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HOW THE U.S. OCCUPATION IMPOSED ECONOMIC REFORMS ON IRAQ IRRESPECTIVE OF INTERNATIONAL LAW AS A FOUNDATION FOR THE PRESENT OIL BONANZA

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CONTENTS

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I. INTRODUCTION

Following the invasion of Iraq, the Coalition Provisional Authority ("CPA") unilaterally imposed economic restructuring on the country when international law strictly forbids altering legal institutions of an occupied territory, and Security Council Resolution 1483, which authorized the U.S. and U.K. to undertake administrative and fiduciary responsibilities, also did not sanction the reforms.[1] In March 2013, the Special Inspector General for Iraq Reconstruction produced its final report[2] and the investigation acknowledged that occupation operations were "frequently in the breach," but underscored the lesson that institutional transformations can be painful while also ultimately contributing to stability in fragile states.[3] With societal divisions and an insurgency in Iraq in 2014, Iraq is now less stable than before the 2003 invasion. Also, a rudimentary lesson in reconstruction and reform is conspicuous from assessing the cause of the drastic fluctuations and economic viability of the Iraqi population. The following chart depicts the positive correlation between oil revenue and per capita income over the past thirty years.[4]

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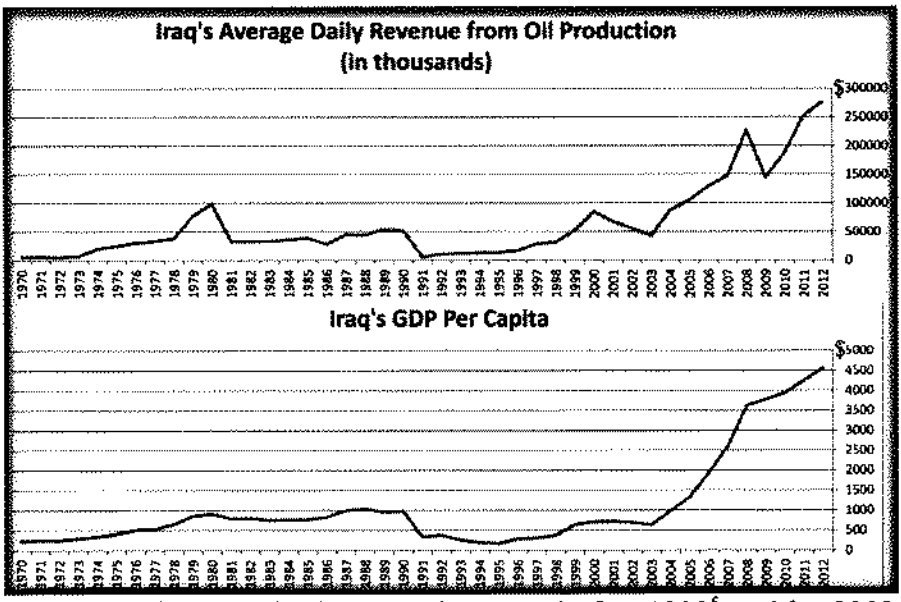
1. *See infra* Parts III, IV.

2. SPECIAL INSPECTOR GEN. FOR IRAQ RECONSTRUCTION (SIGIR), LEARNING FROM IRAQ (Mar. 2013), *available at* http://cybercemetery.unt.edu/archive/sigir/20131001083907/http://www.sigir.mil/learningfromiraq/index.html (last visited Dec. 5, 2015) [hereinafter SIGIR].

3. Stuart W. Bowen, Jr., *A Golden Moment: Applying Iraq's Hard Lessons to Strengthen the U.S. Approach to Stabilization and Reconstruction Operations*, 34 FLETCHER F. WORLD AFF. 17, 17-18 (2010).

4. Iraq's average daily revenues per year constructed with Organization of Petroleum Exporting Countries ("OPEC") ASP data for annual production multiplied by average yearly price per barrel from 1970 to 2012. *See generally Table 3.6: Daily and Cumulative Crude Oil Production in OPEC Members*, Organization of Petroleum Exporting Countries (2014), *available at* http://www.opec.org/library/Annual%20Statistical%20Bulletin/interactive/current/FileZ/Main-Datcicn/Section3.html (last visited Nov. 20, 2015) (providing Iraq's average annual oil production); U.S. Dep't of Energy, *Petroleum & Other Liquids: Cushing, OK WTI Spot Price FOB*, U.S. ENERGY INFO. ADMIN., *available at* http://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=RWTC&f=A (last visited Nov. 20, 2015) (providing annual per barrel price in US dollars from 1986 to 2012); *see Per Capita GDP at Current Prices - U.S. Dollars*, U.N. DATA, *available at* http://data.un.org/Data.aspx?d=SNAAMA&f=grID%3A101%3BcurrID%3AUSD%3BpcFlag%3A1 (last visited Nov. 20, 2015); *Historical Oil Prices Chart*, FORECASTCHART, *available at* http://www.forecast-chart.com/chart-crude-oil.html (last visited Nov. 20, 2015) (providing monthly per barrel price of oil in US dollars from 1970 to 1985).



Iraqi per capita income plummeted after 1990[5] and by 2003 Iraq was ranked seventy-first out of ninety-four developing countries for economic well-being on the U.N. Poverty index in 2003.[6] Over 80% of the Iraqi population lived in poverty.[7] The astounding plunge in income that began in the early 1990s was a direct consequence of the severe economic sanctions that the Security Council placed on the Iraqi people for over a decade following Iraq's invasion of Kuwait. In his 2006 book, former U.N. Humanitarian Coordinator for Iraq Hans C. Von Sponeck, documented the misery inflicted on the Iraqi people as "cold blooded" and explained that U.S. and U.K. leaders politically manipulated foreign relations with propaganda so that few decision-makers outside of Iraq were willing to cease the suffering.[8] The

5. Steve Shifferes, *Iraq's Economy Declines by Half*, BBC (Oct. 10, 2003, 3:02 PM), *available at* http://news.bbc.co.uk/2/hi/business/3181248.stm (last visited Nov. 20, 2015) (using alternative measures, reporting that Iraqi income went from $3600 in 1980, to $770-1020 in 2001, and to $450-610 by the end of 2003).

6. U.N. DEV. PROGRAMME [UNDP], HUMAN DEVELOPMENT REPORT: MILLENNIUM DEVELOPMENT GOALS: A COMPACT AMONG NATIONS TO END HUMAN POVERTY 247 (2003).

7. Hamada Zahawi, *Redefining the Laws of Occupation in the Wake of Operation Iraqi Freedom*, 95 CAL. L. REV. 2295, 2327 (2007) (citing UNDP ARAB HUMAN DEVELOPMENT REPORT: CREATING OPPORTUNITIES FOR FUTURE GENERATIONS (2002)).

8. H.C. VON SPONECK, A DIFFERENT KIND OF WAR: THE UN SANCTIONS REGIME IN IRAQ 13 (2006); *see also* CHALMERS JOHNSON, BLOWBACK: THE COSTS AND CONSEQUENCES OF AMERICAN EMPIRE 9 (2000) (noting that U.S. officials were

sanctions arguably violated humanitarian law[9] as hundreds of thousands of Iraqis were estimated to have died as a result of malnutrition and inadequate medical care.[10] Iraqis did not believe that they should have been punished for Hussein's act of invading Kuwait,[11] and scholars have long debated the uncertain effectiveness of unilateral and third-party sanctions on altering the objectionable policies of a target-government.[12]

The economic juncture occurred after the 2003 war. Security Council Resolution 1483 lifted economic and trade sanctions on Iraq, but real economic conditions for common Iraqis worsened after the invasion because of the chaotic economic, civil, and political conditions plaguing the country several years into the occupation.[13] Despite that it was a decade of U.S.- and U.K.-led sanctions that were

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cognizant of the suffering, with National Security Advisor Sandy Berger stating that the UN sanction program was "unprecedented for its severity in the whole of world history"). *See generally* Reem Bahdi, Book Review, 25 WINDSOR Y.B. ACCESS JUST. 365, 366-67 (2007) (reviewing HANS C. VON SPONECK, A DIFFERENT KIND OF WAR: THE UN SANCTIONS REGIME IN IRAQ (2006)). During the sanction period, the US tried to block watertankers from reaching civilians but the UN condemned the move and noted that "access to clean drinking water" was "the major cause of child deaths," and the US was concerned that vaccines for infant diseases could be used for chemical weapons, but UNICEF and the World Health Organization protested and European biological weapons experts remarked that such a claim was "flatly impossible" scientifically. NOAM CHOMSKY, HEGEMONY OR SURVIVAL 128 (2004) (citing Joy Gordon, *Cool War: Economic Sanctions as a Weapon of Mass Destruction*, HARPER'S, Nov. 2002, at 43-49).

9. RICHARD FALK, THE COSTS OF WAR: INTERNATIONAL LAW, THE UN, AND WORLD ORDER AFTER IRAQ 46-47 (2008).

10. Stefan M. Brooks, *Economic Effects of the Persian Gulf War on Iraq*, *in* THE ENCYCLOPEDIA OF MIDDLE EAST WARS: THE UNITED STATES IN THE PERSIAN GULF, AFGHANISTAN, AND IRAQ CONFLICTS 400 (Spencer C. Tucker ed., 2010) ("[I]t is estimated that anywhere from tens of thousands to hundreds of thousands—perhaps even 1 million—Iraqis, disproportionately children, died under the sanctions regimes during 1990—2003.").

11. *See* Aida Dabbas & Jillian Schwedler, *Protesting Sanctions Against Iraq: A View From Jordan*, 208 MIDDLE EAST REP. 37, 37 (1998).

12. *See* GARY CLYDE HUFBAUER ET AL., ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY 8 (3d ed. 2007); *see also* Jeffrey A. Meyer, *Second Thoughts on Secondary Sanctions*, 30 U. PA. J. INT'L L. 905, 906, 924-25 (2009); Peter L. Fitzgerald, *Pierre Goes Online: Blacklisting and Secondary Boycotts in U.S. Trade Policy*, 31 VAND. J. TRANSNAT'L L. 1, 91 (1998) ("[A]n international consensus does appear to be building that the unilateral extraterritorial application of these controls to third parties is impermissible. . . . [T]he international community is coming to regard the blacklisting of third parties, or secondary boycotts, as 'unreasonable,' and therefore an unjustified intrusion upon the sovereignty of the neutral state.").

13. Zahawi, *supra* note 7, at 2298.

solely responsible for impoverishing the Iraqi people, after the invasion, Secretary of Defense Rumsfeld stated that "Iraq [has] a completely failed economy."[14] The Bush Administration's CPA initiated a rhetoric campaign that linked Iraqi prosperity to the need to impose market and capitalism reforms[15] even though merely dropping sanctions and permitting Iraqis to freely export oil would have raised per capita income fivefold. This post-war boon was particularly noticeable because long-term trends in the per barrel market price more than quadrupled during the occupation.[16] Oil-rich countries prospered while the rest of the world hit a recession.[17]

The U.S.-led war in Iraq in 2003 devastated infrastructure[18] and the impact on U.S. taxpayers was scandalous. Prior to the invasion, the Bush Administration represented to the American public that the war would cost approximately $50 to $60 billion and repeatedly evaded inquiries from reporters about deeper and prolonged cost estimates, which were expenditures that may have also been relevant to the American economy proceeding into a recession.[19]

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14. L. PAUL BREMER III, MY YEAR IN IRAQ: THE STRUGGLE TO BUILD A FUTURE OF HOPE 114 (2006).

15. *See infra* Part II.

16. *See* Robert Bejesky, *Geopolitics, Oil Law Reform, and Commodity Market Expectations*, 63 OKLA. L. REV. 193, 273-77 (2011) [hereinafter Bejesky, *Geopolitics*] (noting also that the drastic surge in oil prices was partially due to the uncertainty and turmoil in the oil market which reverberated after the invasion and from the indeterminate impact on other OPEC and oil-producing countries).

17. Alaalhsan Salloom & Yibing Ding, *Macroeconomic Effects of the (2008-09) Global Financial Crisis on the Arab Countries*, 2 BERKELEY J. SOC. SCI. 1, 1-3 (2012) (stating that the 2008-09 "financial crisis has been described as the worst global financial crisis . . .since the Great Depression in the 1930s" but also noting that "annual GDP growth in real terms reached 5.9% for the Arab region as a whole" from 2006 to 2008).

18. Conor McCarthy, *The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq*, 10 J. CONFLICT & SECURITY L. 43, 62 (2005) (explaining that the Hague Conventions make it clear that it is "not permissible for an occupying power to allow an occupied territory to fester in a state of economic, social, political and infrastructural retardation created by the conflict from which the occupation has resulted."). Hostility may be intense when civilians, cultural items, and infrastructure are inadequately protected during conflict as the laws of war require. *See* Wayne Sandholtz, *The Iraqi National Museum and International Law: A Duty to Protect*, 44 COLUM. J. TRANSNAT'L L. 185, 203-05 (2005).

19. *See* Robert Bejesky, *Politico-International Law*, 57 LOY. L. REV. 29, 84-91 (2011) [hereinafter Bejesky, *Politico*] (discussing the Bush administration's evasion of costs and neglect of economic consequences); Michael Boyle, *How the US Public Was Defrauded by the Hidden Cost of the Iraq War*, GUARDIAN (Mar. 11, 2013, 8:30 AM), *available at*

Due to the near nine-year occupation, expenditures mounted, and may cost American taxpayers $3.7 trillion when considering continuing medical expenditures for American troop injuries.[20] Despite the astronomical figure of $3.7 trillion, the Special Inspector General for Iraq Reconstruction stated that $60 billion was spent on reconstruction and only about $21 billion of that amount was clearly earmarked for construction projects, with the rest predominantly being spent on construction-related security objectives.[21]

Congressional debate was waged over the extent that Iraq should have funded its own reconstruction,[22] but it now appears that Iraq has paid in another way. The Bush Administration continued to maintain that the Iraq War was not executed over an interest in oil, but affirmed that the U.S. would "protect Iraq's natural resources" from Hussein's regime,[23] and stripped the pre-war oil contracts that China, France, and Russia had consummated with Hussein's regime.[24] In April 2013, CNN reported on Iraq's metamorphosis from a nationalized oil industry prior to the invasion to a privatized industry that is now dominated by Western oil companies: "Yes, the Iraq War was a war for oil, and it was a war with winners: Big Oil."[25] Iraqis

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http://www.theguardian.com/commentisfree/2013/mar/11/us-public-defrauded-hidden-cost-iraq-war (last visited Nov. 20, 2015) (stating that prior to the war "the Bush administration estimated that it would cost $50-60 [billion] to overthrow Saddam Hussein and establish a functioning government . . . Some estimates suggest[] that it may even eventually cost as much as $3.7 [trillion.]").

20. Boyle, *supra* note 19 (noting that during the occupation, the extent of expenditures allocated for the Iraq War was not clearly designated on the American budget).

21. SIGIR, *supra* note 2, at 9; Boyle, *supra* note 19 (estimating $90 billion).

22. Albio Sires, *Iraq Should Pay for Its Reconstruction*, HILL (Mar. 14, 2007, 11:40 AM), *available at* http://thehill.com/blogs/congress-blog/politics/28785-iraq-should-pay-for-for-its-reconstruction (last visited Nov. 20, 2015) ("American taxpayers have already paid $379 billion," and H.R. 1325 was introduced to "require[] the Iraqi government to match all U.S. funds spent for reconstruction in Iraq.").

23. *In the President's Words: The Rights and Aspirations of the Iraqi People*, WHITE HOUSE (July 8, 2004), *available at* http://georgewbush-whitehouse.archives.gov/infocus/iraq/rightsandasp.html (last visited Nov. 20, 2015) (*citing* President George W. Bush, Address at the Washington Hilton Hotel (Feb. 26, 2003)).

24. *See* Bejesky, *Geopolitics*, *supra* note 16, at 209, 221, 226-27.

25. Antonia Juhasz, *Why the War in Iraq was Fought for Big Oil*, CNN (Apr. 15, 2013, 7:42 AM), *available at* http://www.cnn.com/2013/03/19/opinion/iraq-war-oil-juhasz/ (last visited Nov. 20, 2015); Christopher Layne, *From Preponderance to Offshore Balancing*, *in* THE USE OF FORCE: MILITARY POWER AND INTERNATIONAL POLITICS 283, 285 (Robert J. Art & Kenneth N. Waltz eds.,

were not left aghast over this outcome because seven years earlier a University of Michigan Institute for Social Research poll revealed that 76% of Iraqis believed that the invasion was "to control Iraqi oil."[26] Antonia Juhasz, author or *The Tyranny of Oil* (2008) and *The Bush Agenda* (2006), emphasizes that "ExxonMobil, BP and Shell were among the oil companies that 'played the most aggressive roles in lobbying their governments to ensure that the invasion would result in an Iraq open to foreign oil companies.'"[27]

The extraordinary per capita income surge for Iraqis in recent years is unrelated to the CPA's capitalist legal transplants, and, over the long-run, it is not apparent that Iraqis should be grateful to the U.K. and the U.S. after being punished economically for over a decade

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6th ed. 2004) (calling access to Persian Gulf oil a vital U.S. security interest); Nafeez Ahmed, *Iraq Blowback: Isis Rise Manufactured by Insatiable Oil Addition*, GUARDIAN (June 16, 2014, 12:17 PM), *available at* http://www.theguardian.com/environment/earth-insight/2014/jun/16/blowback-isis-iraq-manufactured-oil-addiction (last visited Nov. 20, 2015) ("The meteoric rise of Isis is a predictable consequence of a longstanding US-led geostrategy in the Middle East that has seen tyrants and terrorists as tools to expedite access to regional oil and gas resources."). France, China, and Russia, all permanent Security Council members, also recently were awarded contracts in Iraq. Press Release, Technip, Technip awarded FEED contract in Basra, Iraq (Apr. 10, 2014), *available at* http://www.technip.com/en/press/technip-awarded-feed-contract-basra-iraq (last visited Nov. 20, 2015); Tim Arango & Clifford Krauss, *China Is Reaping Biggest Benefits of Iraq Oil Boom,* N.Y. TIMES (June 2, 2013), *available at* http://www.nytimes.com/2013/06/03/world/middleeast/china-reaps-biggest-benefits-of-iraq-oil-boom.html?pagewanted=all&_r=0 (last visited Nov. 20, 2015); Andrew Critchlow, *Russia's Lukoil Opens Giant Iraq Oil Field, Adding to Crude Glut*, TELEGRAPH (Mar. 29, 2014, 4:58 PM), *available at* http://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/10731708/Russias-Lukoil-opens-giant-Iraq-oil-field-adding-to-crude-glut.html (last visited Nov. 20, 2015). These later oil concessions would presumably increase the interest of these key countries in ensuring support for the investment-friendly government and legal structure. Peter Ford, *Why China Stays Out of Islamic State Fight, For Now*, CHRISTIAN SCI. MONITOR (Sept. 26, 2014), *available at* http://www.csmonitor.com/World/Asia-Pacific/2014/0926/Why-China-stays-out-of-Islamic-State-fight-for-now (last visited Nov. 20, 2015) (raising the fact that China has significant oil contracts in Iraq but did not want to get involved as a member of any "coalition" after the US began bombing ISIS because China has "mistrust of US intentions.").

26. *Iraqi Attitudes: Survey Documents Big Changes*, U. MICH. NEWS SERV. (June 14, 2006), *available at* http://web.archive.org/web/20060714022315/http://www.umich.edu/news/index.html?Releases/2006/Jun06/r061406a (last visited Nov. 20, 2015).

27. Dahr Jamail, *Western Oil Firm Remain as US Exits Iraq*, AL JAZEERA (Jan. 7, 2012, 6:45 PM), *available at* http://www.aljazeera.com/indepth/features/2011/12/201112281313407164l.html (last visited Oct. 4, 2015).

during Hussein's rule. Moreover, despite that Iraq's per capita income has significantly increased in recent years, some percentage of the improved domestic production represents value collected by multinational oil companies. Select individuals and groups in Iraq have also enriched themselves while the common Iraqi is destitute, and it is this desperation and hostility toward Prime Minister Maliki, a twenty-three year Iraqi defector-exile who monopolized oil revenues and licenses,[28] that are underlying causes of the uprising that swept the country with violence in 2014.[29]

This current framework unfolded gradually in a country with a population subject to a humanitarian catastrophe and initiated with

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28. Christopher Helman, *How Iraq's Kurds May Be The Unlikely Losers in the ISIS Chaos*, FORBES (June 12, 2014, 5:51 PM), *available at* http://www.forbes.com/sites/christopherhelman/2014/06/12/how-iraqs-kurds-may-be-the-unlikely-losers-in-the-isis-chaos/ (last visited Nov. 20, 2015) ("For years the Kurds have been at loggerheads with the oil ministry in Baghdad" because Kurds want freedom to export oil but "Baghdad insists that only the federal government can license exports and that unilateral exports are blatantly illegal."). Maliki is an Iraqi exile of twenty-three years and was ironically personally welcomed into that leadership position by George W. Bush. Michael Abramowitz, *Bush's Gut Feeling On Maliki Is Positive*, WASH. POST (June 18, 2006), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/06/17/AR2006061700662.html (last visited Nov. 20, 2015).

29. *Analyzing Potential Challenges of Fighting the Islamic State*, PBS NEWSHOUR (Sept. 11, 2014, 6:22 PM), *available at* http://www.pbs.org/newshour/bb/analyzing-potential-challenges-fighting-islamic-state/ (last visited Nov. 20, 2015) ("ISIS emerged because of certain conditions in this region, disorder, dysfunction, alienation, the residue of European colonialism" and the "key facts are that efforts on the part of the United States to use military power to bring . . . stability [and] democracy to this region . . . have actually fostered greater instability."); Shashank Bengali & Patrick J. McDonnell, *Resignation of Prime Minister Maliki Gives Rise to Hope in Iraq*, L.A. TIMES (Aug. 15, 2014, 5:28 PM), *available at* http://www.latimes.com/world/middleeast/la-fg-iraq-maliki-resignation-relief-20140815-story.html (last visited Nov. 20, 2015) ("Sunni leaders accuse Maliki's Shiite-dominated government and security forces of marginalizing members of their sect as well as carrying out unlawful abductions and other abuses. Those policies, they say, have fueled support for the Islamic State militants."); Michael Stephens, *Iraq Crisis: How Extreme Are the Fighters in Isis?*, BBC (June 21, 2014), *available at* http://www.bbc.com/news/world-middle-east-27945954 (last visited Nov. 20, 2015) ("Travelling around the country in recent days, I have been shocked at the levels of deprivation that some of Iraq's citizens have endured. [The recent insurgency is not driven by a jihadist mentality but] is a more general uprising of large groupings of disaffected communities throughout north-western Iraq and a product of years of social exclusion, poor governance and corruption by the Iraqi government."); *Iraq in Ruins: Post-War Life Overshadowed by Crumbling Infrastructure, Corruption, Poverty*, RT TV (May 17, 2013, 9:56 AM), *available at* http://rt.com/news/iraq-poverty-war-crisis-414/ (last visited Nov. 20, 2015) ("Iraqi infrastructure is constantly failing and people are forced to beg.").

Bush Administration and CPA rhetoric that promoted basic market economic reforms and evolved to deeper capitalist reforms with tacit acceptance akin to the same reason a frog meets its fate by not leaping out of a pot of hot water as it progressively gets hotter. The period of CPA governance and its dictates are critical to the present status of Iraq's political and economic system because for the past eight years Prime Minister Maliki became a dictator, established a mafia to terrorize society, suppressed political dissent, corruptly benefited himself and his cronies, and consequently locked in reforms without the democratic process functioning.[30] Part II begins with the initial rhetoric, which was that Iraq needed a market economy to nourish democratization and Part III discusses how the CPA transplanted new capitalist codes wholesale on Iraq. Part IV emphasizes how privatization programs were advocated and how unrestricted foreign investment rules were instituted in conjunction with a free-for-all dollarization of the Iraqi economy, which furnished purchasing power and surreptitiously enhanced favoritism for the occupation due to humanitarian dependence. Part V discusses reconstruction contracts in Iraq, which was the occupation's paramount obligation because of the devastation wrought by bombing and war operations. However, funding allocated to rebuilding represented only one-half of one

30. *See* Zaid Al-Ali, *How Maliki Ruined Iraq*, FOREIGN POL'Y (June 19, 2014), *available at* http://www.foreignpolicy.com/articles/2014/06/19/how_maliki_ruined_iraq_armed_forces_isis (last visited Nov. 20, 2015) (writing of Maliki's suppression of dissent and killing, torturing, and jailing of protestors); Lord Maginnis, *A Fictitious ISIL to Scare Us Away From the Truth in Iraq*, HUFFINGTON POST (Aug. 15, 2014, 10:59 AM), *available at* http://www.huffingtonpost.co.uk/lord-maginnis/iraq-isil_b_5494529.html (last visited Nov. 20, 2015) (explaining that "Corruption in the government and those affiliated to the government is almost unimaginable with billions of dollar embezzled and laundered, thus crippling the country's economy" and a member of the UK House of Lords writing that "Maliki has created a Mafia-like network of criminals and assassins to eliminate the voice of opposition at every level" and estimated that an average of a thousand Sunnis have been killed every month for the past decade by Maliki's assassins); Arwa Damon & Mohammed Tawfeeq, *Iraq's Leader Becoming a New 'Dictator,' Deputy Warns*, CNN (Dec. 13, 2011, 6:33 PM), *available at* http://www.cnn.com/2011/12/13/world/meast/iraq-maliki/ (last visited Nov. 20, 2015) (reporting that Iraqi Deputy Prime Minister Saleh al-Mutlag expressed to CNN that he was "shocked" to witness President Barack Obama address Maliki as "the elected leader of a sovereign, self-reliant and democratic Iraq" when Maliki had been ignoring power-sharing institutions and when the US left Iraq "with a dictator" who systematically suppresses dissent with impunity, and further stating that the country is "going toward a dictatorship" and "[p]eople are not going to accept that, and most likely they are going to ask for the division of the country. And this is going to be a disaster").

percent of the actual total U.S. taxpayer spending for the Iraq war and occupation[31] and the functioning of the procurement process provides lessons of an abysmal application of the Rule of Law.

II. SIMMERING: IMPOSING AN AGENDA BY INITIATING LESS CONTROVERSIAL DISCOURSE

The Bush Administration's rationale for invading and occupying Iraq was to disarm the country of supposedly existing chemical, biological, and nuclear weapon programs, which ultimately did not exist.[32] Yale Law Professors Ackerman and Hathaway punctuate that the Authorization for the Use of Military Force was a limited authorization to use the U.S. military conditioned on there being an actual imminent threat, which means that when the White House began offering additional rationalizations after the war, particularly of humanitarian intervention, "such talk was blatantly inconsistent with the plain language of the 2002 resolution."[33] In 2008, after the Senate Select Committee on Intelligence ("SSCI") completed its five-year investigation, the SSCI Chairman remarked: "In making the case for war, the Administration repeatedly presented intelligence as fact when it was unsubstantiated, contradicted or even nonexistent. . . . Sadly, the Bush Administration led the nation into war under false pretenses."[34] The *post facto* rationalization of "liberating" the country was not a legitimate justification for war, but political liberalization under *jus post bellum* can reasonably be

31. Using the $21 billion of actual construction contract spending divided by an estimated $3.7 trillion in war and occupation spending. Boyle, *supra* note 19. This means that the other 99.5% paid by US taxpayers represented direct and derivative costs for the near nine-year military occupation and suggests that quibbling over whether Iraq should pay for its own reconstruction was almost incidental relative to costs borne by American taxpayers for non-reconstruction operations.

32. Robert Bejesky, *Intelligence Information and Judicial Evidentiary Standards*, 44 CREIGHTON L. REV. 811, 875-82 (2011).

33. *See* Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 464 (2011); *see also* Robert Bejesky, *Weapon Inspections Lessons Learned: Evidentiary Presumptions and Burdens of Proof*, 38 SYRACUSE J. INT'L L. & COM. 295, 350-69 (2011) [hereinafter Bejesky, *Weapon Inspections*].

34. Press Release, Senate Intelligence Committee, Senate Intelligence Committee Unveils Final Phase II Reports on Prewar Iraq Intelligence (June 5, 2008), *available at* http://web.archive.org/web/20080606162033/http://intelligence.senate.gov/press/record.cfm?id=298775 (last visited Nov. 21, 2015).

interpreted to mean establishing institutions for democracy, holding elections, and instituting human rights protections.[35] These reforms, during a foreign occupation, are particularly logical because it is the citizenry who will live under the laws and should have the self-determination right to choose the market structure, the degree of economic openness, and protectionist measures. Instead, the CPA and Bush administration officials assumed a much deeper prerogative by dictating a unilaterally-chosen economic reform agenda for Iraq and did so piecemeal by commencing with discourse that annexed less controversial market principles with democratization and eventually progressed to an assumption that complete economic openness and unrestricted capitalism are inseparable from democratization, which is not a mainstream or consensus international community norm.[36]

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35. RICHARD N. HAASS, INTERVENTION: THE USE OF AMERICAN MILITARY FORCE IN THE POST-COLD WAR WORLD 13 (rev. ed. 1999) (arguing when states violate minimum standards by committing, permitting, or threatening intolerable acts against their own people or other nations, then some of the privileges of sovereignty are forfeited); Robert Bejesky, *Pruning Non-Derogative Human Rights Violations into an Ephemeral Shame Sanction*, 58 LOY. L. REV. 821, 829-31 (2012) (noting that ensuring adequate human rights standards are met is a legitimate occupier prerogative as universal standards are required in a number of human rights agreements). With respect to assisting the emergence of institutions of self-government, self-determination permits a people with a common connection to a given territory to have the right to govern their own affairs, which might include state sovereignty, as was critical during the era of decolonization. *See* G.A. Res. 2625 (XXV), at 121 (Oct. 24, 1970); G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 21 (Dec. 10, 1948) ("The will of the people shall be the basis of the authority of government."); International Covenant on Civil and Political Rights art. 1, *opened for signature* Dec. 19, 1966, S. EXEC. DOC. NO. 95-20, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) ("[a]ll peoples have the right of self-determination," the right to "freely determine their political status and freely pursue their economic, social, and cultural development.").

36. James Thuo Gathii, *Commerce, Conquest, and Wartime Confiscation*, 31 BROOK. J. INT'L L. 709, 737 (2006) (stating that not even the US has such a laissez faire economy as the one that the CPA imposed on Iraq); Edwin Villmoare, *The Fog of Nation Building: Lessons from Kosovo?*, 18 TRANSNAT'L LAW. 25, 26 (2004) (mentioning that from the perspective of domestic institution building, "there can be no genuine progress in any one of these initiatives [of democracy, economic development, and nation building] if there is not progress in all," but also recognizing the fairly universal failures outside the West). Markets are the dominant ideology but no country in the world is completely open to foreign investment and trade, and no newly emerging market economy would likely abruptly open its banking industry without some foreign ownership restrictions or protectionist regulations. James R. Barth, Gerald Caprio, Jr. & Ross Levine, *Bank Regulation and Supervision in 180 Countries from 1999 to 2011*, 5 J. FIN. ECON. POL'Y 111, 177 (2013) (noting that in a study of 180 countries over the 1999 to 2011 period, "[t]here is substantial heterogeneity of bank regulatory and supervisory policies across countries" but there has been some convergence over the past dozen years).

For example, the Bush Administration's September 2002 National Security Strategy states: "America will encourage the advancement of democracy and economic openness in . . . nations, because these are the best foundations for domestic stability and international order."[37] CPA Administrator Paul Bremer stated: "A free economy and a free people go hand in hand. History tells us that substantial and broadly held resources, protected by property rights, are the best protection of political freedom. Building such prosperity in Iraq will be a key measure of our success here."[38] These propositions are not inconsistent with basic reform agendas; even communist systems floundered when they endeavored to completely abolish market mechanisms[39] and the U.S. and Europe traversed several decades in which socialism, the welfare state, and more public utilities were the norm.[40]

Even the most ambitious World Trade Organization ("WTO") members traversed intense domestic political debates over how certain industries and commodities would react to freer trade. Joel I. Klein, Acting Assistant Att'y Gen., U.S. Dep't of Justice, A Note of Caution with Respect to a WTO Agenda on Competition Policy, Presented at The Royal Institute of International Affairs (Nov. 18, 1996) (noting the "intense interest at the intersection of trade and competition policy" at the time of WTO negotiations).

37. EXEC. OFFICE OF THE PRESIDENT, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, fwd. (2002).

38. Robert Looney, *The Neoliberal Model's Planned Role in Iraqi's Economic Reconstruction*, 57 MIDDLE E. J. 568, 574 (2003).

39. CHARLES E. LINDBLOM, POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS 11 (1977) (stating that the Soviet Union, Cuba, and other communist system relied on markets, money, and prices as a method of organizing transactions in society for consumer spending). Communist and capitalist systems are predominantly distinguished by the former's authoritarian role in generating production plans, but even the Russian people were able to accumulate savings and hold rubles in bank accounts. PHILIP ROEDER, RED SUNSET: THE FAILURE OF SOVIET POLITICS 152-53 (1993).

40. THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 154 (Arthur Goldhammer trans., Belknap Press 2014) (2013) (stating that Europeans in the post-World War II era believed that capitalism was being eradicated); PAUL PIERSON, DISMANTLING THE WELFARE STATE?: RAEGAN, THATCHER AND THE POLITICS OF RETRENCHMENT 23, 39 (1994) (stating that welfare states became the norm across advanced industrialized democracies, with 30% to 60% of GNP circulating through government programs). Keynesian economic principles balanced complete socialization of the economy and unbridled capitalism. Peter A. Hall, *Conclusion: The Politics of Keynesian Ideas*, *in* THE POLITICAL POWER OF ECONOMIC IDEAS: KEYNESIANISM ACROSS NATIONS 361, 364-66 (Peter A. Hall ed., 1989). Every capitalist democracy committed itself to providing public goods and social insurance and engaged in macroeconomic management to avert "working-class radicalization." ROBERT FRANZESE, JR., MACROECONOMIC POLICIES OF DEVELOPED DEMOCRACIES 2, 9, 14 (2002) (further noting that only six of the 21

A population surely desires economic prosperity, which will yield more societal stability,[41] but it is crucial for the population to rationally choose its own market formulation because the population could later be offended by the manner in which reforms are imposed and how inequalities manifested, which may undermine effective political institutions.[42] In her book, *World on Fire,* Yale Law Professor Amy Chua states that "contrary to conventional wisdom, markets and democracy—at least in the form in which they're currently being promoted—may not be mutually-reinforcing in the developing world."[43] Creating a market system with new laws in a developing country *does not* decidedly translate into imposing unrestricted capitalism, favoring privatization of available public assets, and promulgating undue "shock treatment,"[44] all of which are not congruous with the gradual capitalist evolutions of developed Western economies. Joseph Stiglitz, Nobel Laureate in Economics and former Chief Economist at the World Bank, published an editorial responding to the Bush administration's use of "shock therapy" capitalism in Iraq. Stiglitz wrote:

> [T]here is a broad consensus that shock therapy, at least at the level of microeconomic reforms, failed, and that countries (Hungary, Poland, and Slovenia) that took the gradualist approach to privatization and the

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economically advanced democracies studied kept total public flows below 60% of their Gross Domestic Product ("GDP") through 1990). Socialism was a middle ground between strict capitalism and communism.

41. *See* 148 CONG. REC. H1773-05(daily ed. May 1, 2002) (statement of Rep. Watts) ("[W]e must reach out to developing nations across the globe, often beset by forces of terror, and demonstrate how free markets, open trade, and private enterprise under the rule of law can lead to prosperity for their citizens. Our national security improves when global stability prevails."); *Office of the Coordinator for Reconstruction and Stabilization*, U.S. DEP'T STATE, *available at* http://2001-2009.state.gov/s/crs/ (last visited Nov. 21, 2015) (espousing that its mission was "to prevent or prepare for post-conflict situations, and to help stabilize and reconstruct societies in transition from conflict or civil strife, so they can reach a sustainable path toward peace, democracy and a market economy."). Market mechanisms and capitalism are effective at developing society and wealth by delegating economic ordering and emphasizing personal responsibility, but the problem is that imposed laws and processes without regard to the desires of the Iraqi people and generating socioeconomic turmoil undermined what market reforms were designed to achieve.

42. *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 174 (1980) (stating that in societies where there is private ownership and excessive disparities in wealth, inequalities without redistribution from the rich can lead to significant dissent).

43. Amy Chua, *The Profitable and the Powerless: International Accountability of Multinational Corporations: The Sixty Annual Grotius Lecture: World on Fire*, 19 AM. U. INT'L L. REV. 1239, 1240 (2004).

44. *See generally* NAOMI KLEIN, THE SHOCK DOCTRINE (2007).

> reconstruction of institutional infrastructure managed their transitions far better than those that tried to leapfrog into a laissez-faire economy.
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> . . . .
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> This record suggests that one should think twice before trying shock therapy again. But the Bush administration, backed by a few handpicked Iraqis, is pushing Iraq towards an even more radical form of shock therapy than was pursued in the former Soviet world. Indeed, shock therapy's advocates argue that its failures were due not to excessive speed - too much shock and not enough therapy - but to insufficient shock.[45]

Despite the evidence available in case studies indicating that shock therapy failed to quickly blossom into prosperity, the U.S. occupation reduced criticism for its own lack of conscientiousness over the abrupt and sweeping capitalistic dictates by presenting the reforms as mainstream and blessed by international economic institutions. The CPA reportedly submitted drafts of CPA orders to the World Bank and International Monetary Fund ("IMF") for comment[46] and the World Bank and IMF "strongly urged" that Iraq be made "one of the most open economies in the world" for foreign investment.[47] Besides the fact that a handful of the most economically powerful countries, led by the U.S., have traditionally been able to leverage voting power and compel policies within the Bretton Woods Institutions ("BWI")[48] and the fact that there was actually no public

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45. Joseph E. Stiglitz, *Iraq's Next Shock Will Be Shock Therapy*, PROJECT SYNDICATE (Feb. 12, 2004), *available at* http://www.project-syndicate.org/commentary/iraq-s-next-shock-will-be-shock-therapy (last visited Nov. 21, 2015).

46. Brett H. McGurk, *Revisiting the Law of Nation-Building: Iraq in Transition*, 45 VA. J. INT'L L. 451, 460 (2005).

47. *Financial Reconstruction in Iraq: Hearing Before the Subcomm. on Int'l Trade & Fin. of the Comm. on Banking, Hous. & Urban Affairs.*, 108th Cong. 53 (2005) [hereinafter *Financial Reconstruction in Iraq*] (statement of M. Peter McPherson, former CPA Director of Economic Development) (commenting that the CPA's investment laws made Iraq "the most open economy in the region - and frankly one of the more open economies of the world" and that those initiatives were "strongly urged" by the World Bank during briefings with CPA).

48. *See* Kristen E. Boon, *"Open for Business": International Financial Institutions, Post-Conflict Economic Reform, and the Rule of Law*, 39 N.Y.U. J. INT'L L. & POL. 513, 574 n.222 (2007); ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 503 (2002); PATRICIA ADAMS, ODIOUS DEBTS: LOOSE LENDING, CORRUPTION, AND THE THIRD WORLD'S ENVIRONMENTAL LEGACY 67 (1991) (noting that the IMF and World Bank, at creation, were required to be "beyond political influence of any one country" and not be "unaccountable"). Responsibility

record of the World Bank and IMF advice and therefore no certainty that this advice was incorporated into the orders adopted by the CPA,[49] the CPA was not beholden to the World Bank's advice and international economic institutions cannot exempt the CPA from adhering to restrictions of occupation law. The CPA owed its fiduciary obligations to the Iraqi people. However, what more can be said about the prospect for compromising the integrity of an international institution after Bush appointed Paul Wolfowitz, the same neoconservative war hawk who advocated false claims that led to the Iraq War[50] and who lacked experience in economic development,[51] to the position of president of the World Bank.[52]

The 1990s "Washington Consensus" pressured countries to fortify the free flow of investment and prodded structural adjustment, austerity, and privatization programs, which proved controversial and manipulative.[53] The U.N., IMF, World Bank, and other international

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can be shirked when the institution or the state is employed as the unit of analysis without recognizing that both the dominate state and the institution can also be perceived as one in the same or at least incorporate the same interests, values, and assumptions. What was implemented for Iraq appears to go well beyond published World Bank Guidelines to support market economies. Alan K. Audi, *Iraq's New Investment Laws and the Standard of Civilization: A Case Study on the Limits of International Law*, 93 GEO. L.J. 335, 350-51 (2004).

49. Boon, *supra* note 48, at 550.

50. *See* Bejesky, *Politico*, *supra* note 19, at 38-52 (discussing advocacy of the neoconservative group that planned for and advocated for the Iraq War long before the invasion).

51. *See* Liam Halligan, *The World Bank Will Be Hated*, TELEGRAPH (Mar. 20, 2005, 12:01 AM), *available at* http://www.telegraph.co.uk/finance/2912396/The-World-Bank-will-be-hated.html (last visited Nov. 20, 2015) (reporting that Nobel Laureate in economics Joseph Stiglitz stated about Wolfowitiz's appointment that "[t]he World Bank will once again become a hate figure" and his concern is that "the World Bank will now become an explicit instrument of US foreign policy"); *see generally* PETER J. HAMMER, CHANGE AND CONTINUITY AT THE WORLD BANK: REFORMING PARADOXES OF ECONOMIC DEVELOPMENT 163 n.13 (2013) (reporting that after Wolfowitz's candidacy for the World Bank position was announced, Columbia University Economics Professor Jeffrey Sachs stated that "it's time for other candidates to come forward who have experience in development . . . This is a position on which hundreds of millions of people depend for their lives").

52. Mark Tran, *Bush Picks Wolfowitz to Head World Bank*, GUARDIAN (Mar. 16, 2005, 7:35 AM), *available at* http://www.theguardian.com/business/2005/mar/16/usnews.paulwolfowitz (last visited Nov. 20, 2015).

53. *See generally* JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2002); Antonio Perez, *Prescriptions for Iraq, Predictions for Russia and Performance for China: Legal Frameworks for Economic Transition in Iraq - Occupation Under the Law of War vs. Global Governance Under the Law of Peace*, 18 TRANSNAT'L LAW. 53, 53 (2004) (stating that the Washington Consensus

institutions were never authorized to impose lawmaking on foreign countries[54] and must instead respect the domestic economic and political sovereignty of countries.[55] Becoming a member of the IMF and promising to adhere to principles of "good governance," to implement transparent financial and economic policy, and to assure financial accountability,[56] has never clearly granted the IMF a right to impose austerity and privatization programs.[57] Instead, the IMF resolutely impels ultimatums as conditions on loans,[58] including when

consistently was under attack); Audi, *supra* note 48, at 360 (noting discontent with the Washington Consensus); John Williamson, *What Should the World Bank Think About the Washington Consensus?*, 15 WORLD BANK RES. OBSERVER 251, 251-52, 255 (2000) (scholar who coined the term "Washington Consensus" explaining that he intended the term to apply to "market fundamentalism," that the policies that were implemented by the Bank may have been more expansive than his definition, and that it is incorrect to presume that the policies implemented correctly represent the standards that do garner significant unanimity).

54. *See* NDIVA KOFELE-KALE, THE INTERNATIONAL LAW OF RESPONSIBILITY FOR ECONOMIC CRIMES: HOLDING STATE OFFICIALS INDIVIDUALLY LIABLE FOR ACTS OF FRAUDULENT ENRICHMENT 396 (2006) (noting the traditional role of the World Bank and IMF that changed from merely lending to a law-making role by using conditionality).

55. Articles of Agreement of the International Monetary Fund art. IV, § 3(b), July 22, 1944, 60 Stat. 1401, 2 U.N.T.S. 39 (stating that in exchange for member countries permitting the IMF to consent to monitoring of a member country's financial flows, the IMF must "respect the domestic social and political policies of members."); Articles of Agreement of the International Bank for Reconstruction and Development art. IV, § 10, *opened for signature* Dec. 27, 1945, 60 Stat. 1440, 2 U.N.T.S. 134 ("The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned.").

56. *Code of Good Practices on Transparency in Monetary and Fiscal Policies: Declaration of Principles*, INT'L MONETARY FUND 5, 13-15 (Sept. 26, 1999), *available at* http://www.imf.org/external/np/mae/mft/code/eng/code2e.pdf (last visited Nov. 21, 2015).

57. *See generally* Naomi Klein, *Bomb Before you Buy: The Economics of War*, 2 SEATTLE J. FOR SOC. JUST. 331, 332-334 (2004) (noting that countries across the world have banded together in dissent to IMF recommendations and rejecting privatizations).

58. *See* Dustin Sharp, *The Significance of Human Rights for the Debt of Countries in Transition*, *in* MAKING SOVEREIGN FINANCING AND HUMAN RIGHTS WORK 47, 50 (Juan Pablo Bohoslavsky & Jernej Letnar Černič eds., 2014) (emphasizing that the IMF and other international financial institutions have intensely influenced country spending and set conditions for loans, such as with structural adjustment programs); *see* Boon, *supra* note 48, at 526-28 (noting that while nothing in the World Bank and IMF Charters, as agreed upon by member or as official policies, authorizes the economic institutions to engage in lawmaking, since the late-1990s, the World Bank and IMF have explicitly advocated legal and judicial reform projects and have provided advice and even draft laws on banking, taxation, finance, telecommunications, commercial law, and other fiscal matters). The programs generally advocate liberalization, minimal government regulation,

the borrowing country may not have been primarily to blame for the economic distress ultimately leading to the reliance on BWIs.[59]

Experts have maintained that the BWIs' neoliberal dictates compounded the global financial crisis in the late-1990s[60] and relegated poor countries to a state of financial dependency.[61] Consequently, one might conceive that the Bretton Woods institutions would relish the opportunity to render similar counsel just a few years later and introduce neoliberal reform on a developing country with an enormous financial potential that could be achieved by lifting sanctions on oil exports and tapping more oil wells to service future debt obligations. However, instead of permitting Iraq to reach a point of self-sufficiency, early dependency was implanted and conditions were imposed even though it was a decade of external sanctions that crippled Iraq's economy. In September 2004, a United Nations World Food Program investigation discovered that 6.5 million Iraqis, or 25%

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and maximizing incentives for investment and clearly promote self-interested purposes of the institutions. *See id.* at 529, 532; *but see* IBRAHIM F. I. SHIHATA, THE WORLD BANK IN A CHANGING WORLD 82 (1991) (former World Bank General Counsel noting that there are limits to recommendations).

59. *See generally* Robert Bejesky, *Currency Cooperation and Sovereign Financial Obligations*, 24 FLA. J. INT'L L. 91, 104-24 (2012) [hereinafter Bejesky, *Currency Cooperation*] (expressing that a country's financial and economic distress may have been caused by or intensified by global economic conditions or odious regimes (rather than a regime with a legitimate nexus to the populace), that the IMF may grant loans to alleviate a crisis to prop up the currency and place conditions on receipt of loans, and that the conditions may leave the populace with permanent institutions even if the populace or a legitimate government did not cause the conditions requiring the economic aid).

60. *See* Perez, *supra* note 53, at 53; Graciana del Castillo, *When the Fighting Stops: Economic Reconstruction of War-Torn Countries: The Role of the International Financial Institutions*, 38 SETON HALL L. REV. 1265, 1267 (2008) (noting that the post-Cold War reconstruction agenda has not been that successful); *see e.g.* Joseph E. Stiglitz & Martin Guzman, *Argentina Default? Griesafault is Much More Accurate*, GUARDIAN (Aug. 7, 2014, 11:37 AM), *available at* http://www.theguardian.com/business/2014/aug/07/argentina-default-griesafault-more-accurate (last visited Nov. 21, 2015) ("For Argentina, the path to its 2001 default started with the ballooning of its sovereign debt in the 1990s, which occurred alongside neoliberal 'Washington Consensus' economic reforms that creditors believed would enrich the country. The experiment failed, and the country suffered a deep economic and social crisis, with a recession that lasted from 1998 to 2002. By the end, a record-high 57.5% of Argentinians were in poverty, and the unemployment rate skyrocketed to 20.8 %.").

61. Fantu Cheru (Independent Expert), *Effects of Structural Adjustment Policies on the Full Enjoyment of Human Rights*, ¶ 30, U.N. Doc. E/CN.4/1999/50 (Feb. 24, 1999) ("The countries of sub-Saharan Africa, with their poor credit rating, have largely been turned into an IMF 'macroeconomic guinea pig' since they depend largely on resources from the multilateral institutions.").

of the population, "remain highly dependent on [government] food rations,"[62] but three months later, Iraq's Interim Vice President Abdel Mahdi extemporized about IMF austerity conditions being imposed on Iraq in exchange for loans: "We really need to work on our subsidy side. Subsidies are taking almost 60 percent of our budget. So this is something we have to work on."[63] The IMF agreed to loan Iraq $2.5-$4.3 billion over three years providing its budgetary directives were implemented.[64] IMF conditions were introduced to slash food subsidies and other public benefits, as they were in other countries.[65]

III. GETTING HOTTER: IMPOSING NEW ECONOMIC LAW REFORMS

Over its fourteen month existence, the CPA adopted over thirty new economic laws,[66] which were predominantly skeletal capitalist frameworks installed wholesale on Iraq. For example, modern banking laws can span hundreds of pages with provisions that promote reliable and efficient banking institutions, punish wrongdoing, and protect consumers (and the CPA mentioned concern over these dangers),[67] but the CPA's banking law scrapped the preexisting framework and adopted a 66-page law that was quite devoted to

62. *Survey Shows High Prevalence of Food Insecurity in Iraq*, WORLD FOOD PROGRAMME (Sept. 28, 2004), *available at* http://www.wfp.org/news/news-release/survey-shows-high-prevalence-food-insecurity-iraq (last visited Nov. 21, 2015).

63. Emad Mekay, *Challenges 2004-2005: U.S. to Take Bigger Bite of Iraq's Economic Pie*, INTER PRESS SERVICE (Dec. 24, 2004), *available at* http://www.ipsnews.net/2004/12/challenges-2004-2005-us-to-take-bigger-bite-of-iraqs-economic-pie/ (last visited Nov. 21, 2015) (reporting that there were hundreds of Americans working in Iraqi government agencies and "helping the interim Iraqi government continue to make major economic changes, including cuts to social subsidies").

64. *Id.*; Mahmoud Hmoud, *The Use of Force Against Iraq: Occupation and Security Council Resolution 1483*, 36 CORNELL INT'L L.J. 435, 452 (2004) (stating that "the vast majority of Iraqis depended on O.F.F. [Oil-for-Food program]").

65. Mekay, *supra* note 63. Country after country has been individually pressured into this system because of many decade-long debt crises and now Iraq was being coerced as well. *See* Bejesky, *Currency Cooperation*, *supra* note 59, at 104-24.

66. Boon, *supra* note 48, at 544.

67. Bank Law Order No. 40 of 2003 art. 2 (Coalition Provisional Authority [CPA], Iraq) [hereinafter Bank Law] (stating that the "primary regulatory objective of this Law is to maintain confidence in the banking system," and that secondary objectives are "promoting public understanding of the banking system . . . protect[ing] . . . depositors, and . . . reduc[ing] financial crime. . .").

opening Iraq to foreign banking institutions with branches, subsidiaries, and representative offices.[68]

Countries have routinely insulated their banking sector from foreign dominance during globalization initiatives,[69] but Iraq's Bank Law contained no provisions that restricted foreign banking investment in Iraq in terms of acquiring domestic banks or as a percentage of the banking economy.[70] In fact, the law eliminated existing protections and endowed foreign banks with "national treatment" as domestic banks,[71] placing Iraqi banks, with weaker financial positions and without powerful parent offices in foreign countries, at a competitive disadvantage.[72] The CPA-appointed Iraqi

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68. *See id.* art. 1-23.

69. JAMES A. CAPORASO & MARY ANNE MADEIRA, GLOBALIZATION, INSTITUTIONS AND GOVERNANCE 158 (2012) (affirming that developing countries have relied on protectionism in their banking industries and noting that "[l]arge American or European banks can . . . easily drive local banks out of business and dominate the banking industry."). *See generally* MALCOLM COOK, BANKING REFORM IN SOUTHEAST ASIA: THE REGION'S DECISIVE DECADE (2008) (discussing history of protectionism in banking sector in Southeast Asia); GERHARD FELS & GEORGE SUTIJA, PROTECTIONISM AND INTERNATIONAL BANKING (1991).

70. Bank Law, *supra* note 67, art. 4, §§ 6-7 (CPA limiting the number of wholly owned foreign banks to six until 2008 and permitting up to 50% foreign ownership in "an existing or new domestic bank").

71. *Id.* art. 4, § 5; *Financial Reconstruction in Iraq*, *supra* note 47, at 101 (statement of John B. Taylor, Under Sec'y of the Treasury for Int'l Affairs) (noting that preexisting laws only permitted Arab banks to operate in Iraq).

72. *See Financial Reconstruction in Iraq*, *supra* note 71, at 101 (stating that Iraqi banks "lack technology" and "a modern, efficient financial sector," but also that "Iraqi authorities decided that it would be important for foreign banks to operate in Iraq because of the experience, technology, and resources they can offer."). One example of a competitive disadvantage is that a handful of Iraqi banks required 200 to 800 percent collateral for the amount sought to be obtained in a loan. Arlyn Tobias Gajilan, *Entrepreneurs in Iraq Tangle in U.S. Red Tape*, CNN (Nov. 1, 2004), *available at* http://money.cnn.com/magazines/fsb/fsb_archive/2004/11/01/8190934/index.htm (last visited Nov. 21, 2015). With respect to "Iraqis" making choices for the banking industry, Iraqi authorities at this point consisted of an Iraqi Governing Counsel with 25 members who were appointed by the CPA and who were not accepted by the populace. *See generally* Governing Council of Iraq Regulation No. 6 of 2003 pmbl. (CPA, Iraq); Monroe E. Price, *Foreword: Iraq and the Making of State Media Policy*, 25 CARDOZO ARTS & ENT. L.J. 5, 15 (2007) ("The Iraqi Governing Council . . . [was] largely appointed or selected by the CPA, [and] lacked legitimacy."); Rajiv Chandrasekaran, *Death Stalks an Experiment in Democracy*, WASH. POST (June 22, 2004), *available at* http://www.washingtonpost.com/wp-dyn/articles/A58888-2004Jun21.html (last visited Nov. 21, 2015) ("But Iraqis criticize the local councils and the interim national government as illegitimate because their members were not elected."). Americans were appointed to Iraqi government agencies, ran the agencies, and implemented economic reform. *See*

agency heads possessed the authority to grant licenses to foreign banks for an "indefinite" period of time[73] and the general policy for the banking system was driven by the fact that the Central Bank of Iraq was required to adhere to the transnational integration mandates contained in Order 56.[74]

On April 26, 2004, CPA Order 81 imposed legal protections for trade-related intellectual property.[75] The policy, cited in the third sentence of Order 81, asserts that Iraq's intellectual property laws were deficient and that the Governing Council affirmed that "significant change in the Iraqi intellectual property system [is] necessary to improve the economic condition of the people of Iraq."[76] The CPA spoke on behalf of the Iraqi people even though many of these provisions were rejected outright by developing countries when they were introduced as WTO side agreements in 1995.[77] Iraqis were not in a position to churn out inventions to utilize the reciprocal monopoly rights that intellectual property protections afford, but the law instead behooves the owners of intellectual property attached to imports and foreign investments.

The CPA's dictates, premised on extrapolations in the occupation's mandate, were accordant with the agenda and rhetoric of the Bush White House. At a May 9, 2003 commencement address, President Bush promoted the notion of a U.S.-Middle East free trade

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generally Mekay, *supra* note 63.

73. Bank Law, *supra* note 67, art. 4, § 2 ("[L]icense[s] or permit[s] granted under this Law shall be granted in writing for an indefinite period of time.").

74. *See generally* Central Bank Law Order No. 56 of 2004 art. 2 (CPA, Iraq).

75. *See generally* Patent, Industrial Design, Undisclosed Information, Integrated Circuits and Plant Variety Law Order No. 81 of 2004 pmbl. (CPA, Iraq).

76. *Id.*

77. *See generally id.* § 1, ¶ 54 (providing for the gamut of IP protections, including the "Plant Variety Law," to protect patent rights in genetically-modified plant species); *see* GREG GRANDIN, EMPIRE'S WORKSHOP: LATIN AMERICA, THE UNITED STATES, AND THE RISE OF THE NEW IMPERIALISM 160 (2006) ("'Iraqi Order 81' even prohibited Iraqi farmers from saving heirloom seeds from one year to the next, obliging them to buy them anew each season from corporations like Monsanto and Dow Chemical . . . "); ERIC HERRING & GLEN RANGWALA, IRAQ IN FRAGMENTS: THE OCCUPATION AND ITS LEGACY 240 (2005) (noting that the CPA adopted Order Number 81 that banned Iraqi farmers from saving genetically modified seeds from year to year and the Protection of New Plant Varieties had only 48 members); Thomas A. Wathen, *Trade Policy: Clouds in the Vision of Sustainability*, *in* BUILDING SUSTAINABLE SOCIETIES: A BLUEPRINT FOR A POST-INDUSTRIAL WORLD 76 (Dennis C. Pirages ed., 1996) (stating that in the case of intellectual property protections, developing countries were wary of the protections but were given a ten year grace period to implement rules).

agreement and ostensibly presumed that "liberty," "freedom," "justice," and "democracy," were byproducts of the expansion of capitalism.[78] One month later and concomitant with experts predicting that Iraqi businesses would be unable to compete with the newly-appearing deluge of inexpensive imports, Bush administration officials were declaring a need to promptly "hammer[] out a free-trade agreement between Iraq and the United States"[79] and of sponsoring WTO membership for Iraq.[80]

The CPA scrambled to expeditiously open Iraq's economy at the domestic level, including by waiving and disposing of preexisting Iraqi laws designed to protect domestic industry,[81] overhauling Iraqi corporate law and securities law, suspending major pre-invasion economic frameworks with the addition of new market regulations,[82]

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78. George W. Bush, President of the U.S., Commencement Address at the University of South Carolina (May 9, 2003) ("Across the globe, free markets and trade have helped defeat poverty, and taught men and women the habits of liberty. . . . [W]ith free markets and fair laws, the people of the Middle East will grow in prosperity and freedom."); Susan L. Sakmar, *Globalization and Trade Initiatives in the Arab World: Historical Context, Progress to Date, and Prospects for the Future*, 42 U.S.F. L. REV. 919, 920, 925 (2008) (noting that Bush proposed that the United States take steps to create a Middle East Free Trade by 2013, which would involve negotiating "comprehensive bilateral [Free Trade Agreements]" with the US and "all countries in the region"); *id.* at 927 (noting that Bush further stated that free trade would decrease poverty and make some countries less "vulnerable to terrorist networks.").

79. Edmund L. Andrews, *After the War: The Economy*, N.Y. TIMES (June 1, 2003), *available at* http://www.nytimes.com/2003/06/01/world/after-war-economy-after-years-stagnation-iraqi-industries-are-falling-wave.html (last visited Nov. 21, 2015).

80. From the later declassified Future of Iraq Project reports, produced before the invasion, the reports actively postulated and planned the steps needed to get Iraq into the WTO. U.S. DEP'T OF STATE, FUTURE OF IRAQ PROJECT: OIL AND ENERGY WORKING GROUP 66-70 (2003) (see section entitled Iraq: Economic Development, the Oil Sector, and Membership of the WTO). In February 2004, Iraq attained observer status at the WTO. Press Release, CPA, Iraq Achieves Observer Status at the WTO (Feb. 12, 2004), *available at* http://govinfo.library.unt.edu/cpa-iraq/pressreleases/20040212_WTO.html (last visited Nov. 21, 2015).

81. *See* Audi, *supra* note 48, at 335.

82. Amendment to the Company Law No. 21 of 1997 of 2004 pmbl. (CPA, Iraq) ("[S]ome of the rules concerning company formation and investment under the prior regime no longer serve a relevant social or economic purpose . . ."). The CPA's new securities law eliminated the Baghdad Stock Exchange, removed all previous government oversight, created a new Iraqi Stock Exchange, and then formed a new Interim Iraq Securities Commission with core rules. Interim Law on Securities Markets Order No. 74 of 2004 pmbl. (CPA, Iraq) ("*Recognizing* that some of the regulations concerning securities markets under the prior regime are not well-suited to a modern, efficient, transparent and independently regulated securities market . . . .").

and lifting Iraqi trade protections, tariffs, and customs to permit the free flow of foreign products into Iraq.[83] The CPA reduced tariffs on imports to 5% and the Trade Bank of Iraq was constituted with an initial capitalization of one hundred million dollars earmarked to stimulate exports and imports.[84] A glaring negative impact of the breakneck capitalist reforms was a long-term increase in the unemployment rate,[85] which would predictably gall workers. Apparently to marginalize dissent from the working class, the combination of occupation initiatives and early Iraqi governments classified state workers and civil servants and denied them the right to organize and participate in collective bargaining,[86] arrested labor leaders, blocked strikes, and even enacted new laws that would restrict the right of labor to organize and strike in the future.[87]

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83. Trade Liberalization Policy Order No. 12 of 2003 § 1 (CPA, Iraq) (suspending all tariffs and trade restrictions).

84. Trade Bank of Iraq Order No. 20 of 2003, §§ 1, 4; Jeff Madrick, *Economic Scene; The Economic Plan for Iraq Seems Long on Ideology, Short on Common Sense*, N.Y. TIMES (Oct. 2, 2003), *available at* http://www.nytimes.com/2003/10/02/business/economic-scene-economic-plan-for-iraq-seems-long-ideology-short-common-sense.html (last visited Nov. 21, 2015) (noting the 5% tariff level and 15% corporate tax rate); *see also* Audi, *supra* note 48, at 335.

85. ANTHONY ARNOVE, IRAQ: THE LOGIC OF WITHDRAWAL 15 (2006) (remarking that three years into the occupation, approximately half of Iraqi workers were unemployed).

86. Shiva Falsafi, *Civil Society and Democracy in Japan, Iran, Iraq and Beyond*, 43 VAND. J. TRANSNAT'L L. 357, 425 (2010).

87. GRANDIN, *supra* note 77, at 159 (emphasizing the crackdown on organized labor); Falsafi, *supra* note 86, at 425 (noting that after the CPA dissolved and in August 2005, the Iraqi government passed Decree 8750 which permitted the seizure of union assets, which further weakened labor movements); Matthew Harwood, *Pinkertons at the CPA*, WASH. MONTHLY (Apr. 2005), *available at* http://www.washingtonmonthly.com/features/2005/0504.harwood.html (last visited Nov. 21, 2015) (describing the massacre of union officials and that "Americans have largely left the Iraqi unions to fend for themselves, and in some cases actively undercut them."); Rajiv Chandrasekaran, *U.S. Back Off On Plans to Reform Economy*, WASH. POST (Dec. 28, 2003), *available at* http://articles.sun-sentinel.com/2003-12-28/news/0312270356_1_iraq-s-reconstruction-iraqis-civil-occupation (last visited Nov. 21, 2015) (stating that a 60% unemployment rate in Iraq has infuriated labor and that Bremer's intention to sell off state-owned enterprises further antagonized workers). In June 2005, Prime Minister Ibraim Jafari planned to shed public sector jobs according to neoliberal dictates even as unemployment approached 50% and commentators believed that unemployment was breeding insurgencies. Jonathan Finer & Omar Fekeiki, *Tackling Another Major Challenge in Iraq: Unemployment*, WASH. POST (June 20, 2005), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/06/19/AR2005061900729.html (last visited Nov. 21, 2015). Shrinking the size of the state to favor corporate and private ownership has

The Bush administration appointed top Iraqi officials and crafted Iraqi foreign economic policy, while labeling it Iraqi foreign policy, and dispatched hundreds of American economic advisors to work in all Iraqi government ministries.[88] U.S. advisors were making critical economic decisions and sponsored the country's economic changes, including by emphasizing privatization and slashing social expenditures.[89] Imposing new rules and undermining the voice of labor may have also truncated organized dissident to the economic reform agenda. The treaty obligations and accords with BWIs leverage congruent domestic reform as an effective directive or cogent obligation. The Bush administration and its CPA were quickly "locking" Iraq into international treaties and foreign policies and setting trajectories for domestic laws, to which Iraqis would later be required to adhere, and this all transpired before elections were held.[90]

IV. SCALDING: PROFFERING PRIVATIZATION

A. *CPA Privatization Initiatives*

Consistent with the general rhetorical position of the White House, CPA Administrator Bremer's discourse also conveyed the significance of interaction among elements of reform, which included emphasizing the importance of democratization, market prices, foreign investment, efficient allocation of resources in the economy, and ensuring strong property rights.[91] On July 8, 2003, Bremer remarked:

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long been promoted by the IMF and may benefit those who acquire privatized assets.

88. Mekay, *supra* note 63.

89. *Id.*

90. Despite much Bush administration rhetoric about quickly allowing self-rule, that was not the case. The Bush administration brought in its own government and the result of this razzle-dazzle babble of "transition" authorities merely affirms that institutional and legal choices were not the product of democratic choices. *See generally* Robert Bejesky, *The Enigmatic Origin of the CPA: An Attribute of the Unitary Executive*, 51 WILLAMETTE L. REV. 269, 279-291 (2015). The Bush administration was entrenching pre-selected loyalists into power for long-term allegiance to the occupation and locking in the rules.

91. *See generally CPA Official Documents*, CPA, *available at* http://www.iraqcoalition.org/regulations/#Orders (last visited Nov. 21. 2015) (list of orders specifies the focus). For an example of assuming that the CPA possessed all of the answers for Iraqi prosperity when political choices of the people should have governed see Paul Bremer, *Operation Iraqi Prosperity*, WALL ST. J. (June 20, 2003, 12:01 AM), *available at* http://online.wsj.com/articles/SB10560666393288510O (last visited Nov. 21, 2015) ("The central lesson from past transitions is that the

> Privatization is obviously something we have been giving a lot of thought to. When we sit down with the governing council. . . it is going to be on the table. The governing council will be able to make statements that could be seen as more binding and the trick will be to figure out how we do this. Everybody knows we cannot wait until there is an elected government to start economic reform.[92]

The CPA's appointed members of the temporary Iraqi governing bodies were powerless[93] and it is not true that "everybody

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private sector must be encouraged to rapidly allocate resources to their most productive uses. In other transition economies, the switch from value-destroying public enterprises to value-creating private ones has been accomplished by stimulating the growth of small and medium-sized private enterprises, which are best able to create jobs quickly. This encouragement takes place by reducing the subsidies to state-owned firms and establishing a clear and transparent commercial code (as well as honest judges to enforce it). More generally, a well-established system of property rights must be established in order for the economy to grow. . . . Opening Iraq to the rest of the world also promises to pay big dividends.").

92. Looney, *supra* note 38, at 574.

93. Bremer endowed himself with a veto power over all IGC decisions and appointments. *See* M. Cherif Bassiouni, *Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal*, 38 CORNELL INT'L L.J. 327, 352-53 (2005); Gregory H. Fox, *The Occupation of Iraq*, 36 GEO. J. INT'L L. 195, 206 (2005); Kristen A. Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 GEO. WASH. INT'L L. REV. 695, 695 (2004); Associated Press, *Bremer Suggests US May Block Islamic Law in Iraq*, USA TODAY (Feb. 17, 2004, 3:22 AM), *available at* http://usatoday30.usatoday.com/news/world/iraq/2004-02-16-islam-law_x.htm (last visited Nov. 21, 2015) (reporting that amid speculations that the IGC could act independently and exercise legislative authority, Bremer remarked that "it can't be law until I sign it."); Feisal Amin al-Istrabadi, *Reviving Constitutionalism in Iraq: Key Provisions of the Transitional Administrative Law*, 50 N.Y.L. SCH. L. REV. 269, 270 (2005) (Iraqi Ambassador to the UN accentuating that "nothing became law in Iraq unless it was signed by . . . Bremmer. . . . It was the Civil Administrator, not the IGC, who had the power to legislate.") (citing S.C. Res. 1483 (May 22, 2003)); SIGIR, IRAQ RECONSTRUCTION: LESSONS IN HUMAN CAPITAL MANAGEMENT 11 (Jan. 2006) ("[The] CPA was the de facto government of Iraq that oversaw the reestablishment of Iraqi ministries, consulted with an advisory 'legislature,' promulgated laws and regulations, provided diplomatic links with foreign governments, and coordinated with the coalition's military leadership."). The CPA's authority over local Iraqi interests was recognized in Security Council Resolutions, but the resolution did not permit unilaterally dictating Iraqi political choices and laws. S.C. Res. 1483, pmbl. (May 22, 2003) (U.S. and U.K. were represented as "the Authority"). Also, the General Accounting Office noted that the "CPA assigned U.S. advisors from various agencies, including the Department of State and the Department of Defense, to work directly with the Iraqi interim minister appointed by the Governing Council. According to a former senior advisor, the advisor had broad managerial authority, including the authority to hire and fire ministry employees, determine ministry budgets, change ministry structures and functions and make policy decisions." U.S. GOV'T ACCOUNTABILITY OFF. (GAO), GAO-04-902R, REBUILDING IRAQ: RESOURCE, SECURITY, GOVERNANCE,

knows" that unilaterally imposing economic agendas, locking in rules that could foster economic and political distress, and shaping the dynamics of new property rights were required before the Iraqi people could choose legal institutions and socioeconomic change for themselves.[94] Nonetheless, the CPA did wrongfully dictate[95] an open capitalist economic system on Iraqis[96] and decrees were not only inconsistent with Iraqi tradition, culture, and morals,[97] but also originated from an even more coercive process than the milieu of pressures that dominant states had placed on other states to quickly adopt *laissez faire* practices and which periodically erupted into societal dissent throughout the developing world.[98] The CPA dramatized the existence of failings in bedrock Iraqi institutions as the basis for contending that institutional transformations were imperative to countenance a market economy, but in fact the first and foremost infrastructure necessary for a market economy is effective contract and property rights institutions, which were contained in the Iraqi Civil Code, but the CPA did not modify the Civil Code.[99] The Iraqi

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ESSENTIAL SERVICES, AND OVERSIGHT ISSUES 75 (2004).

94. Ash U. Bali, *Justice Under Occupation: Rule of Law and the Ethics of Nation-Building in Iraq*, 30 YALE J. INT'L L. 431, 443 (2005); David Harvey, *Political and Economic Dimensions of Free Trade: Neobalism as Creative Destruction*, 610 ANNALS 22, 25 (2007) (reporting that an Iraqi member of the CPA protested the forced imposition of "free market fundamentalism" as "a flawed logic that ignores history").

95. James Gallen, *Jus Post Bellum: An Interpretive Framework*, *in* JUS POST BELLUM: MAPPING THE NORMATIVE FOUNDATION 58, 62 (Carsten Stahn, Jennifer S. Easterday & Jens Iverson eds., 2014) (stating that occupation law was "designed to be palliative, such that major issues or redistribution of land or legal rights would take place in a peace agreement that would end the occupation and regularize the situation").

96. Harvey, *supra* note 94, at 25-26; ANDREW J. BACEVICH, AMERICAN EMPIRE: THE REALITIES AND CONSEQUENCES OF U.S. DIPLOMACY 88 (2002) (stating generally that American capital "movement of goods, capital, people, and ideas" create an "integrated international order conducive to American interests, governed by American norms, regulated by American power, and, above all, satisfying the expectations of the American people for ever-greater abundance."); Naomi Klein, *Baghdad Year Zero: Pillaging Iraq in Pursuit of a Neocon Utopia*, HARPER'S (Sept. 2004) (noting that the CPA policies were ideologically neoconservative).

97. *See* Haider Ala Hamoudi, *Money Laundering Amidst Mortars: Legislative Process and State Authority in Post-Invasion Iraq*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 523, 543 (2007) (explaining that Iraq and other Islamic countries have had traditional and cultural traits that have regarded usury practices and exploitive capitalism akin to thievery).

98. *See generally* OSWALDO DE RIVERO, THE MYTH OF DEVELOPMENT: THE NON-VIABLE ECONOMICS OF THE 21ST CENTURY (2001).

99. *See* Dan E. Stigall, *Comparative Law and State-Building: The "Organic*

Civil Code fully comported with Western notions of property ownership and an owner's absolute right to dispose, use, and exploit property.[100] The CPA was more concerned with adopting new bodies of law that would structure unconstrained capitalism, oblige foreign investment, and urge for privatization of public assets.

Accordant with the archetypical advice rendered by BWIs, in June 2003, Bremer began announcing that Iraq possessed bloated, inefficient, and unsustainable state enterprises as a justification for privatization.[101] On September 19, 2003, Bremer promulgated four orders that included "the full privatization of public enterprises, full ownership rights by foreign firms of Iraqi businesses, full repatriation of foreign profits . . . the opening of Iraq's banks to foreign control, national treatment for foreign companies and . . . the elimination of nearly all trade barriers."[102] However, it is not clear that the appointed and impotent members of the Iraqi Governing Council (IGC) ever officially ratified any of the CPA's open market reforms.[103] The IGC later expressed that members unanimously rejected the CPA's

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Minimalist" Approach to Legal Reconstruction, 29 LOY. L.A. INT'L & COMP. L. REV. 1, n.231 (2007).

100. Civil Code of 1990 art. 1048-49 (Iraq); *see also* Dan E. Stigall, *A Closer Look at Iraqi Property and Tort Law*, 68 LA. L. REV. 765, 772-73, 788 (2008). During the 1980s, Iraq followed liberalization and privatization simultaneously, which included the government privatizing agricultural land that reduced holdings from 50% public ownership during the mid-1980s to only 12% by 1989, and Iraq privatized seventy large construction, mineral extraction, and food processing factories. Kiren Aziz Chaudhry, *Economic Liberalization and the Lineage of the Rentier State*, 27 COMP. POL. 1, 8 (1994).

101. Looney, *supra* note 38, at 574.

> A fundamental component of this process will be to force state-owned enterprises to face hard budget constraints by reducing subsides and special deals . . . Iraq will no doubt find that opening its borders to trade and investment will increase competitive pressure on its domestic firms and thereby raise productivity.

Id. (citing Edmund Andrews, *Overseer in Iraq Vows to Sell-Off Government-Owned Companies*, N.Y. TIMES, June 23, 2003, at A13).

102. Harvey, *supra* note 94, at 25; *see also* Zahawi, *supra* note 7, at 2328.

103. Audi, *supra* note 48, at 355 (noting that Kamel Al-Gailani, the CPA-appointed Iraqi Minister of Finance, publicly reiterated the series of changes that would be made to Iraq's foreign investment laws).

privatization program,[104] but the CPA pushed forward with the privatization agenda.[105]

Two months later, Bush appointed Thomas Foley, his 2000 election campaign chairman and a Harvard Business School colleague,[106] for the mission of privatizing over two hundred state-owned industries, including chemical, mining, and cement companies.[107] Assets owned by the state, on behalf of the people, would be relinquished through a large-scale privatization process,[108] but the program was placed on hold.[109] Instead, on May 1, 2004, CPA Order 76 was adopted and stated that State Owned Enterprises ("SOEs") would be transferred to Iraqi ministries and that the enterprises "shall no longer have a separate legal identity and shall cease to exist" after the transfer.[110] SOEs were placed under the control of Ministry heads who were CPA appointees and who possessed the authority to control the ministries and the budgets, set policy, hire and fire ministry employees,[111] and ultimately, pursuant to Order 76, to consolidate, merge, or sell SOEs.[112] Years later, but still while under the U.S. military occupation, Maliki's dictatorial

104. Klein, *supra* note 96. Bremer met with Iraqi Communications Minister Haider al-Abadi and Minister of Industry Mohamad Tafiq and al-Abadi recalls of this meeting: "I said, 'Look, we don't have the mandate to do any of this. Privatization is a big thing. We have to wait until there is an Iraqi government." *Id.* Tafiq stated even more directly: "I am not going to do something that is not legal, so that's it." *Id.*

105. Bali, *supra* note 94, at 442-43.

106. Thomas B. Edsall & Juliet Eilperin, *Lobbyists Set Sights on Money-Making Opportunities in Iraq*, WASH. POST, Oct. 2, 2003, at A21.

107. *Id.*

108. *See* ZACHARY SHORE, BLUNDER: WHY SMART PEOPLE MAKE BAD DECISIONS 206 (2008) (discussing comments by Foley allegedly stating that he did not care about international law restrictions but he instead promised the President that he intended to privatize all of Iraq's SOEs within 30 days); GRANDIN, *supra* note 77, at 159; Klein, *supra* note 96.

109. Paul Krugman, *Who Lost Iraq?*, N.Y. TIMES (June 29, 2004), *available at* http://www.nytimes.com/2004/06/29/opinion/who-lost-iraq.html (last visited Nov. 22, 2015).

110. Consolidations of State-Owned Enterprises Order No. 76 of 2004 § 4 (CPA, Iraq).

111. GAO, *supra* note 93, at 75("[The] CPA assigned U.S. advisors from various agencies, including the Department of State and the Department of Defense, to work directly with the Iraqi interim minister appointed by the Governing Council. According to a former senior advisor, the advisors had broad managerial authority, including the authority to hire and fire ministry employees, determine ministry budgets, change ministry structures and functions and make policy decisions.

112. Consolidations of State-Owned Enterprises, *supra* note 110, § 4.

government[113] announced plans to privatize over two hundred SOEs over the next three to four years.[114] The institutional framework to promote privatization and to maintain the CPA's legal reforms had been set before the CPA dissolved.

Antonia Juhasz succinctly described what unfolded and how the new laws were adopted and enforced before there was an elected government to approve of the laws.[115] The CPA referred to directives as a single codified source of foundational law, referred to as "Transitional Administrative Law" ("TAL"),[116] which had a potentially permanent effect because of the inordinate procedures required of a future Iraqi government to scrap the TAL:

> Laws governing banking, investment, patents, copyrights, business ownership, taxes, the media and trade have all been changed according to U.S. goals, with little real participation from the Iraqi people. . . . The TAL [laws] can be changed, but only with a two-thirds majority vote in the National Assembly, and with the approval of the prime minister, the president and both vice presidents. . . . The constitutional drafting committee has, in turn, left each of these laws in place.[117]

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113. Al-Ali, *supra* note 30 (expressing that Maliki has alienated both Kurds and Sunnis, been corrupt, deemed himself the "preeminent military leader," dispatched security services to suppress peaceful protests by calling protestors "terrorists," hired thugs to beat and kill dissenters, and had security services arrest and torture dissenters until protests ended); Damon & Tawfeeq, *supra* note 30 (stating that Iraqi Deputy Prime Minister Saleh al-Mutlag expressed to CNN that he was "shocked" to witness President Barack Obama address Maliki as "the elected leader of a sovereign, self-reliant and democratic Iraq," when Maliki had been ignoring power-sharing institutions and when the US left Iraq "with a dictator" who systematically suppresses dissent with impunity).

114. Charlie Welsh & PK Semler, *Iraq Government to Restructure and Privatize Some 200 Industrial Companies*, FIN. TIMES (Oct. 7, 2010, 8:15 AM), *available at* http://www.ft.com/cms/s/2/d0b9b9fe-d1e1-11df-965c-00144feabdc0.html#axzz3CwbtUjaZ (last visited Nov. 22, 2015).

115. *See generally* Antonia Juhasz, *Bush's Economic Invasion of Iraq*, L.A. TIMES (Aug. 14, 2005), *available at* http://articles.latimes.com/2005/aug/14/opinion/oe-juhasz14 (last visited Nov. 22, 2015).

116. Zahawi, *supra* note 7, at 2329-30 (noting that the TAL was even to be regarded as Iraq's interim constitution, suggesting that it should take precedence over all other law); Note, *Democracy in Iraq: Representation Through Ratification*, 199 HARV. L. REV. 1201, 1203 (2006).

117. Juhasz, *supra* note 115. Yet, at the time TAL proposals were launched, it was only intended to remain in effect until an elected government took office (nation-wide elections were scheduled for January 31, 2005). Law of Administration for the State of Iraq for the Transitional Period of Mar. 8, 2004 art. 2 (CPA, Iraq). Then, in the same law, it states that the laws would "remain in force until rescinded or amended by legislation duly enacted and having the force of law."

The CPA codifications were also validated by the CPA's final order (Order 100), which replaced "the names of new Iraqi institutions and officials for those of the CPA" in order to "protect the [CPA] reforms into the future."[118] The CPA included language to mendaciously designate that the reforms were the product of Iraqi government institutions.[119] Lawyers and foreign officials warned that Security Council Resolution 1483 only authorized the occupation to "administrate," that the Hague Regulations of 1907 prevented the occupation from altering the laws of the occupied country, and that the reforms could be annulled.[120] Not one word in Resolution 1483

See id. art. 26(c). Theories that have permitted overruling foreign occupation dictates in the past have included asserting that the laws were not consistent with international law (i.e. the doctrine of postliminy) or that the occupier exceeded its authority. *See generally* ERNEST H. FEILCHENFELD, THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATIONS 145-50 (1942); ROLAND R. FOULKE, 2 A TREATISE ON INTERNATIONAL LAW 289-90 (1920). This could have been a justification vis-à-vis foreign interests and might have reversed illegally attained property rights, but new codifications can change the law.

118. Zahawi, *supra* note 7, at 2332 (citing Gregory H. Fox, *The Occupation of Iraq*, G36 GEO. J. INT'L L. 195, 245 (2005)).

119. Bali, *supra* note 94, at 435 (noting that the CPA's occupation strategy is a "use of local proxies [the IGC and then the Interim Government] to attenuate its direct administration of Iraq by force."); *see also* Bartram S. Brown, *Intervention, Self-Determination, Democracy and the Residual Responsibilities of the Occupying Power in Iraq*, 11 U.C. DAVIS J. INT'L L. & POL'Y 23, 43-44 (2004). To assume that Iraqis favored and chose institutions without knowing anything about them or that the impotent CPA interim authority appointees could somehow legitimately assent on behalf of Iraqis is foolish. Nonetheless, the rules were bestowed with a robust effect as TAL.

120. Gathii, *supra* note 36, at 736 ("It is scarcely arguable that the powers exercised by the CPA in signing privatization contracts lacked legitimacy among a broad range of Iraqis and potentially may be subject to reversal by a post-occupation Iraqi regime . . ."); Audi, *supra* note 48, at 336, 353 (stating that major economic reforms imposed by the CPA could be deemed invalid under international law and could be subject to reversal); Klein, *supra* note 96 (remarking that a future Iraqi government could declare Bremer's orders illegal and foreign companies could have investments nullified). Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land, arts 3, 43, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Regulations] (stating that the occupier must "respect[], unless absolutely prevented, the laws in force in the country" and that breaches make the occupier "liable to pay compensation."); *see* Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 47-54, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (stating the importance to disseminating the Conventions rules and that those in breach are to be penalized). *See generally* Bali, *supra* note 94, at 439-40, 466-67. States and the Security Council required the US and UK to adhere to Geneva and Hague law. S.C. Res. 1472, ¶ 1 (Mar. 28, 2003); S.C. Res. 1483, *supra* note 93, ¶ 5; U.N. SCOR, 58th Sess., 4726th mtg., U.N. Doc. S/PV.4726 (Mar. 26, 2003); U.N. SCOR, 58th Sess., 4732d mtg., U.N. Doc. S/PV.4732 (Mar.

referred to sanctioning the occupying "Authority" or any faction of the occupation to engage in any semblance of "legislating."[121] In the seven times that the Security Council Resolution refers to "institutions" and law-making initiatives, the language is circumscribed by affirmations that the Iraqi people will determine their "own political future" and that all U.N. members, U.N. organs, and "the Authority," which was the U.S. and U.K., were sanctioned to *assist* Iraqis in establishing their own institutions.[122]

With respect to the CPA's attempted privatization agenda, it is true that colonial powers confiscated property and governed over foreign lands due to the ability to subjugate in conquest,[123] but international laws[124] and U.S. Supreme Court precedent have rebuked this norm.[125] Restrictions prohibit the occupier from appropriating

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28, 2003).

121. *See* S.C. Res. 1483, *supra* note 93, ¶ 5.

122. *See id.* ¶¶ 1, 4, 5, 7, 8(c), 8(i), 9.

123. Johnson v. M'Intosh, 21 U.S. 543, 587, 590-95 (1823) (holding that conquest and discovery legitimated title over lands previously inhabited by Native Americans and because they lived in "tribes," incapable of governing themselves, and attained "subsistence . . . chiefly from the forest"); *see* Bejesky, *Currency Cooperation*, *supra* note 59, at 143-44; James Thuo Gathii, *Foreign and Other Economic Rights Upon Conquest and Under Occupation: Iraq in Comparative and Historical Context*, 25 U. PA. J. INT'L ECON. L. 491, 496-97 (2004) ("[T]he extinction of private property rights and contracts upon conquest is . . . a systemic expression of the hegemonic power of conquering states that goes back decades in the history of international law.").

124. *See* Hague Regulations, *supra* note 120, art. 46. ("Private property cannot be confiscated"); Bejesky, *Currency Cooperation*, *supra* note 59, at 138, 149, 155 (noting that decolonization has particularly served as a basis for upholding the right of sovereign self-determination).

125. Early US Supreme Court cases emphasized the right of locals to expel a foreign aggressor and confiscate the aggressor's property. Ware v. Hylton, 3 U.S. 199, 226 (1796) (holding that in expelling the British from American borders, "enemies, by every right, may be plundered, and seized upon" and that "whatever effects of the enemy are found with us who are his enemy, should change their master, and be confiscated, or go into the treasury"); *see* Miller v. United States, 78 U.S. 268, 304-05 (1870) (upholding the power of confiscation as a legal sovereign act pursuant to Congress's authority to declare and prosecute war); *see also* Haycraft v. United States, 89 U.S. 81, 94 (1874); United States v. Percheman, 32 U.S. 51, 51 (1833) ("Even in cases of conquest, it is very unusual for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right, which is acknowledged and felt by the whole civilized world, would be outraged; if private property should be generally confiscated, and private rights annulled."). Legislation upholding confiscation was also enacted during the Civil War as both the Confederate government and Congress passed retaliatory legislation permitting confiscation of enemy property. James G. Randall, *Captured and Abandoned Property During the Civil War*, 19 AM. HIST. REV. 65, 65 (1913).

private property and public assets of the occupied population. The Hague Regulations state that an occupying power can "take possession" of assets temporarily but cannot sell or transfer ownership of the property.[126] Article 55 explicitly addresses public property rights when it affirms that the occupying power "shall be regarded as an administrator and usufructuary" of public assets and that the occupier must "*safeguard the capital* of these properties, and administer them in accordance with the rules of usufruct."[127] Article 53 of the Geneva Convention states that "[a]ny destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited . . ."[128] With the explicit language incorporated into these

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Another example is the seizure of foreign vessels on the high seas when ships were suspected of piracy or involvement in supporting an enemy. Act of June 24, 1795, 1 Stat. 572 (authorizing the defense of U.S. merchant vessels against French depredations)

126. Hague Regulations, *supra* note 120, art. 53, 55; *see* Eyal Benvenisti & Eyal Zamir, *Private Claims to Property Rights in the Future Israeli-Palestinian Settlement*, 89 AM. J. INT'L L. 295, 313 (1995).

127. Hague Relations, *supra* note 120, art. 55 (emphasis added) (listing public assets that include "public buildings, real estate, forests and agricultural estates belonging to the hostile State, and situated in the occupied country."); *see also* Kristen Boon, *Legislative Reform in Post-conflict Zones: Jus Post Bellum and the Contemporary Occupant's Law-Making Powers*, 50 MCGILL L.J. 285, 304-05 (2005); R. Dobie Langenkamp & Rex J. Zedalis, *What Happens to the Iraqi Oil?: Thoughts on Some Significant, Unexamined International Legal Questions Regarding Occupation of Oil Fields*, 14 EUR. J. INT'L L. 417, 432-33 (2003) (suggesting that an occupying power might appoint a private firm to temporarily manage public property or state-owned industry if the occupier does not have a self-enrichment intention and the appointment is in good faith and is economically sound).

128. Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 53, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]. During the 1949 diplomatic conference, which led to the adoption of the Fourth Geneva Convention, the US, UK, and Canada had no qualms with protecting private property from pillage but claimed that there was no basis for protecting public property owned by a defeated state and even maintained that victorious armies should be able to take government property to pay off debts. Lea Brilmayer & Geoffrey Chepiga, *Ownership or Use? Civilian Property Interests in International Humanitarian Law*, 49 HARV. INT'L L.J. 413, 425-26 (2008). Alternatively, the Soviet Union and China contended that "the destruction of [State] property affected not only the interests of the State but also those of individuals" since civilians relied on state-owned property for sustenance; the socialist governments contended that all types of property should be protected during warfare. *Id.* at 425-26 (citing 2A Final Record of the Diplomatic Conference Convened by the Swiss Federal Council for the Establishment of International Conventions for the Protection of War Victims and Held at Geneva from April 21st

prohibitions, the CPA's blatant hypocrisy, after devising a program and attempting to sell off SOEs, is encountered in Article 16 of the CPA's TAL, which states: "Public property is sacrosanct, and its protection is the duty of every citizen."[129]

B. *Foreign Investment*

Historical occupations with exploitive intentions have been condemned,[130] but even if the occupier does not possess a profiteering motive, codification of new investment rules can transfer domestic resources to foreign interests[131] and produce domestic economic winners and losers.[132] Beneficiaries are apt to soundly support reforms and the foreign entities ostensibly correlated to that fortuity,[133] while the disenfranchised will be hostile to the reforms, feel politically ostracized,[134] and be distinctly unwilling to assent to a foreign power unilaterally dictating new laws.

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to August 12th, 1949, at 649 (2004)).

129. Law of Administration for the State of Iraq for the Transitional Period, *supra* note 117, art. 16. The CPA did take Ba'ath party assets and recognized public assets on behalf of the people of Iraq. Management of Property and Assets of the Iraqi Baath Party Order No. 4 of 2003 § 3(1)-(3) (CPA, Iraq) (dictating that all property and assets of the Baath Party were to be seized and transferred to the CPA "for the benefit of the people of Iraq"). Given the circumstance, this order was probably not controversial.

130. Ralph Wilde, *From Trusteeship to Self-Determination and Back Again: The Role of the Hague Regulations in the Evolution of International Trusteeship, and the Framework of Rights and Duties of Occupying Powers*, 31 LOY. L.A. INT'L & COMP. L. REV. 85, 97 (2009).

131. M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 8-9 (3d ed. 2010).

132. Judith S. Kullberg & William Zimmerman, *Liberal Elites, Socialist Masses, and Problems of Russian Democracy*, 51 WORLD POL. 323, 324 (1999) (writing of polls several years into the Russian reforms and noting that elites liked the system because "[s]upport for liberalism is causally related to the ability of individuals to participate in the new economic order: those who are 'locked out' of the new economy and are constrained by circumstances and context from improving their conditions will be more likely to express antiliberal values and attitudes," but only a small segment of the Russian population dramatically benefited with the fall of the socialist economy, but a majority of the Russian population has been harmed).

133. A percentage of the domestic polity will support capitalist reforms and multinational corporations, particularly those segments that perceive that they will be better off as a result of open market laws or those sectors that assimilate an ideology of favoring the foreign authority or its new economic laws. However, the level of popular support at the time new laws were adopted was likely weak.

134. *See* Duncan Kennedy, *Shock and Awe Meets Market Shock*, BOSTON REV. (Oct. 1, 2003), *available at* http://www.bostonreview.net/world/duncan-kennedy-shock-and-awe-meets-market-shock (last visited Nov. 21, 2015) (listing the capitalist reforms applied to Iraq and noting that "[e]conomic development is a

Unlike Iraq, countries possessing actual sovereignty, self-determination, and a voiced citizenry have adopted assorted investment vehicles to protect domestic interests[135] and have chosen gradualist approaches to liberalization and foreign investment, but the CPA passed Order 39, a six-page law, that "replace[d] all existing foreign investment law" and opened up "all economic sectors in Iraq, except . . . natural resources" to complete foreign ownership.[136] Order 39 endowed investors with the right to take a 100% ownership interest in Iraqi enterprises or sectors, required no obligation to partner with or structure joint ventures with Iraqi businesses,[137] and bestowed a rare privilege of plenary "national treatment" so that foreign investors could not be subject to discrimination and would, by law, be treated as domestic businesses.[138] Despite the fact that it was a CPA directive, section 2 provides: "This Order promotes and safeguards the general welfare and interest of the Iraqi people by promoting foreign investment through the protection of the rights and property of foreign investors in Iraq and the regulation through transparent processes of matters relating to foreign investment in Iraq."[139]

The CPA's omnipotence was again on display with CPA Order 39's categorical certification that the CPA knew Iraqi desires, despite the fact that Iraqis did not select the initiatives or the appropriate role for foreign investment. In fact, local Iraqi businessmen began expressing shortly after the invasion that they were excluded from the political process and that they would be unable to compete with foreign businesses that moved to Iraq,[140] but the Bush administration

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dynamic process in which small initial disadvantages often translate into massive permanent inequalities").

135. *See generally* SORNARAJAH, *supra* note 131, at 97-99. The three main vehicles for Foreign Direct Investment (FDI) are Greenfield investments, mergers and acquisitions, and joint ventures, and the details of ownership and applicability of taxation, licensing requirements, and other applicable regulations are determined by local laws and relations with local government officials.

136. Foreign Investment Law Order No. 39 of 2003 §§ 3, 6 (CPA, Iraq); Bali, *supra* note 94, at 442; Audi, *supra* note 48, at 346-47.

137. *See* Foreign Investment Law, *supra* note 136, § 7.

138. *Id.* § 4 (stating that foreign businesses were "entitled to make foreign investments in Iraq on terms no less favorable than those applicable to an Iraqi investor"); Bali, *supra* note 94, at 442 (noting that very few countries permit absolute national treatment for foreign business entities).

139. Foreign Investment Law, *supra* note 136, § 2.

140. *See* Falsafi, *supra* note 86, at 425 (stating that labor unions suffered in Iraq because the occupation and the new Iraqi government used violence to suppress labor leaders, which is indicative of "the Bush Administration's disdain for workers'

pushed for an intense implementation of Order 39 by declaring that Iraq was "Open for Business"[141] and by initiating programs inside the U.S. that urged American corporations to invest in operations in Iraq.[142] Political patrons of the Bush administration were reportedly directly involved in their own rent seeking activities in Iraq following the invasion.[143] None of this was serendipitous; the Bush administration specifically planned for and sponsored such reforms with the two thousand page White House *Future of Iraq Project,* which was led by select Iraqi defectors and U.S. government officials who were impaneled for the operations in early 2002, over a year before the invasion.[144]

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rights, as demonstrated by its aggressive support for oppressive labor laws," and the weak status of labor unions at the time of the invasion); *see also* Timothy Mills, Panel Response, *Panel 3: The Development of a Market Democracy*, 33 GA. J. INT'L & COMP. L. 195, 196 (2004) (remarking about the author's thirteen trips to Baghdad and meeting with Iraqi businessmen, political leaders, and former government officials, and explaining that stakeholders complained that they were excluded from the political process); Jeff Madrick, *An Extreme Plan for Iraq*, N.Y. TIMES (Oct. 2, 2003), *available at* http://www.nytimes.com/2003/10/02/business/02SCEN.html (last visited Nov. 22, 2015) (stating that the CPA reforms "immediately make Iraq's economy one of the most open to trade and capital flows in the world, and put it among the lowest taxed in the world, rich or poor"). Moreover, the adverse consequences of a rapid and deep foreign investment policy could include a higher unemployment rate and a difficulty in competing with cash-endowed and experienced multinationals.

141. Boon, *supra* note 48, at 533.

142. *See generally* IRAQ RECONSTRUCTION TASK FORCE, U.S. DEPARTMENT OF COMMERCE, DOING BUSINESS IN IRAQ: FREQUENTLY ASKED QUESTIONS (2003); GRANDIN, *supra* note 77, at 261 n.2, (citing Naomi Klein, *Risky Business*, NATION, Jan. 5, 2004) (reporting that the Bush administration offered sub-market price corporate insurance to American companies through the Overseas Private Investment Corporation to further reduce the risk of launching business operations in Iraq).

143. Douglas Jehl, *Washington Insiders' New Firm Consults on Contracts in Iraq*, N.Y. TIMES (Sept. 30, 2003), *available at* http://www.nytimes.com/2003/09/30/politics/30LOBB.html (last visited Nov. 22, 2015) (stating that a group of businessmen, lobbyists, and former assistants to Bush and his father established New Bridge Strategies, a firm that boasts of "being created specifically with the aim of assisting clients to evaluate and take advantage of business opportunities in the Middle East following the conclusion of the U.S.-led war in Iraq"). The founder, Joe Allbaugh, former Bush-Cheney campaign manager, remarked: "Getting the rights to distribute Proctor & Gamble products can be a gold mine . . . One well-stocked 7-Eleven could knock out thirty Iraqi stores; a Wal-Mart could take over the country." Klein, *supra* note 96.

144. Farrah Hassan, *New State Department Releases on the "Future of Iraq" Project*, NAT'L SEC. ARCHIVE (Sept. 1, 2006), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB198/index.htm (last visited Nov. 22, 2015); *see also* Erick Schmitt & Joel Brinkley, *The Struggle for Iraq:*

CPA Administrator Bremer announced that foreign firms doing business in Iraq would receive 15% to 45% tax breaks[145] and the CPA dropped the top Iraqi corporate tax bracket to 15%, when the pre-invasion rate was 40%.[146] Without restrictions on foreign investment or business operations, U.S. corporations had a pecuniary motive to shift certain operations to Iraq and lower the U.S. tax bill.[147] The *Wall Street Journal* explained that new laws, with virtually no restriction on foreign investment or movement of capital, made Iraq's economy "one of the most open to trade and capital flows in the world, and put it among the lowest taxed in the world, rich or poor."[148] Professor Greg Grandin explained the impact of resource shifting: "[T]he US occupation has imposed on Iraq a massive [U.S.] intervention on behalf of multinationals, insured by US taxpayers and subsidized by the US defense budget."[149]

Many foreign corporations reaped staggering profits,[150] particularly entities associated with the U.S. military-industrial

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Planning; State Dept. Foresaw Trouble Now Plaguing Iraq, N.Y. TIMES (Oct. 19, 2003), *available at* http://www.nytimes.com/2003/10/19/world/struggle-for-iraq-planning-state-dept-study-foresaw-trouble-now-plaguing-iraq.html (last visited Nov. 22, 2015) (stating that the 13 volumes and over 2,000 pages of the Future of Iraq Project was not released until "several House and Senate committees" had requested them).

145. Klein, *supra* note 57, at 340.

146. Tax Strategy Law Order No. 49 of 2004 explanatory note (CPA, Iraq); *see also* Tax Strategy Law Order No. 37 of 2003 § 4 (CPA, Iraq); ARNOVE, *supra* note 85, at 17.

147. For example, existing business operations could be commingled (as opposed to new operations that may not have been undertaken "but for" Iraq's new laws) and this opportunity could impact the income statement of US companies or reduce the U.S. tax bill if profits were retained in offshore accounts. *See* Joshua Smith & Thomas L. Hungerford, *Cutting Tax Rates Not the Answer: Opposing View*, USA TODAY (May 1, 2014, 8:20 PM), *available at* http://www.usatoday.com/story/opinion/2014/05/01/pfizer-corporate-tax-economic-policy-institute-editorials-debates/8583713/ (last visited Nov. 22, 2015). *See also*, *Corporate Tax Rates Table*, KPMG, *available at* https://home.kpmg.com/xx/en/home/services/tax/tax-tools-and-resources/tax-rates-online/corporate-tax-rates-table.html (last visited Nov. 22, 2015).

148. Madrick, *supra* note 84; *see also* Kennedy, *supra* note 134 (noting the Washington Consensus prescriptions on Iraq and the interest in foreign investment if MNCs expect highly profitable returns and an ability to remove profits from the country).

149. GRANDIN, *supra* note 77, at 159-60.

150. Bali, *supra* note 94, at 443.

complex,[151] and there was no constraint on repatriation of profits.[152] The system of corporate benefit was called "war profiteering,"[153] but apparently from the perspective of the Bush administration, negative reverberations were regarded as inconsequential or legitimate consequences of the CPA's economic ultimatums. Professor Gathii remarks:

> In seeking to remake Iraq into the most idealistic type of free market economy, the United States has placed the interests of its leading multinational corporations at the forefront in transforming public and private wealth into engines of new profit for the United States. Thus, the apparently enlightened occupier mission of ending a dictatorial regime by replacing it with idealistic visions of free markets and liberal democracy may be nothing more than an excuse to legitimate new forms of oppression in Iraq.[154]

Order 39 and the CPA's attempted privatization agenda were overwhelming rejected by Iraqis, including by members of the IGC at the time of adoption,[155] and Order 39 could have been perceived as a violation of international law because the Hague Regulations mandate occupying powers to protect, safeguard, and administer the occupied territory in accordance with the rules of usufruct.[156] Nonetheless, the

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151. CONRAD MOLDEN, WHAT WERE THE CONSEQUENCES OF THE IRAQ WAR CONTRACTS?: FROM EISENHOWER'S WARNINGS TO HALLIBURTON'S PROFITS 11-12 (2012).

152. Foreign Investment Law, *supra* note 136, art. 7(2)(d) (investors can "transfer abroad without delay all funds associated with its foreign investment," including profits and sale of the foreign investment); GRANDIN, *supra* note 77, at 159 (stating that foreign corporations were given the right to "unlimited repatriation of profits"); Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L L. 580, 615 (2006) (stating that Order No. 39 did not require reinvesting profits into the country).

153. *See* Kevin J. Wilkinson, *More Effective Procurement Response to Disasters: Maximizing the Extraordinary Flexibilities of IDIQ Contracting*, 59 A.F. L. REV. 231, 240 (2007).

154. Gathii, *supra* note 123, at 512-13.

155. *See id.* at 736; *see also* Audi, *supra* note 48, at 355; Chip Cummins, *State-Run Oil Company Is Being Weighed for Iraq*, WALL ST. J. (Jan. 7, 2004, 11:37 PM), *available at* http://www.wsj.com/articles/SB107343427082371300 (last visited Nov. 22, 2015) (stating that there are "political sensitivities about foreign interference in the oil sector" and that the intentions of Iraq's leaders have inflamed many inside Iraq).

156. Hague Regulations, *supra* note 120, art. 55; Naomi Klein, *Bring Halliburton Home*, NATION (Nov. 6, 2003), *available at* http://www.thenation.com/article/bring-halliburton-home (last visited Nov. 22, 2015) (stating that Bremer's reforms were illegal with the Security Council

foreign profiteering still occurred and TAL provisions were still operative after the CPA dissolved. Granted, overturning TAL provisions would have been conceivable through legislative reform (after a two-thirds vote of parliament and the authorization of the cabinet),[157] judicial processes, or systematic transnational public law litigation,[158] but invalidating or materially altering the occupation's institutions and influence can become more difficult after a new status quo has been set, the foreign military enforces the occupation, new rights become entrenched, and more time passes,[159] particularly when Iraqis were more concerned with survival during civil war-like conditions than with overturning CPA ultimatums.[160] Property rights can be directly enforceable and may have permanence by socialization and the advocacy interests of new respective owners and similarly situated stakeholders.

C. *Constitutionally Locking in Reforms*

International law and Iraqi law could have permitted overturning CPA reforms and imposing liability,[161] but these rights

specifying the applicability of The Hague Regulations and the Geneva Conventions).

157. Juhasz, *supra* note 115.

158. *See generally* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L. J. 2347 (1991); *see also* Anne-Marie Slaughter & David Bosco, *Plaintiffs Diplomacy*, 2002 FOREIGN AFF. 102 (1991).

159. Bali, *supra* note 94, at 443. Order 39 was repealed, but, while still under occupation, the new Iraqi government enacted a National Investment Law that provided a tax free status for U.S. foreign direct investment in Iraq. *Iraq MPs Pass Law to Encourage Foreign Investment*, FINANZNACHRICHTEN (Oct. 10, 2006, 5:10 PM), *available at* http://www.finanznachrichten.de/nachrichten-2006-10/7117497-iraq-mps-pass-law-to-encourage-foreign-investment-020.htm (last visited Nov. 22, 2015).

160. One can assuredly remonstrate that there was a representative government at the time the Constitution was adopted, which means that Iraqi democratic will could have curbed disputatious provisions from being incorporated into the Constitution, but one can also rebut that the Iraqi public intention was probably more transfixed on survival as the country was consumed by violence and near-civil war conditions. *See generally* Robert Bejesky, A Ripe Foundation for the Formation of ISIS: Tit-for-Tat Hostilities and Contingently Contained Violence (unpublished manuscript) (on file with the Syracuse Journal of International Law and Commerce).

161. Fourth Geneva Convention, *supra* note 128, art. 47 (providing that occupied inhabitants are protected and "shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as a result of the occupation"); Law of Administration, *supra* note 117, art. 22 ("If, in the course of his work, an official of any government office . . . or the local administrations, deprives an individual or a group of the rights guaranteed by this Law or any other Iraqi laws in force, this individual or group shall have the right to maintain a cause of action."); Theodore W. Kassinger & Dylan J. Williams,

can be pitted against other constitutional rights and interests.[162] Iraq's constitutional provisions, which were actually predominately embodied in the CPA's TAL, were later codified in the Iraqi Constitution with notable U.S. exhortation.[163]

Provisions governing economic activity and ordering are explicit in the Iraqi Constitution even though many of the principles would normally comprise interpretable policy issues in consolidated democracies.[164] Article 25 of the Iraqi Constitution affirms that the "State shall guarantee the reform of the Iraqi economy in accordance with modern economic principles to insure full investment of its resources, diversification of its sources, and the encouragement and development of the private sector."[165] Article 26 accentuates that the "State shall guarantee the encouragement of investment in the various sectors, and this shall be regulated by law."[166] Article 23, when viewed in conjunction with restrictions on expropriation and protection for property rights[167] and "national treatment" laws, incorporates commanding protection for foreign investment. These provisions that sanctify capitalism and private sector investment, are included under "Section Two: Rights and Liberties" of the Iraqi

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Commercial Law Reform Issues in the Reconstruction of Iraq, 33 GA. J. INT'L & COMP. L. 217, 218 (2004) (stating that the Geneva rules are customary international law and have been signed by all parties involved).

162. Article 44, Dustūr Jumḥūrīyat al-'Irāq [The Constitution of the Republic of Iraq] of 2005 ("There may not be a restriction or limit on the practice of any rights or liberties in this constitution, except by law or on the basis of it, and insofar as that limitation or restriction does not violates the essence of the right or freedom.").

163. Robert Bejesky, *CPA Dictates on Iraq: Not an Update to the Customary International Law of Occupation but the Nucleus of Blowback with the Emergence of ISIS*, 42 SYRACUSE J. INT'L L. & COM. 273, 305-06 (2015).

164. For example, there is a drastic distinction in the language of the US Constitution which does sanctify "property rights," but only in Amendment V, which only applies to government expropriation. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

165. Article 25, Dustūr Jumḥūrīyat al-'Irāq [The Constitution of the Republic of Iraq] of 2005.

166. *Id.* art. 26.

167. *See id.* art. 23 ("Private property is protected . . . . Expropriation is not permissible except for the purposes of public benefit in return for just compensation, and this shall be regulated by law."). International law seemingly requires fair value for expropriation, but there has been disagreement over measuring compensation. *See* G.A. Res. 3281 (XXIX), art. 2, § 2(c) (Dec. 12, 1974) (emphasizing precedent for the freedom of nationalization and expropriation and that compensation is freely assessed domestically as a principle of sovereignty). *See generally* SORNARAJAH, *supra* note 131, at 414-18.

Constitution and are perversely comingled with other rights, such as the right to life, liberty, and political freedom,[168] as the supreme foundational source of law and fundamental right, calculated to prevail over subsequent legislative agendas.[169]

Perhaps the most polemical progression and the one that was pillared on the sequence of deepening reforms was the robust advocacy to revamp Iraq's oil industry. Iraqi defectors and CPA appointees offered periodic public statements endorsing privatization of Iraq's nationalized oil industry[170] and this advocacy became a source of evidence for those who contended that the Iraq War was driven by interest in Iraqi oil.[171] Security Council Resolution 1546 affirmed "the right of the Iraqi people freely to determine their own political future and control their own natural resources,"[172] but Article 112 of the Iraqi Constitution states that the government "shall . . . formulate the necessary strategic policies to develop the oil and gas

168. *See* Articles 14-46, Dustūr Jumḥūrīyat al-'Irāq [The Constitution of the Republic of Iraq] of 2005 (the articles that comprise "Section Two: Rights and Liberties" of the Iraqi Constitution).

169. *See id.* art. 2 ("No law may be enacted that contradicts the rights and basic freedoms stipulated in this Constitution."); *see, e.g.*, Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or that the legislature may alter the constitution by an ordinary act."); *see* Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment, and International Law*, 38 N.Y.U. J. INT'L L. & POL. 707, 710 (2006) (discussing the binding nature of constitutional provisions to "restrict the actions available to future politicians").

170. *See* Bejesky, *Geopolitics*, *supra* note 16, at 219, 229-32, 245, 249; *see also* Sammy Ketz, *Iraq's Planning Minister Wants to Slash Public Sector Workforce*, DAILY STAR (Nov. 10, 2008, 12:00 AM), *available at* http://www.dailystar.com.lb/Business/Middle-East/2008/Nov-10/82371-iraqs-planning-minster-wants-to-slash-public-sector-workforce.ashx#axzz3DXQ6vblZ (last visited Nov. 22, 2015) (noting that Ali Baban, Iraq's planning minister, contended that the oil and other industries were entirely suitable for full privatization).

171. *See* Bejesky, *Geopolitics*, *supra* note 16, at 209, 226-27. Federal Reserve Chairman Alan Greenspan stated that "the Iraq war [was] largely about oil." Bob Woodward, *Greenspan: Ouster of Hussein Crucial for Oil Security*, WASH. POST (Sept. 17, 2007), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/09/16/AR2007091601287_pf.html (last visited Nov. 22, 2015). When asked to elucidate, Greenspan responded that Saddam Hussein's "behavior" posed a threat to regional oil supplies. *See Alan Greenspan vs. Naomi Klein on the Iraq War, Bush's Tax Cuts, Economic Populism, Crony Capitalism and More*, DEMOCRACY NOW! (Sept. 24, 2007), http://www.democracynow.org/2007/9/24/alan_greenspan_vs_naomi_klein_on (last visited Nov. 22, 2015). Greenspan never described what that recent "behavior" was in relation to the reasons for war.

172. S.C. Res. 1546, pmbl. (June 8, 2004).

wealth in a way that achieves the highest benefit to the Iraqi people using the most advanced techniques of the market principles and encouraging investment."[173] Given that Iraqis were cash poor because of the state of their economy during the invasion and occupation, "encouraging investment" by default presumably meant foreign investment. Shortly after the invasion, American and British oil conglomerates began to entrench themselves in Iraq but waited for four years to finally procure official exploitation rights.[174] In a December 2005 agreement with the IMF, Iraq committed itself to drafting a new petroleum law by the end of 2006 so that foreign oil companies could invest in Iraq.[175] By 2008, multinational oil companies began to be recipients of long-term licenses to exploit Iraqi oil fields through Production Sharing Agreements.[176] In 2013, CNN reported, "[T]he Iraq War was a war for oil, and it was a war with winners: Big Oil."[177]

D. *A Fine Example of the "Rule of Law": Dollarizing the Iraqi Economy*

The CPA may have been able to so handily dictate unbounded capitalist reforms because of the practical and psychological humanitarian dependence that stemmed from the CPA's monetary policy. The authority to manage an occupied country's financial, commercial, and economic system is not authorized in the Hague Regulations,[178] but the CPA initiated a system to provide liquidity to

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173. Article 112, § 2, Dustūr Jumḥūrīyat al-'Irāq [The Constitution of the Republic of Iraq] of 2005.

174. *See* Mekay, *supra* note 63 (stating that there were hundreds of Americans working in Iraqi government agencies and that they worked to give "full access for U.S. companies to the nation's oil reserves").

175. Joshua Gallu, *The Race For Iraq's Resources: Will Iraq's Oil Blessing Become a Curse?*, SPIEGEL ONLINE (Dec. 22, 2006, 3:46 PM), *available at* http://www.spiegel.de/international/the-race-for-iraq-s-resources-will-iraq-s-oil-blessing-become-a-curse-a-456212.html (last visited Nov. 22, 2015). The Bush administration was so interested that the USAID contracted with BearingPoint to draft proposals for Iraq's new law. *See generally* BEARINGPOINT, OPTIONS FOR DEVELOPING A LONG TERM SUSTAINABLE IRAQI OIL INDUSTRY (2003).

176. *See* Bejesky, *Geopolitics*, *supra* note 16, at 224-25, 240-41, 249-50..

177. Juhasz, *supra* note 25.

178. *See* JAMES A. TYNER, THE BUSINESS OF WAR: WORKERS, WARRIORS AND HOSTAGES IN OCCUPIED IRAQ 82 (2006); *see also* LAURENCE BOISSON DE CHAZOURNES, TAKING THE INTERNATIONAL RULE OF LAW SERIOUSLY: ECONOMIC

the Iraqi economy by having the U.S. Federal Reserve Bank physically transport U.S. currency to the CPA and inject the legal tender into the Iraqi economy.[179] Most of the physical U.S. dollar transfers were drawn from the Development Fund for Iraq ("DFI"), which the CPA constituted and controlled[180] as the successor to the U.N. Oil for Food Program.[181] By June 28, 2004, the date the CPA transferred authority to the interim Iraqi government, U.S. officials had disbursed $20.7 billion into the Iraqi economy, of which $12 billion was provided in cash, and some of those disbursements set records as the largest U.S. Federal Reserve cash payouts in history.[182]

The monetary value belonged to Iraqis, but the CPA distributed U.S. dollars like a parent dispensing an allowance to a child,[183] breeding a dependence on the currency for routine and everyday transactions.[184] Iraq had three alternative circulating currencies with different exchange rates,[185] but the high-value of crisp, new U.S. hundred dollar bills bred frenzy and imparted a favorable symbol of the occupation and likely made the U.S. dollar the de facto currency,[186] which was a particularly ironic twist because Hussein's

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INSTRUMENTS AND COLLECTIVE SECURITY 11-12 (2005).

179. *See* Memorandum from the Majority Staff on Cash Transfers to the Coalition Provisional Authority to the House of Representatives Comm. on Oversight and Gov't Reform 1 (Feb. 6, 2007) [hereinafter HR Committee on Oversight and Government Reform].

180. *See* Hmoud, *supra* note 64, at 449-50.

181. HR Committee on Oversight and Government Reform, *supra* note 179, at 1.

182. *Id.* at 1, 4, 5-6. Several of these shipments ($1.5 billion on Dec. 23, 2003, $2.4 billion on June 18, 2003, and $1.6 billion on June 25, 2003) were the "largest pay out[s] of U.S. currency in Fed history." *Id.* at 6-7.

183. *See* Mills, *supra* note 140, at 208 (US government funding salaries and utility needs); Melissa Patterson, *Who's Got the Title? Or, The Remnants of Debellatio in Post-Invasion Iraq*, 47 HARV. INT'L L.J. 467, 471 (2006).

184. CPA fiscal transactions may have set the groundwork for imposed reforms and an open economy because transactions involving payment for government salaries and goods and services rendered inside Iraq and payments to external recipients could be made in US currency or denominated in US dollars for international transactions.

185. New Iraqi Dinar Banknotes Law Order No. 43 of 2003 § 1 (CPA, Iraq) (listing the "Swiss dinar" (1959-89), "1990 dinar," and the "New Iraqi dinar," all of which had different "Official Conversion Rates" but that the goal was to get to only using the "New Iraqi dinar").

186. CPA official Frank Willis testified to Congress and stated that a "'wild west' atmosphere prevailed and the country was awash in brand new $100 bills." HR Committee on Oversight and Government Reform, *supra* note 179, at 13 (citing Testimony of Frank Willis, *An Oversight Hearing on Waste, Fraud and Abuse in*

regime went off the U.S. dollar three years earlier as a hard currency for denominating oil sales in favor of the Euro.[187] U.S. currency represented buying power for the flood of new high-technology gadgets and consumer goods, which were previously restricted imports, not because of the lack of a currency, but because of sanctions and poverty.[188]

With the humanitarian disaster and lack of a tangible commodity-backed or hard currency, the U.S. dollar's full faith and credit served as the basis of currency stability. Alan Greenspan, Federal Reserve Chairman at the time U.S. Federal Reserve payouts were made, later remarked:

> [W]hat we were involved in was essentially endeavoring to create a viable currency for the Central Bank of Iraq. And what we did do was - I think very successfully - create what is a viable financial system, even under the circumstances that currently exist. There was, as far as I can judge, a huge drain of the resources into areas that nobody to this day can understand or follow.[189]

U.S. Government Contracting in Iraq, Senate Democratic Policy Committee Hearing (Feb. 14, 2005)). US $100 bills were juxtaposed with the comparatively weak value of other currencies and symbolized Iraqi economic and social viability when the country had been facing hardship. $100 bills served as a daily reminder of the occupation (as the US dollar was the same currency used by the nation of the occupying force) and more prosperity even though the standard of living could have increased threefold overnight by simply dropping the restrictions on oil sales. Likewise, there would also be an emotive psychological impact with currency containing Saddam Hussein's image. By contrast, Iraqi banknotes, which were denominated at a highest value of 250 Iraqi dinar, worth approximately sixteen cents, required a "brick-like" stack of bills for purchasing daily necessities. Hamoudi, *supra* note 97, at 531. The need to eliminate old currencies because of their low value is predominantly due to the fact that Iraq's economy had been destroyed for over a decade but was suddenly opened to international financial transactions, currencies possess a foreign exchange value with an open economy, there was purchasing power parity with international transactions, and the central bank (under the direction of the current occupational authority) set monetary policy.

187. Faisal Islam, *Iraq Nets Handsome Profit by Dumping Dollar for Euro*, GUARDIAN (Feb. 15, 2003, 8:55 PM), *available at* http://www.theguardian.com/business/2003/feb/16/iraq.theeuro (last visited Nov. 22, 2015).

188. Mills, *supra* note 140, at 204. While the imported products had long existed, the drastic change in trade (under military occupation), may have made it appear that it was the US that brought such opportunities.

189. *"Mr. Greenspan is Flat Wrong": Pulitzer Prize-Winning Journalists Respond to Alan Greenspan's Claim that He Didn't Know About Federal Reserve's Role in Iraq's Missing Billions*, DEMOCRACY NOW! (Oct. 9, 2007), *available at* http://www.democracynow.org/2007/10/9/mr_greenspan_is_flat_wrong_pulitzer (last visited Dec. 1, 2015) Ambassador Timothy Carney remarked: "[A] capable

Greenspan's reference to a "huge drain on the resources" might have been attributable to the CPA's mode of cash distribution. Both the U.N. resolution that created the DFI and CPA rules governing the DFI specified that funds were required to be distributed "in a transparent manner to meet the humanitarian needs of the Iraqi people . . . and for other purposes benefiting the people of Iraq."[190] At the heart of congressional investigations in September 2007 was the location of the Federal Reserve's $12 billion in physical cash allocations after it was delivered to the CPA.[191] Congressional investigations revealed that the CPA compensated recipients with duffel bags stuffed with cash, that trucks carried off loads of cash, that cash was stolen out of vaults, and that "ghost" employees were being paid.[192]

U.N. Resolution 1483 required that Iraq's funds be "audited by [an approved] independent public accountant[]"[193] and CPA rule

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U.S. Treasury team worked out an emergency scheme for [Iraqi] government workers – and I became one of the deliverymen [for cash payments]. Without a functioning banking system, cash was the only way to inject money into the economy." HR Committee on Oversight and Government Reform, *supra* note 179, at 14.

190. S.C. Res. 1483, *supra* note 93, ¶ 14; *see also* S.C. Res. 1511, ¶¶ 23-24 (Oct. 16, 2003) ("Emphasizes that the International Advisory and Monitoring Board (IAMB) referred to in paragraph 12 of resolution 1483 (2003) should be established as a priority, and reiterates that the Development Fund for Iraq shall be used in a transparent manner as set out in paragraph 14 of resolution 1483 (2003)"); HR Committee on Oversight and Government Reform, *supra* note 179, at 2 (emphasizing that CPA officials were fully cognizant that DFI funds were required to be transferred in a transparent manner).

191. HR Committee on Oversight and Government Reform, *supra* note 179, at 1; *The Impact of CPA Decision making on Iraq Reconstruction: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 110th Cong. 18 (2007) (noting that up to $20 billion could have been unaccounted for).

192. HR Committee on Oversight and Government Reform, *supra* note 179, at 2; *see also id.* at 2 ("The failure to account for the $20 billion expended by the CPA appears to have had serious consequences. Many of the funds appear to have been lost to corruption and waste. According to the Inspector General, thousands of 'ghost employees' were receiving paychecks from Iraqi ministries under CPA's control."); *Id.* at 13 (reporting that Frank Willis testified that "when contractors needed to be paid by the CPA, they were told to 'bring a big bag' for cash payment" (citing Interview of Frank Willis, House Committee on Government Reform, Minority Staff (Jan. 27, 2005)); SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, HARD LESSONS: THE IRAQ RECONSTRUCTION EXPERIENCE 155 (2009) ("CPA failed to enforce adequate management, financial, and contractual controls over approximately $8.8 billion of DFI money.").

193. S.C. Res. 1483, *supra* note 93, ¶ 12.

number 2 also stated that it would secure the "services of an independent, certified public accounting firm."[194] The CPA did not hire a "certified public accounting firm,"[195] and post-occupation audits discovered that there were hundreds of instances of inadequate controls and disbursals to unverifiable recipients and for non-existent contracts, contractors, and projects.[196] The Inspector General for Iraq Reconstruction report remarked that "proper cash accountability was not maintained, physical security was inadequate, fund agent records were not complete, and fund managers' responsibilities and liabilities were not properly assigned."[197]

Billions of dollars in Iraqi public money, which the CPA was required to allocate in a consuetude accordant with the fiduciary obligations of an occupier, could not be accounted for.[198] There was hypocrisy; federal criminal charges were filed against individuals suspected of taking bribes and engaging in other criminal misconduct while the U.N. administered the pre-2003 Oil for Food Program[199] and

194. HR Committee on Oversight and Government Reform, *supra* note 179, at 10 (citing CPA, *Regulation Number 2: Development Fund for Iraq* (June 10, 2003)).

195. HR Committee on Oversight and Government Reform, *supra* note 179, at 11 (stating that the CPA did not hire "a certified public accounting firm," but instead paid $1.4 million to a company called North Star Consultants that operated out of a private residence in San Diego, and reporting that the Inspector General for Iraq Reconstruction noted that North Star never performed this work). Bremer also, through Regulation Number 3, created a Program Review Board, which was required to report directly to Bremer, and be "responsible for recommending expenditures of resources from the Development Fund for Iraq and other resources . . ." Program Review Board Regulation No. 3 of 2003 § 6 (CPA, Iraq).

196. SIGIR, REPORT NO. 05-004, AUDIT REPORT: OVERSIGHT OF FUNDS PROVIDED TO IRAQI MINISTRIES THROUGH THE NATIONAL BUDGET PROCESS, 7 (Jan. 30, 2005) [hereinafter SIGIR, AUDIT REPORT].

197. HR Committee on Oversight and Government Reform, *supra* note 179, at 13 (citing SIGIR, AUDIT REPORT).

198. HR Committee on Oversight and Government Reform, *supra* note 179, at 18.

199. In 2005, U.S. officials initiated U.S. federal criminal charge investigations against U.N. officials for criminal misconduct, including for accepting "bribes," in the pre-2003 U.N. Secretary-General administered oil-for-food program. *See* John R. Crook, *Further U.S. Reactions to Abuses in UN Oil-for-Food Program; U.S. Criminal Charges Against UN Officials, Others*, 99 AM. J. INT'L L. 904 (2005); Russell P. McAleavey, Note, *Pressuring Sudan: The Prospect of an Oil-For-Food Program for Darfur*, 31 FORDHAM INT'L L.J. 1058, 1088-89 (2008). In November 2007, Chevron was ordered to pay $30 million in criminal and civil penalties for kickbacks under the U.N. Oil for Food Program. *See* Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act – 1977 to 2010*, 12 SAN DIEGO INT'L L.J. 89, 108 (2010). For example, Aleksandr Yakovlev pled guilty to U.S. federal charges of money laundering, conspiracy, and wire fraud for reportedly receiving

the CPA created the Iraqi Commission on Public Integrity that was focused on investigating historical corruption of Hussein's regime,[200] but CPA officials overtly stated that they believed that their fiscal obligations should be above reproach because their goal was to inject money into the economy.[201] The CPA certainly should not have been above reproach because investigations eventually led a former CPA official to plead guilty to multiple felony counts for stealing millions of dollars in cash.[202]

Another predicament is that the CPA had just stripped hundreds of thousands of employees out of the Iraqi government for Ba'ath Party association and dismantled the Iraqi military apparatus,

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several hundred thousand dollars in bribes. Colum Lynch, *Oil-Food Official Pleads Guilty*, WASH. POST (Aug. 9, 2005), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/08/08/AR2005080800150.html (last visited Dec. 3, 2015).

200. Corruption was not completely overlooked because a January 2004 CPA Order created the Iraqi Commission on Public Integrity, which had a mission to adopt and enforce anti-corruption and government accountability measures, but the Commission was apparently unconcerned with current instances of corruption since they set the jurisdiction for this new entity to trace back possible instances of corruption to July 17, 1968. Delegation of Authority Regarding The Iraq Commission on Public Integrity Order No. 55 of 2004 §§ 3-4 (CPA, Iraq).

201. David Oliver, the head of finance for the CPA, remarked: "I have no idea, I can't tell you whether or not the money went to the right things or didn't—nor do I actually think it is important." Mark Gregory, *Baghdad's 'Missing' Billions*, BBC (Nov. 9, 2006), *available at* http://news.bbc.co.uk/2/hi/business/6129612.stm (last visited Dec. 3, 2015). After the interviewer criticized Oliver for his callous attitude, Oliver remarked: "Billions of dollars of their money disappeared, yes I understand, I'm saying what difference does it make?" *Id.* Oliver claimed that he gave uncertain amounts of cash to the Iraqi government and because nothing was left, the allocations must have been provided to the right people. *Id.* Most countries have (or aspire to improve) accounting systems that require audits of corporations and governmental entities to ensure integrity of the accounting process, to protect public interests, and to prevent white-collar crimes from occurring, but the CPA disbursal process seemed to be rather rudimentary and without protections that would instill integrity. Towards a New Era in Government Accounting and Reporting, PwC 3, 14 (Apr. 2013), *available at* http://www.pwc.com/gx/en/psrc/publications/assets/pwc-global—ipsas-survey-government-accounting-and-reporting-pdf.pdf (last visited Dec. 9, 2015) (assessing in a survey of 100 countries that there needs to be "[b]etter integration and comparability in government accounting systems" but "[t]he G20 has recently emphasized the need for transparent, comparable public sector financial reporting, including public sector balance sheets" and for "sound, transparent accounting systems" in order to restore confidence and having sustainable financial management).

202. Charles R. Babcock, *Contractor Fraud Trial to Begin Tomorrow*, WASH. POST (Feb. 13, 2006), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/02/12/AR2006021200732.html (last visited Dec. 3, 2015).

which meant that the only semblance of *government* was the CPA and the U.S.-appointed heads of ministry and appointed members of Iraqi interim governments.[203] During the CPA's tenure and up until the date that the CPA authority expired, the CPA distributed billions of dollars in cash to its appointees.[204] Congressman Henry Waxman presided over investigations and remarked: "The CPA handed over $8.8 billion in cash to the Iraqi government even though that new government had no security or accounting system. No one can account for it."[205] Not to denote that this unequivocally transpired, but perhaps it is no wonder that the appointed interim Iraqi government permitted the CPA to do whatever it wanted; giving billions of dollars in cash would ostensibly be one of the most straightforward methods of illegally bribing or at least arousing loyalty from appointees.[206] The money belonged to the people of Iraq as a whole,[207] but currency might also just vanish and not effectively stimulate the economy despite the humanitarian need.[208]

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203. DILIP HIRO, SECRETS AND LIES 312-13 (2003). Resolution 1483 required disbursement of funds under the Development Fund for Iraq in "coordination" or "consultation" with the governance authority, which would officially become the IGC in October 2003. S.C. Res. 1483, *supra* note 93, ¶¶ 13-14, 16(b); *see also* S.C. Res. 1511, *supra* note 190, ¶¶ 23- 24.

204. The CPA was apparently having so much fun distributing pallets of bundled $100 bills without consequence or documentation that it requested another $1 billion from the Federal Reserve just hours after its official authority expired. HR Committee on Oversight and Government Reform, *supra* note 179, at 9. Thankfully, the request was denied by the Federal Reserve because "the CPA no longer had control over Iraq's assets." *Id.*

205. Gregory, *supra* note 201.

206. The CPA actions may very well fall into the jurisdiction of a number of international agreements that prohibit bribery of public officials and seek to prevent corruption. *See* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. TREATY DOC. NO. 105-43 (1998); Inter-American Convention on Corruption, Mar. 29, 1996, S. TREATY DOC. NO. 105-39 (1998); Council of Europe Criminal Law Convention on Corruption, Jan. 27, 1999, E.T.S. NO. 173; G.A. Res. 58/4 Convention Against Corruption (Oct. 31, 2003).

207. Government employees, private sector entities, and organizations, could not be paid from what was earmarked as Iraq's own revenues unless the CPA made payments in US dollars. Charles Tiefer, *The Iraq Debacle: The Rise and Fall of Procurement-Aided Unilateralism as a Paradigm of Foreign War*, 29 U. PA. J. INT'L L. 1, 45-46 (2007). In fact, the impropriety was even more direct as Ahmed Chalabi, the Iraqi exile instrumental in producing fabricating witnesses prior to the invasion, and his group became the direct recipients of funding when they established the Iraqi Reconstruction and Development Council. *Id.* at 44.

208. The adverse consequence of "dollarizing" the Iraqi economy, not implementing accounting controls, and being unable to locate billions of dollars,

The next part considers the impact of occupation construction activities. The part untangles the significance of Iraq's debt-stricken financial status in conjunction with multinational cost of reconstruction in section A, addresses the details of no-bid contracts granted by the U.S. government in section B, presents instances of fraud and greed that increased the cost to U.S. taxpayers in section C, and accents the U.S. military's role in securing the reconstruction process in section D. In short, resources shifted to construction projects that benefited multinationals while burdening Iraqis with high cost and lower employment and encumbered American taxpayers with additional spending.

V. CONSTRUCTION CONTRACTS

A. *Obligation to Rebuild and the Financing of Construction*

Perhaps implicitly conducted pursuant to a moral and international law obligation to repair or replace what was destroyed during war,[209] U.S. authorities undertook projects to rebuild infrastructure that was damaged by bombing operations during the 1991 Gulf War and the 2003 invasion.[210] Experts estimated that construction would cost between $55 and $90 billion.[211] Over 150 companies[212] received $21 billion for construction projects and as

would be unlikely to protect against the possibility of bundles of cash being stashed or otherwise removed from the economy instead of being spent to stimulate the economy. This is also a breeding ground of corruption because political appointees could be persuaded by financial gain or be particularly amenable to the occupation's dictates, despite broadly-based and opposing public desires. The occupation authorities were operating like a bank and payroll officer for payees in a country in which the vast majority of the population was impoverished and in dire need of services.

209. *See generally* INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT xi, 11, 39-42 (2001) (setting forth standards for post-conflict situations, noting that the international community must support the intervention, and emphasizing that the intervener [and perhaps the international community] has a "responsibility to rebuild" what was destroyed during war).

210. Bali, *supra* note 94, at 442.

211. *Rebuilding Iraq 'Will Cost $55bn,'* BBC (Oct. 3, 2003, 1:17 PM), *available at* http://news.bbc.co.uk/2/hi/business/3160800.stm (last visited Dec. 4, 2015) (referring to the $55 billion World Bank estimate and the $90 billion estimate by McKinsey consulting).

212. *Blood and Oil: How the West Will Profit From Iraq's Most Precious Commodity*, INDEPENDENT (Oct. 22, 2011), *available at* http://www.independent.co.uk/news/world/middle-east/blood-and-oil-how-the-west-will-profit-from-iraqs-most-precious-commodity-431119.html (last visited

much as $117 billion for security objectives related to reconstruction,[213] which was a sum that was several times Iraq's GDP in 2004.[214] Funding came from U.S. taxpayers, loans,[215] and Iraqi oil revenues.[216]

Iraq required tremendous investment because the country lacked capital for reconstruction and had accumulated massive debt from previous wars, sovereign obligations undertaken by Hussein's regime, and the ridiculously excessive level of debt (up to $350 billion) imposed as damages by the Security Council following the invasion of Kuwait.[217] Prior to the invasion in 2003, Iraq was unable to service existing debt obligations because Security Council restrictions prohibited oil exports starting in the early-1990s and there were revenue limits imposed by the U.N. Oil for Food Program. Emphasizing how Iraq's massive existing debt could undermine reforms,[218] Joseph Stiglitz remarked that Iraq was facing further

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Dec. 4, 2015).

213. SIGIR, *supra* note 2, at 9. $117 billion is the difference between the estimate of $138 billion and $22 billion. Anna Fifield, *Contractors Reap $138B From Iraq War*, CNN (Mar. 19, 2013), *available at* http://edition.cnn.com/2013/03/19/business/iraq-war-contractors/ (last visited Dec. 4, 2015) (noting that $138 billion was spent on "private security, logistics and reconstruction contracts"). However, this number could be much higher if one assumes that reconstruction was a critical precondition to alleviating hostilities within the Iraqi population and ending the occupation and if it is assumed that U.S. military operations were also critical to the security of reconstruction.

214. *Donor Activities and Civil Society Potential in Iraq*, U.S. INST. PEACE (July 2004), *available at* http://www.usip.org/sites/default/files/sr124.pdf (last visited Dec. 4, 2015) (stating that Iraq's GDP was approximately $19 billion in 2004).

215. *See generally* ARNOVE, *supra* note 85, at 74; *see also* IN THE NAME OF DEMOCRACY: AMERICAN WAR CRIMES IN IRAQ AND BEYOND 63 (Jeremy Brecher, Jill Cutler & Brendan Smith eds., 2005) [hereinafter IN THE NAME OF DEMOCRACY]; Juhasz, *supra* note 115 (reporting that through mid-January 2007, U.S. taxpayers had already provided $50 billion in loans to reconstruct Iraq and that these expenditures were allocated to U.S. companies and banking interests).

216. Hmoud, *supra* note 64, at 450 (discussing that the CPA assumed control over the Oil-for-Food Program from the UN and that the new program, called the Development Fund for Iraq could be disbursed for "humanitarian needs, repair of Iraq's infrastructure, disarmament, economic reconstruction, and the costs of Iraqi civilian administration.").

217. Bejesky, *Currency Cooperation*, *supra* note 59, at 100-02 (noting that Kuwaitis filed 2.68 million claims, seeking more than $350 billion in compensation, when Kuwait's annual GDP averaged $41.3 billion).

218. Shortly after the 2003 invasion, Iraqis found themselves in a position similar to that faced by the three-decade-long debt crisis that still plagues developing countries. *See generally* NAT'L BUREAU OF ECON. RESEARCH, DEVELOPING COUNTRY DEBT AND THE WORLD ECONOMY (Jeffrey D. Sachs ed., 2007).

economic travail by "[p]iling more debt onto Iraq's already huge obligations" and warned that "[i]f Iraq's economy falters as a result of a misguided economic reconstruction program based on shock therapy, the country will be further indebted with little to show for it."[219]

The reconstruction process was exorbitant and slighted rational labor market mechanisms because Iraq was strained with high unemployment while multinational corporations employed foreign workers who were paid many times more than Iraqis would have been paid.[220] Representative Henry Waxman, Ranking Minority Member on the U.S. House Committee on Government reform, wrote in a September 2003 memorandum that congressional investigations revealed that "many reconstruction projects could be reduced by 90% if the projects were awarded to local Iraqi companies rather than to large government contractors like Halliburton or Bechtel."[221] Congressional records revealed specific procurement examples in which multinational corporations cost between five and over one hundred times more than an Iraqi construction firm would have charged for the same project.[222] Had Iraqi companies been awarded

219. Stiglitz, *supra* note 45.

220. ARNOVE, *supra* note 85, at 15-16; Juhasz, *supra* note 115 (noting the excessive cost of American companies and that "Iraqis argue that they have the knowledge, skill and experience to conduct the reconstruction themselves"). Consequently, not only were labor market mechanisms not being pursued because higher-paid foreign workers often executed employment tasks instead of locals, but Iraqis had more difficulty finding employment even though much of the infrastructure that needed to be repaired was a direct consequence of a foreign power's bombing operations. IN THE NAME OF DEMOCRACY, *supra* note 215, at 63 (emphasizing that Iraqis were prohibited from fixing critical infrastructure); Tiefer, *supra* note 207, at 4-5 (stating that Iraqis were prevented, in certain industrial sectors, from working to rebuild their own country).

221. Letter from Henry A. Waxman, Ranking Minority Member, U.S. House of Representatives, to Joshua Bolten, Director, U.S. Office of Management and Budget (Sept. 30, 2003), *available at* http://rense.com/general43/iraqicompanieswouldsave.htm (last visited Dec. 4, 2015); *see also* Tiefer, *supra* note 207, at 42 (accentuating the common complaint that American firms do all of the work even though Iraqis do not have as high of overhead expenditures as U.S. design-build firms); Kinan Obeidin, *The Iraq Reconstruction Contracts: Limiting the Sources for Government Contracts*, 29 J. LEGAL PROF. 259, 263 (2005).

222. U.S. H. COMM. ON GOV'T REFORM, MINORITY STAFF SPECIAL INVESTIGATIONS DIV., HALLIBURTON'S GASOLINE OVERCHARGES, 3 (2004), *available at* http://www.halliburtonwatch.org/news/waxman_gas_overcharges.pdf (last visited Dec. 4, 2015) [hereinafter Waxman] (reporting that foreign contractors charged about $25 million to refurbish police stations in Basra while an Iraqi

the same contracts, there might have been a lower unemployment rate, an alleviation of social discontent caused by adverse economic conditions, a lower cost of construction for U.S. taxpayers, and a mitigation of the perception of a profiteering bonanza for multinational corporations.[223]

Explanations provided for the dearth of Iraqi companies receiving contracts included that Iraqis were not sufficiently experienced[224] and that local contractors "lacked the requisite insurance."[225] There was a heightened risk of loss due to violence and foreign insurance companies began to deny claims for losses inside Iraq,[226] but Iraqi companies had a fractional cost of construction at risk irrespective of actuarial insurance calculations. Iraq also had a pre-invasion tort law system to address liability in the event of faulty

company could have done the work for about $5 million); Klein, *supra* note 96 (reporting that the CPA purchasing concrete walls from foreign companies at a price of $1,000 each when seventeen Iraqi state-owned cement companies could have produced the walls at $100 each). In a case where locals were hired, Major General David Petraeus explained to members of the House Committee on Government Reform that he hired Iraqis to fix a cement plant for $80,000, but engineers from US companies quoted a price of $15 million to complete the same contracts. Waxman, *supra* note 222, at 2.

223. Waxman, *supra* note 222, at 2 ("The question we need to confront is whether the Administration is putting the interests of companies like Halliburton and Bechtel over the interests of the American taxpayer and the Iraqi people. When inordinately expensive reconstruction projects are awarded to high-cost federal contracts with close political ties to the White House, the Administration can create a lose-lose situation: not only do U.S. taxpayers vastly overpay for reconstruction services, but Iraqis are denied urgently needed employment opportunities."). Multinational construction companies were not required to pay much Iraqi tax and could repatriate profits.

224. Charles Bronowski & Chad Fisher, *Money as a Force Multiplier: Funding Military Reconstruction Efforts in Post-Surge Iraq*, 2010 ARMY LAW. 50, 61 (2010) (quoting service members who mentioned that "the United States has concerns that Iraqis are becoming too reliant on U.S. expertise in executing reconstruction programs rather than developing organic Iraqi capabilities").

225. Waxman, *supra* note 2221, at 5.

226. *See. e.g.* T. Christian Miller, *AIG Faces Inquiry Over Medical Care for U.S. Contractors*, L.A. TIMES (Apr. 22, 2009), *available at* http://articles.latimes.com/2009/apr/22/nation/na-aig22 (last visited Dec. 9, 2015) (stating that AIG denied 44% of all serious injury claims). The inability to attain private insurance required more dependence on federal compensation programs. War Hazards Compensation Act, 42 U.S.C.§§1701-1712 (enacted on Dec. 2, 1942); *see also* Compensation for Injury, Disability, Death, or Enemy Detention of Employees of Contractors with the United States, 20 C.F.R. pt. 61 (2005).

construction,[227] while CPA Order 17 made contractors from coalition countries immune from liability in Iraqi courts.[228]

B. *No-Bid Contracts*

The occupation's procurement process was not administered with abounding regard for competitive bidding procedures, but instead was candidly called a "reconstruction racket,"[229] the "coalition of the billing,"[230] and corruptly managed.[231] No-bid procurement contracts were awarded to companies with close connections to Iraqi defectors who urged for the war[232] and American corporations with links to influential U.S. politicians.

Criticism was leveled over conflicts of interest as then-Vice President Cheney's former company, Halliburton,[233] was awarded

227. There was a legal structure that might have provided a foundation for liability because pre-invasion Iraqi tort law did provide causes of action that could compensate for harms based on intent, negligence, and strict liability standards. Civil Code of 1990 art. 202 (Iraq). The existing Iraqi tort law system was recognized as the applicable law in a Georgia District Court case that involved two contractors—an American plaintiff and Kuwait Gulf defendant. Baragona v. Kuwait Gulf Link Transp. Co., 688 F. Supp. 2d 1353, 1355-56 (N.D. Ga. 2007). It is not clear why Iraqi construction companies would be required to carry additional insurance beyond that which would normally be required in their own country.

228. Status of the Coalition Provisional Authority, MNF -Iraq, Certain Missions and Personnel in Iraq Order No. 17 (revised) of 2004 §§ 1(11), 4(2)-(3) (CPA, Iraq); *see also* §§ 1(1)-(2), 2(1) ("[u]nless provided otherwise herein, the MNF, the CPA, Foreign Liaison Missions, their Personnel, property, funds and assets, and all International Consultants shall be immune from Iraqi legal process.").

229. ARNOVE, *supra* note 85, at 78.

230. Derek Gregory, *Vanishing Points: Law, Violence, and Exception in the Global War Prison*, *in* TERROR AND THE POSTCOLONIAL 55, 81 (Elleke Boehmer & Stephen Morton eds., 2010) (stating term used by Peter Singer).

231. Gathii, *supra* note 36, at 737.

232. L. ELAINE HALCHIN, CONG. RESEARCH SERV., RL 32370, THE COALITION PROVISIONAL AUTHORITY (CPA): ORIGIN, CHARACTERISTICS, AND INSTITUTIONAL AUTHORITIES 22-24 (2005) (reporting that a $327 million contract was given to Nour USA in November 2003 to equip the new Iraqi armed forces, that there were nineteen other bidders and Nour's bid was $231 million lower than Bumar Group, that Nour's president A. Huda Faouki is an alleged friend of Ahmad Chalabi, and that Nour had no experience because it was formed in May 2003, but the contract was eventually canceled because of procurement contract dispute filings). A lower price is favorable but possible conflicts of interest and lack of experience can undermine a legitimate procurement process.

233. Many criticized this connection between the vice president and Halliburton as a conflict of interest. Robert Bryce & Julian Borger, *Cheney is Still Paid by Pentagon Contractor: Bush Deputy Gets Up to $1m From Firm With Iraq Oil Deal*, GUARDIAN (Mar. 12, 2003. 10:02 AM), *available at* http://www.theguardian.com/world/2003/mar/12/usa.iraq5 (last visited Dec. 4,

with the contract to rebuild existing Iraqi oil production facilities in a secretive no-bid contract two weeks before the invasion.[234] Contract rights morphed into $2.4 billion in revenues for Halliburton over three years[235] and Halliburton reported a 62% increase in revenues.[236] KBR, Halliburton's subsidiary, was awarded at least $39.5 billion in federal contracts related to the Iraq war.[237] Some funds were unaccounted for and Halliburton and other American companies later became subject to a series of Congressional investigations over overbilling.[238] During

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2015) (noting that Cheney was still being paid up to $1 million a year in "deferred compensation" from Halliburton while he was vice president); Aaron Blake, *Rand Paul in '09: Cheney Pushed Iraq War to Benefit Halliburton*, WASH. POST (Apr. 7, 2014), *available at* http://www.washingtonpost.com/blogs/post-politics/wp/2014/04/07/rand-paul-in-09-cheney-pushed-iraq-war-to-benefit-halliburton/ (last visited Dec. 4, 2015) (stating that Senator Rand Paul suggested Cheney was clearly at the forefront of pushing for war and that his own company (Halliburton) benefited).

234. Abigail H. Avery, *Weapons of Mass Construction: The Potential Liability of Halliburton Under the False Claims Act and the Implications to Defense Contracting*, 57 ALA. L. REV. 827, 837-38 (2006) (noting that the contract was consummated in March 2003). This followed after Halliburton's submission of initial planning documents for rebuilding (in fall 2002), which was also an awarded contract. CHALMERS JOHNSON, THE SORROWS OF EMPIRE: MILITARISM, SECRECY AND THE END OF THE REPUBLIC 144 (2004); CBS, *Halliburton Defends No-Bid Iraq Contract*, INFORMATION CLEARING HOUSE (Apr. 27, 2003), *available at* http://www.informationclearinghouse.info/article3141.htm (last visited Dec. 4, 2015) (stating that there was no competition for contracts worth up to $7 billion and that Cheney was instrumental in placing Halliburton into that privileged position).

235. HENRY A. WAXMAN, H. COMM. ON GOV'T REFORM, MINORITY STAFF SPECIAL INVESTIGATIONS DIV., HALLIBURTON'S PERFORMANCE UNDER THE RESTORE IRAQI OIL 2 CONTRACT, 3(2006), *available at* http://www.halliburtonwatch.org/reports/RIO2_audit.pdf (last visited Dec. 4, 2015) [hereinafter House Comm. on Gov't Ref.]; *See also* Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989, 990 (2005); Erik Eckholm, *F.B.I. Investigating Contracts With Halliburton*, N.Y. TIMES (Oct. 29, 2004), *available at* http://www.nytimes.com/2004/10/29/politics/29contract.html?_r=0 (last visited Dec. 4, 2015) (stating that the FBI initiated an investigation because many called the no-bid awards illegal procurement contracts).

236. Minow, *supra* note 235, at 992-93.

237. Fifield, *supra* note 213.

238. Neil King, Jr., *Halliburton's Iraq Cost Examined*, WALL ST. J. (Mar. 12, 2004, 12:01 AM), *available at* http://www.wsj.com/articles/SB107905639161753571 (last visited Dec. 4, 2015) (noting "significant deficiencies" in accounting for KBR billing); T. Christian Miller, *U.S. Officials Suspected of Embezzlement in Iraq*, L.A. TIMES (May 5, 2005), *available at* http://articles.latimes.com/2005/may/05/world/fg-fraud5 (last visited Nov. 23, 2015) (reporting that $100 million dollars in US taxpayer money had disappeared). Among the many scandals, independent auditors found that Halliburton was importing fuel from Kuwait at double price, thus charging US taxpayers twice as much (as it was a "cost-plus" contract in which Halliburton

a Congressional hearing, Marie de Young, a Halliburton employee, testified that "we, essentially, lost control of the project and paid between four to nine times what we needed to fund that project" because there were two or three layers of subcontracts.[239]

Bechtel was also awarded infrastructure repair contracts pursuant to fairly open-ended terms.[240] Even as the bidding process became more competitive, in January 2004, Sheryl Tappan, head of Bechtel's proposal team, called the competition a "sham" and a "farce," and opined that she had never witnessed such an "arrogant" and "egregious" Pentagon bidding process.[241] U.S. federal law requires competitive bidding for government procurement and WTO Government Procurement Agreement rules mandate non-discriminatory treatment for WTO member countries,[242] but

received whatever its costs were plus a profit)). The auditors called the Kuwait oil purchases "highway robbery" and "outrageously high." House Comm. on Gov't Ref., *supra* note 235, at 4. In a series of ten Pentagon audits during 2004-05, auditors discovered that Halliburton's overcharging resulted in $219 million in "questioned" costs and $60 million in "unsupported costs." *Id.* Furthermore, Halliburton had been warned multiple times in 2003 and 2004 and was consistently told of "significant deficiencies" in its cost estimations and even that it "universally failed to provide adequate cost information as required," but the Pentagon kept awarding Halliburton new contracts. *Id.* at 2-5, 6-14; Avery, *supra* note 234, at 839-41 (describing other investigations into Halliburton, including an admission that two of its officials had been receiving kickbacks, engaging in overcharging for food services, and failing to perform services adequately); *see also* Tiefer, *supra* note 207, at 12, 28-30.

239. Minow, *supra* note 235, at 1011.

240. 1 INTERNATIONAL BUSINESS PUBLICATIONS, USA, KUWAIT: TAXATION LAWS AND REGULATIONS HANDBOOK 171 (2012) (USAID awarded an initial $34.6 million on April 17, 2003 to Bechtel for the "repair, rehabilitation or reconstruction of vital elements of Iraq's infrastructure. . . . includ[ing] . . . electrical grids, municipal water systems and sewage systems," and then left open the allocation of additional funding); *see also* Elizabeth Becker, *Aftereffects: The Contractors; Feeding Frenzy Under Way, as Companies From All Over Seek a Piece of the Action*, N.Y. TIMES (May 21, 2003), *available at* http://www.nytimes.com/2003/05/21/world/aftereffects-contractors-feeding-frenzy-under-way-companies-all-over-seek-piece.html (last visited Dec. 4, 2015) (stating that within a month, experts were predicting that the contract would be worth about $20 billion).

241. House Comm. on Gov't Ref., *supra* note 235, at 5.

242. The CPA was acting on behalf of the Bush Administration and was an effective unit of the US government, meaning that US obligations under WTO Government Procurement Agreement (GPA) rules would apply. Michael Davey, *To the Victor Go No Spoils? The United States as an Invading Military Force and Its Relationship With Economic Contracts in Occupied Iraq*, 23 PENN ST. INT'L L. REV. 721, 735 (2005) (discussing Charter of Economic Rights and Duties of States (1974) and emphasizing that the Charter forbids any State from discrimination based on "political, economic or social systems").

multinational companies from non-coalition countries were often deemed ineligible.[243] General rules for competitive bidding were frequently exempted by raising the "public interest exception," which alleged that reconstructing Iraq is indispensible for national security and defense purposes[244] and by stating that there was an "unusual and compelling urgency" for utilizing the chosen procurement process.[245]

Because financing for reconstruction came primarily from the Iraq Relief and Reconstruction Funds, U.S. taxpayers, and loans,[246] foremost policies underlying the prudent dispersal of funds on behalf of the U.S. taxpayer-principal, included saving costs[247] and buttressing

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243. David Palmeter & Niall P. Meagher, *WTO Issues Relating to U.S. Restrictions on Participation in Iraq Reconstruction Contracts*, Am. Soc'y Int'l L. (Dec. 26, 2003), *available at* http://www.asil.org/insights/volume/8/issue/29/wto-issues-relating-us-restrictions-participation-iraq-reconstruction (last visited Dec. 4, 2015) (explaining that 63 countries were eligible); Tiefer, *supra* note 207, at 43 (noting the frequent ineligibility due to a MNC's home state not being a member of the coalition).

244. *U.S. Faces Backlash Over Contracts*, CNN (Dec. 10, 2003, 10:40 PM), *available at* http://www.cnn.com/2003/WORLD/meast/12/10/sprj.irq.contracts/ (last visited Dec. 4, 2015) ("It is necessary for the protection of the essential security interests of the United States to limit competition for the prime contracts for these procurements to companies from the United States, Iraq, Coalition partners and force contributing nations.").

245. Other exceptions that permit granting procurement contracts without a competitive bidding process include when only a single supplier is qualified to provide the service or product in question; when an agency confronts an "unusual and compelling urgency" for supply of a good or service that would otherwise seriously injure the government; when there is a case of national emergency; when a federal statute, treaty or the terms of an international agreement permit something other than a competitive process; and when the head of an agency decides that bypassing competitive procurement procedures are in the public interest. 41 U.S.C. § 253 (2012). It was generally the "urgency" and public interest exceptions that were espoused as exceptions to granting sole-source contracts. *See* Jeffrey Marburg-Goodman, *USAID's Iraq Procurement Contracts: Insider's View*, 39 PROCUREMENT LAW. 10 (2003).

246. Emergency Supplemental Appropriations Act for Defense and for the Reconstruct of Iraq and Afghanistan of 2004, Pub. L. No. 108-106, 117 Stat. 1225 (enacted Nov. 6, 2003); Halchin, *supra* note 232, at 8, 19, 21-22.

247. Given that contractors received appropriated federal government funds, there could have been potential violations of Federal Acquisition Regulations, the Competition in Contracting Act (CICA), and military procurement rule violations, all of which require full and open competition to obtain competitive pricing and save costs. Halchin, *supra* note 232, at 24, 33; 41 U.S.C. § 3301 (2015); 48 C.F.R. § 6.101 (2003); 10 U.S.C. § 2304 (2015). Although, ambiguity was created in that the former Administrator of the Office of Federal Procurement Policy explained that "the CPA is *not* the United States Government. Accordingly, if one enters into a contractual relationship with the CPA, one is not entering into a contractual relationship with the United States. The rights and remedies available to parties contracting with the United States will not be available in a contractual relationship

public integrity,[248] and on behalf of the Iraqi public-principal, included the obligation of the CPA to operate as a responsible fiduciary because occupation law and Iraqi funds were at stake.[249] Journalist Naomi Klein, author of *The Shock Doctrine* (2007) and a critic of the CPA's imposed reforms and the procurement process in Iraq, confronted former Federal Reserve Chairman Alan Greenspan with Greenspan's definition of "crony capitalism" from his book and remarked:

> You said "when a government's leaders or businesses routinely seek out private sector individuals or businesses and in exchange for political support bestow favors on them, the society is said to be in the grip of 'crony capitalism." You say, "The favors generally take the form of monopoly access to certain markets, preferred access to sales of government assets, and special access to those in power." I kept thinking about Halliburton, Blackwater, Lockheed, and Boeing. You were referring to Indonesia at the time, but I'm wondering, according to your definition, [whether you think the U.S. is a crony capitalist economy] . . . we're seeing [extraordinary] contracting emerging, as in the words of the *New York Times*, a fourth arm of government. [The] [f]ront page of the *New York Times* talks about $6 billion being investigated for criminal activity in contract allocation in Iraq.[250]

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with the CPA." SIGIR, IRAQ RECONSTRUCTION: LESSONS LEARNED IN CONTRACTING AND PROCUREMENT 24 (2006); United States *ex rel.* DRC, Inc. v. Custer Battles, L.L.C., 376 F. Supp. 2d 617, 631 (2005) (Defendants alleging that agents were assured that the CPA was a "separate and distinct entity from the warring powers" and "under no circumstances was it the U.S. government").

248. S. REP. NO. 99-345, at 3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5268 ("[F]raud erodes public confidence in the Government's ability to efficiently and effectively manage its programs . . . Even in the cases where there is no dollar loss . . . the integrity of quality requirements in procurement programs is seriously undermined.").

249. Funding can be allocated as CPA operational expenses, but fiduciary obligations require the occupier to act in the best interest of the principal. Hague Regulations, *supra* note 120, art. 48 ("If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall . . . be bound to defray the expenses of the administration of the occupied territory . . ."); *Id.* art. 49 ("If, in addition to the taxes . . . the occupant levies other money contributions in the occupied territory, this shall be for the needs of the army or of the administration of the territory in question."). Iraqi oil revenue is part of this public trust; the resources belong to the Iraqi people. Because revenues were required to be used for the benefit of the people and for the occupier to "administer" the territory, locking in "no bid," large-scale and long-term procurement contracts in favor of firms from the occupier's state for reconstructing the country at approximately ten times the amount that Iraqis would have charged could violate fiduciary obligations. Being unable to account for billions of dollars aggravates the problem. *See id.*

250. *Alan Greenspan vs. Naomi Klein on the Iraq War, Bush's Tax Cuts,*

Greenspan retorted that government corruption with the private sector is not the "dominant force" in the U.S. economy, while corruption was the dominant force in Indonesia under Suharto.[251] This is a valid distinction, but foreign direct investment in developing countries is known to be an environment rife with corruption[252] and the argument that elected government officials have been allegiant to key businesses that support politicians in a manner that is detrimental to public interest and voters, such as by lobbying and with campaign contributions from the private sector,[253] has been a criticism of American democracy for decades.[254] Even the purveyor of public information—the American media—is compromised by capitalist interests.[255]

Economic Populism, Crony Capitalism, and More, *supra* note 171.

251. *Id.*

252. Clemens Fuest, Giorgia Maffini & Nadine Reidel, *Do Corruption and Taxation Affect Corporate Investment in Developing Countries?*, *in* CRITICAL ISSUES IN TAXATION AND DEVELOPMENT 65, 65 (Clemens Fuest & George R. Zodow eds., 2013); Jose Godinez, *Corruption in Latin America and How It Affects Foreign Direct Investment (FDI): Causes, Consequences, and Possible Solutions*, *in* BUSINESS DEVELOPMENT OPPORTUNITIES AND MARKET ENTRY CHALLENGES IN LATIN AMERICA 31, 40 (Mauricio Garita & Jose Godinez eds., 2015).

253. Timothy K. Kuhner, *The Separation of Business and State*, 95 CALIF. L. REV. 2353, 2354 (2007) ("Money in politics can be viewed as an assault on political equality – wealthy actors subjugating common citizens – and yet it can also be viewed as a form of political expression – free speech. This is enough to cause a rational observer to throw up her hands."); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 273, 283 (1988) (the private sector influence on government can "skew public decision-making toward private rent-seeking and away from public interest").

254. There are debates over campaign finance. *See generally* ROBERT E. MUTCH, BUYING THE VOTE: A HISTORY OF CAMPAIGN FINANCE REFORM (2014); C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1 (1998). Lobbying can be controversial. *See generally* DIRTY DEALS? AN ENCYCLOPEDIA OF LOBBYING, POLITICAL INFLUENCE, AND CORRUPTION (Amy H. Handlin ed., 2014); RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE?: PRINCIPLES FOR A NEW POLITICAL DEBATE 129 (2006) ("Large campaign contributors purchase what is euphemistically called 'access' to officials; in fact they often purchase not merely access but control."). CPA reforms can lead to a socioeconomic system and complaints that have long been voiced about the US economy—that the American political system is beholden to corporate agendas rather than to voters and the populace.

255. *See generally* Robert Bejesky, *Press Clause Aspirations and the Iraq War*, 48 WILLAMETTE L. REV. 343 (2012) (noting that dominant media organizations may not always adequately accentuate essential political concerns to Americans even though the media are the purveyors of information and must support US democracy, but the media industry exists in a conglomerate structure, is driven by profitability, and may not always effectively check government as the Framer's of the

C. *Fraud in Contracting*

The procurement process for reconstruction in Iraq was not only inefficient by demonstrating favoritism for foreign companies over local companies and potentially operating improperly by granting no-bid contracts to select foreign companies,[256] but the Inspector General for Iraq Reconstruction reported that billions of dollars allocated for construction contracts were wasted or missing under allegations of fraud, including fraud perpetrated by U.S. contractors.[257] Consequently, the False Claims Act ("FCA"), which has been used for over a century to recover federal funds attained through fraudulent means[258] (including through *qui tam* actions by private citizens on behalf of the government),[259] was employed to recoup funds acquired by fraud perpetrated in Iraq. Even though the FCA specifies that "no proof of specific intent to defraud is required" to impose liability,[260] which means that deliberately ignoring or recklessly disregarding the truth will satisfy the contractor's *mens rea*

Constitution intended, which was a prime complaint about the media's performance in persuading Americans to support the invasion of Iraq).

256. *See supra* Parts V(A)(B).

257. James Glanz, *Audit Describes Misuse of Funds in Iraq Projects*, N.Y. TIMES, Jan. 25, 2006, at A2; *An Oversight Hearing on Accountability for Contracting Abuses in Iraq: Hearing Before the S. Dem. Pol'y Comm.*, 109th Cong. (2006) (statement by Alan Grayson, Attorney, Grayson & Kubli, P.C.) (attorney representing whistleblowers testifying that "[h]alf of the $18 billion in Iraq reconstruction funds are unaccounted for. Senator Dorgan has said that there is an orgy of greed among contractors in Iraq, and there is ample evidence to back that up"). More recent government investigations placed missing Iraqi money at $6.6 billion. Paul Richter, *Missing Iraq Money May Have Been Stolen, Auditors Say*, L.A. TIMES (June 13, 2011), *available at* http://articles.latimes.com/2011/jun/13/world/la-fg-missing-billions-20110613 (last visited Dec. 4, 2015).

258. An Act to Prevent and Punish Frauds upon the Government of the United States, Pub. L. No. 37- Chap. 67, 12 Stat. 696 (1863) (reenacted as False Claims Act, 31 U.S.C. §§ 3729-33(2000)); *see also* Avery, *supra* note 234, at 828-29; Dan L. Hargrove, *Soldiers of Qui Tam Fortune: Do Military Service Members Have Standing to File "Qui Tam" Actions Under the False Claims Act?*, 34 PUB. CONT. L.J. 45, 47 (2004); Jessica C. Morris, *Civil Fraud Liability and Iraq Reconstruction: A Return to the False Claims Act's War-Profiteering Roots?*, 41 GA. L. REV. 623, 646 (2007) (noting that between 1987 and 2002 over $6 billion was recovered through FCA actions); Erik Eckholm, *Judge Limits Statute's Ability to Curb Iraq Contractor Fraud*, N.Y. TIMES (July 12, 2005), *available at* http://query.nytimes.com/gst/fullpage.html?res=9B0CEED6123DF931A25754C0A9639C8B63 (last visited Dec. 4, 2015) (calling the FCA a "potent weapon against contractor fraud").

259. 31 U.S.C. § 3730(b)-(d) (2012).

260. 31 U.S.C. § 3729(b)(1)(B) (2012).

for the statute,[261] commentators expressed that it was notably challenging to effectively hold contractors responsible under the FCA for missing reconstruction funds.[262] If losses cannot be successfully recovered, a contractor could be the recipient of a windfall gain, which is to the detriment of Americans and Iraqis.

There were periodic warnings of the ongoing danger of fraud in Iraq[263] and over the first five years of occupation, fraud losses aggregated into the billions of dollars.[264] Losses were attributable to diverse shams, including outright schemes of artifice perpetrated by foreigners who sometimes had no proven track record of success with the business entity contracting with the CPA,[265] billing authorities inflating invoices,[266] employees of established multinationals

261. 31 U.S.C. § 3729(a)(1), (b)(1) (2012) (creating liability for "knowingly" made false claims presented to the government, which includes "actual knowledge" of falsity, acting in "deliberate ignorance of the truth," or acting in "reckless disregard of the truth or the falsity of the information").

262. M.M. Harris, Commentary, *Patriots and Profiteers: Combating False Claims by Contractors in the Iraq War and Reconstruction*, 59 ALA. L. REV. 1227, 1227 (2008).

263. Reuters, *U.S. Audit Finds Fraud in Iraq*, N.Y. TIMES (July 31, 2004) *available at* http://www.nytimes.com/2004/07/31/international/middleeast/31audi.html (last visited Nov. 15, 2015) (reporting that one month after the CPA was dissolved, the CPA's Inspector General's office explained that it had been conducting 69 criminal investigations involving fraud, with 27 of those investigations still open). As of July 30, 2007, the Special Inspector General for Iraq Reconstruction noted that there were "57 ongoing investigations into fraud, waste, and abuse in Iraq reconstruction, 28 of which are at the Department of Justice for prosecution," and there were five convictions, 13 arrests, and 8 pending trials. SIGIR, QUARTERLY REPORT AND SEMIANNUAL REPORT TO THE U.S. CONG. 13 (2007), *available at* http://www.dtic.mil/get-tr-doc/pdf?AD=ADA509376&Location=U2&doc=GetTRDoc.pdf (last visited Dec. 4, 2015); Morris, *supra* note 258, at 627 (referencing George Washington University expert Steven L. Schooner warning that the "potential for chicanery is great and the potential universe of whistle-blowers is mind-boggling.").

264. Sarah E. Barnes, Comment, *Categorizing Conflict in the Wartime Enforcement of Frauds Act: When Are We Really at War?*, 59 DEPAUL L. REV. 979, 991 (2010); Erin M. Brown, Note, *The Wartime Suspension of Limitations Act, the Wartime Enforcement of Fraud Act, and the War on Terror*, 85 NOTRE DAME L. REV. 313, 331 (2009) (legal amendments were "presented as a way to address the numerous accounts of fraud in the Iraq and Afghanistan campaigns").

265. 60 Minutes, *The Mother of All Heists*, CBS NEWS (June 14, 2007) *available at* http://www.cbsnews.com/stories/2006/10/19/60minutes/main2109200.shtml (last visited Dec. 4, 2015) (reporting that the CPA granted a $1.2 billion contract to a Jordanian company that was founded just weeks earlier with $2,000 in capital, and $750 to $800 million of that amount was stolen).

266. For example, in February 2006, the first security firm fraud case to proceed

embezzling funds,[267] and CPA officials engaging in wrongdoing.[268] The dearth of suitable CPA auditing controls probably did not contribute a deterrent with an expected high risk of punishment[269] but there were some successful prosecutions.[270] Private military contractors ("PMCs") were also involved in protracted legal battles over billing, but in many cases PMCs fared better than initial press

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to trial involved the Alexandria, Virginia firm Custer Battles, which was accused of bilking the American taxpayer for millions of dollars in overbilling in security contracts for the Iraqi airport, the Iraqi currency exchange, and other venues. Babcock, *supra* note 202. After a three-week trial, the jury found Custer Battles liable to repay $3 million dollars in fraudulent invoices, which invoked the FCA's tremble damage provisions. Morris, *supra* note 258, at 628. Several months later Judge Ellis granted the defendant's motion for judgment as a matter of law and stated that the action did not meet the element of being "presented. . .to employees or officers of the United States acting in their official capacity." United States *ex rel.* DRC, Inc. v. Custer Battles, L.L.C., 444 F. Supp. 2d 678, 682 (E.D. Va. 2006). However, the case was reversed on this ground and the jury verdict was reinstated. Ellen Nakashima, *Court Revives Suit Over Iraq Work*, WASH. POST (Apr. 11, 2009), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/04/10/AR2009041003448.html?hpid=topnews (last visited Dec. 4, 2015).

267. Michael S. Devine, *Procurement Fraud*, 2006 ARMY LAW. 132, 134 (stating that an employee of Halliburton subsidiary, Kellogg, Brown, and Root (KBR), and a Kuwaiti businessman, were charged with "devising a scheme to defraud the United States of more than $3.5 million related to the awarding of a subcontract to supply fuel tankers for military operations in Kuwait"); *see also* Minow, *supra* note 235, at 990; Wilkinson, *supra* note 153, at 234-35; Paul D. Carrington, *Enforcing International Corrupt Practices Law*, 32 MICH. J. INT'L L. 129, 136-37 (2010) (noting that in 2009, Halliburton was required to pay $559 million for engaging in corruption in Nigeria, Halliburton manager Albert Jack Stanley was convicted for bribing Nigerian officials, and Halliburton moved its corporate headquarters from Houston to Dubai apparently to attempt to reduce liability and avoid criminal jurisdiction).

268. James Glanz, *Wide Plot Seen in Guilty Plea in Iraq Project*, N.Y. TIMES (Feb. 2, 2006), *available at* http://www.nytimes.com/2006/02/02/international/middleeast/02reconstruct.html?n=Top%2FNews%2FInternational%2FCountries%20and%20Territories%2FIraq&_r=0 (last visited Dec. 4, 2015) (stating that Robert J. Stein, who was a CPA comptroller and funding officer, pled guilty to several felonies that involved kickbacks on lucrative contracts and embezzlement); Griff Witte, *U.S. Contractor Admits Bribery for Jobs in Iraq*, WASH. POST (Apr. 19, 2006), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/04/18/AR2006041801742.html (last visited Dec. 4, 2015) (reporting that an American businessman, Philip H. Bloom, pled "guilty to conspiracy, bribery and money-laundering charges" related to "getting reconstruction contract for his companies").

269. *See supra* Part IV(D) (discussing lack of CPA auditing controls).

270. SIGIR, *supra* note 2, at 9 (reporting that there were 82 convictions resulting from investigations).

releases of alleged wrongdoing intimated.[271] The common perception of PMCs being implicated in improper dealings was presumptively due to the breathtakingly lucrative contracts that awarded PMC firms an average of $445,000 for each employee per year, while an Army Sergeant, carrying out comparable tasks, would earn $51,100 to $69,350 per year.[272]

Perhaps the most probative and encompassing implication from these deficits in the procurement process is that the combination of the CPA unilaterally dictating new resource-shifting laws and institutions on Iraq and employing entities engaged in fraudulent practices furnished an abysmal example of American "democracy" and remiss adherence to the "Rule of Law"[273] even though the CPA's newly instituted civil justice institutions and practices sought to improve then-existing Iraqi institutions[274] and provide a favorable archetype. These episodes of departure between promise and practice, along with CPA Order 17's endowment of immunity to contractors from Iraqi legal process[275] so that the Iraqi government or people did

271. Christina Wilkie, *Iraq War Contractors Fight On Against Lawsuits, Investigations, Fines*, HUFFINGTON POST (Mar. 20, 2013 7:34 AM), *available at* http://www.huffingtonpost.com/2013/03/20/iraq-war-contractors_n_2901100.html (last visited Dec. 4, 2015) (stating that "many of the war's most controversial, and well-paid, U.S. contractors faced relatively few repercussions for their conduct in Iraq," but over the last two years "contractors are on the defensive against allegations of torture, fraud, negligence and extrajudicial killings").

272. CONG. BUDGET OFFICE, PUB. NO. 3053, CONTRACTOR'S SUPPORT OF U.S. OPERATIONS IN IRAQ 14 (2008), *available at* http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/96xx/doc9688/08-12-iraqcontractors.pdf (last visited Dec. 4, 2015).

273. FINNIS, *supra* note 42, at 270-71 (noting that the "Rule of Law" is the name frequently given to describe an effectively functioning legal system, which is a system that fosters compliance with clear, coherent, and stable rules, and holds government officials accountable).

274. Daniel Bodanky, *Establishing the Rule of Law*, 33 GA. J. INT'L. & COMP. L. 119, 129 (2004) (relaying also that some US military perceptions were that Iraq had "no rule of law," "Iraqis are all corrupt," and they were prone to taking "bribes"). Corruption is predominantly attributable to poverty. Michael Johnston, *Poverty and Corruption*, FORBES (Jan. 22, 2009. 6:00 PM), *available at* http://www.forbes.com/2009/01/22/corruption-poverty-development-biz-corruption09-cx_mj_0122johnston.html (last visited Dec. 4, 2015).

275. Status of the Coalition Provisional Authority, *supra* note 228, § 4(2) ("Contractors shall not be subject to Iraqi laws or regulations in matters relating to the terms and conditions of their contracts. . . ."); Atif Rehman, Note, *The Court of Last Resort: Seeking Redress for Victims of Abu-Ghraib Torture Through the Alien Tort Claims Act*, 16 IND. INT'L & COMP. L. REV. 493, 498 (2006) (Order 17 resulted in granting "complete immunity to contractors and military personnel from prosecution in Iraqi courts for killing Iraqis or destroying local property"); J. Stephen

not possess a civil fraud action against wrongdoers,[276] suggest that the "Rule of Law" might be perceived as a mere catchphrase to shift blame for the Bush Administration policies in Iraq.[277] An Iraqi judge opined:

> We don't need you to come here and tell us about what law is. We invented law. . . . We are the people who figured law out, thousands of years ago. But now your soldiers are coming in and telling us what to do, and you're not respecting our legal traditions or legal process. The first thing the Americans did after the war was to announce that they were immune from Iraqi legal process. So, if an American commits a crime, they're completely immune, there's nothing that we can do about it. The Americans are unaccountable. How can this be the rule of law?[278]

D. *Reconstruction Progress and the Role of Military Reconstruction Engineers*

With such significant deficits in the procurement contracting process and oversight, it was not surprising that reasonable estimates of contract completion at the expected reconstruction expense often fell short, and this was another reason for Iraqi dismay with the occupation. Three years into the occupation, the U.S. Inspector General's report on reconstruction noted that while $22 billion had been spent on water, sewage and electricity projects, the infrastructure remained at prewar levels.[279] With poor performance on reconstruction,[280] Iraqis lacking essential commodities while being

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Shi, Comment, *The Legal Status of Foreign Military and Civilian Personnel Following the Transfer of Power to the Iraqi Interim Government*, 33 GA. J. INT'L & COMP. L. 245, 255-56 (2004).

276. Morris, *supra* note 258, at 635.

277. Balakrishnan Rajagopal, *Invoking the Rule of Law in Post-Conflict Rebuilding: A Critical Examination*, 49 WM & MARY L. REV. 1347, 1348 (2008) ("this newfound fascination with the rule of law is misplaced" as it is invoked as the supposed causal mechanism that leads to human rights violations, threats to security, and even economic development but it really is a "desire to escape from politics by imagining the rule of law as technical, legal, and apolitical").

278. Bodanky, *supra* note 274, at 130.

279. Daniel McGrory, *In The Chaos of Iraq, One Project is on Target*, GLOBAL POLICY (May 3, 2006), *available at* https://www.globalpolicy.org/component/content/article/168/37122.html (last visited Dec. 4, 2015) (noting that less than half of the electricity and water projects had been completed and only six of 150 planned health centers had been completed, but one notable project that was on target was the massive U.S. embassy complex).

280. *Iraq in Ruins*, *supra* note 29 ("Despite Iraq being rich in natural resources and the US pouring money into its economy for over a decade, Iraqi infrastructure is constantly failing and people are forced to beg"); *Bleak Picture of Iraq Conditions*,

confronted with a debt crisis[281] and believing that they could have more successfully repaired their country,[282] and officials in Canada, Iraq, Japan, and other countries chastising the American rebuilding progress,[283] U.S. officials affixed blame on insurgencies.[284] Yet, the existence of insurgencies may have been predominantly attributable to the fact that a high percentage of Iraqis opposed the U.S. military presence in the country[285] and that there were poor humanitarian conditions, which eventuated into a circular effect of violence, inferior reconstruction, more extensive expenditures for security and reconstruction,[286] and additional opposition to the military occupation.[287]

The Pentagon offered a surprisingly optimistic view of the rebuilding process[288] and the Bush administration and the U.S.

BBC (Mar. 17, 2008, 12:59 AM), *available at* http://news.bbc.co.uk/2/hi/middle_east/7299914.stm (last visited Dec. 4, 2015) (reporting that while still under the U.S. occupation, the Red Cross stated that the humanitarian situation in Iraq was "among the most critical in the world").

281. ARNOVE, *supra* note 85, at 78.

282. Tiefer, *supra* note 207, at 43 (reporting that Barham Salih, Iraq's minister of planning and development cooperation, stated that reconstruction efforts by US contractors had proceeded "very, very, very slowly so far" and postulated that Iraqis could have rebuilt needed infrastructure with more success).

283. *Id.*

284. *See generally* T. CHRISTIAN MILLER, BLOOD MONEY: WASTED BILLIONS, LOST LIVES, AND CORPORATE GREED IN IRAQ 132-50, 162-63 (Brown Little, 2006).

285. Bejesky, *Politico, supra* note 19, at 105; *What the Iraq Public Wants: A WorldPublicOpinion.org Poll*, PROGRAM ON INT'L POLICY ATTITUDES 4 (Jan. 31, 2006), *available at* http://www.worldpublicopinion.org/pipa/pdf/jan06/Iraq_Jan06_rpt.pdf (last visited Dec. 4, 2015) (noting that in January 2006, 87% of Iraqis wanted a timeline for withdrawal (64% Kurds, 90% Shia, and 94% Sunnis supported withdrawal). Overall, 47% of Iraqis supported attacks on U.S. troops (16% Kurds, 41% Shia, and 88% Sunnis supported attacks on U.S. troops)). *Id.* at 5.

286. MILLER, *supra* note 284, at 163; David Barstow, *Security Companies: Shadow Soldiers in Iraq*, N.Y. TIMES (Apr. 19, 2004), *available at* http://www.nytimes.com/2004/04/19/world/security-companies-shadow-soldiers-in-iraq.html?pagewanted=all (last visited Dec. 4, 2015).

287. ARNOVE, *supra* note 85, at 102-03 (stating that "[t]he [U.S.] is spending one billion dollars a week [for the U.S. military] in its occupation of Iraq, excluding the cost of 'reconstruction'" for the benefit of US corporations and noting that "[t]his is in addition to the tens of billions of dollars already allocated for the invasion of Iraq, the tens of billions the [U.S.] pays to maintain its massive military arsenal in the Middle East and Asia, and the tens of billions the government spends to support 'allies' such as Israel, Egypt, Jordan, Turkey, Saudi Arabia, and the Emirates").

288. GARTH S. JOWETT & VICTORIA O'DONNELL, PROPAGANDA AND PERSUASION 20-21 (4th ed. 2006) (noting that some US military authority apparently engaged in propaganda operations to misrepresent the success of the rebuilding

military proclaimed that nation-building was one of the U.S. military's core missions. In December 2005, Bush issued NSPD 44, which sought to "promote the security of the United States through improved coordination, planning, and implementation for reconstruction and stabilization" in other countries.[289] The *National Security Strategy* in 2006 stated that the U.S. military fights wars and rebuilds after the war.[290] Military manuals, officials and personnel further promoted this nation-building mission.[291] The military did undertake these

process in Iraq by sending letters, allegedly written by US troops, to US newspapers to praise the rebuilding process, but when investigators tracked down the six troops whose names and hometowns appeared on several of eleven identical form letters, the six troops all denied writing the letters).

289. EXEC. OFFICE OF THE PRESIDENT, NAT'L SEC. PRESIDENTIAL DIRECTIVE 44, MANAGEMENT OF INTERAGENCY EFFORTS CONCERNING RECONSTRUCTION AND STABILIZATION 1-2 (2005) ("The United States has a significant stake in enhancing the capacity to assist in stabilizing and reconstructing countries or regions, especially those at risk of, in, or in transition from conflict or civil strife, and to help them establish a sustainable path toward peaceful societies, democracies, and market economies.").

290. EXEC. OFFICE OF THE PRESIDENT , THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 16 (2006).

291. HEADQUARTERS, U.S. DEP'T OF THE ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS iv (Oct. 2008), *available at* http://fas.org/irp/doddir/army/fm3-07.pdf (last visited Dec. 4, 2015) (discussing "joint doctrine" and the role of the US military in supporting broader government operations: "[Stability operations encompass] various military missions, tasks, and activities conduced outside the United States in coordination with other instruments of national power to maintain or reestablish a safe and secure environment, provide essential governmental services, emergency infrastructure reconstruction, and humanitarian relief"); HEADQUARTERS, U.S. DEP'T OF THE ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY forward (Dec. 2006), *available at* http://www.marines.mil/Portals/59/Publications/MCWP%203-33.5%20part%201.pdf (last visited Dec. 4, 2015) (reporting that General David Petraeus and Lieutenant General James Amos explain that "[S]oldiers and Marines are expected to be national builders as well as warriors. They must be prepared to help reestablish institutions and local security forces and assist in rebuilding infrastructure and basic services. They must be able to facilitate establishing local governance and the rule of law"); Peter W. Chiarelli & Stephen M. Smith, *Learning from Our Modern Wars: The Imperatives of Preparing for a Dangerous Future*, 87 MIL. REV. 2, 6 (2007) *available at* http://www.army.mil/professionalWriting/volumes/volume6/january_2008/1_08_1_pf.html (last visited Dec. 4, 2015) (explaining "like it or not, until further notice the U.S. Government has decided that the military largely owns the job of nation-building."); Timothy Austin Furin, *Legally Funding Military Support to Stability, Security, Transition, and Reconstruction Operations*, 2008 ARMY LAW. 1, 13 (stating that with these new emphasized missions that there is a continuum on which operations should be categorized between "peace to crisis to conflict" and that "commanders must consider stability operations when planning each phase of any military operation."); Stigall, *supra*, note 99, at 40 (US Army Judge Advocate claiming: "Military assets are the preferred choice for the task of state-building . . .

obligations in Iraq, but political will might not best be represented by adding new realms of general expertise to core U.S. military missions because there are questions of international community and U.N. consent to specific "nation-building" missions, Congress' constitutional authority to assent to new military missions,[292] the U.S. military's choice to not emphasize educating its leaders with "rule of law" operations,[293] and the fact that the military occupation was arguably not particularly effective in nation-building in Iraq.[294]

[and are] a generally indispensable element of any state-building operation . . . [T]he modern military's diverse and robust continent of professionals . . . [provide] 'combat arms' soldiers . . . [and] a host of trained professionals such as physicians, lawyers (Judge Advocates), and engineers-all of whom are uniformed service members. . . . They are able to operate in post-conflict states and assist in rebuilding or developing legal infrastructure."); J. Porter Harlow, *Publishing Doctrine on Stability Operations and the Rule of Law During Conflict*, 2010 ARMY LAW. 65, 66 ("Soldiers and Marines are expected to be nation builders as well as warriors."); Perhaps this new civilian function makes logical sense given the newly-obscure roles prevailing with the Pentagon's eagerness to privatize everything, including military services, during the occupation. *See generally* Robert Bejesky, *The Economics of the Will to Fight: Public Choice in the Use of Private Contractors in Iraq*, 45 CUMB. L. REV. 1 (2014/2015).

292. It is true that Congress appropriated military funds for reconstruction and for military occupation. *See* Furin, *supra* note 291, at 22 (stating that "the post-conflict SSTR [Stabilization, Security, Transition and Reconstruction] operations in Afghanistan and Iraq are developing well since Congress has appropriated funds to accomplish the SSTR mission." (This might not necessarily be a general sanction for the future.)).

293. Ronald T.P. Alcala, *Vanquishing Paper Tigers: Applying Comparative Law Methodology to Enhance Rule of Law Development*, 2011 ARMY LAW. 5, 5, 11 ("[T]he military is not the designated lead for rule of law but will frequently serve as the de facto lead during stability operations.").

294. Secretary of Defense Gates contended that the Department of Defense does not have sufficient personnel or the skill sets required to operate effectively in Iraq. Eric Talbot Jensen, *Post-Conflict Transition*, 14 NEW ENG. J. INT'L & COMP. L. 35, 37 (2007); Tiefer, *supra* note 207, at 1-8 (noting that the military occupation's "nation building" and economic rebuilding operations were a drastic failure). One rationale for this role for the Pentagon role is that there is not enough civilian capacity in the U.S. government to address these issues. Dan E. Stigall, *The Thickest Grey: Assessing the Status of the Civilian Response Corps Under the Law of International Armed Conflict and the U.S. Approach to Targeting Civilians*, 25 AM. U. INT'L L. REV. 885, 900 (2010); Furin, *supra* note 291, at 1 ("First, DOD formalized a new stability operations policy that elevated stability operations to a core military mission on par with combat operations. Second, DOD broadened its military planning guidance to more fully address pre-conflict and post-conflict operations. Third, DOD developed a joint operations concept to serve as the basis for how the military will further support Stabilization, Security, Transition and Reconstruction (SSTR) operations."); *Conference: From Autocracy to Democracy: The Effort to Establish Market Democracies in Iraq and Afghanistan: Panel 2: Building the Institutions of the Nation*, 33 GA. J. INT'L & COMP. L. 171, 189 (2004) (Professor Wiarda stating "I think neither the United States nor the international

Nonetheless, with CPA directives blatantly contravening restrictions of occupation law, the best protection against the reversal of the CPA's initiatives, rule frameworks, and potential shifts in property rights and power, is to ensure the security of those rules with a long-term military occupation.

VI. CONCLUSION

The invasion of Iraq in 2003 occurred after the Bush administration delivered six months of false allegations about Iraq possessing chemical and biological weapons, a nuclear weapons program, and ties to al-Qaeda, all of which were false.[295] Due to the invasion, a humanitarian crisis unfolded and the Iraqi government was displaced, the U.N. Security Council adopted Resolution 1483 to affirm a mandate to administrate the country under occupation, but did not permit the CPA to unilaterally revamp Iraq's legal system.[296] The CPA's involvement began as a progression that contended democratization and market economies were interdependent, but continued with more contentious reforms, including by deepening foreign investment, advocating for privatization, dollarizing the Iraqi economy, and enacting over thirty new economic codes with rudimentary and nearly unrestricted capitalist provisions.[297] The CPA

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agencies are very good at nation-building or even know what they are doing in most cases.").

295. Ackerman & Hathaway, *supra* note 33, at 464; Bejesky, *Weapon Inspections*, *supra* note 33, at 350-69

296. In a March 26, 2003 memo, British Attorney General Goldsmith stated:

> In short, my view is that a further Security Council resolution is needed to authorise imposing reform and restructuring of Iraq and its Government. In the absence of a further resolution, the UK (and US) would be bound by the provisions of international law governing belligerent occupation, notably the Fourth Geneva Convention and the 1907 Hague Regulations.

Roberts, *supra* note 152, at 609. Goldsmith further added that the "imposition of major structural economic reforms would not be authorized by international law." *Id.* Goldsmith is correct about occupation law restrictions, but the rest of his statement is a red herring. Resolution 1483 permitted a temporary occupation primarily to address humanitarian suffering and economic hardship, search for weapons of mass destruction, and ensure that Iraqis designed viable government to address humanitarian concerns, but absolutely nothing was said about the CPA dictating unilateral structural economic reforms. S.C. Res. 1483, *supra* note 93, ¶¶ 1, 4, 5, 7, 8(c)(i), 9 (noting that when the Resolution mentions "institutions" and reform initiatives, surrounding language affirms that it is the Iraqi people who determine their "own political future" and request that all UN members, UN organs, and "the Authority" were to "*assist*" Iraqis who will determine and establish their own institutions).

297. *See supra* Parts II, III, IV.

broadly construed the explicit language of Resolution 1483 and imposed unilateral dictates without Iraqi support and without a democratic government, while, at the same time presiding over an abysmal rebuilding process, intensified violence and insecurity, and corrupt relations with contractors and appointed representatives of local Iraqi bodies.[298] The CPA assumed it possessed all the answers to Iraqi preferences even before a democratic government was elected.[299] A 2004 World Bank report specifically addressed this issue, recognized the lack of Iraqi public ratification for economic reforms, and contended that Iraqi democratic will should not alter CPA dictates because investor confidence was paramount:

> Crucial to investor confidence is the credibility of the transitional and new governments' approach to the existing legal framework and the predictability of their basic policies. Such sustainability will require achieving adequate consensus at various levels on an underlying

298. NOAH FELDMAN, WHAT WE OWE IRAQ: WAR AND THE ETHICS OF NATION BUILDING 77-80 (2004); Richard B. Bilder & Michael J. Matheson, Book Note, *The International Struggle over Iraq: Politics in the UN Security Council, 1980-2005*, 102 AM. J. INT'L L. 687, 691 (2008) ("[T]he essentially unilateral effort of the United States since [the invasion] has resulted in even worse violence, insecurity, and corruption."); Patterson, *supra* note 183, at 468, 474 (noting that the CPA did not comply with occupation law, which endows a right to remedy wrongs); *see also* Zahawi, *supra* note 7, at 2298. *See generally* Part IV(D), V.

299. The White House *Future of Iraq* project was already planning for an occupation and reforms as much as a year before the invasion. Hassen, *supra* note 144. *See generally* Newt Gingrich & Mark Kester, *A Security Strategy of Transforming Societies: From Stabilizing to Transforming Societies as the Key to American Security*, 28 FLETCHER F. WORLD AFF. 5 (2004) (unabashedly contending that the US should transform societies around the world). Common Iraqis opposed the occupation of their country and from the perspective of Americans, Mr. Bush left office with one of the worst presidential approval ratings in history and it was specifically because of Iraq and the economic recession, which might have been partially due to the excessive spending for the Iraq war. Bejesky, *Politico*, *supra* note 19, at 31, 105. The extrapolation of occupier power and unilaterally-conceived mission of "what is best for the Iraqi people," seems to be based on distorting occupation law and an assumption of omniscience about Iraqi desires conjoined with myths. Roberts, *supra* note 152, at 601 (remarking of the depiction of the occupant as a bastion of progress can beget a "dangerous mix of crusading, self-righteousness, and self-delusion"). Some assumptions, in the author's opinion, during the existence of the CPA seem to include: "We believe that we can install democratic institutions," "We believe that market mechanisms and capitalism are the essence of freedom," "We believe Iraq's public sector requires privatization for the good of the Iraqi people," "We believe foreign investment is needed is essential for your economic well-being and that foreign investment should be given national treatment protections," and "We believe foreign oil company investment in needed." Meanwhile, it was not the "Coalition" that was imposing dictates, but the "United States," and more specifically the Bush Administration.

> economic strategy. For continuity, the sovereign Iraqi government will need to confirm its broad support for legislation issued by the Coalition Provisional Authority and clearly signal that pending administration regulations critical to the implementation of fundamental legal provisions will be developed and implemented.[300]

If Iraqis had been in a position similar to other Organization of Petroleum Exporting Countries (OPEC) (with a cash-rich state-owned oil industry) so that revenues could have been generated from their own oil wealth, Iraqis would not have needed foreign investment. This was actually an insurmountable possibility because of the debt Iraq held throughout the period when the Security Council restricted Iraqi oil sales. Because of Iraq's financial position at the time of the 2003 invasion, new laws were imposed by the CPA, including frameworks that benefited foreign corporations, and likely became socialized and solidified[301] with a long-term military occupation. If the populace is not content with its new society, laws, and institutions, conditions could be ripe for insurgencies because some percentage of the population lost power, wealth, government benefits, employment, and habitable conditions.[302] Indignation may be even more pointed if perceptions of disenfranchisement are attributable to a foreign invasion and an unwarranted military occupation.[303] If commentators concur that corruption is immoral, harmful to public interest, and undermines justice and fair contract and property law protections,[304] it

300. *Building a Sustainable Investment Climate in Iraq* ¶¶ 33-34 (World Bank, Reconstructing Iraq Working Paper No. 1, Sept. 27, 2004).

301. Mills, *supra* note 140, at 199.

302. *See* Stephens, *supra* note 29; *Iraq in Ruins*, *supra* note 29.

303. Perceived discrimination may be heightened when these events occurred in a country where most of the population is poor, aspires for a better life for one's family (which might best be attained by developing favorable connections to the occupying authority), and is beholden to a social and economic reality that is enforced by three hundred thousand American troops and security force personnel. It should also be remembered that the Pentagon was attempting to covertly manipulate Iraqi public opinion by employing advertising and consultancy firms to place favorable pro-US occupation propaganda in Iraqi newspapers and also running its own media outlets in Iraq. *See* Robert Bejesky, *Public Diplomacy or Propaganda? Targeted Messages and Tardy Corrections to Unverified Reporting*, 40 CAP. U. L. REV. 967, 1029-49 (2012).

304. Omar Azfar, Young Lee & Anand Swamy, *The Causes and Consequences of Corruption*, 573 ANNALS AM. ACAD. POL. & SOC. SCI. 42, 46, 53 (2001); Peter Egger & Hannes Winner, *How Corruption Influence Foreign Direct Investment: A Panel Study*, 54 ECON. DEV. & CULTURAL CHANGE 459, 460 (2006); M. Shahid Alam, *Anatomy of Corruption: An Approach to the Political Economy of*

is no wonder that Iraq has recently been torn apart by sectoral allegiances amid claims of discrimination and suppression.[305] Sunnis, Kurds, and a high percentage of Shia wanted Prime Minister Maliki, who operated as a dictator and corruptly enriched himself at public expense,[306] to resign,[307] but he practically had to be torn kicking and screaming from office,[308] only to be appointed vice president a few days later.[309] Maliki has been the target of hostility, but deeper problems must be resolved to achieve a peaceful reconciliation to the present crisis. Economic viability for all Iraqis and ending economic and political discrimination should be at the core of discussions.

Underdevelopment, 48 AM. J. ECON. & SOC. 441, 453 (1989).

305. *See* Sandy Berger, *U.S. Must Forge New Ties With Iraq to Tackle ISIS Threat*, TIME (Aug. 17, 2014), *available at* http://time.com/3130983/sandy-berger-iraq-isis-maliki/ (last visited Dec. 4, 2015) (Sandy Berger, national security advisor during the Clinton administration, stating that "Maliki had governed in such an overtly anti-Sunni fashion that the Sunni tribes in the north had come to hate him more than they feared ISIS"); Al-Ali, *supra* note 30.; Maginnis, *supra* note 30; Damon & Tawfeeq, *supra* note 30.

306. *See supra* Part I.

307. Renae Merle, *Air Force Erred with No-Bid Iraq Contract, GAO Says*, WASH. POST (Nov. 29, 2005), *available at* http://www.highbeam.com/doc/1P2-82607.html (last visited Dec. 4, 2015) ("Our Defense Department has continued to pay, through pliant contractors, for a flock of Iraqi political exiles as our paid political agents in Iraq"). Perhaps it is possible to direct a foreign country's policies after a government holds elections as elected politicians and appointed bureaucrats may be amenable to and beneficiaries of foreign influence. Even politicians who have been democratically-elected can become amenable because that influence is often what empowered them in the first place. Pepe Escobar, *The Roving Eye: Behind the Anbar Myth*, ASIA TIMES (Sept. 14, 2007), *available at* http://www.atimes.com/atimes/Middle_East/II14Ak04.html (last visited Dec. 4, 2015) (noting how Maliki, as the US's puppet, has abused his office).

308. *See* Bozorgmehr Sharafedin, *Why Iran Has Finally Let Go of Maliki*, BBC (Aug. 13, 2014), *available at* http://www.bbc.com/news/world-middle-east-28777142 (last visited Dec. 4, 2015).

309. *What Do Iraqi Leaders Hope to Hear From Obama's Strategy?*, PBS (Sept. 10, 2014 6:06 PM), *available at* http://www.pbs.org/newshour/bb/iraqi-leaders-hope-hear-obamas-strategy/ (last visited Dec. 4, 2015).

ADDRESSING THE 'FAILURE' OF INFORMED CONSENT IN ONLINE DATA PROTECTION: LEARNING THE LESSONS FROM BEHAVIOUR-AWARE REGULATION

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CONTENTS

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ABSTRACT

Information notice and data subject's consent are the current main legal safeguards of data protection and privacy rights: they reflect individuals' instances, such as self-determination and control over one's own private sphere, that have been acknowledged in many jurisdictions. However, the theoretic strength of these safeguards appears frustrated by current online practices that seem suggesting to give-up with their most common form of implementation: privacy notices and request for consent. These measures are proving to be unsuccessful in increasing users' awareness and in fostering a privacy protective-behaviour. As recent studies have shown, although people declare privacy concerns, their actual behaviour diverges from their statements (the "privacy paradox"), as they seem to increasingly disclose personal data and to not even read privacy notices available online; eventually, the current privacy notices are not effective in regulating user's data disclosure.

Behaviourally informed approaches to regulatory problems, already applied to different areas of information provision and public policy, helped to clarify the reasons of similar peoples' behaviour that cannot be reduced to a simplistic "users do not care about privacy." Highlighting the regulatory weakness of traditional information notices, applied behavioural science has also demonstrated to be particularly effective in improving users' decision-making and attaining concrete policy objectives if accompanied by ad hoc design interventions to display the relevant, salient information. As users do not read privacy policies or act in contradiction with them, other strategies might be more successful in promoting, "nudging," privacy-protective behaviour.

The use of innovative information notices, like salient alerts and nudges, seems to be a promising means of behavioural change also in the area of digital privacy, a possible new area of application of behavioural insights.

Building on recent studies in the field (conducted mainly in the U.S.), this paper considers new forms of privacy notices (like "visceral"

notices), as alternative or complement to current legal (technical) measures for data protection. For the informed consent approach (or "notice and choice" approach) to work, it needs to be improved with well-designed, transparent and regulated nudging system, capable to help citizens in their decision-making as regards their privacy.

Without disregarding the challenges and limitations of nudging strategies in public policy in general and in the privacy area in particular, and examining their legal grounds, the paper aims also to integrate that branch of legal-policy research that see "nudging" methods as an effective way to gently encourage safer behaviours in the citizens.

I. INTRODUCTION AND BACKGROUND

The emergence of new digital technologies and the growth of an information-based economy, made data protection policy a priority in the European Union ("EU"), as well as in other countries' agenda, in which the search for a balance between the safeguard of individual fundamental rights and other competing interests is deemed crucial for the same existence of a democratic society. Information Communication Technologies ("ICTs"), despite being a key enabler for economic development, may also represent a threat to fundamental rights, namely to privacy and data protection rights, as enshrined by the Charter of Fundamental Rights of the EU.[1]

Safeguarding these rights plays a central role in building trust in the online environment. As the European Commission pointed out, building this trust is essential to economic development,[2] and it is a key objective in the Digital Agenda for Europe ("DAE"), the EU flagship initiative on all ICT-related activities.[3] For these reasons, the current legal framework

1. *See* Charter of Fundamental Rights of the European Union 326/02, art. 7-8, 2012 O.J. (C 391) 2 (containing two separate articles for privacy and data protection rights).

2. *See Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation)*, at 1, COM (2012) 11 final (Jan. 25, 2012) [hereinafter *Proposal for GDPR*].

3. *See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Agenda for Europe*, at 13, COM (2010) 245 final (May 19, 2010). The DAE, which includes more than 100 distinct actions, has as one of its goals to reinforce trust and security online. Action 35, in particular, aims to provide guidance in implementation of new Telecoms framework with regard to the protection of individuals' privacy and personal data (namely, of the e-*privacy* Directive 2002/58/EC as modified by Directive 2009/136/EC). *See Action 35: Guidance on Implementation of Telecoms Rules and Privacy*, EUROPEAN COMMISSION (Oct. 25, 2010), *available at* https://ec.europa.eu/digital-agenda/en/pillar-iii-trust-security/action-35-guidance-implementation-telecoms-rules-privacy (last visited Dec. 18, 2015). Action 35 has to be read in conjunction with Action 12 (Review of the European Data Protection Rules)

on privacy and data protection in Europe is under review;[4] Directive 95/46/EC is going to be replaced by the General Data Protection Regulation ("GDPR"), which aims "to build a stronger and more coherent data protection framework in the EU."[5]

One of the main safeguards of the EU legal framework that the Proposal for a GDPR seeks to reinforce is represented by the fair information principles;[6] the transparency principle and consequent information obligations for those who process personal data is now strengthened and codified in the Draft Regulation, as a reinforcement of individual rights protection and an instrument of user empowerment.[7]

In particular, "Article 11 introduces the obligation on controllers to provide *transparent and easily accessible and understandable*

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aimed at reviewing the current Data Protection regulatory framework "to strengthen individual rights and tackle emerging challenges from globalisation and new technologies." EUROPEAN UNION: CYBER SECURITY STRATEGY AND PROGRAMS HANDBOOK: VOLUME I STRATEGIC INFORMATION AND REGULATIONS 64, 73 (2014).

4. The legal framework currently applicable in the field of privacy and data protection is represented mainly by the Directive 95/46/EC *on the protection of individuals with regard to the processing of personal data and on the free movement of such data*, integrated by the Directive 2002/58/EC *concerning the processing of personal data and the protection of privacy in the electronic communications sector* (so called e-*Privacy* Directive, as modified by the Directive 2009/136/EC, the e-*cookies* Directive). *See* Council Directive 95/46, 1995 O.J. (L 281) 31 (EC); Council Directive 2002/58, 2002 O.J. (L 201) 37 (EC); Council Directive 2009/136, 2009 O.J. (L 337) 11 (EC).

5. *Proposal for GDPR*, *supra* note 2, at 2. The regulation, will apply to public and private processing of personal data in most of the activities related to the former I pillar of EU (the community pillar, including single market, consumer protection, social policy, etc.). The European Commission has a parallel initiative for the data protection in the area of police and judicial cooperation in criminal matters. *See Commission Proposal for a Directive of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data by Competent Authorities for the Purposes of Prevention, Investigation, Detection or Prosecution of Criminal Offences or the Execution of Criminal Penalties, and the Free Movement of Such Data*, at 15, COM (2012) 10 final (Jan. 25, 2012). Despite the adoption of these two separate legal instruments for data protection in different areas, given that the Lisbon Treaty (2009) has abolished the Pillar structure, the EC is firmly striving to adopt a *comprehensive* approach on data protection. *See Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: A Comprehensive Approach on Personal Data Protection in the European Union*, at 409, COM (2010) 609 final (Apr. 11, 2010) [hereinafter *A Comprehensive Approach on Personal Data Protection*].

6. *See* Paul De Hert & Vagelis Papakonstantinou, *The Proposed Data Protection Regulation Replacing Directive 95/45/EC: A Sound System for the Protection of Individuals*, 28 COMPUTER L. & SECURITY REV. 130, 134 (2012).

7. *See Proposal for GDPR*, *supra* note 2, at 25 ("The principles of fair and transparent processing require that the data subject should be informed in particular of the existence of the processing operation and its purposes, how long the data will be likely stored, on the existence of the right of access, rectification or erasure and on the right to lodge a complaint.").

information."[8] This is particularly relevant in situations such as online advertising, where the proliferation of actors and the technological complexity of practices make it difficult for the data subject to know and understand if personal data relating to them are being collected, by whom and for what purpose.[9] "Article 14 further specifies the controller's *information obligations* towards the data subject."[10]

This means that according to the transparency principle of the European legislation, any data controller, including an Internet company or an Internet Service Provider, must specify the types of data collected and the purposes for which they may be used.

Data processing and data flow are thus allowed under a number of conditions, namely the requirement of obtaining data subject's *consent* that should be *free, specific and informed.*

Directly connected to the transparency principle and information obligations, the *informed* (and also *free and specific*) *consent* requirement represents a cornerstone of the EU data protection legislation: it grants the main legal ground for personal data processing (although other legal basis are contemplated)[11] and it has been strengthened by the Draft GDPR, becoming now an *explicit consent*[12] requirement.

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8. *Id.* at 8.

9. *See id.* at 43 ("Personal data must be: (a) processed lawfully, fairly and in a transparent manner in relation to the data subject."); *id.* at 47 ("1. The controller shall have *transparent and easily accessible policies* with regard to the processing of personal data and for the exercise of data subjects' rights. 2. The controller shall provide any information and any communication relating to the processing of personal data to the data subject in an *intelligible form*, using *clear and plain language*, adapted to the data subject, in particular for any information addressed specifically to a child.") (emphasis added); *see also id.* at 24 (urging, in particular for children, specific protection and a clear language).

10. *Proposal for GDPR*, *supra* note 2, at 8 (emphasis added).

11. *Id.* at 43-44.

> 1. Processing of personal data shall be lawful only if and to the extent that at least one of the following applies:
> (a) the data subject has given consent to the processing of their personal data for one or more specific purposes;
> (b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract . . . .

Id.

12. *See id.* at 42 ("'[T]he data subject's consent' means any *freely given specific, informed and explicit* indication of his or her wishes by which the data subject, either by a statement or by a *clear affirmative action*, signifies agreement to personal data relating to them being processed.") (emphasis added). The need to examine ways to clarify and strengthen the consent requirement has been considered by the European Commission. *See A Comprehensive Approach on Personal Data Protection*, *supra* note 5, at 8-9.

> [I]n the online environment – given the opacity of privacy policies – it is often more difficult for individuals to be aware of their rights and give informed

It is understood that consent cannot be inferred implicitly, as inaction should not be perceived as the indication of users' wishes, and that it should be evidenced by *a statement or by a clear affirmative action*. This last aspect is particularly relevant for the online environment,[13] where user's inactivity cannot be considered as consent, but where a "click" might be accepted as valid consent (if all other conditions are met).[14]

This means that in the context of behavioural advertising (which is becoming the principal business model for companies in the digital economy), the informed *consent* requirement should be obtained, for instance, by the third-party advertisers tracking the users, before placing tracking *cookies* on a user's computer or before accessing information stored on the user's computer. For the consent to be *informed*, the user should be provided with information about, for instance, the sending and purposes of the cookies.[15]

The choice made by the European legislation is clearly for an *opt-in* system, where an active action to consent is required (as opposed to *opt-out* system where the consent is presumed by default, with the possibility for the user to change it).[16]

> consent. This is even more complicated by the fact that, in some cases, it is not even clear what would constitute freely given, specific and informed consent to data processing . . .

Id. at 9.

13. In this regard, it is important to notice that European Directive 2002/58/EC, the distinct directive for the protection of personal data in the electronic communications sector (i.e., the *e-Privacy* Directive) as amended by Directive 2009/136/EC, also requires companies to obtain the Internet users' consent, in particular before installing *cookies*, having the users been provided *with clear and comprehensive information*. *See* Council Directive 2002/58, art. 5, 2002 O.J. (L 201) 37 (EC). The relationship between the Draft General DP Regulation and the e-Privacy Directive still needs to be clarified, however the e-Privacy Directive does not seem affected by the reform (if not for technical adjustments) and it should work as *lex specialis* with respect to the General Regulation. *See Proposal for GDPR*, *supra* note 2, at 99.

14. *See* Council Directive 2002/58 2002 O.J. (L 201) 31 (EC) ("Consent may be given by any appropriate method enabling a freely given specific and informed indication of the user's wishes, including by ticking a box when visiting an Internet website."); *see also Opinion of the Working Parking on the Protection of Individuals with Regard to the Processing of Personal Data on the "Definition of Consent,"* at 26 (July 13, 2011), *available at* http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2011/wp187_en.pdf (last visited Dec. 18, 2015) [hereinafter *Opinion on the Definition of Consent*].

15. Council Directive 2009/136, 2009 O.J (L 337) 11 (EC). According to Recital 66 of Directive 2009/136/EC, modifying e-Privacy Directive "methods of providing information and offering the right to refuse should be as user-friendly as possible" and that, "[w]here it is technically possible and effective, the user's consent to processing may be expressed by using the appropriate settings of a browser or other application." *Id.* (emphasis added); *see Opinion on the Definition of Consent*, *supra* note 14, at 32.

16. *See, e.g.*, *id.*

Now, it must be noticed that both the current Data Protection ("DP") Directives and the Draft Regulation, despite establishing those information obligations and consent requirements, contain few indications on *how* information should be provided to the user or how the latter could exercise her right to object to the processing of personal data. The common instruments usually adopted by data controllers to be compliant with the law are privacy policies (or notices).[17]

As studies conducted both in Europe[18] and outside Europe[19] have shown, the problem with current privacy polices is that they are not effective, at least not concerning the purpose of increasing users privacy awareness (risks and rights) nor of encouraging a more responsible data disclosure. These and similar studies,[20] in fact, have demonstrated that, although the majority of Internet users report to have concerns about privacy and to notice the presence of privacy notices or warning messages, most of them, especially young people, do not read these statements and keep disclosing personal data: this phenomenon is also called "privacy paradox."

Current privacy notices are ignored as they are often written in a not clear and easy language. In brief, they are hardly ever read by users and – even if read – very difficult to understand. The reality offers a scenario characterized by a lack of understanding by users of the ways personal data is collected, used and disclosed, as well as of potential risks with the consequence that the provision of users' consent is not really *informed.*

However, even when the level of clearness and completeness of privacy polices is satisfactory, i.e., when they fulfill the legal formal

17. Most common privacy notices attached to a webpage are usually accessible through a hyperlink and made of a long statement; they are supposed to explain what information is collected and for what purposes, how it is used and the choices offered to the users (e.g. how to update personal account or to modify the default settings). Some examples, taken from Ryanair and Google's websites, are provided here: *see, e.g.*, *Ryanair Website Privacy Statement*, RYANAIR, *available at* http://www.ryanair.com/ie/privacy-policy/ (last visited Dec. 18, 2015); *Privacy Policy*, GOOGLE, *available at* http://static.googleusercontent.com/media/www.google.com/it//intl/en-GB/policies/privacy/google_privacy_policy_en-GB.pdf (last visited Dec. 18, 2015).

18. *See, e.g.*, *Pan-European Survey of Practices, Attitudes & Policy Preferences as Regard Personal Identity Data Management*, JOINT RES. CTR. (2012), *available at* http://is.jrc.ec.europa.eu/pages/TFS/documents/EIDSURVEY_Web_001.pdf (last visited Dec. 18, 2015) [hereinafter *Pan-European Survey of Practices*].

19. *See, e.g.*, Janice Tsai et al., *What's it to you? A Survey of Online Privacy Concerns and Risks* (NET Institute, Working Paper No. 06-29, 2006); Aleecia M. McDonald & Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, 4 J. L. & POL'Y FOR THE INFO. SOC'Y 543 (2008).

20. Mary Madden et al., *Teen, Social Media and Privacy Report*, PEW RES. CTR. (May 21, 2013), *available at* http://www.pewinternet.org/2013/05/21/teens-social-media-and-privacy/ (last visited Dec. 18, 2015).

requirements, they fail to realize the main purpose of the law (at least of the European law), that is, to foster attentive users' decision-making and eventually a conscious data-disclosure behaviour.

As users do not read privacy policies or act in contradiction with them, other strategies might be more successful in obtaining privacy-protective behaviour. It is not enough that privacy policies are provided in a place easy to find on a website, but they also should have an impact on users' behaviour.

Providing simplified, standardized privacy information, although of some benefits, has proved to be also insufficient. Insights from behavioural economics have helped to understand why (as discussed in the next sections).

Finally, current privacy policies do not help users in making the best choices as regards to consent (or not) to data processing. They fail to realize one of the objectives of DP law, i.e., to ensure that people make pondered decisions about their data, and, as ultimate goal, to increase trust in online services. Therefore, there may be a need of policy intervention aimed at changing users' behaviour, introducing alternative, more effective ways of presenting information.

Knowing how users really behave with regard to their personal data (often in contrast with their statements) may play a relevant role in addressing the current "privacy paradox," as well as the gap between existing legal privacy safeguards and implementing tools.

Behavioural research has not only shown that there is a significant relationship between the content of privacy policies and individuals' privacy concerns/trust,[21] but also that an overload of information (e.g., long and complex texts) is counterproductive also in the privacy field.[22] Given that people are influenced by how information (on products, services, etc.) is presented, identifying the appropriate notice content and design to display online privacy information should also improve users' decision-making in this regard, helping them in attaining a greater empowerment online.[23] By making easier, agile and thus more effective the display of privacy information, in fact, users may be able to take more

21. Kuang-Wen Wu et al., *The Effect of Online Privacy Policy on Consumer Privacy Concern and Trust*, 28 COMPUTERS IN HUM. BEH. 889 (2012).

22. *See, e.g.*, Janice Tsai et al., *The Effect of Online Privacy Information on Purchasing Behaviour: An Experimental Study*, 22 INFO. SYSTEM RES. 254 (2011); Alessandro Acquisti & Jens Grossklags, *What Can Behaviorual Economics Teach Us About Privacy*, *in* DIGITAL PRIVACY: THEORY, TECHNOLOGIES AND PRACTICES 363 (Alessandro Acquisti et al. eds., 2007).

23. *See generally* Sebastian Deterding et al., *Designing Gamification: Creating Gameful and Playful Experiences*, *in* CHI '13 CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS 3263 (2013).

informed decisions regarding the usage of their personal information online.[24]

Experiments to test users' responses (their actual behaviour) to new type of privacy policies started to be run mainly in the U.S.,[25] while in Europe this aspect is still not enough explored. This paper gives briefly an account of the existing behavioural studies and experiments, including, though, the first steps undertaken by the EU in this direction: BREVE (*Behavioural Responses to Privacy Visceral Notices*), a project recently launched by the European Commission, aims at studying the impact of different, innovative online privacy notices on users' behaviour as regards their privacy. The aim is to encourage also in Europe the use of behavioural research for policy making in the field of *privacy*.

In light of the above, this article is structured as follows: Part II briefly recalls the main findings of the current research on privacy policies and informed consent requirements as (ineffective) legal tools for privacy protection also in comparison with other information disclosure mechanisms (e.g., in consumer protection contexts). The starting point will be the analysis of the phenomenon called the "privacy paradox." Having learned the lessons from previous studies and experiments on users' practices online, Part III discusses the challenges and opportunities of behavioural sciences applied to public policy in order to better understand the relevance of behavioural aspects in the *privacy* area. The focus will be, eventually, on *privacy* information provisions and users' data disclosure behaviour, with particular emphasis on recent research conducted on *Privacy Visceral Notices*. Part IV, finally, provides some recommendations on how to integrate Behavioural Insights into privacy policy and law (hard law and/or soft law) and on future research. In this way, this paper seeks also to integrate that research strand that explores to what extent (and at what level of governance) the regulatory approach could play a role in cyberspace.[26]

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24. Laura Brandimarte et al., *Misplaced Confidences: Privacy and the Control Paradox*, 4 SOC. PSYCH. & PERSONALITY SCI. 40, 41-45 (2013).

25. *See, e.g.*, Victoria Groom & M. Ryan Calo, *Reversing the Privacy Paradox: An Experimental Study* 1 *passim* (Social Science Research Network, Working Paper, 2011) (experimental study on the efficacy of various techniques of nonlinguistic notice on consumer privacy expectations); Yang Wang et al., *A Field Trial of Privacy Nudges for Facebook, in* PROCEEDINGS OF THE SIGCHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS 2367 (2014) (reporting the results of an experiment conducted on U.S. students, users of Facebook and exposed to different privacy nudges, ranging from a "time nudge" to the "emotional nudge").

26. *See generally* Oreste Pollicino & Marco Bassini, *Internet Law in the Era of Transnational Law* (Robert Schuman Centre for Advanced Studies, Working Paper No. 24 (2011).

II. PRIVACY NOTICES AND PRIVACY PARADOX

A. *Information obligations and informed consent*

"Confidence in the Internet and its governance is a prerequisite for the realization of the Internet's potential as an engine for economic growth and innovation. . . . The [European] Commission is addressing these challenges, notably via the reform of the EU Data Protection framework."[27]

The Draft GDPR, to which this reform has been assigned, strengthens the consent requirement and the transparency principle, as said in the introduction: "The controller shall *have transparent and easily accessible policies*."[28] This information disclosure obligation is imposed by the European legislator to any data controller,[29] including Internet companies/ISPs: they should provide complete and accurate information regarding purposes, nature, conditions of online data processing and users' privacy rights, so that the subjects can provide an "aware" consent.[30]

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27. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Internet Policy and Governance: Europe's Role in Shaping the Future of Internet Governance*, at 9, COM (2014) 72 final (Feb. 12, 2014) (EC).

28. *Proposal for GDPR*, *supra* note 2, at 47.

29. Data controller "determines the purposes, conditions and means of the processing of personal data," as far as there purposes are legitimate. *See id.* at 41-42.

30. The consent to data processing that the data subject might decide to give should refer also to the purposes for which personal data are processing. In the EU legislation, in fact, the consent is conceived as a major instrument for individuals to keep control over the processing (and the purposes) of their data. This also explains the relevance of the notion of free and specific consent as well as of 'further purposes' for which data might be processed. Interestingly, while the current Directive 95/46 states that data cannot be further processed in a way incompatible with the purposes for which they have been collected (Art 6), the Draft Regulation introduces a more permissible criterion. Further processing is allowed where the purposes are compatible with those for which the data have been collected (Art 6): i.e. in case of further processing, subject's consent is required only in case of incompatibility of the further purposes. Internet companies certainly receive advantage from this amendment, as they will not need to ask for consent in many 'compatible' cases. The purposes limitation principle has its equivalent in the North American privacy literature in the concept of 'contextual integrity' and possibly in its regulation as one of the principles of what will be the first U.S. general privacy Act. *See* Helen Nissenbaum, *A Contextual Approach to Privacy Online*, 140 J. AM. ACAD. OF ARTS & SCI. 32, 37 (2011); *see also* EXEC. OFFICE OF THE PRESIDENT, CONSUMER DATA PRIVACY IN A NETWORKED WORLD: A FRAMEWORK FOR PROTECTING PRIVACY AND PROMOTING INNOVATION IN THE GLOBAL DIGITAL ECONOMY (2012). Although it does not seem to add anything new to the European legal framework, the *context integrity* principle could be a useful, interpretive instrument also for the application of the EU Draft DP Regulation, *e.g.* defining the limits of data processing for further purposes, and thus, the scope of the consent, especially online. *See* Kristina Irion & Giacomo Luchetta, *Online Personal Data Processing and EU Data Protection Reform*, CEPS TASK FORCE REP.

The traditional way to fulfill this obligation online is the provision of privacy notices (or policies). More precisely, privacy notices are statements that should help data subjects to understand how data controllers will use their personal data, providing them with detailed information about what, why and how personal data will be collected, processed, stored, used and in cases, disclosed. These notices should also provide information about the data subjects' rights (e.g., to access their personal data) and the security measures adopted for its safe treatment. The final goal would be to confer individuals with control over their personal data and, through this control, to allow them to decide for themselves how to weigh the costs and benefits of the disclosure of their data: this approach is also called "self-management privacy."[31]

These privacy notices have been gradually introduced as implementation of mandatory regulation (that is the rule in the EU) or adopted as self-regulation practices by businesses in response to privacy concerns (that is the rule in the U.S.).[32] Criticisms to the self-regulation model of privacy policies, in particular in the U.S., point out the fact that this model has allowed a sectorial and weak approach to privacy[33] all in favor of business interests. With a proliferation of privacy policies not accompanied by substantial safeguards, individual protection would have become more an appearance of privacy than a reality: users may believe they have more privacy simply because a website has a privacy policy,[34] or they are presumed to be consenting to a website's privacy conditions

CEPS DIGITAL FORUM (2013), *available at* http://www.ceps.eu/publications/online-personal-data-processing-and-eu-data-protection-reform (last visited Dec. 18, 2015).

31. Daniel Solove, *Privacy Self-Management and the Consent Dilemma*, 126 HARV. L. REV. 1879, 1882 (2013).

32. While in the EU information obligations for companies and governmental entities dealing with data processing stem from general privacy legislations, at both *supra*national and national level, in the U.S. sectorial regulations and a self-regulation model prevail, as a federal legislation is missing and a State legislation on privacy is exceptional. *See, e.g.*, CAL. BUS. & PROF. CODE §§ 22575-79 (West 2015). For an overview on the increasing privacy concerns in U.S. (from 43% in the 1990 to 88% in 2003) and for a critical assessment of privacy policies use by companies see generally Allyson W. Haynes, *Online Privacy Policies: Contracting Away Control Over Personal Information?*, 111 PENN. ST. L. REV. 587, 592, 624 (2007) (claiming that U.S. privacy policies, far from being an instrument of protection, have become one more adhesion contract for individuals to avoid, the enforcement of which might be challenged by individuals at least for "(1) a lack of *assent*, as many online privacy policies still employ browse-wrap acceptance features; and (2) unconscionability of terms"). *See also* Chris J. Hoofnagle et al., How Different are Young Adults from Older Adults When it Comes to Information Privacy Attitudes and Policies? 20 (Apr. 14, 2010) (unpublished manuscript) (on file with the U.C. Berkeley School of Law, Berkeley Center for Law and Technology).

33. Daniel Solove & Chris J. Hoofnagle, *A Model Regime of Privacy Protection*, 2006 U. ILL. L. REV. 357, 357, 365-66 (2006).

34. Haynes, *supra* note 32, at 610.

simply because they are visiting that website and using its services.[35]

In Europe, the adoption of privacy policies derives from the implementation of general Data Protection principles and rules (mainly, fairness and information obligations). However, traditional privacy policies (or notices) are criticized also in Europe as they proved to be insufficient to realize the purposes of data protection. Despite the theoretical value of privacy policies, the efficacy of current notice and consent mechanisms is increasingly questioned in the privacy area,[36] as well as in other areas, so much that someone has defined certain criticisms, at times excessive, "notice skepticism."[37]

Traditional privacy policies tend to be written, detailed and usually long and highly complex texts; in online environments, they consist of separate texts hardly accessible or displayed in a slightly visible part of a website. Internet users are asked to consent to the conditions described in the privacy policies by ticking a "yes" box at the end of the statements; more often, this box is simply positioned beside a link (hyperlink), which refers to another page (hypertext) containing the privacy policy: clicking the box presumes you have read the policies.

Users are supposed to read these texts, understand them and give their informed consent to the processing of their personal data along the lines explained in the privacy policies. Nevertheless, this assumption is—most of the time—flawed, as data-subjects tend to merely scroll down the privacy policies and rush for the tick box (or simply tick the box without even following the link).

By providing these textual information notices, however, data controllers comply, at least formally, with their information obligations. Like for other disclosure obligations (e.g., on products and services

35. For an overview on advantages and disadvantages of privacy ("Having too much privacy can be as bad as having too little") see Lior J. Strahilevitz, *Toward a Positive Theory of Privacy Law*, 126 HARV. L. REV. 2010, 2010, 2039, 2041 (2013), who talks of distributive effects of privacy (it benefits some people and damaged others) and urges, also for the U.S., a more proactive and non-sectorial way to protect privacy.

36. *See* Brendan Van Alsenoy et al., *Privacy Notices Versus Informational Self-Determination: Minding the Gap*, 28 INT. REV. L. COMPUTERS & TECH. 185 (2014); Brendan Van Alsenoy & Alessandro Acquisti, *Privacy-Friendly 'Model' Privacy Policies*, SECURITY AND PRIVACY FOR ONLINE SOC. NETWORKS (2013), *available at* https://lirias.kuleuven.be/bitstream/123456789/453694/1/SPION_D9.3.5_Privacy_friendly_model_privacy_policies.pdf (last visited Dec. 18, 2015); *see also* Alessandro Mantelero, *The Future of Consumer Data Protection in the E.U. Re-thinking the "Notice and Consent" Paradigm in the New Era of Predictive Analytics*, 30 COMPUTER L. & SECURITY REV. 643 (2014).

37. Ryan Calo, *Against Notice Skepticism in Privacy (and Elsewhere)*, 87 NOTRE DAME L. REV. 1027, 1055-57 (2012).

quality as set in the Consumer Protection regulation[38]), in fact, the European data protection law does not specify the format that this information to be provided to the users should have[39] (or provides only few indications). This means that, as far as the information provision obligations are satisfied, i.e., the minimum of information required by data protection rules has been provided, the controller is free to choose the way to provide this information, regardless of its effectiveness.

1. *Role of privacy policies in users' data disclosure*

The role of privacy policies should be also to enable in the users a cautious and aware *willingness to disclose* personal data.[40] Under an economic perspective, willingness to disclose personal data might be beneficial for companies (increasingly relying on an information-based business model) and, to some extent, also for the users, who might have personalized, higher quality services and relevant promotions.[41] It would be about striking a balance between obtaining advantages of targeted services and keeping control over their own personal data. According to the neoclassic economic view of privacy, individuals would "rationally" trade off their short term benefits (e.g., targeted services) and long terms costs of data disclosure (e.g., risks of privacy invasion), being able to make a pondered decision.

Some scholars have shown the relationship between the content of privacy policies and the users' intention to interact with websites where there is a requirement to provide personal data.[42] Privacy concerns seem to have a negative impact on the willingness to provide personal information, while trust seems to have a positive impact. However, if people see benefits of disclosure (like personalized services in e-commerce or entertainment in social networks) as outweighing the concerns for privacy risks, they would be more likely to disclose. Given that willingness to provide personal data online is closely related to privacy concerns, a way to reduce these concerns would be to provide them with good privacy policies, i.e., with really informative policies, increasing users' awareness and reassuring them about possible risks:[43] the information would be able to reduce privacy concerns and to increase

38. Consumer protection in Europe is now enshrined in the European Directive on Consumer Rights 2011/83/EC. *See* Council Directive 2011/83, 2011 O.J. (L 304) 64 (EU).

39. Some indications, however, have been offered by the *Opinion on the Definition of Consent*, *supra* note 14, at 26.

40. *Proposal for GDPR*, *supra* note 2, at 8, 25.

41. Wu et al., *supra* note 21, at 890.

42. *Id.* at 891.

43. *Id.*

trust in websites. In other words, using privacy policies, which clearly inform users about how companies treat their data and which are read by users, according to Wu et al., would not only reduce their concerns and increase trust, but it would meanwhile increase users' willingness to disclose personal information.[44]

However, things seem more complicated than they have just been pictured; reducing privacy concerns through complete information is not enough to increase trust. Other studies have shown, in fact, that often the greater the privacy reassurances provided to individuals, the greater their reluctance to reveal personal information because the strong privacy reassurance primes the individuals about the sensitivity of their data. [45]

Moreover, it does not guarantee a safe digital environment for individuals, to whom a cautious, responsible behaviour is required (regardless of the duly supervisory role of regulatory authorities). Risks of privacy violation, illicit data practices or violations of correlated rights (e.g., to non-discrimination, etc.) deriving from the increasing reliance on Big Data became a worrying reality in the digital era.[46] Education and good information are certainly important but demonstrated not to suffice.[47] Therefore, restrictive legal intervention is sometime deemed necessary to protect the data-subject, usually the weakest party in online and offline relationships.

In the attempt to curb the risks for data protection (and related concerns) arising from the massive use of digital technologies, the EU Draft DP Regulation not only strengthens some of the existing safeguards—like the information obligations for data controllers—but also reaffirms the principle of minimization of data collection and processing.[48] On the one hand, personal data collection by public and private entities is not forbidden by the EU law, but regulated and structured; on the other, personal data disclosure by users is not

44. Wu, *supra* note 21.

45. Alessandro Acquisti, *The Economics of Personal Data and the Economics of Privacy: 30 Years after the OECD Privacy Guidelines* 13 (Working Party for Info. Security & Privacy & Working Party on Info. Econ., Background Paper No. 3, 2010), *available at* http://www.oecd.org/sti/ieconomy/46968784.pdf (last visited Dec. 18, 2015).

46. *See, e.g.*, *Opinion of the Working Party on the Protection of Individuals with Regard to the Processing of Personal Data on "Purpose Limitation"* (Apr. 2, 2013), *available at* http://idpc.gov.mt/dbfile.aspx/Opinion3_2013.pdf (last visited Dec. 18, 2015); Jules Polonetsky & Omer Tene, *Privacy and Big Data: Making Ends Meet*, 66 STAN. L. REV. 25 (2013).

47. Hoofnagle et al., *supra* note 32, at 20.

48. *See Proposal for GDPR*, *supra* note 2, at 22. "The data should be *adequate, relevant and limited to the minimum necessary* for the purposes for which the data are processed; this requires in particular ensuring that the data *collected are not excessive* and that the period for which the data are stored is limited to a strict minimum." *Id.* (emphasis added).

discouraged, yet driven to be more aware and wise.

2. *Personal data disclosure: direct and indirect*

It is important to stress that personal data disclosure (and its specular activity, data collection) might occur inadvertently, especially online, where most of people's daily activities are nowadays performed. During their browsing, people leave continuous traces of their behaviour, private lives and preferences without being asked, or without being aware. Data disclosure, in fact, might be direct, i.e., on a *voluntary* basis (like in the cases of filling in an online form) and indirect, as a result from other online activities (web browsing, location moving, click stream, etc.).[49] The latter kind of data disclosure/data collection may create more concerns as it may occur unobtrusively, out of users' control. Most of the time, the two kinds of data collection are also combined: data collected "indirectly" might be matched with data of direct disclosure, allowing companies or public organizations to have a complete profile of people.

Wide literature exists about the several issues raised by profiling techniques[50] and by the "hidden" collection of data, not least the fear of mass surveillance[51] and users' manipulation. Now, the problem is that against this indirect disclosure, traditional privacy notices have very little or any effect at all.[52]

3. *Data disclosure between individual autonomy and legal constraints.*

In certain cases, the individual's autonomy to choose whether or not to disclose their data is restricted by the law intervention, regardless of users' informed consent, because it is presumed not freely given, not genuine and therefore not valid.[53] Some privacy risks are deemed so

49. *See generally* Groom & Calo, *supra* note 25.

50. *See generally* PROFILING THE EUROPEAN CITIZEN: CROSS-DISCIPLINE PERSPECTIVES (Mireille Hildebrandt & Serge Gutwirth eds., 2008). The Draft GDPR takes into account new scenarios, acknowledging the existing practices of users profiling as new business models for companies but also introducing specific limitations to them.

51. *See, e.g.*, Roger Clarke, *Profiling: A Hidden Challenge to the Regulation of Data Surveillance*, 4 J.L. & INFO. SCI. 403 (1993); Roger Clarke, *Information Technology and Dataveillance*, 21 COMM. OF THE ACM 498 (1988).

52. *See generally* Groom & Calo, *supra* note 25.

53. The EU law intervenes to prohibit the collection and processing of special categories of data, even in the presence of individual's consent and when the conditions do not allow the individual to "freely" choose to consent. *See Proposal for GDPR*, supra note 2, at 22. "In order to ensure free consent, it should be clarified that consent *does not provide a valid legal ground* where the individual *has no genuine and free choice* and is subsequently *not able to refuse* or withdraw consent without detriment." *Id.* (emphasis added).

Consent should not provide a valid legal ground for the processing of personal data,

serious by the EU legislation to foresee a strong protection especially for weaker categories of people.[54]

This limitation to individual autonomy, especially in contractual context, which might appear an excess of paternalism, can be explained by the status of data protection and privacy as fundamental rights.[55] This approach has been strengthened with the entry into force of the Treaty of Lisbon in December 2009 that gave to the Charter of Fundamental Rights of 7 December 2000 ("CFR") a binding force of primary law in the EU.[56]

Pursuing the economic development (also) by fostering the free flow of personal data, the European DP law aims at the "protection of individuals with regard to the processing of personal data."[57] Privacy and data protection is understood in Europe as not only an individual right, but also as a public interest, a *conditio sine qua non* for a democratic society, a liberty rather than a freedom:[58] essential to guarantee the right to self-determination, it would ensure other rights, like freedom of expression, enable diversity and prevent undue societal control.[59]

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where there is a clear imbalance between the data subject and the controller. This is especially the case where the data subject is in a situation of dependence from the controller, among others, where personal data are processed by the employer of employees' personal data in the employment context. Where the controller is a public authority, there would be an imbalance only in the specific data processing operations where the public authority can impose an obligation by virtue of its relevant public powers and the consent cannot be deemed as freely given, taking into account the interest of the data subject.

Id.

54. *See id.* at 45. Article 8 sets out further conditions for the lawfulness of the processing of personal data of children in relation to information society services offered directly to them.

55. On a discussion on the private law approach to personal data protection see generally Nadezhda Purtova, *Private Law Solutions in European Data Protection: Relationship to Privacy and Waiver of Data Protection Rights*, 28 NETH. Q. HUM. RTS., 179 (2010).

56. As recalled above, the Charter contains two separate articles for privacy right and for data protection rights. Charter of Fundamental Rights of the European Union, art. 7-8, Dec. 18, 2000, 2000 O.J. (C 326) 1. Moreover, article 16 of the Treaty on the Functioning of the EU provides now the legal basis for any piece of legislation adopted by the EU on data protection. Consolidated Version of the Treaty on the Functioning of the European Union art. 16, May 9, 2008, 2008 O.J. (C 115) 47, 55.

57. *See* Council Directive 95/46, 1995 O.J. (L 281) 31 (EC); *see also Proposal for GDPR*, *supra* note 2, at 2.

It is time to build a stronger and more coherent data protection framework in the EU, backed by strong enforcement that will allow the digital economy to develop across the internal market, put individuals in control of their own data and reinforce legal and practical certainty for economic operators and public authorities.

Id.

58. *See generally* Antoinette Rouvroy & Yves Pullet, *The Right to Informational Self-Determination and the Value of Self-Development: Reassessing the Importance of Privacy for Democracy*, *in* REINVENTING DATA PROTECTION 45 (Serge Gutwirth et al. eds., 2009).

59. *See generally* Mireille Hildebrandt & Bert-Jaap Koops, *The Challenges of Ambient*

Although many times the two statuses overlap, the concept of data subject or user does not coincide necessarily with that of the consumer,[60] as well as the European DP law is not a consumer protection law.[61]

Legal public intervention and supervision mechanisms in favor of individuals' privacy, which might take place regardless of the interested subject's consent to data processing, are not rare in Europe, and are aimed at verifying that other legal grounds (e.g., necessity, proportionality) occur: this is not only to overcome the limitations of a merely self-regulating approach to privacy,[62] but also to guarantee the same existence of democratic processes.[63]

This public intervention, foreseen by the *sui generis* EU Data Protection law[64] to protect the individual's rights, may occur to limit market practices that might jeopardize individuals' rights. The regulatory intervention may take place by imposing information disclosure requirements to companies that collect data, as well as conditions and limitations to the validity of a subject's consent (presumed not valid in cases of children or in cases of unbalanced decisional powers in the employment area).[65] It is also reflected in the decisional, monitoring and

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Law and Legal Protection in the Profiling Era, 73 MOD. L. REV. 428 (2010).

60. For considerations on the consequences of this approach on the legal nature of data subject consent, as unilateral act, like an authorization rather than as a contractual agreement, see Daniel Le Metayer & Shara Monteleone, *Automated Consent Through Privacy Agents: Legal Requirements and Technical Architecture*, 25 COMPUTER L. & SECURITY REV. 136, 138 (2008). The issue, however, is debated in literature, reflecting two different approaches to Data Protection mainly embraced in EU the first, mostly followed in U.S., the second.

61. *See* Irion & Luchetta, *supra* note 30, at 21-22. This Report also stresses the difference between DP and consumer protection, which refers to a cross-cutting EU policy field that aims at enhancing the positions of consumers of product and services; however, according to Irion & Luchetta (CEPS)'s Report, consumer protection regulation when modifies contract law to the benefit of the consumer (*e.g.* regarding unfair terms and practices) would depart from the party autonomy principle, while DP framework would strongly emphasizes the control and autonomy of individual through the instrument of consent. Although I fully share the view of consent as enabling individual to control over her data, I would stress the idea that the European DP regulation contains as much limitations to individual autonomy, deemed necessary for protecting a fundamental right like data protection that is also an essential public interest. First because the consent does not legitimize every type of data processing and also because the interest of data subject is at the center of the European legal framework (even more in the ongoing reform) so much that the protection of his data and private sphere may be acknowledged and granted despite his consent to data collection and regardless of whether he issued a complaint or not. *See generally* Le Metayer & Monteleone, *supra* note 60.

62. Solove & Hoofnagle, *supra* note 33, at 385.

63. *See, e.g.*, Rouvroy & Poullet, *supra* note 58; Julie E. Cohen, *Privacy and Technology: What Privacy is For*, 126 HARV. L. REV. 1904, 1912 (2013).

64. Irion & Luchetta, *supra* note 30, at 22.

65. *See Proposal for GDPR*, *supra* note 2, 43-45.

sanctioning powers granted by the EU law to DP national authorities.[66] The latter could intervene, even *ex officio* (i.e., without a formal claim by the interested subject) to adopt the needed legal measures, aimed at preventing, forbidding data processing detrimental for individual rights or remedying its consequences.[67]

This rights-based approach is also reflected in the recent case law of the European Court of Justice ("ECJ")[68] and seems confirmed by the Draft GDPR; conditions and bans on the use of personal data have been strengthened, at the risk of being considered paternalistic. However, a defensive approach to data protection and privacy rights does not need to be also too rigidly paternalistic.

As discussed below, a different, "soft" perspective seems possible, as well as an evolving interpretation of the DP rules, which, backed by an integrated system of alternative regulatory mechanisms, namely appropriate *nudging* strategies, would allow data protection while preserving the individual autonomy.

4. *Limitations of the current safeguards: the privacy paradox*

Given the relevance of informed consent for data protection, one could expect that it suffices to strengthen these information obligations and foster the provision of privacy policies to enable users to give a meaningful, informed consent.[69]

The proposed GDPR reinforced this concept; however, the reality has shown that this still valuable mechanism is not working well in practice, especially in the digital world.

One of the main criticisms to the informed consent requirement relates to the weakness of the link between information about data processing and consent and to the incapacity of consent to provide

66. *Id.* at 77-78.

67. *See id.* at 77-80.

68. As examples of application of this rights-based approach see Case C-275/06, Productores de Música de España (Promusicae) v. Telefónica de España S.A.U., 2008 E.C.R. I-00271 (Jan. 29, 2008); Case C-70/10, Scarlet Extended S.A. v. Société belge des auteurs, compsiteurs et éditeurs S.C.R.L. (SABAM), 2011 E.C.R. I-11959 (Nov. 24, 2011); Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos (AEPD), 2014 EUR-Lex CELEX LEXIS 317 (May 13, 2014).

69. Although strictly connected, information obligations and informed consent are separate concepts and requirements. Transparency principle (and consequent information obligations) apply also in case of derogations from the consent requirements. This is particularly relevant in all those cases in which it might be impossible to systematically collect users' consent, but that still require the fulfilment of transparency principle about how data are processed. *See* Mireille Hildebrandt, *The Dawn of a Critical Transparency Right for the Profiling Era*, *in* DIGITAL ENLIGHTENMENT YEARBOOK 41 (Jacques Bus et al. eds., 2012).

effective control to users over their data.[70]

While Internet users usually declare to be worried about online privacy risks and to be aware of their privacy rights, in fact, the analysis of their online behaviour and attitudes, in terms of personal data disclosure, seems to suggest that they do not care about privacy. From the Special Eurobarometer 359/2011 of the European Commission ("EB"),[71] emerges that the majority of Internet users report to read these privacy notices when joining a social network or registering for a service online.[72] However, most users' online behaviour shows that they do not act according to their statements, as they do not read the privacy policies entirely or they find it difficult to obtain information about a website's data practices.[73] A large number of people are, nevertheless, concerned that their personal data held by companies may be used for a purpose other than that for which it was collected.[74] Similar surveys[75] seem to confirm this attitude.[76]

In sum, even when people declare to be worried about their privacy, they do not read privacy policies and do not stop disclosing their data, and even when people declare to read these notices they do not seem to reduce privacy concerns. This phenomenon is also called as "the privacy paradox"[77] and has led to questioning the adequacy of the current privacy and data protection mechanisms. The idea that people do not care about their privacy, however, appears too simplistic in light of the most recent research and it has been discarded by most privacy scholars.[78]

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70. Irion & Luchetta, *supra* note 30, at 48.

71. *See Report of the Directorate-General of Justice, Information Society & Media and Joint Research Centre on Attitudes on Data Protection and Electronic Identity in the European Union*, at 137 (June 2011), *available at* http://ec.europa.eu/public_opinion/archives/ebs/ebs_359_en.pdf (last visited Dec. 18, 2015) [hereinafter *Attitudes on Data Protection*].

72. *Pan-European Survey of Practices*, *supra* note 18, at 1.

73. Tsai et al., *supra* note 22, at 17-18.

74. *Id.* at 1.

75. *See* Lee Raine, Aaron Smith & Maeve Duggan, *Coming and Going on Facebook*, PEW RES. CTR. 2 (Feb. 5, 2013), *available at* http://www.pewinternet.org/~/media//Files/Reports/2013/PIP_Coming_and_going_on_facebook.pdf (last visited Dec/ 18, 2015). For a user survey in mobile context (*e.g.*, about the consent provision in the use of Apps by young students) *see generally* Yue Liu, *User Control of Personal Information Concerning Mobile-app: Notice and Consent?*, 30 COMPUTER L. & SECURITY REV. 521 (2014).

76. Tsai et al., *supra* note 22, at 254. *See also* Hoofnagle et al., *supra* note 32, at 3.

77. *See Pan-European Survey of Practices*, *supra* note 18, at 16, 47, reporting and building upon the European Commission's discussion of the *Special Eurobarometer 359/2011*. *See Attitudes on Data Protection and Electronic Identity in the European Union*, *supra* note 71, at 112-15.

78. *See, e.g.*, Hoofnagle et al., *supra* note 32, at 3-4; Danah Boyd & Alice Marwick,

Studies have shown that the reasons for the limitations of informed consent and privacy notices should be ascribed, first of all, to the lack of sufficient information for the users to make a pondered decision about data disclosure, that is, an accurate cost-benefit analysis.[79] This is also called information asymmetry between users (they are unaware or they do not have enough information on what happens with their data) and data controllers (companies or governmental entities that collect and process users' data).[80] This knowledge asymmetry suffered by users about further use of data is particularly sharpened on the Internet, where it is easier to collect data and where "Big Data is poised to reshape the way we live, work and think."[81] The characteristics of Big Data as new technological trend and the entities capable to handle the power of knowledge deriving from it are unknown to most of people, who often do not have (or see) alternatives to consent to their data collection. In the mobile context, then, the lack of meaningful choice to consent to the use of Apps is even more evident when someone talks about the subject's consent as "blind consent."[82]

Regulators tried to cope with this asymmetry, imposing stricter information requirements to data controllers before (or contextually to) the collection of data as transparency mechanisms (like privacy notices).

Social Privacy in Networked Publics: Teens' Attitudes, Practices, and Strategies 1-29 (Sept. 2011) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1925128 (last visited Dec. 18, 2015); Norberto Andrade & Shara Monteleone, *Digital Natives and the Metamorphosis of the European Information Society. The Emerging Behavioral Trends Regarding Privacy and Their Legal Implications*, *in* EUROPEAN DATA PROTECTION: COMING OF AGE 119, 120 (Serge Gutwirth et al. eds., 2013).

79. Acquisti, *supra* note 45.

80. *See* Frederik J. Zuiderveen Borgesius, *Consent to Behavioural Targeting in European Law - What are the Policy Implications of Insights from Behavioural Economics?* 3 (July 27, 2013) (Amsterdam Law School, Research Paper No. 2013-43), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2300969 (last visited Dec. 18, 2015), who stresses that users do not know how their data will be treated and even if they knew, they ignore the consequences of future data use. As he notices, this information asymmetry (and in particular the lack of knowledge about the economic 'value' of own data) would be also the reason why consent within Data Protection regime cannot be considered only under the economic perspective, as a trade-off between 'two parties', an exchange of free service v. personal data. Another reason, however, may be *seen* in the legal significance of data protection as a public interest in a democratic society, from which a different consideration of consent would stem: its nature would be seen as authorization (like an administrative act) rather than as a contractual agreement). *See* Le Metayer & Monteleone, *supra* note 60, at 137.

81. Kennet N. Cukier & Viktor Mayer-Schoenberger, *The Rise of Big Data*, FOREIGN AFFAIRS (May 2013), *available at* http://www.foreignaffairs.com/articles/139104/kenneth-neil-cukier-and-viktor-mayer-schoenberger/the-rise-of-big-data (last visited Dec. 18, 2015).

82. Liu, *supra* note 75.

The assumption is that if users receive appropriate and clear information, they will be able to take a pondered decision about consenting or not to their data processing by, for instance, a website or Social Network: this may include the installation of cookies on one's own device.[83]

However, even if complete and detailed information is provided by data controllers,[84] studies have proved that current privacy notices are not effective: they fail to help data subjects in their decision-making and consequent behaviour as regards to their data disclosure. Traditional privacy policies are "hard to read, read infrequently, and do not support rational decision-making."[85]

Information asymmetries seem difficult to solve, as people are discouraged to read privacy polices (and thus interpret them in their favor): transactional costs (namely the time needed for users to read and interpret them, in case complete information is provided) would make this information asymmetry even more difficult to overcome.[86] In addition, users have to face increasing uncertainty in online environments due to new technological capabilities of tracking systems, with information being gathered in different ways and by new actors: lacking common standards, privacy policies change frequently (though not always clearly) in order to include these upgrades, making the task of keeping abreast with the recent version even more difficult for users.[87]

Some scholars go even further, claiming that even well-informed and rational individuals could not appropriately self-manage their privacy due to several structural problems: a) there would be too many entities collecting and using personal data to make the self-management system (i.e., consent) feasible and b) many privacy harms would be the result of

83. *See* Council Directive 2002/58 2002 O.J. (L 201) (EC) as modified by Council Directive 2009/136, 2009 O.J. (L 337) (EC) (*cookies* Directive). For a recent overview on *functional* and *not functional* cookies, see Joasia Luzak, *Privacy Notice for Dummies? Towards European Guidelines on How to Give "Clear and Comprehensive Information" on the Cookies' Use in Order to Protect the Internet Users' Right to Online Privacy*, 37 J. CONSUMER POL'Y 547, 547-49 (2014).

84. That is assuming companies' fairness in providing true information. Whether companies are not faithful to their privacy policies is, rather, an accountability issue, a matter that goes beyond the scope of this paper. However, it must be noted that further use of data by third parties is often deliberately not covered by a privacy policy, so that companies are exempted from responsibility of third party's processing of data.

85. McDonald & Cranor, *supra* note 19, at 541.

86. Acquisti & Grossklags, *supra* note 22, at 372; McDonald & Cranor, *supra* note 19, at 546; Borgesius, *supra* note 80, at 31.

87. Kirsten Martin, *Transaction Costs, Privacy and Trust: The Laudable Goals and Ultimate Failure of Notice and Choice to Respect Privacy Online*, 18 FIRST MONDAY (Dec. 2, 2013), *available at* http://firstmonday.org/ojs/index.php/fm/article/view/4838/3802 (last visited Dec. 18, 2015).

an aggregation of pieces of data by different entities.[88] Therefore, the current privacy self-management "which takes refuge in consent,"[89] through the notice and choice mechanism, does not seem to provide people with meaningful control over their data.

The 'notice and choice' mechanism is especially popular in the U.S., but similar considerations can be made in the EU as far as informed consent is required to process personal data.

B. *Addressing the drawbacks: alternative mechanisms to traditional privacy policies*

1. *A legal-technical approach*

The privacy paradox emerging from users' attitudes and behaviour online, might be explained in terms of lack of suitable and flexible legal-technical instruments for users to safeguard their privacy, while they seek to enjoy the advantages of innovation and technology.[90]

Attempts to address this lack are not missing, especially in multidisciplinary research environments, where scholars, since at least two decades, have pointed out the need to achieve a more integrated legal-technical approach to privacy.[91] The main idea is that many privacy concerns and legal implementation issues might be addressed through a good technical design that embeds fundamental privacy principles—better known as the privacy by design approach ("PbD").[92] Privacy

88. Solove, *supra* note 31, at 1888-89.

89. *Id.* at 1880.

90. A point that emerges from these surveys is that users (and in particular the youngsters, so called 'Digital Natives') when dispose of adequate mechanisms to avoid privacy risks they make better decisions or they create their own strategies. *See Pan-European Survey of Practices*, *supra* note 18; *see also* Boyd & Marwick, *supra* note 78.

91. *See, e.g.*, Yves Poullet, *Pour une Troisième Génération de Réglementations de Protection de Données*, 3 JUSLETTER (2005); Mireille Hildebrandt, *Legal and Technological Normativity: More (and Less) than Twin Sisters*, 12 TECHNÉ: RES. PHIL. TECH. 169 (2008); ANDREW MURRAY, INFORMATION TECHNOLOGY LAW: THE LAW AND SOCIETY (2d ed. 2010). On the concepts of "Transparency Enhancing Technologies," allowing citizens to possibly anticipate how they will be profiled and the consequence of that see Gordon Hull et al., *Contextual Gaps: Privacy Issues on Facebook*, 13 ETHICS & INFO. TECH. 289 (2011); Shara Monteleone, *Privacy and Data Protection at the Time of Facial Recognition: Towards a New Right to Digital Identity?*, 3 EUR. J. L. TECH. (2012). *See* Hildebrandt, *supra* note 69, at 52-59.

92. *See, e.g.*, Ann Cavukian, *Privacy by Design and the Emerging Personal Data Ecosystem*, PRIVACY BY DESIGN (Oct. 2012), *available at* http://privacybydesign.ca/content/uploads/2012/10/pbd-pde.pdf (last visited Dec. 18, 2015). This approach was formally embraced in 2010 by Privacy Commissioners at their 32nd International Conference, in Jerusalem, where an ad hoc Resolution was adopted. *See Resolution on Privacy by Design*, 32D INT'L CONF. DATA PROTECTION & PRIVACY COMMISSIONERS (Oct. 27-29, 2010), *available at*

enhancing technologies ("PET"), based on specific technical settings that embed privacy principles, proved to play a relevant role in support of privacy and data protection.

The European Commission has been promoting for years legal-technical measures at safeguard of these rights, as essential tools for building confidence online. The Draft GDPR now formalizes the *Data Protection by design* and *by default* principles, introducing specific norms and constraints (Article 23). The close and complex relationship between ICTs and public policy became particularly evident with the development of the Internet and of the Information Society. As stressed in the recent EC Communication on Internet Governance:[93] "Technical details of Internet protocols and other information technology specifications can have significant public policy implications. Their design can impact on human rights such as users' data protection rights and security, [and] their ability to access diverse knowledge and information . . . ." The Commission, although welcomed the efforts of the international technical community to establish approaches to specification setting based on public policy concerns,[94] acknowledged that key decisions are frequently made by technical experts in the absence of efficient mutual interactions between technical and public policy considerations.[95] "This is particularly important when legal rights of individuals, especially their human rights, are clearly impacted."[96]

Special attention should be paid in the design of specific Internet

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http://privacyconference2011.org/htmls/adoptedResolutions/2010_Jerusalem/2010_J5.pdf (last visited Dec. 18, 2015).

93. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region, International Policy and Governance Europe's Role in Shaping the Future of Internet Governance*, at 4, 8-9, COM (2014) 72 final (Dec. 2, 2014) [hereinafter *Shaping the Future of Internet Governance*].

94. *Internet Governance Principles*, NETMUNDIAL (Apr. 23-24, 2014), *available at* http://content.netmundial.br/contribution/internet-governance-principles/176 (last visited Dec. 18, 2015). Positive examples include recent technical guidance for privacy considerations in new protocols. See the guidelines elaborated by the Internet Architecture Board (IAB), Cooper et al., *Privacy Considerations for Internet Protocols*, INTERNET ARCHITECTURE BOARD (July 2013), *available at* http://tools.ietf.org/pdf/rfc6973.pdf (last visited Dec. 18, 2015), which are a development of many sets of privacy principles (like the Fair Information Practices and the privacy by design frameworks that have been developed in different forums over the years). Interestingly, in the recent IAB's guidelines, user participation and interaction is taken into account.

95. These considerations seem to be at the basis also of the European Commission Decision of 28 November 2011. *See* Commission Decision of 28 November 2011 on Setting up the European Multi-stake Platform on ICT Standardisation, 2011 O.J. (C 349) 4, in which a plurality of different actors are called to contribute to the definition of the ICT standardization.

96. *Shaping the Future of Internet Governance*, *supra* note 93, at 9.

architecture, especially with the advent of new digital and smart technologies, given that normativity of technology may be as relevant and effective as the normativity of law (though different) and have an impact on human behaviour and conduct.[97] Moreover, the adoption of ad hoc legal-technical measures to improve the level of transparency online like "Transparency Enhancing Technologies" ("TETs") is also urged.[98] Most users are not even aware that their data are collected or that they are being tracked and profiled while surfing the web[99]: enhanced transparency might help individuals to understand how their personal data are used and what the potential dangers are. Given that information flows are growing dramatically, TETs might be critical.[100] The increase of transparency (on how the data are used) and the availability of easy-to-use privacy-control mechanisms are considered essential aspects in order to ensure a sustainable flow of data that makes privacy to be a virtue for both business and users:

> [While transparency] might initially reduce sharing, it limits the risk of brand damage and helps to attract more informed customers. . . . [P]rivacy controls should be available and easy to use. They will significantly increase data-sharing by individuals, likely offsetting any negative impact on sharing resulting from increased transparency.[101]

Methods of providing information and offering the right to refuse should *be as user-friendly as possible*. This seems to stem from the e-Privacy Directive[102] and also from the draft GDPR (Article 11).[103] Therefore, companies should go beyond the drafting of long and complex privacy policies as the most suitable way to inform users about processing of their own data and it would be also in their own interests to resort to alternatives to traditional notice and choice mechanisms in order to increase trust in online practices. Consequently, rather than only using

97. *See* Hildebrandt, *supra* note 69; *see also* HUMAN LAW AND COMPUTER LAW: COMPARATIVE PERSPECTIVES (Mireille Hildebrandt & Jeanne Gaakeer eds., 2013).

98. Hildebrandt, *supra* note 69.

99. *See generally* Borgesius, *supra* note 79; Hildebrandt & Koops, *supra* note 59.

100. *See* Claude Castelluccia & Arvind Narayanan, *Privacy Considerations of Online Behavioural Tracking*, EUR. UNION AGENCY FOR NETWORK & INFO. SECURITY (Oct. 19, 2012), *available at* https://www.enisa.europa.eu/activities/identity-and-trust/library/deliverables/privacy-considerations-of-online-behavioural-tracking (last visited Dec. 18, 2015).

101. *The Value of Our Digital Identity*, Boston Consulting Group 17 (2012), *available at* http://www.libertyglobal.com/PDF/public-policy/The-Value-of-Our-Digital-Identity.pdf (last visited Dec. 18, 2015).

102. *See* Council Directive 2002/58, 2002 O.J. (L 201) (modified by Council Directive 2009/136/EC).

103. *Proposal for GDPR*, *supra* note 2, at 47.

written privacy policies that the majority of users do not read, companies should engage into alternative ways and instruments—more visual, explicit, simple and user-friendly—to inform Internet users and help them make aware decisions.

Among the remedies identified in literature to cope with the "laudable goals and ultimate failure of notice and choice to respect privacy online,"[104] we can find in particular suggestions aimed to: (1) ameliorate the current notice and choice structure through opportune legislation, industry best practices and privacy enhancing technologies; (2) given the limited users' empowerment due to information asymmetry and transaction costs, focus on privacy reputation and trust, built by companies around respecting privacy expectations;[105] and (3) building on a stream of privacy scholarship that looks at a tort-law model of privacy protection,[106] develop privacy rules by identifying specific *harms* and consequences of data disclosure. The underlying idea is a shift from the notification scheme to managing privacy expectations within a specific *context*: a consequence-based approach to privacy that would be more pragmatic and beneficial also for companies than the current notice and choice, as the privacy norms would be constructed thinking to the harms and not to abstract risks of privacy violations.

Legal-technical proposals to solve the problem of the burdensome requirement of consent also include software personal agents, as an automatic way to achieve the protection of privacy. The underlying idea is that a technological architecture based on "Privacy Agents," which meets a series of legal requirements to ensure the validity of consent delivered through such an agent, could be useful to avoid overwhelming the data subject with repeated requests of consent, while protecting his/her privacy by respecting pre-settled preferences.[107]

Similar measures may be included amid all those technical solutions that embed and implement specific legal rules, also known as techno-regulation.[108] In Ambient Intelligence contexts such as *smart*

104. Martin, *supra* note 87.

105. In particular, according to Martin, firms have multiple tools at their disposal to meet privacy expectations, through three options: increase the obscurity of data exchange so to decrease the probability that information will be leaked; decrease the possible harm that could come from a leakage by using 'do not use' rules, limiting the use of data; increase the benefits of information exchange (possible uses of data) for individuals and society). *Id.*

106. *See, e.g.*, Ryan Calo, *The Boundaries of Privacy Harms*, 86 IND. L.J. 1131 (2011); Helen Nissenbaum, *A Contextual Approach to Privacy Online*, 140 DÆDALUS, J. AMERICAN ACAD. ARTS & SCI. 32 (2011).

107. Le Metayer & Monteleone, *supra* note 60.

108. Bibi van der Berg, *Colouring Inside the Lines: Using Technology to Regulate Children's Behavior Online*, *in* 24 INFORMATION TECHNOLOGY & LAW SERIES: MINDING

environments/cities (so called due to the capability of the sophisticated computer systems used to mine masses of personal and not personal data), TETs would allow citizens to anticipate how they will be profiled and which consequences this may entail.[109] However, the complexity and quantity of information produced by transparency enhancing technologies could overwhelm individuals, if this information were provided in the form of text, requiring their conscious attention:

> TETs will only succeed in empowering citizens if . . . [they do] not inundate a person with detailed technical information that requires her scrutiny in a way that nullifies all the 'advantages' of ubiquitous and seamless computing. . . . [They] will have to communicate the relevant information in a way that allows one to have 'a feel' of the environment's interpretation of one's behaviour, rather than merely adding more text or graphs to the equation.[110]

That is to say that even and primarily in the imminent digitalized and automated world, complementary mechanisms should be promoted in order to ensure that improved information about data processing is provided to the users. Layering of notice may be a step in this direction: data controllers may distribute the required information over different and progressive layers, such as, the short notice, the condensed notice and the complete notice.[111] In general, better ways of presenting information to people, short messages together with educational programs may mitigate inconvenience.[112]

However, providing simplified, standardized privacy information, although of some benefits, has proved to be also insufficient (e.g., cookies alerts): users might end up simply ignoring them and accepting all the requests of consent, by clicking on numerous message boxes.[113]

Nevertheless, it seems that "there is no limit to the ways in which

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MINORS WANDERING THE WEB: REGULATING ONLINE CHILD SAFETY SERIES 67-84 (Simone van der Hof et al. eds., 24th ed. 2014); *see also* Ryan Calo, *Code, Nudge or Notice?*, 99 IOWA L. REV. 773 (2014).

109. Hildebrandt, *supra* note 69, at 53.

110. *Id.* (stressing that this, however, does not mean that a more precise access to the technical details must not be available, for instance to enable a person being subjected to unfair decision making on the basis of automatic profiling, to contest the application of profiles in a court of law).

111. *Opinion of the Data Protection Working Party on "More Harmonised Information Provisions"* (Nov. 25, 2004), *available at* http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2004/wp100_en.pdf (last visited Dec. 20, 2015); Brendan Van Alsenoy, *Privacy-friendly 'model' privacy policies*, SECURITY & PRIVACY IN ONLINE NETWORKS PROJECT [SPION] (June 2013), *available at* https://www.cosic.esat.kuleuven.be/publications/article-2363.pdf (last visited Dec. 20, 2015).

112. Luzak, *supra* note 83, 553-54.

113. Groom & Calo, *supra* note 25, at 8.

transparency and autonomous decision-making can be stimulated. Future research efforts should continue to seek out additional mechanisms to enhance transparency, both on ex ante and post fact basis."[114] Therefore, instead of rejecting tout court the notice and consent mechanisms as not effectively implementing the transparency principle, we should try understanding the underlying reasons, the actual users' attitudes and behaviours and seek out alternative, innovative and integrated ways to enhance them.[115]

2. *An integrated behavioural economic approach*

PbD approach and TETs are supposed to increase user's control over his personal data. However, advanced technical control mechanisms, though necessary, might not be sufficient if relevant cognitive and behavioural "biases" in online users are not taken into account:[116] several hurdles in privacy decision-making, in fact, have been highlighted by behavioural science.[117]

Empirical and social science research demonstrates that "there are severe cognitive problems that undermine privacy self-management. These cognitive problems impair individuals' ability to make informed, rational choices about the costs and benefits of consenting to the collection, use, and disclosure of their personal data."[118] In other words, it is not enough having complete information about costs and benefits of disclosing personal data, as other factors intervene on the user's privacy choice and behaviour.[119] This line of enquiry has significant policy implications: as it has been noticed, "the modern microeconomic theory of privacy suggests that, when consumers are not fully rational or in fact myopic, the market equilibrium will tend *not* to afford privacy protection to individuals, and therefore privacy regulation may be needed to improve consumer and aggregate welfare."[120]

This seems particularly important if we consider how people think and act in the online environment: individuals' cognitive limitations mentioned before as regards information explain the failure of the rational choice model and of the informed consent (in the U.S., the "notice and choice" model) as regulatory techniques.

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114. Van Alsenoy, *supra* note 111, at 9.

115. *See* Ryan Calo, *Against Notice Skepticism in Privacy (an Elsewhere)*, 87 NOTRE DAME L. REV. 1027, 1033 (2012).

116. Acquisti, *supra* note 45, at 6.

117. *Id.*

118. Solove, *supra* note 31, at 1880-81.

119. Acquisti & Grossklags, *supra* note 22, at 9.

120. Acquisti, *supra* note 45, at 6.

Behavioural insights help us understand and interpret these limitations and fallacies. Moreover, as recent research has shown, Behavioural Science, leveraging precisely on these cognitive limitations, can also effectively support policy-making in identifying appropriate mechanisms, e.g., nudging strategies, to help people's decision-making and, eventually, achieving privacy protection in practice.

Building upon the abovementioned interdisciplinary approach in the privacy field (integration of law and technology) a step further is proposed here: to learn the lessons from behavioural science[121] and to think of applying behavioural insights to policy-making in the area of *privacy*, in the wake of behavioural-informed regulation already operational in fields such as reduction of energy consumption, health care, consumer protection, etc.[122]

Cognitive psychology and behavioural economics, which provided meaningful insights on individuals' behaviour in many domains[123]—as discussed in the next part of this article—have recently also explained users' (apparently contradictory) attitudes and practices as regards their privacy protection.[124] Eventually, the privacy paradox receives clearer explanation (and possibly solutions) if looked in light of behavioural science.

What is suggested here is, in other words, to explore not only advanced technical versions of transparency mechanisms, but to identify and test alternative and complementary measures for users' better decision-making as regards data protection; a new approach that, without discarding the notice and choice system per se and taking into account behavioural insights, may provide more suitable, flexible and effective privacy-enhancing mechanisms, such as privacy nudges and "visceral notices," so called because based on certain common psychological reactions of individuals to design, instead of engaging the slower,

121. See, e.g., the research activities conducted by the Danish 'i-Nudge-you' team, INUDGEYOU, *available at* http://www.inudgeyou.com (last visited Dec. 20, 2015). On the increasing interest for behavioral science in policy and government management in USA, see also Courtney Subramanian, *'Nudge' Back in Fashion at White House*, TIME (Aug. 9, 2013), *available at* http://swampland.time.com/2013/08/09/nudge-back-in-fashion-at-white-house/ (last visited Dec. 20, 2015); Professor Kevin Werbach, Beyond Nudges: Gamification as Motivational Architecture, Speech at the 2013 CPDP Conference in Brussels (Jan. 23, 2013).

122. Michael S. Barr, Sendhil Mullainathan & Eldar Shafir, *Behaviorally Informed Regulation*, *in* BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY 440, 444-45 (Eldar Shafir ed., 2012).

123. *See* Cass R. Sunstein, *Nudges.gov: Behavioral Economics and Regulation*, *in* OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 719, 719 (Eyal Zamir & Doron Teichman eds., 2014).

124. *See* Acquisti & Grossklags, *supra* note 22.

reflective way of thinking: they show, rather than tell.[125]

The next part explores this line of research, after briefly considering challenges and opportunities of applying behavioural insights to policy-making in general. These strategies, alternative to traditional privacy notices might also represent a better implementation or at least integration mechanisms of the *Data Protection by Design* approach, as codified in the draft GDPR (Article 23).

IIII. INSIGHTS FROM BEHAVIOURAL ECONOMICS ON INFORMATION PROVISION

In this part, opportunities and challenges of behavioural sciences applied to public policy in general will be discussed, in order to better understand the relevance of behavioural insights in the *privacy* area.

A. *Applying behavioural science to policy: an overview*

Applied behavioural science, often referred to as Behavioural Economics ("BE"), studies human behaviour for better policy-making.

Since the 1970s, BE revealed that people, in their daily life, do not always act "rationally," as suggested by neoclassical assumptions in economics, making choices that lead to the best outcome for them: on the opposite, they often have preferences and take decisions that are not in their interests (suboptimal choices):[126] in other words, people are not perfectly rational in their cost-benefit considerations.

These deviations from rationality in individuals' decision-making are commonly referred to as biases (e.g., mental shortcuts or 'rules of thumb'), such as: *myopia* (people prefer short term gratifications to disadvantages in long terms); *social norms* (people are influenced by what the majority of people say or do, especially if there is a certain affinity with these people—compatriots or neighbours, etc.); *status quo* (people tend to stay with the default options); and *framing* or prime effect (people are influenced on *how* more than *what* information is given to them).

Such findings about human behaviour—very briefly recalled here—started to be taken into consideration by policymakers in the last decades and progressively incorporated in policy interventions focused on structuring the "choice architecture" for people's better decisions; the choice architecture is understood as the background against which decisions are made and that has major consequences for both decisions

125. *See* Groom & Calo, *supra* note 25.

126. *See* DANIEL KAHNEMAN, THINKING, FAST AND SLOW 12 (2011).

and outcomes.[127] Also, BE highlighted that this does not mean that people's behaviour is always irrational, random and unpredictable: on the contrary, it can be predicted, modeled and thus guided.[128]

BE has been regarded in recent years as a promising and exciting new development in public policymaking theory and practice.[129] Consequently, the efforts to bring more accurate understanding of human behaviour and choice to bear on law[130] have made that BE is now considered as the new paradigm for the study of choice behaviour and, on its basis, for the adoption of "behavioural informed regulation"[131] in the most different policy areas. The behaviourally-informed approach to regulatory problems, in fact, is gaining momentum, and its instruments, so called *nudges*, in the form of notices, warnings and default rules,[132] are becoming authentic policy tools.

The informal and cheap nature of these systems makes them more appealing as compared to traditional coercive regulatory mechanisms, like prohibitions, bans, etc. This regulatory approach is also called *libertarian paternalism*, because leveraging insights on individuals' attitudes and behaviours, claims to preserve their freedom of choice: the combination of paternalism and individual freedom would not be an oxymoron. This system is also named *soft paternalism* as opposed to hard paternalism.[133]

A number of public and private institutions have already embraced this approach as its instruments proved to be more effective than common legal instruments in addressing old and new challenges, like the energy consumptions reduction, health care, saving accounts, etc. In the U.S., the Obama Administration intensively counted on behavioural findings

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127. Sunstein, *supra* note 123, at 1.

128. *See* Amitai Etzioni, *Behavioral Economics: Toward a New Paradigm*, 55 AM. BEHAV. SCIENTIST 1099, 1102-03 (2011); Mullainathan & Shafir, *supra* note 122, at 440.

129. *See generally* Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593 (2014), who, however, urge for greater awareness of the tension between the two "seductive" dimensions of Behavioural Law and Economics (its appeal as social science and politics) and consequent limits. Accordingly, policy-makers can in future resort to Behavioural economics for improving the design of law and policy (adopting choice-preserving regulatory tools) in more appropriate and context-dependent ways, *i.e.* pondering advantages and disadvantages of the different regulatory mechanisms (traditional or new) available.

130. *See* BEHAVIORAL LAW AND ECONOMICS 1 (Cass R. Sunstein ed., 2000).

131. *See generally* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).; Mullainathan & Shafir, *supra* note 122, at 428.

132. THALER & SUNSTEIN, *supra* note 131.

133. *See* Oren Bar-Grill, *Consumer Transactions*, *in* THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 465, 478 (Eyal Zamir & Doron Teichman eds., 2014).

for a number of initiatives and in UK an ad hoc 'Behavioural Insights team' within the Cabinet office has been created.[134] At the intersection of "applied behavioural science, public institutions, NGO's and private stakeholders" are initiatives such as *iNudgeYou* - initiated as a Danish Nudging Network and become an international landmark.[135]

European policy-making is also increasingly relying on behavioural insights, both at its design and its implementation phases. Surveys to collect consumers' perceptions and preferences, lab experiments and more accurate behavioural observation methods (i.e., *randomized controlled trials*) are promoted by the EU in different areas of intervention, with the aim to foster better individuals' decision-making.[136] Behavioural insights are, for instance, at the basis of the recent regulation aimed to limit the default options in consumer contracts or to improve consumer protection in booking travel packages.[137] As a new but quite spread trend, varying communitarian goals are being pursued through nudging strategies such as "green behaviors,"[138] as well as improvement in consumer decisions regarding, for instance, retail investments[139] or, more recently, digital purchases.[140]

B. *Applying behavioural science to policy: challenges and*

134. *See Who We Are*, BEHAVIOURAL INSIGHTS TEAM, *available at* http://www.behaviouralinsights.co.uk/about-us/ (last visited Dec. 20, 2015).

135. *See iNudgeyou – The Danish Nudge Unit*, INUDGEYOU, *available at* http://inudgeyou.com/about-us/ (last visited Dec. 20, 2015).

136. *See generally* Rene van Bavel et al., *Applying Behavioural Sciences to EU Policy-Making*, JRC SCIENTIFIC AND POLICY REPORTS EUR 26033 EN 14-19 (2013), *available at* http://ec.europa.eu/dgs/health_consumer/information_sources/docs/30092013_jrc_scientific_policy_report_en.pdf (last visited Dec. 20, 2015).

137. *See* Council Directive 2011/83, art. 22, 2011 O.J. (L 304) 64, 81 (EU); *see also Commission Proposal for a Directive of the European Parliament and of the Council On Package Travel and Assisted Travel Arrangements*, at 4, COM (2013) 512 final (Sept. 7, 2013).

138. *See, e.g.*, *Science for Environmental Policy Future Brief: Green Behaviour*, EUR. COMMISSION (Oct. 2012), *available at* http://ec.europa.eu/environment/integration/research/newsalert/future_briefs.htm (last visited Dec. 20, 2015).

139. *See, e.g.*, *Consumer Decision-Making in Retail Investment Services: A Behavioural Economics Perspective* (Nov. 2010), *available at* http://ec.europa.eu/consumers/archive/strategy/docs/final_report_en.pdf (last visited Dec. 20, 2015).

140. *See, e.g.*, Gabriele Esposito, *Consumer Information in the Digital Online Market – A Behavioral Approach*, CIDOM REP., JRC SCIENTIFIC & TECHNICAL REP. 5, *available at* http://ec.europa.eu/justice/consumer-marketing/files/report_cidom_final.pdf (last visited Dec. 20, 2015).

opportunities

As said before, policy-making is increasingly relying on behavioural studies and nudging strategies for citizens' better decision-making in different areas of intervention.

This happens, however, not without concerns.[141] Applying behavioural science to policy-making requires a thorough consideration of a number of different issues.[142] At least two main categories of problems can be identified as far as the application of the behavioural approach to policy-making is concerned. On the one hand, the legal grounds of its mechanisms that rely on influence and persuasion in order to obtain a behaviour change and creates a new power, potentially subject to abuse. On the other, their (lack of) generalized applicability: a nudge might not have the expected outcome if used in different areas or with different audiences.

The same legitimacy of the nudging system itself within a democratic society might be put in doubt or at least questioned.[143] Most existing criticisms seem to point to the fact that, while a good nudge influences individual choices without changing freedom of choice, sometimes the line between persuasion and manipulation is not easy to see and goes together with the fear of being maneuvered.

Nudges can be stronger or weaker than the law and coercive as well, but the problem is the risk that they might be adopted without the legal safeguards proper of the legislative processes. Moreover the effect of nudges may be very different, depending on context or on the interests of the parties involved.[144]

A substantial regulation of these alternative measures is, therefore, urged, capable to formalize these behavioural-informed mechanisms and

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141. *See, e.g.*, Karen Yeung, *Nudge as Fudge*, 75 MODERN L. REV. 122, 123-24 (2012); *see also* Alberto Alemanno & Alessandro Spina, *Nudging Legally. On the Checks and Balances of Behavioural Regulation*, 12 INT'L J. CONST. L. 429 (2014).

142. Neven Mimica, *Applying Behavioural Insights to Policy-Making: Results, Promises and Limitations* (Sept. 30, 2013), *available at* http://ec.europa.eu/dgs/health_consumer/information_sources/consumer_affairs_events_en.htm (last visited Dec. 20, 2015) (discussing the opportunities and limitations of applying behavioral science to policy making in all areas of interest at a European Commission conference in Brussels).

143. *See* Pelle G. Hansen & Andreas M. Jespersen, *Nudge and the Manipulation of Choice: A Framework for the Responsible Use of the Nudge Approach to Behaviour Change in Public Policy*, 4 EUR. J. RISK REG. 3, 5 (2013); Alemanno & Spina, *supra* note 141, at 445. *See generally* Anne van Aaken, *Judge the Nudge: In Search of the Legal Limits of Paternalistic Nudging in the EU*, *in* NUDGE AND THE LAW: A EUROPEAN PERSPECTIVE 83 (Alberto Alemanno & Anne-Lise Sibony eds., 2015).

144. *See generally* Lauren E. Willis, *When Nudges Fail: Slippery Defaults*, 80 U. CHI. L. REV. 1155 (2013).

to guarantee an oversight system of the new kind of power they bring with.[145] Notwithstanding their informal nature, and given their persuasive quality, the adoption of these mechanisms cannot circumvent basic principles of the State of Law, such as legality and impartiality. An appropriate oversight system on behavioural-informed tools can guarantee a smooth integration of behavioural science into public policy. As some scholars propose:

> [A] general requirement imposed to public administrations to systematically consider formalized behavioral mechanisms at the pre-legislative stage could serve to accommodate in a more principled and consistent way these insights into policy making while at the same time protecting them from possible abuses.[146]

Their enclosure within the framework of essential legal principles like *proportionality* seems necessary. These behavioural-based measures should be pondered according to minimum criteria: their capacity of pursuing a legitimate goal (i.e., individual, societal welfare); their suitability; necessity (other available measures are not effective); proportionality *stricto sensu* (i.e., the mildest measure have been chosen); and foreseeability (at least as regards their purposes and consequences). Invisible, non-transparent nudges should be considered not admissible.[147]

A concrete guideline for policy-makers in order to avoid the adoption of tools of illegitimate manipulation of people's choice, may be the distinction between *transparent and non-transparent* nudges, which might help to distinguish the manipulative use of nudges from other kinds of uses and therefore to adopt a more responsible use of nudging approach to behavioural change.[148] In particular, the choice of policy-makers should fall on nudges aimed at promoting decision-making in ways that are *transparent* to the people influenced, by "making features, actions, preferences, and/or consequences salient, or by providing feedback . . . ."[149] This kind of interpreting and guiding frameworks for the use of 'nudges for good' should be endorsed so that nudges, if chosen and adopted as policy tools, can work at the service of libertarian paternalism.[150]

Another aspect that should be borne in mind, is that alternative, non-traditional methods of changing citizens' behaviour, whether they are

145. *See generally id.* at 1229.
146. Alemanno & Spina, *supra* note 141, at 455.
147. van Aaken, *supra* note 143, at 29-33.
148. Hansen & Jespersen, *supra* note 143, at 23.
149. *Id.* at 24.
150. *See generally* THALER & SUNSTEIN, *supra* note 131, at 5-6.

classified as *code* (like in the techno-regulation), *nudges*, or *notice* (information disclosure), may both facilitate (*help*) or hinder (*friction*) decision-making and a certain conduct.[151]

Some non-traditional public interventions, if focused on obstacles or barriers, may be more coercive than the law; physical barriers or digital ones (*code*) like Digital Right Management Systems ("DRM") to enhance copyrights, but also psychological ones, like some new virtual speed limits made of painted images on the road (*nudges*) introduce an obstacle to a conduct, making it harder or impossible for the individual to act differently. In this case, resisting to a nudge is not without costs, like discomfort, time associated to overcoming the architecture of the choice; the individual autonomy in these cases might be unreasonably jeopardized. In other words, the problem with these alternative measures based on *friction*, would consist in the fact that they may introduce costs and burdens to citizens while, meantime, they may be adopted without the legal safeguards and guarantees proper of the legislative processes, i.e., to be discussed, voted on by elected representatives and in cases, challenged.

However, as Calo stresses, alternative mechanisms for behavioural changes do not necessary and always need to build upon friction, like they do some technical barriers to replace the deterrence function of law (e.g., the doors accessing to a metro station, or the DRMs for copyright protection, or the digital filters installed on a computer for the safety of children).[152] Alternative systems should work by helping, nudging, citizens to arrive to their own goals; instead of studying human behaviour and cognitive biases in order to contrast them, it is better to help them. An example may be represented by placing fruits or other healthy food at eye-level in the cafeteria of a working place.

If policy intervention aims at modifying the choice architecture, altering physical or digital environment, this should be not to impede, prevent certain conducts but to facilitate better decision-making: "the technology should keep its capacity to enhance and not diminish certain essential democratic processes."[153] Accordingly, regulators should explore the possibilities for helping citizens (in using code, nudge or notice mechanisms—or a combination of them) in achieving by themselves their own goals, before introducing forms of alternative but coercive mechanisms (which may lack the safeguards and the process of the law).

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151. Calo, *supra* note 108, at 777.

152. *Id.*

153. *Id.* at 798.

Therefore, when deciding about changes in architecture, regulators' preference should be, where possible, for *facilitation* not for imposing barriers, according to the theory that "we should abandon the safeguards that [support the] law only when it can be said that we are helping citizens do what they would do if they had the right information and tools."[154]

As Calo stresses, combining certain elements of different strategies provides more possibilities for facilitation.[155] A traditional *notice* does not work, but elements of *code* and *nudge* may improve notices so to become more effective, especially when notices are provided at the point of decision-making and this is particularly relevant in the field of privacy and data protection, as discussed below.

An example of successful notice mechanism relying on "nudging" is offered by initiatives seeking to curb obesity, which instead of focusing on traditional notice mechanisms like caloric information labels to ameliorate people's eating/drinking habits, show the physical activity equivalent needed to burn a certain amount of calories, e.g., running, biking, etc.,[156] or seek to directly encourage people to do more exercise.[157]

This facilitation role is not an easy task either; it is difficult to understand when and how to facilitate decision-making (and to renounce it because it does not work). Decision-making can depend entirely on the framing or on the context, but in doubt of what influences our preferences, we should adopt, as a guiding principle, *facilitation* rather than *friction*.[158] At the end of the day, it is not important how we label a public intervention in the choice-architecture as *code*, *notice or nudge*, but regulators should look at the interventions that help. This can mitigate also the concerns mentioned before about the legitimacy of nudging strategies.

C. *Applying behavioural science to policy: from information overload to smart disclosure in Consumer Protection and in Data Protection*

As demonstrated in other sectors (marketing or organization science), the excess of information may have a negative effect on users' choice quality.[159]

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154. *Id.* at 800.

155. *Id.*

156. Sara N. Bleich et al., *Reduction in Purchases of Sugar-Sweetened Beverages Among Low-Income Black Adolescents After Exposure to Caloric Information*, 102 AM. J. PUB. HEALTH 329 (2012).

157. Amitai Etzioni, *On Curbing Obesity*, 51 SOC'Y 115 (2014).

158. *See* Calo, *supra* note 108.

159. *See generally* Byung-Kwan Lee & Wei-Na Lee, *The Effect of Information*

Insights from behavioural studies have shown, in fact, that even when presented with full information, consumers may not always be able to understand or use information in their interest, i.e., to make the best choice. This can be due to not necessarily the lack of information, but to the fact that most of the information is not good; moreover, too much information (although correct and accurate) may be useless and even harmful. There is a moment in the information acquisition (like for the information that we receive when we decide to buy a product or service) in which the cost that a consumer has to spend to process the information is higher than the benefit of ignoring it: this is also called "information overload."[160]

Studies on information overload and its effects on consumer decision-making suggest that what matters is not (necessarily) to provide the consumer with *more* information but to provide her with the *good* one.[161]

This is particularly relevant in the digital environment, on the Internet, where users are constantly exposed to tons of information difficult or impossible to absorb, to interpret and to use. The problem with the traditional information notices (including privacy notices) is that they constitute in many cases an example of "information overload." Burdening the individual with information (whether it is on products and services or on how personal data is processed or protected), is not the solution.

As said before, one of the main lessons that policy-makers receive from behavioural scientists is to work on the *choice architecture*, the social background against which consumer decisions are made.[162] In this way policy-makers are called to become a sort of choice architects, able to make the appropriate, small changes in the underlying environment that may have a large impact on people's behaviour. "Such changes may involve disclosure, warnings, default rules, increased salience, and use of social norms."[163]

Overload on Consumer Choice Quality in an On-Line Environment, 21 PSYCHOL. & MARKETING 159 (2004).

160. *Id.* at 177-78.

161. See the example of the regulatory measure adopted in US to counter the level of obesity and imposing requirements to indicate the calories information on restaurant menus, which did not get the expected results as people ignored them. Brian Elbel et al., *Calorie Labeling, Fast Food Purchasing and Restaurant Visits*, 21 OBESITY 2172 (2013).

162. THALER & SUNSTEIN, *supra* note 131.

163. Cass R. Sunstein, *Behavioral Economics, Consumption, and Environmental Protection* 1 (Harvard Kennedy Sch. Regulatory Policy Program, Working Paper No. RPP-2013-19, 2013).

The most important modification that should be made is *salience*:[164] salience of certain product's features or of a situation (like prices, sizes, incentives), and, above all, of the information to be provided to people about these features. Salience can work, in fact, as a *nudge*.[165] Therefore, the information that people receive should be *salient*, upon *salient* features and provided in a moment and a situation *salient* for these people, enabling a process of "smart disclosure," i.e., of a more effective information provision by those who are responsible for - that the public policy is called to encourage.

Behavioural studies have invalidated a typical assumption underlying many of the current public policies in consumer protection, i.e., that individuals would make a cognitive effort to weigh costs and benefits before taking a decision like buying or not buying a product. In this way, they not only have shown that biases are also typical of policy-makers (as made of human beings), but building upon Kahneman's insights about human cognitive processes,[166] have also highlighted that people predominantly use the *fast thinking* system, that is, more intuitive, more instinctive and rapid way of making decisions.[167]

This suggests that traditional information policies are disregarding important components of human cognitive process that reflect into consumers' behaviour and that this might be the reason of their failure to realize societal and individual best interests. This raised the question whether a different, innovative policy intervention might be necessary to help consumers adopt decisions in their best interests.[168]

An important finding of BE (which has also shown to be useful in order to attain a better public policy by conducting ad hoc experiments) is that the more our activities are routinized, repeated on a daily basis, the more we employ the *fast thinking* system. This is particularly interesting for the decisions we take every day with regards to digital activities (electronic communications, e-transactions, access to a service or product); our activities on the Internet (and on the mobile digital applications) are often made of repetitive and systematic gestures: clicking a button while visiting websites, downloading applications or

164. *Id.* at 6, 9, 15-16.

165. Sunstein, *supra* note 123, at 721.

166. Kahneman, in particular, makes the distinction between *thinking fast* and *thinking slow*, and, as a consequence, between automatic behaviours and reflective choices. *See* KAHNEMAN, *supra* note 126.

167. *Id.*

168. Org. for Econ. Co-operation and Dev. [OECD], *Enhancing Competition in Telecommunications: Protecting and Empowering Consumers*, at 39, OECD Doc. DSTI/ICCP/CISP(2007)1/FINAL (May 24, 2008).

documents, sharing thoughts or pictures, etc. This is particularly true with regard to terms and conditions of an online contract, that, in most of the cases, we accept without reading them, as well as with regard to *privacy policies*.

In light of recent specialized studies on users' privacy attitudes and preferences, in fact, what was just observed for consumer information seems to be valid for information privacy and related users' behaviour.[169] Consumer Protection (strictu sensu) and Data Protection are two interconnected (though distinct) areas.[170] First, because the two fields correspond to two very close EU law domains; the status of data subject and of online consumer are often aligned or overlapping, with the data subject being very often *also, in the meantime*, a consumer; secondly, because the information provision obligation (bearing on data controller or on service provider, who may coincide) and its effects on the corresponding individual's decision-making has equivalent relevance (in one case, regarding his consumer behaviour in buying a product/service, in the other one his citizens' behaviour in disclosing (or not) personal data).

Given the extraordinary growth of Internet services and online transactions, Data Protection is becoming increasingly important for consumer.[171] The attention for it, therefore, is increasing, as it may represent one of the instruments to realize the *consumer protection*.[172] In other words, data protection is also (and in addition to its independent status of a fundamental right) a way to attain consumer protection, especially online; thus, similarities in the assessment of legal and non-legal tools employed to strengthen individuals protection in the two fields, namely information notices and *nudges*, may be drawn.

Recently, policy-makers started to work on minimizing detriment to the consumer's interest resulting not only from a lack of information or misleading information regarding services and products, but also from

169. *See* Acquisti & Grossklags, *supra* note 22.

170. *See* IRIS BENOHR, EU CONSUMER LAW AND HUMAN RIGHTS 166 (2013).

171. *Id.* at 59.

172. The consumer protection has a principle status in the Charter of Fundamental Right of the EU (Article 38), in the sense that it is intended as a legal principle rather than to have the status of a subjective right. However, as other legal principles, this provision in the Charter could evolve in the future and become a right (maybe with the development of the case law). In particular it may become more concrete if it applied in combination with other rights of the Charter. *Id.* (demonstrating that it is already happening). Article 38 could be applied in combination with other rights of the Charter or constitutional provisions, for instance with Article 8 on the right to data protection "in fact in some national cases a cumulative application of basic provisions has resulted in successful claims for individuals." *Id.* at 64.

the "bounded rationality" of consumer decision-making.[173] If the individual, recipient of the disclosure, is overwhelmed by information without the possibility to discern what information is important, then disclosure will have little positive effect. Behavioural studies have demonstrated that alternative ways that try to *induce* people to behave in their best interests may work better than traditional notice and choice or "command and control" measures.[174] Regulators can learn how to enhance information disclosure's effectiveness: "Disclosure has many limitations, but there is also great opportunity for enhancing its beneficial effects."[175]

Consumer protection passes also by competition enhancing policies[176] that focus their attention on *demand* side analysis (i.e., based on insights from consumers' behaviour analysis). Policymakers and regulators started to consider the needs and motivations underlying consumer behaviour in communication markets, while in the meantime, raising awareness about possible risks for consumers as well as opportunities of protection. A main instrument to improve consumer protection (and satisfaction) online has been identified in the quality of information provision. New requirements have been introduced compelling, for instance, all major service operators to provide complete, comparable and accurate information to consumers to reduce the "information asymmetry" between operator and consumer and to enable the latter to take the most suitable choices among products and services offered online and therefore, among providers.[177]

Likewise, we assisted to a proliferation of information obligations and accountability rules in the Data Protection law, also in view of ensuring a fair development of the digital single market, increasingly an

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173. *Id.* at 81-82.

174. *See Applying Behavioural Insights to Reduce Fraud*, U.K. CABINET OFF. BEHAVIOURAL INSIGHTS TEAM (2012), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60539/BIT_FraudErrorDebt_accessible.pdf (last visited Dec. 20, 2015).

175. Sunita Sah, Daylian M. Cain & George Loewenstein, *Confessing One's Sins But Still Committing Them: Transparency and the Failure of Disclosure*, *in* BEHAVIOURAL PUBLIC POLICY 148, 158 (Adam Oliver ed., 2013).

176. OECD, *supra* note 168, at 5.

177. The idea is that further developments in competition policy should serve the consumer interest. *See id.* at 6. The purpose of pro-competition policy is to enhance consumer welfare; in other words, consumer protection and empowerment should be based on pro-competition policy and mechanisms that have the consumer interest as priority. *Id.* at 4 ("[W]here consumers have little information or poor quality information . . . they may end up misled and confused by the choices on offer, may pay too much or buy the wrong service. This may, in turn, inhibit and dampen the competitive process. . . . [Consumers] need to be able to move quickly and with the minimum constraint between service providers.").

information-rich market. Providing innovative and more effective information mechanisms for privacy may also prove to be an innovative and effective competition-enhancing tool, which may benefit individuals as well as businesses and the market in general.

Insights from BE, in fact, recently proved to be helpful also to explain the privacy paradox (i.e., even in the presence of privacy notices and warnings,[178] users tend to disclose a large amount of data) and to find more effective privacy-enhancing mechanisms.

A multitude of systematic deviations from rational decision-making that seems to have an impact on users' *privacy decisions-making*, besides "incomplete information" and a "bounded cognitive ability" to process the available information (information asymmetry and transactional costs), has been identified.[179] These deviations can be explained through the same cognitive biases that BE has revealed in other areas: individuals cannot see the risks deriving in the future from their data disclosure (or from the use of a service that implies automatic data collection) and go for immediate gratification of, for instance, free service (*myopia*); users tend to stick with default options, this highlights the relevance of default privacy settings for the privacy online; few users change them in practice (*status quo*); users' privacy behaviour seems to be more influenced by an image or an alert than by a long, though comprehensive, text (*framing* effect).

Several behavioural biases, therefore, come into play and are critical for the effectiveness of privacy policies. Like the legal information notices on products and services relevant in consumer transactions, privacy policies "are important transparency mechanisms, but are not likely to be decisive in determining user behavior. . . . [They] are [not] salient to consumers . . . ."[180] Although these reflections on privacy policies are related to consumer's behaviour in the context of online transactions, they are seemingly applicable to users' privacy behaviour in

178. A clarification is needed. The concepts of information notices and warning messages may be (legally and technically) distinct and may have different purposes that should be taken into account when testing and assessing users' willingness to disclose data: basically, the first have the purpose to inform about what/how data are collected and protected, about users' rights, about the identity of the data controller, etc., while the warning messages work as caveats, admonitions about possible risks of data disclosure: privacy policies may contain both type of information, but, generally, current polices are made predominantly of the first type.

179. Acquisti & Grossklags, *supra* note 22, at 364.

180. *See* Irion & Luchetta, *supra* note 30, at 36-37, where it is argued that only if privacy choices are embedded in a given transaction and effectuated by rules surrounding the sign-up are consumers likely to align with their privacy preferences: "Hence, opt-in and opt-out rules as well as default settings have strong impacts on the level of data disclosure."

general, when facing information provisions.

There is a need for making the access to privacy policies easier, simpler, agile and therefore more effective, so that users may be able to make more informed decisions regarding the (direct or indirect) disclosure of their personal information online.[181]

IV. TOWARDS REGULATED PRIVACY NUDGES?

Knowing how users really behave with regard to their personal data (often in contrast with their statements) may play a relevant role in addressing the gap between existing legal privacy safeguards and implementing tools. Therefore, like for other areas of policy intervention, a better understanding of data subjects' behaviour should be of interest for policymakers as it can assist them to design better privacy policies and, ultimately, to fill in this gap; behavioural insights can be applied so to identify and adopt innovative privacy-protecting measures.

The solution to the privacy paradox, in fact, does not seem to be the introduction of new principles and rules. Behavioural economics propose the introduction of (tested) tools like "privacy nudges" to be applied in contexts of behavioural advertising, location sharing and social networks.[182] More suitable, effective privacy tools, capable to keep pace with modern times, but especially to support users in their decision-making, i.e., "supporting-choice mechanisms,"[183] should be introduced.

As said in the previous part, behavioural science applied to policy-making is not new to European institutions, as a number of experimental studies in support of policy initiatives are being run by the European Commission. Still, the consideration of behavioural insights in the specific area of *privacy* is very limited in Europe, both at academic and institutional levels and restricted to the analysis of behavioural patterns in online users as regards their data disclosure habits.

Few experimental studies have been commenced in the EU, as discussed below. However, there hasn't been so far, to my knowledge, any completed experimental study in Europe testing the nudging effects on users' behaviour, as a way to foster a privacy-protective behaviour, nor the application of behavioural science to policy-making in the area of *privacy*. Also in Europe, we should support the idea that, instead of discarding the option of notice and choice (i.e., informed consent),

181. *See generally* Acquisiti & Grossklags, *supra* note 22.

182. Alessandro Acquisti, *From the Economics to the Behavioral Economics of Privacy: A Note*, *in* ETHICS AND POLICY OF BIOMETRICS 23, 23-26 (Ajay Kumar & David Zhang eds., 2010).

183. van Aaken, *supra* note 143, § III, § C.

because it is not effective, it is worthy to try improving it with *nudging mechanisms*, which help citizens to make their decisions on data protection/disclosure, i.e., using appropriate behaviour insights to create more effective *privacy notices*.

Privacy nudges, as complementary regulatory tools would seek at encouraging, at *nudging* a privacy-protective behaviour, while preserving the freedom of choice of the users, achieving the *soft* or libertarian paternalism: as said before, it is not an *oxymoron*, if well interpreted and implemented.[184] There seems to be enough space for its application also in the *privacy* area.

Nudging privacy seems to be possible and desirable, once the conditions for its application (similar to those applicable to other areas) are satisfied, i.e.: (1) the privacy nudges are subject to an oversight mechanism and proportionality test; (2) given that these mechanisms may have a double side quality (i.e., preserving and compromising freedom at the same time), avoid that users are heavily charged with the responsibility of DP; (3) the privacy nudges have been proven to work—i.e., to have a positive impact on a target, being it privacy-preserving behaviour or increased awareness; and (4) ensure control mechanisms of companies compliance with DP obligations, the latter point may entail strengthening the powers of national DP authorities. Further research may investigate the best and efficient way to identify and implement these control mechanisms.

Soft paternalism and nudging strategies, under these conditions, can be the way forward for privacy protection online.

A. *Visceral notices*

Against this background, and without dismissing a rights-based approach, perhaps it is time also in Europe to build upon that strand of international lawyers and behavioural scientists who have proposed a new dimension of privacy notices as innovative strategies that impact privacy-related attitudes, like the so-called "visceral notices."[185] The main underlying idea is that information notices should have less text and more interaction.

Unlike traditional notice that relies upon text or symbols to convey information, "emerging strategies of 'visceral' notice leverage a consumer's very experience of a product or service to warn or inform."[186] Moreover, they prove to be useful tools to better inform users about data

184. Sunstein, *supra* note 163, at 313-27.
185. *See* Groom & Calo, *supra* note 25, at 3.
186. Calo, *supra* note 115, at 1027.

collection practices (i.e., hidden collection).

Some visceral notices are particularly interesting because based on "certain common psychological reactions to design to change a consumer's mental model of a product or service; and 'showing' consumers instead of 'telling' them, i.e., demonstrating the result of company practices for the specific consumer, rather than describing the practices themselves."[187]

Previous experiments[188] not only demonstrated the weakness of traditional explicit notices, but also that *visceral* notices are more successful at eliciting privacy-protective behaviour, by pulling users' automatic responses.[189] Visceral notices, such as an interactive character that speaks or moves her eyes while user types or moves the mouse, or the display of the user's location or browsing history, seem to affect privacy-related attitudes and behaviours.

Not every nudge has the same effect and is interchangeable, though. A relevant finding of these studies is that a visceral notice represented by an informal interface ("informal condition") to be employed, for instance, in children's websites, prove to reduce privacy concerns, *but also* to increase data disclosure by users, making the informal design problematic for data protection and privacy policy.

User data disclosure is a complex behaviour.[190] People disclose their information also indirectly, that is, when they are not asked (directly) to reveal their data, when they are not alerted to the sensitivity of the information itself and therefore not urged to "regulate" the disclosure of information. In the indirect disclosure (very frequent in Web browsing), the traditional notice mechanism clearly fails its goal:

> The drive to regulate does not minimize passive [i.e., indirect] disclosure. Passive disclosure is more successfully minimized with visceral notice strategies, such as interactive agents, because they directly affect the desire to disclose and do not rely on the more thoughtful process of determining if privacy is threatened.[191]

The use of a visceral notice such as an interactive agent (e.g., an anthropomorphic silhouette), minimizes user's data disclosure, without relying on service provider's privacy policy. In other words, it appears that this kind of visceral notice has better impact on the user's "fast thinking."

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187. *Id.* at 1033-34.
188. *Id.* at 1054.
189. *See* Groom & Calo, *supra* note 25, at 27.
190. *Id.*
191. *Id.* at 28.

Most important, this sort of *nudge* seems to succeed in eliciting privacy-protective behaviour, reducing data disclosure without creating privacy concerns (what traditional transparency tools usually do).

1. *The BREVE experimental project: Behavioural Responses to Privacy Visceral Notices*

Building upon previous research on "visceral notices"[192] and on "privacy nudges,"[193] the project *Behavioural Responses to Privacy Visceral Notices* ("BREVE") has been undertaken by one of the research institutes of the European Commission between 2013 and 2014.[194]

This study examines, via an online experiment and a survey, how users' online behaviour changes when they are exposed to visceral notices[195] and real-time alerts about the data collection practices associated with their online activities.[196] The underlying idea is to assert to what extent the use of well-designed, intuitive notices effectively change users' behaviour as regard personal data disclosure.[197] The goal

192. *Id.*

193. Yang Wang et al., *Privacy Nudges for Social Media: An Exploratory Facebook Study*, PROC. OF THE 22 INT'L CONF. WWW COMPANION (2013). *See generally* Leslie K. John et al., The Best of Strangers: Context Dependent Willingness to Divulge Personal Information (July 6, 2009), *available at* http://ssrn.com/abstract=1430482 (last visited Dec. 20, 2015); Lior J. Strahilevitz, *Privacy and Technology: Toward a Positive Theory of Privacy Law*, 126 HARV. L. REV. 2010 (2013); Alessandro Acquisti, *Nudging Privacy: The Behavioral Economics of Personal Information*, 7 IEEE SECURITY & PRIVACY 82, 82, 84 (2009); Alessandro Acquisti et al., *The Impact of Relative Standards on the Propensity to Disclose*, 49 J. MARKETING RES. 160 (2012).

194. *Behavioral Economics*, JOINT RES. CENTRE, *available at* http://is.jrc.ec.europa.eu/pages/BE/BEindex.html (last visited Dec. 20, 2015) (for more information about the BREVE project).

195. Groom & Calo, *supra* note 25, at 27.

196. In particular, a series of online experiments on EU users, in which 8 conditions, represented by different privacy notices, is run: beside the traditional (standard and simplified text notices), five types of more innovative notices are displayed to different groups of online participants, who were asked to assess a new (mock-up) search engine, in particular: an anthropomorphic agent (static and interactive); the IP and the search history (displayed on a side of the screen); an informal interface (colourful and youngish appearance). Wang, *supra* note 193.

197. The online experiment involves, in the first phase, the construction of a mock-up search engine that the participants are invited to evaluate through a survey; in the second part, participants are asked to choose among some trivial questions and search for their answers through the search engine: in this phase, the choice of the questions is what matters most. Since these questions vary in terms of the nature and amount of personal information they lead participants to reveal, the choice of questions by participants represents a measure of their level of indirect disclosure of personal information. In fact, one of the three questions in each set (randomly) is a personal data-disclosure question (such as: "What is the street address of a post office in the town where you live?"). The differences among treatments is given by the presentation of different privacy notices (including visceral notices), that are

is to check if any of the treatments affects participants' privacy concerns, if it leads to a significant different personal data disclosure (both direct or indirect data disclosure) and what policy considerations can be drawn.[198]

B. *Integrating behavioural insights into privacy policy making?*

Once the issues on legitimacy of innovative privacy notices (namely visceral notices or privacy nudges) are addressed and after having tested their effectiveness in changing users' behaviours via ad hoc, reliable experiments, the attention should then turn to consider when and how to integrate these mechanisms into policy-making (and into real life).

Behavioural science can be applied to public policies whenever there is a behavioural element to them. It can help design new policies, suggest improvements to existing ones, or provide ex-post explanations of why the target group of a specific policy reacted in a particular way.[199]

When considering at what stages of policy-making behavioural insights and its strategies should be introduced,[200] behavioural aspects should be incorporated (at least) in the following phases of *privacy* policy-making:

First of all, at the first stage of the policy design, where policy-makers seek to understand users' behaviour surveys on online users' practices as regards their personal data (e.g., biases explaining privacy paradox) have been run in several countries as mentioned before and also in the EU; an example is given in the Special Eurobarometer 359/11 and related report published by the Eurpoean Commission ("EC") in 2011.[201] Other specific studies are not missing in Europe, like the one on privacy-friendly default settings, carried out within the SPION project.[202]

However, in order to test the responses of users to innovative privacy strategies, field trails, from which policy recommendations may be drawn, are needed—like those started to be run in the U.S. on privacy

expected to (differently) impact users' disclosive behaviour. *Id.*

198. At the time of writing, the BREVE experiment is underway: results of which are expected to be published soon.

199. *See* Rene van Bavel et al., *supra* note 136.

200. *Id.*; *see also* Alemanno & Spina, *supra* note 141.

201. *See Pan-European Survey of Practices*, *supra* note 18, at 6.

202. *See generally* Alessandro Acquisti & Fred Stutzman, *Behavioral Aspects of Privacy in Online Social Networks*, SPION (Dec. 21, 2012), *available at* http://www.spion.me/workpackage/behavioral-aspects-of-privacy-in-online-social-networks (last visited Dec. 20, 2015).

nudges[203] and visceral notices.[204] These responses are still not enough explored in Europe and studies like BREVE (where a series of different privacy notices are tested on EU users) are exceptional.[205]

Still at the policy design stage, behavioural insights may be employed in the context of the Impact Assessment ("IA"), as one of the pillars of the EC better regulation strategy in different areas of policy intervention.[206] The IA document accompanying the EC Proposal for a GDPR makes some reference to behavioural research; however, more could be done at this level.

As Alemanno & Spina notice, "behavioural considerations may allow policy makers to not only consider a broader set of regulatory options and test their effectiveness through Randomized Controlled Trials ("RCTs"), but also to empower citizens to have a say thus increasing the accountability of the regulatory outcome."[207] These considerations should include testing the policy options (via in field experiments).

Secondly, at the formal stage of law-making process, transferring behavioural considerations into primary or secondary law. At this step, several issues should be considered in future research, such as: should the law impose stricter requirements for online privacy policies, to be 'visceral' and effective[208] (e.g., requirements related to the website architectural design or also on the pursued behavioural change effect)?; How detailed should the privacy law be in this regard?; Would the introduction of specific legal requirements for effective privacy policies, like visceral notices, be feasible and affordable for industry and consumers?; and Would the visceral privacy notices be better introduced with soft law instruments (e.g., recommendations), in which evidence-based models of privacy measures might be strongly urged to industry?

Third, at the implementation level:

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203. *See* Acquisti, *supra* note 182, at 24-25.

204. *See* Groom & Calo, *supra* note 25, at 15.

205. Needless to say that experiments of this kind on users' behaviour should be conducted in compliance with legal and ethical principles, starting from informing the participants about the purposes of the tests (at least about the general goals and before using their data). Principles seem to not have been followed by some social networks in their recent practices. For example, for a week, Facebook members were unwitting participants of an experiment in direct emotional manipulation. Alex Wilhelm, *Facebook and the Ethics of User Manipulation*, TECHCRUNCH (June 29, 2014), *available at* http://techcrunch.com/2014/06/29/facebook-and-the-ethics-of-user-manipulation/ (last visited Dec. 20, 2015).

206. *Impact Assessment Guidelines*, at 4, SEC (2009) 92 final (Jan. 15, 2009).

207. Alemanno & Spina, *supra* note 141, at 456.

208. *See* Calo, *supra* note 115, at 1071-72.

It would be possible to introduce more innovative privacy notices through implementing acts of supranational or national legislation, like implementing acts of the European Commission or European guidelines. Some good examples already exist but are limited to better information provisions.[209]

Another possible integration of behavioural insights at this level might be within the specific *Data Protection Impact Assessment* that any controller will be required to run according to the Draft GDPR, when "processing operations present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes" (Article 33).[210] The use of behavioural insights might be very useful, as it would allow to better assess the impact of risky technologies on users' privacy and their perceptions, as well as the effectiveness of privacy-protecting measures to be adopted by the data controller.

However, this would not be painless. Several issues are at stake. Should behavioural considerations be *imposed* by law at this stage? Furthermore, should, for instance, an ISP conduct his own evaluation about how the application of privacy nudges on his website may reduce risks for privacy, impacting on users' behaviour and should he decide which nudge is more appropriate? Economic considerations may bring him to choose the less appropriate nudge; although a very informal, youngish interface may be of negative effect on users' protective behaviour, it might increase trust in his website and, consequently, increase personal data disclosure (necessary for its business model).[211]

A DP assessment, if any, might be made at a higher level, e.g., by the EDPS, the European DP Supervisor, or by the national Data Protection Authorities and for categories of data controllers (e.g., ISPs). In this case, visceral notices or other kinds of privacy nudges may represent valuable options that add to a wider framework of requirements aimed at obtaining a sort of data protection certification, like privacy seals,[212] which are encouraged by the Draft GDPR (Article 39).

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209. *See* Luzak, *supra* note 83, at 549. See also Exec. Order No. 13563, 3 C.F.R. 13563 (2011), which promotes increased public participation throughout all stages of the rulemaking process and encourages public agencies to consider regulatory approaches such as default rules, disclosure, and simplification that nudge citizens toward better choices while allowing them to retain flexibility and liberty of choice.

210. Artemi R. Lombarte, *The Madrid Resolution and Prospects for Transnational PIAs*, *in* PRIVACY IMPACT ASSESSMENT 385, 395 (David Wright & Paul De Hert eds., 2012).

211. For a critical perspective on privacy nudges see Willis, *supra* note 144, at 1170-72. "Nudges may not be an effective way to help people make better choices about information privacy; accordingly, firms can use the same mechanisms and conditions that make nudges work to make nudges fail." *Id.*

212. *Final Report of the European Union Privacy Seals Project on the Inventory and*

Finally, behavioural insights could be introduced to evaluate ex post the goodness of a law (or piece of law) to improve people's privacy life: learn from the experience (how people reacted to a specific public intervention in the privacy field) and take the consequent policy decisions.

Having said that, a word of caution is required. While it would be naïve to ignore the effect of biases when setting a privacy policy that relies on the decisions of people, we should, however, not totally rely on the effects of biases. First, privacy choices are context-dependent. Therefore, EU future strategies should consider and possibly guide the choice of what privacy nudge is better for a specific context (e.g., informal, youngish context).

Secondly, as recent behavioural research in the law domain also teach us, implementing nudging mechanisms might not be enough to protect online privacy, especially in contexts such as behavioural targeting by companies: we cannot easily rely on user's behaviour change when personal data disclosure is the only way to obtaining a service: in cases such as news programing or webpages targeting kids,[213] prohibitions and a duly control system of certain companies practices are needed.[214] Recent studies have shown that many companies might not obey what they promise in their privacy policies or that they do not respect the users' preference, for instance, not to receive unsolicited commercial emails. [215] Therefore, there will be always some aspects that needs coercive regulatory tools.

In other words, privacy visceral notices might not be considered as a panacea to protect privacy, but complementary tools. Sometimes, coercive measures are still necessary: (1) when personal data is necessary to obtain a public service; (2) in general, technical processes and mechanisms specific of big data[216] make users unaware of what decisions

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Analysis of Certification Schemes, at 12 (2013), *available at* http://www.vub.ac.be/LSTS/pub/Dehert/481.pdf (last visited Dec. 20, 2015).

213. *See* Simone van der Hof, *No Child's Play: Online Data Protection for Our Children*, *in* MINDING MINORS WANDERING THE WEB: REGULATING ONLINE CHILD SAFETY 127, 130 (Simone van der Hof et al. eds., 2014).

214. Borgesius, *supra* note 80, at 5, 46.

215. Some tests with unsolicited commercial emails ("UCE") show that only one out of three websites respect the will of the data subject not to receive commercial communications. *See* Maurizio Borghi et al., *Online Data Processing Consent Under EU Law: A Theoretical Framework and Empirical Evidence From The UK*, 21 INT'L J.L. & INFO. TECH. 109, 152 (2013) (reporting that their study, conducted on popular UK-based websites, "unveils that the way in which websites obtain consent (opt-in, pre-selected opt-in, or opt-out) is not a proxy of lawful processing of data at a later stage").

216. Cukier & Mayer-Schoenberger, *supra* note 81, at 6.

will be taken on the basis of their data; and (3) online companies might not be compliant with their policies. Even if they advertise their website as privacy-protective, thus increasing users' trust, their promises to respect users' privacy preferences might be infringed, without users being able to realize it. Privacy seals might prove to be an instrument for competition among companies that, however, centers on privacy image rather than privacy reality.[217] Moreover, online companies may use the same mechanisms that make nudges work to make nudges fail, like reframing the nudges: "a push [back] can easily overwhelm a nudge."[218]

Therefore, in order to make sure that tested privacy nudges work as expected also in real life, public policy should learn the lessons of behavioural science, being capable to guide and check not only the creation (design) but also the use of these nudges; it may be necessary to impose requirements and conditions, not only on the appearance of a privacy nudge, but on the effects it pursues. Also, for privacy seals to work and given the difficulty for users to distinguish websites on privacy grounds, it would be necessary to increase the driving and supervisory powers of data protection authorities, which can verify the *truthfulness* of privacy seals (or other certification model) and strengthen their effect.

1. *Future research*

Online companies may be non-compliant with data protection law for different reasons, including the lack of appropriate standard of information on what the law requires, as well as a lack adequate supervision mechanisms.[219] On this regard, future research may explore possibilities for nudging systems to target the companies themselves, i.e., to drive them to be compliant with data protection law.

For future research, cyber-security risks (besides and in addition to those for privacy and data protection) should also be considered. Accidental or intentional personal data breaches (e.g., as consequence of, but not limited to, hacking activity), as well as identity thefts (perpetrated, for instance to commit financial crimes) are still far from being defeated. However, the security in cyberspace may be benefited and improved

217. Lauren E. Willis, *Why Not Privacy by Default?*, 29 BERKELEY TECH. L.J. 64, 128 (2014).

218. *Id.* at 131.

219. Borghi et al., *supra* note 215, at 110, 153 (claiming that there is a severe lack of compliance of UK online service providers with essential requirements of data protection law and suggest that this might due to the existence of "an inappropriate standard of implementation, information and supervision by the UK authorities, rather than of a conscious infringing behavior." As they notice, "unclear or unexplained law is detrimental to the development of a safe online environment and, ultimately, to citizens").

precisely through nudging systems,[220] including the use of privacy and security nudges. These might take the form of visceral notices, as described in this text, or of other kinds of nudging mechanisms.[221] Further research should also investigate *the long-term* impact of visceral notices and privacy nudges in general and observe users' privacy behaviours over time.[222]

V. CONCLUSIVE REMARKS

The behaviourally-informed approach to regulatory problems, in fact, is gaining momentum, and its instruments, so called *nudges*, are becoming authentic policy tools. To what extent behavioural insights can be applied to policy-making in the field of *privacy* and how? Building upon few existing experiments on users' attitudes and behaviour as regards privacy, this paper aims at bringing behavioural research methods for *privacy* to the attention of policymakers, exploring challenges and opportunities of applying behavioural insights into privacy policy-making, at its different stages: from the design to the implementation phase.

After having discussed the reasons of the failure of traditional information notices (privacy policies) and considered the benefits of applying behavioural insights for regulatory purposes in general (e.g., *nudging* strategies), this article claims that the introduction of *privacy nudges*, as complementary regulatory tools can be considered legitimate and worthy of policy support, also in Europe, as far as: (1) they seek at encouraging a privacy-enhancing behaviour, while preserving the freedom of choice of the users (rather than hinder it), as soft or libertarian paternalism claims;[223] and (2) they are adopted in a transparent manner and subject to oversight mechanisms to guarantee that base legal principles are respected.

Also, the paper aims to trigger the discussion on the feasibility of introducing specific legal requirements for effective privacy notices (whether on a privacy-by-design architecture or also on the purposes to be pursued, i.e., the behavioural change).

After all, the new Proposal for a European GDPR,[224] seeks to reinforce the transparency and informed consent requirements in view of

220. *See Work Packages*, SPION (Dec. 21, 2012), *available at* http://www.spion.me/workpackages/ (last visited Dec. 20, 2015).

221. van der Berg, *supra* note 108, at 776, 783.

222. Groom & Calo, *supra* note 25, at 4, 28.

223. THALER & SUNSTEIN, *supra* note 131, at 5.

224. *See Proposal for GDPR*, *supra* note 2.

strengthening individual rights. Behavioural insights and nudging systems (as *visceral notices*) may represent an evolving way of interpreting and implementing the new Regulation, or a way of testing the adequacy of its stated safeguards.

A MULTILATERAL CONVENTION ON OUTLAWING INCITEMENT TO ACTS OF TERRORISM UNDER INTERNATIONAL LAW

Frederick V. Perry[†] & Wendy Gelman[††]

CONTENT

ABSTRACT

Terrorist activities have occurred throughout history. In this paper, we study the relationship between incitement to violence, and recruiting, training or convincing others to commit acts of violence and the limitation on the right to free speech as determined by the Supreme Court

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and international tribunals. We advocate bringing accused perpetrators of such international crimes before the courts via universal jurisdiction and offer a solution: a multilateral convention providing for the rendition of suspects who have solicited or persuaded others to perform terrorist acts, whether or not the acts actually occur and are successful.

INTRODUCTION

When a person persuades, encourages, instigates, pressures, trains or solicits another person or group so as to cause that person or group to commit an act of international terrorism, unless there is a treaty of extradition between the state where the terrorist offense has taken place or has been instigated etc., to take place, and the state where the person suspected of doing such instigation etc., is found, very often the suspect goes free. There is no legal reason or motivation for the requested state to render the suspect to the requesting state. To overcome this problem, we propose a multilateral convention. Such a convention would require the arrest and extradition of individuals suspected of training, motivating, inciting or soliciting others to engage in international terrorist activities that have taken place or were or are planned to take place in the requesting state. The convention would not attempt to define a "terrorist activity," since that has eluded international lawyers and states for generations, rather it would work much the same way that typical bilateral extradition treaties work today, working within the frameworks of the national laws of the requesting and the requested state. We propose a separate convention, and not simply amending the Statute of the International Criminal Court, since a number of prominent states are not participants in the ICC.[1]

Under the domestic laws of many countries, a person who solicits or entices another to commit a crime is guilty of a punishable offense and is prosecuted for such crime. The person is arrested and tried. But how do we bring those who incite or solicit acts of international terrorism when they are in a far off land, outside the reach of our police and our courts? In today's world they often go free.

The bombings in Boston on the day of the 2013 Marathon race were generally considered an act of terrorism.[2] Some believe the Boston

1. Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90. For example, China, the United States, India, Pakistan, Indonesia, Turkey Israel are not members, though the United States has signed the Statute, but not ratified it. *See id.*

2. Mark Landler, *Obama Calls Blasts an 'Act of Terrorism,'* N.Y. TIMES (Apr. 16, 2013), *available at* http://www.nytimes.com/2013/04/17/us/politics/obama-calls-marathon-bombings-an-act-of-terrorism.html?adxnnl=1&adxnnlx=1380121442-

Bombing suspects received training or indoctrination outside the United States.[3] The American press believed that a person "radicalized" at least one of the Tsarnaev brothers, causing the Boston carnage.[4] The FBI tried very hard to find that person.[5] According to CNN, by July of 2015, there were more U.S. citizens charged in jihadist-style terrorism related cases than at any time since the attacks of September 11, 2011.[6] Who inspires such activity? Who educates or trains perpetrators to engage in such activity? Now, many believe that the group known as ISIS is doing so to a large degree.[7] Should we or can we do anyting about such inspiration or even training?

The attacks on Westgate Mall in Nairobi, Kenya,[8] are reported to be the work of Al Shabab militants from Somalia, apparently trained there and recruited from there; others think some may have even come from Kenya itself,[9] though as the head of Kenya's military has stated: "We are fighting global terrorism here,"[10] as many believe the group included

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n99IiJGFvdB8FYupxAvC3A (last visited Dec. 20, 2015).

3. Anderson Cooper, *Were Bombing Suspects Trained Overseas?*, CNN (Apr. 23, 2013, 11:14 PM), *available at* http://ac360.blogs.cnn.com/2013/04/23/were-bombing-suspects-trained-overseas/?iref=allsearch (last visited Dec. 20, 2015).

4. Peter Weber, *Who is 'Misha,' the Armenian Muslim Who Radicalized Tamerlan Tsarnaev?*, WEEK (Apr. 24, 2013), *available at* http://theweek.com/article/index/243163/who-is-misha-the-armenian-muslim-who-radicalized-tamerlan-tsarnaev (last visited Dec. 20, 2015).

5. *See* James Nye & David McCormack, *FBI Closing in on 'Misha': Agents Identify Mysterious Bald, Red-Bearded Armenian-American Man Accused of Radicalizing the Boston Bombers*, DAILY MAIL (Apr. 27, 2013, 4:08 PM), *available at* http://www.dailymail.co.uk/news/article-2315605/Boston-bombers-FBI-reveal-theyve-identified-Misha-mysterious-bald-red-bearded-Armenian-American-man.html#ixzz31cOTtOK5 (last visited Dec. 20, 2015).

6. *See* Peter Bergen & David Sterman, *A History of Attacks Against U.S. Military Installations*, CNN (July 17, 2015, 8:46 PM), *available at* http://www.cnn.com/2015/07/16/opinions/bergen-chattanooga-shooting/index.html (last visited Dec. 20, 2015).

7. Ashley Fantz & Dana Ford, *Massachusetts Man Accused of Plot to Bomb Crowded Places on Behalf of ISIS*, CNN (July 14, 2015, 10:55 AM), *available at* http://www.cnn.com/2015/07/13/us/massachusetts-isis-arrest/index.html (last visited Dec. 20, 2015).

8. Daniel Howden, *Terror in Westgate Mall: The Full Story of the Attacks That Devastated Kenya*, GUARDIAN (Oct. 4, 2013, 8:12 AM), *available at* http://www.theguardian.com/world/interactive/2013/oct/04/westgate-mall-attacks-kenya-terror#undefined (last visited Dec. 20, 2015).

9. Duncan Miriri, *Two Kenyan Police Killed in Attack in Northeast County*, REUTERS (Sept. 26, 2013, 6:30 AM), *available at* http://www.reuters.com/article/2013/09/23/us-kenya-attack-idUSBRE98K03V20130923 (last visited Dec. 20, 2015).

10. Duncan Miriri & James Macharia, *Militants Hold out as Kenya Forces Try to Crush Cross-Border Jihad*, REUTERS (Sept. 23, 2013, 5:33 PM), *available at* http://www.reuters.com/article/kenya-attack-idUSL5N0HJ3MV20130923 (last visited Dec. 20, 2015).

fighters from many parts of the world.[11] Planners, plotters, instigators and trainers prepared the militants who carried out the two attacks on the World Trade Center in New York.[12] Terrorists often do not work by themselves and often do not start out life as terrorists. Frequently someone "turns" them or radicalizes them to become terrorists. Just as often, the person or persons who have done the "turning" are found in a state other than the one in which the terrorist incident occurred or was planned to have occurred, rendering the suspects outside the jurisdiction of the state that is the target of the terrorist attack. Some states simply are frustrated by this and the perpetrators go free. Sometimes in other cases, for example such as in the case of the United States, the state chooses the option of its own unlawful activity and resorts to extra-legal means, often called "extraordinary rendition,"[13] Whenever one of these two cases occurs—either doing nothing out of frustration, or resorting to extra-legal actions—the respect for international law breaks down. We suggest a solution: a multilateral convention providing for the rendition of those individuals who are believed to have engaged in the activity of persuading, encouraging, instigating, and pressuring training or soliciting terrorist acts, whether or not the acts actually occur and are successful. The state in which a terrorist act or planned terrorist act is to occur—the target state—would use its own definition of an act of international terrorism and therefore its own statutory definition for the solicitation of such crime—if such activity is a crime under its domestic law—and request another state party to the convention in which the suspect is found, to extradite that person to the requesting state for interrogation and prosecution, if prosecution is warranted. The requested state would go through the safeguards that are normal in such treaties, as explained below, in deciding whether or not to comply with the request, much like they would in all other cases of extradition requests.

I. THE LAW

What do citizens expect or even demand in terms of protection under the law? Especially when dealing with the subject of crime, the law is

11. *Id.*

12. *See* Luis Martinez, *9/11 Plotters Defer Pleas at Guantanamo Bay Arraignment*, ABC NEWS (May 5, 2012), *available at* http://abcnews.go.com/blogs/politics/2012/05/911-plotters-accused-refuses-to-answer-in-guantanamo-bay-arraignment/ (last visited Dec. 20, 2015); *see also Al Qaeda Chief Khalid Sheikh Mohammed Confesses to Planning Sept. 11, Gitmo Transcript Shows*, FOX NEWS (Mar. 15, 2007), *available at* http://www.foxnews.com/story/2007/03/15/al-qaeda-chief-khalid-sheikh-mohammed-confesses-to-planning-sept-11-gitmo/ (last visited Dec. 20, 2015).

13. *See infra* p. 15 (discussing the United States' use of extraordinary rendition in the case of terrorist suspects).

considered to be an instrument of social control.[14] By enacting laws society attempts to achieve uniform behavior, often by describing behavior that is prohibited.[15] The desired behavior is then encouraged by discouraging the undesired behavior through punishment.[16] The populations of many states today consider themselves to be living under the rule of law.[17] Those populations believe, among other things, that the rule of law provides to them as citizens the advantages of not only protection from would be wrongdoers, but also the prevention of arbitrary and corrupt government, the restraint of vengeance and the provision of individual liberty and economic prosperity.[18]

Some of the very first principles of the concept of the rule of law are that a law must be made public and must be reasonably clear in meaning and specific in what it prohibits.[19] And, of course, it must be applied equally to all, that is, without discrimination.[20] The rule of law is considered an essential element of a functioning democracy and a functioning economy.[21] This sentiment has been echoed time and again,[22] including by the United Nations itself, which has said:

> Promoting the rule of law at the national and international levels is at the heart of the United Nations' mission. Establishing respect for the rule of law is fundamental to achieving a durable peace in the aftermath of conflict, to the effective protection of human rights, and to sustained economic progress and development. The principle that everyone – from the individual right up to the State itself – is accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, is a fundamental concept which drives much of the United Nations work.[23]

States have for a very long time generally considered themselves united by some fundamental principles of law into a legal community, governed by law, even though there at times may be disagreement as to

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14. WILLIAM L. CLARK & WILLIAM L. MARSHALL, A TREATISE ON THE LAW OF CRIMES 1-3 (Marian Quinn Barnes ed., 7th ed. 1967).

15. *Id.* at 3-4.

16. *Id.* at 64.

17. ANDREW ALTMAN, ARGUING ABOUT LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY 18 (Peter Adams et al. eds., 2d ed. 2001).

18. *Id.*

19. O. Lee Reed, *Law, The Rule of Law, and Property: A Foundation for the Private Market and Business Study*, 38 AM. BUS. L.J. 441, 448-50 (2001).

20. ALTMAN, *supra* note 17, at 18.

21. *Id.*

22. *Id.*

23. *U.N. & The Rule of Law*, UNITED NATIONS, *available at* http://www.un.org/en/ruleoflaw/index.shtml (last visited Dec. 20, 2015).

the meaning or substance of such law or laws.[24] Another principal tenet of the rule of law is that government should maintain peace and order, for the most part through a system of laws or rules that specify both violations and their corresponding sanctions accruing to violators. This leads to the notion that no act can be regarded as a crime unless there is a specific law prohibiting it and no one can be punished unless they have committed an unlawful act described as a crime. Legal scholars refer to these concepts as nullum crimen sin lege ("no crime without a law") and nulla poena sin crimine ("no punishment without a crime").[25] In other words, crimes must be clearly defined.[26] As will be described below, acts generally considered acts of terrorism, or simply acts of violence are unlawful in most countries at the state level. Although laws prohibiting acts of violence that are in some ways similar do exist at the state level in many states, the "rule of law" at the international level lags behind,[27] especially in the area of curtailing or controlling violence, notably international terrorism.[28]

It has been said that an effective legal system must be capable of reflecting the changing needs of the society in which it exists and functions.[29] Accordingly, just as a state's legal system must have a viable process of continuous law-making in order to regulate the evolving activities of its society, so must the international community have a system of legally binding principles and norms controlling the relations among the member states of the international community, which evolve or grow over time, so as to reflect the changing conditions within the international community.[30] Examples of the international community's laws evolving and spawning new laws are areas such as human rights law, commerce and technology treaties. These areas of law making their mark increased international interdependence and cooperation in the recent past.[31] Large areas of the Law of the Sea and of Space Law have recently come about because of innovations in technology.[32] In other words, societal and technological changes produce new international

24. GENNADII M. DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY 13 (1993).

25. ALTMAN, *supra* note 17, at 5.

26. *Id.*

27. Frederick V. Perry, *Multinationals at Risk: Terrorism and the Rule of Law*, 7 FLA. INT'L U. L. REV. 43, 61 (2011).

28. *See generally id.*

29. DANILENKO, *supra* note 24, at 1.

30. *Id.*

31. *Id.*

32. *Id.* at 2.

laws. This evolving situation has caused the International Court of Justice to say that "throughout its history, the development of international law has been influenced by the requirements of international life."[33] Further, in describing the sources of international law, the International Court of Justice described at least one multilateral treaty as constituting international legislation.[34] Of course there is no international legislator and using the term "legislation" for international law generally is merely a metaphor.[35] The point is that international law both changes and expands with the times and the dominant source of international law today is treaties,[36] particularly multilateral treaties. Indeed, "[w]e live in the age of treaties. Increasingly, bilateral and multilateral written agreements are used for the creation of new international legal standards."[37]

Changes in the world's commercial and geopolitical realities have given rise to new opportunities, but also new dangers. Our changing world and its rapidly evolving technology have given rise to an increasing proliferation of acts of international terrorism. Further, those changes have also given rise to a concomitant and increasing fear of as well as frustration with international terrorism, at least partly caused by the frequent inability to arrest and bring to justice the perpetrators of acts of international terrorism. It is for this reason that we propose the negotiation, drafting and execution of a broad multilateral convention on the extradition of terrorist suspects, not the perpetrators of attacks, since that has so far proved an impossibility for a number of reasons, rather extradition—or prosecution—of those who instigate such acts. Such a convention could be accomplished under the auspices of the United Nations. "A convention is a treaty on matters of common concern, usually negotiated on a regional or global basis and open to adoption by many nations."[38] Conventions are very often sponsored by the United Nations or some other intergovernmental organization within the U.N. system.[39] We suggest therefore a multilateral convention negotiated and drafted under the sponsorship of the United Nations. Just as contracts in the domestic legal sense make for private law between the parties to the

33. 1949 I.C.J. 178; *see also* DANILENKO, *supra* note 24, at 5.

34. DANILENKO, *supra* note 24, at 6.

35. *Id.*

36. Duncan B. Hollis, *A Comparative Approach to Treaty Law and Practice*, *in* NATIONAL TREATY LAW AND PRACTICE 1, 1 (Duncan B. Hollis et al. eds., 2005).

37. ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES 1 (2007).

38. RICHARD SCHAFFER, BEVERLY EARLER & FILBERTO AGUSTI, INTERNATIONAL BUSINESS LAW AND ITS ENVIRONMENT 251 (6th ed. 2006).

39. CONWAY W. HENDERSON, UNDERSTANDING INTERNATIONAL LAW 65 (2010).

contract, so do treaties (or multilateral conventions) make law binding upon their signatories.

The United States is party to over 10,000 treaties still in force.[40] France has nearly 7,000 international agreements in effect and China is a party to over 6,000 bilateral agreements and 273 multilateral agreements.[41] Treaties, therefore, are accepted as normal practice by countries all over the world, and a multilateral treaty is "the nearest thing we yet have to a general statute in international law."[42] There seems to be widespread desire for the rule of law. In its *Millennium Declaration*, the General Assembly of the United Nations stressed the need to strengthen the international rule of law.[43] We believe such a convention would do just that, by providing for international cooperation in the capture, detention and rendition of suspects.

Intergovernmental Organizations, such as the United Nations, and states themselves have traditionally been the prime movers in creating treaties and in general, international organizations organize, negotiate and conclude most multilateral treaties today.[44] Only states and Intergovernmental Organizations can be parties to a treaty. But now Non-Governmental Organizations ("NGOs"), though not signatories, are taking part in treaty making.[45] In fact, in general, "Civil society has become an important participant in today's multilateral treaty-making, thanks in large part to the considerable significance States now accord its work."[46] As an example, in the field of humanitarian law, the International Committee of the Red Cross ("ICRC") has been very active in representing civil society.[47] It may therefore be beneficial for the advocates of a multilateral convention of the type we propose to engage with influential NGOs as well as the ICRC.

II. AD HOC TRIBUNALS

For certain international crimes, especially those of "grave breaches of the Geneva Convention of 1949, violations of the laws and customs of

40. *Treaty Affairs: The Office of Assistant Legal Adviser for Treaty Affairs*, U.S. DEPT. STATE, *available at* http://www.state.gov/s/l/treaty/index.htm (last visited Dec. 20, 2015).

41. Hollis, *supra* note 36, at 1.

42. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 638 (7th ed. 2008).

43. *See, e.g.*, G.A. Res. 65/1 (Oct. 19, 2010).

44. ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 392-93 (2d ed. 2007).

45. *See* Louise Doswald-Beck, *Participation of Non-Governmental Entities in Treaty-Making: The Case of Conventional Weapons*, *in* MULTILATERAL TREATY-MAKING 41, 41 (Vera Gowland-Debbas ed., 2000).

46. *Id.*

47. *Id.*

war, genocide and crimes against humanity," [48] the United Nations Security Council, acting under Chapter VII of the Charter of the United Nations, has established tribunals to try those accused of such acts.[49] The creation of such tribunals and their mandates do not give them authority to create new law, rather they are constrained to apply current international law, that is customary international law, or principles that are *erga omnes*. *Erga Omnes* is defined as "obligation[s] under general international law . . . [reflecting] common values and . . . concern for compliance, so that a breach of that obligation enables all States to take action."[50] Such tribunals apply customary international law and treaty law generally. The creation of such tribunals is however expensive, though they often are created because of some impediment or reluctance to prosecute on the part of the state wherein the crimes occurred or of which the defendants are nationals. It is expected that the International Criminal Court ("ICC") will now deal with those activities that were formerly tried in such *ad hoc* tribunals. But the ICC is supposed to get involved only when for one reason or another the domestic court of the state in which the suspect is found either does not or cannot prosecute the suspect. Currently the best place to try those who have incited or solicited international terrorist activities appears to be domestic courts, but how does a domestic court bring before it a suspect that is found in a distant state? How does the court get not only physical presence of the suspect, but also jurisdiction over him or her?

III. EXTRADITION AND JURISDICTION

According to *Black's Law Dictionary*, the term jurisdiction means:

> The power and authority constitutionally conferred upon (or constitutionally recognized as existing in) a court or judge to pronounce the sentence of the law, or to award the remedies provided by law, upon a state of facts, proved or ad- mitted, referred to the tribunal for decision, and authorized by law to be the subject of investigation or action by that tribunal, and in favor of or against persons (or a res) who present themselves, or who are brought, before the court in some manner sanctioned by law as proper and sufficient.[51]

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48. Daphna Shraga & Ralph Zacklin, *The International Criminal Tribunal for the Former Yugoslavia*, 5 EUR. J. INT'L L. 360, 363 (1994).

49. *See generally* BROWNLIE, *supra* note 42, at 587-607.

50. *Obligations and Rights Erga Omnes in International Law*, 71 ANNUAIRE DE L'INSTITUT DE DROIT INT'L art. 1(a) (2005), *available at* http://www.justitiaetpace.org/idiE/resolutionsE/2005_kra_01_en.pdf (last visited Dec. 20, 2015).

51. *What is Jurisdiction?*, LAW DICTIONARY, *available at*

Under widely accepted norms of International law, five grounds are accepted as the basis on which states can base their criminal jurisdiction: "Territorial jurisdiction" arises from offenses occurring within a state's territory; "nationality jurisdiction" is based on the fact that the defendant is a national of the state claiming jurisdiction; "passive personality jurisdiction" arises when the victim of the offense is a national of the prosecuting state; "protective jurisdiction" is based on the acts that have an effect on important state interests or national security; and "universal jurisdiction" is based on the notion that some international crimes are so egregious that a violation of them by anyone, anywhere, warrants any state taking jurisdiction.[52]

Implementing the desire not to allow perpetrators of atrocities to get away with their crimes has been an objective of the international community for a long time.[53] In fact, that was the impetus that gave rise to the ICC.[54] According to the work of the International Law Commission, there are more than 60 multilateral treaties that create universal jurisdiction and provide the alternatives of extradition or prosecution of suspects of international crimes as defined in such treaties.[55]

So the question becomes, how do we assure that those accused of perpetrating international crimes are brought before the courts? Of course the maxim of being guilty until proven innocent goes without saying, but the accused, the suspects, should at least stand trial, in other words, they should be investigated, interrogated and possibly prosecuted for their crimes. The issue is how to encourage states to seek them out, arrest them and then either prosecute them or send them to a state that will prosecute them, in other words, extradite them. The Latin term, and the term used in international legal parlance is *aut dedere aut judicare*, prosecute or extradite. The principle of *aut dedere aut judicare* is closely related to universal jurisdiction, but it prohibits a state from shielding an international criminal.[56]

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http://thelawdictionary.org/jurisdiction/ (last visited Dec. 20, 2015).

52. *See* Hari M. Osofsky, *Domesticating International Criminal Law: Bringing Human Rights Violators to Justice*, 107 YALE L.J. 191 (1997); *see also* BROWNLIE, *supra* note 42, at 300-05.

53. Miša Zgonec-Rožej & Joanna Foakes, *International Criminals: Extradite or Prosecute?*, CHATHAM HOUSE 3 (July 2013), *available at* https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/0713bp_prosecute.pdf (last visited Dec. 20, 2015).

54. *Id.*

55. *Id.*

56. Amnesty Int'l, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World*, at 7, IOR 53/004/2011 (Oct. 5, 2011).

A widely accepted method of motivating courts is through the use of universal jurisdiction. In the estimation of Amnesty International, "Universal jurisdiction, an essential tool of international justice, is the ability of the court of any state to try persons for crimes committed outside its territory that are not linked to the state by the nationality of the suspect or the victims or by harm to the state's own national interests.[57]

Universal jurisdiction is "based on the nature of the crime, not on any nexus between the forum State and the matter under consideration. It is normally relied upon in a criminal law context to prosecute core international crimes."[58] Practically speaking municipal courts take such jurisdiction in cases of piracy and slave trading more than anything else.[59] In a 2005 resolution of the Institut de Droit International, universal jurisdiction is discussed in the following terms:

> Universal jurisdiction in criminal matters, as an additional ground of jurisdiction, means the competence of a State to prosecute alleged offenders and to punish them if convicted, irrespective of the place of commission of the crime and regardless of any link of active or passive nationality, or other grounds of jurisdiction recognized by international law.
>
> Universal jurisdiction is primarily based on customary international law. It can also be established under a multilateral treaty in the relations between the contracting parties, in particular by virtue of clauses which provide that a State party in the territory of which an alleged offender is found shall either extradite or try that person.[60]

The trouble is that everyone has to agree on what the elements of universal jurisdiction are and how it is to be implemented. Ian Brownlie and Malcolm Shaw, two famous British writers on international law, like the Institut de Droit International, also believe that domestic courts have universal jurisdiction under customary international law[61] for certain crimes that are "particularly offensive to the international community as a whole."[62] Resolutions of the U.N. General Assembly tell states to extradite or prosecute offenders for certain crimes, providing for

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57. *Id.* at 1.

58. ALINA KACZOROWSKA, PUBLIC INTERNATIONAL LAW 310 (4th ed. 2010).

59. *Id.*

60. *Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes*, 71 ANNUAIRE DE L'INSTITUT DE DROIT INT'L ¶¶ 1-2 (2005), *available at* http://www.justitiaetpace.org/idiE/resolutionsE/2005_kra_03_en.pdf (last visited Dec. 20, 2015).

61. *See* BROWNLIE, *supra* note 42, at 306.

62. MALCOLM N. SHAW, INTERNATIONAL LAW 668 (6th ed. 2008).

universal jurisdiction.[63] General Assembly resolutions, while they may provide evidence of customary international law, do not generally create it.[64] Some are of the view that universal jurisdiction is a troublesome concept and not widely accepted under customary international law as being law, that is, as a norm, requiring or allowing action.[65] Those people believe that a treaty is required that provides for universal jurisdiction for the crimes enumerated in the treaty.

In order for a state's judicial and or prosecutorial system to prosecute a suspect for an international crime, the prosecuting state must have the legal ability to do so, either under the state's domestic law, under a treaty to which it is a party or both, or if the state believes that customary international law so provides, simply under universal jurisdiction. Not all treaties that define international crimes provide for or require signatories to either prosecute or extradite, and even of those that do, not all are what is known as self-executing.[66] Further, of those that have such requirements, that is, appear to be self-executing on their face, some states' systems do not require or allow their courts to prosecute based merely on a treaty obligation: they require their own domestic law to provide for it. Further, even in the case where a treaty defines the crime, provides for the obligation to prosecute or extradite and further requires the state signatory to create domestic implementing legislation, many states do not implement the law to give effect to the treaty obligations. There are further obstacles to the implementation of the concept of either universal jurisdiction or simply jurisdiction and extradition obligations under treaties. First is the matter that a state wishing to prosecute must request that the state wherein the suspect is located arrest and extradite the suspect. Will the requested state comply? There is the issue of whether a state, which under its domestic laws or pursuant to an international treaty, possesses the judicial and or prosecutorial will to arrest and then extradite or arrest and then prosecute itself. Whenever two or more states are involved with one another there are also international relations implications. There is always the question of

63. *See* G.A. Res. 2840 (XXVI) (Dec. 18, 1971); G.A. Res. 3074 (XXVIII) (Dec. 3, 1973).

64. Int'l Law Ass'n London Conference, *Statement of Principles Applicable to the Formation of General Customary International Law*, 55-56 (2000); *see also* SHAW, *supra* note 62, at 114.

65. Zgonec-Rožej & Foakes, *supra* note 53, at 12-13.

66. Under current United States' law, a self-executing treaty is one that the courts will enforce absent domestic implementing legislation, that is, the treaty creates a domestic legal obligation without such legislation. Oona A. Hathaway, Sabria McElroy & Sara Aronchick Solow, *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT'L L. 1, 52-53 (2012); *see also* Medellin v. Texas, 552 U.S. 491, 493 (2008).

whether the state has the political will to arrest or to prosecute.

Often the answers to such questions hang on matters having little to do with the criminality of the offense. Whether a state will arrest and extradite or prosecute itself is a matter of international relations, that is, politics; it is sometimes a matter of how incensed the population of the potentially prosecuting state might be over the offense. It might be related to how the state of citizenship of the potential defendant view the prospect of extraditing or prosecuting its citizens for an act taking place in another state. The decision may depend on the extent to which such state may wish that the suspect be prosecuted.

Terrorist attacks such as that in New York of September 11, 2001, the attack in Bali, that in London, in Madrid and others provide a serious challenge for governments in trying to address the problem of international terrorism.[67] Not all states have bilateral extradition treaties between them. Not all states are signatories to multilateral treaties requiring extradition or prosecution. No universal convention defines international terrorism, which means that it is therefore doubly difficult, under current international law, for someone to be guilty of the crime of solicitation or incitement to international terrorism. Since international terrorism, has no accepted universal definition the incitement offense can hardly have one. The international convention that appears to come closest to providing a definition of international terrorism and at the same time outlawing solicitation is the International Convention for the Suppression of the Financing of Terrorism.[68] In view of this shortcoming in international law how do states seek out, capture and bring to justice the suspected person or persons implicated in planning or soliciting the attacks in the absence of an extradition treaty covering the matter between the state seeking the suspect and the state in which the suspect is found? Without effective lawful means at their disposal, some states engage in extrajudicial—read unlawful—means to deal with the situation, such as the United States practice of what is termed "extraordinary rendition."

As discussed above, normally suspects are transferred from one state to another to answer charges against them by means of judicial processes pursuant to extradition treaties, if there is one between the two sates concerned. At times states will, absent a treaty, simply cooperate out of comity. In those cases where an extradition treaty exists, the suspect has the ability to challenge the extradition, but in the case of extraordinary

67. HELEN DUFFY, THE 'WAR ON TERROR' AND THE FRAMEWORK OF INTERNATIONAL LAW 3 (2005).

68. International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 U.N.T.S. 197.

rendition, there is an "extrajudicial transfer of a person from one State to another," generally for the purpose of arrest, detention, and/or interrogation by the receiving State.[69] When this occurs the suspect has no access to the judicial system to challenge the rendition; sometimes the rendition occurs with the consent of the state in which the suspect is found and sometimes it does not.[70] The United States has engaged in another related practice. The United States' policy of allegedly rendering suspected terrorists for the purpose of arrest, detention and interrogation to States who are known for practicing torture has been considered by some to be a highly questionable practice.[71] Such renditions are generally considered unlawful.[72] Torture is of course outlawed.[73]

The European Parliament was concerned about the possible involvement of European governments in such unlawful activity and conducted an investigation.[74] A situation in which states are encouraged to conduct unlawful activities because of a void in the law that does not provide for lawful rendition, that is, for extradition, causes the law not to be respected. When a large, influential state like the United States flaunts the rule of law, states can lose respect for the rule of law, and the rule of law breaks down.

Multilateral conventions or treaties are, as mentioned above, the most popular way that law is created in the international realm.

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69. MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL32890, RENDITIONS: CONSTRAINTS IMPOSED BY LAWS ON TORTURE, 1 (2009) (emphasis omitted).

70. *Id.*

71. *See* Jane Mayer, *Outsourcing Torture*, NEW YORKER (Feb. 14, 2005), *available at* http://www.newyorker.com/magazine/2005/02/14/outsourcing-torture (last visited Dec. 20, 2015).

72 *23 Americans Convicted of Kidnaping Italy*, CHI. TRIBUNE (Nov. 5, 2009), *available at* http://articles.chicagotribune.com/2009-11-05/news/0911050257_1_armando-spataro-judge-oscar-magi-abu-omar (last visited Dec. 20, 2015).

73. G.A. Res. 39/46, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984). "The United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) requires signatory parties to take measures to end torture within their territorial jurisdiction and to criminalize all acts of torture. Unlike many other international agreements and declarations prohibiting torture, CAT provides a general definition of the term. CAT generally defines torture as the infliction of severe physical and/or mental suffering committed under the color of law. CAT allows for no circumstances or emergencies where torture could be permitted." MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL32438, U.N. CONVENTION AGAINST TORTURE (CAT): OVERVIEW AND APPLICATION TO INTERROGATION TECHNIQUES summary (2009).

74. *Temp. Comm. on the Alleged Use of European Countries by the CIA for the Transport and Illegal Detention of Prisoners Working Document on 'Extraordinary Renditions,'* at 2 (Nov. 16, 2006), *available at* http://www.europarl.europa.eu/comparl/tempcom/tdip/working_docs/pe380593_en.pdf (last visited Dec. 20, 2015).

Extradition treaties are popular[75] and they appear to work. For example, the United States has significantly increased its law enforcement cooperation with foreign states and extraditions involving the United States have significantly increased in recent years.[76]

Extradition treaties are in the nature of a contract and generate the most controversy with respect to those matters for which extradition may not be granted. In addition to an explicit list of crimes for which extradition may be granted, most modern extradition treaties also identify various classes of offenses for which extradition may or must be denied. Common among these are provisions excluding purely military and political offenses, capital offenses, crimes that are punishable under only the laws of one of the parties to the treaty, crimes committed outside the country seeking extradition, crimes where the fugitive is a national of the country of refuge, and crimes barred by double jeopardy or a statute of limitations.

Extradition is triggered by a request submitted through diplomatic channels. In the United States, it proceeds through the Departments of Justice and State and may be presented to a federal magistrate to order a hearing to determine whether the request is in compliance with an applicable treaty, whether it provides sufficient evidence to satisfy probable cause to believe that the fugitive committed the identified treaty offense(s), and whether other treaty requirements have been met. If so, the magistrate certifies the case for extradition at the discretion of the Secretary of State. Except as provided by treaty, the magistrate does not inquire into the nature of foreign proceedings likely to follow extradition.[77]

Of course any norms or treaties that cause persons to be arrested for political activity, which may, in some cases, be nothing more than having voiced one's political views, or even for what the United States Supreme Court has termed "symbolic speech,"[78] is troublesome for some courts and for some countries, since this gives rise to freedom of speech issues in many states, or what the United States terms First Amendment issues. So there is a potential problem in defining where the limits of free speech ends and talk or activities that amount to incitement of another to commit a crime—in this case terrorist acts—begins. What do states do when their enthusiasm for protection and extradition bump up against notions of free

75. *See* MICHAEL JOHN GARCIA & CHARLES DOYLE, CONG. RESEARCH SERV., 98-958, EXTRADITION TO AND FROM THE UNITED STATES: OVERVIEW OF THE LAW AND RECENT TREATIES 1 (2010). The United States has such treaties with over 100 states. *Id.*

76. *Id.* at 1 & n.3.

77. *Id.* at 1.

78. Texas v. Johnson, 491 U.S. 397, 404 (1989).

speech?

The second potential problem is the disparity in states' definitions of terrorism. If the United States, for example, were asked to extradite a suspect to Russia, where the law defining terrorism is so broad that robbing a liquor store or even peaceful demonstrations could be considered an act of terrorism, the United States would have a problem with such an extradition (of course the United States does not currently have an extradition treaty with Russia). The Supreme Court of the United States, because of the nature of its Constitution, has rigorously defended the right of freedom of speech, and the government has defended it abroad in treaty negotiations. The problem becomes defining how the right to freedom of expression functions and where the right begins and ends? It is worth analyzing the right to freedom of speech.

IV. PHILOSOPHICAL FOUNDATIONS OF FREE SPEECH IN MODERN WESTERN CULTURE

The sources for the right of freedom of speech as embodied in modern constitutional and international law are rooted in the philosophies of the Protestant Reformation and Enlightenment. For example, in 1644, nearly a century and a half prior to the adoption of the U.S. Constitution, John Milton powerfully argued that the freedom to express one's views "can serve as a powerful force against political abuse and stagnations."[79] Also, in England, the Bill of Rights passed by parliament in 1689 included a guarantee of free speech within the confines of parliament, providing "that the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament."[80] Likewise, the late 17th century Dutch philosopher, Benedict Spinoza championed the basic right to free speech.[81] Perhaps most famously Voltaire, the 18th century French enlightenment representative "considered protection of offensive speech to be a moral duty."[82] Inspired by Voltaire, on August 26, 1789, during the French Revolution, the French National Assembly adopted the Declaration of the Rights of Man, which affirmed free speech as an "unalienable right,"

79. Vincent Blasi, *Milton's Areopagitica and the Modern First Amendment*, YALE L. SCH. LEGAL SCHOLARSHIP REPOSITORY Part VI (Mar. 1, 1995), *available at* http://digitalcommons.law.yale.edu/yslop_papers/6

80. Act for Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown (Bill of Rights) 1688, 1 W. & M. c. 2 (Eng.).

81. Justin Steinberg, *Spinoza's Political Philosophy*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY 10 (Edward N. Zalta et al. eds., Winter ed. 2013).

82. Winfred Brugger, *The Treatment of Hate Speech in German Constitutional Law*, 4 GERMAN L. J. 1, 1 (2003).

providing that "[t]he free communication of ideas and opinions is one of the most precious of the rights of man."[83]

Though the right to freedom of speech has a rich historical tradition in the Western world, it was rarely thought to be an *absolute* right. Though Milton argues forcefully against the evils of government censorship, he steadfastly refused to extend the benefits of freedom of speech to those who practiced the Catholic faith.[84] Spinoza too allowed for the possibility that it could be counter-productive, if not "'very dangerous,' to grant unlimited freedom of speech."[85] Also, and more pertinently, Spinoza believed that the government should ultimately retain "full discretion to determine which actions are acceptable and what forms of speech are seditious."[86] Even the leadership of the French Revolution understood the limits of the right to free expression, providing in the Declaration of the Rights of Man that "[e]very citizen may, accordingly, speak, write, and print with freedom, *but shall be responsible for such abuses of this freedom as shall be defined by law*."[87] Lastly, in the 19th century, English philosopher John Stuart Mill, who presented "perhaps the most famous liberal defense of free speech" likewise recognized that free speech had its limits, arguing that the government could limit an individual's right to free expression where such actions were designed "to prevent harm to others."[88] It is this "harm principle" which establishes the philosophical underpinnings for subsequent government limitation of free speech.

V. FREE SPEECH UNDER THE U.S. CONSTITUTION

A. *Background and Adoption of the First Amendment*

The Constitution of the United States was signed by a majority of delegates to the Constitutional Convention in Philadelphia, Pennsylvania on September 17, 1787.[89] However, only 39 of the 55 delegates to the Convention signed the document, many refusing to do so because the

83. Loi du 26 août 1789 Déclaration des Droits de l'Homme et du Citoyen [Law of Aug. 26, 1789, Declaration of the Rights of Man and of the Citizen] pmbl., art. 11 (Fr.) [hereinafter Dec. Rights of Man].

84. *See* Blasi, *supra* note 79, Part III.

85. Steinberg, *supra* note 81, § 3.5.

86. *Id.*

87. Dec. Rights of Man, *supra* note 83, art. 11 (emphasis added).

88. David van Mill, *Freedom of Speech*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY 3 (Edward N. Zalta et al. eds., Spring ed. 2015) (citation omitted).

89. *The Constitution*, WHITE HOUSE, *available at* http://www.whitehouse.gov/our-government/the-constitution (last visited Dec. 20, 2015).

document lacked a bill of rights.[90] According to the process adopted at the Convention, the Constitution would only become effective after it had been ratified by 9 of the 13 state legislatures.[91] Debate was contentious, with some states approving the Constitution, but with others refusing until the Constitution was amended to incorporate a bill of rights to codify the rights of individuals which would be protected from intrusion by the new government.[92]

The Federalists, those who supported adopting the Constitution without amendment, argued that there was no need for a bill of rights, since individuals did not cede any individual liberties to the new government by adopting the constitution.[93] Others, however, insisted on the need for amendments enumerating certain fundamental individual liberties.[94] Future president Thomas Jefferson, was one of the main proponents of the Bill of Rights, arguing that:

> I am one of those who think it a defect that the important rights, not placed in security by the frame of the constitution itself, were not explicitly secured by a supplementary declaration. There are rights which it is useless to surrender to the government, and which yet, governments have always been fond to invade. *These are the rights of thinking, and publishing our thoughts by speaking or writing. . .*[95]

Ultimately, Jefferson and the other advocates of the bill of rights prevailed and the Constitution and the Bill of Rights, consisting of ten amendments, were proposed to the First Congress on March 4, 1789. This amendment, along with the other amendments comprising the bill of rights were approved by the First Congress on September 15, 1789, and transmitted to the state legislatures for later adoption.[96] The first of these amendments provides, in part, as follows: "*Congress shall make no law* respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom of speech*, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[97]

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90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *The Constitution*, *supra* note 89.

95. Craig R. Smith, *The Aliens are Coming: John Adams and the Federalist Attack on the First Amendment*, CTR. FOR FIRST AMEND. STUD. 1, *available at* www.firstamendmentstudies.org/wp/pdf/alien.pdf (last visited Dec. 20, 2015) (quoting Jefferson's letter dated March 18, 1789, to David Humphries) (emphasis added).

96. *Bill of Rights*, NAT'L ARCHIVES, *available at* http://www.archives.gov/exhibits/charters/bill_of_rights.html (last visited Dec. 20, 2015).

97. U.S. CONST. amend. I (emphasis added).

B. *Alien and Sedition Acts*

During the administration of President John Adams, just a few short years after adoption of the First Amendment, the constitutionally guaranteed right to freedom of speech the new government encountered its first existential crisis involving international intrigue. The Adams administration found itself engaged in an escalating conflict with the revolutionary French government.[98] Jefferson's party, the Democratic-Republicans, were supporters of the ideals of the French revolution. In response to the escalating tensions with France and, perhaps unjustifiably, fearing the encouragement of revolution in the United States from new French immigrants and their Democratic-Republican allies, the Federalist-controlled Congress passed the Alien and Sedition Acts. "The Alien and Sedition Acts included the following summarized provisions:

> *Naturalization Act*: No alien shall be admitted to citizenship unless he has resided within the United States for at least fourteen years. No native, citizen, subject, or resident of a country with which the United States is at war shall be admitted to citizenship.
>
> *Alien Act*: The President may order all such aliens as he shall judge dangerous to the peace and safety of the United States to depart.
>
> *Alien Enemies Act*: When war is declared or invasion threatened, all natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of fourteen years and upwards, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured and removed, as alien enemies.
>
> *Sedition Act*: Any persons combining or conspiring with intent to oppose any measure or measures of the government of the United States shall be liable to fines up to $5,000 and imprisonment up to five years. Any person writing, uttering, or publishing any false, scandalous and malicious writing or writings against the government, the Congress, or the President shall be liable to fine up to $2,000 and imprisonment up to two years.[99]

The Acts were brazen violations of the First Amendment but were ultimately never challenged in court. Empowered by the new legislation, roughly two dozen people were arrested by the new laws, with 15 or more being indicted and 11 cases going to trial, resulting in 10 convictions. Perhaps the most stunning arrest was that of Congressman George Lyon

98. Smith, *supra* note 95, at 1 (quoting Jefferson's letter dated March 18, 1789, to David Humphries).

99. *Id.*

of Kentucky under the provision of the Sedition Act. In defiance of the law, Lyon was re-elected while in jail and remained in Congress when his Democratic-Republican colleagues successfully blocked the Federalist's efforts to expel him.[100]

The Democratic-Republicans, led by Jefferson and Madison, had unsuccessfully opposed the passage of the Acts, but through legislative arm-twisting were able to include a provision mandating that the Acts would terminate as of March 1, 1801, the first day of the next presidential administration.[101] After the Acts were passed and implemented, the opposition continued to fight back ferociously.[102] Jefferson and Madison worked to build popular support against the acts, advocating for states' rights, limited presidential power and free speech.[103] Ultimately, the acts became overwhelmingly unpopular and the Federalist's, who had controlled the reins of government for a nearly a dozen years, fell from power. Now in control, Jefferson immediately pardoned everyone who was convicted under the Acts or waiting trial.[104] The Federalists would never recover from this loss and ultimately disbanded as a political party.[105]

The momentous events leading to the passage and enforcement of the Acts shattered any maximalist, utopian views of the freedom of speech contained in the First Amendment. In the United States, the freedom of speech could not be thought of as absolute. This incident also established a precedent for future acts of government to suppress the freedom of speech under circumstances of civil unrest or perceived agitation by foreign agents.

C. *Civil War*

The crisis involving the Alien and Sedition Acts is just the first example of the U.S. government responding to a foreign crisis by expanding internal restrictions on the freedom of speech at home, thereby "expanding an external threat into an internal threat."[106] There are repeated examples throughout American legal history of the federal government acting to restrain the freedom of speech to safeguard the

100. *Id.*
101. *Id.*
102. *Id.* at 8.
103. Smith, *supra* note 95, at 5.
104. *Id.* at 8.
105. *Id.* at 7.
106. Craig R. Smith, *The Patriot Act in Historic Context*, CTR. FOR FIRST AMEND. STUD. 1, *available at* http://www.firstamendmentstudies.org/wp/pdf/patriot_act.pdf (last visited Dec. 20, 2015).

United States from actual, or perceived foreign threats. During the 1860s, the Lincoln administration, concerned with the potential for subversive activities of confederate sympathizers, suspended the right of *habeas corpus* and jailed newspaper editors and other secessionists who opposed Union policies.[107] Habeas corpus, Latin for "you [should] have the body," is the right imbedded in Common Law and the U.S. Constitution allowing a court to release a prisoner who is being held unjustly by the government.[108] In 1861, John Merryman, a secessionist from Maryland was taken into military custody and immediately appealed to the Supreme Court to be released under a writ of habeas corpus.[109] In the ruling of *ex parte Merryman* the Supreme Court rejected Lincoln's arguments that he was not subject to the jurisdiction of the Court, and issued the writ.[110] Lincoln, however continued to defy the order and insist on the supremacy of the President's ability to suspend the writ. In 1964, southern sympathizer Lambdin Milligan was arrested in Indianapolis and brought before a military tribunal on charges of treason and subversion.[111] Lincoln's attorneys argued that during a time of war the President's "powers must be without limit, because if defending, the means of offense may be nearly illimitable."[112] Only after the war, and Lincoln's untimely death, did the Court rule that Lincoln had overstepped the proper boundaries of presidential authority, and established that a prisoner's right to challenge detention could only be suspended for a limited period of time and only under exigent circumstances.[113] In writing for the majority, Justice David Davis stated, "Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real."[114] According to the Court, no longer should an external threat to U.S. security be used as a pretext for suspension of individual liberties.

D. *Red Scare*

Despite the Supreme Court's rebuke in *Ex Parte Milligan*,

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107. *Id.*

108. *Ex parte* Milligan, 71 U.S. 2, 3 (1866).

109. *Ex parte* Merryman, 17 F. Cas. 144, 147 (C.C.D. Md. 1861).

110. *Id.* at 152.

111. *Ex parte* Milligan, 71 U.S. at 6.

112. *Id.* at 18 (quoting arguments of U.S. Supreme Court briefs by Attorney General Stanberry and Benjamin Butler).

113. Alex McBride, *Ex Parte Milligan (1866)*, PBS (2006), *available at* www.pbs.org/wnet/supremecourt/antebellum/landmark_exparte.html (last visited Dec. 20, 2015).

114. *Ex parte* Milligan, 71 U.S. at 127.

subsequent presidential administrations would continue to use real or perceived foreign threats to curtail civil liberties. Concerned with internal opposition to the U.S. entry into World War I, President Woodrow Wilson urged Congress to pass a series of laws, the Espionage Act, the Trading with the Enemy Act and, finally, the Sedition Act to curtail domestic opposition to government policies.[115] The Espionage Act, allowed the Postmaster to suppress any journals, letters or other publications which he believe to be a threat to national security.[116] The Trading with the Enemy Act created a commission to publish information, and to correct supposed disinformation, regarding the war efforts. Lastly, the Sedition Act, amending the Espionage Act, in perhaps the most direct assault on the freedom of speech, made it a federal crime to "use disloyal, profane, scurrilous, or abusive language" about the government, the Constitution, the flag or the military.[117] The laws were intended to target the opponents of the war and "[m]ore than 2,000 people were prosecuted under the original and amended Espionage Act, including the Socialist spokesman and draft opponent, Eugene V. Debs, who was sentenced to 10 years in prison."[118]

Unlike the Supreme Court during the Civil War, the Court upheld the constitutionality of the Espionage Act and its progeny. In *Schenck v. U.S.*, the court unanimously upheld the conviction of an activist who distributed leaflets opposing the draft and urged peaceful opposition to the law and as a result was charged with "a conspiracy to violate the Espionage Act . . . attempting to cause insubordination in the military . . . and to obstruct . . . recruit[ment]."[119] In upholding the conviction, Oliver Wendell Holmes applied a fact based analysis, stating that "[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[120] Applying this rule to Mr. Schenck's situation, Holmes concluded that during wartime, as opposed to peacetime, the government had far more latitude in restricting the right to free expression.[121] The

115. Smith, *supra* note 106, at 3.

116. *Id.*

117. The Espionage Act of 1917, DIGITAL HISTORY (2014), *available at* http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=3&psid=3904 (last visited Dec. 20, 2015).

118. The Sedition Act of 1918, DIGITAL HISTORY (2014), available at http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=3&psid=3903 (last visited Dec. 20, 2015).

119. Schenck v. United States, 249 U.S. 47, 48-49, 53 (1919).

120. *Id.* at 52.

121. *Id.*

Court later relied on its own precedent in *Schenck* in upholding the conviction of Eugene Debs.[122] In establishing this rule of "clear and present danger," Holmes echoed Mill's "harm" principle and further established a legal precedent for subsequent government limitation of free expression in times of war or national conflict.

E. *The Court's Changing Perspective on Incitement*

In the wake of the *Schenck* and *Debs* ruling, and with the nation still caught up in the "Red Scare," the Supreme Court in subsequent rulings in the 1920s would continue to give wide latitude to the government in its efforts to regulate inflammatory speech. In the landmark case *Whitney v. California*,[123] the Court ruled on the constitutionality of California's Criminal Syndicalism Act, which expressly prohibited "advocating, teaching or aiding . . . terrorism as a means of accomplishing a change in industrial ownership . . . or effecting any political change."[124] The defendant, Charlotte Anita Whitney, a 52-year old Wellesley graduate from a prominent California family and a member of the Communist Labor Party of California was arrested under the Act following a speech given by Ms. Whitney on November 28, 1919, to the Women's Civic Center of Oakland in which she spoke out against recent lynchings and race riots.[125] Following protests from the American Legion and other patriotic organizations, a local police inspector arrested Ms. Whitney on the grounds that her participation several weeks prior to the speech in the formation of the Communist Labor Party California violated the Act. [126] Whitney was later tried and convicted of violating the Act and sentenced to 1 to 14 years in prison.[127] Whitney challenged her conviction, arguing that the statute violated her constitutional right to free speech and the protection of the due process clauses of the Fifth and Fourteenth amendments to the Constitution and her case eventually reached the Supreme Court.[128] The Court upheld the conviction and, relying on the rationale of *Schenck*, held that "a State . . . may punish those who abuse this freedom by utterances . . . tending to . . . endanger the foundations of organized government and threaten its overthrow by unlawful means"

122. Debs v. United States, 249 U.S. 211, 215, 217 (1919).

123. *See generally* Whitney v. California, 274 U.S. 357 (1927).

124. *Id.* at 360.

125. Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 656 (1988).

126. *Id.* at 657.

127. *Id.* at 659.

128. *Whitney*, 274 U.S. at 362.

and was not open to question.[129]

In his famous concurring opinion, Justice Louis Brandeis, joined by Holmes, argued against the majority's interpretation of the First Amendment. Brandeis argued that the government could only prohibit speech which advocated violent revolution "only if under the particular circumstances of the case the speech in question creates a clear and imminent danger of serious injury to the state."[130] Brandeis was drawing a new line in the government's power to regulate speech. Mere "fear of serious injury cannot alone justify suppression of free speech . . . there must be reasonable ground to believe that danger apprehended is imminent . . . that the evil to be prevented is a serious one."[131] Ironically, though the Court used the *Schenck* case as a philosophical basis for its decision, Holmes, the author of the *Schenck* opinion, joined with Brandeis in his concurrence.

The ruling in *Whitney* would stand for over 40 years until the 1969 decision of the Supreme Court in *Brandenburg v. Ohio*.[132] In June of 1964, Clarence Brandenburg held a Ku Klux Klan rally on a farm in Hamilton County, Ohio.[133] The event was televised locally and nationally and at the event, twelve hooded figures burned a cross and shouted Klan slogans advocating racial hatred and uttering other violent threats.[134] Mr. Brandenburg then took the podium and threatened: "We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken."[135] The State of Ohio soon indicted Brandenburg under its own Criminal Syndicalism Act and charged him with advocating the violence in order to accomplish "political reform."[136] Brandenburg was convicted, fined $1,000 and sentenced to one to ten years in prison. Brandenburg appealed the conviction, arguing that the Act violated his First Amendment right to free speech and Fourteenth Amendment right to due process.

The Court held that the Act violated Brandenburg's right to free

129. *Id.* at 371 (quoting the majority opinion).

130. Blasi, *supra* note 125, at 666.

131. *Whitney*, 274 U.S. at 376.

132. *See generally* Brandenburg v. Ohio, 395 U.S. 444 (1969).

133. Susan Gilles, *30th Annual Sullivan Lecture: Brandenburg v. State of Ohio: An "Accidental," "Too Easy," and "Incomplete" Landmark Case*, 38 CAP. U. L. REV. 517, 517 (2010).

134. *Id.*

135. *Brandenburg*, 395 U.S. at 446.

136. *See* Gilles, *supra* note 133, at 518.

speech,[137] and in doing so expressly overruled its decision in *Whitney*. The Court employed a new, two-pronged test to evaluate speech acts. The Court explained that speech can be prohibited by the government if it is "directed at inciting or producing imminent lawless action and is likely to incite or produce such action."[138] In applying this reasoning, the Court explained that Ohio's Criminal Syndicalism Act "purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action."[139] The court considered the statute to be overly broad" since by the statute's terms "mere advocacy [is] not distinguished from incitement to imminent lawless action."[140]

In one of the most recent Supreme Court cases construing government restrictions on inflammatory speech, the Supreme Court struck down a Virginia Statute which made it a crime "for any person . . . with the intent of intimidating any person or group . . . to burn . . . a cross on the property of another, a highway or other public place," and which specified that "[a]ny such burning . . . shall be prima facie evidence of an intent to intimidate a person or group."[141] In a plurality opinion, the Supreme Court of Virginia held that while a state could ban cross burning carried out with an intent to intimidate, the provision of the statute which made cross burning in and of itself "prima facie" evidence of intent to intimidate was unconstitutionally overbroad.[142] In doing so, the Court was applying the *Brandenburg* test and finding that cross burning in and of itself was not sufficient to tilt the balance in favor of a conviction. The Court was also implicitly relying on Brandeis' reasoning in *Whitney*, failing to see cross burning in the absence of proven intent sufficient to prohibit expressions of opinion, regardless of how distasteful it may be.

F. *Post 9/11*

In the aftermath of the September 11, 2011 attacks on the World Trade Center and the Pentagon, the U.S. government, as it had done during the Alien and Sedition Act Crisis, the Civil War and during the Red Scare of World War I, took steps to limit civil liberties in reaction to an external threat to the nation's security.[143] President Bush declared a

137. *Brandenburg*, 395 U.S. at 449.
138. *Id.* at 447
139. *Id. at* 395.
140. *Id* at *Syllabus.*
141. Virginia v. Black, 538 U.S. 343, 348 (2003).
142. *Id.* at 351.
143. *See* Smith, *supra* note 106, *passim.*

"war on terror."[144] This war was to be fought both abroad, and at home. Similar to Lincoln, President Bush decided to use military tribunals to try enemy combatants.[145] The most significant legislation affecting civil liberties was the Patriot Act which significantly tightened immigration, surveillance, money laundering and security standards.[146] Among the key declarations of the Patriot Act, was a provision which made it a federal crime (subject to punishment by fine and up to 15 years in prison) to "knowingly provide material support" to any foreign organization designated by the Secretary of State as a terrorist organization.[147] The goal of the law was to stop terrorism before it happened by draining its sources of funding.[148] However, much like the Alien and Sedition Acts, the law was implemented in a wide ranging fashion. Many were prosecuted for violating the law by providing weapons directly to known terrorist groups.[149] However, other "prosecutions were based on sending money to groups that engaged in both humanitarian work and violence."[150] Among the groups charged with such activities were organizations tied to independence movements for Kurds in Turkey and Tamils in Sri Lanka respectively.[151] The defendants, arguing that they were engaged in purely humanitarian activities, challenged the constitutionality of the law and claimed that the provisions of the statute were unacceptably vague and violated their First Amendment rights to freedom of speech and association.[152] The case eventually reached the Supreme Court. In a 6-3 decision, the Court upheld the statute, deciding that the law was not impermissibly vague and determining that the phrase "material support" was not an inappropriate impingement on the organizations' First Amendment rights. The Court reasoned that "material support" most often did not involve speech and, when it does, the statute is carefully drawn to affect a narrow range of activities.[153] Moreover, the Court articulated that the government's interest in combatting terrorism

144. *See* Richard W. Stevenson, *President Makes It Clear: Phrase is 'War on Terror,'* N.Y. TIMES (Aug. 4, 2005), *available at* http://www.nytimes.com/2005/08/04/politics/04bush.html (last visited Dec. 20, 2015).

145. Smith, *supra* note 106, at 4, 8.

146. *See id.* at 8 & n.34.

147. 18 U.S.C. § 2339B(a)(1) (2012).

148. *See* Adam Liptak, *Civil Liberties Today*, N.Y. TIMES (Sept. 7, 2011), *available at* http://www.nytimes.com/2011/09/07/us/sept-11-reckoning/civil.html?pagewanted=all (last visited Dec. 20 2015).

149. *See id.*

150. *Id.*

151. Holder v. Humanitarian Law Project, 561 U.S. 1, 9 (2010).

152. *See id.* at 10-11.

153. *See id.* at 25-26.

outweighed any resulting and limited impact on First Amendment rights caused by the statute.[154] In the Court's view, the deference to Congress and the President under the circumstances was warranted and in passing the law both branches had determined that even providing seemingly "benign" support to a terrorist organization strengthened that organization.[155]

VI. FREE SPEECH UNDER INTERNATIONAL LAW

A. *Sources*

The right to freedom of expression also "finds protection in all major human rights systems."[156] The right to freedom of speech is specifically guaranteed by the Universal Declaration of Human Rights ("UDHR"), adopted by the UN General Assembly in 1948 and by the International Covenant on Civil and Political Rights ("ICCPR"), adopted by the UN General Assembly in 1966. Article 19 of the UNDR provides:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.[157]

Similarly, Article 19, Section 2, of the ICCPR provides:

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.[158]

The right to freedom of expression is also protected by all of the three regional human rights treaties, the European Convention on Human Rights ("ECHR"), the American Convention on Human Rights ("ACHR") and the African Charter on Human and Peoples'

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154. *See id.* at 36.

155. *See* Adam Liptak, *Court Affirms Ban on Aiding Groups Tied to Terror*, N.Y. TIMES (June 21, 2010), *available at* http://www.nytimes.com/2010/06/22/us/politics/22scotus.html?pagewanted=all (last visited Dec. 20, 2015).

156. Toby Mendel, *Hate Speech Rules Under International Law*, CTR. FOR L. & DEMOCRACY 1 (Feb. 2010), *available at* http://www.law-democracy.org/wp-content/uploads/2010/07/10.02.hate-speech.Macedonia-book.pdf (last visited Dec. 20, 2015).

157. G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 19 (Dec. 10, 1948).

158. International Covenant on Civil and Political Rights art. 19, ¶¶ 1-2, Dec. 16, 1966, 6 I.L.M. 368, 999 U.N.T.S. 171 [hereinafter ICCPR].

Rights ("ACHPR").[159]

B. *Limitations*

As with rights under national constitutions, the freedom of expression under international law "is not an absolute right, and it may be limited to protect overriding public and private interests , including equality and public order."[160] The ICCPR includes specific provisions curtailing the right under certain circumstances, including cases where curtailment of the right is justified by national security priorities. Article 19, paragraph 3 of the ICCPR provides:

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.[161]

It is interesting to note that the UDHR does not include a specific limitation on the right to freedom of expression, whether generally, or in a national security context (this perhaps reflects the fact that the UDHR was adopted in the aftermath of World War II, when the wounds opened by the excesses of fascism were still fresh).[162]

So even though we find that "[f]reedom of speech is a fundamental right recognized in international law and entrenched in most national constitutions,"[163] rights to free speech are not absolute anywhere, and there is a line between simple political speech and incitement to commit a crime. The United States for one is ever mindful of protecting free speech, for example the law respecting inciting a riot, which is a crime, states:

> As used in this chapter, the term "to incite a riot", or "to organize, promote, encourage, participate in, or carry on a riot", includes, but is not limited to, urging or instigating other persons to riot, but shall not be deemed to mean the mere oral or written (1) advocacy of ideas or (2) expression of belief, not involving advocacy of any act or acts of violence or assertion of the rightness of, or the right to commit, any such

159. Mendel, *supra* note 156, at 3.

160. *Id.* at 1.

161. ICCPR, *supra* note 158, art. 19, ¶ 3.

162. Mendel, *supra* note 156, at 1-2.

163. Navanethem Pillay, *Freedom of Speech and Incitement to Criminal Activity: A Delicate Balance*, 14 NEW ENG. J. INT'L & COMP. L. 203, 203 (2008).

act or acts.[164]

But inciting a riot is unlawful and incitement, or solicitation, as it is often termed under U.S. law, is an inchoate crime, meaning that the offense is the solicitation itself, whether or not the solicited crime is actually carried out. Accordingly, U.S. federal law states that:

> Whoever, with intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, solicits, commands, induces, or otherwise endeavors to persuade such other person to engage in such conduct, shall be imprisoned not more than one-half the maximum term of imprisonment or (notwithstanding section 3571) fined not more than one-half of the maximum fine prescribed for the punishment of the crime solicited, or both; or if the crime solicited is punishable by life imprisonment or death, shall be imprisoned for not more than twenty years.[165]

U.S. state laws are similar. For example the Florida law states:

> A person who solicits another to commit an offense prohibited by law and in the course of such solicitation commands, encourages, hires, or requests another person to engage in specific conduct which would constitute such offense or an attempt to commit such offense commits the offense of criminal solicitation . . .[166]

Many states have embedded in their national laws prohibitions against solicitation or incitement to crimes, particularly in the realm of "hate speech."[167]

International law appears to have been a little muddled on the notion of incitement or solicitation,[168] but the statute of the International Criminal Court seems to have clarified the matter, accepting the proposition that incitement to commit a crime or solicitation to commit a crime are punishable offenses under the Court's statute:

> Article 25
>
> Individual criminal responsibility
>
> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction

164. 18 U.S.C. § 2102(b) (2006).

165. 18 U.S.C. § 373(a) (2006).

166. FLA. STAT. § 777.04(2) (2015).

167. *See* Pillay, *supra* note 163, at 203.

168. *See generally* Wibke Kristin Timmermann, *Incitement in International Criminal Law*, 88 INT'L REV. RED CROSS 823 (2006).

of the Court if that person:

. . . .

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime.[169]

As can be seen, the notion of outlawing solicitation to commit criminal acts is widely known and punished worldwide. Further, though many states respect the principle of freedom of expression, and provide safeguards therefore, there are widely accepted exceptions to such freedom. Although there is currently no universally accepted definition of international terrorism, states around the world and their citizens speak of it, and many states have statutes criminalizing and defining terrorism.[170]

The multilateral convention that we propose would be accomplished under the auspices of the United Nations treaty convention making procedure. It would not deal with suspects who have actually committed terrorist acts—though such a convention is probably long overdue—since defining terrorism is too difficult a task to accomplish any time soon. Such a convention would require the arrest and extradition of individuals suspected of training, motivating, inciting or soliciting others to engage in international terrorist activities that have taken place or were or are planned to take place in the requesting state. The convention would not attempt to define a "terrorist activity," rather it would work much the same way that typical bilateral extradition treaties work today, working within the frameworks of the national laws of the requesting and the requested state. The normal bilateral extradition treaty permits a requesting state to request extradition of a person who is accused of

169. Rome Statute of the International Criminal Court, *supra* note 1, art. 25(3).

170. *See* Perry, *supra* note 27, at 63-65.

committing a crime as defined in the laws of and committed within or under the jurisdiction of the requesting state. Most extradition treaties allow the requested state to refuse extradition if the alleged crime is a political offense, if the crime is not a crime in the requested state or if the crime carries the death penalty in the requested state (unless the requested state receives assurances that the death penalty will not be imposed). There are therefore safeguards in those cases where the definition of the crime might be very broad in the requesting state, and not so broad, rather more specific, in the requested state. Further the laws of many countries provide that after the judiciary has approved extradition the final approval is a political one. In the case of the United States, the Secretary of State must approve extraditions.[171] Thus under U.S. law, the country's current foreign relations are taken into account.

Multilateral conventions that provide for extradition and for universal jurisdiction already exist.[172] Those conventions set forth the obligation to extradite, and also certain safeguards. For example, the U.N. Convention for the Suppression of the Financing of Terrorism of 1999 provides:

> Article 9
>
> 1. Upon receiving information that a person who has committed or who is alleged to have committed an offence set forth in article 2 may be present in its territory, the State Party concerned shall take such measures as may be necessary under its domestic law to investigate the facts contained in the information.
>
> 2. Upon being satisfied that the circumstances so warrant, the State Party in whose territory the offender or alleged offender is present shall take the appropriate measures under its domestic law so as to ensure that person's presence for the purpose of prosecution or extradition.
>
> . . . .
>
> Article 10
>
> 1. The State Party in the territory of which the alleged offender is present shall, in cases to which article 7 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of

171. GARCIA & DOYLE, *supra* note 75, at 18.

172. See for example, among others, the International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, S. Treaty Doc. No. 106-6, 2149 U.N.T.S. 256, and the International Convention for the Suppression of the Financing of Terrorism, *supra* note 68.

any other offence of a grave nature under the law of that State.

. . . .

Article 11

1. The offences set forth in article 2 shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the States Parties before the entry into force of this Convention. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be subsequently concluded between them.

2. When a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, the requested State Party may, at its option, consider this Convention as a legal basis for extradition in respect of the offences set forth in article 2. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences set forth in article 2 as extraditable offences between themselves, subject to the conditions provided by the law of the requested State.[173]

In this way, if there is a wide disparity between the laws defining international terrorism of the requested and requesting state, the requested state can refuse on the grounds that the offense in the requesting state for which extradition is requested is not an offense in the requested state, and the suspect will not be rendered to the requesting state. As already mentioned, this is already widely practiced in the international practice of extradition.

CONCLUSION

When a person persuades, encourages, instigates, pressures, trains or solicits another person or group so as to cause that person or group to commit an act of international terrorism, unless there is a treaty of extradition between the state where the terrorist offense has taken place or has been instigated etc., to take place, and the state where the person suspected of doing such instigation etc., is found, very often the suspect goes free. There is no legal reason or motivation for the requested state to render the suspect to the requesting state. When such a situation occurs, some are simply frustrated by their inability to prosecute the felon; other states are encouraged to take the matter into their own hands, despite the fact that extrajudicial or "extraordinary renditions" are

173. International Convention for the Suppression of the Financing of Terrorism, *supra* note 68.

unlawful. This is problematic for international law. In the former case, a guilty party can go free. In the latter case, the law is not respected. In both cases, the rule of law breaks down.

A possible solution might be a multilateral convention providing for the rendition of suspects who have engaged in the activity of persuading, encouraging, instigating, pressuring training or soliciting terrorist acts, whether or not the acts actually occur and are successful. If such activity takes place within a state, that state would use its own definition of an act of international terrorism, and request another state party in which the suspect is found, to extradite that person. The requested state would go through the safeguards that are normal in such treaties in deciding whether or not to comply with the request. If the world were to agree on such a convention, it would be one step closer to closing the loopholes that exist in international law as it pertains to terrorist offenses. If someone somewhere, living in some state other than the United States, did "turn" the Tsarnaev brothers to conduct the bombings at the Boston Marathon, or taught them how to make bombs, perhaps he or she would lawfully be brought to justice.

THE IMPORT OF HOLLYWOOD FILMS IN CHINA: CENSORSHIP AND QUOTAS

Jessica Grimm

CONTENT

I. INTRODUCTION

On May 3, 2013, Marvel Studio's *Iron Man 3* opened in United States ("U.S.") theatres, pulling in a domestic total gross of $409,013,994.[1] In foreign markets, the movie totaled $806,426,000, bringing the film's total global gross to $1,215,439,994.[2] Of this global total, profits from China accounted for $121,200,000, a significant portion of the film's foreign revenue.[3] *Iron Man 3* was neither the first Hollywood film nor the last Hollywood film to be released in China, and it was not even the highest grossing film there.[4] What is interesting about *Iron Man 3*, however, is it is one of the most well-known examples of Hollywood adapting, or in this case adding, to the content of a film strictly to make it eligible for release in China.

There are, in fact, four extra minutes of footage in the version released in China, footage that was not present in the domestic and global release.[5] These four minutes include: (1) product placement for Gu Li Duo, a milk drink from an Inner Mongolia-based dairy company; (2) Chinese actress Fan Bingbing playing a nameless assistant to Dr. Wu, the doctor who uses Chinese medicine to help Iron Man; (3) more product placement appearances by two Chinese electronics makers, TCL and Zoomlion; and (4) a shot of cheering, happy Chinese schoolchildren on TV with Iron Man.[6] While it may seem strange that this extra footage,

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1. *Iron Man 3*, BOX OFFICE MOJO, *available at* www.boxofficemojo.com/movies/?id=ironman3.htm (last visited Nov. 6, 2015).

2. *Id.*

3. *China All Time Openings*, BOX OFFICE MOJO, *available at* http://www.boxofficemojo.com/intl/china/opening/ (last visited Nov. 6, 2015).

4. At the end of 2014, that distinction belonged to *Transformers: Age of Extinction*, which overtook James Cameron's Avatar and grossed $222,740,000 in only ten days. Ben Child, *Transformers: Age of Extinction Becomes Highest-Grossing Film of All Time in China*, GUARDIAN (July 8, 2014, 7:17 AM), *available at* http://www.theguardian.com/film/2014/jul/08/transformers-age-extinction-highest-grossing-china (last visited Nov. 6, 2015). The film finally topped out at a total gross of $320,000,000. *China All Time Openings*, *supra* note 3.

5. Kirsten Acuna, *The Biggest Differences In China's Version of 'Iron Man 3'*, BUS. INSIDER (May 2, 2013, 10:58 AM), *available at* www.businessinsider.com/chinas-version-of-iron-man-3-2013-5 (last visited Nov. 6, 2015).

6. *Id.*; Joyce Lau, *In China, Iron Man's Muscle is Fed by Inner Mongolian Milk*, N.Y. TIMES (May 2, 2013, 8:44 AM), *available at* rendezvous.blogs.nytimes.com/2013/05/02/in-china-iron-mans-muscle-is-fed-by-inner-mongolian-milk/?_r=0 (last visited Nov. 6, 2015).

which did not seem to appeal to Chinese audiences much, was added, there was a rational incentive at its heart.[7] In the end, it comes down to the profit motive. Hollywood receives a great profit return by tapping into the Chinese market. However, this market presents a unique set of challenges that need to be understood and addressed for Hollywood to fully access it.

The two major issues that will be addressed in this note, in terms of Hollywood's access to the Chinese market, are censorship and quotas. Censorship, here, examines each film's content to determine what must be modified or cut to make the film eligible for screening in China. Quotas, on the other hand, place an absolute limit on film imports, thus making Hollywood's access to the Chinese market highly competitive. Hollywood's access to the Chinese market provides a vast source of revenue for its studios—a benefit to all involved in the industry—and also opens up a new, soft power avenue in U.S.-China relations. Chinese censorship laws have a definite impact on Hollywood studios and a better understanding of them is necessary so the industry can continue to efficiently access the Chinese market. The potential revenue to be gained by accessing the Chinese market is substantial and it is easy to see why Hollywood would want to tap China's potential, especially in light of shrinking domestic movie theatre attendance.[8] In fact, the 2014 summer alone witnessed a 14.6% drop in box office revenue in the U.S. and Canada, making it one of the weakest performances in years.[9] However, navigating China's market is tricky at best and Hollywood must surmount several hurdles in order to ensure a foreign film is distributed in China. The first hurdle is the import quota China places on the importation of foreign films. The second is the State's censorship boards. By improving their understanding of both hurdles, more Hollywood studios will have better access to the Chinese market and gain practical solutions and adaptations to the problems within the current system.

This note critically examines various Chinese laws and practices that

7. *See* Clarence Tsui, *'Iron Man 3' China-Only Scenes Draw Mixed Response*, HOLLYWOOD REP. (May 1, 2013, 1:25 PM), *available at* http://www.hollywoodreporter.com/news/iron-man-3-china-scenes-450184 (last visited Nov. 6, 2015).

8. *See* Erich Schwartzel & Ben Fritz, *Fewer American Go to the Movies*, WALL ST. J. (Mar. 25, 2014, 7:43 PM), *available at* http://online.wsj.com/articles/SB10001424052702303949704579461813982237426 (last visited Nov. 6, 2015).

9. Erich Schwartzel, *Movie Chains Reel After a Summer of Few Hits*, WALL ST. J. (Oct. 28, 2014, 7:58 PM), *available at* http://www.wsj.com/articles/movie-chains-reel-after-a-summer-of-few-hits-1414540708 (last visited Nov. 6, 2015).

impact Hollywood studios' access to the Chinese market. Further, this note examines the import and censorship system as it stands now. Part II illustrates the various hurdles and issues Hollywood studios must surmount when screening their films in China, including vague censorship regulations and strict import quotas. Part III uses various case studies to illustrate the vicissitudes of the Chinese censorship regime and predicts what sort of content will likely be deemed objectionable content by China's censorship boards. Part IV expands on the information discussed in the preceding two sections to outline the biggest problems faced by Hollywood studios in China today. Part V examines a recent World Trade Organization ("WTO") ruling against China's import restrictions on cultural products and asserts that pushing for China's compliance with the ruling would actually have a detrimental impact on Hollywood films in China. Finally, Part VI offers various solutions and practices that Hollywood studios should engage in to mitigate problems they currently face in the Chinese market.

A. *What Will Be Examined*

This note will only examine films produced by Hollywood studios. Here, Hollywood studios will be defined as the full-service movie studios geographically located in Hollywood, California. Examples of these studios include Warner Brothers., Paramount, Sony Pictures, Universal, Disney, The Weinstein Company, and 20th Century Fox.[10] However, this list may eventually expand to include China's Dalian Wanda Group Co., which is currently in talks with Lions Gate Entertainment Group, the studio behind *The Hunger Games* movie franchise, about buying Lions Gates shares.[11] Dalian Wanda is also currently working towards building a Chinese version of Hollywood in Qingdao, a coastal city in eastern China, and even brought some major Hollywood stars in for the project's announcement.[12] However, while this is certainly a project Hollywood studios should keep abreast of, the Chinese Hollywood in Qingdao is still under development and its full impact on Hollywood films remains to be seen.[13]

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10. Sammy Said, *The 10 Biggest Hollywood Studios*, RICHEST (Mar. 20, 2013), *available at* http://www.therichest.com/rich-list/the-biggest/the-10-biggest-hollywood-studios/ (last visited Nov. 6, 2015).

11. Ben Fritz & Laurie Burkitt, *Wanda Weighs Deal for Stake in Lions Gate*, WALL ST. J. (Dec. 1, 2014, 2:05 PM), *available at* http://www.wsj.com/articles/dalian-wanda-group-held-talks-with-lions-gate-1417449561 (last visited Nov. 6, 2015).

12. *Id.*

13. *See* Laurie Burkitt, *Dalian Wanda Plans Fund to Lure Movie Business to China*,

B. *State of the Chinese Film Market Today*

Currently, China is the second largest market for film in the world and, arguably, is poised to take the number one spot from the U.S.[14] In 2013, China was ranked as the number one global box office, having grossed $3.6 billion, according to the Motion Picture Association of America, Inc.[15] China also became the first international market to exceed $3 billion in box office revenue.[16] Once again, given the declining demand for film in movie theatres domestically, China's box office statistics are very appealing for Hollywood studios and represent a lucrative market and source of revenue.

However, while many Hollywood films have experienced success in Chinese theatres, this success is not necessarily guaranteed to continue. One of the things Hollywood studios needs to be aware of is not just their own popularity amongst Chinese viewers, but the growing domestic film industry as well. For example, domestic Chinese films dominated the Chinese box office in 2013, while Hollywood films only constituted only three of the ten highest grossing movies.[17] Last year, domestic films accounted for 71% of the annual box office revenue.[18] One of the possible reasons for the recent success in domestic Chinese films lies in the increasing number of movie theatres built across China, combined with the increasing quality, and content, of Chinese films.[19]

The most popular Chinese-made films are simple, personal tales of modern Chinese life, which lack much of the high-end special effects of many Hollywood films and resonate more with Chinese viewers.[20] This shift in content preference is another element that Hollywood studios

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WALL ST. J. (Oct. 7, 2014, 11:51 PM), *available at* www.wsj.com/articles/dalian-wanda-plans-fund-to-lure-movie-business-to-china-1412740295 (last visited Nov. 6, 2015).

14. *The Red Carpet*, ECONOMIST (Dec. 21, 2013), *available at* www.economist.com/news/christmas-specials/21591741-red-carpet (last visited Nov. 6, 2015).

15. *Theatrical Market Statistics 2013*, MOTION PICTURE ASS'N AM., INC. 5, *available at* http://www.mpaa.org/wp-content/uploads/2014/03/MPAA-Theatrical-Market-Statistics-2013_032514-v2.pdf (last visited N, 2015).

16. *Id.*

17 Katie Hunt, *Hollywood Outshone as China Box Office Booms in 2013*, CNN (Jan. 9, 2014, 1:23 AM), *available at* http://www.cnn.com/2014/01/09/world/asia/china-box-office-2013/ (last visited Nov. 6, 2015).

18. *Id.*

19. *Id.*

20. Michelle FlorCruz, *China's Moviegoers Trading Up From Hollywood Explosions to Homegrown Humor*, INT'L BUS. TIMES (May 9, 2014, 5:40 PM), *available at* http://www.ibtimes.com/chinas-moviegoers-trading-hollywood-explosions-homegrown-humor-1582482 (last visited Nov. 6, 2015).

must consider as they pursue greater access to the Chinese market. The homegrown Chinese films do not only have the benefit of resonating with their viewers' lives, but also more accurately reflect their experiences in a way that Hollywood films do not. As the quality of Chinese films increase, they will provide more competition for Hollywood films and most of these films have the benefit of passing the state censors.[21]

Going to the movies has become a large part of China's culture. It has particularly become part of the courtship ritual and a common activity for couples out on dates.[22] It has also become more common given that an increasing number of Chinese citizens are experiencing an increase in spending power and disposable income.[23] As China's economy continues to grow and more luxury items, such as tickets to large movie theatres, become more readily available, the demand for films will more than likely increase, as will the viewers' standards and expectations for the quality and content of these films. Hollywood studios need to keep these factors in mind as they continue to direct their efforts towards the Chinese market.

China has shown its potential as a great source of revenue, but the rules that apply in the U.S. do not apply in China. For example, Hollywood studios do not face content censorship from the U.S. government—rather, it applies its own voluntary film rating system to indicate each film's content and appropriateness for younger viewers—and, in fact, the U.S. film industry has a history of fighting against government censorship.[24] Moreover, Hollywood studios can expect a certain level of protection for their films under U.S. copyright and intellectual property laws, which are designed to encourage creative growth and development within the industry rather than to serve as an instrument of control.[25] This level of personal control over content and the protections provided by U.S. law are not the same as what may be available in China, and these differences need to be acknowledged and understood by the Hollywood studios that wish to access the Chinese market.

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21. *See infra* Part II.

22. *The Red Carpet*, *supra* note 14.

23. *Id.*

24. *See Preserving Free Speech*, MOTION PICTURE ASS'N AM., *available at* http://www.mpaa.org/preserving-free-speech/ (last visited Nov. 6, 2015).

25. *See Why Copyright Matters*, MOTION PICTURE ASS'N AM., *available at* http://www.mpaa.org/why-copyright-matters/ (last visited Nov. 6, 2015).

II. BACKGROUND & THE SYSTEM AS IT STANDS NOW

This section will examine both China's censorship regime and the quotas it imposes on foreign films. Censorship will be addressed first, as it has a larger impact on Hollywood films because the censorship regime seeks to change the actual content of a film, whereas the import quotas merely limit the number of films that can be brought into China per year.

A. *Who Censors?*

The Chinese government has a history of sensitivity to the influence and impact that cultural products can have on the country's people, and film certainly falls into this category. Movies are considered a "cultural market," and in regards to foreign films, have been viewed as a product of "the political, economic, military, and cultural invasions of the West."[26] While the view towards foreign films is not quite so extreme in today's China, it is still an area which the government feels needs to be regulated, censored, and subjected to strict review.[27] However, the mechanisms through which this regulation, censorship, and review operate tend to be rather complex and opaque.

When China acceded to the WTO in December of 2001, it agreed that, within three years of this accession, all enterprises in China, including foreign individuals and enterprises, even those not invested or registered in China, would have the right to import and export all goods not reserved for trading by designated State Owned Entities ("SOE") throughout its customs territory.[28] While cultural or information products, a category which includes film, were not mentioned as one of the products reserved to SOEs, the importation and distribution of foreign films is nonetheless still barred to those entities not given state authorization.[29] The continued refusal to grant non-SOEs the right to import and distribute foreign films has recently caused tensions between the U.S. and China, where the U.S. brought a case against China to the WTO.[30]

Currently, the China Film Corporation is the country's largest film

26. SHUJEN WANG, FRAMING PIRACY: GLOBALIZATION AND FILM DISTRIBUTION IN GREATER CHINA 61 (2003).

27. *See id.*

28. Julia Ya Qin, *Pushing the Limits of Global Governance: Trading Rights, Censorship, and WTO Jurisprudence—A Commentary on the China-Publications Case*, 10 CHINESE J. INT'L L. 1, 5 (2011).

29. *See id.* at 5-6.

30. *See infra* Part V.

enterprise.[31] It is responsible for regulating film distribution throughout the country, including import and export operations.[32] Two bodies operate beneath it: the China Film Import and Export Corporation, which handles the import and export of films, and the China Film Distribution and Exhibition Bureau, which, along with its own various subsidiaries, own the majority of movie theatres in China.[33] The China Film Distribution and Exhibition Bureau and its subsidiaries also have the power to dictate the contractual terms of film distribution and exhibition, as well as the play dates, admission prices, and other aspects of film exhibition.[34] In March of 2003, another distributor was created, the Huaxia Film Distribution group which has the power to distribute foreign films, but unfortunately cannot import these films.[35] Below these are the provincial distributors and exhibitors, which are a part of the China Film Distribution and Exhibition Association, and these bodies deal directly with the foreign studios.[36] These bodies deal directly with film importation and distribution, but there is a level of regulatory bodies above them that is important to note.

Two major government organizations are above these SOEs, which govern the operations of media industries in China: the State Administration of Radio, Film, and Television ("SARFT") and the Ministry of Culture.[37] SARFT is responsible for regulating film for theatrical release and distribution, radio, and television, while the Ministry of Culture is responsible for monitoring the home video import and distribution business.[38] Its power to censor lies in its licensing power, both in granting licenses and revoking them, for foreign film distributors in China.[39] Subsequently, these are overseen by the Communist Party's Central Propaganda Department ("CPD"), the highest body in China responsible for media regulations and access to information.[40] The CDP

31. WANG, *supra* note 26, at 61-62.

32. *Id.* at 62.

33. *Id.*

34. *Id.*

35. Firedeep & Robert Cain, *How China's Movie Distribution Works, Part 1*, CHINAFILMBIZ (Nov. 7, 2012), *available at* http://chinafilmbiz.com/2012/11/07/how-chinas-movie-distribution-system-works-part-1/ (last visited Nov. 6, 2015).

36. *Id.*; WANG, *supra* note 26, at 62.

37. WANG, *supra* note 26, at 62; *see* Firedeep & Cain, *supra* note 35.

38. WANG, *supra* note 26, at 62.

39. *Agencies Responsible for Censorship in China*, CONG.-EXECUTIVE COMMISSION ON CHINA, *available at* http://www.cecc.gov/agencies-responsible-for-censorship-in-china#sarft (last visited Nov. 6, 2015).

40. Michael Ting, *The Role of the WTO in Limiting China's Censorship Policies*, 48

is the Communist Party's counterpart to SARFT and is responsible for monitoring content of publications and media to ensure that nothing inconsistent with the Party's political dogma gets disseminated.[41] This set up allows the government to keep tight control over its film imports, as well as ensuring that its censorship process is nontransparent to provide systems "with the maximum level of flexibility and efficacy desired."[42]

The State Secrets Bureau is yet another agency that controls much of the Chinese censorship regime, which uses China's state secrets laws to designate "practically all information relating to China's government, economy, diplomacy, technology, and military" as being a potential state secret.[43] The State Secrets Bureau also ensures that it is the Chinese citizens, and not the government, that are responsible for maintaining these state secrets.[44] In other words, each citizen is responsible, by law, for maintaining any information they have that could be construed as a state secret, especially if they are engaged in any sort of business or communication with foreigners.[45] Arguably, this agency and the state secrets laws have a chilling effect on freedom of speech in China[46] and contribute to the opaqueness of China's censorship regime.

However, as Hollywood seeks to get more of its films into the Chinese market, it is not just the Chinese government that censors. There have been several indications that Hollywood engages in self-censorship when it comes to films it wants to pitch to China.[47] For example, the 1990s saw several films about Tibet produced, films such as *Seven Years in Tibet* and Disney's *Kundun*, a biographical movie about the 14th Dalai Lama's youth, both of which raised Beijing's hackles.[48] The Beijing government's displeasure was so great that it is reported that Brad Pitt, one of the *Seven Years in Tibet's* stars, is banned from entering China due

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H.K. L. J. 285, 288 (2011).

41. *Agencies Responsible for Censorship in China*, *supra* note 39.

42. Ya Qin, *supra* note 28, at 2.

43. *Agencies Responsible for Censorship in China*, *supra* note 39.

44. *Id.*

45. *See International Agreements and Domestic Legislation Affecting Freedom of Expression*, CONG.-EXECUTIVE COMMISSION ON CHINA, *available at* http://www.cecc.gov/international-agreements-and-domestic-legislation-affecting-freedom-of-expression#secretsonnetworkslaw (last visited Nov. 6, 2015).

46. *See id.*

47. Erica Ho, *Can Hollywood Afford to Make Films China Doesn't Like?*, TIME (May 25, 2011), *available at* http://content.time.com/time/world/article/0,8599,2072194,00.html (last visited Sept. 7, 2015).

48. *Id.*

to his role in the film, and the government also threatened to cut off all future business with Disney.[49] Beijing's response to films it considers either critical of its regime or sympathetic to a cause China opposes, such as Tibetan independence or sympathy for the Dalai Lama, may now very well mean that such films will no longer be produced by Hollywood studios.[50] While self-censorship is a response to China's own censorship regime, it remains a factor needing serious attention, as the Chinese market is likely to continue requiring such practices.

B. *Laws and Regulations Governing and Impacting Chinese Censorship*

While there is no single, omnibus censorship law in China, there are several laws and regulations that play a large part in the Chinese censorship regime. The Chinese censorship regime is better viewed as a patchwork of various regulations and measures covering all forms of media, including newspapers and periodicals, the Internet and satellite television.[51] One of the most directly pertinent regulations to film censorship is a circular released by SARFT in 2008, reiterating its criteria for censoring radio, film and television.[52] The circular was released "to give priority to protecting the healthy development of minors and social welfare; further encourage creativity, tighten control, and purify screen entertainment; provide healthy and rich nourishment for the mind; and build a more harmonious and 'green' film environment."[53] The circular succinctly lists the provisions initially laid out in the *Regulations on the Administration of Films* and *Provisions on the Filing of Film Scripts* (Abstracts) and *Administration of Films* and calls on all departments and units to strictly enforce these regulations.[54] It divides content into two broad categories: prohibited content and content that must be cut or altered.[55] According to the circular, films may not contain content which:

(1) Violates the basic principles of the Constitution; (2) Threatens the unity, sovereignty and territorial integrity of the state; (3) Divulges state secrets, threatens national security, harms the reputation and interests of the state; (4) Instigates national hatred and discrimination,

49. *Id.*

50. *See id.*

51. *See* CONG.-EXECUTIVE COMMISSION ON CHINA, *supra* note 45.

52. *SARFT Reiterates Film Censor Criteria*, H.K. TRADE DEV. COUNCIL (Apr. 1, 2008), *available at* http://info.hktdc.com/alert/cba-e0804c-2.htm (last visited Nov. 6, 2015).

53. *Id.*

54. *Id.*

55. *Id.*

undermines the harmony among ethnic groups, or harms ethnic customs and practices; (5) Violates state policies on religion, and propagates cult religion or superstition; (6) Disrupts social order or social stability; (7) Propagates obscenity, gambling, violence, or abets criminal activities; (8) Insults or defames others, or infringes upon others' legitimate rights and interests; (9) Corrupts social morality, or defames the superiority of national culture; (10) Other contents prohibited by state laws and regulations.[56]

The circular also states that films containing certain content must be cut or altered, including content that is:

> (1) Distorting Chinese civilization and history; seriously departing from historical truth; distorting the history of other countries, disrespecting other civilizations and customs; disparaging the image of revolutionary leaders, heroes and important historical figures; tampering with Chinese or foreign classics and distorting the image of the important figures portrayed therein; (2) Disparaging the image of the people's army, armed police, public security organ or judiciary; (3) Showing obscene and vulgar content, exposing scenes of promiscuity, rape, prostitution, sexual acts, perversion, homosexuality, masturbation and private body parts including the male or female genitalia; containing dirty or vulgar dialogues, songs, background music and sound effects; (4) Showing contents of murder, violence, terror, ghosts and the supernatural; distorting value judgment between truth and lies, good and evil, beauty and ugliness, righteous and unrighteous; showing deliberate expressions of remorselessness in committing crimes; showing specific details of criminal behaviors; exposing special investigation methods; showing content which evokes excitement from murder, bloodiness, violence, drug abuse and gambling; showing scenes of mistreating prisoners, torturing criminals or suspects; containing excessive horror scenes, dialogues, background music and sound effects; (5) Propagating passive or negative outlook on life, world view and value system; deliberately exaggerating the ignorance of ethnic groups or the dark side of society; (6) Advertising religious extremism, stirring up ambivalence and conflicts between different religions or sects, and between believers and non-believers, causing disharmony in the community; (7) Advocating harm to the ecological environment, animal cruelty, killing or consuming nationally protected animals; (8) Showing excessive drinking, smoking and other bad habits; (9) opposing the spirit of the law.[57]

This ninth category is a catch-all category for any content not

56. *Id.*

57. *SARFT Reiterates Film Censor Criteria*, *supra* note 52.

explicitly captured by the preceding categories, to ensure that SARFT maintains flexibility in determining acceptability of content.

The Law of the People's Republic of China on Guarding State Secrets ("State Secrets Law") also has a great impact on China's censorship regime, albeit not an obvious one. Article 1 of the State Secrets Law sets out the purpose of the law, providing "[T]his Law is formulated for the purpose of guarding State secrets, safeguarding State security and national interests and ensuring the smooth progress of reform, of opening to the outside world, and of socialist construction."[58] The law then defines state secrets as "matters that have a vital bearing on State security and national interests and, as specified by legal procedure, are entrusted to a limited number of people for a given period of time."[59] While the law itself does not directly cite foreign films or the organizations that handle them, the breadth and potential implications of some of the law's provisions could certainly have an impact on the Chinese entities that import and distribute foreign films. The law does have a provision stating that "[i]n the publication and distribution of newspapers, journals, books, maps, material with illustrations and captions, and audio and video products and in the production and broadcast of radio and television programmes and films, the relevant security regulations will be complied with and no State secrets shall be divulged."[60]

For example, the State Secrets Law applies to "all State organs, armed forces, political parties, public organizations, enterprises, institutions and citizens," imposing the obligation to guard state secrets on all of these groups.[61] Given the broad scope this obligation applies to, it is very possible for the SOEs and other Chinese organizations that import, distribute, and exhibit foreign films to be subject to this obligation as well. Another relevant provision of the law is the article which defines, in further detail, what state secrets shall encompass, including secrets concerning major policy decisions on state affairs and "other matters that are classified as state secrets by the state-guarding department."[62] This provision could, arguably, extend to any censorship decision issued by

58. Zhonghua renmin gongheguo baoshou guojia mimi fa (中华人民共和国保守国家秘密法) [Law on Guarding State Secrets] (promulgated by the Nat'l People's Cong. Standing Comm., Sept. 5, 1988, effective May 1, 1989), art. 1 [hereinafter Law on Guarding State Secrets].

59. *Id.* art. 2.

60. *Id.* art. 20.

61. *Id.* art. 3.

62. *Id.* art. 8.

either SARFT or the CPD, so long as it could be argued that such a decision constitutes a major policy decision on state affairs. Further, depending on how serious the secret divulged was, the type of punishment attached could either fall into the criminal realm or into the administrative realm.[63]

Administrative punishments would include revoking permits or licenses, fines, and freezing of property.[64] These punishments are handed down by the administrative agency that promulgated the administrative act.[65] Here, this would most likely be the State Secrecy Bureau and would more than likely constitute a fine or the revocation of the distributor's license. Criminal punishments, on the other hand, are much more serious and carry much greater consequences for those being prosecuted under this area of law. In China, the criminal law states "any act which endangers state sovereignty and territorial integrity and security, splits the state, jeopardises the political powers of the people's democratic dictatorship and socialist system, undermines social and economic orders . . . or any other act which endangers society" is liable to be punished under China's criminal law.[66] The punishments that come from China's criminal system include control and supervision of the convicted, with sentences lasting anywhere from two months to two years; criminal detention, which ranges from one month to six months; fixed term imprisonment, lasting anywhere between six months to fifteen years; life imprisonment; or the death penalty.[67] The Chinese criminal law also features three other supplementary punishments: fines with no specified limit, deprivation of political rights, and confiscation of property.[68] Given the potential consequences of revealing state secrets, it is not surprising that censorship decisions handed down by SARFT to the SOEs managing foreign film imports are not made readily available to Hollywood studios.

China's State Secrets Law also works in tandem with the Measures for Implementing the Law on the Protection of State Secrets ("Measures"), which is a set of measures providing for the retroactive classification of information not already a state secret as a state secret if it proves harmful to state security or interest.[69] Article 4 of the Measures

63. *See* Law on Guarding State Secrets, *supra* note 58, art. 31.

64. JIANFU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION 224-25 (2008).

65. *Id.* at 223.

66. *Id.* at 280.

67. *Id.* at 282.

68. *Id.*

69. *State Secrets: China's Legal Labyrinth*, HUM. RTS. CHINA 94 (2007), *available at*

is the source of the law's retroactive power and it lists eight different results that may possibly place information within the scope of state secrets.[70] Article 4(3), provides—"[h]arming the political or economic interests of the state in its dealings with foreign countries"—may be the scenario most pertinent to foreign films in China, depending on how the country views its censorship criteria at the time.[71] The strictures of the State Secrets Law were tightened even further when the law was revised in 2010.[72] The new revisions include provisions restricting the export of electronic data before it can be reviewed and cleared of sensitive information.[73] While the impact this may have on film imports is not readily apparent, many Western companies, including Hollywood studios, have regular dealings with China's SOEs, and therefore receive regular information and communications from these SOEs.[74] Any communication from an SOE regarding the censor's decision on a film seeking release in China could possibly fall under the State Secrets Law, particularly given the law's retroactive power.[75]

C. *Import Quotas*

Despite China joining the WTO in December of 2001,[76] the country still maintained a strict import quota over foreign films, permitting only twenty foreign films to be released there per year.[77] However, following Chinese President Xi Jinping's visit to the U.S. in 2012, an agreement was struck to allow fourteen more films into the country per year, provided that they are in either IMAX or 3D formats.[78] This quota was still maintained despite a WTO ruling against China in a 2009 case brought by the U.S. over the claim that China's limit of books, songs, and

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http://www.hrichina.org/sites/default/files/PDFs/State-Secrets-Report/HRIC_StateSecrets-Report.pdf (last visited Nov. 6, 2015).

70. *See id.* at 96.

71. *Id.*

72. Michael Vella & Jerry Ling, *Traps for the Unwary in Disputes Involving China*, JONES DAY (Aug. 2012), *available at* http://www.jonesday.com/traps_for_unwary/ (last visited Nov. 6, 2015).

73. *Id.*

74. *Id.*

75. *See id.*

76. Ya Qin, *supra* note 28, at 5.

77. Mary Hennock, *Boost for Hollywood Studios as China Agrees to Ease Quota on US Films*, GUARDIAN (Feb. 20, 2012, 8:17 AM), *available at* http://www.theguardian.com/world/2012/feb/20/china-eases-import-quota-hollywood-films (last visited Oct. 22, 2015).

78. *Id.*

movies imports violated WTO rules.[79]

While the ruling itself did not have a direct impact on the quota that caps the number of foreign films allowed to enter China each year, it was meant to permit more than just select SOEs to import foreign films into China, including foreign companies to import and distribute films.[80] For the U.S., the WTO ruling meant that American movie studios, among other media distributors, would have the ability to sell their products more directly to Chinese consumers.[81] However, China has not yet complied with this ruling in full.[82] This is not necessarily an insufferable obstacle for Hollywood studios, although the implications of full compliance may have a detrimental impact on Hollywood studios' ability to maximize their access to the Chinese market.[83]

D. *Revenue-Sharing*

One of the revenue gathering methods under which a studio may calculate its Chinese earnings is the revenue-sharing scheme. Initially, under this system, the film's distributor and exhibitor will negotiate what percentage of the box office receipts each will receive, as well as ensure that the Hollywood studio receives roughly 15% of the box office revenue.[84] This system, of course, means that the majority of the revenue generated by a foreign film remains in China with the Chinese distributor and exhibitor. In 2012, however, a deal was struck between China and the U.S. that boosted the revenue percentage to 25%.[85] This new revenue percentage still means that the majority of profits remain in China, but it does represent a substantial increase from the prior system, where studios were paid on a sliding scale ranging from 13% to 17% of the generated box office revenue.[86] While 25% may not seem like a large percentage, when one considers the amount of money generated at the Chinese box office—2011's *Transformers: Dark of the Moon* alone made U.S. $173

79. Keith Bradsher, *W.T.O. Rules Against China's Limits on Imports*, N.Y. TIMES (Aug. 13, 2009), *available at* http://www.nytimes.com/2009/08/13/business/global/13trade.html?pagewanted=all&_r=0 (last visited Nov. 6, 2015).

80. *See id.*

81. *Id.*

82. Ya Qin, *supra* note 28, at 2.

83. *See* discussion *infra* Part V.

84. WANG, *supra* note 26, at 63.

85. Patrick Frater, *China's Quota Change Heralds Reform, Competition*, FILM BUS. ASIA (Feb. 23, 2012, 4:16 PM), *available at* http://www.filmbiz.asia/news/chinas-quota-change-heralds-reform-competition (last visited Nov. 6, 2015).

86. *Id.*

million at the box office in China—a whole quarter of the profits represents a large cash flow for U.S. studios.[87] The other system used to import foreign films into Chinese theatres is the flat fee system, which operates under slightly different rules than the revenue-sharing system.[88]

III. CASE STUDIES

To better examine the issues arising in passing the censors and distribution, this note examines three categories of films: those rejected outright for distribution; those accepted after certain changes have been made to the film; and those accepted and then pulled from theatres after distribution. It is not entirely clear why certain movies fall into one of the three categories, but the shifting censorship standards likely provide a partial answer.

A. *Outright Rejection*

For example, the film *Noah*, a modern film on the Biblical story of God's great flood starring Russell Crowe, was outright rejected for distribution.[89] While the film's producers tried to satisfy the censors by claiming the focus of the movie is environmental issues and not religious ones, the censors did not accept this rationale and denied permission for distribution.[90] One explanation for the film's rejection was that certain domestic films that were slated for release around this time and that the government wanted to promote these films over those produced by other countries' industries.[91] However, the religious tone or at least background to the film was likely a large reason behind the film's rejection. While the Chinese Constitution purports to guarantee freedom of religion, this freedom is curtailed by the need to protect the health and safety of the State and its people.[92] The film was intended to screen mid-

87. *Id.*

88. This particular system is not subject to the same strict quotas as the films imported under the revenue-sharing system. Rather, after the 2012 deal between China and the U.S., approximately 40 films are now imported into China each year under, as the name implies, a fixed flat fee. *See id.*

89. Cheryl K. Chumley, *'Noah' Way! Movie Blocked in China, Banned by Muslim Nations*, WASH. TIMES (May 9, 2014), *available at* http://www.washingtontimes.com/news/2014/may/9/noah-blocked-china-banned-muslim-nations/ (last visited Nov. 6, 2015).

90. *Id.*

91. *Id.*

92. *See* XIANFA art. 36 (1982) (China) ("Citizens of the People's Republic enjoy freedom of religious belief. No state organ, public organization or individual may compel citizens to believe in, or not to believe in, any religion; nor may they discriminate against citizens who

May and to be imported on a flat-fee basis, meaning it was not constrained by the thirty-four foreign film quota of the revenue-sharing scheme, but did not gain the censors' approval.[93]

Despicable Me 2 was also outright rejected for distribution in China.[94] Unlike with *Noah*, there was a bit of controversy over whether the film was actually denied release in China or whether the film had been presented for release at all.[95] However, one allegation as to why the film was not released in China was that the minion characters "bore an unfortunate likeness to erstwhile Chinese leader Jiang Zemin."[96] Others claim that it was determined that the film simply would not perform well in China, and therefore was not given one of the limited revenue-sharing slots.[97] Which is actually true remains unclear, though it is interesting to note that the first *Despicable Me* film was also denied release in China.[98] Nonetheless, *Despicable Me 2* ultimately did not screen in China, for reasons that are not entirely clear, exemplifying just how arbitrary and unclear the process is.

B. *Accepted After Adjustments/Self-Censorship*

Further, *World War Z* was only accepted for distribution after certain changes and adjustments were made to the film.[99] In this instance, the studio decided to make certain pre-emptive changes to the film, in anticipation that certain elements would be considered objectionable by Chinese censors.[100] Surprisingly, it was not the film's violence that worried the studio, but one rather small plot point instead.[101] Initially,

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believe in, or do not believe in, any religion. The state protects normal religious activities. No one may make use of religion to engage in activities that disrupt public order, impair the health of citizens or interfere with the educational system of the state. Religious bodies are not subject to any foreign domination.").

93. Katie Nelson, *Hollywood Biblical Epic 'Noah' Denied Release Slot in China*, SHANGHAIIST (May 9, 2014, 9:00 PM), *available at* http://shanghaiist.com/2014/05/09/noah-denied-release-slot-china.php (last visited Nov. 6, 2015).

94. Ben Child, *China Denies Despicable Me 2 Ban*, GUARDIAN (Aug. 6, 2013, 06:27 AM), *available* at http://www.theguardian.com/film/2013/aug/06/china-denies-despicable-me-2-ban (last visited Nov. 6, 2015).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. Lucas Shaw, *Fearing Chinese Censors, Paramount Changes 'World War Z'*, WRAP (March 31, 2013, 6:39 PM), *available at* http://www.thewrap.com/movies/article/fearing-chinese-censors-paramount-changes-world-war-z-exclusive-83316/ (last visited Nov. 6, 2015).

100. *Id.*

101. *Id.*

when the characters were debating the origins of the zombie virus, they cited China as the source of the outbreak.[102] The studio, well aware of China's mercurial censorship regime and its sensitivity to any negative commentary on the country, advised the studio to drop the reference to China and instead left the origins of the virus unknown.[103] This is a prime example of the self-censorship Hollywood studios are willing to resort to in order to better their chances of getting a film past the Chinese censors. The change made was small, and most likely unnoticeable to American audiences, but is a significant example of the power and influence of China's censorship regime.

Skyfall, one of the latest James Bond films, is another film subjected to strategic cuts. In this instance, as opposed to the small change made to *World War Z*, an entire scene was omitted, along with several other alterations to dialogue.[104] The scene cut from the original version was set in Shanghai and featured a French hit man shooting a Chinese security guard in the elevator lobby of a skyscraper.[105] Another scene taking place in Macau was edited as well. In this scene, James Bond is questioning a woman about her tattoo, asking her if it came about as a result of being forced into a prostitution ring at an early age.[106] In English, the lines remained untouched but the Chinese subtitles changed the conversation from prostitution to the tattoo resulting from being coerced into a criminal mob instead.[107] Other moments in the film were simply removed from the film. For example, the villain's backstory about being handed over to Chinese authorities while working for MI6 in Hong Kong and being subjected to extreme torture at the hands of his captors was cut from the film.[108]

C. *Accepted and then Later Pulled from Theatres*

Another common scenario is to see films get accepted for distribution, pass the censors, start being screened, and then get pulled from theatres soon after its release. A good example of this scenario is the Quentin Tarantino film, *Django Unchained*. The film was set to be

102. *Id.*

103. *Id.*

104. Clarence Tsui, *Chinese Censors Clamp Down on 'Skyfall'*, HOLLYWOOD REP. (Jan. 6, 2013, 10:06 PM), *available at* http://www.hollywoodreporter.com/news/chinese-censors-clamp-down-skyfall-413140 (last visited Nov. 6, 2015).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

released in China early 2013, after a few small demands to change things such as the color and amplitude of blood, which were considered to be too bright and too prominent, featured in the film.[109] However, on the morning of its release, just minutes into the first screening, the film was stopped and then pulled from theatres.[110] It was most likely the violence or the nudity featured in the original film.[111] However, the film had already undergone some sanitization prior to its Chinese release and the film also already passed through the censors' hands, making it even more unclear as to why the film was suddenly pulled.[112] The film was eventually reapproved and rereleased three weeks later, after several scenes containing nudity and violent murder were removed.[113] The film also experienced reduced screening after its release was scaled back.[114]

However, *Django Unchained* was not the only Hollywood film subjected to this yo-yo like treatment. In fact, in some cases a film can be pulled just before it was set to be released. An example is the film *Outcast*, starring Nicolas Cage.[115] The film is about two crusaders in China during the twelfth century and it was pulled from theatres soon after its initial release.[116] The film was set for release on September 26, 2014, but was pulled from release the evening of September 25.[117] The reasons for the last minute change of heart are unclear and speculation ranges from financial difficulties on the Chinese film group's end to the

109. Richard Brody, *"When Night Falls" and "Django Unchained": Movie Censorship in China*, NEW YORKER (May 23, 2013), *available at* http://www.newyorker.com/culture/richard-brody/when-night-falls-and-django-unchained-movie-censorship-in-china (last visited Nov. 6, 2015).

110. Jonathan DeHart, *Django Unchained (Again) With Cuts in China*, DIPLOMAT (April 30, 2013), *available at* http://thediplomat.com/2013/04/django-unchained-again-with-cuts-in-china/ (last visited Nov. 6, 2015).

111. *Id.*

112. *Id.*

113. *See also id.*; Clarence Tsui, *'Django Unchained' Reopens in China with Nudity and Screenings Reduced*, HOLLYWOOD REP. (May 13, 2013, 2:51 AM), *available at* http://www.hollywoodreporter.com/news/django-unchained-reopens-china-nudity-521650 (last visited Nov. 6, 2015).

114. Tsui, *supra* note 113.

115. Richard Verrier & Julie Makinen, *Nicolas Cage Movie, 'Outcast,' Pulled from Theaters in China*, L.A. TIMES (Sept. 26, 2014, 1:02 PM), *available at* http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-china-film-dispute-20140926-story.html (last visited Nov. 6, 2015).

116. *Id.*

117. Patrick Frater, *Nicolas Cage's 'Outcast' Gets China Relaunch, eOne as U.S. Distributor*, VARIETY (Nov. 4, 2014, 7:55 AM), *available at* http://variety.com/2014/film/news/nicolas-cages-outcast-gets-china-relaunch-eone-as-u-s-distributor-exclusive-1201347000/ (last visited Nov. 6, 2015).

censors reconsidering their approval given the film's alleged high body count and graphic battle images.[118] As of now, the film has still not been released in China, but is slated to be in Chinese theatres in January 2015.[119]

D. *Accepted With No Issues*

One notable example of a film that was smoothly accepted, at least from the censorship regime's perspective, was the fourth *Transformers* movie, *Transformers: Age of Extinction*. The film took the top spot as China's number one grossing film only ten days after its release in theatres, raking in a total of U.S. $222.7 million.[120] In fact, the film performed better in China than it did in its own domestic market.[121] It premiered in Hong Kong and closed at the Shanghai International Film Festival, registering 338,793 screenings across China.[122] Much of the film's success can be attributed to its innate appeal to Chinese audiences. For example, the film used many highly visible sites in Beijing and Hong Kong throughout the film, as well as a scenic spot near the city of Chongqing.[123] A couple of famous actors and actresses have roles in the film as well, including actress Li Bingbing and actor Han Geng, both very famous Chinese actors.[124] There was even a slew of product placement throughout the film for "everything from Chinese milk and PCs to Red Bull and authoritarian styles of government."[125]

However, while the film did not experience any serious troubles from the Chinese censorship regime, it did not come through its Chinese experience unscathed. The film was threatened by two different lawsuits, one prior to the film's screening and one after.[126] The first threatened

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118. *Id.*

119. *Id.*

120. Clifford Coonan, *China Box Office: 'Transformers: Age of Extinction' is No. 1 Film of All Time*, HOLLYWOOD REP. (July 7, 2014, 8:54 PM), *available at* http://www.hollywoodreporter.com/news/transformers-age-extinction-becomes-chinas-717083 (last visited Nov. 6, 2015).

121. *See id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. Coonan, *supra* note 120.

126. *See* Brent Lang, *'Transformers: Age of Extinction' China Sponsor Demands $1.8 Mil Investment Back*, VARIETY (Jun. 24, 2014, 8:08 AM), *available at* http://variety.com/2014/film/news/transformers-age-of-extinction-china-sponsor-demands-1-8-mil-investment-back-1201244725/ (last visited Nov. 6, 2015); *see also* Ji Jin & Cao Yin, *Transformers' Producers Hit With Breach of Contract Suit*, CHINA DAILY USA (Jul. 25, 2014, 7:20 AM), *available at* http://usa.chinadaily.com.cn/epaper/2014-

lawsuit came from one of the film's Chinese sponsors, Beijing Pangu Investment Co., a real estate development company, and was against two of the film's other sponsors, though not against the studio itself.[127] While the suit may not have been a direct threat to the studio itself, it did threaten to delay the film's theatrical release.[128] In contrast, the second lawsuit, post-release, was aimed at the studio and involved a Chinese tourism company, the Chongqing Wulong Karst Tourism Group.[129] The Wulong Karst Tourism Group claimed that the studio breached a contract by failing to show the logo of a Chongqing scenic spot in the film.[130] The tourism company filed suit in Chongqing No. 3 Intermediate People's Court, which has accepted the case.[131] However, while these issues complicated the film's release, in terms of China's censorship regime, *Transformers: Age of Extinction* experienced a relatively smooth release journey in China.

IV. PROBLEMS WITH THE CURRENT SYSTEM

A. *Factors that will Predictably Lead to Rejection Based on Past Experience*

Despite SARFT's circular, which concisely reiterates the administration's censorship criteria, there is still a fair amount of uncertainty over what content will meet with rejection the censors and what content will pass.[132] However, these somewhat vague guidelines do still allow certain insights into what sort of content will most likely be rejected by the state censors. For example, anything that blatantly disparages Chinese culture would likely fall under the category of defaming the superiority of China's national culture.[133] It is also more than likely that any film overtly critical of the Chinese Communist Party or the Chinese government would be struck down by the censors.

It is difficult to determine what constitutes overt criticism. What

07/25/content_17924587.htm (last visited Nov. 6, 2015).

127. Lang, *supra* note 126.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*; Brenda Goh, *Chinese Tourism Company Sues Paramount Over Transformers 4 Scenes*, REUTERS (Jul. 25, 2014, 4:07 AM), *available at* http://www.reuters.com/article/2014/07/25/flim-china-transformers-idUSL6N0Q013420140725 (last visited Dec. 7, 2014). No other information on the case appears to be available as of yet.

132. *See SARFT Reiterates Film Censor Criteria*, *supra* note 52.

133. *Id.*

constitutes criticism of the Chinese Communist Party or the Chinese government is not readily apparent from SARFT's criteria. Certain films have made it past the censors and were screened in China, such as *The Hunger Games*.[134] At first glance, it seems a bit surprising that *The Hunger Games*, a film about a totalitarian government which forces its people to send their children into an arena to fight to the death every year, did not get condemned by the censors. It would be easy to envision the possible parallels between the Capitol government in *The Hunger Games* and the political elite situated in Beijing.[135] Not only did the first film in the series make it onto Chinese screens, but the sequel did as well.[136] Perhaps it had something to do with the idea that the film was set in an imaginary society and was considered far enough removed from modern China to deem it safe. Yet, unexpectedly, or perhaps not unexpectedly, the third film in the franchise is facing issues with its release in China.[137] The film's release date was cancelled indefinitely, likely because of the movie's plot to overthrow the government.[138] When the subject matter is remote enough from Chinese life, it passes the censors, but once the subject matter begins to touch on something the present Chinese government arguably fears, the censors will refuse permission.

Another theme that is likely to face rejection is religious themes, as seen with the censors' rejection of *Noah*.[139] However, a blanket claim that no films with religious themes will pass the censors would not necessarily be accurate. Kung Fu films, such as *The Shaolin Temple* starring Jet Li, are widely popular in China and many are produced domestically.[140] More accurately, films with predominately Western

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134. *See* Etan Vlessing, *'Hunger Games: Catching Fire' Gets Nov. 21 China Release*, HOLLYWOOD REP. (Oct. 22, 2013, 6:41 AM), *available at* http://www.hollywoodreporter.com/news/hunger-games-catching-fire-gets-649996 (last visited Nov. 7, 2015).

135. For example, viewers could possibly draw parallels between China's alleged suppression of freedom and expression and assembly and the fictional Capitol's authoritarian regime.

136. *See* Vlessing, *supra* note 134.

137. *See* Michelle FlorCruz, *'The Hunger Games: Mockingjay---Part 1' China Premiere Canceled: Rebellion Plot Could Cost Movie Millions in China Market*, INT'L BUS. TIMES (Nov. 18, 2014, 12:27 PM), *available at* http://www.ibtimes.com/hunger-games-mockingjay-part-1-china-premiere-canceled-rebellion-plot-could-cost-1725591 (last visited Nov. 7, 2015).

138. *Id.*

139. *See* Chumley, *supra* note 89.

140. *See IMDB Top 250 Martial Arts Movies of All Time*, IMDB, *available at* http://www.listchallenges.com/imdb-top-250-martial-arts-movies-of-all-time (last visited Nov. 7, 2015); *see generally The Shaolin Temple*, IMDB, *available at* http://www.imdb.com/title/tt0079891/ (last visited Nov. 7, 2015).

religious themes are more likely denied approval by the Chinese censors. Conversely, films that deal with the more traditional Chinese religions, such as Confucianism, Daoism, or Buddhism, however, are likely acceptable.

Films that are too gory or violent are also likely to face rejection from the Chinese censors; however, the rejection of this content begs the question of where the line between acceptable gore and violence is. For example, *Django Unchained* was not only accepted by the censors after the director toned down the film's violence and nudity, but even began to screen before being abruptly yanked from theatres only minutes into its first screening.[141] Anyone who has seen the film is aware of its somewhat over-the-top displays of violence, featuring dozens of killings where "blood explodes off the bodies in little bursts of red," and yet, it initially passed the censors with relatively small adjustments.[142] Inevitably, there is a line between acceptable and unacceptable levels of violence, but that line is not always so clear.

A time travel theme could also upset the censors.[143] On its face, this seems to be a rather silly criteria to ban but is actually taken quite seriously in China. Chinese officials view time travel as being disrespectful of history.[144] However, the implications of time traveling characters are readily apparent once one thinks about them. Traveling in time means escaping from the current era and, in China, this means escaping from the Communist Party-dominated state.[145] Traveling back in time poses an even greater risk should the protagonist seek to change history. This particular sub-genre of science fiction runs the risk of being a vehicle to criticize the Chinese state. It is not surprising that the censors and government are unwilling to allow this sort of storyline into Chinese theatres. While it is true that China produces its own historical films, for example, about the Nanjing Massacre of World War II,[146] other historical

141. *See* Brody, *supra* note 109; *see also* DeHart, *supra* note 110.

142. David Denby, *"Django Unchained": Put-on, Revenge, and the Aesthetics of Trash*, NEW YORKER (Jan. 22, 2013), *available at* http://www.newyorker.com/culture/culture-desk/django-unchained-put-on-revenge-and-the-aesthetics-of-trash (last visited Nov. 7, 2015).

143. *See* Richard Brody, *China Bans Time Travel*, NEW YORKER (Apr. 8, 2011), *available at* http://www.newyorker.com/culture/richard-brody/china-bans-time-travel (last visited Nov. 7, 2015).

144. *Id.*

145. *Id.*

146. *See, e.g.*, *Top 10 Nanjing Massacre Movies*, CHINA WHISPERER (Dec. 4, 2012), *available at* http://www.chinawhisper.com/top-10-nanjing-massacre-movies/ (last visited Nov. 7, 2015).

topics are still not permitted in Chinese cinema, such as any negative portrayal of Mao Zedong and his role in the Cultural Revolution.[147] Allowing films about time travel, then, could subtly show the Chinese Communist Party in a negative light.

Essentially, it does not seem possible to contrive a hard and fast list of factors that will lead to the censors' rejection. Even though SARFT has released a fairly long list of the type of content that is impermissible or requires cutting or alteration, their descriptions are broad and rather vague, offering overarching categories with no concrete details. While this lack of concrete detail may not offer a set of definitive instructions for Hollywood studios on questionable content, the SARFT guidelines at least identify areas where studios know they will have to tread carefully, applying these guidelines in the context of experiences with previous films. The studios are accustomed to risk—there is never a guarantee that any film will find favor with an audience, even if the film is the sequel to a major blockbuster. Therefore, it would not be a tough step for studios to use these guidelines to prepare its products for Chinese approval.

B. *Arbitrary*

The inherent arbitrariness of the censorship regime is another problem with the current system that beleaguers Hollywood studios. Studios are left to rely on a list of vague proscriptions and examples from past films. Examples such as *Django Unchained*, *Outcast*, and *Hunger Games: Mockingjay—Part 1* are prime illustrations of the Chinese censor's fickle nature.[148] Even gaining approval from the censors is not enough to guarantee a smooth screening in Chinese theatres and, often times, the reasons for the backpedaling are unclear, allowing for speculation to run wild as to the censors' change of heart.[149] Of course, much of the underlying reasoning for the system's arbitrariness is the government's desire to keeps its censorship criteria flexible and able to respond to the society's shifting and the "perceived danger of the day."[150] While this arbitrariness may very well suit the needs and goals of the Chinese government, the fact still remains that this flexibility comes

147. Lilian Lin, *Chinese Director Fires Back at Oliver Stone*, WALL ST. J. (Apr. 22, 2014. 7:13 PM), *available at* http://blogs.wsj.com/chinarealtime/2014/04/22/chinese-director-ning-haofires-back-at-oliver-stone/ (last visited Nov. 7, 2015).

148. *See* DeHart, *supra* note 110; *see also* Verrier & Makinen, *supra* note 115; FlorCruz, *supra* note 137.

149. *See* DeHart, *supra* note 110; *see also* Verrier & Makinen, *supra* note 115; FlorCruz, *supra* note 137.

150. Ya Qin, *supra* note 28, at 7.

across as arbitrariness to the studios that are subject to the changing tides of Chinese censorship.

C. *Lack of Transparency*

A third prominent issue with the current system is its complete lack of transparency. Despite the 2012 agreement between Chinese Vice President Xi Jinping and U.S. Vice President Joe Biden and the expectation that it would improve system's transparency, these hopes have not been fully met.[151] Not only did the agreement increase the number of revenue-sharing slots available for foreign films each year, it also promised a new national distributor that would be able to compete with the state-owned China Film Group Corporation in a way that the much more limited Huaxia Film Distribution Co. could not.[152] While the import quota has been expanded, it was not until just recently that China began to discuss the possibility of a new national distributor.[153] It is still unclear if this second distributor will actually compete against the existing China Film Group or if the two groups will divide the existing import quota between themselves.[154]

The agreement also stated that the transparency of the system would be improved by allowing the foreign rights owners access to censorship decisions—which they are not currently given—and to the terms of deals struck between the import companies, distributors, and exhibitors.[155] The idea is that the studios would be able to negotiate directly with the censors when an issue arises to address problems or substitute alternative films under the terms of their previously signed import agreements.[156] The experiences of several recent films, however, seem to indicate that this new level of transparency is not implemented.[157]

China's State Secrets Law and its recent revisions may also contribute to the system's lack of transparency. If the State should decide that its censorship decisions impact China's national interests and therefore become classified as a state secret, the various SOEs that

151. *See* Frater, *supra* note 85.

152. *Id.*

153. Patrick Frater, *China Expected to Confirm Second Theatrical Distribution License*, VARIETY (March 23, 2014, 4:31 PM), *available at* http://variety.com/2014/biz/asia/china-expected-to-confirm-second-theatrical-distribution-license-exclusive-1201143916/ (last visited Nov. 7, 2015).

154. *Id.*

155. *Id.*

156. *Id.*

157. *See* DeHart, *supra* note 110; Verrier & Makinen, *supra* note 115; FlorCruz, *supra* note 137.

contract directly with the studios would not be permitted to divulge the reasons a film failed the censors.[158] Censorship decisions are also considered a part of major policy decisions, as they serve to regulate the content of all media forms that reach Chinese citizens, including the film medium.[159] SOEs, understanding that the State Secrets Law may very well apply to them, may not wish to risk divulging censorship decisions to the studios, instead simply citing a vague issue with the censors when seeking to breach their contracts with the studios. To make matters more complex, depending on the seriousness of the breach of a state secret, the consequences could either fall under administrative punishments or criminal punishments, leaving the spectrum of possible punishments very broad.[160] Also, the law's retroactive nature has not increased the transparency of censorship decisions.[161]

D. *Failure to Pay*

Another issue with the current system that arose in the wake of the 2012 Xi-Biden agreement was China's attempt to impose a Value Added Tax ("VAT") to the studios' 25% revenue share of the Chinese box office.[162] Many studios, trying to avoid a dangerous precedent, refused to accept payment rather than allow the VAT to take a chunk of the studio's earnings.[163] This attempted imposition of a VAT was especially frustrating to U.S. studios, who already deal with the rather mercurial moods of Chinese officials when it comes to foreign films' access to the Chinese market, given the promised 25% cut of the box office profits had been a relatively recent concession on the part of China.[164] While it appears that the dispute was resolved because the studios will not be responsible for the VAT, the incident just serves as another illustration of the problems in the current system.[165]

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158. *See generally* Law on Guarding State Secrets, *supra* note 58, arts. 1, 2.

159. *See id.* art. 8.

160. *Id.* art.11.

161. *See State Secrets: China's Legal Labyrinth*, *supra* note 69.

162. Rachel Abrams & Andrew Stewart, *Hollywood Studios Denied Payments from China*, VARIETY (July 29, 2013, 03:35 PM), *available at* https://variety.com/2013/film/news/hollywood-studios-denied-payments-from-china-1200503744/ (last visited Nov. 7, 2015).

163. *Id.*

164. *See id.*

165. *See* Michael Cieply & Brooks Barnes, *Dispute Over Value-Added Tax on Movie Tickets in China Appears Near End*, N.Y. TIMES (Aug. 7, 2013), *available at* http://www.nytimes.com/2013/08/08/business/media/dispute-over-value-added-tax-on-movie-tickets-in-china-appears-near-end.html?pagewanted=all&_r=0 (last visited Nov. 7, 2015).

V. WTO RULING & IMPACT—SHOULD WE PUSH FOR CHINA'S COMPLIANCE?

On January 19, 2010, the WTO's Appellate Body's report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* ("*China—Audiovisual Services*"), became formally accepted by the WTO's Dispute Settlement Body ("DSB").[166] The Appellate Body, and the accompanying panel report, found that China was in violation of the WTO law by failing to allow non-SOEs to import cultural products, such as books, magazines, newspapers, and films.[167] China was also found in violation due to its prohibition on foreign entities from engaging in distribution services for cultural products, such as film, in China.[168] The WTO found China's restrictions on the right to import inconsistent with its commitments to liberalize trading rights under its Accession Protocol,[169] that its restrictions on distribution services are inconsistent with its obligations under the General Agreement on Trade in Services ("GATS"), and that its restrictions on distribution services are also inconsistent with the General Agreement on Tariffs and Trade ("GATT").[170] In this ruling, the WTO judges also refused to accept China's defense that its restrictions on trading rights are necessary for the operation of its censorship regime, which should be justified under the "public morals" exception of the GATT.[171] The WTO granted China until March 19, 2011 to comply with its rulings, but China has failed to fully comply.[172]

The GATT's fundamental principles are non-discrimination, market access and transparency and it contains binding commitments on tariffs and quotas for goods.[173] The GATT is a powerful tool to restrict members' censorship efforts, especially under Article XI, which states that:

166. Liying Zhang & Xiaoyu Hu, *Liberalization of Trade and Domestic Control on Cultural Products: The Application of Public Morals Exception in China—Audiovisual Services*, 45 REVUE JURIDIQUE THÉMIS 403, 407 (2011).

167. Ya Qin, *supra* note 28, at 1-2.

168. *Id.* at 2.

169. *Protocols of Accession for New Members Since 1995, Including Commitments in Goods and Services*, WORLD TRADE ORG. (Apr. 26, 2015), *available at* https://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm#list (last visited Nov. 7, 2015) (affirming China's membership to the WTO).

170. *Id.*

171. *Id.*

172. *Id.*

173. Ting, *supra* note 40, at 293.

> [N]o prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.[174]

In short, this article proscribes the use of quotas and bans on the trade of goods.[175] Article XX, however, provides a series of exceptions to the general GATT commitments.[176] The one most pertinent to China's case is the exception laid out in Article XX(a), the public morals exception.[177] Using this exception, China could justify its film censorship and limits on importation and distribution.

The problem China encountered in trying to use the public morals exception comes from its original accession to the WTO in December 2001.[178] In its accession commitments, China agreed that all enterprises in China, as well as all foreign individuals and enterprises, including those not invested or registered in China, would have the right to import and export goods throughout the country's customs territory within three years, except for a list of products reserved for trading by designated SOEs.[179] China listed these reserved products in Annex 2A of its Accession Protocol, but amongst the eighty-four products for importation and 134 products for exportation, cultural or information products are completely absent.[180] This absence did not help China's case when the WTO Panel sought to determine whether or not China satisfied the public morals exception in Article XX(a) of the GATT.[181] The Panel ultimately concluded that the measure prohibiting all private domestic and foreign entities from importing cultural products was too severely restrictive for these measures to be necessary to protect public morals and that China needed to grant the right to import cultural products in accordance with its trading rights commitments.[182]

While full compliance with the WTO ruling would allow foreign

174. General Agreement on Tariffs and Trade art. 11, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

175. Ting, *supra* note 40, at 293.

176. *Id.*

177. GATT, *supra* note 174, art. XX(a).

178. Ya Qin, *supra* note 28, at 5.

179. *Id.*

180. *Id.*

181. *Id.* at 9.

182. *Id.* at 11, 13.

companies to sell their products directly to Chinese consumers, and therefore allow studios greater access to Chinese theatres, it would require China to alter the way it conducts censorship on imports.[183] The Panel pushed for what it saw as a "reasonably available alternative" to the system, which had been proposed by the U.S.[184] This suggestion would give the Chinese government sole responsibility for content review, rather than allowing SOEs to review such content.[185] Under the current system, the individual SOEs perform content review on the films they import based on their own internal review process.[186] In some ways, this is a fairly efficient system from the Chinese government's perspective, as it is able to delegate the task of censoring imported films to trustworthy government controlled SOEs.[187] However, centralizing this system could have some negative impacts on Hollywood's access to the Chinese market.

Currently, the SOEs involved in importing films enjoy a fair amount of discretion when it comes to interpreting the vaguely worded guidelines issued by SARFT.[188] On the one hand, these SOEs have a financial incentive to interpret these guidelines as broadly as possible as it is in their economic interest to bring in films that are likely to bring in the most revenue.[189] However, centralizing the censorship mechanism could then have a cooling effect and result in much more cautious applications of the censorship criteria. It would result in a much more rigorous and strict screening process, making the barriers Hollywood films face even higher than they are now.[190] After all, government bureaucrats are not affected by the profit motive and would instead be inclined towards behavior that would ensure their continued existence. Also, if the Chinese government switches over to a centralized review system, it is possible that it will also impose a legal duty on the private importers to self-censor and "when private businesses are required by law to practice self-censorship, they tend to err on the side of caution and over-censor content that does not clearly violate the rules."[191] Ultimately China is under no obligation to

183. Ya Qin, *supra* note 28, at 15.

184. *Id.* at 11.

185. *Id.* at 12.

186. *Id.* at 16 (elaborating that SOE approval does not necessarily mean a higher authority will not step in and reverse the SOEs decision, as has likely happened in the cases of many Hollywood films in China).

187. *Id.* at 18.

188. Ya Qin, *supra* note 28, at 19.

189. *See id.*

190. *See id.*

191. *Id.* at 20.

fill even its current quota of foreign films and complying with the WTO ruling could result in fewer foreign films entering the Chinese market.

VI. RECOMMENDATIONS

This final section will be dedicated to outlining possible solutions to some of the problems that plague the current censorship and importation regime under which Hollywood films are screened in China. First, it will examine liquidated damages clauses under Chinese contract law. Next, this section will examine joint productions between Hollywood and Chinese studios. Thirdly, this section will examine the feasibility of Hollywood studios planning for film modifications prior to submitting them to the Chinese censors. Finally, this section examines the various ways Hollywood studios should lobby the U.S. government to negotiate with China on their behalf.

A. *Contractual Enforcement/Liquidated Damages*

There are relatively simple solutions to situations where films are given the green light to screen and then later delayed or pulled from theatres. Hollywood studios, when entering into contracts with SOEs that handle the importation of foreign films, should build a liquidated damages clause into their contracts in the event that the contract is breached via approval recall. A liquidated damages clause would not only ensure that the studio insulates itself from a large loss of revenue, but would also give the Chinese SOEs better incentive to carefully consider what the film may need to alter or eliminate from the outset, rather than subject the studio to later, unanticipated alteration requirements.[192]

The Contract Law of the People's Republic of China[193] ("Contract Law") itself has an entire section dedicated to liability for the breach of contract, stating at its outset that "[e]ither party that fails to perform its obligations under to contract or fails to perform them as contracted shall bear the liability for breach of contract by continuing to perform the obligations, taking remedial measures, or compensating for losses."[194]

192. *See, e.g.*, DeHart, *supra* note 110 (stating *Django Unchained* producers had already made minor alterations to the film prior to its acceptance by the Chinese censors only to be pulled minutes into its first screening and subjected to further alterations before it was re-released).

193. For the purposes of this note, I am assuming that these contracts are entered into under Chinese law with Chinese courts as the chosen forum, as well as that the contracts are not conditioned on approval by the censors.

194. Zhonghua Renmin Gongheguo Hetong Fa (中华人民共和国合同法) [Contract

The Contract Law also has a specific section allowing for liquidated damages specifically, stating that "[t]he parties may stipulate that in case of breach of contract by either party a certain amount of penalty shall be paid to the other party according to the seriousness of the breach, and may also stipulate the method for calculating the sum of compensation for losses caused by the breach of contract."[195] The studios should build these liquidated damages clauses into their Chinese contracts based on a percentage of calculated lost revenue.

The studios can also point to the fact that they have been subject to lawsuits from Chinese companies in the past, such as the lawsuit brought by the Chinese tourism company over Paramount's alleged breach of contract for the film *Transformers: Age of Extinction*.[196] In this dispute, the Wulong Krast Tourism Group claims that Paramount Studios breached their contract by not making it clear that the scenic scenes featured in *Transformers: Age of Extinction* were shot in the Wulong Scenic Area, which the Wulong Krast manages, because the studio failed to include the firm's logo in the shot.[197] The tourism firm demanded that the studio show their logo in all DVDs, TV, and digital platforms on which the movie will be shown, as well as a return of the 4.8 million yuan they made in contract payments.[198] The tourism firm also requested 12 million yuan in expected profit losses as it was required to shut the scenic spot down for several days due to filming.[199] If the studios are going to be vulnerable to law suits from the various Chinese companies they contract with in the process of readying their film for a Chinese audience on top of the well-known vicissitudes of China's censorship regime, building in some semblance of protection into their contracts with the SOE is a simple but effective measure that should be taken.

B. *Joint Productions*

Hollywood studios can reduce their exposure to the problems with the current system by entering into joint productions with Chinese studios or companies. Such ventures would be governed by the China Film Co-Production Corporation ("CFCC"), which is a special organization solely authorized by SARFT to administer affairs relating to Chinese-foreign

Law] (promulgated by the Nat'l People's Cong. Standing Comm., Mar. 15, 1999, effective Oct. 1, 1999), art. 107 [hereinafter Contract Law].

195. *Id.* art. 114.

196. *See* Jin & Yin, *supra* note 126.

197. *See* Goh, *supra* note 131.

198. *Id.*

199. *Id.*

film co-productions.[200] CFCC assesses and approves international co-production applications, conducts reviews of completed co-production films, supervises the performance of co-production agreements between the co-producing parties, provides relevant services, and assists in negotiations of governmental agreement on film co-production between China and other countries.[201] CFCC also handles much of the logistical concerns that arise when filming in China, such as facilitating entry visas for foreign crews participating in co-productions.[202]

CFCC lists the particulars of its detailed, three part process that must be followed when applying for a co-production.[203] These guidelines put the burden of approval seeking on the co-production's domestic partner and it is done under a Domestic Film Review and Approval Form, meaning that the film will be able to be registered as a domestic film and therefore not subject to the foreign film import quota.[204] While co-productions will still be subject to the Chinese censors, it will undergo review as a domestic Chinese film and it is likely that the Chinese production partner will be able to give the foreign production partner a better sense of what will pass and what will not pass the Chinese censors.

Formally, co-productions are defined as films "which are jointly produced by co-financing, assisting or commissioning in and/or outside of China between the Chinese film producers (hereinafter referred to as the Chinese Side) who have obtained 'The Film Production Permit' or 'The Film Production Permit (Single Film)' in a lawful manner and the overseas film producers (hereinafter referred to as the Foreign Side)."[205] These co-productions can take one of three forms:

> 1. Co-production, referring to a film which is co-financed (including funds, labor or in kind) and jointly produced by the Chinese and Foreign Sides, with sharing of benefits and risks; 2. Assisted Production, referring to a film which is solely financed by the Foreign Side and shot in China with paid assistance by the Chinese Side by providing

200. *About China Film Co-Production Corporation*, CHINA FILM CO-PRODUCTION CORP., *available at* http://www.cfcc-film.com.cn/introeg/intro.html (last visited Nov. 7, 2015).

201. *Id.*

202. *Id.*

203. *See Guidelines Film Co-Production Corporation*, CHINA FILM CO-PRODUCTION CORP., *available at* http://www.cfcc-film.com.cn/introeg/busine.html (last visited Nov. 7, 2015).

204. *See Id.*

205. Zhongwai Hezuo Shezhi Dianying Pian Guanli Guiding (中外合作摄制电影片管理规定) [Administrative Regulations on Sino-Foreign Film Co-Production] (promulgated by the St. Admin. for Radio, Film and Television, July 6, 2004, effective Aug. 10, 2004), art. 11.

equipment, facilities, locations, labor and etc.; and 3. Commissioned Production, referring to a film which is commissioned by the Foreign Side to be made in China by the Chinese Side.[206]

Entering into a co-production with a Chinese partner actually leaves the Hollywood studio with a wide range of production options. This arrangement also does not limit Hollywood studios to filming in China only, as The Stipulation of Administration on Chinese-Foreign Film Co-production ("Stipulation"), the main policy governing these co-productions, allows for "films in and/or outside China."[207] While the Stipulation does restrict the composition of the total cast, stating that it can only be two-thirds non-Chinese actors, failing to indicate the types of roles the Chinese and non-Chinese actors must fill, and while it does mandate that a Putonghua[208] version of the film be made, these extra requirements may very well be worth it to Hollywood studios in the long run, since it allows them to bypass the import quota and possibly have a better, insider's view towards the censorship regime. It would also give the studios an actual, physical presence in China, which could then lead to a better relationship with the relevant governmental bodies at play in China's film industry.

Recently, one potential joint venture has been getting some journalistic attention. Warner Bros. Studio is currently in talks with China Media Capital about forming a joint venture which will aim to produce local-language films.[209] Should this partnership go through, it would provide for a longer-standing relationship between the two parties, one which would seek to produce a number of films, as opposed to a relationship formed to produce simply one film.[210] Other studios should seek to engage local studios and investment companies in the way Warner Bros. is engaging with China Media Capital in order to fully capitalize not just on China's market for foreign films, but the growing market for locally produced films as well.

C. *Planning for Modifications*

Another relatively simple step Hollywood studios could take in

206. *Id.* art. V.

207. *Id.* art. III.

208. The official language of China.

209. Ben Fritz & Shalini Ramachandran, *Warner Bros. in Talks to Make Movies in China*, WALL ST. J. (Aug. 25, 2015, 12:01 AM), *available at* http://www.wsj.com/articles/warner-bros-in-talks-to-make-movies-in-china-1440475260 (last visited Nov. 7, 2015).

210. *See id.*

trying to mitigate the effects of China's current censorship regime is to plan for modifications before the film even goes up for approval in China. Of course, to plan for appropriate modifications the studios and producers will need to gain a better understanding of the current climate and culture in China. Pre-emptive adjustments have appeared to pay off in several cases already, such as with the film *World War Z*.[211] *Iron Man 3* is another great illustration of pre-emptive modifications leading to a successful run in China.[212] *Iron Man 3* is also a prime example of a Hollywood studio being prepared to pay out a little more to produce a version of its film that is geared towards China to reap the benefits of having it screen in the country that constitutes the second largest market for film in the world.

Hollywood studios should even consider sprinkling a few Chinese product placements into their film's Chinese version or giving small, bit parts to famous Chinese actors or actresses. Again, this sort of tactic worked well for *Iron Man 3* in terms of getting it approved by the Chinese censors.[213] In fact, this tactic worked so well for Marvel studios in *Iron Man 3* that it was used again in *X-Men: Days of Future Past*, which casted famous Chinese actress Fan Bingbing as Blink, in the character's debut appearance in the *X-Men* films.[214] Casting popular Chinese actors and actresses also has the potential benefit of not just appeasing the censors, but of appealing more to the film's Chinese audience as well. There is a growing acceptance of Asian actors performing as Asians, as evidenced by films such as *X-Men: Days of Future Past*, and this is a trend Hollywood studios would be wise to take advantage of. If possible, perhaps studios could even keep a collection of stock footage—which is known to be acceptable to the Chinese censors—from China that can be inserted into films aimed at the Chinese market.

D. *Lobbying for Negotiations*

A final possible solution for Hollywood studios to consider is lobbying the government to continue its negotiations with China, particularly in terms of getting China to conform to the terms of agreements already made. The 2012 Xi-Biden agreement was a good start, particularly in light of the WTO ruling against China, but

211. *See* Shaw, *supra* note 99.

212. *See* Acuna, *supra* note 5.

213. *See* Lau, *supra* note 6.

214. Xinhua, *Face of Future Past: Fan Bingbing Proud to be X-Men's Blink*, WANT CHINA TIMES (May 23, 2014, 11:48 AM), *available at* http://www.wantchinatimes.com/news-subclass-cnt.aspx?id=20140523000058&cid=1104 (last visited Nov. 7, 2015).

Hollywood studios should lobby for more.[215] Studios should urge the government to take the ground that was gained in these negotiations and use it to keep pushing for continued improvements to the system, such as increased transparency.[216] Hollywood studios and the Motion Picture Association of America ("MPAA"), a major representative of Hollywood studios, should also continue to stress to lawmakers that China is an important and fully developed market for U.S. films, a market that promises a lucrative revenue stream, and that the U.S. government needs to keep putting pressure on China to continue opening up.[217] This would constitute a win-win situation for both China's government and the U.S. studios. China's agreement to increase the number of revenue-sharing films imported each year was certainly a victory, but there is more that can be done.

Opening up the Chinese market even further could even produce positive impacts that go beyond revenue. As MPAA Chairman and CEO, Senator Chris Dodd has said, "Sino-foreign and other international co-productions provide an opportunity for creators to view their craft through scopes that they might not otherwise consider, boosting creativity, technological advancements and the viewer experience."[218] It would not be a huge leap to extrapolate this understanding out for an increased understanding between the U.S. and China as a whole. The potential to use the U.S. film industry as a vehicle for cultural export and a form of "soft power," as well as a means for greater understanding on both sides, is just one of the many reasons Hollywood studios can bring to the table when lobbying the U.S. government to increase its negotiations with China on their behalf.

215. *See* Frater, *supra* note 151.

216. *Id.*

217. *Id.*

218. *4th MPA-China Film Screenings Underscores Expansive Partnership Between U.S. & Chinese Motion Picture Industries*, MOTION PICTURE ASS'N AM. (Nov. 3, 2014), *available at* http://www.mpaa.org/wp-content/uploads/2014/11/4th-MPA-CHINA-FILM-SCREENINGS-UNDERSCORES-EXPANSIVE-PARTNERSHIP-BETWEEN-U.S.-CHINESE-MOTION-PICTURE-INDUSTRIES.pdf (last visited Nov. 7, 2015).

FILLING THE GAPS: NEW PROPOSALS FOR THE CONVENTION ON THE RIGHTS OF A CHILD

Kathleen Boumans†

CONTENT

INTRODUCTION

The Universal Declaration of Human Rights ("Universal Declaration") was adopted and signed by the United Nations ("U.N.") General Assembly in 1948.[1] The Universal Declaration guaranteed the rights of every individual everywhere.[2] The Universal Declaration states that all "persons have the right to life, liberty, and security of person."[3]

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1. *Universal Declaration of Human Rights: History of the Document*, UNITED NATIONS, *available at* www.un.org/en/documents/udhr/history.shtml (last visited Nov. 15, 2015).

2. *Id.*

3. G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 3 (Dec. 10, 1948) [hereinafter Universal Declaration]. In Article 2, the Declaration sets out the basic framework of the document. The Declaration eliminates any form of discrimination against persons.

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without

Even after declaring that all persons would be afforded these protections, there was still a need for more explicit language in providing those rights. Despite the existence of the Universal Declaration, those promises were not made to all individuals. Although the Universal Declaration is not a treaty and it did not directly create legal obligations for states, it has become binding as a part of customary international law.[4] Its many successors include the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Racial Discrimination, both of which are treaties that have been ratified by states to increase the quality of life.[5] There have also been treaties and conventions that pertain to labor restrictions in order to protect persons and children in the work environment.[6] In November of 1989, the Convention on the Rights of the Child ("CRC") was open for signature and ratification.[7] As is stands, the CRC fails to address the gaps that still exist and has a long way to come before providing adequate protection that children need.

This paper will address the changes that States must make to fulfill the intentions and purposes behind the ratification of the CRC. As the CRC stands today, it has failed to provide all the protections promised and due to those failed promises, compliance has not been met and many gaps have been created. This paper will outline the language of the CRC's amendments and discuss how the lack of explicit, mandatory requirements has created problems of interpretation and left large gaps to be filled. It proposes language changes and additions to current amendments that will unambiguously prohibit certain actions and give the CRC's Committee the authority to levy fines against violations. It will also propose additional amendments that should be adopted by member states to provide better enforcement and protection of children throughout the world. It will bring light to the issues of enforcement of

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distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Id. art. 2.

4. *What is the Universal Declaration on Human Rights*, AUSTRALIAN HUM. RTS. COMMISSION, *available at* https://www.humanrights.gov.au/publications/what-universal-declaration-human-rights (last visited Nov. 15, 2015).

5. *Id.*

6. *ILO Conventions and Recommendations on Child Labour*, INT'L LABOUR ORG., *available at* http://www.ilo.org/ipec/facts/ILOconventionsonchildlabour/lang—en/index.htm (last visited Nov. 15, 2015).

7. Convention of the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3.

the CRC, and the Committee's continued struggle to have all of the proper data to correctly analyze the reports submitted by each committee. With the changes and proposals suggested in this paper, the true intention and purpose of the CRC can be provided and the gaps will be filled.

I. BACKGROUND INFORMATION

A. *History and Evolution of Children's Rights*

The first recognition of children's basic needs was addressed in the Geneva Declaration of the Rights of the Child ("Geneva Declaration") in 1924.[8] The Geneva Declaration made early recognitions that "'mankind owes to the Child the best that it has to give' and that 'men and women of all nations' accept it as their duty to fulfill their obligations toward the child 'beyond and above all considerations of race, nationality, or creed.'"[9] The Geneva Declaration focused on five major areas of children's rights: (1) material and spiritual development; (2) "help when hungry, sick, disabled, delinquent or orphaned; (3) to a first call on relief in times of distress;" (4) earn a livelihood free from exploitation; and (5) "an upbringing that instills social responsibility."[10] Unfortunately, the Geneva Declaration did not create an international legally binding treaty that was recognized by a large number of member states.

As mentioned above, the Universal Declaration was adopted in 1948.[11] The Universal Declaration briefly discussed the needs of children by stating that they were entitled to special care and assistance.[12] But there was no further effort made in providing protection to children. It merely recognized the importance of providing special protections to children, but failed to provide and take action for any additional guidance. In 1959, the U.N. General Assembly adopted an expanded version of the Geneva Declaration.[13] The expanded version included the spirit of the Universal Declaration, but expanded it to affirm children's rights to "protection against neglect, cruelty, and exploitation; to prohibition of

8. Kirsten Sandberg, *The Genesis and Spirit of the Convention on the Rights of the Child*, *in* UNICEF, 25 YEARS OF THE CONVENTION ON THE RIGHTS OF THE CHILD: IS THE WORLD A BETTER PLACE FOR CHILDREN? 59, 59 (2014), *available at* http://www.unicef.org/publications/files/CRC_at_25_Anniversary_Publication_compilation_5Nov2014.pdf (last visited Jan. 24, 2016). *See* Geneva Declaration of the Rights of the Child, *adopted* Sept. 26, 1924, League of Nations [hereinafter Geneva Declaration].

9. Geneva Declaration of the Rights of the Child, *adopted* Sept. 26, 1924, League of Nations [hereinafter Geneva Declaration]. *See also* Sandberg, *supra* note 8.

10. Universal Declaration, *supra* note 3. *See also* Sandberg, *supra* note 8.

11. Universal Declaration of Human Rights, *supra* note 3.

12. *Id.* art. 25

13. G.A. Res. 1386 (IX) (Nov. 20, 1959). *See also* Sandberg, *supra* note 8.

employment that could prejudice the child's health, education or development; to the opportunity for play and recreation; and to special treatment, education and care for children with disabilities."[14] Although the Geneva Declaration brought awareness and recognition to these essential children's rights, the document was not legally binding on nations, and it failed to provide specific details of such rights.[15]

In 1978, a doctor by the name of Janusz Korczak wrote and educated people on the importance of children's rights.[16] This new international recognition prompted Poland to begin the drafting of a convention for children's rights.[17] The growing awareness encouraged the U.N. to declare the following year as the International Year of the Child.[18] Poland's draft was similar to the Geneva Declaration but was more specific in its details; the country hoped to create principles that would be binding on all the states.[19] In 1979, the U.N. created a committee to consider whether or not to accept Poland's proposal.[20] It took ten years of redrafting and revisions before States finally accepted it and developed it into the CRC.[21]

B. *The Convention on the Rights of the Child*

"The [C]RC is the most rapidly and widely ratified international human rights treaty in history."[22] It has been either signed or ratified by all U.N. member nations except the United States. [23] Somalia most recently ratified the treaty in January of 2015.[24] It is the first legally binding international human rights treaty to give norms and standards for the protection of children.[25] Although the treaty has been ratified by 194

14. G.A. Res. 1386, *supra* note 13. *See also* Sandberg, *supra* note 8.

15. Sandberg, *supra* note 8, at 59.

16. *Id.* at 60.

17. *Id.*

18. *See id.* at 62.

19. *Id.*

20. Sandberg, *supra* note 8, at 62.

21. *Id.*

22. *Convention on the Rights of the Child*, UNICEF, *available at* http://www.unicef.org/crc/ (last visited Nov. 15, 2015).

23. *Convention on the Rights of the Child*, AMNESTY USA, *available at* http://www.amnestyusa.org/our-work/issues/children-s-rights/convention-on-the-rights-of-the-child (last visited Nov. 15, 2015).

24. *See UN Lauds Somalia as Country Ratifies Landmark Children's Rights Treaty*, UN NEWS CENTRE (Jan. 20, 2015), *available at* www.un.org/apps/news/story.asp?NewsID=49845#.VPS*SfnF9x0 (last visited Sept. 13, 2015).

25. *See* Convention on the Rights of the Child, *supra* note 7.

member nations,[26] there are still many gaps and inequalities that exist for children.[27] Children are still exploited in many of the countries that have ratified the CRC.[28] Problems with enforcement and funding are major issues that need to be addressed in order for the CRC to be more effective.

Until the adoption and ratification of the CRC, children's rights were not explicitly recognized by any treaty, nor was there any legally binding international authority.[29] For the first time, children would possess "innate rights, equal to those of adults: rights to health, to education, to protection, and to equal opportunity . . ."[30] The CRC inspired changes in laws to protect children and policies to help them reach their full potential. "More broadly, it has provided a clear mandate to translate the right of every child to health, protection and hope into practical [programs] and services."[31]

The CRC provides for the creation of a Committee on the Rights of the Child ("Committee").[32] The Committee is made up of eighteen experts who are responsible for monitoring implementation of the CRC by its State parties.[33] Every five years, each state that is a party to the

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26. Kevin Watkins, *The Convention on the Rights of the Child: Delivery on the Promise for Children is Long Overdue*, *in* UNICEF, 25 YEARS OF THE CONVENTION ON THE RIGHTS OF THE CHILD: IS THE WORLD A BETTER PLACE FOR CHILDREN? 67, 72 (2014), *available at* http://www.unicef.org/publications/files/CRC_at_25_Anniversary_Publication_compilation_5Nov2014.pdf (last visited Jan. 24, 2016).

27. *See UNICEF: Progress for Children Rights in South Asia, but Inequalities Exist*, UNITED NATIONS SOCIAL DEVELOPMENT NETWORK (Sept. 12, 2014), *available at* http://unsdn.org/unicef-progress-for-children-rights-in-south-asia-but-inequalities-exist/ (last visited Nov. 15, 2015).

28. *See* Katie Hunt, *The 10 Worst Countries for Child Labor*, CNN (Oct. 15, 2013, 3:09 AM), *available at* http://www.cnn.com/2013/10/15/world/child-labor-index-2014/ (last visited Nov. 15, 2015).

29. *See* Anthony Lake, *Children's Rights, Equity and our Common Future*, *Foreword* to UNICEF, 25 YEARS OF THE CONVENTION ON THE RIGHTS OF THE CHILD: IS THE WORLD A BETTER PLACE FOR CHILDREN? 1, 1 (2014), *available at* http://www.unicef.org/publications/files/CRC_at_25_Anniversary_Publication_compilation_5Nov2014.pdf (last visited Jan. 24, 2016).

> [T]he advance of civilization has been closely tied to the idea that all people have rights: universal, inalienable entitlements to freedom, dignity and security, to be treated fairly and to live free from oppression. The health and soul of all societies depend on how these human rights are recognized – and acted upon.

Id.

30. *Id.* Conforming with the principles of the Charter of the United Nations and the Universal Declaration of Human Rights, the Convention recognizes that the rights are "the foundation of freedom, justice and peace in the world." Convention on the Rights of the Child, *supra* note 7, at preamble.

31. Lake, *supra* note 29, at 4.

32. Convention on the Rights of the Child, *supra* note 7, art. 43.

33. UNICEF, *Is the World a Better Place for Children?: A Statistical Analysis of Progress Since the Adoption of the Convention on the Rights of the Child*, *in* UNICEF, 25

CRC must submit a follow-up report to address their progress, and any problems they are fixing to meet compliance.[34] The Committee is responsible for reviewing the reports that the states are required to provide.[35] The reports must reflect the progress they are making to comply with the CRC, and to their legal responsibility to protect the children of their state.[36] The Committee focuses on four areas of comment when making their observations; legislative reform, independent institutions, child-focused budgets and participation.[37] The Committee, after review of the reports, must then submit observations which contain concerns and recommendations that each State must address over the succeeding five-year period.[38]

The CRC gives children the right to assemble and have the same rights of expression, as well as freedom of thought, conscience, and religion, regardless of their parent's beliefs.[39] This conforms to the key area of participation the Committee sets out. Although the focus of the CRC was to provide children a way to be treated equal in the eyes of the law, no child was present during the drafting of the CRC.[40] As participation is one of the guiding principles, if the document had been drafted today, or if there were any new impending changes to the CRC,

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YEARS OF THE CONVENTION ON THE RIGHTS OF THE CHILD: IS THE WORLD A BETTER PLACE FOR CHILDREN? 7, 41 (2014).

34. *Id.*; Convention on the Rights of the Child, *supra* note 7, art. 43, 44. Article 44 of the CRC states "[r]eports . . . shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned." *Id.* art. 44(2).

35. UNICEF, *supra* note 33, at 41.

36. *Id.*

37. *Id.*

38. *Id.*

39. Convention on the Rights of the Child, *supra* note 7, art. 12-14. Article 12 states that:

> States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child . . . For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body . . .

Id. art. 12. Article 13 provides that:

> The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

Id. art. 13. Finally, article 14 provides that "State parties shall respect the right of the child to freedom of thought, conscience, and religion." *Id.* art. 14.

40. Sandberg, *supra* note 8, at 60.

the author believes children would be involved in the process. Children should be allowed to voice their opinions without the fear of repercussion and without barriers impeding their way to full participation. Increased participation would allow for organizations to work more closely with and for the children.[41] The CRC "provides both the legal grounding and the impetus for children's meaningful participation in the drafting of any and all legislation that affects their well-being."[42]

It is discouraging however, that children were not included in the drafting process of the CRC, and the author believes it is one of the major problems surrounding the idea of the CRC. Cambodia made headway when it allowed the children the opportunity to discuss possible drafting and policy considerations of trafficking and sexual exploitation laws when involving children.[43] But, it did not allow the children to voice their concerns about opposition to traditional cultural and religious legislative concerns.[44]

The CRC was drafted as an emphasis on children as subject of rights; they are human beings in their own rights, they are not owned by their parents or any other individual person.[45] If children cannot be heard, then the spirit of the CRC will serve no purpose. If children can be seen as individuals, then their voice can be heard and they will have a voice in their rights. It is impossible for every child to be able to speak on what they believe is right, or where they believe they have been wronged. But, it would be possible to solve those questions of capacity by including provisions in the CRC stating that the child must be of a certain age to participate in any forums and discussions about child legislation. Similar provisions allowing the persons who are most affected by the laws to be involved in the drafting process are seen in other treaties as well. The U.N. Convention on the Rights of Persons with Disabilities ("CRPD") allowed for persons with disabilities to have a say in the drafting process of the CRPD.[46]

The CRC sets guiding principles for what States must provide to children,[47] yet, in the author's opinion, the States often makes decisions

41. Watkins, *supra* note 26, at 67.

42. Sandberg, *supra* note 8, at 60.

43. Watkins, *supra* note 26, at 95.

44. *Id.*

45. Sandberg, *supra* note 8, at 61.

46. *See Committee on the Rights of Persons with Disabilities*, INT'L JUST. RESOURCE CTR., *available at* http://www.ijrcenter.org/un-treaty-bodies/committee-on-the-rights-of-persons-with-disabilities/ (last visited Nov. 15, 2015).

47. *See* Sandberg, *supra* note 8, at 61.

[I]t is not up to the State to decide, for instance, which children go to school, whether

as if it is optional, therefore not complying with the CRC. Children are still being exploited for their labor. Children are still being trafficked across borders and being sexually exploited.[48] Children are still being forced into soldier positions[49] and they are still being forced to marry at young ages at the wishes of their parents.[50] It is the author's contention that these continued violations have negative impacts on children's lives and it cannot be said that they are being protected to the fullest extent while these activities still continue. In a world where almost 250 million children are being forced to work and over 150 million of them are being forced to work in hazardous conditions, it should be a major, if not top priority that states should be addressing.[51] It is not just that children are being exploited at young ages, but they are being forced to work in conditions that no person under eighteen should be forced into.

Noting that child labor exploitation is extremely hazardous and should be eliminated, the CRC turned to education as an answer to the problem by making it mandatory that the State provide a public education for all children.[52] The CRC mandates that children cannot be exploited for child labor and sets some parameters for the actions of child recruitment for military and hostile purposes.[53] Most importantly, the

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to include children with disabilities in educations or leisure activities or whether to avoid discriminating against girls. The State cannot choose whether it should provide health care to children seeking asylum, or whether to protect children from corporal punishment, sexual abuse or other forms of violence. All of these are the rights of every single child.

Id.

48. *Child Protection from Violence, Exploitation and Abuse*, UNICEF, *available at* www.unicef.org/protection/57929_58005.html (last visited Dec. 7, 2015). *See also* Watkins, *supra* note 26, at 91-92.

49. *Child Recruitment by Armed Forces or Armed Groups*, UNICEF, *available at* www.unicef.org/protection/57929_58007.html (last visited Dec. 7, 2015). *See also* Watkins, *supra* note 26, at 91-92.

50. *Child Marriage*, UNICEF, *available at* www.unicef.org/protection/57929_58008.html (last visted Jan. 20,2016). *See also* Watkins, *supra* note 26, at 91-92.

51. *Child Labor in the World*, HUMANIUM, *available at* http://www.humanium.org/en/child-labour/ (last visited Nov. 15, 2015).

52. Convention on the Rights of the Child, *supra* note 7, art. 28. "States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular . . .make primary education compulsory and available free to all . . ." *Id.*

53. *See id.* art. 32-34.

State Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development . . . State Parties shall in particular: (a) [p]rovide more a minimum age for employment; [and] (b) [p]rovide for appropriate regulation of the hours and conditions of employment.

CRC also dictates that governments take all available measures to ensure these protections are enforced and complied with within their countries,[54] such as providing appropriate funding of sources to maintain their social services, legal, health, and educational systems.[55] "They must help families protect children's rights and create an environment where they can grow and reach their potential."[56] Unfortunately, many of the goals of the CRC have yet to be complied with, and although it addresses many of the problems, in the author's opinion it seems to be more successful at bringing some light to these problems, rather than providing solutions.

C. *Problems with the Convention on the Rights of the Child*

It is difficult for any treaty to have widely effective enforcement and compliance for an array of reasons. "The strength of the [CRC] cannot be measured in ratifications, national laws or government declarations. Ultimately, the real test is whether or not its provisions make a difference in the lives of children."[57] The CRC has yet to draw in strong advocacy worldwide. There is little debate about its importance on the international stage. But the CRC lacks the media coverage that other treaties and policy implications have in today's society.[58]

States that are parties to the CRC either refuse to be serious about their intent in adopting the amendments of the CRC, or they fail to pass legislation that has the necessary enforcement mechanisms to be effective.[59] The Parties pass the CRC, but make numerous reservations or objections, watering down the effect it was intended to have.[60] The States pass laws, but the laws do not provide for enforcement, monitoring,

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Id. art. 32.

1. State Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts, which are relevant to the child. 2. State Parties shall take all feasible matters to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

Id. art. 38.

54. *See id.* art. 4.

55. *Fact Sheet: A Summary of the Rights Under the Convention on the Rights of the Child*, UNICEF, *available at* www.unicef.org/crc/files/Rights_overview.pdf (last visited Nov. 15, 2015) [hereinafter *Fact Sheet*].

56. *Id.* "In some instances, this may involve changing existing laws or creating new ones." *Id.*

57. Watkins, *supra* note 26, at 69.

58. *See id.* at 70. "If the Convention is to become a force for change, it needs to be seen as a reference point for advocacy, campaigning and policy engagement." *Id.*

59. Watkins, *supra* note 26, at 70.

60. William Schabas, *Reservations to the Convention on the Rights of the Child*, 18.2 HUMAN RIGHTS QUARTERLY 472, 472-73 (1996).

or funding for resources.[61] The author believes that ambiguities in interpretation of its text are another problem that undermines the spirit of the CRC. Methods of enforcement need to change, and avenues for turning the principles of the CRC into practical policy need to be scrutinized closer. The CRC as a whole needs to be renewed and reformed to adjust for the continuing injustices to which children are subjected. "In a world where six million children die before their fifth birthday, where 161 million are stunted, and where more than 250 million are denied even the most basic opportunities for learning, business as usual is unacceptable."[62]

Lack of funding is a major problem when it comes to international treaties. Without funding, it is difficult for many states to provide the necessary reform, afford to maintain the reform, and meet compliance standards. Without wider resource availability and awareness, it is unrealistic that all States will be able to comply with the CRC. It is often difficult for formal legal reforms to keep pace with the substantive activities which support developing countries.. As a result, "[i]ntegrating the [CRC]'s principles into legislation does not guarantee child rights."[63] Without awareness and campaigning to help provide the funding to incentivize these countries to implement the laws, it is unlikely that the goals of the CRC will ever be realized. Funding for resources helps close the gap between substantive activities and formal laws, and addresses the problems that exist with inequalities of wealth among countries. Developing countries lack even more of the resources to make compliance with the CRC possible.[64]

The CRPD provides language in the treaty to create an awareness-raising provision.[65] Article 8 of the CRPD provides that State parties are responsible to "adopt immediate, effective and appropriate measures . . . to raise awareness throughout society . . ."[66] It also requires that "public awareness campaigns" be initiated and maintained on a regular basis.[67]

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61. *Id.*

62. *Id.* at 71.

63. Watkins, *supra* note 26, at 72.

The gap between legal form and institutional substance helps to explain why, in a fast-growing country such as India, child labor laws have little tangible effect on child labor practices. It also helps to explain the failure of governments around the world to act on the commitment to equalize opportunity.

Id.

64. *Id.*

65. G.A. Res. 61/106, Convention on the Rights of Persons with Disabilities art. 8 (Dec. 13, 2006).

66. *Id.*

67. *Id.*

Such provisions could be included in the CRC to encourage even larger developments in children's rights. Bringing attention to the problems children are faced with every day can change the attitudes and stereotypes that currently exist toward children. They are constantly faced with barriers to their health, lifestyle, and education.[68] If state parties to the CRC are required to have similar obligations to those of Article 8 of the CRPD, then more awareness and campaigns could be organized. Through awareness-raising campaigns, it is possible that promotions could be made to show the effects such negative attitudes have on the children, and how change is not only necessary, but needed immediately. Increased awareness will also help improve understanding of the CRC, and why its proper implementation is important. Awareness-raising campaigns can take the form of events or publications that show interest in the CRC and the protection of children's rights. The more awareness that exists, the better the CRC can be mainstreamed into implementation. Continuing to promote the importance of equality for children should be the main focus for all State parties to the CRC. The greater cooperation in an effort to create awareness, the more issues will be brought to the surface, and the more the imminent need for change will be realized by all states.

Without the proper funding, the disparities and inequalities will only grow larger between the wealthy and more disadvantaged countries of the world.[69] In the poorer countries of the world child labor laws are poorly enforced.[70] It is the author's contention that the lack of funding makes it difficult to implement and enforce new policies in order to comply with the CRC. Compliance with the CRC is even worse in poor countries, because they lack the funding to implement new policies, and enforcement of those policies that attempt to comply with the CRC.

> Countries with high poverty rates fare badly in the index due to the need for children to supplement their family income . . . but economically important countries like China, India, Russian and Brazil were also found to have extreme risks because child labor laws are often poorly enforced.[71]

If funding could be made more readily available, that might encourage developing countries to comply with the CRC. By requiring better compliance, these countries might have the enforcement incentives and mechanisms to stop all forms of child labor exploitation.

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68. Watkins, *supra* note 26, at 84.
69. *Id.* at 70.
70. Hunt, *supra* note 28.
71. *Id.* (Referring to the Child Labor Index of 2014).

Another reason the CRC has not seen the success many had hoped for is because state parties can make reservations and declarations to the treaty. When countries make reservations and declarations to the CRC they are picking what parts they will choose to enforce.[72] The procedures governing reservations to treaties have changed over time. The traditional rule was that any reservation a State made would not be accepted if it was not affirmatively accepted by all parties.[73] If the reservation was not accepted by all States, the State making the reservation was excluded from the treaty.[74] The modern custom, however, imposes a duty on States to protect the human rights of its own citizens.[75] The many reservations made to the Genocide Convention, "all but gutt[ed] its protections."[76] Concerned about whether or not the reservations should count toward bringing the Genocide Convention "into force," the U.N. requested an advisory opinion of the International Court of Justice ("ICJ").[77] The ICJ held that States need to be allowed to make any reservation they so choose, as long as it is not contrary to the "object and purpose" of the CRC.[78] This ruling loosened the rules and restrictions, making it easier for a state to attach a reservation to a treaty.[79]

Because the rules were relaxed, no longer requiring unanimous acceptance of a reservation, the ICJ allows States to make reservations and not be cut off from the legal force of the treaty. When a State makes a reservation, it leaves the remaining members of the treaty to either choose to accept the reservation, reject the reservation and refuse to join the treaty with the reserving State, or the objecting State can refuse to sign on to the section of the treaty to which the reservation is made.[80] This not only makes it easy for the States making reservations to pick and choose which parts of the treaty they will accept, but also which parts they will refuse to comply with, making it the decision of the rest of the

72. Convention on the Rights of the Child, *supra* note 7, art. 28. Afghanistan, Egypt, Iran, Iraq, Jordan, Kuwait, Maldives, and Qatar are States that have ratified the CRC, but have reserved all rights to express reservations on all provisions of the convention that are incompatible with the laws of Islamic Shari'a and the local legislation in effect. *See id.* at Reservations and Declarations Made Upon Signature.

73. DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 32 (3rd ed. 2010).

74. *Id.*

75. *Id.*

76. *See generally id.* at 33. *See infra* Part II for further reference to the Genocide Convention and how similar actions could be taken to help enforcement issues of the CRC.

77. *Id.* at 33.

78. BEDERMAN, *supra* note 73, at 33.

79. David S. Jonas, *The Object and Purpose of a Treaty: Three Interpretive Methods*, 43 VAND. J. TRANSNAT'L L. 565, 583 (2010).

80. *Id.* at 585.

States to either enforce the treaty or choose to not ratify those parts. This creates gaps, as well as attitudes for the States willing to agree to all the terms of the treaty, while letting other States who make reservations off the hook. It is a frustrating process, and in the Advisory Opinion that the ICJ released, they created an objective test for whether or not a reservation violates the object and purpose of the treaty, which rarely finds reservations invalid.[81]

Countries that have ratified the CRC make these reservations or declarations because they believe the treaty will conflict with their own laws or traditions, and because it may provide issues of enforcement and monitoring. Other states make a reservation or declaration to certain aspects of the Convention simply because they may disagree with them. As with reservations made to the Convention to Eliminate all forms of Discrimination Against Women ("CEDAW"),[82] religious reservations were made to the CRC where the amendments conflicted with the principles of Islamic Sharia law.[83] The other States party to the CRC should have objected more sternly to these reservations, arguing that they were clearly contradictory to the object and purpose of the CRC. The Maldives made a reservation to CEDAW, stating that Sharia law superseded any contradictory protections afforded by CEDAW.[84] This reservation created a virtually complete exception to the purpose of CEDAW.[85] In response to this reservation, the remaining parties to CEDAW sought to its nullification.[86] Finally, the Maldives chose to drop the reservation and replaced it with a less "far reaching one."[87]

Algeria also made an interpretive declaration to the CRC stating that Article 14 shall be interpreted by the Algerian Government in compliance with the basic foundations of the Algerian legal system.[88] Andorra also made a declaration stating its disproval of Article 38 of the CRC and its failure to prohibit the use of children in armed conflicts.[89] Additionally,

81. *See id.* at 583-89. "[T]he ICJ explicitly rejected the unanimous consent rule and intrudes the object and purpose test as an alternative limit on reservation making. Some limit was necessary, the Court explained, because to hold otherwise would 'sacrifice the very object' and 'frustrate the purpose' of a treaty." *Id.* at 588-89.

82. *Id.* at 590.

83. Convention on the Rights of the Child, *supra* note 7, art. 28, Reservations and Declarations Made Upon Signature.

84. Jonas, *supra* note 79, at 590-91.

85. *Id.* at 591.

86. *Id.*

87. *Id.*

88. Convention on the Rights of the Child, *supra* note 7, Declarations and Reservations Made Upon Signature.

89. *Id.*

Andorra expressed disagreement with allowing the participation and recruitment of children of ages fifteen or older.[90] Furthermore, Singapore made a reservation in regards to complying with Article 37, which fails to explicitly prohibit the use of capital punishment on children.[91] Although the CRC is the most widely adopted international law, it has failed to have the effect that was intended. States cannot be stopped from making reservations or declarations, so it becomes even more important for the CRC to be renewed and reformed so as to provide better protection against the existing gaps.

Similar actions to those against the Maldives reservation to the CEDAW should have been taken when identical reservations were being made to the CRC. There is no explanation for why such pushback against the Maldives was made, but when it came to similar reservations to the CRC, such pushback was nowhere to be found. States should have taken a harsher position when going forward with the ratification. It is the author's belief that the reservations that were made to preserve the superiority of Islamic Sharia law clearly violate the purpose of the CRC. Sharia law allows for the denial of education to women, compulsory child marriage, and discrimination against women in general.[92] Such allowances conflict with numerous articles of the CRC. Article 3 refers to the absolute protection of the best interests of the child.[93] The Article also explicitly requires that the states look to their existing laws and assess the changes that are necessary for compliance.[94] Article 12 focuses on respecting the views of the children and allowing them to make decisions on matters that affect their lives, also in direct conflict with reservations that have been made due to Sharia law.[95] Finally, in direct conflict with Sharia law, Articles 28 and 29 are the requirements that deal with education.[96] All children have the right to a primary education[97] and to develop their abilities to the fullest.[98] The same pressure that was applied to the Maldives' when they objected to CEDAW should have been applied in the situation here. Similar alternatives could and should

90. *Id.* art. 28.1(a). Singapore also made a reservation concerning Article 37 in the way that it does not make primary school compulsory. *Id.* at Declarations and Reservations Made Upon Signature.

91. *Id.*

92. Jonas, *supra* note 79, at 591.

93. Convention on the Rights of the Child, *supra* note 7, art. 4.

94. *Id.*

95. *Id.* art. 12.

96. *Id.* art. 28, 29.

97. *Id.* art. 28.

98. Convention on the Rights of the Child, *supra* note 7, art. 29.

have been made by states who follow Islamic Sharia law. By applying pressure, forcing the States to stick to the CRC's purpose, and keeping the CRC coherent, many gaps could have been avoided, and many issues of non-compliance would be moot.

The CRC fails to provide the protections children need in regards to child labor exploitation. The CRC does not stand for the idea that children should be prohibited from performing any type of work during childhood. A common misconception that leads to confusion over the scenarios in which the child is actually being exploited is found in the difference between child work and child labor.[99] Child work is defined as an economic activity that does not negatively affect the health of the child, nor can it interfere with their education.[100] Child labor refers to any child who is working in contravention of ILO standards "engaged in more than light work," and any child "engaged in the worst forms of child [labor]."[101] These distinctions are important because States are not prohibited from allowing children to work, but they cannot exploit the children to work in conditions that are hazardous to their health. But, with the confusion, States are still forcing children to perform duties and work in environments that they deem to be hazardous, even when they are blatantly violating the CRC.[102]

Although the CRC provides for the protection of children in the labor environment in Article 32, it failed to effectively prohibit those exploitations from happening in countries that have ratified the CRC.[103] States that have ratified the treaty are still exploiting the labor of children. Afghanistan, Pakistan, Burundi, Nigeria, Yemen, and Zimbabwe are all countries that are on the top ten list of worst child labor conditions on record in the world.[104] Problems will continue if change doesn't take effect soon. "We cannot afford to continue at the same pace for the next 25 years. Unless efforts are stepped up, the rights of millions of children will continue to be violated."[105] The CRC has clearly failed on many levels to provide the necessary protection to children. The next section

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99. *Factsheet: Child Labour*, UNICEF, *available at* www.unicef.org/protection/files/child_labour.pdf (last visited Nov. 15, 2015).

100. *Id.*

101. *Id.*

102. Watkins, *supra* note 26, at 90.

103. *See* Convention on the Rights of the Child, *supra* note 7, art. 32.

104. Hunt, *supra* note 28.

105. Lake, *supra* note 29, at 50. Lake expresses his continued concern that the CRC has failed on many levels to provide the protection that it promised to children. *Id.* The losses are still felt by children and their families worldwide, especially in countries that have ratified the Convention. *Id.* at 3. "[W]e cannot claim that children's rights are being upheld when 17,000 children under the age of five die every day." *Id.*

of this paper will address changes that can be made to the CRC to give it more enforcement power and propose amendments that will help fill the gaps that States have been able to create.

II. CHANGES TO THE CRC

The changes proposed here will address the concerns that States have made in either their reservations or their declarations to the CRC. In a perfect world, these changes would be accepted without reservation and enacted with full force, but that is a feat which is impossible. International law is a complex area that makes it difficult to provide for a utopian world. Although there will be pushback for the proposals and changes that are absolutely necessary, the blowback should be minimal, and even though imperfect, will be one step closer to providing the protection that should be afforded to the children of the world.

Some States, such as Cambodia, Bulgaria, Iraq, Iran, and Nigeria to name a few, have been open to changes and amendments to the CRC, signing and ratifying optional protocols.[106] Three optional protocols have been ratified since the original ratification of the CRC in 1989.[107] These optional protocols, the third one being the most recent, ratified in April of 2014, have been an attempt to fix the vagueness and looser articles of the CRC.[108] The first optional protocol was focused on affording more protection to children in armed conflicts.[109] Article 3 of the Protocol requires states to raise the minimum age for voluntary recruitment into the armed forces.[110] The Protocol mandates that no person under the age of eighteen can be recruited or used in hostilities.[111] This Protocol was created because Article 38 of the Convention sets the age at fifteen.[112] The second optional protocol dealt with matters of child sex exploitation.[113] The Protocol's purpose is to extend protection beyond that of Articles 1, 11, 21, 32, 33, 34, 35, and 36 of the CRC.[114] Finally, the most recent optional protocol deals with allowing children, who are

106. *See Advancing the CRC*, UNICEF, *available at* http://www.unicef.org/crc/index_protocols.html (last visited Nov. 15, 2015).

107. *Id.*

108. *Id.*

109. *Id.*

110. G.A. Res. 54/263, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography, art. 3 (May 25, 2000) [hereinafter Optional Protocol].

111. *Id.* art. 1.

112. *See id.*; Convention on the Rights of the Child, *supra* note 7, art. 38.

113. *Advancing the CRC*, *supra* note 106.

114. *See* Optional Protocol, *supra* note 110. *See* Convention on the Rights of the Child, *supra* note 7, art. 1, 11, 21, 32-36.

citizens of a state party to the CRC, to have their grievances addressed.[115] The third protocol allows children subjected to violations to submit these violations directly to the Committee to seek redress.[116] These protocols are optional only in the sense that, because they are changes to the CRC, they will legally bind only States that also ratify the individual protocols.[117] With the hope that states are willing to change and are open to change, hopefully more protections will be extended and afforded to the children.

A. Compromissory Clause

Even when ratified, a treaty is still open to change and amendment. "There is a need for change in international law, and treaties would not be an effective source of international legal obligation if anachronistic rules were forever graven in stone."[118] Many treaties are drafted with the intention of later amendments and changes being made.[119] It is "exceedingly common" that states choose to provide new conditions to the treaty.[120] Any proposed changes cannot be amended into the treaty until all parties have expressed approval.[121]

Although there is no international police force that can arrest and bring every State who violates the CRC into court, there are other means by which the threat of punishment and enforcement can be provided.[122] Instead of international police, there is a World Court.[123] The ICJ was created as part of the U.N., with the hope of creating an international adjudicatory body to provide for the enforcement of international law.[124] The ICJ is the forefront vehicle in helping to dissolve international law disputes and helping to provide enforcement of agreements that are made between parties.[125] The problem with the ICJ is that, similar to a treaty, no state can be forced to consent to the Court's jurisdiction.[126]

The first proposal that should be added to the CRC is a clause in the

115. *Advancing the CRC*, *supra* note 106.
116. *Id.*
117. *Id.*
118. BEDERMAN, *supra* note 73, at 37.
119. *Id.* at 38.
120. *Id.*
121. *Id.* at 37-38.
122. *Id.* at 9.
123. BEDERMAN, *supra* note 73, at 255.
124. *Id.*
125. *See id.* at 257.
126. *Id.*; Maurice Mendelson, *The Formation of Customary International Law*, 272 RECUEIL DES COURS 155, 169 (1998).

treaty, which would bind each state to give their consent to have all matters heard before the ICJ. The clause would simply provide that "any such dispute which cannot be settled shall be referred, at the request of any one of the States party to the dispute, to the ICJ for a decision." These types of agreements are described as compromissory clauses.[127] Such clauses are becoming increasingly accepted in the international society, and are ways of making it easier for the ICJ to invoke jurisdiction.[128] Such a clause would waive a State's objections to consenting to jurisdiction to the ICJ. The ICJ has the authority to make decisions in accordance with international law for "disputes of a legal nature that are submitted to it by States . . . and it gives advisory opinions on legal questions at the request of the organs of the [U.N.] . . ."[129] By waiving their objections, the ICJ would have jurisdiction to hear all the matters that dealt with the enforcement of the CRC. Allowing the ICJ to hear these disputes provides an international forum that although is not a police force, would still allow for better protection and enforcement.

Of course, in order to make such a clause binding on the States, it would have to be ratified and all the member parties would have to agree and sign the addition. Giving the ICJ such authority might provide a neutral forum to work out disputes dealing with enforcement and compliance with the CRC. Consenting to the Court's jurisdiction might also provide a backbone to the CRC, an overarching notion that compliance with the CRC will be mandatory. By consenting to the jurisdiction, the States are allowing the ICJ to resolve the dispute and demand them to comply. It would also be a statement that states are willing to take serious actions to stop any offenses and violations to the CRC. It might pressure other States to do the same until they all agreed. Embarrassment in the international community is often avoided at all costs. Calling out States that refuse to make the same serious declarations, could create an additional source of pressure. The CRC would have to provide a provision that would prohibit any state from making a reservation to the consent of ICJ jurisdiction. If not, it is likely that states could object to consenting to the jurisdiction, failing to allow the Court to provide relief for violations.

Allowing the ICJ to have jurisdiction to hear the disputes could provide a uniform system in which matters will be resolved. Although

127. BEDERMAN *supra* note 73, at 257. "Compromissory clauses are included in bilateral and multilateral conventions. Such provisions allow, in the event of a dispute arising under the treaty, that the matter will be submitted to the Court." *Id.*

128. *Id.*

129. *Jurisdiction*, INT'L CT. JUSTICE, *available at* http://www.icj-cij.org/jurisdiction/index.php?p1=5 (last visited Nov. 16, 2015).

some resistance can be expected, such clauses are not unheard of. Many treaties have such clauses consenting to ICJ jurisdiction; it would not be a stretch to amend the CRC to require the same type of compromissory clause.[130] It creates clarity and consistency amongst states, and will ensure that every State party to the Convention will comply with the promises they made.

B. Universal Jurisdiction

A second approach that can be taken to provide for better enforcement would be allowing member States to the CRC to police the other states. Such practices already exist, not only codified in international law, but as a practice of customary international law, giving states the power and responsibility to hold accountable states who violate treaties they have ratified.[131]The Geneva Convention requires member States to search for persons who have made grave violations to the CRC, extradite them, and prosecute them if possible.[132] Not only do states have the ability to engage in policing states to the CRC who are committing war crimes or genocide, but it confers upon them the absolute responsibility that they must investigate any breaches, and bring to justice those states committing the violations.[133]

Universal jurisdiction is a long-standing notion of international law when it comes to punishing violations of such egregious human rights.[134] It is the principle that requires states to police and bring criminal

130. *Practical Information*, INT'L CT. JUSTICE, *available at* http://www.icj-cij.org/information/index.php?p1=7&p2=2 (last visited Nov. 16, 2015) (noting that over 300 treaties contain similar compromissory clauses giving the ICJ jurisdiction to hear disputes that the States to the treaty may submit).

131. *Rule 158. Prosecution of War Crimes*, INT'L COMMITTEE RED CROSS, *available at* https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter44_rule158 (last visited Nov. 16, 2015). "Rule 158. States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects." *Id.*

132. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 49, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 50, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 146, Aug. 12, 1949, 6 U.S.T. 3516 , 75 U.N.T.S. 287.

133. *Rule 158. Prosecution of War Crimes*, *supra* note 131.

134. The Scope and Application of the Principle of Universal Jurisdiction, UNITED NATIONS, *available at* http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Kenya.pdf (last visited Nov. 15, 2015).

proceedings against international crime violations.[135] It acknowledges that some crimes are such large violations of human rights, that they cannot go unpunished. Making states obligated to bring such proceedings, and to take such actions to extradite persons who are committing the violations, despite their nationality or location, creates the notion that human rights are being given heightened priority and will not be compromised.[136] It allows for the prosecution of international crimes committed by anybody anywhere.[137]

If the same obligations were put upon the members of the CRC, then even if a state refuses to ratify the compromissory clause, enforcement of violations can still take place. Crimes against any child are a serious and egregious act that cannot go unpunished. There is no reason as to why the same weight cannot be afforded to the protection of children as is to the violation of war crimes and genocide. They both are actions that greatly impact the future of the world and society. Young children are impressionable and all precautions should be taken to ensure they have a healthy and positive upbringing.[138] If the states have agreed to such obligations and mandatory duties previously, the same should be done here. Allowing universal jurisdiction, and the requirement and responsibility to protect all children of the international community, would help to ensure that children are not being exploited in any part of the world.

A change of this magnitude would not only help to fill the gaps that have been left by the drafters of the CRC, but would also create a sense of responsibility and awareness to the continued violations and exploitations of children. By allowing states to police the other states who are party to the CRC, more children will be afforded protection, and the ultimate goals and purposes of the CRC will be upheld. It would create greater international awareness of the issues that are often swept under the rug on a daily basis. By calling out state actors who choose to violate the CRC, which they have signed and ratified as a member, more pressure can be put on them, and they can ultimately be prosecuted for their violations. It may cause those who are committing the violations to

135. *Id.*

136. *See id.*

137. Rome Statute of the International Criminal Court pmbl., July 17, 1998, 2187 U.N.T.S. 90. "Affirming that the most serious crimes of concern to the International community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation." *Id.*

138. *See generally* Louise Lemyre et al., *Psychosocial Considerations about Children and Radiological Events*, 142 RADIATION PROTECTION DOSIMETRY 70 (2010).

think twice: not only if they are convicted for their crimes, but also when they are thrust into the public eye.

If a state refuses to comply with the obligations of the CRC, implementing policing mechanisms would create better compliance with the CRC. This would put the pressure on the members of the international community who chose to ratify the CRC, to fulfill their obligations as a necessary step to go forward with the changes and reform that are necessary. It is the author's belief that the threat of cutting off aid and support, as well as the awareness that their actions are being monitored, will push states towards compliance, therefore protecting the children who are the most vulnerable to the decisions of others.

Being part of the international community, and choosing to sign and ratify treaties needs to stand for something more serious and concrete. It should not be enough for a State to put their name on a piece of "legally binding" paper, and then violate the very principals they promised to uphold. Unless states are willing to hold each other accountable for their actions, and create better enforcement mechanisms, no degree of specificity will ever be the answer. Universal jurisdiction and consent of waiver to jurisdiction before the ICJ, are steps that must be taken to give the CRC more teeth, and to ensure that if violations are committed, those persons and states will be held to answer for their actions.

C. Budget Proposal to Article 4

The first article that should be added/amended to the CRC, is one that addresses funding, and provides aid and supplies to the states that are parties to the CRC. Article 4 of the CRC focuses on the governments' responsibility to take all measures to assess and make sure that social services, legal services, and educational systems have the appropriate funding to provide the requisite needs to the citizen children.[139] In addition to Article 4, additional paragraphs should be mandated as follows:

> 2. States Parties shall undertake all measures appropriate to make sure that a certain percentage, to be set by the Committee, is being allocated to the social, legal, and educational services of the State. To the maximum extent possible, annual budget allocations for these services will be mandated, before spending can be allocated elsewhere, so far as it does not interfere with funding that is allocated to the defense and infrastructure of the State. States shall make sure that all barriers impeding the accessibility to the resources are removed, so as to make

139. Convention of the Rights of the Child, *supra* note 7, art. 4; *Fact Sheet*, *supra* note 55.

the resources accessible to all citizen children, so that they can take full advantage of the systems, allowing them to use them to develop into better citizens.

3. States will be required to submit their budget and spending allocations annually to the Convention's Committee to be reviewed and approved. If State's fail to pass the Committee's review, they shall be required to take the necessary adjustments within 90 days to allocate their resources as the Committee deems appropriate.

4. The committee will set the sliding percentage scale to determine, based off the Member State's gross income, what allocations will be deemed appropriate.

5. Failure to comply with any part of the Convention will lead to a fine, which will be paid to an account that is held by the Committee, and then allocated to States who need additional funding, as seen fit by the Committee.

The additional provisions to Article 4 of the CRC can help the states who are a party to the treaty in many ways.

First, by setting strict budget percentage requirements, states will be required to provide funding to support children in all of the public services the states are required to provide. As the CRC stands now, the Article only requires that the states, as they see fit, make sure that services are available to children.[140] By allowing states to pick and choose when and where to allocate their services, they often nickel-and-dime the services that are necessary to further the best interests of children. Not only are they providing little funding and aid toward these services and programs, but often provide none at all, claiming that they do not have the resources available to provide to these services.[141] Such relaxed policies occur when states are allowed to choose what the maximum is that they will allocate.[142] This also leads to one of the major reasons why non-compliance issues still arise on a daily basis.

Second, the provisions this paper proposes are better than the existing language of Article 4, because it will help address the issue of the wealth inequality and distribution among the Member States. It is the author's belief that a major concern is that the CRC, as it is written, fails to fix the problem of the wealth inequalities among the states.[143] Poorer states do not have the funding, so their maximum extent available does

140. Convention of the Rights of the Child, *supra* note 7, art. 4; *Fact Sheet*, *supra* note 55.

141. Watkins, *supra* note 26, at 70.

142. Convention of the Rights of the Child, *supra* note 7, art. 4; *Fact Sheet*, *supra* note 55.

143. Watkins, *supra* note 26, at 70, 73.

little, if nothing, to provide the necessary resources to keep services necessary to promote the development of children.[144] By allowing poorer states to slip by without enhancing public services to the children, it makes it difficult to mandate that the wealthier states, which can afford to allocate more funding and resources to the program, to do so. That should be a major red flag in the mind of any person who reads the CRC. These wealth disparities are issues that can be addressed and fixed, yet they have not been. Wealth disparities among the states are a problem because it makes it difficult for poorer states to comply with the CRC. The poorer the states, the worse off the conditions are for the children of that state.[145]

It is extremely unfortunate that where a child is born, in a wealthier or poorer state, affects their life expectancy. A child born in Chad has an increased risk of mortality by a factor of thirty-five relative to France.[146] These disparities matter immensely, and they are at the heart of the CRC. These disparities take away a child's basic opportunity to education, health, and survival.[147] "They violate the letter and the spirit of the [CRC]. Under article 4 of the [CRC], governments around the world have a responsibility to advance child rights and combat the unjust inequalities inherent in discrimination."[148] Such changes to Article 4 would make other aspects of the CRC more realistic and easier to comply with. Article 24 of the CRC requires states to "strive to ensure that no child is deprived of his or her right of access to such health care services" and to "take all appropriate measures . . . [t]o diminish infant and child mortality."[149] Article 28 also requires that states provide an equal opportunity for children to have access to education.[150] If states are required to provide a certain percentage of their resources to furthering these fundamental rights, they will be better equipped to provide resources to the children. "Research by UNICEF found that scaling up low-cost interventions aimed at eliminating the coverage gap between rich and poor households could save two-million lives between 2012 and 2015, cutting child mortality by 13%."[151] These changes can make a huge difference in the lives of many children. It is impossible to fix all of the wealth disparity

144. *See* Hunt, *supra* note 28.

145. *See id.*

146. Watkins, *supra* note 26, at 72.

147. *Id.* at 73.

148. *Id.*

149. Convention of the Rights of the Child, *supra* note 7, art. 24; *Fact Sheet*, *supra* note 55.

150. *See* Convention on the Rights of the Child, *supra* note 7, art. 28.

151. Watkins, *supra* note 26, at 78.

gaps that exist internationally, but little steps over time can make a difference that is necessary. In the long run these changes will be beneficial to all persons, not just the children of these states.

Finally, giving the Committee more control over these matters, and giving them the ability to set the requirements, puts the control into a neutral body whose only purpose is to advance the purposes of the CRC. The Committee has the better resources to research and gather information on the wealth disparities and to know what percentages of allocations are appropriate so that the necessary enhancements to public services are made. Also, by requiring yearly compliance checks, it also gives them more authority over making sure the sources are being provided every year and not just every five years. Finally, by imposing a fine on any state who fails to comply with the CRC adds another sense of consequence and accountability for their actions. States will be more apprehensive to commit the violations if they know they are required to pay additional fines, on top of the resource allocations they are already required to make. Creating more caution against committing violations will clearly further the purpose of the CRC, and further the best interests of the children. If wealthier states continue to commit the violations, they will be subject to punishment and fines, providing more funding not only to allocate to the poorer states, but also more funding for the Committee to look into violations, and expand their control and authority over the CRC.

Now is an appropriate place to discuss the impact that UNICEF could have in furthering the spirit of the CRC, by requiring them to provide funding and requiring them to play a bigger role in enforcing the CRC. The CRC is the first human rights treaty that allows a specialized agency, such as UNICEF, to have a role in the enforcement and implementation of the treaty.[152] UNICEF plays a large part in the advocacy and funding for humanitarian acts in the international community.[153] In 2012, UNICEF was able to raise close to $1.5 billion in humanitarian funds, worldwide.[154] UNICEF could take affirmative steps to team up with the Committee and not only help provide funding for enforcement and wealth issues, but it could help bring greater awareness to the CRC and its purpose. Greater awareness means larger amounts of funding, which means a greater chance of having more teeth for

152. *Monitoring the Fulfillment of States Obligations*, UNICEF, *available at* http://www.unicef.org/crc/index_30210.html (last visited Nov. 15, 2015).

153. *See Overall Funding Trends*, UNICEF, *available at* http://www.unicef.org/appeals/funding_trends.html (last visited Nov. 15, 2015).

154. *Id.*

enforcement. If more states are aware of the requirements of the CRC, they are more willing to act and notice violations, and be more willing to report those violations.[155] If UNICEF, the U.N., and other international actors are willing to help create awareness and funding for the CRC, a step towards filling the gaps would be made.

D. Language Changes and Clarification to Article 32

The second proposal this paper will address is to Article 32 of the CRC. Article 32 refers to the CRC's requirements for child labor.[156] Article 32 focuses on child labor exploitation and why protections must be put in place.[157] It prohibits States from allowing children to perform any work "that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development."[158] But the Article fails to provide, with any clear specificity, as to what the law is. Paragraphs 2(a) and 2(b) fail to clarify a specific age limit, or a specific number of hours allowed.[159] Finally, it concludes by providing that appropriate penalties or sanctions must be provided by the State to ensure the effective enforcement.[160] Article 32 is extremely vague,[161] and it is clear why the percentages of child labor exploitation are still running high throughout the international community.[162] Instead, a new proposal with a few language changes to the Article that would read as follows should be implemented:

> 2(a). States Parties shall provide for a minimum age, or ages for admission to employment, the minimum age not being younger than 14.
>
> 2(b). States Parties shall provide for appropriate regulation of the hours of employment, the maximum allowance not being more than 20 hours per workweek.
>
> 2(c). States Parties shall provide a minimum wage for payment that cannot be less than the minimum wage requirements for any person employed in the State.
>
> 2(d). States Parties shall undertake all measures possible to ensure that children are not being permitted to work in any conditions that are

155. *See* Watkins, *supra* note 26, at 94.
156. Convention on the Rights of the Child, *supra* note 7, art. 32.
157. *See id.*
158. *Id.*
159. *See id.*
160. *See id.*
161. *See* Convention on the Rights of the Child, *supra* note 7, art. 32.
162. Watkins, *supra* note 26 at 68-70, 90.

deemed hazardous to the well-being of the children.

3. The Convention's Committee will provide a list of employment conditions that any child will be prohibited from being subjected to. The list will not be exhaustive, and will be subjected to additions at any time the Committee deems it necessary and appropriate to do so. Some prohibited activities will include; slavery, child trafficking, bondage, sexual exploitation, illicit/illegal activities or crimes, and any work which is likely to harm the health, safety, or morals of children. The Committee will also provide for the appropriate penalties and sanctions for any non-compliance violations.

3(a). The States Parties shall comply with the listed employment conditions that the Committee finds prohibited from child employment. If the States Parties fail to comply with the Convention, or the Committee's stated purpose, they will be subjected to any penalty or sanction the Committee has deemed appropriate for the violation. The Committee has the authority when levying fines to consider the State's wealth, the seriousness of the violation, and whether or not the State has repeated issues of non-compliance.[163]

Such changes are necessary because children are still being exploited through their labor, throughout the international community. Watkins states that:

> 215 million children worldwide are involved in child labour, with more than half of them under age 15 and 91 million less than 12 years old. Many of these children are involved in hazardous employment, working long hours in dangerous occupations such as artisanal mining, sugar cane cutting and unregulated informal activities.[164]

Not only is this a concern that aims toward eliminating any dangers and hazards to the health and well-being of any child, but it also has a ripple effect throughout other areas of the CRC as well. If States are allowing children to be exploited for their labor for long hours per week, whether it be under hazardous conditions or not, they are taking that child out of school, which, directly contradicts Article 28 of the CRC.[165] This may potentially have a long standing effect on not only a child's intelligence level, but also on their ability to develop fundamentally, socially and morally. By allowing states to take children out of school, and allowing them to work long workweeks, they are going against the

163. Convention on the Rights of the Child, *supra* note 7, art. 32

164. Watkins, *supra* note 26, at 90.

165. *See* Convention of the Rights of the Child, *supra* note 7, art. 28; Watkins, *supra* note 26, at 74. Noting that Article 28 is the recognizing the importance of education, and the States Parties obligations to ensure that children are being provided with a primary education that is compulsory and available free to all. *Id.*

purpose of the CRC, which is to ensure the best interests of the children are being protected.

Child labor exploitation has always been a growing concern in the international community, and it lacks the awareness that it should be attracting. The issue of child labor exploitation is a sensitive one that creates difficult problems. There is no perfect solution to fixing and stopping all child labor exploitation throughout the world, but if more steps and efforts are made, it can be combated, and the percentages could drastically drop. Child labor exploitation should be one of the top focal points when it comes to children's rights. There are serious negative effects that child labor exploitation has on children, whether it is work that is not dangerous, or work that is extremely hazardous. Serious problems with premature aging, malnutrition, depression, and drug dependency are all impacts that can be linked to child labor exploitation.[166] There is absolutely no protection for children who are subjected to such conditions. "Their employers do whatever necessary to make them completely invisible and are thus able to exercise an absolute control over them."[167]

Similar to the pros of the budget proposal to Article 4, giving the Committee more authority, and the ability to get more involved in mandating compliance is an added advantage. The Committee is not only more involved in issuing the penalties and sanctions, but they are also closer to the problems and better able to observe them. With the implication of the changes addressed in this paper, the Committee will be better set to gather truthful statistics and percentages of the continued exploitations of children. By creating greater awareness and seeing firsthand the violations that are taking place, the Committee can not only themselves sanction the state parties, but they can also report them to other agencies in charge of punishing the violations.[168]

E. Application

If the proposed changes were applied, they would afford better

166. *Child Labor in the World*, *supra* note 51.

167. *Id.* Going on to further state that "children work in degrading conditions, undermining all principles and fundamental rights based in human nature." *Id.*

168. Watkins, *supra* note 26, at 91.

> Child labour in India is a good example. While official data place the figure as low as 5 million, credible civil society sources suggest that the real figure may be 10 times this level. Meanwhile, prosecution of firms and individuals responsible for child labour has been limited: An analysis by one NGO suggests that just 0.7 per cent of reported cases result in conviction.

Id.

protections to children and create better enforcement and compliance mechanisms. The application of the proposed CRC will be used in the scenario of child labor exploitation in Zimbabwe, Nigeria, Burundi, China, Russia, and Brazil, all of which are states that have signed and ratified the CRC. Zimbabwe, Nigeria, and Burundi are countries that considered to be developing still, [169] while China, Russia, and Brazil are considered countries that are economically developed.[170]

In compliance with the budget proposal to Article 4, all states should be required to allocate a certain percentage of their funding, as determined by the Committee to the social, legal, and educational services of the state. China, Russia, and Brazil, having more wealth to distribute, should be required to allocate a larger amount of funding than the developing countries of Zimbabwe, Nigeria, and Burundi.[171] With these allocations, states will ensure that educational and health services are being given top priority, and that children's access to them is not being impeded. Better education systems will allow for education to be free and mandatory for all children in the States. It is my argument that the better the education infrastructure, the more likely children will attend school, which in turn, will make it so more children are getting an education, and less children are being forced into child labor. By having more funding available, it will not only be free for families, but more of their burdens of transportation and uniform costs will be provided through the funding for developing countries.

A large reason why states argue they are unable to provide a free education made available to the children is because they cannot afford to allocate their resources to education and the related costs, because it takes away from other areas of the budget they would wish to allocate their spending.[172] But with the required allocation of funding, no state, no matter what their economic wealth is, will be allowed to forgo the mandatory funding for education. If states make education free, it could promote the seriousness of educating children, and make sure that an education is beneficial. In developing countries, more funding for education means that educational reform can take place. It may mean

169. *Developing Countries*, INT'L STAT. INST., *available at* http://www.isi-web.org/index.php/news-from-isi/20018-dc014 (last visited Nov. 16, 2015).

170. *See* Hunt, *supra* note 28.

171. *Developing Countries*, *supra* note 158. Similar to a flat tax rate, countries would be required to allocate a certain percentage of their resources to education and these social services. For example, both Zimbabwe and Russia would be required to each allocate 7% of their funding. Because Russia is the wealthier country, they will be allocating a larger amount of funding in comparison to Zimbabwe.

172. *See* Mark J. Epstein & Kristi Yuthas, *Redefining Education in the Developing World*, 10 STAN. SOC. INNOVATION REV. 19, 19 (2012).

that the infrastructure of the system be more focused on independent living and financial responsibility, in contrast to the educational systems in more developed countries.

Because Article 4 of the proposed CRC mandates a fine to any state party who refuses to comply with the Article,[173] the CRC can impose fines on them. The Committee through the authority of the CRC can use its discretion on where to allocate the fines that are received through the violations. In this scenario, it would allow States such as Zimbabwe, Nigeria, and Burundi, to receive additional funding to allocate directly into the education and social services infrastructure. With regards to China, Russia, and Brazil, by mandating that they provide funding for education, whether they already have a system in place allowing for free education, under the newly proposed CRC, they are still required to allocate further funding to their education systems. That funding may be received in the form of uniforms or transportation reimbursements for families to get their children to school. They will not be able to allocate the resources to wherever they choose; the article doesn't impose a sliding scale ration based on the quality of their education, but it is based on their gross income. Education can only be improved and made better under these proposals. The main focus is to get the children into school, and not have them working in hazardous environments.

With the changes and clarifications being made to Article 32 of the CRC, child labor exploitation is explicitly prohibited. This will have major effects on all states, whether developing or not. Zimbabwe, Nigeria, Burundi, China, Russia, and Brazil, all are states that have high percentages of child labor exploitation, yet they have all signed onto the CRC.[174] In compliance with the changes to Article 32, no child, under no exception, will be allowed to work at an age younger than fourteen, nor will they be allowed to work more than twenty hours per week. So, under the proposed condition, if a twelve-year-old girl from Russia is found to have been working in a crop spraying pesticides, Russia will be in violation of the CRC. Not only has Russia allowed for the exploitation of a twelve-year-old child, but they have also allowed for her to be working in an environment that is extremely hazardous to her health. Zimbabwe is considered one of the top ten worse countries for child labor exploitation.[175] But, under the new CRC, it would no longer be allowed to employ children in tobacco fields. Children will no longer be able to be used as drug smugglers, or for sexual exploitation if the new CRC

173. Convention on the Rights of the Child, *supra* note 7, art. 4.

174. Hunt, *supra* note 28.

175. *Id.*

were to be adopted.

Russia and Zimbabwe, clearly in violation of the CRC, will be forced to face some consequences under the new treaty. Not only does the Committee have the discretion to now fine both Zimbabwe and Russia, but both states have also consented to the jurisdiction of the ICJ and will be forced to answer for their violations. There are more repercussions and serious offenses for their violations. By consenting to the ICJ, all state parties to the CRC will be considered serious offenders of the treaty in front of the entire international community. As mentioned before, not only are they subjected to sanctions from the ICJ, but also the Committee can still choose to impose fines upon them for their serious violations. The Committee has the discretion to determine the appropriate fine in balance with the offense. The Committee then has the authority to allocate those fines to countries who are in dire need of more funding so that they can comply with the CRC. The Committee also has the discretion to allocate some of the fines to campaign awareness activities to further the purpose of the CRC. States will now have some fear for their violations and non-compliance. The CRC has more teeth and enforcement mechanisms to ensure compliance by all states.

III. CONCLUSION

In conclusion, the CRC is not a complete failure at providing protection for children. The CRC has made significant strides at bettering the world for children, and has been successful at eliminating many of the dangerous threats they are constantly faced with. But, just because there is a body of law that exists, with the goal of eliminating dangers and creating additional safeguards does not mean it is having the effect that it was meant to have.

By amending the CRC to include the changes proposed, it will not only close the gaps in enforcement, but it will create more specificity to existing amendments, extending the sphere of protection. One of the major problems with the CRC is that it is too vague, and allows states wiggle room to pick and choose which provisions to enforce. By changing the language and requiring States to comply with the specific requirements, it will eliminate the relaxed provisions, and mandate compliance. Second, by giving the Committee more authority to oversee issues of compliance, it creates a larger police force, making sure that the CRC is being upheld to the maximum extent possible. The ability to handle issues of monetary funding is also another way of giving the Committee the power and resources to police the States to the best of their ability. More resources and funding is the ultimate answer to make the biggest changes to reach the real purposes of the CRC. More resources

creates more awareness, which creates more authority and more accountability. States will be more aware of the issues and be more willing to make sure every party is complying with the CRC and hold each other accountable. With the new CRC, the gaps will be filled and children will be protected and provided the same equalities as every other person.