, "one 'cannot derive an 'ought' from an 'is' statement.'."[607]

It is suggested that a human being's seemingly incompatible psychological needs are the genesis of the competing communitarian[608] and human rights'[609] theories of international law.[610] It is further suggested that these divergent ideologies and theories of international law can be reconciled in the same manner that an individual human being reconciles his or her conflicting psychological needs on an on-going basis, to wit:

(1) Each adult member of any nation, in the exercise of his or her personal autonomy, must decide how best to balance his or her psychological needs for security, community, morality, and autonomy, as these needs reside in his or her mind;
(2) As moral beliefs can only be adopted and held by an autonomous or separate human brain,[611] the moral beliefs of a "nation" can only refer to the moral beliefs of a majority of the autonomous adult members of that nation.
(3) It is theoretically possible for an autonomous adult to freely choose to follow the moral dictates of the government or some

606. CAROL A. DINGLE, MEMORABLE QUOTATIONS: JEWISH WRITERS OF THE PAST 10 (iUniverse, Inc. 2003).

607. SAMUEL BRITTAN & ALAN P. HAMLIN, BRITISH ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE, MARKET CAPITALISM AND MORAL VALUES 2 (Alan P. Hamlin ed. Edward Elgar Publ'g 1995) (*citing* DAVID HUME, A TREATISE OF HUMAN NATURE 469 (John Noon 1739) and as reviewed by Murray Wolfson, SOUTHERN ECON. J., July 1996).

608. *See* text accompanying *supra* notes 37-42.

609. *See* text accompanying *supra* notes 38-42.

610. Of course, these theories, in turn, are manifested in various international agreements protecting both "individual rights" such as the freedom of conscience, freedom of religion, freedom of association, freedom of assembly, and freedom of speech and "communal" or "national" rights, such as the right to culture, the right to self-determination, the right to self-governance, and the right to self-defense.

611. To repeat, it is this fact that underlies the requirement in most societies that a person must have possessed the "intent" to commit a proscribed act in order for that act to be considered a "crime." *See* text accompanying *supra* notes 561-66.

other entity or person without question throughout the remainder of his or her life;

(4) As moral beliefs can only be adopted and held by an autonomous or separate human brain, the choice of any one autonomous adult member of a nation to follow the moral dictates of his or her government or some other entity or person without question throughout the remainder of his or her life cannot bind any other member of that nation;[612]

(5) Even if a majority of autonomous adult citizens in a nation at some point freely choose to follow the moral dictates of their government or some other entity or person without question throughout the remainder of their lives, their choice in this regard could fade into the history of that nation, as those particular citizens die and other citizens are born and mature into autonomous adults; and

(6) As moral beliefs can only be adopted and held by an autonomous or separate human brain, the only direct evidence of a person's moral beliefs (including his or her decision to follow the moral dictates of his or her government or other entity or person for the remainder of his or her life) is his or her affirmative expression of those beliefs. Such evidence would include, but not be limited to, oral or written testimony, legislation enacted by a popularly-elected legislature, and views expressed in opinion polls.

In sum, the socio-economic analysis presented in this section concludes that, in a case in which a WTO member defends a trade measure under the morals exception to the WTO free trade rules, the DSB should maintain that the moral beliefs of a majority of the autonomous adult citizens of that nation constitute that nation's moral beliefs, because moral beliefs reside solely in autonomous human brains. With respect to those citizens' moral beliefs, the DSB should be permitted to consider any relevant evidence on this point. In particular, there is no justification for limiting the DSB to considering only legislatively-enacted statutes in this regard, as Mark Wu had suggested, and, in any case, it cannot be assumed that every legislatively-enacted statute necessarily reflects the moral beliefs of a majority of the autonomous adult citizens of a nation. As people's moral beliefs often influence their actions, the

612. Of course, a child in any nation would be expected to conform his or her behavior to the moral beliefs of his or her guardian(s) until that child reached the age of majority.

DSB in such a case should be permitted to consider the actions of the autonomous adult citizens of the nation in question. However, as people not infrequently act in a manner contrary their moral beliefs, the DSB should treat evidence of those citizens' actions as only indirect or circumstantial evidence of their moral beliefs. Finally, in such a case, the DSB should accept as direct evidence of those citizens' moral beliefs only their affirmative articulation of the same, including, for example, oral or written testimony, views registered in opinion polls, and laws enacted by a popularly-elected legislature.

V. Conclusion

During the next few years, one or more WTO panels and the WTO Appellate Body likely will be required to clarify the scope of the public morals exception to the WTO free trade rules. In fact, recent skirmishes between the internet company Google and the Chinese Government presage just such a case. Previous scholars addressing the public morals exception to the WTO rules have concentrated on the degree of latitude a WTO member should be accorded to determine its own moral code. This socio-economic study of the exception reveals that the answer to that issue is clear. A unique set of moral beliefs is the *sina qua non* of a nation, a concept which is supported by the "police power" possessed by any sovereign nation and the international law principle of national self-determination. Accordingly, it would be nonsensical to constrain a nation's ability to define and enforce its unique moral code within the confines of its own territory, as the originalist, universalist, and transnationalist interpretations of the public morals exception all would do. Only a unilateralist interpretation of the public morals exception granting each WTO member unfettered discretion to determine its own moral code (and also prohibiting each WTO member from imposing its moral code on any other WTO member) can be correct. Moreover, the critical issue to address regarding the public morals exception is how a WTO member's right to determine its unique moral code can be reconciled with the fact that moral beliefs are not only uniquely "human," they are uniquely "personal." That is, moral beliefs can only ever be devised, discovered, appreciated, understood, or held by autonomous human brains.

This study concludes that the morals of a WTO member, for purposes of the public morals exception, can only refer to the moral beliefs of a majority of the current autonomous adult citizens of that nation. It furthermore concludes that only those citizens' affirmative articulation

of their moral beliefs (*e.g.*, in opinion polls, oral or written testimony, or legislation enacted by a popularly-elected legislature) can constitute direct evidence of their moral beliefs. It acknowledges that an autonomous adult in any nation could decide to unquestioningly follow the moral dictates of his or her government, religion, or other entry or person for the remainder of his or her life. At the same time, however, this study concludes that only the affirmative articulation of such a choice by a citizen can constitute direct evidence of that choice and any such choice by a citizen cannot bind any other citizen. Therefore, even if a majority of autonomous adult citizens in a nation at some point in history make such a choice, that choice cannot bind the citizens of that nation forever, as the specific individuals who constitute that nation will change over time.

The WTO's adoption of the interpretation of the public morals exception proposed in this article would not require every WTO member to adopt a liberal democratic system of government. This article concludes that a WTO member can proffer whatever evidence it wishes documenting its citizens' affirmative articulation of their moral beliefs, and any requirement that a WTO member adopt any particular form of political system would itself violate the principle of national self-determination. The fact that a nation's moral code and its citizens' autonomous moral beliefs are inextricably linked simply cannot be ignored, and evidentiary standards in the WTO cannot be modified to accommodate a WTO member whose freely-chosen political system renders it difficult for that member to produce sufficient evidence of its citizens' affirmative articulation of their moral beliefs. In any case, a WTO member can always choose to suffer whatever financial penalty a WTO dispute panel imposes rather than alter a challenged trade barrier if it is unable to justify that trade barrier on moral grounds because it cannot produce sufficient evidence of its citizens' moral beliefs.

Finally, the conclusions presented in this article suggest how the competing communitarian and human rights theories of international law can be reconciled. That is, given that any nation is defined by its moral code and its moral code exists only in the autonomous minds of its citizens, the communitarian theory of international law can do justice to the concept of a "nation" only to the extent that it requires a "nation" to represent the moral beliefs of at least a majority of its citizens. More generally, the conclusions presented here suggest how humans' seemingly incompatible needs for security, community, morality and autonomy can be reconciled on both the national and international level.

Libel Lessons From Across the Pond: What British Courts Can Learn from the United States' Chilling Experience with the "Multiple Publication Rule" in Traditional Media and the Internet

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Introduction

One winter morning in 1944, as Allied forces advanced into Fascist Italy, an Ivy League college professor in New York named Gregory Hartmann[1] read with horror about his alleged support of the Fascist powers in an issue of *Life* magazine.[2] These allegations soon became the basis of Dr. Hartmann's "much-traveled claim of libel"[3] against *Life*, spurring changes to defamation law in the United States that lasted well into the Internet era.

On January 17, 1944, *Life* magazine published a picture of Dr. Hartmann with the caption directly above, "U.S. Indicts Fascists (continued)."[4] The prior page consisted of pictures of the indicted men, including Joe McWilliams, a man who purportedly wanted to become the American Fuhrer.[5] An adjacent article to Dr. Hartmann's photograph suggested he was the chairman of a movement "to [p]revent U.S. [v]ictory" in World War II.[6] The article specifically covered a rally of the "Peace Now Movement," in Carnegie Chamber Music Hall, where Dr. Hartmann, with the support of the Quaker community, gave a speech before three hundred people.[7] Dr. Hartmann's rhetoric against the war effort was compared favorably in the article with Mr. McWilliams, one of the indicted Fascists of the prior page.[8] Ultimately, as many as 3,900,000 copies of the offending *Life* issue were "mailed to subscribers and widely distributed to news stands" throughout the continental United States ("U.S.") and in other nations, including England.[9] However, the indictment allegations

1. Dr. Gregory Hartmann, a native born citizen and absolute pacifist, held a Ph.D. from Columbia University in educational and social psychology and had studied in pre-Nazi Germany. Hartmann v. American News Co., 171 F.2d 581, 583 (7th Cir. 1948). He was active in several peace movements and ran for mayor of New York City as a Socialist in 1944. *Id*.

2. Hartmann v. Time, Inc., 64 F. Supp. 671, 676-77 (E.D. Pa. 1946), *modified and remanded*, 166 F.2d 127 (3rd Cir. 1947).

3. *See* Hartmann v. Time, Inc., 180 F.2d 595 (3rd Cir. 1950).

4. *Hartmann*, 171 F.2d at 581-82.

5. *Id*. at 582.

6. The libel matter in the now-defunct *Life* magazine involved an article entitled "Peace Now Is New Propaganda Drive to Prevent U.S. Victory," which was joined to a preceding article with the words "U.S. Indicts Fascists (continued)." *Hartmann*, 64 F. Supp. at 676. Dr. Hartmann's name and picture was featured prominently in the latter article and his "Peace Now" movement was described as "favoring an immediate armistice and a negotiated peace." *Hartmann*, 171 F.2d at 582.

7. Hartmann v. American News Co., 171 F.2d 581, 582-83 (7th Cir. 1948).

8. *Id*. at 581-82.

9. Hartmann v. Time, Inc., 64 F. Supp. 671, 678 (E.D. Pa. 1946) ("[I]t requires undue straining of the imagination to assume that over 3,900,000 copies of the magazine, mailed to subscribers and widely distributed to newsstands did not hit their mark.").

as to Dr. Hartmann were false.[10] Determined to restore his tarnished name,[11] Dr. Hartmann sued Time, Inc. for libel in three states and the District of Columbia with only nominal success.[12] Yet, he did force the publisher of *Life* to incur legal defense costs in multiple jurisdictions.

Dr. Hartmann's multi-state legal battle against Time, Inc., fought more than sixty years ago, remains a classic application of the "multiple publication rule" ("MPR") in the U.S. This common law rule permits plaintiffs, however legitimately injured, to file lawsuits for one defamatory act in multiple jurisdictions, and under an endlessly renewable statute of limitations.[13] Plaintiffs could bring libel claims under the "geographic prong" of the rule, by bringing redundant claims in multiple jurisdictions, wherever the offending work was distributed.[13A] Additionally, they also could take advantage of

But see Hartmann, 171 F.2d at 583 (The caption "U.S. Indicts Fascist [ ]" over Dr. Hartmann's photograph "was deleted in less than one third of the copies distributed, and 1,550,000 undeleted copies were distributed.").

10. In a correction published February 7, 1944, the editors of *Life* magazine admitted Dr. Hartmann was not indicted as a Fascist, but that, as the head of the "Peace Now" movement, he was still a leader of a "subversive movement" dangerous to the U.S. war effort and attempts to achieve "a worthwhile peace." Hartmann v. American News Co., 69 F. Supp. 736, 738 (W.D. Wis. 1947) (libel suit brought against Wisconsin distributor of *Life* magazine); *see also* Hartmann v. American News Co., 166 F.2d 127, 131 (3rd Cir. 1947) (*Life* magazine editors responded to a critical letter from Dr. Hartmann, defending their characterization of his work for "Peace Now").

11. Dr. Hartmann claimed that *Life* magazine cost him his position at Columbia University, *Hartmann*, 166 F.2d at 131, and damaged his earning power, *id*., and his reputation among students at both Columbia and Harvard universities, *Hartmann*, 64 F. Supp. at 681. In May 1944, he was dismissed from his post of full professorship at Columbia, the same year the offending *Life* magazine issue was published, but was later restored to his post in December 1945. *Hartmann*, 171 F.2d at 583. Still, after his temporary dismissal from Columbia University, "he suffered a nervous collapse and entered a sanatorium for medical treatment." *Id*.

12. Dr. Hartmann's lawsuits, brought over a five-year period, were largely dismissed on procedural grounds, although his claims did proceed to a jury trial in one jurisdiction with a verdict for the defendant. *See, e.g., Hartmann*, 166 F.2d at 135-37 (summarizing cases brought by Dr. Hartmann against Time, Inc. in the District of Columbia, New York, Pennsylvania and Massachusetts); *Id*. at 136-37 (noting Dr. Hartmann's lawsuits against Time, Inc. in the District of Columbia and Massachusetts were dismissed as time-barred and on a plea of res judicata, respectively); *Hartmann*, 171 F.2d at 581(holding appeal from negative jury verdict denied); *Hartmann*, 69 F. Supp. at 738-39 (denying summary judgment on the basis of multiple publication rule and defendant's negligence); *Hartmann*, 64 F. Supp. at 681 (dismissing suit in Pennsylvania under the Full Faith and Credit Clause); Hartmann v. Time, Inc., 60 N.Y.S.2d 209 (N.Y. Sup. Ct. 1945), *aff'd*, 271 A.D. 781 (1st Dep't 1946) (dismissing suit as time-barred because the legal publication date was January 9 or 10, 1944, and process was not served until January 16, 1945, well after the one year statute of limitations).

13. J.C.C. GATLEY, GATLEY ON LIBEL AND SLANDER § 6.2 (Patrick Milmo et. al. eds., 10th ed. 2004) (1924).

13A. *Id*.

the "temporal prong" of the MPR, by filing a claim after a statute of limitations for publication had seemingly expired, so long as it was read again elsewhere.[13B] The MPR is consistent with early defamation law, which dictated that "[e]ach time a libelous article [was] brought to the attention of a third person, a new publication had [occurred], and [that] each publication [was] a separate, [fresh] tort," actionable wherever it transpired.[14] However, the multiple lawsuits brought by Dr. Hartmann, together with technological breakthroughs like the high-speed printing press, convinced U.S. courts that the MPR endangered the publishing industry.[15] Dr. Hartmann's legal actions against Time, Inc., and other "chain libel suits," helped persuade the vast majority of U.S. courts to abandon the MPR for the "single publication rule" ("SPR"), where the alleged libel involved traditional media, and, later, the Internet.[15A] The new rule dictates that a single communication equates to a single publication that is actionable by a particular plaintiff *only once* and for *a single statutory period* (measured from the date of first publication), regardless of the number of recipient persons or jurisdictions.[16]

Meanwhile, across the pond in the United Kingdom ("U.K."), the MPR is still in effect today—decades after the U.S. abandoned it.[17] Yet, policymakers in London are reconsidering the soundness of the MPR, in the wake of recent exploitation of the rule by libel plaintiffs against both U.K. and foreign citizens.[18] The U.K. Ministry of Justice recently solicited from the general public arguments in support and against the rule, as part of its larger goal of reassessing the country's libel laws, which many believe are overly pro-plaintiff and chill speech.[19] Moreo-

13B. *Id.*

14. *See* Winrod v. Time, Inc., 78 N.E.2d 708, 709 (Ill. App. Ct. 1948) (quoting from the RESTATEMENT OF TORTS § 578, comment b (1938)).

15. Hartmann v. Time, Inc., 64 F. Supp. 671, 678 (E.D. Pa. 1946) (dismissed as time-barred owing to court's adoption of the SPR over the MPR).

15A. *See* GATLEY, *supra* note 13, 143 n.28.

16. RESTATEMENT (SECOND) OF TORTS § 577A (1977).

17. *See* Gregoire v. G.P. Putnam's Sons, 81 N.E.2d 45, 47-48 (N.Y. 1948).

18. *See* L. Gordon Crovitz, *A Town Called Sue*, WALL STREET J. (Dec. 22, 2009), http://online.wsj.com/article/SB10001424052748704376704574606172532355510.html; Jon Ungoed-Thomas & Michael Gillard, *Libel Tourists Flock to 'Easy' U.K. Courts*, TIMES ONLINE (Nov. 1, 2009), http://www.timesonline.co.uk/tol/news/uk/article6898172.ece; Media Lawyer Staff, *Life Peer In Bid to Reform Libel Laws*, HOLD THE FRONT PAGE (U.K.) (Dec. 22, 2009), http://www.holdthefrontpage.co.uk/law/091222libelreform.shtml.

19. UNITED KINGDOM MINISTRY OF JUSTICE, DEFAMATION AND THE INTERNET: THE MULTIPLE PUBLICATION RULE (2009), *available at* http://www.justice.gov.uk/consultations/docs/defamation-consultation-paper.pdf; Sarah Lyall, *Britain, Long a*

ver, Lord Chancellor Jack Straw[20] has convened a review panel of U.K. libel law, with hopes for the panel to issue a report on the controversial body of law.[21] It is anticipated the panel's report will be released by March 2010, at which time reforms may be implemented prior to the general election of the U.K. Parliament on or before June 2010.[22] To complement these U.K. efforts, this article provides an account of U.S. courts' entanglement with the MPR-from the early 19th century and the rise of modern publishing, to sixty years ago with Dr. Hartmann and within the past ten years with the growth of the Internet—along with a comparison of U.K. and U.S. common law, to bring greater clarity and direction to British discourse on a legal matter of international significance.

I. The Origin of the Multiple Publication Rule

The MPR in both the U.K and the U.S. derives from an 1849 English case that was brought by an eccentric German duke, then living in Paris, against a local publisher.[23] Brooding over a seventeen-year-old libel about him still in circulation in England, the Duke sent his servant to buy from the publisher a copy of the original offending newspaper and proceeded to file a lawsuit.[24] When the publisher argued that the six-year statute of limitations for the Duke's claim had expired, the Duke responded that a new cause of action had arisen upon the publisher's sale of the newspaper to his servant, and that he should therefore be permitted to recover for his injuries.[24A] With surprisingly little discussion, the judges of the Queen's Bench held that the purchase by the Duke's servant constituted a separate publication that was actionable in its own

Libel Mecca, Reviews Laws, N.Y. TIMES (Dec. 10, 2009), http://www.nytimes.com/2009/12/11/world/europe/11libel.html#; Patrick Wintour, *Jack Straw to Review Britain's Libel Laws*, THE GUARDIAN (U.K.) (Dec. 27, 2009), http://www.guardian.co.uk/politics/2009/dec/27/jack-straw-review-libel-law/print ("The New York Times and the Washington Post have said they may be forced to stop selling copies in the U.K. because of the risk of being sued.").

20. The Lord High Chancellor of Great Britain, or Lord Chancellor, is a senior and important functionary in the government of the United Kingdom. He is a member of the Cabinet and, by law, among his various responsibilities, he is charged with the efficient functioning and independence of the U.K. courts. *See* Jack Straw—Biography, http://www.justice.gov.uk/about/straw.htm. (last visited Feb. 2, 2010).

21. Wintour, *supra* note 19.

22. *Id*.

23. David Pallister, *Libel Legacy of Ousted Aristocrat Threatens Internet*, THE GUARDIAN (U.K.) (Dec. 27, 2005), http://www.guardian.co.uk/technology/2005/dec/27/news.constitution.

24. Duke of Brunswick v. Harmer, 14 Q.B. 185, 117 Eng. Rep. 75 (1849).

24A. *Id*.

right.[24B] Thus, the MPR, otherwise known as the *Duke of Brunswick* rule, was created.[24C]

The central aspect of the MPR has been that every individual sale or distribution of defamatory material, such as a newspaper, magazine, or book, is treated as a distinct publication with a separate basis for liability and a separate statute of limitations.[25] The rule eventually grew in scope in both the U.K. and the U.S., allowing suits to be brought in multiple jurisdictions wherever copies of the offending publication were sold or made available.[26]

However, in extending the MPR to its logical conclusion, its impact is clearly disastrous for defendants. As one commentator has noted, "[t]he sum total of the causes of action which might thus arise [from the MPR] would be more than three times as great as the estimated number of all the reported law decisions in the English language, and the lifetime of this generation would not suffice to try them."[27] Thus, a plaintiff defamed by a mass publication could theoretically, under the MPR, bring thousands of suits within numerous jurisdictions for the same publication. In practice, a chain libel suit of this magnitude has never occurred, and the few courts that have had occasion to consider multiple libel suits brought by a plaintiff within a single jurisdiction for the same statement have held that the plaintiff had to join all his actions before commencement of his suit.[28] Still, the real burdens created by the staleness and volume of claims permitted by the MPR were either not sufficiently apparent or troubling at the time of the rule's initial adoption by U.S. courts, thus leading many U.S. courts to apply the rule as devised in England.[29]

24B. *Id*.

24C. *See id*.

25. *See* GATLEY, *supra* note 13, § 6.2.

26. Robert Balin, et. al., *Libel Tourism and The Duke's Manservant*, MLRC BULLETIN, Sept. 2009, at 97, 107-08, *available at* http://www.medialaw.org/Content/NavigationMenu/Publications1/MLRC_Bulletin/Bulletin_Archive/2009-3_Intl.pdf

27. William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 962 (1953).

28. *See, e.g.*, Galligan v. Sun Printing & Publ'g Ass'n, 54 N.Y.S. 471 (N.Y. Sup. Ct. 1898) (denying plaintiff the option to bring two libel actions against two separate parts of allegedly defamatory article).

29. The MPR initially received the unqualified acceptance of the Restatement of Torts and many American courts. *See* RESTATEMENT OF TORTS § 578, comment b (1938); *see also* Central of Georgia R. Co. v. Shetfall, 45 S.E. 687 (Ga. 1903); Louisville Press Co. v. Tennelly, 49 S.W. 15 (Ky. 1899); Staub v. Van Benthuysen, 36 La. Ann. 467 (1884); Renfro Drug Co. v. Lawson, 160 S.W.2d 246, 251 (Tex. 1942).

A. The U.S. Experience with the Multiple Publication Rule

The MPR was adopted in the U.S. as early as the 1850s, before technical advances in printing and communication enabled the rise of mass communication.[30] It was only three years prior to the *Duke of Brunswick* decision that the telegraph proved its worth to journalists as a successful reporting and distribution tool in the Mexican-American war, from 1846 to 1848.[31] The steam-powered rotary printing press, which could print millions of copies of a page in a single day, was invented only in 1843.[31A] In addition, the Associated Press was founded in 1846,[32] only a few years before the MPR became law of the land in England and the U.S. Thus, due to technological limitations, newspaper circulations were severely limited in the early 19th century. It was only in the late 19th century, in the subsequent golden age of journalism, when the real problems with the MPR became apparent. Modern mass media technology combined with the professionalization of journalism, together with the prominence of new publishers like Joseph Pulitzer and William Randolph Hearst, brought news to more readers throughout the country than ever before. In turn, an upsurge of libel lawsuits, even on a multi-state level, followed.[33]

Concerns with the MPR first arose when U.S. courts had to determine the proper venue for claims, as defendants often found themselves

30. Prosser, *supra* note 27, at 962; Lewis v. Reader's Digest Ass'n, Inc., 512 P.2d 702, 704 (1973) ("The origin of the multi-publication rule is the common law.").

31. THE UNITED STATES AND MEXICO AT WAR 103, 450, 471 (Donald S. Frazier ed., 1998).

31A. *Id*. at 450.

32. Richard Pyle, *19th-Century Papers Shed New Light on Origin of The Associated Press*, ASSOCIATED PRESS, Jan. 31, 2005, http://www.ap.org/pages/about/whatsnew/wn_013106a.html (last visited December 5, 2009).

33. The most famous multi-state libel case was the series of seventy suits brought by Congressman Martin Sweeney of Ohio for an alleged libel in the *Washington Merry-Go-Round*, distributed by the United Feature Syndicate in 300 newspapers across the country. *See* PHILIP WITTENBERG, DANGEROUS WORDS 145-46 (1947). The offending syndicated column alleged that Congressman Sweeney was the chief spokesman for Father Charles Coughlin, dubbed "the father of hate radio" in World War II, and that he had opposed the appointment of a foreign born Jew to the federal bench. *See* Sweeney v. Schenectady Union Publ. Co., 122 F.2d 288, 289 (2d Cir. 1941), *aff'd without opinion by evenly divided court*, 316 U.S. 642 (1942); Prosser, *supra* note 27, at 969 & n. 60(citing ten of the cases that reached appellate courts). However, this series of cases, among others, were brought on account of separate publications in different newspapers, and generally against different defendants; so that these cases, much to the confusion of several prominent legal scholars, have little, if any, relation to the problem posed by the MPR, or the solution offered by the SPR. *See, e.g., id*. at 969; William H. Painter, *Republication Problems in the Law of Defamation*, 47 VA. L. REV. 1131, 1138 (1961); Lionel Rothkrug, Recent Legislation, *Defamation: Uniform Single Publication Act*, 44 Ca. L. Rev. 146, 148 (1956).

harassed by actions brought in a number of counties within a state.[34] In addition, libel plaintiffs found they could bring their claims almost indefinitely against defendants, per the temporal prong of the rule, given the extended circulations of publications and the prevalence of archives.[35] Taking advantage of the MPR's wide latitude, libel plaintiffs like Dr. Hartmann challenged defendants through multiple lawsuits, per the geographic prong of the rule, forcing them to incur sizable legal costs at a minimum.[36]

The consequences of the MPR are transparent. It affords "for a litigious or vindictive plaintiff, or one who is merely seeking a bargaining position for purposes of extortion, to subject the defendant to repeated suits in every state in which he can get jurisdiction."[37] It also poses a grave threat to the viability of the press. As one commentator noted in 1953, "[t]he possibility of libel suits or threats [thereof] being used to put some paper or columnist out of business is not to be dismissed lightly. There are forces in our society … that fear the press."[38] His comments still ring true today, particularly with the advent of the Internet.

B. The U.S. Adoption of the Single Publication Rule

Beginning in the 1930s and early 1940s, after lawsuits against newspapers and magazines began overwhelming court dockets, many U.S. judges and legislators moved to abandon the MPR in favor of the Single Publication Rule ("SPR").[39]

Under the SPR, any one edition of a book or newspaper, or any one radio or television broadcast is considered a single publication, with a statute of limitations that begins from the date of publication; there can only be one action for damages per plaintiff for that publication.[39A] All subsequent actions arising out of the same publication, regardless of

34. Prosser, *supra* note 27, at 962, n. 19 (citing libel suits brought in multiple venues including *Age-Herald Pub. Co. v. Huddleston*, 92 So. 193 (Ala. 1921); *O'Malley v. Statesman Printing Co.*, 91 P.2d 357 (Idaho 1939); *Forman v. Mississippi Publishers Corp*., 14 So. 2d 344 (Miss. 1943); *Houston v. Pulitzer Pub. Co.*, 155 S.W. 1968 (Mo. 1913); *Julian v. Kansas City Star Co.*, 107 S.W. 496 (Mo. 1908)).

35. Prosser, *supra* note 27, at 962; *see also* Woodhouse v. New York Evening Post, Inc., 193 N.Y.S. 705 (N.Y. Sup. Ct. 1922).

36. In another multiple lawsuit case, a story run nationally in the now defunct *Saturday Evening Post*, in 1940, provided plaintiff 38 causes of action to act upon against the publisher, one for each state where the libel was published and distributed. *See* O'Reilly v. Curtis Publ. Co., 81 F. Supp. 364 (D. Mass. 1940).

37. Prosser, *supra* note 27, at 968.

38. *Id*. at 969-70.

39. See, e.g., *Wolfson v. Syracuse Newspapers, Inc*., 279 N.Y. 716 (1938); *Gregoire v. GP Putnam's Sons, supra* note 17, at 122-23.

39A. Uniform Single Publication Act, 14 U.L.A. 469 (2005);

the number of people to whom, or the number of states in which it is circulated, are precluded.[40] For example, a plaintiff with a libel action against a defendant in one state for a single statement cannot opt to sue that same defendant in the remaining forty-nine states for that libel, even if the offending statement was distributed unchanged in those jurisdictions. Only a republication of the statement in a new edition or format creates a new cause of action with a new statute of limitations period.[41] A test for identifying a republication is whether the act of the defendant to publish the work anew was a conscious and independent one.[42]

U.S. courts adopted the SPR after recognizing that it levels the playing field between plaintiffs and defendants by preventing "stale" suits, based on old allegedly libelous statements.[43] The rule's introduction of an effective limitations period—one not endlessly retriggered by the availability of a work to the public[44]—affords libel defendants the ability to mount a viable defense. As one U.K. committee recently noted, eventually "[m]emories fade. Journalists and their sources scatter and become, not infrequently, untraceable, and notes and other records are retained only for short periods, not least because of limitations in storage."[45] The SPR helps to minimize this problem for defendants facing libel claims.[46]

U.S. courts have also concluded that the SPR promotes judicial efficiency by packaging all defamation claims arising out of a single publication into one composite action.[47] Under the MPR, one U.S. court noted that "a cause of action, although set in motion in [one place], multiplies as the widening circles of its distribution expand, creating new causes of action throughout the land and to the uttermost parts of the earth."[48] In this setting, defendants have to mount a costly defense in as many courts as they are sued for the same article. By adopting the SPR, U.S. courts avoided these burdens imposed on defendants.

40. *Id*.; RESTATEMENT (SECOND) OF TORTS § 577A (1977).
41. RESTATEMENT (SECOND) OF TORTS § 577A, comment d (1977).
42. Barres v. Holt, Rinehart & Winston, 330 A.2d 38, 46 (N.J. Super. Ct. Law Div. 1974), *aff'd* 359 A.2d 501 (N.J. Super. Ct. App. Div. 1976).
43. Winrod v. Time, Inc., 78 N.E.2d 708, 712 (Ill. App. Ct. 1948).
44. Firth v. New York, 775 N.E.2d 463, 465 (N.Y. 2002).
45. Supreme Court Procedure Committee, *Report on Practice and Procedure in Defamation* at 81, ¶ VIII 2 (July 1991).
46. Robert D. Sack, *Sack on Defamation: Libel, Slander, & Related Problems* § 7.2 (2008).
47. Restatement (Second) of Torts § 577A (1977) (The single publication rule's purpose consists of "avoiding multiplicity of suits, as well as harassment of defendants and possible hardship upon the plaintiff himself.")
48. *Forman v. Mississippi Publishers Corp.*, 195 Miss. 90, 105 (1943).

Moreover, while the SPR limits a plaintiff's ability to bring multiple actions, it does so without undermining that plaintiff's substantive rights. The rule allows the plaintiff to recover all of his damages from a libel claim, wherever it is published, albeit he can only do so only once. In other words, were Dr. Hartmann to have brought his suit under the SPR, he could still have recovered all his damages against Time, Inc.—to the extent that the publisher was at fault for the publication of the allegedly defamatory work. All the same, his damages from the national publication of the offending issue of *Life* magazine could only have been recoverable in *one* action against Time, Inc., brought in *one* proceeding.[49]

Finally, and perhaps most importantly, U.S. courts adopted the SPR because, had they continued to apply the MPR, the courts knew they would eventually cripple the modern mass publishing industry.[50] It was largely observed that the rule "challenged the ability and willingness of publishers to report freely on the news and on matters of public interest" because "the advent of books and newspapers that were circulated among a mass readership threatened unending and potentially ruinous liability as well as overwhelming (and endless litigation)."[51] The SPR was designed to prevent this possibility and help accommodate the use of new forms of communication.

Notwithstanding these compelling rationales for a change in U.S. libel law, the shift to the SPR in the U.S. through case law and statutes[52]

49. See, e.g., *Wathan v. Equitable Life Assur. Soc.*, 636 F. Supp. 1530, 1533-1536 (C.D. Ill. 1986); *Dubinsky v. United Airlines Master Executive Council*, 303 Ill. App.3d 317, 333-334 (1999); Uniform Single Publication Act § 1 (West 2009) (recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions).

50. See, e.g., *Gregoire v. G.P. Putnam's Sons, supra* note 14, at 120-124 [collecting cases]; *Hartman v. Time, Inc*., 166 F.2d 127, 134 (3d Cir. 1948) (observing the 19th century rule posed a threat to freedom of the press); *Applewhite v. Memphis State University*, 495 S.W.2d 190, 194 (Tenn. 1973).

51. *Shively v. Bozanich, 3*1 Cal. 4th 1230, 1244 (2003).

52. Only seven states have adopted the Uniform Single Publication Act § 1 (West 2009), promulgated in 1952: Arizona (A.R.S. § 12-651, passed in 19531955), California (Cal.Ca Civ. Code §§§ 3425.1 to 3425.53, passed in 19551953); Idaho (I.C. §§ 6-702 to 6-705, passed in 1953), Illinois (S.H.A. ch. 126, ¶¶ 11 to 155, passed in 1959), New Mexico (N.M.S.AAnn. §§ 41-7-1 to 41-7-5, passed in 19551953), North Dakota (N.D.C.C.Code § 14-02-10, passed in 1953), and Pennsylvania (42 Pa.C.S.A. § 8341341, passed in 19531960). The Act provides:

> No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one edition of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recover in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.

did not happen overnight. One commentator in the 1950s attributed the delay in the rule's adoption in part to the unsavory reputation of publishers at the time. As Professor William L. Prosser noted, "[f]rom the 'yellow journalists' of the nineties down to the 'smear technique' publishers of the present day, there are some of those defendants who have earned very little sympathy, and for whom no decent citizen would be anxious to do a kind deed."[53] By 1984, the Supreme Court stated that "the great majority of the States now follow the 'single publication rule'."[54]

II. Internet Libel in the U.S. and the Multiple Publication Rule

Despite the clear adoption of the SPR in U.S. libel suits involving traditional media, U.S. plaintiffs have challenged the application of the rule on the Internet, which is "a form of communication certainly not envisioned when the [SPR] was created."[55] Instead, plaintiffs have advocated for the revival of the MPR. However, most courts have rejected the rule's revival online, declining to hold that the limitations period of an unmodified online work should restart every time a user accessed the work.[56]

To support their position that the MPR should apply online, plaintiffs have used the following reasoning:[57] Internet publishers lack the

53. Prosser, *supra* note 27, at 993; JOSEPH W. CAMPBELL, YELLOW JOURNALISM: PUNCTURING THE MYTHS, DEFINING THE LEGACIES (2001) (defined yellow journalism as a type of journalism from the late 19th century that downplayed legitimate news in favor of eye-catching headlines that sell more newspapers. It featured exaggerations of news events, scandal-mongering, sensationalism, and unprofessional practices by news media organizations or journalists.)

54. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778 (1984) (quoting the Restatement (Second) of Torts § 577A, Appendix, Reporter's Note (1977)). However, at least one state, Montana, has explicitly rejected SPR and continues to use the MPR. See, e.g., *Treperinas v. Burlington Northern and Santa Fe Railway Company*, No. DV-04-431, 2005 Mont. Dist. LEXIS 828, at *10 (Mont. D. Ct. January 14, 2005) (defamation claim not time barred under the multiple publication rule); *Lewis v. Reader's Digest Association, Inc., supra* note 30 (Montana Supreme Court adopting the multiple publication rule in libel matters). Fifteen states—Alaska, Arkansas, Delaware, Hawaii, Indiana, Kentucky, Maine, North Carolina, Oregon, South Dakota, Utah, West Virginia, and Wisconsin—have not decided whether to follow the single publication rule, but their respective federal district courts have applied them. See, e.g, *Beech Aircraft Corp v. National Aviation Underwriters*, No. 80-1214, 1984 U.S. Dist Lexis 24862, at *60 (D. Kan September 18, 1984) ("While no Kansas state court has ever formally adopted the single publication rule, several federal courts have predicted that it would.").

55. *Salyer v. Southern Poverty Law Center*, 2009 WL 4758736, at *2 (W.D. Ky. December 7, 2009).

56. Carolyn Conway, *2007 in Review: Single Publication Rule and the Internet*, MEDIA LAW RESOURCE CENTER (2007).

57. Other arguments have been made in support of applying the MPR online. For example, publishers or owners of web sites may alter their sites at any time, *Firth v. State*,

"internal controls" and professionalism found in traditional print media.[58] Internet publications are available in the same manner, with the same level of prominence, throughout time, and have the potential for much greater circulation than traditional print media.[59] Internet publishers, unlike traditional print media publishers, make a conscious choice every day to publish a document by maintaining the document on a website that they can easily remove.[60] Moreover, Internet works are subject to potential fraud and abuse not generally associated with traditional print media.[61] That is, unscrupulous online publishers may avoid liability for defamation by restricting access to what might be a defamatory document during the statute of limitations period.[62] Then, after the limitations period has expired, the online publishers may supposedly make that document visible to major search engine algorithms by removing certain anti-crawling files, thereby significantly increasing the likelihood of access by the public to a defamatory document.[63]

So far, none of these arguments has availed Internet libel plaintiffs in the vast majority of libel cases, when weighed against countervailing public policy considerations. Indeed, every U.S. court forced to confront the issue has ruled that applying the SPR to the Internet furthers the goals of the rule.[64] Courts in the U.S. have found no rational basis to distinguish between traditional and online publications, holding that the statute of limitations for online content begins to run once the material is available to the public.[65]

In *Firth v. New York*,[66] a landmark New York Court of Appeals case, the plaintiff sued more than a year after a defamatory report about him

supra note 44, at 369. Publications on the Internet are also available only to those who seek them, and thus "new" whenever viewed. *Id*.

58. *Churchill v. State*, 876 A.2d 311, 314-315 (N.J. App. 2005).

59. *Id*.

60. *Id*.

61. *Id*.

62. *Id*.

63. *Id*.

64. Media Law Resource Center, *Position Paper to the U.K. Justice Ministry's Consultation on Defamation and the Internet* (2009) ("Courts throughout the U.S. have held that the single publication rule is particularly appropriate to the Internet as a medium of mass communication. To date this includes courts in Arizona, California, Colorado, Florida, Georgia, Kentucky, Massachusetts, Mississippi, New Jersey, New York, North Dakota, Texas and the Second, Fifth, Ninth and D.C. Circuit Courts of Appeal.").

65. See *Mitan v Davis*, 243 F. Supp.2d 719, 724 (W.D. Ky. 2003) (")("A statement electronically located on a server which is called up when a web page is accessed, is no different from a statement on a paper page in a book lying on a shelf which is accessed by the reader when the book is opened.").

66. *Firth v. State, supra* note 44, at 365.

was published online, and the one-year statute of limitations had run. The plaintiff contended his claim was still timely because the limitations period began anew with each review of the work by an online visitor.[67] The court was not persuaded and applied the SPR, noting that "[t]he policies impelling the original adoption of the single publication rule support its application to the posting of the … report regarding claimant on the … Web site."[68] The court stated that an online libel was similar to traditional media libel, but on a "much grander scale," given that it can be viewed "by thousands, if not millions, over an expansive geographic area for an indefinite period of time." As a result, adopting the MPR on the Internet would "implicate an even greater potential for endless retriggering of the statute of limitations, multiplicity of suits and harassment of defendants."[69] This would inevitably lead to "a serious inhibitory effect on the open, pervasive dissemination of information and ideas over the Internet, which is, of course, its greatest beneficial promise."[70]

Following this N.Y. Court of Appeals decision in 2002, the MPR has, to date, been kept away from the Internet. Jurisdictions are almost unanimous in holding that the SPR should be applied to the Internet, whether the case involves parallel online and traditional hard copy publications,[71] online archives,[72] republication by a third-party website,[73] or websites that are modified with information unrelated to the defamatory material.[74] U.S. courts do so out of recognition that the Internet has become the standard for the mass production, distribution and archival storage of

67. *Id*. at 369.
68. *Id*. at 370.
69. *Id*.
70. *Id*.
71. *Simon v. Ariz. Bd. Of Regents*, 28 Med. L. Rep. 1240 (Ariz. Super. 1999).
72. *McCandliss v. Cox Enter., Inc.*, 265 Ga. App. 377 (2004).
73. *Jankovic v. International Crisis Group*, 494 F.3d 1080, 1087 (D.C. Cir. July 24, 2007) ("In the print media world, the copying an article by a reader even for wide distribution does not constitute a new publication [by the original publisher]. The equivalent occurrence should be treated no differently in the Internet.").
74. *Firth v. State, supra* note 44, at 369; *Canatella v. Van De Kamp*, 486 F.3d 1128 (9th Cir. 2007) (California Bar Association's posting of a summary of a disciplinary proceeding did not restart the statute of limitations, as the posting and the earlier material were identical and appeared on the same website.); *Atkinson v. McLaughlin*, 462 F.Supp.2d 10383409130 (D.N.D. November 28, 2006) (alterations to a defendant's allegedly defamatory website did not restart the limitations period as they did not rise to the level of substantive change.); *Bloom v. Goodyear Tire & Rubber Co*., No. 05-cv-01317, 2006 WL 2331135 (D. Colo. August 10, 2006) (changes to Goodyear's website since the initial publication of the allegedly defamatory statements did not constitute "subsequent publications" as they did not alter the substance of those statements).

print data and other forms of media. The same cannot be said of U.K. libel law today, where the MPR remains "firmly entrenched."[75]

III. The U.K. Experience with the Multiple Publication Rule

Although the U.K. was no less affected by the development of modern mass publishing and as aware of its needs as the U.S., it appears that detailed examination of the MPR did not come about in the U.K. until fairly recently, when the rule was applied to the Internet in a series of libel cases beginning in 1999—nearly 150 years after the MPR was first developed. While there have been relatively few cases employing the MPR in the U.K. that appear abusive, those that have surfaced raise a troubling specter and underscore the larger concern of how the libel laws in the U.K. support a pro-plaintiff legal environment. Although the degree to which these laws have had a chilling effect on the press and on speech in general cannot be quantified, the alarms raised about them in the publishing industry are quite widespread.[76]

In the first of these cases, *Godfrey v. Demon*, a U.K. court considered the liability of an Internet service provider for defamatory material posted for 10 days on its server archive.[77] The court found that "every time one of the defendant's customers accesses 'soc.culture.thai' and saw the posting, which was defamatory of the plaintiff, there was a publication to that customer."[78] This holding was significant because it confirmed "the 'multiple publication rule' applied equally online as in the offline world."[79] Thus, even though the Limitations Act of 1980[80] established as a general rule in the U.K. that the limitation period for actions in defamation is set at 12 months from the date of publication, the U.K. court in *Godfrey v. Demon* was essentially reaffirming that the MPR could subvert this legal restriction.

In the 2000 libel case of *Berezovsky v. Michaels*, the issue before the court was whether the U.K. was the appropriate forum for bringing

75. *Loutchansky v. Times Newspaper Ltd.*, [2001] EWCA Civ. 1805; [2002] Q.B. 783 at 62.

76. On November 10, 2009, two English PEN and Index on Censorship launched their report into English libel law entitled 'Free Speech Is Not For Sale', as part of national campaign in the U.K. to reform the law. See *The Libel Reform Campaign, available at* http://www.libelreform.org/ (last visited January 18, 2010).

77. *Godfrey v. Demon*, [1999] EMLR 542.

78. *Id*.

79. Gavin Sutter, *One Way Or Another? Is it Time for the Introduction of the Single Publication Rule in English Defamation Law*, CONTEMP. ISSUES OF LAW Vol. 7, Issue. 4, at 378 (2005/2006).

80. Limitations Act (1980) (U.K.)

an action claiming defamation for injury done to plaintiff's reputation in the U.K. by a defamatory article in *Forbes*, an American business magazine.[81] After pointing out that the *Duke of Brunswick* case affirmed that the U.K. had proper jurisdiction, the court dismissed as irrelevant concerns that a favorable ruling for the plaintiff would encourage other plaintiffs to bring multiple suits for individual libel torts elsewhere. While recognizing that the MPR could lead to "a multiplicity of suits," and that it was "more appropriate to 'small communities and limited circulations'; but 'potentially disastrous today'," the court nevertheless viewed the discussion as "entirely academic" in the case before it.[82] The court noted that "[i]t is the plaintiffs who are for practical purposes treating the publication as a 'global tort' by calling upon the English court and only the English court to vindicate their reputations."[83] While this case does not directly implicate the MPR, it does raise the potential for multiple libel suits brought by plaintiffs in the U.K. against foreign defendants. U.K. courts have signaled that so long as a few copies of a foreign defendant's publication enter the U.K., that defendant could be subject to the jurisdiction and venue of the U.K. legal system.[84] This increased liability for foreign publishers in the U.K. has only further drawn attention to the shaping of the country's libel regime.

Finally, it was the 2002 libel case of *Loutchansky v. Times* that a U.K. court fully re-examined the multiple publication rule.[85] Here, the court was called upon to assess whether the MPR posed a problem for the media and potentially jeopardized the purpose of the statute of limitations.[86] The case arose out of libel actions brought by a Russian businessman in response to two articles published by *The Times* (U.K.) in September and October 1999. Appearing online and in web archive, these articles referred to the plaintiff as a "suspected Mafia boss" and suggested he was associated with organized crime. The plaintiff filed a suit claiming defamation as to the original publication, and more than a year later, a second action in respect to the online archival versions of the articles. The English Court of Appeal found that the statue of limitations was no bar to the action being brought as the "multiple publication

81. *Berezovsky v. Michaels*, [2000] 2 All ER 986.
82. *Id*.
83. *Id*.
84. *Mardas v. New York Times Company*, [2008] EWHC 3135 (QB) (a libel case brought against the New York Times by a Greek national named Alexis Mardas was brought in England and Greece for the same article).
85. *Loutchansky v. Times*, [2002] EMLR 14.
86. *Id*.

rule … a well established principle of the English law [of defamation]" applied.[87] This meant that every time one of the articles in question was pulled from *The Times*' online archives by a user of the website, a new publication was made and a new cause of action began to accrue. The U.K. court declined to shift to the SPR, holding that to do so would represent a change in policy that should be decided not by the courts, but by the U.K. parliament, a conclusion not shared by U.S. courts.

In reaching this decision, the U.K. court dismissed the argument that the MPR imposes a disproportionate restriction on freedom of expression, holding arbitrarily that archival material was "stale news""—unlike news that is published soon after an event or development—and its publication was therefore not as important to shield from liability.[88] The U.K. court also reasoned that responsible journalism required news organizations, upon notice of a defamation claim, to alter or flag an archived article that is subject to a claim.[89] Nowhere in the decision did the court consider the public policy concerns with the rule that have troubled U.S. courts from the 19th century to the present; namely, that the MPR enabled undue harassment of defendants, allowing plaintiffs to launch multiple suits in different jurisdictions over the same article indefinitely.[90] That the Internet magnified this problem through the advent of online archives, chilling the keenness of publishers to provide such services, appeared of no consequence to the U.K court. Instead, it reasoned that it would not be overly burdensome to defend a libel action over an article originally published many years ago, given that damages would likely remain modest.[91] But the U.K. court did not consider in its ruling the legal costs of *actually* defending the case, which oftentimes "dwarf the damages."[92]

Supporters of the *Loutchansky* decision have argued that the burden on the press is a small price to pay to ensure that all plaintiffs are not left without any recourse to defend their reputations should an online publication evade notice and cause them harm after the statute of limitations had run. It has been argued that the MPR allows for the fullest protection of one's reputation.[93] But as Professor Gavin Sutter, a British

87. *Id*.
88. *Id*. at 244.
89. *Id*.
90. Sutter, *supra* note 79, at 382.
91. [2002] EMLR 14 at 244.
92. David Hooper, *Developments in U.K. and European Media Law* at 33-34, MLRC Media Law Letter (September 2009).
93. Sutter, *supra* note 79, at 382.

commentator has stated, "[w]hy should some claimants be enabled to sue indefinitely on the indiscriminate grounds that the articles which apparently defamed them were available in an archive?"[94] Surely it is common, whenever a limitations period is set for bringing a claim, that a potential plaintiff may reasonably not become aware of the defamation until after the time has expired.[95] Moreover, it strains logic to make it every publication's financial burden to maintain a detailed log of how they reported each of their stories, in addition to the archive of the stories themselves for a decade or more, as the English courts would seem to require. Such an encumbrance would weigh unreasonably upon online publishers, as they could never predict the extent of their online liability and expense of insuring their online activities.

Following the *Loutchansky* decision, *The Times* (U.K.) brought an application before the European Court of Human Rights ("ECHR") alleging, in part, that that the U.K courts breached its right to freedom of expression under Article 10 of the European Convention of Human Rights by not applying the SPR to online archives, and it also asked the court to recognize the importance of these online archives.[96] In its decision, while the ECHR agreed with *The Times* on the value of online archives, it found that "the margin of appreciation afforded to States in striking the balance between the competing rights is likely to be greater where news archives of past events, rather than news reporting of current affairs are concerned."[97] It also held unanimously that the MPR did not violate Article 10 because it believed the delay of 14 to 15 months between the libel actions at issue did not so prejudice the defendant as to prevent it from mounting a reasonable defense. The ECHR did suggest, however, that a greater delay between the first publication and suit would "give rise to a disproportionate interference with press freedom under Article 10."[98]

While U.K. courts and legislatures continue to debate policy considerations behind the MPR, in the wake of the ECHR decision in *Times Newspapers v. U.K.*, plaintiffs continue to bring troubling cases that exploit the MPR in a manner long since discarded by U.S. courts. For instance, *Forbes* magazine has faced multiple libel suits in Northern Ireland, England and the Republic of Ireland, brought by one plaintiff,

94. *Id*.
95. *Id*.
96. *Times Newspapers v. United Kingdom*, [2009] EMLR 14, 256.
97. *Id*. at 267
98. *Id*. at 268

over a 2006 story about marathon running in the North Pole, which questioned, in part, the safety measures taken by the plaintiff-organizer.[99] It also appears plaintiffs are ready to further capitalize on the advantage the MPR affords them, so long as it exists as good law. Reflecting on a strategy that implicates the MPR, one plaintiff-attorney noted that his "favorite tactic is the triple whammy—issuing proceedings in Dublin, Belfast and London. Facing three separate sets of legal costs and possible damages can be very effective in terms of concentrating a publisher's mind and encouraging early settlements."[100]

Thus, although the U.K. may lack the geography to suffer the scale of "chain libel suits" possible in the U.S., the MPR can still become oppressive for defendants even when there are just two or three jurisdictions implicated or when the case involves the Internet.

IV. The Endurance of the Multiple Publication Rule in the U.K

It is generally unclear why U.K. courts have not responded to the MPR in a similar manner to U.S. courts, or, at the very least, reconsidered the rule sooner, given its demonstrated "chilling effect" on modern publishing. There are at least five cultural, logical and historical circumstances that may have contributed to this comparatively lasting presence in the U.K. of the MPR.

A. The U.K.'s Pro-Plaintiff Libel Laws

The discrepancy in approaches to the MPR between the U.S. and the U.K. may reflect "the overall characteristics of defamation law in the jurisdictions as they were developed in, the United States having traditionally been viewed as more pro-defendant, and England as more pro-[plaintiff]."[101] The U.K. libel laws are generally considered pro-plaintiff because the initial burden of proof in the U.K. falls on the defendant, who must prove the truth of the offending statements. In other words,

99. Balin, *supra* note 26, at 13108; Ray Managh, *Sportsman Claims U.S. Magazine Defamed Him*, INDEPENDENT (August 14, 2007).) *available at* http://www.independent.ie/national-news/sportsman-claims-us-magazine-defamed-him-1058348.html; After extensive negotiations between the parties, it was agreed that the libel cases against *Forbes*, originally to run in England, the Irish Republic and Northern Ireland, would now be combined and heard in Belfast, Ireland. Staff, *Runner's Libel Action Will Be Heard In Belfast*, Belfast Telegraph (December 1, 2009).

100. *Id.*. *See* Suzanne Breen, *She's Just Jenny from the H-Blocks to Lawyer Tweed*, TRIB. NEWS (August 31, 2008), *available at* http://www.tribune.ie/news/international/article/2008/aug/31/shes-just-jenny-from-the-h-blocks-to-lawyer-tweed/.

101. Sutter, *supra* note 79, at 386.

the defendant is guilty of libel until proven innocent.[102] In contrast, libel plaintiffs in the U.S. bear the initial burden of proof and must show, among other elements, that the material at issue was false and defamatory, and that the defendant was at fault.[103] It is therefore logical that the MPR would receive more favorable treatment in U.K. courts than in U.S. courts as it is arguably pro-plaintiff, affording multiple opportunities to recover damages for a single defamatory act by a defendant over an indefinite period of time.

B. The U.K.'s Steadfast Protection of Reputation

It is also likely that conceptual press rights—which the MPR undoubtedly diminishes—have never been as politically saleable in U.K. courts as they are in the U.S. courts. This is possibly due to the U.K.'s comparatively stronger concern for an individual's reputation than for his speech. In the U.K., where purportedly "pre-capitalist concepts of honor, family, and privacy survive," it appears that "reputation is a weighty matter not only for the remnants of the nobility who still fight duels to protect it, but for all the middle groups."[104] It is thus very likely that U.S. culture, which views reputation more as an asset in capitalistic terms than "an attribute to be sought after for its intrinsic value,"[105] and which has well-developed "traditions of individualism, egalitarianism and irreverence and extravagance in speech," has allowed for a faster and more dramatic reformation of libel laws, such as the MPR, than its U.K. counterpart.[106]

C. The Impact of British Tabloids on Press Rights in the U.K.

It is also possible that the half-hearted support for reversing a pro-plaintiff rule like the MPR in U.K. courts and Parliament may be due to

102. COLIN DUNCAN & BRIAN NEILL, *Defamation*, chs. 12-14 (1978). Extensive scholarship has already documented how U.K. libel laws generally favor plaintiffs' reputational and privacy interests over defendants' freedom of speech: *See, e.g.*, Laura R. Handman & Robert D. Balin, *The Interface Between Foreign and U.S. Defamation Law: The First Amendment Goes Global*, 9 Libel Defense Resource Ctr. 50-State Survey 1992-93, at xviii, xx (Henry R. Kaufman ed., 1993) ("[A]pplication of British law effectively prohibits American publishers from invoking two core guarantees of the First Amendment."); Kathleen A. O'Connell, Comment, *Libel Suits Against American Media in Foreign Courts*, 9 DICK. J. INT'L L. 147, 152 (1991) (English libel law "is 'plaintiff friendly' since the burdens on the respective parties favors the plaintiff").

103. DON R. PEMBER AND CLAY CALVERT, MASS MEDIA LAW 141 (McGraw-Hill 2009-10).

104. David Riesman, *Democracy and Defamation*, 42 COLUM. L. REV. 727, 730 (1942).

105. *Id.*

106. Richard C. Donnelly, *The Right of Reply: An Alternative to an Action for Libel*, 34 VA. L. REV. 867, 868-869 (Nov. 1948).

the "dubious" reputation of some contemporary members of the British press. Just as the "yellow journalists" of the 1890s and the "smear journalists" of the 1950s stifled the evolution of press rights in the U.S., the same argument could be made that contemporary British tabloids are hampering the rights of the press in the U.K.. The fact that some British tabloids feed so readily and successfully on scandals and sensationalism, undeterred by lawsuits, seems it would more than likely dampen needed government support for greater press freedoms.[107] Thus, invoking the vital role of journalism in democracy and the exchange of ideas in support of the SPR, may simply remind U.K. officials of British tabloid sins and deter further movement in the law.

D. Fundamental Misunderstandings and Unwarranted Fears in the U.K. about the "Single Publication Rule"

Underlying the U.K.'s inertia in reforming its libel laws, particularly with regard to the MPR, may be fundamental misunderstandings and misguided fears regarding the SPR. U.K. officials and their constituents could be under the erroneous belief that under the SPR, a defamatory statement, once published for more than its statutory term of limitations, may no longer be actionable if republished elsewhere.

In fact, the opposite is true. There have been numerous cases where a defamatory statement in one publication has still been considered a new publication for statute of limitations purposes elsewhere. These purposes include: the rebinding into paperback of a hardcover book,[108] the publication of a newspaper series in book form,[109] the rebroadcast of a television program,[110] the re-posting of content online with "substantive" modifications,[111] and later editions of a newspaper.[112] Clearly, the SPR in the U.K. would give plaintiffs more than one opportunity to restore their reputations, where appropriate.

107. Zelman Cowen, *The Responsibility Of The Media*, British Medical Journal, Vol. 298, No. 6686, p 27 (Jun. 3, 1989) (noting how the British tabloids, among other U.K. publications, have failed to live up to the press standards as set forth by the U.K. Press Council).

108. *Rinaldi v. Viking Penguin, Inc.*, 52 N.Y.2d 422 (1981).

109. *Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, 554 (1980).

110. *Lehman v. Discovery Communications, Inc.*, 332 F.Supp.2d 534, 539 (E.D.N.Y. 2004).

111. *Woodhull v. Meinel*, 145 N.M. 533, 538 (Ct. App. 2009) (holding that a later posting on a website, for which the statute of limitations had not yet lapsed, was sufficiently different from the prior posting to lead a reasonable jury to conclude it was a republication.); *Sundance Image Technology v. Cone Editions Press*, No. 02 CV 2258, 2007 WL 935703 (S.D. Ca. March 7, 2007) (holding that a modification of a header of a website, where allegedly defamatory materials were posted, was deemed a republication, as the change was viewed as deliberate and for a substantive purpose.).

112. *Rivera v. NYP Holdings, Inc.*, 847 N.Y.S.2d 904 (N.Y. Sup. 2007).

U.K. policymakers and judges may also have unwarranted fears about unscrupulous publishers exploiting the statute of limitations under the SPR to publish their works while avoiding liability.[113] However, it is hardly realistic in the publishing world that a defendant would hold back distribution of a substantial number of copies of a defamatory periodical or hide the content from online search engines or algorithms until the statutory period had elapsed, given that "the element of timeliness is of paramount importance in the distribution of a bestseller [or a breaking news story]."[114] In any event, under the SPR, "if it were shown that a defendant had purposely withheld distribution of a substantial number of copies in order to take advantage of the single publication rule, a court would be free to find that there was a new publication."[115] This means that a court would have the discretion to deem the publication as new and extend the statute of limitations for the defamed plaintiff in question. For these reasons, any such fears that the U.K. government and courts may be harboring about the rule are unwarranted.

E. The Pace of Common Law Reform and the Sparsity of MPR cases

It may well be that, as we have seen here in the U.S., a law as old and entrenched as the MPR in the U.K. just requires time and effort to change. In the U.S., the MPR was not officially abandoned in certain states until the late 1930s and early 1940s—at least 90 years after the rule was created. Moreover, the SPR was not adopted as a national standard in the U.S. until the late 1970s. Thus, the fact that the MPR was first devised in the U.K. more than 150 years ago, and that there does not appear to be a record of much exploitation of the rule until the recent past, may help explain—though not necessarily justify—the reluctance of lawmakers and judges to entirely abandon the rule.[116] As one prominent U.S. media lawyer noted, "nations do not adjust quickly to radical changes in rules of law, particularly when they have lived for

113. Prosser, *supra* note 27, at 966.
114. Painter, *supra* note 33, at 1138 n.28.
115. *Id*.
116. VAN VECHTEN VEEDER, *The History of the Law of Defamation*, 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 446 (1909) ("English law of defamation is not the deliberate product of any period. It is a mass which has grown by aggregation, with very little intervention from legislation, and special and peculiar circumstances have from time to time shaped its varying course. The result is that perhaps no other branch of the law is as open to criticism for its doubts and difficulties, its meaningless and grotesque anomalies. It is, as a whole, absurd in theory, and very often mischievous in its practical operation.").

centuries under a relatively static common law, and certainly not in an area as sensitive as restraints on freedom of speech."[117]

V. Conclusion

Regardless of the reasons that the MPR remains firmly entrenched in U.K. libel law, the rule's dangers to freedom of speech and press in the U.K. are as real today as they were in the U.S. over 60 years ago, when Dr. Hartmann filed his multi-state libel suit against Time, Inc. By now, savvy U.K. libel plaintiffs have learned to manipulate and pressure defendants by confronting them with chain libel suits—a legal strategy barred in U.S. courts. Problems with the MPR have only been magnified in the U.K. with recent rulings in online libel suits where the courts reaffirmed the viability of the MPR in such suits, allowing for claims to be brought in potentially as many jurisdictions as the Internet reaches, and possibly years after a defendant could mount any reasonable defense.

The practical considerations informing the development of the SPR in U.S. courts should be weighed heavily in relevant policy discussions in the U.K.. U.S. judges and legislators adopted the SPR because they realized the MPR rendered the statute of limitations on libel claims ineffective, allowing stale suits to proceed against defendants. The SPR was also necessary for the sake of judicial efficiency as the MPR clogged the judicial system with redundant claims for the same tort in multiple jurisdictions. U.S. courts also abandoned the MPR for the SPR to maintain a vibrant publishing industry. Importantly, the SPR afforded these vital gains without altering the substantive rights of plaintiffs.

Of course, U.S. courts were not so naïve as to believe that the adoption of the SPR would ensure all or even most publishers would carry out their traditional watchdog role and pursue important matters of public interest. Nevertheless, in balancing the needs of society, the U.S. courts and legislatures had the foresight to understand that as long as the MPR led to overwhelming, endless litigation against publishers, very few, if any of them, would play their "crucial informing role in democracy," "speak[ing] truth to power."[118] The U.K. Parliament and courts would also do well to recognize the gravity of the MPR's threat to free speech and act swiftly to eliminate the rule, reforming U.K. libel law for the benefit of its citizens and others within its jurisdictional reach.

117. Bruce W. Sanford, Libel and Privacy: Prentice Hall Law & Business (2d. ed. 1991).

118. Anthony Lewis, *Democracy and a Free Press: Are They Incompatible?*, Bulletin of the American Academy of Arts and Sciences, Vol. 50, No. 5, at 63 (Mar. 1997).

Postscript

As this article goes to press, four important events have occurred in the United Kingdom that may lead to the establishment of a single publication rule in the country. First, the U.K. House of Commons' Culture, Media and Sport Committee issued a report advocating, among other things, for a one-year limitation period on actions brought in respect of publications on the Internet.[119] Second, The Ministry of Justice Review Group, established by the Justice Secretary, considered adopting the single publication rule in at least certain circumstances.[120] Third, the U.K. election was completed in May, leading to the formation of a Conservative Party and Liberal Democrat coalition government.[121] According to the coalition's agreement, it appears that libel law reform will proceed as part of their agenda.[122] Finally, Lord Anthony Lester, a member of the British Parliament, published a sweeping private member's bill on libel reform, which, if passed by Parliament, would introduce a single publication rule into U.K. law.[123] While these measures may face strong opposition from certain corners of the legal profession,[124] they provide room for optimism that the British government may abandon the multiple publication rule and other aspects of their libel law that have otherwise stifled free expression around the world.

119. HOUSE OF COMMONS CULTURE, MEDIA AND SPORT COMMITTEE, PRESS STANDARDS, PRIVACY AND LIBEL: PRESS COMPLAINTS COMMISSION'S RESPONSE TO THE COMMITTEE'S SECOND REPORT OF SESSION 2009-10, Vol. I, H.C. 362-I, at 59, *available at* http://www.publications.parliament.uk/pa/cm/cmcumeds.htm.

120. U.K. MINISTRY OF JUSTICE, REPORT OF THE LIBEL WORKING GROUP, March 2010, at 21, *available at* http://www.justice.gov.uk/publications/libel-working-group-report.htm.

121. THE DAILY MAIL (U.K.), *U.K. Election 2010: The Lib Dem-Conservative Coalition Agreement In Full*, (May 13, 2010), http://www.dailymail.co.uk/news/article-1277879/UK-Election-2010-The-Lib-Dem-Conservative-coalition-agreement-full.html.

122. THE GUARDIAN (U.K.), *Libel Reform, Free Speech and the Coalition Government*, (May 13, 2010), http://www.guardian.co.uk/uk/2010/may/12/coalition-free-speech-libel-reform ("The coalition government has promised a review of libel laws to protect freedom of speech").

123. THE PRESS GAZETTE (U.K.), *Lord Lester's Defamation Bill—Main Provisions*, (June 2, 2010), http://www.pressgazette.co.uk/story.asp?storycode=45524.

124. John Kampfner, *Libel Reform Forces Its Way Up The Political Agenda*, THE GUARDIAN (U.K.), (May 31, 2010), http://www.guardian.co.uk/media/organgrinder/2010/may/31/libel-reform-political-agenda ("The bigger danger is that it is destroyed or watered down beyond recognition, as the government caves in under pressure from those in the legal profession who have made tidy profits from an archaic and unbalanced body of law.")

Privacy Down Under

By Peter Bartlett*

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Introduction

Modern Western societies increasingly perceive privacy as an invaluable personal interest and right. Its growing prominence stems, in part, from the belief that threats to personal privacy are increasing. Rapid advances in technology, changes in the methods of recording and storing information, and the rise and use of internet sites, which encourage worldwide publication of personal information in all kinds of forms, contribute to the perception that privacy is under siege. The consequences for a loss of autonomy and human dignity are potentially frightening:

> "There's a loss of personality:
> or rather, you've lost touch with the person you thought you were.

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> You no longer feel quite human.
> You're suddenly reduced to the status of an object—a living object but no longer a person."
>
> [T.S. Eliot, the Cocktail Party, Act 1, Sc.1][1]

Lawmakers in the United States (U.S.), the United Kingdom (U.K.), Europe, Australia and many other jurisdictions are grappling with the challenge of formulating laws to protect personal privacy. The task is complicated because to some extent, an individual's right to an appropriate level of personal privacy must be balanced with the fundamental right to freedom of the press, freedom of speech and the public's right to information. There are also issues of defining personal privacy with precision and developing technical instruments to effectively protect it. Different jurisdictions are approaching the issues in divergent ways, with contrasting emphasis and results. This article examines developments in privacy law on the Australian legal landscape and how these issues have been approached.

I. History

In 1937, Australia's highest court decided that no general right of privacy existed at common law.[2] The case, *Victoria Park Racing and Recreation Grounds Co Limited v Taylor*[3], concerned the question of whether an operator of race meetings could prevent someone from broadcasting race descriptions from outside the track[4] The operator was concerned about the loss of patronage[5] It sought an injunction based on common law nuisance[6] and also argued that the defendant was publishing information about its race meeting, which was its property, without consent.[7]

The Court held that the racetrack operator could not prevent the defendant from observing and broadcasting races,[8] Chief Justice Latham, in writing for the majority, said:

1. The Law Reform Commission, Austl. Gov't, Report No. 11, Unfair Publication: Defamation and Privacy ¶ 206 (1979) (*quoting* T.S. ELIOT, THE COCKTAIL PARTY, act 1, sc. 1).
2. Victoria Park Racing v. Taylor, (1937) 58 C.L.R. 479 (Austl.), ¶ 10 (Latham, C.J.), ¶ 58 (Evatt, J.) *available at* http://www.austlii.edu/au/cgi-bin/sinodisp/au/cases/HCA/1937/45.html?query=victoria%20park%20racing.
3. *Id.*
4. *Id.* ¶ 2 (Latham, CJ.).
5. *Id.*
6. *Id.* ¶ 4.
7. *Id.* ¶ 12.
8. *Id.* ¶ 8.

> The claim under the head of nuisance has also been supported by an argument that the law recognizes a right of privacy which has been infringed by the defendant. However desirable some limitation upon invasions of privacy might be, no authority was cited which shows that any general right of privacy exists.[9]

Victoria Park Racing concerned the rights of an organization, rather than an individual.[10] Despite this and largely as a result of the comments of the Chief Justice, the High Court's ruling was, for many years, interpreted as foreclosing the development of any common law right to privacy in Australia.[11]

A. Steps by the Australian Law Reform Commission (ALRC)

In 1979 the ALRC published Report No. 11, *Unfair Publication: Defamation and Privacy*[12], in which it recommended the introduction of some privacy protection in Australia.[13] The ALRC, however, sought to strike a balance between privacy and other competing interests.[14] It noted that "the price, in terms of freedom of speech, must not be excessive."[15]

The ALRC examined the general tort of privacy available in the U.S., Europe and Canada, where a plaintiff had "an action for damages whenever there is a substantial, unreasonable infringement of his [or her] privacy."[16] It found that there were strong arguments in favor of creating a general right along American lines.[17] This approach would overcome the stultifying effects of previous decisions like *Victoria Park Racing* which denied a right to privacy, and would enable the courts in Australia to formulate specific principles over time, as had occurred in the U.S. and Europe.[18] The ALRC was concerned, that until the courts developed a comprehensive jurisprudence, there would be considerable uncertainty as to the scope of the general right.[19] The ALRC concluded that "at least in the short and medium term, the price of a general right of privacy might exceed the benefits gained."[20]

9. *Id.* ¶ 11.
10. *Id.* ¶ 2.
11. *See* The Law Reform Commission, Austl. Gov't, *supra* note 1, ¶ 216.
12. *Id.*
13. *Id.* ¶ 231.
14. *Id.*
15. *Id.*
16. *Id.* ¶ 232.
17. *Id.*
18. *Id.*
19. *Id.* ¶ 233.
20. *Id.*

The ALRC went on to assess the merits of introducing a specific and closely circumscribed tort and considered that "if the courts would in time distil a general right down to specific principles, why not do so immediately?"[21] The ALRC recommended "legislative protection against serious, deliberate exposures of a person's home life, personal and family relationships, health and private behavior."[22]

The specific tort advocated by the ALRC was intended to prevent a wide range of conduct, but was also directed at specific incidents that occurred in Australia and overseas.[23] These included the identification of a victim of sexual assault,[24] publication of the name and address of the witness to a murder,[25] photographing by the media of two fifteen-year-olds who had gone on a "five day Romeo and Juliet elopement,"[26] filming someone in the street without consent,[27] media investigations into the personal life of a television journalist separated from her husband[28] and the taking of paparazzi photographs of a woman who gave birth to quadruplets.[29] In order to achieve these aims, the ALRC proposed the introduction of legislation prohibiting publication of sensitive private facts:

> A person publishes sensitive private facts concerning an individual where the person publishes matter relating or purporting to relate to the health, private behavior, home life or personal or family relationships, of the individual in circumstances in which the publication is likely to cause distress, annoyance or embarrassment to a person in the position of that individual.[30]

The ALRC recognized that in order to balance competing interests, a claim for invasion of privacy "must yield to any legitimate public interest in exposure."[31] It considered the availability of a public interest defense to be critical.[32] Other suggested defenses included consent, privilege and publication under legal authority.[33]

The ALRC's recommendations in its 1979 report[34] were not implemented. This was perhaps because the Federal Government of Australia

21. *Id.* ¶ 234.
22. *Id.*
23. *Id.* ¶ 230.
24. *Id.* ¶ 228.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* ¶ 236.
31. *Id.* ¶ 234.
32. *Id.*
33. *Id.* ¶ 246.
34. *See supra* note 1.

at the time was awaiting the outcome of another ALRC investigation exclusively on privacy law. This further report, released in 1983,[35] noted the negative effects that intrusive modern technology, enhanced official powers and new business activities were having on people's privacy.[36] Despite this, the ALRC recommended that a general tort of invasion of privacy should not be introduced in Australia because "such a tort would be too vague and nebulous."[37] Consequently, the Australian courts were left with the task of developing appropriate protections for personal privacy.

B. A turning point: Australian Broadcasting Corporation v Lenah Game Meats[38]

The leading case on personal privacy in Australia is the 2001 High Court decision of *Australian Broadcasting Corporation v Lenah Game Meats Pty Limited* [2001] 208 CLR 199[39] In this case, the High Court responded to the challenge set by the ALRC and left open the possibility of personal privacy protection under Australian common law, either under a freestanding tort or through an extension of the law of breach of confidence.[40] In doing so, the High Court fundamentally challenged existing interpretations of *Victoria Park Racing*.[41]

The case concerned graphic video footage of possums being stunned and then having their throats cut.[42] Trespassers had installed hidden video cameras on the property of a licensed possum slaughterhouse operated by Lenah Game Meats (LGM).[43] They recorded the activities of the abattoir, then later retrieved the footage and cameras.[44] The video was supplied to an animal liberation organization which, in turn, supplied it to the Australian Broadcasting Corporation (ABC) for television

35. 2 The Law Reform Commission, Austl. Gov't, Report No. 22, Privacy Proposals (1983).
36. *Id.* ¶ 1044.
37. *Id.* ¶ 1081.
38. Australian Broad. Corp. v. Lenah Game Meats Party Ltd., (2001) 208 C.L.R. 199 (Austl.), *available at* http://russell-allen.com/teaching/LAWS1031/materials/Australian%20Broadcasting%20Corporation%20v%20Lenah%20Game%20Meats%20Pty%20Ltd%20%5B2001%5D%20HCA%2063%20%2815%20November%202001%29.html
39. *Id.*
40. *Id.* ¶¶ 34-35, 39, 41, 55 (Gleeson, CJ.).
41. Victoria Park Racing Taylor, (1937) 58 C.L.R. 479 (Austl.), *available at* http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1937/45.html?query=victoria%20park%20racing.
42. *See Lenah Game Meats Party Ltd.*, 208 C.L.R. 199, ¶ 25 (Gleeson, CJ.).
43. *Id.* ¶ 24.
44. *Id.* ¶¶ 24, 66.

broadcasting.[45] LGM applied to the Supreme Court of Tasmania for an interlocutory injunction to restrain the ABC from distributing, publishing, copying or broadcasting the video.[46] The application was dismissed at first instance, but this decision was reversed by the Full Court of the Supreme Court of Tasmania on appeal.[47] The High Court upheld the ABC's appeal and refused to grant the injunction sought by LGM.[48]

Although the ultimate decision was not revolutionary, comments made by the court have had significant implications for privacy law in Australia. The case addressed two principal issues:

- whether an interlocutory injunction could be granted in the absence of an established cause of action; and[49]
- whether there was a right to privacy upon which LGM could rely.[50]

Four of the judges, Gleeson CJ, Gummow, Hayne and Gaudron JJ, concluded that an interlocutory injunction could only be issued to protect an equitable or legal right, not merely on the basis of unconscionable conduct, and that the implied constitutional freedom protecting discussion of matters of governmental and political concern militated against the exercise of judicial discretion in favor of LGM.[51]

In separate judgments the two other judges, Kirby J and Callinan J, each concluded that an interlocutory injunction could be granted where no cause of action was disclosed.[52] This was based on a line of Australian authority which began with a decision of the New South Wales Supreme Court, *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457[53] where Young J stated:

> The court has power to grant an injunction in the appropriate case to prevent publication of a video tape or photograph taken by a trespasser even though no confidentiality is involved. However, the court will only intervene if the circumstances are such to make publication unconscionable.[54]

Kirby J held that although an interlocutory injunction could be granted, it should not be granted in this case, taking into account the impact

45. *Id.* ¶ 24.
46. *Id.* ¶¶ 1-2.
47. *Id.* ¶ 2.
48. *Id.* ¶ 61 (Gaudron, J.).
49. *Id.* ¶¶ 3, 8 (Gleeson, CJ.).
50. *Id.* ¶ 38.
51. *Id.* ¶ 61 (Gaudron, J.).
52. *Id.* ¶ 160 (Kirby, J.), ¶ 287 Callinan, J.).
53. *Id.* ¶ 100 (Gummow, J., Hayne, J.) (*citing* Lincoln Hunt Australia Party Ltd v. Willesee (1986) 4 N.SW.L.R. 457, 463 (*quoting* Young, J.)).
54. *See Willesee*, 4 N.S.W.L.R. 457, 463.

of the implied constitutional freedom favoring discussion of animal welfare as a legitimate matter of governmental and political concern.[55] Callinan J dissented, holding that the injunction should be granted.[56]

The second key issue in *Lenah* was whether the High Court should recognize a freestanding right to privacy.[57] Four judges departed from the decided view, holding that *Victoria Park Racing* did not stand as an obstacle to the development of a tort of invasion of privacy.[58] Despite this, all members of the court stopped short of finding that such a tort existed.[59] Gaudron, Gummow and Hayne JJ all concluded that whatever development may take place in the field of privacy, it would be to the benefit of natural, not artificial, persons.[60] This stance on corporations allowed the court to postpone the question of whether a tort for invasion of privacy should be developed.[61]

Of all the justices, Chief Justice Gleeson was most resistant to the idea of a freestanding tort of privacy, taking the view that "the lack of precision of the concept of privacy is a reason for caution in declaring a new tort of the kind of which the respondent contends."[62] His Honour considered that the problem was illustrated by the fact that in the U.S. it had been necessary to develop categories to give greater specificity to the kinds of interests protected by a right to privacy, observing:

> There is no bright line which can be drawn between what is private and what is not. Use of the term "public" is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private. An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford. Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behavior, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful test of what is private.[63]

55. *See Lenah Game Meats Party Ltd*., 208 C.L.R. 199, ¶¶ 220-221 (Kirby, J.).
56. *Id*. ¶ 287 (Callinan, J., dissenting).
57. *Id*. ¶ 38 (Gleeson, J).
58. *Id*. ¶¶ 107, 132 (Gummow, J., Hayne, J), ¶ 189 (Kirby, J.), ¶¶ 318, 320 (Callinan, J.).
59. *Id*. ¶ 41 (Gleeson, CJ.), P 258 (Gummow, J., Hayne, J.) P 278 (Kirby, J.) P328 (Callinan J.).
60. *Id*. ¶ 132 (Gummow, J., Hayne, J.).
61. *Id*. ¶ 190 (Kirby, J.).
62. *Id*. ¶ 41 (Gleeson, J.).
63. *Id*. ¶ 42.

The test referred to by Gleeson CJ, whether disclosure or observation of the information or conduct would be "highly offensive to a reasonable person,"[64] was drawn from the U.S. *Restatement of the Law Second, Torts*, published in 1977.[65] In their joint judgment, Gummow and Hayne JJ also examined the U.S. formulation of the tort of privacy. Their Honours noted, that it was necessary to exercise caution in this respect because the U.S. Constitution, unlike the Australian Constitution, provides express protection for freedom of speech and freedom of the press.[66] As a result, in the U.S. "privacy concerns give way when balanced against the interest in publishing matters of public importance."[67] The outcome would not necessarily be the same in Australia.

Although the High Court did not determine whether a tort of invasion of privacy actually existed in Australia, and the judgments highlighted several major challenges facing the development of any such a cause of action, the decision in *Lenah*[68] unequivocally opened the door for significant changes to the way the common law of Australia could protect personal privacy. Even the Chief Justice acknowledged that "the law should be more astute than in the past to identify and protect interests of a kind which fall within the concept of privacy."[69] The case marked a turning point.

II. The Current Common Law Position

There have been three cases in lower courts and one appellate decision of particular relevance since the decision in *Lenah*.[70] The first, and most controversial, was *Grosse v Purvis* [2003] QDC 151 a decision by Skoien DCJ in the Brisbane District Court.[71] Conceding that it was a "bold step." His Honour held that an individual has a civil cause of action for damages based upon the right to privacy.[72] In his view, the High Court's decision in *Lenah*[73] indicated that the time had arrived to

64. *Id*.
65. Restatement (Second) of Torts § 652B (1977).
66. *See Lenah Game Meats Party Ltd*., 208 C.L.R. 199, ¶¶ 118-119.
67. *Id.* ¶ 118 (citing Bartinicki v. Vopper, 532 U.S. 514, 534 (2001) (quoting Stevens, J., majority opinion)).
68. *Id*.
69. *Id*. ¶ 118 (citing Bartnicki v. Vopper, 532 U.S. 514, 534 (2001) (quoting Stevens, J., majority opinion)).
70. *Id*.
71. *Grosse v Purvis* (2003) QDC 151 (Queensl.) *available at* http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/qld/QDC/2003/151.html?query=grosse.
72. *Id*. ¶ 442.
73. *See supra* note 66 at 199.

consider how and to what extent privacy should be protected at common law. His Honour identified what he considered to be the essential elements of a new cause of action for invasion of privacy. These were:[74]

- a willed act by the defendant;
- which intrudes upon the privacy or seclusion of the plaintiff;
- in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities; and
- which causes the plaintiff detriment in the form of mental, psychological or emotional harm or distress which prevents or hinders the plaintiff from doing an act which he is lawfully entitled to do.

His Honour found that a defense of public interest could be raised to a tortious claim for invasion of privacy, but that it was not available on the facts of the case.[75]

The plaintiff, Alison Grosse, had engaged in a sexual relationship with the defendant, Robert Purvis, for a period of approximately twelve months.[76] After that time, relations between the parties deteriorated.[77] The plaintiff complained that the defendant had stalked her and cited over seventy specific incidents of threatening conduct.[78] These included occasions where the defendant:

- loitered outside the plaintiff's residence for lengthy periods of time[79];
- advised the plaintiff on numerous occasions that she was being watched[80];
- broke into the plaintiff's residence[81];
- followed the plaintiff to social and business functions[82];
- assaulted the plaintiff's male friends[83];
- constantly telephoned the plaintiff and her friends[84]; and
- twice, left death threats on the plaintiff's answering machine.[85]

74. *Id.* ¶ 444.
75. *Id.* ¶ 447.
76. *Id.* ¶¶ 21-22.
77. *Id.* ¶¶ 25,33.
78. *Id.* ¶ 73.
79. *Id.* ¶ 178.
80. *Id.* ¶ 180.
81. *Id.* ¶ 186.
82. *Id.* ¶¶ 218-220.
83. *Id.* ¶¶ 331-32.
84. *Id.* ¶¶ 233, 265-66.
85. *Id.* ¶¶ 251-52, 275.

The plaintiff claimed damages for invasion of privacy, harassment, intentional infliction of physical harm, nuisance, trespass, assault, battery and negligence. The trial judge found that plaintiff developed a post-traumatic stress disorder as a result of the defendant's conduct and awarded $178,000, Australian dollars, in damages, which included an award for invasion of privacy.

Although *Grosse v Purvis* is noteworthy, its significance should not be overstated. Skoien DCJ emphasised that he was not attempting to formulate a general cause of action and that the decision was strictly confined to its facts. Further, as a decision of the District Court, it has limited value as a precedent and is not binding on other courts.

Giller v Procopets [2004] VSC 113,[86] a case originally heard by a single judge of the Victorian Supreme Court, was the next important decision in relation to the development in the tort of privacy. The plaintiff, Ms. Giller, claimed damages for distress and hurt caused by the defendants showing and threatening to distribute a video of her and defendant, Mr. Procopets, engaged in sexual activities while they were in a relationship. The video surveillance had been covertly conducted on several occasions, and later with the plaintiff's consent. Gillard J found that defendant had shown the video to a third party, left a copy of the video with the plaintiff's father, and threatened to show it to others, including the plaintiff's employer.

The plaintiff alleged that distribution of the videos by the defendant gave rise to three causes of action:

- breach of confidence;
- intentional infliction of emotional distress; and
- invasion of privacy.

Gillard J found that the plaintiff did not suffer any physical or mental injury as a result of the activities of the defendant. However, His Honour found that she was extremely angry, annoyed, upset, concerned, anxious, distressed, humiliated and embarrassed by the defendant's conduct.[87]

In relation to the plaintiff's claim for breach of confidence, Gillard J found that:[88]

86. *Id.* ¶ 147. Giller v Procopets [2004] VSC 113 ("Giller v Procopets").
87. *Id.* ¶ 147.
88. *Id.* ¶ 149.

- during their sexual activities a confidential relationship existed between the parties;
- what appeared on the videotape was a portrayal of information of a confidential nature; and
- showing of the video would constitute unauthorised use of the information by the defendant.

However, Gillard J held that in order to make out her claim, the plaintiff was required to prove that she was entitled to damages.[89] This involved establishing first, that equity allows recovery of general damages for breach of confidence and secondly, that damages can be awarded for mere mental suffering falling short of recognised physical or psychiatric injury.[90] The plaintiff failed to satisfy these requirements.

Gillard J found that, traditionally, damages were never a remedy for breach of an equitable obligation.[91] His Honour noted under section 38 of the *Supreme Court Act 1986 (Vic)*, where a Court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages "in addition to, or in substitution for, an injunction or specific performance."[92] However, Gillard J considered that section 38 did not apply in the circumstances because the plaintiff only sought general damages and has not claimed an injunction or specific performance.[93]

Further, Gillard J held that the law does not permit recovery of damages for breach of confidence because it does not allow damages to be awarded for distress-type injuries.[94] His Honour observed that apart from a few exceptions, the common law did not allow the recovery of damages for nervous shock, or damages for distress and humiliation, indicating a trend against awarding damages for mere distress.[95] Gillard J acknowledged the opinions of commentators who argued that damages for injury to feelings should be available in breach of confidence cases, where the action is being adapted to protect privacy and personal reputation. However, His Honour held that at the time of his decision in 2004, the law did not recognise or permit damages in such circumstances.

89. *Id.*
90. *Id.* ¶ 161.
91. *Id.* ¶ 162.
92. *Id.* ¶ 162.
93. *Id.* ¶ 165.
94. *Id.* ¶ 170.
95. *Id.* ¶ 161.

In relation to the plaintiff's claim for breach of privacy, Gillard J held that neither U.K. nor Australian law recognised a cause of action based on breach of privacy.[96]

The plaintiff appealed to the Court of Appeal of the Victorian Supreme Court. In the decision handed down in December 2008, the Court held that Giller was entitled to recover $40,000Australian dollars, including $10,000 for aggravated damages for breach of confidence relating to the use and threatened use of the videotapes.[97] It rejected the trial judge's interpretation of section 38 of the *Supreme Court Act 1986 (Vic)*, finding instead that damages could be awarded despite the fact that plaintiff had not sought an injunction. Damages were available whenever the court had *jurisdiction* to grant an injunction, irrespective of the remedies actually claimed by the plaintiff.[98]

The Court of Appeal also held that damages could be awarded for mere distress caused by a breach of confidence. Neave JA, who gave the leading judgment, found that while no Australian decisions indicated whether damages for breach of confidence could be awarded for mere distress, there was significant English authority in support of the proposition. Her Honour examined *Campbell v MGN* [2004] 2 AC 457 where the House of Lords held that Mirror Group News ("MGN") was liable to Naomi Campbell for breach of confidence based on the publication of photographs of her outside a narcotics anonymous meeting. Campbell had not claimed to have suffered any psychiatric injury as a result of MGN's conduct and the House of Lords assumed, without discussion, that she was entitled to damages for distress.[99] Similarly, in *Douglas v Hello!* [2001] QB 967 and *Cornelius v De Taranto* [2001] EMLR 12, U.K. courts awarded damages for hurt feelings and distress caused by breaches of confidence.[100]

The Court of Appeal's decision to award damages for distress was heavily influenced by the U.K. decisions. However, it was also based on policy considerations. Both Neave JA and Ashley JA emphasised that equitable remedies such as injunctions are available to prevent the publication of confidential information, without first showing that, if unrestrained, the breach of confidence would cause financial loss or

96. *Id.* ¶ 187.
97. *Giller v Procopets* [2008] VSCA 236.
98. *Id.* ¶ 407.
99. *Id.* ¶ 412.
100. *Id.* ¶¶ 413, 417.

psychiatric injury.[101] By parity of reasoning, equitable damages should be available to compensate an actual breach of confidentiality, despite the fact that the claimant only suffered distress and embarrassment.[102]

Again drawing on the U.K. decisions, the Court of Appeal also held that aggravated damages are available for breach of confidence, although exemplary damages are not.[103]

Given that the Court of Appeal already found for the plaintiff on the basis of breach of confidence, it was not required to determine whether Australian law recognizes a tort of privacy. Neave JA noted that Courts in the U.K., Australia and New Zealand have responded to claims for breach of privacy in two distinct ways.[104] Her Honour considered that the first approach, epitomised by *Lenah Game Meats* and the U.K. decisions, was to further develop existing causes of action to provide greater legal protection for privacy interests.[105] The second option, favoured by Courts in New Zealand, was to recognize a new tort for invasion of privacy.[106] Significantly, Neave JA concluded:

> The question of whether a tort of invasion of privacy should be recognised necessarily requires consideration of the different types of privacy invasion which might fall within the scope of such a tort. Professor Michael Tilbury, the Commissioner-in-charge of the reference to the New South Wales Law Reform Commission, has commented: The difficulties of defining the conduct to which an action for invasion of privacy does, or should, extend are notorious. At the heart of the problem lies the variety of contexts in which ordinary language uses 'privacy', as the four American torts protecting privacy illustrate.
> The Australian Law Reform Commission has recently published a report which recommends that Federal legislation should provide for a "statutory cause of action for a serious invasion of privacy." Because I have already concluded that Ms Giller has a right to compensation on other grounds, it is unnecessary to say more about whether a tort of invasion of privacy should be recognised by Australian law.[107]

Ashley JA however, was more strongly opposed to the development of a new tort, emphasising the associated definitional difficulties.[108] His Honour also observed that a generalized tort of unjustified invasion of privacy has not been recognized by any superior court of record in Australia and, significantly, made no reference to the lower court decisions

101. *Id.* ¶ 423.
102. *Id.*
103. *Id.* ¶¶ 427, 439.
104. *Id.* ¶ 448.
105. *Id.*
106. *Id.* ¶ 449.
107. *Id.* ¶¶ 451-52.
108. *Id.* ¶ 167.

of *Grosse v Purvis* and *Jane Doe v ABC*.[109] Despite these strong comments, Ashley JA, like the other judges, refused to rule on whether a generalized tort of invasion of privacy should be recognized because the court already found in favor of the plaintiff on breach of confidence.[110] The third judge simply agreed with the claim for breach of privacy, Neave JA's judgment.

Prior to the Court of Appeal's decision, the conflicting stances taken in *Grosse v Purvis* and *Giller v Procopets* created incoherence in the law (although the decision of the Victorian Supreme Court in *Giller v Procopets* carries more weight than the District Court judgment). In the Federal Court case of *Kalaba v Commonwealth of Australia* [2004] FCA 763[111], Heerey J summarised the position:

> … I accept the submission of Counsel that in Australia at the moment there is no tort of privacy, although in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at [132] Gummow and Hayne JJ, with whom Gaudron J at [58] agreed, left open that possibility. In a Victorian Supreme Court case, *Giller v Procopets* (2004) VSC 113 at [187] to [189], Gillard J held that the law had not developed to the point where an action for breach of privacy was recognised in Australia. Senior Judge Skoien of the District Court of Queensland was prepared to find that there is such a tort: *Grosse v Purvis* [2003] QDC 151, but I think the weight of authority at the moment is against that proposition.[112]

The Court of Appeal decision in *Giller v Procopets* provides additional support for the stance taken by Heerey J.

Heerey J granted the defendant's application for summary dismissal of the plaintiff's case, including his claim for breach of privacy based on an allegation that the Government had disclosed erroneous information about him to the Australian Permanent Mission of the United Nations. The plaintiff's case was so weak that the facts are of little assistance to the present discussion. However, Heerey J's approach and, in particular, his reliance on U.S. jurisprudence, is of interest:

> "Bearing in mind the high level of the test that Dey and General Steel require to be satisfied, if this were a case where there was even a faintly arguable case that there had been an infringement of a right of privacy of a kind entertained elsewhere in the common law world, and particularly by American Courts, I would be reluctant to exercise the power of summary dismissal. The history of the common law shows that sometimes seemingly unlikely claims proceed through the courts and ultimately succeed at the highest level. However, it is instructive to note that in *Lenah Game Meats*, Callinan J at [323] referred to an article by Professor William Prosser, author of the

109. *infra* note 112.
110. *Id*. ¶ 168.
111. *Kalaba v Commonwealth of Austrailia* [2004] FCA 763 ("Kalaba").
112. *Id*. ¶ 6.

> standard text, Prosser and Keaton on the Law of Torts, which noted that protection for privacy had been afforded in American Courts in four categories of case.
>
> '1. Intrusion upon the plaintiff's seclusion or solitude or into his private affairs;
> 2. Public disclosure of embarrassing private facts about the plaintiff;
> 3. Publicity which places the plaintiff in a false light in the public eye;
> 4. Appropriation for the defendant's advantage of the plaintiff's name or likeness.'
>
> That categorization has been subsequently accepted by the decisions of the United States Supreme Court. The allegations in the present statement of claim do not remotely approach any of those categories."[113]

It is apparent from this statement that Heerey J considered that if Australian courts were to recognize a cause of action for breach of privacy, it would probably adopt the U.S. approach. The plaintiff appealed to the Full Court of the Federal Court, but was refused leave.

The final relevant lower court decision concerning the development of a common law tort for invasion of privacy in Australia is the decision of Judge Hampel of the County Court of Victoria in *Jane Doe v Australian Broadcasting Corporation and Ors* [2007] VCC (Unreported, Hampel J, 3 April 2007).[114] This judgment predates the appeal decision in *Grosse v Purvis*. The plaintiff, Jane Doe, had been attacked and raped by her estranged husband, YZ (their names are suppressed).[115] He was tried, convicted and sentenced on two counts of rape and one count of common law assault.[116] On the day of sentencing, the ABC broadcast three radio news bulletins concerning the case, which identified Jane Doe by reporting YZ's name[117]. The broadcasts also reported that he had been sentenced for rapes within marriage, the offences had occurred in Jane Doe's home, and the suburb in which she lived.[118] One of bulletins also named Jane Doe as the victim.[119]

Jane Doe brought proceedings against the ABC, the reporter and the news producer for negligence, breach of statutory duty under § 4(1A) of the *Judicial Proceedings Reports Act*, which prohibits publication of information identifying the victim of a rape or sexual offence, breach of confidence and breach of privacy.[120] The ABC argued that the plaintiff should be limited to a claim for damages for defamation; any injury suf-

113. *Id*. ¶¶ 7, 8.
114. *Jane Doe v Australian Broad, Copr. & Ors* [2007] VCC (Unreported, Hampel, J 3 Apr, 2007) ("Jane Doe v ABC").
115. *Id*. ¶ 171.
116. *Id*.
117. *Id*.
118. *Id*.
119. *Id*.
120. *Id. at 2*.

fered was a result of publication and was compensable in defamation proceedings. Defamation was the appropriate forum for the action because this would preserve the coherence of the law and defamation law had well-established checks and balances between freedom of speech and rights of individuals.[121] Hampel J rejected these arguments, stating that the plaintiff sought damages for the loss of protection of her identity, not for the vindication of her reputation.[122] The ABC would probably have had a complete defense under defamation law. An application for leave to appeal this decision to the Court of Appeal was also refused, the court finding that a trial of the facts was required. No findings of this decision are formally recorded.

Dealing with the findings at trial in relation to each claim:

- Breach of statutory duty—The plaintiff contended that section 4(1A) of the *Judicial Proceedings Reports Act* also gave rise to a private right to damages as the ABC had a statutory duty to the plaintiff not to publish her identity.[123] Hampel J accepted this argument and found the defendants liable on this point;
- Breach of confidence—The ABC argued that the plaintiff could not succeed in an action for breach of confidence because it did not owe her a duty of confidence, and in any event, the information had lost its quality of confidentiality before the broadcasts.[124] Drawing on the approach of the U.K. Courts in *Douglas v Hello! Ltd*[125] and *Campbell v MGM Ltd*[126], Hampel J held that the obligation of confidence now extends to a wider range of people than had previously been the case and that "it is no longer necessary for there to be a relationship of trust and confidence in order to protect confidential information."[127] Her Honour acknowledged that care had to be taken in considering U.K. decisions concerning privacy because the *Human Rights Act 1998* requires Courts to take into account the rights enshrined in the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, including a right to privacy and freedom of expression.[128] Despite this, Her Honour's decision was clearly guided by U.K. jurisprudence.

121. *Id*. at 17.
122. *Id*. at 20-21.
123. *Id*. at 23.
124. *Id*. at 33.
125. *Id*. at 34 (citing *Douglas v Hello! Ltd*).
126. *Id*. at 36. (citing Campbell v MGM Ltd).
127. *Id*.
128. *Id*. at 33.

Hampel J was satisfied that identifying a person as a victim of a sexual assault is confidential information because the person to whom this information relates would have a reasonable expectation that it would remain private, particularly in light of the prohibition on publication in § 4(1A).[129] Her Honour considered that the confidential nature of the information was not lost simply because the plaintiff's identity was disclosed in open court, she had reported the rape to the police or she had informed fourteen people of the assault by ZY before the broadcast.[130] Hampel J was clearly influenced by policy considerations in this respect and observed:

> Recent studies suggest there is already a significant under reporting of sexual offences. Public confidence in the criminal justice system is eroded if victims are discouraged from reporting criminal offenses. There should not be any further barriers put in the way of reporting sexual offences.[131]

However, Her Honour also justified her decision on the basis of *Campbell*, which demonstrated that information does not have to be secret to satisfy the test of private or confidential.[132] Hampel J concluded that the ABC had breached its obligation of confidence to Jane Doe.[133]

- Breach of privacy—Significantly, Hampel J held that "invasion, or breach of privacy alleged here is an actionable wrong which gives rise to a right to recover damages."[134] Her Honour distinguished the Supreme Court decision in *Giller v Procopets*, noting that since that decision there had been a rapidly growing trend, particularly in the U.K., towards protection of an individual's right to personal privacy. Further, Hampel J considered that:

  > If the mere fact that a court has not yet applied the developing jurisprudence to the facts of a particular case operates as a bar to its recognition, the capacity of the common law to new causes of action, or to adopt existing ones to contemporary values is stultified.[135]

  Her Honour considered that a breach of privacy would be made out where there was an "unjustified publication of personal

129. *Id*. at 39.
130. *Id*. at 44.
131. *Id*. at 42.
132. *Id*. at 39.
133. *Id*. at 26.
134. *Id*. at 51-52.
135. *Id*. at 53.

information."[136] The test is slightly different from the *Grosse v Purvis* formulation. However, Hampel J specifically stated that she was not attempting to articulate a general cause of action and was merely identifying the principle applicable to the facts before her.[137] In this case, the wrong was the publication of personal information, in circumstances where there was no public interest in publishing it and where there was a prohibition on its publication.[138]

- Damages—Hampel J found that Jane Doe had developed chronic symptoms of post traumatic stress disorder as a result of the sexual assault by her husband and, while she had made some improvement leading up to the trial, the broadcasts caused additional trauma and damage.[139] The plaintiff was awarded $234,190.00 Australian dollars damages including $85,000 general damages for the tortious causes of action (negligence and breach of privacy) and $85,000 for breach of confidence.[140]

The ABC appealed the decision but settled the claim before it reached hearing.

Grosse v Purvis and *Jane Doe v ABC* constitute important developments in Australian privacy law. However, their significance must not be overstated. Both were decisions at first instance and do not create a binding precedent. As noted above, it is revealing that neither case received significant attention in the Court of Appeal's decision in *Giller v Procopets*. Further, the factual scenarios in both cases are relatively unusual and are not examples of the types of behavior that a tort for breach of privacy would generally be aimed at preventing. In *Jane Doe v ABC* the breach of the plaintiff's privacy occurred through a mistake of the ABC and the action for invasion of privacy was not strictly necessary given that the plaintiff could already establish its case on the basis of the breach of *Judicial Proceedings Reports Act*.[141] Finally, the inconsistencies between the *Grosse v Purvis* and *ABC v Jane Doe*, the contrasting approach in *Kalaba*, and the fact that the Court of Appeal is unwilling to conclusively determine whether Australian law recognizes a tort of privacy in *Giller v Procopets*, clearly indicates that this area of law remains unsettled in Australia, suggest-

136. *Id*. at 54.
137. *Id*. at 54.
138. *Id*. at 54.
139. *Id*. at 57.
140. *Id*. at 23.
141. *Id*. at 71.

ing also that the courts would prefer to leave the formulation of any tort to Parliament.

III. Legislative Protections

In contrast to the position in the U.K., Europe generally, and the U.S., Australian law does not give any general protection to an individual's right to privacy. Legislation protects privacy to a limited extent by protecting the identity of victims of sexual assault,[142] regulating the use of listening devices,[143] and the ability to carry out telecommunications interception,[144] and restricting direct marketing.[145] Privacy is also incidentally protected through the common law of trespass, nuisance, and confidentiality. There is also federal legislation, which protects personal data.[146]

A. Privacy Act 1998 (Cth)

In 1988 the Commonwealth Government enacted the *Privacy Act*, designed to regulate the collection, storage and use of personal information or data. The Act includes two sets of privacy principles, the Information Privacy Principles (IPPs)[147], which apply to federal government agencies, and the National Privacy Principles (NPPs)[148], which relate to the private sector. The IPPs and NPPs impose similar but not identical requirements. The Act requires compliance to these principles, a breach of which will result in a breach of privacy under the Act. The IPPs and NPPs regulate the type of personal information that can be collected, the method of collection and the information to be provided to individuals about collection of their personal information and use of the information.[149] They also establish requirements for storage of personal information to ensure it is protected against loss, unauthorized access, use, modification, disclosure, or other misuse.[150] The key difference be-

142. See e.g. Judicial Proceedings Reports Act § 4, (1958) (Vic); Crimes Act § 578A (1900)(NSW).

143. Listening Devices Act (1992) (ACT); Listening Devices Act (1984) (NSW); Listening Devices Act (1990) (NT); Invasion of Privacy Act (1971) (Qld); Listening Devices Act (1972) (SA), as amended in 1989; Listening Devices Act (1991) (Tas); Listening Devices Act (1969) (Vic); Listening Devices Act (1978) (WA).

144. *Telecommunications (Interception and Access) Act*, § 105, *(1979) (Cth)*.

145. E.g. Use of the electoral roll for direct marketing purposes was restricted by the Electoral and Referendum Amendment (Access to Electoral Roll and Other Measures) Act (2004) (Cth) (amending the Commonwealth Electoral Act (1918) (Cth)).

146. Privacy Act (1988) (Cth).

147. Privacy Act (1988) (Cth).

148. *Id*. at sched. 3.

149. *Id*.

150. *Id*. at § 15(1).

tween the two sets of principles is that the NPPs are more demanding and contain additional obligations. The Act also established the office of the Commonwealth Privacy Commissioner.[151] Complaints for breach of privacy under the Act must first be made to the Commissioner.[152] Significantly, the Act only protects personal data and does not apply to media organizations in the course of journalism.[153]

B. Uniform Defamation laws

Prior to the introduction of national defamation laws in 2006, Queensland, Tasmania and the Australian Capital Territory required defendants to prove not only that the publication was true, but that it was published for the public benefit.[154] In New South Wales, the publisher had to prove truth and that the publication was published in the public interest.[155] This public benefit or public interest criterion provided some degree of protection to privacy interests. For example, *Mutch v Sleeman* involved a statement that a member of parliament was a "brutal wife basher."[156] This was derived from an allegation made by the plaintiff's ex-wife during divorce proceedings and was not protected by the defense of truth because even if the allegation were true, it was not in the public interest to publish information.[157] The public interest element of the truth defense therefore provided privacy protection.

However, as a result of the new uniform defamation laws introduced throughout Australia throughout 2006, truth alone is a complete defense to publication of defamatory material, despite many lobbying for an additional public interest requirement?[158] In developing the new laws, the Standing Council of Attorney's General acknowledged that privacy was a legitimate interest in need of protection and expressly referred to Article 17 of the International Convention on Civil and Political Rights, to which Australia is a party that states "no one shall be subjected to arbitrary or unlawful interference with his privacy."[159] It ultimately concluded however, that a defense of truth alone was ap-

151. *Id*. at § 19(1).
152. *Id*. at § 36.
153. *Id*. at § 7b(4a).
154. *New South Wales Law Reform Comm'n, Privacy in Australian Law*, Consultation Paper 1, 45 (May 2007), *available at* (http://lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/vwFiles/cp01.pdf/$file/cp01.pdf.
155. *Id*.
156. *Id*. at 46.
157. *Id*.
158. Defamation Act, § 25 (2005) (Vic.).
159. G.A. Res. 2200 (XXII), art. 17, U.N. Doc. A/RES/220 (Dec. 16, 1966).

propriate.[160] The Western Australian delegation in particular, argued that it was inappropriate to include a public interest element in the defense to protect privacy interests because instead of protecting privacy indirectly through defamation laws, a law specifically aimed at privacy interests could be developed.[161] This change in the law of defamation removed any suggestion that defamation laws protect personal privacy

C. Codes of Conduct

In addition to these indirect privacy protections, the radio and television codes of conduct, which required under the *Broadcasting Services Act* and regulated by the Australian Communications and Media Authority, also contain privacy obligations.[162]

The Commercial Television Industry Code of Practice, for example, states that "in broadcasting news and current affairs programs, licensees . . . must not use material relating to a person's personal or private affairs, or which invades an individual's privacy, otherwise than where there is an identifiable public interest reason for the material to be broadcast."[163] The advisory note to practitioners states that particular care should be taken in respect of people in vulnerable positions, such as, bereaved relatives or survivors of traumatic accidents.[164] It also states that stations should not identify an individual when commenting on the conduct of a group of people and that journalists observe standards for the handling of personal information required by their station.[165] The Code of Conduct and Guidelines developed by Commercial Radio Australia include similar privacy requirements, including, the requirement not to broadcast a person's personal or private affairs unless there is a public interest in doing so.[166]

160. *New South Wales Law Reform Comm'n, Privacy in Australian Law*, Consultation Paper 1, 46(May 2007).

161. SCAG Working Group of State & Territory Officers, *Proposal for Uniform Defamation Laws 22 (July 2004), available at* http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(03995EABC73F94816C2AF4AA2645824B)~Uniform+Defamation+States+Territories.pdf.

162. Broadcasting Services Act, § 123 (1992) (Cth.).

163. Commercial Television Australia, *Code of Conduct and Practice* 21 (Jan. 2010), *available at* http://www.acma.gov.au/webwr/aba/contentreg/codes/television/documents/2010-commercial_tv_industry_code_of_practice.pdf.

164. *Id*. at 64.

165. *Id*.

166. *Id*. Commercial Radio Australia, *Code of Conduct and Practice* 6 (Sept. 2004), available at http://www.acma.gov.au/webwr/aba/contentreg/codes/radio/documents/cra-codeofpractice.pdf

In June 2008, a new Internet Industry Code of Conduct was released under the *Broadcasting Services Act*.[167] The Code includes provisions for online safety and enables Hosting Services Providers to become Family Friendly Content Services Providers. It requires Family Friendly Content Service Providers to have a link on their website to a safety page, which in turn includes links to web pages containing appropriate information about user rights to privacy.[168]

The Australian Press Council has also developed privacy standards to which member organizations can subscribe. It requires that, "in gathering news, journalists should seek personal information only in the public interest"[169] and "personal information gathered by journalists and photographers should only be used for the purpose for which it was intended."[170]

Although these industry codes provide some protection for privacy interests, it has long been argued that their enforcers are paper tigers with no power to impose penalties. Therefore, the strength of privacy protections, particularly in the context of the Internet, is questionable.

IV. New South Wales Law Reform Commission (NSWLRC) Review

In April 2006, the then New South Wales Attorney General requested that the NSWLRC investigate and report on whether existing legislation provided an effective framework for protection of personal privacy in that State. In particular, he asked the NSWLRC to inquire into the desirability of introducing a statutory tort of privacy in New South Wales.

The NSWLRC released a consultation paper in May 2007 recommending the introduction a statutory cause of action for invasion of privacy. The paper provided a detailed review of international approaches to privacy law and identified four possible models for a statutory cause of action:[171]

167. Broadcasting Services Act, sched. 5 (1992) (Cth.).

168. Internet Industry Ass'n, *Internet Industry Code of Conduct* 23 (June 2008), *available at* http://www.acma.gov.au/webwr/_assets/main/lib310679/registration_of_content_svces_code.pdf.

169. Australian Press Council, *Privacy Standards*, (Oct. 2008), available at http://www.presscouncil.org.au/pcsite/complaints/priv_stand.html.

170. *Id*.

171. New South Wales Law Reform Comm'n, *Privacy in Australian Law*, Consultation Paper 1 (2007), available at http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_cp01chp2#H3.

1. One general, non-specific right to seek redress for invasion of personal privacy.
2. A general cause of action for invasion of privacy, supplemented by a non-exhaustive list of the circumstances that could give rise to the cause of action.
3. A general cause of action for invasion of privacy, together with other specific statutory causes of action, such as for unauthorized surveillance activity.
4. Several narrower and separate causes of action based on various distinct heads of privacy.

The second option, based on laws in the Canadian provinces of British Columbia, Saskatchewan, Manitoba, Newfoundland and Labrador and the Irish Privacy Bill, was preferred by the NSWLRC.[172] It recommended that legislation should be introduced which provided that "a person would be liable [under this Act] for invading the privacy of another, if he or she:

(a) interferes with that person's home or family life;
(b) subjects that person to unauthorized surveillance;
(c) interferes with, misuses or discloses that person's correspondence or private written, oral or electronic communications;
(d) unlawfully attacks that person's honor and reputation;
(e) places that individual in a false light;
(f) discloses irrelevant embarrassing facts relating to that person's private life;
(g) uses that person's name, identity, likeness or voice without authority or consent."[173]

This list of conduct giving rise to an action for invasion of privacy would be non-exhaustive.[174] The NSWLRC discussed in more detail the possible elements of the cause of action, the defense and the need to balance protection of individual privacy with the public interest, but did not provide recommendations of these points.[175] It did however, provide a list of remedies that should be available for invasion of privacy, includ-

172. New South Wales Law Reform Comm'n, *Privacy in Australian Law*, Consultation Paper1, at 153 (2007), available at http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_cp01chp2#H3.
173. *Id*. at 160.
174. *Id*.
175. *Id*. at 163-82.

ing damages, an account of profits, an injunction and an order that the defendant apologize.[176]

To date, the NSWLRC has not released its final report on privacy law and is unclear whether its approach will be influenced by the recent release of another ALRC report which now recommends the creation of a statutory cause of action for invasion of privacy.[177] It would certainly be desirable for privacy law to be consistent throughout all Australian jurisdictions, rather than for the state of New South Wales to introduce its own privacy law, which ignores the reality of the internet.

V. New ALRC Enquiry

In January 2006, the Australian Attorney-General asked the ALRC to "conduct an enquiry into the extent to which the Privacy Act 1988 (Cth) and related laws continue to provide an effective framework for the protection of privacy in Australia."[178]

The Attorney-General identified four areas which he considered justified for review at that time:

- rapid advances in information, communication, storage, surveillance and other relevant technologies;
- possible changing community perceptions of privacy and the extent to which privacy should be protected by legislation;
- the expansion of state and territory legislative activity in areas relevant to privacy; and
- emerging areas that may require privacy protection.[179]

Although not mentioned in the terms of reference, it is perhaps not a coincidence that the enquiry was announced in the same month that the new uniform defamation laws came into force in most Australian states and territories, deleting the indirect privacy protection afforded by the truth/justification defense to defamation. The ALRC published its final report, *For Your Information: Australian Privacy Law and Practice*, in August 2008.[180] It recommended 295 changes to existing privacy laws,

176. *Id*. at 188-200.
177. Australian Law Reform Comm'n, *For your Information Australian Privacy Law and Practice*, Report No. 108, *available at* http://www.austlii.edu.au/au/other/alrc/publications/reports/108/
178. *Id*. at 19.
179. *Id*.
180. A.LR.C.R. 108.

the majority of which relate to data privacy.[181] Most significantly, the report recommends the introduction of a statutory cause of action for serious invasion of privacy.[182]

In arriving at this recommendation, the ALRC appears to have been heavily influenced by a fear that the development of a common law tort of invasion of privacy would lead to "piecemeal and fragmented privacy protection."[183] It considered that such an approach would make it extremely difficult for individuals and organizations to ascertain their legal obligations, particularly if they operated in multiple Australian jurisdictions.[184] The ALRC examined international approaches to privacy protection, focusing in particular on the U.S., the U.K., Germany and New Zealand. It considered the U.K. approach problematic because the breach of confidence action is only available where private information is used and as such, intrusions upon private life are not actionable of themselves.[185] The ALRC found it unacceptable should the U.K. approach apply in Australia, people in the position of the plaintiff in *Grosse v Purvis* would have no cause of action despite having suffered detriment from the invasion of their privacy.[186] It concluded that a tort for invasion of privacy similar to those developed by the Courts in the US and New Zealand should be developed.[187] However, the ALRC considered that a statutory cause of action should be adopted rather than leaving the task to the Courts because this would protect individuals from intrusions into their private lives or affairs, while maintaining clarity and coherence in the law.[188]

The ALRC has proposed a surprisingly wide cause of action for "serious invasion of privacy," available where a plaintiff can show that in the circumstances:

(a) there is a reasonable expectation of privacy; and
(b) the act or conduct complained of is highly offensive to a reasonable person of ordinary sensibilities.[189]

It recommends that the new legislation contain a non-exhaustive list of the types of acts or conduct that could constitute an invasion of privacy, including where:

181. *Id*. at 2536.
182. *Id*. at 2585.
183. *Id*. at 2536.
184. *Id*.
185. *Id*.
186. *Id*. at 2564.
187. *Id*. at 2535-36, 2569.
188. *Id*. at 2565.
189. *Id*. at 2584.

- there has been a serious interference with an individual's home or family life;
- an individual has been subjected to unauthorized surveillance;
- an individual's correspondence or private written, oral or electronic communication has been interfered with, misused or disclosed; and
- where sensitive facts relating to an individual's private life have been disclosed.[190]

The ALRC expressly declined to follow the American model, which includes unauthorized use of a person's identity or likeness and placing a person in a false light within the general tort for invasion of privacy.[191] It found that these types of conduct are more closely aligned with other areas of the law, such as defamation.[192]

The ALRC considered that circumstances giving rise to the cause of action should not be limited to activities taking place in the home or in private places:[193]

> Clear lines demarcating area in which privacy can be enjoyed should not be drawn in advance, since each claim will have to be judged in its particular context. The appropriate test is whether the circumstances give rise to a reasonable expectation of privacy, regardless of whether the activity is in public or private.

Despite this, the ALRC commented that the narrower U.K. view of when a public act can be private should be followed.[194] Under this approach, only sensitive public acts are protected. This can be contrasted with the European position, as demonstrated in *Von Hannover v Germany*, Eur. Ct. H.R. 1 (2005)[195], where an action for breach of privacy can be made out in relation to publication of "relatively ordinary daily activities occurring in public places."[196]

The second limb of the new cause of action, that "the act or conduct complained of is highly offensive to a reasonable person of ordinary sensibilities,"[197] draws on language used by Chief Justice Gleeson in *Lenah Game Meats*.[198] The ALRC acknowledges that it was initially

190. *Id*.
191. *Id*. at 2565.
192. *Id*. at 2566.
193. *Id*.
194. *Id*. at 2567.
195. *Von Hannover v Germany*, 40 Eur. Ct. H.R., 1 (2005).
196. 3 Australian Law Reform Comm'n, *For Your Information: Australian Privacy Law and Practice*, Report No.108 (2008), at 2547.
197. *Id*. at 2584.
198. *Australian Broad, Corp. v. Lenah Game Meats Pty, Ltd*. (2001) 208 C.L.R. 199, at 42.

concerned that the "highly offensive" formulation was too onerous and would not achieve sufficient protection for privacy interests.[199] However, after receiving public submissions on the point, it concluded that setting a high threshold to establish a serious invasion of privacy is appropriate, given the need to balance privacy interests and the right to freedom of expression.[200] In particular, the ALRC recommended that:

> …for the purpose of establishing the cause of action for serious invasion of privacy, the court must take into account whether the public interest in maintaining the claimant's privacy outweighs other matters of public interest—including the interest of the public to be informed about matters of public concern and the public interest in allowing freedom of expression.[201]

The quid pro quo for this stricter formulation of the cause of action is that the ALRC has not recommended a public interest or fair comment defense, which it had originally proposed when it called for submissions. It argues that its formulation of the elements of the cause of action removes the need for a public interest type defense.[202] However, this is not necessarily the case. Designating the public interest as something for courts to consider when determining whether an act is highly offensive puts defendants in a significantly weaker position than having a specific public interest defense designed to protect freedom of speech.

The ALRC does recommend three defenses to serious invasion of privacy.[203] These are that the act or conduct was incidental to the exercise of a lawful right of defense of person or property, was required or authorized by law, or that publication was, under the law of defamation, privileged.[204] These do not however, compensate for the absence of a public interest defense.

If implemented, the ALRC's recommendation of a new tort of invasion of privacy will have massive consequences, particularly for the media. The proposed remedies are extensive, including damages, an injunction restraining publication, an apology, an account of profits and a corrections order.[205]

199. 3 A.L.R.C. R. 108, at 2568.
200. *Id*.
201. *Id*. at 2575.
202. *Id*. at 2578.
203. *Id*. at 2585.
204. *Id*.
205. *Id*.

VI. Future Directions?

The Minister then responsible, John Faulkner, indicated that it could be some time before any of the recommendations in the ALRC's most recent report are implemented. He did not comment on the Federal Government's attitude to the more contentious recommendations, including the introduction of a statutory tort for breach of privacy.

The Government faces an election late in 2010 and it is unlikely that it would table such controversial recommendations for legislation. Clearly, they will be attacked by the media. That said, Minister Faulkner has made it clear that the Government regards privacy as an important issue, and that the ball is now in the Government's court.[206]

Given that the Government will take some time to respond to the ALRC's recommendations it is possible that the Courts will have another opportunity to consider whether a cause of action for breach of privacy exists at common law. Since *Lenah*,[207] it has seemed that the tide has been gradually turning towards greater protection of privacy in Australia and in the last five years we have seen the first two decisions where courts (albeit lower courts) have awarded damages for breach of privacy. Still, progress in this area is likely to be slow. The cases of *Jane Doe v ABC*[208] and *Grosse v Purvis*,[209] while notable, arise from unusual facts and are not binding on other courts. Significantly, the only appellate court decision to consider the tort of privacy in the last five years, *Giller v Procopets*,[210] has failed to clarify the position, instead preferring to look to protections under the equitable remedy for breach of confidence, and reveals a reluctance by the Courts to make any significant determinations on privacy law while the ALRC report is before the parliament.

Beyond the legal uncertainties, there are practical challenges associated with privacy protection. In a world of constantly changing technology, regulators and law enforcers will always be one step behind and this will affect the level of protection offered by new privacy laws. Further, there is also some question as to whether a generation who freely

206. Speech by Senator The Hon John Faulkner, 'Speech to Launch the Australian Law Reform Commission's Report on Privacy' delivered on 11 August 2008.

207. *Australian Broad, Corp. v. Lenah Game Meats Pty, Ltd*. (2001) 208 C.L.R. 199, at 42.

208. *Jane Doe v. Australian Broad. Corp. & Ors* (2007) V.C. Ct. (Unreported, Hampel J).

209. *Grosse v Purvis*, (2003) QDC 151 (Queensl.) *available at* http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/qld/QDC/2003/151.html?query=grosse

210. Giller v Procopets (2004) V.S. Ct. 113.

shares personal information and publicizes private details on internet sites such as MySpace, Facebook and YouTube, will even want the law to develop privacy protections.

International developments suggest that, ultimately, the Australian Courts or legislature will have to provide greater protection of personal privacy. The ALRC and NSWLRC reports and the approach of the lower courts in *Grosse v Purvis* and *ABC v Jane Doe* suggest that this will probably be along the lines of a U.S.-style tort for invasion of privacy. While this would have many advantages for many people, it is not without consequences in terms of freedom of the press and free speech. Privacy is undeniably a significant human right, but it must not be forgotten that free speech and freedom of the press are fundamental to the success of any democratic society. Any tort or statute should adequately reflect the need to balance these competing rights just as the laws of defamation do.

Fee Shifting in Libel Litigation: How the American Approach to Costs Allocation Inhibits the Achievement of Libel Law's Substantive Goals

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"As it stands today, libel law is not worth saving. What we have is a system in which most claims are judicially foreclosed after costly litigation. It gives plaintiffs delusions of large windfalls, defendants nightmares of intrusive and protracted litigation, and the public little assurance that the law favors truth over falsehood. If we can do no better, honesty and efficiency demand that we abolish the law of libel."[1]

David A. Anderson

The fee-shifting system used in U.S. libel litigation compels the media and potential plaintiffs to behave in a manner inconsistent with the achievement of libel law's substantive goals. Since 1964, libel law in this country has sought to recalibrate the balance between protecting reputation and encouraging free speech. It has moved from being concerned primarily with the achievement of traditional tort-based goals centered on restoring and incentivizing to concerning itself more with diluting the potential chilling effect that broad defamation laws can have on press self-censorship. It now (somewhat ambitiously) seeks to restore both the defamed and the defamer to their pre-infringement positions and to deter media outlets from publishing defamatory material. And it seeks to

1. David A. Anderson, *Is Libel Law Worth Reforming, in* Reforming Libel Law, 1-2 The Guildford Press, (John Soloski & Randall P. Bezanson eds. 1992) [hereinafter Anderson].

do this in a manner that more meaningfully materializes the protection of the First Amendment and compels robust reporting and public criticism. Although the substance of the law points in this direction, some procedural elements (namely the American approach to costs allocation) seem to induce behavior with an entirely different trajectory.

This article will consider the relationship between the two major goals of U.S libel law—restoring and incentivizing (both incentivizing the media to report robustly and incentivizing the media to desist from defamatory reporting)- and the current system of fee-shifting used in American litigation. Specifically, it will examine whether the English fee-shifting model of "loser pays" is better suited to achieving the purposes of U.S. libel law than the American model of "bear your own costs." Part I will set out five goals of U.S. libel law and locate them within the overarching categories of restoring and incentivizing. Part II will outline the salient aspects of both the American and English fee-shifting models. It will examine the role of contingency fees in both jurisdictions, and indicate the exceptions developed by U.S. courts to the American rule that permit the recovery of fees from a losing party. Part III will assess whether, and to what extent, each fee-shifting model inhibits, does not affect, or promotes the goals set out in Part I. It will underscore the important role that procedural law can have on the achievement of goals articulated in the substantive law. It will set out the traditional arguments proffered by proponents of each model and seek to use empirical material to determine the weight such arguments should be given. Ultimately, a good argument can be made that the English model is better-suited to achieving the goals of the U.S. libel system.

I. What are the Goals of the U.S. Libel Law System?

Tort law is designed to serve the dual function of compensating plaintiffs for their individual injuries and limiting the incidence of high-risk behavior.[2] It seeks to restore both parties as nearly as possible to their respective positions prior to the defendant's violation while at the same time incentivizing potential tortfeasors to desist from engaging in tortious conduct in the future.[3] For libel law specifically, courts and legislatures have developed laws and implemented procedures aimed at concurrently returning the plaintiff's reputation to its pre-defamation

2. *See* Gregory A Hicks, *Statutory Damage Caps Are an Incomplete Reform: A Proposal for Attorney Fee Shifting in Tort Actions*, 49 LA. L. REV. 763, 774-75 (1989).

3. *See* Jane P. Mallor, *Punitive Attorney's Fees for Abuses of the Judicial System*, 61 N.C. L. REV. 613, 614-619 (1983).

level and incentivizing the press to desist from publishing defamatory material. However, as suggested in this paper's introduction, efforts have been made to ensure that such laws and procedures do not operate to chill the media into self-censorship and the constitutional guarantee of a free press continues to encourage forthright reporting and public comment by the media.[4] With these broad purposes in mind, this article will categorize five key goals under the headings of restorative-based goals (Goals (1), (2), (3)) and incentive based goals (Goals (4), (5)).

A. Restorative-Based Goals

The restorative goals of the U.S. libel system are hinged on the proposition that courts cannot create wealth; they can only redistribute it[5] with a view to making a successful plaintiff "whole."[6] One party has improved its position at the expense of the other party and it is the task of the courts to recalibrate the respective positions of each party and return them to their pre-infringement levels. In defamation, this means penalizing a media outlet that has profited from a particular publication that contravenes the law and remunerating plaintiffs in an amount commensurate to the damage inflicted on their reputation by that publication.[7] It is not a goal of libel law to repair damage caused to a plaintiff's reputation by a non-tortious publication, irrespective of how offensive, degrading, or even false that publication may be.

The ability of libel law to return both the defamed and the defamer to their pre-infringement positions will largely depend on the achievement of three more particular goals:

1. GOAL (1): POTENTIAL PLAINTIFFS SHOULD BE DISCOURAGED FROM FILING NON-MERITORIOUS LAWSUITS.

Libel law is concerned with restoring both parties to their pre-infringement positions.[8] Where it is highly probable that there has been

4. *See* Robert D. Sack, *Libel, Slander and Related Problems* 2-4 (Practising L. Inst., 1997, 1980).

5. *See* Gregory Maggs & Michael Weiss, *Progress on Attorney's Fees: Expanding the "Loser Pays" Rule in Texas*, 30 Hous. L. Rev. 1915, 1924 (1994) [hereinafter Maggs et al].

6. Randall R. Bovberg & Frank Sloan, *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering*, 83 NW. U. L. REV. 908, 909-10 (1989) ("There is a universal agreement that the compensatory goal of tort law requires making the successful plaintiff 'whole'[.]").

7. *See* Jonathon Fischbach & Michael Fischbach, *Rethinking Optimality in Tort Litigation: The Promise of Reverse Cost-Shifting*, 19 BYU J. Pub. L. 317, 320 (2005) [hereinafter Fischbach et al]. *See also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) (Justice Powell) ("[The] legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood.").

8. *See* Rodney A. Smolla, SUING THE PRESS (Oxford Univ. Press 239 (1986).

no infringement, it is highly probable that libel law will not seek to adjust the positions of either the press or the plaintiff.[9] Yet, the initiation of a non-meritorious lawsuit will always operate to adjust the parties' positions because the litigation costs that are imposed on each party will not be recovered. Libel law is concerned only with the redistribution of wealth from the defamer to the defamed. Where the publication will not satisfy the standards prescribed by libel law to justify redistribution, the litigation process operates contrary to the goals of libel law by simply reducing the wealth of both parties, rather than redistributing it.

2. GOAL (2): POTENTIAL PLAINTIFFS WITH SMALL CLAIMS SHOULD BE ENCOURAGED TO FILE LAWSUITS.

The overarching goal of restoration underpinning libel law must extend to plaintiffs, irrespective of the size of their claim. Libel law must have the effect of encouraging the defamed plaintiff "with a just but monetarily small claim to seek redress."[10]

3. GOAL (3): PLAINTIFFS SHOULD BE ENCOURAGED TO SETTLE LITIGATION PRIOR TO TRIAL.

Since the law of libel is primarily directed at returning both the media and the defamed to their positions prior to trial, protracted litigation should be avoided because it "imposes financial and emotional burdens that move both parties further from their pre-incident positions as the trial progresses."[11] If appropriate wealth redistribution is the "transaction" that libel law purports to effect, then protracted litigation can be properly understood as a "transaction cost" which reduces the total wealth that can be redistributed.[12] Settling before trial is a means to reduce this transaction cost.

B. Incentive-Based Goals

Some authors have suggested that compensating victims for their losses is no longer as important as incentives for potential tortfeasors to behave optimally.[13] For most torts, optimal conduct is usually framed in negative terms–compelling tortfeasors to desist from committing tortious behavior. For example, the tort of negligence seeks to compel would-be negligent drivers to take additional care when driving so as

9. *See* Brandon Chad Bungard, *Fee! Fie! Foe! Fum!: I Smell the Efficiency of the English Rule Finding the Right Approach to Tort Reform*, 31 SETON HALL LEGIS. J. 1, 13-15 (2006).

10. Comment, *Court Awarded Attorney's Fees and Equal Access to the Court*, 122 U. PA. L. REV. 636, 650 (1974) [hereinafter University of Pennsylvania].

11. Fischbach et al, *supra* note 7, at 320.

12. *Id*.

13. Bungard, *supra* note 9, at 9-10.

to meet the standard that the law deems appropriate. In these cases, the law is not necessarily concerned with incentivizing all non-tortious behavior (as opposed to deterring tortious behavior). If a driver decides to drive well below the speed limit or with excessive care, the only societal loss is a reduction in efficiency.[14] The goals of libel law are different. The effect of the First Amendment is that there is much more to be lost than efficiency, should the media decide to exercise an inappropriately high level of care. In addition to expanding the field of reporting that the law considers acceptable and non-tortious,[15] courts have become increasingly concerned with ensuring that the press operate to the outer boundaries of this field. Put differently, they have become equally concerned with incentivizing all non-tortious conduct (namely all robust reporting and public comment that falls below the level of defamation) as they have with deterring tortious conduct.

Accordingly, two separate, although related, goals of libel law can be stated as follows:

1. GOAL 4: ENCOURAGE ALL REPORTING AND PUBLIC COMMENT BY MEDIA OUTLETS THAT IS LESS THAN ACTIONABLE DEFAMATION
2. GOAL 5: DISCOURAGE ALL REPORTING THAT AMOUNTS TO ACTIONABLE DEFAMATION

II. What are the Features of the U.S. and English Fee-Shifting Systems?

There are two general approaches to fee-shifting: the American rule and the English rule. The former requires litigants to bear their own costs irrespective of the outcome of the litigation. The latter requires the losing party to pay a portion or all of the victorious party's costs. Outside of the U.S., some variant of the English rule is the "norm."[16]

A. The American Rule

The U.S. Supreme Court first articulated the American rule in 1796 in *Arcambel v Wiseman*.[17] In rejecting the lower court's decision to award $1,600 for attorneys' fees, the court stated:

> We do not think that this charge ought to be allowed. The general practice of the United States is in opposition to it and even if that practice were not strictly correct

14. *See id*. at 10-24.
15. *See infra* Part III, Goal (4) and Goal (5) (discussing the ways in which the Supreme Court has expanded the types of publications that the law will no longer deem "defamatory").
16. *See* Bungard, *supra* note 9, at 33-34.
17. *See* Arcambel v. Wisman, 3 U.S. 306, 306 (1796).

> in principle, it is entitled to the respect of the court, till it is changed or modified by statute.[18]

Over the past two centuries U.S. courts have adhered to the American rule by refusing to award damages to a victorious party unless otherwise provided for by statute.[19] There are over 200 federal statutes[20] and 2000 state statutes[21] that provide for the shifting of attorneys' fees in the United States. These statutes however, usually do so in narrow circumstances and on a one-way fee-shift basis.[22] One-way fee-shifting statutes permit victorious plaintiffs to recover from defendants; victorious defendants, on the other hand, must still bear their own costs.[23] The only state to provide a two-way fee shifting mechanism is Alaska as set forth in that state's Rule of Civil Procedure 82:

> "Except as otherwise provided by law or agreed to by the parties, the prevailing party…shall be awarded attorneys' fees calculated under this rule."[24]

Despite the apparent breadth of its wording, in practice this provision only permits a partial recovery by the winning party,[25] with a showing of bad faith required to support an award of full damages.[26] In 1980, Florida enacted a two-way fee-shifting statute that applied only to medical malpractice suits. It was repealed in 1985.[27]

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18. *Id*.

19. *See, e.g.*, Stewart v. Sonneborn, 98 U.S. 187 (1879); Fleischmann Distilling Corp v Maier Brewing Co., 386 U.S. 714 (1967); F.D. Rich Co. v United States *ex rel*. Industrial Lumbar Co., 417 U.S. 116 (1947); Alyeska Pipeline Serv. Co. v Wilderness Soc'y, 421 U.S. 240 (1975).

20. John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U.L. REV. 1567, 1588 (1993).

21. *Id*. For a lengthier discussion of state fee shifting statutes, see Note, *State Attorney Fee Shifting Statutes: Are we Quietly Repealing the American Rule?*, LAW & CONTEMP. PROBS. (Winter 1984) [hereinafter *State Attorney Fee Shifting Statutes*].

22. Herbert M. Kritzer, *Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say*, 80 TEX. L. REV. 1943, 1946 (2002). *See id*. at 1946 ("Most of the statutes that abrogate the American Rule in the United States introduce a 'one-way' fee-shifting regime…").

23. *See, e.g.*, The Equal Access to Justice Act (28 U.S.C. § 2412 (d) (2003)). For a discussion of various states' one-way fee shifting statutes see *State Attorney Fee Shifting Statutes, supra* note 21, at 330-31.

24. For a judicial discussion of this rule, *see* Anchorage Daily News v Anchorage School Dist., 803 P.2d 402, 404 (Ak. 1990); City of Anchorage v McCabe, 568 P.2d 986, 993-94 (Ak. 1977); Gilbert v State, 526 P.2d 1131, 1136 (Ak. 1974).

25. For example, a victorious party that recovers a money judgment can receive up to 20% of that judgment (for the payment of costs) for the first $25000 and 10% for any amount over that. This amount decreases if there has not been a trial (18% then reduced to as low as 2% for money judgments over $500,000) or if the amount has not been contest (10% then reduced to as low as 1% for money judgments over $500,000).

26. *See* Malvo v J.C. Penney Co, 512 P.2d 575, 588 (Ak. 1973); Demoski v New, 737 P.2d 780, 788 (Ak. 1987).

27. FLA. STAT. ANN. § 768.56 .(YEAR).

A further dimension to the costs allocation system in the United States is the prevalence of attorneys working on the basis of a contingent fee.[28] Contingent fee agreements provide for fees as a fraction, usually one third, of the amounts recovered in an action.[29] Some studies suggest that up to seventy-one percent of plaintiffs are represented on a contingency basis.[30] For libel matters, this percentage has been reported as being as high as eighty-six percent.[31]

In libel litigation, the most relevant exception to the American rule relates to the recovery of attorneys' fees for frivolous or bad faith claims. Although there exists a range of federal[32] and state statutes[33] that permit such fee-shifting, only "the rare libel complaint" or "the extreme case" is likely to satisfy the high threshold required for recovery.[34]

B. The English Rule

The English rule requires the losing party in civil litigation to pay the winning party's attorneys' fees.[35] In its purest form, this rule of-

28. For a discussion on the various other methods of payment in the United States *see* Kritzer, *supra* note 22, at 1944. Kritzer lists six different approaches to payment: fixed fees; time-based fees; task-based fees; statutory fees; commission based fees; and value-based fees.

29. *See, e.g.*, Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?* 37 UCLA L. Rev. 29, 30 (1989).

30. David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983).

31. RANDALL P. BEZANSON, GILBERT CRANBERG & JOHN SOLOSKI, LIBEL LAW AND THE PRESS: MYTH AND REALITY 69 (Collier Macmillan Pub. London 1987) [hereinafter Bezanson et al]. For a discussion of the reasons for the increased percentage in libel matters and the impact this has on the achievement of libel goals *see* Part III *infra*.

32. See, e.g., Rule 11 of the Federal Rules of Civil Procedure.

33. For a comprehensive discussion of state statutes, *see* MEDIA LAW RESOURCE CENTER, MLRC 50-STATE SURVEY: EMPLOYMENT, LIBEL AND PRIVACY LAW. See, e.g., statutes in Arizona (A.R.S. § 12-341.01(C) ("clear and convincing evidence that the other's claim or defense constitutes harassment, is groundless and not made in good faith")); California (Code Civ. Proc. § 1021.7 ("a court may award reasonable attorneys' fees to the defendant in a libel or slander action, upon a finding that the action was not filed or maintained in good faith and with reasonable cause")); Colorado (C.R.S. § 13-17-102 ("a defendant may recover reasonable attorney fees in the event an action is determined to be groundless or frivolous)); and Illinois (Illinois Supreme Court Rule 137 permitting the taxing of attorney's fees and reasonable expenses against parties which plead untrue statements without reasonable cause). *See also* decisions in New York: Nemeroff v. Abelson, 704 F.2d 652, 9 Media L. Rep. 1427 (2d Cir. 1983) in which the court held that a prevailing defendant is entitled to an award of attorneys' fees if an action is brought or maintained without an adequate factual basis or in bad faith. *See also* Mitchell v. Herald Co., 137 A.D. 2d 213, 529 N.Y.S.2d 602, 15 Media L. Rep. 1613 (4th Dep't 1988), in which the court held that the defendant was entitled to reasonable fees and costs pursuant to CPLR § 8303-1 because the plaintiff and counsel knew that neither falsity nor gross irresponsibility could be shown and refused to discontinue suit.

34. BARBARA DILL, THE JOURNALIST'S HANDBOOK ON LIBEL AND PRIVACY 248 (Collier Macmillon Pubs. London 1986).

35. Werner Pfennigstorf, *The European Experience With Attorney Fee Shifting*, LAW & CONTEMP PROBS. 44 (Winter 1984).

fers the winning party indemnification of its fees. In its diluted, more widely used and arguably more practical form, fee-shifting occurs when a winning party's claim for fees is "taxed" or assessed and a reasonable proportion allocated from the losing party.[36] To label the law "English" may understate its international prevalence. For example, article 696 of the French Code requires that "costs are assessed against the losing party unless the judge assesses the whole or part of the burden against the other party, in a decision with reasons given."[37] Similarly, section 91 of the German Code provides that the "losing party must bear the costs of the litigation, and must in particular reimburse the costs incurred by the opponent insofar as they were necessary . . .".[38] The English version of the rule provides slightly more discretion for judges than the French and German statutes, granting to the court "full power to determine by and who and to what extent the costs are to be paid."[39] Although these statutes provide a means by which a party can conceivably recover their total legal costs, the reality is that a winning party will rarely recover more than three quarters of their total legal costs.[40] Recovery can also decrease depending on the court in which the matter was heard, and the size of the litigation.[41] Contingent fees, although once impermissible, are now allowed in most countries using the English rule.[42]

III. Why the English Rule Best Achieves the Goals of U.S. Libel Law

The thesis of this article is that the fee-shifting approach of the American rule (each party bears its own costs) incentivizes behavior

36. For a discussion on the various forms of the English Fee Shifting model, *see* Bungard, *supra* note 9, at 34.

37. Code Civil [C. civ.] art. 696 (Fr), *as cited in* Bungard, *supra* note 9, at 34.

38. BGB [Civil Code] § 91, *as cited in* Bungard, *supra* note 9, at 34.

39. *See* Senior Courts Act, 1981, c. 54 § 51 (Eng.), *as cited in* Bungard, *supra* note 9, at 34.

40. *See* Vargo, *supra* note 20, at 1613 (recalling telephone interviews the author conducted with partners from Australian law firms Cashman & Partners (now Morris Cashman) and Attwood Marshall Solicitors). The author stated that these interviews revealed a consensus that the amounts collectible under the Australia party/party system are between one-half and two-thirds of the amounts charged to a client under solicitor/client costs. The author of this article's professional experience litigating in Australia is that the amount collectible is usually closer to one-half.

41. *See id.*, discussing in Australia, a recovering party should expect less from a Federal Court than a state court. This is because the taxing system used by the federal court is older and accordingly the permissible hourly charge-out rate of partners and attorneys are lower. The court is also likely to allow less "permissible" charges as the litigation gets larger. The rationale is that the larger the matter, the more duplicative work is conducted and the greater the "leakage" of costs.

42. *See* Bungard, *supra* note 9, at 35. In England, contingent fees were introduced in 1990 by section 58 of the Courts and Legal Services Act 1990.

that is contrary to the key goals of libel law. Although the English rule (loser pays) is far from perfect, it is better suited to achieving these key goals. Part III will assess the impact of both fee-shifting models on each of the five goals of libel law set out in Part I, supra. Some authors argue that "neutral" procedural law should not be changed to achieve the goals of the substantive law.[43] This paper will argue that the American rule, in its current state, is not procedurally neutral (because it compels behavior that is contrary to the substantive libel law) and, can appropriately be amended. The original aim of this research was to conduct a comparative empirical analysis of the effect of the American and English rules on libel litigation in the United States and England respectively.[44] Due to the difficulty of collecting data relating to the effects of fee-shifting on tort claims generally[45] and libel claims specifically[46], this paper will use the sparse empirical material to elucidate some of its key arguments without relying on such material to draw conclusions.

43. *See* Rodney A. Smolla, *The Annenberg libel Reform Proposal, in* REFORMING LIBEL LAW 269 (John Soloski & Randall P. Bezanson eds. 1992). Professor Smolla suggests that the U.S. Supreme Court was unwilling to import additional procedural safeguards to bolster the constitutional protection provided by the substantive law of defamation in *Calder v. Jones*, 465 U.S. 783 (1984) and *Keeton v. Hustler Magazine Inc*. 465 U.S. 770 (1984). He further suggests that this approach is consistent with the notion of "procedural neutrality" and that tailoring procedural law to defamation litigation could create an "overprotective form of 'double counting.'" Professor Smolla also points out that the Supreme Court imposed "special procedural rules more protective than free speech interests . . . to reinforce substantive constitutional principles" in *Bose v. Consumer Union of United States, Inc.*, 466 U.S. 485 (1984).

44. The framework for a comparative analysis would involve a comparison of the quantum of cases initiated under each system, how many of those cases are settled and what percentage do plaintiffs win.

45. *See* Avery Wiener Katz, *Indemnity of Legal Fees*, 5 ENCYCLOPEDIA OF LAW AND ECONOMICS 64-65 (Boudewijn Couckaert & Gerrit de Gees eds. (2000)). Avery Katz explains that despite the prima facie appeal of such a comparative study, a meaningful empirical analysis is nearly impossible because "legal costs influence all aspects of the litigation process (and as such) the effects of fee shifting are complex and difficult to ascertain. . . . The current state of economic knowledge does not enable us to reliably predict whether a move to fuller indemnification would raise or lower the total costs of litigation, let alone whether it would better align those costs with any social benefits they might generate. . . ." *See also* Herbert Kritzer, *supra* note 22, at 1984-99. Professor Kritzer argues that there has been "relatively little empirical research on the actual effect of fee shifting on lawyers, litigants and litigation" and labels cross-national examination of fee shifting "problematic because of other legal differences between the countries."

46. The author gained information relating to the difficulties of collecting empirical data relating to libel claims from a telephone conversation with Staff Attorney David Heller of the Media Law Research Center. Professor Heller suggested that the simple problem of not having a specific box that claimants would tick on their initiating document could be enough to derail a comprehensive empirical analysis of libel litigation.

A. Goal (1): Potential Plaintiffs Should Be Discouraged from Filing Non-Meritorious Lawsuits.

The English rule would operate to deter potential plaintiffs from filing non-meritorious libel suits by threatening them with the potential burden of paying the defendant's costs. Former Vice President Dan Quayle, speaking on behalf of the elder Bush Administration's Council on Competitiveness, argues "because the losing party would be obligated to pay the winner's fees, this approach will encourage litigants to evaluate carefully the merits of their cases before initiating a frivolous claim."[47] Approaching this issue from an economic perspective, Professor Bungard concludes that "a simple economic analysis of the two general approaches to fee-shifting demonstrates that…American rule plaintiffs are more likely to file suits that are frivolous or have a low probability of victory than English rule plaintiffs."[48]

Professor Vargo questions such a conclusion and the "mystical curative powers to deter non-meritorious claims" that have been attributed to the English rule.[49] His challenge is based on the erroneous assumption that the abusing party, when deciding to file suit, would be cognizant to the potential liability that fee-shifting rules create. A study conducted by the Alaska Judicial Council on Alaska's Rule 82 supports this challenge, with only thirty-five percent of attorneys recalling a single instance in which the state-based fee-shifting rule played a significant role in a prospective client's decision not to file suit or assert a claim.[50] Other data collected in this study seems to compel the drawing of contrary conclusions. For example, Alaska has fewer tort filings than the rest of the country but more cases go to trial.[51] Such data could indicate that Rule 82 has had an effect by reducing the number of non-meritorious cases being filed (which accounts for the overall drop in tort filings) and relatedly increasing the quality of cases that were filed (which accounts for the increase in cases going to trial rather than being settled or dismissed). The Council was unwilling to embrace such a firm conclusion.[52]

47. Thomas D. Rowe, *Indemnity or Compensation? The Contract with America, Loser-Pays Attorney Fee Shifting, and a One-Way Alternative*, 37 WASHBURN L.J. 317, 320 (1998).
48. Bungard, *supra* note 9, at 37.
49. Vargo, *supra* note 20, at 1632.
50. *See* Kritzer, *supra* note 22, at 1952.
51. *See id*. at 1951.
52. *Id*.

Although the available empirical material permits the drawing of only equivocal conclusions, it is widely accepted that the threat of paying an opponent's fees under the English rule deters low-probability or non-meritorious plaintiffs from filing suit more effectively that the American rule. The proposition that the English rule should thus be adopted (because it reduces the number of non-meritorious cases being filed) gains even more weight in the context of U.S. libel litigation given the large number of low-probability defamation claims that are filed. There are two key reasons for the proliferation of non-meritorious libel suits:

1. LIBEL PLAINTIFFS ARE INCENTIVIZED TO SUE EVEN WHEN THEY KNOW THAT THEIR SURIT WILL FAIL

The Iowa Libel Research Project concludes that a majority of the plaintiffs interviewed filed suit because they were interested in curing alleged falsity and not in receiving money.[53] Commenting on this finding, Professors Bezanson, Cranberg and Soloski cite this as a reason that so many non-meritorious plaintiffs file libel suits.[54] Individuals with claims that are without merit because they will clearly be defeated by a constitutional privilege (and accordingly will not result in financial reparations) are still incentivized to file suit because the court system provides a forum in which the falsity of the accusation can be judicially proclaimed and their reputation vindicated. In this way, the act of suing, rather than winning, provides a "direct and effective form of self-help."[55] A further incentive for plaintiffs, entirely unrelated to the merits of their case, is the desire to "get even" or "punish the media."[56] The Iowa Project identified such a motive in thirty percent of those plaintiffs interviewed.[57]

53. *See* Randall P. Bezanson, Gilbert Cranberg & John Soloski, *The Economics of Libel, in* THE COST OF LIBEL: ECONOMIC POLICY IMPLICATIONS (Everette E. Dennis & Eli M. Noam eds. 1989). Viewing libel litigation as a means to achieve goals unrelated to the merits of a case undermines the force of the constitutional hurdles erected by the Court within the substantive law. This issue is taken up in more detail at Goal (4).

54. *See* Randall P. Bezanson, Gilbert Cranberg & John Soloski, *supra* note 53, at 33-37 ("The high standards of proof do not necessarily discourage litigants who are more interested in clearing the air than in being awarded money damages. Most plaintiffs have found to be more interested in restoring their reputation or punishing the media than in winning money damages. The plaintiffs sue to set the record straight and this is accomplished independent of the judicial result").

55. *See* Bezanson et al., *supra* note 31, at 151.

56. *See, e.g.*, Smolla, *supra* note 8, at 76 ("What is clear…is that if the plaintiff's primary motive is vindication through punishment of the media defendant, it is not necessary to win in order to win. If the suit can be prolonged sufficiently the mere ticking away of the defense lawyer's clock will be enough to extract the pound of flesh").

57. *See* Randall P. Bezanson, Gilbert Cranberg & John Soloski, *supra* note 53, at 34.

2. THE HIGH RATE OF CONTINGENCY FEE ARRANGEMENTS IN LIBEL LITIGATION UNDERMINES THE TRADITIONAL DETERRING EFFECT THAT THE AMERICAN RULE HAS ON LITIGANTS

Plaintiffs have traditionally been deterred from filing non-meritorious suits under the American rule because irrespective of the outcome they will have to pay for their own legal fees. For libel, this deterring effect is largely obviated because of the prevalence of contingency fee arrangements between attorney and plaintiff.[58] Contingency fee arrangements are most common with public figure plaintiffs. Many attorneys are happy to bear the additional risk because "representing a well-known public figure has appeal beyond the fee."[59] Ironically, public plaintiffs have the least chance of success and should accordingly be the most deterred from filing non-meritorious suits. Even so, the likelihood that a public figure plaintiff will enter into a contingency arrangement reduces their risk to almost zero and as such incentivizes the filing of a suit irrespective of its merits.

The adoption of the English rule may be an artful wayto reduce the disproportionately high number of non-meritorious libel suits being filed. It would make plaintiffs who sue to achieve goals other than winning the suit—such as using the courts to repair their reputation or punishing the media-reassess the cost they are willing to pay to achieve such goals.[60] It would also inject risk into the decision-making process of those litigants who have engaged attorneys on a contingency basis and are presently able to sue with zero or low potential liability under the American rule.

B. Goal (2): Potential Plaintiffs with Small Claims Should Be Encouraged to File Lawsuits.

Both the American and the English rules partially achieve this goal. For proponents of the American rule, bearing one's own costs means

58. *Id.*
59. *Id.*
60. It may be argued that the decreasing potential damage awards for a winning plaintiff could lead to similar reductions in non-meritorious libel litigants as increasing costs for a losing plaintiff. The key problem with this argument is that, as noted above, non-pecuniary motivations are prevalent in many libel litigants' decisions to sue. As a result, raising or lowering potential damages awards is unlikely to change the way a libel litigant acts in the same way that raising or lowering potential damages awards is likely to change the way, for example, a plaintiff with a potential negligence claim acts. This should be viewed differently to the liability a potential litigant will incur if he or she loses; a factor that this paper considers has a significantly larger impact on a litigant's decision-making process. Put differently, decreasing the likely award a libel plaintiff can recover if they win will probably have less effect on that plaintiff's decision to sue than increasing the liability a plaintiff will incur if they lose.

litigants with small claims will not be discouraged from suing because of concerns over paying their opponent's legal fees should they lose.[61] Professor Anderson argues that fee-shifting "could impose a severe-possibly disastrous-penalty on the [small claim] plaintiff who miscalculates the merit of his claim."[62] For proponents of the English model, small claimants are discouraged by the knowledge that their own large legal fees are likely to dwarf any potential damage awards.[63] This argument gains weight when one considers the relationship between attorneys' fees in libel cases and the average damage award, with some studies suggesting that the former can often be four times the quantum of the latter.[64] Proponents of the American rule have responded to this claim by underscoring the prevalence of contingency fee arrangements in libel matters.[65] Such arrangements, at the end of the day, greatly reduce the fees a plaintiff is likely to incur and make the pursuit of small claims more financially viable.

Professor Shavell provides a useful categorization of the type of small claimant that is assisted by each of the English and American rules:

> When a plaintiff is relatively optimistic about prevailing, his expected legal costs will be relatively low under the English system (because the other side will pay) whereas under the American system he must bear his own costs with certainty. Thus, he will be likely to find suit a more attractive prospect under the English system. But when the plaintiff is not optimistic, converse reason explains why he would be expected to sue more often under the American system.[66]

Proponents of the English rule will suggest that it is more appropriate to incentivize optimistic plaintiffs to sue because their claims are more likely to have merit. Proponents of the American rule will argue that U.S. libel law is so heavily tilted in favor of the defendant that no plaintiff would ever be optimistic and accordingly risk responsibility for defendant's fees under the English rule.[67] For every argument in

61. *See, e.g.*, Fischbach et al., *supra* note 7, at 325 ("Where the normative value of particular legal rights outweighs a plaintiff's financial interest in their preservation… such rights might atrophy from lack of enforcement").

62. *See* David A. Anderson, "*Libel and Press Self-Censorship*" 53 TEX. L. REV. 422, 437 n.76 (1975) ("If the law is to retain a remedy for defamation, it should not put a plaintiff to such great peril for seeking to avail himself of that remedy").

63. Smolla, *supra* note 8, at 239.

64. *Id*.

65. *See, e.g.*, G. Marc Whitehead & Robert B MacDonald, *The Truth About the English Rule*, Litig. 3 (Winter 1995).

66. As quoted in David A. Hollander, *The Economics of Libel Litigation, in* THE COST OF LIBEL 282 (Everette E. Dennis & Eli M. Noam eds. 1989) [hereinafter Hollander].

67. This argument may also have relevance to UK libel law after the decision of the House of Lords in *Jameel v Wall Street Journal Europe* [2006] UKHL 44. In that case, the House of Lords restated the "responsible journalist" defense enunciated by Lord

favor of either the American rule or the English rule as the best means to encourage small-claim plaintiffs to sue there seems to exist a counter-argument. As such, neither rule is better-suited to achieve Goal (2); they are either equally as likely or unlikely to do so.

C. Goal (3): Plaintiffs Should Be Encouraged to Settle Litigation Prior to Trial.

The English rule would provide greater incentive than the American rule for plaintiffs to settle prior to trial. It would enable courts to more completely restore both parties to their pre-infringement positions. Settlement is of particular pertinence in libel matters because of the high cost of litigation.[68] There exist two major barriers to settlement in libel litigation and the English rule is best equipped to deal with both.

The first barrier to settlement in libel litigation is that negotiated solution is unlikely to appeal to the defamed plaintiff who uses litigation to achieve non-monetary goals. Settlement normally occurs in libel litigation where the defamed's minimum demand is less than the defamer's maximum settlement.[69] Where the defamed's minimum demand is an acknowledgment of falsity or the imposition of costs on (i.e., to get even with) the defendant, it is hard for a defendant to set a maximum amount that responds to these demands. Put simply, settlement is not apt to deal with the former non-monetary demand (acknowledgement of falsity) and represents the antithesis of the latter demand (the imposition of costs on the media).[70] As a result, the most effective way for a fee-shifting model to maximize settlement numbers is to limit the number of plaintiffs that initiate litigation seeking non-monetary goals. These are

Nicholls in *Reynolds v Times Newspaper* [2004] EWHC 37 (QB), which developed the common law defense of qualified privilege in libel cases to establish a public interest defense for newspaper articles that were the product of responsible journalism. Based on the articulation in *Reynolds*, it was a difficult a defense for a defendant to make out because of the ten relevant factors that needed to be proven. The effect of the decision of the House of Lords in *Jameel* was to "significantly strengthen press freedom to report on matters of public interest." *See* Guy Vassall-Adams, *A Resounding Victory for Newspapers*, TIMES ONLINE, Oct. 11, 2006 (*available at* http://www.timesonline.co.uk/tol/comment/article668356.ece). (Vassall-Adams was second junior counsel for the Wall Street Journal Europe before the House of Lords on this case.).

68. *See, e.g.*, James Goodale, who described the rise in libel costs as an "uncontrollable firestorm" in *Survey of Recent Media Verdicts, Their Disposition on Appeal, and Media Defense Costs, in* PRACTICING L. INST., MEDIA INSURANCE AND RISK MANAGEMENT (1985).

69. See Steven Shavell, *Suit, Settlement and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 56-57 (1982).

70. Settlement represents the antithesis of imposing costs on the media because settlement, by its very nature, is always designed to minimize the imposition of costs on each settling party.

the plaintiffs who will not be responsive to the traditional financial appeal of settlement. Although such plaintiffs exist under both fee-shifting systems, for reasons discussed at Goal (1) supra, the English rule better deters plaintiffs with non-monetary goals than the American rule.

The second barrier to settlement in libel litigation is the willingness of the defamed to settle in a situation where the defamed is seeking to achieve pecuniary-based goals (unlike those non-monetary goals outlined in the paragraph above). Although the system of settlement attached to the common law system is apt to address these goals, a libel plaintiff can most clearly evince their unwillingness to settle at the outset by setting a minimum demand that far exceeds the maximum settlement offer of the defamer. Moreover, as the litigation continues, such plaintiffs can continue to reduce the likelihood of settlement by refusing to adjust a high demand or, indeed, by increasing it.

Under the American rule, plaintiffs will set their minimum demand level relatively high because they are likely to be litigating with minimal or zero risk due to a contingency arrangement and/or the knowledge that the defendant will have to bear its own costs. Moreover, this minimum demand is unlikely to become negotiable over the course of the trial because their liability to either their own attorneys or their opponent does not increase. The demand starts high and gets higher.

Conversely, English rule plaintiffs will set their minimum demand level relatively low in a libel settlement and be willing to adjust this figure as the litigation progresses. There are two separate, although related, reasons for this. First, at the outset, English rule plaintiffs know that their potential exposure to their opponents will only increase as the trial progresses. Accordingly, and with a view to killing the litigation early, their initial offer is usually much more reasonable.[71] Second, the willingness of an English rule plaintiff to settle increases as the trial progress. As suggested above, this is because their risk increases in line with the defendant's costs increasing. Some authors, such as Professors Mitchell Polinksy and Daniel Rubinfield, reject this conclusion arguing that having the U.S. switch to the English rule would lead to lower settlement rates.[72] Such arguments seem inconsistent with the statistic that approximately ninety-seven percent of all tort claims in England are terminated before trial.[73]

71. *See* Bungard, *supra* note 9, at 47.

72. Mitchell Polinksy & Daniel Rubinfeld, *Does the English Rule Discourage Low-Probability-of-Prevailing Plaintiffs?*, 27 J. Legal Stud. 519 (1998).

73. Bungard, *supra* note 9, at 47 n.197.

D. Goal (4): Encourage All Reporting and Public Comment by Media Outlets That Is Less Than Defamation

Over the last half century, the U.S. Supreme Court has sought to achieve Goal (4) by adjusting the substantive elements of defamation as a cause of action and providing increased protection to the media. The American rule, by requiring the press to incur legal costs irrespective of the outcome of litigation, has operated to undermine the incentivizing effect that these substantive changes were designed to create. Conversely, the English rule would bolster and support these substantive protections.

1. ATTEMPTS TO ACHIEVE THIS GOAL USING THE SUBSTANTIVE LAW

In 1964, in the landmark decision of *New York Times v Sullivan*, the court required that a public official plaintiff show actual malice on the part of the publisher to make out a claim in defamation;[74] in 1967, this requirement was extended to "public figures";[75] and in 1974 the court required all states to set a standard of fault greater than strict liability in respect of publications concerning private figures.[76] The rationale of the court in each case has been well-documented: the threat of large damage awards that flow from a successful defamation action will lead the press down a path of self-censorship that is contrary to the core protection that the First Amendment is designed to provide. In *Sullivan*, Justice Brennan articulated this approach, explaining "the pall of fear and timidity imposed (by large damage awards) upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."[77] Increased legal protection incentivizes the media to report robustly on matters of public interest.

It is unclear how much these substantive protections have encouraged all reporting and public comment by media outlets that donot rise to a claim for defamation. Professors Stephen Renas, Charles Hartmann and James Walker conducted a useful study into the incentivizing effects that different levels of fault (strict liability, negligence and actual

74. 376 U.S. 254, 279-80 (1964). Justice Brennan delivering the opinion of the Court stating: "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice—that is with knowledge that is was false or with reckless disregard of whether it was false or not."

75. Curtis Pub. Co. v. Butts, 388 U.S. 130, 164 (1967).

76. 418 U.S. 323, 347 (1974).

77. 376 U.S. 254, 278 (1964) (alteration in original).

malice) have on the willingness of editors to publish certain types of material.[78] Twelve percent of all daily newspaper editors were presented with four different scenarios, non-defamatory under standards of the day, but each varying in degrees of "controversy" and "risk." They were asked to rate their willingness to publish (from zero to ten) each of these stories under each of the three levels of fault. Unsurprisingly a "chilling" effect could be seen as the standard of proof moved from actual malice down to strict liability:

> The percentage of editors absolutely willing to publish declines as the standard of proof is reduced, while the percentage absolutely unwilling to publish increases as the standard of proof (is reduced).[79]

One cannot expect the actual malice standard to make every editor willing to publish all four articles. However, it is telling that, on average, only forty-five percent of the editors were absolutely willing to publish any of the four articles, even though none of them were likely to be considered "defamatory" under U.S. libel law.

a. The American Rule Undermines the Protection Provided By the Substantive Law; The English Rule Would Bolster and Support These Protections

The authors' explanation for the unwillingness of editors to publish despite legal protection underscores the chilling effect that the threat of suit, rather than the threat of a damage payout, can have on the press. They argue that the chilling effect is not uniform and is "most pronounced among papers. . .that have been sued but have not paid damages."[80] Professor Anderson argues that the chilling effect does not come solely from the judgment "since the media enjoy success rates that most other classes of tort defendant would envy."[81] Rather, it comes primarily from

78. Stephen M. Renas, Charles J. Hartmann & James L. Walker, *An Empirical Analysis of the Chilling Effect, in* THE COST OF LIBEL: ECONOMIC POLICY IMPLICATIONS 41-68 (Everette E. Dennis & Eli M. Noam eds. 1989) [hereinafter Renas et al.].

79. *Id*. at 48. The authors argue that the magnitude of chilling is not insubstantial: "A change in the standard from malice to negligence reduces the percentage of editors who are absolutely willing to publish by between 9.7 percent and 16.5 percent. A change from malice to strict liability reduces the percentage by between 13.6 percent and 28.7 percent."

80. *Id*.

81. Anderson, *supra* note 1, at 36. *See also* Smolla, *supra* note 8, at 238: "To force the media to incur huge legal costs to defend what ultimately turns out to be true creates an obvious chill on free expression." In *Gertz v Robert Welch, Inc.*, Justice White, in his dissent, questions such conclusions, arguing: "The press today is vigorous and robust. To me, it is quite incredible to suggest that threats of libel suits from private citizens are

the cost of litigating. This distinction—between the chilling effect of judgment and the chilling effect of suit-is the primary reason that the constitutional privileges established by the U.S. Supreme Court have not incentivized the press to publish with absolute confidence and without self-censorship. Although these privileges give the press comfort that they will not face large damage awards, they do not give the press comfort that they will not be sued and face high litigation costs. The primary reason for this is the American rule, which operates to undermine any potential deterring effect the constitutional privileges may have on a plaintiff's decision to sue or to continue litigating. The need for a showing of malice or negligence would logically deter a non-meritorious plaintiff from suing or compel a litigant in a long running suit to settle. For reasons discussed at Goal (1) of part III supra, the removal of the risk of paying your opponents costs makes these "logical" incentives and disincentives less compelling. An English rule would reinvigorate these constitutional privileges and make them as relevant to the decision of the plaintiff to sue or settle as they are to the decision of the judge or jury to award damages.

A further problem for editors is the inability of media defendants to rely on their constitutional privilege to dismiss a suit early on in proceedings. Constitutional privilege, and the actual malice standard, is not a test that lends itself to summary judgment. It will rarely be apparent from the pleadings alone and as such does not provide a predictable ground for a motion to dismiss.[82] Put differently, the press must incur substantial costs and progress well down the path of litigation before it can rely on the protections afforded to it by the Supreme Court. The English rule will not solve this problem; it will simply reduce the number of cases being filed that are ultimately dismissed on privilege grounds.

E. Goal (5): Discourage All Reporting That Amounts to Actionable Defamation

In addition to incentivizing the press to publish non-tortious material, the English rule better discourages the press from reporting in a manner that amounts to actionable defamation. The reasoning supporting this argument can be stated simply: the English rule punishes defamatory publication more than the American rule. The American rule

causing the press to refrain from publishing the truth. I know of no hard facts to support this proposition, and the Court furnishes none." 418 U.S. 323, 390 (1974).

82. Anderson, *supra* note 1, at 15.

requires a losing defendant to pay damages and its own legal costs; the English rule requires a losing defendant to pay damages, its own costs and the plaintiff's legal costs. Proponents of the American rule have argued that the English fee-shifting model will encourage the press to report more recklessly knowing that they will be recompensed for any expenses incurred defending publications that do not meet the very high standard required to prove of defamation. This is not an attack against the English rule; rather, it is a criticism of the proof required to prevail in defamation. So long as the law delineates acceptable conduct from unacceptable conduct, the fee-shifting model that services this law must dissuade only the conduct that is deemed unacceptable. The English rule imposes greater liability on the media for defamatory publication than the American rule and better achieves Goal (5).

IV. Conclusion

This article has argued in favor of adopting the English rule of fee-shifting for all U.S. libel litigation. It does not undertake to make a normative analysis of whether the standards set by the U.S. Supreme Court are tilted too heavily in favor of either protection of reputation or freedom of the press. Nor has it considered practical difficulties arising from implementing a fee-shifting rule that goes against the legacy of two centuries of state and federal jurisprudence. It has sought only to elucidate five key goals of libel law and determine whether, and to what extent, the American rule and English rule inhibit, do not affect, or promote the achievement of these goals. In four out of the five goals, the English rule was more apt to achieve these goals. It has a greater propensity to restore parties to their pre-infringement position than the American rule, and is more likely to incentivize optimal behavior that strengthens, rather than undermines, the force of the substantive law.