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ARBITRABILITY IN BILATERAL INVESTMENT TREATIES: THE CASE THAT APPLIED INTERNATIONAL LAW TO JUSTIFY ITS NON–APPLICATION

*Carlo Brooks**

I. INTRODUCTION

Attorney General Loretta Lynch arrives at the White House one morning and discovers on her desk a notice compelling the United States of America to appear at an arbitral proceeding in Brussels for an alleged breach of a U.S.-Armenia bilateral investment treaty. An

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Armenian corporation claims damages due to the failure of the U.S. to provide the company "fair and equitable treatment." The corporation has bypassed the requirement that investors first litigate claims in U.S. courts. The U.S. disputes the tribunal's jurisdiction, but a Belgian court of appeals finds jurisdiction proper under Belgian procedural law. This vignette is fictitious yet, as this article will illustrate, entirely proper under current American jurisprudence. To prevent this scenario, U.S. domestic law should consider international treaty arbitration law in analyzing consent as a prerequisite to arbitration.

International investment treaty arbitration ("ITA") typically involves arbitration by an investor against a sovereign country, often under a bilateral investment treaty ("BIT").[1] In contrast to international commercial arbitration ("ICA"), which "involve[s] commercial disputes between private parties,"[2] ITA requires an arbitral tribunal "to perform very substantial, multi–step, legal work before reaching its final decision"[3] and consider, among other factors, "the BIT itself, the law of the Contracting State, [and] the rules and principles of international law."[4]

Although the arbitral tribunal's final decision is heavily grounded on international principles, "[h]ost–country law retains significance in international investment disputes, notwithstanding the BIT movement and its focus on international law."[5] "The tribunal must inquire into its jurisdiction to hear the claim and whether the claimant has stand-

1. *See* Stephen R. Halpin III, *Stayin' Alive?: BG Group, PLC v. Republic of Argentina and the Vitality of Host–Country Litigation Requirements in Investment Treaty Arbitration*, 71 WASH. & LEE L. REV. 1979, 1981 (2014) (citing GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 42 (2012) (noting that, "most BITs provide significant substantive protections for investments made by foreign investors, including guarantees against expropriation and denials of fair and equitable treatment.")); *see generally* NIGEL BLACKABY & CONSTANTINE PARTASIDES, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 1–2 (4th ed. 2004) (describing the historical roots of arbitration).

2. *See* BORN, *supra* note 1, at 411.

3. Bernard Hanotiau, *Investment Treaty Arbitration and Commercial Arbitration: Are They Different Ball Games? The Legal Regime/Framework*, *in* 50 YEARS OF THE NEW YORK CONVENTION: ICCA INTERNATIONAL ARBITRATION CONFERENCE 146, 148 (Albert Jan van den Berg ed., 2009).

4. Richard H. Kreindler, *The Law Applicable to International Investment Disputes*, *in* ARBITRATING FOREIGN INVESTMENT DISPUTES: PROCEDURAL AND SUBSTANTIVE LEGAL ASPECTS 401, 404 (Norbert Horn & Stefan Michael Kröll eds., 2004); *see also* ANTONIO R. PARRA, APPLICABLE LAWS IN INVESTOR STATE ARBITRATION 4 (2008).

5. Halpin, *supra* note 1, at 1989 (citing CAMPBELL MCLACHLAN QC, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 69–70 (2007) (stating that "[t]he investments of non–State actors are creatures of private law and tribunals cannot avoid addressing issues arising under the law pursuant to which investments owe their existence in adjudicating treaty questions.")).

ing to bring the claim."[6] Given the extent and complexity of the factors considered:

> Divining the applicable law is a more complicated task than in the strictly commercial context. A BIT is often thought of as a 'self–contained legal system,'[7] and choice–of–law provisions in BITs frequently direct a tribunal to consider, among others, 'the BIT itself, the law of the Contracting State, [and] the rules and principles of international law.'[8]

Recently, in *BG Group PLC v. Republic of Argentina*,[9] the U.S. Supreme Court set a precedent for eschewing the multi–step ITA analysis described above. The Court's decision was in favor of the interpretive presumptions of U.S. private commercial arbitration law to determine the "arbitrability" of BIT disputes. This threshold question is critical as it determines "whether an arbitral tribunal has the authority to decide, as an initial matter, that a given dispute should be submitted to arbitration for a determination of whether the arbitral tribunal has jurisdiction over the dispute."[10] *BG Group* was the first time the Court ruled on an investor–state dispute arising out of a BIT between two sovereign nations. The Court held that an arbitral tribunal's determination of whether a treaty requirement is a condition on the State's consent to arbitrate is subject to deferential, not *de novo*, review.[11] In so holding, the Court expressly declined to apply principles of treaty interpretation to determine the appropriate standard of review.[12] Instead, the Court employed standards derived from the context of private arbitration, effectively side–stepping international

6. *Id.* at 1987–88 (citing Hanotiau, *supra* note 3, at 148 ("In investment arbitration, the issue of jurisdiction is nearly invariably raised by the respondent. It leads the arbitral tribunal to determine whether claimant has standing . . . but also whether it qualifies for protection under the applicable BIT . . . .")).

7. *See id*. at 1988 (quoting Richard H. Kreindler, *The Law Applicable to International Investment Disputes*, *in* ARBITRATING FOREIGN INVESTMENT DISPUTES: PROCEDURAL AND SUBSTANTIVE LEGAL ASPECTS 401, 404 (Norbert Horn & Stefan Michael Kröll eds., 2004); *see also* Jieying Ding, *Enforcement in International Investment and Trade Law: History, Assessment and Proposed Solutions* 47 GEO. J. INT'L L. 1137, 1143 (2016).

8. Halpin, *supra* note 1, at 1988.

9. BG Grp. PLC v. Republic of Argentina, 134 S. Ct. 1198 (2014); *accord* Chevron Corp. v. Republic of Ecuador, 795 F.3d 200, 205 (D.C. Cir. 2015) (holding that an arbitral tribunal's determination of whether a treaty requirement is a condition on the State's consent to arbitrate is subject to deferential, not *de novo*, review).

10. Laurence Shore, *Defining 'Arbitrability'*, N.Y. L. J. (June 15, 2009), http://www.newyorklawjournal.com/id=1202431398140/–Defining–Arbitrability#ixzz3oZyLUf6R (noting that, "what the United States calls 'arbitrability' can be an exceedingly complicated question, both here and internationally.").

11. *See BG Grp. PLC*, 134 S. Ct. 1198 (2014).

12. *Id.*

treaty principles in favor of domestic arbitration law presumptions to determine the arbitrability of the sovereign nation's consent to arbitration.[13] *BG Group* and its progeny stand for the proposition that a private multinational commercial interest can sidestep host–country law and international treaty principles by submitting a dispute directly to arbitration before a court has determined whether a precondition to arbitration has been satisfied, and that the U.S. will give deference to the arbitrator's findings under the presumptions of ordinary U.S. contract law.

Still, treaty interpretation, international law, and international policy all militate in favor of interpreting the arbitrability of a treaty under governing international–law principles as opposed to the contract–law framework employed in domestic arbitration law analysis. First, the *BG Group* decision relies on a blatant misconstruction by the arbitral tribunal of Articles 31 and 32 of Vienna Convention on the Law of Treaties (the "Vienna Convention"), which the U.S. "generally recognizes . . . as an authoritative guide to treaty interpretation."[14] Second, the *BG Group* Court's application of private commercial arbitration principles to ITA fails to consider standard investor–state arbitration defenses under international law, such as the exhaustion of local remedies requirement.[15] Third, because an arbitration agreement often implicates a nation's sovereign interests and entails large financial stakes, U.S. courts should treat traditional international law conditions on consent as conditions precedent to consent to arbitration unless the text and other relevant evidence sufficiently indicate otherwise.

II. "Purposeful Availment" of Customary International Law of Treaties

The imposition of U.S. contract law in ITA stems from an ITA tribunal's flawed interpretation of the Vienna Convention on the Law of Treaties. Although not a party, the United States "considers many of the provisions of the Vienna Convention . . . to constitute customary international law on the law of treaties."[16] In deferring to the ITA

13. *Id.*

14. *See, e.g.*, Fujitsu Ltd. v. Fed. Express Corp., 247 F.3d 423, 433 (2d Cir. 2001), *cert. denied*, 534 U.S. 891 (2001) (citing Chubb & Son, Inc. v. Asiana Airlines, 214 F.3d 301, 309 (2d Cir. 2000)).

15. *See* BG Group PLC v. Republic of Argentina, 134 S. Ct. 1198, 1208-13 (2014).

16. *Compare* Frequently Asked Questions, *Vienna Convention on the Law of Treaties*, U.S. Dep't of State, http://www.state.gov/s/l/treaty/faqs/70139.htm (last visited Feb. 29, 2016) (noting that the United States is not a party to the Vienna Convention on the Law of Treaties since,

tribunal's problematic determination of arbitrability, and therefore to its interpretation of the BIT, the *BG Group* Court tacitly approved the tribunal's misuse of Articles 31 and 32 of the Vienna Convention to misconstrue "existing customary international law."[17]

A. The Road to the Vienna Convention and Back

The U.S. Supreme Court upheld a judgment in favor of a British natural gas consortium against Argentina under a BIT to which the U.S. is not a party.[18] To fully grasp this outcome, one must understand how ITA law and U.S. law intersect.

The dispute in *BG Group* involved a BIT entered into in 1990 between Great Britain and the Republic of Argentina.[19] The claimant in the arbitration, BG Group PLC. ("BG"), was a British corporation with "a direct and an indirect ownership interest in MetroGAS S.A.[,] . . . a natural gas distribution company incorporated in Argentina."[20] BG filed notice of arbitration in 2003 pursuant to Article 8 of the BIT, which provided for the submission of disputes "to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made."[21] The BIT provided for two exceptions to this general jurisdiction requirement. It allowed for submission to international arbitration in the following cases:

> (a) if one of the Parties so requests, in any of the following circumstances:

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although "[t]he United States signed the treaty on April 24, 1970 . . . [t]he . . . Senate has not given its advice and consent to the treaty.") *with Chubb*, 214 F.3d at 309 (stating that, "[t]he United States considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties.") *and* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. III intro. note, at 144–45 (1987) (discussing the Vienna Convention's codification of customary international law governing international agreements and the acceptance of the Convention by the United States).

17. *See* Karl Zemanek, *Vienna Convention on the Law of Treaties*, U.N. AUDIOVISUAL LIBRARY OF INT'L LAW, http://legal.un.org/avl/pdf/ha/vclt/vclt–e.pdf (quoting Guinea–Bissau v. Sen., ICJ REP. 53, para. 48 (Nov. 12, 1991) (stating that, "[a]rticles 31 and 32 of the Vienna Convention on the Law of Treaties . . . may in many respects be considered as a codification of existing customary international law . . . .")).

18. *See* BG Grp. PLC v. Republic of Argentina, Final Award, at 5 (UNCITRAL Dec. 24, 2007), [hereinafter Final Award], http://www.italaw.com/sites/default/files/case-documents/ita0081.pdf.

19. *See id.* (referencing the Agreement Between the Government of the United Kingdom and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, Arg.-U.K., Dec. 11, 1990, 1765 U.N.T.S 33 [hereinafter Arg.–U.K. BIT]).

20. *See* Final Award, *supra* note 18, at 5.

21. *Id.* at 5–6 (citing Arg.–U.K. BIT, *supra* note 19, at art. 8 (describing the article as, "Settlement Disputes Between an Investor and the Host State")).

(i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision;
(ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute; [or]
(b) where the Contracting Party and the investor of the other Contracting Party have so agreed.[22]

BG did not attempt to litigate the dispute in Argentina, however.[23] Instead, it sought Argentina's agreement, under Article 8 of the BIT, to submit the dispute to the International Centre for Settlement of Investment Disputes ("ICSID").[24] Argentina naturally declined.[25] BG then referred the dispute to arbitration under the UNCITRAL rules, a procedure proper under Article 8 of the BIT only "[i]f after a period of three months . . . of the claim there [was] no agreement to [either one of the ICSID or UNCITRAL] alternative procedures."[26]

Whether a feat of cynicism, brilliance, or both, BG Group's decision to bypass the BIT's exhaustion provisions and file for ad hoc arbitration under the UNCITRAL rules proved to be fateful for Argentina.[27] Under the UNCITRAL regime, "the place of arbitration [is] determined by the arbitral tribunal having regard to the circumstances of the case."[28] Thus, the BG tribunal was free to select an Argentine, British, or any other UNCITRAL member State locality, as the place, or "seat," of arbitration for the dispute.[29] However, the

22. *See* Final Award, *supra* note 18, at 6.

23. *Id.* at 48; *see also* Arg.–U.K. BIT, *supra* note 19, at art. 8 (stating that, "[d]isputes . . . which arise within the terms of this Agreement between an investor of one Contracting Party and the other Contracting Party . . . shall be submitted, at the request of one of the Parties to the dispute, to the decision of the competent tribunal of the Contracting party in whose territory the investment was made.").

24. *See* Final Award, *supra* note 18, at 7.

25. *Id.* at 8.

26. *See* Final Award, *supra* note 18, at 6 (alteration in original) (citing Arg.–U.K BIT, *supra* note 19, at art. 8).

27. *See* BORN, *supra* note 1, at 412 (noting that, "many BIT arbitrations are conducted under general institutional arbitration rules, such as UNCITRAL Rules . . . [or] [i]n other instances . . . subject to specialized and *sui generis* dispute resolution mechanisms . . . .").

28. UNCITRAL Arbitration Rules (as revised in 2010), G.A. Res. 65/22, U.N. Doc. A/RES/65/22, art. 18(1) (Jan. 10, 2010) (noting that, "[i]f the parties have not previously agreed on the number of arbitrators, and if within 30 days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.").

29. *See FAQ – Origin, Mandate and Composition of UNCITRAL*, UNCITRAL, http://www.uncitral.org/uncitral/en/about/origin_faq.html#members (last visited Mar. 21, 2016) (stating that

tribunal was constituted in 2004 in Washington D.C.[30] in accordance with Article 7(1) of the UNCITRAL Rules.[31] Thus, because BG filed for arbitration in Washington D.C., the tribunal was also free to select Washington D.C. as the "seat" of arbitration.

This determination is no trivial matter.[32] "The 'place' or 'seat' of the arbitration is important because the law of the 'place' or 'seat' will affect a number of issues, including the powers of the arbitral tribunal, the availability and quality of state court intervention in the arbitral proceedings, and the enforceability of the arbitrators' award."[33] Indeed,

> once parties have agreed where to arbitrate, the law of the seat of arbitration (law of the situs or *lex arbitri*) provides procedural rules that parties must follow during arbitration [and] sets forth the grounds on which parties may vacate an arbitral award. In the United States, the FAA grants the U.S. federal district court embracing the location where an award is made the power to vacate the award on certain procedural grounds.[34]

Accordingly, the *BG Group* claim became justiciable in the United States when Argentina petitioned under the Federal Arbitration Act ("FAA") to vacate the arbitral award rendered against it in the U.S. for its alleged violation of a BIT. Thereafter, the U.S. District Court for the District of Columbia confirmed the award, the U.S. Court of Appeals for the District of Columbia Circuit reversed, and the U.S. Supreme Court granted certiorari. However, since the FAA

"UNCITRAL was originally composed of 29 States; its membership was expanded in 1973 to 36 States and again in 2004 to 60 States.").

30. *See* Final Award, *supra* note 18, at 7.

31. *Id.*; *see also* UNCITRAL Arbitration Rules, *supra* note 28, at art. 7(1) (noting that, "[i]f the parties have not previously agreed on the number of arbitrators, and if within 30 days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.").

32. *See* Halpin, *supra* note 2, at 1992 (FAA determines seat)*; but see* BORN, *supra* note 1, at 116 (citations omitted) ("In contrast to legislation in most countries, the FAA grants U.S. courts a potentially significant role in the selection of the arbitral seat in international arbitrations. In particular, the FAA grants U.S. courts the power to compel arbitration (under §4, §206 and §303 of the FAA) in a particular place. In issuing orders compelling arbitration under the FAA, U.S. courts have therefore sometimes specified the place where the arbitration is to proceed. In some cases, U.S. courts have issued orders compelling arbitration within the United States, even where parties have agreed to arbitration in accordance with institutional rules specifying an alternative means of selecting a seat. This approach is at odds with the overwhelming weight of authority, with U.S. obligations under Article II of the Convention and with principles of party autonomy.").

33. *See* JOHN W. HINCHEY & TROY L. HARRIS, INTERNATIONAL CONSTRUCTION ARBITRATION HANDBOOK § 5:13 (2015).

34. *See* Halpin, *supra* note 1, at 1992.

controlled procedurally with respect to the seat of arbitration,[35] Argentina's ability to wrest the dispute from U.S. law was greatly diminished from the moment the tribunal asserted jurisdiction. In this sense, the threshold question is: on what basis could the tribunal assert jurisdiction?

The tribunal expressly stated that the applicable law governing the arbitration would be defined by the BIT, which provides that the "arbitral tribunal [would] decide [the] dispute in accordance with the provisions of this Agreement, the laws of the Contracting Party involved in this dispute, including its rules on conflict of laws, the terms of any specific agreement concluded in relation to such an investment and the applicable principles of international law."[36] Argentina's troubled economic and political history seems to have been pivotal in the tribunal's decision to rely on "applicable principles of international law," by way of the Vienna Convention, to produce an outcome it deemed just. Argentina entered into the BIT at the height of President Menem's extremely market–oriented economic policy, which he launched "amid the worst economic crisis in the country's history."[37] Argentina had pegged the peso to the U.S. dollar, but was never able to maintain parity.[38] At the time of the BG dispute, Argentina was restructuring and renegotiating its debt to reflect economic realities.[39] Emergency measures involved temporarily barring creditors from bringing suit in Argentine courts.[40] Persuaded "that under the dire circumstances surrounding the emergency measures, the Executive Branch sought to prevent the collapse of the financial system by (i) directly interfering with the normal operation of its courts, and (ii) by excluding litigious licensees from the renegotiation process,"[41] the tri-

35. *See* 9 U.S.C. § 10(a) (West 2012) (granting U.S. courts "in and for the district wherein the award was made" power to "make an order vacating the award" for reasons such as corruption, fraud or prejudice).

36. *See* Arg.–U.K BIT, *supra* note 19, at art. 8; *see also* Final Award, *supra* note 18, at 6 (stating "BG appointed Professor Albert Jan van den Berg and Argentina appointed Professor Alejandro M. Garro as arbitrators, both of whom jointly designated Guillermo Aguilar Alvarez as president of the tribunal.").

37. Carlos Menem, BRITANNICA, http://www.britannica.com/biography/Carlos–Menem (last visited Mar. 2, 2016).

38. *See* Indep. Evaluation Office of the Int'l Monetary Fund, *The Role of the IMF in Argentina, 1991-2002*, Pub. No. 70403, Int'l Monetary Fund 1 (July 2003), www.imf.org/External/NP/ieo/2003/arg/070403.pdf.

39. See *id*. at 4.

40. Petition of the Republic of Argentina to Vacate or Modify Arbitration Award at 53, BG Grp. PLC v. Republic of Argentina, 665 F.3d 1363 (D.C. Cir. 2012) (No. 08–0485 (RBW)), http://www.italaw.com/documents/BGvArgentina.pdf.

41. *Id*.

bunal excused BG from its duty to exhaust local remedies and ultimately awarded the British consortium $185,285,485 in damages, $247,300 in arbitration costs, and $437,073 plus £2,414,141 in legal fees and expenses.[42] Argentina's only avenue of redress was, oddly enough, through a U.S. district court. Yet, as we will see, in a strange twist of fate, the *BG Group* Court's use of U.S. contract law served to reinforce a peculiar application of international law.

B. International Vienna Convention Jurisprudence

The BG arbitration tribunal's award against Argentina is grounded on two provisions of the Vienna Convention. While the tribunal "accept[ed] Argentina's position that as a matter of treaty law investors acting under the Argentina–U.K. BIT [had to] litigate in the host State's courts for 18 months before they [could] bring their claims to arbitration," the tribunal held that "[a]s a matter of treaty interpretation . . . Article 8(2)(a)(i) [could not] be construed as an absolute impediment to arbitration."[43] The tribunal reasoned that "[w]here recourse to the domestic judiciary is unilaterally prevented or hindered by the host State, any such interpretation would lead to the kind of absurd and unreasonable result proscribed by Article 32 of the Vienna Convention."[44] According to the tribunal, "allowing the State to unilaterally elude arbitration, which has been the engine of the transition from a politicized system of diplomatic protection to one of direct investor–State adjudication,"[45] was the type of manifest absurdity contemplated by Article 32.[46]

Article 32 is a sister provision of Article 31,[47] which states that international treaties are to be interpreted according to the "ordinary language" of their provisions.[48] Article 32 creates an exception to this

42. *Id*. at 3-4.

43. *See* Final Award, *supra* note 18, at 50.

44. *Id*.

45. *Id*.

46. *See id*. The Final Award is silent with respect to whether an interpretation of the BIT that would permit BG to patently disregard Article 8(2)(a)(i) would also result in a manifest absurdity. *See id*.

47. *See* Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S 331 [hereinafter Vienna Convention] ("Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.").

48. *See id*. at art. 31(1) (providing that, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

rule when an attempt to interpret the plain language of the treaty "[l]eads to a result which is manifestly absurd or unreasonable."[49] The British corporation first seized on this provision in its writ of certiorari to the U.S Supreme Court, arguing that under the Vienna Convention, "a treaty shall not be *applied* in a manner that produces an absurd or unreasonable result."[50] The actual language of Article 32 provides that the exception arises when an "interpretation"—not an *application*—leads to a result which is manifestly absurd or unreasonable.[51] The U.S Supreme Court in *BG Group* seems to have missed this distinction. While acknowledging that the arbitration tribunal's interpretation of the Vienna Convention was "controversial,"[52] the Court concluded that the arbitrators' conclusions were not barred by the BIT as the arbitrators did not "'stra[y] from interpretation and application of the agreement' or otherwise 'effectively dispens[e] their own brand of . . . justice.'"[53] Yet the Court need only have consulted the official reports of the International Law Commission to confirm just how far the *BG Group* arbitrators strayed from the ordinary meaning of the Vienna Convention in order to stray from the ordinary meaning of Article 8(2)(a)(i) of the BIT.

The arbitral tribunal claimed that its decision was commanded "[a]s a matter of treaty interpretation."[54] Yet the official records of the General Assembly of the Vienna Convention make clear that the International Law Commission ("ILC") never intended Article 32 to function as a mechanism for importing extrinsic factors into treaty interpretation when the ordinary language of the treaty stands for itself; rather, "[t]he word 'supplementary' emphasizes that article [32] does *not* provide for alternative, autonomous, means of interpretation but only for means to aid an interpretation governed by the principles contained in article [31]."[55] With respect to the "manifestly absurd or

49. *See id*. at art. 32.

50. Petition for a Writ of Certiorari, *BG Grp. PLC*, 665 F.3d 1363, 1368 *petition for cert. filed*, 2012 WL 3091067 (U.S. July 27, 2012) (No. 12–138) (citing Vienna Convention, *supra* note 47, at art. 32(b)).

51. Vienna Convention, *supra* note 47, at art. 32.

52. *See* BG Grp. PLC v. Republic of Argentina, 134 S. Ct. 1198, 1212-13 (2014) ("We would not necessarily characterize these actions as rendering a domestic court–exhaustion requirement 'absurd and unreasonable'. . .").

53. *Id.* at 1213 (citing Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 671 (2010) (quoting Major League Baseball Players Assn. v. Garvey, 532 U.S. 504, 509, (2001) (per curiam)) (alternation in original) (internal quotation marks omitted).

54. *See* Final Award, *supra* note 18, at 50.

55. Int'l Law Comm'n, Rep. on the Work of its 18th Sess., May 4 – July 19, 1966, U.N. Doc. A/6309/Rev/1, 2 Y.B Int'l L. Comm'n 173, 223; GAOR, 21st Sess., Supp. No. 9 (1966). http://legal.un.org/ilc/documentation/english/reports/a_cn4_191.pdf.

unreasonable" exception in which the tribunal expressly couched its decision, the ILC made clear that this exception was "limited to cases where the absurd or unreasonable character of the *'ordinary' meaning* is manifest"[56]—i.e., "cases where *interpretation* under article [31] gives a result which is manifestly absurd or unreasonable."[57]

In clarifying the ancillary role of Article 32, the ILC cited a 1925 case in which the Permanent Court of International Justice eschewed the strict construction of Poland's postal rights urged by Danzig.[58] There, the Court stated that, "the rules as to a strict or liberal construction of treaty stipulations can be applied *only in cases where ordinary methods of interpretation have failed*."[59] The ILC summary notes confirm that the Vienna Convention drafters intended to enforce a "two stage approach to interpretation,"[60] with Article 31 being the default provision and Article 32 being "decisive only when the processes set out in article [31] failed to eliminate ambiguity or obscurity."[61]

C. U.S. Vienna Convention Jurisprudence

Notwithstanding the original U.S. position on Articles 31 and 32 of the Vienna Convention, prevailing U.S. law has shown a deference to the ILC–intended meaning of Article 32. The case of *Bank of New York v. Yugoimport*, recently decided by the U.S. Court of Appeals for the Second Circuit, illustrates this well.[62] In *Yugoimport*, the Bank of New York brought a state law interpleader action to resolve the ownership of funds in a deposit account to which Yugoimport, a Serbian entity, claimed full ownership.[63] The Republics of Croatia and

56. *Id.* (emphasis added) (internal quotation marks omitted).

57. *Id.* (emphasis added).

58. *See* Polish Postal Service in Danzig, Advisory Opinion, 1925 P.C.I.J. (ser. B) No. 11, at 41 (May 16).

59. *Id*. at 39 (emphasis added).

60. J. G. Merrills, *Two Approaches To Treaty Interpretation*, 1968–69 AUSTRALIAN Y.B. INT'L L. 55, 57 (1971) (describing that this strict view stood in contrast with the U.S. view that "the text of the treaty should be regarded as simply the formal embodiment of the parties' shared intentions and requiring the interpreter to make, as a matter of course, a far ranging inquiry into non–textual matters." (citing Summary Record of the 873d Meeting on the Law of Treaties, [1966] 1 Y.B. Int'l L. Comm'n, at 206, U.N. Doc. A/CN.4/SR.873.)).

61. *See Summary Record of the 873d Meeting on the Law of Treaties*, [1966] 1 Y.B. Int'l L. Comm'n, at 206, U.N. Doc. A/CN.4/SR.873 [hereinafter Summary Record], http://legal.un.org/docs/?path=../ilc/documentation/english/summary_records/a_cn4_sr872.pdf&lang=EFS (according to Special Rapporteur, Sir Humphrey Waldock, this approach represented the "existing rule.").

62. *See, e.g.*, 745 F.3d 599 (2d Cir. 2014).

63. *See id*. at 602.

Slovenia, however, contended that the funds should be divided among the states pursuant to a multilateral treaty, the interpretation of which was governed by the Vienna Convention.[64] Like the plaintiff in *BG Group*, Yugoimport relied on extrinsic evidence in an effort to avoid a "plain language interpretation"[65] of the international treaty. On appeal, Yugoimport contended that the district court should have credited this evidence.[66] The Appeals Court expressly rejected Yugoimport's position, holding that the evidence "could [not] properly have been taken into consideration under the interpretive rules set forth in the Vienna Convention."[67] The Court explained that under Article 32,

> courts may consider certain, limited types of external evidence only to confirm the ordinary meaning of the text, or where the ordinary meaning is ambiguous or would lead to absurd results. External evidence may not be admitted to create ambiguity where there is none or to compel an interpretation different from the text's ordinary meaning.[68]

Similarly, when interpreting provisions of the Warsaw Convention, the U.S. Supreme Court explicitly stated that "analysis must begin . . . with the text of the treaty and the context in which the written words are used."[69] This is true because "it is [a court's] responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties."[70]

III. Traditional Sovereign Substantive Defenses to Investor Claims

In adopting a private commercial arbitration framework, the U.S. District Court for the District of Columbia and the U.S. Supreme Court did not consider the traditional international law defenses available in investor–state arbitration, and thereby failed to engage in the

64. *Id.*

65. *Id.* at 611.

66. *Id.*

67. *Id.* at 611-12.

68. *Id.* at 611.

69. *See* Air France v. Saks, 470 U.S. 392, 396-97 (1985) (citing Maximov v. United States, 373 U.S. 49, 53-54 (1963)). *Id.* at 598.

70. *Id.* at 399 (alteration added) (citing Reed v. Wiser, 555 F.2d 1079 (2d Cir. 1977), *cert. denied*, 434 U.S. 922; Day v. Trans World Airlines, Inc., 528 F.2d 31, 35 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976)); *see also* Zicherman v. Korean Air Lines Co., 516 U.S. 217, 223 (1996).

traditional "exhaustion of local remedies" analysis that is the norm in international law.[71]

As described in detail by Gary Born, "[h]ost states have a variety of defenses available to claims by investors in investment arbitrations . . . . [T]hese defenses are virtually always governed principally by international law (not national law), in the form of either the provisions of the applicable investment treaty or customary international law."[72]

One such traditional investor–state arbitration defense is "permitted regulation," where a host state denies "either that [its] regulatory actions constitute an (indirect) expropriation or amount to a denial of fair and equitable treatment or a breach of the international minimum standard of treatment of aliens."[73] In *Methanex Corp. v. United States*,[74] Methanex, a Canadian corporation submitted a claim to arbitration under the UNCITRAL rules for alleged injuries resulting from a California ban on the gasoline additive methyl tertiary-butyl ether ("MTBE").[75] Methanex distributed methanol, which is used to manufacture MTBE. Methanex contended that the regulation denied Methanex fair and equitable treatment in accordance with international law since the regulatory measures had the effect of harming the expectancy interests of foreign methanol producers such as Methanex.[76] Methanex's contention was similar to BG's in that it claimed that the purpose of its contract under the trade agreement was frustrated by the host country's regulatory actions.[77] The *Methanex* tribunal cited a lack of conclusive evidence justifying California's ban of MTBE in favor of ethanol; nevertheless, it found the sovereign state's regulatory response warranted under the circumstances.[78] Like BG, Methanex appealed to Article 32 of the Vienna Convention in an attempt to cast California's actions as either "unfair and inequitable" or "discriminatory" in a sense that lay outside of the

71. *See* BORN, *supra* note 1, at 433.

72. *See id*. at 433-36 (describing the following as recognized defenses in investor-state arbitration: permitted regulation, exceptions, investor's unlawful conduct, necessity, exhaustion of local remedies, international obligation, and time bar).

73. *See id.* at 434 ("States frequently cite concepts of national sovereignty and regulatory prerogatives in asserting such defenses.").

74. Methanex Corp. v. United States, 44 I.L.M. 1345, pt. I, preface, ¶ 1 (NAFTA Ch. 11 Arb. Trib. 2005) (Veeder et al., Arb.), http://www.state.gov/documents/organization/51052.pdf.

75. *See id*.

76. *Id*. at pt. II, ch. D, ¶ 27.

77. *Id*. at pt. II, ch. E, ¶ 5.

78. *See id*. at pt. III, ch. A, ¶ 65.

ordinary meaning of the terms as set forth in NAFTA Article 1105.[79] The *Methanex* tribunal rejected the attempt, stating that the "approach of the Vienna Convention is that the text of the treaty is deemed to be the authentic expression of the intentions of the parties [and] its elucidation, rather than wide ranging searches for the supposed intentions of the parties, is the proper object of interpretation."[80]

Even if Argentina's regulation of its court system could not pass muster as a "permitted regulation," the *BG Group* tribunal and reviewing courts could have recognized Argentina's actions under the customary international law doctrine of "necessity."[81] Under Article 25 of the International Law Commission's Articles on State Responsibility, necessity may "be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State" if the act "is the only way for the State to safeguard an essential interest against a grave and imminent peril."[82] Thus, in the context of an investor dispute that arose under a BIT between Argentina and the U.S., an ICSID tribunal held Argentina to be in breach of its obligations under the BIT with respect to the standard of fair and equitable treatment and prohibition of discriminatory

79. *See* North American Free Trade Agreement, U.S.-Can.-Mex., art. 1105, Dec. 8–Dec. 17, 1992, 32 I.L.M. 289, (1993) ("Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security . . . [and] each Party shall accord to investors of another Party, and to investments of investors of another Party, non–discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.").

80. Methanex Corp. v. United States, 44 I.L.M. 1345, pt. II, ch. B, ¶ 22 (NAFTA Ch. 11 Arb. Trib. 2005) (Veeder et al., Arb.), http://www.state.gov/documents/organization/51052.pdf (citing Int'l Law Comm'n, Rep. on the Work of its 18th Sess., May 4 – July 19, 1966, U.N. Doc. A/6309/Rev/1, 2 Y.B Int'l L. Comm'n 173, 223, ¶18; GAOR, 21st Sess., Supp. No. 9 (1966), http://legal.un.org/ilc/documentation/english/reports/a_cn4_191.pdf ("[T]he Commission's approach to treaty interpretation was on the basis that the text of the treaty must be presumed to be the authentic expression of the intentions of the parties, and that the elucidation of the meaning of the text rather than an investigation *ab initio* of the supposed intentions of the parties constitutes the object of interpretation.")); *see also* Vienna Convention, *supra* note 47, at art. 31.

81. *See* BORN, *supra* note 1, at 435 ("Host states sometimes raise a defense of 'necessity' under customary international law or 'essential security' under the text of some BITs. These defenses typically claim that a governmental act was either unavoidable or justified because of pressing and essential state interests.").

82. *See, e.g.*, *Rep. of the Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, art. 25 and commentary, U.N. Doc. A/56/10, http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

measures provisions.[83] However, the tribunal recognized Argentina's "necessity" defense as legitimate under the provisions of the BIT and "general international law."[84] Accepting Argentina's proposition that the "conditions as of December 2001 constituted the highest degree of public disorder and threatened Argentina's essential security interests," the Tribunal rejected the Kentucky corporation's contention that the pertinent BIT necessity provision was "only applicable in circumstances amounting to military action and war,"[85] finding, on the contrary, that "the conditions in Argentina . . . called for immediate, decisive action to restore civil order and stop the economic decline."[86] Central to the tribunal's reasoning was the recognition that Argentina was not a party to a commercial contract but a sovereign state:

> To conclude that such a severe economic crisis could not constitute an essential security interest is to diminish the havoc that the economy can wreak on the lives of an entire population and the ability of the Government to lead. When a State's economic foundation is under siege, the severity of the problem can equal that of any military invasion.[87]

Although Argentina's liability under the BIT was not extinguished entirely, the Tribunal excused Argentina from its duty to perform during the "State of Necessity," which lasted from December 1, 2001 to April 26, 2003.[88]

It is worth noting that the *LG&E* tribunal's rationale in recognizing the legitimacy of the "necessity" defense in the general context of the BIT did not lie exclusively in Argentine law, the BIT, or customary international law;[89] rather, the tribunal determined it would "apply first the Bilateral Treaty; second, *and in the absence of explicit provisions therein*, general international law; and, third, the Argentine domestic law."[90] Significantly, the tribunal explained that this trump order derived directly from international law itself, since there was *no contract* between LG&E and Argentina but rather a binding *treaty*

83. *See generally* LG&E Energy Corp., LG&E Capital Corp., LG&E Int'l, Inc. v. Argentine Republic, ICSID Case No. ARB/02/1 (Oct. 3, 2006), http://www.italaw.com/sites/default/files/case-documents/ita0460.pdf.

84. *See id*. ¶ 206.

85. *Id*. ¶ 238.

86. *Id*.

87. *Id*. ¶ 238.

88. *See id*. ¶ 245.

89. *See id*. ¶ 206.

90. *Id*. ¶ 99 (emphasis added).

between the two states.[91] As in *BG Group*, the relevant provision existed within the plain meaning of the BIT. The tribunal made clear that this obviated the need for recourse to Articles 31 and 32 of the Vienna Convention, as deference to customary international law as an "instrument for the interpretation of the Treaty" is only triggered "where a term is ambiguous, or where further interpretation of a Treaty provision is required."[92]

Like "permitted regulation" and "necessity," exhaustion of local remedies is recognized as both a customary international law principle as well as a valid BIT defense provision.[93] The Argentina–U.K. BIT expressly required the investors to litigate in the host state's courts for eighteen months before they could bring their claims to arbitration.[94] As in *LG&E*, this express provision reflected recognized customary international law principles.[95] Employing the sound logic of the *LG&E* tribunal, the BIT provision would have been controlling in the *BG Group* arbitration decision without need for recourse to the Vienna Convention,[96] and the *BG Group* tribunal could have granted partial relief as did the *LG&E* tribunal before it.[97]

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91. *Id.* ¶ 98 (stating that "[i]n short, one must also recall that between Argentina and LG&E there is no binding contractual agreement. The existence of such relationship would have allowed the parties to agree on stabilization clauses in the event of changes in certain circumstances. But, in the absence of such agreement, one is bound to resort to a legal system regulating those events. *The fact that there is no contract between the Argentine Republic and LG&E favors in the first place, the application of international law, inasmuch as we are dealing with a genuine dispute in matters of investment which is especially subject to the provisions of the Bilateral Treaty complemented by the domestic law*") (emphasis added).

92. *Id.* ¶ 89.

93. *See* BORN, *supra* note 1, at 435 ("[A] few BITs require an investor to exhaust its local remedies in the host state courts before commencing an investment arbitration. In addition, states sometimes argue that no violation of a foreign investor's substantive rights has occurred because the investor failed to exhaust its local remedies – for example, by seeking appellate review of a wrongful first instance judicial decision.").

94. *See* Final Award, *supra* note 18, at 47-48 (citing Arg.–U.K. BIT, *supra* note 19, at art. 8).

95. *See* BORN, *supra* note 1, at 427 (citing the Argentina-U.K. BIT as an example of "BITs [that] contain provisions requiring an investor to pursue relief initially in the host state's courts prior to commencing an investment arbitration.").

96. *See* INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, ICSID CONVENTION, art. 26 (Apr., 2006), https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English–final.pdf (providing that, "[c]onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.").

97. Whether arbitral awards create judicial precedent is an unsettled question from a purely theoretical point of view. *But cf.* BORN, *supra* note 1, at 366 ("In practice, awards frequently serve as decisive authority."); s*ee also* W. Mark C. Weidemaier, *Toward A Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895 (2010) ("Much like courts . . . arbitrators can . . . create precedent that guides future behavior and provides a language in which disputants, lawyers, and adjudicators can express and resolve grievances.").

American trade agreement jurisprudence should not have presented any obstacle to obtaining partial relief in an ICSID or UNCITRAL arbitral tribunal, or in the federal court system. NAFTA tribunals, for example, recognize the validity of the traditional defense of exhaustion of local remedies.[98] In *Loewen v. United States*, a NAFTA tribunal adjudicated a Canadian funeral home business's claim for damages against the state of Mississippi for the alleged violation of international standards of due process.[99] A Mississippi state court had rendered a $500 million verdict against Loewen in favor of a local Mississippi state business.[100] Loewen claimed that the company was effectively "foreclosed" from seeking redress from the allegedly discriminatory verdict in the Mississippi judicial system due to the state's onerous bond requirements and brought the dispute to arbitration.[101] The tribunal denied Loewen's claim, resting its decision on "the Claimants' failure to show that Loewen had no reasonably available and adequate remedy under United States municipal law in respect of the matters of which it complains, being matters alleged to be violations of NAFTA."[102] Although far from indifferent to Loewen's plight,[103] the tribunal noted that "the local remedies rule which requires a party complaining of a breach of international law by a State to exhaust the local remedies in that State before the party can raise the complaint at the level of international law is *procedural* in character."[104] The tribunal emphasized the "gatekeeping" function of the exhaustion of local remedies rule, citing Article 44 of the ILC Draft Articles on State Responsibility as proof that "the local remedies rule deals with the *admissibility* of a claim in international law, not whether the claim arises from a violation or breach of international

98. *See* Loewen Grp., Inc. and Raymond L. Loewen v. U.S., ICSID Case No. ARB (AF)/98/3, Award, ¶ 165 (June 26, 2003), 7 ICSID Rep. 442 (2005) [hereinafter Loewen Group] ("There is a body of opinion which supports the view that the complainant is bound to exhaust any remedy which is adequate and effective (*The Finnish Ships Arbitration Award*, May 9, 1934, 3 RIAA, 1480 at 1495; *Nielsen v Denmark* [1958–1959] Yearbook of the European Commission on Human Rights, 412 at 436, 438, 440, 444) so long as the remedy is not 'obviously futile' (*The Finnish Ships Arbitration Award* at 1503–05).").

99. *See id*. ¶¶ 3-4, 87.

100. *See id*. ¶ 4.

101. *See id*. ¶¶ 5-7 (Indicating that Mississippi law required an appeal bond for 125% of the judgment as a condition of staying execution on the judgment. Both the trial court and the Mississippi Supreme Court refused to reduce the appeal bond. Thus, Loewen was required to post a $625 million bond within seven days in order to pursue its appeal).

102. *Id*. ¶ 2.

103. *See id*. ¶ 1 (Acknowledging that the case was "extremely difficult").

104. *Id*. ¶ 149 (emphasis added).

law."[105] In the tribunal's view, this rule was qualified only by the principle that the obligation to exhaust is limited to remedies "which are effective and adequate and are reasonably available to the complainant in the circumstances in which it is situated."[106]

Unlike BG Group, Loewen made a good faith effort to seek redress in the investor state, but ultimately elected to settle with the Mississippi litigant rather than pay the bond required to pursue the local judicial remedy or apply to the Fifth Circuit for a stay of execution pending the filing of a petition for *writ of certiorari* to the U.S. Supreme Court.[107] The tribunal acknowledged Loewen's efforts, but rested its decision on the logical implications of its effective/adequate/reasonably available exhaustion rule:[108]

> If, in all the circumstances, entry into the settlement agreement was the *only* course which Loewen could reasonably be expected to take, that would be enough to justify an inference or conclusion that Loewen had no reasonably available and adequate remedy. . . . Although entry into the settlement agreement may well have been a reasonable course for Loewen to take, we are simply left to speculate on the reasons which led to the decision to adopt that course rather than to pursue other options. It is not a case in which it can be said that it was the *only* course which Loewen could reasonably be expected to take. . . . Accordingly, our conclusion is that Loewen failed to pursue its domestic remedies . . . .[109]

Under the logic of the *Loewen* decision, it is clear that an arbitration claimant lacks the discretion to determine whether local remedies are effective, adequate, and reasonably available (this is a matter for a reviewing court or tribunal to decide); rather, a claimant has a *duty* to attempt to exhaust all such remedies to gain "admission" into the jurisdiction of an international tribunal. BG Group's actions did not come close to satisfying the ILC standard as articulated by the *Loewen* tribunal, as it made no attempt to engage, let alone exhaust, the Argentine judicial system, for a mere eighteen months. In fact, courts and tribunals have upheld much longer exhaustion periods than

105. *Id.* (emphasis added).

106. *Id.* ¶ 168.

107. *See id.* ¶ 200.

108. *See id.* ¶ 216; s*ee generally* Oxford Dictionaries, http://www.oxforddictionaries.com/us/definition/american_english/exhaustion (last visited Mar. 7, 2016) (defining the term "exhaustion" as, inter alia, "[t]he process of establishing a conclusion by eliminating *all the alternatives*.") (emphasis added).

109. Loewen Group, *supra* note 98, ¶ 216.

the "manifestly unreasonable" eighteen–month period of redress available to BG Group in the Argentine judicial system.[110]

IV. The Issue of Sovereignty

The foregoing discussion of customary treaty interpretation and investment treaty defenses brings the implications of the U.S. Supreme Court's *BG Group* decision into sharp relief. The *BG Group* majority held that the BIT's local court litigation requirement could indeed be construed as a procedural condition precedent to arbitration.[111] This is what happened in the *Loewen* case. "Procedural," however, had a very different significance in the *Loewen* context. In *Loewen*, the exhaustion requirement was "procedural" in a due process sense in that it ensured deference to the host party's *domestic* law before a party could raise the complaint at the level of international law.[112] The *BG Group* majority, however, framed the issue as whether "the presence of the term 'consent' in a treaty warrant[ed] abandoning, or increasing the complexity of, [the Court's] ordinary intent–determining framework."[113] With the presumption thus reversed in favor of "ordinary" U.S. arbitration principles, the *BG Group* court acceded not only to the tribunal's arbitrability determination but also to its dubious use of international law to justify that determination.

In an odd sense, Argentina, a sovereign nation, now found itself in a dilemma analogous to that of ordinary consumers who unwittingly consent to binding arbitration when they sign contracts containing boilerplate language they assume will never be given effect.

110. *See* Interhandel (Switz. v. U.S.), Preliminary Objections, 1959 I.C.J. 6, at 26-27 (Mar. 21) (holding that, despite a twelve year delay, remedies had not been exhausted in U.S. courts); *see also* Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 Va. J. Int'l L. 809, 824 (2005) (due to the exhaustion of local remedies requirement in the context of state espousal of traditional international law denial of justice claims, a "state could not intervene diplomatically until its injured citizen had attempted to gain redress locally. This principle respected the sovereign right of a host state to control matters within its borders by allowing it the opportunity to grant redress for wrongs committed within its territory. While an alien did not have to exhaust local remedies if they proved to be futile, waiting to reach the point of futility could be very frustrating, and proving futility is not necessarily straightforward.").

111. *See* BG Grp. PLC v. Republic of Argentina, 134 S. Ct. 1198, 1208 (2014) (citing Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 85 (2002) ("[W]hether a party filed a notice of arbitration within the time limit provided by the rules of the chosen arbitral forum 'is a matter presumptively for the arbitrator, not for the judge.'")).

112. *See* Loewen Group, *supra* note 98, ¶¶ 149, 161.

113. *See BG Grp. PLC*, 134 S. Ct. at 1209; *see also* Halpin, *supra* note 1, at 2010 (characterizing the Court's reasoning as a declination "to grant the term 'consent' in an international treaty talismanic significance . . . .").

Although the BIT arbitration provision was not "buried in the fine print," it was plainly intended to lay dormant and only become available as an alternative remedy after local remedies had been exhausted. Additionally, like an ordinary consumer, Argentina's consent to the arbitration provision had more to do with lack of a meaningful choice than a preference for "direct investor–State adjudication" over "diplomatic protection."[114] The BIT was entered into at the time of President Menem's aggressive economic policies to stave off inflation and save the country from economic collapse.[115] The BIT provided for tariffs intended to attract foreign investors, the terms to which a wealthy nation would never so slavishly consent. BG claimed that Argentina "damage[d] . . . the value of its shares . . . [by] measures adopted by Argentina which had a negative impact on the activities of MetroGAS and, hence, on the value of its shareholding in GASA and in MetroGAS."[116] Argentina's efforts to restructure its debt, according to BG, caused "a substantial deprivation of the value and economic benefit of an investment;" the tribunal agreed that this "qualifie[d] as an expropriation . . . even without any alteration of formal ownership rights."[117] The Section 8 exhaustion prerequisites were Argentina's only protection against arbitral tribunals leery of "diplomatic protection" and more inclined to be sympathetic to the economic interests of rich investor nations.

Despite these precautions, Argentina could not foresee the force that the U.S. Supreme Court would give to the arbitrator's power to decide arbitrability in the United States—a force that the Court has interpreted to extend to class action certification,[118] and which determined the Court's deferential review of the arbitration tribunal's questionable interpretation of international treaty law. In so doing, the Court flouted the basic principles of sovereignty that ought to guide all interpretation of treaty law. This is true in several respects. First, the *Howsam* presumption emanates from considerations that are not germane to international treaty law. Second, international treaty law, whether commercial or not, is grounded in the irreducible authority of a state to govern itself.[119] Third, BITs are often negotiated in economic contexts that are no longer valid at the time of presumed breach and that entail social, economic and political consequences

114. *See* Final Award, *supra* note 18, at 50.
115. *See supra* note 40.
116. *See* Final Award, *supra* note 18, at 64.
117. *See id.* at 80.
118. *See* AT&T Mobility v. Concepcion, 563 U.S. 333, 343-44 (2011).
119. *See*, *e.g.*, Vienna Convention, *supra* note 47.

that are qualitatively different from those that befall private interests.[120]

A. The Howsam Rationale in Commercial Transactions

Essential to the *BG Group* holding was the Court's reluctance to depart from what it considered a workable legal standard to decide arbitrability.[121] The *First Options/Howsam* framework provides a neat "two-step" analysis, which requires determining, based on very liberal standards, whether the parties agreed to arbitrate; if so, the arbitrator has the primary power to arbitrate the merits of the dispute and to determine arbitrability itself.[122] The *Howsam* element of the rule arose in the context of a brokerage firm's suit to enjoin a customer from arbitrating an allegedly time–barred dispute.[123] The Court held that interpretation of the arbitration regime's rule imposing a six–year time limit for arbitration was a matter presumptively for the arbitrator, not for the court.[124] The Court relied on the principle that "procedural" questions, which grow out of the dispute and bear on its final disposition, are presumptively not for a judge to decide; rather, "the presumption is that the arbitrator should decide allegation[s] of *waiver, delay, or a like defense* to arbitrability."[125] The *BG Group* Court relied expressly on the *Howsam* procedural/substantive distinction, finding the UK–Argentina "local litigation requirement . . . highly analogous to procedural provisions that both this Court and

120. *See* Maíra de Melo Vieira, *The Regulation of Tax Matters in Bilateral Investment Treaties: A Dispute Resolution Perspective*, 8 DISP. RESOL. INT'L NO. 1, 63, 67 (May 2014).

121. *See* Transcript of Oral Argument at 37, BG Grp. PLC v. Republic of Argentina, 134 S. Ct. 1198 (2013) (No. 12–138), http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-138_8l9c.pdf (Breyer, J.) ("I thought [Howsam] said there's a presumption about that procedural rule, and I thought important language was the language that the Court has found the phrase, i.e., for the judge, applicable in the narrow circumstance where contracting parties would likely have expected a Court to have decided the gateway matter. Now, that, it seems to me, *a little bit easier to work with* than this notion of whether a state gave consent or didn't give consent or it doesn't mention it in the treaty.") (emphasis added).

122. *See* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 940 (1995) (whether arbitrators or courts have primary power to decide if parties agreed to arbitrate merits of dispute depends on whether parties agreed to submit question to arbitration); *see also* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002) ("procedural" questions which grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for an arbitrator, to decide).

123. *See Howsam*, 537 U.S. at 81.

124. *See id*. at 82-83.

125. *Id*. at 84 (quoting Moses H. Cone Memorial Hosp. v. Mercury Construction Corp., 460 U.S. 1, 25 (1983)) (emphasis added).

others have found are for arbitrators, not courts, primarily to interpret and to apply."[126]

B. The Primacy of Sovereignty

Yet the facts of any dispute involving a treaty between nations are readily distinguishable from those in *Howsam*. *Howsam* involved a consumer commercial transaction contract containing a typical boilerplate arbitration provision.[127] Jurisdiction was not the basis of the bargain. Investment treaties, by contrast, are designed to address jurisdictional issues.[128] Developing countries know that opening up their borders may invite a fox into the henhouse. Hence the BITs' balance between institutional arbitration remedies and host country litigation requirements. Thus, arbitrability in investor-state disputes is not a mere procedural question, but entails *the* key question of consent.

Just as the Eleventh Amendment grants immunity to states from suit without their consent, local remedies clauses prevent a nation from being commandeered by its trade commitments. In *Loewen*, such a clause served as a safeguard against a NAFTA trade party from using an international law claim (denial of justice) to escape an international trade agreement provision (exhaustion) executed by sovereign nations.[129] In keeping with the "procedural" nature of the exhaustion requirement, the *Loewen* tribunal applied a "procedural" legal standard, finding against Loewen because it failed to exhaust *all* available remedies. The *Loewen* approach embodies the "procedural" rigors dictated by sovereignty and supported by international law. This stands in stark contrast to the *BG Group* rationale, which was guided by a competing notion of "procedural" that could only take root in international law thanks to a suspicious application of customary treaty interpretation.

C. State Considerations

The *BG Group* decision violates basic principles of sovereignty that ought to guide all international treaty interpretation. An arbitration agreement can implicate a nation's sovereign interests and entail

126. *BG Grp. PLC*, 134 S. Ct. at 1207-08 (2014) (citing *Howsam*, 537 U.S. at 85).

127. *Howsam*, 537 U.S. at 81.

128. *Id.* at 81-82, 84.

129. *See* Loewen Group, ICSID Case No. ARB (AF)/98/3, Award, ¶ 145, 189, (June 26, 2003), 7 ICSID Rep. 442 (2005) http://www.state.gov/documents/organization/22094.pdf.

large financial stakes.[130] The United States is a signatory to no less than 48 BITs,[131] yet it has never ratified the Vienna Convention. The United States federal judiciary has decided at least two cases against these signatory nations.[132] Comity itself should require U.S. courts to treat traditional international law conditions on consent, absent express terms that provide otherwise, as conditions precedent to consent to arbitration.

V. Conclusion

Governing international law treaty principles, deference to traditional investor–state arbitration defenses, and principles of sovereignty all weigh in favor of an international approach to international investment treaty arbitration based upon governing international law principles. This comports with the grounding principle of the Vienna Convention, that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"[133] – the very principle, of course, which should have determined arbitrability in the first instance.

130. *See BG Grp. PLC*, 134 S. Ct. at 1219 (Roberts, C.J., dissenting) ("It is no trifling matter for a sovereign nation to subject itself to suit by private parties; we do not presume that any country—including our own—takes that step lightly." (internal citation omitted)).

131. *See* United States Bilateral Investment Treaties, U.S. Dep't of St., http://www.state.gov/e/eb/ifd/bit/117402.htm (last visited Mar. 8, 2016).

132. *See* Chevron Corp. v. Ecuador, 795 F.3d 200, 205–06 (D.C. Cir. 2015) (quoting *BG Grp. PLC*, 134 S. Ct. at 1219 ("FSIA . . . allows federal courts to exercise jurisdiction over Ecuador in order to consider an action to confirm or enforce the award.")).

133. *See* Vienna Convention, *supra* note 47, at art. 31(1); *see also supra* text accompanying note 48.

THE TPP AND BEYOND: THE VITAL ROLE OF JUDICIAL DISCRETION IN THE ENFORCEMENT OF INTERNATIONAL COPYRIGHT RULES

*Haik Gasparyan**

I. INTRODUCTION

The United States has an obvious interest in protecting copyrights. In 2014 alone, "core copyright industries" contributed over a

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trillion dollars to the U.S. GDP and produced nearly 5.4 million jobs in the U.S. alone.[1] However, even with the most rigorous copyright enforcement policies in the world, a myriad of studies claim that U.S. industries still lose hundreds of billions of dollars a year to piracy in its various forms.[2] These losses are often contributed to the lack of cohesive international enforcement policies and the availability of circumvention technology that allow for exploitation of legal loopholes in copyright laws.[3] Historically, the U.S. has relied on highly leveraged free trade agreements (FTAs) that require other countries to beef up their enforcement of copyrights within their respective borders, but these enforcement efforts, for the most part, have been ineffective.[4] For example, during the negotiation rounds of the Trade-Related aspects of Intellectual Property Rights Agreement (TRIPS), countries against a demanding enforcement regime struck key compromises that construed enforcement provisions as only granting official authority to enforce copyrights, without mandating exactly *how* and *what* to apply this authority against.[5] These compromises disappointed enforcement-centric countries, and are now referred to as the "Achilles heel of TRIPS."[6]

For those countries, like the U.S., who have been leading the efforts in global copyright enforcement policies, another major setback has been the ability of digital pirates and illegal downloaders to bypass both jurisdiction and law.[7] But there have been some successes as

1. *See* STEPHEN E. SIWEK, INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY 1, 9 (2016), http://www.iipawebsite.com/pdf/2016CpyrtRptFull.pdf.

2. *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-423, OBSERVATIONS ON EFFORTS TO QUANTIFY THE ECONOMIC EFFORTS OF COUNTERFEIT AND PIRATED GOODS 18 (2010), http://www.gao.gov/assets/310/303057.pdf.

3. *See* Peter K. Yu, *Enforcement, Enforcement, What Enforcement?*, 52 IDEA: THE INTELL. PROP. L. REV. 239, 241-49 (2012).

4. *See id*. at 243-49.

5. *See id*. at 242-43; *see also* J.H. Reichman, *Universal Minimum Standards of Intellectual Property Protection Under the TRIPS Component of the WTO Agreement*, *in* INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE: THE TRIPS AGREEMENT 23, 71 (Carlos M. Correa & Abdulqawi A. Yusuf eds., 2d ed. 2008); *see also* Rachel Brewster, *The Surprising Benefits to Developing Countries of Linking International Trade and Intellectual Property*, 12 CHI. J. INT'L L. 1, 31 (2011).

6. *See* Yu, *supra* note 3, at 243; *see also* J.H. Reichman & David Lange, *Bargaining Around the TRIPS Agreement: The Case For Ongoing Public-Private Initiatives To Facilitate Worldwide Intellectual Property Transactions*, 9 DUKE J. COMP. & INT'L L. 11, 34 (1996).

7. *See* MOISES NAIM, ILLICIT: HOW SMUGGLERS, TRAFFICKERS, AND COPYCATS ARE HIJACKING THE GLOBAL ECONOMY 23-24 (2005); *see also* Bobbie Johnson, *Internet Pirates Find 'Bulletproof' Havens For Illegal File Sharing*, GUARDIAN (Jan. 4, 2010, 6:05 PM), http://www.theguardian.com/technology/2010/jan/05/internet-piracy-bulletproof; *see also* TIMOTHY P.

well. The 2012 indictment against Megaupload, and its founder Kim Dotcom, is often cited as the most ambitious piracy cases brought by the U.S.[8] The government successfully argued that the court should extend jurisdiction to foreign defendants based on their use of U.S. servers, and classify commercial piracy as conspiracies.[9] However, as previously illustrated, rigid rules cannot deter piracy in the age of flexible technology.[10]

The flexible means of online infringement and piracy, combined with the weak track record of international efforts continues to drive U.S. pressure on other countries to adopt or further strengthen their enforcement efforts.[11] In 2010, the U.S. began to push for the enforcement of copyrights through a new, and more demanding FTA known as the Trans-Pacific Partnership Agreement (TPP), urging the twelve participating countries to adopt a copyright enforcement model similar to that of the U.S.[12] In October of 2015, after five years of intense negotiations, all parties finally signed the TPP agreement, placing the ball in the courts of member-party legislative authorities for ratification.[13]

TRAINER & VICKI E. ALLUMS, PROTECTING INTELLECTUAL PROPERTY RIGHTS ACROSS BORDERS 453 (2009).

8. *See generally* Press Release, U.S. Dept. of Justice, Justice Department Charges Leaders of Megaupload with Widespread Online Copyright Infringement, (Sept. 14, 2014), http://www.justice.gov/opa/pr/justice-department-charges-leaders-megaupload-widespread-online-copyright-infringement.

9. *See generally* United States v. All Assets Listed in Attachment A, 89 F. Supp. 3d 813 (E.D. Va. 2015) (holding the alleged acts were in furtherance of the conspiracy to commit copyright infringement within the court's judicial district when defendants "allegedly reproduced and stored infringing files on these servers and caused communications to be sent from servers in Virginia indicating that infringing files had been removed."), *aff'd sub nom.* United States v. Batato, 833 F.3d 413 (4th Cir. 2016).

10. *See* Bryan H. Choi, *The Grokster Dead End*, 19 HARV. J. L. & TECH. 393, 394-395 (2006).

11. *See* Yu, *supra* note 3, at 243; *see also* Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 SMU L. REV. 975, 989 (2011).

12. *TPP Full Text, Chapter 18, Intellectual Property,* OFFICE OF U.S. TRADE REPRESENTATIVE, https://ustr.gov/tpp/overview-of-the-TPP (last visited Mar. 2, 2017); *Trans-Pacific Partnership Agreement*, N.Z. MINISTRY OF FOREIGN AFF. & TRADE, https://www.mfat.govt.nz/en/about-us/who-we-are/treaties/trans-pacific-partnership-agreement-tpp/text-of-the-trans-pacific-partnership (last visited Mar. 2, 2017); *see also* Aditya Tejas, *New TPP Leaks Reveal US Pushing For Strong Copyright, IP Enforcement,* INT'L BUS. TIMES (Aug. 6, 2015 at 7:56 AM), http://www.ibtimes.com/new-tpp-leaks-reveal-us-pushing-strong-copyright-ip-enforcement-2041486; Michael Geist, *The Trouble with the TPP's Copyright Rules*, *in* THE TRANS-PACIFIC PARTNERSHIP AND CANADA: A CITIZEN'S GUIDE 159-68 (Scott Sinclair & Stuart Trew eds., 2016).

13. *See A Review of the Patent Related Provisions of the TPP*, NAT'L LAW REV. (Oct. 14, 2015), http://www.natlawreview.com/article/review-patent-related-provisions-tpp-patentable-subject-matter-and-grace-periods#sthash.9XHpxkv1.dpuf.

As this article went into publication, President Trump signed a memorandum to withdraw the U.S. from the TPP, thus officially bringing U.S. participation to an indefinite halt and leaving the remaining eleven member countries in uncertainty.[14] However, even with the U.S. withdrawal, the TPP's implications on copyright enforcement are not entirely nullified. The TPP's heavily negotiated principles will likely, in one form or another, find its way into future international copyright agreements, as demonstrated by the transplantation of similar IP-related provisions in the past.[15] Thus, although the TPP is defunct in its current form,[16] it does not necessarily mean that its well-developed copyright provisions are gone for good.[17]

In its final form, the TPP's IP Chapter (Chapter 18) sets out an elaborate framework, outlining the minimum amount of protection that member countries must implement into their copyright enforce-

14. Memorandum Regarding Withdrawal of the U.S From the Trans-Pacific Partnership Negotiations and Agreement, 2017 DAILY COMP. PRES. DOC. 64 (Jan. 24, 2017).

15. *See* Jeremy Malcolm, *RCEP: The Other Closed-Door Agreement to Compromise Users' Rights*, ELECTRONIC FRONTIER FOUND. (Apr. 20, 2016), https://www.eff.org/deeplinks/2016/04/rcep-other-closed-door-agreement-compromise-users-rights (noting the mirroring civil damages provisions contained in the TPP and those contained in the draft Regional Comprehensive Economic Partnership (RCEP) agreement); *see also* Jeremy Malcolm, *The Battle Against TPP Isn't Over, But It Has Shifted*, ELECTRONIC FRONTIER FOUND. (Nov. 9, 2016) [hereinafter Malcolm, *The Battle Against TPP Isn't Over*], https://www.eff.org/deeplinks/2016/11/battle-against-tpp-isnt-over-it-has-shifted.

> TPP countries are still in the process of passing their implementing legislation, which contains all of the worst measures in the TPP that we have been fighting against for the last six years—including the extension of the term of copyright, the strict rules against DRM circumvention, [and] the tough criminal penalties against those who infringe copyright . . . .

Id.; *see also* Ruth Lopert et al., *Inside Views: TPP May Be Dead – But Its Impact Lingers*, IP WATCH (June 12, 2016), http://www.ip-watch.org/2016/12/06/tpp-may-dead-impact-lingers ("Despite the [TPP] being—to all-intents-and-purposes—dead in the water, pursuit of some of the most egregious objectives of the corporate interests driving the TPP agenda rolls on."); *see* PEDRO ROFFE ET AL., KNOWLEDGE PARTNERSHIP PROGRAMME, FROM TRIPS TO PREFERENTIAL TRADE AGREEMENTS, INCLUDING THE TRANS-PACIFIC PARTNERSHIP AGREEMENT AND RELATED TRENDS IN THE EUROPEAN UNION: CHALLENGES FOR EMERGING COUNTRIES 19, 41-43, http://www.ipekpp.com/admin/upload_files/Report_3_54_From_2237283020.pdf (providing a report of the historical similarities and transformations of IP provisions, and examples of common preferential language contained in subsequent IP agreements); *see also* Susan Sell, *Trips was Never Enough*, 18 J. INTELL. PROP. L. 447 (2011); Peter K. Yu, *TPP and Trans-Pacific Perplexities*, 37 FORDHAM INT'L L.J. 1129 (2014).

16. *See* Malcolm, *The Battle Against TPP Isn't Over*, *supra* note 15; *see also* Lopert et al., *supra* note 15.

17. *See* Alan Yuhas, *Congress Will Abandon Trans-Pacific Partnership Deal, White House Concedes*, GUARDIAN (Nov. 12, 2016, 8:14 PM), https://www.theguardian.com/business/2016/nov/12/tpp-trade-deal-congress-obama; *see also* Steven Seidenberg, *US Perspectives: TPP's Copyright Term Benefits US, Burdens Others*, IP WATCH (Mar. 23, 2015), http://www.ip-watch.org/2015/03/23/tpps-copyright-term-benefits-us-burdens-others/.

ment.[18] In other words, member countries approved the TPP's regulatory provisions, not as a ceiling for copyright enforcement, but as a floor in order to "promote the public interest in sectors of vital importance," as boldly advocated by the introductory "Principles" paragraph.[19] The official release of the TPP text on November 5, 2015 confirmed the incorporation of most U.S.-pushed provisions, which by a closer look, reflect the core values of U.S. copyright law.[20] From the Digital Millennium Copyright Acts' takedown process, to the abundance of criminalization provisions, one can get the impression that the U.S. simply reworded the Copyright Act, gave it some steroids, and unleashed it on its TPP partners.[21] However, by adopting harsher and more demanding enforcement standards, member countries are urged to promote the U.S. export of copyrighted works at the expense of subjecting their citizens to steep penalties and wide-scale criminalization.[22] Although this harsher standard of enforcement may one day live up to its deterrent purpose, before it does, it will pose serious issues to social welfare, international court conformance, and, perhaps most importantly, creative expression.[23]

Although the recent shift of FTAs, such as the TPP, compel member countries to adopt a far stricter minimum standard of copyright enforcement, signatory countries and their courts should utilize any FTA-granted discretionary rights to level the imbalance between interests of citizens and copyright industries.[24] This is not to suggest that member country courts should intentionally undermine already agreed upon trade agreements. Instead, I argue that they should use any *permitted* discretion to tailor a balanced approach; one that takes

18. *TPP Full Text, supra* note 12.

19. *Id.*

20. Notice of Intention to Enter Into the Trans-Pacific Partnership Agreement, 2017 DAILY COMP. PRES. DOC. 64 (Nov. 5, 2015); *See* Jeremy Malcolm, *The Final Leaked TPP Text Is All That We Feared*, ELECTRONIC FRONTIER FOUND. (Oct. 9, 2015), https://www.eff.org/deeplinks/2015/10/final-leaked-tpp-text-all-we-feared.

21. *See* K. William Watson, *A Strong Fair Use Provision Could Help Balance the TPP's Copyright Rules*, CATO INST. (Sept. 30, 2015), http://www.cato.org/publications/commentary/strong-fair-use-provision-could-help-balance-tpps-copyright-rules; *see also* sources cited *supra* note 12.

22. *Id*; *see also* Michael Geist, *The TPP's Unbalanced Approach to Internet Providers Pits Rights Holders Against Users*, RABBLE.CA (Jan. 11, 2016), http://rabble.ca/news/2016/01/tpps-unbalanced-approach-to-internet-providers-pits-rights-holders-against-users.

23. Abraham Gross, *TPP Limits Creative Expression*, WASH. SQUARE NEWS (Nov. 30, 2015), http://www.nyunews.com/2015/11/30/tpp-limits-creative-expression/.

24. *TPP Full Text, supra* note 12, art. 18.66; Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631 (member country courts and other judicial authorities often do not participate in the deal-making and negotiation process of FTAs, thereby limiting the role of courts in the enforcement of such obligations).

into account not only their country's obligations to FTAs, but also the difficult realities of ironclad enforcement measures. By utilizing their discretionary powers to (1) elevate the threshold for criminalization; (2) introduce "fair-use" protections; and (3) place certain limitations on civil damages, member countries to TPP-like FTAs and their courts will continue to meet required minimum enforcement standards, but also be able to alleviate the imbalance of interests created under it.

This article advances the presented arguments through a utilitarian approach, which as I argue, enhance the efficacy of prospective FTAs and international copyright measures. However, this not only requires that member-country courts utilize their allowable discretion, but also that they should do so *proactively* in order to strike a much needed balance between user and producer interests. Further, this article will analyze and illustrate by example of the TPP's heavily negotiated copyright enforcement controls and discretionary provisions, which I believe reflect the future of international copyright enforcement efforts.

Part II will first provide the issues created by criminal copyright liability, in general; Part III will break down the TPP's text, by way of example, to demonstrate the means by which member-party courts may utilize discretionary language to avoid the risk of wide-scale criminalization; and finally Part IV will illustrate why steep civil remedies provided by TPP-like agreements incentivize the growth of "copyright trolls" on an international scale and the means by which the international copyright troll can be averted.

II. Criminal Copyright Enforcement

Copyright producers have a legitimate concern and right to protect their copyrights. However, the means by which privacy-driven losses are cured should not rest solely on aggressive enforcement policies against the consuming public.[25] Recent debates about the balance, or lack thereof, between copyright producers and users under the TPP have led to much criticism on grounds that the TPP benefits producers most heavily at the potential expense of widespread criminalization of

25. Although the scope of this article focuses on member-country court discretion *after* the enactment of TPP-like copyright enforcement agreements, it is worth noting that commentators continue to explore alternative theories of infringement prevention that do not require the imposition of aggressive enforcement mechanisms. *See* Geraldine Moohr, *The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm, and Criminal Theory*, 83 B.U. L. Rev. 731, 776, n. 201 (2003); Tao Leung, *Misconceptions, Miscalculations, and Mistakes: P2P, China, and Copyright*, 30 Hastings Int'l & Comp. L. Rev. 151 (2006).

users.[26] Criminal punishment is often justified as an effective means of deterrence, regardless of whether it is applied against crimes committed online or on the street.[27] According to the Department of Justice's 2006 Intellectual Property Manual, "criminal sanctions are often warranted to punish and deter the most egregious violators: repeat and large-scale offenders, and organized crime groups . . . ."[28] Megaupload is perhaps an accurate example of those infringers that the Department of Justice had in mind when they drafted this manual. Kim Dotcom, though often viewed by his supporters as a modern day Robin Hood, clearly exploited an astronomical number of works for his own personal financial benefit, and further incentivized other users to illegally share files, even after several warnings by the U.S.[29] Proceeds from his operations allowed him luxuries, some even beyond those enjoyed by the many creators whose works he illegally disseminated over the Internet.[30] Likely, his conduct would be conceived as so egregious as to justify the application of TPP's criminal copyright enforcements.

However, the language provided by TPP's copyright enforcement provisions do not limit criminal sanctions to piracy captains like Megaupload and Kim Dotcom—it instead engulfs a larger segment of society: the everyday users and consumers.[31] If the TPP's copyright provisions are any indication of future international copyright enforcement efforts, a careful discretionary balancing by member countries would be vital in order to prevent a clash between foreign obligations and domestic realities. The following parts will focus on the behavioral aspect of piracy in the 21st century, the issues created by aggressive criminal enforcement, and the corrective discretion allowed to member country courts by FTAs.

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26. Watson, *supra* note 21.

27. Moohr, *supra* note 25, at 747-49.

28. MICHAEL BATTLE ET AL., U.S. DEP'T OF JUST., PROSECUTING INTELLECTUAL PROPERTY CRIMES 5-6 (3rd ed. 2006); Miriam Bitton, *Rethinking the Anti-Counterfeiting Trade Agreement's Criminal Copyright Enforcement Measures*, 102 J. CRIM. L. & CRIMINOLOGY 67, 74 (2012).

29. Russell Blackstone, *The Fall of The House of Dotcom*, N.Z. HERALD (Nov. 23, 2014, 7:27 AM), http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11363084.

30. Melanie Jones, *Why Kim Dotcom Has a Case: The Truth Behind the Megaupload Indictment*, INT'L BUS. TIMES (Feb. 02, 2012, 2:07 PM), http://www.ibtimes.com/why-kim-dotcom-has-case-truth-behind-megaupload-indictment-213963.

31. *See TPP Full Text, supra* note 12, art. 18.76; David Levine, *Trade Secrecy and the Trans-Pacific Partnership Agreement: Secret Lawmaking Meets Criminalization*, CTR. FOR INTERNET & SOC'Y (Oct. 27, 2014, 4:26 PM), http://cyberlaw.stanford.edu/blog/2014/10/trade-secrecy-and-trans-pacific-partnership-agreement-secret-lawmaking-meets.

A. The Piracy Culture of the 21st Century

Although proponents of copyright-related criminal sanctions are quick to say, "if you can't do the time, don't do the crime," the culture and mindset behind illegal file sharing is much more complex than what is seen on the surface. There exists a fascinating phenomenon in the minds of file sharers, where the legality of their conduct does not prevent them from hoarding stockpiles of illegally downloaded content.[32] Studies have shown that everyday users continue to illegally download copyrighted content due to their perceived anonymity, the vast availability of free media, and the intangible nature of the content.[33] After years of studying the psychology of file sharers, scholars have pinpointed "moral disengagement" as one of the key reason for this behavior.[34] This behavioral argument simply states that although users understand what is right from wrong, the act of illegally sharing and downloading media is often not perceived as immoral, which in turn, does not dissuade illegal file sharing.[35] Other studies indicate that low self-control is an influential determinant in the average users' choice to download illegally—similar to the common cause of drug abuse.[36]

Though a limited number of studies have attempted to draw a causal connection between the threat of criminal prosecution and its deterrent effect on users, research has consistently found that "the threat of certainty is more important than severity."[37] This key finding indicates that adequate and firm notice, coupled with educational efforts to properly notify users that they will not be spared when caught, can one day conclusively curb file sharing.[38] However, as in the case under the TPP and other enforcement-heavy copyright agreements, pursuing deterrence through criminal enforcement is not the best

32. Alexander Peukert, *Why Do 'Good People' Disregard Copyright on the Internet?*, *in* CRIMINAL ENFORCEMENT OF INTELLECTUAL PROPERTY 163 (Christophe Geiger Ed., 2012).

33. *Id.*

34. *Id.*; *see also* Ken Burleson, *Learning from Copyright's Failure to Build Its Future*, 89 IND. L.J. 1299, 1309-1310 (2014); Peter S. Menell, *This American Copyright Life: Reflections on Re-Equilibrating Copyright for the Internet Age*, 61 J. COPYRIGHT SOC'Y U.S.A. 235, 253-254 (2014).

35. Menell, *supra* note 34, at 253.

36. Scott E. Wolfe & George E. Higgins, *Explaining Deviant Peer Associations: An Examination of Low Self-Control, Ethical Predispositions, Definitions, and Digital Piracy*, 10 W. CRIMINOLOGY. REV. 43, 45-46 (2009).

37. Scott E. Wolfe et al., *Deterrence and Digital Piracy: A Preliminary Examination of the Role of Viruses*, 26 SOC. SCI. COMPUTER REV. 317, 319 (2008).

38. *See* Ben Depoorter & Alain Van Hiel, *Copyright Alert Enforcement: Six Strikes and Privacy Harms*, 39 COL. J.L. & ARTS 233, 269-70 (2015).

route where there is a lack of notice provided to the online community, and especially where the activity prompting criminalization is deeply embedded in widespread behavior. As taught by centuries of legal philosophers: when law is at odds with popular culture, that law will be difficult to enforce.[39]

B. The War on Piracy

An aggressive policy against end-users is not only detrimental to the welfare of everyday citizens, but it also shifts the focus away from the core problem of digital piracy—the thriving industry created by large-scale piracy operations.[40] In order to examine whether the aggressive enforcement regime of copyrights will prove to be effective so as to justify its criminalization efforts, it is helpful to draw a historical comparison of a similar enforcement regime and its outcomes. Though digital piracy is a fairly novel issue, its causes and the approach taken by world leaders to alleviate the problem are not so different. For one, the issues created by digital piracy, and the approach taken by world leaders is eerily similar to the prohibition of drugs, namely, the "War on Drugs" policy created under the Nixon administration.[41] For example, by facilitating individual enforcement through the criminal system, and mandating harsher punishment such as steep fines and criminal sanctions, the TPP's plan against digital piracy mirrors the failed approach taken by the U.S. against victims of drug abuse.[42] After spending, on average, $7 billion per year on arresting and prosecuting 800,000 people for criminal offenses related to marijuana alone, the U.S. drug policy has barely put a dent in cartel operations, and the use of drugs altogether.[43]

In retrospect, a "zero-tolerance" criminalization policy, combined with inadequate treatment, was arguably not the best policy for drug enforcement, and I believe it will have the same disappointments in the context of international copyright enforcement.

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39. *See generally* Robert C. Post, *Law and Cultural Conflict*, 78 CHI.-KENT L. REV. 485, 496-496 (2003).

40. *See* Steven Tremblay, *The Stop Online Piracy Act: The Latest Manifestation of a Conflict Ripe for Alternative Dispute Resolution*, 15 CARDOZO J. CONFLICT RESOL. 819, 827-29 (2014).

41. Annemarie Bridy, *Carpe Omnia: Civil Forfeiture in the War on Drugs and the War on Piracy*, 46 ARIZ. ST. L.J. 684, 686 (2014).

42. *See generally* Steven Wisotsky, *A Society of Suspects: The War on Drugs and Civil Liberties*, CATO INST. (Oct. 2, 1992), http://www.cato.org/publications/policy-analysis/society-suspects-war-drugs-civil-liberties.

43. *Id.*

III. An Analysis of the Criminal Enforcement Provisions

The text of the TPP reflects a long history of the copyright problem, and the ongoing friction between the Unites States Trade Representative (USTR) and the many countries that the USTR finds inadequate in their copyright enforcement efforts.[44] Every year, the Office of the USTR publishes the Special 301 Report, highlighting "Watch List" countries for their insufficient regulations and lax enforcement efforts.[45] It further prioritizes countries based on how their "practices have the greatest adverse impact (actual or potential) on the relevant U.S. products."[46] In the 2015 report, USTR included five TPP participating countries on the Watch List: Canada, Chile, Mexico, Peru, and Vietnam.[47] A major reason for why these countries were included on the list was because the USTR found that their protection of copyrights was insufficient, or at least not to the degree preferred by copyright holders and related industries.[48] The USTR, a major player in TPP negotiations, also places countries on the Watch List for their failure to use criminal sanctions against copyright infringers.[49]

In an attempt to standardize and provide greater protection to copyright holders, Chapter 18 of the TPP introduced definitive provisions that require member countries to criminalize anyone who is found to infringe on a "commercial scale."[50] Chapter 18 further provides that member countries must provide for criminal procedures and penalties to be applied for "willful . . . copyright or related rights piracy on a commercial scale."[51] Commercial scale under the TPP is defined as:

> (a) acts carried out for commercial advantage or financial gain; and
> (b) significant acts, not carried out for commercial advantage or financial gain, that have a substantial prejudicial impact on the interests of the copyright or related rights owner in relation to the marketplace.[52]

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44. *See generally* Office of the U.S. Trade Representative, 2015 Special 301 Report 1 (2015), https://ustr.gov/sites/default/files/2015-Special-301-Report-FINAL.pdf; William New, *Confidential USTR Emails Show Close Industry Involvement In TPP Negotiations*, IP Watch (May 6, 2015), http://www.ip-watch.org/2015/06/05/confidential-ustr-emails-show-close-industry-involvement-in-tpp-negotiations/.

45. *See generally* Office of the U.S. Trade Representative, 2015 Special 301 Report 1 (2015), https://ustr.gov/sites/default/files/2015-Special-301-Report-FINAL.pdf.

46. *Id.*

47. *Id.* at 3-4.

48. *Id.* at 1-3.

49. *Id*. at 1-4.

50. *See TPP Full Text, supra* note 12, art. 18.77.

51. *Id.*

52. *Id.*

On its face, subsection (a) reiterates the widely adopted justification for criminal sanctions—where the copyright infringement is carried out for a commercial benefit.[53] This subsection is an effective and often warranted tool to pinpoint large piracy operations that unjustly profit from infringed content through sources such as advertisements, and membership fees. However, subsection (b) not only applies criminal sanctions against large-scale copyright infringers, but also to individuals who, by their "significant [non-commercial] acts" over the Internet, create a "substantial prejudicial impact" against the interests of the copyright holder.[54] This language, for one, is not the type of measurable and definitive language accustomed to by U.S. trade partners.[55] Our NAFTA neighbors, Mexico and Canada, for example, criminalize copyright infringement solely if there is a "commercial gain" similar under subsection (a), but under this default standard they would also need to prosecute activity that falls under subsection (b).[56] The provision's footnotes further particularizes on the key word "substantial," which states that member countries have discretion to either (1) interpret "substantial" as it would in the way its applied in criminal copyright cases in their countries; or (2) by taking into account whether the "volume and value" of the infringement has a substantial impact on the copyright holder's interests.[57] Although the goal is to deter through tough consequences, if future international IP agreements reflect the provisions in subsection (b), its vagueness and potential for wide scale criminalization of individuals may very likely lead to an over-deterrence of innovation and overcriminalization of ordinary users.[58]

A. Potential for Widespread Criminalization: File Sharing and Memes

To illustrate how low the TPP's threshold for criminality actually is, one should turn to the recent trend of Internet memes. An Internet

53. *See, e.g.,* 17 U.S.C § 506 (2012); Anti-Counterfeiting Trade Agreement (ACTA), art. 23(1) Dec. 3, 2010, 50 I.L.M. 243.

54. *TPP Full Text, supra* note 12, art. 18.77.

55. *See* North American Free Trade Agreement, U.S.-Can.-Mex., art. 1717, Dec. 17, 1992, 32 I.L.M. 289 (1993).

56. *Id.*; *see also* Copyright Act, R.S.C. 1985, c. C-42, § 29.21 (Can.); Ley Federal del Derecho de Autor [LFDA] [Federal Law on Copyright], Diario Oficial de la Federación [DO], 17 de Marzo de 1997 (Mex.).

57. *TPP Full Text, supra* note 12, art. 18.77 nn. 126 & 127.

58. *See* Jingjing Hu, Research On TPP "Intellectual Property Damages" And China's Approach, (2014) (unpublished Ph.D. dissertation, Peking University Law School), https://www.law.berkeley.edu/files/Hu_Jingjing_-_draft-Research_On_TPP.pdf.

meme is the use of a picture or video to express some "idea, behavior or style," often through mimicry.[59] The crucial component of a successful meme is how well it resonates with others, which in return demonstrates its ability to go viral.[60] However, since a majority of memes incorporate copyrighted visuals or sound recordings, when the meme does indeed go viral, the creator of it may be subject to criminal prosecution and steep fines.[61] Although the meme creator's intent here was not to receive a "commercial advantage," the mere fact that it went viral can fall into the realm of a "significant act" that has a "prejudicial impact" on the copyright holder.[62] This would be the case even if there was absolutely no financial gain from the success or dissemination of the meme.[63] Typically in the U.S., a situation involving copyright infringement through the use of memes would most likely be protected under the "fair use doctrine" unless it was used for marketing or other commercial purposes.[64] However, since Chapter 18 does not incorporate the basic safeguards provided by U.S. copyright law, such as the "fair use doctrine," signatory countries to agreements that lack similar safeguards may need to draw out an enforcement plan with vigilance, so that they do not become compelled to enforce a large number of systematic prosecutions that would not occur even under the most stringent U.S. copyright laws.

Though the TPP's threshold for criminalizing file sharing is low, member countries to similar agreements and their courts can prevent widespread criminalization by striking a "balance in its copyright and

59. *See Meme*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/meme; *see also Meme*, OXFORD DICTIONARY (2017) (defined as "an element of a culture or system of behavior passed from one individual to another by imitation or other non-generic means," through an image, video or text and is generally humorous in nature).

60. *See* Kate Miltner, *What made 'Nasa Mohawk Guy' such a successful meme?,* GUARDIAN (Aug. 8, 2012), https://www.theguardian.com/commentisfree/2012/aug/08/nasa-mohawk-guy-bobak-ferdowsi-meme.

61. *See* Nicole Martinez, *Posting an Internet Meme? You May Receive a Getty Letter*, ART. L.J. (Oct. 1, 2015), http://artlawjournal.com/internet-meme-getty-letter/; Lorelei Laird, *Do Memes Violate Copyright Law?*, ABA J. (Sept. 1, 2016), http://www.abajournal.com/magazine/article/do_memes_violate_copyright_law.

62. *See* Maira Sutton, *Go to Prison for File Sharing? That's What Hollywood Wants in the Secret TPP Deal,* ELECTRONIC FRONTIER FOUND. (Feb. 12, 2015), https://www.eff.org/deeplinks/2015/02/go-prison-sharing-files-thats-what-hollywood-wants-secret-tpp-deal (discussing that if copyrighted work is used, even if it is on a non-commercial scale, criminal sanctions will be imposed); *see also* Brandon Brown, *Fortifying the Safe Harbors: Reevaluating the DMCA in a Web 2.0 World*, 23 BERKELEY TECH. L.J. 437, 445-449 (2008).

63. *See* Richard J. Hawkins, *Substantially Modifying the Visual Artists Rights Act: A Copyright Proposal for Interpreting the Act's Prejudicial Modification Clause*, 55 UCLA L. REV. 1437, 1448-50 (2008).

64. 17 U.S.C. § 107 (1976).

related rights system," as encouraged by the TPP.[65] This minimal wiggle room is key because such an aggressive minimum enforcement standard, by default, will compel member countries to enforce criminal copyright to any case where an individual can be proven to have an impact on the copyright holders' interest.[66] Therefore, by increasing the standard, through careful discretionary balancing, member countries and their respective courts will be able to limit the prosecution of its users to only "the most egregious violators," as intended by the DOJ.[67] Courts can eliminate potential widespread criminalization of their citizens by first textually analyzing the negotiated language, and pinpointing the exact discretion afforded. For example, footnote 127 of Chapter 18 states, "A Party may provide that the 'volume and value' of any infringing items may be taken into account in determining whether the act has a substantial prejudicial impact on the interests of the copyright or related rights owner in relation to the marketplace."[68] The permissive language provided here clearly shows that the drafters intended to allow judicial authorities some flexibility in how they are to apply the law.[69] In addition, the TPP provides guidance on implementing "fair-use" protections for particular types of infringement that involve recreations or adaptations.[70] Although the discretion allowed under criminal enforcement is minimal, there are two types of infringing conduct that courts may have a fair amount of control over: (1) illegal file sharing, and (2) unlicensed re-adaptations or derivative works.[71]

B. Volume-Based Approach for Enforcement of Illegal File Sharing

Whether through tracking the number of files that the file-sharer uploads through Peer-to-Peer software, or by tracking the number of illegal files downloaded by a particular IP address, Internet Service Providers (ISPs) today have an unprecedented access to the number of files that enter and exit the user's devices.[72] Under the TPP and similar agreements, there is a growing pressure on ISPs to keep track of this data, and through the persistence of copyright holders seeking

65. *TPP Full Text, supra* note 12, art. 18.66.
66. *See* Hawkins, *supra* note 63.
67. BATTLE ET AL., *supra* note 28, at 5-6.
68. *TPP Full Text, supra* note 12, art. 18.77 n.127.
69. *See id*.
70. *See id.* arts. 18.62, 18.66.
71. *See id.* art. 18.77.
72. Corinne Reichart, *TPP: ISPs Will Hand Over Copyright Infringer Details*, ZDNET (Nov. 6, 2015), http://www.zdnet.com/article/tpp-isps-will-hand-over-copyright-infringer-details/.

to file suit, the data entering and exiting one's device is no longer a secret.[73] Though this growing invasion is definitely more intrusive than the intermediary involvement required before, it is nevertheless a beneficial means for participating countries to gauge the severity of their file-sharing problem. This will require a careful analysis of their country's file-sharing norms, coupled with a balancing of public policy to determine the most egregious actors in each country.

Although drawing a rigid line to determine legality is not always the best way to make law, if this practice is coupled with a discretionary approach and proper notice to the public, it can potentially scale back illegal file sharing and decrease the number of criminal prosecutions.[74] By limiting enforcement efforts to each country's "high-volume" uploaders and downloaders, members can conform to minimum standards of enforcement with the added benefit of preventing wide-scale criminalization of innocent infringers.[75]

First, member countries can avoid a miscarriage of justice through a volume standard by preventing the prosecution of those who are "not in fact willfully infringing copyright, [and] who genuinely believe that their conduct is legal," but instead, only prosecuting those who partake in the highest volume of infringing activities.[76] Willfulness, which is a prerequisite for criminal copyright infringement, can be inferred by the blatancy of one's conduct.[77] Therefore, if there is in fact evidence of a large volume of illegal uploads and downloads, then it is "highly unlikely that these high-volume uploaders are in fact engaged in legal conduct," or that they were oblivious as to their wrongdoing.[78]

Second, if member country courts are able to determine the precise volume of illegal file sharing to be considered criminal, they will avoid wasting judicial time and resources to provide an ad-hoc analysis for each individual case. It is unlikely that there will be a lot of

73. *Id.*; *see* Sell, *supra* note 15, at 457; Alexandra Giannopoulou, *Copyright Enforcement Measures: The Role of the ISPs and the Respect of the Principle of Proportionality*, 7 EUR. J. OF L. & TECH. (2012), http://ejlt.org/article/view/122/204.

74. *See generally* Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1351-53 (2004) (arguing that a combination of approaches will be most beneficial to limiting illegal file sharing and criminal prosecutions).

75. *Id.* at 1402-04.

76. *Id.* at 1403.

77. 17 U.S.C. § 1291 (2012).

78. Lemley, *supra* note 74, at 1402.

deliberation as to the severity of the infringement if the pre-established volume that triggers criminal liability is set sufficiently high.[79]

Finally, by drawing a bright and clear line as to the precise volume required for criminal punishment, file-sharers will receive sufficient notice as to the certainty of punishment against them, which in itself serves as an effective deterrent. As mentioned previously, studies have consistently found that "the threat of certainty is more important than severity."[80] A recent study in Canada, for example, illustrates that a significant drop in Canada's piracy is attributable to notices forwarded to users by ISPs.[81] Likewise, sufficient notice provides unaware infringers the opportunity to check their systems to make sure whether or not their activities online can potentially be found criminal.

These three objectives not only prevent the widespread criminalization of users, but the attributed notice in providing a bright-line distinction between criminality and innocence may better further serve to the benefit of rights holders than an expensive witch hunt.

Though the volume-based standard suggested here, like any threshold-based regulation, may potentially allow the threshold to be worked-around by infringers, its effects do not severely hinder the ongoing fight for stronger international enforcement mechanisms.[82] The threshold can potentially be manipulated if, for example, a member country's judicial authorities provide notice that illegally sharing 1000 files is considered a "significant-act" that justifies criminalization, thereby prompting file-sharers to limit their file-sharing to 999. However, illegally file-sharing 999 files would still be grounds for civil suit that allows a wide-range of remedies for copyright holders to utilize.[83] Therefore, it would not sterilize enforcement efforts since the risk of steep civil damages can serve as a deterrent inasmuch as criminal punishment does.[84]

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79. *Id.* at 1402-03.

80. Wolfe, *supra* note 37, at 319.

81. Daniel Tencer, *Massive Drop In Canadian Online Piracy Under New Law, Copyright Firm Says*, HUFFINGTON POST (May 25, 2015), http://www.huffingtonpost.ca/2015/05/21/online-piracy-canada-ceg-tek_n_7372626.html.

82. *See* Lemley, *supra* note 74, at 1413 (arguing that although the system can be gamed, it does not necessarily mean that enforcement will become ineffective).

83. *See TPP Full Text, supra* note 12, arts. 18.74(8)-18.74(10).

84. *Id.*

C. The Need for Fair Use Protection of User-Made Content

In the U.S., the Copyright Act of 1976 affords creators of derivative or transformative content, both amateur and professional, a vital privilege to re-create copyrighted content without incurring liability for specific purposes through applicable "fair use" protections.[85] The fair use defense is a "privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without consent."[86] The U.S. fair use protections allow parties to use copyrighted material for limited "transformative" purposes,[87] such as criticism, comment and parody, without incurring liability.[88] Given the lengthy duration of copyright protection, fair use serves as a vital exception, intended to serve the fundamental policy rationale of copyright law, "to promote progress, creativity, and innovation for the benefit of society as a whole."[89]

Once a copyright holder demonstrates a likelihood of success on an infringement claim, the burden of proof shifts to the defendant to show that her use of the copyrighted work meets the fair use four-factor test.[90] Under this test, U.S. courts evaluate a question of fair use by looking at: whether the use of the copyrighted content is transformative, the nature of the work being used, the amount and substantiality of the portion used, and the market impact on the infringed work by the infringing work.[91] Normative theories regarding memes and their relationship under the fair use analysis widely support the notion that memes created by everyday individuals will almost always be protected against infringement suits.[92] U.S.'s fair use protections, as evolved through the judicial process and codified in the U.S. Copyright Act, show that even in the U.S. where copyrights are afforded

85. 17 U.S.C. § 107 (1976).

86. HORACE G. BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944).

87. Brian Sites, *Fair Use and the New Transformative*, 39 COLUM. J.L. & ARTS 513, 522, 534-36 (2016).

88. 17 U.S.C. § 107 (1976).

89. *See* Jessica Meindertsa, *Fair Use 101: Why Do We Need Fair Use*, Ohio State Univ.: OHIO STATE UNIV. LIB. COPYRIGHT RES. CTR. (Feb. 17, 2014), https://library.osu.edu/blogs/copyright/2014/02/17/fair-use-101-why-do-we-need-fair-use/; Lydia Pallas Loren, *Fair Use: An Affirmative Defense?*, 90 WASH. L. REV. 685, 688-91 (2015); Daniel P. Fernandez et al., *Copyright Infringement and the Fair Use Defense: Navigating the Legal Maze*, 27 U. FLA. J.L. & PUB. POL'Y 135, 138 (2016).

90. Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1163 (9th Cir. 2007).

91. Ronak Patel, *First World Problems: A Fair Use Analysis of Internet Memes*, 20 UCLA ENT. L. REV. 235, 244 (2013).

92. *Id.* at 256.

expansive protections, vehicles for cultural expression such as memes and other transformative uses are worth protecting.[93]

Though fair use is a highly cherished defense in the U.S., many participating countries to the TPP and other IP-related international agreements do not follow U.S. style fair use protections, but instead utilize an alternative model known as "fair dealing."[94] Fair dealing, in contrast, is not an open-ended concept and is applied too rigidly to keep up with changing times.[95] It merely provides exemptions to specifically enumerated uses of copyrighted works, allowing them safeguards against infringement liability.[96] Citizens from these member countries, with limited or no protections, are at a far greater risk for suit under TPP-like agreements than those from countries with fair use protections.[97] Although the use of copyrighted content often stems from innocuous purposes, the potential for a meme to become grounds for criminal liability—due to its "substantial prejudicial impact"—poses troubling consequences for the evolving nature of cultural expression.[98] As cultural expression takes on new forms and becomes more easily shared, due to the rapid growth and expansion of the Internet, liability-triggering language such as "significant noncommercial acts" should at least be balanced with greater fair use protections.[99]

As with the judicial flexibility allowed under the criminal enforcement section, the TPP also expressly encourages member countries to "achieve an appropriate balance in its copyright and related rights systems . . . by means of limitations or exceptions . . . including those for the digital environment."[100] The TPP further lists out some safeharbors that countries may use to exempt individuals from civil and

93. *Id.*

94. *See, e.g.*, Ariel Katz, *Fair Use 2.0: The Rebirth of Fair Dealing in Canada, in* THE COPYRIGHT PENTALOGY: HOW THE SUPREME COURT OF CANADA SHOOK THE FOUNDATIONS OF CANADIAN COPYRIGHT LAW 93-156 (Michael Geist ed., 2013) (analyzing the Canadian Copyright Act and Fir Use defense); Sean M. Flynn et al., *The U.S. Proposal for an Intellectual Property Chapter in the Trans-Pacific Partnership Agreement*, 28 AM. U. INT'L L. REV. 105, 124 (2012); Organization for Transformative Works, *What the Trans Pacific Partnership Means for Fans* (Nov. 13, 2015), http://www.transformativeworks.org/what-trans-pacific-partnership-means-fans/.

95. Katz, *supra* note 94, at 93-94, 139-40.

96. *Id*. at 138.

97. *See* Jean Dryden, *The Trans-Pacific Partnership Free Trade Agreement*, 34 TALL Q. 14, 14-15 (2016).

98. *TPP Full Text, supra* note 12, art. 18.77; Daniel Daniele, *Memes and GIFs: A New Cultural Phenomenon*, SOCIAL MEDIA L. BULLETIN (Oct. 1, 2013), http://www.socialmedialawbulletin.com/2013/10/memes-and-gifs-a-new-cultural-phenomenon/.

99. *Id.*

100. *TPP Full Text, supra* note 12, art. 18.66.

criminal liability, including: "legitimate purposes such as . . . criticism; comment, [and] news reporting."[101] For further clarification, footnote 79 following this section states, "a use that has commercial aspects may in appropriate circumstances be considered to have a legitimate purpose . . . ."[102] Though this section does not expressly state that individual use of underlying copyrighted works should be protected or be provided with U.S. style fair use exceptions, it is reasonably inferred as the examples provided are not meant to be exhaustive. Rather, this section titled "Balance in Copyright and Related Rights Systems," is to provide member countries some guidance and flexibility in providing safeguards, such as fair use defenses for qualified copyright uses, where the otherwise unlawful use is balanced against the degree of "unreasonabl[e] prejudice" to the copyright holder.[103] If the TPP's provisions are indeed resurrected into future international copyright agreements, the above discretion should be integrated into future agreements as it provides for an optimal opportunity for member country courts to create better safeguards for individual protection.

IV. Steep Damages and Abusive Settlement Tactics: The Copyright Troll

The final version of the TPP's civil damages provisions nearly mirrors other existing and proposed international enforcement measures with respect to how participating country courts are to calculate damages in civil proceedings for copyright infringement claims by rights owners.[104] The third paragraph of "Article 18.74: Civil and Administrative Procedures and Remedies," states the following:

> Each Party shall provide that, in civil judicial proceedings, its judicial authorities have the authority at least to order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person's intellectual property right by an infringer . . . .[105]

Although the language "damages adequate to compensate for the injury" is fairly ambiguous, the following two paragraphs attempt to create guidance as to the sorts of damages that would be considered adequate.[106] Paragraph five states that "each party shall provide that . . . its judicial authorities have the authority to order the infringer . . .

101. *Id.*
102. *Id*. n.79.
103. *TPP Full Text*, *supra* note 12, arts 18.65-18.66.
104. *See id*. art. 18.74.
105. *Id.*
106. *Id.*

to pay the right holder the infringer's profits that are attributable to the infringement."[107] Further, paragraph four allows courts the added discretion to use "the value of the infringed goods or services measured by the market price, or the suggested retail price" as a means for measuring damages.[108] As a general argument, using "market price" is a common, and arguably reasonably predictable means of measurement.[109] However, the following provisions go further and state that judicial authorities are required to compel defendants to pay the prevailing attorney's fees, court filing fees, in addition to any statutory or pre-established damages resulting from the infringement.[110] This is where the damages for an illegally downloaded album can grow astronomically.[111] The threat of large court ordered damages, as illustrated by several U.S. cases,[112] creates an opportunity for copyright holders to make a "quick buck" through out-of-court settlements, and this opportunity for exploitation may introduce foreign countries to the copyright troll problem.[113]

A. Copyright Trolls: The Creation of Thriving Conditions

A major problem with opening up the international arena to integrated enforcement measures and allowing copyright holders to bring suit against international defendants with ease, is the possibility of infecting other countries with legal problems that persist in originating

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107. *Id.*

108. *Id.*

109. Ching-Yi Liu, *The Case for Flexible Intellectual Property Protections in the TPP: How can the US do it Correctly?*, *in* THE TRANS-PACIFIC PARTNERSHIP AND THE PATH TO FREE TRADE IN THE ASIA PACIFIC 276 (Peter C.Y. Chow ed., 2016).

110. *TPP Full Text, supra* note 12, art. 18.74(6)-(10).

111. *See* Sony BMB Music Entm't v. Tenebaum, 719 F.3d 67 (1st Cir. 2013); Capitol Records Inc. v. Thomas-Rasset, 680 F. Supp. 2d 1045 (D. Minn. 2010).

112. *See* Righthaven LLC v. Hoehn, 716 F.3d 1166 (9th Cir. 2013); West Bay One, Inc. v. Enid Eddings, 1:10-cv-00481-RMC (2010); Righthaven LLC v. Democratic Underground LLC, 791 F. Supp. 2d 968 (D. Nev. 2011); Righthaven v. DiBiase, 98 U.S.P.Q.2d 1598 (D. Nev. 2011).

113. *See* Christopher M. Swartout, *Toward a Regulatory Model of Internet Intermediary Liability: File-Sharing and Copyright Enforcement*, 31 NW. J. INT'L L. & BUS. 499, 508-13 (2011) (explaining how exceedingly high damages create the conditions for coercive settlement practices); *see also* David Llewellyn, *Statutory Damages for Use of a "Counterfeit Trade Mark" and for Copyright Infringement in Singapore: A Radical Remedy in the Law of Intellectual Property or One in Need of a Rethink*, 28 SING. ACAD. L.J. 61, 87 (2016) (explaining the importance of maintaining caps on the amounts that Singapore courts may award for infringement claims in order to "avoid the possibility of Singapore becoming an attractive destination for copyright trolls whose business model is based on mass threats of litigation resulting in the extortion of excessive amounts from unsophisticated infringers").

countries.[114] One problem that has drawn major criticism from copyright experts is the persistence of the copyright troll.[115] A copyright troll refers to "an entity whose business revolves around the systematic legal enforcement of copyright in which it has acquired a limited ownership interest."[116] The main type of copyright trolls in the U.S. can be described as a third-party entity who solicits litigious copyright owners, searches for possible cases of infringement online, and upon discovering a potential infringement, the third-party "troll" acquires a partial assignment of copyright from the owner to pursue its claim under that particular right.[117] Thus it can be said that the plaintiff here is not the copyright owner per se, but rather, an entity with merely a right to sue. By opening the arena to threats of large damages, extending the duration of copyright protection, and making it easier for individuals to be found liable, imbalanced copyright measures invite entities with a mere right to sue the opportunity to coerce individuals to pry open their pocketbooks through aggressive out-of-court settlement offers.[118] Member country courts, however, should limit the abuse of the settlement system by using any authorized discretion to reserve the right to sue to only copyright holders, set maximum caps on damages, and define aggressive out of court settlement offers as "abuse" when permitted.[119]

However permissible or legally tolerated the copyright troll scheme may be, it encourages copyright holders to take advantage of the imbalance of power between themselves and the defendant, thus allowing them to abuse the process of out of court settlements.[120] One thing copyright trolls have in common is that they propose a settlement, seeking disproportionate fines, backed up by a threat to litigate in court, where the amount sought is threatened to be far greater than the amount proposed by the settlement offer.[121] This often-successful settlement tactic, which relies heavily on the reality that both individ-

114. *See* Jeremy Malcolm, *New TPP Leaked Text Reveals Countries' Weakening Resistance to Copyright Maximalist Proposals*, ELECTRONIC FRONTIER FOUND. (Aug. 5, 2015), https://www.eff.org/deeplinks/2015/08/new-tpp-leaked-text-reveals-weakening-resistance-maximalist-proposals.

115. Shyamkrishna Balganesh, *The Uneasy Case Against Copyright Trolls,* 86 S. CAL. L. REV. 723, 738-39 (May 2013); Matthew Sag, *Copyright Trolling, an Empirical Study*, 100 IOWA L. REV. 1105, 1112-14, 1120 (2015).

116. Balganesh, *supra* note 115, at 732.

117. *See* Sag, *supra* note 115, at 1111.

118. Balganesh, *supra* note 115, at 736-38; Brian L. Frye, *IP as Metaphor*, 18 CHAP L. REV. 735, 751-52 (2014-2015); Sag, *supra* note 115, at 1119-21, 1135-36.

119. *See TPP Full Text, supra* note 12, arts. 18.2-18.3, 18.67, 18.72, 18.74(1), 18.76.

120. *See* Sag, *supra* note 115, at 1113-16.

121. *See id.*

ual defendants and copyright holders often seek alternatives to avoid the judicial process, further opens the doors for the copyright troll industry to thrive.[122] Likely, even defendants with a strong chance of prevailing over the plaintiff would rather settle for a discount than risk paying greater damages, in addition to attorney and court fees.[123]

Although the TPP provides language that gives individuals basic protection against the copyright holder's misuse of enforcement procedures,[124] it is not enough incentive for individuals to risk going through trial for the slight chance of earning the ability to recover attorney and court fees. Additionally, from a policy perspective, the quiet nature of private settlements arguably do not deter others from infringement.[125] Since settlements take place away from the public eye, they therefore fall short of providing notice of the repercussions of infringement to the public at large.[126]

B. Restricting the Right to Sue and Preventing Abusive Settlement Tactics

The main problem with this business model is that such lawsuits are not intended to deter, but instead "are used to encourage quick settlements."[127] What makes this even more troubling is that a large cut of purported damages do not even reach the injured party, but rather fall in the hands of third party trolls.[128] In no way would this scenario be "conducive to social and economic welfare, and to a balance of rights and obligations" as the TPP's objective attempted to establish.[129] Judicial authorities of member countries should therefore utilize discretion allowed under the TPP and similar agreements in the interest of maintaining a fair court system and alleviating the imbalance created by the potentially abusive damage measurements.[130]

For example, the following provision (Article 18.3), if incorporated in future international agreements and actually exercised by

122. *See id*. at 1113, 1116; Swartout, *supra* note 113, at 513.

123. Swartout, *supra* note 113, at 513.

124. *See TPP Full Text, supra* note 12, art. 18.69(1).

125. *See* Swartout, *supra* note 113, at 509.

126. *See* Llewellyn, *supra* note 113, at 83.

127. James DeBriyn, *Shedding Light on Copyright Trolls: An Analysis of Mass Copyright Litigation in the Age of Statutory Damages*, 19 UCLA Ent. L. Rev. 79, 98 (2012) (citing Julie E. Cohen., *Pervasively Distributed Copyright Enforcement*, 95 Geo. L.J. 1, 17 (2006)).

128. Brad A. Greenberg, *Copyright Trolls and Presumptively Fair Uses*, 85 U. Colo. L. Rev. 53, 72-79 (2014).

129. *See TPP Full Text, supra* note 12, art. 18.2.

130. *See id.* arts. 18.3, 18.71(1), 18.72(15), 18.75.

member party courts, can be construed so to prevent the copyright troll problem in their respective countries, which states:

> Appropriate measures, provided that they are consistent with the provisions of this Chapter, may be needed to *prevent the abuse of intellectual property rights by rights holders* or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.[131]

In addition, courts should be insistent on making sure that the party bringing suit is in fact the copyright holder or an official representative.[132] For example, this can be accomplished through the incorporation of provisions such as "Article 18.75: Provisional Measures," which states, "judicial authorities have the authority to require the applicant . . . to provide any reasonably available evidence in order to satisfy themselves with a *sufficient degree of certainty that the applicant's right is being infringed*."[133] By utilizing these two discretionary provisions, courts may be able to define "abuse" to include coercive settlement offers, and further require the party bringing suit be able to identify themselves as the injured party through a demonstration of the legitimacy of their claim. As the language "applicant's right" indicates, the TPP allows for courts to require that the applicant be the one to bring suit, and to show that the rights violated are in fact her own.[134]

The matter of individual injury and whether copyright trolls have proper standing was recently deliberated in the Ninth Circuit, where the court held that an entity who is merely assigned a right to file suit does not have standing "to sue for infringement because it was not the owner of any of the exclusive rights in the news articles required for standing."[135] Righthaven, LLC, who is known to commentators as a notorious copyright troll, had followed the well-known practice of acquiring a limited, revocable license for the mere purpose of filing suit.[136] However, the Ninth Circuit found that in order to have standing, Righthaven needed to be the exclusive rights holder under the Copyright Act.[137] The model followed by the Ninth Circuit can serve

131. *Id.* art. 18.3 (emphasis added).

132. *See id.* arts. 18.72(1), 18.75(2).

133. *Id.* art. 18.75(2) (emphasis added).

134. *See id.*

135. Righthaven LLC v. Hoehn, 716 F.3d 1166, 1168, 1171 (9th Cir. 2013).

136. Balganesh, *supra* note 115, at 739; Benjamin Marks, *Righthaven v. Hoehn: Bad News for Copyright Trolls*, Law360 (May 21, 2013, 12:54 PM), http://www.law360.com/articles/443335/righthaven-v-hoehn-bad-news-for-copyright-trolls.

137. Righthaven LLC, 716 F.3d at 1169 (quoting 17 U.S.C. §501(b) (2000)) (citing Silvers v. Sony Pictures Entm't, Inc., 402 F.3d 881, 890 (9th Cir. 2005)).

as a model for member country courts, and given the unfavorable consequences of copyright trolling, it is unlikely that other member countries would deliberately avoid making a decision to limit these coercive tactics.

V. Conclusion

Though, on its face, the TPP's aggressive minimum standard of enforcement has stirred a lot of debate and criticism, its discretionary language has not been given enough credit. Whether it be for adopting new standards of criminal enforcement, implementation of fair-use policies, or calculating damages, the TPP leaves many key terms open to discretionary application. Although the TPP, in its current form, begins to look more and more as a thing of the past, its carefully crafted concessions that allow member parties certain limitations and flexibilities should not be ignored. As with TRIPS and the TPP, discretionary safeguards in IP enforcement provisions will continue to exist, especially where the U.S. is a party. Thus the key question is not whether member parties will continue to enjoy similar discretions in the future, but instead whether they will actually make use of them.

However, even if discretion is actually exercised, the turning point for international copyright enforcement in the following years will depend on whether member countries to similar agreements and their courts will be able to better fit their needs and demands while conforming to minimum standards of enforcement. This can only be achieved through a fair balance of producer rights and individual interests, while keeping in mind the realities of normative enforcement measures.

UNIVERSITY ADJUDICATION OF SEXUAL ASSAULT: HOW AFFIRMATIVE CONSENT CAN HELP CLOSE THE GAP

*Michelle Lewis**

I. INTRODUCTION

What appears to be an everlasting game of legislative tug-o-war regarding university adjudication of sexual assault has put an immense strain on the backs of all parties involved. Many wonder, why do universities investigate a criminal matter such as sexual assault? In an effort to deter gender discrimination of students and maintain safe environments on university campuses, several western countries enacted laws that require universities to investigate and punish gender-

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based offenses such as sexual assault.[1] Most recently, in the United States, Canada, and the United Kingdom, cases of campus sexual assault appear to be on the rise, but are often handled with a lack of concern and consistency—varying from insufficient victim protection to lack of procedural safeguards for the accused.[2] These misaligned efforts leave the victim, the accused, and the university at a major loss. Consequently, universities, legislatures, and victims' rights groups are independently trying to conjure up solutions to correct the imbalances—but it appears that no one can get it quite right.[3]

In a world where our laws are shaped by our actions, it is important that current statutory definitions and standards reflect current societal needs. Efforts made by legislatures and universities include redefining what is really at the heart of the crime of sexual assault: consent.[4] In the context of sexual assault, it is common for society to understand 'consent' to mean "no means no."[5] We also traditionally perceive the crime of rape and sexual assault to play out as a masked man who ambushes and violently attacks a helpless woman in the middle of the night. However, neither the typical understanding of consent nor sexual assault reflects what actually occurs more often than not between young adults on college campuses today—neither do our laws.[6]

Applying laws and qualifications that do not reflect current realities of society is arguably one of the biggest issues surrounding the mishandling of university adjudication of sexual assault. Many of the sexual assault cases that take place on university campuses around the world are scenarios between two people who know each other or who became acquainted at a party and may initially agree to be intimate

1. *See* Title IX of the Education Amendments Act of 1972, 20 U.S.C. §§ 1681–1688 (2012); Sexual Offences Act, 2003, c. 42 (U.K.).

2. *See* Rachel Browne, *Why Don't Canadian Universities Want to Talk About Sexual Assault*, MACLEAN'S (Oct. 30, 2014), http://www.macleans.ca/education/unirankings/why-dont-canadian-universities-want-to-talk-about-sexual-assault/.

3. *See AAU Climate Survey on Sexual Assault and Sexual Misconduct,* ASS'N OF AM. U., http://www.aau.edu/Climate-Survey.aspx?id=16525 (last visited Feb. 27, 2017).

4. *See* CAL. EDUC. CODE § 67386 (West 2016); Criminal Code, R.S.C. 1985, c. C-46, § 153.1(2)(Can.); *see also CPS and Police Focus on Consent at First Joint National Rape Conference*, THE CROWN PROSECUTION SERV. (Jan. 28, 2015), http://www.cps.gov.uk/news/latest_news/cps_and_police_focus_on_consent_at_first_joint_national_rape_conference/ (U.K.).

5. *See What is Consent,* CONSENTED, http://www.consented.ca/consent/what-is-consent/ (last visited Feb. 19, 2017).

6. *See Campus Sexual Violence: Statistics*, RAINN, https://www.rainn.org/statistics/campus-sexual-violence (last visited Feb. 28, 2017).

until one changes their mind.[7] There exists a gross misunderstanding of acquaintance rape scenarios, as one scholar points out:

> A very old concept of rape prevails. According to this mind-set, there can only be two precursors to rape: (1) A stranger jumps out from the bushes; (2) There is no rape unless the woman puts up a fight, to the death if necessary.[8]

A recent survey of more than 4,000 Canadian college women found that most rapes and attempted rapes occur when the victim is alone with the offender, usually a boyfriend, former partner, classmate, or acquaintance.[9] Most take place in the victim's residence or off-campus living quarters and fewer than five percent are reported to police.[10] But what makes sexual assault so unlike any other crime and so difficult to prove is that,

> [Sexual assault] . . . is the only crime in which the victim is presumed to be lying. If a person was mugged in an alley . . . would we be skeptical of the victim's testimony . . . because there weren't any eyewitnesses?[11]

Because of this typical scenario of sexual assault, it would follow that both parties understand that verbal or nonverbal consent has been given and that the parties then maintain mutual consent throughout the *duration* of the entire sexual encounter. The affirmative consent ideal will allow the accuser and the accused to defend his or her position justly when there are no witnesses, by demonstrating mutual participation. However, many definitions of consent do not reflect this position, and are thus interpreted to mean that sexual activity is consensual between acquaintances unless there is in fact denial or combat present.[12] Because of these gaping discrepancies and, not to mention, the significant psychological intricacies of sexual assault, the idea of affirmative consent is taking both universities and governments by storm in order to reconcile the current climate and misun-

7. *See* Jessica Bennett, *Campus Sex . . .With a Syllabus*, N.Y. TIMES, Jan. 10, 2016, at ST1.

8. JON KRAKAUER, MISSOULA: RAPE AND THE JUSTICE SYSTEM IN A COLLEGE TOWN 305 (2015).

9. Rosanna Tamburri & Natalie Samson, *Ending Sexual Violence on Campus*, U. AFF. (Oct. 20, 2014), http://www.universityaffairs.ca/features/feature-article/ending-sexual-violence-campus/.

10. *Id.*

11. KRAKAUER, *supra* note 8, at 292.

12. *See* Lucinda Vandervort, *Affirmative Sexual Consent in Canadian Law, Jurisprudence, and Legal Theory*, 23 COLUM. J. OF GENDER & L. 395, 409 (2012); *see also* Criminal Code, R.S.C. 1985, c. C-46, § 265(3) (Can.); R. v. Jobdion, [1991] 2 S.C.R. 714, 715-17 (Can.) (the definition of consent in the sexual assault cases has previously been recognized in the Canadian Criminal Code as well as Canadian common law).

derstandings surrounding sexual assault and consent on a broader scale.[13]

While sexual assault is far from a black and white issue, consent is not. Universities can still put their best foot forward in making sure that the definitions they use to find sexual assault match what sexual assault scenarios actually look like. Not only are the traditional, legal definitions of consent at odds with capturing the affirmative nature of consensual sex, but they also profoundly have the opposite effect of proving sexual assault by construing that consent is lacking only if there is a presence of denial, combat, or silence.[14] Therefore, because most statutes state that denial, combat, or silence *do not* equate to consent,[15] laws should be revised to hold that active and enthusiastic participation *are* what equate to consent—instead of allowing varying interpretations to run amok in the minds of applicable triers of fact.

Opponents of affirmative consent believe that modifying consent standards is yet another ploy in favor of upholding victims' rights—however, there are many benefits to be afforded to the accused through consent reform as well.[16] In 1992, Canada changed its consent laws to reflect affirmative standards, and most recently, the Crown Prosecution Service in England did the same.[17] The realization that consent is one of the major issues surrounding the adjudication of sexual assault underscores the need for education codes to reflect affirmative consent standards as well.

Affirmative consent reform will help clear the murky waters surrounding university adjudication of sexual assault—however, equality, fairness, and procedural safeguards must not escape new legislation and revised university policies. Federal legislation, such as the United States' Title IX, was enacted to correct an imbalance of gender discrimination, namely, discrimination against women in the work place

13. *See* THE CROWN PROSECUTION SERVICE, *supra* note 4; *The Neurobiology of Sexual Assault*, NAT'L INST. OF JUSTICE (Dec. 3, 2012), https://nij.gov/multimedia/presenter/presenter-campbell/pages/presenter-campbell-transcript.aspx; *see generally* S.B. 967, 2013-14 Leg., Reg. Sess. (Cal. 2014).

14. *See* Vandervort, *supra* note 12, at 409-10.

15. *See*, *e.g.*, D.C. CODE § 22-3001(4) (2017); MINN. STAT. ANN. § 609.341(4)(a) (2017); WASH. REV. CODE ANN. § 9A.44.010(7) (2016). *But cf.* ALA. CODE § 13A-6-65 (2015); TENN. CODE. ANN. § 39-13-503 (2016) (providing examples of sexual assault statutes that refer to consent, however, do not define consent).

16. *See* Cathy Young, *Campus Rape: The Problem With 'Yes Means Yes'*, TIME (Aug. 29, 2014), http://time.com/3222176/campus-rape-the-problem-with-yes-means-yes/.

17. *See* Vandervort, *supra* note 12, at 411-12; *see also* The Crown Prosecution Service, *supra* note 4.

and institutions of higher education.[18] Within its gamut, Title IX specifically states that federally funded schools must investigate, punish, and deter gender-based offenses, including sexual assault.[19] In light of those efforts, however, many of the current university policies only contain language that pertains to a complainant in the event that a complaint for sexual assault is filed—but not the rights of the accused or plan of recourse.[20] Regrettably, the strict implementation and adherence to outdated university policies indicate that the accused have been completely left out of the sexual assault adjudication equation—resulting in an abundance of lawsuits.[21] Most university policies do not contain language detailing clear guidelines about how sexual assault adjudications are to proceed, which makes the accused feel as though considerable rights are falling by the wayside.[22]

Punishments rendered by universities are not nearly as severe as punishments rendered in criminal prosecutions,[23] but they still have the profound impact of encumbering the accused's educational career and professional prospects. Notably, however, expulsion remains to be the most austere punishment for the accused in university sexual assault adjudication proceedings, which does not warrant the use nor necessarily afford the accused all constitutional due process rights afforded in trial to criminal defendants—though opponents would assert otherwise.[24] Not only would procedural safeguards for the accused be in the best interest of universities, but it would also help with the process of adjudicating sexual assault, and even reduce the backlash of lawsuits brought forth by the accused.

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18. *See Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC. (Apr. 2015), https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html.

19. *See id*.

20. *See* Tovia Smith, *For Students Accused of Campus Rape, Legal Victories Win Back Rights*, NPR (Oct. 15, 2015, 4:45 AM), http://www.npr.org/2015/10/15/446083439/for-students-accused-of-campus-rape-legal-victories-win-back-rights.

21. *See id*.

22. *Id*.

23. Sara Ganim & Nelli Black, *An Imperfect Process: How Campuses Deal with Sexual Assault*, CNN (Dec. 21, 2015, 4:38 PM), http://www.cnn.com/2015/11/22/us/campus-sexual-assault-tribunals/; Editorial, *Why Colleges Should Report Sex Crimes, Pronto, to Police and Prosecutors*, CHI. TRIB. (Aug. 28, 2015), http://www.chicagotribune.com/news/opinion/editorials/ct-sex-assault-campus-crime-reporting-rape-police-edit-0830-jm-20150828-story.html.

24. Kristen Lombardi, *A Lack of Consequences for Sexual Assault*, CENTER FOR PUB. INTEGRITY (Feb. 24, 2010, 12:00 PM), https://www.publicintegrity.org/2010/02/24/4360/lack-consequences-sexual-assault; Tyler Kingkade, *Many Universities Don't Want You to Know How they Punish Sexual Assault*, HUFFINGTON POST (Sept. 29, 2014, 4:18 PM), http://www.huffingtonpost.com/2014/09/29/punish-sexual-assault_n_5894856.html.

Universities in the United Kingdom have yet to feel the repercussions from mishandling sexual assault complaints. This is partly due to their strong belief that a criminal matter, such as sexual assault, should be left entirely for the police to handle.[25] However, statistics and sentiments amongst university students of rising incidences of sexual assault reveal that leaving the matter solely to local authorities is not the best route either—largely because the police and government agencies cannot resolve cases in an efficient or sensitive manner.[26] So, if rising incidences of university sexual assault and their mishandling occur regardless of whether universities or local authorities control the matters exclusively, it follows that the need for changing university policies to reflect affirmative consent will help adjudicate these matters efficiently and ultimately deter them.

Rising numbers of campus sexual assault cannot be traced back to one specific source, but the means by which universities adjudicate them would provide more clarity and structure. Because students' time on campuses is relatively short-lived, it is important that universities investigate and reprimand cases of sexual assault to uphold and foster a safe educational environment.[27] While affirmative consent has been the national norm in Canada since 1992, the realization that universities must also enact similar policy is just now surfacing.[28] Outdated definitions of consent are at the root of this pervasive problem and inadequate procedural safeguards for the accused significantly enable further mishandling of sexual assault cases that currently plague universities. Whether cases of university sexual assault occur in the U.S., U.K., or Canada, the need for comprehensive improvements is finally realized. University adjudication of sexual assault will improve with the adoption of affirmative consent standards coupled with clear procedural safeguards that protect both parties to a sexual assault dispute.

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25. *See* Eliza Gray, *Why Don't Campus Rape Victims Go to the Police?*, TIME (June 23, 2014), http://time.com/2905637/campus-rape-assault-prosecution/; *see also* Tyler Kingkade, *And People Ask Why Rape Victims Don't Report to Police*, HUFFINGTON POST (Aug. 12, 2016, 11:39), http://www.huffingtonpost.com/entry/rape-victims-report-police_us_57ad48c2e4b071840410b8d6; Jed Rubenfeld, *Mishandling Rape*, N.Y. TIMES, Nov. 16, 2014, at SR1.

26. Owen Boycott, *Student Sues Oxford over Handling of Rape Complaints*, GUARDIAN (May 7, 2015, 8:07 AM), https://www.theguardian.com/law/2015/may/07/student-sues-oxford-rape-complaints-policy.

27. *See* Tamburri & Samson, *supra* note 9.

28. *See id.*; *see also* Laura Kane, *Sexual Assault Policies Lacking at Most Canadian Universities, Say Students*, CBC NEWS (Mar. 7, 2016, 11:43 AM), http://www.cbc.ca/news/canada/british-columbia/canadian-universities-sex-assault-policies-1.3479314; *The Law of Consent in Sexual Assault*, WOMEN'S LEGAL EDUC. & ACTION FUND, http://www.leaf.ca/the-law-of-consent-in-sexual-assault/ (last visited Feb. 25, 2017).

II. Background

Sexual assault is a serious crime and also serves as a form of sex discrimination on university campuses. Given the pressing needs for students to enjoy a hostility-free learning environment, the United States passed Title IX of the 1972 Education Amendments, which prohibits sex discrimination in any federally funded educational institution.[29] Universities across the U.S., however, are no longer simply institutions of higher learning—but also environments that foster heavy drinking and partying that often create the ripe conditions for sexual assault, which now prompt stricter regulations.[30] In 2006, the National Institute of Justice conducted a study of campus sexual assault and found that only 19% of college women reported attempted or completed sexual assault.[31] After exposure of this pervasive problem, the Office of Civil Rights (OCR) has since enacted rigorous policies and guidelines that universities must follow when handling sexual assault complaints.[32] In 2011, OCR sent out the famous "Dear Colleague Letter," which most notably required universities to use the preponderance of the evidence standard of proof, a lesser standard, instead of clear and convincing evidence when adjudicating sexual assault.[33]

Similarly, the U.K. passed the Equality Act of 2010, which also prohibits sex discrimination at institutions of higher education.[34] The laws evolved to include sexual assault as a form of harassment and advocate that universities respond and investigate student allegations.[35] However, unlike that of the U.S., nearly all discretion is left to universities without real oversight or repercussions—which result in either a total lack of policy and procedure or confusing procedural

29. 20 U.S.C. §§ 1681-1688 (2012).

30. *See* Pádraig MacNeela et al., Rape Crisis Network Ireland, Young People, Alcohol and Sex: What's Consent Got to Do With it? 65-66 (Jan. 28, 2014), http://www.rcni.ie/wp-content/uploads/Whats-Consent-Full-A41.pdf.

31. Christopher P. Krebs et al., Nat'l Inst. of Justice, The Campus Sexual Assault (CSA) Study, at 5-3 (Dec. 2007), https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf.

32. U.S. Dep't of Educ., Dear Colleague Letter Providing Guidance about Title IX Requirements for Schools (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [hereinafter Dear Colleague Letter].

33. *Id.*

34. *See* Equality Act, 2010, c. 15, §§ 64-76 (U.K.); *see also* Polly Williams, Equality Act 2010 Implications for colleges and HEIs, Equality Challenge Unit (Aug. 2012), http://www.ecu.ac.uk/wp-content/uploads/external/equality-act-2010-briefing-revised-08-12.pdf.

35. *See* Williams, *supra* note 34.

guidelines that fail to properly resolve sexual assault disputes.[36] Not far behind the U.S., the U.K is in the process of implementing more stringent requirements for campus sexual assault—with affirmative consent on its agenda.[37]

Despite the implementation of affirmative consent in Canada's national criminal code, many Canadian universities are even further behind those in the U.S. and U.K, lacking *any* policies or regulations concerning incidences of university sexual assault.[38] Most recently in 2015, Ontario published an action plan to stop campus sexual assault that addressed the necessity that universities adopt policies and procedures to combat campus sexual assault and assist complainants.[39] The action plan resulted in the 2016 passage of Bill 132, Sexual Violence and Harassment Action Plan Act, holding universities accountable for implementing sexual assault policies and procedures.[40]

At varying stages of enactment and implementation, universities' perfunctory efforts are deficient in the fine details of the key issue: consent. If universities are going to tackle sexual assault efficiently and correctly, proper consent definitions must be outlined. Further, the lack of transparency and access to policies coupled with uninformed administrators has had the profound effect of either dismissing valid complaints of sexual assault, and on the other end of the spectrum, expelling the accused from their university without any real recourse.[41] Countries with universities on both ends of the spectrum are facing backlashes from disgruntled students in the form of lawsuits.[42]

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36. Karen McVeigh & Elena Cresci, *Student Sexual Violence: 'Leaving Each University to Deal with it Isn't Working*, GUARDIAN (July 26, 2015, 2:27 PM), https://www.theguardian.com/education/2015/jul/26/student-rape-sexual-violence-universities-guidelines-nus.

37. *See NUS Announces the Next Phase of its Fight Against Lad Culture*, NAT'L UNION OF STUDENTS (July 27, 2015), https://www.nus.org.uk/en/news/press-releases/nus-announces-the-next-phase-of-its-fight-against-lad-culture/; *see also* NAT'L UNION OF STUDENTS, LAD CULTURE AUDIT REPORT (2015), http://www.nusconnect.org.uk/resources/lad-culture-audit-report/download_attachment.

38. *See, e.g.,* Kane, *supra* note 28.

39. *See* OFFICE OF THE PREMIER OF ONTARIO, IT'S NEVER OKAY: AN ACTION PLAN TO STOP SEXUAL VIOLENCE AND HARASSMENT 27 (Mar. 2015), http://docs.files.ontario.ca/documents/4136/mi-2003-svhap-report-en-for-tagging-final-2-up-s.pdf.

40. Sexual Violence and Harassment Action Plan Act, S.O. 2016, c.2 (Can.).

41. *See* Ashe Schow, *Due Process for Campus Sexual Assault is Not a Left/Right Issue*, WASH. EXAMINER (July 9, 2015, 12:01 AM), http://www.washingtonexaminer.com/due-process-for-campus-sexual-assault-is-not-a-leftright-issue/article/2567881.

42. *See* Anita Wadhawani, *Growing List of Colleges Facing Sexual Assault Lawsuits*, USA TODAY (Feb. 20, 2016), http://www.usatoday.com/story/news/nation-now/2016/02/20/growing-list-colleges-facing-sexual-assault-lawsuits/80689514/; *see also* Elizabeth Ramey, *Why I'm Suing Oxford University Over Rape*, TELEGRAPH (May 7, 2015), http://www.telegraph.co.uk/women/womens-life/11588353/Rape-case-Why-Im-suing-Oxford-University.html. *See generally* Sahm v.

Recently, in the U.S., a San Diego district court ruled against the University of California San Diego and ordered the dismissal of a ruling that found a student guilty of sexual assault.[43] The judge ruled that the university did not afford the accused adequate rights during the adjudication, resulting in a dismissal of the judgment.[44] On appeal, the court reversed and remanded the case in favor of the university.[45] Conversely, at Oxford University in the United Kingdom, a student was unsuccessful in maintaining that the university *did not* do enough to investigate her claim of sexual assault against a fellow student during the course of her studies at their graduate school.[46]

Overall, the crime of sexual assault is largely underreported.[47] This is due to the very sensitive nature of the crime and the stereotypes perpetuated by society.[48] Most university students who complain of sexual assault do not go to local authorities because criminal prosecutions are too lengthy and intrusive.[49] Additionally, prosecutors are reluctant to file sexual assault cases because of significant evidentiary hurdles; when they do, however, they are not very successful in obtaining convictions.[50] For these reasons, universities that implement policies with affirmative consent models will be more equipped to offer autonomy, sensitivity, fairness, and efficient results without long, public proceedings.[51]

The inconsistencies and lack of proper definitions and guidelines morphed the adjudication of sexual assault into a revolving door with no easy solution. Universities are trying to play catch up with rising complaints of campus sexual assault—with efforts ranging from issuances of no-contact orders between students to flat out expulsions

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Miami Univ., 110 F. Supp. 3d 774 (S.D. Ohio 2015); Doe v. Regents of the Univ. of California, 210 Cal. Rptr. 3d 479, 484 (Cal. App. 4th Dist. 2016); R. (on the application of Ramey) v. Oxford Univ., [2014] EWHC 4847 (Admin).

43. *See Regents of the Univ. of California*, 210 Cal. Rptr. at 484.

44. *Id.*

45. *Id.*

46. *See Oxford Univ.*, EWHC at 4847 (Admin.).

47. *See* AZ v. Shinseki, 731 F.3d 1303, 1313-14 (Fed. Cir. 2013); State v. Navarro, 354 P.3d 22, 24 (Wash. Ct. App. Div. 1. 2015).

48. *See* State v. Daniel W. E., 142 A.3d 265, 280, 284-286 (Conn. 2016).

49. *See* Kingkade, *supra* note 25; *see also* McVeigh & Cresci, *supra* note 36.

50. *See* Gray, *supra* note 25; *see also* Meredith Donovan, *Why Convictions in Sex Crime Cases are so Hard to get,* N.Y. Daily News (Mar. 31, 2012, 10:19 a.m.), http://www.nydailynews.com/opinion/convictions-sex-crimes-cases-hard-article-1.1053819.

51. *See* Katherine Tam, *UC Implements New Student Model in Ongoing Progress Toward Addressing Sexual Violence and Sexual Harassment*, UCnet (Jan. 6, 2016), http://ucnet.universityofcalifornia.edu/news/2016/01/uc-implements-new-student-model-in-ongoing-progress-toward-addressing-sexual-violence-and-sexual-harassment-.html.

which leave students with lingering feelings of inadequacy, on both sides of the fence.[52] Although issues that pertain to sexual assault amount to a problem on a much larger scale, they will not be solved easily or independently according to Professor Wayne MacKay of Saint Mary's University.[53] He states that if universities do not make a better effort to respond, "how can [universities] have really effective learning in an unsafe, discriminatory, sexist kind of environment?"[54] The short answer is, "[They] can't. [They] have to find the means and the ways to do it."[55]

III. Affirmative Consent Evaluated

Redefining sexual assault consent standards to reflect the affirmative nature of consent not only makes logical sense, but is also reaffirmed by various studies and court cases.[56] While most laws do not require mental behavioral adjustments on our part, society has so profoundly maimed traditional sex roles to fit into an imperfect ideal that perpetuates sexual assault that any new legislation regarding an affirmative consent model may feel unnatural to those who comply with skewed ideals.[57] Sexual assault is a unique crime as it involves an act that is natural to humans—so requiring us to re-learn a key component of a natural act is accompanied by its very own hardships.[58] This is not to say that affirmative consent will be ineffective, because it has proved to be the opposite, and it seems as though the small scale environments like those of universities will allow a more focused approach to educating and adjudicating sexual assault based on the affirmative consent model.[59]

Many who oppose the adoption of affirmative consent by universities believe that these standards now require two individuals to enter

52. *See* Tamburri & Samson, *supra* note 9; *see also* Butters v. James Madison Univ., No. 5:15-CV-00015, 2016 WL 5317695 at 13 (W.D. Va. 2016); Marshall v. Indiana Univ., 170 F.Supp.3d 1201, 1204-05 (S.D. Ind. 2016).

53. *See* Tamburri & Samson, *supra* note 9.

54. *Id.*

55. *Id.*

56. *See* Vandervort, *supra* note 12, at 440-45, 449-57, 459-65 (2012); *see also* R. v. J.A., [2011] S.C.R. 440 (Can.).

57. Jacklyn Friedman & Jessica Valenti, Yes means Yes! Visions of Female Sexual Power & A World Without Rape 20-21 (2008); *see also* State *ex rel.* M.T.S., 609 A.2d 1266, 1277 (N.J. 1992).

58. Friedman & Valenti, *supra* note 57, at 26.

59. Tyler Kingkade, *Colleges Are Rewriting What Consent Means To Address Sexual Assault*, Huffington Post (Sept. 11, 2014), http://www.huffingtonpost.com/2014/09/08/college-consent-sexual-assault_n_5748218.html.

into a written contract prior to any sexual act.[60] However, that could not be further from the truth.[61] Affirmative consent is defined as:

> a knowing, voluntary, and mutual decision among all participants to engage in sexual activity. Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity. Silence or lack of resistance, in and of itself, does not demonstrate consent. The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression.[62]

Affirmative consent highlights the importance of *voluntary* words or actions that are actively *communicated*. Surprisingly, however, critics are still confused by the semantics of affirmative consent and do not truly understand that the wording in fact matches natural sexual encounters.[63] Therefore, to fully understand the subjective nature of communicated voluntarism, it is necessary to evaluate the way in which humans engage in sexual activities.

A. Psychology Supports Affirmative Consent

A psychological study titled "Young People, Alcohol, and Sex: What's Consent Got To Do With It?" was conducted in 2014 by the National University of Ireland.[64] The study ultimately revealed that young adults' descriptions of sexual encounters naturally mimicked affirmative consent.[65] In the study, one female focus group noted that "Even if [consent] is not verbalized, it should be obvious that both people want to be doing it . . . unless you get a clear yes, don't just assume the other person wants to do it"—meaning that actions can and do speak louder than words in sexual scenarios.[66] "The [typical] 'no means no' standard places the onus on the targeted individual to protest and offers no protection for bodily integrity until an assault is threatened or already in progress."[67] Consent standards that reflect

60. Amanda Hess, *"No Means No" Isn't Enough. We Need Affirmative Consent Laws to Curb Sexual Assault*, SLATE (June 16, 2014), http://www.slate.com/blogs/xx_factor/2014/06/16/affirmative_consent_california_weighs_a_bill_that_would_move_the_sexual.html.

61. *Id.*

62. *What is Affirmative Consent?*, AFFIRMATIVECONSENT, http://affirmativeconsent.com/whatisaffirmativeconsent/ (last visited Feb. 26, 2017).

63. Suzannah Weiss, *5 Common Arguments Against Affirmative Consent & Why They're Actually BS*, BUSTLE (Oct. 23, 2015), https://www.bustle.com/articles/119012-5-common-arguments-against-affirmative-consent-why-theyre-actually-bs.

64. MACNEELA ET AL., *supra* note 30.

65. *Id.* at 14, 69.

66. *Id.* at 18.

67. Vandervort, *supra* note 12, at 404; *see also* FRIEDMAN & VALENTI, *supra* note 57, at 20-25 (defining the culture of rape and understanding and respecting a female's sexual pleasure).

this notion do not understand or delineate that actions *do* show the subjective intent of parties to go forward with a sexual act, and therefore consent should be modified to reflect that reality. "No means no" standards not only fail to reflect natural attitudes toward consent, but tend to be one-sided and lead toward absolute innocence on behalf of the accused.[68] This model is faulty because the he-said she-said nature of sexual assault and lack of witnesses so often allow the accused to simply claim that the complainant did not scream or protest, thus forging a false sense of consent.

Moreover, affirmative consent reform is not aimed solely at appeasing complainants of sexual assault—it encompasses the ideals of initiators of the sexual acts as well—who are typically men. The Irish study involved several male focus groups that relayed the same sentiments as women.[69] The study found that it is unacceptable for the accused to act on silence during a sexual encounter and that "A yes is more important than saying no."[70] These findings suggest the importance for regular checking that the other person agrees to progress with further sexual activity.[71] But verbal assertions aside, these findings suggest that men and women alike understand consent to mean that all parties involved are *active* participants. Meaning, enthusiastic body language is conveyed by both parties throughout the encounter.

These findings additionally reveal that while some people may choose to verbalize consent, affirmative consent standards largely encompass nonverbal, enthusiastic bodily communication.[72] In the Irish study, the male focus groups further revealed, "She should be an active participant, not just like lying there nearly passed out."[73] Bluntly stated, enthusiastic body language and active participation encompass sexual reciprocity: both parties asserting new sexual positions, both moving in accordance with one another, and both parties responding positively to the acts.[74] Most perplexing, however, is the fact that opponents of affirmative consent are fighting against a model that mimics natural sex. Affirmative consent, contrary to popular, albeit incorrect belief, does not require two people to sign a contract before

68. *See* Nicholas J. Little, *From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, 58 VAND. L. REV. 1322, 1322-23 (2005).

69. *See* MACNEELA ET AL., *supra* note 30, at 7, 21.

70. *Id.* at 21.

71. *Id.*

72. *See id.* at 21, 24.

73. *Id.* at 24.

74. *See* MACNEELA ET AL., *supra* note 30, at 14; *see also* FRIEDMAN & VALENTI, *supra* note 57, at 47-49 (describing how you can read consent through body language).

sex—it simply holds that both participants are active, engaged, and willing to proceed with any sexual act.[75]

IV. Affirmative Consent on Broader Scales

Affirmative consent is not only on the agenda of universities. Both Canada and England have revised their *national* criminal codes to reflect affirmative consent.[76] In 1992, Canada revised their criminal codes to reflect affirmative consent and several cases following this legislation have demonstrated the importance of redefining consent standards.[77] Just recently, in January 2015, England changed its criminal code to an affirmative consent standard as well.[78] Despite the fact that many universities in both Canada and England are plagued with similar sexual assault burdens like that of the U.S., their efforts on a broader scale implicate something more—a need for change.[79] The willingness of countries to completely revise their national, criminal standards of consent indicate how difficult the adjudication of sexual assault is and that universities, faced with more cases than ever, must revise their standards as well.

A. England Reforms Consent Standards

The Crown Prosecution Service in England completely revised their criminal prosecution standards of consent to reflect affirmative consent.[80] Alison Saunders, Director of Public Prosecutions in England, set forth new guidelines with respect to consent—holding that "Prosecutors are now being instructed to ask how the suspect knew that the complainant had consented—with full capacity and freedom to do so."[81] While the United States has been the frontrunner in trying to tackle university mishandling of sexual assault, it seems as though

75. *See* Katherine Timpf, *Students Told to Take Photos with a 'Consent Contract' Before They Have Sex*, Nat'l Rev. (July 7, 2015), http://www.nationalreview.com/article/420870/college-affirmative-consent-contract.

76. *See* Sexual Offences Act 2003, c. 42 § 74 (U.K.); Can. Crim. Code, R.S.C., c. C-46 § 153.1 (1985).

77. *See* Tamburri & Samson, *supra* note 9.

78. *See* Sexual Offences Act 2003, c. 42 (U.K.); *see also* The Crown Prosecution Service, *supra* note 4.

79. *See* Timothy Sawa & Lori Ward, *Sex Assault Reporting on Canadian Campuses Worryingly Low, Say Experts*, CBC News (Feb. 6, 2015), http://www.cbc.ca/news/canada/sex-assault-reporting-on-canadian-campuses-worryingly-low-say-experts-1.2948321; Ministry of Justice, An Overview of Sexual Offending in England and Wales (Jan. 10, 2013), http://webarchive.nationalarchives.gov.uk/20160105160709/https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/214970/sexual-offending-overview-jan-2013.pdf (U.K.).

80. *See* The Crown Prosecution Service, *supra* note 4.

81. *Id.*

England has surpassed the U.S. by updating their criminal justice system to reflect new ideals.[82]

While England may be revising standards on a national level, their university policies considerably lag behind the U.S.[83] In 2014, Elizabeth Ramey, a student at Oxford University, unsuccessfully filed a lawsuit against Oxford and its policy on investigating campus rape.[84] She was told by the university to go to the police, but even after she did, her case was never prosecuted.[85] Finally, the Office of the Independent Adjudicator of Higher Education, who found Oxford's policies to be inadequate, reviewed Ms. Ramey's case.[86] Because of governmental agencies' inability to prosecute sexual assault cases like Ms. Ramey's, the growing need that universities be able to maintain clear policies aimed at protecting all students is ever more paramount.

B. Canada's Implementation of Affirmative Consent

Canada's affirmative consent laws and following cases prove that affirmative consent is a step in the right direction and can be for universities as well.[87] The Criminal Code enacted by Parliament in 1992 states that "Consent means that the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused."[88] Additionally, and most importantly, in implementing this new standard, when the accused claims the complainant gave consent, the accused must "believe that the complainant effectively said, 'yes' through her word and/or her action."[89] In response to the new affirmative consent laws, Chief Justice McClachlin of the Supreme Court of Canada stated:

> This concept of consent produces just results in the vast majority of cases. It has proved of great value in combating the stereotypes that historically have surrounded consent to sexual relations and undermined the law's ability to address the crime of sexual assault.[90]

Three decisions rendered by the Supreme Court of Canada between 1992 and 1997, *R v. M, R v. Park,* and *R v. Esau*, made significant contributions to the development of common law jurisprudence

82. See *id*.

83. *See* Vicky Spratt, *What's Your University Doing About Consent?*, DEBRIEF (Oct. 6, 2016), http://www.thedebrief.co.uk/news/real-life/consent-at-university-2016-20161065185.

84. *Oxford Univ.*, [2014] EWHC 4847 (Admin).

85. *Id*.; *see also* Boycott, *supra* note 26.

86. Boycott, *supra* note 26.

87. Vandervort, *supra* note 12, at 398.

88. R. v. Ewanchuk, [1999] 1 S. C. R. 330, 355 (Can.).

89. Vandervort, *supra* note 12, at 433.

90. R v. J.A., [2011] 2 S.C.R. 440, 464 (Can.).

on affirmative consent in Canada.[91] In *R v. M*, the 16 year-old complainant did not resist sexual touching advanced by her stepfather.[92] The evidence presented at trial was that her lack of resistance was due to fear of her stepfather.[93] The Court of Appeals quashed the trial verdict because the complainant did not resist the touching, and in the absence of coercion, there was no evidence that consent was *not* obtained.[94] The Supreme Court later reinstated the trial court's initial conviction, holding that a lack of resistance is not equated with consent.[95] Further, the Court rephrased their holding to "focus on the legal effect of non-communication by the complainant" and that "silence means 'no'."[96]

The preconceived notions involving sexual assault make it difficult for the general public to conceptualize affirmative consent. Because most think that a complainant can kick and scream in the event of unwanted sexual advances, they also believe that consent standards reflecting protest are sufficient. However, in most instances, victims of sexual assault are in so much shock and distress that their bodies tense and freeze over, thus inhibiting any such physical or even verbal protests.[97] This realization is what necessitates that consent standards be revised to reflect affirmative consent. Most university sexual assault incidences are not violent or scary. *R v. M* confirms that submission is not what in fact takes place during unwanted sexual advances—it is an intense fear for lack of control of your body.[98] For this reason, successful adjudication of sexual assault must encompass not only that lack of protest and silence is not consent, but that both individuals must be engaging in positive, active verbal or nonverbal communicative manners. If both parties are active and engaged, then there is no reason to believe either does not want to be performing these acts—for free will and basic human nature tells us just that.

Non-affirmative definitions of consent offer inadequate protection for women against sexual violence. In the case of *M.C. v Bulgaria*, the European Court of Human Rights "considered rape legislation that focuses exclusively or unduly on proving the use of force, rather

91. Vandervort, *supra* note 12, at 415.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 416.

97. Kris Hannah, *Freezing During Rape is Normal*, HEALING HEART (Apr. 20, 2012), https://krishannah.wordpress.com/2012/04/20/freezing-during-rape-is-normal/.

98. Vandervort, *supra* note 12, at 415.

than the lack of consent of the victim, to be in violation of the European Convention on Human Rights."[99] The Istanbul Convention incorporated this judgment by requiring States Parties to adapt their criminal legislation on sexual violence and rape to focus on consent as a constituent element of the crime.[100] Countries around the world are focusing their efforts on redefining consent because it truly is at the root of sexual assault. While requiring the use of force to be an element of sexual assault is an outdated model in most developed countries, it is finally realized that we have been operating under outdated consent models as well.

A deeper analysis and understanding of the social context of consent helps further explain affirmative consent. In Justice L'Heureux-Dube's opinion in *R v. M*, she acutely detailed that:

> consent must be regarded from the standpoint of communication, rather than from the standpoint of a mental state: the social act of consent consists of communication to another person, by means of verbal and non-verbal behavior, of permission to perform one or more acts which that person would otherwise have a legal or non-legal obligation to perform.[101]

Because the ways in which consent are communicated, laws must reflect and incorporate these notions.

The implications from affirmative consent standards for equality is significant and help in separating two stories of he-said she-said. In *R v. Ewanchuk*, the trial court found that the complainant had not consented to the unwanted sexual acts of the accused but ultimately acquitted the accused on the grounds that the he may have believed she consented on the grounds of "implied consent."[102] The Supreme Court eventually held that "under Canadian law there is no defense of implied consent."[103] While implied consent is no longer a valid defense, in most jurisdictions, a defendant may still assert a defense that the complainant consented to a sexual act. Because of this, affirmative consent models would aid in clarifying whether or not consent was in fact given by evidencing that both parties were actively engaged.

The significance of these two cases connotes the importance of active, enthusiastic participation in response to a sexual advance.

99. M.C. v. Bulgaria, 2003-XII Eur. Ct. H.R. 1, 35.

100. Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence art. 36, *opened for signature* May 11, 2011, C.E.T.S. No. 210 (entered into force Aug. 1, 2014).

101. R v. Park, [1995] 2 S.C.R. 836, 866 (Can.).

102. Vandervort, *supra* note 12, at 428.

103. *Id.*

There are too many instances that allow sexual assault to go undetected under traditional consent models. For those reasons, affirmative consent standards should also require that complainants and the accused discuss who obtained consent and *how* it was demonstrated throughout a sexual encounter. Affirmative standards are not any more designed for complainants than they are for the accused: the importance is that affirmative consent standards reflect *reality*. Consequently, the cases of sexual assault adjudicated by universities are real instances of lack of consent and must be held to reflecting standards.

V. Implementation of Affirmative Consent

Much of the criticism surrounding affirmative consent policies and laws deal with implementation. While universities are not legal tribunals, adjudications are comprised of administrative panels that render a final determination of culpability—with the most severe punishment being expulsion from the university.[104] These panels are not much different than panels that hear incidences of student perjury or other similar misconduct, but may require more elaborate guidelines given the difficult intricacies of the offense.[105] Further, the evidentiary burden exercised by universities requires "beyond a preponderance of the evidence," similar to the civil evidentiary standards held by many countries.[106]

Canadian court cases that utilized affirmative consent reflect its effectiveness in proving and disproving sexual assault cases, however, implementation of affirmative consent remains to be an obstacle on a larger scale. Because no appellate court or independent review tribunal review the actions of police, prosecutors or judges, government officials continue to investigate and prosecute sexual assault based on common law principles of consent.[107] The most significant causes of haphazard disposal of sexual assault cases are due to a lack of awareness of what the law actually requires, and failure to enforce the law.[108] Moreover, because police and prosecutors are unwilling to

104. Robert Carle, *The Trouble with Campus Rape Tribunals*, Pub. Discourse (July 14, 2014), http://www.thepublicdiscourse.com/2014/07/13369/.

105. Ganim & Black, *supra* note 23; Tovia Smith, *When College Sexual Assault Panels Fall Short, and When They Help*, NPR (May 1, 2014, 8:31 PM), http://www.npr.org/2014/05/01/308607420/when-college-sexual-assault-panels-fall-short-and-when-they-help; *see also* Emily Bazelon, *Washing Takes on College Rape*, Slate (Apr. 29, 2014, 5:58 PM), http://www.slate.com/articles/double_x/doublex/2014/04/campus_sexual_assault_new_white_house_guidelines_won_t_solve_the_ongoing.html.

106. Dear Colleague Letter, *supra* note 32.

107. Vandervort, *supra* note 12, at 439.

108. *Id.* at 439-40.

conform to newer ideals of sexual assault, it is imperative that universities be able to adjudicate such matters. Universities are not busy government offices or police stations back-logged with paperwork and rape kits—they are institutions devoted to upholding a fair and safe educational environment for their students, which requires deterring and punishing sexual assault amongst students.

A. Applying Affirmative Consent at the University Level

Educators and legislators have relayed their confusion as to how consent will be proven under affirmative consent standards.[109] However, affirmative consent will clear up many gray areas in instances of campus sexual assault—mainly due to the fact that alcohol plays a significant role in most cases.[110] In instances where a complainant is drunk, his or her lack of active participation through either verbal or nonverbal communication will clearly indicate that he or she did not consent in that moment—regardless if prior conduct indicated otherwise.[111] Additionally, new definitions of consent can greatly protect the accused from false accusations and simply very gray encounters where some lines were crossed.[112] For instance, a slightly intoxicated complainant who positively engages in the activity will have a very hard time convincing the university that he or she has not demonstrated consent to the sexual activities—despite the complainant's subjectivity.[113]

In applying affirmative consent at universities, critics argue that it would require a "burden shifting" upon the accused, thus making it an unworkable model. The U.S. Office of Civil Rights, for example, requires schools to promptly investigate reasonably known incidents of sexual assault even if the complainant chooses not to file a formal complaint.[114] The policy is not that the complainant bears the burden of proof, but instead, that the university must evaluate all relevant facts and evidence presented by both sides under the applicable defi-

109. Ashe Schow, *5 Problems with California's 'Affirmative Consent' Bill*, WASH. EXAMINER (Aug. 28, 2014, 8:00AM), http://www.washingtonexaminer.com/5-problems-with-californias-affirmative-consent-bill/article/2552537.

110. Tamburri & Samson, *supra* note 9.

111. *See* Amanda Marcotte, *Can Affirmative Consent Standards Fix the Problem of Alcohol and Rape?*, SLATE (Feb. 18, 2014, 12:27 PM), http://www.slate.com/blogs/xx_factor/2014/02/18/alcohol_and_rape_it_s_time_to_embrace_affirmative_consent_standards.html.

112. *Id.*

113. *Id.*

114. U.S. Dep't of Educ., Know Your Rights: Title IX Prohibits Sexual Harassment and Sexual Violence Where You Go to School (2011); *see also* 20 U.S.C. § 1681.

nitions by a preponderance of the evidence.[115] The "burden shifting" argument is not entirely applicable as universities are not courts of law, and complainants have no burden—universities simply assess the dispute equally and weigh the relevant evidence under a standard of preponderance.[116]

Traditional and often skewed views of consent uphold the narrative that sex is something "that belongs to one person and is taken by another."[117] Affirmative consent can finally allow a comprehensive discussion and investigation as to how *both* parties acted throughout the encounter. Affirmative consent is the definition to be used by *both* the accuser and the accused. Meaning, the accuser demonstrates that he or she was not voluntarily and actively participating because the language of the proposed affirmative consent definitions hold that "a knowing, voluntary, and mutual decision among all participants to engage in sexual activity" be present.[118] Updating definitions to state that sexual assault has occurred "if accomplished without that person's affirmative consent" would ensure that, on a national level, no such "burden shifting" occurs.[119]

Among concerns of implementation, some argue that allowing universities to adjudicate sexual assault diminishes the seriousness of a real crime.[120] It has been purported that students are often reluctant to report rape and other sexual assaults to authorities because they feel they will be re-traumatized by the police investigation process.[121] It may initially feel safer to report a rape to someone on campus, but is this a good enough reason to allow schools to police themselves?[122] Critics argue that universities should not be adjudicating sexual as-

115. *Id.*

116. *See Standards of Proof*, Campus Clarity (Oct. 15, 2013), https://home.campusclarity.com/standards-of-proof/; *see also* Gomes v. Univ. of Me. Sys., 365 F. Supp. 2d 6, 16, 45 (D. Me. 2005).

117. Joelle Stangler, *We Need Affirmative Consent Now*, Change.org, https://www.change.org/p/students-need-affirmative-consent-now (last visited Feb. 22, 2016); *see* Aegis, Comment to *Yes Some Guys are Assholes, but It's Still Your Fault if You Get Raped*, Alas! (June 24, 2005, 12:08 AM), http://amptoons.com/blog/?p=1628&cpage=5#comments; *see also* Thomas MacAulay Millar, *Toward a Performance Model of Sex*, *in* Friedman & Valenti, *supra* note 57, at 35.

118. N.Y. Educ. Law §6441 (McKinney 2015).

119. Tamara Rice Lave, *Affirmative Consent and Burden Shifting, Take 2*, Prawfs Blawg (Sept. 8, 2015, 2:33 PM), http://prawfsblawg.blogs.com/prawfsblawg/2015/09/affirmative-consent-and-burden-shifting-take-2.html.

120. Kari O'Discoll, *Why On Earth Do We Let Colleges and Universities "Handle" Their Own Rape Cases?*, The Feminist Wire (May 19, 2014), http://www.thefeministwire.com/2014/05/op-ed-earth-let-colleges-universities-handle-rape-cases/.

121. *Id.*

122. *Id.*

sault—however, the ineffectiveness and time consuming prosecutions that would take place otherwise simply do not afford victims of sexual assault the autonomy or efficiency that a university can.[123]

VI. Procedural Safeguards

If universities are going to undertake the efforts to adjudicate sexual assault, the policies and guidelines reflecting such efforts must afford both parties adequate procedural safeguards. The overcorrection of one problem has led universities to completely absolve the accused of his or her rights in the event of sexual assault adjudication.[124] This is not to say that universities will now become the judge and jury, so to speak, but that students must have the opportunities to ask questions, have lawyers present if requested, and review evidence. Moreover, punishments enacted by universities are at odds with universities' current efforts. Many are diligently trying to protect the victim but turn around with a slap on the wrist for the perpetrator.[125] Without clearer punishments in place, victims are forced, during an emotionally difficult time, to live amongst their assaulter.[126] These vast inconsistencies within universities' policies call for a strict adherence to clear guidelines that afford both parties the necessary safeguards when adjudicating sexual assault.

A. Lawsuits by the Accused & Due Process Considerations

Lack of procedural safeguards for students who are accused of sexual assault have resulted in lawsuits against their respective universities. In California, one student sued the University of California San Diego. Superior Court Judge Joel M. Pressman held that the accused student, identified as John Doe, was impermissibly prevented from fully confronting and cross-examining his accuser.[127] However, the Confrontation Clause of the U.S. Constitution is only applicable in

123. *See Why Schools Handle Sexual Violence Reports*, Know Your IX, http://knowyourix.org/why-schools-handle-sexual-violence-reports/ (last visited Feb. 23, 2015).

124. *See generally* Emily Yoffe, *The College Rape Overcorrection*, Slate (Dec. 7, 2014, 11:53 PM), http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html.

125. *See* Nick Anderson, *Colleges Reluctant to Expel for Sexual Assault*, Wash. Post (Dec. 15, 2014), https://www.washingtonpost.com/local/education/colleges-often-reluctant-to-expel-for-sexual-violence—with-u-va-a-prime-example/2014/12/15/307c5648-7b4e-11e4-b821-503cc7efed9e_story.html; *see also* Lombardi, *supra* note 24.

126. *See* Lombardi, *supra* note 24.

127. Doe v. Regents of Univ. of Cal., 210 Cal. Rptr. 3d 479 (Cal. App. 4th Dist. 2016).

criminal prosecutions—thus establishing the basis for the court's ruling in favor of the University of San Diego on appeal.[128]

Due process concerns are at the forefront of the argument against implementing affirmative consent. Yet, school policies maintain whether it is the most blatant violation of perjury or violation of sexual misconduct, the most severe punishment is still expulsion. So why are opponents fighting tooth and nail against affirmative consent and pushing for constitutional criminal rights when these proceedings are not of that nature? "Campus disciplinary proceedings must be handled in a . . . consistent manner—not in an arbitrary manner chosen for this or that particular case—[but] must include procedural safeguards *that match* the seriousness of the potential punishment."[129] In the U.S., students are notified of violations and are afforded the ability to explain or rebut accusations against them, in addition to presenting evidence and witnesses.[130] While the OCR discourages cross-examining witnesses, the accused may still ask any questions necessary to assert their position.[131] However, courts have found that the Fourteenth Amendment does not guarantee complete due process in university proceedings, thus rendering certain university policies sufficiently equitable.[132]

Opponents of university adjudication of sexual assault hold that however flawed narratives of sexual assault can be, it is "by questioning the witness, holding hearings, by sharing the evidence that has been gathered, by giving everyone access to lawyers, by assuring a neutral fact-finder."[133] Fairness must not escape university policies and "While we know from the Innocence Project that even these 'tests' can produce wrongful convictions, they are at least more likely to produce reliable results than the opposite—a one-sided, administrative proceeding, with a single investigator, judge, jury, and appeals court."[134] One possible route to ensure an accused's criminal rights

128. U.S. CONST. amend. VI.

129. FOUND. FOR INDIV. RIGHTS IN EDUC., FIRE'S GUIDE TO DUE PROCESS AND CAMPUS JUSTICE (2017), https://www.thefire.org/fire-guides/fires-guide-to-due-process-and-campus-justice/fires-guide-to-due-process-and-fair-procedure-on-campus-full-text/#__RefHeading__2480_2127946742 [hereinafter FIRE'S GUIDE].

130. *See* DEAR COLLEAGUE LETTER, *supra* note 32.

131. *See id.* at 11-12.

132. Fernand N. Dutile, *Students and Due Process in Higher Education: Of Interests and Procedures*, 2 FLA. COASTAL L.J. 243, 265 (2001); *see also* Board of Curators of University of Missouri v. Horowitz, 435 U.S. 78, 85 (1978); Regents of University of Michigan v. Ewing, 474 U.S. 214, 225 (1985).

133. Nancy Gertner, *Sex, Lies and Justice*, AM. PROSPECT (Jan. 12, 2015), http://prospect.org/article/sex-lies-and-justice.

134. *Id.*

are not violated in the event criminal action is taken, would be for countries to statutorily enact legislation holding that any evidence and determination of culpability exposed in a university proceeding cannot be used against them in a criminal prosecution.[135]

Complainants and the accused are not the only "losers" in many cases of university adjudication of sexual assault that have gone awry. Universities, plagued with lawsuits from both sides, are forced to pay large sums of money due to their procedural inadequacies.[136] The U.S. Department of Education has launched more investigations, imposed more fines, and issued more guidelines on campus sexual assault than ever before, pressuring schools to improve what many acknowledged were serious flaws in their handling of complaints—however, these efforts remain to be seen.[137] As these efforts often go unseen, another concern is that "[w]hen you have unfair procedures it delegitimizes the process, it makes the whole process seem like a joke. And people don't actually believe in the accuracy of the result when the process itself is unfair."[138]

Many universities in the U.S. have Title IX compliance offices with administrators available to assist students with discrimination on campus.[139] As a solution, it would be relatively simple to have an independent coordinator, trained in sexual assault policies and guidelines, to oversee investigations and adjudications. In addition to allowing students to have attorneys present, access to evidence, and allowance to question their complainant, hiring an independent coordinator to oversee sexual assault cases will help to resolve matters efficiently, but most importantly, correctly.[140]

VII. Conclusion

The current adjudication of sexual assault by universities is improving, but largely at the expense of both the victim and the accused. Complainants of sexual assault are not receiving the proper attention

135. *See* FIRE's Guide, *supra* note 129.

136. *See generally* Jamie Altman, *Former UC Berkeley Students Sue University for Mishandling Sexual Assault,* USA Today C. (July 1, 2015), http://college.usatoday.com/2015/07/01/former-uc-berkeley-students-sue-university-for-mishandling-sexual-assaults/; Boycott, *supra* note 26; Sarah Kaplan, *Columbia University Sued by Male Student in 'Carry That Weight' Rape Case*, Wash. Post (Apr. 24, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/04/24/columbia-university-sued-by-male-student-in-carry-that-weight-rape-case/?utm_term=.dd3788aa1daa.

137. *See* Gamin & Black, *supra* note 23.

138. *Id.*

139. Dear Colleague Letter, *supra* note 32.

140. *Id.*

and commitment to potential cases, the accused are not given the necessary procedural safeguards, and both parties are suing universities. Implementing affirmative consent standards will allow both sides to a sexual assault case to prove whether consent actually took place. Affirmative consent not only reflects the attitudes and realities of sexual encounters, but most importantly also holds *each* party accountable for their actions. Consent is at the heart of sexual assault, which is why overwhelming efforts by countries across the world are being made to fix it. Due to the current climate of inconsistencies, successful adjudication of sexual assault at universities also requires clearer procedural policies so that both parties' rights are ensured. Clearer policies will create a comprehensive approach that can both protect victims while affording the accused proper defense mechanisms while eliminating the chances for error and future lawsuits brought by either side against the university for their mishandling. University adoption and implementation of affirmative consent would allow new guidelines to reflect real sexual scenarios, uphold the bodily and moral integrity of students on campuses, and thus ultimately lead to fairer adjudications of sexual assault altogether.

RETHINKING COPYRIGHT TERMINATION IN A GLOBAL MARKET: HOW A LIMITATION IN U.S. COPYRIGHT LAW COULD BE RESOLVED BY FRANCE'S DROIT D'AUTEUR

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I. INTRODUCTION

In 1932, two teenagers, Jerome Siegel and Joseph Shuster, created a superhero that would change the world forever.[1] This superhero began as just a man, but these two teenagers breathed an extraordinary life into him.[2] Over time, they gave him a backstory, superhuman powers, an alter-ego, a love interest, and most important of all, the name: "Superman."[3] By creating Superman, Siegel and Shuster enabled an escape from the reality of despair that was the Great Depression.[4] To them, Superman was the solution, as he could transform from an ordinary man into a superhero to aid the "downtrodden and oppressed."[5]

Once further developed, Siegel and Shuster began shopping Superman around for acquisition.[6] After a series of setbacks and changes, they created several weeks' worth of comic strips for eventual newspaper syndication.[7] Upon this series of revisions, they eventually struck a deal with DC Comics in 1938, thereby assigning "'all [the] goodwill attached . . . and exclusive right[s]' to Superman 'to have and hold forever,'" for a sum of $130.00.[8] Although this was quite a deal of money in the midst of the Great Depression, it absolutely pales in comparison to the more than $1 billion franchise that Superman would eventually become.[9]

This was a great investment on DC Comics' part, but the same cannot be said for Superman's creators, who lived in near destitute conditions,[10] and unfortunately, did not survive long enough to enforce the termination rights granted to them under Section 304 of the Copyright Act of 1976.[11] Instead, it was Siegel's surviving heirs who

1. Siegel v. Warner Bros. Entm't, 542 F. Supp. 2d 1098, 1102 (C.D. Cal. 2008); *see also* JENNIFER K. STULLER, INK-STAINED AMAZONS AND CINEMATIC WARRIORS: SUPERWOMEN IN MODERN MYTHOLOGY 13-14 (2010).

2. *See Siegel,* 542 F. Supp. at 1103-04.

3. *Id.* at 1104.

4. *Id.* at 1102.

5. *Id.*

6. *Id.* at 1105.

7. *Id.* at 1104.

8. *Id.* at 1107.

9. Edward E. Weiman et al., *Copyright Termination for Noncopyright Majors: An Overview of Termination Rights and Procedures*, 24 No. 8 INTELL. PROP. & TECH. L.J. 3, 4 (2012).

10. Bruce Lambert, *Joseph Shuster, Cartoonist, Dies; Co-Creator of 'Superman' was 78,* N.Y. TIMES (Aug. 3, 1992), http://www.nytimes.com/1992/08/03/arts/joseph-shuster-cartoonist-dies-co-creator-of-superman-was-78.html.

11. *See* 17 U.S.C. § 304(c) (2016) (provides the framework to terminate assignments made before 1978). Termination rights cause a reversion of copyright after assignment, which can be

brought suit to terminate the initial assignment made in 1938.[12] Complying with the statute, Siegel's heirs properly served notice of termination on Warner Brothers Entertainment ("Warner Brothers") in 1997.[13] However, litigation eventually ensued in 2004.[14]

While Siegel's heirs successfully terminated the 1938 assignment after four years of litigation, the result was only a partial victory.[15] The heirs recovered only the rights and interests to Superman within the United States,[16] but any of the rights or interests acquired by DC Comics, or later Warner Brothers, by exploitation in foreign nations were left undisturbed, as they are governed by each nation's own copyright law.[17] Therefore, Warner Brothers was not obligated to return its exploitation rights in territories outside of the U.S.[18]

This limitation of termination rights under U.S. copyright law is a frustration shared by many authors. In today's global market, the exploitation of intellectual property is not limited by jurisdiction, yet the law governing it is.[19] This conflict is problematic because when a U.S. author assigns his or her rights to a U.S. assignee, the author assigns the right to exploit the work outside of the U.S., which vests ownership in the assignee in whichever foreign territory it chooses to exploit the work.[20] Thus, the author cannot terminate his or her assignment to the assignee in those territories under U.S. copyright law.[21] While the assignee may be the owner of the author's work in foreign jurisdictions, this should not mean that the author has no redress.

In today's global market, U.S. authors are in need of a remedy that will allow them to regain the rights in and to their work on a

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exercised by the original author of a work. *Id.* Termination is further discussed below, see discussion *infra* Part II, Section A.

12. *Siegel,* 542 F. Supp. 2d at 1114.

13. *Id.*

14. *See id.*; *see also* JOE SERGI, THE LAW FOR COMIC BOOK CREATORS: ESSENTIAL CONCEPTS AND APPLICATIONS 206 (2015).

15. *See Siegel,* 542 F. Supp. 2d at 1142.

16. Michael Cieply, *Ruling Gives Heirs a Share of Superman Copyright,* N.Y. TIMES, Mar. 29, 2008, at C3.

17. *Siegel,* 542 F. Supp. 2d at 1141-42 (holding that the termination notice is not effective as to the remainder of the grant, that is, defendants' exploitation of the work abroad under the aegis of foreign copyright laws); *see also* 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 11.02[B][2] (2015) ("A grant of copyright 'throughout the world' is terminable only with respect to uses within the geographic limits of the United States.").

18. *See Siegel*, 542 F. Supp. 2d at 1142 (noting the right to termination leaves "undisturbed the original grantee or its successors in interest's rights arising under 'federal law.'") (citing 17 U.S.C. § 304(c)(6)(E) (2016)).

19. *See* 17 U.S.C. § 304(c)(6)(E) (2016).

20. Bill Gable, *Taking it Back*, L.A. LAWYER, June 2008, at 38.

21. *Id.* at 36.

global scale. Fortunately for such authors, many civil law nations, such as France, favor authorship over ownership,[22] which is a concept that presumptively supports an author of a work to assert his or her natural rights to reclaim ownership. While favoring authorship over ownership is at odds with U.S. copyright law, the principles of civil law and natural rights are in harmony with the underlying policy of copyright termination in the U.S.[23]

Part II of this article will first compare the development of copyright law in both common law and civil law nations. This will provide a better understanding of how the law in these two different classifications of nations has evolved to a point where the underlying policies allow for a limitation in one type of nation to be resolved by the other.

Parts III through V will then explain why civil law nations should apply U.S. copyright law to allow a U.S. author to recover his or her foreign rights when effectuating a termination in the U.S., and how the policies of civil law nations justify such application of U.S. copyright law in this context.

For purposes of simplicity, this article will closely analyze the developments and significant aspects of U.S. copyright law, exemplifying the traditional views of common law nations, and French copyright law, representing the civil law nations.

II. An Overview of Copyright Law and its Development in Common Law Nations and Civil Law Nations

A. Common Law Nations

The copyright laws of many common law nations, including the U.S., can trace its initial inception back to the Statute of Anne,[24] but for purposes of this article, our analysis will begin with the U.S. Constitution. The Copyright Clause authorizes Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times

22. *See* Paul Goldstein & Bernt Hugenholtz, International Copyright: Principles, Law, and Practice 20-21 (3d ed. 2013).

23. Congress gave the author the right to regain copyright because the author's initial bargaining power may have been "weak." *See* Adam R Blankenheimer, *Of Rights and Men: The Re-Alienability of Termination of Transfer Rights in Penguin Group v. Steinbeck*, 24 Berkley Tech. L.J. 321, 321 (2009).

24. The Statute of Anne was enacted in 1710 by the English Parliament, which imposed limits on its copyright term and provided the framework for U.S. Copyright Law. *See* Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 84 J. Pat. & Trademark Off. Soc'y 909, 914-19 (2002); Lionel Bently et al., *Emerging Divergences in the Common Law of Intellectual Property*, *in* The Common Law of Intellectual Property: Essays in Honour of Professor David Vaver 3 (Catherine W. Ng et al. eds., 2010).

to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[25] This single sentence is the foundation of U.S. copyright law, from which all subsequent law is derived.

The Founding Fathers could never have fathomed today's global market, but wisely authorized Congress to amend the law as authors' needs developed.[26] U.S. copyright law has been amended numerous times since its inception in the Constitution,[27] each time addressing newer needs of authors. The Copyright Act of 1790 first introduced copyright laws in the U.S.,[28] providing authors with a fourteen-year term of protection upon registration,[29] which could be renewed for another fourteen years.[30] Later, in the Copyright Act of 1909, the two fourteen-year terms were extended to two twenty-eight-year terms.[31]

However, the most significant revision to U.S. copyright law occurred in the Copyright Act of 1976. This Act drastically changed copyright law by: (i) extending the term of copyright to life of the author, plus an additional fifty years (and later expanded to seventy years in 1998);[32] and (ii) granting the author the ability to terminate an earlier assignment of copyright by complying with the statutory requirements.[33]

These two changes afforded authors more protection in and to their works than they had ever been given before. By granting such an extended term, authors would never live to see their work enter the public domain, and thus, allowing the author to exploit the work throughout his or her lifetime, and even beyond. Of course, this extension of the copyright term would not hold much value for the authors who had assigned the rights in and to their works if Congress did not also provide them the ability to terminate their earlier assignments.

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25. U.S. CONST. art. I, § 8, cl. 8. "Authors" and "Writings" apply to copyright owners, while "Inventors" and "Discoveries" apply to patent owners, s*ee* Gregory Troxell, *Copyright Reform and the Author's Right to "Vend": The Case of the Unpaid Manufacturer*, 10 IND. L. REV. 507, 519 (1976); *see also What are Patents, Trademarks, and Copyrights*, DOCIE INVENTION & PAT. MARKETING, http://www.docie.com/patenting-help/what-are-patents-trademarks-and-copyrights/ (last visited Feb. 25, 2017).

26. *See* Eldred v. Ashcroft, 537 U.S. 186, 204 (2003).

27. James Marion, *An Act for the Encouragement of Learning – Copyright Law Then and Now*, 41 S.F. ATT'Y 42, 44 (2015).

28. *Id.* at 43; Copyright Act of 1790, ch. 15, 1 Stat. 124 (repealed 1802).

29. Copyright Act of 1790; Ochoa, *supra* note 24, at 914.

30. Copyright Act of 1790; *See also Eldred* 537 U.S. at 246; Ochoa, *supra* note 24, at 915.

31. Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075, 1080 (1909) (repealed 1976).

32. Copyright Act of 1976, 17 U.S.C. § 302(a) (2012). This applies to works created on or after January 1, 1978. *Id.* However, the applicable term for works created on or before December 31, 1977 is different. 17 U.S.C. § 304(c)-(d).

33. 17 U.S.C. § 203.

Termination signifies a radical departure from traditional U.S. copyright law because the U.S. places a higher value on the economic right of a copyright than the moral rights of authors.[34] With the termination right, Congress expressly protected the author's integrity and work to his or her assignee's detriment. For the first time in U.S. copyright law, Congress recognized the author's disparities in initial bargaining power with his or her assignee, and sought to undermine the assignee's economic interest, thus allowing the interest of authors—as the work's originators—to prevail.

B. Civil Law Nations

The majority of the world's nations have adopted the civil law system.[35] Therefore, a number of bodies of law could be analyzed in this article. However, because no nation is as passionate about, nor has a more robust body of law defining moral rights than France,[36] this article examines France's *droit d'auteur*, or "author's rights"[37] for comparison.

Prior to the French Revolution (the "Revolution"), France's copyright law favored authors' economic rights over their moral rights.[38] During this time, the king would selectively grant authors copyright protection.[39] This was just one way in which the king's centralized powers enraged the French people and ultimately led to the Revolution.[40] When the Revolution began, revolutionaries sought to destroy all symbols of the former monarchy, "including cultural and artistic

34. *See* Mira T. Sundara Rajan, *The Tradition and Change: The Past and Future of Author's Moral Rights*, *in* INTELLECTUAL PROPERTY IN COMMON LAW AND CIVIL LAW 123, 137-38 (Toshiko Takenaka ed., 2013); *see also* Brandi L. Holland, *Moral Rights Protection in the United States and the Effect of the Family Entertainment and Copyright Act of 2005 on U.S. International Obligations*, 39 VAND. J. TRANSNAT'L L. 217, 230-31 (2006).

35. *The World Factbook: Legal Systems,* C.I.A., *available at* https://www.cia.gov/library/publications/the-world-factbook/docs/notesanddefs.html?fieldkey=2100&term=Legal%20system (last visited Mar. 8, 2017) (noting that approximately 80 countries apply common law and 150 countries apply civil law "in various forms").

36. Rajan, *supra* note 34, at 53 (noting that French law contains "one of the most comprehensive sets of provisions on moral rights in the world.").

37. Jean-Luc Piotraut, *An Authors' Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared*, 24 CARDOZO ARTS & ENT. L.J. 549, 551 (2006); Droit d'auter consists of authorial rights, as well as moral rights (droit moral). *Id.* at 554-55.

38. *See* Christine L. Chinni, *Droit D'auteur Versus the Economics of Copyright: Implications for American Law of Accession to the Berne Convention*, 14 W. NEW ENG. L. REV. 145, 149 (1992).

39. Calvin D. Peeler, *From the Providence of Kings to Copyrighted Things (And French Moral Rights)*, 9 IND. INT'L & COMP. L. REV. 423, 428 (1999).

40. *Id.*

property."[41] In response, a new cultural awareness of national heritage spread to prevent the destruction of art.[42] This new policy focused on the author of the work, rather than just the work itself.[43]

In 1793, after the Revolution, France enacted its first copyright laws,[44] which were likely influenced by and modeled after both the English Statute of Anne and the more contemporary U.S. Copyright Act of 1790.[45] Despite the movement to protect authors' rights during the Revolution, early post-Revolution French copyright law still favored economic rights over moral rights.[46] Although an author's moral rights were not yet highly regarded under France's early copyright laws, its significance would emerge, not statutorily, but within the French court system.[47] Because moral rights developed through the court system, they would continually be redefined and reinterpreted by recurring arguments based on public policy as to the proper function and purpose of copyright protection.[48] Thus, the law grew as "social concerns about ethics and justice" evolved.[49] While French courts freely interpreted moral rights issues as they arose, this was not problematic, as the post-Revolution French "rulers found a different relationship with culture than their predecessors."[50] This relationship differed from the past as it considered art to glorify the nation and that its creative elements were part of the author as the art's originator.[51]

The policies that shaped moral rights developed throughout the nineteenth and twentieth centuries and were eventually codified in 1957 through the parliament's ratification of France's most recent copyright act.[52] The most significant aspect of France's codification of moral rights is its recognition that "[a]uthorship is the foundation of copyright law,"[53] distinctively separating it from its economic right

41. *Id.*

42. *Id.* at 429.

43. *See* Joseph L. Sax, *Heritage Preservation as a Public Duty: The Abbe Gregoire and the Origins of an Idea*, 88 MICH. L. REV. 1142, 1155-56 (1990).

44. STINA TEILMANN-LOCK, BRITISH AND FRENCH COPYRIGHT: A HISTORICAL STUDY OF AESTHETIC IMPLICATIONS 32-33 (2009).

45. Peeler, *supra* note 39, at 429.

46. *See* Chinni, *supra* note 38, at 151.

47. Peeler, *supra* note 39, at 432.

48. *Id.*

49. *Id.*

50. *Id.* at 449.

51. *Id.* at 448.

52. Chinni, *supra* note 38, at 152.

53. Rajan, *supra* note 34, at 123.

protections.[54] Moral rights are concerned with an author's reputation but frequently overlap with economic rights, which relate to matters of exploitation.[55] In France, moral rights are so revered that they are "perpetual, inalienable, and imprescriptible,"[56] whereas the economic right is subject to a limited term.[57]

Despite the fact that French copyright law is now codified, French courts continue to facilitate the development of moral rights laws, much like they did during the nineteenth century.[58] Because every case that comes before the court is unique, the court may expand upon the law beyond the legislature's initial intent to invoke public policy, and further, to consider any philosophical or political argument by any litigant, or of its own volition.[59] Because France safeguards authors by consistently providing them various remedies, it "continue[s] to exert cultural domination in the arts."[60]

C. Reconciling Two Competing Ideologies in a Global Market

As demonstrated by the foregoing, modern U.S. and French policies regarding copyright law are drastically different. The U.S. emphasizes ownership more than it does authorship, while France, conversely, emphasizes authorship over ownership.[61] While these differences are at odds with each other, this is a benefit to the U.S. author.

While U.S. copyright law does not apply extraterritorially,[62] France "extend[s] moral rights to all authors regardless of a treaty point of attachment."[63] For U.S. authors who are restricted from regaining the foreign rights in and to their works under U.S. copyright law, the extraterritorial application of moral rights allows them to assert their rights not just in France, but in various other civil law nations as well.[64] In the European Union alone, the harmonization of copyright law has accelerated the convergence between economic and

54. *See* Peeler, *supra* note 39, at 423.

55. *Id.* at 434-35.

56. CODE DE LA PROPRIÉTÉ INTELLECTUELLE art. L121-1 (Fr.) (consolidated June 20, 2008).

57. Piotraut, *supra* note 37, at 612.

58. Peeler, *supra* note 39, at 454.

59. *Id.*

60. *Id.* at 455.

61. Piotraut, *supra* note 37, at 551.

62. Subafilms, Ltd. v. MGM-Pathe Commc'ns Co., 24 F.3d 1088, 1098-99 (9th Cir. 1994); Armstrong v. Virgin Record, Ltd., 91 F. Supp. 2d 628, 632 (S.D.N.Y. 2000).

63. GOLDSTEIN & HUGENHOLTZ, *supra* note 22, at 365-66.

64. *See id.*

moral rights.[65] With France being a forerunner in the continuing development of moral rights, many other nations are likely to follow in its place, which may allow U.S. authors to regain their rights in various territories.

D. The Berne Convention: An International Agreement to Protect Authors' Rights Throughout the World

While there is no international copyright law per se, there are multiple treaties and agreements to which many nations are signatories. The most significant of these agreements is the Berne Convention for the Protection of Literary and Artistic Works ("Berne").[66] Berne, which went into effect in 1886,[67] can trace its origins back to 1852, when, coincidentally, French legislation sought to establish universal copyright law through the invocation of natural rights.[68] With consideration of natural rights, Berne laid out many terms of protection and national reciprocity by establishing "minimum standards"[69] for its signatory nations to abide by.[70] Berne made protection available to authors who were "nationals" of signatory countries, whether their work was published in other countries or not.[71]

When Berne went into effect in 1886, Europe's most powerful nations such as France, Germany, and the United Kingdom committed to its obligations.[72] The U.S. was the most commercially significant country to refuse adherence to Berne. Although throughout its history the U.S. has entered into a series of bilateral copyright agreements on a country-by-country basis, it evaded adherence until 1989: 103 years after some of the world's most significant, and today's most economically important nations had joined.[73] The implications of the U.S. joining Berne are significant, as it affords U.S. authors the ability to substantively gain more rights in signatory nations, allowing them to assert more of their rights abroad.[74]

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65. *Id.* at 21.

66. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 331 U.N.T.S. 217.

67. *Id.*

68. GOLDSTEIN & HUGENHOLTZ, *supra* note 22, at 34.

69. ANTHONY D'AMATO & DORIS ESTELLE LONG, INTERNATIONAL INTELLECTUAL PROPERTY ANTHOLOGY 225 (1996).

70. *Id.*

71. GOLDSTEIN & HUGENHOLTZ, *supra* note 22, at 36.

72. SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986, at 79 (1987).

73. GOLDSTEIN & HUGENHOLTZ, *supra* note 22, at 38.

74. *See id.* at 38-39.

While Berne sets universal standards for its signatories to adhere to, its signatories are free to interpret its provisions with some freedom.[75] As is inevitable in international copyright disputes, where national sovereignty is monumental, choice of law conflicts are likely to arise. However, Article 5(2) of Berne provides some guidance as to what to do when a national of one nation seeks redress in another. Article 5(2) provides: "the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed."[76] While this language appears to preclude an author from asserting his or her rights under U.S. copyright law extraterritorially, Berne is in fact silent as to "questions of authorship, initial ownership, and transfers of ownership,"[77] which provides U.S. authors with the basis to pursue U.S. termination in such an instance.

With Berne being silent as to issues of transfers of ownership, a French court is free to apply whichever law it sees fit to govern instances where a U.S. author seeks to terminate an earlier assignment, and his or her assignee has exploited the copyright in France.[78] Therefore, a U.S. author would not be prohibited by Berne from extraterritorial application of U.S. termination in France. In fact, Berne's silence on transfers of ownership may have been intended to grant individual nations such freedom to determine how they are to proceed in an ever-changing global market. While it is ultimately up to a French court to decide which law may govern in such an instance, without any regulation to the contrary, and in consideration of other arguments, which shall be made below, U.S. termination could conceivably be applied in France to allow a U.S. author to regain his or her French rights.

III. La Société des Auteurs des arts visuels et de l'Image Fixe (SAIF) v. Google:[79] U.S. Copyright Law Makes its Way into French Civil Court

A French Civil Court recently addressed a copyright infringement claim under a framework analogous to a termination of assignment in

75. Sam Ricketson & Jane C. Ginsburg, International Copyright and Neighbouring Rights: The Berne Convention and Beyond 1297 (2d ed. 2006).

76. Berne Convention for the Protection of Literary and Artistic Works art. 5(2), Sept. 9, 1886, 331 U.N.T.S. 217.

77. Ricketson & Ginsburg, *supra* note 75, at 1299.

78. *See id.*

79. Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, 3e ch., May 20, 2008, 05/12117 (Fr.).

a global market.[80] However, the issue arose in the context of the internet, which is another prime example of how the exploitation of copyright is not limited to a single jurisdiction. What began as a French lawsuit quickly developed into a case of international copyright law and eventually made the U.S. internet pioneer corporation, Google, a party.

In 2005, the French artists' society, SAIF, a collective organization that represents visual artists,[81] alleged that the websites google.fr and images.google.fr had infringed its members' copyrights by displaying various thumbnail images as search results.[82] Through its search engines, Google located online images and downloaded copies into its database.[83] SAIF alleged that the process violated its members' exclusive rights, specifically those of reproduction and display.[84]

In turn, Google argued that the French Civil Court ought to apply U.S. copyright law—specifically, the fair use doctrine.[85] Under the fair use doctrine, a defendant admits to an unauthorized use of a copyrighted work, but claims defense against such alleged copyright infringement "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."[86] In order to prevail, the defendant must argue that the four factors the court must consider tip in favor of the use being "fair" and not an infringement.[87] Interestingly, Google argued that such an application of U.S. copyright law was justified under Article 5(2) of the Berne Convention.[88]

When the case went to trial in 2008, the Paris Civil Court agreed with Google and applied U.S. copyright law.[89] The Civil Court "noted that the Berne Convention did in fact control [its] choice of law analysis."[90] It then looked to the Court of Cassation,[91] which "had interpreted the Berne Convention to require the application of the

80. *See id.*

81. *La Saif, Societe des Auteurs des artes visuels et de l'Image Fixe*, SAIF.Fr, https://www.saif.fr/spip.php?page=saif2&id_article=90 (last visited Mar. 8, 2017).

82. Kate Spelman & Brent Caslin, *La Societe des Auteurs des arts visuels et de l'Image Fixe (SAIF) v. Google: A Parisian Story of the Berne Convention and Online Infringement Claims*, 19 Cal. Int'l L.J. 3 (2011) ("'Thumbnail' images are typically small, low-resolution reproductions of full-sized images.").

83. TGI, Paris, 3e ch., May 20, 2008, 05/12117 (Fr.).

84. *Id.*

85. *Id.*; *see also* 17 U.S.C. § 107 (2012).

86. 17 U.S.C. § 107 (2012).

87. *See id.*

88. TGI, Paris, 3e ch., May 20, 2008, 05/12117 (Fr.); *see supra* Part II.D.

89. *Id.*

90. *Id.*; Spelman & Caslin, *supra* note 82, at 5.

country's law in which the harm was produced."[92] Since the alleged harm was generated by Google's search engine at its headquarters in California, the court reasoned that U.S. copyright law ought to govern such an alleged case of infringement.[93]

The Civil Court compared Google's operation to that of a dictionary, which warranted application of the fair use doctrine.[94] The Civil Court then went through the four steps of a fair use doctrine analysis and found such use to be "fair."[95] This decision not only applied U.S. copyright law extraterritorially, but also expanded the holding of a prior U.S. fair use doctrine case,[96] which was applied extraterritorially by way of the Berne Convention.[97]

This is a very significant outcome for the French courts and a very promising achievement for hopeful U.S. authors who wish to apply U.S. termination provisions extraterritorially. While the defense of fair use is quite distinct from the right to terminate an earlier assignment, the application of any U.S. provision in France raises hope that an author can assert his or her natural rights as the author to regain ownership in his or her works abroad. One must also consider the context of this decision with how termination may be treated even more favorably. Copyright infringement and the fair use defense are primarily concerned with the economic right (i.e., that of reproduction and display) in a copyright,[98] whereas the right of termination encompasses both the economic right as well as the author's moral right.[99]

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91. The Court of Cassation is France's highest court. SPELMAN & CASLIN, *supra* note 82, at 5.

92. *Id.* (emphasis in original).

93. TGI, Paris, 3e ch., May 20, 2008, 05/12117 (Fr.).

94. *Id.* "The court analogized Google to a dictionary or directory providing cost-free and universal access to information, and thus deserving of the 'fair use' protection." SPELMAN & CASLIN, *supra* note 82, at 5.

95. TGI, Paris, 3e ch., May 20, 2008, 05/12117 (Fr.); SPELMAN & CASLIN, *supra* note 82, at 5.

96. Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1176 (9th Cir. 2007). The Ninth Circuit Court of Appeals found that "the copying function performed automatically by a user's computer to assist in accessing the Internet is a transformative use. Moreover, . . . a cache copies no more than is necessary to assist the user in Internet use . . . Such automatic background copying has no more than a minimal effect on Perfect 10's rights, but a considerable public benefit." Thus, the four fair use factors weighed in favor of a fair use. *Id.* at 1147, 1169-70, 1176-77.

97. SPELMAN & CASLIN, *supra* note 82, at 5.

98. *See* 17 U.S.C. § 107 (2016).

99. *See* Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L. J. 347, 393-97 (1993); *see also*, Michael H. Davis, *The Screenwriter's Indestructible Right to Terminate Her Assignment of Copyright: Once a Story is "Pitched," a Studio Can Never Obtain All Copyrights in the Story*, 18 CARDOZO ARTS & ENT. L. J. 93, 106-07, 106 n.75 (2000). *See generally* Jill R. Applebaum, *The Visual Arts Rights*

French courts favor the author's moral right over the economic right,[100] and when considering this, they may be more inclined to apply U.S. copyright law than the court in *SAIF*.

While this was a major victory justifying the application of U.S. copyright law abroad, it must be noted that SAIF appealed this decision to the Paris Court of Appeals, where the decision was overturned.[101] Google still prevailed over SAIF, but the Paris Court of Appeals applied a French variation of fair use[102] instead of the U.S. fair use doctrine.[103] While this foreclosed Google's pursuit of applying U.S. copyright law in France, this is only so because France has its own equivalent protections to uphold Google's defense.[104] Unlike fair use, France does not have an equivalent legal protection that could supplant U.S. termination. The concept is unique to the U.S. and no equivalent legal remedy exists in French copyright law.

SAIF demonstrates the willingness of France's Civil Court to apply U.S. copyright law and what may happen when France has its own equivalent legal remedy. However, it is still unknown what may happen when the Paris Court of Appeal is faced with a claim to which no French copyright law could sufficiently supplant U.S. termination. Fortunately for U.S. authors, France's legal system operates very differently than the U.S. legal system. Whereas the U.S. abides by *stare decisis*, France does not.[105] French case law still develops much like its law of moral rights developed prior to its codification in 1957.[106] It is developed by judges who seldom cite case precedent.[107] This inconsistency benefits U.S. authors because no French court is bound by an-

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Act of 1990: An Analysis Based on the French Droit Moral, 8 AM. U. J. INT'L & POL'Y 183 (1992) (analyzing the Visual Artists Rights Act of 1990 based on the French doctrine of moral rights).

100. *See* Applebaum, *supra* note 99, at 186-87.

101. Cour d'appel [CA] [regional court of appeal] Paris, 1e ch., Jan. 26, 2011, 08/13423; SPELMAN & CASLIN, *supra* note 82, at 5.

102. CA, Paris, 1e ch., Jan. 26, 2011, 08/13423. The Appeals Court found that since the alleged harm was sustained in France, French law should apply. *Id.*; SPELMAN & CASLIN, *supra* note 82, at 5. Thus, the court held that "Google [was] not liable for copyright infringement under the Law on Confidence in the Digital Economy (*Loi sur la Confiance dans l'Economie Numerique*, or 'LCEN'), which governs internet actors absent a more specific statute." CA, Paris 1e ch., Jan. 26, 2011, 08/13423; SPELMAN & CASLIN, *supra* note 82, at 5.

103. CA, Paris, 1e ch., Jan. 26, 2011, 08/13423.

104. *See* Zohar Efroni, *Who Said France Does Not Have Fair Use?*, STAN. L. SCH. CTR. FOR INTERNET & SOC'Y (Jan. 28, 2011, 3:41 AM), http://cyberlaw.stanford.edu/blog/2011/01/who-said-france-does-not-have-fair-use.

105. WILLIAM L. BURDICK, THE BENCH AND BAR OF OTHER LANDS 228 (1939).

106. *See* Peeler, *supra* note 39, at 432.

107. BURDICK, *supra* note 105, at 228.

other, and when such a unique concept such as U.S. termination is brought before it, the application of U.S. copyright law can prevail.

While the uncertainty of a ruling in France may be a drawback for a U.S. author, there exist contractual remedies, which the author may argue and use to support the application of U.S. copyright law to effectuate a termination of assignment in France, in the event a French court would not be so willing to apply more U.S. copyright law than it already has.[108]

IV. *Lex Contractus*: When the Contract Effectuating an Assignment Selects the Applicable Law

Under U.S. copyright law, an assignment of copyright is ineffective unless it is done in writing.[109] As many copyright professors have emphasized when explaining the concept of assignment, the writing effectuating such assignment need not be complex.[110] All that is required is a simple writing, and no matter how simple it may be, the assignor and assignee are left with a fully binding contract of assignment.[111]

While only a simple writing is required, this is rarely the case. In many instances (particularly in an entertainment context), an assignment of copyright is usually a part of a much larger contract. Because of the complexities of these types of contracts and the many possible legal scenarios that could potentially arise from entering into such a contract, the parties always designate an applicable law to govern a dispute if and when it arises. This "choice of law" provision is commonly referred to as the "*lex contractus*."[112] Several states' laws could be applied, but in many instances (particularly in an entertainment context), the most popular laws are California and New York. While there may not always be an explicit reference to federal law, federal copyright law preempts state copyright law[113] (which is almost nonexistent), and is therefore implicitly acknowledged to govern any copyright dispute that may arise.

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108. *See* Andre Lucas, UNESCO Copyright Bulletin, Applicable law in Copyright Infringement Cases in the Digital Environment 1, 6-9 (Oct.-Dec. 2005), http://portal.unesco.org/culture/en/files/29336/11338009191lucas_en.pdf/lucas_en.pdf.

109. 17 U.S.C. § 204(a) (2012).

110. *See* Jay Dratler Jr. & Stephen M. McJohn, Licensing of Intellectual Property 8-9 (2014) (citing Effects Assocs., Inc. v. Cohen, 908 F.2d 555, 557 (9th Cir. 1990)).

111. *See id.*

112. Ricketson & Ginsburg, *supra* note 75, at 1324.

113. 17 U.S.C. § 301 (2012).

The nations of the European Union, including France, are signatories to the Rome I Regulation ("Rome I"),[114] which allows parties to choose the law that will govern all or part of a contract, expressly or implicitly, so long as it is "clearly demonstrated by the terms of the contract or the circumstances of the case."[115] To be effective, the court must first determine whether the rights have been legitimately acquired in the source country.[116] Once this has been determined, the court will then consult the choice of law designated in the contract and determine whether the scope of assignment should be narrowed using local laws.[117] The court will then consider the parties' intentions, whether it be expressed or implied, and apply the law of the nation that has the closest relationship with the contract.[118] Public policy will also be a consideration of the court.[119]

Returning to the entertainment contract discussed above, one can see how a French court may rule when considering a choice of law clause in the context between a U.S. author and a U.S. assignee. The court would first look to the contract that assigns the author's rights to the assignee. Upon reading the contract, the court will see that the assignee has legitimately acquired the author's rights in the source country (for our purposes, the U.S.). The court will then see a choice of law that is "clearly demonstrated by the terms of the contract."[120] Whether the contract selects the laws of New York or California to govern, the court will see that the two U.S. parties entered into a contract granting the assignee the rights to exploit the author's rights internationally and that the parties have mutually agreed upon a specific set of U.S. laws to govern any dispute that may arise from such exploitation. The court might also elect to narrow the scope of assignment using local laws, if determined necessary.

Following a thorough consideration of the contract, the court will then consider public policy. Public policy and its connection to the author's moral rights is really the heart and soul of any argument for the extraterritorial application of U.S. copyright law, whether a party

114. Regulation (EC) No. 593/2008 of the European Parliament and the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), art. 3, 2008 O.J. (L 177) 1, 2 [hereinafter Rome I].

115. *Id.*

116. Ricketson & Ginsburg, *supra* note 75, at 1324.

117. *Id.*

118. *Id.*

119. *Id.* at 1325.

120. Rome I, *supra* note 114, art. 3.

brings suit insisting upon its application like Google did in *SAIF* above, or relying on the parties' mutual assent in the contract.

V. *ORDRE PUBLIC* – FRANCE'S PUBLIC POLICY IS IN HARMONY WITH THE UNDERLYING REASONING FOR U.S. TERMINATION OF ASSIGNMENTS

Both of the arguments made in Parts III and IV provide ample support to a U.S. author who is seeking to apply U.S. termination provisions extraterritorially. Whether the author insists upon the application of U.S. copyright law without reference to a contract, or solely looks to the contract of assignment for its application, doing so without other support for such application may not persuade a French court. As previously mentioned, French courts do not abide by *stare decisis*[121] and may not be so willing to consider the ruling of *SAIF*. Further, courts may very well decide to extend Article 5(2) of the Berne Convention to assignments of copyright,[122] which would mean that French copyright law would govern and the author's attempt to implement U.S. copyright law in France would come to a rather abrupt halt. Nevertheless, while an author could rely on the legal principle of *lex contractus* to identify the U.S. as the country with the closest connection to the contract to justify the application of U.S. copyright law, a French court could decide that its laws better suit the claim brought against the assignee.[123] Therefore, neither claim on its own may be enough to persuade a French court to apply U.S. copyright law.

What a U.S. author needs is support from French law itself; a justification that would compel a French court to realize that its laws are not a valid substitute for U.S. copyright law in this particular instance and that the public policy of French copyright law, in terms of an author's rights, justifies this application. The Court of Cassation has stressed the principle of public policy in recent years, applying it in both domestic and international cases.[124] Public policy strengthens the moral right by indicating that it is a right that "upholds fundamental values of society."[125]

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121. *See* BURDICK, *supra* note 105, at 228.

122. *See* RICKETSON & GINSBURG, *supra* note 75, at 1299.

123. *See id.* at 1325.

124. ELIZABETH ADENEY, THE MORAL RIGHTS OF AUTHORS AND PERFORMERS: AN INTERNATIONAL AND COMPARATIVE ANALYSIS 171 (2006).

125. *Id.* ¶ 8.28.

As previously noted, French law developed and continues to develop through judge-made decisions, growing more sensitive to the author throughout time.[126] The French also revere the author's moral rights over his or her economic rights.[127] What is interesting to note is that the author's rights and needs have not independently changed significantly since the French Revolution. What has changed is the drastic exploitation of the economic rights of a copyright due to the globalization of the world economy. The author's rights and needs have only had to adapt due to the global focus of copyright exploitation.[128] Such rights and needs have developed throughout time and France's strong and protective measures to remedy an author are ready to embrace another nation's copyright law to better protect the author in a global economy.

A French court must first look to the U.S. termination provisions and understand its underlying policy before it can proceed. Upon doing so, it will see that while there is definitely an economic component attached to the right of termination,[129] the reason for doing so lies much deeper. The reason for termination is to "give the author a second bite at the apple," and allow the author to renegotiate a possible extension of the initial assignment based on the actual worth of the copyright.[130] However, one must also consider the legislative intent for granting the author such a right. The right is more author-centric than it is economic-centric by going so far as to provide an author the right to overcome the economic interest of its assignee;[131] a principle France is familiar with.

A. The Right of Withdrawal

Considering the underlying legislative intent behind U.S. termination rights, a French court can compare such a right with its own moral right of withdrawal. The French moral right of withdrawal may actually be the least understood moral right, as there is very little case law to flesh out its real meaning or to define its scope,[132] in turn, allowing a U.S. author to make a creative argument to establish a parallel with termination. The right of withdrawal allows the author to

126. Peeler, *supra* note 39, at 432.

127. *See* GOLDSTEIN & HUGENHOLTZ, *supra* note 22, at 20; *see also* Peeler, *supra* note 39, at 428.

128. *See* GOLDSTEIN & HUGENHOLTZ, *supra* note 22, at 96.

129. *Id.* at 85, 152-53.

130. *See* Blankenheimer, *supra* note 23, at 321.

131. ADENEY, *supra* note 124, at 195.

132. *Id.*

reconsider the work even after its economic rights have been assigned to and exploited by another.[133] Essentially, it allows the author to end exploitation or utilization of the work,[134] and may even be exercised after publication of the work.[135]

Notably, the right of withdrawal may also override a contract formed for purposes of exploitation.[136] Additionally, since French law "does not indicate a proper choice of law in relation to the rights of [ ] withdrawal,"[137] it may even be open to the application of U.S. termination when supported by a choice of law provision already agreed upon by the parties in the contract of assignment.

While it is a moral right of the author to overcome an economic right of the assignee by withdrawing their work, the assignee is not without redress, as the assignee is provided more safeguards than under the right of termination.[138] Whereas under U.S. copyright law, an author owes no compensation to the assignee, nor does he or she even have to renegotiate an extension of assignment, the French moral right of withdrawal causes the author to indemnify the assignee of the economic interest for such a disruption in the exploitation of the work.[139]

When considering the implications of applying U.S. termination and seeing that it affords U.S. authors a greater right than its own right of withdrawal, a French court may be more interested in expanding upon the principles of U.S. termination to assist U.S. authors in the global marketplace, simply because of the similar underlying policies of termination and withdrawal.

B. Reciprocity

The concept of reciprocity is extremely important in a global market where various nations are engaged in trade and therefore, a great number of individual nation's laws could apply.[140] Reciprocity empha-

133. *Id.*; D'AMATO & LONG, *supra* note 69, at 121. The Right of withdrawal may only be exercised by the author against his or her assignee. ADENEY, *supra* note 124, at 195.

134. D'AMATO & LONG, *supra* note 69, at 121.

135. Peeler, *supra* note 39, at 427.

136. ADENEY, *supra* note 124, at 196.

137. *Id.* at 671. It should be noted that because the right of withdrawal is so closely associated with an assignment of economic rights in a work, no indication of a proper choice of law in an international dispute could very well be attributable to the absence of assignments from the Berne Convention. *See* RICKETSON & GINSBURG, *supra* note 75, at 1299.

138. *See* D'AMATO & LONG, *supra* note 69, at 415.

139. *See* ADENEY, *supra* note 124, at 196.

140. Francesco Parisi & Nita Ghei, *The Role of Reciprocity in International Law*, 36 CORNELL INT'L L.J. 93, 94 (2003).

sizes one nation's specific behavior towards another nation who is also expected to exhibit a particular behavior in a similar instance.[141] Reciprocity promotes cooperation between nations by incentivizing each other to behave cordially in expectations for reciprocal treatment.[142]

Due to its implications, reciprocity has become imperative between various nations with respect to international legal disputes.[143] Such a relationship is meant to discourage opportunistic action.[144] The concept of reciprocity is not limited to instances of trade, and courts are free to consider the application of another nation's laws when adjudicating a dispute.

A French court should be willing to apply U.S. copyright law because of the U.S. Seventh Circuit Court of Appeal's application of French law in *Bodum, USA, Inc. v. La Cafetiere, Inc.*[145] In this case, the court was presented with a trademark dispute between Bodum, a French distributor of a successful French-press maker, and Household Articles Ltd. ("Household"), a British distributor of a French-press maker.[146] Household sold a French-press maker that had a striking similarity to Bodum's French-press maker.[147] Household wanted to continue selling their French-press makers and entered into negotiations with Bodum to do so.[148] The parties came to an agreement whereby "Household would never sell one of its French-press makers in France [and] that it could not use the trade names Chambord or Melior."[149]

Household continued its business and eventually established a distributor in the U.S., which prompted Bodum to file suit against Household under U.S. federal and state law for trade dress violation.[150] The parties agreed that the agreement would be interpreted using French law.[151] Therefore, the court referenced various sections of the French Civil Code and Commercial Code in reaching its conclu-

141. *See id.*

142. *See id.* at 95-96.

143. *Id.* at 106.

144. *Id.* at 94-97.

145. Bodum USA, Inc. v. La Cafetiere, Inc., 621 F.3d 624, 628 (7th Cir. 2010).

146. *Id.* at 625.

147. *Id.* at 626.

148. *Id.* at 625.

149. *Id.*

150. *Id.* at 625-26. Trade dress is a "form of trademark;" it is a product's "distinctive appearance that enables consumers to identify a product's maker." *Id.* at 626.

151. *Id.* at 628.

sion.[152] By doing so, the court honored the agreement's choice of law provision, resolving this dispute under French law.[153]

While the court was silent as to its decision to apply French law, it may be presumed that it was due to the parties' mutual assent in their initial agreement that French law was to govern any and all disputes. The significance of this decision sets a precedent and encourages French courts to apply U.S. law when U.S. authors come before it and present a contract entered into under U.S. law with the intention that it be the sole law to govern a dispute, very much like it would in the entertainment contract discussed in Part IV.

While trademark law and copyright law are distinct areas of intellectual property, they are similar enough to justify that where a U.S. court decides to apply French law in a trademark dispute, a French court ought to reciprocate and apply U.S. law in a copyright dispute. The matter really lies in the court's decision to respect the parties' intention to have a particular nation's law be the governing law, despite where the suit may be brought. Article 1156 of France's Civil Code provides that the parties' intention when entering into a contract ought to prevail over the written word.[154] This could only strengthen the instance where the parties have explicitly set out their intention in their contract and thus, the intention and written word of the contract would be in harmony, compelling the application of the law set forth in the contract, particularly when the underlying policy of U.S. termination is in harmony with French public policy.

VI. Conclusion

U.S. authors can overcome the territorial limitation of U.S. termination rights by demonstrating that its underlying policy is in harmony with the various policies of moral rights. Moral rights favor authorship over ownership,[155] justifying the application of U.S. termination in France. The underlying policy of the reversion of rights under U.S. termination is in harmony with the public policy of French moral rights. This policy recognizes reversion of U.S. rights as a quintessential right of an author that should prevail over any economic interest of an assignee and cause the author's rights to revert in France as well.

As demonstrated in Part II, The Berne Convention does not state which nation's laws ought to apply in the instance of copyright assign-

152. *Id.* at 628-30.
153. *See id.*
154. Code Civil [C. Civ.] art. 1156 (Fr.).
155. *See* Rajan, *supra* note 34, at 125.

ment.[156] This allows a U.S. author to argue that U.S. termination ought to apply extraterritorially because of its intrinsic association with assignment. Because U.S. termination is such a unique concept, France does not have a valid substitute that a U.S. author could argue in a French court. However, a U.S. author could argue for its application as Google did in *SAIF* and by comparing termination to the right of withdrawal. The similarities between the policies of both termination and the right of withdrawal could justify such an application of U.S. copyright law, particularly because no other remedy in France is so comparable as to supplant U.S. copyright law in such an instance. However, a French court can see that it recognizes a similar remedy (i.e., the right of withdrawal) in a slightly different context so that its courts would not be wholly unaware of the repercussions of applying U.S. termination.

Additionally, as demonstrated in Part IV, the choice of law of a contract would justify the application of U.S. termination in France, as it manifests the parties' true intent at the time they entered into the contract. By recognizing that a U.S. author assigned his or her rights to a U.S. assignee and that the parties agreed that U.S. law is to govern any dispute that may arise, a French court would be compelled to apply U.S. termination. Article 1156 of France's Civil Code would support the application of U.S. copyright law, as it is mostly concerned with the parties' intent.[157] A French court may be even more compelled to apply U.S. termination after recognizing the U.S.'s application of French law in *Bodum, USA, Inc. v. La Cafetiere, Inc.*, because of the parties' mutual assent as set forth in their agreement. France would be incentivized to behave cordially in hopes of further reciprocation by the U.S. in future instances.

While this article specifically addresses how a dispute ought to be resolved between the U.S. and France, it is also intended to provide a framework for the protection of authors of common law nations in civil law nations. As previously mentioned, France is a forerunner in the development of moral rights and the various nations of the European Union develop their copyright law to be in harmony with French copyright law.[158] Therefore, this position, if accepted and enacted, has the potential of substantively revising how business is conducted and how rights are evaluated on a worldwide basis.

156. *See* Ricketson & Ginsburg, *supra* note 75, at 1299.
157. Code Civil [C. Civ.] art. 1156 (Fr.).
158. Goldstein & Hugenholtz, *supra* note 22, at 19-21.

ACHIEVING THE COPYRIGHT EQUILIBRIUM: HOW FAIR USE LAW CAN PROTECT JAPANESE PARODY AND *DOJINSHI*

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I. INTRODUCTION

The film industry as a whole is without question an important contributor to the United States economy, given that its revenue comprises three percent of the country's GDP for goods and services.[1] With Hollywood films also serving as one of America's major exports, the U.S. film industry has a prominent presence throughout the world. Similarly, Japan considers the animation and manga (the Japanese term for comic books) industry as one of the important players in the Japanese economy.[2] Manga comprises around thirty percent of the Japanese printing industry[3] and over seventy percent of electronic book sales in Japan.[4] Popular animation series, often based on original manga, boost sales of character products in neighboring industries, including video games and action figures.[5] The Japanese anime and manga industry is a star player in the Japanese economy, just as the film industry is in the U.S.

Many Japanese believed that the industry was being threatened while Japan was negotiating to be part of the Trans-Pacific Partnership (TPP) agreement, a multilateral trade agreement signed by twelve Pacific Rim countries including the U.S. and Japan in October, 2015.[6] To comply with the agreement, Japan needed to enact a law allowing the Japanese police to file criminal copyright infringement complaints in cases of commercial copyright piracy without the copyright holder's

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1. *The Government Released Its First Official Measure of How Arts and Culture Affect the Economy*, HOLLYWOOD REP. (Dec. 5, 2013, 9:02 AM), http://www.hollywoodreporter.com/news/hollywood-creative-industries-add-504-662691.

2. *See* KEIZAI SANGYŌSHŌ [MINISTRY OF ECONOMY, TRADE AND INDUSTRY], BUNKA SANGYŌ RIKKOKU NI MUKETE [TOWARDS THE ESTABLISHMENT OF A STRONG PRESENCE IN THE CONTENT INDUSTRY] 6, 15-18, 22-23 (2010), http://www.meti.go.jp/policy/mono_info_service/mono/creative/bunkasangyou.pdf (Japan). The Ministry of Economy, Trade and Industry of Japan had adopted an unofficial slogan "Cool Japan" to express its commitment to promote Japan's soft power including the popularity of anime and manga contents both domestically and overseas. *See* Kazuaki Nagata, *Exporting Culture via "Cool Japan,"* JAPAN TIMES (May 15, 2012), http://www.japantimes.co.jp/news/2012/05/15/reference/exporting-culture-via-cool-japan/#.WJaGDtlrldU.

3. SHUPPAN KAGAKU KENKYŪJO & ZENKOKU SHUPPAN KYŌKAI, SHUPPAN SHIHYŌ NENPŌ [ANNUAL REPORT ON THE PUBLICATION MARKET] 222 (2016) (Japan).

4. *Id.* at 16.

5. *See* TZE-YUE HU, FRAMES OF ANIME CULTURE AND IMAGE BUILDING 113 (2010); Salil Mehra, *Copyright and Comics in Japan: Does Law Explain Why All the Cartoons My Kid Watches Are Japanese Imports?*, 55 RUTGERS L. REV. 155, 158 (2002).

6. William Mauldin, *U.S. Reaches Trans-Pacific Partnership Trade Deal with 11 Pacific Nations*, WALL ST. J. (Oct. 5, 2015, 5:12 PM), http://www.wsj.com/articles/u-s-reaches-trade-deal-with-11-pacific-nations-1444046867.

initiation.[7] Although one might think that copyright holders would welcome such a law, it created a unique problem within Japan's anime and manga industry. It has been argued that the manner by which the law defines the scope of piracy could affect the creation of parody works because Japan does not recognize parody as an exception to copyright infringement like many other countries, including the United States.[8] They feared that enforcement of such a law would discourage the creation of parodies in Japan,[9] which are often based on popular anime and manga series.[10] They further argued that because parody is believed to play an important role in Japan's anime and manga industry, this potential chilling effect on parody creations could undermine the success of the whole industry.[11] For that reason, many Japanese parody creators actively supported the idea to introduce a fair use provision that is modeled on U.S. fair use law.

However, their fear turned out to be unwarranted because the Cabinet Secretariat, when submitting the bill to amend the Japanese Copyright Act to the Japanese House of Representatives, specifically stated that the scope of piracy will not include secondary works such as Japanese parodies.[12] As a result, the argument to adopt fair use law was not brought up during the 190th session of the Diet, after which the bill was approved by the Cabinet.[13] Even though the newly created criminal copyright law might not significantly affect the creation of parody, the TPP agreement could still impose a negative effect because of its overly protective characteristics for copyright owners. For example, the agreement requires Japan to extend its copyright term from fifty years *post mortem auctoris* (p.m.a.) to seventy years p.m.a.[14] It also requires Japan to provide statutory damages to copyright in-

7. Trans-Pacific Partnership Agreement art. 18.77, *opened for signature* Feb. 4, 2016 [hereinafter TPP Agreement], https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text.

8. Mehra, *supra* note 5, at 175-76.

9. *Urgent Appeal on TPP Intellectual Property Provisions*, Japan Forum for the Intellectual Property Aspects and Transparency of TTP (last visited Feb. 9, 2017), http://thinktppip.jp/?page_id=713&lang=en.

10. Mehra, *supra* note 5, at 164.

11. *See* discussion *infra* Part II.A.

12. Naikaku Kanbō [Cabinet Secretariat], Kantaiheiyō Pâtonâshippu-Kyōtei no Teiketsu ni Tomonau Kankei-Hōritsu no Seibi ni Kansuru Hōritsu-an no Gaiyō [Summary of Bill for the Establishment of Relevant Laws to Accompany the Ratification of the Trans-Pacific Partnership], 3 (2016), http://www.cas.go.jp/jp/houan/160308/siryou1.pdf (Japan).

13. *Development of Copyright Protection Policies for Advanced Information and Communication Networks*, Copyright Res. & Info. Ctr. (Oct. 2016), http://www.cric.or.jp/english/csj/csj3.html.

14. *See* TPP Agreement, *supra* note 7, art. 18.63.

fringement,[15] which is known as a major cause behind increases in the number of copyright lawsuits and damages awarded.[16] Most problematic is that the Intellectual Property (IP) chapter of the agreement, primarily based on the U.S. proposal, omits important safe-harbor rules and exceptions that the U.S. Copyright Act makes available to individual defendants.[17] While these changes will certainly strengthen the protection for copyright owners, copyright protection should also take account of the public's interest in free access to preexisting works, as all creations employ preexisting materials to some extent.[18] If the access to preexisting works is unduly restricted, it would inhibit the overall creation of expressive works, including parodies.

Although the Trump Administration's withdrawal from the TPP made it less likely that the original agreement will stand between the remaining partner countries, it is still possible that the U.S. will attempt to impose a bilateral agreement against Japan that is similar to the TPP agreement in the future. In such a case, pro-copyright owner provisions of the TPP agreement could be included in the bilateral agreement, a possibility that Japan should not disregard. In the case where the TPP agreement takes effect in any form—whether through multi-lateral partnership or bilateral partnership, Japan should adopt a fair use provision modeled on U.S. fair use doctrine[19] in order to protect parody creations.[20]

A fair use provision will serve to maintain a balance between protecting the interests of copyright owners and allowing free access to existing copyrighted materials that encourages parody creations. In fact, prior to the entrance to the TPP agreement, Japan had considered the adoption of a fair use exception into its Copyright Act for

15. *See id.* art. 18.74.

16. *See, e.g.,* John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 549 (2007).

17. For more detailed discussion, *see* Jonathan Band, *The SOPA-TPP Nexus*, 28 AM. U. INT'L L. REV. 31, 58-62.

18. Glynn S. Lunney, Jr., *Reexamining Copyrights Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 572; *see also* Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 1006 (1970). *See generally* Mehra, *supra* note 5, at 179-80 (explaining that Japanese manga and anime artists often draw characters from Japan's collective heritage).

19. 17 U.S.C. § 107 (2012).

20. Although the United Kingdom's fair dealing doctrine is also a viable candidate for a copyright exception, this article exclusively focuses on the U.S. fair use doctrine because the scope of the fair dealing doctrine is more limited than that of the fair use doctrine. As explained *infra* Part II, many Japanese "parodies" fall outside the legal definition of a parody and will not likely fall within the fair dealing categories. *Compare* Copyright, Designs and Patents Act, 1988, c. 48, §§ 29-30 (U.K.) (fair dealing defenses) *with* 17 U.S.C. § 107 (2012) (fair use defense).

several years, though its efforts never came to fruition.[21] However, the enactment of the amended Japanese Copyright Act in response to entering into the TPP agreement, or an agreement similar to the TPP agreement, creates a viable opportunity for Japan to reconsider the option to adopt a fair use exception in order to achieve equilibrium between the protection for copyright owners and the public's need to access copyrighted materials for new creations. Faced with a similar need, South Korea, whose legal system in many ways parallels that of Japan, recently enacted a fair use provision almost identical to the U.S. fair use doctrine when it entered into a free trade agreement with the United States.[22] Given the nature of the TPP agreement, Japan should follow suit and adopt a U.S.-modeled fair use exception.

This article addresses both how and why Japan should adopt U.S. fair use doctrine in its Copyright Act to protect parodies. Part II provides background information of the development of, and the relationship between, Japanese parody and copyright law. Part III explains the four factors of the U.S. fair use doctrine codified in the U.S. Copyright Act and judicial application of that doctrine. Part IV proposes how Japan should transplant the U.S. fair use doctrine into its copyright law, followed by Part V which offers the conclusion.

II. Japanese Parody Deemed as Copyright Infringement in Japan

A. The Importance of Parody for the Japanese Culture

Japan has recognized the importance of intellectual property in recent years. With the increasing popularity of Japanese manga and anime overseas,[23] Japan has formally acknowledged both manga and anime as important industries, and has begun to focus on strategically promoting these goods to international markets.[24] One reason why Japanese anime and manga are popular, both within and outside of Japan, may be because unlike American cartoons and comic books,

21. *See* Bunka Shingikai Chosakuken Bunkakai (dai 41 kai) Gijiroku Haifushiryō [The Minutes of 41st Meeting for the Council for Cultural Affairs Copyright Subdivision], Agency for Cultural Affairs (last visited Feb. 9, 2017), http://www.bunka.go.jp/seisaku/bunkashingikai/chosakuken/bunkakai/41/index.html (discussing the necessity and feasibility to adopt a general copyright exception similar to American fair use doctrine).

22. Jeojakkwonbeop [Korean Copyright Act], Act. No. 3916, Dec. 31, 1986, art. 35-3, *amended by* Act. No. 11110, Dec. 2, 2011 (S. Kor.).

23. World Intellectual Prop. Org., *The Manga Phenomenon*, WIPO Mag. (Sept. 2011), http://www.wipo.int/wipo_magazine/en/2011/05/article_0003.html.

24. Roland Kelts, *Japan Spends Millions in Order to Be Cool*, Time (July 1, 2013), http://world.time.com/2013/07/01/japan-spends-millions-in-order-to-be-cool/.

many Japanese manga and anime target adults as their audience.[25] They are often filled with elaborate and detailed drawings, accompanied by engaging and often complex plots.[26] Thus, the economic success of Japanese anime and manga is partly owed to the fact that many people, regardless of age, can enjoy them as entertainment.

The large base of Japanese artists who actively create these works, both professionally and as amateur authors, fuel the success of Japanese anime and manga. In fact, manga creations by amateur artists are visibly active in Japan, as large numbers of amateur artists are constantly competing for the opportunity to enter the professional manga industry.[27] Because only a handful of amateur manga artists can get their works commercially published, many of them privately publish what is known as "parody manga."[28] Parody manga artists often borrow characters and storylines from popular anime and manga to depict their own stories,[29] so that the artists can use the publicity of the original manga to increase the visibility of their own work. While many Japanese people refer to these works as "parodies" in Japanese, they actually do not fit the legal definition of a parody,[30] which requires the work to criticize or comment on the original.[31] Rather, these "parodies" often expand on a pre-existing work's original storyline or create derivative stories by adding new elements or characters to the original.[32] Thus, Japanese parody manga and anime

25. Hsiao-Ping Chen, *The Significance of Manga in the Identity-Construction of Young American Adults: A Lacanian Approach*, MARILYN ZURMUEHLIN WORKING PAPERS IN ART EDU., issue 1 art. 2, 2006, 2; *see also* Minoru Matsutani, *'Manga': Heart of Pop Culture,* JAPAN TIMES (May 26, 2009), http://www.japantimes.co.jp/news/2009/05/26/reference/manga-heart-of-pop-culture/#.VlUc_n4vfIU.

26. Chen, *supra* note 25, at 2.

27. *See* Rena Seiya, *The Key to the Popularity of Japanese Manga*, MANGA ARTIST/AUTEUR DE MANGA, http://www.japanese-manga-artist.com/%EF%BD%81%EF%BD%92%EF%BD%94%EF%BD%89%EF%BD%83%EF%BD%8C%EF%BD%85%EF%BC%91-the-key-to-the-popularity-of-japanese-manga/ (last visited Feb. 9, 2017).

28. I use the term '"parody"' to specifically refer to Japanese works that borrow characters and storylines from popular anime and manga to depict their own stories. "Parodies" can include legal parodies, as long as they criticize or comment on the original. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580 (1994).

29. *See* Mehra, *supra* note 5, at 164, 175; *see also* SHARON KINSELLA, ADULT MANGA CULTURE & POWER IN CONTEMPORARY JAPANESE SOCIETY 111 (2000).

30. Mehra, *supra* note 5, at 164.

31. *See Campbell*, 510 U.S. at 580; 17 U.S.C. § 107.

32. *See, e.g.*, *Sailor Moon Doujinshi*, MISS DREAM, https://missdream.org/sailor-moon-doujinshi/ (last visited Feb. 9, 2017) (exhibiting translated version of Japanese *dojinshi* featuring characters from the popular manga/anime series *Sailor Moon*).

is often not parody at all, at least in a legal sense, but rather fan-created cartoon works that are more akin to fan fiction.[33]

Although parody manga possesses many characteristics similar to fan fiction, the most significant difference is that parody manga is often sold for profit, whereas American fan-fiction works are not.[34] Japanese parody manga that are privately printed for sale are called *dojinshi*,[35] which are typically sold at large-scale, organized commercial conventions, some of which attract nearly half a million visitors.[36] The commercial short-duration spot market for *dojinshi* has continued to thrive in Japan since its debut in the 1970s.[37] Some scholars believe that the *dojinshi* market serves to develop young talent by securing a place for them to improve their skills and foster creativity while recouping some profit to support themselves.[38] For this reason, Japanese "parodies," especially *dojinshi*, are considered to be an important part of Japan's anime and manga industry.[39]

B. Japanese Copyright Law and Infringing Works

Despite the massive economic success of *dojinshi* in Japan, it would most likely be deemed copyright infringement under the Japanese Copyright Act (JCA),[40] which is similar to the American Copyright Act (ACA) in many ways.[41] First, the JCA protects creative

33. *See* Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651, 655 (1997) (describing that fan authors creating fan fictions borrow characters and settings for use in their own writings).

34. *Compare* Mehra, *supra* note 5, at 164 (noting that parody manga is most often produced for sale), *with* Tushnet, *supra* note 33, at 654, 664 (explaining that fan fiction is noncommercial and mostly nonprofit).

35. Mehra, *supra* note 5, at 164.

36. *See, e.g.*, COMIC MKT. PREPARATIONS COMM., WHAT IS THE COMIC MARKET? 4 (Feb. 4, 2008), http://www.comiket.co.jp/info-a/WhatIsEng080528.pdf.

37. Mehra, *supra* note 5, at 164.

38. *Id.* at 197.

39. In Japan, the anime industry is heavily affected by the manga industry because many anime works professionally created by anime studios are based on popular manga series. *See List of Films Based on Manga*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_films_based_on_manga (last visited Feb. 9, 2017).

40. Chosakukenhō [Copyright Act], Law No. 43 of 2012 (Japan) [hereinafter Japanese Copyright Law] *translated in* JAPANESE L. TRANSLATION, http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=01&dn=1&x=49&y=20&co=01&ia=03&ky=%E8%91%97%E4%BD%9C%E6%A8%A9%E6%B3%95&page=13 (last visited Feb. 9, 2017).

41. Because both Japan and the United States are signatories to the Berne Convention and the Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement, both countries are obligated to incorporate the minimum standards for copyright protection into their copyright law. *See generally* Berne Convention for the Protection of Literary and Artistic Works, arts. 1-21, Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221(revised July 24, 1971); Agreement on Trade-Related Aspects of Intellectual Property Rights art. 9, Apr. 15, 1994, 1869 U.N.T.S. 299.

expressions such as literary works and cinematographic works, similar to the ACA.[42] Second, both the JCA and ACA accord copyright owners exclusive economic rights, including the reproduction right and the right to create or authorize the creation of derivative works based on existing copyrighted works (adaptation right).[43] Third, fictional characters are protected both in Japan and the United States.[44] Thus, when a *dojinshi* artist takes characters from an original anime or manga work without the copyright holder's permission to create *dojinshi*—a secondary work—he or she would likely violate the reproduction right and the adaptation right of the copyright owner under both Japanese and U.S. law.

Despite these similarities, there are also dissimilarities between the JCA and ACA. Most notable and relevant to the creation of parodies is that the JCA does not include a general exception to copyright owners' exclusive rights, while the ACA's fair use provision offers flexible defenses to certain copying.[45] Instead, the JCA enlists a limited "laundry list" of permitted copying,[46] including copying for private use[47] and quotations for news reporting, criticism, or research.[48] These provisions are narrowly interpreted by Japanese courts, and thus, far from comparable to the American fair use doctrine.[49] Moreover, the JCA contains protection for the moral rights of the original author, including the right to preserve the work's integrity,[50] whereas American law limits moral rights protection to narrow categories of visual arts.[51] As discussed *infra* Part IV, these dissimilarities should be considered for "parody" protection.

Although the number of copyright infringement cases involving *dojinshi*, or parody in general, is relatively low in Japan, a limited

42. *See* Japanese Copyright Law, arts. 2-(1)(i), 10-(1)(vii) (providing that JCA protects production in which thoughts or sentiments are expressed in a creative way); *see also* 17 U.S.C. § 102(a) (2012).

43. *See* Japanese Copyright Law, arts. 21, 27-28; *see also* 17 U.S.C. § 106(2).

44. *See* Saikō Saibansho [Sup. Ct.] July 17, 1997, 1992 (o) no. 1443, SAIKO SAIBANSHO HANREISHŪ [SAIBANSHO WEB] *translated in* http://www.courts.go.jp/app/hanrei_en/detail?id=1484 (Japan); *see also* Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930); Warner Bros. Pictures v. Columbia Broad. Sys., 216 F.2d 945 (9th Cir. 1954).

45. 17 U.S.C. § 107.

46. Mehra, *supra* note 5, at 175-76.; Japanese Copyright Law, arts. 30-49.

47. Japanese Copyright Law, art. 30(1).

48. Japanese Copyright Law, art. 32.

49. *See, e.g.*, PETER GANEA ET AL., JAPANESE COPYRIGHT LAW: WRITINGS IN HONOUR OF GERHARD SCHRICKER 58-61 (2005).

50. Japanese Copyright Law, arts. 18-20.

51. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089; 5128-33 (codified as amended at 17 U.S.C. §106A).

number of judicial opinions suggest that Japanese "parodies"—including *dojinshi*—most likely violate the rights of copyright owners. In 1999, a *dojinshi* artist who depicted original characters from the popular anime *Pokémon* in a sexual manner was arrested and fined for copyright infringement under criminal copyright law.[52] This incident and resulting punishment indicates that *dojinshi* potentially violates the copyright holder's economic rights. Furthermore, other cases suggest that "parodies"—both parodies in a legal sense and as *dojinshi*—may also violate the author's moral rights. In 1966, a famous alpine photographer brought a copyright infringement action against a famous political parodist called Mad Amano because he had overlaid an image of a larger-than-life Bridgestone tire onto plaintiff's black and white photograph of a snowy alpine slope in Austria.[53] Although the collage was clearly political speech that expressed the parodist's criticism about and warning of the over-development of the Alpine resorts, the Japanese Supreme Court held that Mad Amano violated the plaintiff's right to maintain the integrity of his work.[54] Similarly, a Tokyo court granted a permanent injunction to a Japanese video game company to prevent the defendant from selling videocassettes of a "parody anime" (an anime version of *dojinshi*) depicting characters of the plaintiff's popular role-playing game, *Thrilling Memorial*.[55] These cases highlight Japan's strong protection for the original authors' moral rights in the context of "parodies."

C. Dojinshi and Tolerated Uses

Despite the obvious copyright infringement issues associated with the creation of *dojinshi*, the *dojinshi* industry coexists and even thrives side-by-side with the mainstream anime and manga industry.[56] Many scholars have attempted to attribute different factors to reach a logical explanation for this odd phenomenon. One commonly cited reason is because litigation does not make economic sense in Japan, given the fact that *dojinshi* usually sell only some hundred copies for around five dollars each, making the damages amount quite low.[57] In addi-

52. Mehra, *supra* note 5, at 198.

53. Saikō Saibansho [Sup. Ct.] Mar. 28, 1980, Sho 54 (o) no. 923, SAIKO SAIBANSHO HANREISHŪ [SAIBANSHO WEB] 1, http://www.courts.go.jp/app/files/hanrei_jp/283/053283_hanrei.pdf (Japan).

54. *Id.*

55. Tōkyō Chihō Saibansho [Tōkyō Dist. Ct.] Aug. 30, 1999, Hei 11 (wa) no. 15575, CHITEKI ZAISAN SAIBAN REISHŪ [SAIBANREI JOHO] 1, http://www.courts.go.jp/app/files/hanrei_jp/668/013668_hanrei.pdf (Japan).

56. Mehra, *supra* note 5, at 195.

57. *Id.* at 165-66, 185-87.

tion to the economic disincentive, some professional manga artists are lenient towards *dojinshi* because they became professionals themselves after their success in the *dojinshi* market.[58] Even manga artists who have never participated in *dojinshi* activities often exhibit general tolerance towards *dojinshi*, given the industry's historical practice of "borrowing," which may be rooted in the traditions of Confucianism.[59] These reasons, coupled with the general tendency of Japanese people to avoid litigation,[60] may well explain why the number of infringement cases involving "parodies" is low.

Likewise, large corporate authors[61] do not usually take legal action against *dojinshi* authors because they believe that *dojinshi* has some positive impact on their original works.[62] Many corporate authors and copyright holders, including major publishing and entertainment companies such as Disney Japan, have attended large-scale *dojinshi* conventions to advertise their works.[63] After all, *dojinshi* authors are often enthusiastic fans of the original works, and their fans are also fans of the original.[64] Many of the original authors take the stance that they will tolerate the commercial activities of *dojinshi* authors so long as there is no obvious harm being done to the original works.[65]

However, this fragile relationship between the professional manga and anime industry, and the amateur *dojinshi* industry could be

58. Nicolle Lamerichs, *The Cultural Dynamic of Doujinshi and Cosplay: Local Anime Fandom in Japan, USA and Europe*, J. AUDIENCE & RECEPTION STUD. 154, 159 (May 2013), http://www.participations.org/Volume%2010/Issue%201/10%20Lamerichs%2010.1.pdf.

59. Confucianism is one of the theories of copyright, along with the utilitarian theory and the natural right theory, which viewed intellectual creations as the common heritage of people that was necessary for proper socialization through free access to them. Under Confucianism, copying was regarded virtuous. *See* DANIEL C.K. CHOW & EDWARD LEE, INTERNATIONAL INTELLECTUAL PROPERTY 84-85, 91 (West, 2nd ed. 2012); *see also* Mehra, *supra* note 5, at 179-80 (noting the historical practice of "borrowing" of manga characters).

60. Sean Kirkpatrick, Comment, *Like Holding a Bird: What the Prevalence of Fansubbing Can Teach Us About the Use of Strategic Selective Copyright Enforcement*, 21 TEMP. ENVTL. L. & TECH. J. 131, 148 (2003).

61. Corporations can be authors under Japanese copyright law. *See* Japanese Copyright Law, art. 15.

62. *See* Mehra, *supra* note 5, 184.

63. *See* Jun Hongo, *Comiket, Where Otaku Come to Share the Love*, JAPAN TIMES (Dec. 19, 2013), http://www.japantimes.co.jp/culture/2013/12/19/general/comiket-where-otaku-come-to-share-the-love/#.VlWQKH4vfIU; *see also* Mehra, *supra* note 5, at 184 (suggesting that mainstream manga publishers use dojinshi markets to advertise their works).

64. *See* Lamerichs, *supra* note 58, at 159 (suggesting that since dojinshi, as "amateur manga," are often created as works of love).

65. *See Urgent Appeal on TPP Intellectual Property Provisions*, *supra* note 9.

affected by Japan's obligation to comply with the TPP agreement.[66] For instance, the *Pokémon* incident occurred because Nintendo, the author of the *Pokémon* series, filed a criminal complaint for copyright infringement with the Japanese police.[67] However, after the enactment of the criminal copyright prosecution law, *anyone* could file a criminal complaint for alleged copyright infringement deemed as piracy.[68] Even though the definition of piracy is narrow enough in scope to exclude Japanese "parodies" like *dojinshi*, it is still possible that courts would, over time, expand the scope of piracy to include parodies contrary to the original intention of the drafters of the amendment. This possibility may deter the creation of such "parodies." Moreover, even if the amended Copyright Act expressly guaranteed that legal parodies and *dojinshi* fall outside the definition of piracy, strengthened protection for the interests of secondary artists is still necessary to maintain proper balance between the competing interests of the rights holder and the secondary user, which will be tilted in favor of copyright holders by the TPP Agreement. Although the actual impact of "parody" and *dojinshi* activities on the professional anime and manga industry is unknown, many Japanese people, even authors of original works, firmly believe that the success of *dojinshi* has a positive contribution to the progress of Japanese anime and manga culture.[69] Therefore, Japan should reconsider the option to adopt a fair use exception to alleviate the potential negative effects to the creation of "parodies."

66. Japan's obligation to abide by the TPP agreement is reserved until the agreement enters into effect. Kantaiheiyō Pâtonâshippu Kyōtei no Teiketsu ni Tomonau Kankeihōritsu no Seibi ni Kansuru Hōritsuan [Bill for the Establishment of Relevant Laws to Accompany the Ratification of the Trans-Pacific Partnership], SHŪGIIN [HOUSE OF REPRESENTATIVES], http://www.shugiin.go.jp/internet/itdb_gian.nsf/html/gian/honbun/houan/g19005047.htm (last visited Feb. 10, 2017) (Japan). Nevertheless, in this article, I assume that the TPP agreement or an agreement similar to the TPP agreement will take effect upon Japan in the future and discuss Japan's options. Accordingly, from this point of the article, I use the term "TPP agreement" to refer to both the original TPP agreement and an agreement similar to the original TPP agreement.

67. Mehra, *supra* note 5, at 180.

68. TPP Agreement, art. 18.77.

69. Ken Akamatsu, a Japanese professional manga artist known for a popular manga and anime series *Love Hina*, was one of the leading activists for the protection of *dojinshi*. *See* Scott Green, *Manga Author Ken Akamatsu Renews Concerns About Trade Deal's Effect on Doujinshi and Cosplay*, CRUNCHYROLL (July 27, 2015, 1:00 PM), http://www.crunchyroll.com/anime-news/2015/07/27-1/manga-author-ken-akamatsu-renews-concerns-about-trade-deals-effect-on-doujinshi-and-cosplay; *see also* Mariko Tai, *Why Cosplay Fans Fear TPP*, NIKKEI ASIAN REV. (July 25, 2015, 1:00 PM), http://asia.nikkei.com/Life-Arts/Life/Why-cosplay-fans-fear-the-TPP.

III. Overview of the U.S. Fair Use Analysis

Even without regard to the TPP agreement, Japan is still in need of broader exceptions to copyright protection because current Japanese copyright law does not protect political speech in the form of parody, as was the case with Mad Amano.[70] Some commentators argue that adopting the United Kingdom's fair dealing doctrine[71] is the better option due to both its similarity to U.S. fair use doctrine and the scope of the doctrine being limited to certain categories of works.[72] However, implementing the U.S. fair use doctrine would be more appropriate than using the U.K's fair dealing doctrine because the former better serves the policy goal of copyright.[73] Part III of this article describes the current state of the U.S. fair use doctrine, and Part IV explains how Japan can achieve its copyright policy goal through adoption of a U.S.-modeled fair use exception.

Under Section 107 of the U.S. Copyright Act, certain uses of copyrighted materials are permitted as fair use.[74] To determine whether an unauthorized appropriation of a copyrighted work constitutes fair use, courts analyze each case on a case-by-case basis[75] under four statutory factors:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[76]

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70. *See supra*, Part II.B.

71. Copyright, Designs and Patents Act, 1988, c. 48, §§ 28-30 (Eng.).

72. *Id*. The fair dealing doctrine only applies to: (1) research and private study, (2) criticism, review and news reporting, and (3) incidental inclusion of copyright material. *Id*.; *see also* Miya Sudo & Simon Newman, *Japanese Copyright Law Reform: Introduction of the Mysterious Anglo-American Fair Use Doctrine or an EU Style Divine Intervention via Competition Law?*, Intell. Prop. Q. 2014, 1, 40-70 (comparing the fair use doctrine of the U.S. with an E.U.-style approach to copyright regulation in Japan).

73. *See infra*, Parts III. & IV.

74. *See* 17 U.S.C. § 107. The preamble lists criticism, comment, news reporting, teaching, scholarship, and research as examples of permitted purposes of secondary use, but fair use is not limited to these examples. *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 561 (1985).

75. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577-78 (1994). The *Campbell* court states that "[t]he fair use doctrine thus 'permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." *Id*. at 577 (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990)).

76. 17 USC § 107; *see also Campbell*, 510 U.S. at 577.

These factors are interrelated, and all of them must be weighed together.[77] The following sections discuss each of the four factors and the courts' analyses under these factors.

A. The Purpose and Character of the Secondary Use

The U.S. Supreme Court in *Campbell v. Acuff-Rose Music*[78] noted that the central purpose of the assessment under the first factor is to see whether the secondary use fulfills the objective of copyright law[79]—to promote "the Progress of Science and useful Arts."[80] Thus, courts are to assess the following sub-factors in light of the copyright objective.[81] First, the statute suggestively calls for inquiry into whether the secondary use is commercial in nature[82]—i.e., whether the secondary user intended to profit from exploitation of the original work without paying a licensing fee.[83] Although secondary works created for commercial use (as opposed to noncommercial use) tend to weigh against a finding of fair use,[84] it cannot be the sole determining factor because whether the commercial nature of the secondary work affects the outcome of the fair use analysis depends on the context of each case.[85] Thus, commercialism is merely a single consideration within the first factor, and courts cannot bar a finding of fair use solely based on the commercial nature of the secondary work.[86] Additionally, if relevant, courts may account for the propriety of the nature of the secondary user's conduct, which weighs against a finding of fair use if he acquired the original work in an immoral way.[87]

The central inquiry under the first factor according to Judge Leval, an influential figure in the development of the modern fair use doctrine, is whether the new work is "transformative."[88] A secondary work can be deemed transformative if the new work adds something valuable through new expression, meaning, or message, rather than

77. *Campbell*, 510 U.S. at 578.
78. 510 U.S. 569 (1994).
79. *Id.* at 579. The *Campbell* court has adopted Judge Leval's definition of "transformative" use. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990) (discussing "transformativeness" and its significance to fair use analysis).
80. U.S. CONST. art. I, § 8, cl. 8.
81. Leval, *supra* note 79, at 1110-11.
82. 17 USC § 107(1).
83. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985).
84. *Campbell*, 510 U.S. at 584.
85. *Id.* at 585.
86. *Id.* at 584.
87. *Harper & Row*, 471 U.S. at 562.
88. Leval, *supra* note 79, at 1111.

merely superseding or free-riding off of the original work.[89] If the secondary work is transformative, this sub-factor weighs in favor of the secondary user because of the new value that the secondary use adds to the original—exactly what the fair use doctrine intends to protect "for the enrichment of society."[90] This is an important element because the more transformative the secondary work is, the less significant other factors, such as commercialism, become.[91]

What is notable about judicial analyses involving "transformative" use is that courts tend to presume the secondary work is transformative if it is a parody.[92] Although the *Campbell* Court emphasized that parody, a highly transformative work, still needs to be analyzed under the other three factors to qualify for fair use,[93] courts usually find highly-parodic works fair use. Therefore, following the *Campbell* Court's instructions, the U.S. Court of Appeals for the Eleventh Circuit held that a novel titled *The Wind Done Gone*, which retold the story of the famous novel *Gone with the Wind* from the black slaves' perspectives, was a parody and entitled to fair use defense, despite the fact that *The Wind Done Gone* took substantial portions of protected elements of the original work.[94] In contrast, the U.S. District Court for the Southern District of New York found that an unauthorized novel that depicted a sequence of the novel *Catcher in the Rye* was not parody, but rather a kind of derivative work reserved for the original author, and thus not entitled to fair use protection.[95] Accordingly, being deemed as a parody in a legal sense would significantly increase the likelihood for secondary works to be protected as fair use.

How courts determine whether the secondary work is transformative varies by jurisdiction. However, courts typically focus on the transformativeness of the secondary user's purpose in using the original work, rather than the actual content that has been added by the secondary user to create the secondary work.[96] This means that courts

89. *Campbell*, 510 U.S. at 579; *see also* Leval, *supra* note 79, at 1111. *But cf.* William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1768-79.

90. Leval, *supra* note 79, at 1111. *But cf.* Fisher, *supra* note 89, at 1768-69 (analyzing "transformativeness" as a somewhat subjective, rather than static, element).

91. *Campbell*, 510 U.S. at 579.

92. *See id.* at 583; *see also* Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2550 (2009) (reiterating the presumption that parodies have an "obvious claim to transformativeness").

93. *Campbell*, 510 U.S. at 581.

94. *See* SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1269-76 (11th Cir. 2001).

95. *See* Salinger v. Colting, 641 F. Supp. 2d 250, 256-68 (S.D.N.Y 2009).

96. R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467, 485 (2008).

tend to find that secondary works are transformative if the secondary user uses the underlying work for a completely different purpose than of the original author when she created the original.[97] Under this approach, courts may find transformativeness even though the secondary user has not altered the content of the original work at all, as long as the purpose is to some degree different from that of the original author.[98] Thus, the reproduction of an entire concert poster in a biography of a musical group which hosted the concert, for instance, would be transformative under this approach.[99]

On the other hand, recent cases show that more and more courts are focusing on the contents of the secondary work to determine if it is transformative. To ascertain the secondary work's transformativeness, these courts evaluate its contents, rather than focusing on its purpose.[100] Some courts went even further and conducted a side-by-side analysis, comparing aesthetic similarities between the plaintiff's and defendant's work. For example, the Second Circuit in *Cariou v. Prince*[101] concluded that, in comparing the appropriationist-defendant's collage paintings with the photographer plaintiff's original photographs side by side, the secondary works were transformative because the defendant's artworks "employ[ed] new aesthetics with creative and communicative results distinct from" the plaintiff's photographs, without giving any explanation why their aesthetics are different.[102] However, this approach has received much criticism because it allows judges to act as art critics to an extent,[103] which is precisely what Justice Holmes intended to prevent since the early development of the Supreme Court's copyright analysis.[104]

Additionally, the Second Circuit court's analysis is particularly instructive to transformativeness analysis involving parodic works or *dojinshi*. The Second Circuit has noted that although derivative works transform an original work into "a new mode of presentation," such works take expression for purposes that are not transformative.[105]

97. *Id.*

98. Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1165 (9th Cir. 2007).

99. Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 609 (2d Cir. 2006).

100. *See* Cariou v. Prince, 714 F.3d 694, 706-08 (2d Cir. 2013) (implying that the content of the secondary work is significant in determining transformativeness).

101. 714 F.3d 694 (2d Cir. 2013).

102. *Id.* at 707-08.

103. *See generally* Shoshana Rosenthal, *A Critique of the Reasonable Observer: Why Fair Use Fails to Protect Appropriation Art*, 13 COLO. TECH. L.J. 445 (2015).

104. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

105. Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 143 (2d Cir. 1998); *see also* Twin Peaks Prods. v. Publ'ns Int'l, Ltd., 996 F.2d 1366, 1376 (2d Cir. 1993).

Thus, according to the Second Circuit, transformative works must be more than derivative works.[106] Conversely, if a work is transformative, it is not a derivative work. Accordingly, if *dojinshi* is deemed transformative, it will not be a derivative work.

B. The Nature of the Original Work

The second fair use factor calls attention to the original work. Under this factor, courts will consider: (1) whether the underlying work is creative or factual and (2) whether the work is published or unpublished.[107] The underlying principle of this factor is that not all works are equally protected by copyright; some works are more worthy of protection than others, thus rendering fair use defenses less likely to succeed.[108]

As copyright law accords greater protection to creative works than factual works,[109] the more creative the original work is, the more it should be protected against unauthorized copying.[110] Creative works are considered to be "closer to the core of intended copyright protection" than factual works.[111] Therefore, this factor tends to weigh against a finding of fair use when the secondary use involves a creative or expressive work. Similarly, unpublished works receive greater protection than published works.[112] Publication of an original work by a third party prior to publication by the original author would seriously interfere with the author's right to decide when and whether to make the work public, so the use cannot be called fair.[113] For this reason, the fact that the original work is unpublished tends to negate the defense of fair use.[114]

However, it is important to note that because the significance of this factor tends to be affected by the other factors—especially the first factor[115]—courts generally give little weight to this second factor in their overall fair use analysis.[116] This is especially true in cases in-

106. *See Castle Rock*, 150 F.3d at 143.

107. *See id;* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994); Leval, *supra* note 79, at 1122.

108. *See Campbell*, 510 U.S. at 586.

109. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 345-48 (1991).

110. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A][2][a] (2015).

111. *Campbell*, 510 U.S. at 586.

112. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564 (1985).

113. *Id.*

114. *Id.* at 551 (citing NIMMER & NIMMER, *supra* note 110, § 13.05[A][2][b]).

115. *See supra* Part III.A.

116. NIMMER & NIMMER, *supra* note 110, § 13.05[A][2][a] n.136.2.

volving parody because parodies "almost invariably copy publicly known, expressive works."[117]

C. *The Amount and Substantiality of the Portion Used*

The third factor asks whether the amount and substantiality of the secondary use is justified by the purpose for the copying.[118] Courts look at both quantity and quality of the portion used in relation to the copyrighted work as a whole.[119] The portion taken must be "no more than necessary" to serve the legitimate purpose of the secondary work.[120] The extent of permissible copying varies depending on the analysis of the first factor: "the purpose and character" of the secondary use.[121] Generally, the more transformative the secondary work, the more reasonable a taking of a large and substantial portion of the original becomes.[122] Furthermore, this factor may also be influenced by the analysis of the fourth factor, which considers the danger of adverse market impact on the original work.[123] It is more difficult to justify a taking of even a small portion of a work if there is danger of market substitution.[124] Therefore, an extensive copying could qualify as fair use if there is strong justification and no adverse market impact.[125] This notion is well illustrated in *Perfect 10, Inc. v. Amazon .com, Inc.*,[126] where the Ninth Circuit held that Google's thumbnail reproduction of Perfect 10's full images fell under fair use because it was transformative; it altered the artistic expression to improve access to information on the internet, which served the public's interest, and the danger that Google's reduced-size images would supersede Perfect 10's cell phone download use of the images was "incidental."[127]

Courts seem to primarily focus on the degree of transformativeness of the secondary work to determine how much of and when a taking is reasonable in a given context. Some courts strictly apply this

117. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994).

118. *Id.*; Leval, *supra* note 79, at 1123.

119. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564 (1985).

120. Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 144 (2d Cir. 1998) (citing *Campbell*, 510 U.S. at 588-89).

121. *See* Cariou v. Prince, 714 F.3d 694, 710 (2d Cir. 2013) (referencing Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 613 (2d Cir. 2006)).

122. *See* Leval, *supra* note 79, at 1122.

123. *Id.* at 1123; Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994) (citing *id*. at 1110-11); *see infra* Part III.D.

124. *See Harper & Row*, 471 U.S. at 565-66.

125. Leval, *supra* note 79, at 1123 (interpreting *Harper & Row*, 471 U.S. at 565).

126. 508 F.3d 1146 (9th Cir. 2007).

127. *Id*. at 1165-67.

standard when the degree of transformativeness of the secondary work is low, finding any copying that is more than necessary to serve the transformative purpose against the secondary user.[128] For example, in *Warner Bros. Entm't Inc. v. RDR Books*,[129] the court conducted a detailed inquiry into whether the amount and value of the portion used was reasonable in relation to the transformative purpose of creating a complete reference guide to the original *Harry Potter* series that took creative expressions from the official companion book.[130] Because the purpose of each of these books were very similar, the court assumed that any borrowing for purposes more than reporting fictional facts was reserved for the original author.[131]

On the other hand, courts generally employ a lenient standard for this factor when a highly transformative work is involved, especially in cases of parody. The *Campbell* Court noted that to serve the parodic purpose of the secondary work, it must copy enough to "conjure up" the original to make its target recognizable.[132] According to the Court, taking the most distinctive or memorable features—the "heart" of the original—does not make the copying excessive if it is necessary for the parodist to make sure the audience will know which work was parodied.[133] Thus, the *Campbell* Court held that the defendant's copying of the opening riff and the first line of the plaintiff's song "Oh, Pretty Woman" —allegedly the "heart" of the song—was necessary to create the parody because it most readily "conjures up" the original song in the listener's mind.[134] Once enough has been taken to assure identification, any further taking must specifically serve the parodic goal of the secondary work.[135] Courts are to balance the substantiality of the parodic purpose against the portion copied, while also taking into account any danger of the parody serving as a substitute for the original.[136] In summary, although copying cannot be excessive in relation to the purpose and character of the parody, fairly modest amounts of copying are generally allowed for parodies.[137]

128. *See* Warner Bros. Entm't, Inc. v. RDR Books, 575 F. Supp. 2d 513, 546-49 (S.D.N.Y. 2008).

129. 575 F. Supp. 2d 513 (S.D.N.Y. 2008).

130. *Id.* at 546-49.

131. *Id.* at 548-49.

132. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 588 (1994).

133. *Id.*

134. *Id.*

135. SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1271 (11th Cir. 2001).

136. *See Campbell*, 510 U.S. at 588-89.

137. *See SunTrust Bank*, 268 F.3d at 1273-74.

D. The Effect of the Secondary Work upon the Value of the Original Work

The last factor is "the effect of the use upon the potential market for or value of the copyrighted work."[138] The main focus here is the danger of market substitution, not mere harm to the market for the original work.[139] This is provided that copying to criticize the original work, which would likely harm the market for the original, is a typical example of fair use.[140] Courts must also consider whether "unrestricted and widespread conduct of the sort" by the secondary user would result in "a substantially adverse impact on the potential market" for the original.[141] Furthermore, courts must take account of not only any potential harm to the original, but also of harm to the market for derivative works.[142] This inquiry is only as to the market in which the original author would generally develop or license others to develop.[143] The *Campbell* Court noted that the protectable derivative market does not include the market for criticism, including parody, because of the unlikelihood that original authors will license critical reviews or lampoons of their works.[144] Some courts have acknowledged that this is the most important factor of all four;[145] however, other courts take a contrary stance, based on the *Campbell* Court's recognition that "[a]ll [factors] are to be explored, and the results weighed together, in light of the purposes of copyright."[146]

The fourth factor is even more interrelated with the first factor because the degree to which the secondary work is transformative affects the likelihood of market substitution.[147] Some courts, especially the Second Circuit, are of the opinion that if the secondary work is transformative, there is no apparent danger of market substitution because it targets different markets.[148] Notably, the Second Circuit has established that if the secondary work is transformative, it is not a

138. 17 U.S.C. § 107(4).

139. *See Campbell*, 510 U.S. at 591-93.

140. 17 U.S.C. § 107(preamble).

141. *Campbell*, 510 U.S. at 590 (quoting NIMMER & NIMMER, *supra* note 110, § 13.05[A][4]).

142. *Id.* (quoting Harper & Row Pub., Inc. v. Nation Enters., 471 U.S. 539, 568 (1985)).

143. *Id*. at 592.

144. *Id.*

145. *Harper & Row*, 471 U.S. at 566.

146. Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 145 (2d Cir. 1998) (quoting *Campbell*, 510 U.S. at 578).

147. *See Campbell*, 510 U.S. at 591.

148. *See id*.; Cariou v. Prince, 714 F.3d 694, 704 (2d Cir. 2013) (quoting *Castle Rock*, 150 F.3d at 145).

derivative work.[149] For example, the *Cariou* court found this factor in favor of the appropriationist who transformed the plaintiff's black and white photographs depicting the "natural beauty of Rastafarians and their surrounding environs" into "hectic and provocative" color collage works placed on canvas because they were marketed towards entirely different audiences.[150] Thus, transformative works are generally found to pose little risk of market substitution for the original and its derivative works, and the Second Circuit will most likely find this factor in favor of the secondary user when the secondary work is transformative.

IV. How Japan Should Adopt Fair Use to Maximize the Protection for "Parody"

Japan should introduce a fair use provision to promote its copyright goal: "to contribute to the development of culture."[151] In doing so, Japan should adopt the four statutory factors stipulated in the ACA to capture the spirit of the permitted uses under the U.S. fair use doctrine. U.S. courts have developed these four factors over the centuries to balance authors' economic incentives to create works and the public's interest in accessing existing expressions upon which they can expand new creations[152] in order to achieve the goal of promoting "the Progress of Science and Useful Arts."[153] As the JCA aims for a similar goal, adopting the four factors of the U.S. fair use doctrine would benefit Japan in achieving its copyright goal.

Some people might argue that U.S. copyright law's utilitarian goal is different from Japan's "author's right" approach,[154] and thus

149. *See supra* Part III.A.

150. *Cariou*, 714 F.3d at 706, 709.

151. JCA Article 1 provides its purpose as follows:

> [t]he purpose of this Law is, by providing for the rights of authors and the rights neighboring thereon with respect to works as well as performances, phonograms, broadcasts and wire diffusions, to secure the protection of the rights of authors, etc., having regard to a just and fair exploitation of these cultural products, and thereby to contribute to the development of culture.

Japanese Copyright Law, art. 1.

152. Judge Joseph Story first established in *Folsom v. Marsh* the four fair use factors, which were encoded into the current Copyright Act. *See* Folsom v. Marsh, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841); *see also* 17 U.S.C. § 107 (2012).

153. U.S. Const. art. I, § 8, cl. 8.

154. The United States' copyright theory is the utilitarian approach, which provides authors with financial incentives through copyright to create new works that serve a larger end for the public good, whereas continental European countries' approach is based on the tradition of "author's right" (*droit d'auteur*), which deems that author's rights extend to their creations as a matter of natural right. Chow & Lee, *supra* note 59, at 84-85. Japan, on the other hand, has adopted the "author's right" approach. Ganea et al., *supra* note 49, at 11.

the U.S. fair use doctrine would not be enough "to secure the protection of the rights of the authors."[155] However, the fact that U.S. copyright law does not protect the "author's rights" or moral rights[156] does not mean that adopting a U.S.-modeled fair use exception into the JCA would jeopardize Japan's moral rights protection. First, Japan has adopted the dualistic approach,[157] which clearly distinguishes between economic rights on the one hand, and moral rights on the other.[158] Thus, changing the level of economic rights protection would not significantly affect moral rights protection. In fact, as previously discussed, Japan's moral rights protection is already strong.[159] Moreover, the language of JCA Article 1 clearly suggests that "the development of culture" is the ultimate end and "the protection of the rights of authors, etc." is a means to achieve that end.[160] Therefore, the JCA has an objective similar to that of the ACA, which is benefitting society as a whole,[161] and an adoption of a U.S.-modeled fair use exception will help ensure that the JCA can achieve that goal.

Although each of the four factors of the U.S. fair use doctrine should be adopted by Japan, minor adjustments need to be made in order to make them work effectively within Japanese copyright law. I propose the following three adjustments described in the subsequent sections.

A. Japan Should Incorporate "Transformative Use" as a Sub-Factor into the First Prong of the Fair Use Factors.

One key adjustment that should be made to the U.S. fair use doctrine is to incorporate "transformative use" as a sub-factor under the first factor, because the transformativeness of the secondary work should be the central consideration in fair use analysis.[162] As the fair use exception aims to promote new creations that benefit the advancement of arts and culture,[163] the secondary work must be sufficiently transformative so that it can be considered as a new creation,

155. Japanese Copyright Law, art. 1.

156. *See* GANEA ET AL., *supra* note 49, at 11-12.

157. *Id*. at 12. In contrast, the monistic approach links authors' moral rights and economic rights to a non-separable bundle of rights. *Id*.

158. *Id.*

159. *See supra* Part II.B.

160. By placing the word "thereby" preceding the phrase "to contribute to the development of culture," JCA suggests that contribution to "the development of culture" is its ultimate purpose. *See* Japanese Copyright Law, art. 1.

161. *See* Leval, *supra* note 79, at 1109, 1136.

162. *See id*. at 1111.

163. *See id*.; Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578, n.10 (1994).

not merely a derivative work that "supersede[s]" the original work.[164] This does not mean that transformativeness is the only element that needs to be considered under the first factor; other elements such as commercialism[165] are also relevant to the first factor. However, considering that the degree of the transformative use affects the weights given to other factors,[166] the proposed fair use exception should reflect the importance of the transformative use. Therefore, Japan should stipulate transformative use as a sub-factor under the first factor.

B. Japan Should Codify the Definition of "Transformative Use" in the First Prong of the Fair Use Factors.

Most importantly, the new fair use exception should codify the definition of "transformative" use in its provision. This codification is important because it distinguishes transformative works from derivative works. As already discussed in Part III.D., the line-drawing between transformative works and mere derivative works affects the fourth factor because the risk of market substitution includes potential harm to the derivative work market that the original authors "would in general develop or license others to develop."[167] Furthermore, the degree of transformativeness of the secondary work would also affect the reasonable amount and quality of permitted copying.[168] Therefore, defining "transformative" use within the proposed fair use provision would substantially affect the analysis of other fair use factors.

Moreover, this distinction between transformative works and derivative works is particularly important for Japan because of its strong protection of moral rights, especially the author's right of integrity. When the secondary work is merely a derivative work of the original, the original author's right of integrity extends to the derivative work.[169] Thus, a creation of a derivative work based on a pre-existing work without the original author's permission—which is often the case of *dojinshi*—will constitute infringement on his or her integrity right if the creation constitutes a "distortion, mutilation, or other modification" against the author's will.[170] On the other hand, when the secondary work is transformative, the original author's right of

164. Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901).
165. 17 U.S.C. § 107(1).
166. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).
167. *Id.* at 592.
168. *See supra* Part III.C.
169. *See* Japanese Copyright Law, arts. 20, 28.
170. *Id.* art. 20.

integrity arguably does not extend to the transformative work because it is no longer the author's work. This distinction would have a significant implication for *dojinshi* because Japanese courts have indicated that *dojinshi* most likely infringes upon the original author's right of integrity.[171] Therefore, if the proposed fair use exception properly defines a "transformative" use, it could also resolve the issue associated with the JCA's strong protection for the author's right of integrity without amending its moral rights provisions.

For these reasons, the definition of a transformative work should differentiate transformative works from derivative works to ensure the protection of "parodies" including *dojinshi*. *Dojinshi* typically are unauthorized derivative works for sale that exploit expressive works,[172] which would lead to the second and fourth factors being weighed against the *dojinshi* creator. Thus, it is critical for *dojinshi* to be deemed as a transformative work to escape infringement liability.

Taking account of this concern, Japan should adopt the definition of a transformative work as a secondary work that adds a "new meaning, message, or purpose"[173] to the copyrighted work, and which also falls outside the scope of derivative works. Under current Japanese law, a derivative work is a creation that has adopted pre-existing material and includes newly-added creative elements.[174] Under this definition, a movie based on a novel is a derivative work because it is an adaptation of the original novel with new creations such as the actors' performances, music, and depictions of the novel's "sentiments and thoughts."[175] However, it is not a "transformative" work under the proposed definition because the movie's purpose is not transformative—contrarily, its purpose is to re-cast the elements of the original novel through different media in such a way that it accurately represents the world of the original novel. Nor does the movie add new meaning or message to the original novel; it merely traces the original meaning or message in a different media. As demonstrated, the proposed definition effectively distinguishes transformative works from derivative works.

Importantly, the proposed definition could cover parodies and *dojinshi* as transformative works, which qualify them as fair use, assuming that they do not "supersede" the original works and the copy-

171. *See supra* Part II.B.

172. *See supra* Part II.A.

173. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

174. *See* GANEA ET AL., *supra* note 49, at 57.

175. *Id.*

ing is reasonable.[176] Under this assumption, legal parodies most likely qualify as fair use because they use the original work for a new purpose and message, namely to criticize or comment on the original.[177] Thus, a *dojinshi* that uses original characters to depict the original story from a new perspective, offering a new interpretation of the original work, could be protected as parody.[178] Other types of *dojinshi* could qualify as transformative works if, for example, they depict the original characters in a new storyline that falls under a different genre from that of the original. It arguably adds new message and meaning to the original as it draws interactions and emotional exchanges between the characters placed in new settings and perspectives. Moreover, it is unlikely to "supersede" the original work because as an entirely new work, it would unlikely act as a substitute for the original or its derivative works. Thus, qualifying "parodies" and *dojinshi* will likely be protected under this proposed definition.

C. *The Fair Use Provision Should Explicitly Prohibit Judges from Evaluating the Artistic Worth of the Secondary Work.*

In addition, the provision concerning the transformative use should explicitly state that Japanese courts should only determine (1) whether a new meaning, message, or purpose can be reasonably perceived from circumstantial evidence[179] and (2) whether that meaning, message, or purpose will help "to contribute to the development of culture."[180] This will prevent Japanese courts from playing the role of an art critic to subjectively determine whether the new work is artistically different from the original. Under this instruction, courts are to objectively determine whether the alleged legitimate purpose can be reasonably perceived from circumstantial evidence, including the secondary work itself. Courts ought not to focus on the value of the new elements added by the secondary users to determine whether the new work is transformative. This would prevent courts from conducting a side-by-side comparison of the two creations, which requires expertise in the subject matter of the works in order to fairly determine whether the secondary work adds something of significance or value. These aforementioned adjustments, coupled with the proposed instruction, effectively assist Japanese courts in objectively determining whether

176. *See supra* Parts III.C. & D.

177. *See Campbell*, 510 U.S. at 581-83.

178. *See* SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1269-71 (11th Cir. 2001).

179. *Campbell*, 510 U.S. at 582. This approach parallels the *Campbell* Court's reasonable observer approach to determine whether the secondary work is a parody. *Id*.

180. Japanese Copyright Law, art. 1.

the secondary use at issue is a legitimate fair use that contributes to the "development of culture."

V. Conclusion

Japan needs to adopt a U.S.-modeled fair use exception to mitigate the possible chilling effect on "parodies" that would likely be created through Japan's compliance with the TPP Agreement. Japan's entrance into the agreement will tilt the balance of its copyright protection towards the overprotection of authors and copyright owners,[181] which could create a chilling effect on all creations of secondary works. This stunted growth of new creations would not only undermine Japan's "development of culture,"[182] but also could ultimately affect Japan's so-called "gross national cool"[183] because "parodies" are one of the important pillars of Japan's soft power.[184] Excessive protection for copyright owners' exclusive rights must be avoided because that is not the goal of copyright law. We must always remember that the ultimate objective of Japanese copyright law is to promote "the development of culture." We must also remember that all new creations are based on pre-existing materials, whether they are unprotected ideas or protectable expressions. Thus, we need to ensure that enough materials are left for future creators upon which they can build new creations.

As evidenced in Japan's cultural history, free flow of information enhances artists' inspiration and creativity, resulting in active creations that are essential to achieve Japan's copyright objective.[185] The fair use exception proposed in this article will properly strike the balance of protection between the rights of copyright owners and the public interest in having a society rich in arts and culture. This will necessarily protect the deserving "parodies" and *dojinshi* that contribute to Japan's "development of culture."

181. *See supra* Part I.

182. Japanese Copyright Law, art. 1.

183. Douglas McGray, *Japan's Gross National Cool*, Foreign Pol'y (Nov. 11, 2008), http://foreignpolicy.com/2009/11/11/japans-gross-national-cool/.

184. *See supra* Part II.A.

185. *See supra* Part II.

CONTRACTING FOR BLUE GOLD: AN EXAMINATION OF THE LEGAL DESIGNS SURROUNDING PRIVATE WATER DELIVERY

*Shannon Royster**

INTRODUCTION

California's historic mega-drought has lasted five years with little sign of relief.[1] Under these circumstances, it is no surprise that water receives vast coverage by news outlets across the United States. Water conservation is a trending topic; 1.2 trillion pounds of waste are released directly into U.S. freshwater sources every year.[2] Some U.S. water sources are so polluted that they cannot support life, and local

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1. *See* Doyle Rice et al., *California's 100-Year Drought*, USA TODAY (Sept. 2, 2014, 4:52 PM), http://www.usatoday.com/story/weather/2014/09/02/california-megadrought/14446195.

2. Rinkesh Kukreja, *40 Interesting Facts About Water Pollution*, CONSERVE ENERGY FUTURE, http://www.conserve-energy-future.com/various-water-pollution-facts.php (last visited Jan. 28, 2017).

governments have condemned many as unfit for human use.[3] Rampant pollution drives the search for clean water underground. Yet, water users (such as the Coca-Cola Corporation) pump groundwater at an unsustainable rate.[4] Usable water sources are dwindling, and instances of water conflicts are increasing.[5] Though drought-stricken Californians are already grappling with the issue,[6] people everywhere should be asking: who owns our water?

Allocating water is a complex task for any government; every country has its unique set of laws and codes that govern water ownership and use rights.[7] In the U.S., there are two main legal schemes for allocating water rights: riparian and prior-appropriation.[8] Several states have systems for allocating water that draw from both theories—a "dual system" of water rights.[9] Governments often grant rights to use water under state permit schemes that allow the right-holder to withdraw a specific amount of water at a particular location for a term of years.[10] Although most state governments legally reserve the discretion to deny a permit for water use that is not in the public interest, this option is rarely, if ever, exercised.[11]

While state and local governments generally control water rights within their jurisdictions, most states have passed legislation that allows local governments to "privatize" their water delivery systems.[12] Privatization is a term with varying meanings.[13] However, at its core it

3. *See, e.g.*, MINN. POLLUTION CONTROL AGENCY, MISSOURI RIVER BASIN MONITORING AND ASSESSMENT REPORT 1 (2014), https://www.pca.state.mn.us/sites/default/files/wq-ws3-10170204b.pdf.

4. *See, e.g.*, Archana Chaudhary, *Farmers Fight Coca-Cola as India's Groundwater Dries Up*, BLOOMBERG (Oct. 8, 2014, 11:30 AM), http://www.bloomberg.com/news/articles/2014-10-08/farmers-fight-coca-cola-as-india-s-groundwater-dries-up.

5. *See* VANDANA SHIVA, WATER WARS: PRIVATIZATION, POLLUTION, AND PROFIT, at vii–ix, 1–2 (2002).

6. *See, e.g.*, *California Orders Large Water Cuts for Farmers*, AL JAZEERA (June 12, 2015, 5:12 PM), http://america.aljazeera.com/articles/2015/6/12/california-orders-large-water-cuts-for-farmers.html.

7. *See generally* BARTON H. THOMPSON, JR. ET AL., LEGAL CONTROL OF WATER RESOURCES: CASES AND MATERIALS (5th ed. 2013) (discussing the various schemes state governments use to allocate water).

8. In riparian doctrine, water rights belong to the owner of the land on which the water sits. *Id.* at 14. Under prior-appropriation theory, on the other hand, whoever is first to put water to a "beneficial use" gains the right to use that water source. *Id.*; *see also* SHIVA, *supra* note 5, at 21–23.

9. *See* THOMPSON ET AL., *supra* note 7, at 14.

10. *See id.* at 172–73.

11. *See id.*

12. *See id.* at 802–03.

13. *See* Danwood Mzikenge Chirwa, *Privatisation of Water in Southern Africa: A Human Rights Perspective*, 4 AFR. HUM. RTS. L.J. 218, 220 (2004).

is the action of a government selling one of its assets to a private party, usually a corporation.[14] In the water context, public to private transfer can occur in various degrees that range from the total sale of water rights and infrastructure, to less invasive forms of privatization, such as partnerships between public and private institutions ("PPPs" or "P3").[15] Privatization is inseparably linked to other neoliberal, free-market principals such as deregulation and liberalization.[16]

Margaret Thatcher,[17] the godmother of privatization,[18] began pushing for neoliberal[19] reforms during the nineteen eighties in the United Kingdom as a means to raise state revenue and reduce government intrusion in the economy.[20] Thatcher's program was politically popular because it encouraged widespread ownership of private property in the form of shares.[21] The U.K. government, starting with the de-nationalization of already profitable industries—namely telecommunications[22]—subsequently passed the Water Act that privatized

14. Privatization comes in various forms, including:

> (1) full-fledged water privatization, meaning an actual transfer of assets and operational responsibilities to the private sector; (2) public ownership of assets combined with private provision of services under service or management contracts . . . , leases . . . or concessions . . . ; and (3) build, operate and transfer schemes where local government contracts with a private entity to build and operate an infrastructure facility . . . .

Jennifer Naegele, *What Is Wrong With Full-Fledged Water Privatization?*, 6 L.J. Soc. Challenges 99, 107 (2004) (citing Isabelle Fauconnier, *The Privatization of Residential Water Supply and Sanitation Services: Social Equity Issues in the California and International Contexts*, 13 Berkeley Plan. J. 37, 44 (1999)).

15. Thompson et al., *supra* note 7, at 802–03.

16. *See* Chirwa, *supra* note 13, at 221.

17. Margaret Hilda Thatcher was the late prominent British politician and member of the Conservative Party who served as Prime Minister of the United Kingdom from 1979-1990. *See Biography*, Margaret Thatcher Found., http://www.margaretthatcher.org/essential/biography.asp (last visited Jan. 29, 2017).

18. Perhaps the most prominent public figure to support privatization, Thatcher's program undoubtedly stemmed from Chicago-school neoliberal and Hayekian ideas. *See* Naren Prasad, *Privatisation of Water: A Historical Perspective*, 3/2 Law Env't & Dev. J. 217, 225–26 (2007).

19. "Neoliberal" refers to an economic and political policy that deemphasizes government regulation in the market and aims for reductions in government spending. *See* Emanuele Lobina & David Hall, Pub. Servs. Int'l Res. Unit, UK Water Privatisation - A Briefing 5 (2001), http://www.archives.gov.on.ca/en/e_records/walkerton/part2info/partieswithstanding/pdf/CUPE18UKwater.pdf.

20. *See* Prasad, *supra* note 18, at 225.

21. This type of program is often referred to as "popular capitalism"; however, some commentators doubt the validity of the theory in practice. *See, e.g.*, Paul Grout, '*Popular Capitalism' of the '80s Returns via Royal Mail & Lloyds*, Conversation (Oct. 16, 2013), http://theconversation.com/popular-capitalism-of-the-80s-returns-via-royal-mail-and-lloyds-19168.

22. *See* Richard Seymour, *A Short History of Privatisation in the UK: 1979-2012*, Guardian (Mar. 29, 2012), http://www.theguardian.com/commentisfree/2012/mar/29/short-history-of-privatisation.

water delivery in 1989.[23] Following the U.K.'s example, many countries have adopted legal schemes that support water privatization.[24]

Privatization is popular not only as an outgrowth of neoliberal economic policy but is also touted as a way to alleviate problems associated with aging water infrastructure, water scarcity and water quality. Private water advocates contend that private investment in aging water infrastructure is the only way for financially-strapped local governments to successfully restore America's 100-year old water infrastructure system (some towns still have wooden pipes).[25] Furthermore, large water corporations contend that, by benefitting from economies of scale and corporate water expertise, they are in a better position than local governments to assure water quality and water access for users.[26] Moreover, proponents argue that private control over water—which means private control over its price—will conserve water because people would be less likely to waste water when it is more expensive.[27] Although water privatization has been a rising trend, these purported benefits are not without their costs.

Inseparably linked to water privatization, water commodification is a private water cost that is chiefly borne by water users. The commodification of water means that water is treated as an economic good, subject to the same market forces as any other good available for sale, by which the price of water derives from supply and demand market forces—we have already seen this at play in the bottled-water industry.[28] The commodification of water is in direct conflict with the

23. *See* Ben Page & Karen Bakker, *Water Governance and Water Users in a Privatised Water Industry: Participation in Policy-Making and in Water Services Provision: A Case Study of England and Wales*, 3 INT'L J. WATER 38, 44 (2005).

24. *See* Prasad, *supra* note 18, at 225–27.

25. *See, e.g.*, *Public-Private Partnerships: A Solution for Infrastructure*, NAT'L CTR. FOR POL'Y ANALYSIS (Jan. 30, 2013), http://www.ncpa.org/sub/dpd/index.php?Article_ID=22790; *see also* Justin K. Lacey, *How to Profit from America's Crumbling Infrastructure*, MOTLEY FOOL (Jan. 19, 2014, 10:48 AM), http://www.fool.com/investing/general/2014/01/19/how-to-profit-from-americas-crumbling-infrastructu.aspx; Tim Ronaldson, *On Nov. 4, Haddonfield Voters Decide Whether to Sell Borough's Water and Sewer Rights to New Jersey American Water*, HADDONFIELD SUN (Oct. 20, 2014), https://haddonfieldsun.com/on-nov-4-haddonfield-voters-to-decide-whether-to-sell-boroughs-water-and-sewer-rights-to-new-jersey-1ea2da13b088#.ckyb0tqmx ("We recently redid the utilities on Pamona and we pulled wooden pipe out of the ground there. We've come across 125-year-old pipes on Maple.").

26. *See* Craig Anthony Arnold, *Privatization of Public Water Services: The States' Role in Ensuring Public Accountability*, 32 PEPP. L. REV. 561, 601 (2005) [hereinafter Arnold, *Privatization of Public Water*].

27. *See* Peter Rogers et al., *Water is an Economic Good: How to Use Prices to Promote Equity, Efficiency, and Sustainability*, *in* 4 WATER POL'Y 1, 5–6 (2002) (discussing the allocation of water through the imposition of tariffs).

28. *See* SHIVA, *supra* note 5, at 99–100.

idea that water is held in "the commons," or as a social good, due to water's unique characteristic of being essential for all life on Earth.[29] When water is characterized primarily as a profitable commodity, private actors in charge of distributing water can charge the market price for water; often making it vastly more expensive than it is under government-run, subsidized regimes.[30] Because corporations exist to make profits, the social and ecological values of water are in danger of being washed away when water is valued primarily as a moneymaking tool.

This paper argues that the legal procedures governments use to erect and support private water regimes are the same instruments that exacerbate the ills of private water and work damage to the public good, to democratic government, and to the sanctity of human rights. Part I of this paper contends experience demonstrates that private water regimes subordinate the public good in favor of private corporate interests due to private companies' fiduciary duties to shareholders. Part II argues experience illustrates that private arbitration and statute modification often work to erode the transparency required for democratic water management. Part III claims experience reveals that international trade agreements encourage water companies to enter new markets, but serious problems regarding the enforcement of international human rights law allow water corporations to escape punishment for human rights violations in those same markets. The legal armor available to proponents of water privatization makes a government's decision to privatize water delivery systems difficult to reverse without suffering collateral damage.

I. Common Good vs. Private Interests

Experience shows that private water regimes, which value water as an economic commodity, subordinate the public good in favor of private corporate interests due to private companies' fiduciary duties to shareholders. Part A contends that although private water systems operate on the premise that water markets are the best way to distribute water's value as an economic good among society, actual markets for water are exceptionally rare. Thus, a government's wholesale faith in water markets can work against its citizens. Part B argues that private water companies with large amounts of capital to invest, and with the cooperation of government officials, benefit at the expense of

29. *See* Maude Barlow & Tony Clarke, Blue Gold: The Fight to Stop Corporate Theft of the World's Water 3, 86–87 (2002).

30. *See id.* at 127.

the general population via favorable contract terms designed to ensure corporate profits. Part C asserts that even if local governments exit their corporate pacts, they are often left with the same financial difficulties that they had before privatizing their water system. Private management of water is largely incompatible with the concept that water is necessary for life due to the profit-centered fiduciary obligations of corporations.

A. Water "Markets"

The 1992 Dublin Conference on Water and the Environment[31] solidified the idea that water is an economic good.[32] Water is essential to human life. There will always be a demand for it, and it can be supplied to meet that demand via delivery networks. Thus, water suppliers can charge a price for water based upon the supply-demand paradigm.[33] Many economists and water managers maintain that these qualities make water's "economic good" characterization a foregone conclusion.[34] As an economic good, these professionals argue that water is allocated most effectively when water is traded in water markets with users paying full-cost price[35] for its value.[36]

However, the premise that water markets exist and operate like markets for other consumer goods is flawed. According to Professor Joseph Dellapenna, using the term "market" to describe the context in which water transfers occur is a misuse of the word—true markets for water are quite rare.[37] The existence of the bottled water industry suggests that water markets exist effectively. However, the bottled water

31. The Dublin Conference on Water and the Environment was a meeting of water experts to discuss water-related problems, which convened on January 31, 1992. *See* Int'l Conference on Water and the Environment, *The Dublin Statement on Water and Sustainable Development* (Jan. 31, 1992), www.ircwash.org/sites/default/files/71-ICWE92-9739.pdf. Participants produced the "Dublin Statement on Water and Sustainable Development," or the "Dublin Principles." *Id.*

32. *See id.* at 14*; see also* Hubert H.G. Savenije, *Water is Not an Ordinary Economic Good, or Why the Girl is Special*, 27 PHYSICS & CHEMISTRY EARTH 741, 741 (2002).

33. *See* Savenije, *supra* note 32, at 741.

34. *See, e.g.*, John Briscoe, *Water as an Economic Good*, *in* COST-BENEFIT ANALYSIS AND WATER RESOURCES MANAGEMENT 46, 65 (Roy Brouwer & David W. Pearce eds., 2005); *see also* Rogers et al., *supra* note 27, at 2.

35. "Full-cost price" is an economic term of art, which means that basic economics requires the price of a service match the cost of providing that service. *See* PETER ROGERS ET AL., GLOBAL PARTNERSHIP TECHNICAL ADVISORY COMMITTEE, WATER AS A SOCIAL AND ECONOMIC GOOD: HOW TO PUT THE PRINCIPLE INTO PRACTICE 9 (1998).

36. *See* Rogers et al., *supra* note 27, at 5.

37. *See* Joseph W. Dellapenna, *The Importance of Getting Names Right: The Myth of Markets for Water*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 317, 324 (2000) ("Such markets . . . have been used to transfer fairly small quantities of water among similar users in close proximity to each other . . . .").

market is minuscule compared to the possibilities of bulk raw water transactions and the entire water resources sector.[38] Water privatization proposals seldom create a real working market scenario—a situation where:

> water users will be able to negotiate over the price of water and seek out [the lowest-cost] provider, providers will be able to seek out the [highest-paying] user . . . and both will . . . engage in the sorts of activities that give rise to the expectation that markets are likely to generate the . . . most economically efficient use of water.[39]

Who gets to use water and at what price is not primarily a market decision, rather, it is a legal, administrative, and social one.[40]

When governments make this error, it is often its citizens who suffer. Consider, for example, the Chilean experience.[41] In Chile, water rights can be freely bought and sold; they are given private property protection by the constitution and civil code, creating a "market" for water that exists unmatched by any other country in the world.[42] Chile's tradable water rights system, established by the Water Code of 1981,[43] is the longest-running, and arguably most successful, privatization experiment in the world to date. Although this free-market legal framework was meant to cure water scarcity issues, many argue that it has created more problems than it has solved.[44]

Private property is protected from government regulation in Chile; thus, decisions about water use are made without regard to how those uses may affect third parties by private users who have the purchase-power necessary to amass water rights.[45] Supported by the legal framework, big business interests have collected a majority of Chile's water rights. This has been to the direct disadvantage of family farmers and rural populations that no longer have access to water because it has been transferred out from their communities for use in

38. *See id.* at 320.

39. *Id.* at 322.

40. *See id.* at 322–23.

41. Chile offers a strong example, as it has privatized not only the delivery of water, but also water rights themselves, which are freely purchased and sold by users. *See generally* Monica Ríos Brehm & Jorge Quiroz, *The Market for Water Rights in Chile: Major Issues*, WORLD BANK TECH. PAPER NO. 285 (1995).

42. *See id.* at 1–2.

43. CÓD. AGUAS, Octubre 29, 1981, DIARIO OFICIAL [D.O.] (Chile).

44. Carl J. Bauer, *Dams and Markets: Rivers and Electric Power in Chile*, 49 NAT. RES. J. 583, 643–51 (2009).

45. *See* CARL J. BAUER, SIREN SONG: CHILEAN WATER LAW AS A MODEL FOR INTERNATIONAL REFORM 32 (2004); *see also* Stephen E. Draper, *The Unintended Consequences of Tradable Property Right to Water*, 20 NAT. RES. & ENV'T 49, 51 (2005).

mining, logging or hydro-electric operations.[46] Some Chileans' only access to drinking water comes via truck delivery; these populations forego showers and use plastic bags instead of toilets for defecation because they have lost access to potable water.[47] Many Chilean citizens are calling for a restructuring of the laissez-fare water rights regime and insisting the government to return water to the public domain.[48] These people urge that the current legal framework "favors profits and the wealthy."[49] In the words of one Chilean water activist, "Chile's [economic] development cannot come at the cost of sacrificing the water of local communities . . . ."[50]

B. Blue Gold

Businesses are often thought of as a "nexus of contracts."[51] A business's primary method of operations is via contract; it contracts with other business, individuals, and governments to achieve its goals. By legal design, a publically held corporation separates its owners and its managers.[52] Furthermore, corporations owe a fiduciary duty to their owners.[53] This means that managers of the firm owe a binding legal obligation[54] to act in the best interests of the firm's shareholders who, collectively, own the firm through buying that firm's stock.[55] As a shareholder in a corporation, one is legally entitled to a share in the firm's profits. Thus, maximizing shareholder wealth from profitable

46. *See* Marianela Jarroud, *Laissez Faire Water Laws Threaten Family Farming in Chile*, INTER PRESS SERV. (May 27, 2015), http://www.ipsnews.net/2015/05/laissez-faire-water-laws-threaten-family-farming-in-chile; *see also* Alexei Barrionuevo, *Chilean Town Withers in Free Market for Water*, N.Y. TIMES, Mar. 15, 2009, at A12.

47. *See* Jarroud, *supra* note 46.

48. *See* BAUER, *supra* note 45, at 605; *see also Proyecto de Ley Busca Nacionalizar el Agua*, LA NACION (Mar. 20, 2008), http://www.lanacion.cl/noticias/vida-y-estilo/proyecto-de-ley-busca-nacionalizar-el-agua/2008-03-19/ 220549.html.

49. Marianela Jarroud, *Mining and Logging Companies Are Leaving All of Chile Without Water*, GUARDIAN (Apr. 24, 2013, 7:17 AM), http://www.theguardian.com/global-development/2013/apr/24/mining-logging-chile-without-water.

50. *See* Jarroud, *supra* note 46.

51. *See* CHARLES R.T. O'KELLEY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS 6 (6th ed. 2010); *see also* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 311 (1976).

52. *See* O'KELLEY & THOMPSON, *supra* note 51, at 6.

53. *Id.* at 154.

54. In Justice Cardozo's words, the "punctilio of an honor . . . ." Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).

55. *See* A.G. Anderson, *Conflicts of Interest: Efficiency, Fairness and Corporate Structure*, 25 UCLA L. REV. 738, 780 (1978).

business decisions is the prime objective of modern publically traded corporations.[56]

The global water industry is worth an estimated 591 billion dollars.[57] For every one U.S. dollar spent on water systems, the economic return can be as high as twenty-eight dollars.[58] Additionally, some market analysts contend that the water business sector is one of the best current investments—the economic version of a "sleeper hit."[59] Ten major corporations dominate the water industry.[60] The two water-giants, Vivendi Universal and Suez, operate in at least 130 countries.[61] Private water companies, even the smaller ones, are in control of tremendous capital.[62] This capital becomes an effective bargaining chip when negotiating with governments.

As a result of this bargaining power, contracts between private water companies and governments tend to be very flexible, allow for renegotiations, and favor the company.[63] For example, the 1989 contract between the Argentinian government and Suez-led consortium Aguas Argentina contained several advantageous terms that protected the corporation's profit margins.[64] One such term allowed Aguas Argentina to file for a rate increase if its costs became too high.[65] A year after the contract was signed, the company argued the government was making "extra-contractual demands" that poor neighborhoods receive water service immediately and it could not af-

56. *See* O'KELLEY & THOMPSON, *supra* note 51, at 7.

57. According to 2014 estimates, by 2025, the industry is slated to be worth one trillion dollars. *See* ROBECOSAM, WATER THE MARKET OF THE FUTURE 2 (2015), https://www.robeco.com/images/RobecoSAM_Water_Study.pdf.

58. GUY HOTTON & LAURENCE HALLER, WORLD HEALTH ORG., EVALUATION OF THE COSTS AND BENEFITS OF WATER AND SANITATION IMPROVEMENTS AT THE GLOBAL LEVEL 3 (2004), http://www.who.int/water_sanitation_ health/wsh0404.pdf.

59. *See, e.g.*, David Zeiler, *Water Stocks: Don't Overlook This $1 Trillion Opportunity*, MONEY MORNING (Feb. 16, 2013), http://moneymorning.com/2013/02/06/water-stocks-dont-overlook-this-1-trillion-opportunity; *see also* Jeff Siegel, *Investing in Desalination Stocks: A Boring Way to Make a Crap Ton of Money!*, ENERGY & CAP. (Oct. 1, 2014), http://www.energyandcapital.com/articles/investing-in-water-desalination-stocks/4604; Jeff Siegel, *Investing in Water Stocks: This is BETTER Than Oil!*, ENERGY & CAP. (Jan. 28, 2015), http://www.energyandcapital.com/articles/investing-in-water-stocks/4731.

60. *See* Naegele *supra* note 14, at 112.

61. *See id.*; *see also* BARLOW & CLARKE, *supra* note 29, at 117.

62. *See* Bill Marsden, *Cholera and the Age of Water Barons*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Feb. 3, 2003), http://www.icij.org/projects/waterbarons/cholera-and-age-water-barons; *see also* BARLOW & CLARKE, *supra* note 29, at 118.

63. *See* MAUDE BARLOW, BLUE COVENANT: THE GLOBAL WATER CRISES AND THE COMING BATTLE FOR THE RIGHT TO WATER 38–40 (New Press 2008) (2007); *see also* BARLOW & CLARKE, *supra* note 29, at 103.

64. *See* BARLOW & CLARKE, *supra* note 29, at 103.

65. *See id.*

ford to make those improvements without increasing water bills; Argentina acquiesced to the company's demands.[66] Corporations demand high returns on their investment[67]—flexible terms that benefit the corporation are a hallmark of water privatization contracts.[68]

This favorable-contract scenario has played out in the United States as well. In 2001, the city of Coatesville sold its water system to the publically held Pennsylvania-American Water Company (PAWC) for 38 million dollars to raise revenue, alleviate municipal debt and overhaul the city's aging water infrastructure.[69] Citing increased costs, PAWC requested nine rate increases over the duration of its tenure in Coatesville based on flexible contract terms allowing for re-negotiations.[70] The Pennsylvania Public Utility Commission granted every request, even though a water bill for a single-family household could be higher than 100 dollars.[71] Rate hikes such as these, stemming from contract re-negotiations, are a common feature of private water systems;[72] while private companies can access private capital to fund projects, it seems that water-users pick up the tab over the long-term.

C. The Fallout

Because these contractual modifications result in extreme rate hikes, many governments often exit these private contracts prematurely and are left picking up the pieces. For example, in Atlanta, Georgia, a Suez subsidiary named United Water entered into a 20-year, 428 million dollar contract with the Atlanta government to con-

66. *See id.* at 102–03. A price hike of 13.5 percent for consumption, disconnection and reconnections, and a 42 percent increase in an infrastructure surcharge. Prior to these increases, there had already been hikes in 1991 and 1992 of 25 percent and 29 percent, respectively. *Id.*

67. *See, e.g.*, Naegele, *supra* note 14, at 110 (noting that a private water company in Chile demanded, as a condition imposed by the World Bank, a 33 percent return on its investment); *see also* BARLOW & CLARKE, *supra* note 29, at 103–04 (noting that profit margins for Aguas Argentina were beyond excellent—two and a half times higher than margins by private water companies in England and Wales).

68. *Cf.* BARLOW & CLARKE, *supra* note 29, at 111 (noting that, in Europe, "[p]lagued by constant wrangling since [a privatization] contract was first signed, one senior Budapest city official reflected: 'it is now clear that this kind of privatization was a mistake.'").

69. Aaron Miguel Cantú, *In Pennsylvania City, The Poor are Paying the Price for a Bad Water Deal*, AL JAZEERA (July 13, 2015, 5:00 AM), http://america.aljazeera.com/articles/2015/7/13/in-coatesville-the-poor-are-paying-the-price-for-a-bad-water-deal.html.

70. Laura Benschoff, *What Your City Can Learn About the Cost of Water in Coatesville, PA*, KEYSTONE CROSSROADS (Oct. 21, 2015), http://crossroads.newsworks.org/index.php/local/keystone-crossroads/87370-what-your-city-can-learn-from-the-cost-of-water-in-coatesville-pa.

71. *Id.*

72. *See* PUB. CITIZEN, WATER PRIVATIZATION FIASCOS: BROKEN PROMISES AND SOCIAL TURMOIL 3 (2003), https:// www.citizen.org/documents/privatizationfiascos.pdf.

trol water delivery in 1998.[73] Under United Water's management, Atlanta's water bills increased an average of 12 percent a year before the city withdrew from the contract in 2003.[74] United Water billed an extra 37.6 million dollars on top of the contract price for work that was never completed; it also engaged in other suspicious billing practices.[75] When Atlanta exited the contract, the situation was bleak: Atlanta still had a sprawling urban population, a crumbling infrastructure that could not support the expanding city, and constituents who lost faith in the government's ability to provide for their needs.[76]

The situation was similar in Buenos Aires. Contractual re-negotiations produced a 20 percent rise in water prices that were "borne disproportionately by the urban poor."[77] Furthermore, Aguas Argentina never built the sewage treatment plant it agreed to construct.[78] When the private water deal eroded, 95 percent of the city's sewage was dumped directly into the Rio de la Plata River.[79] Notwithstanding obvious long-term costs associated with pollution, financing the upgrades that Aguas Argentina partially completed or neglected would be left to the Argentine government and the taxpayers.[80] Corporations, guided by market principles, are designed to prioritize short-term monetary gains with little to no regard to the effects of their actions on citizens or the government.

Although private water systems operate on the premise that the economic market will most effectively distribute water's value among society, a government's adoption of that belief is inherently flawed. Unequal bargaining power in privatization negotiations results in contract terms that are overly favorable to the private water corporation, allowing it to maximize profits without regard to the customers it serves. Even if the government ends the contractual relationship, it is often no better off than it was before entering into the privatization

73. *Id.*

74. *Id.*

75. *See id.* ("[United Water] billed an extra $37.6 million for additional service authorizations, capital repair and maintenance costs, and the city paid nearly $16 million of those costs."). In addition to neglecting critical infrastructure updates, the company failed to provide acceptable sanitation for the city's drinking water—there were numerous "boil water advisories" during United Water's tenure. *Id.*

76. *See* Geoffery F. Segal, *Many Questions Remain for Atlanta After United Water*, GA. PUB. POL'Y FOUND. (Jan. 30, 2003), http://www.georgiapolicy.org/2003/01/many-questions-remain-for-atlanta-after-united-water ("It's a shame Atlanta decided to cut ties with United Water, ultimately tying the hands of the city well into the future.").

77. *See* PUB. CITIZEN, *supra* note 72, at 2.

78. *See id.*

79. *Id.*

80. *See id.*

agreement. Experience shows that private water regimes, which value water as an economic commodity, subordinate the public good in favor of private corporate interests due to private companies' fiduciary duties to shareholders. No matter how conscientiously a private water company carries out its business, such commercial enterprises are simply not designed with egalitarian principles in mind.[81]

II. Democratic Water

This section argues that private arbitration and legislative enactments often work to erode the transparency required for democratic water management. Part A contends that democratic control of water assets is necessary to ensure citizen-centered water management. Part B asserts that, internationally, private arbitration—often a term in Bilateral Investment Treaties—works to remove transparency in water administration. Part C argues that, domestically, many local legislatures have proposed measures that allow finalization of privatization agreements without a popular vote, stripping the privatization process of critical democratic oversight. Less democratic oversight allows water corporations to pursue profits without adequate checks and balances.

A. The Importance of Democracy

The very nature of water demands democratic control of water assets so that governments can ensure citizen-centered water management. Water, in addition to being recognized as an economic good, is also recognized by academics as a public good (or, social good).[82] Although there is no single definition of a public good, public goods often have "spillover" effects.[83] For instance, literacy is often cited as a social good, because the ability to read does not just affect the immediate individual—it increases the level of education and sophistication for the entire society.[84] Availability of clean and affordable water

81. *See* Barlow & Clarke, *supra* note 29, at 89 ("Management of water resources . . . is based on market dynamics of increasing consumption and profit maximization, rather than on long-term sustainability of a scarce resource for future generations.").

82. *See* Naegele, *supra* note 14, at 114; *see also* Craig Anthony Arnold, *Water Privatization Trends in the United States: Human Rights, National Security, and Public Stewardship*, 33 Wm. & Mary Envtl. L. & Pol'y Rev. 785, 804 (2009) [hereinafter Arnold, *Water Privatization Trends*].

83. *See* Peter H. Gleick et al., Pac. Inst., The Risks and Benefits of Globalization and Privatization of Fresh Water 5 (2002), http://pacinst.org/app/uploads/2013/02/new_economy_of_water3.pdf.

84. *Id.*

confers benefits on the individual user as well as the population at large.[85]

In addition to having social, cultural and religious significance, water is essential to life itself.[86] More than two billion live without access to sanitation services.[87] Potable water systems greatly reduce instances of water-borne illnesses, saving millions of lives per year.[88] Without clean water to drink, people turn to polluted lakes and rivers; they have no choice but to accept the risk of fatal illness from doing so. In the words of Jennifer Naegele, "above all, water is a social good and should be regulated in order to ensure equitable use among all users."[89]

Accepting the premise that clean and affordable water is necessary for society to prosper, the task of overseeing water management should be primarily assumed by the people for whom the system is designed to serve.[90] The process of supplying water must be accountable to the larger public interest.[91] Thus, decisions regarding water management must be open to public scrutiny. In order for the people to attentively examine water management, information about the choices water providers make must be accessible.[92] Though access to this information may be lacking in public water systems, private con-

85. *See* Arnold, *Water Privatization Trends*, *supra* note 82, at 789.

86. *See* SHIVA, *supra* note 5, at 35.

87. *See* Naegele, *supra* note 14, at 107.

88. WORLD HEALTH ORG., THE WORLD HEALTH REPORT 2002: REDUCING RISKS, PROMOTING HEALTHY LIFE 9 (2002), http://www.who.int/whr/2002/en/whr02_en.pdf.

89. Naegele, *supra* note 14, at 114.

90. *The Realization of Economic, Social and Cultural Rights*, U.N. ESCOR Comm'n on Hum. Rts., 52d Sess., Agenda Item 4, at 3, U.N. Doc. E/CN.4/Sub.2/2000/NGO/19 (2000) ("Irrespective of the form of water service management and the degree of involvement of private companies in the service, the public authorities must exercise control over the operations of the various public or private bodies involved in water service management. This includes, in particular, the financing of works, the quality of the water, continuity of the service, pricing, drafting of specifications, degree of treatment and user participation.").

91. *See* Pankti Vora et al., *Analyzing the Implications of Water Privatization: Reorienting the Misplaced Debate*, 6 NUJS L. REV. 147, 161 (2013) (citing Arnold, *Privatization of Public Water*, *supra* note 26, at 564 ("The more important issues involve identifying under what conditions water privatization should occur and what safeguards and accountability mechanisms should be provided to protect the public.")).

92. *See* Karin M. Krchnak, *Improving Water Governance Through Increased Public Access to Information and Participation*, 5 SUSTAINABLE DEV. L. & POL'Y 34, 35 tbl.1 (2005). Project-related decisions include: participation in concessions; facility siting; transparency of award process and final decision on award; and accessibility of performance monitoring and review procedures. *See id.* Policy-making decisions include: participation in the formulation of regional policies, plans and programs; questions on the timeliness and scope of public notice; breadth of consultation in drafting and formulation; lead-time for public comments on proposals; feedback and transparency in communication of final decisions; and accessibility of performance monitoring review procedures. *See id.*

trol over water delivery is, by its nature, antithetical to democratic goals of openness and transparency.[93] This transparency deficit starts with the initial contract, as terms are bargained for behind closed doors.

B. Contracts and Treaties

Contract terms between governments and water providers are deliberately left general and flexible.[94] These malleable terms facilitate a system that does not hold private water providers accountable for their actions. Because "the . . . management of water supply is so complex . . . , the performance parameters of the scheme are often left vague . . . ."[95] Hence, these contracts provide significant leeway to the corporation to "flout" contract targets and escape responsibility for doing so.[96] Moreover, private water concessions are often set to run for decades; the water company stands to benefit from a lack of accountability throughout the life of the investment project.[97] Private water regimes are generally designed in such a way that protects the interests of the corporation.

Many water corporations also escape public accountability through the use of Bilateral Investment Treaties (BITs). Broadly speaking, a BIT is a contract that establishes the terms and conditions for private investment by citizens and corporations of one nation-state in a different nation-state, granting rights of investors from each country to access the other's markets.[98] These agreements allow a corporation to bring legal action against a country if the host country cancels a contractual investment relationship prematurely.[99] Another distinctive feature of these contracts is the private-arbitration clause. These clauses allow investor-companies to bypass domestic judicial systems;

93. *See* BARLOW & CLARKE, *supra* note 29, at 207–08.

94. *See supra*, Part I.B.

95. Vora et al., *supra* note 91, at 162.

96. *Id.* In Stockton, for instance, "[a]fter independent analyses showed that a contract was based on underestimated inflation figures, overestimated energy expenditures, and overstated capital cost savings, courts determined that [the California Environmental Quality Act] required the city to engage in thorough environmental impact analysis before approving the contract." Arnold, *Water Privatization Trends*, *supra* note 82, at 801–02; *see also* Concerned Citizens Coalition of Stockton v. City of Stockton, 26 Cal. Rptr. 3d 735, 737 (Ct. App. 2005).

97. *See* Vora et al., *supra* note 91, at 162.

98. *See* BARLOW & CLARKE, *supra* note 29, at 176; *see also Bilateral Investment Treaty*, CORNELL UNIV. L. SCH., https://www.law.cornell.edu/wex/bilateral_investment_treaty (last visited Jan. 31, 2017).

99. *See* BARLOW & CLARKE, *supra* note 29, at 176.

instead, a company's legal claims are adjudicated in secret by an international investment arbitration panel.[100]

For example, Bolivia and the Netherlands signed a BIT that facilitated Bechtel Corporation's legal action against the Bolivian government.[101] After popular protest resulting from a failed private water contract, the Bolivian government canceled its Cochabamba contract with Aguas del Tunari, a subsidiary of Bechtel.[102] To gain rights under the Bolivia-Netherlands BIT, Bechtel moved one of its holding companies from the Cayman Islands to the Netherlands in order to submit a 40 million dollar legal claim against the Bolivian government after the contract was cancelled.[103] Unlike the judicial proceedings of many countries that are open to the public, these proceedings are adjudicated in secret.[104] Legal maneuvering by private water advocates that reduces public accountability is not limited to the developing world.

C. These Great United States

Legal mechanisms that diminish transparency are at play in the United States as well. In February 2015, New Jersey governor Chris Christie signed a bill into law that removed a public-vote requirement from existing state water laws.[105] The Water Infrastructure Protection Act allows New Jersey cities to privatize their water delivery services without public input if the municipality meets one of six conditions.[106] One of these criteria is the determination that the municipality's water infrastructure has suffered "material damage."[107] Although the exact condition of New Jersey's water infrastructure is unknown, it is well

100. *See id.* at 171.

101. *Id.* at 177.

102. *Id.* at 155, 177.

103. *See id.* at 177. As a result, the company gained "the right to sue Latin America's poorest country at the World Bank's International Centre for Settlement of Investment Disputes." *Id.*

104. *See id.* at 171; *see also* Julien Chaisse & Marine Polo, *Globalization of Water Privatization: Ramifications of Investor-State Disputes in the "Blue Gold" Economy*, 38 B.C. INT'L & COMP. L. REV. 1, 15, 20 (2015). Not only does the tribunal meet in secret, it is comprised of officials from the World Bank. This is significant because the World Bank was an instrumental part of Aguas del Tunari's presence in Bolivia in the first place. *See* BARLOW & CLARKE, *supra* note 29, at 176. The World Bank's involvement in global water privatization will further be discussed *infra* Part III.A.

105. *See* Assemb. B. 3628, 2014 Leg., 216th Sess. (N.J. 2014), http://www.njleg.state.nj.us/2014/Bills/A4000/3628_R1.htm; *see also* Nicholas Huba, *Law May Give Residents No Say on A.C. Water Utility's Future*, PRESS OF ATL. CITY (Nov. 20, 2015), http://www.pressofatlanticcity.com/communities/atlantic-city_pleasantville_brigantine/law-may-give-residents-no-say-on-a-c-water/article_329e91c6-8fe7-11e5-8c0c-1bafc7ef5395.html.

106. *See* N.J. STAT. ANN § 58:30 (West 2016).

107. *See id.*

known that America's water infrastructure is crumbling,[108] such that the American Society of Civil Engineers assigned a "D" grade to America's water pipes.[109] It seems that America's water delivery is already materially damaged. Not only have New Jersey residents lost the ability to participate in water privatization decisions, it stands to reason that privatization of water systems in the future will be streamlined.

Many states do not even have a vote-requirement to privatize water systems. Groups across the country have worked to introduce ballot initiatives that give the public a voice in the decision to privatize water delivery. For example, in 2003, the mayor and city council of Stockton, California announced a plan to privatize the city's water delivery.[110] With democratic accountability being one of the main focuses, those opposed to the plan organized a ballot initiative and gathered enough signatures to qualify for a public vote on the privatization issue.[111] Despite this victory, the vote was unsuccessful; Stockton sold off its water system to a multi-national water consortium, OMI-Thames, for a 600 million dollar contract.[112] Although private water proponents had urged that Stockton citizens would not be negatively affected by the decision to privatize, in 2008, citing a lack of transparency, rate hikes and sewage spills, the city council resumed control over Stockton's water system.[113] State and local legislative bodies that repeal public accountability procedures—or that simply do not have them in the first place—contribute to a lack of democratic oversight in private water systems. Indeed, a goal of privatization is to reduce political "interference" in the allocation of water.[114]

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108. *See, e.g.*, Benjamin Preston, *Taking a Road Trip This Summer? Enjoy America's Crumbling Infrastructure*, GUARDIAN (July 27, 2015, 7:00 AM), http://www.theguardian.com/travel/2015/jul/27/america-infrastructure-roadways-highways-funding ("Few things are more American than hitting the open road—the problem is, so many of those roads suffer from underfunding."); *see also* Rosabeth Moss Kanter, *What It Will Take to Fix America's Crumbling Infrastructure?*, HARV. BUS. R. (May 11, 2015), https://hbr.org/2015/05/what-it-will-take-to-fix-americas-crumbling-infrastructure.

109. *See 2013 Report Card for America's Infrastructure*, AM. SOC'Y OF CIVIL ENG'RS, http://www. infrastructurereportcard.org/water-infrastructure (last visited Feb. 1, 2017) (stating that, "[e]ven though pipes and mains [in the U.S.] are more than 100 years old and in need of replacement, outbreaks of disease attributable to drinking water are rare.").

110. *See* JOANNA L. ROBINSON, CONTESTED WATER: THE STRUGGLE AGAINST WATER PRIVATIZATION IN THE UNITED STATES AND CANADA 1 (2013).

111. *See id.* at 3.

112. *See id.*

113. *See id.* at 3–4.

114. *See* Nicholas McMurry, *Water Privatisation: Diminished Accountability*, 5 HUM. RTS. & INT'L LEGAL DISCOURSE 233, 238 (2011).

Democratic control of water delivery systems is necessary to ensure public accountability and citizen-centered water management. Internationally, private arbitration—a central feature of BITs—works to remove democratic transparency in water administration. Domestically, local governments that pass legislation removing public accountability measures, or that do not enact such measures in the first place, strip the privatization process of democratic oversight. Private arbitration and actions (or inactions) by legislatures that diminish transparency erode the public accountability necessary in water management. Less democratic oversight allows water corporations to pursue profits without adequate checks and balances. Often, this lack of safeguards allows corporations to commit violations of human rights laws and escape liability for doing so.

III. Human Rights

This section argues that international trade agreements historically encourage water companies to enter new markets, but serious problems regarding the enforcement of international human rights law allow water corporations to escape punishment for human rights violations in those markets. Part A contends that the current international trade framework facilitates global corporate water investment, providing increased revenue to water corporations. Part B argues that water corporations often commit significant human rights violations in the pursuit of profits. Part C asserts that water corporations often escape punishment for human rights abuses because enforcement of human rights laws, if any even exists at all, is lax. Private water companies have an incentive to commit human rights violations if such violations will result in higher earnings for the company and its shareholders.

A. Economic Globalization

The current international trade rules aid global corporate water investment, facilitating corporations' entrance into new private water delivery markets. The dismantling of trade barriers by international trade rules to facilitate a single global economy is referred to as economic globalization.[115] The General Agreement on Tariffs and Trade (GATT) was seminal in the advancement of a global economy.[116] In-

115. *See* Barlow & Clarke, *supra* note 29, at 81 ("In this global market economy, everything is now up for sale, even areas of life once considered sacred, such as health and education, culture and heritage, genetic codes and seeds, and natural resources, including air and water.").

116. *See id.* at 83.

stituted in 1947, GATT was a multilateral treaty that established international investment rules between twenty-three nations.[117] Importantly, in 1994, a round of GATT negotiations created the World Trade Organization (WTO), which assumed control over the regulation of international trade.[118] GATT is still an operational treaty under the WTO framework, but it is no longer the primary international investment agreement.[119]

The WTO has an active hand in facilitating the privatization of water delivery services in all corners of the world. Under the WTO's trade rules, water is identified as a tradable commodity—an economic good.[120] The WTO's rules mandate that any constraint on the trade of goods (water being included in this definition) is a "trade restrictive measure" that is subject to adjudication by a WTO tribunal.[121] These lawsuits can be worth billions of dollars.[122] Thus, the WTO's classification of water makes it incredibly difficult for nations to place restrictions on the trade of water, even if such restrictions are enacted for valid and compelling ecological or social reasons.[123] WTO rules serve to remove trade barriers so that private water corporations are able to seek profits in new markets.

The policies of major international financial institutions build upon these free-trade rules, explicitly promoting privatization and ensuring the success of private water providers. The two most important

117. *See The General Agreement on Tariffs and Trade (GATT 1947)*, WORLD TRADE ORG., https://www.wto.org/ english/docs_e/legal_e/gatt47_01_e.htm (last visited Feb. 1, 2017).

118. Also known as the "Uruguay round." *See A Summary of the Final Act of the Uruguay Round*, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/ursum_e.htm#General (last visited Feb. 1, 2017).

119. There are several main treaties under the WTO, including: umbrella (the Agreement Establishing the WTO); goods and investment (the Multilateral Agreements on Trade in Goods including the GATT 1994 and the Trade-Related Investment Measures (TRIMS)); services (General Agreement on Trade in Services (GATS)); intellectual property (Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)); dispute settlement (Dispute Settlement Understanding (DSU)); and reviews of governments' trade policies (Trade Policy Review Mechanism (TPRM)). *See Understanding the WTO – Overview: A Navigational Guide*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm (last visited Feb. 1, 2017).

120. *See* BARLOW & CLARKE, *supra* note 29, at 165.

121. *See id.* at 170 ("Although the WTO cannot directly command a member nation-state to change its laws, the threat of economic sanctions creates . . . a 'chill effect' that compels governments to review and revise their legislation for fear of being targeted by a WTO tribunal.").

122. *See id.* at 177.

123. *See id.* at 165 ("This means that if a water-rich country placed a ban or even a quota on the export of bulk water for sound environmental reasons, that decision could be challenged under the WTO as a trade-restrictive measure and a violation of international trade rules.").

are the World Bank and the International Monetary Fund (IMF);[124] they provide large private loans to developing nations. When extending aid to foreign countries, the World Bank conditions loan proceeds on a requirement that the receiving nation privatize its national industries (including its water delivery system).[125] These institutions also insist on "full cost recovery," which means that governments are forbidden from offering subsidies to financially insolvent individuals that cannot afford the private water company's increased rates.[126] Full cost recovery ensures maximization of profits for corporate water providers and often finds its way into privatization agreements themselves.

B. Violations

Backed by international financial institutions and a friendly system of trade rules, the pursuit of revenue by corporations goes beyond advantageous contract terms—many commit egregious human rights violations in the pursuit of profits. The human right to water has been established in a variety of international agreements. The most powerful statement was issued by the United Nations Committee on Economic, Social and Cultural Rights in 2002.[127] *General Comment Number 15, The Right to Water*, states that the right to potable water is an essential part of the right to an adequate standard of living; it is a "prerequisite for the realization of other human rights" and "indispensable for leading a life in human dignity."[128] The right to water captures not just the necessity of clean water, but also its affordability, availability in sufficient quantities, and physical accessibility for domestic uses.[129] Violations of these rights in private water regimes are unfortunately too common.

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124. *See* Nancy Alexander, *The Roles of the IMF, the World Bank, and the WTO in Liberalization and Privatization of the Water Services Sector*, CITIZENS' NETWORK ON ESSENTIAL SERVS. 3 (Oct. 21, 2005), http://docplayer.net/ 24212101-The-roles-of-the-imf-the-world-bank-and-the-wto-in-liberalization-and-privatization-of-the-water-services-sector-1.html.

125. *See id.* at 7. This is referred to as a "structural adjustment program." *Id.*

126. *See id*. at 9–10. Like the so-called "'boil the frog method' . . . . [the structural adjustment program] assumes that, just as a frog will not jump out of water if it comes to a boil gradually, so too, water users will not rebel if full cost recovery is introduced gradually over several years." *Id.* at 10.

127. *See* Arnold, *Water Privatization Trends*, *supra* note 82, at 815.

128. U.N. ESCOR, Comm'n on Econ., Soc. & Cultural Rights, *General Comment No. 15: The Right to Water* (*Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights*), ¶ 1, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003).

129. *Id.* ¶ 2.

The situation of Cochabamba, Bolivia provides a provocative illustration. In 1998, the IMF lent the government of Bolivia 138 million dollars to aid in the country's economic growth.[130] One of the loan conditions required Bolivia to sell its public enterprises, including the water delivery system.[131] The Bolivian parliament quickly legalized the privatization of water.[132] Water company Aguas del Tunari was the sole bidder for the contract in one of Bolivia's largest cities: Cochabamba. In the subsequent months, Aguas del Tunari dramatically raised water prices in order to finance updates to the city's water infrastructure—in some cases by 100 to 200 percent.[133] Even though water bills could be about twenty five percent of the monthly income for a working-class family, IMF policy mandated that Bolivia could not provide subsidies to these citizens.[134] If water bills were not paid, access to water was shut off.[135] Even those who had built wells on their land before privatization were charged for water withdraws; the contract granted Aguas del Tunari complete and exclusive rights to supply water.[136] The citizens opposed the hikes immediately. Protests evolved into a series of violent riots in Cochabamba and surrounding cities, injuring 175 people, including a young boy was shot by the police.[137] Aguas del Tunari's outrageous price increases were violations of the human rights to water and life; potable water was neither affordable, nor accessible.

Another story tainted of flagrant human rights violations by a water corporation takes place in South Africa. In 1999, a concession contract was awarded to a British water company, Biwater, for a 30-year term. Not only were the water bills "grossly inflated," but residents also paid for water even when it did not flow into their homes. Home meters, installed by Biwater, started tallying how much a customer uses once the tap was turned on; however, most taps do not dispense water for up to ninety minutes after it has been turned on—

130. Malgosia Fitzmaurice, *The Human Right to Water*, 18 FORDHAM ENVTL. L. REV. 537, 564 (2006).

131. *Id.*

132. *Id.* at 565.

133. *See* PUB. CITIZEN, *supra* note 72, at 5.

134. *See* Naegele, *supra* note 14, at 109 (citing Kristie Reilly, *Not a Drop to Drink*, IN THESE TIMES (Oct. 11, 2002), http://inthesetimes.com/article/131/not_a_drop_to_drink). A policy against subsidization in this context appears in private-public water contracts as "full cost recovery." *Id.*

135. *See* William Finnegan, *Leasing the Rain*, NEW YORKER (Apr. 8, 2002), http://www.newyorker.com/magazine/2002/04/08/leasing-the-rain.

136. *See* PUB. CITIZEN, *supra* note 72, at 5.

137. *Id.*

the concession contract required users in the poorest segments of society to pay for this "air time."[138] Though taps were turned on and customers were paying, there was no water flow provided to thirsty residents.

C. *No Punishment*

Water corporations often escape punishment for human rights abuses because enforcement of human rights law is lax, if any exists at all. Notwithstanding the fact that *General Comment 15* is contained in a nonbinding legal instrument, international human rights framework is constructed to hold nations responsible for rights violations suffered by their citizens.[139] The United Nations has declared that "the prime responsibility and duty to promote and protect human rights lie with the State . . . ."[140] Thus, the state has a duty to take action to protect citizens from human rights violations committed by private corporations.[141] Often, nation-states are forced into privatization agreements, or seek them out in order to fulfill their own human rights obligations to provide clean water to citizens. Many academics criticize the current responsibility-paradigm in international human rights law.[142] It plainly fails to provide satisfactory redress for violations committed by corporations, but nations are limited in the measures that they can take to hold such corporations accountable because private water contracts limit democratic involvement as a central feature.[143]

The current international trade rules facilitate global investment by water corporations, allowing them to maximize revenue. Transnational water corporations often commit violations of human rights in pursuit of revenue. These corporations can escape liability for human rights violations because there are no significant international legal mechanisms to hold them accountable. International trade laws encourage water companies to enter new markets, but serious problems regarding the enforcement of international human rights law allow water corporations to escape punishment for human rights violations in those markets. Private water companies have an incentive to com-

138. Nick Mathiason, *Turning Off the Tap for Poor*, GUARDIAN (Aug. 18, 2002, 6:01 PM), https://www.theguardian.com/business/2002/aug/18/theobserver.observerbusiness10.

139. *See* Fitzmaurice, *supra* note 130, at 549–51.

140. Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, G.A. Res. 53/144, Annex pmbl., U.N. Doc. A/RES/53/144 (Mar. 8, 1999).

141. *See* Fitzmaurice, *supra* note 130, at 559.

142. *See, e.g.*, McMurry, *supra* note 114, at 236, 238.

143. *See* Chirwa, *supra* note 13, at 222–28.

mit human rights violations if those violations will result in higher earnings for the company and its shareholders.

Conclusion

Experience demonstrates that private water regimes subordinate the public good in favor of private corporate interests due to corporations' fiduciary duties to shareholders. Additionally, experience has revealed that private arbitration and legislative actions (or inaction) work to erode the accountability and transparency required for democratic water management. Moreover, experience shows that international trade agreements encourage water companies to enter new markets, but serious problems regarding the enforcement of international human rights law allow those companies to escape punishment for human rights violations in those same markets. The legal procedures that proponents of private water delivery deploy in the construction and maintenance of private water regimes are the same instruments that make private water so damaging to the public good, to democratic government, and to the sanctity of human rights.

As drought continues to devastate not only California, but also communities around the world, it is only natural for citizens to engage the question of how water will be managed in order to provide for future needs. The debate surrounding water privatization is not new, but with technological advancements such as desalination, the debate is brought into new focus. Because large corporations have the capital required to invest in expensive desalination projects, private corporations may control the delivery of more water than ever. Though water is essential to humans and the life of the planet, transnational corporations prefer to focus on other considerations—namely, their bottom line. Corporations are essentially guaranteed immunity for acts they commit in pursuit of profits, even acts as egregious as human rights violations. Thus, the legal armor available to proponents of water privatization makes a government's decision to privatize water delivery systems difficult to reverse without suffering collateral damage—monetary or otherwise.

THE TIME DOES NOT FIT THE CRIME: ELIMINATING MANDATORY MINIMUMS FOR NONVIOLENT DRUG OFFENDERS IN FAVOR OF JUDICIAL DISCRETION

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* J.D. Candidate, May 2017, Southwestern Law School. I would like to thank my mother, Feri, for her unconditional love and support throughout my life. I would also like to thank Ryan Harold, Sherron Wiggins and Brett Haber for their constructive feedback on various drafts of this article.

I. Introduction

What is the ultimate goal of incarceration? Is it to punish or to rehabilitate the offender in pursuance of preventing future criminal activity? The societal goals of incarceration differ between cultures.[1] These cultural differences and their respective aims for incarceration result in some systems developing to enforce rules, maintain public safety, or rehabilitate wrongdoers, while other systems revolve around the objective to punish offenders.[2]

The American criminal justice system is the latter—developed with the objective of punishing those who have committed crimes, rather than rehabilitating them.[3] This approach to incarceration results in the United States having the largest number of incarcerated persons per capita in the world.[4] Because European countries are culturally similar to the U.S., this statistic is notable, if not surprising. This unprecedented and ever increasing incarceration statistic is likely a firsthand result from the passage of rigorous legislation aimed at fighting the "War on Drugs," the institution of mandatory minimum sentences for drug offenses in the 1980s, and the stringency of parole eligibility.[5] What naturally follows from mandatory prison sentences and decreasing parole eligibility is an inevitable increase in the number of prisoners.[6] With 189,214 people in federal custody, 46.4% were charged with drug related offenses.[7] According to the Federal Bureau of Prisons (BOP), 82,415 inmates are currently serving time for drug

1. Johannes Andenaes, *The General Preventive Effects of Punishment*, 114 U. Penn. L. Rev. 949, 959, 966 (1966).

2. *See generally id*. at 959-73.

3. Max Fisher, *A Different Justice: Why Anders Breivek Only Got 21 Years For Killing 77 People,* The Atlantic (Aug. 24, 2012), http://www.theatlantic.com/international/archive/2012/08/a-different-justice-why-anders-breivik-only-got-21-years-for-killing-77-people/261532/.

4. Katie Ward et al., *Incarceration Within American and Nordic Prisons: Comparison of National and International Policies,* 1 Engage 38 (2013), https://www.researchgate.net/publication/235948052.

5. Roberta M. Harding, *In the Belly of the Beast: A Comparison of the Evolution and Status of Prisoners' Rights in the United States and Europe*, 27 Ga. J. Int'l & Comp. L. 1, 4, 5 (1998); Don Johnson, *Towards a Compassionate and Cost-Effective Drug Policy: A Forum on the Impact of Drug Policy on the Justice System and Human Rights*, 24 Fordham Urb. L. J. 315, 332 (1997).

6. Harding, *supra* note 5.

7. *Population Statistics*, Fed. Bureau of Prisons, https://www.bop.gov/about/statistics/population_statistics.jsp (last updated Jan. 26, 2017).

offenses.[8] This, as this article will argue, can be directly attributed to the aforementioned "War on Drugs" policy, coupled with the institution of mandatory minimum sentences.

Mandatory minimum sentences in the U.S. primarily targets major drug dealers and kingpins, but has failed to serve its purpose because in the vast majority of cases, the low level dealers and users are sentenced, while major drug dealers and kingpins rarely serve time.[9] A possible reason for the failure of the original legislation to crack down on the kingpins and high level dealers could be credited to them having leverage in the form of information about other criminals.[10] They are able to use this information to be granted leniency in their charge, and serve minimal prison time, if any at all.[11] Meanwhile, the small-scale dealers, who are ordinarily poor individuals trying to earn a little cash and make ends meet, receive outrageous sentences and serve 20 plus years.[12] The legislation by the U.S. Congress condemns the small-scale offenders instead of the big kingpins, and doing so without any real knowledge on the crimes or circumstances surrounding the offense.[13] What results is an inhumane system.

Due to the mandatory sentences and the federal "War on Drugs" policy, which run contrary to studies that indicate incarceration is not the most effective means of deterrence, the U.S. is now faced with overcrowded prisons.[14] The federal government has indicated that it is aware of the issue and is taking steps to address the problem.[15] In October 2015, new sentencing guidelines were introduced by a bipartisan group of senators to reduce mandatory minimum sentences for nonviolent offenders.[16] In the same month, the Justice Department announced that about 6,000 inmates would be released from federal prisons.[17] Even with these steps being taken, and those 6,000 inmates indeed being released, there remains a great deal of work to be done.

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8. *Id.*
9. *See* Johnson, *supra* note 5, at 331.
10. *See id.* at 331, 350.
11. *Id.*
12. *Id.* at 321, 331.
13. *Id.* at 331-32.
14. Carolyn W. Deady, Incarceration and Recidivism: Lessons From Abroad 1-2 (2014), https://www.salve.edu/sites/default/files/filesfield/documents/Incarceration_and_Recidivism.pdf.
15. Michael S. Schmidt, *U.S. to Release 6,000 Inmates from Prisons*, N.Y. Times, Oct. 7, 2015, at A1.
16. James A. Baker, *DOJ to Release 6,000 Prisoners: What You Should Know*, Baker Inst. Blog (Oct. 8, 2015), http://blog.chron.com/bakerblog/2015/10/doj-to-release-6000-prisoners-what-you-should-know/.
17. Schmidt, *supra* note 15.

These additional steps that the government needs to take will be explored in this article.

Additionally, the U.S. has the highest recidivism rates in the world, signifying the ineffectiveness of the current system.[18] Thus, it is time to explore the successful components of other European prison systems in order to establish a more effective approach. With the lowest recidivism rate, Scandinavian countries, like Norway, are considered models of effective incarceration practices.[19] Though drug use and trafficking are prevalent in Norway, as they are in the U.S., their humane and compassionate treatment of inmates is a far better method of achieving rehabilitation goals.[20] Norway has an estimated population of 5 million people, yet there are less than 4,000 incarcerated.[21] Further, at 20 percent, Norway has one of the lowest recidivism rates in the world.[22] This finding suggests that the Norwegian prison systems reduces recidivism more effectively than the U.S.[23] The U.S. and Norwegian penal systems are similar in terms of the goals of incarceration.[24] Both punish for the crime committed and attempt to rehabilitate the offender.[25] They differ, however, in their manner of achieving these goals. Norway has not implemented mandatory minimums, meaning when they incarcerate, the term of incarceration are proportionate to the severity of the crime committed.[26] What results is a system more concerned with effective rehabilitation and release of prisoners, not in doling out punishments that do not fit the crime committed.[27]

Unlike the U.S., where judges have been stripped of their authority in terms of determining the length of an offender's sentence,

18. Ward et al., *supra* note 4, at 38 (recidivism is the tendency for a criminal to reoffend. The American incarceration rate is at over 714 per 100,000 citizens, compared to western European countries at 95 per 100,000 citizens).

19. DEADY, *supra* note 14, at 3.

20. Ward et al., *supra* note 4, at 38-39.

21. Christina Sterbenz, *Why Norway's Prison System Is So Successful*, BUS. INSIDER (Dec. 11, 2014), http://www.businessinsider.com/why-norways-prison-system-is-so-successful-2014-12 ("Norway also has a relatively low level of crime compared to the US, according to the Bureau of Diplomatic Security. The majority of crimes reported to police there are theft-related incidents, and violent crime is mostly confined to areas with drug trafficking and gang problems").

22. DEADY, *supra* note 14, at 3.

23. *Id.*

24. Fisher, *supra* note 3.

25. *Id.*

26. *Id.*

27. *See Inside Norway's Progressive Prison System*, VICE (Aug. 3, 2011), http://www.cnn.com/2011/WORLD/europe/08/02/vbs.norwegian.prisons/; Sterbenz, *supra* note 21.

judges in Norway have retained this power.[28] The Norwegian system views criminals as individuals who have made mistakes and who are capable of being rehabilitated.[29] Thus, instead of punishment, the main objective of Norway's prison system is rehabilitation.[30] In addition, Norway advocates the "principle of normalization," meaning that their rehabilitation includes programs that ensure that recently released prisoners can easily integrate back into society.[31]

The American criminal justice system must shift its focus from punishment to rehabilitation, particularly for nonviolent drug offenders.[32] A good starting point for the shift is to abolish mandatory minimums that remove judicial authority to take into account facts surrounding the crime and the criminal, and instead force judges to sentence offenders for a set period of time specified by statute.[33] Part II of this paper will examine the background of U.S. and Norwegian drug laws and further examines the current governing laws and policies. Part III will analyze the problems with mandatory minimums and explain why judicial discretion is a superior method. Part IV will compare the incarceration goals in the U.S. criminal justice system with Norway's to determine what aspects of the Norwegian criminal justice system may be reasonably adopted in the U.S. Although members of Congress are coming together to decrease the duration of mandatory minimum sentences, I propose eliminating them altogether in favor of judicial discretion.

28. *See* Hilde K. Kvalvaag, *Norway Prisons Rehabilitate Criminal Offenders*, U. OF BERGEN (Aug. 24, 2016), http://www.uib.no/en/news/100126/norwegian-prisons-rehabilitate-criminal-offenders; Mark Lewis & Sarah Lyall, *Norway Mass Killer Gets the Maximum: 21 Years*, N.Y. TIMES, Aug. 25, 2012, at A3.

29. *See* William Lee Adams, *Norway Builds the World's Most Humane Prison*, TIME (May 10, 2010), http://content.time.com/time/magazine/article/0,9171,1986002,00.html; Jessica Benko, *The Radical Humaneness of Norway's Halden Prison*, N.Y. TIMES MAG. (Mar. 26, 2015), https://www.nytimes.com/2015/03/29/magazine/the-radical-humaneness-of-norways-halden-prison.html.

30. Fisher, *supra* note 3.

31. *See* NORDIC COUNCIL OF MINISTERS, NORDIC PRISON EDUCATION: A LIFELONG LEARNING PERSPECTIVE 15, 123 (2009), http://epeamalta.org/uploads/3/0/6/4/3064611/nordic_prison_education.pdf; Benko, *supra* note 29; Sterbenz, *supra* note 21.

32. For purposes of this paper nonviolent crimes include drug offenses such as possession, possession with intent to distribute, manufacture, sale, and trafficking of controlled substances.

33. Johnson, *supra* note 5, at 332.

II. The Development of Governing Drug Laws and Policies Until Now: United States vs. Norway

A. The United States

The United States has been at war with drugs for decades, but it has been a losing battle as it has failed to produce any evidence of success.[34] In the 1930s, Congress formed the Federal Bureau of Narcotics to better enforce the then criminal prohibition of alcohol and other narcotics.[35] In 1951, Congress enacted two-year mandatory minimum sentences, doubling down on the ill-perceived effectiveness of incarceration.[36] Nevertheless, drugs became the symbol of youthful rebellion in the late 1960s.[37] In response, President Nixon declared a war on drugs in 1971, increasing both the size and presence of drug control agencies, and enacting legislation that further extended mandatory minimum sentences.[38] Further, President Reagan focused on "Getting Tough" on drugs, from which incarceration rates skyrocketed.[39] Between 1980 and 1996, only 12 percent of the incarceration rate increase was due to actual increases in crime—the remaining 88 percent of the increase was due to the institution of certain sanctions and mandatory minimum sentences.[40] These changes in sentencing policy resulted in more than half of the population in federal prisons being incarcerated for drug related offenses.[41]

One of the main culprits responsible for more than half of the U.S. prison population being incarcerated for drug offenses is the

34. *See* Nick Clegg & Richard Branson, *We Have Been Losing the War On Drugs for Four Decades*, Guardian (Mar. 3, 2015), https://www.theguardian.com/commentisfree/2015/mar/03/war-on-drugs-british-politicians-nick-clegg-richard-branson.

35. Johnson, *supra* note 5, at 321.

36. *Id.*

37. Herron Keyon Gaston, *Race, Morality, and the Law: The Lingering Effects of the War on Drugs*, Huffington Post (Jan. 27, 2015), http://www.huffingtonpost.com/herron-keyon-gaston/race-morality-and-law-the_b_6544286.html.

38. *See* Robert C. NeSmith, *Tough on Crime or Tough Luck for the Incarcerated? Exploring the Adverse Psychological Impacts of Mandatory Minimum Sentencing and Pushing for Action*, 39 Law & Psychol. Rev. 253, 255-56 (2015); Karim Ismaili, *Some Reflections on the Origins and Implications of Mass Imprisonment in the U.S.*, 44 J. Cath. Legal Stud. 411, 414-15 (2005).

39. NeSmith, *supra* note 38, at 256.

40. Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons, 1980-1996*, 26 Crime & Just. 17, 43 (1999).

41. *See* Doris Layton Mackenzie, Sentencing and Corrections in the 21st Century: Setting the Stage for the Future 1, at 14 (2001), https://www.ncjrs.gov/pdffiles1/nij/189106-2.pdf. The proportion of drug offenders in federal prison has declined only marginally since 1996. At the time this article went into press, drug offenders compose of 46% of the federal prison population. *See Offenses*, Fed. Bureau of Prisons, https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (last updated Dec. 24, 2017).

Anti-Drug Abuse Act of 1986, which "established the basic framework of mandatory minimum penalties currently applicable to federal drug trafficking offenses."[42] Under this framework, the mandatory minimums "ranged from five years without parole to life imprisonment" with "the quantities triggering mandatory minimums [varying] for [different] drugs."[43] For example, the 1986 Act distinguished between powder cocaine and crack cocaine by treating quantities of crack cocaine differently than powder cocaine for purposes of sentencing using the "100-to-1" ratio as specified statute.[44] This disparity is evidenced by the "mandatory minimum of five years imprisonment for trafficking offenses which involved at least five grams of crack cocaine, whereas trafficking offenses involving powder cocaine required at least 500 grams of the substance to trigger the same mandatory minimum."[45] Congress established this ratio, however, due in large part to the fact that crack cocaine was more affordable than powder cocaine, and thus increasing in popularity.[46] Because of this arbitrary ratio and related legislation, imprisonment rates continue to rise as crime rates have fallen.[47] Therefore, it is obvious that enactment of stringent legislation aimed at fighting the "War on Drugs" and the "Get Tough on Crime" policies has led to an increased number of incarcerations for drug related offenses.[48] In order to combat mass incarceration, Congress passed the Fair Sentencing Act of 2010.[49] The Act sought to reduce mandatory minimum sentences for drug related offenders by reducing the 20 years mandatory minimum to 15 years, and reducing the life imprisonment mandatory minimum to 25 years.[50]

In sum, more drug offenders are going to prison because the U.S. criminal justice system perceives no other option for these individuals aside from sending them to prison.[51] This is the result of a combination of the reduction in treatment and legislation requiring mandatory

42. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, §§ 1002- 1302, 100 Stat. 3207 (1986); U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 23 (2011).

43. U.S. SENT. COMM'N, *supra* note 42.

44. *Id.* at 23, 25.

45. *Id.* at 25.

46. *See id.*

47. *See* NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 47 (2014).

48. Harding, *supra* note 5.

49. Fair Sentencing Act, 21 U.S.C. § 801 (2010); U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: IMPACT OF THE FAIR SENTENCING ACT OF 2010, at 3, 7 (2015).

50. *Id.*

51. Harding, *supra* note 5.

minimum sentences.[52] The sheer number of those incarcerated for drug related offenses indicate that the war on drugs has failed. Because of this, criminologists are increasingly asking the same question: does the U.S. penal system run counter to its goals of offender rehabilitation?[53]

B. Norway

Norway, along with Denmark, Finland, Iceland, and Sweden, commonly referred to as Scandinavia, stand out in many respects due to its liberal criminal justice policies and moralistic position on drug offenses.[54] These liberal policies are evidenced by Scandinavia's abandonment of the idea of a "drug-free society" as "unrealistic" and implementing policies "based on harm reduction ideas."[55] Similar to the U.S., Norway is divided between judicial, executive, and legislative branches, each of which is mutually independent.[56] It is also similar in terms of law and court structure, as their laws are "codified and the court systems consist of local courts, regional appellate courts, and a Supreme Court."[57] However, unlike the U.S., which has mandatory minimum sentencing, Scandinavia's "sentencing is preserved as an area of normal judicial decision making, guided by valid sources of sentencing law such as the General Civil Penal Code (GCPC)."[58]

Norwegian laws prescribe reasonable minimum and maximum penalties for each offense.[59] Sections 162 of the GCPC states:

> Any person who unlawfully manufactures, imports, exports, acquires, stores, sends or conveys any substance that pursuant to statutory provision is deemed to be a drug shall be guilty of a drug felony and liable to fines or imprisonment for a term not exceeding two years. An aggravated drug felony shall be punishable by imprisonment for a term not exceeding 10 years.[60]

Further, "[w]hether or not a drug offense is judged as serious depends on the type of drug involved, its quantity and the nature of the

52. *See* United States v. Williams, 788 F. Supp. 2d 847, 871 (N.D. Iowa 2011).

53. Symposium, *Towards a Compassionate and Cost-Effective Drug Policy: A Forum on the Impact of Drug Policy on the Justice System and Human Rights*, 24 FORDHAM URB. L.J. 315, 320-324, 326, 333 (1997).

54. Tapio Lappi-Seppälä, *Penal Policy in Scandinavia,* 36 CRIME & JUST. 217, 221 (2007).

55. *Id*. at 261.

56. *Id.* at 221.

57. *Id.* at 222.

58. *Id*. at 225; ALMINDELIG BORGERLIG STRAFFELOV [Civil Code] pt. II, ch.14, § 162 (Nor.).

59. JENNIFER TURNER & WILL BUNTING, ACLU, A LIVING DEATH: LIFE WITHOUT PAROLE FOR NONVIOLENT OFFENSES 201 (Vanita Gupta ed., 2013).

60. STRAFFELOV § 162 (Nor.).

offense. If the quantity is 'very significant' imprisonment will be imposed for a period of 3 to 15 years."[61]

However, unlike the U.S. mandatory minimum sentencing laws, the sentencing guidelines set forth in the GCPC are discretionary.[62] Influenced by both rational and traditional factors, the Norwegian criminal justice system thoroughly details criminal charges and considers factors such as "age, former behavior, and personal characteristics" beyond the statutes.[63] The system has recognized that crime is a result of innate propensities in the individual, of upbringing, and numerous other environmental influences.[64] The Norwegian criminal justice system has recognized that "these various factors do not operate separately or independently of one another, but are woven together in a complicated pattern."[65] As a result, milder sentences are handed down after understanding the reasons behind the offense.[66] The courts in Norway, unlike the courts in the U.S., have realized that leniency, rather than traditional justice, provides better dividends in the form of quicker reintegration.[67] What results is a justice system that functions effectively by being fair to its criminals, rather than simply punishing them irrespective of the circumstances surrounding their offense.[68]

Although the crime rates in Norway are high, similar to other industrialized countries, the imprisonment rates are among the lowest in Western democracies largely due to their commitment to liberal values, human rights, and rational policymaking. Although the length of sentencing is milder in Norway, the courts still punish the offender while compensating those harmed by the offender.[69] This is largely

61. *Norway Criminal Codes,* CRIME & SOCT'Y, https://www-rohan.sdsu.edu/faculty/rwinslow/europe/norway.html (last visited Jan. 26, 2017) (citing STRAFFELOV § 162 (Nor.)).

62. KATJA FRANKO AAS, SENTENCING IN THE AGE OF INFORMATION: FROM FAUST TO MACINTOSH 99 (2005).

63. Johannes Andenaes, *Choice of Punishment*, 2 SCANDINAVIAN. STUD. L. 55, 60 (Swed.) (1958); Tapio Lappi-Seppälä, *Nordic Youth Justice*, 40 CRIME & JUST. 199-201 (2011); STRAFFELOV § 46, 55 (Nor.).

64. Liliana Segura, *In Sentencing Criminals, Is Norway Too Soft? Or Are We Too Harsh?*, THE NATION (Aug. 28, 2012), https://www.thenation.com/article/sentencing-criminals-norway-too-soft-or-are-we-too-harsh/.

65. Andenaes, *supra* note 63.

66. *Id.* at 68; ANNE BUKTEN ET AL., NORWEGIAN CENTRE FOR ADDICTION RES., THE NORWEGIAN OFFENDER MENTRAL HEALTH AND ADDICTION STUDY – DESIGN AND IMPLEMENTATION OF A NATIONAL SURVEY AND PROSPECTIVE COHORT STUDY (2015).

67. *See* Su-Syan Jou, *Norwegian Penal Norms: Political Consensus, Public Knowledge, Suitable Sentiment and a Hierarchy of Otherness*, 9 NAT'L U. L. REV., 283, 303 (2014).

68. Segura, *supra* note 64.

69. Nicholas C. Katsoris, *The European Convention on the Compensation of Victims of Violent Crimes: A Decade of Frustration*, 14 FORDHAM INT'L L.J. 186, 204 (1990).

due to the fact that anger and a desire for vengeance are socially undesirable in Norway.[70] To them, deprivation of freedom is enough of a punishment, and thus there is a major focus on rehabilitation of inmates.[71] Further, instead of utilizing mandatory minimum sentencing laws, Norway has defined the maximum sentence for a particular offense as 21 years with possible extensions.[72] Thus, not only is there no death penalty in Norway, it has abolished the life sentence and replaced it with a 21-year maximum term for most crimes—even mass murder.[73] Although it is rare, the 21-year imprisonment can be "extended in five-year increments" if prison authorities, while the offender is in treatment, "determines that an offender is not rehabilitated by the end of the initial term."[74] The U.S. should take note of Norway's penal system, which has achieved its incarceration goals while keeping inmate populations low by focusing on rehabilitating and releasing inmates, rather than simply punishing them by use of lengthy prison terms.

III. Problems Posed by Mandatory Minimums and How Eliminating Them in Favor of Judicial Discretion Is a Better Approach for the United States

The American criminal justice system's decades of relentless "War on Drugs" and "Tough on Crime" policies have fueled the passage of unnecessarily long sentencing laws such as mandatory minimum penalties and life without possibility of parole (LWOP).[75] Prolonged prison terms for nonviolent drug offenders are generated by these mandatory sentences and associated limits on judicial discretion.[76] The passage of mandatory minimum laws in the U.S. have resulted in the statutory requirement that judges punish people by sentencing them to at least a mandatory minimum number of years in

70. *See* Jou, *supra* note 67.

71. *See* Benko, *supra* note 29.

72. Straffelov § 162 (Nor.); Lappi-Seppälä, *supra* note 54, at 223.

73. Straffelov § 17 (Nor.); *See* Bob Cameron, *Why Does Norway Have a 21-Year Maximum Prison Sentence?*, The Local (Aug. 24, 2012 4:04 PM), http://www.thelocal.no/20120824/why-norways-maximum-sentence-is-just-21-years.

74. *See* Bob Cameron, *Why Does Norway Have a 21-Year Maximum Prison Sentence*?, Slate (May 7, 2013), http://www.slate.com/blogs/quora/2013/05/07/why_does_norway_have_a_21_year_maximum_prison_sentence.html.

75. Harding, *supra* note 5, at 4-5.

76. Johnson, *supra* note 5, at 324 (Mandatory minimum sentencing means that the judge has little to no discretion, and must give the sentence that the legislators have determined is appropriate, based on the quantity of the drug).

prison.[77] However, there is no direct correlation between the offender's role in the offense and term of imprisonment; thus, the offender's blameworthiness is irrelevant to the minimum sentence length.[78] By enacting these mismatched laws, the American criminal justice system has unduly inhibited judges from carrying out their profession, that is, to evaluate the circumstances surrounding the offenders' individual cases and assign the punishment they find most appropriate.[79] On the other hand, these laws have vastly assisted prosecutors through empowering them to control the fates of offenders by giving them inherent discretion to charge a defendant with a sentencing enhancement that triggers LWOP.[80] As of 2012, the BOP and Department of Corrections estimates that approximately 79% of the 3,278 federal prisoners serving LWOP are for nonviolent drug crimes.[81]

By requiring judges to apply mandatory sentences, the judges' hands are tied and they have to sentence offenders to a certain term in prison, regardless of whether or not the judge agrees that the sentence is in the best interest of justice.[82] In cases reviewed by the American Civil Liberties Union (ACLU), the sentencing judges went on record, time after time, and objected to the mandatory sentences as being disproportionately severe but declared that they had no discretion to take individual circumstances into account.[83] For instance, Federal District Judge James R. Spencer is one of many judges who have voiced their opposition to mandatory sentences. He went on record to protest while sentencing a man, who was a drug addict, to a mandatory LWOP because the man had sold small amounts of crack cocaine out of a hotel room for a few weeks to support his addition.[84] During the man's sentencing, Honorable Judge Spencer stated:

> I think a life sentence for what you have done in this case is ridiculous. It is a travesty. I do not have any discretion about it. I do not agree with it, either. And I want the record to be clear on that. This is just silly. But as I say, I do not have any choice.[85]

77. *Id.*

78. *See id.* at 331.

79. *See id.* at 332 (consideration that can be taking into account include: former behavior, environment, guilt, personal characteristics, etc.).

80. *Id.* at 331.

81. TURNER & BUNTING, *supra* note 59, at 2.

82. *See id.* at 115 (Judge McClendon reasoned in a concurring opinion that she did not agree with the mandatory sentence, but was forced to follow the mandate of the legislature).

83. *Id.* at 74.

84. *Id.* at 4.

85. *Id.*

Honorable Judge Robert Sweet has also voiced his opposition for his compelled sentencing of an eighteen-year-old to a ten-year mandatory term. Judge Sweet was outraged for having to impose such a lengthy sentence for a first-time offender who was employed at a dispensary as a security guard.[86]

Other cases in which people were sentenced to LWOP for nonviolent drug crimes include the following:

> acting as a go-between in the sale of $10 of marijuana to an undercover officer . . . [,] verbally negotiating another man's sale of two small pieces of fake crack to an undercover officer . . . [,] having a trace amount of cocaine in clothes pockets that was so minute it was invisible to the naked eye . . . [,] possession of a crack pipe . . . [,] and [selling] methamphetamine to pay for a lifesaving bone marrow transplant . . . for his son.[87]

In light of these stories, there is a great deal of injustice being done by the American criminal justice system. When considering the impact that American drug policy has had on human rights and the U.S. justice system, it is clear that mandatory minimum sentences have failed. Instead of mandatory minimums, the American criminal justice system should focus on the rational humane treatment of the individual offender, while continuing its education on the different treatment facilities offered by various institutions.

I propose abolishing mandatory minimum sentences in favor of allowing judges to award appropriate and just sentences in proportion to the offender's guilt and circumstances. In the spirit of the law, mandatory minimums should be discretionary guidelines. We should permit judges to decide an offender's punishment based on a sense of what is just by considering the circumstances of individual cases. Many Americans disagree, but frequently, what a nonviolent drug offender truly needs is rehabilitation, not prolonged imprisonment.[88] We can learn from other countries such as Norway, which emphasizes rehabilitation as its primary goal of incarceration.[89]

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86. Johnson, *supra* note 5, at 324.

87. TURNER & BUNTING, *supra* note 59, at 4, 80.

88. Johnson, *supra* note 5, at 332; DOUG MCVAY, VINCENT SCHIRALDI, AND JASON ZIEDENBURG, JUSTICE POLICY INSTITUTE, TREATMENT OR INCARCERATION? NATIONAL AND STATE FINDINGS THE EFFICACY AND COST SAVINGS OF DRUG TREATMENT VERSUS IMPRISONMENT 6 (2004).

89. DEADY, *supra* note 14, at 3.

IV. The Criminal Justice System's Approach to Achieving Its Incarceration Goals: United States vs. Norway

When an offender is incarcerated, judicial systems around the world have historically focused their approach to imprisonment on four distinct principles: retribution, incapacitation, deterrence, and rehabilitation.[90] First, retribution, or punishment, focuses on atoning for the wrongdoings of offenders.[91] Second, the objective behind incapacitation is to inhibit criminal offenders from committing future crimes.[92] Third, the idea surrounding deterrence is to educate the offender and the public about the consequences surrounding criminal activity, and to dissuade the general public from committing crimes.[93] Finally, rehabilitation focuses on training and preparing offenders for a "crime-free" life once they are released from prison.[94]

Throughout history, the primary goal of the American criminal justice system has been to punish those who commit crimes.[95] Unlike the U.S., however, Norway has been proactive in approaching their criminal justice system with the primary goal of rehabilitating their offenders.[96] Which is a more effective system? Is it the U.S. with a goal of criminal punishment, or the Norwegian system with a goal of criminal rehabilitation? An analysis of how each country achieves its goals is required to answer this question.

A. Retribution

1. The United States

According to the United States Sentencing Commission, "the most commonly-voiced goal of mandatory minimum penalties is the "justness" of long prison terms."[97] Those in favor of retribution believe that punishing offenders is warranted because the wrongdoer de-

90. Leslie Patrice Wallace, *"And I Don't Know Why it is That You Threw Your Life Away": Abolishing Life Without Parole, The Supreme Court in Graham v. Florida Now Requires States to Give Juveniles Hope, for a Second Chance,* 20 B.U. Pub. Int. L.J. 35, 68-69 (2010).

91. Gerard V. Bradley, *Retribution: The Central Aim of Punishment,* 27 Harv. J.L. Pub. Pol'y 21, 23 (2003).

92. Joanna R. Lampe, *A Victimless Sex Crime: The Case for Decriminalizing Consensual Teen Sexting,* 46 U. Mich. J.L. Reform 703, 723 (2013).

93. Richard S. Frase, *Punishment Purposes,* 58 Stan. L. Rev. 67, 71.

94. *Id.* at 70.

95. Cameron, *supra* note 74.

96. Deady, *supra* note 14, at 3.

97. U.S. Sent. Comm'n, Special Report to the Congress: Mandatory Minimum Penalties in the Federal Justice System 13 (1991).

serves to be reprimanded for the crimes they have committed.[98] In addition, those in favor of retribution believe long-term sentencing is "payback" and a way to provide closure for the affected community.[99] Conversely, critics of the retribution system argue that punishment is more so revenge than it is just.[100] As the world's model of fairness and justice, the American criminal justice system, should strive more. Instead, the American criminal justice system horrifically imposes ruthless penalties that abuse many of the basic human rights laws.[101] However, in too many circumstances, long-term prison sentences, including life sentence, do not serve the objectives that a criminal justice system strives to achieve. A basic principle followed by many is that "the punishment [should] fit the crime."[102] But in reality, do they?

2. Norway

Unlike the U.S., the Norwegian culture does not approve of the concept of vengeance.[103] Even outside the criminal justice system, the Norwegian community has a strong disregard for retribution.[104] Due to this, the Norwegian criminal justice system is able to more justly and objectively sentence its offenders.

B. Incapacitation

1. The United States

Incapacitation, or imprisonment, is often defined as the offenders' physical detention to prevent them from committing new crimes.[105] The Journal of Crime and Justice has noted that incapacitation is a "social experience that places offenders in a unique social domain – the "society of captives" – and that it qualitatively restruc-

98. *See* David A. Starkweather, *The Retributive Theory of "Just Deserts" and Victim Participation in Plea Bargaining*, 67 IND. L.J. 853, 866 (1992).

99. *See* L. Harold de Wolf, *From Retribution to Prevention and Social Restoration*, 33 JURIST 25, 47 (1973); Spear It, *Legal Punishment as Civil Ritual: Making Cultural Sense of Harsh Punishment*, 82 MISS. L.J. 1, 5 (2013); HUMAN RIGHTS WATCH, NATION BEHIND BARS: A HUMAN RIGHTS SOLUTION 7-9 (May 4, 2008), https://www.hrw.org/sites/default/files/related_material/2014_US_Nation_Behind_Bars_0.pdf.

100. *See* Spear It, *supra* note 99, at 43.

101. *See* Molly M. Gill, *Let's Abolish Mandatory Minimums: The Punishment Must Fit the Crime*, 36 HUM. RTS. 4 (2009); *see also* Dirk van Zyl Smit & Andrew Ashworth, *Disproportionate Sentences as Human Rights Violations*, 67 MOD. L. REV. 541, 542 (2004).

102. John Alan Hamilton, *Making the Punishment Fit the Crime*, J. AM. INST. CRIM. L. & CRIMINOLOGY 159 (1921).

103. Jou, *supra* note 67, at 304.

104. *Id.*

105. *See* Andenaes, *supra* note 63, at 69; *Incapacitation*, U.S. LEGAL DICTIONARY, https://definitions.uslegal.com/i/incincapacitat-sentencing/ (last visited Jan. 25, 2017).

ture their lives from ones of freedom to ones of substantial constraint."[106] In direct contradiction to its intended purpose, many argue that by confining the offenders together, they expose each other to further levels of criminal influence, which inherently creates an environment where criminal ideals, skills and thought processes are both learned and hardened.[107] According to the social learning theory, a nonviolent drug offender's likelihood of living a criminal life post-release is significantly increased once they have spent time with other criminals in confinement.[108]

In addition, individuals in support of incapacitation argue that the best way to extinguish the drug epidemic in the U.S. is to imprison drug offenders for long periods of time.[109] Nevertheless, since the U.S. has begun its "War on Drugs," this strategy has thus far been proven ineffective, as drug use in America today is as high as it has ever been.[110] The system creates a cynical effect, where drug dealers who are eventually incarcerated are simply replaced by new ones.[111]

In addition, lengthy prison sentences lose their value because offenders serving these sentences eventually adapt and endure the punishment.[112] For example, the average prison sentence for federal drug offenders in the U.S. is 11.3 years.[113] Also, the Bureau of Justice Statistics estimates 35 percent of federal drug offenders have either no prior record of imprisonment or at most a minimal criminal history.[114] Furthermore, as of October 2015, 49.5 percent of federal inmates have been incarcerated for drug offenses.[115] With that being said, of the entire drug offender population, only 18 percent of those inmates

106. Daniel S. Nagin et al., *Imprisonment and Reoffending*, 38 CRIME & JUST. 115, 125 (2009).

107. *Id.* at 125-26.

108. *Id.* at 126.

109. U.S. SENT. COMM'N, *supra* note 97.

110. *See* Thomas M. Mieczkowski, *The Prevalence of Drug Use in the United States*, 20 CRIME & JUST. 349 (1996); *see also* NAT'L INST. ON DRUG ABUSE, DRUG FACTS NATIONWIDE TRENDS (June 2015), https://d14rmgtrwzf5a.cloudfront.net/sites/default/files/drugfacts_nationtrends_6_15.pdf.

111. ALEX HAROCOPOS & MIKE HOUGH, DRUG DEALING IN OPEN-AIR MARKETS 24 (2011-2012), https://ric-zai-inc.com/Publications/cops-p067-pub.pdf.

112. Andenaes, *supra* note 63, at 72.

113. U.S. DEPT. OF JUSTICE, NCJ248648, DRUG OFFENDERS IN FEDERAL PRISONS: ESTIMATES OF CHARACTERISTICS BASED ON LINKED DATA 6 (2015).

114. *Id.* at 1.

115. U.S. DEPT. OF JUSTICE, NCJ 250229, PRISONERS IN 2015, at 15 (2016).

were labeled as violent, because of the involvement of weapons.[116] Therefore, this system is inefficient as a way to combat crime.[117]

It seems as if the American criminal justice system would rather incarcerate the offender for life as opposed to rehabilitating them.[118] Nonviolent drug offenders who are serving LWOP have described their experience as "'a slow death sentence,' 'a slow, painful death,' 'a slow, horrible, torturous death,' 'akin to being dead, without the one benefit of not having to suffer any more,' . . . [and] 'You are dead. You do not exist anymore . . . .'"[119]

There are certainly other methods to decrease drug related offenses that are not as excessive as the methods currently being employed by the U.S.[120] While offenders who have committed and been convicted of a crime should face repercussions, imposing these cruel sentences upon them does not fit the crime.[121] Correctional facilities should instead focus their efforts on educating the offenders in order to provide them with the help and skills they need once they are released from prison.[122]

2. Norway

The Norwegian criminal justice system considers incapacitation itself, a limitation of freedom, enough of a punishment.[123] Therefore, the sentencing court does not further limit any other rights, and accordingly, criminal wrongdoers have exactly the same rights as every other Norwegian citizen.[124] For example, in Norway, prisoners do not serve their sentences in conditions stricter than necessary, by placing the offender in the lowest level of the security system.[125] The liberal

116. U.S. DEPT. OF JUSTICE, *supra* note 113, at 5.

117. *See* Michael Neminski, *The Professionalization of Crime: How Prisons Create More Criminals*, 23 CORE J. 81, 83-84 (2014).

118. TURNER & BUNTING, *supra* note 59, at 9.

119. *Id.*

120. *Breaking the Cycle of Drugs and Crime*, OFF. OF NAT'L DRUG CONTROL POL'Y (1999), https://www.ncjrs.gov/ondcppubs/publications/policy/99ndcs/iv-d.html (such efforts are deployed to reduce illicit drug use, manufacturing and trafficking; drug-related crime and violence; and drug-related health consequences).

121. DEADY, *supra* note 14, at 5.

122. *Id.* at 4.

123. Kriminalomsorgen, *About The Norwegian Correctional Service* (Nor.), http://www.kriminalomsorgen.no/information-in-english.265199.no.html.

124. *Id.*

125. *Id.*

attitude in Norway suggests that the prisoners' loss of liberty is an adequate form of punishment, regardless of the nature of the crime.[126]

The Norwegian penal philosophy is that the traditional, repressive prison system does not work to achieve the sought after goals, one being the goal of sentencing for the offender to return to the community.[127] In addition, the Norwegian approach suggests that the humane treatment of prisoners will greatly improve the inmates' chances of rejoining society upon release.[128] At the core of this belief is the principle of normalization. This entails the preservation of all rights, except the freedom of movement, and allows prison life to bear a resemblance to life outside of prison, so that upon release, the offender will have an easier journey reintegrating into society.[129]

An excellent example of this is Halden, one of Norway's newest maximum-security prisons.[130] Inside, prisoners are given flat screen televisions and refrigerators in every cell.[131] The cells also have barless windows, which allows for more sunlight, and are given community living space and kitchens in order to create a sense of family and togetherness.[132] Furthermore, inmates at Halden have access to the library, computers, hygienic facilities, and even a recording studio, in addition to educational training and programs that will help inmates develop life skills.[133] In some circumstances, inmates are allowed to enjoy the overnight stay of guests.[134] For offenders who are addicted to drugs, the inmates can enter into agreements with authorities who will provide them with more privileges in exchange for regular drug counseling.[135]

126. Erwin James, *The Norwegian Prison where inmates are treated like people*, GUARDIAN (Feb. 25, 2013), https://www.theguardian.com/society/2013/feb/25/norwegian-prison-inmates-treated-like-people.

127. DEADY, *supra* note 14, at 3.

128. Kriminalomsorgen, *supra* note 123.

129. Gerhard Ploeg, Opinion, *Norway's Prisons Are Doing Something Right*, N.Y. TIMES (Dec. 18, 2012), http://www.nytimes.com/roomfordebate/2012/12/18/prison-could-be-productive/norways-prisons-are-doing-something-right.

130. William Lee Adams, *Sentenced to Serving the Good Life in Norway,* TIME (July 12, 2010), http://content.time.com/time/magazine/article/0,9171,2000920,00.html.

131. *Id.*

132. *Id.*

133. *Inside Norway's Halden Prison,* STORY INST., http://www.thestoryinstitute.com/halden/ (last visited Jan. 23, 2017).

134. Eleanor Muffitt, *The old debate: punish prisoners, or rehabilitate them?* TELEGRAPH (Dec. 18, 2013), http://www.telegraph.co.uk/news/uknews/crime/10514678/The-old-debate-punish-prisoners-or-rehabilitate-them.html.

135. Casey Tolan, *Inside the Most Humane Prison in the World, Where Inmates Have Flat-screen Tvs and Cells are like Dorms,* FUSION (Sept. 16, 2016), http://fusion.net/story/340235/norway-halden-prison-most-humane/.

Bastoy, founded in 1982, is another example of a successful prison in Norway.[136] With no armed guards or fences, inmates and guards are not assigned uniforms and are encouraged to dress freely.[137] Located on an island, Bastoy provides ocean views and housing accommodations for up to six inmates with each holding their own key.[138]

Every inmate at Bastoy is assigned a paid job from 8:30 a.m. to 3:30 p.m. such as gardening, farming, and cutting trees for firewood.[139] An example of an interesting job is supervising horses that are utilized to cart wood and various supplies around the island.[140] Inmates are not required to wear shackles or electronic monitor bracelets, at times without guard supervision.[141] Another example of how Bastoy prepares inmates for life outside is that only one meal per day is given in the prison's dining hall.[142] Inmates are given a monthly allowance for food where they can shop at the island's supermarket where they purchase food and prepare breakfast and dinner.[143]

Now, why treat prisoners this humanely when they are incarcerated for crimes such as murder, drug trafficking or rape? This is because the goal in Norway is to rehabilitate the offender and get them ready to rejoin the population as normal, law-abiding citizens.[144] To dehumanize prisoners is to take away their ability to survive on their own.[145] Prisons such as Bastoy and Halden teach their inmates to become better citizens. Thus, this model of open prisons where inmates are given a chance to live like regular citizens should be used by the American criminal justice system.

C. Deterrence

1. The United States

Unlike retribution, deterrence focuses on the prevention of crime in the future.[146] Deterrence theorists purport that offenders calculate

136. John D. Sutter, *Welcome to the World's Nicest Prison,* CNN (May 24, 2012), http://www.cnn.com/2012/05/24/world/europe/norway-prison-bastoy-nicest/.
137. *Id.*
138. James, *supra* note 126; Sutter, *supra* note 136.
139. Sutter, *supra* note 136.
140. *Id.*
141. *Id.*
142. James, *supra* note 126.
143. Sutter, *supra* note 136.
144. *See id.*
145. *See id.*
146. Frase, *supra* note 93.

prison as an outcome when they choose to commit a crime.[147] Mandatory minimum sentences are proposed to keep inmates incarcerated, so that they do not commit future crimes, and to discourage citizens from committing similar crimes.[148] Nevertheless, the overflowing American prison population has come to represent the failure that is the U.S. criminal justice system. Rather than prevent future victims, our justice system is predicated on a resulting fearful population, a political class that validates the public's fears, and a punitive approach that highly regards retribution by victims, their families and society.[149] This understanding of "deterrence" is not conducive to discouraging current inmates from committing further crimes.

2. Norway

In Norway, deterrence takes on an entirely different meaning.[150] There, it is believed that the concept of deterring crime can be manifested, not through fear but through the development of a collective sense of morals and values.[151] In turn, Norwegian citizens tend to abstain from criminal activity because it goes against the moral fiber of the community, and not because the criminal act would be followed by a horrid punishment.[152] In response to critics of the Norwegian criminal justice system who often view it as being too lax, the Norwegian Ministry of Justice has said, "Prisoners are required to take responsibility for their actions – past, present and future, we believe that it is more effective for a person to want to stay away from crime than for our system to try and scare them away from it."[153] Although it is unclear whether this approach would work in the U.S., because Norway's cultural beliefs and trust in people are vastly different than that in the U.S., it is a possibility to consider.

D. Rehabilitation

1. The United States

Rehabilitation, or treatment, refers to "any measure taken to change an offender's character, habits, or behavior patterns so as to

147. Daniel S. Nagin et al., *supra* note 106.

148. U.S. SENT. COMM'N, *supra* note 97, at 13.

149. *The Norwegian Prison Where Inmates are Treated like People*, NEWS FORAGE (Aug. 22, 2013), http://www.newsforage.com/2013/08/the-norwegian-prison-where-inmates-are.html.

150. Lappi-Seppälä, *supra* note 54, at 350.

151. *Id.*

152. *Id.* at 351.

153. Ploeg, *supra* note 129.

diminish his criminal propensities."[154] While there are many strategies to accomplish this goal, the U.S. criminal justice system is geared towards punishing offenders rather than rehabilitation.[155] According to the BOP report, three out of four prisoners involved in drug related offenses are rearrested within five years.[156] Instead of mainly focusing on punishing prisoners, the U.S. should implement more rehabilitation programs such as education and workshops, which build life skills. This is necessary because the high recidivism rate is generally attributed to parolees lacking basic life skills and education.[157] Without such resources, nonviolent drug offenders are most likely to resort to the same behaviors that put them in prison in the first place.[158] In turn, this will continue to keep prisons overcrowded.[159]

Unfortunately, Americans want their prisoners punished first and rehabilitated second, despite the fact that research proves that certain forms of rehabilitation have been shown to reduce the risk of future offending.[160] The BOP has confirmed the importance of treatment in reducing recidivism and future drug use.[161] According to the BOP reports, studies on drug use show that prisoners who participated in a residential drug abuse treatment program were less likely to have evidence of post-release drug use.[162] Their research concluded that 49.9 percent of male inmates who fulfilled the drug abuse program were likely to use drugs within 36 months after being released.[163] In comparison, 58.5 percent of inmates who did not participate in the treatment program were likely to use drugs in the same amount of time after release.[164] These statistics highly suggest that drug treatment programs have a significant impact on the inmates' post-release lifestyle.[165]

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154. ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 11 (Marshall Cohen et al. eds., 1976).

155. TURNER & BUNTING, *supra* note 59, at 200.

156. FED. BUREAU OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010, at 7 (Apr. 2014), https://www.bjs.gov/content/pub/pdf/rprts05p05 10.pdf.

157. DEADY, *supra* note 14, at 4.

158. *See id.* at 2.

159. *See* Pearl Jacobs, *The Challenge of Prison Overcrowding and Recidivism, in* SACRED HEART U. CRIM. JUST. FAC. PUB. 156 (2005).

160. DEADY, *supra* note 14, at 2; FED. BUREAU OF PRISONS, TRIAD DRUG TREATMENT EVALUATION PROJECT 13 (2000).

161. FED. BUREAU OF PRISONS, *supra* note 160.

162. *Id.* at 3.

163. *Id.* at 11.

164. *Id.*

165. *Id.* at 13.

Further, LWOP for nonviolent drug crimes does not consider the inmates' ability for rehabilitation and fails to provide public safety benefits.[166] Further, the imprisonment of inmates is unjustified because of dwindling community drug treatment programs and mental health resources.[167] The ACLU has documented numerous examples, where offenders violated the law due to a drug addiction; however, the state never offered these offenders state-sponsored drug treatment even though the offenders were agreeable to treatment.[168] In sum, rehabilitation aimed at treating inmates' drug addiction, will reduce both recidivism and crime rate.[169]

2. Norway

The Norwegian criminal justice system has a very progressive approach to sentencing. The criminal justice system in Norway prioritizes rehabilitation as their primary strategy, as it is proven to reduce recidivism. It aims to ensure that those who have gone off on the wrong track in life get a fair chance to come back.[170] No matter what horrific crime they have committed, prisoners are treated as normal citizens and maintain their right to be treated fairly and compassionately.[171] Imprisonment is used less frequently and for shorter durations because nonviolent drug offenders are given sanctions, probation and community service instead of incarceration if it is feasible.[172] For those offenders who end up in prison, incarceration is geared toward reducing an offender's risk of returning to a life of crime after release.[173] This is achieved by great emphasis on rehabilitation and teaching life skills rather than focusing on punishment alone.[174]

This approach has a very successful result in terms of reducing the risk of re-offense.[175] There are scholars who argue that the Norwe-

166. TURNER & BUNTING, *supra* note 59, at 12.

167. *Id.*

168. *Id.* at 5.

169. Redonna Chandler, Bennett Fletcher & Nora Volkrow, *Treating Drug Abuse and Addiction in the Criminal Justice System*, 301 JAMA 183, 184 (2009).

170. Willow Robinson, *Prisoners Deserve Chance at New Life,* THE OLYMPIAN (Dec. 25, 2016), http://www.theolympian.com/opinion/letters-to-the-editor/article122679274.html.

171. *See* Sean K. Moynihan, *They Don't Do It Like My Clique: How Group Loyalty Shapes the Criminal Justice Systems in the United States and Norway,* 33 ARIZ. J. INT'L & COMP. L. 423, 429 (2016).

172. *See* DEADY, *supra* note 14, at 3.

173. *Id.*

174. *Id.*

175. Ploeg, *supra* note 129.

gian criminal justice system is too lax and weak on crime due to its focus on compassion and rehabilitation, but the numbers suggest otherwise.[176] For example, only 20 percent of inmates who serve time in Norway's prisons reoffend within two years of being released.[177] Bastoy's recidivism rate, at 16 percent, is even lower.[178] When compared to U.S.'s recidivism rate of 40 percent, the data suggests that Norway's penal system works much better than the American penal system.[179] The Norwegian criminal justice system assures that every prisoner feels respected and welcomed back in society.[180] With a major focus on rehabilitation, Norwegian prison systems fight crime by giving the offenders the tools to be productive members of society and avoid crime upon their release.[181]

V. CONCLUSION

What are the fundamental goals of incarceration? Theoretically, the goals of incarceration in the American justice system are retribution, incapacitation, deterrence, and rehabilitation. In reality, however, not all of these objectives are successfully accomplished. In order to guarantee the successful implementation of these theoretical goals, the U.S. criminal justice system must shift its focus from punishment to rehabilitation, particularly for nonviolent drug offenders. What these offenders really need is rehabilitation, not prolonged imprisonment. The first step in changing this senseless system is to eliminate mandatory minimum sentences for nonviolent drug offenders to enable judicial discretion, which has proved to be a successful method in Norway.

In determining the appropriate punishment for wrongdoers, judges in Norway primarily evaluate the circumstances surrounding individual cases, and secondarily employ sentencing guidelines to their discretion. The Norwegian criminal justice system does not promote or utilize severe punishment, but it is guided by righteousness and perceived fairness. The reason that incarceration goals in Norway are better accomplished is due to their compassionate and humane treatment of inmates. Further, the Norwegian criminal justice system sets out

176. DEADY, *supra* note 14, at 4-5.

177. Sutter, *supra* note 136.

178. *Id.*

179. *Id.*

180. *See* Mike C. Materni, *Criminal Punishment and the Pursuit of Justice,* 2 BRIT. J. OF AM. LEGAL STUD., 263, 293 (2013).

181. Moynihan, *supra* note 171.

guidelines and resources to appropriately rehabilitate their offenders so that they may successfully reintegrate into society.

Bearing in mind America's long history of its war on drugs and cultural values, numerous political leaders and other members of society would almost certainty have intense objections to this superior approach, which has proven workable in Norway, and which places a greater emphasis on rehabilitation rather than on punishment. The American criminal justice system's desire to punish results in tremendous counterproductive effects on both society and the offender. Statistical evidence has proven that there are other available alternatives that are more effective at significantly reducing crime. Perhaps punishment with a predominant purpose to punish a wrongdoer is not to serve justice, but it is just a cover to attain retribution. Shouldn't the American criminal justice system aspire to achieve more than that? The goal in the U.S. should be to make prisoners better citizens, which will, in turn, reduce the recidivism rate, crime rate, and ultimately the prison population.