

TERRORISM, A HISTORY: STAGE ONE

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“Our cultures, our histories, grasp us with a thousand invisible fingers. . . . [E]ach country is inhabited not only by its citizens but also by ghosts from the past and by phantasms from imaginary futures or saints from lands outside time.”¹

* In order to write I am obliged to dedicate. Because this piece so often concerns revolutionaries and because revolutionaries are, for many of us, romantic “outlaw” figures, and because we suffer for our illusions, I dedicate the work to culture heroes. And, because my husband is one of the culture heroes of our generation, especially to him and to our communal redemption, I dedicate this work.

Whisky Jack shook his head. ‘I’m a culture hero,’ he said. ‘We do the same shit gods do, we just screw up more and nobody worships us. They tell stories about us, but they tell the ones that make us look bad along with the ones where we came out fairly okay.’

NEIL GAIMAN, *AMERICAN GODS* 400 (2001). In addition, I would like to express my appreciation to the James E. Beasley School of Law for their continuing financial support and encouragement.

1. ROBERT CONQUEST, *REFLECTIONS ON A RAVAGED CENTURY* 29 (2000). My youth cut across the 1960-1970 era of Civil Rights, hippies, anti-war protests, with all the accompanying violence associated with these movements. From Reverend Martin Luther King to the Black Panthers; from the death of Freedom Riders to the bombing of churches; from People’s Park to Altamont; from the Peace Movement to Four Dead in Ohio; from anti-war marches to trial of the Chicago 8; from We Shall Overcome to the Weathermen; this was my culture, my history. Its ghosts will always whisper their hopes to me; its ghouls will always warn me of the danger of wanting without wisdom. The particular memory that connects those days with this study of terrorism happened one day in 1971 while sitting through an interminable strategy session. It occurred to me that “Come the Revolution” my friends and I, embroiled revolutionaries, would be no more able than our current government to love the people, generate justice or walk hand-in-hand into a better world. We had become the enemy. That ended the revolution for me. But, I never forgot the intense dedication to a cause that burned so brightly. I never forgot what it was like to look into the light. And, because I never forgot, those who struggle against oppression are always my brothers and sisters. The way I see it, but for a moment of humility in an otherwise arrogant life, I could have died at Ruby Ridge, joined Timothy McVeigh’s Oklahoma horror story or found myself lending support to Osama

“Epochal moments belong rightly to history, and it is history that holds the only hope of providing an understanding of the twisted road that has brought us to this frightening pass.”²

“So long as the past and the present are outside one another, knowledge of the past is not of much use in the present. But suppose the past lives on in the present . . . and [is] at first sight hidden beneath the present’s contradictory and more prominent features.”³

I. INTRODUCTION

In a recent *New Yorker* article,⁴ I was exposed to a view of history previously unknown to me. The first glance revealed a period of “humiliation and disgrace” which began for many Muslims in 1918 with the defeat of the Ottoman sultanate by Western European forces.⁵ Shortly thereafter, when Turkish nationalists were able to regain territorial control from the French and British, the sultanate, the Ottoman sovereign, the caliph, head of all Sunni Islam, the last personality to inherit authority through a lineage directly connected the Prophet Muhammad, was abolished.⁶ Finally, the caliphate itself, a rocky but essentially unbroken tradition, a symbol of Muslim unity and identity for thirteen centuries, was eradicated.⁷

Lewis, the author of the *New Yorker* article, points to resulting shock waves that continue to be experienced in the Muslim community. I can well understand the fact of this type of historic shock. I was raised in a tradition where the destruction of a Temple not long after the beginning of the Christian era was taught as a

bin Laden. I never want to call these people names, dehumanize them, demonize them, degrade or belittle them. They are not so different from me. On the other hand, I do not want to be murdered or to have my friends, family, and fellow citizens slaughtered or tormented by those who find themselves trapped in violence. So, it is here, acknowledging that we are capable of endangering ourselves and others to achieve our projected ends, that I want to start my exploration of history.

2. CALEB CARR, *THE LESSONS OF TERROR: A HISTORY OF WARFARE AGAINST CIVILIANS—WHY IT HAS ALWAYS FAILED AND WHY IT WILL FAIL AGAIN* 5 (2002).

3. JONATHAN GLOVER, *HUMANITY: A MORAL HISTORY OF THE TWENTIETH CENTURY* 411 (1999) (citing R.G. COLLINGWOOD, *AUTOBIOGRAPHY* (1978)).

4. Bernard Lewis, *The Revolt of Islam*, *THE NEW YORKER*, Nov. 19, 2001, at 50.

5. *Id.*

6. *Id.* at 50-51.

7. *Id.* at 51.

trauma from which there was no complete recovery. Having been raised among Roman Catholics, I can imagine the deep disturbance the loss of the Pope, as Father of the Church, would cause. When the Dalai Lama was forced into exile by the Chinese, the shock to that Buddhist community was evident. Imagine the ramifications had “foreign imperialists and domestic modernists”⁸— the forces Lewis identifies as being held responsible for the loss of the caliphate— been capable of eradicating completely the person and position of this religious leader.

The second glance revealed a world unified by religion, not nationality.⁹ While I know this world well from my childhood and from my studies of pre-Reformation Europe, my ignorance of Middle Eastern history had veiled its vitality in the Muslim community. Nation-states and the form of nationalism associated with them are relatively new inhabitants of the world community.¹⁰ Tribal and religious collectives, loyalties, and identities are far older. Their strength draws from the deepest possible affiliations known to humankind.¹¹ It would be foolhardy to look upon a community united through religion and anticipate an equivalent regard for political affiliations.

The third revelation exposed a previously unfamiliar view of the United States as a threatening monolithic empire. From the vantage point of a once powerful Islam brought low by “foreign imperialists and domestic modernity,” a degree of safety was achieved as the tensions between imperialist superpowers kept them off balance. The failure of the Soviet system left the United States singular and unrivaled.¹² No compensating patron existed for Islamic interests. As Lewis puts it, “Middle Easterners found themselves obliged to mobilize their own forces of resistance. Al Qaeda—its leaders, its sponsors, its financiers— is one such force.”¹³

There is more to this particular history: the international and unwelcomed imposition of Israel; the support by the United States of tyrannical governments; the poverty of many in the Middle East along with the extravagant wealth of others in the same community; the role of jihad in Islamic tradition; the unbridgeable distinctions

8. Id.

9. Id.

10. Id.

11. Matthew 8:21 (The Oxford Annotated Bible) (“Another of the disciples said to him, ‘Lord, let me first go and bury my father,’ But Jesus said to him, ‘Follow me, and leave the dead to bury their own dead.’”); DAVID S. NOSS & JOHN B. NOSS, *MAN’S RELIGIONS* 106-07 (7th ed. 1984) (reporting the often repeated story of Prince Gautama, the Buddha, who left his royal family, wife and child, renouncing household life, to seek spiritual renewal).

12. Lewis, *supra* note 4, at 51.

13. Id. at 54.

between strict Islamic and hedonistic Western lifestyles; and the modern history of terrorism.¹⁴

These aspects are not unimportant details, listed to be overlooked in favor of the deep, underlying influences of history. They are, as Collingwood instructed us, the sometimes contradictory and always prominent features familiar to us in the present.¹⁵ But they, by themselves, may not be enough to prepare us to make informed decisions in the present about how to move toward a more peaceful, resolved future.¹⁶

Wanting to know how to move toward that future, I decided to learn from the past by immersing myself in history. Specifically, I wanted to know more about the history of terrorism.¹⁷ I decided to

14. *Id.*

15. See GLOVER, *supra* note 3.

16. I think, not until I mourn with the Sunni Islamic community over the loss of their caliph, can I begin to comprehend the perspectives that influence belief and underlie action. I think, not until I perceive the overwhelming nature of United States power, can I hope to comprehend the seemingly futile but horribly painful acts of resistance represented by the events of September 11th.

17. The constructed history of terrorism begins with the sicari, an extremist group of Jewish resisters active during the Roman occupation of Palestine. It is from this group we inherited the word “zealot;” a zealous lot they were. They fought as guerrillas against the Romans in the countryside, attacking priests and moneylenders, and torched archives and palaces within Jerusalem. These are the suicidal patriots of Masada and, according to Josephus Flavius, may have contributed to the destruction of the second Temple, circa 70 C.E., and thus, to the seemingly endless Diaspora of the Jewish people. WALTER LAQUEUR, *THE NEW TERRORISM* 11 (1999). Next, we are brought into the eleventh century with the Order of the Assassins (Hashhashin), a Muslim sect that began by seizing mountain fortresses, graduated to urban activity and specializing in the assassination of powerful individuals. Yonah Alexander, *Terrorism in the Twenty-First Century: Threats and Responses*, 12 *DEPAUL BUS. L.J.* 59, 65 (1999/2000). Their goal was the purification of Islam in preparation for the coming of the Madhi or Messiah. Patricia A. Long, *In the Name of God: Religious Terrorism in the Millennium—An Analysis of Holy Terror*, *Government Resources*, and the Cooperative Efforts of a Nation to Restrain Its Global Impact, 24 *SUFFOLK TRANSNAT'L L. REV.* 51, 56 (2000). The Assassins must be considered in conjunction with their enemies, the Crusaders, who came from Europe to the Holy Land during the same era. They too sought, through violence, to purify the land of Jesus' birth in what they called a “righteous war against the infidel.” *Id.* European pirates and privateering during sixteenth and eighteenth century are mentioned as additional episodes of terrorism. Alexander, *supra*, at 65; see also Marcus Rediker, *The Seaman as Pirate: Plunder and Social Banditry at Sea*, in *BANDITS AT SEA: A PIRATE'S READER* 139, 152 (C. Richard Pennell ed., 2001) (“The Jolly Roger . . . a ‘black Ensign, in the Middle of which is a large white Skeleton’ . . . was intended to terrify the pirates’ prey.”). Research for my American Legal History class revealed a rich and stimulating supply of sources, such as the importation of slaves from Africa to the Americas. HANNAH ARENDT, *ON REVOLUTION* 65-66 (1963) [hereinafter *ARENDR, ON REVOLUTION*]. Additional research yields supportive information. Slavery in the United States is mentioned as a product, rather than a method, of terror. CARR, *supra* note 2, at 136-37. See ALLEN W. TRELEASE, *WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION* (1971), for an intensive investigation into the terrorist activities of the KKK during Reconstruction. Other sources speak about Rwanda and South Africa, but these are not always focused on terrorism. HUMAN RIGHTS WATCH, *SLAUGHTER AMONG NEIGHBORS: THE POLITICAL ORIGINS OF COMMUNAL VIOLENCE* (1995) (covering Rwanda at 13-32 and South

investigate the history of terrorism in a formal sense, in the sense that from a date forward there existed an identifiable class of political conduct that was called terrorism. According to the Western canon, the terrorism I was interested in is first associated with the Reign of Terror in the French Revolution.¹⁸ So, it was to the French Revolution that I turned. Also, the idea of terrorism, its justification, is linked to the violence of an oppressed people seeking liberation from the clutches of subjugation.¹⁹ As a result, it was to

Africa at 57-72). See also PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* (1998). The Maasai-Kikuyu conflict in Kenya, which brought the term “mau mau” into association with terrorism, is mentioned in one of my sources. HUMAN RIGHTS WATCH, *supra*, at 102-05. Sri Lanka is mentioned in several sources but the emphasis is mostly modern and not solely on the terroristic nature of the problem. HUMAN RIGHTS WATCH, *supra*, at 85-100; Bruce Kapferer, *Remythologizing Discourses: State and Insurrectionary Violence in Sri Lanka*, in *THE LEGITIMIZATION OF VIOLENCE* 159, 159-88 (David E. Apter ed., 1997); LAQUEUR, *supra*, at 100-01, 191-96. Chinese and Indian secret societies are mentioned briefly as having long histories that qualify for further investigation. The Boxer Rebellion of 1900 in China is alluded to as providing some relevant material. *Id.* at 12. Finally, from India, the thuggee, from which we have derived the term “thug,” who strangled their victims as a service to Kali, are noted as part of terrorist history. *Id.*

18. Bradley Larschan, *Legal Aspects to the Control of Transnational Terrorism: An Overview*, 13 OHIO N.U. L. REV. 117, 123 n.32 (1986) (citing PAUL WILKINSON, *POLITICAL TERRORISM* 9 (1974) for the proposition that the first usage of “terrorism” was in reaction to the “systematic policy of violence, intimidation and the use of the guillotine by the Jacobin and Thermidorian movements in revolutionary France.”). 17 OXFORD ENGLISH DICTIONARY 820-21 (2d ed. 1989) (listing as its first definition of “terrorism”: “Government by intimidation as directed and carried out by the party in power in France during the Revolution of 1789-94; the system of the ‘terror’ (1793-4);” and, as its first definition of “terrorist” it provides: “As a political term: a. Applied to the Jacobins and their agents and partisans in the French Revolution, especially to those connected with the Revolutionary tribunals during the ‘Reign of Terror.’”). This methodology of looking for and attending to the first use of a particular term, accords with Foucault’s system of searching out the earliest uses of terminology. See MICHEL FOUCAULT, *ETHICS: SUBJECTIVITY AND TRUTH* (Paul Rabinow ed., Robert Hurley et al. trans., 1997) (referring especially to chapters covering: *The Abnormals*, at 51-57; *Society Must Be Defended*, at 59-65; *Technologies of Self*, at 223-251; and *What is Enlightenment*, at 303-319); see also CONQUEST, *supra* note 1, at 4 (“[I]n France . . . we first find Revolution in the sense of the complete destruction of the existing order, and its replacement by abstract concepts—these latter formulated by, and dictatorially enforced by, theorists with no experience of real politics.”).

19. Actually, this issue is part of a definitional debate between those who conclude that politically motivated violence should not automatically be labeled terrorism and those who believe that the unlawful use of violence to further political or social objectives and/or to intimidate or coerce governments into changing policies is exactly what terrorism is. Compare and contrast definitions quoted by Louis René Beres, *The Meaning Of Terrorism—Jurisprudential And Definitional Clarifications*, 28 VAND. J. TRANSNAT’L L. 239, 240-41 (1995) (citing R. Kidder, *Unmasking Terrorism: The Fear of Fear Itself*, in *VIOLENCE AND TERRORISM* 14 (Bernard Schechterman and Martin W. Slann eds., 3d ed. 1993)) which promote the idea that terrorism is “the unlawful use of violence to intimidate or coerce in furtherance of political agendas,” with the Third World Proposal definition, which shelters from the label of terrorism the use of violence for self-determination and independence while attaching the label to the use of violence by colonial racist regimes who seek to repress a people’s struggle for freedom; and State assistance offered to fascist or mercenary groups whose terrorist activities are directed against other sovereign nations. Liam G. B. Murphy,

A Proposal on International Legal Responses to Terrorism, 2 *TOURO J. TRANSNAT'L L.* 67, 81 n.47 (1991) (citing Third World Proposal, Report of the Ad Hoc Committee on International Terrorism, 28 U.N. GAOR supp. (No. 28) at 21, U.N. Doc. A/9028 (1973)). When, in the 1970s, the United Nations undertook to draft "An International Convention Against the Taking of Hostages," the inability of nation-states to reach an agreeable definition of terrorism moved the community to adopt a piecemeal instead of a comprehensive approach toward restraints against terrorism. Elizabeth R.P. Bowen, Note, Jurisdiction over Terrorists Who Take Hostages: Efforts to Stop Terror-Violence Against United States Citizens, 2 *AM. U. J. INT'L L. & POL'Y* 153, 191 n.202 (1987) (citing Ved P. Nanda, Progress Report on the United Nations' Attempt To Draft An "International Convention Against the Taking of Hostages," 6 *OHIO N.U. L. REV.* 89, 89 (1979)). More than a decade later, "defining terrorism remained a stumbling block to international agreements. Despite years of effort it was impossible to definitionally distinguish between terrorist activity and national liberation movements." Caleb M. Pilgrim, Terrorism in National and International Law, 8 *DICK. J. INT'L L.* 147, 157-58 (1990). The condition lingers in this unsettled state. See Roberta Smith, Note, America Tries To Come To Terms With Terrorism: The United States Anti-Terrorism and Effective Death Penalty Act of 1996 v. British Anti-Terrorism Law and International Response, 5 *CARDOZO J. INT'L & COMP. L.* 249, 254-55 (1997); see also Michael J. Glennon, The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter, 25 *HARV. J.L. & PUB. POL'Y* 539, 558 (2002); Emanuel Gross, Thwarting Terrorist Acts by Attacking the Perpetrators or Their Commanders as an Act of Self-Defense: Human Rights Versus the State's Duty to Protect its Citizens, 15 *TEMP. INT'L & COMP. L.J.* 195, 200-03 (2001).

In its modern manifestations, terror is the totalitarian form of war and politics. It shatters the war convention and the political code. . . . Despite this, terrorism has been defended. . . . It is said, for example, that there is no alternative to terrorist activity if oppressed peoples are to be liberated. Those who make these arguments, I think, have lost their grip on the historical past.

Id. at 233. The issue of definition is so controversial that scholars have questioned the possibility of solution. Note, International Terrorism and Islamic Law, 29 *COLUM.J. TRANSNAT'L L.* 629, 631 n.7 (1991) (citing JOHN F. MURPHY, PUNISHING INTERNATIONAL TERRORISTS 3-5 (1985) and ALEX P. SCHMID & ALBERT J. JONGMAN, POLITICAL TERRORISM 1-10 (1988)); R.R. Baxter, A Skeptical Look at the Concept of Terrorism, 7 *AKRON L. REV.* 380, 380 (1974) ("We have cause to regret that a legal concept of 'terrorism' was ever inflicted upon us. The term is imprecise; it is ambiguous; and above all, it serves no operative legal purpose."). Compiling multiple definitions is a technique offered by some. See Beres, *supra*, at 240-41; Murphy, *supra*, at 81-83 nn.47-50. Still others define terrorism based on the intent of the perpetrator.

See Jeffrey Allan McCredie, Note, The Responsibility of States for Private Acts of International Terrorism, 1 *TEMP. INT'L & COMP. L.J.* 69, 69 n.2 (1985) (citing Tran Tam, Crimes of Terrorism and International Criminal Law, in *A TREATISE ON INTERNATIONAL LAW* 491 (M. Bassiouni ed., 1973)); see also Note, International Terrorism and Islamic Law, 29 *COLUM. J. TRANSNAT'L L.* 629, 631 n.7 (1991) (citing BUREAU OF DIPLOMATIC SECURITY, U.S. DEPT OF STATE, PUB. NO. 9718, SIGNIFICANT INCIDENTS OF POLITICAL VIOLENCE AGAINST AMERICANS: 1988 (1989), at 2).

Traditional terrorism, whether of the separatist or the ideological (left or right) variety, had political and social aims, such as gaining independence, getting rid of foreigners, or establishing a new social order. Such terrorist groups aimed at forcing concessions . . . from their antagonists. The new terrorism is different in character, aiming not at clearly defined political demands but at the destruction of society and the elimination of large sections of the population.

LAQUEUR, *supra* note 17, at 81. While subjected to critical appraisal, cataloguing offenses is sometimes posited as our only alternative. LAQUEUR, *supra* note 17, at 79 ("There has been no 'terrorism' per se, only different terrorisms."); but see International Terrorism and Islamic

a trail of Revolutions emerging from the French experience that I turned.

This article is the resulting documentation of my research. After a brief introduction by way of background material, it moves to an examination of the events, and delves into the processes, of four Revolutions—French, Russian, Chinese, and Cambodian—from their inception through their devolution into terror. Each revolutionary section is weighted toward historic reporting; each attempts to capture the movement from a liberating to a terroristic regime. The conclusion is appropriately brief, proffering a series of hypotheses requiring further investigation.

II. BACKGROUND

A. Definitional Difficulties: Political Action or Criminal Conduct

“It becomes difficult to ignore the heroic side of political violence. Reallocations of wealth . . . human betterment . . . are . . . inseparable from political violence. . . . It takes confrontation outside the law to make the law itself. Few basic changes in the content and scope, logic and practices of liberty and equality occur peacefully.”²⁰

Compare:

“[W]e distinguish political violence from violence in general. Most violence is random if not criminal. Political violence disorders explicitly for a designated and reordering purpose: to overthrow a tyrannical regime, to redefine and realize justice and equity, to achieve independence or territorial autonomy, to impose one’s religious or doctrinal beliefs.”²¹

with:

“Engels said that the first form of revolt of the modern proletariat. . . was criminality. . . [A]t the end

Law, *supra*, at 631 n.7 (defining terrorism based on intent).

20. David E. Apter, Political Violence in Analytical Perspective, in *THE LEGITIMIZATION OF VIOLENCE* 1, 3 (David E. Apter ed., 1997).

21. *Id.* at 5 (citing John Locke, A Letter Concerning Toleration, in *THE SECOND TREATISE ON CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION* (John Wiedhofft Gough ed., 1948)).

of the eighteenth century and at the beginning of the nineteenth century criminality was perceived, by the proletarians themselves, to be a form of social struggle.”²²

and:

“[E]veryone knows that Napoleon III was able to seize power only with the help of a group consisting, at least on its lower levels, of common-law criminals.”²³

Terrorists commit crimes. No one doubts that. Timothy McVeigh was executed as a murderer for the Oklahoma federal building bombing.²⁴ In 1995, Shoko Asahara and his Aum Shinri Kyo followers released sarin, a poison gas, in a Tokyo subway station killing a dozen people and injuring more than 5,000. Sheikh Omar Abdul Rahman was charged with the 1994 bombing of the World Trade Center. On September 11, 2001 many of us watched in horror the actual destruction of the World Trade Center towers.

In addition to their specified terroristic crimes, terrorists often commit instrumental crimes. Bank robbery was a preferred method for attaining financial support among some modern right wing terrorists in the United States.²⁵ Irish terrorists in the nineteenth century were known to forge banknotes to keep themselves in funds.²⁶ “The ‘social banditry’ of Pancho Villas combined horse theft with a political agenda.”²⁷ Ideologists of terrorism like Bakunin, perhaps following Engels’ philosophy, identified criminals as the true revolutionary class.²⁸ Stalin, operating under the name Koba

22. MICHEL FOUCAULT, *POWER/KNOWLEDGE* 18-20 (Colin Gordon ed., Colin Gordon et al. trans., 1980).

23. *Id.* at 40. See also LAQUEUR, *supra* note 17, 210-25, where the author provides a modern day overview of the links between terrorist groups and organized crime. An investigation of the connections between terrorism and criminal organizations, particularly between terrorism and illegal drugs, is covered in part in MARK BOWDEN, *KILLING PABLO: THE HUNT FOR THE WORLD'S GREATEST OUTLAW* 63-70, 188-200 (2001) [hereinafter “BOWDEN, *KILLING PABLO*”].

24. LOU MICHEL & DAN HERBECK, *AMERICAN TERRORIST: TIMOTHY MCVEIGH & THE OKLAHOMA CITY BOMBING* 468-71 (2001).

25. KEVIN FLYNN & GARY GERHARDT, *THE SILENT BROTHERHOOD* 39, 152, 153-56, 158, 159, 162, 454, 465 (1989). See also *id.* at 275-76, 282, for references to the Brinks Company robberies.

26. LAQUEUR, *supra* note 17, at 210; see also FLYNN & GERHARDT, *supra* note 25, at 136-41, 266-69 (describing how counterfeiting was one method relied upon as a source of funding for political action groups).

27. LAQUEUR, *supra* note 17, at 210.

28. *Id.* at 211.

in 1907, successfully attacked two Cossack guarded carriages carrying large sums of money.²⁹ The “outlaw” issues its own seductive appeal.³⁰

Whether to treat terrorism as a crime or as an act of war is one of the debates pervading the literature of definition.³¹ The proponents of criminal treatment hold that war is a condition between States; with the exception of qualified guerillas,³² it is not available to private parties or non-State collectives.³³ Those who favor criminalization often desire to “de-legitimize terrorists, revealing them to society as the criminals they really are.”³⁴ Others favor this approach because it could empower International Court action.³⁵ Those who view terrorism as a species of war speak of

29. EDVARD RADZINSKY, *STALIN* 56 (H.T. Willetts trans., 1996).

30. BOWDEN, *KILLING PABLO*, *supra* note 23, at 14-15.

Anyone can be a criminal, but to be an outlaw demands a following. The outlaw stands for something. . . . No matter how base the actual motives of criminals like those in the Columbian hills, or like the American ones immortalized by Hollywood—Al Capone, Bonnie and Clyde, Jesse James—large numbers of average people rooted for them and followed their bloody exploits with some measure of delight. Their acts, however selfish or senseless, were invested with social meaning. Their crimes and violence were blows struck against distant, oppressive power. Their stealth and cunning . . . were celebrated, these being the time-honored tactics of the powerless.

Id.

31. Compare Pilgrim, *supra* note 19, at 147 and Larschan, *supra* note 18, at 117 (suggesting a war-based orientation), with Beres, *supra* note 19, at 239; Murphy, *supra* note 19, at 67; L. Paul Bremer III, *Counterterrorism: Strategies and Tactics*, *DEPT ST. BULL.*, Jan. 1988, at 47, 47; Jacqueline Ann Carberry, Note, *Terrorism: A Global Phenomena Mandating A Unified International Response*, 6 *IND. J. GLOBAL LEGAL STUD.* 685 (1999) (favoring criminal treatment). See also generally CARR, *supra* note 2, for an insightful recharacterization of war and terrorism. Noah Feldman, in a recent article, has expanded the range of considerations brought to this topic. Noah Feldman, *Choices of Law, Choices of War*, 25 *HARV. J.L. & PUB. POLY* 457 (2002). His willingness to end the binary nature of the discussion is joined by Sean D. Murphy, *Terrorism and the Concept of “Armed Attack”* in Article 51 of the U.N. Charter, 43 *HARV. INT’L L.J.* 41, 49-50 (2002); see also United Nations Office on Drugs and Crime, *Terrorism*, at www.undep.org/odccp/terrorism.html (last visited Feb. 13, 2003) (“Terrorism is a unique form of crime. Terrorist acts often contain elements of warfare, politics and propaganda. . . . Their form of psychological warfare is ‘propaganda by deed.’”); Beverly Allen, *Talking “Terrorism”: Ideologies And Paradigms In A Postmodern World*, 22 *SYRACUSE J. INT’L L. & COM.* 7, 7 (1996) (“‘Terrorism’ is the most linguistic of violent political acts because its success depends entirely on whether or not it gets its message across. Such violence does not claim territory or establish new sovereignties; it works in a largely communicative mode, where the language is destruction, injury, and murder.”).

32. LAQUEUR, *supra* note 17, at 8 (“The strategy of guerrilla warfare is to liberate territory, to establish counter institution and eventually a regular army. . . . The classic case of guerrilla warfare is China in the 1930s and 1940s. . . .”); see also Eric J. HOBBSBAWM, *REVOLUTIONARIES* 195-211 (1973).

33. Murphy, *supra* note 19, at 75; see also Maryann Cusimano Love, *Globalization, Ethics, and the War on Terrorism*, 16 *NOTRE DAME J.L. ETHICS & PUB POLY* 65, 66 (2002).

34. Bremer, *supra* note 31, at 47.

35. Carberry, *supra* note 31.

“campaigns of violence,”³⁶ “global battlegrounds,”³⁷ “low-level armed conflict”³⁸ and “nothing less than warfare.”³⁹ Their objective is often premised on a “strategic deterrence” theory—neutralize terrorists by forcing them to concentrate on defense and survival.⁴⁰ Alternatively, Caleb Carr promotes “terrorism as war” to emphasize its roots, and the disutility of its unduly extreme measures.⁴¹

These persistent categorical difficulties⁴² were not obstacles I foresaw when initiating the research. Operating without a clear referent, doing historical research without a defined object of investigation, is daunting. How to search out the history of “something” when there was no “objective correlative”⁴³ for the

36. Larschan, *supra* note 18, at 134.

37. *Id.*

38. *Id.* at 139.

39. *Id.*

40. Pilgrim, *supra* note 19, at 155.

41. CARR, *supra* note 2, at 12.

42. Consider LAQUEUR, *supra* note 17, at 43: “Classic terrorism is propaganda by deed.” “If, according to the nineteenth-century creed, terrorism was propaganda by deed, a suicide terrorist mission was a fortiori such propaganda.” *Id.* at 140. “For the aim of terrorism . . . was propaganda by deed, and if their actions were not publicized—or if their actions were ascribed to their political foes—it must have seemed pointless or even counterproductive to engage in terrorist operations.” *Id.* at 107.

The word [terrorism] works very well, in fact, as a cipher indicating practically nothing about the events we think it describes, but a great deal about the ideology of the person . . . who uses it.

The word “terrorism”. . . like the word “terrorist,” is more than anything else a shifting indicator of the user’s point of view.

Allen, *supra* note 31, at 8 (1996); Ileana M. Porras, On Terrorism: Reflections on Violence and The Outlaw, 1994 UTAH L. REV. 119, 124-125 (“Everyone uses the word ‘terrorism’ to mean a kind of violence of which he or she does not approve, and about which he or she wants something to be done. . . . [T]he word ‘terrorism’ came to be understood universally as pejorative.”). Interestingly, the history of piracy reveals similar complexities. “[T]here is no authoritative definition of international piracy.” Anne Pérotin-Dumon, The Pirate and the Emperor: Power and the Law on the Seas, 1450-1850, in BANDITS AT SEA 25, 31 (C. Richard Pennell ed. 2001). Pérotin-Dumon goes on to draw this tight analogy between piracy and terrorism:

In the 1930s the Nicaraguan patriot Augusto Sandino was a bandit in the eyes of the North Americans, and in the 1940s the German authorities of occupied France viewed as terrorists the resistants loyal to France libre.

On the Malabar coast of India in the sixteenth century, the Kunjalis were the main adversaries of the Portuguese, who treated them as cossarios; for the Zamorin princes of Calicut, the Kunjalis were their naval force and were patriots *avant la lettre*.

Id.; see also John L. Anderson, Piracy and World History, An Economic Perspective on Maritime Predation, in BANDITS AT SEA 82, 82-83 (C. Richard Pennell ed. 2001) (“Piracy is a subset of violent maritime predation in that it is not part of a declared or widely recognized war. Within the general category of maritime predation, a precise definition of piracy universally acceptable over time and between places has eluded jurists.”).

43. FRANCIS OTTO MATTHIESSEN, THE ACHIEVEMENT OF T.S. ELIOT: AN ESSAY ON THE NATURE OF POETRY 58 (2d ed. 1947).

“something” searched for?⁴⁴ I found myself, through my research, in a conundrum I had not anticipated. In my attempt to seek understanding, my choice of focus led me into a debate I was not prepared to enter: whether terrorism can emanate from state action. My conclusion is that it can and it does. We cannot understand terrorism without paying careful attention to the terroristic capacity of establishing and established governments.⁴⁵

III. REVOLUTIONS

A. A Terrorist Tree: Evolution In Action

1. The French Revolution Clears the Land: Slash & Burn
“It was the war upon hypocrisy that transformed Robespierre’s dictatorship into the Reign of Terror.”⁴⁶

“Looked at from without, from the viewpoint of misery and wretchedness, it [eighteenth century French society] was characterized by heartlessness; but seen from within, and judged upon its own terms, it was the scene of corruption and hypocrisy. That the wretched life of the poor was confronted by the rotten life of the rich is crucial for an understanding of . . . Rousseau and Robespierre.”⁴⁷

“[O]nly naked need and interest [are] without hypocrisy, the ‘malheureux’ changed into the ‘enrages’, for rage is indeed the only form in which misfortune can become active.”⁴⁸

“[T]he rage of impotence eventually sent the Revolution to its doom, it is true that suffering, once

44. Allen, *supra* note 31, at 7 (“Therefore, the ‘terrorism’ we speak of . . . in some very real symbolic sense does not exist. In linguistic terms, the signifier has no signified.”).

45. But see Love, *supra* note 33, at 66 (“[T]errorism . . . the use of violence by nonstate actors against non combatants for the purpose of causing fear in order to achieve political goals.”) (emphasis added). This definition complies with the general understanding of Saint Augustine’s “Just War Tradition” which operates “to de-legitimize private armies and bands of armed criminals and to centralize the use of force in the hands of the sovereign.” *Id.* at 72. The intended purpose of the “Just War Tradition” was to progress toward peace. Its theorists hope to attain this end by “legitimizing a monopoly on the use of organized violence for public authorities” and by “requiring strict limitations . . . on the circumstances under which war could be used and how it could be waged.” *Id.*

46. ARENDT, *ON REVOLUTION*, *supra* note 17, at 95.

47. *Id.* at 101.

48. *Id.* at 106.

it is transformed into rage, can release overwhelming forces.”⁴⁹

Hannah Arendt’s thesis is that the French Revolution twisted on its axis, moving away from its original orientation, political freedom, toward an unbounded desire to liberate “man from suffering.”⁵⁰ This unleashing of unbounded desire led to terror, not to political liberation. Three elements of Arendt’s reasoning are required to understand her point and to consider this point in relationship to terrorism.

First are Arendt’s ideas about liberation, freedom, and the political identity of free people. Arendt, like the Greeks she so admires, believes in the elevating value of responsible community decision-making: participation in the governing of affairs as civic virtue.⁵¹ Revolution, she believes, is best undertaken to change the structure of the political realm.⁵² One intelligently undertakes to establish a political realm of civil equality. Arendt, who does not believe in essential or ‘by nature’ equality, posits that through institutions an artificial equality, a community of peers participating together, discussing and deciding the affairs of their community, is desirable and achievable.⁵³ “[N]o one can be free except among . . . peers” is a principle she adopts from the ancient Greeks.⁵⁴ A liberated person, a free person, is one who, out from under the oppression of tyrannical, despotic or household obligations, is able to meet with her peers and participate in public

49. *Id.* at 107.

50. *Id.* But see HOBBSAWM, *supra* note 32, at 201-08, for a critical view of Arendt’s methods and conclusions.

51. ARENDT, ON REVOLUTION, *supra* note 17, at 25 (“[T]he actual content of freedom . . . is participation in public affairs, or admission to the public realm.”). See also GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 104 (1991):

Public virtue was the sacrifice of private desires and interests for the public interest. It was devotion to the commonweal.

Republicanism thus put an enormous burden on individuals. They [are] expected to suppress their private wants and interests and develop disinterestedness- the term eighteenth century most often used as a synonym for civic virtue.

Id.

52. ARENDT, ON REVOLUTION, *supra* note 17, at 17.

53. *Id.* at 23.

[T]his equality within the range of the law . . . was not equality of condition . . . but the equality of those who form a body of peers. . . . Neither equality nor freedom was understood as a quality inherent in human nature, they were . . . conventional and artificial, the products of human effort and qualities of the man-made world.

Id.

54. *Id.* at 23.

affairs.⁵⁵ Creating and maintaining opportunities for shared participation in community decisions is a positive and attainable goal.

Second, Arendt presents a wondrous exploration of the way in which the term ‘revolution’ was transplanted from its scientific, planetary, cosmic applications to its political constructions. Where, originally, the term referred to planetary patterns of cycles and return, restoration,⁵⁶ through association with the French Revolution the irresistibility element of these same patterns emerged as dominant.⁵⁷ The strength and power of natural forces that keep the cosmos in place, their lawfulness, when applied to human events, became the irrepressible, unstoppable, violence of renewal, a law unto itself.⁵⁸ Restoration transmuted into creation,

55. *Id.* at 23-24.

[N]o one can be free except among his peers. . . . [N]either the tyrant nor the despot nor the master of a household—even though . . . fully liberated and . . . not forced by others—was free. . . . The life of a free man needed the presence of others. Freedom itself needed . . . a place where people could come together . . . the political space proper.

Id.

56. *Id.* at 35-36.

When the word [revolution] first descended from the skies and was introduced to describe what happened on earth among mortal[s], it appeared clearly as a metaphor, carrying over the notion of an eternal, irresistible, ever-recurring motion to the haphazard movements, the ups and downs of human destiny. . . . [T]he original meaning of the word . . . was used for a movement of revolving back to some pre-established point.

[T]he word “revolution” meant originally restoration. . . . The revolutions of the seventeenth and eighteenth centuries, which to us appear to show all evidence of a new spirit . . . were intended to be restorations.

Id.

57. *Id.* at 40-41.

The date was the night of the fourteenth of July 1789, in Paris, when Louis XVI heard from the Duc de La Rochefoucauld-Liancourt of the fall of the Bastille. . . . The famous dialogue that took place between the king and his messenger is . . . very revealing. The king . . . exclaimed, “C’est une revolte,” and Liancourt corrected him: “Non, Sire, c’est une revolution.” Here we hear the word still, and politically for the last time, in the sense of the old metaphor which carries its meaning from the skies down to the earth; but here, for the first time . . . the emphasis has entirely shifted from the lawfulness of a rotating, cyclical movement to its irresistibility. The motion is still seen in the image of the movements of the stars, but what is stressed now is that it is beyond human power to arrest it, and hence it is a law unto itself.

Id.

58. *Id.* See, e.g., *id.* at 42-43. “In the decades following the French revolution, this association of a mighty undercurrent sweeping men with it . . . was to become dominant.” *Id.* “Whether these men [referring to the Founding Fathers of US Revolution] were ‘conservative’ or ‘revolutionary’ is . . . impossible to decide . . . [C]onservatism as a political creed and an ideology owes its existence to a reaction to the French revolution and is meaningful only for the history of the nineteenth and twentieth centuries.” *Id.* at 37-38.

origination, unleashing violence. While Arendt does not refer to nuclear energy as an analogue, it comes to mind as not dissimilar to the process she describes.

Perhaps, even after this transformation, Arendt would prefer to conceive of revolution as a political event, as the violent establishment of a new body politic, during which or through which liberation from oppression is attained and a new beginning fostering participation in the public realm is initiated.⁵⁹ However, she acknowledges that through the French Revolution, so radical was the shift in paradigm, that one of its most far-reaching consequences was the birth of the modern Hegelian concept of history.⁶⁰ According to Arendt, through Hegel, and later Marx, necessity replaced freedom as the chief focus of political and revolutionary thought.⁶¹ As Arendt views it, this replacement is more than just a loss of an ideal; it exemplifies supplanting a sound aspiration with an essentially dangerous idea.⁶²

Third, according to Arendt, this substitution—the ideological exchange of freedom for necessity—along with the French (rather than the American) Revolution “set the world on fire.”⁶³ Consequently, it is with reference to the events of the French Revolution and not with reference to the events of the American Revolution that our current use of the term ‘revolution’ receives its

59. *Id.* at 28.

[O]nly where change occurs in the sense of a new beginning, where violence is used to constitute an altogether different form of government, to bring about the formation of a new body politic, where the liberation from oppression aims at least at the constitution of freedom can we speak of revolution.

Id.; see also Jacques Derrida, *Force of Law: The “Mystical Foundation Of Authority,”* in *DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE* 3, 31-57 (Drucilla Cornell et al. eds., 1992) (discussing founding violence, conserving violence and divine violence in the context of law and justice).

60. ARENDT, *ON REVOLUTION*, *supra* note 17, at 45.

61. *Id.* at 46-47.

[O]ut of the revolution and counter-revolution, from the fourteenth of July to the eighteenth of Brumaire and the restoration of the monarchy, was born the dialectical movement and counter-movement of history which bears men on its irresistible flow, like a powerful undercurrent, to which they must surrender the very moment they attempt to establish freedom on earth.

Id. at 47-48.

62. *Id.* at 47-48. See also *CONQUEST*, *supra* note 1, at 4 (quoting Alexander Yakovlev, former Politburo member: “The morbid faith in the possibility of forcing through social and historical development, and the idealization of violence, traces back to the very sources of the European revolutionary tradition.”). “What remains today of Marxism, once a large and ambitious structure, is little more than this basic dogma that our society (and all others) is driven by unappeasable strife, in which one contestant must inevitably destroy the other.” *Id.* at 49.

63. ARENDT, *ON REVOLUTION*, *supra* note 17, at 49.

connotations. We conceive of revolution in inversion, not reversion terms; we conceptualize it as representing irresistible forces of change. Despite the fact that it ended in obvious disaster, the French Revolution became the model we follow.⁶⁴

Following Arendt's theories of revolution, revolutionaries would forecast, could forecast and should forecast, that revolutions "devour their children."⁶⁵ The maw of the monster, like a shark, contains two rows of teeth. The first row, historic necessity, casts a magic spell, what Arendt calls the "self-imposed compulsion of ideological thinking."⁶⁶ Individuals find themselves carried along by, but do not direct, and in that sense believe themselves insulated from responsibility for, revolutionary forces. When this tidalic factor of historic necessity combines with the second element, physical necessity, the overwhelming biological impulse to survive engendered by acute poverty,⁶⁷ terror is unleashed.

The modeling events, which took place without preconception during the French Revolution,⁶⁸ served as an inspiration, and not as a warning, to future thinkers, planners, actors.⁶⁹ Necessity was

64. *Id.*

[T]he October revolution, was enacted according to the rules and events that led from the fourteenth of July to the ninth of Thermidor and the eighteenth of Brumaire—dates which so impressed themselves on the memory of the French people that even today they are immediately identified by everybody with the fall of the Bastille, the death of Robespierre, and the rise of Napoleon Bonaparte.

Id. at 44; see also GWYNNE DYER, *WAR* 161 (1985) ("The principle technique which insurgent groups have used to attack the state in the past half century . . . drew . . . inspiration from the French revolution in 1789.").

65. ARENDT, *ON REVOLUTION*, *supra* note 17, at 51. "[T]his association of a mighty undercurrent sweeping men with it, first to the surface of glorious deeds and then down to peril and infamy." *Id.* at 42. Revolution "devouring its own children" is a phrase coined by Vergniaud and used by Arendt. *Id.*

66. *Id.* at 50-51.

67. *Id.* at 54.

Poverty is more than deprivation, it is a state of constant want and acute misery whose ignominy consists in its dehumanizing force; poverty is abject because it puts men under the absolute dictate of their bodies, that is, under the absolute dictate of necessity as all . . . know . . . from their most intimate experience and outside all speculations.

Id.

68. *Id.* at 96.

[E]ntirely absent from the French Revolution . . . was the concept of historical necessity, which . . . did not so much spring from the experiences and thoughts of those who made the Revolution as it arose from the efforts of those who desired to understand and to come to terms with a chain of events they had watched.

Id.

69. *Id.* at 54-55.

It is well known that the French revolution had given rise to an entirely new figure on the political scene, the professional revolutionist, and his life was spent not in revolutionary agitation, for which there existed but

expressed in man-made violence until, eventually, violence became the necessary function or surface phenomenon of an all powerful underlying and overruling necessity.⁷⁰ To this formula was added the fact that selflessness, the ability to deny the value of self when confronted with the needs of the many or the necessity for action, emerged as a prerequisite both for the revolutionary and for the people she purports to serve.⁷¹

Finally, Arendt says both Rousseau and Robespierre were governed by sentiment and an emotionally laden insensitivity to reality instead of principle or compassion. Under these influences, driven to solve, more quickly than feasibly, the vast problem of wretchedness and misery experienced and expressed by the malheureux, Robespierre allowed force to replace communal public action;⁷² in this way, the chance for freedom was sacrificed.⁷³

The experience of the French became an unfortunate theme. Again and again we would, we will, observe revolutionary leadership, out of touch with the real experiences of deliberative community action, overreaching and controlling, acting under a self-imposed compulsion to ride the wave of necessity toward almost instantaneous, and, therefore, impractical solutions to nearly intractable problems. As a result, over and over again, in the name of freedom, independence, human dignity, we will observe the torrent revolutionnaire,⁷⁴ terreur.⁷⁵

Not every historian sees the French Revolution a la Arendt. However, its terror is equally, although distinctively, communicated

few opportunities, but in study and thought, in theory and debate, whose sole object was revolution.

Id. at 262. It is somewhat surprising to me that Arendt, who I usually count on to be more sensitive than I am to such issues, does not notice the substitution here of privatized discourse- the dialogues between these newly generated professional revolutionaries- for the participation in public affairs she so respects. Perhaps I am missing the point. Perhaps immediate community needs and concerns must be at the heart of these "participating in governance" events for them to take on the fellowship of responsibility that makes for equality and freedom for Arendt.

70. Id. at 59. "Their need [the poor in France, the malheureux] was violent, and . . . prepolitical; it seemed that only violence could be strong and swift enough to help them." Id. at 86.

71. Id. at 74-76.

72. Id. at 247-50, 259-61. See also CONQUEST, supra note 1, at 64 ("[I]dentification with the masses was in all these cases more than a mental generalization. It also . . . involved a psychological mechanism—of the sort Kierkegaard refers to when he writes that . . . [T]he pleasure consists in losing oneself in order to be volatilised into a higher potency.").

73. ARENDT, ON REVOLUTION, supra note 17, at 55 ("Robespierre, finally, knew well enough what had happened though he formulated it (in his last speech) in the form of prophecy: 'We shall perish because, in the history of mankind, we missed the moment to found freedom.'").

74. Id. at 42.

75. Id. at 95.

in alternative accounts.⁷⁶ For instance, as another historian, Schama, understands it, “[b]loodshed was not the unfortunate by-product of revolution, it was the source of its energy.”⁷⁷ The terror, in its particular formulation, followed the fall of the monarchy on August 10, 1792, and the erection of the guillotine “on the place du Carrousel, in front of the Tuileries.”⁷⁸ It was not the introduction of a new wave of experience; it was the continuation of a process begun much earlier.⁷⁹ Those who held official positions in the French government repeatedly tried to recover for the state its monopoly on punitive violence; always, they found themselves outmaneuvered by other politicians who organized and endorsed further episodes of public violence.⁸⁰

Schama reports the story to us this way: in the period beginning with the fall of the monarchy a series of events took place culminating in the institution we call “The Terror.” The nation was at war, threatened by war. The people were afraid.⁸¹ By late August arrests became “absurdly indiscriminate.”⁸² Paris was frantic with activity.⁸³ Danton was orchestrating attacks on traitors.⁸⁴ The massacres of September began with an attack on the

76. SIMON SCHAMA, *CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION* (1989).

77. *Id.* at 615.

78. *Id.* at 619.

79. *Id.* at 615.

80. *Id.* at 623. See also Love, *supra* note 33, and its brief coverage of the Just War Tradition through the lens of Ms. Love’s law review article. It may be that terror is likely to result when nation-state or empire building strategies inclined to monopolize violence come in contact with intractable resistance.

81. SCHAMA, *supra* note 76, at 612.

Earlier in the summer the Prussians had entered the war as allies of the Emperor and during July had advanced with ominous steadiness. Their declaration of intent was issued in the name of their commander, the Duke of Brunswick. . . .

The Brunswick Manifesto in effect told the Parisians . . . that they had already committed acts for which they would be unsparingly punished. . . . All that counted was to keep those who threatened them at home from acts of betrayal. All calculations had come down to this final primitive determination: kill or be killed.

Id.

82. *Id.* at 625.

83. *Id.* at 627.

84. *Id.* at 627-628. Schama quotes Danton: “Our enemies prepare to carry out the last blows of their fury. . . . Citizens, no nation on earth has ever obtained liberty without a struggle. You have traitors in your bosom; well, without them the fight would have been soon over.” *Id.* at 628. For those whose indoctrination in revolutionary history does not include these details, Danton, along with Robespierre, were Jacobin leaders during the French revolution, that is, both emerged from the most radical, ultra democratic party of the time. Danton was eventually executed in 1794. Robespierre followed him several months later. The Girondins were members of a more moderate republican party in the revolutionary French Assembly during the 1791-1793 period. They were excluded from power and subjected to execution during the Terror.

Abbaye, a prison holding mostly priests.⁸⁵ The slaughter continued at a Carmelite convent used to imprison other priests.⁸⁶ At Bicetre, another prison, common criminals and adolescent boys were killed. At LaSalpetriere, the victims were prostitutes.⁸⁷ When September ended, half the prisoners in Paris were dead.⁸⁸

The “moral squalor” of the revolutionary predicament, the dependence of the Revolution on organized killing to attain political ends, was fully exposed,⁸⁹ and still what we call “The Reign of Terror” awaited its future. The king was beheaded in January of 1793.⁹⁰ Insurrections began in earnest that spring.⁹¹ In March, the Revolutionary Tribunal was established.⁹² By April, the Committee of Public Safety, the key organ of the Terror, was initiated.⁹³ Inflation, grocery riots,⁹⁴ the collapse of the war effort,⁹⁵ disorder in the countryside, more insurrections,⁹⁶ factionalism,⁹⁷ growing distrust and lawlessness,⁹⁸ all this followed one after another in a mad rush fueled by the enrages, by the sans-culotte, by what Schama calls a desire for paternalism.⁹⁹ The Republic could not

85. *Id.* at 633 (“A party of twenty-four priests. . . . In an hour and a half, nineteen of the group were hacked to pieces.”).

86. *Id.* at 633-34. Of the one hundred and fifty clerics held in this convent, “by the end of the day one hundred and fifteen . . . had been subject to the *baché vengeresse* (the axe of vengeance).” *Id.* at 634.

87. *Id.* at 634-35.

88. *Id.* at 636.

89. *Id.* at 637-38.

90. *Id.* at 668-71.

91. *Id.* at 696-705. In this case the insurrections were secondary rebellions; rebellions on the part of territorial subcommunities outside of Paris like Vendee and Lyon. *Id.* at 690-706, 727-29. These insurrections were treated as counter-revolutionary activities by the Revolutionary government and viciously repressed. *Id.* at 786-92, 779-87.

92. *Id.* at 706. The Tribunal was authorized to try suspects accused of counter-revolutionary activities. *Id.*

93. *Id.* at 706. Schama quotes Danton defending the establishment of the Revolutionary Tribunal and the Committee of Public Safety: “Let us be terrible so that the people will not have to be.” *Id.*

94. *Id.* at 707-08.

95. *Id.* at 708.

96. *Id.* at 709-11.

97. *Id.* at 716-20. “In mid-May, the battle for survival between the Mountain [the Jacobins] and the Gironde was joined in deadly earnest.” *Id.* at 720.

98. *Id.* at 714. Schama quotes Pierre Vergniaud speaking before the tribune:

When the laws were set aside out of fear of intimidation, ‘it is a great accomplishment for the enemies of the republic thus to have perverted reason and set at naught all ideas of morality. . . . So, citizens, it must be feared that the revolution, like Saturn, successively devouring its children, will engender, finally, only despotism with the calamities that accompany it.

Id.

99. *Id.* at 713. Schama spoke of “the common people”: “They wanted paternalism rather than economic liberalism, the regulation of prices rather than a free market, and above all they wanted the public punishment of exploiters.” *Id.* See, e.g., *id.* at 713-14, 720-24.

survive losses in the field, insurrection in the countryside, and mob violence in the streets. Schama says of the Jacobins, who rode to power during the late spring of 1793 on the back of this violence, that with them, "Revolutionary democracy would be guillotined in the name of revolutionary government."¹⁰⁰

Terror became the order of the day.¹⁰¹ Schama catalogues the process: a revolt in Lyon; the purging of the Girondins in Paris;¹⁰² the assassination of Marat;¹⁰³ the ceremonies of Champ de Reunion;¹⁰⁴ terroristic economic policies;¹⁰⁵ Jacobian manipulation of the "language and the tactics of popular mobilization;"¹⁰⁶ the institution of national conscription;¹⁰⁷ a massive mobilization of resources to further the war effort;¹⁰⁸ the passage and implementation of the Law of Suspects;¹⁰⁹ a revised calendar, along with the establishment of public standards of conduct and morality;¹¹⁰ the fostering of dechristianization policies and practices;¹¹¹ the profoundly destructive eradication of centers of rebellion, i.e., "the wholesale destruction of an entire region in France;"¹¹² the rapid deployment of prisons to house the increasing

100. *Id.* at 725.

101. *Id.* at 726-92; *id.* at 807 (attributing the original phrase "Terror is the order of the day" to a September 5th speech by Danton).

102. *Id.* at 728.

103. *Id.* at 729-46. Marat, like Danton and Robespierre, was a Jacobin activist. Unlike the others he was not officially executed. Instead, he was assassinated by a young woman. She believed the ousted Girondins and not the victorious Jacobins, were that last best hope for the Revolution. *Id.* at 729-37.

104. *Id.* at 746-50.

105. *Id.* at 753 ("[P]roposals for the economic Terror-extensive price controls, poor relief funded by draconian forced loans and taxes on the rich . . . were emanating from the enrages and the Commune.").

[A] great network of information about crops and harvests that . . . implied an unprecedented intrusion into the rural economy. . . Even the Terror had inadequate resources for this enormous exercise in snooping, and very often it degenerated into the sans-culotte armies revolutionnaires, sent to enforce the economic Terror, ransacking villages.

Id. at 757.

106. *Id.* at 759.

107. *Id.* at 760-63.

108. *Id.* at 764-65 ("[T]he revolutionary state had committed itself to an all-out mobilization of resources that would not be seen again in Europe until the twentieth century.").

109. *Id.* at 766-67. "[E]nacted on September 17 [1793 it] . . . gave the Committee . . . sweeping powers of arrest and punishment over extraordinary broad categories of people defined as harboring counter-revolutionary designs." *Id.* at 766.

110. *Id.* at 770-74; *Id.* at 805 ("Purity became a political fetish.").

111. *Id.* at 776-79.

112. *Id.* at 787. See also *id.* at 791-92, where Schama discusses the death toll of these events, placing the numbers at a low of 40,000 to a high of 250,000. It may be that in the year spanning spring 1793 to spring 1794, one third of the entire population of the Vendee region of France was killed.

number of counter-revolutionary suspects awaiting execution;¹¹³ the beheading of Marie Antoinette;¹¹⁴ the death of families;¹¹⁵ the “epidemic of suicides among the fallen revolutionaries;”¹¹⁶ the denunciation, trial and execution of Danton;¹¹⁷ Robespierre’s schools of virtue;¹¹⁸ the Festival of the Supreme Being;¹¹⁹ the bloody violence of Floreal, Prarial, Messidor;¹²⁰ and, finally, Thermidor, the month in which Robespierre himself was sacrificed to the guillotine.¹²¹

Schama tells us that the violence did not end with the Terror,¹²² and reiterates his theme that the violence of the terror was not an unfortunate side effect of the revolution. Instead, he reminds us, “violence was the motor of the Revolution.”¹²³ According to Schama, it is the “morbid preoccupation with the just massacre and the heroic death” that designates the political culture of the French Revolution and to which should be attributed much of its horror.¹²⁴ This “neoclassical fixation with the patriotic death”¹²⁵ dehumanizes victims, brutalizes participants,¹²⁶ obsesses revolutionaries¹²⁷ and distorts observation.¹²⁸

This, then, is the heritage that informs the concept of terrorism. Following Fabre d’Eglantine, the creator of the French Revolutionary calendar, “we conceive nothing except by images: even the most abstract analysis or the most metaphysical formulations can only take effect through images.”¹²⁹ Our ideas about revolution are rooted in this French experience. And, the images, the imaginative associations, we bring out of the French Revolution, especially out of the years after 1792 insinuate themselves into the attitudes, we could even call them prejudices, that attach themselves to our here and now ability to think about

113. *Id.* at 793.

114. *Id.* at 796-98.

115. *Id.* at 822-27.

116. *Id.* at 804.

117. *Id.* at 808-11, 816-20.

118. *Id.* at 827-30.

119. *Id.* at 831-36.

120. *Id.* at 837. Schama accounts for 354 executions in Floreal (a month in the revolutionary calendar)—up from only 155 the month before—that number increases to 509 in Prarial and to 796 in Messidor. In just the first nine days of Thermidor the number of executions was 342. *Id.*

121. *Id.* at 839-46.

122. *Id.* at 852 (“The violence did not stop . . . with the Terror.”). Schama refers to, “waves of the Counter-Terror . . . anarchic murder gangs.” *Id.*

123. *Id.* at 859.

124. *Id.*

125. *Id.* at 861.

126. *Id.* at 860.

127. *Id.* at 875.

128. *Id.* at 859, 861.

129. *Id.* at 770.

terrorism. For Westerners, the violent, bloody images we carry from the last months, from Foreal, Prairial, Messidor, Thermidor, are the ground, the soil, in which the seeds of terrorism are planted.¹³⁰ What grows draws its nourishment from this source.¹³¹

2. The Russian Revolution: Seeds, Once Planted, Ripen In Fertile Soil

Terror as an institutional device, consciously employed to accelerate the momentum of the revolution, was unknown prior to the Russian Revolution.¹³²

The eighteenth-century terror was still enacted in good faith. . . . The purges in the Bolshevik party . . . were motivated chiefly by ideological differences; in this respect the interconnection between terror and ideology was manifest from the very beginning.¹³³

Mass atomization in Soviet society was achieved by the skillful use of repeated purges.¹³⁴

[N]ot only political propaganda but the whole of modern mass publicity contains an element of threat; that terror, on the other hand, can be fully effective without propaganda, so long as it is only a question of conventional political terror of tyranny. Only when terror is intended to coerce not merely from without

130. CONQUEST, *supra* note 1, at xiv (claiming that we have carried into the present: “[A] still living past, where we can trace the primitive but still powerful notion that any political or other objective can be achieved by mere force.”).

131. ARENDT, *ON REVOLUTION*, *supra* note 17, at 108, wrote in 1963:

[A]ll revolutions, with the exception of the Hungarian Revolution in 1956, have followed the example of the French Revolution and used and misused the mighty forces of misery and destitution in their struggle against tyranny or oppression. And although the whole record of past revolutions demonstrates beyond doubt that every attempt to solve the social question with political means leads into terror, and that it is terror which sends revolutions to their doom, it can hardly be denied that to avoid this fatal mistake is almost impossible.

There is no doubt of the emphasis Arendt accords the ethnocentricity of the Western canon. Writing in 1963, she was able to ignore the very different revolutionary history of Gandhi in India or Nkrumah's success in Ghana.

132. *Id.* at 95.

133. *Id.*

134. HANNAH ARENDT, *TOTALITARINISM: PART THREE OF THE ORIGINS OF TOTALITARINISM* 21 (1968) [hereinafter ARENDT, *TOTALITARINISM*].

but . . . from within, when the political regime wants more than power, is terror in need of propaganda.¹³⁵

What was required for the success of the Russian Revolution was “the manufacturing of Communist man out of the human material of the capitalist age.”¹³⁶ Revolutionary leaders in Russia confronted the task of transforming a structureless mass governed by a despotic and centralized bureaucracy¹³⁷ into a paradise of shared abundance. The end of suffering, the procurement of human happiness, goals inherited from the French Revolution, called for dramatic measures.¹³⁸

These dramatic measures began early with Lenin’s purges¹³⁹ and escalated to the horrors, the terrors, of Stalin’s regime. The estimates of the carnage stun the mind. According to Glover’s sources, over sixty million people may have been killed between 1917 and 1987. He reports another estimate, for just the Stalin years, that puts the death toll at twenty million. Yet another estimate approximates almost ten million killed in the decade between 1930 and 1940. As Glover states it, regardless of our ability to determine exact figures “a very rough idea is enough. Stalinist deliberate killing was on a scale surpassed only by war.”¹⁴⁰

The methods used varied. Many were executed, singly or in masses.¹⁴¹ Compulsory displacements of populations, which effectively translated into mass murder, account for many deaths.¹⁴² Many collective farm efforts amounted to little more than compulsory starvation, deliberately constructed famines.¹⁴³ Slave labor took its toll; up to 250,000 died building the Baltic-White Sea Canal.¹⁴⁴ Officials were given quotas of “enemies of the people” and directed to accomplish their extermination.¹⁴⁵ Religious practice

135. *Id.* at 39 n.1.

136. GLOVER, *supra* note 3, at 254, tells us that Lenin underlined this particular phrase in his copy of Nikolai Bukharin’s *Economics of the Transition Period*.

137. ARENDT, *TOTALITARIANISM*, *supra* note 134, at 16.

138. See GLOVER, *supra* note 3, at 255. Walter Duranty’s supportive poem, *Red Square*, published in the *New York Times* in 1932, is quoted by Glover: “Russians may be hungry and short of clothes and comfort/ But you can’t make an omelet without breaking eggs.” *Id.*

139. ARENDT, *ON REVOLUTION*, *supra* note 17, at 95-96.

140. GLOVER, *supra* note 3, at 237.

141. *Id.*

142. *Id.* at 238. For example, Glover reports, through Solzhenitsyn as a source, that in 1930, 10,000 families were sent on a winter relocation move that, in the end, killed them all. *Id.*

143. *Id.* (reporting that four to six million people died in the Ukraine as the result of collectivization policies that imposed impossible grain quotas, removed home-grown food products and blockaded the population so no supplies could be brought from the outside). Radzinsky estimates a five to eight million death toll figure. RADZINSKY, *supra* note 29, at 258.

144. GLOVER, *supra* note 3, at 238-39.

145. *Id.* at 239.

was a criminal offense. Arrest led to torture. Torture led to confessions. Confessions led to labor camps. Labor camps led to more torture and, most often, death.¹⁴⁶

As Glover describes the Stalin period: “Resistance was paralyzed [sic].”¹⁴⁷ Informers were everywhere. The terror became its own fuel. Fear governed.¹⁴⁸ Party leaders as well as ordinary people had good reason to tremble. They too were frequently arrested, tortured, tried, convicted and executed;¹⁴⁹ for example, Bukharin, one of the ideological leaders of the Revolution was, during Stalin’s regime, charged, tried, convicted, and executed.¹⁵⁰ According to Glover, “[t]he leaders were trapped by fear of Stalin and even he was trapped by his fear of their desire to be rid of him.”¹⁵¹

Picking up on a theme from Arendt, Glover says: “What distinguishes the Soviet terror from its predecessors is the role of an ideology, or system of beliefs.”¹⁵² In Glover’s terms ideology supplanted moral restraint.¹⁵³ According to this ideology, for the Russian Revolution to succeed, the people needed to be led by the Party and the Party needed to be led by an incorruptible source.¹⁵⁴

All this leadership was necessary, according to Marxist theory, because, for the most part, prior regimes had already corrupted the minds, ideas, and beliefs of those who experienced them. Prevailing morality, for Marxists, is not an honorable result of deep human reason but a mask for obscuring class interests.¹⁵⁵ That mask must be removed for the people to see clearly their real interests and

146. Id. at 238-39.

147. Id. at 242.

148. Id. See also RADZINSKY, *supra* note 29, at 261 (reporting that “[f]ear is stronger than shame”).

149. GLOVER, *supra* note 3, at 243-45.

150. Id. at 245-46. “My own fate,” Bukharin said at his trial, “is of no importance. All that matters is the Soviet Union.” Id. at 246.

151. Id. at 250.

152. Id. at 252. Glover quotes Aleksander Solzhenitsyn’s *The Gulag Archipelago*: “Macbeth’s self-justifications were feeble—and his conscience devoured him. Yes, even Iago was a little lamb too. The imagination and the spiritual strength of Shakespeare’s evildoers stopped short at a dozen corpses. Because they had no ideology.” Id.

153. Id.

154. Id. at 253.

Totalitarian movements are mass organizations of atomized, isolated individuals. . . . [T]heir most conspicuous external characteristic is their demand for total, unrestricted, unconditional, and unalterable loyalty of the individual member. . . . Such loyalty can be expected only from the completely isolated human being who, without any other social ties to family, friends . . . derives his sense of having a place in the world only from his belonging to a movement.

ARENDT, *TOTALITARIANISM*, *supra* note 134, at 21-22.

155. GLOVER, *supra* note 3, at 254.

options. Stripped of obscurity, they will see what is in their own best interest. The problem is how to make the transition from the defective reasoning of the deluded population to the cleansed reasoning of those who have finally achieved freedom from their chains.

The problem appears solvable at the level of ideas. One need only treat the population to an educational cleansing. Reveal the error of the old. Reveal the strength of the new. People, however, are not as pliable as ideas. Or, maybe, people are exactly as pliable as ideas. It may be that we are deluded about the ease with which ideas can be changed. Glover, whose theme is morality, talks about the web of interconnected ideas and concepts that hold a belief system in place.¹⁵⁶ He tells us any belief, “no matter how absurd,” can be preserved if a person is willing to make enough changes to its supportive web.¹⁵⁷ It seems, as a logical inversion, that beliefs can be changed as long as there is sufficient willingness to make the requisite changes to their supportive networks.

The process of bringing change to the network of beliefs that holds one’s moral universe in place is described by Glover throughout his book. For me, it is the process of bringing change, or more accurately of attempting to bring change through terror to populations in revolutionary contexts that drew me to his work. What I am observing are revolutionary leaders who attempt to change social results by requiring people to conduct themselves in accordance with ordained ideas.

In Russia, the inspiration for change began at an intellectual level. For many the word “intelligentsia” accurately characterizes the early leaders of the Russian Revolution. The term, Pipes tells us, refers to “intellectuals who want power in order to change the world.”¹⁵⁸ As Pipes describes it, intelligentsia feed on materialistic beliefs that facilitate social engineering by conceiving of human beings almost entirely as creatures of changeable environments. As environments change, the humans who experience them also change.¹⁵⁹ Perfect environments create perfect human beings.¹⁶⁰ Imperfect, defective environments inevitably create imperfect, defective people.¹⁶¹ These ideas, conceived during the

156. *Id.* at 265-66.

157. *Id.* at 266; see also CONQUEST, *supra* note 1, at 146 (“Even in the true sciences, deep intellectual investment in what turns out to be a fallacy is not easily given up.”).

158. RICHARD PIPES, *A CONCISE HISTORY OF THE RUSSIAN REVOLUTION* 21 (1995). “They were revolutionaries not for the sake of improving the condition of the people but for the sake of gaining domination over the people and remaking them in their own image.” *Id.* at 388.

159. *Id.* at 21.

160. *Id.* at 23.

161. *Id.* at 24.

Enlightenment,¹⁶² incubated in the patriotic clubs of France in the mid-1700s,¹⁶³ quickened by Marx,¹⁶⁴ infiltrated, influenced and, indeed, generated generations of “intelligentsia” as professional revolutionaries. It is to these professional revolutionaries, a class identified by Arendt, and not to the general conditions of early twentieth century Russia, that Pipes attributes the Russian Revolution.¹⁶⁵

Preceding this revolution, a closed caste of professional revolutionaries created the first organization in history dedicated to political terror. They were capable of ignoring the beliefs of others, capable of calling themselves the “People’s Will” despite their miniscule representation, and capable of assassinating Tsar Alexander II.¹⁶⁶ Their efforts did not succeed in bringing the masses to their side. They did, however, give rise to other terrorist organizations.¹⁶⁷ A Tsarist government incapable of responding successfully to its own challenges played into the hands of this developing revolutionary class.¹⁶⁸ Its capitulations did not stop their violence. Terrorism increased after 1905.¹⁶⁹ Eventually, in 1917,

162. CONQUEST, *supra* note 1, at 4 (“The origin of the modern era’s ideologies lay in John Locke’s derivation of scholastic generalities from traditional English understandings of liberty, thus excessively rationalizing and at the same time limiting, or in a sense desiccating, the more complex reality.”).

163. PIPES, *supra* note 158, at 24.

164. *Id.* at 23-24. Pipes quotes Marx: “The whole development of man . . . depends on education and environment.” It would follow that, “[I]f man draws all his knowledge . . . from the world of the senses . . . the empirical world must be arranged so that in it man experiences and gets used to what is really human. . . . If man is shaped by his surroundings, his surroundings must be made human.” *Id.* at 24-25.

165. *Id.* at 24 (“Nothing in early twentieth century Russia inexorably pushed the country toward revolution, except the presence of an unusually large and fanatical body of professional revolutionaries.”). Pipes defines professional revolutionaries as “a novel breed whose life’s goal was overthrowing by violence all existing institutions.” *Id.* at 29.

166. *Id.* at 26. Pipes tells us that the group involved thirty individuals in a nation of one hundred million, and “the ‘masses’ neither needed nor desired a revolution; the only group interested in it was the intelligentsia.” *Id.* at 390.

167. *Id.* at 27. Pipes identifies the Socialist-Revolutionary Party as a direct descendent of the People’s Will. In fact, Pipes tells us, one main distinguishing point between the Socialist-Revolutionaries and the Social-Democrats, a rival organization, was their beliefs about terror. The SR (as he calls them) favored terror as a means of coming to power. The SDs also believed in the political utility of terror. They, however, believed it was best used as a strategy after assuming control of a government. *Id.* at 29.

168. *Id.* at 36-44.

Lenin viewed skeptically the whole notion of ‘proletarian culture.’ He had a very low opinion of the cultural level of the Russian masses and little faith in their creative potential. The task facing his government, as he perceived it, was to inculcate in the masses modern scientific and technical habits. . . . The Communist regime under Lenin controlled cultural activities through two devices: censorship and strict monopoly on cultural organizations and activities.

Id. at 315.

169. Pipes estimates four thousand, five hundred officials and nine thousand people were

“Russia’s fragile political structure” collapsed under the stress of this “war of attrition.”¹⁷⁰

The February Revolution began as a mutiny of soldiers.¹⁷¹ With surprising speed, the Russian state deteriorated.¹⁷² The Bolshevik Party that took over in October 1917 was Lenin’s party, Lenin’s creation.¹⁷³ The political idea that guided this Party was Lenin’s radicalism, the radicalism that Pipes says became the heartbeat of Russia. It was not idealistic; instead, its ideation was rooted in personal resentment.¹⁷⁴ On a more intellectual level, Lenin sought to graft Marxism to the anarchism-terrorism of the People’s Will.¹⁷⁵ He thought of politics as warfare.¹⁷⁶ He could not tolerate dissent or criticism; he trusted only physical force;¹⁷⁷ Lenin was absolutely

killed in SR attacks in 1906 and 1907. *Id.* at 49.

170. *Id.* at 56. Of course, World War I played a role in this dynamic. Pipes does not ignore the war. See *id.* at 58-70. But, for the purposes of studying the Revolution, emphasis on the War would distract from the development of material.

171. *Id.* at 81.

172. *Id.* at 96-97 (“It was as if the greatest empire in the world had been an artificial construction, without organic unity. The instant the monarch withdrew, the entire structure collapsed in a heap.”). Pipes quotes V. Rozanov as stating,

Russia wilted in two days. . . . Even *The New Times* [the newspaper] could not have been shut down as quickly as Russia shut down. It is amazing how she suddenly fell apart, all of her, down to particles, to pieces. . . . There was no Empire, no Church, no army, no working class. And, what remained? Strange to say, literally nothing. The base masses remained.

Id. at 97. “Lenin rode to power on that anarchy, which he did much to promote.” *Id.* at 390.

173. *Id.* at 101. The Bolsheviks,

on seizing power in October 1917, promptly eliminated all rival parties to become Russia’s exclusive source of political authority. Communist Russia, therefore, was throughout its seventy-four years to an unusual extent the embodiment of the mind and psyche of one man: his biography and its history are uniquely fused.

Id.

174. *Id.* at 103.

[T]errorism had become a kind of philosophy through which to express frustration, resentment, and blind hatred, a kind of political expressionism which used bombs to express oneself, which watched delightedly the publicity given to resounding deeds and was absolutely willing to pay the price of life for having succeeded in forcing the recognition of one’s existence on the normal strata of society.

ARENDR, *TOTALITARIANISM*, *supra* note 134, at 30.

175. PIPES, *supra* note 158, at 103.

176. *Id.* at 104. Pipes calls Lenin:

one of history’s great conquerors—a distinction not vitiated by the fact that the country he conquered was his own. His innovation, the reason for his success, was militarizing politics. He was the first head of state to treat politics, domestic as well as foreign, as warfare in the literal sense of the word, the objective of which was not to compel the enemy to submit but to annihilate him.

Id. at 392.

177. *Id.* at 144.

convinced of the rightness of his position and totally committed to the revolution.¹⁷⁸ Pipes tells us that Lenin was cruel, a person able to condemn thousands of people to death without remorse.¹⁷⁹ The political system he constructed out of these beliefs and personality traits, he made up as he went along.¹⁸⁰ The Party was conceptualized as a spiritual force, leading by example.¹⁸¹ A facade of democratic institutions was put in place, while the institutions of the old regime were uprooted, smashed, eradicated.¹⁸² Opposition was dealt with ruthlessly.¹⁸³ Machine guns became instruments of political persuasion.¹⁸⁴ The Cheka, a new security organ, was licensed to kill. Bolshevik terror began.¹⁸⁵

Events began to take shape. Foreign affairs were determined according to a Marxist theory delineating the eventual dominance of Communism.¹⁸⁶ Lenin's regulation of domestic affairs was

178. *Id.* at 104. Lenin, like the other intelligentsia, "saw 'revolution' not as the replacement of one government by another but as something incomparably more ambitious: a total transformation of the human condition for the purpose of creating a new breed of human beings." *Id.* at 387. Indeed: "Although couched in scientific terms, [these] . . . views were immune to contrary evidence and hence more akin to religious faith." *Id.*

179. *Id.* at 105.

180. *Id.* at 151.

181. *Id.* at 152. Whatever else this meant, it did not mean an improvement in the education system. Despite the importation of modern ideas into model schools, the fact is that by the mid-1920s Soviet per capita allocations for education were lower than they had been in 1913 and only 45% of eligible children actually attended school. *Id.* at 325. Nor did it mean that the children of Russia were otherwise well cared for. By the mid-1920s seven to nine million *besprizornye*, orphans or abandoned children, lived without parents, in gangs, and survived by begging, scrounging, stealing, and prostitution. *Id.* at 326. Moreover, whatever else the idea of spiritual leadership implied, it certainly did not imply support of the Church. "[O]rganized religion . . . had no place in a Communist society." *Id.* at 334.

182. *Id.* at 151.

183. *Id.* at 154-165. Pipes quotes a Russian proverb "He who grabs the stick is corporal," to support the proposition that the boldest, most ruthless claimant was the one most likely to succeed to power. *Id.* at 164. "[M]erciless violence, violence that strove for the destruction of every actual and potential opponent, was for Lenin not only the most effective but the only way of dealing with problems." *Id.* at 394.

184. *Id.* at 165 ("The unrestrained brutality with which they [the Bolsheviks] henceforth ruled Russia stemmed in large measure from the knowledge . . . that they could do so with impunity."). See also *id.* at 203 ("[T]he Communists would . . . govern not by consent but by coercion.").

185. *Id.* at 173. In 1922, the Cheka would become the GPU. *Id.* at 332. In 1934, the GPU would become the NKVD—People's Commissariat of Internal Affairs. RADZINSKY, *supra* note 29, at 316.

186. PIPES, *supra* note 158, at 178. In Lenin's words:

The existence of the Soviet Republic alongside the imperialist states over the long run is unthinkable. In the end, either the one or the other will triumph. And until that end . . . a series of the most terrible conflicts between the Soviet Republic and bourgeois governments is unavoidable. This means that the ruling class, the proletariat, if it only wishes to rule and is to rule, must demonstrate this [intent] also with its military organization.

Id. In Pipes' words: "[T]he Bolsheviks seized power in Russia not to change Russia but to use

governed by his belief that socialism would be, or could be, instantaneously successful.¹⁸⁷ To assure that success, radical economic policies, policies at least the equivalent of the economic terror of the French Revolution, were put into effect.¹⁸⁸ These policies introduced the Red Terror of the Russian Revolution. The proletariat declined by one half, industrial output declined by three-quarters, and industrial productivity declined by more than two-thirds.¹⁸⁹ To compensate, the worker's state initiated compulsory labor¹⁹⁰ and collectivized agriculture.¹⁹¹ Lenin asserted state control over the food supply; he ordered the monopolization of the grain trade, the forced extraction of produce;¹⁹² he instituted intra-group

her as a springboard from which to change the world. . . . [T]he Bolsheviks came to regard the interests of Russia as identical with those of world communism." *Id.* at 286-87. Again, in Lenin's words: "We assert that the interests of socialism, the interests of world revolution, are superior to national interests." *Id.* at 286.

187. *Id.* at 192. Trotsky is reported quoting Lenin: "The triumph of socialism in Russia [required] a certain interval of time, no less than a few months. . . . I recall very distinctly that in the first period . . . Lenin invariably repeated that we shall have socialism in half a year and become the mightiest state." *Id.* "The Bolshevik leaders viewed culture in purely instrumental terms: it was the branch of government concerned with molding minds and promoting attitudes favorable to the construction of a socialist society. Essentially, its function was propaganda in the broadest sense of the word." *Id.* at 313.

188. See *id.* at 193-94. These policies, instituted by amateur economists, included: expropriation of real estate; nationalization of industry; repudiation of state debts; abolition of inheritance; and the radical devaluation of money. Lenin said:

The socialist organization of the economy begins with the liquidation of the market, and that means the liquidation of its regulator—the 'free' play of the laws of supply and demand. The inevitable result—namely the subordination of production to the needs of society—must be achieved by the unity of the economic plan, which, in principle, covers all the branches of production.

Id. at 197.

189. *Id.* at 199 ("[T]he utopian programs which Lenin had approved had all but destroyed Russian industry and reduced by one half Russia's industrial labor force."). According to one spokesperson, during this period the Russian economy suffered a calamity "unparalleled in the history of mankind." *Id.* at 203. However, the fact that the state's policy had reduced productivity to levels that threatened Russia's survival did not sound an alarm to dedicated revolutionaries. "Bukharin, a leading left communist, boasted that [it] performed a positive role in that it thoroughly demolished the legacy of capitalism, clearing the way for communism." *Id.*

190. See *id.* at 201-02. Trotsky commented: "One may say that man is rather a lazy creature. As a general rule, he strives to avoid work. . . . The only way to attract the labor force required for economic tasks is to introduce compulsory labor service." *Id.* at 201. See also Pipes' comment that when the Party found that workers were less attracted to its ideology than intellectuals, Lenin instructed: "[I]n case of necessity . . . resort to every kind of trick, cunning, illegal expedient, concealment, suppression of truth, so as to penetrate the trade unions, to stay in them, to conduct in them, at whatever cost, Communist work." *Id.* at 297.

191. *Id.* at 203.

192. *Id.* at 204. See also CONQUEST, *supra* note 1, at 93 (claiming about Lenin's strategies: "Ideology demanded that the independent peasantry be destroyed as an economic class; power demanded that the products of the countryside be taken into the hands of the state.").

hostility.¹⁹³ These policies were no more successful than the Bolshevik's industrial program; they led to a 12.5% decline in cultivated acreage and generated a 30% decline in agricultural yields.¹⁹⁴ People went hungry.¹⁹⁵ Peasants openly revolted. No amount of military presence and no amount of bloody repression could improve those figures or change these facts.¹⁹⁶

Meanwhile, the Tsar and his family were murdered;¹⁹⁷ the Party that was proving itself unable to rule by consent was simultaneously proving itself willing to rule by terror.¹⁹⁸ At a minimum, terror in this context meant summary executions, a pervasive atmosphere of lawlessness, and the enforced wrenching powerlessness of ordinary citizens.¹⁹⁹ Later, after an attempt on Lenin's life, concentration camps were established²⁰⁰ and "a kind of murderous psychosis seized the Bolsheviks."²⁰¹ The death toll

193. PIPES, *supra* note 158, at 205.

Only if we succeed in splitting the village in two irreconcilably hostile camps, if we are able to inflame there the same civil war that had taken place . . . in the cities . . . only then will we be in a position to say that we will do that to the village that we are able to do for the city.

Id. at 207 (quoting I. Sverdlov).

194. *Id.* at 209.

195. *Id.*

196. *Id.* at 208-09. See also CONQUEST, *supra* note 1, at 39 (quoting Lenin as stating: "The victory of the workers is impossible without sacrifices, without a temporary worsening of their condition."). Further, as Conquest reasons: "Only when envisaged in the abstract, as verbal icons, did the proletariat or the masses figure positively." *Id.* at 41.

197. PIPES, *supra* note 158, at 216. Trotsky is quoted: "The execution of the Tsar's family was needed not only to frighten, horrify, and instill a sense of hopelessness in the enemy but also to shake up our own ranks, to demonstrate that there was no retreating, that ahead lay either total victory or total doom." *Id.*

198. *Id.* at 217. According to one government official quoted by Pipes, terror became a "heavy, suffocating cloak thrown from above over the country's entire population, a cloak woven of mistrust, lurking vigilance, and lust for revenge." *Id.* "Lenin attached to propaganda the highest priority, attributing to it (along with the disunity of his opponents) his regime's ability to survive. . . . Its prerequisite was complete control of all sources of information." *Id.* at 305.

199. *Id.* at 217. Law was replaced by "revolutionary conscience." *Id.* at 219. Political crimes were handled by revolutionary tribunals modeled after those made famous during the French Revolution. *Id.* In Lenin's own words, the task of the Communist judiciary was to provide a "justification of terror. . . . The court is not to eliminate terror . . . but to substantiate it and legitimize it." *Id.* at 220. According to Pipes:

The whole thrust of legal theory and practice under Lenin was to eliminate all obstacles that stood in the way of punishing those whom the government for any reason found undesirable. Communist legal historians, referring to the practices of the 1920s, defined law as 'a disciplining principle that helps strengthen the Soviet state and develop the socialist economy.'

Id. at 355.

200. *Id.* at 223. "The decree on Red Terror of September 5, 1918, explicitly provided for 'safeguarding of the Soviet Republic from class enemies by isolating them in concentration camps.'" *Id.* at 227.

201. *Id.* at 224. "Without mercy, without sparing, we will kill our enemies by the scores of

mounted.²⁰² More would soon perish from associated events; the carnage was exacerbated by civil war.²⁰³ The civil war was accompanied by pogroms in the Ukraine,²⁰⁴ the liquidation of the Cossacks in the Don region,²⁰⁵ and severe casualty losses on both sides.²⁰⁶ Its toll on the civilian population is staggering.²⁰⁷ The civil war was followed by famine.²⁰⁸ The famine excused attacks on the Church.²⁰⁹

hundreds, let them be thousands, let them drown in their own blood. For the blood of Lenin and Uritskii . . . let there be floods of blood of the bourgeoisie—more blood, as much as possible.” *Id.* (quoting the Red Army Newspaper). Also, “[w]e must execute not only the guilty. Execution of the innocent will impress the masses even more.” *Id.*

202. *Id.* at 227. The death toll for this stage of the Red Terror is estimated at between fifty thousand and one hundred forty thousand. *Id.*

203. *Id.* at 233-36. “Lenin not only expected civil war to break out in his own country and around the globe after he had taken power, but he took power in order to unleash such a war.” *Id.* at 233. As Trotsky stated: “Soviet authority is organized civil war.” *Id.* And, “[t]he Civil War was primarily a political conflict, a struggle for power and not a conventional war.” *Id.* at 236.

204. *Id.* at 259. The death toll for this endeavor reached an estimated fifty thousand to one hundred thousand. *Id.* at 264.

205. *Id.* at 254 (“A secret directive from Moscow demanded ‘the complete, rapid, decisive annihilation of Cossackdom as a separate economic group, the destruction of its economic foundations, the physical extermination of its officials and officers, and altogether the Cossack elite.’”).

206. *Id.* at 274 (estimating 1,125,000 casualties).

207. *Id.* Between one and a half and two million citizens fled the country. Infectious diseases are believed to have killed two million people during this period. Malnutrition, exposure, suicide, account for another sizable statistic. *Id.*

208. *Id.* at 337. The famine and associated diseases killed over five million people. *Id.* at 360. It was not a natural disaster in any ordinary sense. It was the result of Bolshevik agrarian policies. In 1920,

The government persevered with forcible confiscation of peasant food ‘surplus,’ which in many cases was not surplus at all but grain needed for sustenance and the planting of next year’s crop. Since the weather in 1920 was unfavorable to agriculture, the meager bread reserves dwindled still further and the countryside began [experiencing] . . . famine.

Id. at 344. By the spring of 1921, conditions had reached mass starvation proportions.

[M]illions of wretched human beings abandoned their villages . . . Moscow persisted in denying that a catastrophe had occurred . . . Visitors to the stricken areas passed village after village with no sign of life. . . . In the cities, corpses littered the streets. . . . The famine was accompanied by epidemics. . . . The Soviet government watched the spread of the famine in a state of paralysis. . . . [It] “confronted a problem which, for the first time, it could not solve with resort to force.”

Id. at 357 (quoting historian Michel Heller). In the summer of 1921, an appeal for help was finally issued. The United States, guided by Herbert Hoover under the auspices of the American Relief Administration (“ARA”), established a system of assistance. By the summer of 1922, the ARA was feeding eleven million people a day. Deaths from starvation had ceased. *Id.* at 359-60.

209. *Id.* at 338-40. In Lenin’s words:

It is now and only now, when in regions afflicted by famine there is cannibalism and the roads are littered with hundreds if not thousands of corpses, that we can (and therefore must) pursue the acquisition of [church] valuables with the most ferocious and merciless energy, stopping

This was the Red Terror; it was followed by another. Lenin aged and died.²¹⁰ Stalin assumed power.²¹¹ It was Stalin's theory that "the closer Communism approached final victory, the more intense grew social conflicts—a notion that justified a bloodbath of unprecedented ferocity."²¹² Trotsky and others were hounded from the party and executed or assassinated.²¹³ Under Stalin's leadership forcible confiscation of grain resumed, peasant class antagonisms were reawakened.²¹⁴ Informing on others became a virtue; the secret police were transformed into heroes.²¹⁵ Show trials and the escalation of class warfare²¹⁶ were followed by renewed attacks against what was left of the Church as Stalin led the country into renewed revolution.²¹⁷ Famine re-emerged.²¹⁸ A campaign against "ideological distortions" was undertaken to tame the intelligentsia.²¹⁹ Despite its total subservience to him, between

at nothing in suppressing all resistance. . . . The greater the number of the representatives of the reactionary bourgeoisie and reactionary clergy we will manage to execute in this affair, the better.

Id. at 338.

210. Id. at 372-81.

211. Id. at 372-73.

212. Id. at 392.

213. Id. at 378-79; see also RADZINSKY, *supra* note 29, at 228 ("Lenin had intended to tame the rebellious old guard: Stalin made this imperative. Lenin had adopted a menacing resolution on Party unity: Stalin made it an iron law.").

214. CONQUEST, *supra* note 1, at 96 ("We now have full documentation that the Stalin leadership knew exactly what was happening and used famine as a means of terror, and of revenge, against the peasantry."); see also RADZINSKY, *supra* note 29, at 233. Stalin called for "the liquidation of the kulak as a class." Id. at 246. Deportation, execution, camp assignments for Kulak individuals and Kulak families was mercilessly undertaken. In the end about four hundred thousand people were uprooted. Id. at 246-247. Kulaks were characterized as counter-revolutionaries. Id. However, it seems as if they were the most successful of the peasant class. Id. at 248. Surviving peasants were united in collective farms. Id.

215. Id. at 240.

216. Id. at 242-43. "Those under arrest confessed to everything. . . . One thing unknown until the present was the extent of Stalin's involvement. Only now, after reading the new documents, can I say for sure that he personally staged the trials." Id. at 249. "He . . . saw to it that blood was spilled abundantly. How can you have Terror without blood?" Id. at 251.

217. Id. at 244-45.

The underlying idea of the plan was to squeeze a century of progress into ten years, by revolutionary means. This required industrialization, the collectivization of agriculture, and the creation of a manipulable Party, which would carry out the leader's injunctions to the letter instead of wasting time on discussion and opposition. Only such a Party could finally tame a country stirred up by revolution and create a united society.

Id. at 254. "The revolutionary path, through blood and famine, was the one by which the people could be led into the bright future." Id. at 298.

218. Id. at 256-59. This famine consumed between five and eight million people. Id. at 258. Stalin fought it with Terror. Id. He bound the peasants to the land, like serfs, while exporting grain. Id. at 259. "Never mind the hunger, never mind the corpses: Stalin would drag his helpless country along the road he had always envisioned for it." Id. at 272.

219. Id. at 261. "Stalin was gradually eliminating shame. Fear is stronger than shame."

1935 and 1938, Stalin destroyed the Leninist Party.²²⁰ More show trials ensued.²²¹ Torture was developed into an art form.²²² Fear became insanity.²²³ The daily life of most citizens was lived collectively.²²⁴ They, too, were victimized by terror.²²⁵ Industrialization was, however, achieved to some degree.²²⁶ World War II occurred.²²⁷ During the war Stalin's deliberate terrorizing of

Id. "[A]rt's only duty was to set the agenda for technology." Id. at 265.

220. Id. at 319.

221. Id. at 343-51. In ARENDT, *TOTALITARIANISM*, supra note 134, at 31, the author points to the "demoralizing fascination in the possibility that gigantic lies and monstrous falsehoods can eventually be established as unquestioned facts . . . that the difference between truth and falsehood may cease to be objective and become a mere matter of power and cleverness, of pressure and infinite repetition."

222. RADZINSKY, supra note 29, at 354-55. Cell torture led to torture by interrogator. Id. at 354. Those who survived were subjected to "the notorious conveyor belt"—a system of continuous interrogation. Id. at 355. Consolidation, a form of "good cop" followed. Id. Testimony, when it was allowed, was rehearsed. Id.

223. Id. at 368. Radzinsky tells us that "1937 was to be the most terrible year in Russia's history." Id. at 364. Wreckers, another term for internal counter-revolutionaries, were denounced everywhere. Id. at 368. Even Bukharin, the Party's greatest theoretician, was arrested, imprisoned, convicted, and executed. Id. at 358-61, 374-84. Radzinsky describes the entire process as "[t]he deadly conveyor belt." Id. at 391. "Stalin inaugurated a self-service system of elimination: each victim killed his predecessor, and was killed by his successor. . . . Stalin wanted to involve as many people as possible in the work of destruction." Id. at 392. According to Radzinsky, this series of public trials provided a "magnificent ritual of retribution." Id. at 386.

224. Id. at 387.

Everything was collective. You worked collectively, lived collectively in a communal apartment, enjoyed your leisure collectively, perhaps on a collective excursion into the countryside. Holidays were collective. . . . Every profession had its own holiday, so that on that one day its collectives could drink and frolic to their hearts' content, and—most important—all together.

Id. And, "[p]ersonal responsibility died; there was only collective responsibility. . . . This collective conscience enabled people to enjoy life unconcernedly when the Terror was at its most cruel. Woe to anyone troubled by a conscience of his own." Id. at 388.

225. Id. at 413.

The families of enemies of the people, their acquaintances, acquaintances of their acquaintances—endless chains of people were turned into convicts. In the hands of the army, mass terror consigned thousands of physically strong people to the camps. [Stalin] now had at his disposal the army of unpaid laborers of which Trotsky once dreamed. . . . Before any major project was begun, the NKVD received direct instructions about the number of arrests it needed to make.

Id.

226. Id. at 424 ("In the economy, the private sector had been abolished, capitalism was finished."). "The victory of the workers' and peasants' state was more important than mere human lives." Id. at 437. Through terror, Stalin had managed to wrestle Russia into the twentieth century.

227. Id. at 443-89. During WWII the Russian army lost over eight hundred fifty thousand men and the civilian population suffered a loss of eighteen million. Id. at 505.

his own population abated; following the war, it resumed.²²⁸ Only Stalin's death relieved the tension.²²⁹

Arendt speaks about a fury of wretchedness as fueling the rage of destruction that became the Reign of Terror in the French Revolution; in the Russian situation a kind of manipulative coldness seemed to take over. To some degree, Arendt draws a connection between the passionate destruction of the French Revolution and the heartless destruction wrought by Russian revolutionaries by examining a transformation of suspicion.²³⁰ Because the overall theme of my research is an investigation into the terrorism that grows out of this revolutionary tradition, I hoped to draw connections through the fervent wish for liberation; if I insist on this image, like a bulimic, we would experience liberation though the process of purge. And, during and after the Russian Revolution, when we purge, we rid ourselves of more and more of the facts and artifacts of human life.²³¹

When we finally move through the Chinese Revolution to Pol Pot's regime in Cambodia, we will find that purging an entire city

228. *Id.* at 500. Over one half million Chechen and Ingush people were evacuated from their homelands. *Id.* at 503. The Crimea was "cleansed" of over two hundred thousand ethnic minorities. *Id.* Pogroms against Soviet Jews resumed. *Id.* at 529-35. New trials were planned. *Id.* at 550-60.

229. *Id.* at 568-69. Radzinsky reports: "Shortly before he died the Boss [Stalin asked one of his guards]. . . 'What do you think- will America attack us or not?'. . . '[J]ust remember this: they will attack us, [they are] imperialists, and they certainly will attack us. If we let them.'" *Id.*

230. Compare, ARENDT, ON REVOLUTION, *supra* note 17, at 250,

For Robespierre's rule of terror was indeed nothing else but the attempt to organize the whole French people into a single gigantic party machinery . . . through which the Jacobin club would spread a net of party cells all over France; and their tasks were no longer discussion and exchange of opinions . . . but to spy upon one another and to denounce members and non-members alike

with, ARENDT, TOTALITARIANISM, *supra* note 134, at 120,

The first stage [is] . . . ferreting out secret enemies and hunting down former opponents. . . . The end of the first stage comes with the liquidation of open and secret resistance in any organized form. . . . Only after the extermination of real enemies has been completed and the hunt for 'objective enemies' begun does terror become the actual content of totalitarian regimes.

and, "[t]otalitarianism defined its enemies ideologically before it seized power, so that categories of the 'suspects' were not established through police information." *Id.* at 121.

231. PIPES, *supra* note 158, at 393.

[T]he Bolsheviks . . . were guilty of ignoring the cultural realities of Russia and her unpreparedness for the economic and social order that they tried to impose on her. The Bolsheviks ceased to be utopians when, once it had become obvious the ideal was unattainable, they persisted in the attempt by resorting to unrestrained violence.

Id. "Terror . . . the execution of a law of movement whose ultimate goal is . . . the fabrication of mankind, eliminates individuals for the sake of the species, sacrifices the 'parts' for the sake of the whole." ARENDT, TOTALITARIANISM, *supra* note 134, at 163.

of its population and purging, that is exterminating, an entire quarter of a nation's people is both possible and not enough.

Mussolini seemed to capture the spirit motivating Russian Revolutionary terror when he said of Lenin: "Lenin is an artist who worked on humans as other artists work on marble or metal. But human beings are harder than granite and less malleable than iron."²³² The quote continues with Mussolini saying, "No masterwork has emerged. The artist has failed. The task has proven beyond his powers."²³³ I have no doubt that the artist failed; but, the fact that he failed does not go to the heart of the matter. The problem lies in his, or our, willingness to accept the idea of human beings as mediums of expression; human perfectibility does not mix well with political power.²³⁴ This problem, though, was certainly not evident to Mao Zedong. It is to Zedong's work in the context of the People's Republic of China that we now turn.

3. The People's Republic of China: Let a Hundred Flowers Bloom

The true heirs of Stalin were not the Soviet leaders... For huge Stalinist projects of reshaping society, one has to turn to Mao Zedong in China and Pol Pot in Cambodia.²³⁵

Political power grows out of the barrel of the gun.²³⁶

Disclosure is better than no disclosure; early disclosure is better than late disclosure; thorough disclosure is better than reserved disclosure. If one sincerely discloses his whole criminal story and

232. PIPES, *supra* note 158, at 404-05.

233. *Id.* at 405.

234. CONQUEST, *supra* note 1, at 3 ("The huge catastrophes of our era have been inflicted by human beings driven by certain thoughts. . . . The basic characteristic and attraction was and is the archaic idea that utopia can be constructed on earth; the offer of a millenarian solution to all human problems."). My terrorism research moves me to a profound distrust for the undertaking. It does not seem tolerably possible for any one of us to imagine herself an "artist" whose medium is people. Not that I doubt the accuracy of the imaginative characterization; rather, it is the willingness of the mind to entertain the metaphor that moves me to object. CONQUEST, *supra* note 1, at 126, warns against people who admired the ability of the Soviets to enforce their ideas. Further on he reports being troubled by "the persistence to this day of an adolescent revolutionary romanticism, as one of the unfortunate afflictions to which the human mind was and is prone." *Id.* at 294-95.

235. GLOVER, *supra* note 3, at 283.

236. JONATHAN D. SPENCE, *THE SEARCH FOR MODERN CHINA* 563 (1990). The full quote by Zedong includes the following: "Our principle is that the party commands the gun and the gun shall never be allowed to command the party." *Id.*

admits his crimes to the people humbly, he will be treated leniently and given a way for safe conduct, and his case will not affect his family.²³⁷

Earlier in this article I said: “What revolutionary leaders in Russia confronted was the task of transforming a structureless mass governed by a despotic and centralized bureaucracy into a paradise of shared abundance.”²³⁸ A not entirely dissimilar situation faced China in the first quarter of the twentieth century. However, where the Russians confronted an essentially centralized system, the Chinese faced extreme fragmentation. Many years prior to the rise of revolutionary communism, China’s imperial order collapsed. Internal disputes and foreign interventions resulted in a prolonged period of political instability.²³⁹ Among intellectual, educated Chinese, self-scrutiny, stimulated by a serious concern that their country might perish, led to the exploration of different political theories.²⁴⁰ Prior to the Bolshevik Revolution in Russia, Chinese scholars had shown little interest in Marxism;²⁴¹ following the events of 1917, many turned to Russia, rather than France, as a source for revolutionary inspiration.²⁴² Adapting the industrial-

237. *Id.* at 613 (quoting HONG-YUNG LEE, *THE POLITICS OF THE CHINESE CULTURAL REVOLUTION: A CASE STUDY* 292-93 (1978)). During the Cultural Revolution “[c]onfession’ to some sort of failing was seen as essential to personal redemption; stubborn silence or righteous insistence on innocence could lead to vicious punishment and sustained group pressure.” SPENCE, *supra* note 236, at 613.

238. *Supra* note 137 and accompanying text.

239. SPENCE, *supra* note 236, at 271. Spence tells us that when the last Manchu emperor abdicated in 1912:

[N]ational finances were in disarray, with a depleted treasury in Peking and little money coming in from the provinces. Groups of scholars and bureaucrats had expressed a wide range of dissatisfactions with the defunct [imperial] regime, and this discontent now had to be addressed. The army troops occupying Peking were numerous but hard to control, of doubtful loyalty, and liable to mutiny. . . . Natural disasters had devastated the countryside, causing ruined harvests and starvation. . . . Foreign pressure was intense, the possibility of invasion imminent. . . . [T]here was a strong chance that independent separatist regimes would emerge . . . weakening central authority.

Id. at 275. Also, “[t]he social, economic, and political dimensions of Chinese life were all in flux, and the fragmentation of the country under militarists’ rule made coherent planning almost impossible. The persistent tension between central and local power in China was especially keen.” *Id.* at 296.

240. *Id.* at 271. One study group, the Marxist Research Society, set up in 1918, eventually attracted many influential students, among them, Mao Zedong. *Id.* at 307.

241. *Id.* at 305. Sun Yat-sen’s socialist ideas were rooted in the British socialist constructions associated with Henry George. *Id.*

242. *Id.* Spence quoting Li Dazhao: “[W]e have only to raise our heads to welcome the dawn of the new civilization of the world, and turn our ears to welcome the new Russia that is founded upon freedom and humanism, and to adapt ourselves to the new tide of the world.” *Id.* at 306. However, France was important to the Chinese Communist Party. *Id.* at 231.

proletariat model of Marx to an agrarian-peasant based economy proved no more obstructive to the Chinese than it had to the Russians.²⁴³ Initiating a theme that was to continue through the Mao and Pol Pot regimes, the intellectual class was “sent” to the countryside to escape the corruption of urban life and to dignify themselves through honest labor.²⁴⁴ Visits to the Soviet Union cemented associations.²⁴⁵

What followed were decades of stressful cooperation, strife, and finally open warfare between the Chinese Socialists, those led by Sun Yat-sen (later led by Chiang Kai-shek) and the Chinese Communists, of the Long March fame who would eventually be represented by Mao Zedong.²⁴⁶ Simultaneously, these same decades contained external strife represented by the growth of Japanese domination and WWII.²⁴⁷ When, on October 1, 1949, Mao formally

Between 1919 and 1920, over one thousand Chinese students participated in programs that allowed them to work and study in France, mostly in or near Paris. *Id.* There they were introduced to French labor organizations and socialist doctrines. *Id.* Deng Xiaoping, one of the Chinese students in France, became a political activist. *Id.* While in France, he and Zhou Enlai joined the Communist Party. *Id.* at 322.

243. CONQUEST, *supra* note 1, at 90, speaks generally about this transformation: “In the Jacobin tradition the task of revolution was now . . . entrusted not to a nebulous ‘class’ but to a professional revolutionary elite party acting in that class’s name.” SPENCE, *supra* note 236, at 307-08, speaks more specifically to the Chinese formulation.

China . . . was at the mercy of foreign imperialist forces that had exploited all the Chinese people in ways similar to those in which capitalists exploited their workers—by owning the means of production and seizing the workers’ surplus value for themselves. . . . “[T]he whole country has gradually been transformed into part of the world proletariat. . . . [T]he common people [of China] still indirectly suffer from the direct capitalist oppression in a way that is even more bitter than the direct capitalist oppression suffered by the working classes of the various [capitalist] nations. . . . Our China is a rural nation and most of the laboring class is made up of peasants. If they are not liberated, then our whole nation will not be liberated.”

Id. at 308 (paraphrasing and quoting Li Dazhou).

244. *Id.* at 308-09. “[A]mbivalence toward cities . . . was a feature of Chinese communism.” *Id.* at 519.

245. *Id.* at 309-10. Spence, speaking of Qu Qiubai’s experiences in the Soviet Union and the meaning of these visits to the Chinese Communist revolutionary movement, says:

[T]hrough knowledge, the Chinese would come to see socialism as a valid critique of the existing order; through feeling, they would understand socialism as an emotion that made possible the replacement of the current order with a new one; through will, they would achieve that transformation by exerting their efforts on the objective world.

Id. at 310.

246. *Id.* at 334-60, 403-74, 484-519. Interestingly, Sun Yat-sen and Chiang benefited from associations with warlords. *Id.* at 334. For Sun Yat-sen the connection was actually with a formidable bandit leader, White Wolf. *Id.* at 296. In Chiang Kai-shek’s case, one warlord was a Shanghai gangster, Du Yue-sheng. *Id.* at 298. Both were linked to the well-known criminal group—Green Gang. *Id.* These connections might have slipped by my attention were it not for the conclusion of this research. See *infra* section 3.

247. *Id.* at 456-72, 474-83.

announced the founding of the People's Republic of China, the human horrors and the terrors of revolutionary violence had already begun.²⁴⁸ Though, for these people, in these times, it was more likely that the struggle with external enemies, the toll of civil strife, and the failure of economic systems created a fabric of generalized, rather than revolutionary specific, violence.²⁴⁹

The newly constructed People's Republic inherited disastrous inflation. In addition to curbing this inflation, the government was confronted with the need to restore war damaged industry, to establish law and order, and to improve agricultural production.²⁵⁰ They had only a small cadre of people and, regardless of anti-imperialistic rhetoric, were, as a practical matter, dependent upon foreign assistance.²⁵¹ Land reform was initiated and coordinated by "work teams;"²⁵² violent confrontations between resistant landlords and enthusiastic peasants were encouraged by revolutionary leaders.²⁵³ Propaganda was used to build support in the cities; citizens were ordered into study groups to learn the vocabulary and policies of the communist government; street-committees were established to produce localized services; anti-vice programs targeting prostitution and opium addiction were facilitated.²⁵⁴

248. The Mao-led Autumn Harvest Uprising in Hunan in 1927 was no great success. *Id.* at 359. In the same year, the Soviet directed "Canton commune" effort cost many lives. *Id.* at 359-60. Chiang Kai-shek conducted a reign of terror in the months following his 1927 coup. *Id.* at 361. The "Red Army," a renegade force that combined the military might under Mao's leadership with the trained military of an ex-soldier of fortune, became a fast-moving guerrilla force. *Id.* at 374. The Long March itself consumed almost 90% of its participants. From the approximate eighty thousand people who began the travail, only eight to nine thousand survived. *Id.* at 409.

249. *Id.* at 444-50, 463-66, 468-69, 496 (describing the Japanese conquest). *Id.* at 488-89, 492-93, 504-08, 512-13 (describing internalized strife). *Id.* at 429-34, 498, 501-04 (describing general conditions).

250. Inflation had reached dramatic proportions. Spence reports that a sack of rice that had sold for 6.7 million yuan in June of 1948 sold for sixty three million yuan in August of that year. *Id.* at 502. He says, "there was little hope of coping with ordinary cash transactions." *Id.* And, by the autumn of that year, "[t]he Chinese republic had become, for all practical purposes, a barter economy." *Id.* at 504. For industrial development, see *id.* at 521-22. For mention of only some of the law and order issues, see *id.* at 508-09. For Mao's eight point program, see *id.* at 510. For agricultural reform efforts, see *id.* at 516-17.

251. *Id.* at 514-15.

252. *Id.* at 516 ("[A]bout 40 percent of the cultivated land was seized from landlords and redistributed, and that about 60 percent of the population benefited in some way."). Work teams constituted from three to thirty people. Veteran cadres were joined by students to form these teams. *Id.* Many team members received only rudimentary training. *Id.* Their task was to identify local landlords and break into the ancient patterns of deference that held these landlords in authority. *Id.*

253. *Id.* at 517 ("[O]ne landlord family out of six had a member killed in these confrontations . . . as many as one million or more people . . . died during this phase of the revolution.").

254. *Id.* at 517-18. Spence quoted Liu Shaoqi to emphasize the early enthusiasm and hopefulness of the revolutionaries. Selfless service, he said, was a goal and an ideal, and "any class background could be transcended by piercing self-examination and prolonged study of

Progress toward organizing the country was underway when China decided to invade Tibet and participate as combatants in the Korean War.²⁵⁵ During the latter, the Chinese suffered massive casualties;²⁵⁶ afterward, western foreign influences were increasingly rejected and spies and reactionaries were hunted. The regime hardened.²⁵⁷

In 1953, the People's Republic adopted the Soviet "Five-Year Plan" model of economic development. The adoption of an integrated economic policy came with basic shifts in political organization. Coordination and purging took place simultaneously.²⁵⁸ China's attempts at radical economic restructuring initially appeared successful.²⁵⁹ However, like the Russians, the Chinese were fueling growth by consuming agricultural wealth.²⁶⁰ By 1957, these policies no longer achieved

Marxism-Leninism." *Id.* at 520.

255. *Id.* at 525 (discussing the invasion of Tibet); *Id.* at 529-30 (discussing the Chinese entry into the Korean War).

256. *Id.* at 531. Spence says the Chinese suffered "staggering losses of close to one million men." *Id.* He also says: "The Chinese Communists probably gained in the short run from participating in the Korean War," because a unified United States sponsored Korea was not in the Communists' best interest. *Id.* at 533. "The longer-range tragedy," he adds, "was that China had lost all hope of the 'new democracy' that had seemed implicit in the rhetoric . . . of 1949." *Id.*

257. *Id.* at 531-32. Spence says that as a result of the Korean War the Chinese drew closer to the Soviet Union while turning away from the perceived evils of Western imperialism. *Id.* By 1950, he reports, almost all foreigners had left the country. *Id.* at 534. In the early 1950s deadly campaigns were directed against domestic counterrevolutionaries. *Id.* Spence reports that during this period approximately thirty thousand people were executed, some of them in public spectacles. *Id.* at 535. A broad based campaign was waged against internal corruption within the party and, "an all-out assault on the bourgeoisie in China, a class war" was initiated. *Id.* at 535-36. "[B]usiness leaders were forced to undergo group criticism sessions and to confess their past economic crimes." *Id.* at 537. The fact of massive denunciations (approximately two hundred thousand) followed by intense investigations and "voluntary" confessions involving up to seventy thousand business men just in Shanghai, help put the effort in perspective. *Id.* at 538.

During 1950 and 1951 tens of thousands of Chinese intellectuals of all ages were given six-to eight-month-long 'courses' at 'revolutionary colleges. . . .' [T]hey met with small groups . . . for discussion and self-criticism, and prepared 'autobiographies' in which they analyzed their own past failings and those of their parents. . . . [I]n general the entire process subjected the intellectuals to severe mental stress.

Id. at 564. After a brief defrosting of the situation—the Hundred Flowers period—Mao's government returned to a hard-line approach to intellectual freedom. *Id.* at 572.

258. *Id.* at 541-42.

259. *Id.* at 544 ("[T]he First Five-Year Plan achieved a dramatic increase in industrial production.").

260. *Id.* ("The Chinese . . . forced the peasantry to sell more than a quarter of their total grain production to the state at extremely low prices. This policy left the peasants at subsistence level while it enabled the government to guarantee food supplies in the cities and keep wages down."). Apparently, the permissibility of private plots allowed the Chinese peasants to survive these otherwise famine generating government policies. *Id.* at 550.

satisfactory ends. The Great Leap Forward was instigated in an attempt to spontaneously energize the nation's economy.²⁶¹ Communes were merged; people were organized along military lines; gigantic irrigation projects were undertaken with labor from the cities; the allowance for private plots was ended; and farmers were expected to both grow grain and produce home made steel in makeshift furnaces.²⁶² The pooling of household, child-rearing, and cooking arrangements had significant and long-term effects on family structure; despite the success of several irrigation projects, the grain yield was profoundly disappointing; and the steel furnaces did not work.²⁶³ The result was chaos rather than progress.²⁶⁴ China continued to export grain in order to pay for heavy machinery. Grain production continued to fall. In a replay of horror familiar from Russian history, starvation and famine set in.²⁶⁵

261. *Id.* at 575-77. According to Spence, several factors were at play here. Mao was inspired by Soviet technological development. *Id.* at 575. Mao was uninspired by China's agricultural production figures for 1957. *Id.* "The roots of Mao's radical thinking had always lain in the voluntaristic, heroic workings of the human will and the power of the masses." *Id.* at 576. He was troubled by what he saw as a loss of vitality in the Chinese Revolutionary situation. *Id.* He was worried about the growth of "individualism, departmentalism, absolute egalitarianism or liberalism." *Id.* As a result of these factors, Mao seized on Trotsky's "permanent revolution" idea:

Now we must start a technological revolution so that we may overtake Britain in fifteen or more years. . . . Our revolutions are like battles. After a victory, we must at once put forward a new task. In this way, cadres and the masses will forever be filled with revolutionary fervour.

Id. at 577.

262. *Id.* at 578-80.

263. *Id.* at 580.

264. *Id.* at 581.

265. *Id.* at 583. Spence says that this famine claimed twenty million lives between 1959 and 1962. *Id.* Glover says the death toll ought to be placed between twenty and thirty million. GLOVER, *supra* note 3, at 284. According to Spence, it was the unwillingness of cadre with accurate information to confront high ranking officials, who desired good news, with the bad news of failing production that facilitated the deepening of the famine process. SPENCE, *supra* note 236, at 583. According to Glover, "Mao's policies needed corrective feedback, but most people were too frightened to give it." GLOVER, *supra* note 3, at 287. Glover tells two stories of importance in this regard. First, he describes how at the height of the famine Mao went out to tour the harvest areas. *Id.* at 285-86. So unused was he to being contradicted and so unwilling were officials to upset this pattern that the following scene evolved (as related by Mao's personal physician and political advisor, Dr. Li, who accompanied him on the trip):

The scene along the railroad tracks was incredible. Harvest time was approaching, and the crops were thriving. The fields were crowded with peasants at work. . . . "Good news reporting stations" were . . . competing with nearby brigades and communes to report—red flags waving, gongs and drums sounding—the highest, most extravagant figures.

GLOVER, *supra* note 3, at 285 (quoting LI ZHISUI, *THE PRIVATE LIFE OF CHAIRMAN MAO: THE MEMOIRS OF MAO'S PERSONAL PHYSICIAN* 272-73 (1994)). This scene, as Dr. Li later discovered, turned out to be a theatrical production:

In Hubei the peasants were ordered to remove rice plants from far-away fields and transplant them along Mao's route to give the impression of a wildly abundant crop. The rice was planted so closely together that

As if the famine had resulted from the failure of the people to accept communist ideology, the government redoubled its efforts to introduce basic socialist values into Chinese society.²⁶⁶ Economic recovery was accomplished;²⁶⁷ however, the political situation was not as easily stabilized.²⁶⁸ The Cultural Revolution commenced.²⁶⁹

electric fans had to be set up around the fields to circulate the air in order to prevent the plants from rotting.’

GLOVER, *supra* note 3, at 285-86 (citing and quoting LI ZHISUI, *THE PRIVATE LIFE OF CHAIRMAN MAO: THE MEMOIRS OF MAO’S PERSONAL PHYSICIAN* 277 (1994)). Second, Glover reports that in 1959 the harvest was thirty million tons less than in 1958. GLOVER, *supra* note 3, at 285. Most officials, however, found it prudent to report large increases in order to placate Mao. *Id.* at 287. Peng Dehuai, the Minister of Defense, was not among them. *Id.* He spoke up detailing the danger of starvation. *Id.* He even wrote to Mao to explain the situation. *Id.* Mao dismissed Peng’s criticisms. *Id.* Peng, still determined to break through Mao’s denial of the truth, accused him of becoming like Stalin in his willingness to sacrifice the people to “impossible production targets.” *Id.* As if to demonstrate the correctness of the Stalin analogy, Peng was condemned as an “anti-Party element” and as “a right opportunist.” *Id.* He was put under house arrest and assigned to write a self-criticism. During the Cultural Revolution he was tortured and killed. *Id.*

266. SPENCE, *supra* note 236, at 592 (“The collective was to be placed ahead of the individual.”). And, quoting Mao, “Any departure from this correct analysis and logical reasoning will inevitably cause our work of socialist construction to lose its direction.” *Id.* Solzhenitsyn speaks about similar reasoning in Soviet Russia: “The primitive refusal to compromise is elevated into a theoretical principle and is regarded as the pinnacle of orthodoxy.” CONQUEST, *supra* note 1, at 112. According to Conquest, this way of thinking implies that, “political leadership, and political considerations generally, were on a higher and more comprehensive plane than all other elements in society and were empowered to make final decisions in all fields.” *Id.* Conquest recites Orwell’s proposition that

it is common for revolutionaries to hate the system much more than they pity its victims. . . . [I]deology becomes a sort of mental trap. And when its bearers come to power they are . . . stuck with a program that produces far worse suffering . . . than . . . under the original oppressors.

Id. at 141-42.

267. SPENCE, *supra* note 236, at 595-96.

268. *Id.* at 603. Speaking about the forces that would eventually yield up the Cultural Revolution, Spence points to Mao’s view that, again, the Revolution was “losing impetus,” this time because of party conservatism and bureaucratic lethargy. *Id.* at 603. Glover states that “Mao believed especially in the energy of the young,” GLOVER, *supra* note 3, at 288, and that “Mao encouraged the young to tear up the existing society and start again.” *Id.* Explaining the destabilizing factors, Spence points to disaffected urban youths, the political ambitions of several people in the government, SPENCE, *supra* note 236, at 604, Mao’s own loss of esteem and influence, and beliefs among influential party leaders that “the Chinese cultural garden was overgrown with ‘anti-socialist poisonous weeds.” *Id.* at 603. “[I]f the proletariat does not occupy the positions in literature and art, the bourgeoisie certainly will.” *Id.*

269. SPENCE, *supra* note 236, at 604-06 (describing how events piled up: the 1966 purging of the cultural bureaucracy was followed by later purges of higher echelons of party leadership; the issuing to students of arm bands announcing them as the “Red Guards—the vanguard of the new revolutionary upheaval”; the mounting of gigantic chanting parades; the closing of schools to facilitate the staging of a revolutionary struggle; the demolishing of old buildings, temples, and art works in the name of revolutionary purification; the comprehensive attack on “old customs, old habits, old culture, and old thinking.”). The country was gripped by “euphoria, fear, excitement, and tension . . . violence grew apace. Thousands of intellectuals . . . were beaten to death. . . . Thousands more were imprisoned, often in solitary confinement, for years. Millions were relocated to purify themselves through

Humiliation was its main tool.²⁷⁰ The Cultural Revolution was marked by the creation of an intense climate of fanaticism and fear.²⁷¹ At some point the regular army and the radicals began to clash. Violence escalated.²⁷² Glover calls the Cultural Revolution one of this century's "great man-made catastrophes."²⁷³ He attributes it, and other of Mao's extravagant errors, to his belief in the total reconstructability of human life, to "large-scale thinking and lack of moral restraints."²⁷⁴

4. Pol Pot's Cambodia: The Lotus Dies; No Moon Cushion

"The Khmer methods do not require a large personnel, there are no heavy charges to bear because everyone is simply thrown out of town . . . [T]he Khmers have adopted the method which consists in overturning the basket with all the fruit inside; then, choosing only the articles that satisfy them completely, they put them back in the basket."²⁷⁵

labor in the countryside." Id. at 606. Spence informs us that the "combination of incessant indoctrination with hard labor" became the norm in Chinese villages during this period. Id. at 614. According to Spence, "[t]he extent of this outpouring of violence, and the rage of the young Red Guards against their elders, suggest the real depths of frustration that now lay at the heart of Chinese society." Id. at 606.

270. GLOVER, *supra* note 3, at 291. Cruelty, he says, was able to solicit unprecedented mass participation. Id. at 292. So intimidating was the general atmosphere that, according to Glover: "People feared stepping out of line even in their thoughts." Id. Glover characterizes the Cultural Revolution as an "unprecedentedly intrusive assault on any moral identity other than the permitted one." Id. at 296.

271. Id. at 284. Glover relates the story of a young Red Guard beating a kneeling, bloodstained woman while reciting the words of Mao: "Mercy to the enemy is cruelty to the people!" Id. at 291; see also DYER, *supra* note 64, at 141 ("Fear is not just a state of mind; it is a physical thing.").

272. SPENCE, *supra* note 236, at 611. Spence tells us that the numbers killed in these conflicts is unknown, "but there were eyewitness reports of rivers blocked with bodies, and many corpses washed up on the shores of Hong Kong." Id. Lynn White credits claims as high as one million people, but doubts the accuracy of claims as high as twenty million people. LYNN T. WHITE, *POLICIES OF CHAOS: THE ORGANIZATIONAL CAUSES OF VIOLENCE IN CHINA'S CULTURAL REVOLUTION* 7 (1989). Jing Lin believes the death toll should be established at approximately five million. JING LIN, *THE RED GUARDS' PATH TO VIOLENCE: POLITICAL, EDUCATIONAL, AND PSYCHOLOGICAL FACTORS* 2 (1991). Harry Harding says the events of 1967 took the lives of half a million Chinese. Harry Harding, *The Chinese State in Crisis, 1966-9*, in *THE POLITICS OF CHINA: THE ERAS OF MAO AND DENG* 148, 244 (Roderick MacFarquhar ed., 2d ed. 1997).

273. GLOVER, *supra* note 3, at 284.

274. Id. at 297-98; see also CONQUEST, *supra* note 1, at xi ("[H]umanity has been savaged and trampled by rogue ideologies.").

275. GLOVER, *supra* note 3, at 299 (quoting FRANCOIS PONCHAUD, *CAMBODIA, YEAR ZERO* 22 (1978) who, in turn is quoting a Khmer official, Prachachat, June 10, 1976).

“We went to Phnom Penh to search for enemies hidden there, and drive the people out. . . . We were told to tell the people to leave for three days, and that then they could return. We were told to shoot people who refused. Our group shot 2 or 3 families.”²⁷⁶

“Everyone, including children, worked very hard, usually twelve-or thirteen-hour days, plus about six nights every month on particular tasks and occasional compulsory evening political meetings. . . . [T]he workday in the fields was sometimes extended by two or three hours of night labor. People were raised or demoted in the hierarchy according to whether their work was ‘vigorous, medium or weak.’ The system’s demands on its subjects were so great as to divide and redivide them. . . . Base people suspected of crimes were regularly ‘sent up to higher levels’—which meant death. . . . The base people lost faith one hundred percent.”²⁷⁷

Mao and the People’s Republic of China may not present a terror on the same scale as Stalin. And, in sheer numbers, the Cambodian death toll pales in comparison to the results in these prior two regimes. But, in its genocidal effects, and in the profundity of human sadness, no one has surpassed the terror of Pol Pot’s government.²⁷⁸

Without a doubt the United States played a role in the international arena relevant to Chinese politics prior to the inception of the People’s Republic of China.²⁷⁹ However, that role is dramatically overshadowed by the direct and unfortunate contributions made by the United States to the situation in Cambodia. The Democratic Kampuchea enterprise, the Pol Pot regime, the Khmer Rouge,²⁸⁰ had two major external enemies: the

276. BEN KIERNAN, *THE POL POT REGIME: RACE, POWER AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE, 1975-79*, 43 (1996) (quoting Chhin Phoeun).

277. *Id.* at 175-77.

278. When I wrote this sentence I had not yet read the book about Rwanda: PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* (1998). It may be that hyperboles about human sadness may always be out of place.

279. SPENCE, *supra* note 236, at 478-80, 484-91.

280. KIERNAN, *supra* note 276, at xi, xiii. DK is an abbreviation for Democratic Kampuchea, the formal name for the regime that governed Cambodia from 1976-1979. Democratic Kampuchea is synonymous with Pol Pot’s regime at least insofar as during the existence of Democratic Kampuchea, Pol Pot and his party, the Communist Party of Kampuchea (“CPK”), were in control of the nation. The Khmer Rouge, or Red Khmers, is a broader term. It was

imperialistic United States and neighboring Vietnam.²⁸¹ The history of this Cambodian-Vietnamese enmity may lay rooted in French colonialism. It was the French who introduced the Vietnamese into Cambodian culture where they, like the Thai and Chinese, exercised an urbanizing influence on the more insular Cambodian society.²⁸² The history of Cambodian-United States enmity is short and horrific. From the early 1960s until the mid 1970s, United States policies resulted in the political and military destabilization of Cambodia.²⁸³ In this study of terrorism-through-

once associated with the Khmer People's Revolutionary Party—the first viable communist party to emerge on the Cambodian scene—in contrast to other associations of Khmers; Khmer being a general term for identifying Cambodian ethnicity. Later on the term became associated with Pol Pot's take-over. Id. at 13, 19, 25-26.

281. Id. at 3.

282. Id. at 4-6. Kiernan provides data that suggests Pol Pot's personal experience might have contributed to the animosity. When Pol Pot, then called Saloth Sar, was twenty, he was given a scholarship to study in Paris. Id. at 10. He and another Cambodian youth traveled together, first to Saigon, the largest city either had ever seen where according to Saloth Sar's companion they felt like "dark monkeys from the mountains." Id. On the other hand, Kiernan makes it clear that among left leaning Cambodian students studying in Paris during this period, nationalistic sentiments ran high enough to experience as offensive Vietnamese possessive claims to Angkor Wat, or suggestions that the visiting Ho Chi Minh was someone who shared their interests. Id. at 10-11. Regardless of its relatedness to Cambodian-Vietnamese relations, it is worth noting the influence the French connection played in the education of revolutionaries. While Mao himself did not study in Paris, some of his influential colleagues did. See *supra* note 242. Pol Pot and many of his cadre did receive a French education during which radicalization occurred. KIERNAN, *supra* note 276, at 26. So strong was this influence in Cambodia that Kiernan says, "[o]ver time the membership of the top CPK circle became increasingly restricted to the French-educated Pol Pot group." Id.

283. Id. at 16-17. Early contributing policies include: United States'—backing of French efforts to reestablish colonial domination of Cambodia and Vietnam; United States' attempts to encircle China; United States' escalations of hostilities in Vietnam that undermined Sihanouk's, Cambodia's head of state, attempts at neutrality. Id. at 16. In the early mid 1960s, the following policies were added: the massive military escalation of the United States involvement in Vietnam; troop commitments that rose from twenty thousand to three hundred thousand; and, the United States facilitation of a dramatic increase in Saigon's military force which recruited one hundred sixty thousand soldiers in 1965 as compared to forty five thousand the previous year. Id. at 17. The enormous demand for food, rice, promoted by these policies destabilized the agricultural economy upon which Cambodia depended, plunging Sihanouk's government toward bankruptcy. Id. The war itself had other consequences: Vietnamese communists intruded into Cambodian territory seeking refuge, while United States forces—mostly in the form of bombing and strafing—pursued them; almost twenty thousand ethnic Cambodians residing in Vietnam began flooding into Cambodia seeking refuge from the hostilities; United States Special Forces teams made "secret reconnaissance and mine-laying incursions into Cambodian territory"—almost two thousand of these casualty rich missions took place by spring of 1970; United States sponsored intelligence operations probed deeply into Cambodian territory; but the most serious were the bombing missions. Id. at 17-8. "100,000 tons of bombs were dropped" on Cambodia by United States forces by 1969. Id. at 18. During 1970-1973, these intrusive activities escalated: the rice crop continued to bleed into Vietnam; refugees continued to stream into Cambodia; soldiers continued to seek refuge in Cambodia with United States forces in pursuit; the frontier between Cambodia and Vietnam broke down; the eventual United States invasion of Cambodia exacerbated an already disastrous situation; bombing

revolution it is not inappropriate to report, in this instance, the independent contributions of United States—inflicted terrorism through invasive bombing.²⁸⁴ United States sources were aware of the devastating affect these actions were having on the people of Cambodia. It is unlikely that informed officials underestimated the fearful carnage;²⁸⁵ what is more evident is their inability, or unwillingness, to acknowledge the political implications of this carnage.²⁸⁶

patterns increased so that “540,000 tons were dropped in the last six months” of the bombing in 1973. *Id.* at 19. The high-end estimate approximates a death toll of six hundred thousand people from these bombings; ten percent of the Cambodian population. GLOVER, *supra* note 3, at 301. A low-end estimate approximates one hundred fifty thousand dead civilians from United States bombing between 1969 and 1973. KIERNAN, *supra* note 276, at 24. However many people actually died, the results were catastrophic to the Cambodians. *Id.* at 19.

284. KIERNAN, *supra* note 276, at 21. Kiernan quotes a March 1973 UPI report: “Refugees swarming into the capital from target areas report dozens of villages . . . have been destroyed and as much as half their population killed or maimed in the current bombing raids.” *Id.* Kiernan quotes another commentator, William Shawcross, as labeling the result “wholesale carnage.” *Id.* Kiernan also quotes Chhit Do, a CPK leader who later fled the country, as saying

[t]he ordinary people . . . sometimes literally shit in their pants when the big bombs and shells came. . . . Their minds just froze up and they would wander around mute for three or four days. Terrified and half-crazy, the people were ready to believe what they were told. That was what made it so easy for the Khmer Rouge to win the people over. . . . It was because of their dissatisfaction with the bombing that they kept cooperating with the Khmer Rouge, joining with the Khmer Rouge, sending their children off to go with them.

Id. at 23.

285. *Id.* at 24. Keirman quotes a report to the United States army in July of 1973 stating: “[T]he civilian population fears United States air attacks far more than they do Communist rocket attacks or scorched-earth tactics.” *Id.* Perhaps it is useful to be reminded of the official purpose of these bloody raids. “The decision to bomb was taken by Richard Nixon and Henry Kissinger, and was originally justified on the grounds that they were targeting North Vietnamese bases set up inside Cambodia.” GLOVER, *supra* note 3, at 301. Admittedly, the United States did not plan to terrorize or slaughter whole segments of the Cambodian population. On the other hand, the United States was not without intelligence apparatus. See KIERNAN, *supra* note 276, at 24. Kiernan cites a United States Department of Defense Intelligence Information Report detailing the extent of one raid’s impact on a civilian village and warning that “the Communists intend to use this incident for propaganda purposes.” *Id.* Kiernan cites another United States intelligence source as reporting, “aerial bombardments against the villagers have caused civilian loss on a large scale” and then warning that peasant survivors “were turning to the CPK for support.” *Id.* at 20.

286. KIERNAN, *supra* note 276, at 24-25. Kiernan quotes Kissinger as pondering, as late as 1974, whether the Cambodian insurgency—the general Khmer Rouge—was regional and factionalized with a veneer of centralized control or whether real power now lay with the Pol Pot center. *Id.* at 25. The irony, or as Kiernan labels it, the tragedy, is that until 1972 regionalization and factionalization did characterize Cambodian communist forces; United States policies pursued by Kissinger and Nixon “were largely responsible” for the shift of power from this dispersion to Pol Pot. *Id.* For Kiernan, “[t]he popular outrage over the United States bombing, predictably manipulated by the CPK,” lay at the heart of Pol Pot’s ability to seize control of Cambodia. *Id.*

Regardless of how successfully denial functioned for United States government officials,²⁸⁷ in Cambodia an organization that in 1969 had only four thousand members was able, by 1975, to supercede competing forces and seize control of the Cambodian government.²⁸⁸

The relentless terror inflicted by that government might not be thinkable had it not been realized. Its terroristic strategies, like those of the French, the Russians, and the Chinese, arose from seemingly beneficial seeds. Arendt identified the seeds in France with the extreme wretchedness of the people's condition.²⁸⁹ The Russians thought of their seeds as Marxist, and eventually as Marxist-Leninist, and, of course, they thought of Marxist-Leninism as serving the best interests of the people.²⁹⁰ The Chinese, too, understood themselves as rooted in this soil.²⁹¹ As early as 1976, Democratic Kampuchea proudly announced itself ahead of "other Asian communist states, having 'leaped' from feudalism to a socialist society straight away."²⁹² Unthinkably horrific as the Pol Pot regime's actions might have been, they were born out of the same hope for a better world as these other revolutions.²⁹³

287. GLOVER, *supra* note 3, at 301, reports Roger Morris, a member of Kissinger's staff, as saying:

Though they spoke of terrible human suffering reality was sealed off by their trite, lifeless vernacular: 'capabilities', 'objectives', 'our chips', 'giveaway'. It was a matter too of culture and style. They spoke with the cool, deliberate detachment of men who believe the banishment of feeling renders them wise and, more important, credible to other men. . . . They neither understood the foreign policy they were dealing with, nor were deeply moved by the bloodshed and suffering they administered to their stereotypes.

Id. Kiernan quotes Kissinger as saying long after the events: "We destabilized Cambodia the way the British destabilized Poland in 1939. . . . It was Hanoi—animated by an insatiable drive to dominate Indochina—that organized the Khmer Rouge long before any American bombs fell on Cambodian soil." KEIRNAN, *supra* note 276, at 24.

288. GLOVER, *supra* note 3, at 300-01. "Although it was indigenous, Pol Pot's revolution would not have won power without United States economic and military destabilization of Cambodia . . . [which] peaked in 1969-1973 with the carpet bombing of Cambodia's countryside. . . . This was probably the most important single factor in Pol Pot's rise." KIERNAN, *supra* note 276, at 16.

289. See *supra* note 67.

290. See *supra* notes 160-164 and accompanying text.

291. See *supra* note 241.

292. KIERNAN, *supra* note 276, at 25-26.

293. ARENDT, *ON REVOLUTION*, *supra* note 17, at 111.

Necessity and violence, violence justified and glorified because it acts in the cause of necessity, necessity no longer either rebelled against in a supreme effort of liberation or accepted in pious resignation, but, on the contrary, faithfully worshipped as the great all-coercing force which . . . in the words of Rousseau, will "force men to be free."

Id. Norman Cohn, in later editions of *The Pursuit of the Millennium*, claimed that Communism and Nazism had been inspired by archaic fantasies.

For me, the process of bringing change, or more accurately, of attempting to bring change-through-terror, to populations in revolutionary contexts is part of the fascination of this study. What I want to know is how and why, in the name of serving the people, so many of the intended beneficiaries are deliberately slaughtered or carelessly subjected to terrifying life threatening treatments.²⁹⁴ Why is it that killing and fear became the strategies of choice for achieving social change? Earlier in the article, observing revolutionary leaders attempting to change societies by requiring people to conduct themselves in accordance with ordained ideas, I said that the problem of dramatic social reconstruction may appear solvable at the level of ideas.²⁹⁵ At the ideation level of abstraction, it may seem that the population needs re-education; it may be

As with the chiliastic movements of centuries long past, modern revolutionaries have . . . claimed to be charged with the unique mission of bringing history to its preordained consummation . . . 'a restlessly dynamic and utterly ruthless group which, obsessed by the apocalyptic phantasy and filled with the conviction of its own infallibility, set itself infinitely above the rest of humanity and recognised no claims save that of its own supposed mission.'

CONQUEST, *supra* note 1, at 75.

Their guilt 'is not mitigated by the fact that they believed their aim to be a good one; they must be judged ultimately by reference to the cause to which they dedicated themselves . . . the lie that betrays him is a lie in the soul; that the causes men dedicate themselves to . . . reveal the kind of person that they really are.'

Id. at 132 (quoting John Sparrow).

294. Arendt says "[a]ll rulership has its original and its most legitimate source in man's wish to emancipate himself from life's necessity, and men achieved such liberation by means of violence, by forcing others to bear the burden of life for them. This was the core of slavery." ARENDT, *ON REVOLUTION*, *supra* note 17, at 110. It makes some sense for me to quote this statement by Arendt here in the preliminary comments to an investigation into the Pol Pot regime since, in the end, I conclude that what occurred in Cambodia during his government was a particularly terroristic form of enslavement. However, I am not convinced of the inevitable accuracy of this Arendt observation. What I am convinced of is the appropriateness, in this context, of its introduction. Another idea worth pondering during the remainder of the paper is set forth in CONQUEST, *supra* note 1, at 233, where Conquest quotes Douglas North, Nobel Prize winner in economics, as saying, "[t]he price you pay for precision is inability to deal with real-world questions." This idea is appropriately introduced because my (our) desire for accurate responses to the disturbing questions of our times may move us to seek precision when what would be more useful is an increased ability to "deal with real-world questions." *Id.*

295. PIPES, *supra* note 158, at 24-25, claims that these ideas were conceived during the Enlightenment, incubated by the "patriotic" clubs of France in the mid 1700s, quickened by Marx, then infused, by generations of "intelligentsia" acting as professional revolutionaries, into political events in Europe, Asia and elsewhere. See also HEGEL: *TEXTS AND COMMENTARY* 62 (Walter Kaufmann trans. & ed., Univ. of Notre Dame Press 1977) (1807 [hereinafter HEGEL] ("Regarding historical truths . . . insofar as their purely historical aspect is considered . . . they concern particular existence and the accidental and arbitrary side, the features that are not necessary.")).

believed that the strength of the new will emerge in and from a process of purification.²⁹⁶

Revolutionary faith posits that beliefs can be changed when the supportive network of institutions and ideas is radically modified;²⁹⁷ this is an aspiration widely shared by many social reformers.²⁹⁸ No one was more committed to the realization of this idealization than Pol Pot and his cadre.²⁹⁹ The regime initiated the change by emptying, literally emptying, the capital city.³⁰⁰ Other cities were

296. See GLOVER, *supra* note 3, at 306 on the situation in Cambodia:

There was a lot of talk of 'purification,' with political 'enemies' being likened to causes of disease. One report, probably by Pol Pot, said: '[T]here is a sickness inside the Party . . . We cannot locate it precisely. The illness must emerge to be examined . . . we search for the microbes without success. They are buried. As our socialist revolution advances, however, seeping more strongly into every corner of the Party, the army and among the people, we can locate the ugly microbes.'

297. See *supra* notes 156 & 157 and accompanying text.

298. PIPES, *supra* note 158, at 21-25. See *supra* note 158-160 and accompanying text, (stating that the intelligentsia fed on materialistic beliefs that conceive of human beings almost entirely as creatures of changeable environments, and understanding people in this way produces social engineering based strategies). Adherents reason that as environments change, the humans who experience them will also change; perfect environments will create perfect, or close to perfect, human beings; while imperfect, defective environments inevitably create imperfect, defective people. PIPES, *supra* note 158, at 21-25. Hence, to them, human misery is a correctable condition that can be, indeed needs to be, addressed at the level of social systems. *Id.* Create the right social system, populate it, enforce its structures, and people will be extracted from wretchedness. *Id.* Glover tells us about the Cambodians,

As with the social experiments of Stalin and Mao, the case for all this was a consequentialist one. It was thought acceptable to destroy things people valued, such as family, religion and the traditional culture. It was thought justifiable to kill so many and to put such pressure on those left alive. The belief was that these things would further the Revolution, which in turn would produce a state 'overflowing with harmony and happiness.'

GLOVER, *supra* note 3, at 305. Such social experimentation had not previously been performable:

This century has in fact been the first in which the groups taking over countries had the power to use state machinery to impose doctrinally produced errors on the whole of society. . . . [I]t finally became technically possible to control an entire society and eventually to pervade it fully with the regime's propagandas and its terrors.

CONQUEST, *supra* note 1, at 81.

299. Pol Pot and his cadre formed a closed caste of professional revolutionaries very much akin in spirit to the "People's Will," the early Russian organization dedicated to political terror; both groups in the name of the people were capable of ignoring the beliefs or the needs of the people. See *supra* note 166 and accompanying text.

The Party's Four-Year Plan said, 'technology is not the decisive factor; the determining factors of a revolution are politics, revolutionary people, and revolutionary methods.' Pol Pot himself said, 'Formerly to be a pilot required a high school education-twelve to fourteen years. Nowadays, it's clear that political consciousness is the decisive factor.'

GLOVER, *supra* note 3, at 304.

300. Recall earlier in the paper when I said:

Because the overall theme of my research is an investigation into

also evacuated.³⁰¹ These evacuations, while publicized as

the terrorism that grows out of this revolutionary tradition, I hoped to draw connections through the fervent wish for liberation; if I insist on this image, like a bulimic, we would experience liberation through the process of purge. And . . . when we purge, we rid ourselves of more and more of the facts and artifacts of human life. When we finally move . . . to Pol Pot's regime in Cambodia, we will find that purging an entire city of its population and purging, that is exterminating, an entire quarter of a nation's people is both possible and not enough.

Supra text accompanying note 231. The purging began, as a public event, in Cambodia with the policy of evacuating the urban areas. KIERNAN, supra note 276, at 33-64. Kiernan describes in detail the communications confusions associated with this policy, "[t]ransmission of the evacuation order took time, and it reached different Zone units in different versions." Id. at 33. However, the confusion in military directives only exacerbated the burdens of the confused denizens of Phnom Penh who, for the most part, on short notice were crudely ordered to leave. Id. at 38. As one observer reports, people were told: "The inhabitants who put up resistance or refuse to take to the road will be liquidated, as enemies of the people." Id. Kiernan not only describes the confusion at the level of military command, he ably gives eye-witness accounts to reveal the accompanying chaos. Id. at 39-47. To quote a small sampling,

Ping Ling, an ethnic Chinese engineer, left his . . . home . . . 'with bullets whooshing past from everywhere.' A large group of Khmer Rouge stopped him and his companions and began searching their belongings. Then another group approached and yelled, 'let them move on!' Ping Ling comments: 'Those surrounding us stared at this second group with defiance in their eyes. . . . It seems there is restrained violence between these two groups. It seems the second group [was] keen on our leaving the city fast.' Later that day, in the city's northern suburbs 'we came across another group of Khmer Rouge this time wearing khaki uniform.... We were told by them to return back to the city.' Unsure [of] what to do, Ling and his companions waited, 'trying to catch our breath.' But soon afterwards, 'out of nowhere a loud-speaker blared out at us, ordering everyone to move on, followed by machine gun firing.'

Id. at 42. Another eye-witness describes,

'a lot of confused people on the tops of buildings and in the street, not knowing where to go.' Four or five soldiers were firing shots, ordering them along, calling everyone out into the street. Enormous crowds filled the roadways, swaying en masse under the pressure. At one point, Khmer Rouge fired an M-79 grenade into the crowd. . . . The crowd panicked, and people ran in all directions.

Id. at 44. Yet another observer recounts:

[p]atients driven out of the hospitals were pushed in their hospital beds by relatives, who 'struggled with the beds, like ants with a beetle,' some 'with plasma and drip bumping alongside.' Limbless Lon Nol soldiers [from the prior regime] hobbled and crawled with the crowd. I shall never forget one cripple who had neither hands nor feet, writhing along the ground like a severed worm, or a weeping father carrying his ten-year-old daughter wrapped in a sheet tied round his neck like a sling, or the man with his foot dangling at the end of a leg to which it was attached by nothing but skin.'

Id. Kiernan gives us more information about the immediate follow-up to the evacuation. He interviewed at least one hundred people involved. They were able to describe the experience of thirty-six different groups of evacuees: "the thirty-six groups set out from the city and walked west, south and east into the countryside for various lengths of time ranging from several days to six weeks." Id. at 48. Kiernan reports that the death toll from this single event, the evacuation of a city of approximately 2 million inhabitants, was nearly twenty thousand. Id. at 49.

temporary, were intended as permanent.³⁰² They were part of an eight-point program. The eight points were: 1) evacuate the people from all towns; 2) abolish all markets; 3) abolish the Lon Nol regime's currency and withhold replacement currencies; 4) defrock Buddhist monks and put them to work growing rice; 5) execute the Lon Nol leadership; 6) establish cooperatives in the countryside with mandated communal eating; 7) expel the Vietnamese; and 8) dispatch troops to the Vietnamese borders.³⁰³ Additionally, the plan was to condense the development of the nation's industry and agriculture into a ten to fifteen year period and to use this period to create a genuine socialist society by screening, that is killing, anyone unable to achieve the requisite level of purity.³⁰⁴

In the first year of the regime, China emerged as the "paramount external power in Cambodia."³⁰⁵ Cambodia, previously the refuge for people seeking shelter from the violence of Vietnam, began leaking refugees into surrounding countries.³⁰⁶ Returnees, mostly intellectuals, were treated to twenty-day political education courses designed to introduce them to the regime's beliefs about themselves and the outside world.³⁰⁷ They, however, like so many of their fellow citizens, ended up as indentured agrarian servants, and, most likely, the victims of genocidal terror.³⁰⁸ In accordance with the eight-point program money was abolished.³⁰⁹ The idea was

301. KIERNAN, *supra* note 276, at 39-49.

302. *Id.* at 53, 58. "The evacuation was . . . a sea change in Cambodia's political demography, facilitating both ethnic cleansing and the acquisition of totalitarian power. . . . [W]ithout towns . . . citizens became far more easy to control." *Id.* at 64. Kiernan quotes a CPK publication: "We evacuated the people from the cities which is our class struggle." *Id.*

303. KIERNAN, *supra* note 276, at 55. Wiping out money and markets was designed to wipe out all private property, while defrocking the monks was a step toward wiping out religion. *Id.* at 57. The problem of Vietnam was never solved. In fact, it was Vietnam that eventually facilitated the coup d'etat that toppled Pol Pot from power. *Id.* at 441-55.

304. *Id.* at 56. "The Khmer Rouge's ultimate concern was the purity of the society." GLOVER, *supra* note 3, at 303. As announced in its Four-Year Plan, the objective was, in part, to "[c]ontinue the struggle to abolish, uproot, and disperse the cultural, literary and artistic remnants of the imperialists, colonialists, and all of the other oppressor classes." *Id.* Glover offers us as a telling slogan the refrain, "[d]ry up the people from the enemy." *Id.* at 302.

305. KIERNAN, *supra* note 276, at 134. Pol Pot was inspired by the Chinese Revolution. He is reported by Glover as saying,

Comrade Mao[s] works and the experience of the Chinese revolution played an important role . . . particularly under the guidance of Comrade Mao[s] works, we have found a road conforming with the concrete conditions and social conditions of our country . . . we have creatively and successfully applied Mao[s] thought.

GLOVER, *supra* note 3, at 304. Glover reports that Pol Pot visited China during the Cultural Revolution and following the capture of Phnom Penh. *Id.*

306. KIERNAN, *supra* note 276, at 142 (describing the exodus to Thailand).

307. *Id.* at 147-56.

308. *Id.* at 156.

309. *Id.* at 147.

for everyone to transform himself/herself into a peasant.³¹⁰ Indefinitely indentured to China's economy, Democratic Kampuchea relied on turning its population into an unpaid, underfed, overworked labor force to survive.³¹¹ It resulted in depriving Cambodian peasants of the three most cherished features of their lifestyle: their land, their families, and their religion.³¹² Life in the countryside was marked by extremely demanding daily production targets, barely adequate rations, the establishment of communal eating, repeated deportations and massive population movements, dwindling medical supplies, the ongoing terror of executions, trends toward increasing harshness, and the emergence of the brutality which was to become the hallmark of the regime.³¹³

310. *Id.* at 149 n.238. Kiernan reports Michael Vickery's interpretation: "It was . . . a complete peasant revolution. . . . [N]ationalism, populism and peasantism really won out over communism. . . . [It was] a victorious peasant revolution, perhaps the first real one in modern times." *Id.* at 164. Kiernan further quotes Vickery as claiming that the DK was "pulled along" by "the peasant element." *Id.* Echoing Arendt's explanation of Robespierre's role in the French Revolution, according to Kiernan, Vickery's thesis is that the Center, that is the CPK, Pol Pot's political party, was itself comprised of

middle-class intellectuals with such a romantic, idealized sympathy for the poor that they did not imagine rapid, radical restructuring of society in their favour would lead to such intolerable violence. . . . [T]hey did not foresee, let alone plan, the unsavory developments of 1975-79. They were petty bourgeois radicals overcome by peasantist romanticism.

Id. at 165. Kiernan disagrees with Vickery. He proposes an alternative explanation wherein Pol Pot and his closest associates directed affairs, or rather, misdirected affairs so that in the end, "DK mismanagement had simply been so serious that not even peasants could survive." *Id.* at 165-66. On the other hand, Kiernan does not disclaim that early on the regime enjoyed widespread peasant support. *Id.* at 167. For these supporters, "in 1975-76," Kiernan reports, "nationalism was pervasive, victory sweet, hope millennial." *Id.* at 213. What he goes on to say, however, is that by 1977, "the DK system was so tightly organized and controlled that little spontaneous peasant activity was possible." *Id.* at 212.

311. *Id.* at 163. "Economically, the country had become one, 'gigantic workshop' of indentured agrarian labor." *Id.* at 164. Reflecting Arendt's work on totalitarianism, Kiernan reports that initially, in the process of turning Cambodians into unpaid indentured workers, each individual in the massive labor gangs was assigned and individualized daily production target as the "CPK atomized its citizens to assure maximum social control." *Id.* at 167.

312. *Id.* at 167.

[E]merging kinship structures were a departure from traditional peasant society, which had 'no larger organized kin groups beyond the family or household.' The deliberate social classification resembled a census, a process characteristic of modernity, not of peasant community. Multilayered, carefully calibrated, rigidly institutionalized, the new DK caste system had as little to do with peasant class politics as the new centralized labor management system had to do with peasant farming.

Id. at 186; see also *id.* at 215 ("Along with massacres that threatened peasant life itself, it was the CPK's attack on the family that alienated peasant supporters.").

313. *Id.* at 173-80; conditions in the Southwest Zone are discussed at 168-204. For example,

Two hundred families walked sixty kilometers on a can of rice (250 grams) per person. Some died on the trek. The rest arrived at their destination to be told that there were no trucks to take them on, and they would all have to go back! More died. Back in Bati they found crowds of

Conditions deteriorated.³¹⁴ While in some areas the starvation of 1976 eased, it was replaced by large-scale killings.³¹⁵ In other areas, hunger and starvation remained a fact of life.³¹⁶ The loss of children was often added to unthinkably burdensome work requirements and obligatory communal eating.³¹⁷ The CPK

new people 'from all over Region 33.' There was no food for them, and many more died waiting a week in the rain. . . .

Id. at 179.

We worked incessantly. . . . It all depended on them. There was no rest time. . . . They said they were going to raise the living standards of the poor, so they won. But when they took over they collectivized everything: cattle, buffalo, plates, everything . . . they put it all in one place. You could only eat what you were given. . . . And, anyone suspected of not being happy with them, they killed.

Id. at 185.

[T]he CPK had 'executed more people in 1975 than in 1976.' However, 'death from disease and malnutrition—most likely in combination—was greater in 1976 than in 1975.' A DK official . . . [later] reported that by August 'the whole of western Cambodia, as well as the southwest region, was suffering from famine, and there was widespread starvation in Kampot.' Worse was to come.

Id. at 193. Id. at 205-09 (describing conditions in the Eastern Zone). Id. at 216-20, 224-26, 232-36 (describing the Northwest Zone). For example,

[I]n 1976 many people in [the] . . . area died of disease, though there was no starvation. . . . However, food ran out before the harvest, and famine struck late in the year. Four hundred of the eleven hundred people in the village died in November and December 1976. . . . The population of one cooperative in Preah Net Preah district fell from 5,017 to only 2,982 in November. . . . One reason for the 1976 starvation was the center's demand for rice for its own staff and for export to China.

Id. at 235. "All the intellectuals working with the Region 5 committee were to be killed, San says. 'Most of us were killed in early 1976.'" Id. at 232.

314. Id. at 237 ("[L]ife was tougher and tighter than before. We worked day and night. Rations fell."). "By the end of 1977, of the Region 5 chalat workforce of fifteen thousand, fewer than seven thousand remained. Women no longer menstruated." Id. at 239. Kiernan reports, reiterating the Arendt totalitarian theme: "'Happy' collective work . . . came to an end in 1977: individual daily harvesting targets now had to be completed in order to receive food. The practices of collective cooking and reduced collective work were only superficially inconsistent. Both gave the authorities greater control over the population." Id. at 243.

315. Id. at 188. For example,

The new subdistrict chief . . . hated and starved the new people. . . . According to Uch, 70 percent of the population of Koh Touc subdistrict perished. . . . [The] Koh Touc subdistrict became home to one thousand new people in 1975, all of whom perished in Democratic Kampuchea.

Id. at 195-96. And, "in 1977-1978, the rate of killings more than doubled." Id. at 204. "[T]he number of killings increased. San reports that the Southwest executed the local cadres, then killed their wives and children; they said this practice 'avoids vengeance.'" Id. at 241. Kiernan reports that in the Northwest, the most seemingly benign of the regime's regions, "in 1977, the [death] toll probably exceeded one hundred thousand, as massacres escalated to the highest levels ever." Id. at 246.

316. Id. at 240 ("By late 1977, a daily can of rice was shared among five people. People dropped like flies."). Kiernan cites another eye-witness who reports, "in 1977 food began to be taken away." This apparently led to "'starvation on a large scale' in 1977-78." Id. at 243.

317. Id. at 189. "[I]n early 1977, children aged three and over were taken from their homes

government, the Center, sought absolute power.³¹⁸ Ethnic cleansing was an important attribute of their program.³¹⁹ The emphasis on purity became an obsession.³²⁰ The Center began splintering; an

to a children's center. . . . Those aged ten and over were sent to worksites." *Id.* at 195.

318. *Id.* at 245. "[F]rom late 1976 we were forbidden to sing," reports an eye-witness, "[due to] the villagers' tendency to make subversive readings of the lyrics of CPK songs." *Id.* at 247. Again, supporting Arendt's thematic description of totalitarianism, Kiernan opines:

Angkar's overweening presence seems to have denied some peasants any experience of personal space or time, to which they could withdraw and consider their verdict on Democratic Kampuchea. They thus drew no distinction between their own private and Democratic Kampuchea's official views. Asked if they had personally liked the CPK, some peasants have replied, "Of course, we had to like them, we had no choice!" . . . A Cham villager describes his experience this way: "They could beat us if they felt like it, even if we obeyed their laws. There were no laws. If they wanted us to walk, we walked; to sit, we sat; to eat, we ate. And still they killed us. It was just that if they wanted to kill us, they would take us off and kill us."

Id. at 250. In CONQUEST, *supra* note 1, at 74, the author refers to totalitarianism as a system of governance in which, "the state recognizes no limits to its authority in any sphere, and in practice extended that authority wherever remotely feasible." Later on he says:

We see the state as a mechanism for enforcing the legal order. . . . This notion of the state is wholly different from that of the totalitarian. . . . For them the state is the possessor of total power over its subjects, and it is the practical embodiment of the ideological fantasies and intentions of the rulers.

Id. at 202.

319. KIERNAN, *supra* note 276, at 251-309. The racism of the Khmer Rouge is an important thesis in Kiernan's book. According to his figures, peoples of various non-Khmer ethnicity made up approximately twenty percent of the Cambodian population at the time the CPK came to power. *Id.* at 251. He estimates that total population figure to be slightly under eight million people in 1976. *Id.* at 210. Inferentially, this would yield an ethnic minority population of approximately one and one-half million people. Subjected to particularly harsh treatment even by DK government standards, Cham-Cambodian Muslims, Chinese, Vietnamese, Thais, Laotians, and various tribal minorities experienced death tolls that frequently exceeded 50%. *Id.* at 294, 307.

320. GLOVER, *supra* note 3, at 306. Glover also compares Cambodian purging to the actions of the French, Russian, and Chinese revolutionary predecessors. While these prior regimes were obsessed with ferreting out and eliminating traitors, in Cambodia, guilt was presumed. The obsession with purity is apparent in the government's comparison of people as "rotten fruit:"

Frequent emphasis was placed on the need for drastic measures to protect the purity of the Revolution from contamination by rotten fruit. On radio and at meetings the slogans echoed the theme: 'What is infected must be cut out,' 'What is rotten must be removed', and 'It isn't enough to cut down a bad plant, it must be uprooted.'

Id. Tuol Sleng, the most notorious of the Cambodian death camps, was one result of this obsession with purity and purification. *Id.* at 308. Glover says that the obsession with enemies grew, until it became apparent that the struggle against enemies would be a permanent feature of life. *Id.* at 307-308. In Cambodia, he says, this realization was nurtured and applauded. *Id.* at 308. Camps were established to house the constant flow of enemies; these camps were places where the enemies could be tortured, could confess, and could be executed. *Id.* Glover calls Tuol Sleng, "a place of appalling cruelty," and well kept records. *Id.* Kiernan also discusses Tuol Sleng and its function within the Santebal, or Special Branch, calling it the "nerve center of the purge apparatus." KIERNAN, *supra* note 276, at 314-16.

attempt was made on Pol Pot's life, thus irritating the already insatiate need for control.³²¹ Arrests increased.³²² Relations with Vietnam and other bordering countries slipped from guarded caution, into open aggression.³²³ "Genocide gathered speed,"³²⁴ in efforts to assert control, whole districts or Zones were evacuated.³²⁵

321. KIERNAN, *supra* note 276, at 319-23. "The Party . . . adopted 'a framework of procedures for implementing our revolutionary authority' . . . entitled . . . The Authority to Smash [people] Inside and Outside the Ranks." *Id.* at 320. "The rate of arrests skyrocketed in late 1976." *Id.* at 335. Pol Pot is quoted as saying: "Don't be afraid to lose one or two people of bad background. . . . Driving out the treacherous forces will be a great victory. . . . Everyone must be verified." *Id.* at 336. Kiernan reports that approximately sixty five hundred prisoners were "smashed" at Tuol Sleng in 1977, about four times the 1976 total. *Id.* at 355-56. By mid-year 1978, more than fifty five hundred had already entered this camp. *Id.* at 355 n.121. "[T]roops in the Phnom Penh area were forbidden to have any contact with the population." *Id.* at 353. At least two attempts were made to poison Pol Pot. See *id.* at 321, 353. Kiernan reports, as part of his description of massive repression, an eye-witness describing the results of a demonstration: "There were killings throughout 1977. . . . They started arresting and executing people, one after another. . . . People were put on trucks and taken away, night and day. . . . There was no prison. People were just killed." *Id.* at 342.

322. *Id.* at 350.

323. *Id.* at 357-66. "Phnom Penh radio charged that entire 'generations of Vietnamese' had 'devised' cruel strategies 'to kill the Cambodian people' and 'exterminate' them. Vietnamese were alternatively called the 'historic enemy' and Cambodia's 'hereditary enemy.' *Id.* at 366. See also *id.* at 366, 373-76, 386-92 (describing further relations with Vietnam); see *id.* at 366-68 (describing relations with Thailand); see *id.* at 368-69 (describing relations with Laos).

324. *Id.* at 353. "[A]s the genocide gathered speed, more and more of the victims, even at the nerve center of the repression, were nonpolitical. . . . Instability persisted even as mistrust spread." *Id.* Kiernan reports that purges in the Eastern Zone during 1978 resulted in the massacre of between one hundred and two hundred fifty thousand people. "Vickery calls [it] 'by far the most violent event of the entire DK period.'" *Id.* at 404-405 n.67.

325. *Id.* at 405-16 (discussing conditions in the Eastern Zone). Color coded scarves were used to identify the deportees, "no one besides the Eastern evacuees wore blue scarves. . . . [I]t was a 'sign' for people to be 'killed off.' After a month or two, easterners realized the deadly significance of the blue scarves and stopped wearing them." *Id.* at 407. "In Sandan district, according to one account, 19,000 out of 20,000 deportees perished." *Id.* at 409. "During his evacuation . . . in 1978, Ngoy Taing Heng claims to have witnessed the murder of more than six thousand people, when Khmer Rouge deliberately blew up three large boats." *Id.* at 411. And, "[o]f the seven thousand people on the train, three thousand were selected." *Id.* Further, "[i]n mid-1978, three thousand Prey Veng people came to our cooperative. . . . Two months later they were all executed. . . . [We were informed that] the Eastern Zone people were 'sick' . . . none could be spared, they would be completely 'cleaned up.'" *Id.* at 412. Kiernan also covers treatment of the Northwest Zone. *Id.* at 416-23. According to one of the cadre, "the 1978 killings, the worst he had known . . . took the lives of ordinary base people for the first time." *Id.* at 419. And, "each evening for a week, these women would take twenty to thirty prisoners out, kill them, and throw their bodies into pits." *Id.* at 418. "Of the ninety thousand people in the whole of Preah Net Preah district at the end of 1976, just over sixty thousand survived two years later." *Id.* at 421. Kiernan covers the treatment of the Southwest Zone. *Id.* at 423-36. One villager reports, "All Vietnamese and Chinese were rounded up and wiped out." *Id.* at 424.

DK raiding parties from the Southwest kidnapped thousands of Khmer Krom from their villages inside Vietnam. . . . [c]lassed as 'depositees' [they] work[ed] twelve hours per day. The rice they produced was taken away . . . the workers subsisted on gruel . . . starvation wiped out a hundred families.

A half million refugees fled the country.³²⁶ Increasingly, the leadership relied on kinship rather than ideological relations.³²⁷ Hanoi invaded.³²⁸ Phnom Penh was again emptied.³²⁹ Retreating DK forces continued to destroy the land³³⁰ and slaughter the population,³³¹ but the time of this regime had come to an end. The new People's Republic of Kampuchea gradually assumed power.³³²

Harold Lasswell once said, "[s]oldiers are the tradesmen of killing, but officers are the managers of violence."³³³ The violence in Cambodia was intense and, in some sense, managed. Yet, for the most part it was neither the violence of war nor the violence of crime management.³³⁴ It seems strikingly similar to the violence associated with warlords.³³⁵

IV: CONCLUSION

A. Fruits of the Poisonous Tree

"One learns that what one supposed was not what one was supposed to suppose."³³⁶

"Historical study is only fruitful for the future if it follows a powerful life-giving influence, for example

Id. at 425-26. "1978 was the worst year for killings of Chams, whom Southwesterners singled out for execution." Id. at 428. Kiernan quotes an eye-witness as saying, "[a]nyone they suspected of not being happy with them, they killed." Id. at 434.

326. Id. at 441-42. Four hundred thousand relocated in Vietnam. One hundred thousand relocated in Thailand. Id. at 442.

327. Id. at 437. "Nearly all public positions are . . . held by the Pol Pot-Ieng Sary group, their wives, or people unknown to outsiders or using aliases." Id. at 443.

328. Id. at 450.

329. Id. at 451.

330. Id. at 453.

331. Id. at 454.

332. Id. at 455.

333. DYER, *supra* note 64, at 131.

334. See Feldman, *supra* note 31, at 484-85 (concluding at least in the context of terrorism, it is not necessary to choose between the war-crime dyad. Instead, he suggests we reexamine and, perhaps, reformulate the framework we use for addressing international terrorism.).

335. See Rise of Warlords, THE CORNER, at http://www.thecorner.org/hists/china/warlords.htm#THE_WARLORDS (last visited Feb. 15, 2003) (an online history forum) for a general definition of warlord. "A warlord was a commander of a personal army, ruling a territory, and acting more or less independently. . . . [T]he warlords exploited the people." Id. In reference to how warlords governed their respective territories: "[F]or the most part they governed with terror. . . . Administration was carried out with violence and force." Id. The term 'warlord' is often associated with China. Id. See also 19 OXFORD ENGLISH DICTIONARY 913-14 (2d ed. 1989) (referring in one of its definitions to the 1916-1928 period of Chinese history). However, China is not the only referent for the term. The same dictionary begins by quoting an 1856 tract by Emerson "Piracy and war gave place to trade, politics, and letters; the war-lord to the law-lord." Id. at 913.

336. HEGEL, *supra* note 295, at 96.

a new system of culture; only, therefore, if it is guided and dominated by a higher force, and does not itself guide and dominate.”³³⁷

“The sorts of beings we presume ourselves to be define the sorts of orders we may recognize and deem important.”³³⁸

In this project, I took upon myself an inquiry into the history of terrorism. During the project, I have learned far more about genocide than I wanted to know. I have learned far more about the current horrors occurring in the ordinary lives of citizens throughout the world than I wanted to know. I have learned more about the structure of the modern political world than I wanted to know. I have learned far, far more about the role of governments in the seemingly endless torture and slaughter of men, women and children than I ever wanted to know. And, I have learned to proceed with extreme caution when thinking, let alone speaking, about terrorism. I have reached the following conclusions.

First, for myself, I have little doubt that the Pol Pot regime attempted to enslave the population. I believe Lenin and Stalin also endeavored, in the name of Revolution, to enslave the peoples of the Soviet Union. While I doubt that any of the named individuals would have understood himself as aligned with the awful history of the African slave trade and slave ownership in the Americas, the flavor of those practices infuses their conduct.³³⁹ While nothing

337. STANLEY V. MCDANIEL, *THE PHILOSOPHY OF NIETZSCHE* 224 (1965).

338. David Hall, From: “Modern China and the Postmodern West,” in *FROM MODERNISM TO POSTMODERNISM* 698, 703 (Lawrence E. Cahoon ed., 1996).

339. 15 *OXFORD ENGLISH DICTIONARY* 668 (2d ed. 1989) (defining “slavery” as a form of servitude or bondage, as the condition or fact of being entirely subjected to or under the domination of some power). From the same source, “slave-drive” is defined as demanding “hard or servile labor.” Id. Also—and this is in part my point—“to demand an excessive amount of work from (a person).” Id. In the cases of the Russian, Cambodian, and perhaps the Chinese Revolutions, the amount of work demanded from people was grievous enough to cause the death of significant portions of the population. See, e.g., supra note 224 (referring to Stalin’s “army of unpaid laborers”); supra notes 259 & 265 and accompanying text referring to the exploitation of the Chinese peasants; supra notes 311, 313, & 317 (referring to the ‘work to death’ policies of the Pol Pot regime in Cambodia). Because of the unfortunate history of the United States, my immediate association to slavery is with the concept of the capitalization, in the form of human ownership, of people. This perspective obscured for me the fact that this capitalization could appear in various forms. The willingness to take advantage of people in order to advance a particular social or political theory, when extended to the degrees noted in these revolutionary settings, connotes an attitude of rightful domination, an attitude of justifiable exploitation in which the humanity of the exploited is sufficiently discounted by the exploiter to generate enslavement. I believe, because of my own country’s history, that I am not only sensitive to the presence of this category of treatment, but profoundly saddened by it.

could have been further from my thoughts when I began this research, what began as a study of terrorism seems to be ending with an emphasis on its relationship to slavery.³⁴⁰ I understand why that happened. That is, I understand how the strong-armed imposition of ideology yields reliance on the tools of enslavement.³⁴¹ What I do not yet know well enough to say is whether inspired violence is too closely associated with the compulsion of others to be safely used to liberate rather than to enslave a people.

Second, I said that the violence of the regime in Cambodia seemed similar to the action of warlords. Thus, I find myself raising the whole question of the legitimacy of governance techniques, an issue no easier to address than the initial investigation into the use of the term terrorism. In this context, I join Carr in finding myself unwilling, actually unable, to define “state terrorism” out of the equation. Exclusion serves to simplify our concerns. Nevertheless, whatever apparent mental clarity we achieve by reliance on such a simplistic formulation, is illusory. I have become convinced that those who wish to enjoy an honest and informed perspective on terrorism must consider those who hijack airplanes, bomb buildings and assassinate leaders along with those who, having gained control of entire populations, torture, exploit, enslave and murder to achieve their ends. We cannot have one rule for those excluded from nation-state arenas and another for those who hold positions of power within these entities and hope to develop sound analysis or wholesome policies for containing terroristic violence.³⁴² What I was

340. See ARENDT, ON REVOLUTION, *supra* note 17, at 110 (identifying as the core of slavery the desire of some to liberate themselves by forcing others into service). See also PIPES, *supra* note 158 (stating his belief that the Russian revolutionaries were interested more in gaining domination over the people in order to remake them in their own image than in freeing or liberating the people to remake themselves).

341. Cass R. Sunstein, *Why They Hate Us: The Role of Social Dynamics*, 25 HARV. J. L. & PUB. POL’Y 429, 429 (2002) (“When group polarization is at work, like-minded people, engaged in discussion with one another, move toward extreme positions. . . . [P]eople can move in literally dangerous directions. . . . They produce a cult-like atmosphere.”).

342. Nicholas N. Kittrie, *A New Look at Political Offenses and Terrorism*, in INTERNATIONAL TERRORISM IN THE CONTEMPORARY WORLD 354, 371 (Marius H. Livingston et al. eds., 1978).

[A]ll concerned should seek to overcome the current ideological breach by dealing both with nongovernmental and governmental violence and illegality. To bridge the current gap, one will have to dispel the serious concern that while ‘sieges of terror’ are being condemned and regulated, ‘reigns of terror’ are left free of international intervention. The outcome must reflect the growing realization that people are entitled to expect all rights enunciated in the Universal Declaration on Human Rights and in similar documents.

Id. See also W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT’L L. 3, 39 (1999) (“State-sponsored terrorism is the most noxious and dangerous of its species, yet its authors and architects evade all deterrence and prospect of punishment if the fiction is that states are not involved and only their agents are deemed responsible for the

taught in law school by Harold Lasswell and Myers MacDougal can be understood in relation to terrorism. Any undertaking not steeped in a deep and abiding respect for human dignity is neither promising nor safe. This principle applies to the terroristic undertakings of revolutionaries and governments alike.

Third, for the time being I can do no better than to join Malcolm X in the mandate to know history.³⁴³ I think, had I been taught to study with care the histories of revolutions, I might not have been so inclined to follow models of such dubious integrity. Instead of romanticizing revolutionary leadership for their successful liberation of oppressed peoples, I might have understood to take heed of their failures.

Fourth, this abbreviated survey of revolutionaries cum terrorists has left me with an enormous debt to the millions of men, women and children whose lives were sacrificed to ideas.³⁴⁴ It is a debt impossible to settle in ordinary terms. If I have learned nothing else from this study, I have learned the necessity of humility, the dangers of grandiosity, the sanity of proportionality. I have learned that the world of real *politique* seems a vain-glorious search for justification in the face of a starved and tormented people.

I cannot order anyone to cease and desist from the patterns of conduct we witnessed in these pages. I can ask every one of us to reach deeper into a sense of shared existence, shared humanity, whenever some seemingly irrefutable plan of ours involves

terrorism.”).

343. MALCOLM X, *THE END OF WHITE WORLD SUPREMACY: FOUR SPEECHES BY MALCOLM X* 26 (Benjamin Goodman ed., 1971).

[O]f all things that . . . [a] man . . . can study, history is the best qualified to reward all research. You have to have a knowledge of history no matter what you are going to do; anything that you undertake you have to have a knowledge of history in order to be successful at it.

Id.

344. See Henry J. Richardson III, *Excluding Race Strategies From International Legal History: The Self-Executing Treaty Doctrine And The Southern Africa Tripartite Agreement*, 45 *VILL. L. REV.* 1091, 1132 (2000).

Developing methodological and legal interpretive principles to eliminate the scrubbing of information from international legal history about past racial oppression, oppression done by identifiable decisions and actors to the voiceless, is essential to ‘giving voice to the voiceless’ under international law. But, in an affirmative sense, the stake of the voiceless in the international legal process, growing out of their own group histories, must be identified and made part of both the jurisprudence and the interpretation of international law, and thus part of its history, because of the impact that this law has had on them, and because this impact makes them part of the story of its authority.

Id.

sacrificing the safety and well-being of so many of our fellow citizens.³⁴⁵

Finally, because I am a lawyer and because all this study must lead us somewhere, we must begin to ponder the role of law, the role of the rule of law, in matters terroristic. There is an existing literature suggesting the development of international tribunals as the soundest route;³⁴⁶ some of this literature suggests support for the international court of criminal justice with jurisdiction to handle charges of terrorism.³⁴⁷

While not wishing to criticize the suggestion, and with deep respect to Justice Goldstone, my own studies lead me to conclude that we are not yet developed enough as an international community to imagine this as a successful endeavor.³⁴⁸ Recall how earlier in the paper disparate definitions of terrorism were

345. See *id.* at 1133.

Each people of color has its own jurisprudence, which has been trampled under the supervening law of a conquering or dominating group. . . . This includes their expectations about international or 'outside' law as they would . . . understand for it to impact fairly on them and what it would mean in their lives. These legal histories must be incorporated into the accepted sources of international law.

Id. (emphasis added).

346. See RICHARD J. GOLDSTONE, *FOR HUMANITY: REFLECTIONS OF A WAR CRIMES INVESTIGATOR* 120-38 (2000); see also Roy S. Lee, *An Assessment Of The ICC Statute*, 25 *FORDHAM INT'L L.J.* 750 (2002); Philippe Kirsch, *The International Criminal Court*, 46 *MCGILL L.J.* 255 (2000); but see Lee A. Casey, *The Case Against The International Criminal Court*, 25 *FORDHAM INT'L L.J.* 840 (2002) (discussing why the United States should refuse to endorse an international tribunal).

347. See GOLDSTONE, *supra* note 346, at 134-35.

The second half of the twentieth century has witnessed the proliferation of wars and war crimes. Huge areas such as the Great Lakes region of Central Africa have become destabilized, as more than a million people have been killed and many millions more have been forced to flee their homes with accompanying misery and hardship. In Rwanda there are tens of thousands of homes in which the eldest member of the family is a teenager. In Sierra Leone unimaginable atrocities were committed against innocent women, men, and children whose limbs were amputated with machetes. . . . If this trend is not to continue . . . then the international community will have to take positive steps to arrest it. One effective deterrent would be an international criminal justice system, sufficiently empowered to cause would-be war criminals to reconsider their ambitions. . . . An overwhelming number of human rights protagonists worldwide . . . believe that when the Rome Treaty is ratified by enough nations, a workable and worthwhile court will be established.

Id.

348. GOUREVITCH, *supra* note 17, *passim*, provides disturbing details about the failures of the international community to take effective action in the context of Rwanda. Having detailed the failure of the international community to deal effectively with the problems it, in part, contributed to, Gourevitch eventually concludes: "The West might later wring its hands over the criminal irresponsibility of its policies, but the nebulosity known as the international community is ultimately accountable to nobody." *Id.* at 325.

displayed as problematic with regard to investigating the situation.³⁴⁹ These same definitional difficulties make law-making among nations impractical.³⁵⁰ Further, recent events regarding anarchy,³⁵¹ genocide,³⁵² and warfare³⁵³ must be taken as warnings against assuming easy or simple answers to complex international problems. We are not ready yet to assume levels of responsibility adequate to the task at hand. Of course, this does not mean we are excused from action. Incapacity is cause for humility, not for

349. See *supra* notes 19 & 42.

350. See *supra* notes 31 & 33-41.

351. See generally MARK BOWDEN, *BLACK HAWK DOWN: A STORY OF MODERN WAR* (2000). Bowden's book details what is called the Battle of the Black Sea, a mission undertaken by American forces to capture two lieutenants of a Somali warlord. The Americans ended up pinned down overnight in Mogadishu. The survivors were rescued the next day by a multinational force except for one individual who was held hostage but eventually released. That event that left eighteen Americans dead and many others wounded. It also resulted in the death of approximately five hundred Somalians, while injuring more than one thousand. As a result of the battle, an "unprecedented [United Nations] effort to salvage a nation so lost in anarchy and civil war that millions of its people were starving," was aborted. *Id.* at 410. The troops were originally committed to Somalia to end a famine caused not by natural disasters, but by "cynical, feuding warlords deliberately using starvation as a weapon." *Id.* at 426. Once the famine was under control, efforts at stabilization and nation-building were undertaken with laudable intentions. As Bowden reports it, "[t]he battle came at the end of a chain of eminently defensible decisions made by sensible people." *Id.* at 427. Bowden reports that the battle of the Black Sea and its resulting pull out of United Nations forces ended "a brief heady period of post-Cold War innocence, a time when America and its allies felt they could sweep venal dictators and vicious tribal violence from the planet . . . Mogadishu has had a profound cautionary influence on U.S. military policy." *Id.* at 410. Bowden says that "[l]earning what America's power can and can't accomplish is a major challenge," with no easy answers. *Id.* at 427.

352. GOUREVITCH, *supra* note 17, at 95.

Genocide, after all, is an exercise in community building. A vigorous totalitarian order requires that the people be invested in the leader's scheme, and while genocide may be the most perverse and ambitious means to this end, it is also the most comprehensive. . . . The specter of an absolute menace that requires absolute eradication binds leader and people in hermetic utopian embrace, and the individual—always an annoyance to totality—ceases to exist.

Id. Gourevitch's development of the idea that the international community is not up to the task of soundly handling these challenges was alluded to in note 344. Perhaps it is sufficient to add: "[i]f Rwanda's experience could be said to carry any lessons for the world, it was that endangered people who depend on the international community for physical protection stand defenseless." *Id.* at 351.

353. See GOLDSTONE, *supra* note 346, at 336. However, Justice Goldstone is more optimistic about the future of the international community to bring about positive change. "As the world contracts in consequence of modern technology, so the international community is able to exert more pressure on rogue governments to respect human rights. What is required to encourage . . . this . . . trend is the political will of the most powerful nations." *Id.* at 135. "I have no doubt," he says later on, "that the twenty-first century will witness the growth of an international criminal justice system and that the victims of war crimes will no longer be ignored." *Id.* at 138; see also Jack M. Beard, *America's New War On Terror: The Case for Self-Defense Under International Law*, 25 *HARV. J.L. & PUB. POL'Y* 559, 579-82 (2002) (expressing some optimism as regards the ability of the international community to cope with the threat of terrorism).

neglect. Nevertheless, we cannot expect sound answers to emerge from oversimplified formulas. Perhaps it is my personal inclination as a scholar to study more, to know more. Certainly continuing to investigate the conditions and episodes of terrorism appeals to me. For now, I am satisfied that turning attention to history rewards with knowledge. That is as sound a place to begin as I know of.

AMERICA'S BORDERS AND CIVIL LIBERTIES IN A POST-SEPTEMBER 11TH WORLD

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I. INTRODUCTION

The burden of being an empire is a responsibility which every great nation has had to either accept or decline. Maintaining an empire requires the focus and devotion of its government and the people it governs. However, like all creations of man, even the most majestic empires will ultimately perish. No historical account proves this proposition better than the fall of the Roman Empire. In 408 A.D., Alaric and his Visigoths ended history's mightiest and most advanced empire.¹ History tells us that as the so-called barbarians neared the city, the Romans sought safety behind the locked gates of their beloved metropolis.² Consequently, the Visigoths surrounded Rome, cutting it off from the outside world until August, 410 A.D.³ It was then, with the assistance of collaborators from inside the city walls, that the Visigoth warriors slipped into the city.⁴ For three days they looted and sacked Rome,

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1. See Frank E. Smitha, World History: Attitudes and Events from Early Humanity to A.D. 2000, at <http://www.fsmitha.com/h1/ch24.htm> (last visited Feb. 19, 2003).

2. See *id.*

3. *Id.*

4. *Id.*

sparing only the Christian churches.⁵ The seemingly unbelievable destruction of Rome left many across the empire and the world believing that the end of civilization was at hand.⁶ Although the fall of Rome did not end civilization, it did usher in what is commonly known as the “Dark Ages” (500-1000 A.D.).⁷

While the fall of Rome is in the distant past, could the same fate that befell Rome await America in the decades to come? Is it possible that terrorists and enemies of democracy and freedom could cause the premature demise of the American Empire? Of course, this question presumes that America is an empire and thus, vulnerable to the diseases that have plagued empires throughout history. In truth, to call America anything other than an empire is disingenuous and historically irresponsible.

This article will employ the lens of history as the mechanism by which to discuss the birth of the American Empire and the role of domestic security in society and explore the current domestic security challenges presented by America’s international borders. It will assess the challenges of securing the American nation in the post-September 11th world in light of the historical limitations placed on the federal military in effectuating domestic security and the challenges of maintaining secure borders in a global economy. Finally, it will argue that a nexus exists between the consequences of continued unabated immigration with the potential for further terrorist activities and the ultimate erosion of our civil liberties.

II. THE END OF THE REPUBLIC

While there are those who will argue that America’s hegemonic aspirations are not imperialistic in nature, history tells us that the last days of the American republic and the first days of American empire are rooted in the Spanish-American War of 1898.⁸ As one historian notes,

Between the Civil War and [the year] 1900, the U.S. began its apprenticeship as an imperial power. As early as the 1850’s, the U.S. was sending troops to Argentina, Nicaragua, Japan, Uruguay and China, as well as eyeing sugar rich Cuba for annexation purposes. The latter half of the Nineteenth Century was spent in industrialization and the installment

5. *Id.*

6. *Id.*

7. *See id.*

8. *See AMERICAN IMPERIALISM IN 1898* (Theodore P. Green ed., 1955).

and maintenance of a social order that would prove beneficial to capitalist expansion and progress.⁹

This change in the American character shows a break with the traditions of the Founding Fathers. Soon to be in the minority were those who “thought of the United States in the terms of its founders, as a nation opposed to militarism, conquest, standing armies and all the other bad habits associated with the monarchies of the old world.”¹⁰ Simply put, Americans in the late nineteenth century could not wait for their crack at an empire.¹¹

The Spanish-American War, called by some “a splendid little war,” ultimately ended with the defeat of the Spanish fleet in Manila Bay at the hands of American Admiral George Dewey.¹² The results were manifold: the occupation of Manila and the Philippines,¹³ the capture of Cuba,¹⁴ and the occupation of Puerto Rico.¹⁵ The armistice signed in December 1898, known as the Treaty of Paris, also gave Guam to the United States, and it also gave the United States a protectorate over Cuba.¹⁶ At this point, it can be said that the republic of the United States of America, the magnificent experiment in democracy, came to a premature end, and the American empire was born.

Once the republic was abandoned, America began its journey down the road of imperialism, like all the great empires before her. Whether we look to the history of Sweden under Charles XII, France under the Sun King or Napoleon, Russia under its czars, or Rome under its Caesars, maintaining an empire requires certain sacrifices. The last vestiges of the Victorian empires collapsed with the defeat of the Central Powers at the end of World War I, but the concept of empire did not fade into history at the Peace of Paris in 1919.¹⁷ Rather, the empire finds its modern incarnation in the

9. Christopher Conway, *The Birth of U.S. Imperialism: An Introduction to the Spanish-American War*, at <http://www.geocities.com/kajuble/usimp.htm> (last updated June 28, 2002). See generally AMERICAN IMPERIALISM IN 1898, *supra* note 8.

10. BARBARA W. TUCHMAN, *THE PROUD TOWER: A PORTRAIT OF THE WORLD BEFORE THE WAR 1890-1914*, at 137 (1966).

11. See *id.* at 149.

12. *Id.* at 151.

13. *Id.*

14. *Id.* at 150.

15. Marisabel Bras, *The Changing of the Guard: Puerto Rico in 1898*, Hispanic Division, Library of Congress, at <http://www.loc.gov/rr/hispanic/1898/bras.html> (last visited Mar. 5, 2003).

16. TUCHMAN, *supra* note 10, at 158. According to Tuchman, the causes of the war were United States interests in Cuba and the sinking of the U.S.S. Maine in Havana harbor on February 15, 1898. *Id.* at 150.

17. See generally Frank E. Smitha, *Upheaval in Germany, The Peace Treaty and Imperialism*, at <http://www.fsmitha.com/h2/ch09.htm> (last visited Mar. 6, 2003).

expansionistic dictatorships of Japan and Germany in the 1930s and 1940s, as well as in the Soviet model from 1922 to 1991.¹⁸

Today, there is only one great empire—the United States of America. Although modern America has not resorted to the imperial style of colonization along Victorian lines, the American economic, cultural, and military empire is undeniable. From the Manifest Destiny¹⁹ which gave the United States territory ranging from Miami to Seattle and from San Juan to Honolulu, there is no question that America has, at times, stretched its power through military and economic subjugation.

America's rapid ascension to its present global predominance and the dawn of what is often called the "American Century" arguably began in the hot and bloody summer of 1914. The United States emerged from the carnage of the Great War and its progeny, the Second World War, as a nation transformed. The country went from a debtor nation to the largest creditor on earth, from a largely untested military power to the preeminent military force in the history of warfare.

The benefits of our empire are numerous. Nevertheless, these benefits come with a hefty price tag. Amazingly, after the sacrifices of World War II, America has only been forced to make limited sacrifices for her empire. However, the events of September 11th have demonstrated that the American way of life is threatened by the very openness and freedom that have contributed to her success.

While we must endeavor to adhere to the bedrock principles of freedom and liberty that underpin this nation, certain principles were applicable to our former republic and not our present empire. One fundamental American tenet is the strict separation between the regimes of civil law enforcement and the federal military.

The Posse Comitatus Act (PCA) embodies this separation of powers.²⁰ The genesis of the PCA lies in the ashes of the war-

18. See generally Frank E. Smitha, *The 20th Century: Conflict Attitude and Changing Religions*, at <http://www.fsmitha.com/h2/index.html> (last visited Mar. 3, 2003).

19. See Conway, *supra* note 9. "Manifest Destiny was a phrase coined by a writer who was trying to get across the idea that it was the providential mission of the [United States] to extend itself over the frontier, claiming it as a god-given, national right. Manifest Destiny was not an explicit, policy phrase, but a cultural concept that reflected Anglo-Saxon attitudes about westward expansion and the Native-American question." *Id.*

20. 18 U.S.C. § 1385 (1988). The PCA delineates Army and Air Force posse comitatus power by stating: "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both." *Id.* Posse comitatus translates from Latin to mean "power of authority of the county." Merriam-Webster's Collegiate Dictionary 1426 (Deluxe ed. 1998). In this context it has the modern meaning "a body of persons summoned by a Sheriff to assist in preserving the public peace usually in an emergency." *Id.*

ravaged Southern states of the Reconstruction period.²¹ American democracy managed to survive this period, as the passage of PCA allowed Southerners to rely on the civilian law system, not military justice, as a functional society was reestablished.²² Undoubtedly, the protection and proliferation of civil liberties are fundamental to our society—ensuring our domestic security is the most proactive method of protecting those liberties now and in the future.

If our porous borders are allowed to flood the streets of cities like Los Angeles, Dallas, and Minneapolis with those who seek to harm Americans and the institution of democracy itself, there is no question that drastic security steps to restore order will be taken by the federal and state governments. There is also little doubt that such steps will negatively affect individual freedom and liberties. Whether we look to the Los Angeles riots in 1992 or the streets of Manhattan on September 12, 2001, civil liberties always suffer in the aftermath of chaos. While this may be necessary in the short term, the drastic curtailment of freedom could become an accepted way of life if Americans are subjected to suicide bombers in the local grocery store or at college football games. This would effectively end this experiment in democracy. If this were to occur, the next generation of Americans would know only a life in which curfews and restrictions are as perfunctory and accepted as metal detectors at airports. In the face of continued violence and terror, America's civil liberties will be sacrificed on the altar of collective safety. Therefore, Americans' liberties are more threatened by an ineffective border policy than by the introduction of a significant military presence at those vulnerable border areas.

America has always exhibited great flexibility and ingenuity in times of national crisis. Whether it was the remarkably smooth reunification of the Union and the Confederacy during Reconstruction or the unprecedented industrial juggernaut following the first day of infamy at Pearl Harbor, America has always risen to the occasion. What is at stake today is nothing short of the preservation of America as we know her.

When insecurity and chaos reign in the city streets, citizens will willingly sacrifice their former liberties in exchange for peace and security. An example of how a nation under pressure from within can buckle and face a terrible future comes from post-World War I Germany, in which chaos followed the conclusion of the Great War.

21. Jeffrey Addicott, *Drafting the Military: The Posse Comitatus Act and the Hunt for the DC Sniper*, JURIST, at <http://www.jurist.law.pitt.edu/forum/forumnew62.php> (Oct. 17, 2002). See also Matthew Carlton Hammond, Note, *The Posse Comitatus Act: A Principle In Need of Renewal*, 75 WASH. U. L.Q. 953, 960-61 (1997).

22. See generally Stephen Young, *The Posse Comitatus Act: A Resource Guide*, Feb. 17, 2003, at <http://www.llrx.com/features/posse.htm> (last visited Mar. 6, 2003).

The former German Empire was thrown into anarchy and revolution. Demoralized and externally threatened on all borders, Germany also faced the real possibility of a Bolshevik coup.²³ In these dark days that would spawn the stab-in-the-back Dolchstoß myth—so adeptly used by the National Socialists to bring Corporal Adolph Hitler to power—a new form of totalitarianism loomed on the horizon.²⁴ The failure of the interim postwar government to protect the citizenry threatened the existence of the nation itself.²⁵ In this power vacuum, Gustav Noske was appointed the defense minister and uttered the famous words, “Someone must become the bloodhound. I won’t shirk the responsibility!”²⁶ Noske’s efforts were largely responsible for ferreting out the Bolshevik elements in Germany and temporarily salvaging the Weimar Republic’s ability to govern.²⁷ However, the damage was done. It may be argued that the long-term results of this instability, and the toll which it took on the citizenry, led to the Third Reich’s seizing power, the Holocaust, and millions of deaths. Certainly, Wilhelmine Germany was not a bastion of democracy.²⁸ However, the Nazi regime completely eliminated civil liberties and almost destroyed the German nation during its brief but horrific reign.²⁹

While the process of Hitler’s rise to power was rather gradual, it was the continued instability during the Weimar transition that set the stage for the populace’s blind adherence to the Nazi promises of peace and security.³⁰ Looking back, it is difficult to understand how the educated and cultured nation of Germany fell under the demonic spell of the evil corporal. However, it is completely understandable that Germans in the 1920s and early 1930s longed for stability when their cities and towns were plagued by rogue Freikorps, mutinous soldiers, and violent Bolsheviks.³¹ On a simple human level, the average Berliner or Bavarian wanted peace and security just like the average New Yorker or Californian.

Today, it appears that the United States military must assist civilian law enforcement in order to ensure the domestic security of

23. See generally RICHARD M. WATT, *THE KINGS DEPART: THE TRAGEDY OF GERMANY VERSAILLES AND THE GERMAN REVOLUTION* (1968).

24. *Id.* at 463.

25. See *id.* at 317-342.

26. *Id.* at 239 (quoting *FALL OF THE GERMAN EMPIRE* 535 (Ralph H. Lutz ed., 1932)).

27. *Id.*

28. HOLGER H. HERWIG, *THE FIRST WORLD WAR: GERMANY AND AUSTRIA-HUNGARY 1914-1918*, at 18 (Hew Strachan ed., 1997).

29. See generally ALAN JOHN PERCIVALE TAYLOR, *THE ORIGINS OF THE SECOND WORLD WAR 102-130* (A Touchstone Book, 1996) (1961).

30. ROBERT GELLATELY, *BACKING HITLER: CONSENT AND COERCION IN NAZI GERMANY 9-50* (2001).

31. *Id.* See also ROBERT G.L. WAITE, *VANGUARD OF NAZISM: THE FREE CORPS MOVEMENT IN POSTWAR GERMANY, 1918-1923*, at 201-20 (1952).

the nation. Waiting until the situation worsens could have disastrous consequences for democracy. If the citizens of this nation deny an expanded role for the military and further acts of terrorism occur within our borders, only then is it rational to surmise that civil liberties, from Main Street to Wall Street, will suffer greatly. Taken to the extreme, such an environment could ultimately lead to the end of federalism, the centralization of power, and eventually, to totalitarianism and/or balkanization. We need only look to the continuing tragedy in Israel to verify that the consequences of having one's enemies at the gates, when the gates cannot be locked, are tragic and costly. Cafes, discos, markets, restaurants, and high-rises are the new battlefields in the war against freedom and democracy.

III. THE SEPARATION OF POWERS AND THE POSSE COMITATUS ACT

The main obstacle to deploying the military into this present breach is the well intentioned and successful, yet antiquated, Posse Comitatus Act. When examining the PCA, one cannot separate the law itself from the context of the time and place in which it was enacted. The Reconstruction era was a time when the power of the federal government and the role of the federal military could have resulted in dramatic changes to the structure of American society. The hotly contested presidential election of 1876 directly led to the passage of the PCA under less than respectable circumstances:³²

The post-Civil War military presence in the South continued to foment a distaste for military involvement in the civilian sphere. The military presence was necessary to support the Reconstruction governments installed in the South, but the situation came to a head during the 1876 presidential election, which was determined by only one electoral vote. In the election, Rutherford B. Hayes won with the disputed electoral votes of South Carolina, Louisiana, and Florida. In those states, President Ulysses S. Grant had sent troops as a posse comitatus for federal marshals to use at the polls, if necessary. This misuse of the military in an election—the most central event to a democracy—led Congress to enact the PCA in 1878.³³

32. Hammond, *supra* note 21, at 956.

33. *Id.* at 960-61.

This perceived unconstitutional power-grab by the executive branch forced a re-examination of the role of the military in American society.³⁴ The PCA was meant to prevent the degradation of our treasured checks and balances and the very concepts of federalism and freedom.³⁵ As noted by Seth Kreimer,

There are two rationales for the [Posse Comitatus] Act. First, the traditional concern that a powerful military engaged in domestic policies is in a better position to challenge civilian authority. Second, in the absence of such legislation, military policies prevent soldiers from adequately enforcing civilian law. Soldiers are taught to violently and effectively destroy the enemy and their training does not include sensitivity to constitutional limitations on search, seizure, and the use of reasonable force.³⁶

While these rationales are as compelling today as they were in the late 1860s, the threats and challenges of the twenty-first century require new paradigms.

Its reputation notwithstanding, the PCA “does not prohibit all military action in support of civilian law enforcement.”³⁷ In fact, it allows such uses “in cases and under circumstances expressly authorized by the Constitution or an Act of Congress.”³⁸

The allowable use of the military in the domestic arena is limited to circumstances such as quelling insurrections and “operations to ensure that federal laws are being enforced.”³⁹ “In recent years, Congress has attempted to force a generally unwilling Pentagon toward a more active role in the fight against [illegal] drugs, as well as an increased responsibility for disaster relief operations.”⁴⁰ Of course, the Pentagon’s reluctance is understandable, as the legislative and executive branches must assure the military it will be supported in this new role, even when the inevitable mistakes occur. To ensure success, it is incumbent on

34. See *id.* at 956-61. See also 18 U.S.C. § 1385 (1994).

35. See generally Seth F. Kreimer, *Federalism and Freedom*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 66 (2001).

36. John Flock, *The Legality of United States Military Operations Along the United States-Mexico Border*, 5 SW. J. L. & TRADE AM. 453, 454 (1998) [hereinafter Flock].

37. Kurt Andrew Schlichter, *Locked and Loaded: Taking Aim at the Growing use of the American Military in Civilian Law Enforcement Operations*, 26 LOY. L.A. L. REV. 1291, 1298 (1993) [hereinafter Schlichter].

38. *Id.* (citing 18 U.S.C. § 1385 (1988)).

39. *Id.* at 1299 (citing 10 U.S.C. § 332). See also Peter M. Sanchez, *The “Drug War”: The U.S. Military and National Security*, 34 A.F.L. Rev. 109, 110-20 (1991); Hammond, *supra* note 21, at 959.

40. Schlichter, *supra* note 37, at 1299.

the government to prepare the American public for this new military role.

A. What Action Constitutes a Violation of the PCA?

Although the PCA prohibits the use of the military as the mechanism by which laws are enforced, this does not mean that the military is prohibited from protecting America's citizens. The burden of establishing the balance between these two competing interests has fallen to the judicial branch.⁴¹ Although the issue of the deployment of the military as *posse comitatus* is justiciable, courts—including the United States Supreme Court—have avoided the issue.⁴² Consequently, the Judicial branch has failed to provide the necessary clarity on the scope and limitations of the PCA and the use of the military itself.⁴³ In this amorphous environment, the federal courts of this nation have developed an overly complicated and theoretical approach based on a limited number of cases. The application of which is more for the classroom than reality.

In attempting to balance the PCA and the realities of domestic security, courts have developed three formulations, all of which examine the role of the military in the realm of civilian law enforcement activity.⁴⁴ Courts have chosen to analyze this issue through the prism of an active versus passive analysis.⁴⁵ This active/passive formula, although embodied in three different formulations, stems from one incident in 1973—the standoff between the federal authorities and the Native Americans at Wounded Knee, South Dakota.⁴⁶ “The formulations allow passive assistance in support of law enforcement without causing a PCA violation.”⁴⁷

The active/passive test was first set forth in *United States v. Red Feather*.⁴⁸ In *Red Feather*, the court held that the direct involvement of the United States Army or Air Force in assisting federal authorities would violate the PCA.⁴⁹ Assistance in the form of military supplies and equipment would not result in a breach of the PCA.⁵⁰

41. See Charles Doyle, Cong. Res. Serv. No. 88-583A, *Use of the Military to Enforce Civilian Law: Posse Comitatus Act and Other Considerations* 10 (1988) [hereinafter Doyle].

42. *Id.*

43. *Id.*

44. Hammond, *supra* note 21, at 965.

45. *Id.*

46. *Id.*

47. *Id.* See also Doyle, *supra* note 41, at 2.

48. 392 F. Supp. 916, 921-923 (D. S.D. 1975) (addressing the issue of whether involvement of military personnel in the takeover of the village of Wounded Knee violated the PCA).

49. *Id.*

50. *Id.*

The courts further analyzed the active/passive dichotomy in *United States v. Jaramillo*.⁵¹ The court examined whether the military involvement “pervaded” the civilian activities. This fact-based analysis further complicated and muddied the PCA analysis.⁵² Once again, the court found that the provision of supplies and equipment was acceptable although the court was critical of the role the military played in advising the civilian authorities.⁵³

United States v. McArthur,⁵⁴ which was affirmed by the Eight Circuit in *United States v. Casper*,⁵⁵ set forth the third version of the active/passive test. The McArthur test focuses on the definition of “execute” in the posse comitatus statute.

[T]he posse comitatus statute with its mandate against the use of a part of the Army or Air Force to ‘execute’ the law; ‘execute’ implies an authoritarian act. I conclude that the feared use which is prohibited by the posse comitatus statute is that which is regulatory, proscriptive or compulsory in nature.⁵⁶

This version of the test requires much deeper investigation into the facts surrounding military involvement.

While the intent of the active/passive formulation is laudable, none of its manifestations cure the essential ill of the test. The unwieldy analysis it requires does not address the core of the issue. This is not a matter of legal nuisance, nor should it be the subject of the judiciary legislating from the bench. The problem with the active/passive test cannot be cured through judicial “tweaking.” Rather, the critical nature of the PCA and the handicap it places on

It is clear from the legislative history of 18 U.S.C. § 1385 . . . the intent of Congress in enacting this statute and by using the clause ‘uses any part of the Army or the Air Force as a posse comitatus or otherwise,’ was to prevent the direct active use of federal troops, one soldier or many, to execute the laws. Congress did not intend to prevent the use of Army or Air Force material or equipment in aid of execution of the laws.

Id. at 923.

51. 380 F. Supp. 1375, 1381 (D. Neb. 1974), appeal dismissed, 510 F.2d 808 (8th Cir. 1975) (addressing the issue of whether the PCA prohibits any use of military personnel to quell civil unrest).

52. *Id.* at 1379-80.

53. *Id.* at 1379-81. The Jaramillo court draws a distinction between using U.S. military forces to execute the laws and the mere presence of military forces during a law enforcement action. *Id.*

54. 419 F. Supp. 186 (D. N.D. 1975) (holding that evidence of military involvement in domestic law enforcement activities is relevant to the analysis of whether defendants were unlawfully interfering with law enforcement).

55. 541 F.2d 1275, 1278 (8th Cir. 1976).

56. *McArthur*, 419 F. Supp. at 194 (emphasis added).

the president require that the ineffectual active/passive framework be abandoned.

B. Exceptions to the PCA

The PCA, as enacted by Congress, was never intended to categorically exclude the military from all domestic activity.⁵⁷ Nonetheless, until Congress grants the President the authority to deploy the military to strengthen border integrity, the President must rely on the exceptions to the PCA, as well as the inherent authority of the chief executive as commander-in-chief of all American armed forces to send troops to our international gateways.⁵⁸

America now faces the legitimate risk of having its institutions and ideals destroyed by the enemies of democracy and the west. If another terrorist attack succeeds in destroying the White House, a nuclear power plant, or a packed athletic stadium, there is no question that civil liberties will be significantly curtailed in the resulting scramble to restore security. Curfews, checkpoints, and invasions of privacy could become the norm. Life in America would be akin to life in Israel, where civilians are forced to live under a cloud of fear, shopping and dining surrounded by tanks and

57. See 14 U.S.C. § 1 (1988) (stating that the “Coast Guard . . . shall be a military service and a branch of the armed forces of the United States at all times” and that it “shall be a service in the Department of Transportation, except when operating as a service in the Navy”). With the passage of the Homeland Security Act of 2002, the Coast Guard is now a part of the Department of Homeland Security, rather than the Department of Transportation. Dep’t of Homeland Security—Organization, at <http://www.dhs.gov/dhspublic/display?theme=9> (last visited Mar. 5, 2003).

58. See 10 U.S.C. §§ 332, 333 (2000).

Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.

10 U.S.C. § 332 (2000).

The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or (2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.

10 U.S.C. § 333 (2000).

machine guns. This scenario represents the greatest threat to the existence of American democracy.

Given the extremely challenging and dangerous circumstances facing America, it is likely that the President already possesses the inherent authority to deploy troops along our borders.⁵⁹ However, such a decision is sure to be shrouded in controversy given the nature and source of presidential authority in this area. If the President were to take wide-ranging unilateral action to put troops on the border, he would be operating on the fringes of his power. The Supreme Court has dealt with an analogous situation in the case of *Youngstown Sheet & Tube Co. v. Sawyer*.⁶⁰ During the conflict in Korea, President Truman ordered the seizure of a steel production plant, using his independent constitutional powers as a justification. However, the Court found that the seizure was not within the President's power. In his concurring opinion, Justice Jackson set forth a three-tiered framework that provided a sliding scale for the evaluation of presidential power:⁶¹

(1) When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate . . . (2) When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility . . . [and] (3) When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only on his own constitutional powers minus

59. *Martin v. Mott*, 25 U.S. 19, 32-33 (1827).

We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union.

Id. at 30.

60. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

61. *Id.* at 635-38.

and constitutional powers of Congress over the matter.⁶²

It is within this “twilight zone” that the President may find his authority for military border deployment.⁶³ Congress is primarily responsible for the maintenance of the nation’s safety, and border integrity is the sine qua non of this mandate.⁶⁴ This responsibility likely renders the PCA and its limitations expendable in this debate. As noted by the author of a recent note,

[a]nother ‘constitutional’ exception to the PCA is described by the Department of Defense regulations based upon the ‘inherent right of the U.S. Government . . . to ensure the preservation of public order and to carry out governmental operations . . . by force, if necessary.’ The Office of Legal Counsel of the Department of Justice has promulgated a similar view in recognition of the U.S. government’s power to protect federal functions. The power to protect federal functions has been so broadly interpreted, however, that if accepted it would become the exception that swallows the rule. Now Chief Justice William Rehnquist interpreted this power to extend to any ‘uniquely federal responsibility’ while he was an attorney in the Office of Legal Counsel. However, this exception has yet to be tested in the courts and would likely be interpreted as narrowly as the other exceptions to the PCA.⁶⁵

The allowances set forth here force the question: What is more uniquely federal than the securing of our borders from hostile

62. *Id.* at 635-37.

63. See Hammond, *supra* note 21, at 968.

64. Article I, Section 8 of the United States Constitution addresses Congress’ responsibilities related to national security. It grants the power to raise and support Armies. U.S. CONST. art. I, § 8, cl. 12. It also grants the power to provide for calling forth a militia to “execute the Laws of the Union, suppress Insurrections and repel Invasions.” U.S. CONST. art. I, § 8, cl. 15.

65. Hammond, *supra* note 21, at 968. Hammond cites United States Dep’t of Defense, Directive No. 5525.5, DoD Cooperation with Civilian Law Enforcement Officials, encl. 4, at 4-6 (Jan. 15, 1986) (extending the PCA’s application to the Navy and Marine Corps “as a matter of DoD policy”), available at <http://www.dtic.mil/whs/directives/corres/html/55255.htm> (last visited Feb. 15, 2003). Hammond also cites Secretary of the Navy, Dep’t of the Navy, Instruction No. 5820.7B, Cooperation with Civilian Law Enforcement Officials, Office of the Secretary, 4 (Mar. 28, 1988), available at <http://neds.nebt.daps.mil/Directives/table54.html> (last visited Feb. 15, 2003). Additionally, Hammond cites a Memorandum from William H. Rehnquist, Asst. Att’y Gen., Office of Legal Counsel, United States Dep’t of Justice, to Robert E. Jordan, III, Gen. Counsel, United States Dep’t of the Army 1-2 (May 11, 1970).

foreign elements? Accordingly, the PCA must be reexamined in order to ensure that the citizens of this nation are adequately protected.

IV. CHALLENGES AHEAD: THE LONGEST UNDEFENDED INTERNATIONAL BORDER AND OUR NEIGHBORS TO THE SOUTH

The issue of securing America's borders is not only a physical security issue but one of economic security as well. The Canadian border is the primary gateway for the world's largest trade partnership, worth more than 1.6 billion Canadian dollars per day.⁶⁶ The use of some American military power on what is often called the world's longest undefended border seems inevitable given the extraordinary importance of this economic relationship.

To achieve tighter security since September 11th, the United States government has transferred agents from other duties to checkpoints along the 6,400-kilometer border with Canada.⁶⁷ With the passage of the North American Free Trade Association ("NAFTA")⁶⁸ and the attempts at economic integration of the North American continent, there is little question that old strategies will not be able to protect the two nations' economic partnership. "NAFTA is a comprehensive rules-based agreement among the United States, Canada, and Mexico, which took effect January 1, 1994."⁶⁹ The agreement eliminated many tariffs immediately, while other tariffs will fall to zero over a five to fifteen-year period.⁷⁰ The ripple effect of failing to secure the Canadian border could be economically disastrous for the United States, Canada, and the world.

Similarly, the relationship between Mexico and the United States is an economic colossus. In the year 2000, American exports totaled over \$111 billion to Mexico, while Mexican exports to the United States totaled \$135 billion.⁷¹ With the passage of NAFTA,

66. Canadian Embassy, Canada—United States: The World's Largest Trading Relationship, available at <http://www.canadianembassy.org/trade/wltr-en.asp> (last visited Mar. 3, 2003).

67. *Id.*

68. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289 [hereinafter NAFTA].

69. United States-Mexico Chamber of Commerce, The North American Free Trade Agreement (NAFTA) at Five Years: What it Means for the U.S. and Mexico, available at <http://www.usmcc.org/n6.html> (last visited Mar. 5, 2003).

70. *Id.* NAFTA was "signed by the governments of the United States, Mexico, and Canada in December 1992, and ratified by the U.S. Congress in November 1993. . . . This Agreement broadened and superseded the 1989 free trade agreement between the United States and Canada." *Id.* "Mexico's population of approximately 96 million is about one-third the size of the U.S." and is the second-largest market for American goods and services, having surpassed Japan in 1997. *Id.*

71. United States-Mexico Chamber of Commerce, Trade Statistics, available at

the North American nations have created a trade zone which is the envy other countries, and produces trade numbers on a scale unimaginable twenty years ago.

While protection of the physical border itself is of the utmost importance to domestic security, America cannot afford the consequences of Berlin Walls with our northern and southern neighbors. Therefore, coincident with increasing border security, the immigration and judicial system must also amend failing policies that undermine security efforts at the border.⁷² While such an analysis is beyond the scope of this article, the following is an egregious example of bureaucratic buffoonery. One particular defect in the administrative system is the process by which we deport those who enter the country illegally.

Under current U.S. government policy, a 24-year-old Sudanese who is caught illegally entering the United States through Mexico has a right to live freely on bond in this country until his deportation, unless authorities can demonstrate that he has a criminal record or is a flight risk.

This policy, implemented daily by 300,000 immigration courts, allowed more than 300,000 illegal immigrants from all over the globe—even from countries where major terrorist groups operate—to skip bail while waiting for their hearing or their ride home.⁷³

How do these illegal aliens get home? Shockingly, even in the wake of September 11th, the Immigration and Naturalization Service (“INS”) still routinely sends unescorted deportees on commercial airlines back to their native countries.⁷⁴ This is obviously a practice rife with potential dangers, and is a ludicrous response to a logistical challenge. The conflicting regimes of the INS and United States Customs practices must be reconciled with our domestic security efforts if an effective, comprehensive policy is to be implemented. Domestic security begins at the various entry

<http://www.usmcc.org/eco2.html> (last visited Feb. 19, 2003).

72. See Luis Herrera-Lasso, *Border Cooperation: The Tijuana/San Diego Region—A Three Models Case Study*, 35 *SAN DIEGO L. REV.* 727, 736-37 (1998) (noting the drastically different immigration policies of the United States versus Mexico).

73. David Freddoso, *Border Violators Routinely Freed to Roam Country—Even Illegal Aliens From Terror-Sponsoring States Are Not Routinely Detained*, at <http://www.humaneventsonline.com/articles/01-07-02/freddoso.htm> (last visited Feb. 26, 2003).

74. Paul Sperry, *INS to Deport Arab Aliens on Airliners*, Aug. 1, 2002, at http://www.worldnetdaily.com/news/article.asp?ARTICLE_id=28474 (last visited Feb. 28, 2003).

points to the United States. Our seaports, airports, and border crossings are the battlefield for the new war on terrorism, and they have long been the forward trenches in the failed war on illegal drugs.⁷⁵

Clearly, the civilian government has a duty to remain vigilant against any overreaching by the military. Nonetheless, the watershed events of September 11th mandate that we reconsider the role of our military within our borders. While critics of an expanded role for the military in domestic affairs cite the protection of historical separation and the preservation of individual liberty as barriers to border deployment, our military is already serving on the border in an attempt to protect this nation.⁷⁶

[A]long the United States-Mexico border . . . soldiers from the Army, Marine Corps, and National Guard have conducted more than 3,000 missions along the 1,700 mile border during the past seven years. The purpose of these missions is to stop drug traffic and curb illegal immigration. Although the military provides support to the United States Border Patrol, the troops are prohibited from detaining suspects or making arrests. Instead, soldiers are to report suspicious activity to Border Patrol agents.⁷⁷

Although there are those opposed to such activities, there has been no public outcry, no military coup d'etat, no junta of generals seeking to overthrow the duly elected government officials. In light of the inadequate performance of the INS, along with the poor performance of other agencies in ensuring that border and immigration laws are enforced, we are faced with a choice. Like all decisions balancing civil liberties against government control and authority, this is a Handesque examination.⁷⁸ On one side of the scale is the PCA; on the other, the effort to maintain peace, security, and prosperity in this nation. Ultimately, we must decide which side will tip the scale.

Throughout most of her history, America has been considered the melting pot of the world. Nonetheless, as the heat of the

75. See Douglas Herring, Comment, Getting High from South of the Border: Illicit Smuggling of Rohypnol as an Example of the Need to Modify U.S. Response to International Drug Smuggling After NAFTA, 18 LOY. L.A. INT'L & COMP. L. REV. 841, 849 (1996). See also Kris Axtman, Rising Border Traffic, More Drugs, CHRISTIAN SCI. MONITOR, May 8, 2001, available at 2001 WL 3735289.

76. See Flock, *supra* note 36, at 453-55.

77. *Id.* at 453.

78. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (referring to Judge Learned Hand's balancing test).

melting pot dwindles, the balkanization of our nation is a growing and legitimate concern that challenges our traditional reliance on common goals amongst disparate groups. As America becomes more divided politically and racially between the coasts and the heartland, the potential for balkanization is now a serious topic for sociologists and politicians, not just historians looking to southern Europe or other tales of irredentism. If border states become sieves, infecting and destabilizing this nation by the introduction of hostile foreigners, the potential for Balkanization or the evisceration of true Federalism is increased.

A. Rationale for Keeping the Military Off Our Borders

The prevailing criticism of the use of the military to secure our borders is essentially that such a deployment will ultimately lead to the erosion of valued civil liberties. An indispensable component of this argument is that:

Soldiers are not trained peace officers, and that distinction is crucial. The mission of an infantry unit is 'to close with the enemy to kill him, destroy his equipment, and shatter his will to resist,' which is hardly the role of a peace officer.⁷⁹

While this statement is correct on its face, its application to the securing of United States borders is unsuitable because our borders are now more akin to war zones than city streets or college campuses. The prospect of a dirty nuclear bomb or a virulent chemical agent making its way across the border is enough to make many Americans view the border regions as the frontlines, the very trenches of the new war on terror. Given the changing attitudes and circumstances in post-September 11th America, old presuppositions fail to meet the challenges facing this expansive and diverse nation.

The tragic memory of the debacle at Kent State (as some critics claim) is no longer a valid argument for prohibiting the military from operations along the border. With some three thousand casualties stemming from September 11th, the cost-benefit analysis has been irrevocably altered. While the National Guard, as the modern militia, is an integral part of this nation and its defense, its horrendous failure some thirty-two years ago at Kent State is irrelevant to this debate. Today's professional federal military contains the most highly trained and disciplined soldiers in the

⁷⁹ See Schlichter, *supra* note 37, at 1303 (quoting U.S. ARMY, FIELD MANUAL 7-10: THE INFANTRY RIFLE COMPANY 1-1 (Dec. 14, 1990)).

world. While the fog of war can, and no doubt will, result in needless tragedy, this is a small price to pay for the preservation of the American way of life.

It is crucial to remember that military personnel on the border will be subject to not only their mission parameters, but also to strict rules of engagement. Such legal regimes should assuage the fears of critics who view the domestic deployment of the military on the border as tantamount to a military dictatorship.⁸⁰ Chief among laws which will limit the tactics and activities of the military in the border region is that of humanitarian law.⁸¹ Humanitarian law is the law that governs armed conflict, and it is founded upon the Geneva Conventions and Additional Protocols, the Hague Convention of 1907, select United Nations resolutions, and international custom.⁸²

“The Hague Conventions regulate military operations.”⁸³ The purpose of the Hague Conventions is to “limit war’s destruction by calling for the preservation of human life and its cultural and historical environment.”⁸⁴ The Geneva Conventions owe their existence to the atrocities that were regular occurrences during the Second World War.⁸⁵ The Geneva Conventions “apply in times of war or other armed conflict between parties,” and in times of occupation by another state.⁸⁶

The Geneva Conventions provide special protections for ‘protected persons,’ defined as ‘those who, at any given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.’⁸⁷

Another check on the activities of combatants during times of armed conflict comes from the fundamental precepts of armed conflict—that is, the right of the belligerent to use any means to

80. See, e.g., Schlichter, *supra* note 37, at 1331-32 (concluding that politicians have become all too willing to use the military as a powerful tool for solving social problems).

81. Generally M. Tia Johnson, *The American Servicemembers’ Protection Act: Protecting Whom?*, 43 VA. J. INT’L L. 405, 412 n.26 (2002).

82. Neil A.F. Popovic, *Humanitarian Law, Protection of the Environment, and Human Rights*, 8 GEO. INT’L ENVTL. L. REV. 67, 71-86 (1995).

83. *Id.* at 72.

84. *Id.* at 73.

85. *Id.*

86. *Id.*

87. *Id.* (quoting Geneva Convention IV Relative to the Protection of Civilian Person in Time of War, Aug. 12, 1949, 6 U.S.T. 3516).

achieve victory is not unlimited.⁸⁸ All these legal mechanisms will apply to further regulate the activities of the military on the border.

Given the highly centralized and controlled nature of the United States military, it is ludicrous to presume that crack Army Rangers will be gunning down Mexican women and children as those innocents race toward Camelot. One need only look at the military's immense capabilities and intelligence to know that such fears are nothing more than red herrings. Nonetheless, the executive and the legislative branches are obligated to impose clear and effective restrictions on our military. Further, a nonmilitary agency, such as the Department of Justice or the Department of Homeland Security, must implement, in conjunction with Congress and the President, sufficient oversight to ensure the localization and legality of domestic military activities. By adequately monitoring the military on the border, our citizenry can rest assured that the preeminence of the civilian authority will not be threatened while the security of our borders is increased.

V. CONCLUSION

It is fair to say that this entire debate crystallizes around one question: "Do we trust our democracy?" In other words, can a free people maintain their democracy while allowing their military an expanded domestic role? America is no South American nation—there is no Hugo Chavez lurking in the wings. This is the world's greatest democracy, a successful experiment in the laboratory of freedom. Our freedom can afford the deployment of the military on the border, but our freedom cannot afford another September 11th. There is no doubt that if we allow the leaking sieves of our borders to result in another September 11th, our civil liberties will be systematically eroded in the name of national security. Clearly, this is a decision that requires public awareness and consensus along with sincere deliberation and oversight.

However, it is the price we, a free people, must pay to maintain our freedom. This issue does not require a discussion about race, diversity, tolerance, or compassion. When the Twin Towers crumbled, the lives of Latinos, Canadians, Muslims, Catholics, and Jews crumbled with them. To preserve our treasured freedoms and our way of life, the military's deployment to the border must without a doubt be accompanied by authoritative and detailed oversight and limitations. It is also important that the duration of this

88. The five fundamental tenets of the law of armed conflict are limitation, discrimination, prevention of unnecessary suffering, proportionality, and military necessity. Betsy Baker, *Legal Protections for the Environment in Times of Armed Conflict*, 33. VA. J. INT'L L. 351, 359 (1993).

deployment be limited. However, the time frame should be a function of the circumstances, not politics. While life in post-September 11th America presents new challenges, these challenges are unfortunate burdens to shoulder as the world's dominant force—the modern Rome. Ultimately, we, like the World War II generation, must now pay the price and sacrifice for freedom. We must now become a “great” generation, and time is of the essence. Like the scene in Rome sixteen centuries ago, the Visigoths are at the gates, and our modern day legions must now go once more into the breach. This is a crucial test for democracy, and one we cannot afford to fail.

SEARCH, SENTENCE, AND (DON'T) SELL: COMBATING
THE THREAT OF BIOLOGICAL WEAPONS THROUGH
INSPECTIONS, CRIMINALIZATION, AND
RESTRICTIONS ON EQUIPMENT

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I. INTRODUCTION

Biological weapons represent a significant threat to the security and health of the United States and the rest of the world. Naturally occurring biological agents, such as smallpox, have been responsible for hundreds of millions of deaths over the last century. Advances in biotechnology have created the potential to make these agents even more dangerous. The potential damage from a large-scale attack using sophisticated bioweapons is incalculable.

In 1972, the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (“Biological Weapons Convention” or “BWC”) was formed to combat the threat of bioweapons.¹ Although many states have ratified the agreement,

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1. Convention on the Prohibition of the Development, Production and Stockpiling of

the BWC has done little to combat the development of bioweapons by state and non-state actors. This failure has been largely attributed to the lack of an adequate enforcement mechanism for the BWC.

Three types of solutions have been proposed to this lack of enforcement mechanism: inspection regimes; equipment restrictions; and criminalization. Inspection regimes would force both public and private facilities to submit to declaration requirements and inspections of their capabilities in addition to their potential involvement with bioweapons. Equipment restrictions would attempt to combat the risk by limiting access either to the microorganisms themselves or to the sophisticated equipment needed to develop and weaponize the agents. Criminalization would attempt to target those actors who are developing bioweapons, either through domestic legislation or international recognition of bioweapons as a universal crime.

Three proposals have been advanced which incorporate various aspects of these solutions. The BWC Ad Hoc Group ("BWC proposal") has advocated an inspection regime modeled on the Chemical Weapons Convention ("CWC") and has also recognized the potential value of criminalization. The Bush administration, after rejecting the BWC inspection proposal, has advocated domestic criminalization by all members of the BWC and equipment restrictions. And, the Harvard Sussex Program has advocated universal criminalization of bioweapons.

Each of the proposals has advantages and drawbacks. The BWC proposal would be the best at reaching state actors, but its potential efficacy is questionable and concerns have been raised regarding national security and threats to proprietary information during inspections. The Bush proposal is designed to address the threat of non-state actors, but its criminalization approach has proved largely ineffectual in the United States where its restriction on equipment has proved difficult to implement. The criminalization of the Harvard Sussex approach would be more effective than the Bush administration's criminalization, but it would likewise fail to reach state actors.

In order to create an effective tool for combating bioweapons, elements from all three proposals would be needed. The various threats that both state and non-state actors pose must be addressed through effective mechanisms. While no approach would be completely successful, any substantial reduction in the threat and

proliferation of bioweapons would be of immense benefit to the United States and the rest of the world.

II. THREAT ASSESSMENT

“[T]he tragedy of September 11 was nothing like what might be possible with biological weaponry.”

- Bill Joy, Chief Scientist of Sun Microsystems, on the potential of biotechnology to develop devastating weaponry.²

In determining the best response to the threat of bioweapons, it is important to initially establish what actual threat is posed. First, this section will identify the potential agents and their relevant characteristics that would be used. Second, this section will analyze the historic uses of bioweapons by states and non-state groups to determine the type of actor, the associated type of agent and the kinds of uses. Third, this section will evaluate the current types of actors and the threats that they represent. Finally, this section will conclude with an overall assessment of the risk created by bioweapons from both state and non-state actors.

A. Types of Agents

Although there are literally thousands of potential biological agents that might be used,³ a number of specific organisms have been identified as important in considering the large probability that they would be used, or the risk of extreme harm that could result, if they were used. Although anthrax has attracted the most recent publicity,⁴ a recent symposium of scientists and public health professionals have also identified smallpox, plague, and botulinum toxin as potential threats.⁵ These agents also appear as the most dangerous threats on the critical agents list of the Center for Disease Control (“CDC”), as well as hemorrhagic fevers such as Ebola and Marburg.⁶

2. Bioweapons: A Potential Threat of Mass Destruction, THE HINDU, Oct. 31, 2001 [hereinafter Bioweapons], available at 2001 WL 28477849.

3. US Representative Christopher Shays Holds Hearing on Biological Terrorism, FDCH POL. TRANSCRIPTS, Oct. 12, 2001 [hereinafter Hearings] (testimony of Ken Alibek, a.k.a. Kanatjan Alibekov, former deputy head of Biopreparat, the Soviet Union’s bioweapons program, and President of Advanced Biosystems, Inc.), available at 2001 WL 26187096.

4. See, e.g., Anthrax Investigation—Award Increased, Press Release, FBI, (Jan. 23, 2002) [hereinafter FBI], available at <http://newark.fbi.gov/pressrel/2002/pr012302.htm> (offering reward of up to \$2.5 million for information on recent anthrax attacks).

5. David H. Frankel, US Experts Take the Threat of Bioterrorism Seriously, THE LANCET, Feb. 27, 1999, at 734.

6. Ali S. Khan et al., Public-health Preparedness for Biological Terrorism in the USA, THE

These potential agents can be divided in three categories. The first group includes common agents, which are organisms that are relatively ubiquitous in the environment and can be cultured and stored with relative ease. The second group includes exotic agents, which include extremely rare, or difficult to culture, agents and to create weaponized forms of common agents. And the third group includes smallpox, which is treated separately due to its extreme rarity and enormous potential for inflicting human casualties even in an unweaponized form.

1. Common Agents

Common agents include bacteria, such as anthrax and plague, and biotoxins, such as botulinum toxin and ricin. These agents are relatively common in nature and relatively easy to culture as compared to other possible agents. While these agents can be extremely lethal, they are not likely to cause widespread harm due to the lack of person-to-person transmission, the availability of treatments, and the difficulty in delivery. Examples include:

Anthrax: Anthrax, or *Bacillus anthracis*, is a ubiquitous bacterium found throughout the world.⁷ Although more common in temperate climates, it is also found in the United States.⁸ The bacterium is fairly easy to culture, but would not grow well in quantity without sophisticated fermenter equipment.⁹ Although the spore form of the bacteria is highly stable in the environment, its physical properties make it difficult to aerosolize.¹⁰ Anthrax is also not

LANCET, Sept. 30, 2000, at 1179. The Pan American Health Organization also lists anthrax, smallpox, plague, botulism, and hemorrhagic fever viruses as likely bioweapon agents. Pan American Health Organization, *Intentional Use of Biological and Chemical Agents: Risks and Recommendations*, at http://www.paho.org/English/SHA/be_v22n3-bioterrorism.htm (Sept. 2001) (on file with author).

7. The disease generally preys upon grazing animals such as sheep and goats. David Tell, *All About Anthrax; Everything You Didn't Want to Know*, WKLY. STANDARD, Oct. 29, 2001, at 29 (describing historical and current incidents of anthrax); Barry Kellman, *Biological Terrorism: Legal Measures for Preventing Catastrophe*, 24 HARV. J.L. & PUB. POL'Y 417, 433-34 (2001) [hereinafter Kellman, *Biological Terrorism*] (detailing key features of anthrax and other agents). For a general description of anthrax, see CDC Fact Sheet on Anthrax, available at http://www.cdc.gov/ncidod/dbm/d/diseaseinfo/anthrax_t.htm (last visited Dec. 13, 2002).

8. In the early twentieth century, there were over 100 human cases of the disease reported each year in the United States. Tell, *supra* note 7, at 29.

9. Kellman, *Biological Terrorism*, *supra* note 7, at 459.

10. See Pan American Health Organization, *supra* note 6 (evaluating biological agents that might be used as weapons); Kellman, *Biological Terrorism*, *supra* note 7, at 458 (same); Rick Weiss & David Eggen, *Additive Made Spores Deadlier*, WASH. POST, Oct. 25, 2001, at A01 (stating that only the United States, Russia, and Iraq have the capability of producing the

contagious from infected individuals.¹¹ Inhalation anthrax infections are almost always fatal if not treated before the onset of symptoms.¹²

Plague: The plague, or *Yersinia pestis*, is infamous for wiping out one-quarter of Europe's population during the Middle Ages.¹³ Like anthrax, it is found naturally in animal populations worldwide and within the United States.¹⁴ There are generally ten to fifteen documented cases of plague in the United States each year, and an estimated 1,000 to 3,000 worldwide.¹⁵ It is highly communicable person-to-person, but somewhat difficult to grow in culture.¹⁶

Botulinum Toxin: Botulism, or *Clostridium botulinum* toxin, is different from the above agents in that it is a biochemical compound rather than a reproducing organism.¹⁷ It is extremely toxic;¹⁸ however, it is difficult to deliver to large populations, and would not reproduce like other agents.¹⁹

Ricin: Also a potent biotoxin, ricin can easily be isolated from castor beans.²⁰ It is extremely toxic through dermal exposure, and has been used mainly in assassination attempts, such as by coating the tip of an umbrella and making contact with exposed skin.²¹ Similar to botulinum toxin, it is difficult to

weaponized form of anthrax used in recent attacks).

11. Meryl Nass, Biological Warfare, *THE LANCET*, Aug. 9, 1998, at 491 (analyzing key features of anthrax).

12. Fact Sheet on Anthrax, *supra* note 7. There are natural and engineered strains of anthrax that are resistant to antibiotics. Nass, *supra* note 11, at 492.

13. Scott Keefer, International Control of Biological Weapons, 6 *ILSA J. INT'L & COMP. L.* 107, 113 (1999).

14. Kellman, Biological Terrorism, *supra* note 7, at 434-35.

15. CDC, Plague Home Page, at <http://www.cdc.gov/ncidod/dvbid/plague/index.htm> (last visited Jan. 23, 2002).

16. Kellman, Biological Terrorism, *supra* note 7, at 435.

17. Botulinum toxin is the only non-replicating agent in the top six biological agents that are threats to civilians. Robert Schechter & Stephen Arnon, Extreme Potency of Botulinum Toxin, *THE LANCET*, Jan. 15, 2000, at 238.

18. The LD₅₀, or dose needed to kill 50% of animals in laboratory testing, is 0.4 ng/kg. Extrapolating from this data, one ounce, if evenly distributed, could kill over one million people. *Id.*

19. See *id.*

20. Kellman, Biological Terrorism, *supra* note 7, at 436.

21. *Id.* at 442.

deliver to large populations, and would not reproduce once delivered.

Because of their availability, common agents represent the most likely agent to be used in a bioweapons attack. They are fairly easy to acquire and produce, but are difficult to deliver as part of a widespread attack. They may also be useful in attacking individuals or small groups but are not suited to causing widespread harm. Apart from the psychological response these weapons may elicit in the public, they are far less effective and more expensive than conventional weapons.²²

2. Exotic Agents

Exotic agents are much more difficult to acquire and develop than common agents because they can be relatively rare, difficult to culture, and require sophisticated equipment and expertise. This category includes some viral agents, such as the hemorrhagic fevers and weaponized forms of other agents. Examples include:

Hemorrhagic Fevers: Viruses such as Ebola and Marburg can be highly infectious and fatal.²³ They have the potential to spread within a population after an initial attack and cause widespread harm. However, they are very rare in the environment and can be found only in limited geographical areas during outbreaks.²⁴ These viruses are also difficult to culture and would be difficult to deliver in an initial attack.

Weaponized Common Agents: Sophisticated engineering may be able to reduce the limitations of the common agents described above. Possible modifications include mechanical engineering to improve the delivery of these agents²⁵ and

22. See Hearings, *supra* note 3 (testimony of Raymond Decker, director of the Defense Capabilities Management Team for the United States General Accounting Office).

23. See Kellman, *Biological Terrorism*, *supra* note 7, at 435-36 (describing the characteristics of these agents).

24. See CDC, *Viral Hemorrhagic Fevers: Fact Sheet*, available at <http://www.cdc.gov/ncidod/dvrd/spb/mnpages/dispages/vhf.htm> (last visited Jan. 23, 2002).

25. See Hearings, *supra* note 3 (testimony of Dr. Kenneth Alibek, former deputy head of Biopreparat, the Soviet Union's bioweapons program, and President of Advanced Biosystems, Inc.).

bioengineering to improve the innate characteristics or to develop resistance to medical treatments.

Bioengineered Agents: New agents may continue to emerge as potential threats. In January 2001, Australian scientists reported that they had accidentally created a virulent strain of mousepox.²⁶ As biotechnology continues to evolve, more sophisticated biotoxins, such as interference RNA, may emerge as novel bioweapons.²⁷ Although any threat from such designed bioweapons would not likely materialize in the near future, it may be important to keep such sophisticated weaponry from being developed.

Exotic agents represent a more serious threat than common agents. These agents could be highly infectious and spread quickly through a population. For many of these agents there are no effective treatments. An attack using such weapons could affect a far larger population and cause greater damage than an attack using common agents. However, they are more difficult to acquire, culture, and use, and they may require significant facilities to develop. Therefore, it is likely that only sophisticated actors with significant resources would have access to exotic agents.

3. Smallpox

Smallpox, or *Variola major*, is included in a separate category because of its unique characteristics. It is similar to common agents in that it is easy to culture.²⁸ Because it is highly contagious,²⁹ even simple delivery mechanisms could lead to widespread casualties.³⁰

26. Richard Ingham, *Miracle of Biotech Could Also Breed a Monster*, AGENCE FR. PRESSE, Oct. 23, 2001.

27. RNAi could be designed to inactivate a specific gene within a host. *Bioweapons*, supra note 2.

28. 60 Minutes: Smallpox (CBS television broadcast, Oct. 1, 2000) (Mike Wallace reporting), available at 2000 WL 4212977 [hereinafter 60 Minutes] (noting that it is possible to produce substantial quantities of smallpox by simply inoculating a chicken egg with the virus and then harvesting a week later).

29. In some outbreaks, infected individuals have each infected over ten other people. Donald A. Henderson, *Smallpox: Clinical and Epidemiological Features*, EMERGING INFECTIOUS DISEASES (July-Aug. 1999), at 537, available at <http://www.cdc.gov/ncidod/EID/vol5no4/henderson.htm> (last visited Feb. 17, 2003). For a general background on smallpox, see World Health Organization, *Smallpox Fact Sheet*, available at <http://www.paho.org/English/DPI/pr011022.htm> (last visited Feb. 17, 2003).

30. The virus kills about one-third of its victims and is believed to have caused 5000,000,000 deaths in the twentieth century. 60 Minutes, supra note 28. Once Cortez's crew

It is similar to exotic agents in that it is extremely difficult to acquire. It is believed that the virus has been eradicated in nature, with two remaining samples stored in the United States and Russia.³¹ However, many reports exist that samples of the virus now exist in other locations.³² Although a vaccine for smallpox exists that can be effective up to five days after infection, routine vaccinations in the United States have not occurred for over twenty years. Currently, an insufficient supply of vaccine exists to protect the public.³³

Smallpox may be the most dangerous bioweapon. It could be capable of producing a worldwide catastrophe with fatalities reaching into the hundreds of millions in an unweaponized form with a simple delivery mechanism. Two major restrictions on the use of smallpox as a weapon exist. First, it is extremely difficult to acquire. Second, any use of smallpox would likely lead to a pandemic that would affect every nation, including the state (or home of the non-state group) that initially released the virus. Therefore, it is unlikely that a rational actor would use such a weapon.

3. Conclusion

This division of agents into three categories is useful for evaluating the type of actor who would use a given agent and the type of threat that they present. Unsophisticated actors would be more likely to use common agents, which do not represent as serious a threat as the other agents. On the other hand, sophisticated actors might be able to develop and use exotic agents, which represent a greater threat. While smallpox is perhaps the greatest threat, it is likely that only a few state actors possess the virus.

introduced the virus into the virgin Aztec population, it is estimated to have killed 3.5 million Aztecs in two years. Jamie Talan & Liam Plevin, *America's Ordeal*, *NEWSDAY*, Nov. 6, 2001, at A04.

31. The two official storage sites are the CDC in Atlanta and the Vector facility in Novosibirsk, Russia. Shannon Brownlee, *Clear and Present Danger*, *WASH. POST*, Oct. 28, 2001, at W08. There have been no reported cases of smallpox since 1977. *Id.* While both of these samples were slated for destruction, this has been postponed due to fear that there may be other samples of the virus in existence. Henderson, *supra* note 29, at 538.

32. See, e.g., Brownlee, *supra* note 31, at W08 (listing countries suspected of having smallpox weapons programs); Hearings, *supra* note 3 (same).

33. See Talan & Plevin, *supra* note 30, at A04.

B. Types of Actors

Having identified the agents that may be used as bioweapons, it is important to identify the types of actors that would utilize these agents, what resources they would have and need, their motivations for using bioweapons, and what agents they would be likely to use. The potential users of such weapons could be broadly broken down into state and non-state actors. First, past uses of bioweapons by both state and non-state actors will be examined. Second, this information will be applied to modern actors to evaluate their potential for use of bioweapons

1. Historic Uses by State Actors

“[Y]ou will do well to try to inoculate the Indians by means of the blankets, as well as to try every other method that can serve to extirpate this execrable race.”

- Orders to British troops in 1763 to deliver blankets contaminated with smallpox to Native Americans.³⁴

The use of bioweapons by states dates back over 2,500 years.³⁵ Modern use of bioweapons began during World War I, when German soldiers infected livestock exports bound for Allied nations with anthrax and glanders.³⁶ Between World War I and World War II, the infamous Unit 731 of Japan conducted widespread work on bioweapons in occupied Manchuria.³⁷ World War II saw many other nations involved in both widespread³⁸ and individually targeted³⁹

34. Keefer, *supra* note 13, at 113.

35. Ancient Athenians used toxic plants to try to poison the water supplies of other cities as early as 600 B.C. *Id.* at 112-113. In 1346, Mongols besieging the Crimean city of Caffa catapulted plague infested corpses into the city. When fleeing civilians brought the disease to Europe, it started an epidemic that killed one-quarter of Europe's population. *Id.* at 113. During the American Civil War, fleeing Confederate soldiers drove animals into ponds and shot them in attempts to contaminate the water supply for advancing Union forces. *Id.*

36. *Id.* Tell, *supra* note 7, at 29.

37. Thousands of Chinese were killed during 1932-1945. *Id.* at 29. The Japanese were allegedly working on plague, cholera, and typhoid. Keefer, *supra* note 13, at 114. During this period, Belgium, France, Canada, Great Britain, Italy, the Netherlands, Poland, and the Soviet Union were also developing bioweapons programs. *Id.*

38. For example, Britain prepared 5,000,000 “cattle cakes” laced with anthrax for an anticipated “Operation Vegetarian” against Germany. Tell, *supra* note 7, at 29. By 1944, the United States had prepared 5,000 anthrax bombs that were ultimately not deployed. *Id.* Japanese forces released plague-infested fleas during conflicts in Manchuria. Bioweapons, *supra* note 2. In 1942, Russia deployed pneumonic tularemia in an attempt to halt advancing Nazi forces. Jack Woodall, *The Soviet Bioweapons Programme: An Insider's View*, *THE LANCET*, Oct. 30, 1999, at 1568.

39. In 1942, the British secret service used botulinum toxin to assassinate Reinhard Heydrich, the presumed successor to Hitler. Alexandra Witze, *Biological Warfare No Longer*

use of bioweapons. Following WWII, most state use of bioweapons has been as tools of assassination.⁴⁰ By far the biggest development of bioweapons was the Biopreparat program by the Soviet Union from 1972 to 1992.⁴¹ Although reportedly no longer in existence, the Soviet program created tons of various weaponized agents and even deployed them in combat.⁴²

State development of bioweapons has involved a great variety of agents including common agents, exotic agents, and smallpox. Although initially state actors used bioweapons for widespread effects and even as battlefield weapons, their overall use in these situations proved ineffectual and unpredictable.⁴³ Even prior to the BWC in 1972, most states had stopped using these weapons at all or restricted their use as a strategic deterrent or as tools of assassination. During this same time period, many states continued to develop chemical weapons because their predictable and limited effects were much better suited to battlefield use.

2. Historic Uses by Non-State Actors

The use of bioweapons by non-state actors is a relatively recent phenomenon. One of the earliest examples is a Japanese researcher who contaminated food with typhoid from 1964 to 1966, infecting over 100 people.⁴⁴ In 1972, neo-nazis were caught in the United States with over thirty kilograms of typhoid bacteria, intending to poison water supplies.⁴⁵ In 1984, the Rajneeshee cult in Oregon attempted to influence a local election by contaminating salad bars

Desperate Measure, DALLAS MORNING NEWS, Oct. 27, 2001, at 39A.

40. In 1978, the Soviets used ricin to kill Bulgarian defector Georgi Markov in London. Bioweapons, *supra* note 2. South Africa has also been accused of using bioweapons for assassination during the Rhodesian Civil War in the 1970's. Keefer, *supra* note 13, at 117. An outbreak of anthrax during 1979-1980 in Zimbabwe is also suspected of being a bioweapon attack by the white Rhodesian army. Tell, *supra* note 7, at 29.

41. The facility in Stepnogorsk, Kazakhstan, which was built in 1982, had ten 20,000-liter fermentation vats, which could produce 300 tons of anthrax in a 220-day cycle. Judith Miller et al., A Horrifying Revelation in Kazakhstan, TIMES UNION, Nov. 5, 2001, at A1 [hereinafter Miller et al., Revelation]. Overall, Biopreparat employed over 30,000 people, including over 7,000 scientists at 50 different laboratories. The O'Reilly Factor: Interview with Bill Kurtis (Fox News Network television broadcast, Oct. 26, 2001), available at 2001 WL 5081847.

42. The Soviet program weaponized anthrax, Ebola, and Marburg, among other agents. Wendy Orent, After Anthrax, AM. PROSPECT, May 8, 2000, at 18. During their invasion of Afghanistan, the Soviets released glanders on Mujahedin forces. Woodall, *supra* note 38, at 1568.

43. For example, Russian forces stopped a Nazi advance in 1942 through the use of pneumonic tularemia, but the attack backfired when the outbreak returned to infect the Russian army. Woodall, *supra* note 38, at 1568.

44. Ali Khan et al., Precautions Against Biological and Chemical Terrorism Directed at Food and Water Supplies, 116 PUB. HEALTH REP. 3, 5 (2001). It is hypothesized that the researcher used the agent in an attempt to gather data for his doctoral thesis. *Id.*

45. Kellman, Biological Terrorism, *supra* note 7, at 443.

with salmonella, causing 751 illnesses.⁴⁶ Before releasing sarin gas during a chemical weapons attack on a Tokyo subway, Aum Shinrikyo had attempted to weaponize and release botulinum toxin and anthrax.⁴⁷ In 1995, Aryan nation member, Larry Wayne Harris, was arrested for ordering bubonic plague through the mail.⁴⁸ Also in 1995, two Minnesota militia members were caught trying to use ricin to attack government officials.⁴⁹ In 1996, a disgruntled hospital employee contaminated muffins and doughnuts with *Shigella dysenteriae* in Dallas.⁵⁰

A number of conclusions can be drawn from these examples. First, none of the attacks caused widespread harm. The broadest effect was that caused by the Rajneeshee's, who caused over 700 illnesses.⁵¹ However, none of these attacks caused more than a few fatalities. Most of the attacks were never carried out or were not very effective. Second, there are two general types of non-state actors who actually use these weapons. As the 1962 and 1996 incidents show, one type includes disgruntled lone actors who work around biological agents.⁵² These attacks have included common agents and exotic agents to which the actor had access.⁵³ While these actors appear more effective in causing death, the scopes of the attacks have been limited, and no widespread effect appears to have been intended.

The other type of non-state actors include religious extremists.⁵⁴ They appear to intend much broader effects but have failed to achieve them.⁵⁵ For example, Aum Shinrikyo spent years and millions of dollars attempting to create bioweapons, yet failed to accomplish much.⁵⁶ While limited casualties have been possible, non-state actors have not yet demonstrated the ability to yield bioweapons as weapons of mass destruction.⁵⁷ Attempts to develop exotic agents have generally failed, and the use of common agents has not lead to widespread harm.

46. Khan et al., *supra* note 44, at 5.

47. Schechter & Arnon, *supra* note 17, at 238. In 1992, the cult sent a team to Zaire in a failed attempt to acquire Ebola. Kellman, *Biological Terrorism*, *supra* note 7, at 425.

48. Barry Kellman, *Catastrophic Terrorism – Thinking Fearfully, Acting Legally*, 20 *MICH. J. INT'L L.* 537, 552 (1999) [hereinafter Kellman, *Catastrophic Terrorism*].

49. Keefer, *supra* note 13, at 118.

50. Khan et al., *supra* note 44, at 5.

51. *Id.*

52. This is the Federal Bureau of Investigation's current theory for the 2001 anthrax attacks. See FBI, *supra* note 4.

53. *Id.*

54. Religious actors such as the Japanese cult, Aum Shinrikyo, represent this type of actor. Schechter & Arnon, *supra* note 17, at 238; Brownlee, *supra* note 31, at W08.

55. See FBI, *supra* note 4; Brownlee, *supra* note 31, at W08.

56. Schechter & Arnon, *supra* note 17, at 238; Brownlee, *supra* note 31, at W08.

57. Schechter & Arnon, *supra* note 17, at 238.

3. Current Uses by State Actors

Some experts believe that state actors are the major threat of bioweapons. Because it is so difficult to acquire, it is believed that only a state could have smallpox right now.⁵⁸ The difficulties of weaponization have led some to believe that only a state could have produced the anthrax that was used in the recent attacks.⁵⁹ Although the exact list of states with bioweapons is not known, the CIA⁶⁰ and other experts⁶¹ believe that approximately one dozen nations have bioweapons programs. Some nations may be drawn to bioweapons as a cheaper and easier alternative to nuclear weapons for use as a strategic deterrent.⁶² One reoccurring fear is that scientists who were formerly employed in the Soviet bioweapons program have been drawn to Iraq or Iran to work on bioweapons programs.⁶³ State actors would have the resources to develop exotic agents, and may also have the ability to acquire smallpox. Current examples include:

Iraq: Iraq is known to have a bioweapons program.⁶⁴
 By 1990, Iraq had 150 bombs with 60-85 liter
 payloads of botulinum toxin, anthrax, or aflatoxin.⁶⁵
 In total, the Iraqi government is believed to have

58. Brownlee, *supra* note 31, at W08. Some experts believe that Russia, Iraq and North Korea have the virus and suspect that China, Libya, South Africa, Israel, and Pakistan might have the virus. *Id.* See also Hearings, *supra* note 3 (quoting Dr. Kenneth Alibek as saying he knew North Koreans were working on smallpox and that Iraq was working on camelpox as a surrogate).

59. E.g., Weiss & Eggen, *supra* note 10, at A01. But see FBI, *supra* note 4 (hypothesizing that a lone actor is responsible for the attacks).

60. See Tara O'Toole & Thomas Inglesby, Facing the Biological Weapons Threat, *THE LANCET*, Sept. 30, 2000, at 1129 (listing the number of states that the CIA believes possess bioweapons programs).

61. See, e.g., Will Englund, USSR One of Many Sources for Anthrax, *BALTIMORE SUN*, Oct. 17, 2001, at 8A (listing Iraq, North Korea, Iran, China, Libya, Syria, Taiwan, Pakistan, India, Israel, Egypt, South Africa, and Sudan).

62. See Keefer, *supra* note 13, at 112 (describing the role of biological weapons as strategic assets).

63. See, e.g., Nicholas Kralev, Anthrax Stirs US Review of Foreign Germ Programs, *WASH. TIMES*, Oct. 22, 2001, at A16. Vector scientists only earn \$100 a month in Russia. See Talan & Plevin, *supra* note 30, at A04. Iran has offered \$5,000 a month for their services. See Brownlee, *supra* note 31, at W08. Plans to transform old facilities into legitimate biotech facilities have failed. Miller et al., *Revelations*, *supra* note 41, at A1.

64. See, e.g., JUDITH MILLER ET AL., *GERMS: BIOLOGICAL WEAPONS AND AMERICA'S SECRET WAR 98-150* (2001) (describing Iraq's bioweapons program).

65. Keefer, *supra* note 13, at 111.

10,000 liters of botulinum toxin⁶⁶ and to be working on either smallpox itself or related viruses.⁶⁷

China: A recent outbreak of hemorrhagic fever in Northeastern China sparked concern because there had been no previous cases in the affected area.⁶⁸ Subsequent reports showed facilities in the area with fermenters and biocontainment equipment, which led many to hypothesize that China was pursuing a bioweapons program.⁶⁹

Russia: Although the Soviet weapons program officially ended in 1992, the former deputy head of the program believes that the program may still exist.⁷⁰ Russian officials admitted in 1999 that military labs continue to research Ebola and Marburg, although supposedly only for treatment purposes.⁷¹

Iran/Cuba: While neither country is known to have bioweapons programs, both are suspected of pursuing such programs and have extremely well-developed biotechnology sectors.⁷²

As shown, a number of states have well-developed bioweapons programs. These programs include common agents, exotic agents, and smallpox. These various bioweapons represent a serious threat to the safety of the world. However, the ineffectual use of such agents on the battlefield would characterize these weapons as more of a strategic asset rather than a military one. States would likely use such assets as negotiation tools in deterring other states from using weapons of mass destruction. While bioweapons have been used during the 20th century during armed conflict, unexpected and negative consequences have shown them to be ill-suited for military

66. Schechter & Arnon, *supra* note 17, at 238. This amount of the toxin is hypothetically sufficient to kill over 300 billion people.

67. Hearings, *supra* note 3 (testimony of Dr. Kenneth Alibek, stating that Iraq was working on camelpox as a surrogate for smallpox).

68. Woodall, *supra* note 38, at 1569.

69. *Id.*

70. Andrew Jack, *Extent of Russian Bioweapons Programme Generates Fear*, *FIN. TIMES*, Oct. 26, 2001, at 5 (quoting Dr. Alibek's fears of a continuing program).

71. Orent, *supra* note 42, at 18. This claim seems suspicious in light of the fact that Ebola and Marburg are not endemic to any Russian territory. *Id.*

72. See Hearings, *supra* note 3 (testimony of Dr. Alibek).

use. The most powerful agents, which are highly infectious, could be transmitted back into the state that released them. Therefore, states may be even less likely to use bioweapons than nuclear weapons.⁷³

4. Current Uses by Non-State Actors

While some experts believe that only a state could have the resources to pursue bioweapons, other experts have identified non-state actors as a greater threat.⁷⁴ Bioweapons clearly have advantages that would appeal to terrorists, such as the potential for high death to cost ratios; the ability to smuggle small, undetectable, yet effective quantities; and the ability to cause mass panic.⁷⁵ However, some experts have viewed the failures of non-state actors with sophisticated resources to develop effective bioweapons as proof that such weapons are not within the grasp of non-state groups.⁷⁶

Non-state actors could be divided into three general categories: political terrorists, religious terrorists, and disgruntled loners. This first group would probably not use bioweapons, but the latter two may. "Political terrorist" encompasses the 1970's and 1980's view of terrorists, including social revolutionaries and national separatists.⁷⁷ These are groups that are motivated by political goals, and want to influence the political decisions that are made in the West.⁷⁸ Therefore, they are likely to avoid the humanitarian outrage that weapons of mass destruction would evoke.⁷⁹ In focusing on discrete targets, conventional weapons would be much cheaper and much more effective.⁸⁰ While it is possible that such a group would pursue the development of bioweapons, it would be for

73. However, it also may be harder to detect or trace back a bioweapons attack. This might make such weapons more attractive to use.

74. See, e.g., Panel II of the Hearing of the Technology, Terrorism, and Government Information Subcommittee of the Senate Judiciary Committee, *FED. NEWS SERV.*, Nov. 6, 2001 [hereinafter Panel II] (testimony of Michael Drake, Vice President of Health Affairs for the University of California).

75. See Kellman, *Biological Terrorism*, *supra* note 7, at 427.

76. See *The O'Reilly Factor*, *supra* note 41 (reporting that Aum Shinrikyo spent millions of dollars and years trying to develop anthrax and botulinum, but failed to create effective weapons).

77. See *Hearings*, *supra* note 3 (testimony of Jerrold Post, political psychiatrist and psychologist who interviews terrorists).

78. See *id.*

79. See Barry Kellman, *Review Essay: Clashing Perspectives on Terrorism*, 94 *AM. J. INT'L L.* 434, 435-436 (2000) [hereinafter Kellman, *Review Essay*] (reasoning that such groups would want to influence the existing political structure and attract adherents, and, therefore, would not take actions that would lead to complete outrage in public opinion).

80. See *Hearings*, *supra* note 3 (testimony of Jerrold Post, political psychiatrist and psychologist who interviews terrorists).

similar reasons as a state: for use as a strategic asset rather than as a weapon.⁸¹ Such groups have not been shown to be involved with bioweapons so far.⁸²

Religious terrorists, on the other hand, would utilize bioweapons because their goals are very different.⁸³ Their goals include widespread damage, and they are not as concerned with political repercussions.⁸⁴ Such groups have no real political agenda and are not trying to build a movement or negotiate with the existing power structure.⁸⁵ Right-wing groups such as the Montana Militia and Aryan Nation are included within this group because of the close ties of their tenets to extreme religious philosophies and similar disregard for political fallout of actions.⁸⁶ Most bioweapons use by non-state groups has been by entities falling within this classification.⁸⁷ Some evidence exists that current groups within this category are attempting to acquire or develop bioweapons.⁸⁸ While previous attempts have proved largely ineffective, new delivery techniques such as suicide human vectors⁸⁹ may get around many previous problems with delivery mechanisms. However, such weapons would likely be limited to common agents due to the difficulty of acquiring and developing exotic agents or smallpox.

The third group, disgruntled loners, represents a threat of bioweapons, but not of widespread usage. Past incidents have involved lone actors using resources obtained from their employment.⁹⁰ While some experts feel that such lone actors represent the biggest threat of future terrorism,⁹¹ the examples of past usage seem to indicate a narrower threat. Such actors are constrained by their access to biological materials. While they may have access to exotic agents, they do not have sophisticated

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. See Kellman, Review Essay, *supra* note 79, at 435.

86. See, e.g., Hearings, *supra* note 3 (testimony of Jerrold Post, political psychiatrist and psychologist who interviews terrorists).

87. For a review of bioweapon use by non-state actors, see discussion *supra* Part II.B.2.

88. See, e.g., Englund, *supra* note 61, at 8A (examining unconfirmed reports that bin Laden got anthrax from Czech Republic or North Korea); Kenya, A Weapon of Choice in Biological Warfare, *AFR. NEWS*, Oct. 19, 2001 [hereinafter Kenya] (reporting that members of Egyptian Islamic Jihad claimed to have bioweapons in 1999).

89. "Suicide human vector" refers to deliberately infecting human agents with a contagious disease, and then instructing the agent to try to infect as many people as possible through casual contact. Infected agents would visit crowded enclosed areas, such as shopping malls or movie theaters, and try to infect others. The Japanese used such techniques in a battlefield setting with some success in Manchuria. Keefer, *supra* note 13, at 114.

90. See discussion *supra* Part II.B.2.

91. E.g., Kellman, Review Essay, *supra* note 79, at 435.

equipment or developmental capabilities beyond acquiring those agents that could easily be acquired. While the recent anthrax attacks may represent the potential reach of such a lone actor,⁹² they would involve single, unsophisticated agents and limited delivery mechanisms. If laboratories exist, which work on smallpox or sophisticated exotic agents, there would also be a risk that these agents may be used by a disgruntled employee. However, the risk is small because such laboratories would likely have significant oversight and surveillance.

Non-state actors are limited in the types of agents they could utilize as bioweapons. Common agents such as anthrax or plague could easily be acquired from natural sources.⁹³ Defunct weapons testing sites such as Vozrozhdeniya Island in the Aral Sea could also be a potential source of a wider range of agents.⁹⁴ Exotic agents such as hemorrhagic fevers would likely be too difficult to acquire and to culture for non-state actors to possess.⁹⁵ Smallpox could probably not be acquired, absent transfer from a state, which is not likely due to the extreme political repercussions that would follow if such a transfer were discovered.

C. The Current Threat

Non-state religious terrorists are the greatest threat because they are the actors most likely to use bioweapons in an attempt to cause widespread harm. They have demonstrated the desire to acquire and to deploy such weapons, although their attempts to actually use such weapons have been limited to common agents and have not caused widespread harm so far. State actors have much more sophisticated weaponry, including exotic agents and smallpox, which would be effective in causing casualties if deployed. While states themselves are unlikely to actually use such weapons, the development of such agents raises the fear that religious terrorists may acquire the agents.⁹⁶ The existence of extreme religious terrorist groups with close ties to states also raises the possibility of such transfers. Therefore, the existence of state programs raises the

92. See, e.g., FBI, *supra* note 4 (hypothesizing that a loner actor is responsible for the recent anthrax attacks).

93. See discussion *supra* Part II.A.1.

94. See Orent, *supra* note 42, at 18 (noting that the island has been inundated with many different weaponized agents).

95. See Kellman, *Biological Terrorism*, *supra* note 7, at 440.

96. Either accidentally, such as from old testing sites, or intentionally, such as reported for bin Laden acquiring anthrax. In a dying declaration, King Hussein of Jordan warned of smallpox being reintroduced into the world. 60 Minutes, *supra* note 28.

threat of bioweapons, although it may be non-state actors who are actually employing them.

It is crucial to stop the proliferation of these weapons because medical and public health response would not likely be able to prevent widespread harm. Public health surveillance may be inadequate to detect bioweapons events early enough,⁹⁷ and potential treatments may not be effective,⁹⁸ or available, in sufficient quantities to respond to threats. Recent simulations of infectious bioweapon releases have predicted catastrophic consequences.⁹⁹ Therefore, all steps must be taken to ensure that the threat of bioweapons is adequately controlled.

III. THREAT RESPONSES

Four types of responses to the threat of bioweapons have been used or proposed. The first is an international agreement, such as the BWC. The second is an inspection regime. The third is restrictions on the materials necessary to develop and use bioweapons. The final option is criminalization of bioweapons.

A. The 1972 Bioweapons Convention

“The [Biological Weapons Convention] needs enforcement teeth if we are to have confidence it is being respected around the world.”

- 1998 Statement by Madeline Albright, United States Ambassador to the United Nations.¹⁰⁰

97. See Debora MacKenzie, Under Surveillance, *NEW SCIENTIST*, Apr. 8, 2000, at 1616 [hereinafter MacKenzie, Under Surveillance] (discussing the probable inadequacy of a public health response to a biological attack).

98. See Hillel W. Cohen et al., Bioterrorism “Preparedness”: Dual Use or Poor Excuse?, 115 *PUB. HEALTHREP.* 403, 404 (2000) (noting that the anthrax vaccine has never been proven effective against weaponized forms); Kelly Morris, US Military Face Punishment for Refusing Anthrax Vaccine, *THE LANCET*, Jan 9, 1999, at 130 (noting that some experts doubt vaccine’s efficiency); Nass, *supra* note 11, at 492 (reporting that the only manufacturer of the anthrax vaccine received 11-pages of quality control failures from FDA inspectors).

99. A recent two-day simulation at Andrews Air Force Base started with twenty-four smallpox cases in the United States and ended two weeks later with the vaccine supply exhausted, 15,000 infections, 1,000 deaths, and a 10-fold increase in infections expected every two weeks. Another simulation starting with 100 cases in a United States city led to a worldwide catastrophe within 1 year. See Brownlee, *supra* note 31, W08.

100. Helen Gavaghan, Arms Control Enters the Biology Lab, *SCIENCE*, July 3, 1998, at 29.

“[There is] broad agreement that more work needs to be done to examine measures to strengthen the Biological Weapons Convention...”

- 2001 Statement by Philip Reeker,
State Department Spokesman.¹⁰¹

The 1972 Bioweapons Convention (“BWC”) has been ineffectual at stopping the proliferation of bioweapons. Although 143 nations have ratified the convention,¹⁰² many countries, including some of those who have ratified the convention, have continued to produce bioweapons.¹⁰³ The Soviet bioweapons program even experienced a rapid expansion after the 1972 convention.¹⁰⁴ Compliance with the treaty has been extremely difficult to monitor.¹⁰⁵ Additionally, such conventions have no power to deter terrorist groups that are seeking to acquire or to use such weapons.¹⁰⁶ Therefore, it is necessary to utilize measures beyond the BWC to combat the threat of bioweapons.

B. Inspections

Inspections have been proposed by many parties as a solution to the inefficacy of the BWC. First, the structure of the BWC Protocol’s inspection regime will be analyzed. Second, the costs of such an inspection program will be evaluated. Third, possible constitutional challenges to inspections will be reviewed. Fourth, the efficacy of the inspection regime will be evaluated as to different threats. Finally, a summary of the net value of inspections will be presented.

1. BWC Protocol

The recent draft proposal for an inspection regime for the BWC included both random transparency visits and challenge visits.¹⁰⁷ Similar to the Chemical Weapons Convention (“CWC”), the Protocol

101. Philip Reeker Holds State Department Briefing, FDCH POL. TRANSCRIPTS, July 23, 2001 [hereinafter Briefing].

102. See Kenya, *supra* note 88 (stating 17 other nations have signed the BWC, but have not yet ratified it).

103. See discussion *supra* Part II.B.3.

104. See Russia Could Reactivate Biological Weapons in Months, AGENCE FR. PRESSE, Apr. 6, 1999, at 1999 WL 2577987.

105. See Matthew Linkie, The Defense Threat Reduction Agency: A note on the United States’ Approach to the threat of Chemical and Biological Warfare, 16 J. CONTEMP. HEALTH L. & POL’Y 531, 533 (2000).

106. See *id.* at 552.

107. See Bioweapons, *supra* note 2. For the text of the Protocol, see <http://www.un.org/Depts/dda/WMD/bwc/index.html> (last visited Feb. 13, 2003).

would create three bodies: a general Conference of State Parties, an Executive Council to make decisions regarding compliance, and a Technical Body to conduct inspections.¹⁰⁸ Members could request challenge inspections for both state and non-state facilities as well as field-testing for suspected releases.¹⁰⁹ A member being investigated would have the right to limit access to sensitive areas unrelated to the claim of non-compliance.¹¹⁰

2. Costs of Inspections

“I’m not sure that anyone can guarantee confidentiality.”

- Helmut Bachmayer, Head of
Corporate Biosafety for Novartis.¹¹¹

“[I]f I come to a new facility or any facility and see some equipment . . . it says absolutely nothing to me”

- Ken Alibek, former Deputy Head of the Soviet bioweapons program, testifying before Congress on the lack of threat to proprietary information.¹¹²

The Bush administration and industry groups have identified a number of concerns over the proposed inspection regime. The major concerns are threats to intellectual property and threats to national security.¹¹³ Although the industry concerns are legitimate, especially in light of the potential scope of inspections,¹¹⁴ experience with the CWC and the views of industry representatives have indicated that many of these threats could be adequately minimized

108. See Keefer, *supra* note 13, at 132-133.

109. See *id.* at 136.

110. See *id.*

111. Gavaghan, *supra* note 100, at 29.

112. Hearings, *supra* note 3.

113. See, e.g., Glenda Cooper, U.S. Rejects Biological Arms Ban Protocol, WASH. POST, July 26, 2001, at A01 (stating that almost all of the 55 nations party to the draft negotiations supported the proposal); Lynn C. Klotz, Means for Protecting U.S. Industry Within an Effective Compliance Regime for the Biological Weapons Convention, 12 DEPAUL BUS. L.J. 329, 331 (2000). Other nations, including China and India, have expressed concerns over inspection regimes. See Debora MacKenzie, Biowar Checks Hang in the Balance, NEW SCIENTIST, Nov. 23, 1996, at 1111 [hereinafter MacKenzie, Biowar].

114. See Gavaghan, *supra* note 100, at 29 (predicting hundreds of facilities would come within scope of inspection criteria); Caroline Linton, Boston Labs: Anthrax Secure, U-WIRE, Oct. 30, 2001, at *1-2 (noting that many labs in the Boston area work with some form of anthrax); Cooper, *supra* note 113, at A01 (stating that approximately 40% of the world’s biotech firms are located within the United States). Other estimates are that there are approximately 250 university labs and 300 private labs in the United States that work on restricted pathogens and would, therefore, be subject to inspection. Panel II, *supra* note 74.

with an effective inspection regime.¹¹⁵ The threat to national security could also be minimized through restrictions on the scope of inspections.

Intellectual Property: There are two types of information that it is feared may be compromised: proprietary microorganisms and other confidential information.¹¹⁶ In the biotech industry, the microorganism itself is often the most valuable asset.¹¹⁷ Because only a miniscule amount of microorganism would need to be taken to steal the technology, there is an added threat that does not exist under the CWC.¹¹⁸ However, it may be possible to limit the risk of such a theft. Inspectors could be required to use non-viable testing only, which would mean that live organisms would never leave the facility and could not be stolen.¹¹⁹ The limited immunities within the current Protocol also allow for inspectors and other employees to be held civilly liable for theft of confidential information or proprietary microorganisms.¹²⁰

As compared to chemical plants, biotech facilities would reveal as much useful information.¹²¹ Unlike the chemical industry, where complex processing is often the crucial technology, the biotech industry revolves around microscopic phenomena that are not easily revealed. Many industry representatives have even expressed their acceptance of proposed inspection regimes.¹²² While there is some uncertainty, it

115. The BWC has not had a single accusation of theft of proprietary information after almost 50 years of inspections. LA Times Urges Administration Support for Bioweapons Treaty, BULLETIN'S FRONTRUNNER, Nov. 5, 2001.

116. See Klotz, *supra* note 113, at 338.

117. See *id.*

118. See *id.*

119. See *id.*

120. See Keefer, *supra* note 13, at 132-33.

121. See Hearings, *supra* note 3 (testimony of Dr. Kenneth Alibek, former deputy head of Biopreparat, the Soviet Union's bioweapons program, and President of Advanced Biosystems, Inc., stating that merely having inspectors within a biotech facility would not reveal any proprietary information).

122. E.g., Klotz, *supra* note 113, at 342 (author is a consultant to biotech industry); Marketplace Health Desk (Nat'l Public Radio, Nov. 5, 2001), audio available at http://marketplace.org/features/health_desk/ [hereinafter Marketplace] (citing Barbara Hatch Rosenberg, head of the Federation of American Scientists, as saying inspections could protect

appears that an inspection regime could include enough safeguards to satisfy the biotech industry's concerns regarding proprietary information.

rejection of the proposed inspection regime is primarily out of National Security. The Bush administration has fear of a threat to national security.¹²³ Potential threats include harassment of government labs through excessive and disruptive challenge visits,¹²⁴ undermining technology export regulations,¹²⁵ and compromising defensive research into bioweapons.¹²⁶ While these threats are legitimate concerns, it may be possible to design the inspection Protocol to protect against them. Exportation of technology could be prohibited by restricting testing to on-site or non-viable mechanisms. The effect on government research could be avoided through the use of a right to refuse inspections, such as that included in the CWC,¹²⁷ or the right to limit the scope of inspections as set forth in the draft Protocol.

While there are legitimate threats from an inspection regime, it appears likely that such threats could be dealt with in designing the protocol for inspections. Industry groups have shown a willingness to accept inspections, and the chemical industry has submitted to inspections without incident for many years. Government security concerns could also be dealt with, if necessary, by reserving the right to deny access to inspectors. Unless the United States is protecting a clandestine bioweapons program of its own, the inspections should not present a serious problem.

proprietary strains and information).

123. See Cooper, *supra* note 113, A01 (quoting United States negotiator Donald A. Mahley: "In our assessment, the draft protocol would put national security and confidential business information at risk").

124. See *id.*

125. See *id.*

126. See *Inspect and Survive*, *NEW SCIENTIST*, Nov. 3, 2001, at 33 [hereinafter *Inspect and Survive*].

127. See Michael P. Scharf, *Clear and Present Danger: Enforcing the International Ban on Biological and Chemical Weapons Through Sanctions, Use of Force, and Criminalization*, 20 *MICH. J. INT'L L.* 477, 485 (1999).

3. Constitutional Issues of Inspections

The use of an inspection regime may implicate the Fourth Amendment.¹²⁸ Similar constitutional issues exist under the CWC, since the CWC authorizes the federal government to inspect chemical facilities without a search warrant.¹²⁹ While under the BWC, international inspectors would be carrying out the inspection rather than federal agents, however, they would likely be judged as “state actors.”¹³⁰ Therefore, rights under the Fourth Amendment would be implicated.

While challenge visits would have to be authorized by the Executive Council under the current Protocol, this would unlikely satisfy the warrant requirement due to the Council’s inability to be neutral and detached. The Council would have the responsibility to ensure compliance with the BWC, and therefore, it may be viewed as an executive body.¹³¹ However, these searches may be constitutional under the “Special Needs” exception to the warrant requirement.¹³² If the primary purpose of the inspection is not a criminal investigation, the courts will balance the nature of: 1) the privacy interest at stake; 2) the intrusion; and 3) the government’s interest.¹³³

The Supreme Court has broadly applied the “special needs” doctrine¹³⁴ and would likely apply it here, due to the threat that bioweapons pose to both public health and national security. Because the potential harm from bioweapons is uniquely devastating, courts would likely find a “special need.” The privacy at stake is the same as those of factories and laboratories, as opposed to individuals; thus, courts would not likely attach much weight to the privacy interest or the intrusion. Courts would further recognize that biotechnology is a heavily-regulated industry, and therefore should not expect a great deal of privacy.¹³⁵ In

128. “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause.” U.S. CONST. amend. IV.

129. See Linkie, *supra* note 105, at 562 (discussing the constitutional implications of such searches).

130. See Debbie Ryan Bing-Zaremba, Knock, Knock, Who’s There? Can Chemical Weapons Inspectors Enter U.S. Facilities Without a Search Warrant?, 11 TEMP. INT’L & COMP. L.J. 57, 66-67 (1997).

131. For a detailed analysis of this issue, see *id.* at 69-71.

132. See Kellman, Biological Terrorism, *supra* note 7, at 478-79.

133. *Id.* at 479.

134. See, e.g., Griffin v. Wisconsin, 483 U.S. 868, 875 (1987) (recognizing the role of probation officers for the government’s interest in rehabilitation); Camara v. Mun. Ct. of San Francisco, 387 U.S. 523, 535-36 (1967) (recognizing the government’s interest in housing inspections).

135. See, e.g., Skinner v. Ry. Labor Executives’ Ass’n, 489 U.S. 602 (1989) (reasoning that

addition, courts have given broad discretion to government decisions that involve national security¹³⁶ and international relations.¹³⁷ For all of these reasons, it would be very likely that courts would find the proposed inspection regime constitutional.

4. Efficacy of Inspections

Even if the costs of inspections can be minimized, they may not provide a powerful tool in the fight against bioweapons. Part of the attractiveness of the CWC was the ability to inspect alleged violators' chemical weapons.¹³⁸ Large, complex, and immobile facilities are needed to produce substantial quantities of chemical agents. However, with biotechnology, small-scale production could easily be hidden with one or two weeks notice of an impending inspection.¹³⁹ One of the Bush administration's biggest criticisms of the proposed inspection regime is that it would be possible to circumvent detection.¹⁴⁰ States may be able to delay inspections long enough to destroy any evidence of violations. The experience of United Nations inspectors in Iraq demonstrates the difficulty in detecting a bioweapons program.¹⁴¹ Inspections would not be able to reach non-state actors if their facilities were not large enough or visible enough to be subject to an inspection regime.

While not foolproof, inspection regimes may still deter or retard the development of bioweapons. Developing exotic agents may require the type of facilities that would fall under the inspection regime. Even if inspections could not stop a state from pursuing a program, they may significantly raise the cost of conducting research and thereby deter such research.¹⁴² One of the motivations for state bioweapons research is the fear that the United States possesses such weapons.¹⁴³ Greater transparency may reduce this motivation and discourage countries from seeking bioweapons.

because the train industry is heavily regulated, it should not expect or receive great privacy protection).

136. E.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (giving very broad deference to decision to inter Japanese-Americans due to national security concerns).

137. E.g., *State v. Holland*, 252 U.S. 416 (1920) (holding that Congress can pass laws pursuant to the treaty power that would be unconstitutional if passed for solely domestic reasons).

138. See Bing-Zaremba, *supra* note 130, at 61.

139. Hearings, *supra* note 3 (testimony of Dr. Alibek).

140. See Bill Nichols, U.S., Europeans resume talks on bioweapons, *USA TODAY*, Oct. 23, 2001, at 4A.

141. See JUDITH MILLER ET AL., *supra* note 64, at 98-150 (detailing the experience of the United States and the United Nations with Iraq's biological weapons program).

142. See Kellman, *Catastrophic Terrorism*, *supra* note 48, at 553; Cohen et al., *supra* note 98, at 404.

143. See Kellman, *Catastrophic Terrorism*, *supra* note 48, at 553.

Even if non-state actors are the largest threat, they may disguise their efforts behind legitimate fronts that would be reached by the inspections.¹⁴⁴ Additionally, curtailing state-based programs would reduce the risk of accidental or intentional transfer of technology or agents to non-state actors. Therefore, inspections may help combat both state and non-state actors from developing or acquiring bioweapons.

5. Conclusion

The potential costs of inspection regimes could likely be avoided by building in adequate safeguards, such as non-viable testing to prohibit theft of microorganisms, by limiting the scope of inspections to specific challenges, and by refusing inspections in order to protect national security interests. Although inspections would not eliminate the threat of bioweapons, it may discourage state actors from pursuing programs and hinder non-state actors in their efforts. While not completely effective, the benefits of inspections appear to outweigh the costs of such a system.

C. Restrictions on Equipment

One of the alternatives that the Bush administration has proposed is expansion and strengthening of the Australia Group, a group of approximately thirty nations formed in 1985 that restricts the sale and export of the high-tech equipment needed to develop weapons of mass destruction.¹⁴⁵ This section will first analyze restrictions on seed cultures for bioweapon agents. Second, this section will review restrictions on the equipment needed to culture and weaponize such agents. Finally, it will summarize the ability of such restrictions to combat the development of bioweapons.

1. Restrictions on Seed Cultures

If the goal is to restrict the use of biological agents as weapons, it may seem valuable to restrict access to such biological agents. For example, U.S. regulations require registrations for transfers of biological materials.¹⁴⁶ Sales from domestic firms to foreign governments and foreign individuals require the approval of the Commerce Department.¹⁴⁷ The biotech industry supports such

144. Such large facilities might be necessary to develop exotic agents. See discussion *supra* Part II.A.2.

145. See Cooper, *supra* note 113, at A01 (describing the Australia Group).

146. See Heather A. Dagen, Comment, Bioterrorism: Perfectly Legal, 49 *CATH. U. L. REV.* 535, 565 (2000).

147. See Eric Nadler & Robert Windrem, *Deadly Contagion: How We Helped Iraq Get Germ*

restrictions of sales.¹⁴⁸ If the microorganisms themselves could be restricted, it would be impossible for state or non-state actors to develop bioweapons.

However, lax restrictions on sales and natural availability of common agents have made restrictions on microorganisms inadequate to combat the threat of bioweapons. It is possible for almost any individual to order cultures through the mail.¹⁴⁹ Although public backlash after reports of a neo-nazi ordering plague resulted in supposedly stricter regulations on sales,¹⁵⁰ it is still possible to acquire many live agents.¹⁵¹ Even with government approval as a requirement to approve shipments abroad, vast numbers of dangerous organisms have been sold to governments that are now working on bioweapons.¹⁵² Outside the United States, there are also many sources for these agents, whether from previous weapons testing¹⁵³ or from foreign firms.¹⁵⁴ Many biological agents have already been marketed to enough parties, and have continued to be marketed so broadly that restrictions on the agents themselves would be ineffectual in the short-run. For some exotic agents and smallpox, however, restrictions on cultures may be important for preventing the development of future weapons.

2. Restrictions on Weaponizing Equipment

Because of the ease of acquiring biological agents, the Australia Group has focused on restricting access to the equipment that would be needed to weaponize the agents.¹⁵⁵ Such equipment is necessary

Weapons, *THE NEW REPUBLIC*, Feb. 4, 1991, at 18-20.

148. See Panel II, *supra* note 74 (testifying that the American Society of Microbiologists supports registration requirements).

149. “[C]ommercial firms offer cultures for a few dollars, and they rarely check whether those placing an order are acquiring it for a legitimate use.” Kellman, *Review Essay*, *supra* note 79, at 436.

150. Kellman, *Biological Terrorism*, *supra* note 7, at 451-453 (noting that the CDC now requires establishment licenses for certain facilities, product licenses to sell microbes, and requires that sales and transfers be registered with the CDC).

151. Kellman, *Review Essay*, *supra* note 79, at 436.

152. In the 1980’s, the CDC shipped deadly viruses such as West Nile encephalitis to Iraq, Cuba, Soviet Union, and China, and over 130,000 cultures of various organisms are still sold by the firm each year to foreign nations. Nadler & Windrem, *supra* note 147, at 18-20. From 1985 to 1989, the private firm American Type Culture Collection sold 21 strains of anthrax to Iraq, with all of the sales approved by the Commerce Department. Tell, *supra* note 7, at 29.

153. Samples of plague, tularemia, glanders, and anthrax still contaminate Vozrozhdeniye Island, available to anyone with the minimal protection of mask and gloves. See Hearings, *supra* note 3 (testimony of Dr. Alibek).

154. Russian scientists are currently marketing antibiotic resistant tularemia from Obolensk, Moscow, and Vienna. Orent, *supra* note 42, at 18. There are over 1,500 repositories worldwide that sell various strains of microorganisms. *Inspect and Survive*, *supra* note 126, at 33.

155. For example, the Australia Group regulates the sale of fermenters, containment

for actors trying to produce bioweapons.¹⁵⁶ Therefore, it might be more effective to regulate sales of such equipment than to try to regulate acquisition of the agents themselves.

However, restrictions on the sales of this equipment have also proved ineffective so far at preventing the spread of the machinery and technology. Both lax enforcement of sales restrictions and the dual-use nature of much of this equipment has complicated these efforts. The type of milling equipment necessary to weaponize anthrax is freely available on the open market for less than the price of an automobile.¹⁵⁷ In a recent survey, ten out of nineteen countries evaluated received failing grades for treaty-required regulation of biotech equipment.¹⁵⁸ Russia was recently exposed for planning to sell 50,000-liter fermenters to Iraq.¹⁵⁹ While sales of such equipment might represent a more effective way to inhibit the development of bioweapons than restricting the agents themselves, the Australia Group has so far failed to restrict such sales enough for the measures to be effective.

3. Conclusions

It is possible that regulating the sale and transfer of biological agents and biotech equipment could combat the development of bioweapons. Many exotic agents are difficult or impossible to acquire from natural sources. While some nation-states may be able to work around such barriers, non-state groups could be hampered by such restraints. However, regulatory regimes for both biological agents and equipment have failed so far. Stringent regulation may be a valuable tool for the future, but it has not been sufficient to combat the present threat of bioweapons.

D. Criminalization

In response to international criticism of the Bush administration's rejection of the inspection protocol for the BWC, it proposed requiring members of the BWC to criminalize the use of

facilities, centrifuges, freeze drying equipment, and aerosol inhalation chambers. Kellman, *Biological Terrorism*, supra note 7, at 458-59.

156. Because anthrax is ubiquitous, the prohibitive step in creating a bioweapon is aerosolization, which would involve milling the particles to the proper size and eliminating electrostatic charges between particles. Panel II, supra note 74. However, smallpox is one of the few agents that can cause catastrophic damage without sophisticated engineering or delivery. See discussion supra Part II.A.3.

157. Tell, supra note 7, at 29.

158. Charles Seabrook, *Much of World Lax on Bioweapons*, COX NEWS SERV., Oct. 25, 2001 (noting failing marks for China and many former Soviet republics).

159. Englund, supra note 61, at 8A (reporting that Russia cancelled the transfer after the sale was exposed).

bioweapons within their borders rather than to submit to international inspections.¹⁶⁰ This was based on the assessment that non-state actors pose the real threat of bioweapons and was thought as the best way to get to such groups. The CWC, when confronted with similar threats as the BWC, has also included criminalization requirements.¹⁶¹ In assessing the value of criminalization, this section will analyze both current and proposed criminal sanctions. It will evaluate their effectiveness at deterring bioweapons development and preventing the use of such weapons.

1. Current Criminal Laws

United States law currently prohibits the use and possession of bioweapons and carries sanctions of imprisonment in addition to the death penalty.¹⁶² However, there are many problems with these laws. The most important problem is that the laws are ineffective at criminalizing behavior that takes place before the use of bioweapons in an attack.¹⁶³ If a person is caught before using bioweapons, then it would be virtually impossible to convict under these laws.¹⁶⁴ For example, neo-nazi Larry Wayne Harris received only six months probation for mail fraud in connection with his mail ordering of plague.¹⁶⁵ When considering the potential irreparable harm associated with a bioweapons attack, it seems ineffectual for criminal sanctions to only apply after such attacks.¹⁶⁶ It is likely that the current United States laws would do little to deter the development of bioweapons. Given the philosophies of groups likely

160. See Bill Nichols, U.S., Europeans Resume Talks on Bioweapons, USA TODAY, Oct. 23, 2001, at 4A.

161. See Kellman, Catastrophic Terrorism, *supra* note 48, at 549.

162. See 18 U.S.C. §§ 175-178 (2002) (criminalizing known possession or development of a biological agent for use as a weapon); Linkie, *supra* note 105, at 543 (discussing the criminal laws).

163. See Kellman, Catastrophic Terrorism, *supra* note 48, at 551 (discussing the limitations of the requirement that the biological agents be "for use as a weapon").

164. See Kellman, Biological Terrorism, *supra* note 7, at 466 (noting that possession of any biological agent without a license would be legal unless the government is able to prove intent to use the agent as a weapon); but see *United States v. Baker*, 98 F.3d 330, 338-39 (8th Cir. 1996) (upholding a conviction under 18 U.S.C. § 175 for actions by defendant prior to an actual attack with ricin).

165. Harris avoided charges under 18 U.S.C. § 175 by claiming he was ordering the plague to conduct defensive research. See Kellman, Biological Terrorism, *supra* note 7, at 449. 18 U.S.C. § 175(b) (1994) excludes from criminality possession or development of agents for "prophylactic, protective, bona fide research, or other peaceful purpose[s]."

166. President Bush's proposal of expanding the United Nations' ability to investigate suspected bioweapons attacks is likewise nonsensical given the potential damage of a bioweapons attack and the need to take preventative measures. James Gerstenzang, Tougher Bioweapons Ban Asked; Bush Urges 1972 Pact Be Bolstered in Face of Threat, CHI. TRIB., Nov. 2, 2001, at 14 (stating President Bush's proposal).

to actually use bioweapons, it would also do nothing to deter the use of such weapons. Even if other states were to accept President Bush's proposal and institute criminal laws in their own territories, there is no reason to believe that enforcement would be any more effective than it is in the United States. In addition, no impact would be made on a state's bioweapons program.

2. Expanded Criminal Laws

Senator Diane Feinstein has proposed to extend United States law to criminalize the possession of certain biological agents.¹⁶⁷ While the biotech industry has expressed some reservations over the potential scope of such laws, it may be possible to define the criminal conduct without infringing upon legitimate research. This would close the loophole in the current United States laws, and may allow federal authorities to take action against non-state actors that represent a bioweapons threat within the United States. However, even if this approach were applied abroad, pursuant to President Bush's proposal, it would still be subject to potentially ineffectual enforcement (intentional or otherwise) by foreign nations and an inability to reach state-based bioweapons programs.

A separate proposal for using criminalization, advocated by the Harvard Sussex Group,¹⁶⁸ is to push for international acceptance of characterizing involvement with bioweapons as a "universal crime."¹⁶⁹ In addition to requiring other nations to criminalize bioweapons, by bringing in any advantage such an approach may afford, it would create many procedural benefits which would allow the United States to combat bioweapons on a worldwide basis.¹⁷⁰ Such an approach may also encourage acceptance of unilateral action in response to a bioweapons threat. This could even allow the United States to target state actors that are pursuing bioweapons. Recent efforts by the United Nations in other areas have shown that this kind of approach could succeed.¹⁷¹ Despite these potential advantages, the Bush administration has explicitly clarified that its proposed criminalization is not for "universal jurisdiction."¹⁷²

167. Dagen, *supra* note 146, at 562.

168. See Scharf, *supra* note 127, at 506-508 (giving background on the Harvard Sussex Program and explaining its plan).

169. See Cecil Hunt, *The Potential Contribution of the Chemical Weapons Convention to Combating Terrorism*, 20 MICH. J. INT'L L. 523, 531-33 (1999) (discussing the adoption of air piracy and hostage taking as universal crimes).

170. *Id.* Benefits include easier extradition, international assistance with enforcement, universal jurisdiction, and renditions.

171. See Kellman, *Catastrophic Terrorism*, *supra* note 48, at 555-56 (discussing the United Nations recent decision to make the bombing of public buildings an international crime).

172. Editorial, *Germ War Treaty Redux*, BOSTON GLOBE, Nov. 6, 2001, at A14.

3. Conclusion

Criminalization might be able to reach non-state actors who could avoid an inspection regime. However, the current United States laws have proved ineffective for deterring development or use of bioweapons. Bush's proposal to extend United States-type laws to other nations would likewise be ineffective at reaching non-state actors, and would do nothing to target state bioweapons programs. To make the United States laws effective, they would have to extend to activities prior to the actual use of a bioweapon. However, such laws would still be ineffective internationally because of the potential for ineffective enforcement. Making the use, development, or possession of bioweapons a universal crime would combine any advantages of President Bush's plan with the added ability of the United States to use criminal enforcement against foreign non-state actors and possibly to justify the use of unilateral actions against state actors.

IV. PROPOSALS

"[I]t is not now a question of whether [enforcement measures will be added], but of when and how."

- Tibor Toth, chair of the Geneva talks
on reforming the BWC.¹⁷³

"[There is] broad agreement that more work needs to be done to examine measures to strengthen the Biological Weapons Convention."

- Philip Reeker, State Department spokesperson.¹⁷⁴

A universal agreement in the international community almost exists, so action needs to be taken in order for the BWC to be effective in preventing the development and use of bioweapons. This section will analyze the various proposals that have been advanced. The proposals will be analyzed as to their efficacy in combating the threat of bioweapons from both state and non-state actors.

173. Gavaghan, *supra* note 100, at 29.

174. Briefing, *supra* note 101, at 4.

A. BWC Protocol

“[T]he draft protocol would put national security and confidential business information at risk.”

- Donald A. Mahley, United States negotiator
to the BWC Ad Hoc Group.¹⁷⁵

The BWC Ad Hoc Group recently presented its draft protocol for an enforcement mechanism for the BWC.¹⁷⁶ Although almost all of the nations that had participated in the negotiations supported the protocol,¹⁷⁷ including the United States' allies in Europe and Asia,¹⁷⁸ the United States completely rejected the proposed protocol, claiming it would be ineffective and unduly intrusive.¹⁷⁹ The central feature of the draft protocol was an inspection regime modeled largely on that used by the CWC.

The criticism, which came almost exclusively from the United States, was based upon a perceived threat to industry, a threat to national security, and ineffectualness. Although the Bush administration has denied that it is opposing the measure solely due to its multilateralism,¹⁸⁰ its declared reasons are largely refuted by an analysis of the proposal. Industry has voiced acceptance of an international inspection regime in addition to the similar CWC inspection regime, which has been shown as not threatening proprietary information.¹⁸¹ Threats to the security of national labs could be likely dealt with by the right to limit the scope of inspections and the right to refuse inspections, similar to those in the CWC. Threats to export controls are a minimal threat if testing is limited to non-viable means. It should not be a major factor when considering the general failure of other more important export controls at regulating trade in either microorganisms or the sophisticated equipment needed to weaponize such agents. Therefore, many of the fears raised by the Bush administration and

175. Cooper, *supra* note 113, A01.

176. The text of the draft protocol and other releases from the Ad Hoc Group are available on-line, at <http://disarmament.un.org/wmd/bwc/index.html> (last visited Feb. 17, 2003).

177. Cooper, *supra* note 113, at A01.

178. Washington Confirms It Will Not Back Germ Warfare Pact Enforcement Draft, *AGENCE FRANCE PRESSE*, July 23, 2001.

179. See Kralev, *supra* note 63, at A01. The protocol has effectively been abandoned because of the United States' response. *A Biological Imperative*, *LOS ANGELES TIMES*, Nov. 5, 2001, at 10; see Gertstenzang, *supra* note 166.

180. See State Department Regular Briefing, *FED. NEWS SERV.*, July 25, 2001; Briefing, *supra* note 101.

181. See discussion *supra* Part III.B.2. Barbara Hatch Rosenberg, the head of the FAS, has said that proprietary information could be completely protected. *Marketplace*, *supra* note 122.

industry groups can be adequately addressed by the structure of the regime.

The lack of efficacy of the draft protocol is a serious issue. Unless vigorous and unannounced inspections are included, it is likely that state programs could avoid detection, although they might be harassed by inspections. Non-state actors might be detectable, but only to the extent that they use legitimate covers or other operations that would be subject to inspection. This might reach the complex operations necessary to develop exotic agents but would likely not reach the small-scale facilities needed for common agents or smallpox. However, acceptance of the protocol would probably not harm the United States, and it might deter the development of bioweapons on balance. Therefore, the protocol has the potential to help combat the threat of bioweapons, and does not appear to likely cause any great harm.

B. Bush Proposal

“Ironically . . . Bush this summer renounced long-standing calls for the creation of such a mechanism for bioweapons.”

- Andrew Jack, *Extent of Russian Bioweapons Programme Generates Fear*, *Fin. Times* (London), Oct. 26, 2001.

“[It is] ironical [sic] that partially U.S. has been responsible [for blocking enforcement mechanisms].”

- *Bioweapons: a Potential Threat of Mass Destruction*, *THE HINDU* (India), Oct. 23, 2001, at 2001 WL 28477849.

“Efforts to build a tough verification protocol to the 1972 BWC have been blocked for years, ironically, by the US.”

- Richard Ingham, *Miracle of Biotech Could Also Breed a Monster*, *AGENCE FR. PRESSE*, Oct. 23, 2001.

Three months after rejecting the draft protocol, and in the wake of anthrax attacks on United States soil, the Bush administration proposed an alternative to the BWC protocol.¹⁸² The heart of the

182. The Bush administration has denied that its proposal was motivated by the recent anthrax attacks, claiming it always intended to propose an alternative. Nichols, *supra* note

Bush proposal is for all countries to criminalize the use, production, importation, and exportation of bioweapons.¹⁸³ President Bush has also advocated expansion of the ability of the United Nations to investigate suspected bioweapons attacks and to develop an ethical code of conduct for biological scientists.¹⁸⁴ As the analysis above indicates, these measures would have little effect on the development or use of bioweapons by either state or non-state actors. Despite repeated requests by Congressional committees, the administration's representative to the BWC negotiations has refused to provide the reasons for the administration's rejection of the protocol or advocacy for its proposals.¹⁸⁵ It appears that the Bush proposal would not greatly aid the fight against bioweapons.

In addition to not helping the efforts to discourage bioweapons, the Bush administration's proposals may actually hurt such efforts by preventing transparency. Many scientists working for the Soviet bioweapons program felt justified in doing so, because they believed the United States was pursuing a similar program.¹⁸⁶ Such a belief continues to be an issue in the world community,¹⁸⁷ fueled by reports that the United States is pursuing offensive bioweapons programs.¹⁸⁸ The above-mentioned quotes from various foreign media sources demonstrate the surprise that the world community has experienced toward the Bush administration's position. It has frequently been attributed to either a general dislike of multilateral actions or to the desire to conceal an offensive bioweapons program. Both of these accusations hinder the ability of the United States to address the worldwide threat of bioweapons, and the latter may encourage development of such weapons by other countries. Combined with the inefficacy of the proposed actions, these reasons make the Bush approach an unviable option for combating the threat of bioweapons. History has unfortunately shown that the

140; Krlev, *supra* note 63, at A17. In fairness to the current administration, the Clinton administration also failed to identify multilateral action as a key component of responding to the threat of bioweapons. Michael McCarthy, USA Plans Major Effort to Counter Biowarfare, *THE LANCET*, May 30, 1998, at 1641 (reporting on a speech in which Clinton cited four factors for addressing the threat of bioweapons, none of which was a multilateral solution).

183. See Nichols, *supra* note 160, at 4A.

184. See Gerstenzang, *supra* note 166.

185. Hearings, *supra* note 3 (remarks of Rep. Christopher Shays, chairman of the House subcommittee on National Security, Veterans Affairs and International Relations).

186. See Miller et al., *Revelation*, *supra* note 41, at A1.

187. See Cohen, *supra* note 98.

188. See, e.g., Judith Miller et al., U.S. Germ Warfare Research Pushes Treaty Limits, *NEW YORK TIMES*, Sept. 4, 2001, at A1 [hereinafter Miller et al., *Germ Warfare*] (describing "defensive" research which includes engineering more virulent strains of anthrax and which has been characterized by many experts as a violation of the BWC).

United States often responds to biological threats only after catastrophes.¹⁸⁹

C. Harvard Sussex Plan

Although it has received much less attention than the previous two plans, the Harvard Sussex Plan¹⁹⁰ centers around a unique form of criminalization. In addition to requiring countries to adopt their own criminal laws, the plan would require acknowledgement of bioweapons crimes as universal jurisdiction offenses. This would create international law obligations not only to adopt criminal laws, but also to vigorously enforce them.¹⁹¹ Also, all covered offenses would also be extraditable, and there would be a duty to assist other nations in the enforcement of their laws.¹⁹² Universal criminality may also justify extraterritorial jurisdiction of United States enforcement efforts. In contrast to the Bush plan, this type of criminalization might actually reach non-state actors and prevent their development and use of bioweapons. Possession of bioweapon agents would be one of the included crimes, which is not covered by the Bush plan.

In addition to these benefits, the plan might encourage acceptance of unilateral actions in response to either a state actor's or non-state actor's use or development of bioweapons. Actions such as the United States' strike on the alleged weapons factory in Sudan might be seen as justified and even accepted as legitimate uses of force.¹⁹³ While such a result would not necessarily follow widespread acceptance of the Harvard Sussex Plan, acceptance of bioweapons crimes as a universal jurisdiction offense would further this argument, and there is evidence that much of the world would not be distressed by such actions.¹⁹⁴

189. Victoria V. Sutton, A Precarious "Hot Zone"- The President's Plan to Combat Bioterrorism, 164 MIL. L. REV. 135, 154 (2000) (stating that "the Biologics Act of 1906 was a response to the death of several children due to a vaccine infected with tetanus; The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 was a result of the Love Canal environmental disaster; and the Emergency Planning and Community Right-to-Know Act of 1986 was a result of the Bhopal disaster.").

190. Scharf, *supra* note 127, at 506 (stating that "[t]he Harvard Sussex Program on Chemical and Biological Warfare Armament and Arms Limitation has proposed a 'Convention on the Prevention and Punishment of the Crime of Developing, Producing, Acquiring, Stockpiling, Retaining, Transferring or Using Biological or Chemical Weapons'"). The Harvard Sussex plan has been vigorously advocated in the United States by Matthew Meselson, a Harvard University molecular geneticist. Bioweapons, *supra* note 2.

191. Scharf, *supra* note 127, at 506.

192. *Id.*

193. *Id.* at 494 (noting that a negative public reaction did not occur until evidence emerged that the factory was not involved in chemical or biological weapons, suggesting much of the world would already accept unilateral military action in the face of a bioweapons threat).

194. *Id.* at 494-95.

V. CONCLUSION

Biological weapons represent a significant threat to the security and welfare of the United States and the world in general. An estimated twelve states have existing bioweapons programs, which include weaponized forms of the most dangerous agents such as smallpox. A release of these agents, or an attack with such weapons, would lead to devastating results. However, it appears that such weapons could be used by states in a conceptually similar manner as nuclear weapons, either as a strategic asset for international diplomacy or as a deterrent against other weapons of mass destruction. History has taught harsh lessons that battlefield use of such weapons is not effective and could have dire and unforeseen effects.

Non-state actors represent a different threat than states. Other than religious terrorists, most groups would not attempt to develop or desire to use such weapons. The religious terrorist groups that have tried to acquire and weaponize biological agents have also failed to achieve the capabilities they have desired. Although a potential exists for the transfer of agents from state to non-state actors, it is likely that non-state groups would be limited in their ability to obtain agents other than the more common pathogens such as anthrax or plague. Without the sophisticated facilities to process or weaponize such agents, it is currently unlikely that such a group could cause any greater harm with biological agents than it could with conventional weapons.

Three types of solutions have been proposed in the face of these two threats. First, an inspection regime may be somewhat effective against state actors but would be less effective against non-state groups. If non-challenge visits could be performed without significant notice, it may be possible to discover or deter the use of large facilities for bioweapons development. While this may not prohibit state-based bioweapons, it would raise the costs of developing them. Even if it did not hinder state programs, it might encourage transparency and reduce the perceived needs for the development of bioweapons. An inspection regime may also reach non-state groups that were using legitimate facilities as covers for their operations. By discouraging state programs, it would also minimize the risk of transfers from states to non-state actors. Concerns over national security and confidential information being compromised by an inspection regime are overstated, and the benefits of a well-designed program should outweigh the costs.

Restrictions on equipment have failed so far to be a barrier to bioweapons development, but they may serve a role in the future. It is impossible to limit access to many of the common agents that

would be used in bioweapons because they are ubiquitous in the environment. Restrictions on the equipment needed to weaponize such agents have the potential to thwart the development of bioweapons. Many experts believe engineering issues are the prohibitive step in weaponizing biological agents. Despite the efforts of the Australia Group, sales of this type of equipment continue. Even if these restrictions were effective in combating the development of bioweapons by non-state actors, they would likely do little to inhibit a state from bringing its resources to bear on such development.

Absent universal jurisdiction, criminalization would likely do little to combat the threat of bioweapons. Current United States criminalization has proved largely ineffective, therefore little would be gained from other states' adoption of similar measures. Even if harsher measures were advocated, enforcement in other states may be ineffectual, possibly intentionally so. There is the potential for international support for the classification of bioweapons offenses as universal crimes leading to universal jurisdiction and other mechanisms for enhanced prosecution. This may allow effective criminalization of the offenses and also potentially lead to acceptance of unilateral actions in response to the threat of bioweapons.

There have been three proposed sets of actions to the threat of bioweapons. The BWC Ad Hoc Group has proposed a draft protocol for an inspection regime. Such a regime would likely discourage state-based programs, encourage transparency, and may inhibit non-state actors. The Bush administration's proposal centers around encouraging non-universal criminalization and support for the Australia Group's restrictions on sales of equipment. This would likely have little effect on state-based programs, but the restriction on equipment, if effective, may hamper non-state actors. The Harvard Sussex Program, which has advocated universal criminalization, would be more effective in reaching non-state actors than Bush's plan which also advocates for criminalization. Although it would not directly get to state-based programs, it could potentially lead to international norms against bioweapons and acceptance of unilateral actions against those who are developing bioweapons.

None of the three proposals would be wholly effective at combating the threat of bioweapons. Inspections would offer some discouragement of state-programs through fear of detection, increased costs, and decreased motivation to develop bioweapons due to transparency. Additionally, equipment restrictions and universal criminalization may inhibit non-state actors in their quest to develop effective bioweapons. The use of all three approaches—

international inspections, universal criminalization, and equipment restrictions—is necessary to seriously combat the threat of bioweapons. Therefore, the ideal response would be to combine the CWC-type inspection regime from the BWC protocol with an expanded Australia Group-type restriction on equipment and a Harvard Sussex-type universal criminalization.

The potentially catastrophic consequences of bioweapons demand a comprehensive response to this threat. Access to biological agents and equipment, detection of bioweapon facilities, and universal criminalization of possession and development of bioweapons are all needed to adequately combat the proliferation and utilization of biological weapons.

HATE SPEECH ONLINE: RESTRICTED OR PROTECTED? COMPARISON OF REGULATIONS IN THE UNITED STATES AND GERMANY

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I. INTRODUCTION

Debate on the limits of free expression is not an invention of recent years. Development of new technology, such as the Internet, has introduced some new concerns, yet the main arguments in the debate have not changed much. It is probably true that “the more technology changes, the more free speech issues remain the same.”¹

“[C]onception of the Internet as a regulation-free medium . . . [is very] appealing in principle.”² The Internet retains a number of unique characteristics: “[it] offers a [whole] range of communicative options: person-to-person, some-to-some, one-to-many, or many-to-

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1. Clay Calvert & Robert D. Richards, *New Millennium, Same Old Speech: Technology Changes, but the First Amendment Issues Don’t*, 79 B.U. L. REV. 959, 960 (1999).

2. John F. McGuire, *Note, When Speech is Heard Around the World: Internet Content Regulation in the United States and Germany*, 74 N.Y.U. L. REV. 750, 773 (1999).

many;³ it provides “globalism, anonymity and speed for any on-line activity;”⁴ and it does not have such inherent restrictions as scarcity of resources or limited accessibility. However, the reality is that the Internet is being regulated to the extent that each nation considers possible and appropriate.

In spite of many new communicative and technical options of the Internet, both the United States and Germany attempt to fit this new media into their old free speech standards. Approaches by both countries to the regulation of Internet speech reflect their usual preferences in the application of free expression doctrines. Although “both nations—built on tenets of traditional liberalism with its focus on the individual—face the legacy of massive atrocities stemming from racial prejudice: Slavery and the Holocaust,”⁵ Germany is traditionally less tolerant of hate speech as compared to standards in the United States.⁶ This attitude is demonstrated with respect to Internet speech as well.

It is widely recognized that hate propaganda harms society as a whole, and many countries outlaw hate speech in their criminal codes (such as Germany, Canada, France, the Netherlands, Austria, and Italy).⁷ The United States’ approach is strongly influenced by the First Amendment of the federal Constitution, and hate speech, being considered close to political speech, falls under its protection most of the time.⁸ One hundred sixty-five nations, including Germany, have ratified the Convention on the Elimination of All Forms of Racial Discrimination that calls “on states to ban racist activities outright. The United States has not.”⁹ The difference in

3. Chris Gosnell, *Hate Speech on the Internet: A Question of Context*, 23 *QUEEN'S L.J.* 369, 376 (1998).

4. Gabriele Schmölzer, *Strafrechtliche Aspekte zum Thema Rassismus, Neonazismus und Rechtsextremismus im Internet [Criminal Aspects for the Topic of Racism, Neo-Nazism and Right-Wing Extremism on the Internet]*, in *DAS NETZ DES HASSES: RASSISTISCHE, RECHTSEXTREME UND NEONAZISTISCHE PROPAGANDA IM INTERNET [THE NET OF HATE: RACIST, RIGHT-WING AND NEO-NAZI PROPAGANDA ON THE INTERNET]* 246, 272 (Brigitte Bailer-Galanda et al. eds., 1997).

5. Natasha L. Minsker, “I Have a Dream—Never Forget”: When Rhetoric Becomes Law, a Comparison of the Jurisprudence of Race in Germany and the United States, 14 *HARV. BLACKLETTER L.J.* 113, 113 (1998).

6. Wolfgang Terhoerst, *Selbstregulierung, Internet Content Summit: Zensur im Internet*, *COMPUTERWOCHE*, No. 37, Sept. 17, 1999, available at <http://www.computerwoche.de>.

7. See RICHARD DELGADO & JEAN STEFANCIC, *MUST WE DEFEND NAZIS?: HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT* 58 (1997).

8. See, e.g., *R.A.V. v. St. Paul*, 505 U.S. 377, 383 (1992) (protecting cross burning as political speech).

9. Credence Fogo-Schensul, *Comment, More Than a River in Egypt: Holocaust Denial, the Internet, and International Freedom of Expression Norms*, 33 *GONZ. L. REV.* 241, 247 (1997). Actually, the United States has ratified the treaty but with a number of reservations, including one for protection of the right of free speech. See Office of the United Nations Commissioner for Human Rights, *Status of Ratification of the Principal International Human*

approaches becomes particularly disturbing in the age of the Internet, as regulatory efforts of one country may be nullified by a lack of similar regulations in another country.

This article examines the controversy between the restrictions of hate speech on the Internet and the interests of freedom of expression. It describes two distinct legal approaches to Internet hate speech regulation: the pro-speech approach of the United States and the anti-hate approach of Germany, including the regulatory framework of European bodies of which Germany is a part. This article compares conceptual arguments on both sides, investigates practical advantages and shortcomings of national solutions, analyzes the necessity for international cooperation, and attempts to evaluate the probability of success of international initiatives. This article also attempts to predict the future of hate speech on the Internet, taking into consideration the implications that freedom of expression and the technological phenomenon of the Internet will inevitably produce.

II. WHY HATE SPEECH ON THE INTERNET IS SPECIAL

Obviously, hate speech on the Internet has its roots in the biases and prejudices of society that existed long before the appearance of the Internet. The Internet, however, added some new aspects.

A. Historical and Technological Overview

“The Internet is an international . . . [framework] of interconnected computers.”¹⁰ It began as a military program, ARPANET, in the sixties, and it has grown into a civilian network that enables ten million people to communicate with one another and access vast amounts of information from around the world.¹¹ The Internet offers a wide variety of communication and information retrieval methods.¹² The most popular include electronic mail, automatic list services, newsgroups, chat rooms and the World Wide Web.¹³ “Taken together, these tools constitute a unique medium [known as “cyberspace”] located in no particular geographical location but available to anyone . . . with access to the

Rights Treaties as of Dec. 9, 2002, at 9, at <http://193.194.138.190/pdf/report.pdf> (last visited Feb. 21, 2003). See also Friedrich Kübler, *How Much Freedom for Racist Speech?: Transnational Aspects of a Conflict of Human Rights*, 27 *HOFSTRA L. REV.* 335, 357 (1998) (describing additional international treaties which show consensus towards protecting speech as a fundamental human right).

10. *Reno v. ACLU*, 521 U.S. 844, 849 (1997).

11. *Id.* at 850.

12. *Id.* at 851.

13. *Id.*

Internet.”¹⁴ “Any person or organization with a computer connected to the Internet can ‘publish’ information. . . . ‘No single organization controls any membership in the Web, nor is there any single centralized point from which individual Web sites or services can be blocked from the Web.’”¹⁵

Hate activists were fast to recognize the opportunities offered by this new medium. Among the first were American neo-nazis who began to use the Internet for their propaganda in the beginning of the 1980s. They prepared guides on how to seek and contact potential members, how to attract those who were just curious, and how to increase their influence by means of the Internet.¹⁶ Soon American activists were followed by German adherents, often from outside of Germany, because in Germany most racist activities were criminalized.

B. New Opportunities

The Internet has provided unique resources for expanding hate propaganda. Its influence goes beyond text and word that were available before leaflets and brochures.¹⁷ It appears to be “a relatively cheap and highly effective tool for racist individuals or groups to spread hateful ideas to an audience of thousands, if not millions.”¹⁸ The Internet offers an opportunity to establish groups and discussion forums, easy means of communication, and makes it possible to accumulate data and reach large numbers of people, both potential followers and victims. It also supplies additional methods of attracting children and youth, such as making available hate-music and hate-games to download (for example, “Ethnic Cleansing” and “Shoot the Blacks”).¹⁹ The Internet also offers the convenience

14. *Id.* at 853 (citing *Reno v. ACLU*, 929 F. Supp 824, 838 (E.D. Pa. 1996)).

15. *Id.*

16. Martin Dietzsch & Anton Maegerle, *Rechtsextreme deutsche Homepages [Right-Wing German Homepages]*, in *DAS NETZ DES HASSES: RASSISTISCHE, RECHTSEXTREME UND NEONAZISTISCHE PROPAGANDA IM INTERNET [THE NET OF HATE: RACIST, RIGHT-WING AND NEO-NAZI PROPAGANDA ON THE INTERNET]* 47, 47 (Brigitte Bailer-Galanda et al. eds., 1997).

17. Juliane Wetzel, *Antisemitismus im Internet [Anti-Semitism on the Internet]*, in *DAS NETZ DES HASSES: RASSISTISCHE, RECHTSEXTREME UND NEONAZISTISCHE PROPAGANDA IM INTERNET [THE NET OF HATE: RACIST, RIGHT-WING AND NEO-NAZI PROPAGANDA ON THE INTERNET]* 78, 78 (Brigitte Bailer-Galanda et al. eds., 1997).

18. Commission Proposal for a Council Framework Decision on Combating Racism and Xenophobia, EUR. PARL. DOC. (COM 664 final) 9 (2001) [hereinafter Proposal], available at http://europa.eu.int/comm/employment_social/news/2002/feb/proposal_jai_664_en.pdf (last visited Feb. 21, 2003).

19. Anti-Defamation League, Press Release, ADL Report: Growing Proliferation of Racist Video Games Target Youth on The Internet (February 19, 2002), at http://www.adl.org/presrele/extremism_72/4042_72.asp (last visited Feb. 21, 2003).

of “mirror sites” whereby, even with imposed regulations, enjoined Web sites may appear again on another server.²⁰

The new opportunities of the Internet have been assessed differently in the United States and Germany. Traditionally, “[t]he United States Supreme Court has treated different types of media differently for purposes of First Amendment analysis.”²¹ In respect to the Internet, the Supreme Court recognized that the Internet has neither the history of extensive government regulation, nor the scarcity of available frequencies at its inception, nor the “invasive nature” of broadcasting, and thus “is entitled to ‘the highest protection from governmental intrusion.’”²² In Germany, however, the unique nature of the Internet does not play a big role. “Nazi propaganda is illegal . . . in Germany;”²³ consequently, there is no imposition of “new censorship, but rather enforce[ment of]existing policies on the Internet.”²⁴

C. Hate Speech on the Internet

The term “hate speech” is most often used to refer to racist and xenophobic speech, but it also applied in respect to other distinct groups and minorities. Black’s Law Dictionary defines hate speech as “speech that carries no meaning other than the expression of hatred for some group, such as a particular race, especially in circumstances where the communication is likely to provoke violence.”²⁵ Other sources characterize hate speech as “a form of expression offensive to women, ethnic and religious groups, and other discrete minorities.”²⁶ In many circumstances, hate speech communicates the message “that distinctions of race [or origin] are ones of merit, dignity, status, and personhood.”²⁷ It also injures career prospects, social mobility, and may even cause mental illness and psychosomatic disease.²⁸ These definitions and descriptions, developed by United States authors, have their focus on victims’ sufferings and reactions and are only partly applicable to Internet

20. Elizabeth Phillips Marsh, *Purveyors of Hate on the Internet: Are We Ready for Hate Spam?*, 17 GA. ST. U. L. REV. 379, 389 (2000).

21. *Id.* at 386.

22. Reno, 521 U.S. at 863 (citing *Reno v. ACLU*, 929 F.Supp. at 877).

23. McGuire, *supra* note 2, at 788.

24. *Id.*

25. BLACK’S LAW DICTIONARY 1407-08 (7th ed. 1999).

26. Rachel Weintraub-Reiter, Note, *Hate Speech over the Internet: A Traditional Constitutional Analysis or a New Cyber Constitution?*, 8 B.U. PUB. INT. L.J. 145, 149 (1998) (citing SAMUEL WALKER, *HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY* 8 (1994)). This definition comes from the Human Rights Watch, a non-profit advocacy organization dedicated to protecting human rights around the world.

27. DELGADO & STEFANCIC, *supra* note 7, at 4.

28. See *id.* at 6.

speech. First, “communications over the Internet do not appear on computer screens without the user taking a series of affirmative steps,”²⁹ and in most cases, it is possible to avoid undesirable messages; second, as a rule, neither the speaker nor the addressee is accessible for violence, and in many cases is anonymous or unknown.

Another approach to the definition of hate speech, fully reflective of Germany’s attitude, was undertaken by the Council of Europe. According to the Additional Protocol to the Convention on Cybercrime, “racist and xenophobic material’ means any representation of thought or theories, which advocates, promotes or incites hatred, discrimination or violence against any individual or group of individuals based on race, color, descent or national or ethnic origin.”³⁰ Obviously, the focus of this definition is not on a particular victim but on the dissemination of racist attitudes in the society. This approach is closer to Germany’s concerns regarding the regulation of Internet hate speech. Many German authors fear, not without a reason, that a powerful political movement can actually appear from an ideologically eccentric neo-nazi network.³¹

The most popular hate motives on the Internet (at least among those that attract attention in the United States and Germany) include themes of white superiority, intimidation of people of color and Jews, neo-nazism, and Holocaust denial. Among different topics of hate speech on the Internet, the most controversial topic belongs to Holocaust denial, or revisionism. It is a particularly disturbing topic in Germany due to its recent history; however, it is not regarded as the same serious issue in the United States. One of the problems arises from the fact that the hate message is not so obvious. For the most part, modern:

revisionists do not deny that atrocities were committed against Jews during WWII. However, they contend that there was no Nazi plan to exterminate European Jewry, the ‘Final Solution’ ...

29. Weintraub-Reiter, *supra* note 26, at 165.

30. Additional Protocol to the Convention on Cybercrime concerning the Criminalisation of Acts of a Racist or Xenophobic Nature Committed Through Computer Systems, opened for signature Jan. 28, 2003, Europ. T.S. No. 189 [hereinafter Protocol], available at <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm> (last visited Feb. 21, 2003). See also Explanatory Report of the Comm. of Ministers [of the Additional Protocol to the Convention on Cybercrime], 111th Sess., (adopted on Nov. 7, 2002) [hereinafter Explanatory Report], available at <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm> (last visited Feb. 21, 2003).

31. Christoph Seils, Das Netz der Nazis [The Net of Nazis], DIE WOCHE (Germany), Aug. 17, 2001, at 1.

being no more no less their expulsion from Europe[; that t]he Nazis did have a system of concentration camps, but there were no gas chambers for mass murder in them[; a]nd finally, the claim of six million murdered Jews is an exaggeration, as the number killed was far less.³²

Some Holocaust deniers claim that their goal is not the same as the intentions of anti-Semites, their goal is not to intimidate Jews, but to uncover the truth.³³ Numerous Internet sites invite free discussion for the sake of "historical accuracy."³⁴ In Germany, nevertheless, this kind of discussion is criminalized, which is perfectly in accordance with its constitutional values.³⁵

From another perspective, hate speech on the Internet is special because it usually does not imply any physical harm and is unlikely to cause immediate violence. It is pure speech, and among degrees of racial discrimination, such as verbal rejection, avoidance, discrimination, physical attack and extermination,³⁶ hate speech on the Internet falls into the least dangerous category of verbal activity. On the other hand, "[t]he idea that messages can be a 'killing force' is sometimes taken quite literally nowadays."³⁷ For example, the United States Supreme Court denied writ of certiorari to an appeal from the decision of the lower court in *Paladin Enterprises, Inc. v. Rice*,³⁸ thus refusing to extend the First Amendment protection for a book, *Hit Man On-Line: A Technical Manual for Independent Contractors*, which instructions had allegedly been relied on in a triple murder-for-hire crime.³⁹ It may

32. See, e.g., Paul Grubach, *The Political Implications of Holocaust Revisionism*, David Duke Online, at <http://www.duke.org/library/race/revisionism1.shtml> (last visited Feb 21, 2003).

33. Wilhelm Lasek, "Revisionistische" Gruppen und Personen im Internet ["Revisionist" Groups and Persons on the Internet], in *DAS NETZ DES HASSES: RASSISTISCHE, RECHTSEXTREME UND NEONAZISTISCHE PROPAGANDA IM INTERNET [THE NET OF HATE: RACIST, RIGHT-WING AND NEO-NAZI PROPAGANDA ON THE INTERNET]* 123, 134 (Brigitte Bailer-Galanda et al. eds., 1997).

34. See, e.g., The Institute of Historical Review, Website, at <http://www.ihr.org/> (last visited Feb. 21, 2003).

35. See, e.g., *Holocaust Denial Case*, BverfGE 90, 241 (1994) [German Federal Constitutional Court].

36. See, e.g., PIERRE-ANDRÉ TAGUIEFF, *THE FORCE OF PREJUDICE: ON RACISM AND ITS DOUBLES* 50-51 (Hassan Melehy ed. & trans., 2001).

37. Calvert & Richards, *supra* note 1, at 980 (describing numerous popular culture media "messages" which were accused of inciting crimes).

38. *Rice v. Paladin Enters., Inc.*, 940 F.Supp. 836 (D. Md. 1996), *rev'd*, 128 F.3d.233 (4th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998).

39. The district court held that the book merely advocated, rather than encouraged, murder. See *Rice*, 940 F.Supp. at 836. However, the Court of Appeals reversed and held that the book was not entitled to protection under the First Amendment as a abstract advocacy. *Rice*

be mentioned, however, that the book may be easily found on the Internet.⁴⁰

III. RESTRICTION OF HATE SPEECH ON THE INTERNET

The restrictive approach to regulation of speech on the Internet is chosen by many countries. In democratic societies, any restriction on speech must be in conformity with recognized standards on the limits of freedom of expression. The functioning of a restrictive state policy in an atmosphere of proclaimed respect to fundamental human rights is well demonstrated by the example of Western European states. The German example is particularly interesting because Germany perhaps has the strictest attitude towards any kind of racist activities, and at the same time, it has consistently expressed its commitment to the ideals of a free democratic society.

A. On The National Level

Germany's legal approach to regulation of hate speech on the Internet has to be considered in light of the nation's history. "The legal reconstruction of Germany following [World War II] included numerous measures specifically intended to eradicate the ideology of Nazism and the racial prejudice underlying the Holocaust."⁴¹ At the end of the 1960s, however, attempts at revisionism began, first by shifting the responsibility for the war.⁴² These circumstances have led "to the prohibition of certain forms of political speech that will not be tolerated in any medium, including the Internet."⁴³

The basis for the free expression doctrine in Germany is provided by Article 5 of the German Basic Law:

(1) Everyone has the right to freely express and disseminate his opinion in speech, writing, and pictures and to freely inform himself from generally accessible sources. Freedom of the press and freedom

v. Paladin Enters., 128 F.3d 233 (4th Cir. 1997).

40. See, e.g., REX FERAL, HIT MAN ON-LINE. A TECHNICAL MANUAL FOR INDEPENDENT CONTRACTORS (1983), available at <http://www.die.net/prose/hitman/> (last visited Feb. 21, 2003).

41. Minsker, *supra* note 5, at 137.

42. Brigitte Bailer-Galanda, "Revisionismus" als zentrales Element der internationalen Vernetzung des Rechtsextremismus ["Revisionism" as a Central Element of the International Network of Right-Wing Extremism], in DAS NETZ DES HASSES: RASSISTISCHE, RECHTSEXTREME UND NEO-NAZISTISCHE PROPAGANDA IM INTERNET [THE NET OF HATE: RACIST, RIGHT-WING AND NEO-NAZI PROPAGANDA ON THE INTERNET] 106, 109 (Brigitte Bailer-Galanda et al. eds., 1997).

43. McGuire, *supra* note 2, at 773.

of reporting by means of broadcasts and films are guaranteed. There will be no censorship.

(2) These rights are subject to limitations in the provisions of general statutes, in statutory provisions for the protection of the youth, and in the right to personal honor.

(3) Art and science, research and teaching are free. The freedom of teaching does not release from allegiance to the constitution.⁴⁴

The article expressly imposes limitations on free expression in section 2.⁴⁵ Besides these limitations, the Basic Law contains other provisions that may serve to restrict freedom of speech: article 1, declaring human dignity as an utmost value;⁴⁶ article 18, forfeiture of basic rights when abusing them;⁴⁷ article 21, section 2, prohibition of political parties seeking to impair the free democratic order;⁴⁸ and some other, implicit, provisions, all of which establish the basis for the functioning of the German militant democracy and allow German legislators to successfully restrain racist (hate) activities in almost any form.⁴⁹

Several provisions of the German Penal Code specifically target hate speech.⁵⁰ For example, section 130 criminalizes incitement to hatred or violence against parts of the population and attacks on the human dignity and also prohibits distribution and publication of hate messages, including through broadcast. Section 130 also specifically penalizes Holocaust denial, i.e., the approval, denial and minimization of the acts of Nazis committed during World War II.⁵¹ Other relevant provisions address depictions of violence in a glorifying or degrading manner,⁵² insults to personal honor,⁵³ and defaming the memory of the dead.⁵⁴ Remarkably, in spite of the rule that insulting statements are actionable on the petition of the injured person, section 194 provides for public prosecution in the

44. Art. 5, GUNDESETZ [German Constitution], translated in CONSTITUTIONS OF THE WORLD 106 (Albert P. Blaustein & Gisbert H. Flants eds., 1994) [hereinafter GG].

45. Id. § 2.

46. Id. art. 1.

47. Id. art. 18.

48. Id. art. 21, § 2.

49. See generally GG, supra note 44.

50. See STRAFGESETZBUCH [Penal Code] [hereinafter StGB].

51. § 130 StGB.

52. § 131 StGB.

53. § 185 StGB.

54. § 189 StGB.

case of distribution of insulting or defamatory statements by broadcast (which might include the Internet) in respect of victims, or members of groups prosecuted by the Nazis or other totalitarian regimes.⁵⁵

In 1997, Germany passed the Multimedia Law which is meant to keep illegal material out of cyberspace.⁵⁶ Inter alia, the law prohibits content criminalized by the Penal Code,⁵⁷ no doubt having hate speech in mind in the first place.⁵⁸ The law also establishes criteria for the liability of an Internet service provider ("ISP"). Generally, ISPs are not liable for transmission or short storage of a third-party's illegal content unless they initiate, select, or modify the information.⁵⁹ In cases of longer storage of information (hosting), ISPs are not liable if they do not have actual knowledge of illegal information, and upon obtaining such knowledge, act expeditiously to remove or to disable access to such information.⁶⁰ Almost identical provisions are contained in the Teleservice Law.⁶¹ "Many German providers and users have greeted [the law] with a sigh of relief,"⁶² as the issue of ISPs' liability has been a tense one. However, critics say that the law still left open the "extent [to which] online services are responsible for content they do not control,"⁶³ and indeed, this issue produced much controversy in the Felix Somm case.

Felix Somm, the former manager of the German subsidiary of CompuServe, was prosecuted by Bavarian authorities for "distributing online pornography (as CI\$ [CompuServe] manager, he provides access to the Internet)."⁶⁴ "[A]ccording to the indictment, [he] should have filtered out criminal contents originating in the United States and reaching German Internet users."⁶⁵ In 1999, the case was reversed on appeal on the grounds

55. § 194 StGB.

56. MEDIENDIENSTESSTAATSVERTRAG [Media Law] [hereinafter MDStV].

57. § 12 abs.1 MDStV.

58. Originally the law expressly prohibited incitement to hatred and degrading depictions, in accordance with §§ 130 & 131 of the Penal Code. See § 8 abs. 1 MDStV (as adopted in 1997).

59. § 7 abs. 1 MDStV; § 8 MDStV.

60. § 9 MDStV.

61. § 9-§ 11 TELEDIENSTEGESETZ [Teleservice Law] [hereinafter TDG].

62. Michael Langer, Germany's New Multimedia Law and the Possible Consequences, TELEPOLIS: MAGAZIN DER NETZKULTUR (Aug. 17, 1997), at <http://www.heise.de/tp/english/inhalt/te/1260/1.html> (last visited Feb. 21, 2003).

63. Germany Passes Internet Law Limiting Content Cyberspace: Online ban on porn and other controversial material draws skepticism over enforcement and liability, L.A. TIMES, July 5, 1997, at D1.

64. Langer, *supra* note 62.

65. Ulrich Sieber, Commentary on the Conclusion of Proceedings in the "CompuServe Case" [Acquittal of Felix Somm], DIGITAL LAW NET, at <http://www.digital-law.net/somm/>

that there was no liability for the third-party content, and that Felix Somm could not technically filter the Internet, especially since he was only a manager of a subsidiary company owned by the American company CompuServe.⁶⁶ As one of his lawyers commented, “the acquittal of Felix Somm . . . [goes] beyond the individual aspect of rehabilitation of the accused—furthermore shows clearly the failure of national solutions intended to protect the German part of the Internet with a virtual wall against harmful contents from abroad.”⁶⁷

Another important issue was raised in 1999 by the case of “Frederick Toben, an Australian-based Holocaust revisionist who denied that millions of Jews died during World War II.”⁶⁸ Toben, an Australian citizen born in Germany:

was found guilty . . . of promoting his opinions on Holocaust denial through printed leaflets and Web pages. Sentenced to 10 months in prison [by a German court], Toben appealed, arguing that since his Internet material was ‘printed’ outside of Germany, it was not subject to German legislation. The German Federal Court of Justice [disagreed and] ruled that the country’s legislation banning communications glorifying the Nazis and denying the Holocaust applies to all aspects of the Internet, no matter what their country of origin, or how the information is presented.⁶⁹

In this decision, the Federal Court “effectively set the precedent that all material published on the Web is subject to German legislation . . . [and] laws prohibiting racial hatred clearly apply to Internet material created outside of Germany . . . but . . . accessible to German Internet users.”⁷⁰

commentary.html (last visited Feb. 21 2003).

66. Besides technological impossibility, the court also considered Somm’s lack of authority to employ filtering. See Felix Somm, *CompuServe Urteil des LG München vom [The Judgment of München Land Court in Case of Felix Somm]* (Nov. 17, 1999), at <http://www.publex.de/cgi-bin/prt.cgi/Rechtsquellen/Urteile/Cybercrime/1999crim01.html> (last visited Feb. 21, 2003). The possibility of blocking illegal content was one of prerequisites for liability at time of Somm’s prosecution. See § 5 abs. 3 TDG (as adopted in 1997).

67. Sieber, *supra* note 65.

68. Center for Democracy and Technology, *Exercise of Jurisdiction by Foreign Courts Seen in Other Cases*, CDT Policy Post 7.06(3) (July 11, 2001) available at <http://www.cdt.org/publications/pposts2001.shtml> (last visited Feb. 21, 2003).

69. *Id.*

70. *Id.*

Thus, Germany upholds criminal responsibility for those who put racist material on the Internet with no regard to their location and releases from responsibility ISP executives. However, there remains another problem: even released from criminal responsibility, German ISPs are still under obligation to block Internet material that is illegal by German standards.⁷¹ Although this legal obligation concerns only material of which ISPs are aware, it has resulted in extensive self-censorship by German ISPs. "The German government has reported a phenomenal increase in right-wing and xenophobic violence in the last decade,"⁷² and the Internet is considered to be an influential tool. German providers complain that if they block certain sites then they support censorship, and if they don't then they support right-radicalists.⁷³ Since the choice is usually in favor of self-censorship, some critics have even called Germany "one of the most Internet-averse nations."⁷⁴ However:

Germany's approach has proven influential. After the country's largest [ISP] cut off Germans' access to the more than 1,500 Web sites operated by the American provider which houses Zündel's site [a Holocaust revisionist's site], the European Union's Consultative Commission on Racism and Xenophobia urged all other member states to follow the example of Germany.⁷⁵

B. On The European Level

Cooperation within Europe is particularly important for Germany in combating hate speech on the Internet. There are numerous concerns in this area. One example is when German authorities required German ISPs to block "a magazine published on a Web site in the Netherlands which allegedly promoted terrorist violence . . . [t]he Dutch host service provider . . . complained that the action of the German authorities constitutes an interference

71. See § 6 abs. 2 MDSStV; § 8 abs. 2 TDG.

72. Maryellen Fullerton, Germany for Germans: Xenophobia and Racist Violence in Germany, HUMAN RIGHTS WATCH, (April 1995), available at <http://www.hrw.org/reports/1995/Germany.htm> (last visited Feb. 21, 2003).

73. Internet ohne Zensur [Internet Without Censorship], Der deutsche Provider ISIS sperrt US-Seiten ISIS: "Die Provider sind immer die Dummen," [The German Provider ISIS Blocks US-Sites ISIS: "The Providers are Always the Blockheads"], (posted Nov. 23, 2001), at <http://www.ioz.ch/news/011123.htm> (last visited Feb. 21, 2003).

74. McGuire, *supra* note 2, at 768.

75. Fogo-Schensul, *supra* note 9, at 269.

with the free movement of services within the E.U.”⁷⁶ Furthermore, as a member of the European Union and the Council of Europe, Germany is forced to comply with the legal obligations that it undertook by participating in these bodies. In fact, this is not a big effort for Germany, as the approach of these bodies is almost identically reflected in Germany’s own attitude.

1. The Council of Europe

The Council of Europe’s position in respect to hate speech is strict. It has announced that it “considers racism not as an opinion but as a crime”⁷⁷ and that it intends to fight it. This position is generalized to apply to any hate speech, not only racist remarks, and the Council emphasized that “[n]ot only racism, but also the dissemination of hate speech against certain nationalities, religions and social groups must be opposed.”⁷⁸

Having previously put words into action, the Council of Europe had prepared “the first ever international treaty on criminal offences committed against or with the help of computer networks such as the Internet”—The Convention on Cybercrime.⁷⁹ It was opened for signature in November 2001, in Budapest, and 26 States signed the treaty on the first day, including Germany and the United States, who took part in the drafting.⁸⁰ The final text of the Convention does not deal with the problem of hate speech, although this possibility has been discussed.⁸¹ Instead, the Committee of Experts on the Criminalization of Racist or Xenophobic Acts Using Computer Networks was instructed to prepare a draft of the First Additional Protocol to the Convention on Cybercrime that would address the issue.⁸² The main problem is that this First Additional Protocol may not have the approval of all major actors. The United States may be very strict when it comes to copyright infringements or sexually explicit materials, however it is usually more liberal

76. European Commission Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Illegal and Harmful content on the Internet*, available at <http://europa.eu.int/ISPO/legal/en/internet/communic.html> (last visited Feb. 21, 2003).

77. *Racism and Xenophobia in Cyberspace*, EUR. PARL. DOC. (REC 1543) (2001), at ¶ 1 [hereinafter *Recommendation*], available at <http://assembly.coe.int/Documents/AdoptedText/TA01/EREC1543.htm> (last visited Feb. 21, 2003).

78. *Id.* ¶ 5.

79. Press release, Council of Europe, 30 States Sign the Convention on Cybercrime at the Opening Ceremony (November 23, 2001), available at [http://press.coe.int/cp/2001/875a\(2001\).htm](http://press.coe.int/cp/2001/875a(2001).htm) (last visited Feb. 21, 2003).

80. *Id.*

81. *Id.*

82. Protocol, *supra* note 30. See also *Recommendation*, *supra* note 77.

when it comes to racist speech (with other forms of speech).⁸³ The Council of Europe itself recognized that the Additional Protocol to the Convention on Cybercrime, aimed at punishing racism on the Internet, will have no effect unless every state hosting racist sites or messages is a party to it.⁸⁴ As a temporary solution, the Council's starting-point is to initiate a dialogue with all service providers to convince them of the need to take steps to combat the existence of racist sites.⁸⁵ This strategy may be successful, but there are some implications about private censorship which will be discussed in Section V.

Meanwhile, the Council of Europe's Committee of Ministers adopted the Additional Protocol to the Convention on Cybercrime and decided to open it for signature by the states at the next Parliamentary Assembly.⁸⁶ The Additional Protocol will impose obligations on state parties to criminalize the following acts of racist and xenophobic nature committed through computer systems: the dissemination of racist and xenophobic material; racist and xenophobic motivated threats; racist and xenophobic motivated insults; revisionism; and aiding and abetting in the above activities.⁸⁷ The draft of the Additional Protocol also confirms an important principle: it essentially releases ISPs from criminal liability, as they do not normally have the criminal intent which is one of the elements of crime.⁸⁸ Moreover, ISPs are not required to "actively monitor content to avoid criminal liability."⁸⁹

One more required element for the offenses described by the Protocol is that racist/xenophobic material be made available to the public, except for a racist/xenophobic motivated threat.⁹⁰ One-to-one communications are not covered, however offensive they may be.⁹¹ This is another detail that demonstrates that the main purpose of this initiative is to protect society in general and not an individual addressee of racist/xenophobic messages.

The drafting of the First Additional Protocol was not an easy task. The provisions of the Protocol are supposed to be mandatory

83. JEREMY HARRIS LIPSCHULTZ, *FREE EXPRESSION IN THE AGE OF THE INTERNET: SOCIAL AND LEGAL BOUNDARIES* 56 (2000).

84. Recommendation, *supra* note 77, at ¶ 1.

85. *Id.* at ¶ 6.

86. Press Release, Council of Europe, *The Council of Europe Fights Against Racism and Xenophobia on the Internet* (November 7, 2002), available at http://www.coe.int/T/E/Communication_and_Research/Press/Theme_Files/Cybercrime/e_CP554.asp (last visited Feb. 21, 2003).

87. Protocol, *supra* note 30, arts. 3-7.

88. Explanatory Report, *supra* note 30, ¶¶ 25, 45.

89. *Id.* ¶ 45.

90. *Id.* ¶¶ 29, 35.

91. *Id.* ¶ 30.

for the participants, and to make them acceptable for various legal cultures many options have to be available. The signatory may choose not to criminalize dissemination of materials that promote discrimination (there is no such option for incitement to hatred or violence);⁹² the requirements on criminalization of racial insult and denial, gross minimization, approval or justification of genocide and crimes against humanity (revisionism) are optional, in whole or in part, as well.⁹³ With so many options, it is somewhat questionable whether the Additional Protocol is able to achieve its main purpose, which is to harmonize criminal law in the sphere. It is even more questionable whether the Protocol will have a meaningful impact on fighting racist speech at the international level. Its provisions run contrary to United States' standards in many respects and bring about serious doubts on the perspective of the First Additional Protocol to become an international treaty signed by all major states.⁹⁴

2. The European Union

The European Union expressed its approval and support of the Council of Europe's Convention on Cybercrime and of its initiative on the Additional Protocol.⁹⁵ It also developed its own strategies in fighting hate speech in cyberspace. European Union intervention in this area is carried out within two areas of the European Union's competence: "the free movement of services (first pillar) and civil liberties and justice (third pillar)."⁹⁶

The importance of the Internet is greatly appreciated by the European Union.⁹⁷ It recognizes that:

Internet services with their possibilities for interactive communication . . . can benefit large sections of the population . . . and notes that in several authoritarian and repressive states the Internet services, because of the possibility of anonymity, interactivity and speed, has played an

92. Protocol, *supra* note 30, art. 3, §§ 2, 3.

93. *Id.* art. 5, § 2; art. 6, § 2.

94. *See id.* § 4.

95. Antonio Vitorino, Speech delivered in Berlin, *The Internet and the Changing Face of Hate* (June 26, 2000) (transcript available at http://europa.eu.int/ISPO/docs/services/docs/2000/June/speech_00_239_en.pdf (last visited Feb. 21, 2003)).

96. Committee on Civil Liberties and Internal Affairs, Report on the Commission on the Communication on Illegal and Harmful Content on the Internet, EUR. PARL. DOC. COM(96)0487-C4-0592/96, § 18 [hereinafter Report].

97. *Id.* § 5.

important role in communication between persecuted persons and other victims and the rest of the world.⁹⁸

The European Union declared its adherence to freedom of expression and affirmed that “the free movement of information on the Internet is a fundamental manifestation” of it.⁹⁹

At the same time, not every kind of expression is welcome on the Internet, and the European Union took a position very similar to the German approach. “The fight against racism and xenophobia—these profound forms of rejecting diversity—is a major concern of the international community and a challenge for our society,” said Antonio Vitorino, the European Union’s Commissioner for Justice and Home Affairs, at a conference entitled *The Internet and the Changing Face of Hate*.¹⁰⁰ He emphasized the necessity of unified international efforts, “[b]ecause of the nature of the Internet, there are serious limits to what any country can achieve on its own.... The Internet is an international phenomenon in every sense of the word and any effective response will hinge on high levels of international co-operation.”¹⁰¹

“In 1999, the European Council and Parliament adopted an Action Plan for safer use of the Internet by combating illegal or harmful content on global networks.”¹⁰² It mainly consists of four measures which directly involve European Internet companies: the creation of a European network of hotlines, the development of a rating system for Internet content, the encouragement of consumer awareness, and the institution of consumer support.¹⁰³

Later initiatives of the European Union addressed the creation of a legal framework for combating hate speech. In line with the Additional Protocol to the Convention on Cybercrime, the European Union wants “to ensure that racist and xenophobic content on the Internet is criminalised in all Member States. The basic idea would be contained in the principle that ‘what is illegal off-line is illegal on-line.’”¹⁰⁴

98. *Id.*

99. *Id.* § 6.

100. Vitorino, *supra* note 95, at 2.

101. *Id.*

102. Community Research and Development Information Society, Cooperation needed to combat Internet racism, Doc. 15102 (June 30, 2000), at <http://www.cordis.lu/en/home.html> (on file with *Journal of Transnational Law & Policy*).

103. Proposal for a European Parliament and Council Decision Adopting a Multiannual Community Action Plan on Promoting Safer Use of the Internet by Combating Illegal and Harmful Content on Global Networks Document, EUR. PARL. DOC. (COM 0784) (1998), available at <http://europa.eu.int/ISPO/iap/proposal/en.html> (last visited Feb. 21, 2003).

104. Proposal for a Council Framework Decision on combating racism and xenophobia, EUR. PARL. DOC. (COM 644 final) 6 (2001) [hereinafter Proposal], available at <http://europa.eu>.

As to the ISPs' liability, according to Article 12 of the Directive on Electronic Commerce, ISPs should not be held "liable for the information transmitted, on the condition that the provider: (a) does not initiate the transmission; (b) does not select the receiver of the transmission; and (c) does not select or modify the information contained in the transmission."¹⁰⁵ At the same time, the Directive permits a court or administrative authority of a Member State to require "the service provider to terminate or prevent an infringement."¹⁰⁶ This raises many issues that will be addressed later in this article.

In respect to personal liability for racist and xenophobic content, the European Union, like Germany, follows a broad approach and proposes that states' jurisdiction should extend to all cases where the offence is committed through an information system, and:

(a) the offender commits the offence when physically present in its territory, whether or not the offence involves racist material hosted on an information system in its territory; (b) the offence involves racist material hosted on an information system in its territory, whether or not the offender commits the offence when physically present in its territory.¹⁰⁷

IV. HATE SPEECH ON THE INTERNET AS PROTECTED SPEECH

Hate speech is perceived as undesirable in almost any society. However, even being unwelcome, it may be protected for the sake of the fundamental human right to freedom of expression. The major country that follows this approach is the United States of America. Although it is not the only country that hosts the Internet-related services, the significance of its position for the regulation of Internet speech worldwide is hard to overestimate for several reasons. First, there is the fact that the Internet began and developed in the United States and until now, the United States has kept the leading position in the number of the Internet users and services.¹⁰⁸ Second,

int/comm/employment_social/news/2002/feb/proposal_jai_664_en.pdf (last visited Feb. 21, 2003).

105. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), art. 12, § 4, 2000 O.J. (L 178), available at <http://europa.eu.int> (last visited Feb. 21, 2003).

106. *Id.*

107. Proposal, *supra* note 104, art.12.

108. See Leonard R. Sussman, *The Internet in Flux: Press Freedom Survey 2001*, FREEDOM HOUSE, 41, available at <http://www.freedomhouse.org/pfs2001/pfs2001.pdf> (last visited Feb.

the United States' position is deeply rooted in the moral and legal traditions of the American society with its priority on freedom of expression. Third, it is unwise to disregard the position of the United States as a powerful and independent nation in the modern world. A relevant example is the recent Yahoo! controversy.¹⁰⁹ The United States District Court refused to enforce an order of the French court which sought to require Yahoo!, a California Internet company, to bar the access of French citizens to Nazi memorabilia auctions available on the Internet.¹¹⁰ At the same time, United States courts were successful in enforcing their decisions against foreign Internet services that provided Internet material which is illegal in the United States of America, but perfectly legal in their own countries.¹¹¹

A. Development of Legal Doctrine

Legal doctrine for regulating freedom of expression in the United States emerged from the interpretation of the First Amendment of the United States Constitution.¹¹² The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."¹¹³ This strong statement, however, is seldom taken literally.¹¹⁴ The United States Supreme Court created different categories of speech, allowing some a greater or lesser degree of First Amendment protection, or denying it.¹¹⁵

The "debate in the United States occurs only within a category of speech 'protected' by the First Amendment."¹¹⁶ The attitude towards hate speech is controversial. Many recognize the harm of hate speech and want to treat it in the same way as pornography, denying it constitutional protection.¹¹⁷ The United States Supreme Court usually places hate speech into a protected category, "regardless of the effect it has on the listener and society."¹¹⁸ Obviously, the same rule applies to Internet hate speech as well.

21, 2003).

109. *Yahoo!, Inc. v. La Ligue Contre Le Racisme et l'Antisemitisme*, 169 F.Supp 2d. 1181 (N.D. Cal. 2001).

110. *Id.*

111. More detailed analysis of this point is provided later in the section.

112. See, e.g., Omer Lee Reed, *The State is Strong But I am Weak: Why the "Imminent Lawless Action" Standard Should Not Apply to Targeted Speech That Threatens Individuals with Violence*, 38 AM. BUS. L.J. 177 (2000).

113. U.S. CONST. amend. I. See also, Reed, *supra* note 112, at 183.

114. Reed, *supra* note 112, at 183.

115. *Id.* at 185-88.

116. Gosnell, *supra* note 3, at 412.

117. See, e.g., DELGADO & STEFANCIC, *supra* note 7, at 7.

118. See, e.g., Weintraub-Reiter, *supra* note 26, at 161 (citing DAVID S. HOFFMAN, *HIGH-TECH HATE: EXTREMIST USE OF THE INTERNET* 9 (1997)).

“Internet [hate] speech that is merely critical, annoying, offensive, or demeaning enjoys constitutional protection.”¹¹⁹

There are many reasons to limit hate speech, including on the Internet, but the United States Supreme Court found reasons not to do so. It has been firmly established by Supreme Court precedents that “the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.”¹²⁰ In *Beauharnais v. Illinois*, the Supreme Court upheld a statute prohibiting racist speech directed at a class of citizens for the benefit of “free, ordered life in a metropolitan, polyglot community.”¹²¹ The validity of *Beauharnais* is seriously questioned at present. On one hand, it has never been overruled,¹²² and the Supreme Court still mentions it in its decisions,¹²³ however, on the other hand, many courts expressly refuse to recognize its authority as it has been considerably weakened by subsequent cases.¹²⁴ It seems that most authors agree that “defamation of a group is probably not a valid cause of action anymore.”¹²⁵ Moreover, racist remarks may be different from libel in many cases as the remarks may be true and not necessarily defamatory.¹²⁶ The relevant issue in *Beauharnais* is whether a civil action for racially insulting language is possible within the tort of intentional infliction of emotional distress. The Restatement (Second) of Torts defines this tort as being committed by “[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another.”¹²⁷ There have been a number of lawsuits where courts have awarded damages for racial insult.¹²⁸ However, in more recent decisions the Supreme Court has been less willing to recognize this tort. In *Hustler Magazine v. Falwell* the Court made clear that:

119. Statement of the Anti-Defamation League on Hate on the Internet before the Senate Committee on the Judiciary, FDCH POL. TRANSCRIPTS, Sept. 14, 1999 [hereinafter Statement], available at 1999 WL 27594383.

120. *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970) (citing *Street v. New York*, 394 U.S. 576, 592 (1969)).

121. 343 U.S. 250, 259 (1952).

122. DELGADO & STEFANCIC, *supra* note 7, at 63.

123. See, e.g., *New York v. Ferber*, 458 U.S. 747, 763 (1982); *R.A.V. v. St. Paul*, 505 U.S. 377, 383 (1992) (mentioned and distinguished but not overruled).

124. See, e.g., *Dworkin v. Hustler Magazine*, 867 F.2d 1188, 1200 (9th Cir. 1989); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (weakening group libel claim).

125. See, e.g., NICHOLAS WOLFSON, HATE SPEECH, SEX SPEECH, FREE SPEECH 65 (1997).

126. *Id.* at 64.

127. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

128. See, e.g., *Wiggs v. Courshon*, 485 F.2d 1281 (5th Cir. 1973); *Alcorn v. Ambro Eng'g*, 2 Cal. 3d 493 (Cal. 1970); *Agarwal v. Johnson*, 25 Cal. 3d 932 (Cal. 1979).

outrageousness in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views. . . . An 'outrageousness' standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.¹²⁹

R.A.V. is one of the leading precedents for racist speech regulation that content-based regulations of hate speech are not permissible and disallowed the imposition of special prohibitions on speakers who express their views on disfavored subjects, such as race, color, or religion, however odious those views may be.¹³¹ Only general non-content based prohibitions on "insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace"¹³²—are permitted. This standard runs contrary to the European initiative and raises serious doubts about the possibility of successful regulation of Internet hate speech worldwide.

The R.A.V. rule does not mean that hate speech is totally uncontrolled. There is an exception from the protected category where speech may be outlawed when that speech presents a "clear and present danger."¹³³ More specifically, the Brandenburg rule requires that such speech must be "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."¹³⁴ Some authors consider that this traditional clear and present danger test is "difficult to apply in cyberspace."¹³⁵ Indeed, it does not seem highly probable that impersonal, or even personal messages on the computer screen would directly cause someone to get involved in violence or disorder. Again, this is a major difference from the European approach, as Brandenburg expressly allows "mere advocacy"¹³⁶ of lawless actions, including advocacy of racism, whereas the Europeans expressly prohibit it.¹³⁷

129. 485 U.S. 46, 55 (1988).

130. 505 U.S. 377 (1992).

131. *Id.* at 391.

132. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

133. See *Schenck v. United States*, 249 U.S. 47, 52 (1919); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

134. *Brandenburg*, 395 U.S. at 447.

135. LIPSCHULTZ, *supra* note 83, at 11.

136. *Brandenburg*, 395 U.S. at 449.

137. See, e.g., Protocol, *supra* note 30, arts. 2, 3.

Perhaps more applicable to Internet speech is the rule from *Watts* that “true threats” are not protected under the First Amendment.¹³⁸ This category has already been tested for Internet speech in several cases. In *Planned Parenthood of Columbia/Willamette v. American Coalition of Life Activists*, abortion providers brought a suit against anti-abortion activist organizations, based on public disclosure of their names, photos, home addresses and other personal information on the Coalition’s Internet web site.¹³⁹ “In three instances, after a particular doctor listed on the site was murdered, a line was drawn through his name.”¹⁴⁰ The United States District Court for the District of Oregon entered judgment on a jury verdict awarding the abortion providers monetary damages and also granted a permanent injunction.¹⁴¹ The Ninth Circuit Court of Appeals confirmed that computer threats are not protected by the First Amendment but the propriety of the punitive damages award has yet to be evaluated.¹⁴² It remains to be seen what will be the final resolution of this case.

In *United States v. Alkhabaz*, the Sixth Circuit court had to decide on criminal liability for electronic communications allegedly containing threats to kidnap or injure another person.¹⁴³ *Alkhabaz*, a university student also known as Baker, “exchanged e-mail messages over the Internet, the content of which expressed a sexual interest in violence against women.”¹⁴⁴ The unique aspect of the case was that the messages describing sexual violence against a girl, bearing the name of *Alkhabaz*’s classmate, were not sent to the victim, but posted on an electronic bulletin board and sent to a pen pal by e-mail.¹⁴⁵ The court concluded that:

to constitute ‘a communication containing a threat’ ...
a communication must be such that a reasonable
person (1) would take the statement as a serious
expression of an intention to inflict bodily harm . . .
and (2) would perceive such expression as being

138. *Watts v. United States*, 394 U.S. 705, 708 (1969). True threats are also proscribed in 18 U.S.C. §875(c) (2003).

139. 41 F. Supp 2d. 1130 (D. Or. 1999), rev'd, 290 F.3d 1058 (9th Cir. 2002).

140. Statement, supra note 119. See also *Planned Parenthood*, 41 F. Supp 2d. at 1131-55.

141. *Planned Parenthood*, 41 F. Supp 2d. at 1131-55.

142. 290 F.3d 1058, 1086 (9th Cir. 2002), petition for cert. filed, 71 U.S.L.W. 3292 (U.S. Oct. 8, 2002) (No. 02-563).

143. 104 F.3d 1492 (6th Cir. 1997).

144. *Id.* at 1493.

145. *Id.*

communicated to effect some change or achieve some goal through intimidation¹⁴⁶

which was not found here. This standard, when applied to anonymous, obscure, or non-specific hate messages on the Internet, makes successful prosecution for Internet threats very unlikely.

It appears that the "Supreme Court precedents leave Internet hate speech ample pathways to become acceptable discourse in the United States."¹⁴⁷ In most cases, "hate speech transmitted over the Internet . . . [will] remain constitutionally protected speech," but it may also become a hate crime if it threatens a specific person.¹⁴⁸

If a bigot's use of the Internet rises to the level of criminal conduct, it may subject the perpetrator to an enhanced sentence under a state's hate crimes law. Currently, 40 states and the District of Columbia have such laws in place. . . . However, these laws do not apply to conduct or speech protected by the First Amendment.¹⁴⁹

B. Liability and Jurisdictional Issues

Besides the issue as to what extent hate messages may fall outside of the protection of the First Amendment, there is an issue of liability for unprotected messages. First by courts,¹⁵⁰ later by legislation,¹⁵¹ ISPs were declared not to be treated as the publisher or speaker of any information provided by another information content provider, that is, they were released from civil liability for any content they do not actually produce. At the same time, ISPs are encouraged to exercise self-censorship, as the same legislation provides that:

[n]o provider of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to material that the provider considers to be obscene, lewd, lascivious,

146. *Id.* at 1495.

147. Alexander Tsesis, *Hate in Cyberspace: Regulating Hate Speech on the Internet*, 38 *SAN DIEGO L. REV.* 817, 853 (2001).

148. Weintraub-Reiter, *supra* note 26, at 148.

149. Statement, *supra* note 119.

150. See, e.g., *Cubby, Inc. v. CompuServe*, 776 F. Supp. 135 (S.D.N.Y. 1991); *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997).

151. 47 U.S.C. § 230 (2002) (providing protection for private blocking and screening of offensive material).

filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.¹⁵²

The controversy of *Yahoo!, Inc. v. La Ligue Contre Le Racisme et l'Antisemitisme* is a remarkable example of the conflict between European and United States standards and of the implications it raises for racist speech on the Internet.¹⁵³ The case originated in France when a French court found that Yahoo!, a California corporation, through its auction services, violated the provision of the "French Criminal Code which prohibits exhibition of Nazi propaganda and artifacts for sale."¹⁵⁴ Yahoo! was ordered to "eliminate French citizens' access to . . . [Nazi-related] material on the Yahoo.com auction site" and was subjected "to a penalty of 100,000 Euros for each day that it fails to comply with the order."¹⁵⁵ Yahoo! amended its auction policy, making it more restrictive towards hateful material, however, it opposed the French decision in the United States courts on the basis that it violated the First Amendment to the United States Constitution.¹⁵⁶

The United States District Court reflected on the global nature of the Internet and noticed that "there is little doubt that Internet users in the United States routinely engage in speech that violates, for example, China's laws against religious expression, the laws of various nations against advocacy of gender equality or homosexuality, or even the United Kingdom's restrictions on freedom of the press."¹⁵⁷ The court emphasized the First Amendment principle "that it is preferable to permit the non-violent expression of offensive viewpoints rather than to impose viewpoint-based governmental regulation upon speech."¹⁵⁸ Having expressed respect for the decision of the French court, the court nevertheless announced that "absent a body of law that establishes international standards with respect to speech on the Internet and an appropriate treaty or legislation addressing enforcement of such standards to speech originating within the United States, the principle of comity is outweighed by the Court's obligation to uphold the First Amendment."¹⁵⁹

152. 47 U.S.C. § 230(c)(2) (2002).

153. See 169 F. Supp 2d. 1181 (N.D. Cal. 2001).

154. *Id.* at 1184.

155. *Id.* at 1185.

156. *Id.* at 1185-86.

157. *Id.* at 1186-87.

158. *Id.* at 1187.

159. *Id.* at 1193.

Although the decision of the district court is currently on appeal and cannot be regarded as the highest constitutional standard, it is a vivid illustration of how other United States courts are likely to treat such controversies. The First Amendment of the United States Constitution protects the vast majority of extremist Web sites that disseminate racist or anti-Semitic propaganda, as well as individual statements expressing hatred of an ethnic, racial, or religious nature.¹⁶⁰ This approach has been extensively criticized, both by anti-hate activists in the United States and in Europe. Some authors have opined that “the U.S. (sic) Supreme Court’s short-sightedness is, therefore, causing waves around the world.”¹⁶¹ After the Yahoo! decision the debate on how to successfully regulate (or not to regulate) hate speech on the international level may become more vigorous than ever.

Jurisdictional issues raise the biggest problem in regulating Internet speech. The case of Yahoo! provides an example of how the problem is addressed when the speech in question is protected by the United States’ First Amendment.¹⁶² However, the United States courts do not feel particularly constrained in exercising jurisdiction over foreign companies. For example, in *iCraveTV*,¹⁶³ “an American judge issued an injunction against iCraveTV, a Toronto-based Internet company”¹⁶⁴ ordering it “not to place . . . television broadcasts on its web page if viewers in the United States could access them.”¹⁶⁵ Since “iCraveTV could not possibly provide its service solely for Canadians . . . [it had to] shut down its web site”¹⁶⁶ although it was in compliance with Canadian laws.¹⁶⁷ A similar case involved an Italian Internet site, “Playmen,” that was charged with trademark infringement in a United States court and was ordered not to provide access to the site to American customers.¹⁶⁸ It is noteworthy that in Yahoo!, the United States court did not examine the technical possibility of requiring Yahoo! to block access to

160. Statement, *supra* note 119.

161. Tsesis, *supra* note 147, at 859.

162. See Yahoo!, 169 F. Supp. 2d. at 1181.

163. *Twentieth Century-Fox Film Corp. v. iCraveTV*, 2000 U.S. Dist. Lexis 11670 (W.D. Pa. 2000).

164. William Crane, Legislative Update, *The World-Wide Jurisdiction: An Analysis of Over-Inclusive Internet Jurisdictional Law and an Attempt by Congress to Fix it*, 11 DEPAUL-LCA J. ART & ENT. L. AND POL’Y 267, 287 (2001).

165. *Id.* at 288.

166. *Id.*

167. The decision was taken by the Canadian company in an out of court settlement after the court’s preliminary injunction. See, e.g., Bill Pietrucha, *iCraveTV Shuts Down Internet site*, INTERNETNEWS.COM (Feb. 29, 2000), at http://dc.internet.com/news/article/0,,2101_312481,00.html (last visited Feb. 21, 2003).

168. *Playboy Enterprises v. Chuckleberry Pub., Inc.*, 939 F. Supp. 1032 (S.D.N.Y. 1996).

certain sites just to French citizens.¹⁶⁹ On the contrary, it announced that “the factual question of whether Yahoo! possessed the technology to comply with the order is immaterial.”¹⁷⁰ Remarkably, it seems that the United States will continue to use its position as a powerful nation for one-sided application of the law and will not extend the Yahoo! approach to foreign entities engaged in Internet speech which is illegal in the United States.¹⁷¹

Even if the United States decides to set an example for other nations by freeing foreign providers from liability for certain Internet content, as some authors recommend,¹⁷² it is not likely that Germany will accept a similar approach, and American providers may face more suits like Yahoo! in Germany. This issue was recently addressed by Congressman Dreier in the United States Congress.¹⁷³ He introduced a bill that:

opposes efforts by foreign governments to hold ISPs based in the United States criminally liable under foreign laws for content that is protected by the First Amendment; [and objects to] the expansion of liability for Internet service providers under international treaties . . . which might expose ISPs based in the United States to criminal liability for third-party content.¹⁷⁴

As for American users, some of them already face criminal prosecution in Germany, since they are liable in Germany for the content they put on the Internet regardless of their physical location. This perspective has been criticized on the ground that “[f]rom the point of view of participants, the near-impossibility of controlling with certainty the flow of information on the Internet would give them no notice of the legal regime to which they might be subjected, a fundamental principle of legal fairness and the rule of law.”¹⁷⁵ However, this argument extends to the United States regulations as well, as the United States has also subjected users

169. Yahoo!, 169 F.Supp.2d at 1194.

170. *Id.*

171. See, e.g., H.R. Res. 12, 107th Cong. (2001), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:hr12ih.txt.pdf (last visited Feb. 21, 2003).

172. See, e.g., Crane, *supra* note 164, at 307.

173. H.R. Res. 12, *supra* note 171.

174. Summary of House Resolution 12, Thomas: Legislative Information on the Internet (as of Jan. 3, 2001), available at <http://thomas.loc.gov/> (last visited Feb. 21, 2003).

175. Gosnell, *supra* note 3, at 415.

from different jurisdictions to criminal liability in the areas of copyright infringement and obscenity.¹⁷⁶

176. See, e.g., *United States v. Elcom Ltd.*, 203 F. Supp 2d. 1111 (N.D. Cal 2002) (prosecution by the United States of a Russian programmer); *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996) (prosecution by the state of Tennessee of a California user).

V. FILTERING AND SELF-CENSORSHIP

Self-regulation is another important aspect of the regulation of hate speech on the Internet. Sometimes ISPs voluntarily agree to prohibit users from sending or receiving racist and hateful messages over their services.¹⁷⁷ Such prohibitions are encouraged in Germany and do not raise any legal problems in the United States: as they do not implicate First Amendment rights because they do not involve government action.¹⁷⁸ In response to criticism of its policy to review and edit any material submitted for display, Prodigy, an Internet computer service, has replied that “the First Amendment protects private publishers . . . [and] bestows no rights on readers to have their views published in someone else’s private medium. What the Constitution does give readers is the right to become publishers themselves.”¹⁷⁹

“Once an ISP promulgates such regulations, it must monitor the use of its service to ensure that the regulations are followed. If a violation does occur, the ISP should, as a contractual matter, take action to prevent it from happening again.”¹⁸⁰ Some ISPs do not undertake contractual obligations but declare a “hate-free policy” and reserve the right to modify or terminate their services at any time if the service is used for posting or transmitting objectionable material.¹⁸¹ “The effectiveness of this remedy is limited, however. Any subscriber to an ISP who loses his or her account for violating that ISP’s regulations may resume propagating hate by subsequently signing up with any of the dozens of more permissive ISPs in the marketplace.”¹⁸²

In addition to self-censorship by ISPs, users may independently ensure hate-free cyberspace for themselves by installing filtering software on their computers.¹⁸³ Many Web sites release free hate-filtering software. For example, the Anti-Defamation League offers HateFilter “that blocks access to sites that advocate hatred, bigotry, or violence towards Jews or other groups on the basis of their religion, race, ethnicity, sexual orientation, or other immutable

177. See, e.g., Weintraub-Reiter, *supra* note 26, at 168.

178. Statement, *supra* note 119.

179. Weintraub-Reiter, *supra* note 26, at 168 (quoting Lynn Sharp Paine, Prodigy Services Company, HARV. BUS. SCHOOL CASE, at 6A (1993)).

180. Statement, *supra* note 119.

181. See, e.g., Yahoo, Yahoo GeoCities Terms of Service, at <http://docs.yahoo.com/info/terms/geoterms.html> (last visited Feb. 21, 2003).

182. Statement, *supra* note 119.

183. Anti-Defamation League, ADL Releases Free Filtering Software Designed to “Keep Hate Out Of Homes” (March 21, 2002), at http://www.adl.org/presrele/Internet_75/4054_75.asp (last visited Feb. 21, 2003). A free copy of the software is located at the Anti-Defamation League’s website, at <http://www.asl.org>, to download the free software.

characteristics. There are also some commercially marketed filters that¹⁸⁴ contain many categories for objectionable material, such as “intolerance” or “racism or ethnic impropriety.”¹⁸⁵

It is necessary to mention that such individual filtering software is mostly recommended for parents who want “to prevent . . . [their children] from viewing sites that contain pornography[, violent, and hateful] or other problematic material.”¹⁸⁶ There is no problem with parental control over children’s access to the Internet; parents may control what they want.¹⁸⁷ The restriction of adults’ access is a completely different issue. Generally, the Internet is not regarded as an intrusive medium and most adults can avoid hateful messages on the Internet if they chose to do so. Thus, when governments or ISPs exercise censorship it mostly targets those who are really interested in learning about unpopular views, be it from curiosity or when looking for allies. The result is particularly incompatible with the United States’ First Amendment but is desirable in Germany (at least in respect to racism).

The issue of filters and private blocking has inspired much criticism. First, there is the problem of imperfect technology. Because many filters are based on word recognition they screen out educational or other harmless materials on objectionable topics. The most notorious example is when “America Online screened out material with the word ‘breast,’ thereby denying access to information and discussion groups about breast cancer.”¹⁸⁸ Such filters are also unreliable in cases of hate speech since they ban speech on the basis of words that may be present in anti-hate propaganda as well.¹⁸⁹

Second, in the case of filters based on various rating systems by independent bodies, there remains the question of arbitrary human evaluation. Some authors fiercely oppose them. It is “a blow to free expression on the Internet because it removes judgment from the hands of audience members. They become, instead, atomized members of a mass society to be programmed at, measured, and sold consumer goods.”¹⁹⁰ Even suggestions of “computer warnings and blocking statements”¹⁹¹ appearing before a display of objectionable material are met with suspicion by “cyberliberitarians,” because

184. Statement, *supra* note 119.

185. See, e.g., LIPSCHULTZ, *supra* note 83, at 100. See also Cyber Patrol, CyberNot for download, at <http://www.cyberpatrol.com/trial/home.htm> (last visited Feb. 21, 2003).

186. Statement, *supra* note 119.

187. See, e.g., *id.* at 30.

188. McGuire, *supra* note 2, at 782.

189. Die These: Internet; Neonazi, DIE WOCHE (Germany), August 18, 2000, at 4.

190. LIPSCHULTZ, *supra* note 83, at 65.

191. *Id.*

they serve “to make judgments for the majority of the public that is unwilling to exercise independent thought.”¹⁹²

Third, “Floyd Abrams, a First Amendment scholar, asserted, that the only problem with private filters is to make sure they don’t become public filters.”¹⁹³ Even the Platform for Internet Content Selection, (PICS), technology, which “allows multiple independent rating systems to be standardized and read by different screening software packages” in accordance with personal preferences,¹⁹⁴ does not provide release from this concern. Some authors “see PICS as a vehicle through which governments can control the Internet rather than as private preemption of legislative censorship.”¹⁹⁵ Barry Steinhardt, the Associate Director of the American Civil Liberties Union (“ACLU”) echoed these concerns when he “noted that ‘[t]he Internet has changed the nature of the issue . . . [i]n order to preserve free speech values, you have to concern yourselves with the actions of the dominant private companies that will structure this medium.’”¹⁹⁶

Proponents of anti-hate speech measures are also against private censorship, but for a different reason. They argue that filtering actions from ISPs do not release the government from its responsibility to provide for rights of the citizen for hate-free cyberspace¹⁹⁷ and controls should not be placed on private establishments but on democratic institutions.¹⁹⁸

VI. PUBLIC DEBATE AND PUBLIC REACTION

Obviously, regulation of Internet speech would be most successful in a case of international cooperation by all major states. “The United States and Germany, countries with similar . . . [democratic values], differ on what content they wish to control on the Internet, indicating the wide disparity of policy choices that an international Internet regulatory structure must accommodate.”¹⁹⁹ Among the public, both in Germany and in the United States, there are eager proponents of both approaches.

The United States supporters of a free speech approach often rely on Holmes’ marketplace of ideas theory²⁰⁰ and the self-

192. *Id.*

193. Weintraub-Reiter, *supra* note 26, at 169.

194. McGuire, *supra* note 2, at 783.

195. *Id.* at 787-88.

196. Weintraub-Reiter, *supra* note 26, at 170 (quoting Amy Harmon, *The Self-Appointed Cops of the Information Age*, N.Y. TIMES, Dec. 7, 1997, sec. 4, at 1, 6).

197. See, e.g., Terhoerst, *supra* note 6.

198. Tsesis, *supra* note 147, at 867.

199. McGuire, *supra* note 2, at 791.

200. Weintraub-Reiter, *supra* note 26, at 147.

government argument of Meiklejohn.²⁰¹ Their opponents reply that “society derives no benefit from deliberately falsified scientific data, fabricated fallacies about the intellectual and economic attributes of people, and concocted stereotypes.”²⁰² In response to the argument that “because we cannot be certain as to what opinions help or harm democracy, we should not censor that which we consider offensive to the democratic ideal,”²⁰³ there is a counter-argument that “hate speech does not further the interests of democracy because it advocates that certain social elements should be denied fundamental rights.”²⁰⁴ Supporters of free speech give many examples: Should we ban Roman Catholic preaching because it advocates that homosexuality is loathsome and sinful? Should we ban Huckleberry Finn because it disparages blacks?²⁰⁵ They also point out that pre-Hitler Germany had anti-hate speech laws and “there is some indication that the Nazis of pre-Hitler Germany shrewdly exploited their criminal trials in order to increase the size of their constituency.”²⁰⁶ Their opponents are not convinced.²⁰⁷

There are numerous arguments on both sides, however, arguments do not have much chance to change the legal framework of both nations. The main constitutional values, freedom of speech in the United States and human dignity in Germany, taken together with historical imperatives are determinative for the legislature and courts.

The conflict between different approaches has caused controversies not only on the normative level but also as a practical response. For example, in 1996, “at the request of the German government . . . [the German ISP] Deutsche Telekom began denying its customers access to Zündel’site, a web page by Ernst Zündel, a renown holocaust denier and anti-Semite living in Canada.”²⁰⁸ Users from the United States “began creating ‘mirror sites’ [with] . . . an exact copy of material on Zündel’s Web page . . . mak[ing] it available . . . [through alternate] access providers that the German

201. Reed, *supra* note 112, at 183; Weintraub-Reiter, *supra* note 26, at 147.

202. Tsesis, *supra* note 147, at 849.

203. WOLFSON, *supra* note 125, at 30.

204. Tsesis, *supra* note 147, at 847.

205. See, e.g., WOLFSON, *supra* note 125, at 53.

206. Nadine Strossen, *Incitement to Hatred: Should There Be a Limit?* 25 S. ILL. U. L.J. 243, 260 (2001) (quoting *R. v. Keegstra*, [1990] 3 S.C.R. 697(Can.)).

207. For more arguments, see William G. Ortner, Note, *Jews, African-Americans, and the Crown Heights Riots: Applying Mastuda’s Proposal to Restrict Racist Speech*, 73 B.U. L. REV. 897 (1993); David Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445 (1987); Kübler, *supra* note 9, at 335.

208. Sally Greenberg, *Threats, Harassment, and Hate On-Line: Recent Developments*, 6 B.U. PUB. INT. L.J. 673, 693 (1997).

government could not control.”²⁰⁹ “The individuals who created these sites were not Nazi sympathizers; [t]hey were [just] free speech advocates.”²¹⁰ Zündel’s “writings are now more accessible than ever.”²¹¹

The critics have said:

While it is clear that the United States will not change its domestic regime, the trans-national nature of the Net requires that it make some concession to the rule of international law. The United States is out of step; it should attempt to contain the bile that spews from the servers in its physical jurisdiction—this burden should not fall upon the rest of the international community.²¹²

Yet, so far the United States government has emphasized that it “supports the broadest possible free flow of information across international borders.”²¹³

Anti-hate movements have an impact as well. In the past years, United States mass media and anti-hate organizations have been persistently pressuring ISPs to block access to Internet sites that promote hate and racism.²¹⁴ Many ISPs were not influenced by public opinion, but some were. For instance, the Internet auctioneer eBay expanded “its listing policy to prohibit the sale of Nazi memorabilia and other items that glorify hatred, violence or racial intolerance or promote hate groups.”²¹⁵ GeoCities removed some KKK sites.²¹⁶ Yahoo! also announced “its decision to take steps to remove hateful materials from its Internet auctions”²¹⁷ even though it proceeded to fight penalties and legal obligations imposed by the French court.

Whether filtering and blocking measures are employed by ISPs or by governments, they are likely to fail unless there is

209. *Id.*

210. *Id.* at 694.

211. *Id.*

212. Fogo-Schensul, *supra* note 9, at 276.

213. McGuire, *supra* note 2, at 790.

214. Michael L. Siegel, *Hate Speech, Civil Rights, and the Internet: The Jurisdictional and Human Rights Nightmare*, 9 ALB. L.J. SCI. & TECH. 375, 382 (1999).

215. Press Release, Anti-Defamation League, ADL Applauds eBay for Expanding Guidelines to Prohibit the Sale of Items that Glorify Hate (May 4, 2001), at http://www.adl.org/presrele/internet_75/3820_75.asp (last visited Feb. 21, 2003).

216. Siegel, *supra* note 214, at 382.

217. Press Release, Anti-Defamation League, ADL Commends Yahoo for Action Banning Nazi Memorabilia and Other Hateful Items on its Auction Site (Jan. 3, 2001), at www.adl.org/presrele/internet_75/3735_75.asp (last visited Feb. 21, 2003).

international conformity in legal regulation of online hate. There are several examples which illustrate how separate censoring efforts may be overcome by users. Most of the anti-censorship methods were developed by western liberalists to overcome local Internet restrictions of citizens by totalitarian governments.²¹⁸ Obviously, the same technology may be employed by users in democratic countries who want to access restricted Web sites.

There are Web-based anti-censorship proxy (“ACP”) servers that work “by creating an alternate namespace for the entire Internet.”²¹⁹ This makes it possible for “every site on the entire Internet . . . to appear as if it is a page on . . . [such a] server,” and as such, the site is not detected as objectionable by ISP filters.²²⁰ Brian Ristuccia, who set up such an ACP server, contended that “[t]he ACP server is a very effective Internet censorship repair tool because it takes only one unblocked site to unblock the entire Internet.”²²¹

There is also a method developed on the basis of Peer-to-Peer technology.²²² After installation of specific software on the user’s computer, it requires no central server for the exchange of information, thus avoiding much control and liability for any content.²²³ Another is a very simple method that requires no fancy technology (though it may be more expensive), where users can dial into another country on their modems and bypass local service provider restrictions.²²⁴

Some are of the opinion that with the development of technology and filtering devices it may be possible to adequately control hateful content, including that within the borders of one country.²²⁵ However, there is no doubt that new anti-censorship technologies will be developed as well. Unless legal responsibility for posting, transmitting, and distributing hateful material on the Internet is

218. See, e.g., Internet ohne Zensur, Tool ermöglicht Zugriff auf verbotene Websites: FreeBird umgeht Zensursysteme mit Peer-to-Peer-Netzwerk [Tool makes access possible to forbidden Websites: FreeBird deals censorship systems with Peer to Peer network] (Aug. 11, 2001), at <http://www.ioz.ch/news/010811.htm> (last visited Feb. 21, 2003).

219. Human Rights Watch, The Internet in the Mideast and North Africa: Free Expression and Censorship, *Cybercensorship: Its Various Forms* (June 1999), at <http://www.hrw.org/advocacy/internet/mena/censorship.htm> (last visited Feb. 21, 2003).

220. *Id.*

221. *Id.*

222. Internet ohne Zensur, Browser für unzensurable Informationen. Hacker wollen Software im Juli vorstellen, [Internet without Censorship, Browser for Uncensorable Information. Hackers want to introduce the Software in July] (May 10, 2001), at <http://www.ioz.ch/news/010510.htm> (last visited Feb. 21, 2003).

223. *Id.*

224. Human Rights Watch, The Internet in the Mideast and North Africa: Free Expression and Censorship How Users can Protect their Right to Privacy and Anonymity (June 1999), at <http://www.hrw.org/advocacy/internet/mena/privacy-rights.htm> (last visited Feb. 21, 2003).

225. Tthesis, *supra* note 147, at 836.

universally recognized, success of private blocking measures is highly questionable.

VII. CONCLUSION

Hate speech on the Internet is and will be controlled to different degrees by different national authorities. However, the probability of success of national regulations is limited and the result of any regulatory efforts is inevitably influenced by the position of other participants.

Several common principles of liability for unprotected messages are already recognized by many countries, including the United States and Germany. Thus, it is not a viable practice to hold ISPs liable for transmitting a third-party's Internet content unless the ISP itself initiates the transmission. This is a fair principle from ISPs' point of view; however, it deprives the state of legal mechanisms to regulate the availability of harmful material to the users. Perhaps as compensation for that, another principle has been developed: states can expose anyone that they can exert jurisdiction over to liability, disregarding the fact that the material in question was physically put on the Internet in a territory where it may be perfectly legal, or was put on a server located in such territory.

There is less agreement, however, as to questions about the content of the hateful material. Absent worldwide conformity with the United States' First Amendment as a cornerstone, hate speech will remain available on the Internet despite regulatory efforts of other countries, and its regulation will have implications for the actors on both sides. By the choice of anti-hate state policy, the availability of objectionable content to the users may be limited within a given country, but it will not be blocked out completely due to imperfect filtering technology and numerous technical opportunities of the Internet. By the choice of pro-speech state policy, there is a danger that national ISPs and users may face civil and criminal liability once they happen to get into another more restrictive country.

"Hate and harassment existed long before the establishment of the Internet and would continue even if the Net was heavily censored."²²⁶ The United States and Germany chose to fight hate speech with different means—the United States through the free and open exchange of ideas, and Germany through suppressing such speech. Indeed, "[t]here may be no single balance that would work for all cultures."²²⁷ At present, the international solution, though

226. Greenberg, *supra* note 208, at 695.

227. DELGADO & STEFANCIC, *supra* note 7, at 130.

much desirable, is highly improbable “due to differing views on the nature of free speech and freedom from censorship.”²²⁸ The option left to every country is to educate the public, to teach tolerance to and acceptance of diverse values. After all, “[r]acist speech is a mere symptom of racism.”²²⁹

228. Siegel, *supra* note 214, at 396.

229. Ortner, *supra* note 207, at 918.

THE COUNCIL OF EUROPE CONVENTION ON CYBERCRIME

MIKE KEYSER*

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I. INTRODUCTION

The Internet is often referred to as the new “Wild West.”¹ This maxim holds true, because the Internet is so similar to the turn of the century Western Frontier.² Like the Wild West, the Internet has brought with it opportunity and millions of new jobs.³ The Internet also brings with it very real dangers. Although the specific dangers may be different from those faced on the American Frontier, a web surfer’s exposure to dangers which are new, difficult to police, and difficult to prevent, is very similar.⁴ The only significant difference may be that the Internet is a virtual society

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1. Henry E. Crawford, *Internet Calling: FCC Jurisdiction over Internet Telephony*, 5 COMM. L. CONSPICUOUS 43, 43 (1997) (discussing the Internet and analogizing it to the Wild West).

2. *Id.*

3. Mohit Gogna, *The World Wide Web Versus the Wild Wild West*, at <http://home.utm.utoronto.ca/~mohit/> (last visited Dec. 4, 2002). For example, in 1996, 1.1 million jobs were created. *Id.*

4. *Id.*

rather than a tactile one; a virtual society existing only in networks and information packets.⁵ However, the harms committed against both individual citizens and businesses are very real.⁶ These citizens are extremely vulnerable as criminal activity on the Internet continues to run rampant.⁷

This article is intended to expand upon the existing wealth of knowledge regarding cybercrimes. However, it takes the analysis one step further. This is the first article to consider the impact of a new, powerful, and timely piece of international legislation: The Council of Europe's Convention on Cybercrime.⁸ Section II of this comment begins with a survey of the cyber-landscape. It illustrates citizenry and critical infrastructures extremely vulnerable to international, as well as domestic, cyber attacks. Section II ends with a case example—the case of Raymond Torricelli and his Internet exploits. Section III is an in-depth analysis of the newly signed, but not yet ratified, Cybercrime Convention. Section III examines the entire Convention, article by article, taking into account critical opinion, as well as drafter intent. Select provisions of importance are analyzed in greater depth by looking at their improvements upon existing law, in addition to their pitfalls. The fourth and final section concludes the comment by projecting toward the future, forecasting some aspects of the Convention's impact upon our lives as it enters into force, as well as the likely objections individuals, businesses, and interest groups will have to treaty provisions.

5. Joginder S. Dhillon & Robert I. Smith, *Defensive Information Operations and Domestic Law: Limitations on Governmental Investigative Techniques*, 50 A.F.L. REV. 135, 138 (2001) (explaining the composition of the Internet and how information is transferred).

6. Many of the crimes committed against individuals and businesses are legislated against in the European Convention on Cybercrime, and include identity theft, child pornography, and fraud, among others. Convention on Cybercrime, opened for signature Nov. 23, 2001, Europ. T.S. No. 185 [hereinafter *Convention*], available at <http://conventions.coe.int/Treaty/EN/projets/FinalCybercrime.htm> (last visited Dec. 4, 2002).

7. Aaron Craig, *Gambling on the Internet*, 1998 COMPUTER L. REV. & TECH. J. 61 (1998) (discussing the seriousness of the effects of crime on the Internet), available at <http://www.smu.edu/csr/Spring98-2-Craig.PDF>.

8. *Convention*, supra note 6.

II. YOUR NETWORK NEIGHBORHOOD

A. Crime on the "Net"

The 2001 Computer Crime and Security Survey, conducted by the Computer Security Institute and the FBI's San Francisco office, is prime evidence of the extent of lawlessness on the Internet:

1. 47 percent of the companies surveyed had their systems penetrated from the outside;⁹
2. 90 percent reported some form of electronic vandalism;¹⁰
3. 92 percent reported personal data and transaction information (including reports on stolen credit card numbers).¹¹

This figure is daunting since only a small percentage of companies responded, while hundreds of companies whose systems have been compromised, and whose information has been stolen, remain in the dark.¹² Numerous reasons exist which explain why businesses are reluctant to report system intrusions.¹³ Most commonly, this reluctance is attributed to the fear that a public report would compromise a competitive position in their respective market.¹⁴ In other words, they may lose business if the public perceives the company as vulnerable to attack or unable to keep personal identification secure.¹⁵ The FBI estimates that the cost of electronic crime exceeds ten billion dollars per year.¹⁶

Cybercrimes are not limited to businesses. The Federal Trade Commission reported that identity theft and bogus Internet scams topped the list of consumer fraud complaints in 2001.¹⁷ Identity theft, arguably the most prevalent crime on the Internet, comprised 42 percent of the total complaints.¹⁸ With figures like these, it is no

9. John Galvin, Meet the World's Baddest Cyber Cops, ZIFF DAVIS SMART BUS. FOR THE NEW ECON. (Oct. 1, 2001), at 78 (on file with the Journal of Transnational Law & Policy).

10. *Id.*

11. *Id.*

12. *Id.*

13. Dhillon & Smith, *supra* note 5, at 140 (discussing the reluctance of companies to report intrusions on its systems).

14. *Id.*

15. *Id.*

16. *Id.* at 139.

17. Jay Lyman, ID Theft and Web Scams Top Consumer Complaints, NEWSFACTOR NETWORK (Jan. 24, 2002), at <http://www.newsfactor.com/perl/story/15965.html>.

18. *Id.*

secret that cybercrimes pose an ongoing and significant threat to the security of the United States and its citizens.¹⁹

B. Greater Dependency on Technology

As our lives become more advanced, we depend on computers and technology to even greater degrees. For example, one should consider the increasing trend of Internet sales. The convenience and privacy of online consumer spending is leading towards a growing use of the Internet as a consumer's primary purchasing location. In the year 2000, online retail sales totaled \$5 billion, while total sales were \$42.4 billion.²⁰ "Total U.S. spending on online sales increased from \$4.9 billion in November to \$5.7 billion in December" of 2001.²¹ Consumer online sales for the third quarter of 2002 reached \$17.9 billion, a 35 percent increase over the third quarter of 2001.²² Online sales through the third quarter of 2002 totaled \$52.5 billion.²³ As online sales continue to increase, and personal and credit card information is transferred over the Internet, the American public also increases its chances that it will become the victim of a "cybercrime."

C. What is a Cybercrime & Who are Cybercriminals?

"The Department of Justice ("DOJ") defines computer crimes as 'any violations of criminal law that involve a knowledge of computer technology for their perpetration, investigation, or prosecution.'²⁴ The types of people who commit cybercrimes vary as much as the multitude of crimes that can be committed.²⁵ "Computer criminals can be youthful hackers, disgruntled employees and company insiders, or international terrorists and spies."²⁶ These criminals become "cybercriminals" when their crimes involve the use of a computer. "[A] computer may be the 'object' of a crime," or in other words, "the criminal targets the computer itself."²⁷ "[A] computer may [also] be the 'subject' of a crime," or in other words, it "is the

19. Galvin, *supra* note 9.

20. CyberAtlas Staff, December Rakes in the E-Commerce Dough, at http://cyberatlas.internet.com/markets/retailing/article/0,,6061_961291,00.html (last visited Feb. 11, 2003).

21. *Id.*

22. Robyn Greenspan, Shoppers Gearing Up for Season, at http://cyberatlas.internet.com/markets/retailing/article/0,,6061_1494231,00.html#table1 (last visited Feb. 11, 2003).

23. *Id.*

24. Sheri A. Dillon et al., Note, Computer Crimes, 35 Am. Crim. L. Rev. 503, 505 (1998) (defining "computer crime") (quoting National Institute of Justice, U.S. Dep't of Justice, Computer Crime: Criminal Justice Resource Manual 2 (1989)).

25. Dillon et al., *supra* note 24, at 506.

26. *Id.*

27. *Id.* at 507.

physical site of the crime, or the source of, or reason for, unique forms of asset loss.”²⁸ Examples of this type of crime are viruses, logic bombs, and sniffers.²⁹ Finally, “a computer may be [the] ‘instrument’ used to commit traditional crimes.”³⁰ For example, a computer might be used to commit the most common type of cybercrime to date—identity theft.³¹

D. Identity Theft

Identity theft is now being called “the signature crime of the digital era.”³² “Identity theft is the illegal use of another’s personal identification numbers.”³³ Examples include a person using a stolen “credit card, or social security number to purchase goods,”³⁴ withdraw money, apply for loans, or rent apartments.³⁵ While these types of crimes have existed for a long time in the form of pick pocketing, the Internet facilitates their frequency and ease.³⁶ Without faces or signatures, the only thing preventing a person from posing as another is a password, which can be intercepted without much difficulty by an experienced criminal.³⁷

E. Taking a Bite out of Crime, Domestically Speaking

In the United States, laws intended to combat cybercrimes are already in place.³⁸ Congress treats cybercrimes as distinct federal offenses through a multitude of acts, most notably the Computer

28. *Id.*

29. *Id.*

30. *Id.*

31. See Lyman, *supra* note 17.

32. Michael McCutcheon, Identity Theft, Computer Fraud and 18 U.S.C. § 1030(G): A Guide to Obtaining Jurisdiction in the United States for a Civil Suit Against a Foreign National Defendant, 13 *LOY. CONSUMER L. REV.* 48, 48 (2001) (discussing identity theft).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 49.

38. See, e.g., 18 U.S.C. § 875 (2000) (originally enacted as Act of June 25, 1948, ch. 645, 62 Stat. 741) (interstate communications: including threats, kidnapping, ransom, and extortion); 18 U.S.C. § 1029 (2000) (possession of access device); 18 U.S.C. § 1030 (2000) (fraud and related activity in connection with computers); 18 U.S.C. § 1343 (2000) (originally enacted as Act of July 16, 1952, ch. 879, § 18(a), 66 Stat. 722, and amended by Act of July 11, 1956, ch. 561, 70 Stat. 523) (fraud by wire, radio, or television); 18 U.S.C. § 1361 (2000) (based on Act of Mar. 4, 1909, ch. 321, § 35, 35 Stat. 1095; Act of Oct. 23, 1918, ch. 194, 40 Stat. 1015; Act of June 18, 1934, ch. 587, 48 Stat. 996; Act of Apr. 4, 1938, ch. 69, 52 Stat. 197) (injury to government property or contracts); 18 U.S.C. § 1362 (2000) (based on Act of Mar. 4, 1909, ch. 321, § 60, 35 Stat. 1099) (communication lines, stations, or systems); Economic Espionage Act of 1996, 18 U.S.C. § 1831, *et seq.* (2000).

Fraud and Abuse Act of 1986³⁹ and the National Information Infrastructure Protection Act of 1996.⁴⁰ These laws are designed to incriminate domestic hackers. A good example is the case of twenty-year old Raymond Torricelli, known by the hacking code name, "rolex."⁴¹

Torricelli was the head of a notorious hacking group known as "#conflict."⁴² Operating out of his New Rochelle, New York home, Torricelli "used his personal computer to run programs designed to search the Internet, and seek out computers which were vulnerable to intrusion."⁴³ Once a computer was "located, Torricelli's computer obtained unauthorized access . . . by uploading a program known as 'rootkit.'⁴⁴ When run on a foreign computer, rootkit "allows a hacker to gain complete access to all of a computer's functions without having been granted these privileges by the authorized users of that computer."⁴⁵

"One of the computers Torricelli accessed was used by NASA [the National Aeronautics and Space Administration] to perform satellite design and mission analysis concerning future space missions."⁴⁶ Another computer Torricelli accessed was used by NASA's Jet Propulsion Laboratory "as an e-mail and internal web server."⁴⁷

After gaining unauthorized access to these computers, Torricelli "used many of the computers to host chat-room discussions."⁴⁸ "[I]n these discussions, he invited other chat participants to visit a website which enabled them to view pornographic images."⁴⁹ "Torricelli earned 18 cents for each visit a person made to that website," ultimately netting \$300-400 dollars per week from this activity.⁵⁰

Torricelli's criminal activities were far from over. He also intercepted "usernames and passwords [by] traversing the computer networks" of San Jose State University.⁵¹ In addition, he stole

39. Pub. L. No. 99-474, § 2, 100 Stat. 1213 (1986) (amending 18 U.S.C. § 1030).

40. Pub. L. No. 104-294, tit. 2, § 201, 110 Stat. 3488, 3491-94 (1996) (amending 18 U.S.C. § 1030). For a discussion of laws currently in place, see Dillon et al., *supra* note 24, at 508.

41. Press Release, United States Dep't of Justice, Hacker Sentenced in New York City for Hacking into Two NASA Jet Propulsion Lab Computers Located in Pasadena, California (Sept. 5, 2001), available at <http://www.usdoj.gov/criminal/cybercrime/torricellisent.htm>.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

passwords and usernames from numerous other sources “which he used to gain free Internet access, or to gain unauthorized access to still more computers.”⁵² When Torricelli “obtained passwords which were encrypted, he would use a password cracking program known as ‘John-the-Ripper’ to decrypt the passwords.”⁵³

Torricelli was still not finished. He also obtained stolen credit card numbers and “used one such credit card number to purchase long distance telephone service.”⁵⁴

[M]uch of the evidence obtained against Torricelli was obtained through a search of his personal computer. . . . [I]n addition to thousands of stolen passwords and numerous credit card numbers, investigators found transcripts of chat-room discussions in which Torricelli and members of ‘#conflict’ [his hacker group] discussed, among other things, (1) breaking into other computers . . . (2) obtaining credit card numbers belonging to other persons and using those numbers to make unauthorized purchases . . . and (3) using their computers to electronically alter the results of the annual MTV [Music Television] Movie Awards.⁵⁵

52. Id.

53. Id.

54. Id.

55. Id.

III. TAKING A BITE OUT OF CRIME

A. The Internationalization of Cybercrime

Due to the nature of cybercrimes and an undeveloped international body of law on the topic, cybercrimes often occur internationally. For example, perpetrators “across the United States and Europe were indicted by a federal grand jury [in May, 2000] for allegedly conspiring to infringe the copyright of more than 5,000 computer software programs. . . .”⁵⁶ These programs were “made available through a hidden Internet site located at a university in Quebec, Canada.”⁵⁷

Some of the perpetrators:

allegedly were members . . . of an international organization of software pirates known as “Pirates with Attitudes,” [“PWA”] an underground group that disseminates stolen copies of software, including programs that are not yet commercially available.... [Others] were employees of Intel Corp., four of whom allegedly supplied computer hardware to the piracy organization in exchange for obtaining access . . . to the group’s pirated software, which had a retail value in excess of \$1 million.⁵⁸

PWA is “one of the oldest and most sophisticated networks of software pirates anywhere in the world.”⁵⁹ Officials are aware of this because “previous software piracy investigations that have focused on smaller sites have turned up numerous copyrighted software files bearing annotations reflecting that the files were supplied to the sites through PWA.”⁶⁰

International crime syndicates often communicate “in real time on private Internet Relay Chat [“IRC”] channels,” or in code via open Internet chat rooms.⁶¹ “PWA allegedly maintained numerous File Transfer Protocol [“FTP”] sites configured for the transfer of

56. Press Release, United States Dep’t of Justice, U.S. Indicts 17 in Alleged International Software Piracy Conspiracy (May 4, 2000), available at <http://www.cybercrime.gov/pirates.htm>.

57. *Id.*

58. *Id.*

59. *Id.* (quoting Scott R. Lassar, United States Attorney for the Northern District of Illinois).

60. *Id.*

61. *Id.*

software files and stored libraries of pirated software on each of these sites.”⁶²

PWA’s website “was not accessible to the general public, but instead was configured so that it was accessible only to” those people who knew its Internet Protocol (“IP”) address.⁶³ In order for users to maintain their ability to access the website and download pirated software, they were required “to ‘upload,’ or provide files, including copyrighted software files obtained from other sources and, in return, were permitted to ‘download’” pirated files provided by other users.⁶⁴ At one point, “more than 5,000 copyrighted computer software programs were available for downloading. . . .”⁶⁵

Software pirates are often assigned different tasks, which shields the overall organization from a governmental “bust.”⁶⁶ PWA followed this organizational scheme assigning some members to the role of “cracker,” which are people who strip “away the copy protection that is embedded in [the] . . . software.”⁶⁷ Others were assigned as “couriers” whose job it was to transfer software to PWA, or as “suppliers” who were funneling “programs from major software companies to the group.”⁶⁸

In this case, the United States had jurisdiction over those nationals involved in the piracy scheme.⁶⁹ But what about PWA members that live outside U.S. borders in countries that do not have an extradition treaty with the United States? It seems that United States laws might not apply to those international criminals or cannot reach their criminal actions. This problem poses a serious concern for many government officials because many computer systems can be easily accessed through a “global telecommunications network from anywhere in the world.”⁷⁰ Furthermore, it becomes a roll of the dice as to whether the criminal’s host country has laws stringent enough to bring the criminal to justice, or if the host country is even willing to cooperate in the first place.⁷¹ Thus, in order to successfully combat cybercrime, it is clear that the world needs a better international legal system in which to catch and convict cybercriminals.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. Dillon et al., *supra* note 24, at 539 (discussing computer systems and ease of access).

71. *Id.*

B. The Council of Europe Cybercrime Convention

The forty-one nation Council of Europe (“COE”) drafted the Cybercrime Convention⁷² after four years and twenty-seven drafts.⁷³ It was adopted by the Committee of Ministers during the Committee’s 109th Session on November 8, 2001.⁷⁴ The Convention was opened for signature in Budapest, on November 23, 2001.⁷⁵ Thirty-five countries have signed the treaty, with Albania and Croatia having ratified it as well.⁷⁶ The Convention will come into force when five states, three of which must be COE members, have ratified it.⁷⁷ The treaty is intended to create a common cross-border “criminal policy aimed at the protection of society against cybercrime . . . by adopting appropriate legislation and fostering international co-operation.”⁷⁸

1. Importance

The COE’s Convention on Cybercrime is important international legislation because it binds countries in the same way as a treaty. “An international convention, or treaty, is a legal agreement between governments that spells out a code of conduct.”⁷⁹ Once a large number of states have ratified a treaty, then it becomes acceptable to treat it as general law.⁸⁰ Treaties are the only machinery that exist for adapting international law to new conditions and strengthening the force of a rule of law between states.⁸¹ Thus, it seems very important for an international regime to be set up to combat these types of crimes in a growing and

72. Convention, *supra* note 6.

73. Peter Piazza, *Cybercrime Treaty Opens Pandora’s Box*, SECURITY MGMT. (Sept. 2001), available at <http://www.securitymanagement.com/library/001100.html>.

74. Convention, *supra* note 6.

75. *Id.*

76. Council of Europe, *Chart of Signatures and Ratifications*, available at <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm> (last visited Dec. 6, 2002) (signatories include: United States; Albania; Armenia; Austria; Belgium; Bulgaria; Canada; Croatia; Cyprus; Estonia; Finland; France; Germany; Greece; Hungary; Iceland; Ireland; Italy; Japan; Malta; Moldova; Netherlands; Norway; Poland; Portugal; Romania; Slovenia; Spain; Sweden; Switzerland; South Africa; Ukraine; United Kingdom; and the former Yugoslav Republic of Macedonia).

77. Wendy McAuliffe, *Council of Europe Approves Cybercrime Treaty*, ZDNET UK NEWS (Sept. 21, 2001), at <http://news.zdnet.co.uk/story/0,,t269-s2095796,00.html>.

78. Convention, *supra* note 6, pmb1.

79. UNICEF, *Laws and International Conventions*, at http://www.unicef.org/turkey/laws_i_c/ (last visited Feb. 11, 2003).

80. JAMES LESLIE BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 57 (Humphrey Waldock ed., Oxford Univ. Press 6th ed. 1963) (1928).

81. *Id.*

integrated global society, which is becoming ever more vulnerable to cyber attacks.

2. Objectives

The Convention is intended to be the “first international treaty on crimes committed via the Internet and other computer networks.”⁸² Its provisions particularly deal with infringements of copyrights, computer-related fraud, child pornography, and violations of network security.⁸³ Its main objective, set out in the preamble, is to “pursue . . . a common criminal policy aimed at the protection of society against cybercrime . . . especially by adopting appropriate legislation and fostering international co-operation.”⁸⁴

3. Parties Involved

The Convention is open to worldwide membership.⁸⁵ Instrumental in its drafting were the forty-one COE “countries, which cover most of Central and Western Europe.”⁸⁶ In addition, the United States, Canada, Japan, and South Africa also aided in its drafting.⁸⁷ As stated earlier, as of the date of this publication, thirty-five countries have signed the treaty.⁸⁸

4. Scope

The Convention is broken up into four main segments, with each segment consisting of several articles. The first section outlines the substantive criminal laws and the common legislation all ratifying countries must adopt to prevent these offenses.⁸⁹ The second section delineates the prosecutorial and procedural requirements to which individual countries must adhere.⁹⁰ The third section sets out guidelines for international cooperation that most commonly involve joint investigations of the criminal offenses set out in section one.⁹¹ Finally, the fourth section contains the articles pertaining to the signing of the Convention, territorial application of the Convention,

82. Convention, *supra* note 6, pmb1.

83. *Id.*

84. *Id.*

85. Lawrence Speer, Computer Crime: Council of Europe Cybercrime Treaty Attacked by ISPs, *Business at Hearing*, 6 *COMPUTER TECH. L. REP.* 100 (Mar. 16, 2001).

86. Robyn Blumner, Cyberfear Leading to International Invasion of Privacy, *MILWAUKEE J. SENTINEL*, June 6, 2000, at 17A.

87. *Id.*

88. Council of Europe, Chart of Signatures, *supra* note 76.

89. Convention, *supra* note 6.

90. *Id.*

91. *Id.*

declarations, amendments, withdrawals, and the ever-important, federalism clause.⁹²

5. Convention Section 1 – Definitions and Criminal Offenses

Article 1 initially defines four terms vital to the treaty.⁹³ These terms are vital because they are heavily relied upon throughout the treaty. The treaty first defines “Computer system” as a device consisting of hardware and software developed for automatic processing of digital data.⁹⁴ For purposes of this Convention, the second term, “computer data,” holds a meaning different than that of normal computer lingo.⁹⁵ The data must be “in such a form that it can be directly processed by the computer system.”⁹⁶ In other words, the data must be electronic or in some other directly processable form.⁹⁷

The third term, “service provider” includes a broad category of entities that play particular roles “with regard to communication or processing of data on computer systems.”⁹⁸ This definition not only includes public or private entities, but it also extends to include “those entities that store or otherwise process data on behalf of” public or private entities.⁹⁹

The fourth defined term is “traffic data,” which has created some controversy in this Convention. “Traffic data” is generated by computers in a “chain of communication in order to route” that communication from an origin to its destination.¹⁰⁰ Thus, it is auxiliary to the actual communication.¹⁰¹ When a Convention party investigates a criminal offense within this treaty, “traffic data” is used to trace the source of the communication.¹⁰² “Traffic data” lasts for only a short period of time and the Convention makes Internet Service Providers (“ISPs”) responsible for preservation of this data.¹⁰³ The increased costs placed upon ISPs as a result of the Convention’s stricter rules regarding preservation of “traffic data” is one issue of concern for many ISPs. Another concern is the

92. *Id.*

93. *Id.* art. 1.

94. Explanatory Report of the Comm. of Ministers [of the Convention on Cybercrime], 109th Sess. (adopted on Nov. 8, 2001), art. 1(a), ¶ 23 [hereinafter Explanatory Report] (on file with the Journal of Transnational Law & Policy).

95. *Id.* art. 1(b), ¶ 25.

96. *Id.*

97. *Id.*

98. *Id.* art. 1(c), ¶¶ 26, 27.

99. *Id.*

100. *Id.* art. 1(d), ¶¶ 28-31.

101. *Id.*

102. *Id.*

103. *Id.*

requirement of rapid disclosure of “traffic data” by ISPs.¹⁰⁴ While rapid disclosure may be necessary to discern the communication’s route, in order to collect further evidence or identify the suspect, some civil libertarians express concern over its infringement upon individual rights—namely the right to privacy.

The drafters intended that “Convention parties would not be obliged to copy [the definitions] verbatim into their domestic laws....”¹⁰⁵ It is only required that the respective domestic laws contain concepts that are “consistent with the principles of the Convention and offer an equivalent framework for its implementation.”¹⁰⁶

After defining the vital terms, Article 1 lays out the Convention’s substantive criminal laws. The purpose of these criminal laws is to establish a common minimum standard of offenses for all countries.¹⁰⁷ Uniformity in domestic laws prevents abuses from being shifted to a Convention party with a lower standard.¹⁰⁸ The list of offenses is based upon the work of public and private international organizations, such as the United Nations and the Organization for Economic Cooperation and Development.¹⁰⁹

“All of the offenses contained in the Convention must be committed ‘intentionally’ for criminal liability to apply.”¹¹⁰ In certain cases, additional specific intentional elements form part of the offense.¹¹¹ The drafters have agreed that the exact meaning of “intentional” will be left to the Convention parties to interpret individually.¹¹² A mens rea requirement is important to filter the number of offenders and to distinguish between serious and minor misconduct.

The criminal offenses in Articles 2 thru 6 were intended by the drafters “to protect the confidentiality, integrity and availability of computer systems or data.”¹¹³ At the same time, however, the drafters did not criminalize “legitimate and common activities inherent in the design of networks, or legitimate . . . practices.”¹¹⁴

104. Convention, supra note 6, arts. 17, 30.

105. Explanatory Report, supra note 94, art. 1, ¶ 22.

106. Id.

107. Id. ch. 2, § 1, ¶ 33.

108. Id.

109. Id. ch. 2, § 1, ¶ 34.

110. Id. ch. 2, § 1, ¶ 39.

111. Id.

112. Id.

113. Id. tit. 1, ¶ 43.

114. Id.

a. Article 2 – Illegal Access¹¹⁵

Article 2 relates to “illegal access,” or access to a computer system without right.¹¹⁶ Examples of unauthorized intrusions are hacking, cracking, or computer trespassing; like those our friend Raymond Torricelli had demonstrated earlier. Intrusions such as these allow hackers to gain access to confidential data, such as passwords and identification numbers.¹¹⁷ “Access” deals with the entering of any part of a computer system such as hardware components and stored data, but it “does not include the mere sending of an e-mail message” to a file system.¹¹⁸ Convention parties are granted great latitude with respect to the legislative approach they take in criminalizing this action.¹¹⁹ Parties can take a wide approach, or a more narrow one, by attaching such qualifying elements as infringing upon security measures, requiring specific intent to obtain computer data, or requiring a dishonest intent justifying criminal culpability.¹²⁰

The analogous United States law to this Article is the Computer Fraud and Abuse Act of 1986 (“CFAA”).¹²¹ This Act makes it unlawful to either knowingly access a computer without authorization or to exceed authorization and obtain protected or restricted data.¹²² The case of *United States v. Ivanov*,¹²³ is an example of the way in which courts would be able to utilize Article 2 in international prosecutions. Ivanov, a Russian computer hacker, was “charged with conspiracy, computer fraud and related activity, extortion, and possession of unauthorized access devices” after hacking into a Connecticut e-commerce corporation’s computer files and stealing passwords and credit card information.¹²⁴ He then threatened the corporation with extortion while he was in Russia.¹²⁵ Ivanov moved to dismiss the indictment “on the ground that court lacked subject matter jurisdiction.”¹²⁶ Essentially, Ivanov contended that because he was in Russia, the laws of the United States did not apply extraterritorially to him. The district court held that the taking of the corporation’s data occurred in Connecticut, the

115. *Id.*

116. Convention, *supra* note 6, art. 2.

117. Explanatory Report, *supra* note 94, art. 2, ¶ 47.

118. *Id.* art. 2, ¶ 46.

119. *Id.* art. 2, ¶ 49.

120. *Id.* art. 2, ¶ 50.

121. 18 U.S.C. § 1030 (2000).

122. 18 U.S.C. § 1030(a)(1).

123. 175 F. Supp. 2d 367 (D. Conn. 2001).

124. *Id.* at 368.

125. *Id.*

126. *Id.*

violation of the CFAA occurred when his email was received in Connecticut, and thus the CFAA applied to Ivanov.¹²⁷ It would appear on its face that the CFAA is the United States equivalent to this Article. However, the Convention improves upon the CFAA by applying an across the board rule to all signatories thereby ensuring compliance. For instance, in this case, Russia cooperated with United States authorities in extraditing Ivanov to the United States for trial. But if Russia was not so cooperative, Ivanov would have broken a United States law, caused serious damage to a United States corporation and hundreds of citizens, and would be a free man living in another country. This is a situation in which the Convention's global law enforcement network would succeed.

b. Article 3 – Illegal Interception

Article 3, “illegal interception,” outlaws the interception, without right, of nonpublic transmissions of computer data, whether it be by telephone, fax, email, or file transfer.¹²⁸ This provision is aimed at protecting the right to privacy of data communication.¹²⁹ One element of this offense is that the interception occur through “technical means,” which is the surveillance of communications “through the use of electronic eavesdropping or tapping devices.”¹³⁰ The offense also only applies to “nonpublic” transmissions of computer data.¹³¹ This qualification relates only to “the nature of the transmission . . . and not the nature of the data” being transferred.¹³² In other words, the data being transmitted may be publicly available, but the parties communicating may wish to remain confidential.¹³³ This communication can take place from computer to printer, between two computers, or from person to computer (such as typing into a keyboard).¹³⁴ For example, the use of common commercial practices, such as “cookies” used to track an individual's surfing habits, are not intended to be criminalized because they are considered be “with right.”¹³⁵

This provision does not exhaustively define what sorts of interception are lawful and which ones are unlawful. Therefore, according to the DOJ cybercrime website, nothing in this provision

127. *Id.* at 374.

128. Convention, *supra* note 6, art. 3.

129. Explanatory Report, *supra* note 94, art. 3, ¶ 51.

130. *Id.* art. 3, ¶ 53.

131. Convention, *supra* note 6, art. 3.

132. Explanatory Report, *supra* note 94, art. 3, ¶ 54.

133. *Id.*

134. *Id.* art. 3, ¶ 55.

135. *Id.* art. 3, ¶ 58.

“would change the U.S. wiretap statute (18 U.S.C. 2511(2)(a)(I)), which specifically allows monitoring by a service provider of traffic on its own network undertaken to protect its rights and property.”¹³⁶

c. Article 4 – Data Interference

Article 4, criminalizing the destruction of data, aims “to provide computer data and computer programs with protection similar to that enjoyed by” tangible objects against the intentional infliction of damage.¹³⁷ The input of malicious codes, viruses, and Trojan horses is thus covered under this criminal code.¹³⁸ Convention parties are granted the freedom to require that “serious harm” be committed when legislating this crime, in which the interpretation of what constitutes “serious harm” is left to the respective government.¹³⁹

The United States’ statutory equivalent is the Computer Fraud and Abuse Act of 1986.¹⁴⁰ This section prohibits a person from knowingly transmitting “a program, information, code, or command, and as a result of such conduct, intentionally” causing “damage without authorization, to a protected computer.”¹⁴¹ A “protected computer” is defined as a computer “which is used in interstate or foreign commerce or communication.”¹⁴² Damage must also occur to “one or more persons,”¹⁴³ but courts have held that “one or more persons” includes corporations.¹⁴⁴ In *United States v. Middleton*, a disgruntled former employee obtained illegal access to his former company’s computer system, changed all the administrative passwords, altered the computer’s registry, deleted the entire billing system (including programs that ran the billing software), and deleted two internal databases.¹⁴⁵ In response, company employees spent a considerable amount of time repairing the damage and buying new software.¹⁴⁶ The former employee, arrested under section 1030(a)(5)(A), moved to dismiss by alleging that the company was not an “individual” for purposes of the statute.¹⁴⁷ The

136. United States Dep’t of Justice, Frequently Asked Questions and Answers About the Council of Europe Convention on Cybercrime, at <http://www.usdoj.gov/criminal/cybercrime/COEFAQs.htm> (last visited Feb. 13, 2003) [hereinafter Frequently Asked Questions].

137. Explanatory Report, *supra* note 94, art. 4, ¶ 60.

138. *Id.* art. 4, ¶ 61.

139. *Id.* art. 4, ¶ 64.

140. Pub. L. No. 99-474, § 2, 100 Stat. 1213 (1986) (amending 18 U.S.C. § 1030).

141. 18 U.S.C. § 1030(a)(5)(A).

142. *Id.* § 1030(g)(e)(2)(B).

143. 18 U.S.C. § 1030(e)(8)(A).

144. *United States v. Middleton*, 231 F.3d 1207, 1210-1211 (9th Cir. 2000).

145. *Id.* at 1209.

146. *Id.*

147. *Id.*

Court of Appeals disagreed, holding that Congress intended the word “individual” to include corporations.¹⁴⁸

d. Article 5 – System Interference

Article 5, criminalizing “system interference,” aims to prevent “the intentional hindering of the lawful use of computer systems.”¹⁴⁹ “Hindering,” as used in this Article, must be serious enough to rise to the level of criminal conduct.¹⁵⁰ “The drafters considered as ‘serious’ the sending of data to a particular system in such a form, size, or frequency that it has a significant detrimental effect on the ability of the owner or operator to use the system, or to communicate with other systems. . . .”¹⁵¹ A common example of a hack criminalized under this section would be a “denial of service attack,” a malicious code, such as a virus, that prevents or substantially slows the operation of a computer system leaving the common web surfer unable to access a web page.¹⁵² A questionable example is “spamming,” a practice whereby a person or program sends huge quantities of email to a voluminous amount of recipients for two possible purposes: (1) to block the communicating function of the system,¹⁵³ or (2) to over-expose enough consumers to advertising that sales of a product are generated.¹⁵⁴ It is arguable that spamming could fall under Article 5 when it reaches the point of computer sabotage in the slowing or shutting down of a computer network or service provider. However, a violation under Article 5 must be committed intentionally, and whether a “spammer” who merely mass advertises has the requisite mens rea will be an important issue that the Council and individual countries will need to resolve.¹⁵⁵

Besides invoking Article 4 (Data Interference), the spreading of a computer virus would fall under this Article as well. One should consider, for example, the “Melissa” virus, which was launched in 1999 and ultimately caused eighty billion dollars in damage.¹⁵⁶ The virus was set to invade a person’s address book and send up to fifty

148. *Id.* at 1211.

149. Explanatory Report, *supra* note 94, art. 5, ¶ 65.

150. *Id.* art. 5, ¶ 67.

151. *Id.*

152. *Id.*

153. *Id.*

154. Arosnet Policies, Newsgroup and Email Spamming: What is Spamming? at <http://www.aros.net/policies/spam.shtml> (last visited Feb. 12, 2003).

155. Explanatory Report, *supra* note 94, art. 5, ¶ 69.

156. Damien Whitworth & Dominic Kennedy, Author Could Escape Arm of the Law, *TIMES* (LONDON), May 5, 2000, at A1, available at 2000 WL 2888574.

e-mail messages to addresses stored on the computer.¹⁵⁷ With the rapid spread of the virus and subsequent massive strings of e-mails being sent and received by infected users, companies were forced to shut down their servers.¹⁵⁸

e. Article 6 – Misuse of Devices

Article 6 establishes, as separate and independent offenses, the intentional commission of illegal acts regarding certain devices that are used in the commission of the named offenses of this Convention.¹⁵⁹ In many cases, black markets are established to facilitate the sale or trade of “hacker tools,” or tools used by hackers in the commission of cybercrimes.¹⁶⁰ By prohibiting the production, sale, or distribution of these devices, this Article intends to combat these black market activities.¹⁶¹ This Article not only covers tangible transfers but also the creation or compilation of hyperlinks facilitating hacker access to these devices.¹⁶² A troubling issue arose with regard to “dual-use devices,” or devices that have both a good and evil purpose.¹⁶³ In order for the dragnet not to sweep up devices that serve a useful purpose, the drafters intended this Article to relate to devices that “are objectively designed, or adapted, primarily for the purpose of committing an offen[s]e.”¹⁶⁴ Finally, in order to avoid overcriminalization, the Article requires both a general intent and also a “specific . . . intent that the device is used for the purpose of committing any of the offen[s]es established in Articles 2 [thru] 5 of the Convention.”¹⁶⁵

f. Article 7 – Computer-Related Forgery

Article 7 outlaws computer-related forgery, or the intentional “input, alteration, deletion, or suppression of computer data resulting in inauthentic data with the intent that it be considered or acted upon for legal purposes as if it were authentic. . . .”¹⁶⁶ The purpose of this Article is to create a parallel offense to the forgery

157. Kelly Cesare, *Prosecuting Computer Virus Authors: the Need for an Adequate and Immediate International Solution*, 14 *TRANSNAT'L LAW* 135, 143 (2001) (discussing the impact of the Melissa virus).

158. *Id.*

159. Explanatory Report, *supra* note 94, art. 6, ¶ 71.

160. *Id.*

161. *Id.* art. 6, ¶ 72.

162. *Id.*

163. *Id.* art. 6, ¶ 73.

164. *Id.*

165. *Id.* art. 6, ¶ 76.

166. Convention, *supra* note 6, art. 7.

of tangible documents.”¹⁶⁷ National concepts of forgery differ greatly.¹⁶⁸ Some countries base forgery on the “authenticity as to the author of the document,” others base forgery on “truthfulness of the statement contained in the document.”¹⁶⁹ In either case, the drafters intended that the minimum standard be the authenticity of the issuer of the data, regardless of the correctness of the actual data.¹⁷⁰ Convention parties are permitted to further define the genuineness of the data if they so choose.¹⁷¹

g. Article 8 – Computer-Related Fraud

Article 8 makes computer-related fraud illegal.¹⁷² Computer-related fraud is the intentional causing of a loss of property by deletion or alteration of computer data, “interference with the functioning of a computer system, with fraudulent or dishonest intent of procuring without right, an economic benefit for oneself or for another person.”¹⁷³ Assets such as electronic funds, deposit money, and credit card numbers have become the target of hackers, who feed incorrect data into the computer with the intention of an illegal transfer of property.¹⁷⁴ This Article is specifically intended to criminalize a direct economic or possessory loss of property if the “perpetrator acted with the intent of procuring an unlawful economic gain. . . .”¹⁷⁵ In addition to the general intent requirement, this Article also “requires a specific fraudulent or other dishonest intent to gain an economic or other benefit. . . .”¹⁷⁶ This specific intent requirement is another effort by the drafters to filter serious misconduct from minor crimes.

This Article is an international tool of legislation that is greatly needed. Computer-related fraud in online auction houses, such as eBay, is a growing business for many criminals. The Internet Fraud Complaint Center (“IFCC”), a partnership between the Federal Bureau of Investigation (“FBI”) and the National White Collar Crime Center (“NW3C”), reported that 1.3 million transactions per day take place on Internet auction sites.¹⁷⁷ Auction fraud through

167. Explanatory Report, *supra* note 94, art. 7, ¶ 81.

168. *Id.* art. 7, ¶ 82.

169. *Id.*

170. *Id.*

171. *Id.*

172. Convention, *supra* note 6, art. 8.

173. *Id.*

174. Explanatory Report, *supra* note 94, art. 8, ¶ 86.

175. *Id.* art. 8, ¶ 88.

176. *Id.* art. 8, ¶ 90.

177. INTERNET FRAUD COMPLAINT CENTER, FEDERAL BUREAU OF INVESTIGATION, INTERNET AUCTION FRAUD, May 2001, at <http://www1.ifccfbi.gov/strategy/AuctionFraudReport.pdf> (last

the Internet ranks as the most prevalent type of fraud committed over the Internet, and it comprises sixty-four percent of all fraud reported.¹⁷⁸ This fraud results in a loss of almost four million dollars per calendar year.¹⁷⁹ The creation of a uniform criminal structure that outlaws the practice of fraud across the globe and facilitates the cooperation of countries in policing and preventing fraud in the sales of merchandise online, is a positive step toward securing the Internet as a safe place to do business. This Article will strengthen consumer confidence on the Internet and promote greater usage and integration into our lives.

h. Article 9 – Offenses Related to Child Pornography

Article 9 seeks to strengthen protective measures against sexual exploitation of children by modernizing current criminal law provisions.¹⁸⁰ Many countries, like the United States, already criminalize the traditional production and distribution of child pornography.¹⁸¹ However, unlike the United States, some countries fail to expand this prohibition to electronic transmissions.¹⁸² The treaty uses the term “minor” to refer to children under the age of eighteen.¹⁸³ This is in accordance with the definition of child under the United Nations Convention on the Rights of the Child.¹⁸⁴ However, the drafters recognized that some countries have a lower age for “minors” and allow Convention parties to set “a different age-limit, provided it is not less than 16 years [of age].”¹⁸⁵

The United States already has a law on the books dealing with child pornography.¹⁸⁶ The Protection of Children from Sexual Predators Act makes it illegal to knowingly possess one or more child pornographic images that have been transmitted in interstate or foreign commerce, which includes possession of such images on a computer.¹⁸⁷ If the treaty were to be ratified, it is likely the defenses attempted by defendants to prosecution under United States law would also be attempted in prosecutions under the Convention. Defendants have argued, albeit unsuccessfully, that

visited Feb. 12, 2003).

178. *Id.*

179. *Id.*

180. Explanatory Report, *supra* note 94, art. 9, ¶ 91.

181. *Id.* art. 9, ¶ 93.

182. *Id.*

183. *Id.* art. 9, ¶ 104.

184. *Id.*

185. *Id.*

186. 18 U.S.C. § 2252 (2000), as amended by Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, § 203(a)(1), 112 Stat. 2977, 2978 (1998).

187. *See id.* § 2252(a)(4)(B).

computer files are not “visual depictions” as defined in the United States Code.¹⁸⁸ This apparently would not change, since the treaty makes it a crime to possess child pornography on a computer system, thus making any child pornographic image on a computer a criminal offense.¹⁸⁹ Defendants have also argued that the images had been deleted, and thus, the images were not in their “possession” within the meaning of section 2252.¹⁹⁰ However, the government can point to other sources of evidence to prove possession, such as floppy disks, CD-Roms, and computer logs.¹⁹¹

Article 9 also makes virtual child pornography unlawful. Virtual child pornography is similar to real child pornography in that it appears to depict minors in sexually explicit situations, but it has one significant difference: it is produced through means that do not involve the use of children.¹⁹² This can be accomplished through the use of adult actors that look like children, through computer-generated images, or through a process known as “morphing.”¹⁹³ Morphing is the alteration of innocent pictures of children into sexually explicit depictions.¹⁹⁴

The production, possession, and distribution of virtual child pornography was unlawful under 18 U.S.C. §§ 2252 and 2256. However, in *Ashcroft v. Free Speech Coalition*, the United States Supreme Court held that two key provisions of § 2256 were overbroad and unconstitutional.¹⁹⁵ This holding has tremendous impact on any future ratification of the Convention into United States law. *Ashcroft* held that the statute criminalized speech that is protected under the First Amendment.¹⁹⁶ The government, in arguing in favor of criminalizing virtual child pornography, made similar arguments to those of the drafters of the Convention.¹⁹⁷ First, the government argued that virtual child pornography can be used to lure or seduce children into performing illegal acts.¹⁹⁸ The Court found this argument unpersuasive because it was not the least restrictive means necessary to accomplish the government’s objective.¹⁹⁹ The Court stated that many inherently innocent objects could be used to seduce children, including candy and video games,

188. *United States v. Hocking*, 129 F.3d 1069, 1070 (9th Cir. 1997).

189. *Convention*, supra note 6, art. 9.

190. *United States v. Lacy*, 119 F.3d 742, 747 (9th Cir. 1997).

191. *Id.*

192. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 239 (2002).

193. *Id.* at 242.

194. *Id.*

195. *Id.* at 258 (holding 18 U.S.C. §§ 2256(8)(B), 2256(8)(D) unconstitutional as overbroad).

196. *Id.* at 256-58.

197. Explanatory Report, supra note 94, art. 9, ¶ 93.

198. *Ashcroft*, 535 U.S. at 251.

199. *Id.* at 252-54.

and therefore it is axiomatic that the government cannot ban speech intended for adults merely because it may fall into the hands of children.²⁰⁰ Next, like the Convention's drafters, the government argued that virtual child pornography whets the appetites of pedophiles and encourages them to engage in illegal conduct.²⁰¹ The Court responded that this is also not a justification for the statute, because the government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."²⁰² This is a cornerstone upon which the First Amendment was built.²⁰³ The government next argued that virtual images are indistinguishable from real ones, part of the same market, and often exchanged.²⁰⁴ The Court found this unpersuasive as well, stating that virtual images cannot be "virtually indistinguishable," because otherwise the illegal images would be driven from the market by the indistinguishable substitutes. The Court reasoned that "few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice."²⁰⁵

Finally, the government argued that the "possibility of producing images by using computer imaging makes it . . . difficult . . . to prosecute those who produce pornography by using real children."²⁰⁶ The government felt it would have difficulty in saying whether the pictures were made by using real children or by using computer imaging, and therefore the only solution is to prohibit both kinds of images.²⁰⁷ The Court was unpersuaded by this argument as well, holding that the government cannot prohibit lawful speech as a means to ensnare unlawful speech.²⁰⁸

The application of the arguments made in *Ashcroft* are extremely relevant to the justifications for Article 9, as their policy justifications and prohibitions run parallel. As the situation currently stands, with sections 2256(8)(B) and 2256(8)(D) unconstitutional, the United States would be forced to take a limited reservation to Article 9 should it decide to ratify the Convention.

200. *Id.*

201. *Id.* at 253.

202. *Id.* (quoting *Stanley v. Georgia*, 394 U.S. 557, 566 (1969)).

203. *Ashcroft*, 535 U.S. at 253.

204. *Id.* at 254.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

i. Article 10 – Offenses Related to the Infringements of Copyright and Related Rights

Additionally, Article 10 relates to those offenses that “are among the most commonly committed offen[s]es on the Internet. . . . The reproduction and dissemination on the Internet of protected works, without the approval of the copyright holder, are extremely frequent.”²⁰⁹ Copyright offenses “must be committed ‘willfully’ for criminal liability to apply.”²¹⁰ “Willfully” was substituted for “intentionally,” because this term is employed in the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”), which governs the obligations to criminalize copyright violations.²¹¹

j. Article 11 – Attempt and Aiding or Abetting

Article 11 establishes offenses related to attempting or aiding and abetting “the commission of the offenses defined in the Convention.”²¹² Liability under this Article arises when “the person who commits a crime established in the Convention is aided by another who also intends that the crime be committed.”²¹³ For example, the transmission of a virus is an act that triggers the operation of a number of articles of the Convention. However, transmission can only take place through an ISP. “A service provider that does not have the requisite criminal intent cannot incur liability under this section.”²¹⁴ Therefore, there is no duty under this section for an ISP to actively monitor content in order to avoid criminal liability under this section.²¹⁵

k. Article 12 – Corporate Liability

This Article “deals with the liability of legal persons.”²¹⁶ Four conditions must be met in order to establish liability.²¹⁷ First, a described offense must have been committed.²¹⁸ Second, it must have been committed to benefit a legal person.²¹⁹ Third, a person who is in a “leading position” must be the one who committed the

209. Explanatory Report, *supra* note 94, art. 10, ¶ 107.

210. *Id.* art. 10, ¶ 113.

211. *Id.*

212. *Id.* art. 11, ¶ 118.

213. *Id.* art. 11, ¶ 119.

214. *Id.*

215. *Id.*

216. *Id.* art. 12, ¶ 123.

217. *Id.* art. 12, ¶ 124.

218. *Id.*

219. *Id.*

offense, which could include a director.²²⁰ Finally, “the person who has a leading position must have acted . . . within the scope of his or her authority to engage the liability of the legal person.”²²¹ In the case of an offense committed by an agent or employee of the corporation, the offense must have been made possible by the leading person’s “failure to take appropriate and reasonable measures to prevent employees or agents from committing criminal activities on behalf of the [corporation]. . . .”²²² Appropriate and reasonable measures are determined by examining the type of business, its size, the standards or established business practices, and other like factors.²²³ However, liability of a corporation does not exclude individual liability.²²⁴

1. Article 13 – Sanctions and Measures

Article 13 completes Section 1 of the Convention by requiring Convention parties to provide criminal sanctions that are “effective, proportionate, and dissuasive” and “include the possibility of imposing prison sentences.”²²⁵ The drafters intended that this Article leave discretionary power to Convention parties “to create a system of criminal offences and sanctions” that are compatible with their existing national legal systems.²²⁶

6. Convention Section 2 – Prosecutorial and Procedural Requirements

The articles in this section describe procedural measures that Convention parties must take “at the national level for the purpose of criminal investigation of the offences established in Section 1.”²²⁷ This section is intended to overcome some of the challenges associated with policing the ever-expanding information highway.²²⁸ Some of those challenges are: (1) the difficulty in identifying the perpetrator, (2) the difficulty in determining “the extent and impact of the criminal act,” (3) the difficulty in dealing with the volatility of electronic data, and (4) the difficulty in maintaining the speed and secrecy vital in the success of a cybercrime investigation.²²⁹

220. *Id.*

221. *Id.*

222. *Id.* art. 12, ¶ 125.

223. *Id.*

224. *Id.* art. 12, ¶ 127.

225. *Id.* art. 13, ¶ 128.

226. *Id.* art. 13, ¶ 130.

227. *Id.* art. 13, § 2, ¶ 131.

228. *Id.* art. 13, § 2, ¶ 132.

229. *Id.* art. 13, § 2, ¶ 133.

These challenges pose major problems for investigators since electronic data can be altered, moved, or deleted within seconds, which may very well be the only evidence in a criminal investigation.²³⁰

One way in which the Convention overcomes these problems is by adapting traditional procedures, like search and seizure, to an ever-changing technological landscape.²³¹ However, in order to make these traditional crime investigation methods effective, new measures have been created.²³² Examples of those measures include the expedited preservation of data, “[the] real-time collection of traffic data, and the interception of content data.”²³³

a. Article 15 – Conditions and Safeguards

Article 15 establishes minimum safeguards upon the procedures instituted within Convention party legal systems, which may be provided constitutionally, legislatively, or judicially.²³⁴ Parties are to ensure that their safeguards provide for the adequate protection of human rights and liberties.²³⁵ However, the Convention only refers to parties who have human rights obligations under previously signed treaties.²³⁶ The Convention seemingly leaves the point moot for parties that have not signed any international human rights treaties.²³⁷ Opponents to the Convention argue that the treaty infringes upon basic human rights and liberties, most notably the right to privacy.

b. Article 16 – Expedited Preservation of Stored Computer Data

Article 16 relates to the expedited preservation of stored computer data, a new measure implemented in order to facilitate the investigation of cybercrimes.²³⁸ This Article applies only to data that has already been collected and retained by ISPs.²³⁹ One must not confuse “data preservation” with “data retention.”²⁴⁰ For purposes of this Article, data retention merely relates to the protection from deterioration of data already existing in stored

230. *Id.*

231. *Id.* art. 13, § 2, ¶ 134.

232. *Id.*

233. *Id.*

234. *Id.* art. 15, ¶ 145.

235. *Id.*

236. Convention, *supra* note 6, art. 15.

237. *Id.*

238. *Id.* art. 16.

239. Explanatory Report, *supra* note 94, tit. 2, ¶ 149.

240. *Id.* art. 15, tit. 2, ¶ 151.

form.²⁴¹ On the other hand, data retention, or the process of storing and compiling data, does not apply under this Article.²⁴² The concept of “data preservation” is a new legal power in many domestic laws, brought about by because of the ability for computer data to be destroyed or lost through careless handling and storage processes.²⁴³ The statute operates in one of two ways: (1) the competent authorities in the Convention party country simply access, seize and secure the relevant data, or (2) where a reputable business is involved, competent authorities can issue an order to preserve the relevant data.²⁴⁴ Convention parties are thus required to introduce a power that would enable law enforcement authorities to order the preservation of data for a particular period of time not exceeding 90 days.²⁴⁵ Data such as this is frequently stored only for short periods of time, since these laws are designated to protect privacy and because the costs are high when preserving this type of data.²⁴⁶

c. Article 17 – Expedited Preservation and Partial Disclosure of Traffic Data

Article 17 establishes specific obligations with respect to the preservation of “traffic data” under Article 16. In addition, it provides for quick disclosure of some “traffic data,” so authorities can identify the person or persons who have distributed such things as child pornography or computer viruses.²⁴⁷ Recall that “traffic data” merely indicates where and how a virus or email was transmitted, but not who transmitted it or what it contained.²⁴⁸ This section is most important when considering the following example. Often, more than one service provider is

involved in the transmission of a communication. Each service provider may possess some ‘traffic data’ related to the transmission of the specified communication, which either has been generated and retained by that service provider in relation to the

241. *Id.*

242. *Id.* art. 15, tit. 2, ¶¶ 151, 152.

243. *Id.* art. 15, tit. 2, ¶ 155.

244. *Id.*

245. *Id.* tit. 2, ¶ 156.

246. *Id.* art. 17, ¶ 166.

247. *Id.* art. 17, ¶¶ 165, 166.

248. *Id.* art. 1(d), ¶¶ 28-31.

[actual] passage of the communication through its system or has been provided [by] other [ISPs].²⁴⁹

For commercial, security or technical purposes, sometimes “traffic data” is shared among the service providers involved.²⁵⁰

In such a case, any one of the service providers may possess the crucial traffic data that is needed to determine the source or destination of the communication. Often, however, no single service provider possesses enough of the [important ‘traffic data’] to be able to determine the actual source or destination of the communication. Each possesses one part of the puzzle, and each of these parts needs to be examined in order to identify the source or destination.²⁵¹

The preferred method for accomplishing the expedited preservation and partial disclosure of “traffic data” is to enact legislation enabling authorities to obtain a single order, the scope of which would apply to all ISPs involved in a communication and “[t]his comprehensive order could be served sequentially on each service provider identified in the order.”²⁵²

d. Article 18 – Production Order

Article 18 relates to production orders, which specifically allow “competent authorities to compel a person in its territory to provide specified stored computer data” or to compel an ISP to provide subscriber information.²⁵³ This Article strictly relates to production of stored or existing data, not “traffic data” or “content data related to future communications.”²⁵⁴ Production orders precede search and seizure as a means of obtaining specific data.²⁵⁵

e. Article 19 – Search and Seizure of Stored Computer Data

Article 19, which relates to search and seizure, aims at modernizing and harmonizing differing domestic laws.²⁵⁶ In many

249. Id. art. 17, ¶ 167.

250. Id.

251. Id.

252. Id. art. 17, ¶ 168.

253. Id. art. 18, ¶ 170.

254. Id.

255. Id. art. 18, ¶ 175.

256. Id. art. 19, ¶ 184.

countries, stored computer data is not considered a tangible object, and thus, cannot be searched and seized in the same manner as a tangible object.²⁵⁷ This Article aims to establish an equivalent search and seizure power ranging from tangible objects to stored computer data.²⁵⁸ The preconditions required to search and seize traditional property, such as probable cause, will remain the same.²⁵⁹

However, additional procedural provisions are necessary “to ensure that computer data can be obtained in a manner . . . equally effective to a search and seizure [for] a tangible data carrier.”²⁶⁰ There are a number of reasons for this:

[F]irst, the data is in intangible form. . . . Second, while the data may be read with the use of computer equipment, it cannot be seized and taken away in the same sense as [tangible goods]. . . . Third, due to [interconnected networks], data may not be stored in the particular computer that is searched, but such data may be readily accessible to that system.²⁶¹

In the second case, either the physical medium on which the intangible data is stored must be seized or taken away, or a copy of the data must be made in either tangible form, such as a computer printout, or in intangible form, such as a diskette, before the tangible or intangible medium containing the copy can be seized and taken away.²⁶²

f. Article 20 – Real-Time Collection of Traffic Data

Article 20 takes into account the importance of collecting “traffic data” to determine the source or destination of the cybercrime being committed.²⁶³ “Like real-time interception of content data, real-time collection of ‘traffic data’ is only effective if undertaken without the knowledge” of the suspect.²⁶⁴ Therefore, ISPs knowledgeable about the interception must be required to maintain complete secrecy in order for this to be successful.²⁶⁵ One way to achieve the necessary

257. *Id.*

258. *Id.*

259. *Id.* art. 19, ¶ 186.

260. *Id.* art. 19, ¶ 187.

261. *Id.*

262. *Id.*

263. *Id.* art. 20, ¶ 216.

264. *Id.* art. 20, ¶ 225.

265. *Id.*

secrecy is by relieving the service provider of any contractual or legal obligation to notify its customers about the data being collected.²⁶⁶ This can be accomplished through a law requiring confidentiality, or by threatening an obstruction of justice charge against the ISP should it fail.

g. Article 21 –Interception of Content Data

Article 21, “interception of content data,” has traditionally been carried out through governmental monitoring of telephone conversations.²⁶⁷ However, recently, the rising popularity of communication through the Internet has made “tapping the net” a priority for law enforcement officials. The fact that computers are capable of transmitting not only words but also visual images and sounds makes it even easier for crimes to be committed.²⁶⁸ “Content data refers to the communication content of the communication,” or in other words, the gist of the message.²⁶⁹

h. Article 22 – Jurisdiction

Article 22 simply establishes that member countries must enact laws enabling them to have jurisdiction over all the previous crimes described above should they occur in any one of four places: (1) in the member country’s territory, (2) on board a ship flying the flag of that country, (3) on board an aircraft registered under the laws of that country, or (4) outside the territory of the country but committed by one of its nationals.²⁷⁰ A party would establish territorial jurisdiction if the person attacking the computer system and the victim were located within the country, or where the victim was inside the territory but the attacker was not.²⁷¹ The remaining jurisdictional sections are rather self-explanatory.

7. Convention Section 3 – International Cooperation

This section contains a series of provisions relating to the mutual legal assistance member countries must afford each other under the Convention.²⁷² This section causes grave concern for many United States businesses and interest groups.²⁷³ This concern

266. Id. art. 20, ¶ 226.

267. Id. art. 21, ¶ 228.

268. Id.

269. Id. art. 21, ¶ 229.

270. Convention, *supra* note 6, art. 22.

271. Explanatory Report, *supra* note 94, art. 22, ¶ 233.

272. Id. ch. 3, ¶ 240.

273. See Mike Godwin, *International Treaty on Cybercrime Poses Burden on High Tech*

stems from the fact that although it may not be such a big deal to have the United States government wield greater power, the same new powers will also be given to member countries that may not “have a strong tradition of checks and balances on police power.”²⁷⁴ United States companies do not want foreign investigators searching through domestic computer systems based on a warrant issued under the Convention.²⁷⁵

The following example illustrates why United States companies should have cause for concern. Suppose a Seattle University law student, while researching a potential research topic, corresponds by e-mail with an Al-Qaeda member in Italy. A few days later the unknowing student finds federal agents examining the files on his home computer. The agents also visit the student’s ISP, Seattle University, to retrieve records of the student’s computer usage. The agents are basing their authority on a warrant that was issued by Italian authorities, which allows them to search for Al Qaeda locations and documents. Italian officials framed their warrant in terms of “suspected terrorist activity.” Maybe the student should have anticipated this scenario, given the vigor with which the world is cracking down on Al-Qaeda members. Even if the law student is willing to run the risk, and bear the burden, of this kind of search, should Seattle University?

Larger ISPs, such as America Online, get dozens of search warrants and subpoenas every month. This treaty would change everything by not only requiring them to respond to those submitted by United States law enforcement officials, they would also have to respond to warrants and court orders from dozens of nations. All ISPs, phone companies, and other businesses would be forced into cooperating with investigations. This equates to higher storage, investigative and retrieval costs for this extra data. These higher costs would likely be passed down to the consumer in the form of higher monthly service rates.

The opposing argument is plausible, however; ISPs should expect this sort of intrusion as a cost of doing business in the Internet era. The problem again lies in the fact that these added costs will be passed down to the consumer. Additionally, if two companies have cabled together two computers, the second company could be forced to comply with investigations of other ISPs, which would cause even more problems.

Companies, IP WORLDWIDE, Apr. 4, 2001, at <http://www.law.com/servlet/ContentServer?pagename=OpenMarket/Xcelerate/View&c=Law Article&cid=1015973978355&live=true&st=1&pc=0&pa=0>.

274. Id.

275. Id.

a. Article 23 – General Principles Relating to International Cooperation

Article 23 begins this section by outlining “general principles” of mutual legal assistance. Cooperation is to be extended for all crimes described above, as well as for the collection of data and evidence in electronic form for the criminal offense.²⁷⁶

b. Article 24 – Extradition

Article 24 deals with extradition of criminals between member countries. “The obligation to extradite applies only to” those crimes committed in Articles 2 thru 11.²⁷⁷ A threshold penalty also exists to minimize the massive extradition of criminals.²⁷⁸ Under certain offenses, like illegal access (Article 2) and data interference (Article 4), member countries are permitted to impose short periods of incarceration.²⁷⁹ Accordingly, extradition can only be sought where the maximum penalty is at least one year in jail.²⁸⁰

Important policy considerations are furthered by adding an extradition provision. By all the countries prosecuting the same crimes and sending criminals from one jurisdiction to another, criminals effectively cannot hide from the law when committing a crime within the Convention’s jurisdiction. Because the deterrence of crime is an important policy goal of any criminal law statute, as well as this Convention, the extradition provision strengthens the entire Convention. In fact, extradition laws governing computer crimes are “hopelessly outdated and therefore, lagging behind the forces they are trying to regulate.”²⁸¹ This lack of uniformity results in lax treatment of cybercriminals, allowing them to escape law enforcement officials by fleeing to countries unwilling to extradite a suspected criminal. This Convention provision is an important step in harmonizing extradition laws between member countries and bringing reluctant countries up to date.

276. Explanatory Report, *supra* note 94, art. 23, ¶ 243.

277. *Id.* art. 24, ¶ 245.

278. *Id.*

279. *Id.*

280. *Id.*

281. Cesare, *supra* note 157, at 153 (quoting John T. Soma et. al., *Transnational Extradition for Computer Crimes: Are New Treatises and Laws Needed?* 34 *HARV. J. ON LEGIS.* 317, 317-18 (1997)).

c. Article 25 – General Principles Relating to Mutual Assistance

Article 25 requires mutual assistance “to the widest extent possible.”²⁸² Provisions from this Article include communications which are made through email and other means. For the most part, this treaty section is considered harmless, and therefore this section is uncontested by civil libertarians.

d. Article 26 – Spontaneous Information

Article 26 discusses “spontaneous information” and refers to those times when a member country obtains vital information to a case that it believes may assist another member country in a criminal investigation or proceeding.²⁸³ In these situations, the member country that does not have the data may not even know it exists, and thus will never generate a request for such data. This section empowers the country with the “spontaneous information” to forward it to applicable foreign officials without a prior request.²⁸⁴ While this might seem obvious and needless to a United States citizen, this provision is very useful in an multilateral treaty such as this, because under the laws of some member states, “a positive grant of legal authority is needed in order to” effectuate the provision of assistance absent a request.²⁸⁵

e. Article 27 – Procedures Pertaining to Mutual Assistance Requests In the Absence of Applicable International Agreements

Article 27 relates to mutual assistance in the absence of applicable international agreements. In other words, it establishes a mutual set of rules when parties are not already obliged under the European Convention on Mutual Assistance in Criminal Matters and its Protocol, or other similar treaties.²⁸⁶ The terms of applicable agreements can be supplemental to the Convention as long as member countries continue to also apply the terms of this provision.²⁸⁷ Parties must establish a central authority “responsible for sending and answering requests for [assistance].”²⁸⁸ This is particularly helpful in expediting the rapid transmission of information in combating and prosecuting cybercrimes.²⁸⁹

282. Explanatory Report, *supra* note 94, art. 25, ¶ 253.

283. *Id.* art. 26, ¶¶ 260, 261.

284. *Id.* art. 26, ¶ 260.

285. *Id.*

286. *Id.* art. 27, ¶ 262.

287. *Id.* art. 27, ¶ 263.

288. Convention, *supra* note 6, art. 27.

289. Explanatory Report, *supra* note 94, art. 27, ¶ 265.

One important objective of this section “is to ensure that its domestic laws governing the admissibility of evidence are fulfilled,” so that the evidence can be used before the court.²⁹⁰ To ensure that this result is accomplished, member countries are required to “execute requests in accordance with procedures specified by the requesting party” so its domestic laws are not infringed.²⁹¹ This is required, unless the request violates the host country’s domestic laws, then the county is not obliged to follow.²⁹² For example, a procedural requirement of one party may be that a witness statement be given under oath. “Even if the requested party does not” have this requirement, “it should honor [sic] the requesting party’s request.”²⁹³

f. Article 28 – Confidentiality and Limitation on Use

Article 28 specifically provides for confidentiality and limitations on use of information in order to preserve sensitive materials of a host country. This Article only applies when no mutual assistance treaty exists.²⁹⁴ When such a treaty already exists, its provision apply in lieu of this provision, unless the countries agree otherwise.²⁹⁵ Two types of confidentiality requests can be made by member countries. First, a party “may request that the information or material furnished be kept confidential where the request could not be complied with in the absence of such condition.”²⁹⁶ “Second, the requested party may make furnishing of the information or material dependent upon the condition that it not be used for investigations or proceedings other than those stated in the request.”²⁹⁷

g. Article 29 – Expedited Preservation of Stored Computer Data

Article 29, mutual assistance related to the expedited preservation of stored computer data, is in most respects identical to Article 16, except that it relates to international cooperation. Drafters agreed that a mechanism needed to be in place to ensure the availability of this type of data when a lengthier and more involved process of a mutual assistance request is handled.²⁹⁸

290. Id. art. 27, ¶ 267.

291. Id.

292. Id.

293. Id.

294. Id. art. 28, ¶ 276.

295. Id.

296. Id. art. 28, ¶ 277.

297. Id. art. 28, ¶ 278.

298. Id. art. 29, ¶ 282.

h. Article 30 – Expedited Disclosure of Preserved Traffic Data

Likewise, Article 30, mutual assistance related to the expedited disclosure of preserved “traffic data,” is the mutual assistance arm of Article 17.²⁹⁹ Therefore, it needs little discussion.

i. Article 31 – Mutual Assistance Regarding Accessing of Stored Computer Data

Article 31 requires that each member country have the ability to search, access, or seize “data stored by means of a computer system located within its territory” for the benefit of another member country.³⁰⁰ Paragraph one authorizes a member country to request this type of assistance, and paragraph two requires the host country to provide it.³⁰¹

j. Article 32 – Trans-Border Access to Stored Computer Data With Consent or Where Publicly Available

Article 32 deals with “[t]rans border access to stored computer data with consent or where publicly available,” which merely makes it permissible for a publicly available source of data to be available to a member country unilaterally and without a mutual assistance request, while at the same time, not preparing a comprehensive, legally binding system.³⁰²

k. Article 33 – Mutual Assistance Regarding the Real-Time Collection of Traffic Data

Article 33 makes it law that each party is obliged to collect real time “traffic data” for another member country.³⁰³

l. Article 34 – Mutual Assistance Regarding the Interception of Content Data

Article 34 is another hot button issue in this treaty because it discusses the cooperation and sharing of information obtained through means such as eavesdropping and wiretapping. In addition, it relates to the mutual assistance regarding the interception of content data.³⁰⁴ The assistance provided in this

299. *Id.* art. 30, ¶ 290.

300. *Id.* art. 31, ¶ 292.

301. *Id.*

302. *Id.* art. 32, ¶ 293.

303. *Id.* art. 33, ¶ 295.

304. *Id.* art. 34, ¶ 297.

provision is limited by the mutual assistance regimes already in place and the domestic laws already enacted.³⁰⁵

m. Article 35 – 24/7 Network

Article 35 is a very interesting provision. The “24/7 network” is a way to effectively combat crimes committed through the use of computer systems when those crimes require a rapid response. This Article obligates each country to designate a point of contact that is available 24 hours per day, 7 days a week.³⁰⁶ This Article was considered by the drafters to be one of the most important means of effectively responding to law enforcement challenges posed by cybercrimes.³⁰⁷

8. Convention Section 4 – Final Provisions

a. Article 36 – Signature and Entry Into Force

Article 36, entitled “Signature and entry into force,” allows non-COE states to become signatories, in addition to COE states who had participated in drafting the Convention.³⁰⁸ The Convention does not enter into force until five countries have ratified it, three of which must be COE states.³⁰⁹

b. Article 37 – Accession to the Convention

Article 37 deals with those states which have not participated in the drafting but, nevertheless, are interested in signing and ratifying the treaty.³¹⁰ A formal procedure is required “to invite a non-member State to accede” which requires a two-thirds majority to be present in addition to a “unanimous vote of the representatives of the contracting parties” in order for the state to accede.³¹¹

c. Article 38 – Territorial Application

Article 38, “territorial application,” simply provides that a member country must express to which territories it intends the Convention to apply upon signature and ratification.³¹²

305. *Id.*

306. *Id.* art. 35, ¶ 298.

307. *Id.*

308. *Id.* art. 36, ¶ 304.

309. *Id.* art. 36, ¶ 305.

310. *Id.* art. 37, ¶ 306.

311. *Id.*

312. Convention, *supra* note 6, art. 38(1).

d. Article 39 – Effects of Convention

Article 39 relates to the Convention's relationship with other international agreements, particularly how pre-existing conventions of the COE should relate to each other or to other treaties concluded outside the COE.³¹³ In particular, member countries should adhere to “the rule of interpretation *lex specialis derogat legi generali*,” or in other words, precedent should be given to the rules contained in this Convention.³¹⁴

e. Article 40 -- Declarations

Article 40, “[d]eclarations,” refers to certain articles contained within the Convention that permit parties to include specific “additional elements which modify the scope of the provisions.”³¹⁵ Also, these elements were added to accommodate certain legal differences between member countries.³¹⁶ These “should be distinguished from ‘reservations,’ which permit a party to exclude or modify the legal effect of certain obligations set forth in the Convention.”³¹⁷

f. Article 41 – Federalism Clause

Article 41 is another important clause added to the Convention. The “federalism clause” allows for a special kind of declaration that is intended to accommodate the difficulties certain countries might face with regimes that distribute power between central and regional authorities.³¹⁸ The Convention was originally crafted with countries that had non-federalist governmental regimes in mind. In other words, the Convention was crafted with European countries in mind, which have one single police power. Countries such as the United States that have federal—as well as state—laws, would have been unable to sign the treaty without a federalism clause.³¹⁹ The reason is that some computer crimes committed wholly within a state would be considered state crimes, even though the federal government could ratify the treaty. Additionally, if the individual states did not consent to the Convention application, or consent to the new federal law, then the treaty would not extend to all

313. Explanatory Report, *supra* note 94, art. 39, ¶ 308.

314. *Id.* art. 39, ¶ 309.

315. *Id.* art. 40, ¶ 315.

316. *Id.*

317. *Id.*

318. *Id.* art. 41, ¶ 316.

319. *Id.* art. 41, ¶ 317.

territories within a state.³²⁰ The COE added this clause so countries, such as the United States, would ratify this agreement. This clause is a source of controversy for many non-federalist countries because they are skeptical of the extent to which non-federalist countries can convince their constituent state governments to adhere to the treaty provisions.

g. Articles 42 & 43 – Reservations and Status and Withdrawal of Reservations

Articles 42 and 43 allow certain reservations to be made at the time of signature or ratification for those allowable reservations enumerated within the Convention.³²¹

h. Article 44 -- Amendments

Article 44 allows for amendments to be made to the Convention.³²² Any amendments adopted would come into force only when all of the member countries “have informed the Secretary General of their acceptance.”³²³

i. Article 45 – Settlement of Disputes

Article 45 “provides that the European Committee on Crime Problems (“CDPC”) should be kept informed about the interpretation and application of the provisions of the Convention.”³²⁴ Three means of dispute resolution are provided within this section, which are the CDPC, “an arbitral tribunal or the International Court of Justice” (“ICJ”).³²⁵

j. Article 46 – Consultation of the Parties

Article 46 creates a framework for the Parties to consult regarding implementation of the Convention, the effect of significant legal, policy or technological developments pertaining to the subject of computer or computer related crime and the collection of evidence in electronic form, and the possibility of supplementing or amending the Convention.³²⁶

320. See *id.*

321. *Id.* art. 42, ¶¶ 320, 321.

322. Convention, *supra* note 6, art. 44.

323. Explanatory Report, *supra* note 94, art. 44, ¶ 325.

324. *Id.* art. 45, ¶ 326.

325. *Id.* art. 45, ¶ 327.

326. *Id.* art. 46, ¶ 328.

k. Article 47 -- Denunciation

Article 47 permits a member country to denounce the Convention.³²⁷ A country's denunciation would "become effective on the first day of the month following the expiration of a period of three months after the date of receipt" and notification by the Secretary General.³²⁸

l. Article 48 – Notification

Article 48 requires notification to member countries of signatories and ratifications when they occur.³²⁹

m. Secret "Second Protocol"

Additionally, the COE may add a secret 'Second Protocol' to the treaty, which would cover the decoding of terrorist messages on the Internet.³³⁰ It is certain that this new addition will come under heavy attack, particularly since privacy groups and civil libertarians have strongly voiced their opposition to the "existing cybercrime treaty for the last two years."³³¹

IV. THE ROAD AHEAD

Before ratification by the United States, the Convention will face a myriad of oppositional forces. Those opposing the Convention make a number of compelling arguments: (1) the Convention curtails freedom of expression online, (2) the Convention overextends the investigative powers of police and governmental organizations, (3) the Convention demands too much of companies and individuals by requiring them to provide law enforcement with far greater information than is now the norm under most telecommunications laws, and (4) the Convention infringes upon citizen civil liberties.

The second argument made by those opposed to the Convention is that the government is granted an excessive amount of investigatory power, which is best illustrated in the example of call data vs. "traffic data." Presently, law enforcement agencies are allowed to seek call related data, which includes the phone numbers that are dialed and the duration of the calls. However, under the

327. Convention, *supra* note 6, art. 47(1).

328. *Id.* art. 47(2).

329. *Id.* art. 48.

330. Council of Europe—Treaty Change May Allow Greater Surveillance of Terrorists, PERISCOPE-DAILY DEF. NEWS CAPSULES, Feb. 21, 2002, available at 2002 WL 5970273.

331. *Id.*

Convention, law enforcement authorities would have the right to wide-ranging "traffic data," which includes the source, destination, and duration of calls, as well as the type of traffic or the sort of services consulted. Such a request could force an ISP to inform law enforcement agencies that a client visited a particular website for thirty minutes, downloaded ten images, and then sent emails to three specific addresses. Whether this is a violation of a person's right to privacy is an issue hotly contested.

The third argument touches upon the corporate opponents' Convention concerns. ISPs and other related businesses are reluctant to divulge their confidential client records, known as "subscriber data," at the whim of an investigating governmental agency. Companies are also concerned with the increased costs associated with retaining and preserving data should an order be served upon the company to do so. In all likelihood, however, these costs will be passed along to the consumer in the form of higher connection and subscriber fees. Thus, it is ultimately the consumer that will need to weigh the importance of policing cybercrime with the increased cost associated with Internet access when deciding whether to support the Convention.

The fourth argument, that civil liberties will be infringed, appears to be an unfounded concern. Article 15 requires member countries "to establish conditions and safeguards to be applied to the" governmental powers established in Articles 16 thru 21.³³² Those conditions and safeguards are required "to protect human rights and liberties."³³³ Article 15 in fact "lists some specific safeguards, such as requiring judicial supervision, that should be applied where appropriate in light of the power or procedure concerned."³³⁴

V. CONCLUSION

Cybercrimes are not confined within national borders. A criminal armed with a computer and a connection has the capability to victimize people, businesses, and governments anywhere in the world. The criminal can commit violent crimes, participate in international terrorism, sell drugs, commit identity theft, send viruses, distribute child pornography, steal intellectual property and trade secrets, and illegally access private and commercial computer systems. These criminals can hide their tracks by weaving their communications through numerous ISPs.

332. Frequently Asked Questions, *supra* note 136.

333. *Id.*

334. *Id.*

For example, consider a computer hacker in Vancouver, British Columbia, who disrupts a corporation's communications network in Seattle, Washington. Before accessing the corporation's computer, he routes his communication through ISPs in Japan, Italy, and Australia. In such a case, Canadian law enforcement would need assistance from authorities in Tokyo, Rome and Sydney before discovering that the criminal is right in their own backyard.

International crimes such as these have impeded law enforcement efforts in ways never before contemplated. While the Internet is borderless for criminals, law enforcement agencies must respect the sovereignty of other nations. Thus, cooperation with foreign law enforcement agencies in fighting cybercrimes is paramount to any effort to catch these criminals. Unfortunately, differing legal systems and disparities in the law often present major obstacles. This article is intended to be the first inclusive survey and analysis of the Council of Europe's Convention on Cybercrime; the first international legislation designed to harmonize legal systems and those disparities in the law that make combating cybercrime so difficult. This article analyzed critical opinion as well as the drafters' intent regarding specific Convention provisions, while also explaining the purpose of the different articles. It also examined a select number of provisions in depth, determining their impact upon existing United States cybercrime laws. Finally, the author of this article has intended to remain neutral on the topic of whether the Convention is ultimately a positive or negative step forward for both the United States and the world, with the intent that the reader can form his or her own educated opinion upon weighing some of the issues raised in this comment.

MEXICAN ENVIRONMENTAL LAW: ENFORCEMENT
AND PUBLIC PARTICIPATION SINCE THE SIGNING
OF NAFTA'S ENVIRONMENTAL COOPERATION
AGREEMENT

CHRISTOPHER N. BEHRE*

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I. INTRODUCTION

With the negotiations surrounding the Free Trade Area of the Americas ("FTAA") raging, the debate over what is the proper relationship between international trade and environmental protection that colored the NAFTA negotiations a decade ago is being rekindled.¹ This is a manifestation of globalization trends, which, if defined as the growing interdependence between peoples across national borders, have provided opportunities for international cooperative efforts to address common challenges. Notably, experimentation with the regional side agreements that made NAFTA possible concerning labor rights and environmental protection, has widened the potential for proliferating human rights

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1. See generally Christopher M. Bruner, *Hemispheric Integration and the Politics of Regionalism: The Free Trade Area of the Americas (FTAA)*, 33 U. MIAMI INTER-AM L. REV. 1 (2002) (citing hearing before the House Subcommittee on International Economic Policy and Trade concerning the linkage between trade, labor, and environment).

along side of liberalized trade in less industrialized countries such as Mexico.

A recent article in the American Bar Association's International Law News noted the successes and challenges remaining within Mexico's labor and employment laws since the signing of NAFTA.² The article reports that recent legislation is improving labor-management relations and wage rates are on the rise.³ However, concerns about freedom of association have been raised by non-governmental labor rights organizations and labor unions who have submitted their grievances beyond national government resources to the labor institution created by the North American Agreement on Labor Cooperation.⁴ A parallel institution for environmental cooperation exists which was created by the North American Agreement for Environmental Cooperation ("NAAEC"). This institution, called the Commission for Environmental Cooperation ("CEC"), accepts submissions from any citizen or non-governmental organization that resides in one of the parties to NAFTA which petition the CEC to investigate and publish a factual record of alleged failures by a member state to enforce its environmental laws.⁵

Because the CEC has accepted numerous submissions concerning Mexico's environmental protection record, like the ABA article on Mexico's labor laws, this article outlines Mexico's successes and its remaining challenges in the realm of the environment. Unlike the ABA article, the author will take a more historically comprehensive and comparative approach to outlining the trends in Mexico's promulgation and enforcement of its environmental laws. Throughout this article particular attention is paid to the role of the public and its potential to influence these critical aspects of environmental regulation at the grass roots level.

II. BACKGROUND OF MEXICO'S ENVIRONMENTAL LEGISLATION

Before one can engage in a serious comparison between two legal regimes such as United States and Mexican environmental laws, a couple of preliminary contrasts must be made. Although both countries' constitutions provide for federal structure of government, each has approached its concept of federalism differently over the centuries. Notably, if one defines federalism by

2. Phillip Berkowitz & Eduardo Ramos Gomez, Recent Developments in Mexico A Labor and Employment Law Perspective, 31 INT'L L. NEWS 12 (2001).

3. Id.

4. Id.

5. Francisco S. Nogales, The NAFTA Environmental Framework, Chapter 11 Investment Provisions, and The Environment, 8 ANN. SURV. INT'L & COMP. L. 97, 104-06 (2002).

how rigidly a nation's governmental powers are bifurcated into State and federal spheres, Mexico's governmental structure is more federal than the United States. According to Article 117 and 124 of Mexico's Constitution, all powers not expressly attributed to federal authorities and not prohibited from the States are reserved to the States.⁶ This rigid system for the division of powers allows no room for concurrent powers (i.e. a State's ability to "occupy" a field delegated to the federation) but does allow for cooperation or coordination in the design and implementation of public policy.⁷

A. A History of Centralization

The history of Mexico's Constitution shows a tendency towards centralization. This centralization has determined whether State or federal actors have primary jurisdiction over environmental protection. Much like England's colonial structure in early North America impacted the United States' constitutional evolution, the Spanish colonial structure in Mexico during the 16th Century had profound repercussions on Mexico's constitutional evolution.⁸ The English colonies were established separately over time for varying reasons the pursuit of business enterprises, the avoidance of religious persecution, etc.⁹ As a result, the English colonies were under no central royal authority comparable to the Spanish Viceroy. This centralized Spanish authority assisted the conquistadors in their common goals of gold and "heathen" conversion.¹⁰

Although Mexico achieved independence from Spain in the early 19th Century, an independence movement would linger for two more generations as it strove to overcome the de facto rulers of Mexico, the centralized military and clergy.¹¹ Even then, as liberal proponents ascended to power and drafted the 1857 Constitution, civil liberties and anti-clerical clauses in the Constitution were not enforced until the 1910 Mexican revolution, which resulted in the 1917 Constitution of the United Mexican States that is still in force today.¹²

Despite the long history of centralization, the 1917 Constitution codified powers retained by state and local authorities, which can

6. See José Ma. Serna de la Garza, *Constitutional Federalism in Latin America*, 30 CAL. W. INT'L L.J. 277, 287 (2000) (contrasting the Mexican Constitution's use of the word "expressly" in defining federal legislative jurisdiction with the absence of the word in the Tenth Amendment of the United States Constitution).

7. *Id.* at 289.

8. JAMES E. HERGET & JORGE CAMIL, *AN INTRODUCTION TO THE MEXICAN LEGAL SYSTEM* 4 (1978).

9. *Id.*

10. *Id.* at 5.

11. FRANCISCO AVALOS, *THE MEXICAN LEGAL SYSTEM* 2-3 (1992).

12. *Id.* at 3-4.

trace their roots back to the relationship between the Spanish crown and the indigenous Aztec legal system. As early as 1530, the centralized Spanish crown had given up on applying uniform laws to all of its colonial possessions. Such tolerance of local customs was reflected in the concept of *derecho indiano*, which accorded respect for indigenous law wherever such laws did not directly conflict with Catholicism or the “basic principles of the Spanish people.”¹³ This system of concordant authority survives in Title 2, Chapter 1, Article 40 of the 1917 Constitution, which ensures a “federal, democratic, representative Republic composed of free and sovereign States.”¹⁴

Much like in the United States, the latter half of the 20th Century saw the erosion of state’s rights as the centralized federal government expanded its jurisdiction.¹⁵ This could be seen in the dominance of the executive branch of the Mexican federal government, constitutional amendments, and the institution of several federal models for state legislation.¹⁶ In the face of such erosion, Mexican State legislatures have retained exclusive rights to certain environmentally hazardous industries, which they have used to protect their environments from foreign investors. Such activities exclusively reserved to the Mexican States include oil and other hydrocarbons, basic petrochemicals, electricity, generation of nuclear energy, and radioactive materials.¹⁷

B. Foreign Investment

During the mid-1990s, Mexico was praised by prospective investors as having foreign investment rules that have been considerably liberalized, “strong government efforts to reduce inflation, a continuing trend to reprivatize government-owned enterprises, a low-cost, easily trainable workforce, and a generally mild climate.”¹⁸ This attractive climate for trade and foreign direct investment (“FDI”) was not always so inviting. From the formation of the 1917 Constitution until the 1970s, foreign investment was

13. Francisco Avalos, *The Legal Personality of the Colonial Period of Mexico*, 83 *LAW LIBR. J.* 393, 395 (1991) (quoting *J. OTS CAPDEQUI, INSTITUCIONES* 231 (1959) (quoting *Reales Cédulas y Ordenes*, tomo VII, folios 468-69, 836-41)).

14. *Constitución Política de los Estados Unidos Mexicanos*, [CONST. 1917] [Constitution] art. 40 (Mex.) (as amended), translated in *ORGANIZATION OF AMERICAN STATES, CONSTITUTION OF THE UNITED MEXICAN STATES* (1964).

15. See Robert Bejesky, *An Analytical Appraisal of Public Choice Value Shifts for Environmental Protection in the United States & Mexico*, 11 *IND. INT’L & COMP. L. REV.* 251, 279 (2001).

16. James F. Smith, *Confronting Differences in the United States and Mexican Legal Systems in the Era of NAFTA*, 1 *U.S.-MEX. L.J.* 85, 89 (1993).

17. PRICE WATERHOUSE, *DOING BUSINESS IN MEXICO* 49-50 (1991).

18. *Id.* at 1.

severely restricted and investment in some activities was closed outright.¹⁹ The 1973 Foreign Investment Law (“FIL”) set forth a principle that foreign investment could not exceed 49% of any business venture within Mexico with special exceptions only rarely granted and difficult to obtain.²⁰ The 1973 FIL set up the Foreign Investment Commission (“FIC”) from which all potential investors had to receive approval.²¹ It exercised this discretionary authority in line with the nationalistic xenophobic philosophy of the time and thus permitted very few foreign investors.²²

Throughout the presidential term of Miguel de la Madrid (1982-1988), Mexico experienced a mild reversal of the government’s attitude toward foreign investment as a reaction to worldwide recession and the withdrawal of foreign loans.²³ As President he passed the Guidelines on Foreign Investment and Proposals for its Promotion in 1984, which turned Mexico’s formerly defensive policies to active promotion of “foreign investment alternatives” in order to meet the new national development priorities.²⁴ The FIC fell into line with the new attitude approving 93% of all requests for majority foreign ownership presented to it from 1982 to 1988.²⁵

This new attitude toward foreign investment was further solidified with the election of President Carlos Salinas de Gortari.²⁶ President Salinas’ 1989 Regulations greatly liberalized restrictions on foreign investment but were still limited by the 1973 FIL.²⁷ However, in 1993 the 1973 FIL gave way to a new FIL that shifted presumptions to accepting foreign investment unless the FIL expressly provided otherwise.²⁸ Mexico’s signing of the NAFTA,²⁹ which went into force on January 1, 1993, committed Mexico to phase out many of the remaining restrictions on foreign investment over a fifteen-year period.³⁰ Annual flows of foreign investment have doubled between the first and second half of the 1990s.³¹

19. Jorge Camilet. al., Restrictions on Foreign Investment, in AN INTRODUCTION TO DOING BUSINESS IN MEXICO 45, 46 (William E. Mooz, Jr. ed., 1995).

20. *Id.* at 47.

21. J. Hayden Kepner, Jr., Mexico’s New Foreign Investment Regulations A Legal Analysis, 18 SYRACUSE J. INT’L L. & COM. 41, 44 (1992).

22. *Id.* at 45.

23. Camil, *supra* note 19, at 47.

24. Kepner, *supra* note 21, at 47.

25. *Id.*

26. Camil, *supra* note 19, at 47.

27. *Id.*

28. *Id.* at 47-48.

29. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289 (entered into force Jan. 1, 1993).

30. Camil, *supra* note 19, at 49.

31. Claudia Schatan, The Environmental Impact of Mexican Manufacturing Exports Under NAFTA, in GREENING NAFTA THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION (David Markell & John Knox eds., forthcoming July 2003)

These political and legal changes reflected a public willingness to suffer the inevitable environmental deterioration that follows rapid industrialization in order to counter poverty and rampant financial crisis.³²

C. Environmental Responses

In response to the environmental problems inherent in industrial growth and trade liberalization, Mexico adopted the General Law on Ecological Balance and Environmental Protection, which took effect March 1, 1988 (the Ecology Law).³³ The Ecology law was followed by numerous regulations later that year: "Environmental Impact Regulations" (June 8, 1988), "the Atmospheric Pollution Regulations" (November 26, 1988), and "the Hazardous Waste Regulations" (November 26, 1988).³⁴

In 1994, Anne Rowley, a staff attorney in the International Activities Division of the United States Environmental Protection Agency ("EPA") Office of General Counsel noted that "in only six years Mexico has established the foundation of a credible legal framework to control environmental contamination."³⁵ Many United States environmental statutes are media specific such as the Clean Water Act, the Clean Air Act and the Resource Conservation and Reclamation Act. They were generally developed individually and in response to specific crises. Mexico's Ecology Law, however, has a broad reach contained in one comprehensive law.³⁶ Furthermore, Mexico's legislature was able to enact such a comprehensive legal framework in a short amount of time because Mexican law derives expressly from the 1917 Mexican Constitution.³⁷

At the top of the framework provided by the Ecology Law, sits the Ministry of Social Development ("SEDESOL"), the executive agency entrusted to administer the Ecology Law.³⁸ It issues ecological Technical Standards which, as defined by the Ecology Law, set forth the "requirements, specifications, conditions,

(manuscript at 219, on file with author).

32. Bejesky, *supra* note 15, at 274 (relying on investigations done by environmentalists who interviewed public leaders, businesses and, white and blue collar workers).

33. Douglas W. Alexander & L. Roberto Fernandez R., *Environmental Regulation of Business in Mexico*, in *AN INTRODUCTION TO DOING BUSINESS IN MEXICO* 233-34 (William E. Mooz, Jr., ed., 1995).

34. *Id.* at 234-35.

35. Anne Rowley, *Mexico's Legal System of Environmental Protection*, 24 *ENVTL L. REP.* 10,431, 10,448 (1994).

36. *Id.* at n.12.

37. *Id.* at 10,432.

38. Alexander & Fernandez, *supra* note 33, at 235 (SEDESOL stands for the Secretaria de Desarrollo Social or the Ministry of Social Development).

procedures, parameters, and permissible limits that must be observed” where activities cause or may cause ecological imbalance, or harm the environment.³⁹

NAFTA directives for the harmonization of member state’s environmental laws make it “likely that Mexico will develop a body of Technical Standards comparable in scope” to those issued by the EPA.⁴⁰ During the mid-1990s, Mexico intended to complete and promulgate 71 new technical norms. This was touted a “very ambitious goal” due to the Federal Law on Measurements and Standardization enacted in 1993, which required proposed norms to achieve desired goals at the highest net benefit feasible to society feasible.⁴¹ Although capable of hindering environmental legislation, this requirement does not appear to be as rigid as the cost-benefit analysis requirements of Executive Order 12291 for United States regulatory initiatives.⁴² This executive order requires all United States Federal agencies take no regulatory action unless they chose the regulatory alternative “involving the least cost to society” with objectives that will “maximize net benefits to society.”⁴³

Beyond issuing technical standards, SEDESOL also has the important task of Environmental Impact Evaluation. Under Article 28 of the Ecology Law, all works or actions that may either 1) cause ecological imbalance or 2) exceed the limits and conditions of environmental regulations or technical standards, “cannot be carried out without preparation of an environmental impact statement environmental impact statements and prior authorization from the corresponding federal, state or local environmental agencies.”⁴⁴ Under the United States National Environmental Policy Act of 1969 (“NEPA”)⁴⁵ and its implementing regulations, EISs are required to be prepared only for “major Federal actions significantly affecting the quality of the human environment.”⁴⁶ Since Mexico has a greater amount of nationalized industries that function as federal entities⁴⁷ and EISs are required

39. *Id.* at 235-36.

40. *Id.*; see also Michael Robins, Comment *The North American Free Trade Agreement: The Integration of Free Trade and the Environment*, 7 *TEMPLE INT’L. L. J.* 123, 129 (1993) (stating that harmonization of Technical Standards are common in trade liberalizing agreements).

41. Rowely, *supra* note 35, at 10,433 (citing Federal Law on Measurement and Standardization, in *Diario Oficial de la Federación*, July 1, 1992, at 48-66).

42. *Id.* (citing Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 19, 1981)).

43. *Id.* at n.23.

44. Alexander & Fernandez, *supra* note 33, at 237.

45. 42 U.S.C. § 4321, et seq. (2000).

46. Rowely, *supra* note 35, at 10,436 (citing a portion of the National Environmental Protection Act, 42 U.S.C. § 4332(C)).

47. JAMES E. HERGET & JORGE CAMIL, *AN INTRODUCTION TO THE MEXICAN LEGAL SYSTEM* 72 (William S. Hein ed., 1978).

in Mexico for all activities with potential environmental impact, public and private,⁴⁸ Mexico's impact evaluation system is potentially more comprehensive than the United States system.

By requiring risk studies and contingency plans to combat environmental emergencies, Mexico's environmental impact evaluation system may also be broader in its scope of monitoring highly dangerous activities than the United States system.⁴⁹ However, the Mexican environmental impact evaluation system may be less comprehensive than the United States system in that it does not require evaluation of the cumulative impact of past, contemporaneous or potential future projects.⁵⁰ Whether more comprehensive or broader in scope, Mexico's environmental policies are significantly more centralized due to the source of most environmental laws concentrated in the federal Ecology Law.⁵¹

1. State versus Federal Authority

This centralization, however, does not mean complete deprivation of participation for states. Title I, Chapter II of the Ecology Law allows state and local governments to legislate in all environmental areas except those specifically reserved to the Federal Government, so long as such laws are consistent with the Ecology Law.⁵² Article 46 gives federal, state, and local authorities power to designate protected natural areas, each with certain specific restrictions depending on the character of the area in question.⁵³ Special reserves of land which specifically prohibit population centers in such areas can be established so long as the areas are "biogeographically" representative of the country and their uses are educational, recreational or investigative in nature.⁵⁴ National parks, natural monuments, national marine parks, areas for protection of natural resources, areas for the protection of flora and fauna, urban parks, and zones subject to ecological preservation can also be established with only the latter two open to State and local jurisdiction.⁵⁵

As an example of State and local power vis a vis federal power, the Mexican State of San Louis Potosi entered the international spotlight when its ecological decree of September 20, 1997

48. Alexander & Fernandez, *supra* note 33, at 237.

49. Rowely, *supra* note 35, at 10,436

50. *Id.*

51. Joseph E. Sinnott, *The Classic Civil/Common Law Dichotomy and its Effect on the Functional Equivalence of the Contemporary Environmental Law Enforcement Mechanisms of the United States and Mexico*, 8 *DICK. J. ENVTL. L. & POL'Y* 273, 285-86 (1999).

52. Alexander & Fernandez, *supra* note 33, at 236-37.

53. *Id.*

54. *Id.*

55. *Id.* at 239-41.

expropriated land owned by an American corporation for the preservation of certain species of cacti.⁵⁶ This action by the state came after a controversy arose between its municipality of Guadalcázar, near where the American corporation built their landfill without receiving a municipal permit, and Mexican federal authorities, which represented that the corporation had the authoritative permission required to commence the project.⁵⁷ The municipal government officially denied a permit but only after the corporation secured permission to operate the landfill through an agreement with federal sub-agencies of the Secretariat of the Environment, Natural Resources and Fishing.⁵⁸ Although the controversy between local and federal power was never decided on its merits,⁵⁹ it is representative of the new conflict of laws issues flowing from Mexico's promulgation of environmental protection policies.

2. Public Participation

Mexico's Constitution states that all government power is derived from the people⁶⁰ and it provides the mechanism of amparo to empower citizens to call upon Constitutional rights embodied therein.⁶¹ Amparo or "shelter" suits grant federal courts jurisdiction to decide controversies arising from laws or acts of authorities that violate individual guarantees under the Constitution. Such suits are limited by Article 107, which requires that amparo suits be prosecuted at the instance of only injured parties and that such judgments only affect the right of the individual who brought the suit.⁶² This express grant of federal judicial jurisdiction by the Mexican Constitution is comparable to the United States' version of standing. Considering the many nationalized industries which count as federal entities, citizen

56. *United Mexican States v. Metalclad Corp.*, [2001] 89 B.C.L.R.3d 359 (Can.), additional reasons stated in [2001] 95 B.C.L.R.3d 169 (Can.), *aff'g* *Metalclad Corp. v. United Mexican States*, 16 ICSID REV.—FOREIGN INV. L.J. 168 (2001) (Int'l Centre for Settlement of Investment Disputes Aug. 30, 2000), available at 40 I.L.M. 36 (2001) (holding that Metalclad's property had been improperly expropriated in violation of Article 1110 of NAFTA).

57. *Id.*

58. *Id.*

59. *Id.* The writ of amparo (defined *infra* text accompanying notes 59-60) filed by the municipality was ultimately dismissed on the basis that such a proceeding was not available to a municipal body (as opposed to a private person) for the purpose of challenging a decision of another level of government, the proper method being a Constitutional Controversy.

60. *Constitución Política de los Estados Unidos Mexicanos*, [CONST. 1917] [Constitution] tit. I, ch. I, art. 39 (Mex.) (as amended), translated in ORGANIZATION OF AMERICAN STATES, CONSTITUTION OF THE UNITED MEXICAN STATES (1964).

61. *Id.* tit. II, ch. IV, art. 103.

62. *Id.* art. 107.

enforcement is potentially greater in Mexico than in the United States.⁶³

The large public role with respect to the Ecology Law begins with Article 18, which requires SEDESOL to promote the participation of social groups and organizations in all environmental planning. Article 33 of the Ecology Law and Article 39 of the Environmental Impact Regulation ("EIR"), require SEDESOL to allow any person to consult the files of any mandatory EIS. Article 41 of EIR allows anyone to request that SEDESOL compel any entity undertaking an activity with potential environmentally negative effects to submit an EIS. The Federal Law on Measurements and Standardization requires that proposed Norms be published and subject to a ninety-day public review and comment period.⁶⁴

Despite these avenues open to civil society, there have been no regulations adopted to implement the public participation provisions of the Ecology Law which would provide needed guidance to the public on how to obtain access to files on mandatory EISs.⁶⁵ Unlike the United States' NEPA requirement for an opportunity for public comment on draft EISs, the Mexican public cannot even view an EIS until it is final.⁶⁶ But all hope is not lost for public access and participation in the promulgation of environmental legislation. Non-governmental organizations have been growing in political strength since the meeting between the Mexican Secretary of Social Development on May 28, 1992 and more than 100 environmental ("NGOs"), which resulted in documented procedures for consultation on matters concerning the environment.⁶⁷

III. EXAMPLES OF MEXICO'S ENVIRONMENTAL ENFORCEMENT

Regardless of who promulgates them, or with what level of public participation, environmental legislation is worthless unless effectively enforced. As a general example, the maquiladora program, which dates back to the 1965 "Border Industrialization Program" and was intended to promote Mexican exports,⁶⁸ resulted in rapid industrialization near the United States-Mexican border. This program ultimately lead to serious environmental contamination and pollution-related diseases.⁶⁹ Under the

63. HERGET & CAMIL, *supra* note 8, at 72.

64. Rowely, *supra* note 35, at 10,434 n.39.

65. *Id.* at 10,435.

66. *Id.* at 10,436.

67. *Id.* at 10,434.

68. Carlos Angulo & Jorge Vazquez, Export Promotion Programs, in AN INTRODUCTION TO DOING BUSINESS IN MEXICO 87 (William E. Mooz, Jr. ed., 1995).

69. Laura J. Van Pelt, Countervailing Environmental Subsidies A Solution to the

maquiladora program “foreigners were permitted to set up 100% foreign owned and managed companies” that could import, duty-free, all component and maintenance parts in order to eventually export them from Mexico abroad.⁷⁰ “In 1990 there were an estimated 1,857 plants and 449,587 workers in the maquiladora industry.”⁷¹ This number had risen to over 560,000 workers by 1994.⁷² Between 1994 and 1998, foreign investment in the maquila industry grew 24% annually and by September of 2000 made up 21% of the total foreign investment within Mexico.⁷³ Due to high levels of industrialization and congestion, the establishment of maquiladoras within Mexico City faced severe restrictions unless investing companies did not generate pollution during production.⁷⁴ Nevertheless, as of 1994, only slightly more than half of the United States maquiladora plants were complying with Mexican hazardous waste disposal regulations.⁷⁵

During the United States Congressional NAFTA negotiations, many NGOs and individuals warned of a myriad of detrimental consequences of further trade liberalization—a possible increase of trans-boundary pollution having already begun in the maquiladora program; the migration of United States industries to escape expensively strict United States environmental laws increasing overall pollution in Mexico; the integration and interdependence of bi-national economics leading to the harmonization of environmental laws and an overall decrease in the United States’ strictness; and under-regulated Mexican imports posing health risks from misuse of pesticides.⁷⁶ These concerns were politically appeased with the NAAEC, the supplemental environmental

Environmental Inequities of the North American Free Trade Agreement, 29 *TEX. INT’L L.J.* 123, 126 (1994).

70. *Id.* at n.23.

71. *Id.*

72. Elvia R. Arriol, *Voices from the Barbed Wires of Despair: Women in the Maquiladoras, Latina Critical Legal Theory, and Gender at the U.S.-Mexico Border*, 49 *DePaul L. Rev.* 729, 755 n.115 (2000) (criticizing a range of socioeconomic and cultural effects resulting from the maquiladora industry).

73. Schatan, *supra* note 31, at 221.

74. Angulo & Vazquez, *supra* note 68, at 88.

75. Van Pelt, *supra* note 69, at 133.

76. Rowely, *supra* note 35, at n.39; 139 *CONG. REC.* 9875-10048 (daily ed. Nov. 17, 1993) (debate in the United States House of Representatives); 139 *CONG. REC.* 16602-22, 16709, & 16712-13 (daily ed. Nov. 20, 1993) (debate in the United States Senate). Cf. Schatan, *supra* note 31, at 212 (concluding that no shift of pollution-intensive industries to Mexico has occurred since the signing of NAFTA, although neither has intensified trade created funds used for environmental protection); see generally Alejandro Nadal, *Corn in NAFTA Eight Years After: Effects on Mexican Biodiversity*, in *GREENING NAFTA: THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION* (David Markell & John Knox eds., forthcoming July 2003) (manuscript at 228, on file with author) (discussing the detrimental effects of intensified trade between the United States and Mexico on the genetic resources on the North American ecosystem).

agreement attached to NAFTA but because the NAAEC provides for very limited relief to individuals, it offers the parties to NAFTA little incentive to actually improve environmental enforcement.⁷⁷

As a result of this debate, two theories accounting for the disparity of enforcement effectiveness between the United States and Mexican environmental law have been documented by Joseph E. Sinnott: inadequate funding and differing legal traditions (civil law versus common law) theory.

A. Inadequate Funding

The more prevalent inadequate-funding theory is supported by the fact that Mexico's overall enforcement performance has increased as more money has been devoted to enforcement endeavors.⁷⁸ "During the second half of his administration, President Salinas increased the budget for environmental enforcement steadily and significantly, which translated into a similar increase in inspections and plant closures."⁷⁹ When the Ecology Law was originally adopted, the Mexican government increased the environmental protection budget from \$95 million in 1988 to \$1.8 billion by 1991.⁸⁰ Of those funds, enforcement allocations increased from \$4.2 million in 1988 to \$78 million by 1992.⁸¹ Actual enforcement followed suit; the amount of inspections tripled and the amount of fines assessed and plants either partially or permanently closed increased one hundred fold between 1988 and 1993.⁸²

However, after NAFTA was adopted by Mexico the rate of environmental inspections fell dramatically leading some to speculate the motives behind what initially appeared to be improvements.⁸³ As of 1999, Mexico's gross domestic product ("GDP") was growing by 10-14% annually.⁸⁴ However, only 0.6% of the GDP are being invested into environmental protection.⁸⁵ Mexico, unfortunately, has not attempted to encourage industry to comply with environmental rules by providing federal money to

77. Van Pelt, *supra* note 69, at 132; North American Agreement on Environmental Cooperation, Sept. 13, 1993, Can.-Mex.-U.S., 32 I.L.M. 1480 (1993).

78. Sinnott, *supra* note 51, at 274.

79. Alexander & Fernandez, *supra* note 33, at 261.

80. Sinnott, *supra* note 51, at 295.

81. *Id.*

82. *Id.*

83. Kevin P. Gallagher, *The CEC and Environmental Quality: Assessing the Mexican Experience*, in *GREENING NAFTA: THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION* (David Markell & John Knox eds., forthcoming July 2003) (manuscript at 193, on file with author).

84. Schatan, *supra* note 31, at 219.

85. *Id.*

purchase new technology.⁸⁶ Much of the maquila industry lacks sufficient infrastructure to combat the serious environmental damage caused by the intensified trade along the border.⁸⁷ Between 1985 and 1999, scholars calculate, that Mexico has suffered the following increases in environmental damage:

[R]ural soil erosion grew by 89%, municipal solid waste by 108%, water pollution by 29%, and air pollution by 97%. Disaggregating air pollution, sulfur dioxide grew by 42%, nitrous oxides by 65%, hydrocarbons by 104%, carbon monoxide by 105%, and particulate matter by 43%.⁸⁸

B. Differing Legal Traditions

The more adventurous differing legal traditions theory was developed from imposing classic models of the civil and common law traditions on to their respective enforcement mechanism. Regardless, a closer look at each environmental enforcement mechanisms shows that differing legal traditions have little impact on enforcement effectiveness.⁸⁹ The environmental enforcement mechanisms found in both countries today defy the classic and stereotypical characteristics of their respective legal traditions.⁹⁰ Comparing early models of these legal traditions emphasizes the differences in the sources of law and the role played by the judiciary in the law-making process.⁹¹ The classic model says that civil law codes like the one in Mexico rely less on binding judicial precedent and more on administrative proceedings as a means of developing and enforcing the law.⁹² In contrast, judicial review of constitutional violations by the Mexican government through the writ of amparo has given rise to the limited form of binding precedent known as “jurisprudencia.”⁹³ Taken together with the fact that United States law has come to rely primarily on statutory sources of law, especially in the area of environmental protection, this represents a convergence of the legal traditions towards “practical uniformity.”⁹⁴

86. Gallagher, *supra* note 83, at 193.

87. Schatan, *supra* note 31, at 221.

88. Gallagher, *supra* note 83, at 189-90.

89. *Id.* at 275.

90. *Id.* at 279.

91. *Id.*

92. Rowely, *supra* note 35, at 10, 432.

93. Sinnott, *supra* note 51, at 281.

94. *Id.*

Sinnott also discusses another possible basis for the disparity in enforcement effectiveness: the fact that environmental enforcement efforts are primarily centralized in Mexico's federal government under SEDESOL even though the Ecology Law does not mandate this.⁹⁵ Most municipalities and even States lack adequate resources to "implement their own enforcement mechanisms" leaving SEDESOL to pick up the slack.⁹⁶ According to the Ecology Law, inspections should be coordinated among federal, state and local authorities, with states and municipalities empowered to inspect cities and verify compliance, "even in areas and matters of federal jurisdiction."⁹⁷ Enforcement efforts are not centralized under the Environmental Protection Agency ("EPA"), SEDESOL's United States counterpart; rather states and municipal governments play an active role in administering environmental protection needing only to report their progress back to the EPA.⁹⁸ Neither legal framework is more advantageous if implemented properly. Centralized systems with sufficient staffs of inspectors can provide as comprehensive jobs as local ones; while decentralized systems, if there is efficient cooperation between authorities, can provide coordinated, holistic evaluations of the environmental impact on individual entities.⁹⁹

As further evidence of systemic convergence, the EPA's continual commitment to avoid litigation has resulted in reliance on negotiated settlements and has diminished their reliance on the judiciary for dispute resolution.¹⁰⁰ Nearly 95% of all administrative and civil judicial actions are resolved through negotiated consent agreements, which reflects the EPA's recognition of litigation as an inefficient dispute resolution tool.¹⁰¹

C. Enforcement Trends and Public Participation

Negotiated settlements and voluntary environmental audits have provided Mexico low-cost enforcement mechanisms.¹⁰² Through the threat of stiff sanctions, SEDESOL is able to negotiate settlements to remedy both current violations and even pre-1988 violations, to which the Ecology Law's retroactivity does not reach, in exchange for leniency on the current violation.¹⁰³ Through

95. *Id.* at 287.

96. *Id.* at 288.

97. Alexander & Fernandez, *supra* note 33, at 256.

98. Sinnott, *supra* note 51, at 288.

99. *Id.* at 289.

100. *Id.* at 291.

101. *Id.*

102. Alexander & Fernandez, *supra* note 33, at 260-61.

103. *Id.* at 260.

environmental audits, if companies risking environmental violation voluntarily submit to inspection and commit to remediation, SEDESOL tacitly waives its right to sanction the company and gives it a reasonable amount of time to carry out remediation.¹⁰⁴

Despite the drastic disparity in funding, e.g. in 1991, Mexico's budget towards environmental enforcement was \$.48 per capita compared to \$24.40 per capita in the United States,¹⁰⁵ Rowely's article concluded that Mexico's environmental law had a "solid foundation and beginning structure that [was] sufficient to alleviate some of the concerns expressed by NGOs and others. . . ."¹⁰⁶

Mexico's government has taken some steps to further this progress. In June of 1992, Mexico decentralized SEDESOL into several units including the National Institute of Ecology ("INEC") and the Federal Attorney for the Protection of the Environment ("PFPA").¹⁰⁷

Citizens are able to register complaints about harmful environmental conditions to PROFEPA, which is then responsible for receiving, investigating and otherwise addressing such complaints.¹⁰⁸ Unfortunately, the Ecology Law only grants the right that complaints to PROFEPA must, within 30 days, receive confirmation that an investigation has occurred and what, if any, enforcement steps are being taken.¹⁰⁹

Whereas citizens' groups and non-profit organizations serve in the United States as "private attorneys general" by monitoring industry and government compliance with environmental laws, since 1992 Mexico lacked all of the following: "community right-to-know" laws which allow public monitoring of industrial compliance; required examinations of alternative actions or opportunities for public comment on environmentally impacting projects; and citizen suit provisions authorizing citizens to bring actions against Mexican industries or the government for noncompliance.¹¹⁰ But would these mechanisms be appreciated or even utilized? Rapid industrialization in response to financial crisis tends to develop public interest only in regulations that protect labor and society interests, but it does not enhance environmental protection despite blatant detriments to the natural environment.¹¹¹ Without any

104. *Id.* at 261.

105. Alicia A. Saimos, *NAFTA's Supplemental Agreement: In Need of Reform*, 9 N.Y. INT'L L. REV. 49, 63 (1996).

106. Rowely, *supra* note 35, at 10,432.

107. John R. Zebrowski, *Pollution Gets Attention: Mexico's Environmental Laws Get Tougher*, 16 NAT'L L. J. 25, 28 (1993) (PROFEPA stands for la Procuraduría Federal para la Protección Ambiental or the Federal Procurator for Environmental Protection; INE stands for el Instituto Nacional de Ecología or the National Institute of Ecology).

108. Rowely, *supra* note 35, at 10,434.

109. *Id.*

110. Van Pelt, *supra* note 69, at 133.

111. Bejesky, *supra* note 15, at 253-54.

grassroots incentives, it is possible that NAFTA's intermingling of environmental concerns with Mexico's dependence on foreign direct investment was the best way to foster change in their "environmental protection regime."¹¹²

But to rely on decisions made at the NAFTA level, far from the level where their effects take place, may run the risk that international political interests will take priority over local environmental interests. Mexico's El Cuchillo Dam Project offers an unfortunate example of the consequences that result from an entanglement of international politics with environmental protection leading to a lack of vigorous environmental enforcement. The Project's immediate harms caused severe reduction of water levels in certain reservoirs down river, the remainder of which became highly polluted, centered in the Mexican State of Tamaulipas.¹¹³ The dam project took place in less than six years between 1988 and 1994 during former President Carlos Salinas de Gortari's administration.¹¹⁴ A comparable project in the United States would have taken over ten years just to get through the litigation over potential environmental impacts.¹¹⁵ The environmental impact statements made by Mexican authorities and released by the Inter-American Development Bank ("IDB") that funded the project never contemplated potential impacts to Tamaulipas.¹¹⁶

Raul M. Sanchez compared the actions of both the United States and Mexican governments with respect to the Project, with principles found in the International Conference on Water and the Environment, on January 31, 1992. These principles state that development and management of water projects should be based on a "participatory approach," where each level of user, planner and policy maker, is involved and aware of the project's importance.¹¹⁷ Such an approach involves decisions being made at the lowest appropriate level with full public consultation with regard to planning and implementation.¹¹⁸ Against this measure Sanchez

112. *Id.* at 272-73.

113. Raul M. Sanchez, Mexico's El Cuchillo Dam Project: A Case Study of Nonsustainable Development and Transboundary Environmental Harms, 28 U. MIAMI INTER-AM. L. REV. 425, 429 (1996) [hereinafter Sanchez, El Cuchillo I].

114. *Id.* at 426.

115. Raul M. Sanchez, Mexico's El Cuchillo Dam Project: A Case Study of Nonsustainable Development and Transboundary Environmental Harms, 30 U. MIAMI INTER-AM. L. REV. 629, 642 (1999) [hereinafter Sanchez, El Cuchillo II] (relying on D. Kevin Dunn & Jessica L. Wood, Substantive Enforcement of NEPA Trough Strict Review of Procedural Compliance: Oregon Natural Resources Council v. Marsh in the Ninth Circuit, 10 J. ENVTL. L. & LITIG. 499, 501 (1995)).

116. Sanchez, El Cuchillo I, *supra* note 113, at 434.

117. *Id.* at 425.

118. *Id.* at 425, n.1.

found that both governments fall short: the Mexican government for directly failing to consult the population of Tamaulipas,¹¹⁹ and the United States government for failing to recognize the indirect impacts on American citizens whose taxes indirectly contributed to the Project through the IDB.¹²⁰

IV. CONCLUSION

Through the unfortunate example of El Cuchillo, a microcosmic landscape of Mexico's environmental protection policies unfolds, leaving foreign investors and the common people of Mexico in diametric tension. The federal authorities, with primary influence over the shape and enforcement of Mexico's environmental laws, play the critical role of intermediary between the two groups. Meanwhile, as Mexico's states and municipalities receive more tax revenues from foreign investment funds, their potential to eventually exercise their legislative and policing influence over their own environments grows. At Mexico's grassroots level, however, participation seems more ambiguous. While the NAAEC provides Mexico's general public with a unique political mechanism for environmental protection,¹²¹ the public's capacity to formally participate on matters of promulgation and enforcement in Mexico may remain deficient as the debate whether to prioritize poverty alleviation over environmental protection takes place among international trade ministers with little accountability or transparency.

119. *Id.* at 429, n.12.

120. *Id.* at 434.

121. See generally Jonathan Graubart, Giving Meaning to New Trade-Linked "Soft Law" Agreements on Social Values: A Law in Action Analysis of NAFTA's Environmental Side Agreement, 6 *UCLA J. INT'L L. & FOREIGN AFF.* 425 (2001-2002) (demonstrating how environmental activists can use the citizen submission process as political pressure on Mexico to enforce environmental standards); see also Paul Stanton Kibel, The Paper Tiger Awakens: North American Environmental Law After the Cozumel Reef Case, 39 *COLUM. J. TRANSNAT'L L.* 395 (2001) (concluding that the CEC's factual record, while not determining that Mexico failed to enforce its environmental law, demonstrates Mexico's action inconsistent with Mexican environmental law).