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HUMAN RIGHTS IN ASEAN: A CATHOLIC CRITIQUE OF THE HUMAN RIGHT MECHANISMS IN THE ASSOCIATION OF THE SOUTHEAST ASIAN NATION (ASEAN)¹

D. Brian Scarnecchia²

ABSTRACT

This article considers the history and progress of human rights mechanisms in the Association of Southeast Asian Nations (ASEAN) in the light of Catholic social teaching and concludes that only an objective understanding of human rights can provide a sound basis for the culture of peace and integral human development. The two dangers facing ASEAN human rights mechanisms are 1) the peril of legitimizing through ineffective action the human rights violations of its rogue member states, while 2) at the same time effectively imposing post-modern Western ideological dis-values under the guise of human rights upon all its member states. Nongovernmental organizations (NGOs) of Catholic inspiration working in this region of the world must warn of these twin dangers.

INTRODUCTION

Christ commissioned his disciples to go out and baptize and make disciples of all nations.³ Christ’s Great Commission entails bringing the light of the Gospel to those hungry for hope and faith, which gives meaning to life, human suffering, and death. For many, this Gospel light will result in conversion, baptism, and confession of faith in Jesus Christ. Christ also said the poor we will have with us always.⁴ Certainly, included among the poor, are those who do not believe in Christ. For those who are not baptized, the

¹ This article, slightly modified, was first presented as a paper for the conference on The Foundation of Human Rights: Catholic Contributions, co-sponsored by Ave Maria School of Law, Ave Maria University, and Sacred Heart Seminary (Ave Maria, FL, Mar. 3–4, 2011).
² D. Brian Scarnecchia, J.D.
⁴ Matthew 26:11; Mark 14:7; John 12:8.
Great Commission of Christ is meant to affect *Pax Christi*, the reign of the peace of Christ, among all nations.\(^5\)

A great European, Carol Cardinal Wojtyla, upon completing an extended visit to the United States just before returning to his native Poland, was quoted in the *New York Times* on November 9, 1976 to have said: “We are now facing the final confrontation between the Church and the anti-church, of the Gospel and the anti-Gospel.” Later, as Pope John Paul II, he described the times in which we live as an “anti-civilization”\(^6\) characterized by a commodification of the human person and a fixation upon all that frustrates and withers human life. It is composed, he said, of various programs backed by powerful resources which aim at breaking down the natural family and glamorizes irregular or counterfeit family structures.\(^7\) Like the Manicheans of thirteen century Europe, today’s “neo-Manicheans”\(^8\) boldly proclaim that any sex act is good, provided that it is promiscuous, unnatural or infertile. Many powerful international organizations and NGOs use this anti-Gospel as a weapon to implode the fertility of the poor and to wreck the natural family structure, the “fundamental group unit,”\(^9\) of the developing world.\(^10\)

ASEAN recently inaugurated a new human rights body: the Intergovernmental Commission on Human Rights (ICHR). This paper asks: Whether ASEAN’s human rights mechanisms will be used to further or to frustrate authentic human rights, and integral human development? Will the ICHR be an instrument of authentic human development or will it be coopted in the service of an anti-life, anti-human rights ideology? And how best may NGOs of Catholic inspiration move the ICHR in the right direction?

### I. History of ASEAN

ASEAN came into being in 1967 at the height of the Vietnam War as a political coalition of five Southeast Asian nations - the Philippines, Malaysia, Thailand, Indonesia, and Malaysia.

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\(^6\) POPE JOHN PAUL II, LETTER TO FAMILIES FROM POPE JOHN PAUL II ¶ 13 (The Two Civilizations) (1994).

\(^7\) Id. at ¶ 5 (*Love and Concern for All Families*).

\(^8\) Id. at ¶ 19 (*The Great Mystery*).


Singapore, Indonesia, and Thailand – to resist Communist aggression. The Secretariat of ASEAN is located in Jakarta, Indonesia. Over the years, five new members were added – Brunei (1984), Vietnam (1995), Laos (1997), Burma (1997) and Cambodia (1999). Timor-Leste made application to become a member of ASEAN in March of 2011. Following the close of hostilities in Vietnam, ASEAN expanded its scope to include economic development, hoping to create a single market and economic community by 2015. However, until recently, it was not charged specifically to promote and protect human rights.

At the time of its formation in 1967 until 2007, ASEAN’s international personality remained “relative” or “subjective.” That is, it was ever dependent upon the express recognition of its member states. However, once the ASEAN heads of government signed the Charter of the Association of Southeast Asian Nations (hereinafter, “the Charter”) at the 13th ASEAN Summit in Singapore on November 20, 2007, its legal personality changed. ASEAN evolved into an “intergovernmental organization,”... enjoying functional immunities and privileges.” ASEAN was no longer the sum of its parts.

The Charter became effective on December 15, 2008 and it aims to accomplish three goals: to give ASEAN international legal personality and to streamline its decision making; to strengthen its institutions, especially the Secretariat; and to establish mechanisms to monitor compliance of its agreements and settle disputes between its members. It contains thirteen chapters, fifty-five articles and four annexes. ASEAN’s declaration of international legal personality is found in chapter three, and the ASEAN Human Rights Body is mentioned in chapter four.

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12 Kate McGeown, East Timor Applies to Join ASEAN, BBC NEWS ASIA – PACIFIC (Mar. 4, 2011), http://www.bbc.co.uk/news/world-asia-pacific-12644608; see also, Tan, supra note 11, at 177 n. 34.
13 Tan, supra note 11, at 197.
16 Id. at 89.
17 Tan, supra note 11, at 171–172.
18 Id. at 172.
19 Id. at 177.
20 Id. at 177.
The Terms of Reference (TOR) for the ASEAN Human Rights Body (AHRB) were formally adopted on July 20, 2009, by all ten ASEAN Foreign Ministers. Dr Surin Pitsuwan, Secretary-General of ASEAN, pointed out that the TOR embody the spirit and the letter of the Charter: “Democracy and human rights are two basic principles enshrined in the Charter and we are now taking steps towards the fulfillment of these principles for our peoples.”

On October 23, 2009, ASEAN leaders inaugurated the ASEAN Intergovernmental Commission on Human Rights (AICHR) as the overreaching human rights institution for the promotion and protection of human rights in ASEAN. The Prime Minister of Thailand, H.E. Abhisit, pointed out the AICHR is still evolving: “AICHR is not an end in itself but an evolutionary process towards strengthening the human rights architecture within the region” of Asia and the Pacific. One newly formed human rights body that will operate under AICHR is the ASEAN Commission on the Rights of Women and Children (ACWC). United Nations (UN) representatives from UICEF and UNIFEM were present at the inauguration of ACWC. Each State member would appoint one representative on the ACWC. It has been established to “promote the implementation of international instruments, ASEAN instruments and other instruments related to the rights of women and children” and develop policies consistent therewith.

Finally, on November 18, 2012 ASEAN adopted a Human Rights Declaration at its summit in Phnom Penh. However, this long awaited achievement was not greeted with enthusiasm by civil society because it compromised the principle of the indivisibility and universality of all human rights.

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25 Id.
Article 8 of the Declaration, in particular, contains the following problematic language:

The human rights and fundamental freedoms of every person shall be exercised with due regard to the human rights and fundamental freedoms of others. The exercise of human rights and fundamental freedoms shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition for the human rights and fundamental freedoms of others, and to meet the just requirements of national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society.

The United Nations High Commissioner for Human Rights, Navi Pillay, expressed concern that ASEAN’s new Human Rights declaration fell below international standards: “The international human rights mechanisms will continue to hold ASEAN member states to their international obligations and encourage ASEAN to strengthen further its regional human rights framework.” The International Gay & Lesbian Human Rights Commission criticized the ASEAN Human Rights Declaration because they say it “makes a mockery of the international human rights values and principles that all nations and citizens abide by and are held accountable to” by excluding lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) peoples throughout the region from its protection. The World Organization Against Torture (OMCT) also denounced ASEAN’s Human Rights Declaration for the loopholes it provides state members to pick and choose which human rights it will honor and protect and which it will not:

OMCT further deplores the broad language on the limitation of rights in the Declaration, such as ‘national security’, ‘public order’ and ‘public morality’. This sets a dangerous signal to the countries in the region with a track record of abusive and expansive invocations of state security and

29 ASEAN Human Rights Declaration, par. 8 (Nov. 18, 2012)(emphasis added).
public order or moral to curtail universally accepted rights. These laws created frameworks of arbitrary detention and prone to torture and ill treatment."

ASEN’s Human Rights Declaration violates the universality of human rights by creating huge lacunae that allow its member states to discriminate, decide and enforce only those human rights which comport with their nation’s culture, morality and tradition.

However, internationally, in every region of the world, there is a conflict raging over which human rights uphold human dignity and which do not:

We see a danger, however, in a process we may qualify as top-down globalism which, under the guise of bottom-up participation, equal rights and non-discrimination, uses the channels of global governance to try and engineer global assent to special interests by way of a manipulative use of language in the consensus-building process."

A number of states in attendance at the 19th Session of the Human Rights Council on March 7, 2012 objected to the inclusion of sexual orientation and gender identity as threatening the universality of human rights. They argued that “national and religious particularities had to be raised in the context of any discussion of human rights since homosexual acts were against the teachings of world religions, as well as cultural and traditional values of many communities.”

Archbishop Tomasi, Permanent Observer of the Holy See to the United Nations in Geneva, noted that the undue focus on sexual orientation and gender identity particularizes human rights to such a degree as to “easily put at risk the universality of these rights” raise serious concerns. Vice Secretary of State for the Holy See, Archbishop Mamberti in his address to the High level Segment of the 22nd Session of the Human Rights Council warned that “the introduction of ambiguous expression and ideological positions appear to ignore the solid foundations of human rights,

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33 Margueritr A. Peters, "Towards preserving the universality of human rights: The gender agenda divorces the human person from himself or from herself, from his or her body and anthropological structure," L’Osservatore Romano, April 19, 2013, www.oservatoreromano.va/portal/dt?JSPTabContainer.setSelected+JSPTabContainer...
to weaken the successes already achieved, and to undermine the universality of human rights.”\(^36\) These, so called, “new rights” put at risk the universality and indivisibility of human rights” enshrined in the Universal Declaration on Human Rights,” he said.\(^37\) Rather than seeking to impose new rights that do not enjoy universal recognition, he suggested, that the Human Rights council ought to strive to strengthen those already agreed upon.\(^38\) Archbishop Mamberti pointed out that the key to international peace must be found in the “promotion of the universality and indivisibility of human rights.” Ironically, in this context, the deference accorded national and religious and cultural values in ASEAN’s Human Rights Declaration may serve to protect its member states from the imposition of post-Modern Western “new rights” that threaten the universality of human rights. It would seem that ASEAN’s Human Rights Declaration has revived the “Asian Values” debate, discussed more fully below in Part IV.

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\(^{37}\) Id.

\(^{38}\) Id.
II. History of a Regional Human Rights Mechanism in ASEAN

The UN Commission on Human Rights (UNCHR) set up a study group in the 1960’s to further regional human rights commissions around the world. In 1968, the UNCHR requested that the UN Secretary General plan regional seminars in areas of the world that had no regional human rights commissions. A series of seminars and workshops were set up in Asia and the Pacific starting in 1982.

The world Conference on Human Rights in Vienna in 1993 produced the Vienna Declaration and Programme of Action which was adopted by 171 states and it recognizes the importance of regional human rights mechanisms: “Regional arrangements play a fundamental role in promoting and protecting human rights. They should reinforce universal human rights standards, as contained in international instruments…where they do not already exist.”

From the beginning, the factors hindering progress towards establishing human rights mechanisms in ASEAN included the lack of political will, different cultural value systems and languages, legal issues concerning

39 Many of the important events in the formation of ASEAN’s human rights mechanisms may be summarized as follows: ASEAN was established in Bangkok, Thailand on August 8, 1967. In 1993, ASEAN’s heads of state met in Bangkok and adopted The Asia Pacific Declaration on Human Rights, also known as, The Bangkok Govermental Human Rights Declaration. At the 26th ASEAN Ministerial Meeting in Singapore in July of 1993, they declared their general support, with important reservations, for the Vienna Declaration of 1993. The ASEAN Inter-Parliamentary Organization (AIPR) responded to the statement of support for the Vienna Declaration. In July of 1995, the Regional Working Group for an ASEAN Human Rights Mechanism (Working Group) came into existence and in July of 2000, it submitted a Draft Agreement for the Establishment of the ASEAN Human Rights Commission to ASEAN officials. At its 6th Annual Summit in Bali, ASEAN issued the Declaration of ASEAN Concord II (Bali II) declaring that the three pillars of the ASEAN Community were political and security cooperation, economic cooperation and social-cultural cooperation. ASEAN adopted a Plan of Action for a Security Community that expressed the desire to strengthen democratic institutions and protect vulnerable groups. In December of 2005, at the ASEAN Summit held in Kuala Lumpur, ASEAN leaders issued the Kula Lumpur Declaration on the Establishment of the ASEAN Charter and established an Eminent Persons Group (EPG) to make recommendations for the proposed Charter. The High-Level Task Force took over for the EPG and they argued that the proposed Charter ought to include an ASEAN human rights mechanism. In January of 2007, ASEAN leaders at the ASEAN Summit in Cebu issued the Cebu Declaration on the Blueprint of the ASEAN Charter which endorsed the High-Level Task Force recommendations. In March of 2007, the ASEAN Foreign Ministers Meeting in Cambodia approved the inclusion of a human rights body in the proposed Charter. In November of 2007, ASEAN leader adopted the ASEAN Charter at the 13th ASEAN Summit in Singapore. On December 15, 2008, the ASEAN Charter came into force. The Terms of Reference for the ASEAN Human Rights Body (AHRB) was adopted on July 20, 2009. Finally, the ASEAN Intergovernmental Commission on Human Rights (AICHR) was adopted on October 23, 2009. (See Shaan Narine, Human Rights Norms and the Evolution of ASEAN: Moving without Moving in a Changing regional Environment, 34 CONTEMPORARY SOUTHEAST ASIA 365, 367–75 (2012).

40 Chiam, supra note 14, at 128.

human rights norms embodied in UN treaties, political issues centering on state sovereignty, and the economic and developmental diversity of these various nations.\(^{42}\) The Working Group for an ASEAN human rights mechanism considered three possible instruments and mechanisms: a declaration of principles, a human rights commission, and a human rights court.\(^{43}\) A human rights declaration and court were not provided for, but Article 14 stated that a Human rights Body would be established for “the promotion and protection of human rights and fundamental freedoms.”\(^{44}\) However, what many believe is necessary for any serious treatment of human rights violations is the triple-prong model adopted by the inter-American, European, and African systems of human rights convention and declaration, a human rights commission, and a human rights court.\(^{45}\) On the other hand, even without these mechanisms, the ASEAN charter of itself makes a difference and “marks a convergence of ASEAN towards ‘universalizing’ core human rights norms as now seen in its Organization Principles and the new requirements of ASEAN membership obligations.”\(^{46}\)

On October 23, 2009, ASEAN created the ICHR as well as the TOR for the ICHR, both of which provide that it will have primarily an advisory, as opposed to enforcement role. This has led to some observers to quip that ICHR lacks teeth.\(^{47}\) One of the main objectives of the ICHR remains “to develop an ASEAN Human Rights Declaration with a view to establishing a framework for human rights cooperation” through conventions and human rights instruments.\(^{48}\)

Setting up human rights mechanisms in ASEAN may prepare the way for greater Asian human rights mechanisms following the “step by step” path marked by the growing economic integration of Asian nations.\(^{49}\) The economic approaches are characterized by “flexible participation and implementation” and appear to be “indicative of a nuanced recalibration of the consensus approach.”\(^{50}\) From a pragmatic point of view, the same formulas for economic integration may be used to advance human rights in ASEAN and in the greater Asia and Pacific area.\(^{51}\)

\(^{42}\) Chiam, \textit{supra} note 14, at 143.
\(^{43}\) \textit{Id.} at 137–38.
\(^{45}\) Hsien-Li, \textit{supra} note 21, at 244.
\(^{46}\) Desierto, \textit{supra} note 15, at 80.
\(^{48}\) \textit{Id.} at 4.
\(^{49}\) Chiam, \textit{supra} note 14, at 148.
\(^{50}\) Tan, \textit{supra} note 11, at 182.
\(^{51}\) Tan, \textit{supra} note 11, at 181. \textit{See also} Chiam, \textit{supra} note 14, at 148.
ASEAN nations have broken the stalemate of requiring total consensus on economic initiatives in the following three ways. One approach is the “ASEAN–X” formula characterized by most of the ASEAN nations, minus a few acting in consort. Within the ten-member organization of ASEAN those “states that are not ready to participate in the range of free trade agreements use this formula and may participate at a later stage.” Another approach is that of two ASEAN nations plus more that is the “ASEAN 2+X” sum. ASEAN employs this formula to accommodate the differing speeds of integration and development of the various ASEAN nations. This formula allows two member states to advance in modes of cooperation when they are ready while those that are not can join later, so that no member holds back the group. A third approach is that all ASEAN nations plus however many non-ASEAN nations wish to join a joint economic venture, that is, the “ASEAN +3” (ASEAN nations plus China, Japan, and Korea) or “ASEAN +6” (ASEAN nations plus Australia, India, and New Zealand) equation.\(^{52}\)

The ICHR might look to the Arab Charter on Human Rights since it weaves together both human rights and Islamic law, which are pertinent in several ASEAN countries. Also, both the Arab Charter on Human Rights and the African Charter on Human Rights may serve as references for how to incorporate non-Western perspectives and still maintain a universal non-negotiable vision of human rights.\(^{53}\)

Although the ICHR has no enforcement provision and may appear a toothless tiger, it may still provide a catalyst for civil society to advocate successfully for human rights in ASEAN by reinforcing the lobbying efforts of human rights NGOs. However, in a worst case scenario for ASEAN, the ICHR may be co-opted and “[o]bfuscate or diminish the positions of reform-minded individuals” as well as the more provocative human rights minded foreign ministers within ASEAN instead of strengthening them.\(^{54}\) Also, special interest groups are courting ICHR members, attempting to woo them to their post-modern vision of human rights treaty obligations of the ASEAN member states.\(^{55}\)

### III. Hard Law v. Soft Law in the ASEAN Charter

The lack of any provision for sanctions in ASEAN’s Charter for non-compliance or a serious breach of the Charter,\(^{56}\) such as expulsion or

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52 Chiam, supra note 14, at 148.
53 Kelsall, supra note 35, at 5.
54 Kelsall, supra note 35, at 6.
56 Tan, supra note 11, at 185–86.
suspension of membership, would seem to be a serious setback for the rule of law in ASEAN. However, upon closer inspection, these formal lacunae in ASEAN’s Charter may have been calculated to secure maximum buy-in, so as to enlist its states’ members in an informal process of “soft law” sensitivity training. This training would make one sensitive to values respectful of human dignity and a culture of human rights:

A case can be made that the Charter also endows ASEAN with the software and attitudinal mindset of encouraging member states to imbibe the desired values, and to adopt the desired conduct so as to facilitate the attainment of the purposes and principles of ASEAN. The development of the Charter was seen as one of the strategies for the ‘shaping and sharing of norms’ in the Vientiane Action Programme.57

Over time, the scope of the “hard law” tends to expand through court interpretation and application. What the top-down pressure “hard law” produces will inevitably meet with societal resistance if it is not complimented by a change in cultural mores, habits of thought, and behavior that either pave the way for or reinforce the “hard law” norms. The role of supranational “soft law” customs – international customary law - is to produce a complimentary scissor movement from the bottom-up of politically correct cultural virtues and social sins that, together with “hard law” norms and enforcement mechanisms, cut through all effective social resistance to engineer the desired “social learning.” ASEAN’s Charter may prove to have a transformative capacity to create, through “soft law,” a fertile soil for a culture of human rights to be eventually reinforced by “hard law:”

Soft law can also be understood as law in the embryonic stage of formation –a precursor of emerging hard law...Specifically, soft law mechanisms can be adapted for the purposed of persuading ASEAN members of the importance of the norms that the Charter seeks to promote concertize and give effect to. In ASEAN’s context, this means the member states can use soft law attributes to attract, socialize and co-opt other member states on the imperative of observing the Charter…socializing stakeholders through a consensual and confidence-building process.58

But will this hard law/soft law double scissor movement coincide with what is already traced on the “fleshy tablets of the human heart”?59 What if it cuts out the heart of authentic human rights and transposes post-modern

57 Id. at 187.
58 Id. at 188.
Western ideologically driven norms. Even worse, what if the importation of such post-modern norms is really in the service of First-World neo-colonialism, as some suggest is at the heart of the debate over “Asian Values.”

IV. The “Asian Values” debate & ASEAN Summit’s ability to Decide

The “Asian Values” debate, styled “the parochialism of ‘Asian values versus Western imperialism,’”60 drew international attention when ASEAN delegations to the Vienna World Conference on Human Rights (1993) claimed exception from the imposition of Western, so-called, universal human rights. The 26th ASEAN Ministerial Meeting sent a joint communiqué which stressed that “development is an inalienable right and that the use of human rights as a conditionality for economic cooperation and developmental assistance is detrimental to international cooperation and could undermine an international consensus on human rights.”61 The Vienna Declaration rejected these claims and denied an exception from the sweep of universal core human rights on the basis of cultural relativism: “It is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”62

The arguments put forward by Asian values proponents can be seen in one of three ways: 1) As an excuse for tyrant’s rights, that is, as an attempt by various Asian dictatorial regimes to avoid scrutiny of their abysmal human rights record by asserting that human rights are a Western or Capitalist imposition; 2) As a last stand in resisting post-modern Western cultural relativism sweeping the developing world,63 which fights in defense of truly universal innate core human rights; or 3) As a bit of both.

An example of the first perspective may be heard in the Chinese Communist delegation’s disingenuous attempt to regionalize core political rights as “Western” in an attempt to deflect criticism from China’s egregious violation of these same political rights:

The concept of human rights is a product of historical development. It is closely associated with specific social, political and economic conditions and the specific history, culture and values of a particular country. Different historical development stages have different human rights requirements.

60 Desierto, supra note 15, at 114.
61 ASEAN Charter, supra note 32, art. 17; see also Tan, supra note 11, at 182–83.
62 Desierto, supra note 15, at 83.
Countries at different development stages or with different historical traditions and cultural backgrounds also have a different understanding and practice of human rights.\textsuperscript{64}

On the other hand, ASEAN societies may genuinely wish to shield themselves from permissive Western culture and excessive post-modern individualism, epitomized by the hedonistic sexual and reproductive rights movement.\textsuperscript{65}

We draw a line between liberty and license. We do not deem it a matter of constitutional principle that there should be a right to desecrate a national flag, to blaspheme our religion and to walk freely into shops to buy murderous weapons. We view a free-wheeling sexual lifestyle, drug taking and alcohol addiction with revulsion. With the bulk of us, pornography is not part of free speech, abortion on demand is not part of personal liberty and homosexuality is not part of freedom of choice. We acknowledge that rights and responsibilities must go hand-in-hand and that freedom is not an end in itself.\textsuperscript{66}

Nobel Peace Prize Laureate and former president of South Korea, Kim Dae Jung, argues that concepts of the universal and objective nature of human rights are part of Asia’s traditions: “Asia has its own venerable traditions of democracy, the rule of law, and respect for the people. Asia’s destiny is to improve Western concepts, not ignore them.”\textsuperscript{67} Nobel Prize winning economist, Amartya Sen, described development as substantive human freedoms including both civil and political freedoms as means and ends in themselves.\textsuperscript{68} If this is true, then “human rights norms should not be seen as an obstacle, but as necessary instruments to advance states’ conception of the ‘good,’ or the individual’s ‘personhood,’” which form part of the “human capital” the poor need to accumulate for authentic integral development.\textsuperscript{69}

\textsuperscript{64} Chiam, supra note 14, at 145 (referring to Human Rights and International Relations in the Asia Pacific (James T. H. Tang ed., 1995)).

\textsuperscript{65} Li-ann Thio, Implementing Human Rights in ASEAN Countries: Promises to Keep and Miles to Go Before I Sleep, 2 Yale H.R. & Dev. L.J. 1, 2 (1999).

\textsuperscript{66} Id. at 18–19.


\textsuperscript{68} Desierto, supra note 15, at 104.

\textsuperscript{69} Id. at 105–06.
Perhaps, it is not so much the political rights per se but the imposition of permissive post-modern Western mores as human rights that is offensive to various leaders in ASEAN. Former Prime Minister of Malaysia, Dr. Mahaithir, regarded the post-modern West as “morally decadent because of the growth of gay rights and relative success of the women’s movement.” Even former General Secretary of the UN, Kofi Annan, has at times felt constrained to offer a more authentic vision of human rights as innate and, for that reason, universal and inviolable:

There is no one set of European rights, and another of African rights. Human rights assert the dignity of each and every individual human being, and the inviolability of the individual’s rights. They belong inherently to each person, each individual, and are not conferred by, or subject to, any governmental authority. There is not one law for one continent, and one for another. And there should be only one single standard—a universal standard—for judging human rights violations.

So what are the core values, Asian or Otherwise, of ASEAN? These can be found in Article 2 of the Charter as “Principles,” which include respect for different cultures, languages and religions, while emphasizing “common values in the spirit of unity in diversity.” The gravamen of these aspirational core principles—including respect for rule of law, good governance, renunciation of the use of force and the peaceful settlement of disputes—are in accord with an authentic culture of universal human rights. However, as commentators have noted, the “unity within diversity” principle in the ASEAN context may be a prescription for turning a blind eye to egregious human rights atrocities enshrining “the so called ASEAN Way of non-interference in the internal affairs [of rogue state members].”

To be sure, the traditional “ASEAN Way” of consultation and consensus and “non-interference” is codified in the Chapter in Article 20(1). However, the Charter has modified the rules for ASEAN to deal with the human rights violation of its members by adding a mechanism for arbitrating obdurate “hold out” postures of state members. The Charter provides that the ASEAN Summit can “decide” disputes involving state members of ASEAN whether or not states members consent.

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70 Chiam, supra note 14, at 146. See also Chris Brown, Human Rights, in THE GLOBALIZATION OF WORLD POLITICS: AN INTRODUCTION TO INTERNATIONAL RELATIONS 599 (John Baylis & Steve Smith eds., 2001).

71 Kofi Annan, Address by the UN Secretary General to the Foreign Institute to the Paasiviki Association in Helsinki, Finland (Aug. 13, 1997).

72 Desierto, supra note 15, at 114.

73 ASEAN Charter, supra note 32, art. 2(2)(1) quoted in Tan, supra note 11, at 188.

74 Tan, supra note 11, at 189.
determine unresolved disputes and the non-compliance of state members.\textsuperscript{75} The ability of the ASEAN Summit to decide disputes is an expression of its new objective legal personality, i.e., “the possession of the organization’s own ‘distinct will’ apart from that of its members, evidenced by the organization’s power to take binding decisions upon the entire membership through the vote of a mere majority of its members.”\textsuperscript{76} The Charter has implicitly “opened the door for a robust interpretation and application of the norm of non-interference.”\textsuperscript{77}

The case of the admission of Cambodia into ASEAN may be illustrative of when the ASEAN Summit acted decisively. When Cambodia sought admission to ASEAN, it was told to achieve peace within its borders first, before it would be granted admittance. However, this was not a requirement when Burma sought admittance. So, what justifies the different treatment? Some suggest ASEAN is more willing to intervene in the internal affairs of one of its state members if their domestic turbulence threatens to spill over across its borders than when their internal affairs, even if they involve egregious violations of human rights, are not threatening to disrupt the regional status quo.\textsuperscript{78}

ASEAN has tended to see itself as a family with a liberally applied “live and let live” approach to each other’s internal domestic policies.\textsuperscript{79} However, what goes on in the privacy of the home should not always receive a blind eye from one’s neighbors, especially when it involves matters of domestic abuse. One’s home may be one’s castle in many respects, but it should not imprison victims of crime, muffling their cries for help. Respect for human dignity and genuine human rights must supersede state sovereignty. This growth in the formation of international conscience may be seen as reflected in “the emergence of the putative ‘responsibility to protect’ (R2P) norm in humanitarian law.”\textsuperscript{80} If any nation’s government is unwilling or unable to protect its own citizens from “mass atrocity crimes (e.g. ethnic cleansing, genocide),…then a wider responsibility lies with the international community…and if required, [to] act effectively.” However, the use of force on an abusive state government is legitimate, some suggest, only if endorsed by the United Nations Security Council.\textsuperscript{81}

\begin{thebibliography}{99}
\bibitem{75} ASEAN Charter, \textit{supra} note 32, art. 26, 27.
\bibitem{76} Desierto, \textit{supra} note 15, at 92.
\bibitem{77} Tan, \textit{supra} note 11, at 190.
\bibitem{78} Thio, \textit{supra} note 53, at 57.
\bibitem{79} Tan, \textit{supra} note 11, at 186.
\bibitem{80} \textit{Id.} at 185.
\bibitem{81} \textit{Id.} (noting that the ‘R2P’ doctrine was adopted by the UN World Summit in 2005); \textit{see also} Pope John Paul II, \textit{Evangelium Vitae}, ¶ 55, \textit{cited in CATECHISM OF THE CATHOLIC CHURCH}, ¶ 2265 (2d ed. 1997)
\end{thebibliography}
When Pope Benedict XVI addressed the United Nations in 2008, he spoke quite extensively about the “principle of the responsibility to protect,” noting that although it has only been recently defined, this responsibility has been present implicitly in the origins of the UN. In fact, it “was considered by the ancient *ius gentium* as the foundation of every action taken by those in government with regard to the governed.”

Francisco de Vitoria “described this responsibility as an aspect of natural reason shared by all nations, and the result of an international order whose task it was to regulate relations between peoples.”

His Holiness noted that R2P only makes sense if it points to the transcendence and the natural reason of the human person: “now, as then, this principle has to invoke the idea of the person as an image of the Creator, the desire for the absolute and the essence of freedom.”

When this orientation has been abandoned, “freedom and human dignity [have been] grossly violated.”

The world is still waiting to see whether the ASEAN Summit or the AICHR have the political will to “decide” to protect the victims of human rights violations by its most notorious rogue nation – Burma/Myanmar.

### A. ASEAN and Burma/Myanmar

Burma became an independent republic following the withdrawal of the British colonial government in 1948. It was a representative republic until 1962 when General Ne Win led a military coup. His regime lasted until the August 8, 1988 popular uprising. Aung San Suu Kyi made her first appearance at this time and went on to become the leader of Burma’s National League for Democracy (NLD). Burma’s military ousted Ne Win and formed the State Law and Order Restoration Council (SLORC), which crushed the reform movement.

Three thousand students were massacred in the military occupation of Rangoon University alone. Hoping to garner

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83 *Id.*

84 *Id.*

85 *Id.*


legitimacy, Burma’s military junta held multiparty elections in May of 1990, which resulted in an overwhelming victory for the opposing party, the NLD. The military regime, however, refused to honor the results of the election. Later in 1998, the NLD convened a parliament based on the 1990 election results. Unfortunately, the military junta detained two hundred NLD delegates and hundreds of pro-democracy supporters 88 including NLD secretary general and 1990 Noble Prize recipient, Aung San Suu Kyi. 89 At this time, SLORC changed Burma’s name to Myanmar. Currently, the UN recognizes this name change, but many countries, including the US, refuse to honor it because they deny that the military’s junta has a right to rule the country. 90 In 1997, the same year Burma was admitted into ASEAN, SLORC changed its name to the State Peace and Development Council (SPDC) 91 but otherwise continued the same policies. In 2005, the UNCHR issued the following scathing denunciation of the SPDC’s human rights violations:

Extrajudicial killings, rape and other forms of sexual violence are persistently carried out by members of the armed forces, continuing use of torture, renewed instances of political arrests and continuing imprisonment and other detentions…destruction of livelihoods and confiscations of land by armed forces; forced labor, including child labor; trafficking in persons; denial of freedom of assembly association, expression and movement; discrimination and persecution on the basis of religious or ethnic background…systematic use of child soldiers; and violations of the rights to education and to an adequate standard of living, including food and medical care. 92

Moreover, Burma leads the world in the production of heroin, producing 24,000 metric tons of heroin per year. For comparison, it is estimated that the consumption of heroin in the US is approximately 10 metric tons per year. The junta and drug traffickers work together to build up the country’s infrastructure. 93 As such, drug trafficking is the backbone of the Burmese economy. 94 The U.S. Assistant Secretary of State for Narcotics and Law

88 Id. at 321.
90 Arendshorst, supra note 73, at 103–104 (noting that in this article Burma will not be called Myanmar).
91 Id. at 104.
92 Id. at 107.
93 Johansson, supra note 74.
94 Id. at 326.
Enforcement Affairs, Robert Gelbard, confirmed the collation of the military junta and drug lords:

The Burmese junta has brazenly exploited drug trafficking...[D]rug traffickers and their families are among the leading backers of high-profile infrastructure projects in Burma. They launder their money with impunity in banks controlled by the military.\(^95\)

The European Union (EU) and the United States have imposed economic sanctions against Burma. However, this has only served to strengthen China’s historic role and influence in Burma.\(^96\) Modeled after the South African anti-apartheid statutes, in the early and mid-1990’s, some municipalities and the states of Massachusetts and Connecticut refused to do business with companies that traded with Burma.\(^97\) In 2000, the U.S. Supreme Court in *Crosby v. National Foreign Trade Council* struck down all such laws stating as its reason that state’s action in this respect was preempted and unconstitutional under the Supremacy Clause of the federal Constitution.\(^98\) All the same, Nobel Peace Prize recipient and head of the National League for Democracy, Aung San Suu Kyi, supports economic sanctions against Burma.\(^99\) Countries and corporations that invest in Burma are stigmatized as complicit with the human rights violations perpetrated by Burma’s military/drug cartel junta.\(^100\)

Both Thailand and the Philippines suggested that Burma should democratize before entry into ASEAN in 1997, but the majority of ASEAN members thought Burma would reform after its entry.\(^101\) The EU temporarily suspended its formal dialogue with ASEAN in 1997 in response to the admission of Burma into ASEAN.\(^102\) In 2001, the UN General Assembly condemned Burma’s human rights violations against ethnic and religious minorities, women and children and strongly urged the government of Burma/Myanmar to “ensure full respect for all human rights and fundamental freedoms.”\(^103\) Six months later, the Burma junta temporarily released Aung San Suu Kyi from house arrest.\(^104\) However, in 2002, Burma

\(^{95}\) Id. at 337.
\(^{96}\) Id. at 339.
\(^{97}\) Id. at 336.
\(^{99}\) Thio, *supra* note 53, at 45.
\(^{100}\) Id. at 48.
\(^{101}\) Johansson, *supra* note 74, at 339 n. 181.
\(^{102}\) Bunyanunda, *supra* note 76, at 131.
\(^{104}\) Id at 617.
blocked East Timor’s bid for inclusion in ASEAN because of its leaders’ links with NLD leader, Aung San Suu Kyi. 105

ASEAN policy with Burma has been characterized as one of “constructive engagement.” 106 Despite the fact that Burma’s human rights record is despicable, geopolitical realities have prevented ASEAN from expelling it from her ranks. Burma is strategically located between China and India. Singapore’s Foreign Minister explained that if Burma was expelled from ASEAN, then China and India would create options for themselves in Burma. Then, in the event of internal discord in Burma, they would be dragged in, which would consequently alarm the Japanese and the Americans. “In the end, Myanmar can become an arena for big power conflicts. At that point in time, our own interests will be dragged in too.” 107 So, he argued, it is better to keep Burma within ASEAN’S circle of influence. 108 On the other hand, ASEAN’s policy of constructive engagement may amount to nothing more than securing a favored trade partner relationship with Burma as much as preventing Burma from becoming China’s “Trojan horse in the region.” 109 However, China already enjoys a near monopoly as military supplier to the junta and has expressed its willingness to aid Burma in case of a military coup or popular uprising. 110 Unfortunately, “China’s ties with Burma are deepening and its leverage over [Burma’s junta] has only grown during the period of constructive engagement.” 111 For many, “constructive engagement” is simply a “euphemism for economic exploitation and opportunism.” 112

B. Customary International Law

ASEAN is beginning to come to grips with the idea of R2P and “responsible sovereignty,” meaning that each country is responsible for the effects its domestic policies produce in other sovereign states as well as its impact on its own citizens. 113 Responsible sovereignty, for better or worse, will mean that international customary law will have a greater role to play in a country’s internal affairs. “More fundamentally, ASEAN will also have

105 Id. at 623.
106 See PAUL SECK FAI CHEAK, ASEAN’S CONSTRUCTIVE ENGAGEMENT POLICY TOWARD MYANMAR (BURMA) 2012.
107 Tan, supra note 11, at 192.
108 Id.
109 Id.
110 Bunyanunda, supra note 76, at 123.
111 Id. at 123.
112 Id. at 129.
113 Id. at 133.
114 Tan, supra note 11, at 194.
difficulty justifying its non-observance of prevailing and emerging international norms to the domestic constituencies as well.”

It is likely the measures ASEAN meets out to bring Burma in line with respect to the core principles of human rights (respect for rule of law, democratic principles, free and open elections, freedom from torture, and crimes against humanity) will be brought to bear against state members for non-compliance with the highly contentious post-modern sexual and reproductive rights and gender mainstreaming. Many influential Western public advocacy groups believe sexual and reproductive rights and gender mainstreaming are to be grouped with torture, crimes against humanity, war crimes, apartheid, racial discrimination, and sexual discrimination as opicio juris obligations to which all ASEAN states are bound to comply under the international human rights norms the ASEAN Charter incorporates by reference.

The proponents of “Asian values” are wrong insofar as they advance the claims of relativism – that one can derive an “ought” from an “is”. It is wrong to suggest that from the fact of a diversity of cultural norms around the world, one must conclude that there is only one political norm binding on all nations, namely, tolerance of all cultural norms: “The fact of moral diversity no more compels our approval of other ways of life than the existence of cancer compels us to value ill-health.”

However, the claims of those who see in the call “for full enforcement and universality of human rights...yet another mode of Western imperialism to arrest the development of Southern states” should not be lightly dismissed. Perhaps the mingling of post-modern “decadent” human rights, such as “sexual and reproductive rights” and “gender mainstreaming,” with the authentic body of universal human rights is in the service of the hegemony of the post-modern West. Leaders of the Developing Countries have reason to distrust a human rights project that includes sexual, reproductive, and gender rights as a tool of repression. Furthermore, they have evidence to support their belief. In 1995, the Vice Major of Manila, Lito Atienza, referenced the newly declassified United States National Security Memorandum 200 and quipped at a human rights conference “Tell the American to dump their damn condoms in Manila Bay”:

114 Id. at 194.
115 Desierto, supra note 15, at 84.
116 Id. at 94.
117 Id. at 102.
118 The author was present in October 1995, when the vice Major of Manila, Philippines, Lito Atienza, made this remark to a gathering of participants from Human Life International 2nd Love Life and Family Conference, referencing the United States National Security Study Memorandum (NSSM 200). See STEPHEN D. MUMFORD, THE LIFE AND DEATH OF NSSM 200: HOW THE DESTRUCTION OF POLITICAL.
Declassified in 1989, National Security Study Memorandum 200 (NSSM 200) explained that the real problem of strategic supply of vital mineral ores for the United States was not in their scarce physical supply, but in the political and economic issues of access, given the conflicts of interest between the developed and developing world. These conflicts of interest over the natural resources of the developing world would be less exacerbated under conditions of slow or zero population growth and the elimination of large, growing, unemployed and rebellious youthful populations. Therefore, NSSM 200 urged that greater motivation for smaller family size be brought to bear on developing nations. However, because leaders in the least developed countries (LDCs) might see this as a form of economic or racial imperialism, NSSM 200 recommended that the United States promote reduction in fecundity in the LDCs as a vindication of the right of individuals to freely and responsibly number and space their children, and as the way of social and economic development for poor countries. To better motivate the masses of the LDC to embrace smaller family size, minimal levels of education, especially for women, would be necessary in order to indoctrinate them in the desirability of smaller family size.119

Given the fact that all ten ASEAN state members have signed the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), one should not be surprised if the AICHR brings pressure on its state members to fully comply with the recommendations for the CEDAW treaty body reports for their countries. Under the tutelage of the Center for Reproductive Rights (CRR), ASEAN’s intergovernmental commission on Human Rights (AICHR) is being shown how to bring the Philippines in line. For instance, for ten years, the Manila City government has prohibited public health facilities funded by Manila City from counseling and recommending contraceptives.120 The CRR opines that Convention on the Elimination of all Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), the Civil and Political Rights Covenant and the International Economic, Social and Cultural Rights Covenant requires states to “provide access to family planning services and information.”121 As such, it suggests that Manila City’s “NFP only ordinance “is in violation of these treaty commitments insofar as it fails to provide a

120 Cheak, supra note 106.
121 Id.
full range of family planning information.”

The CRR encouraged and then commended the Philippines Commission on Human Rights, a national human rights body, for its, “strong statement calling for the revocation of Manila City’s ban on contraception, categorizing it as in violation of human rights obligations, and urging the council to apologize.”

Shortly after the creation of the ICHR, the CRR presented its vision of global, sexual reproductive rights to members of ICHR during their first visit to the United States. The CRR praised ICHR for being “uniquely positioned to provide leadership on this important humanitarian issue” concerning maternal mortality due to lack of access to comprehensive reproductive healthcare services, including family planning. This humanitarian issue also concerned pervasive gender inequality and discrimination “as it begins to implement its mandate to promote human rights in Southeast Asia and assumes the role of key architect of human rights norms and standards in the region.”

Asian values ought not to be used to justify gross violations of human rights, as the Minister of Foreign Affairs of Singapore said: “Murder is murder whether perpetuated in America, Asia, or Africa. No one claims torture as part of their cultural heritage.” However, Asian values, or simply authentic human rights, ought to be used to shield the ICHR so that it is no co-opted to serve the political and economic/demographic interests of powerful Western nations. These nations would attempt to force ASEAN state members to discriminate against their own people based on the stage of their development, as one human rights advocate testified: “I believe profoundly in the universality of the human spirit. Individuals everywhere want the same essential things…I believe there is nothing in these aspirations that is dependent upon culture, or religion, or stage of development (emphasis added).”

V. NGOs of Catholic Inspiration and Conclusion

In late November of 2007, eighty-five Catholic inspired NGO’s (CNGOs) were invited to Rome to further a dialogue between themselves

123 Id.
124 Id.
125 Id.
126 Desierto, supra note 15, at 93.
127 Id. at 100.
and the Holy See. In his address to CNGO’s, Pope Benedict XVI said they need to take part in the public sphere and work in their personal capacity to reconfigure social life, disfigured by a “relativistic logic” which makes a natural law ethic impossible: “This has led, in effect, to the imposition of a notion of law and politics which ultimately makes consensus between states...the only real basis of international norms.”

His Holiness urged Catholic NGO’s to collaborate and develop amongst themselves a spirit of solidarity conductive to promoting as a united group ethical principles “which by their very nature and their role as the basis of social life, remain non-negotiable.”

Will the new regional mechanism of human rights enforcement, including those laying nascent in ASEAN, be used to underscore or undermine authentic human rights? Will ASEAN turn a blind eye to the atrocities of its rogue members, while at the same time imposing a tyranny of relativism on others? Or will it uphold Asian values in the best sense of the term, rejecting sexual and reproductive rights as both decadent and imperialistic? Will it call to task egregious human rights violations that deny a rule of law based on an innate human dignity?

The normative content of “human dignity” is not entirely self-evident: It cannot be exhaustively defined, but neither is it obscure. We know it when we see it. In a relativistic universe, one must look to areas of agreement to discern which core or fundamental rights are universally accepted. The Universal Declaration of Human Rights, which was affirmed by 171 countries at the 1993 Vienna Conference on Human Rights, and constitutional bills of rights are good starting places.

Pope John Paul II, visited the UN for the first time in 1979. In an impassioned address, he reminded the gathered delegates that the horrors of World War II and Poland, “on whose living body Oswiecim was at one time constructed,” were the painful inspiration that gave rise to the Universal Declaration of Human Rights. He said, the desire to avoid a repetition of the horrors of WWII and its crimes against humanity gave rise to the Declaration of Universal Human Rights which remains the “cornerstone of the United Nations Organization”:

129 Id. at 6.
130 Id. at 6.
131 Thio, supra note 53, at 23.
This declaration was paid for by millions of our brothers and sisters at the cost of their suffering and sacrifice, brought about by the brutalization that darkened and made insensitive the human consciences of their oppressors and of those who carried out a real genocide. This price cannot have been paid in vain! The universal Declaration of Human Rights...must remain the basic value in the United Nations...If the truths and principles contained in this document were to be forgotten or ignored and were thus to lose genuine self-evidence that distinguished them at the time they were brought painfully to birth, then the noble purpose of the United Nations Organization could be faced with the threat of a new destruction.132

NGOs of Catholic Inspiration are called to hold high the light of self-evident natural law principles in order to pierce the miasma of the anti-Gospel. In doing so they will reaffirm the contour of human dignity marked out by right reason and etched in the seminal human rights documents of humanity – the Universal Declaration of Human Rights (1948), The Declaration of Independence (1776), The Declaration on the Rights of Man and Citizen (1789) and the Magna Carta (1215). The discovery and promulgation of these documents “can be compared with the discovery of fire, or electricity in the technical and scientific fields.”133

These perennial self-evident fundamental human rights must guide AICHR to avoid the twin dangers it faces: To fail to sanction the egregious violations of authentic self-evident human rights perpetrated by its rogue state members, while compelling all its state members to adopt ideologically constructed Western dis-values, such as sexual and reproductive health/services/rights, sexual orientation and gender identity issues in the service of a neo-colonialism that seeks to undermine the natural family, the “fundamental group unit,”134 of all Asian nations. The basic question for NGOs of Catholic inspiration is - “How can we ensure the fundamental rights of man, when they are mocked? How can we make those in charge realize that it is a question of an essential heritage of man that on one can harm with impunity, on any pretext, without making an attempt on what is most sacred for a human being and thus ruining the very foundations of social life?”135

133 SCHOOYANS, supra note 113, at 8-9; Pope John Paul II, supra note 112.
134 International Covenant on Civil and Political Rights, supra note 9.
INTRODUCTION

According to Francisco Suárez, man, by his rational nature, has a political end that can only be realized in the heart of a peaceful order—an order in which the assembly of States, the mediators of a human life’s fulfillment, share in a common destiny that surpasses them and from which, nevertheless, they derive benefit.¹ At the same time, the international society shares in the sphere of the natural law as a condition for the exteriorization of human nature’s potentialities. But it makes it equally clear that, with respect to the development of human societies, the law of nations belongs to the sphere of positive law, since this law only becomes effective by being enforced by a human will that makes the universal values of the natural law suitable to historical variations.

Thus, in the historical constitution of the entire human community, custom necessarily leads to recognizing the division of human law into two classes: the written law and the unwritten law.² Custom, like the law of nations, is common to all peoples; together they (custom and the law of nations) constitute two leading pieces in the determination of the juridical evolution of the human community. There is one point for Suárez that confirms the historical-political link between custom and the law of nations: the precepts of the law of nations must be distinguished from the precepts of the civil law because they are not constituted by written laws, but by customs, which are not specific to any single country but to the totality or quasi-totality of nations.

Consequently, the critical examination of the law of nations reveals three difficulties: 1) that of its origin, which faces the problem of the distinction between nature and convention, between the universality of the natural law and the historical particularity of

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¹ See FRANÇOIS SUÁREZ, DES LOIS ET DU DIEU LÉGISLATEUR [THE LAWS OF GOD AND LEGISLATORS] 180-84 (Jean-Paul Coujou, ed. and trans., 2003).
² Id. at 624.
positive law; 2) that of its foundation, which requires establishing its link to the natural law and its distinction from it; and 3) that of its finality—opening the way to the constitution of an ethical-juridical development of humanity which respects diversity.

I. Historicity of custom and the law of nations

Suárez insists, in De legibus, on the fact that custom and civil law are not any less made aware of their limits when responding to the problem of international relations, since it is not possible to establish an economy consisting of the types of relations to which all nations should conform in order to allow their coexistence and ensure their ongoing existence. It seems that the limited attributions of custom and law prevent them from ensuring the historical unity of the human race.\(^3\) Thus, the power of civil laws has never been historically “one and the same for the universal totality of men.”\(^4\) The human community is to be understood, in its foundation and its institution, on the premise that it will be separated into multiple States. The agreement of humanity on the bestowal of universal power to a single leader proves, for Suárez, to be illusory.

Even if such a power were possible, it could not fail to be illegitimate and a source of a tyranny without limits. Thus, “It is not necessary for preservation or natural well-being that all men be gathered into a single political community.”\(^5\) The reality of this historical-political division into multiple communities justifies the initiation of a common law, the law of nations, by which the mutual assistance and preservation of peace and justice become effective by the mediation of common consent based on the recognition of common laws (peace treaties, truces, immunity of ambassadors, the law of fortification, captivity, etc., not to mention the Etymologies of Isidore of Seville). Such a law “has been instituted by custom and tradition more than by legal disposition.”\(^6\)

For Suárez, in fact, the universal custom of the law of nations (ius gentium) is distinct from particular private custom.\(^7\) The first category includes “the customs of the totality of the whole that constitutes the law of nations.”\(^8\) The Aristotelian position—which understands the State as an

\(^3\) Id. at 627.
\(^4\) FRANÇOIS SUÁREZ, De legibus \[ON THE LAWS\] in OPERA OMNIA vol. 5, bk. III, pt. 2, ¶ 6, at 181 (Ludovicus Vivès ed., Paris, 1856–1861) [hereinafter Vivès].
\(^5\) Id. ¶ 5.
\(^6\) Id. ¶ 6, at 182.
\(^7\) Id. vol. 6, bk. VII, pt. 3, ¶ 7, at 143.
\(^8\) Id. at 141.
autocratic community for the purpose of justifying its existence—seems, to Suárez, no longer appropriate for making sense of the State’s evolution in history.9 The State constitutes a totality included within the whole totality of the human race since it is nothing but a partial expression of this universal community. The history of universal relations shows that the State is unable to be an entity having “an absolute autonomy,”10 existing metaphysically in itself and by itself. This is part of the international logic passed on by Francisco Vitoria, which judges it appropriate to think in terms of an “association and a common exchange,”11 of a mutual assistance, without which a greater well-being and progress could never be possible in the order of human development. Consequently, nations—without such association—could not provide an economy with the juridical principles needed for rationally structuring the necessity of exchanges and mutual associations, confirming by this likewise a political principle proper to the State; to endure, and a metaphysical principle proper to the exposition of the temporal category: to endure signifies, for every created thing, the preservation of its existence, whether that of an individual, a community, or a State.

This presupposes—for such a prospect to be real—an establishment not only by natural reason but also by the mediation of custom. Historically, an analogy can be established: just as custom reveals itself to be a source of law in the community of the human race, so also the introduction of the law of nations is carried out because of custom. These customs contribute socially to create an agreement with human nature so the principles of the law of nations may become acceptable to all in an easy manner. The law of nations likewise takes the form of an assembly of precepts and ways of life that, without pretending to be understood by the totality of the human race, do not have an international agreement as an immediate end.12 Its establishment corresponds to an internal jurisdiction of the State in accordance with constitutional procedures. Thus, one could consider rendering worship to God as something of the order of the natural law; nevertheless, the determination of its specific modality belongs to the sphere of divine positive law, and according to the social order it comes back to civil or private law.

Consequently, one may conclude that for Suárez the universal customs constitutive of the law of nations express a true law and oblige in the manner of an authentic law.13 Such an unwritten law is the result of a creation of the

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9 Suárez, supra note 2, at 627.
10 Id.
11 Id.
12 Id. at 628-29.
13 Vivès, supra note 5, vol. 6, bk. VII, pt. 3, ¶ 7, at 143.
whole human race. The law of nations draws the strength of its identification from custom, the human power of interaction within time, without which the origin of this same strength has only the natural law as a foundation. The history of societies, ultimately, can only confirm that the common law of nations at the same time possesses a natural dimension and it serves as a first law without being comparable to a pure defect of the law.

In conformity to these preliminary remarks, it belongs precisely to the ius gentium (identifiable in Roman law with positive law, holding force for all men and elaborated by human reason) to create the conditions of the historical unification of the human race. This is in spite of the rational demands of a calculus of interests and the need a for an effectiveness appropriate to the conditions that come into play in every political reality, which in Suárez’s time was shown by the wars of conquest in America and northern Europe. Thus, the divisions of the human race into different peoples and kingdoms does not exclude the persistent existence of “a specific unity of the human race" and of a “political and moral unity."  

In order to understand the issue at hand it proves immediately judicious, in spite of the recognition of an affinity between the natural law and the law of nations (namely that they both represent a specific human law), to show the foundation of their difference. This is in order to avoid all confusion between what is given according to an intrinsic and natural necessity and that which—as the effect of the common practice of some peoples—cannot claim the necessity of such universality. Eliminating this confusion is intended precisely to once more spell out the relation between human nature and history. The law of nations is, for Suárez, the bringing together of “a footbridge between the natural law and the human law even though it is closer to the first." In fact, contrary to the natural law, the law of nations does not prescribe by itself anything necessary to practical morality and it does not forbid anything that would be by itself intrinsically evil.

Thus, as Fray Luis de Léon remarked, freedom comes from the natural law, yet this principle has been upset with the introduction of slavery by custom and the law of nations. 

14 SUÁREZ, supra note 2, at 627.
15 Id. at 605-06.
16 Id. at 596.
17 Id. at 606.
18 FRAY LUIS DE LÉON, DE LEGIBUS O TRATADO DE LA LEYES [DE LEGIBUS OR TREATISE ON THE LAWS] 74 (L. Pereña ed., 1963) (1571); see JUAN DE LA PEÑA, DE BELLO CONTRA INSULANOS INTERVENCION DE ESPAÑA EN AMÉRICA [ON THE WAR AGAINST THE ISLANDERS: INTERVENTION OF SPAIN IN AMERICA] 163 (L. Pereña et al. eds., 1982) (“Slavery was introduced by the law of nations, but not by the natural law” [. . . servitus introducta est iure gentium, non autem iure naturali]).
The laws and decrees of men can never change what the natural law prescribes. The natural law, founded on the two attributes of human nature, freedom and reason, remains—in spite of its trans-historical dimension—submissive to its effective fulfillment in the face of the arbitrary quality of human wishes and the relations of historical forces. Institutions likewise reveal that human law grants dispensations in relation to the precepts of the natural law. As Suárez recalls, according to the natural law a community of things exists, yet men have instituted private property, which brings into the State a different manifestation of the natural law. Still, freedom—which is constitutive of man’s being according to the natural law—can appear in many States diminished or even abolished by human law.

For Suárez, it is all the more easy to confuse the natural law and the law of nations than it is to legitimately determine the points of convergence between them. They are both, according to their respective modalities, common to all men. Their practical implications and precepts concern the human sphere in a unique way. Finally, they both contain “some prohibitions and some concessions or permissions.”

Nevertheless, these similarities cannot hide the moral differences that clearly establish their distinctions.

First, the affirmative precepts proper to the law of nations are not established by their obligatory character because they prescribe or forbid that which is good or bad in itself in the manner of the natural law. These precepts do not derive from their objects the origin of their obligatory character and this implies an inversion: for, contrary to the natural law, the law of nations does not forbid an immoral practice because it is bad, but it is the prohibition that makes such a practice become bad. It does not signify only what constitutes an evil, but it is constitutive of what can be qualified as evil. Its prohibition has the power of making bad whatever it reports as such. Such precepts are extrinsic and dependent on the will and human conventions. According to this orientation, what the natural law prescribes is of natural right, which amounts to setting down that, for natural reason, this prescription appears necessary to moral rectitude.

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19 SUÁREZ, supra note 2, at 532.
20 Id. at 602-03.
21 Id. at 618.
22 The principles of the natural law, as Suárez recalls, are in some way summed up in the Institutes of Justinian: "Honeste vivere, alterum non laedere, suum civique reddere" [live honestly, do not injure one another, give to each his own]; see also 1 THE DIGEST OF JUSTINIAN bk. 1, pt. 1, ¶ 9 (explaining that law which natural reason has established among all men, and which all nations observe, is referred to as the law of nations).
same way represents the unconditional ontological norm of the legitimacy of the action.

Second, by the same reason of its historicity, the law of nations can never claim an immutability comparable to that of the natural law. The essence of the latter resides in the immutability of its precepts and such immutability operates on the immutability of human nature. On the one hand, the natural law, in the totality of its precepts, defines the legitimate space of human behavior since it is not in contradiction with the natural characteristic of man. On the other hand, the immutability of human nature, with respect to what it refers, represents a universal given that humanity has no power to modify. As a result socio-historical relations must actualize this first immutability, the condition for the development of every axiology. The voice of conscience in each one of us expresses precisely the referential immanence of this corollary immutability of a necessity unfamiliar to the law of nations. On the opposite side, the State has the power to modify the law of nations in its proper territory, precisely because the precepts of the law of nations correspond to a simple civil law when they apply within a State.

This rapprochement allows for a refinement of the difference with respect to the natural law, for, when the law of nations is in force within a State, it can only recall its dependence relative to the authority and the customs of a particular people apart from other nations. Such a law can be modified within the state without investigating its agreement with other nations. Nevertheless, if this law is envisaged from an international perspective, insofar as it is common to the quasi-totality of nations and its advent assumes the authority of the totality of peoples, the pretension of abrogating it in a way independent of general consensus proves to be illusory.

Legitimate exceptions to this principle are, however, observable. As Suárez remarks, the law of nations on the slavery of prisoners obtained by a "just war was abolished by the Church and Christendom, and this rule was not observed in accordance with an ancient ecclesiastical custom." It thus becomes equally possible to note another order of difference regarding the question of mutability: that which exists between the law of nations and the civil law. While the precepts of the civil law can be the object of an abrogation or a complete modification, the rules of the law of nations will only be the object of a partial derogation. The examination of the question of mutability allows for the essential demarcation of the tradition of the law of

23 SUÁREZ, supra note 2, at 625.
24 Id.
25 Id. at 637.
nations as an intermediate form between the natural law and the civil law.\textsuperscript{26} From the point of view of universality it agrees with the first (the natural law), but in a limited way, since it is derived from natural principles without being such according to an absolute necessity. This restriction confirms its agreement with the human law.

Finally, it is appropriate to bring out a difference concerning the nature of the universality proper to the law of nations and the law of nature—in spite their apparent agreement (i.e. they reflect upon precepts, prohibitions, and concessions). The universality of the law of nature is characterized by its universality and its absoluteness. In fact, the natural law unites with ontology in its dimension as a universal knowledge understanding the human according to a rule of universality. Natural law conforms to the principle of the constitution of a universal and abstract representation of the human, so it forms a basis for equal dignity among individuals; if it ceases to be observed, that could only result in a perversion with respect to human nature.

With regard to the law of nations, its universality is such that although it is apparent that the quasi-totality of nations observes it,\textsuperscript{27} it must at the same time be noted that one cannot assign to this law an absolute intrinsic and natural necessity. "It proves sufficient," according to the heritage of Isidore of Seville, "that almost all nations are suitably organized in making use of it."\textsuperscript{28} The cessation of its observation in any space or time does not contradict the principles of human nature as much. This explains that precisely because the law of nations is "quite simply human and positive"\textsuperscript{29} and therefore "instituted not by nature but by men,"\textsuperscript{30} the term institution, in this case, signifies that habits and customs, not writings, are at the origin of its introduction.

Not only can one not infer from the rootedness of the law of nations in custom that it could be reduced to a purely artificial creation, but it seems not to have this meaning precisely because it has, as its ontological and anthropological foundation, the existence of a natural community among men. Such a community excludes isolation by reason of the common possession of the whole surface of the earth. Humanity cannot have effectiveness and a meaning except in terms of universality, of which one of

\textsuperscript{26} Id. at 638.  
\textsuperscript{27} Id. at 625 (it is a law common to all the nations and established not by the imposition of the nation alone, but by the usage of nations).  
\textsuperscript{28} Id. at 625.  
\textsuperscript{29} Id. at 619.  
\textsuperscript{30} Id. at 624.
the concrete manifestations is communication and mutual commerce.\textsuperscript{31} The reciprocal action between men is made necessary by the spherical form of the earth; this implies that exchanges are initiated between them from one end of the earth to the other. For Suárez, the notion of commerce includes the general fact of the circulation and exchange on one common surface.

In the Suarezian perspective, the assembly of these analyses confirms the legitimacy and necessity of the division of the law into the natural law and the positive and human law.\textsuperscript{32} In conformity to the juridical tradition invoked by Suárez, the law of nations is effectively defined by Gaius\textsuperscript{33} in the Digest of Justinian as an assembly of rules to which all people conform themselves and which is established by the natural reason of things, namely their natural order.\textsuperscript{34} It is a law essentially human in contrast to the natural law, which is common to men and animals. Isidore of Séville had reprised, in precise terms, the tripartite division of Roman law (ius naturale, ius gentium, ius civile) notably by Ulpian, in order to assimilate the ius gentium to institutions in use in the quasi-totality of nations, apart from their conformity or non-conformity to the natural law.\textsuperscript{35} It is only after a long theological gestation, juridical and philosophical, led notably by Saint Bonaventure and Alexander of Hales,\textsuperscript{36} that the ius gentium will be considered as a natural law properly human.

II.  \textit{The law of nations, footbridge between the natural law and the civil law}

Historically, for Suárez, the first one who assigned a specific value to the ius gentium was Thomas Aquinas,\textsuperscript{37} who presented a theory of the law of nations as customary law resting on the heritage of the Aristotelian distinctions concerning a primary and secondary natural law. The first reflects an absolute right possessing universal value, namely with regard to the moral virtue of justice found in a disposition to preserve and restore equity in relations with others. This equity is a mathematically determined

\textsuperscript{31} Id. at 627.
\textsuperscript{32} Id. at 622-23.
\textsuperscript{33} \textit{Digest of Justinian}, supra note 23, bk. 1, pt. 1, ¶ 9.
\textsuperscript{34} \textit{The Etymologies of Isidore of Seville} bk. V, pt. iv, ¶ 1, at 117 (Stephen A. Barney et al. eds., 2006) (c. 615-30 A.D.).
\textsuperscript{35} \textit{Suárez}, supra note 2, at 618-19.
\textsuperscript{36} \textit{Jean-Marie Aubert, Le Droit Romain dans l’oeuvre de Saint Thomas [Roman Law in the Work of Saint Thomas]} 97 (1955).
mean: geometric or proportional in what concerns distributive justice; arithmetic in what concerns commutative justice. The second corresponds to political right, which is part natural and part legal. There is thus recognition of an immanence of nature with regard to political right, leading to the necessity of the determination of the content proper to the distinction between the natural and the legal.

The non-contradictory articulation between the natural law and the law of nations derived its possibility from the Aristotilian thesis. This thesis maintains there is no obstacle in formulating the natural law as changeable without having this mutability lead to the divestiture of its specificity of natural right, all in making intelligible the fact that a natural right cannot be always and in every respect the same. The authentic natural law corresponds to what adjusts to a human nature essentially mutable, which boils down to the inference that the mutability of laws is not comparable to a sign of their artificiality, but that the abstract universality—which requires the identity of laws everywhere—proves itself definitely against nature.

In the strict line of this heritage Suárez maintains the division between the natural and positive law. One will notice in this regard that the laws of the law of nations are not purely natural and, according to the invoked division, they can only be positive and human. In contrast to the natural law derived from natural evidence, the law of nations follows from probable conclusions and from the common appreciation of men. The fact that it is rooted in custom confirms its mutability, and it is precisely in this that it is distinguished from the natural law. For as the historical evolution shows, for the preservation and progress of the human race there has never been any necessity that humanity be comprised of one single political community. The Roman Empire itself never exercised a complete sovereignty on the people over whom it had power. In this sense the law of nations historically confirms that there has never been one sovereign political body in humanity. The constancy of such an absence does not exclude the constitution of a relative universality (distinct from the absolute sovereignty

38 SUÁREZ, supra note 2, at 623.
39 Id. at 635-36 ("The law of nations is changeable because it depends on the consent of men."); see also id. at 626-27 ("One thing can be qualified about the law of nations according to two senses: in the first place, because it consists of a law that all peoples and different nations ought to observe in their mutual relations. In the second, because it is a law that each of the States or kingdoms observe within their territory, but it is called the law of nations by reason of its resemblance and its harmony [with other laws].").
40 Vivès, supra note 5, ¶ 5, at 181.
41 Id. pt. 7, ¶ 4, at 195.
of the natural law) corresponding to one communitarian unity in the evolution of the search for the establishment of reciprocal obligations.

Nevertheless, it seems that 1) the principles of the law of nations, in spite of their specific universality, never acquire such an intrinsic necessity; and 2) the law of nations does not possess an intrinsically moral value and it is not possible for it to take, as a reference, conclusions necessarily inferred from moral principles. The precepts that implicate the latter are constitutive of the natural law.  

In fact, all one can deduce from natural principles by evident reasons is likewise "written into the human heart." The universality found in the natural law is imminent to the human nature completely in reference to a transcendent origin. It, therefore, proves to be absolute.

In contrast, the dominant trait of the origin of the law of nations resides in the fact that men have historically instituted their precepts in the quasi-totality of the human community. This universality, when one takes into consideration the socio-historical evolution of peoples, is relative because it does not rest on a reading of human nature, but on the free will and consent of men. These last two elements proper to its conventional dimension are capable of value for all humanity without assuming an identical justification and foundation. If the content of the precept of the natural law corresponds to what is good or bad in itself, the content of the law of nations concerns that which is evaluated as such as a result of common consent. One can conclude from this: 1) the universality of the natural law is absolute because it defines itself by its unicity and immutability as it transcends the political-historical reality as a constitutive given of the humanity of man; and 2) the universality of the law of nations is relative by reason of a) the artificial character of its existence, and b) its origin by means of the consensus of the greatest number at a given historical moment.

The "quasi political and moral unity" proper to law of nations actually constitutes a necessarily relative unity on account of the historical evolution of humanity, for it remains in part dependent on the sovereignty of each State. Nevertheless, the law of nations historically reinforces the ontological principle of human sociability and the anthropological principle of human

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42 SUÁREZ, supra note 2, at 462 ("All these precepts are issued according to a particular necessity of nature and God, as the creator of nature; and they tend toward an identical end which is, without question, the legitimate conservation and natural perfection or happiness of human nature. Consequently, everything among them belongs to the natural law.").

43 Id. at 604-05.

44 Id. at 627.
interaction. Its theorization is based on the concept of universitas\textsuperscript{45} from the Middle Ages, a sign of an ontology of totality—of totus orbis—comprising humanity as the synthesis of the entirety of peoples constituted in States. The movement of the multitude of peoples in historical evolution toward an association, organized within limits that respect the sovereignty of States, remains possible and desirable.

This reinforces historically the actuality of a universal human founded on the recognition of a nature common to all individuals, which constitutes them insofar as they are human beings. The Suárezian understanding of the law of nations brings out, in historical practice, the effects of this understanding of the human being at the intersection of the heritage of Stoical anthropology and Christian thought which structures a universal community of the human race expressing a specific entity: that of being-in-common. It aims at promoting a representation of humanity, which only becomes legitimate by being theorized in the universal. This leads to the successful realization of the process of the substitution of universitas for the cosmos of Antiquity in order to advance, starting from reference to the divine order, a dimension of politics proper to the whole, and a global conception of humanity. With the law of nations there emerges the fact that humanity is no longer a part of the whole; it is henceforth on the way toward being identifiable with a whole in becoming what, by its own law, it is in itself.

The law of nations, on the one hand, confirms the relative dimension of the legitimacy of the State’s power and, on the other hand, it frees the State from historical isolation and introduces it into a community of law residing in the unity of the human race. Its exact function is understandable from an international political order and it is likewise differentiated on this point from the civil law.

The function of the civil law implies an act proper to the human will, consisting of that by which "men gather themselves into a body politic according to a social bond in order to assist each other in view of a political end.\textsuperscript{46} Nevertheless, this "unity by itself"\textsuperscript{47} is not historically accomplished; it requires the mediation of the law of nations. The theoretical framework is thus marked out in order to recall that human nature is historically incarnated into a multiplicity of States\textsuperscript{48} and its intelligibility cannot be dissociated from

\textsuperscript{46} SUÁREZ, supra note 2, at 643.
\textsuperscript{47} Vivès, supra note 5, ¶ 4, at 181.
\textsuperscript{48} Id. ¶ 6 ("The totality of men has not reached integration into a single political body but it is rather divided into several States.").
its incarnation in the historical evolution. In conformity with the preceding anthro-theological deductons, it thus becomes necessary to invoke a law, which, by the character of its relative universality, distinguishes itself from all other laws. In this way, it is the expression of freedom and reason in history and not the product of a logical deduction from human nature, but it does not remain in this less historically advantageous to the affirmation of this same nature.

This relation to history allows for a refinement of the difference between the natural law and the law of nations. The object of the natural law is not comparable to the humanity historically comprised as a unity divided into States, but rather to the humanity ontologically grasped as a unity composed by the whole assembly of men; every man considered individually does not remain any less by himself a manifestation of his natural law. If one refers to the object of the law of nations, it is comparable to nations as members of humanity, its function being regulated in the historical evolution of international relations. It confirms the same aspect in its public dimension of striving to guarantee peace and justice in the inter-communitarian realm.

Historically, it seems that the precepts of the law of nations take on a character more general than those of the civil law. This is precisely because "the interest of the whole of humanity and conformity to the first and universal principles of nature"\footnote{SUÁREZ, supra note 2, at 632.} are taken into account. Nevertheless, the necessity of such conformity would never overlook the mutability of the law of nations since "it depends on the consent of men."\footnote{Id. at 635.} Its prohibitions and positive precepts are in the same way affected as soon as it is stipulated that its rules cannot be derived from natural principles "by way of necessary and evident deductions."\footnote{Id.} Also, the foundation of its obligation does not follow from pure reason but implies reference to a human obligation resting on custom.

If humanity encounters in itself the particularity with respect to the law of nations, how does it attain universality? How does it submit its decision to the truth of the natural law? An antinomy seems to appear between the diversity of the ways of being and human destiny; between the contingency of the given and the immutability of the first universal principles of nature. The understanding of the law of nations as an intermediary between the natural law and the civil law allows for a response. The distinction in the historical evolution within the law of nations leads to an agreement between diverse nations and universal law "by means of international customs and

\footnote{SUÁREZ, supra note 2, at 632.}
\footnote{Id. at 635.}
\footnote{Id.}
habits insofar as peoples in their mutual relations maintain a form of association and exchange." 52 This opens the way to overcoming the aforementioned antinomy notably by reference to a political and moral unity of the human race.53

The first law remains dependent on the particularity and customs of each people considered in an autonomous way. A State operates in this way by outlawing prostitution within its own territory.54 With regard to the second, common to the whole of nations, it establishes the possibility of the universal in the very heart of the recognition of the particularity in the first law, confirmed by the impossibility of its total abrogation since it has as its origin "the authority of all the nations." 55 Thus follows the immunity of ambassadors, the respect for treaties and truces.

For Suárez, not only does history confirm that the well-being and preservation of humanity has never required the integration of men into a single political community,56 but the power of instituting human laws has never been one and the same for all humanity.57 History, since the fracturing of humanity into multiple communities, presents itself as a succession of events and a series of existences. Is it thus possible to grasp the totality of history in adopting a synthetic point of view on the multiplicity of its communities? What type of understanding could attain such a comprehension of history? The problem of the law of nations sketches the framework of a philosophy of history by showing from the start that there is no incompatibility between its nature and the fact of the history of societies, which have come to operate without a single political body, a single sovereign, and the temporal and spatial diversification of State structure.

This philosophy of history maintains that human history cannot be reduced to a pure juxtaposition of a multiplicity of States, on interests and divergent institutions; it must lead to the determination of a totality moving toward a better life in common, capable of assigning a meaning to the whole. This meaning is a search, in the function and the finality of the law of nations: to create the conditions of mutual assistance among nations in view of the conservation of peace and justice by means of common consensus and common laws58 not reducible to the spheres of the natural law or positive

52 Id. at 636.
53 Id. at 627.
54 Id. at 637.
55 Id.
56 Vivès, supra note 5, ¶ 5, at 181.
57 Id. ¶ 6.
58 Id.
law. Thus, in this contractual logic, the form of the agreement constitutes the matter of civil law, the ethical requirement of observing this law reflects the natural law, and the freedom of passing such an agreement belongs to the sphere of the law of nations.

By way of these remarks, it is likewise fitting always to keep in mind the distinction between the intra-communitarian law of nations—comparable to a private and positive international law—and the inter-communitarian law of nations—comparable to a customary public law capable of establishing the meaning of the historical totality in a theological logic of salvation. Finally, one must emphasize that the natural law remains omnipresent in international relations since nations can only claim a limited and relative sovereignty with respect to moral persons.

For Suárez, as soon as one maintains that from the international perspective nations define themselves by their independence and their natural equality, the sole conceivable origin for a common law resides in the natural law. The distinction between the natural law and the law of nations does not lead to their separation; it leads to recognizing again the unavoidable character of the axiological priority of the first. Consequentially, the ethic that grounds the finality of the law of nations on the adequacy of the natural law ascribes ultimate value to it and guarantees the legitimacy of its integration into the universal teleological order. In return, the theological-political sphere confirms the existence of a link in the human world between the natural right, which the natural law determines in its immanent obligation, and the conventional agreements that human institutions establish. From another perspective, the law of nations reveals the complementarity between nature and convention for conceiving in a new way the extension of the ethico-political domain in history.

III. The foundational heritage of Vitoria

The source of such a historical-political construction of the law of nations is to be sought in the influence of Vitoria's theses. The analysis that he proposes of the law of nations first implies a reexamination of the definition of the jurist Gaius:59 “One calls the law of nations that which natural reason has established among all peoples.”60 Now, for the term “man” present in the definition of Gaius, Vitoria substitutes that of

“peoples,” carrying out in the same way a transition from the law of individuals or the law of private persons to the international law among different States or the law of public persons. This redefinition of the Roman concept of the law of nations lays out the theoretical conditions for the establishment of a regulating principle of the historical relations between nations. The redefinition assigns it a historical-political meaning, which sets the law apart by its identification—original to the whole of the juridical natural law—in order to open it to a cosmopolitical demand, the Communitas totius Orbis, understood as the universal community of peoples. And it integrates into this title both the relations of citizens to other nations as well as the duty of hospitality and the recognition of the fundamental human rights for individuals and for peoples.

Such a shift in Vitoria is connected to the process of deconstruction of the theocratic medieval order that it initiates by a separation of the spiritual ecclesiastical power and the temporal political power, not excluding their respective autonomy. The temporal power in its essence does not depend on pontifical delegation; in fact, it finds its basis in the natural law and the law of nations. The latter is defined by the scope of anthropology and history. On one side, this confirms the substitution of the medieval Orbis Christianus by the Communitas totius Orbis, and on the other side, reveals that the juridical meaning of the cosmopolitan is inseparable from its cultural and moral realization. The progressive organization of citizens, as a historico-political system, has precisely as its bond a society of the assembly of nations or universal community. The principles of such a structuring are found in the natural law and the law of nations. For these complement one another in their universal and internationalist finality with respect to the imperatives of civil society, distinctive and founded on the dignity of the human person as the image of God and endowed with inalienable rights such as political and religious liberty.

The foundation of the law of nations in the natural law does not exclude allowing Vitoria to remove its origin from assent and agreement. As a result, one part of its juridical precepts belongs to the realm of the positive law. It is possible in this sense to invoke without contradiction a natural law of nations and a law of nations issued by an institutional will. A double semantic acceptance, formally considered, follows: the law of nations represents one of the subdivisions of law and constitutes a norm of reference in the invocation of the opposition of the natural law to the positive law. Considered from the point of view of content, it expresses a restricted domain of the juridical order—that of international law—and, as such, it encompasses the precepts of both the natural law and consensual positive
law. The way is thus opened for a natural right theory of international law. The latter involves a joint existence of a law of nations founded on private consent and a law of nations founded on the common consent of peoples and nations. Both oblige morally in conscience since they guarantee, according to their respective modality, the preservation of the natural law. The historical-political force of the law of nations comes from human agreement and consensus. The human race, insofar as it constitutes a republic in its own way, affirms its power to give just laws to all. It exists in the community of peoples, as it confirms—within the history of societies—a legislative ordering function of States living together.

Vitoria likewise invokes, as an extension of this perspective, a law of natural sociability and of free communication among all citizens and nations of the world. This allows for the origin of a distinct internationalist doctrine whose foundation resides, insofar as it has been determined, in the natural law and the law of nations. The universal community of the assembly of men constitutes an organic whole; a self-sufficient community capable of promoting the existence and progress of its members. The world in its entirety, which has been created by God and placed at the disposition of the human race, is the original site of all men. The universality of this natural condition signifies that all men, insofar as they reside in the world, possess by the same fact of being a law over all parts of the earth. Such a law cannot be abrogated by historical-political partitions instituted by human positive law. Thus, the partition of lands whether on the private or national level cannot pretend to abolish this natural law at the foundation of the relation between each man and the totality of the world.

Spatiality is actually promoted as a constitutive element of the world. It is precisely in reference to it that one can take hold of the human value of the world. The structure of the latter is rooted in human existence; that which implicates the Communitas Orbis is the same historical expression of the ontological and ethical character of the human. It is this that makes possible such an unlimited opening to every manifestation of the human. Whether one refers to the natural law or the law of nations, the fact of coming together and being near represents constitutive characteristics of being in the world. They manifest a more unexpected aspect of the spatiality of human existence in providing it the possibility of moving about in a universal juridical space.

Thus, the idea of the sociability of the totality of men is articulated by a series of rights and duties that must be universally respected: the right to the freedom of travel by land and by sea; the right to free communication between nations; the right to free commerce between peoples; and the right of citizenship, of emigration, and of living in common. Likewise, the
elements of nature—such as the air, water, forests, flowers, and sea—are common to the whole of humanity according to the natural law and the law of nations. Historically, this communication, a significant expression of international solidarity, takes on, in equal ways, the form of commercial exchanges between nations, most notably according to the principle of the freedom of the high sea. This liberty springs directly from the common possession of the entirety of the earth’s surface. It responds in a practical way to the use that can be carried out by the right to what is given as the common possession of the human race. One such use for Vitoria is found in commerce, which brings about the reciprocal action between men made necessary by the spherical and limited space of the earth. This assumes that exchanges are established between them and they share in a peaceful reconciliation of nations. The international solidarity that is manifested by this is inseparable from a process of juridical generalization of exchanges, sharing in the historical construction of the international human society. The relations between States—with equal claim as the relations between individuals because they seek equilibrium in the conflict of interests—must be subjected to the regulating power of the law, without which the peace becomes precarious. After having contributed to the formation of each political community by access to self-sufficiency, communication contributes by extension to the genesis of a community of republics. For it synthesizes, by its actualization, the need for distributive justice and social justice in interstate relations.

Now the arrival of a higher political unity requires a harmony of wills which have their origin in the sovereign decision of each State. The thesis of the Communitas Orbis allows for precision on this point: neither papal power, nor the power of an emperor, whatever it may be, can pretend to possess the power to impose the unity of such a republic, for it exceeds the scope of their jurisdiction. The higher unity of such a Communitas must in fact rest on the recognition of a universal authority of the law of nations as the principle for the recognition of reciprocity and the factor of agreement.

In this sense, the principle of the equality of States appears as the extension of the equality of men and their right of self-determination. This presupposes the permanent reference to the common condition of men, implying a power proper to the whole group for appropriating the adequate means that permit the achievement of the objectives pursued by political association: namely the fulfillment of the highest possibilities of man,
It involves invoking the common nature of men to promote a foundation of the temporal order (the political power being the natural law and not divine positive law, as with ecclesiastical power) on which the law of nations can rest without contradiction. And if Vitoria invokes a higher unity, it is because it is centered on the principle of the common universal good as the guiding norm of a peaceful world order indicating that the common good of a people must be subjected to the common international good.

Two historical higher forms designed for the integration of the political community can be brought forth; human coexistence could present a unity that establishes the totality both at once and in succession. The first form for Vitoria corresponds to the federation of Christian republics resting on their respective autonomy. The second refers to the community of human nature resting on the universal and effective authority of the law of nations, conceived as a conventional historical manifestation of the commandments derived from the natural law and integrating religious diversity and necessary cultural plurality.

CONCLUSION

To conclude, I hope I have underscored the importance of the interpretation adopted by Suárez according to which—following the heritage of Vitoria—international positive law rests on a double support: the natural law for the ethical legitimacy of its principles, and the law of nations for the possibility of the historical actualization of these principles. In this sense, the law of nations is to international positive law what the natural law is to civil law. In this perspective developed by the second scholasticism it belongs logically to the law, insofar as it is appropriate, to contribute to the actualization of the juridical evolution of humanity in the international order. As a consequence, Suárez confirms—following his illustrious predecessor, Francisco de Vitoria—that it is for our contemporary world to serve as the pioneer of such a theorization.

Translated from French by Robert L. Fastiggi

62 FRANCISCO DE VITORIA, LEÇON SUR LE POUVOIR POLITIQUE [LESSON ON POLITICAL POWER] 73-74 (Maurice Barbier trans., 1980) (“For the entire world, which forms, in a certain manner, one political community, has the power to make good and just laws for all, such as those found in the law of nations.”).
LE DROIT DES GENS ET LE DEVENIR JURIDIQUE DE L’HUMANITÉ CHEZ SUÁREZ ET VITORIA

Jean-Paul Coujou

L'homme, pour Suárez, possède par sa nature raisonnable une destination politique qui n'est en mesure de s'accomplir qu'au cœur d'un ordre pacifique dans lequel l'ensemble des États, médiateurs de l'accomplissement d'une vie humaine, participent à une finalité commune qui les dépasse et dont, néanmoins, ils tireront profit. Par là même, la société internationale fait partie de la sphère du droit naturel en tant que condition de l'extériorisation des potentialités de la nature humaine; mais elle fait également apparaître au regard du devenir des sociétés humaines que le droit des gens appartient à la sphère du droit positif, puisqu'il ne devient effectif que par une volonté humaine s'efforçant de rendre adéquates les valeurs universelles du droit naturel aux variations historiques.

Ainsi, dans la constitution historique de toute communauté humaine, la coutume amène nécessairement à prendre en compte la séparation du droit humain en deux classes : le droit écrit et le droit non écrit63 ; la coutume comme le droit des gens est commune à l’ensemble des peuples ; ils constituent deux pièces maîtresses dans la détermination du devenir juridique de la communauté humaine. Un point vient confirmer pour Suárez le lien historico-politique entre la coutume et le droit des gens : les préceptes du droit des gens doivent être différenciés des préceptes du droit civil parce qu’ils ne sont pas constitués par des lois écrites, mais par des coutumes, non spécifiques à tel ou tel pays, mais à la totalité ou à la quasi-totalité des nations.

Par conséquent, l'examen critique du droit des gens fait apparaître trois difficultés : 1°) celle de son origine qui confronte au problème de l'articulation entre la nature et de la convention, entre l'universalité du droit naturel et la particularité historique du droit positif, 2°) celle de son fondement qui requiert d'établir sa liaison et sa différenciation d'avec le droit naturel, et 3°) celle de sa finalité ouvrant à la constitution d'un devenir éthico-juridique de l'humanité qui en respecte la diversité.

1. Historicité de la coutume et du droit des gens

Suárez insiste dans le *De legibus* sur le fait que la coutume et la loi civile n’en sont pas moins confrontées à leurs limites, dès lors qu’il s’agit de répondre au problème des relations interétatiques, puisqu’il n’est pas possible de faire l’économie de la référence du type de relations auquel l’ensemble des nations doit se conformer afin de permettre leur coexistence et d’en assurer la continuité. Il apparaît que les attributions réduites de la coutume et de la loi ne peuvent pas leur permettre d’assurer l’unité historique du genre humain 

Ainsi le pouvoir des lois civiles n’a jamais été historiquement « unique et identique pour la totalité universelle des hommes ». La communauté humaine est à comprendre dans sa fondation et son institution à partir du principe de sa séparation en de multiples États, l’accord de l’humanité sur l’attribution à un chef unique d’un pouvoir universel s’avérer pour Suárez, illusoire ; quand bien même un tel pouvoir serait possible, il ne pourrait manquer d’être illégitime et source d’une tyrannie sans limites. « Il n’est pas nécessaire pour la conservation ou le bien être naturel que tous les hommes se rassemblent dans une communauté politique unique ». Le constat de cette division historico-politique en de multiples communautés justifie l’instauration d’un droit commun, le droit des gens, par lequel l’entraide et la préservation de la paix et de la justice deviennent effectifs par la médiation d’un consentement commun portant sur la reconnaissance de droits communs (Traités de paix, trêves, immunité des ambassadeurs, droit de fortification, captivité … ainsi que le mentionnaient le *Digeste* et les *Étymologies* d’Isidore de Séville). Un tel droit « a été institué par coutume et la tradition, plus que par disposition légale 

Par là est confirmée la division opérée par Suárez de la coutume morale en coutume universelle à dimension publique et en coutume particulière privée. La première catégorie comprend « les coutumes de la totalité de l’univers qui constituent le droit des gens ». La position aristotélicienne concernant la compréhension de l’État comme communauté autarcique pour justifiée qu’elle soit ne peut plus apparaître pour Suárez pertinente pour rendre raison de son devenir dans l’histoire. L’État

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64 *Des lois*, II, 19, n. 9, p. 627.
65 *De legibus*, O. O., volume 5, III, 2, n. 6.
66 *De legibus*, O. O., volume 5, III, 2, n. 5.
67 *De legibus*, O. O., volume 5, III, 2, n. 6.
68 *De legibus*, O. O., volume 6, VII, 3, n. 7.
69 *De legibus*, O. O., volume 6, VII, 3, n. 7.
70 *Des lois*, II, 19, n. 9, p. 627.
constitue une totalité englobée dans la totalité du genre humain puisqu’il n’est jamais qu’une expression partielle de cette communauté universelle. L’histoire des relations internationales révèle que l’État ne saurait être une entité ayant « une autonomie absolue »\(^{71}\), donc métaphysiquement existant en soi et par soi ; c’est dans une logique interétatique léguée par Vitoria qu’il convient de le penser, celle d’une « association et échange commun »\(^{72}\), d’une aide mutuelle, sans lesquels un plus grand bien-être et des progrès ne seraient pas concevables dans l’ordre du devenir humain. Les nations ne peuvent par conséquent faire l’économie de principes juridiques pour structurer rationnellement la nécessité d’échanges et d’associations mutuelles, confirmant en cela à la fois un principe politique propre à l’État : durer, et un principe métaphysique propre à l’exposition de la catégorie temporelle : durer signifie pour toute chose créée persévérer dans son existence qu’il s’agisse d’un individu, d’une communauté ou d’un État.

Cela suppose, pour qu’un tel événement soit effectif, un établissement par la raison naturelle, mais également la médiation de la coutume. Historiquement, une analogie peut être établie : de même que la coutume s’avère source de droit, dans la communauté du genre humain, l’introduction du droit des gens s’est effectuée grâce à des coutumes. Ces dernières contribuent socialement à créer un accord avec la nature humaine de telle sorte que les principes du droit des gens soient aisément acceptables par tous. Le droit des gens présente également la forme d’un ensemble de préceptes et de manières de vivre qui, sans prétendre être étendus à la totalité du genre humain, n’a pas pour finalité immédiate un accord interétatique\(^{73}\). Son établissement correspond à une juridiction interne à l’État conformément aux procédures constitutionnelles. Ainsi, on peut considérer que le fait de rendre un culte à Dieu est de l’ordre du droit naturel ; néanmoins, la détermination de sa modalité spécifique appartient à la sphère du droit divin positif, et selon l’ordre social, elle renvoie au droit civil ou privé.

Par conséquent, on en conclut pour Suárez que les coutumes universelles constitutives du droit des gens expriment un droit véritable et obliquent à la manière d’une loi authentique\(^{74}\). Un tel droit non écrit résulte d’une création de l’ensemble du genre humain. Le droit des gens tire sa force de son identification à une coutume, puissance humaine d’interaction dans le temps, sans que l’origine de cette même force ait pour fondement le seul droit naturel. L’histoire des sociétés, en fin de compte, ne fait que confirmer

\(^{71}\) Des lois, II, 19, n. 9, p. 627.
\(^{72}\) Des lois, II, 19, n. 9, p. 627.
\(^{73}\) Des lois, II, 19, n. 10, p. 628-629.
\(^{74}\) De legibus, O. O., volume 6, VII, 3, n. 7.
que le droit des gens commun possède par là même une dimension naturelle, et il fait office de proto-loi sans être assimilable à une pure défaillance de la loi.

Conformément à ces remarques préliminaires, il appartient précisément au *ius gentium* (identifiable dans le droit romain au droit positif, en vigueur pour l’ensemble des hommes et élaboré par la raison humaine) de créer les conditions de l’unification historique du genre humain, malgré l’exigence rationnelle des calculs d’intérêts et l’impératif d’efficacité propres aux moyens mis en œuvre par toute politique que manifestent, à l’époque de Suárez, les guerres de conquête en Amérique et les guerres de conquête dans le nord de l’Europe. Car la division du genre humain en différents peuples et royaumes n’exclut pas l’existence persistante d’une « *unité spécifique du genre humain* » et d’une « *unité politique et morale* »75.

Pour en comprendre l’enjeu, il s’avère d’emblée judicieux, malgré la reconnaissance d’une affinité entre le droit naturel et le droit des gens (à savoir qu’ils représentent tous deux un droit spécifique humain76), d’exposer le fondement de leur différence afin d’éviter toute confusion entre ce qui est donné selon une nécessité intrinsèque et naturelle et ce qui, comme produit de l’histoire et de l’usage commun des peuples, ne peut prétendre à la nécessité d’une telle universalité. La levée de cette confusion est précisément destinée à retravailler la relation entre nature humaine et histoire. Le droit des gens est à rapprocher pour Suárez d’« *une passerelle entre le droit naturel et le droit humain bien qu’il soit plus proche du premier* »77. En fait, contrairement au droit naturel, il ne prescrit rien de nécessaire par soi à la moralité de la pratique et n’interdit rien qui serait par soi intrinsèquement mauvais78. Ainsi, comme le faisait remarquer Fray Luis de Léon79, la liberté est de droit naturel, pourtant ce principe a été bouleversé avec l’introduction de l’esclavage par la coutume et le droit des gens. Ce qui est prescrit par le droit naturel ne peut être changé par les lois et les décrets des hommes. Le

75 *Des lois*, II, 19, n. 9, p. 627.
76 *Des lois*, II, 17, n. 9, p. 605-607.
77 *Des lois*, II, 17, n. 1, p. 596.
78 *Des lois*, II, 17, n. 9, p. 606.
droit naturel fondé sur les deux attributs de la nature humaine, la liberté et la raison, malgré sa dimension transhistorique, demeure soumis dans son accomplissement effectif, à l’arbitraire des volontés humaines et des rapports de forces historiques ; les institutions révèlent également que la loi humaine accorde des dispenses par rapport aux préceptes du droit naturel. Comme le rappelle Suárez, il existait selon le droit naturel une communauté des choses, pourtant les hommes ont instauré la propriété privée qui deviendra dans l’État une manifestation différente du droit naturel. Enfin, la liberté constitutive de l’être de l’homme selon le droit naturel peut apparaître dans bien des États diminuée, voire abolie par les lois humaines.

La confusion entre le droit naturel et le droit des gens est d’autant plus aisée à commettre pour Suárez que des points de convergence peuvent être légitimement déterminés entre eux. Ainsi, ils sont tous deux selon leurs modalités respectives, communs à l’ensemble des hommes. Leurs implications pratiques et leurs préceptes concernent uniquement la sphère humaine. Enfin, ils contiennent l’un et l’autre « des interdictions et des concessions ou permissions ».

Ces accords ne sauraient néanmoins dissimuler les différences morales qui fondent la clarté de leurs distinctions. 1°) Les préceptes affirmatifs propres au droit des gens ne fondent pas leur caractère obligatoire sur le fait qu’ils prescriraient ou interdiraient à la manière du droit naturel ce qui est bon ou mauvais en soi. Ces préceptes ne tirent pas de leurs objets l’origine de leur caractère obligatoire, ce qui sous-entend une inversion : car, contrairement au droit naturel, le droit des gens n’interdit pas une pratique immorale parce qu’elle est mauvaise, mais l’interdiction fait précisément qu’une telle pratique devient mauvaise. Il ne signifie pas seulement ce qui constitue un mal, mais il est constitutif de ce qui peut être qualifié de mal ; son interdiction a le pouvoir de rendre mauvais ce à quoi elle se rapporte. De tels préceptes sont extrinsèques et tributaires de la volonté et des conventions humaines. Selon cette orientation, est de droit naturel ce que la loi naturelle prescrit, ce qui équivaut à poser que pour la raison naturelle, cette prescription apparaît comme nécessaire à la rectitude morale. La loi naturelle représente par là même la norme ontologique inconditionnelle de la légitimité de l’action.

80 Suárez, Des lois, II, 14, n. 2, p. 532.
81 Des lois, II, 17, n. 6, p. 602-603.
82 Des lois, II, 19, n. 1, p. 618.
83 Les principes du droit naturel, ainsi que le rappelle Suárez, sont récapitulés de la sorte dans les Institutes de Justinien : vivre honnêtement, ne pas léser autrui, rendre à chacun le sien (Honeste vivere, alterum non laedere, suum civique reddere).
2°) Du fait même de son historicité, le droit des gens ne peut prétendre à une immutabilité comparable à celle du droit naturel. L’essence de ce dernier réside dans l’immutabilité de ses préceptes. Et une telle immutabilité se règle sur l’immutabilité de la nature humaine. D’une part, le droit naturel dans la totalité de ses préceptes, définit l’espace légitime de la pratique humaine pour qu’il ne soit pas en contradiction avec la caractéristique naturelle de l’homme. D’autre part, l’immutabilité de la nature humaine à laquelle il se réfère, représente une donnée universelle que l’humanité n’a pas le pouvoir de modifier. Il en résulte que les rapports socio-historiques devront actualiser cette immutabilité première, condition du déploiement de toute axiologie. La voix de la conscience en chacun de nous exprime précisément l’immanence référentielle de cette immutabilité corollaire d’une nécessité étrangère au droit des gens. À l’inverse, l’État a le pouvoir de modifier le droit des gens sur son propre territoire, précisément parce que les préceptes de ce dernier lorsqu’ils s’appliquent dans un État correspondent à « un simple droit civil ».

Ce rapprochement permet d’affiner la différence d’avec le droit naturel, car lorsque le droit des gens est en vigueur dans un État, il ne fait que rappeler sa dépendance par rapport à l’autorité et aux coutumes d’un peuple considéré abstraction faite des autres nations. Un tel droit peut être modifié intra-étatiquement sans rechercher un accord avec d’autres nations. Néanmoins, si ce droit est envisagé du point de vue interétatique, en tant qu’il est commun à la quasi totalité des nations et que son avènement suppose l’autorité de l’ensemble des peuples, la prétention à l’abroger indépendamment du consentement général, s’avère illusoire. Des exceptions légitimes à ce principe sont cependant constatables. Ainsi que le remarque Suárez, le droit des gens sur l’esclavage des prisonniers à l’issue d’une guerre juste a été aboli par l’Église et la chrétienté, « cette règle n’étant pas observée en vertu d’une ancienne coutume ecclésiastique ». Il devient alors également possible de marquer un autre ordre de différence concernant la question de la mutabilité : celui existant entre le droit des gens et le droit civil. Alors que les préceptes du droit civil peuvent faire l’objet d’une abrogation ou d’une modification intégrale, les règles du droit des gens ne feront l’objet que d’une dérogation partielle. L’examen de la question de la mutabilité permet de resituer en se démarquant de la tradition le droit des gens comme forme intermédiaire entre le droit naturel et le droit civil.

86 *Des lois*, II, 20, n. 8, p. 637.
s’accorde du point de vue de l’universalité avec le premier mais de manière limitative, puisqu’il est dérivé de principes naturels, sans l’être selon une nécessité absolue. Cette restriction confirme son accord avec le droit humain.

3°) Il convient enfin de dégager une différence, malgré leur apparente convergence (ils renvoient à des préceptes, des interdictions et des concessions), concernant la nature de l’universalité propre au droit des gens et au droit de nature. L’universalité de ce dernier se caractérise par son universalité et son absolutité. En effet, le droit naturel rejoint l’ontologie dans sa dimension de science universelle en comprenant l’humain selon une règle d’universalité. Il est au principe de la constitution d’une représentation universelle et abstraite de l’humain afin de fonder une équivalence de dignité entre les individus ; s’il cesse d’être observé, cela ne peut résulter que d’une perversion du rapport à la nature humaine. Quant au droit des gens, son universalité est telle qu’il appartient de remarquer qu’il n’est observé que par la quasi-totalité de nations, ce qui revient à reconnaître par là même qu’on n’assigne pas à ce droit une nécessité absolument intrinsèque et naturelle. “Il s’avère suffisant – selon l’héritage d’Isidore de Séville – que presque toutes les nations convenablement organisées en fassent usage”.

La cessation de son observation dans un espace ou un temps donné ne contredit pas pour autant les principes de la nature humaine. Cela s’explique précisément parce que le droit des gens est « tout simplement humain et positif » et qu’il a donc été « institué non par la nature mais par les hommes », le terme d’institution signifiant dans ce cas précis que ce sont les us et coutumes et non les écrits qui sont à l’origine de son introduction.

Non seulement on ne peut déduire de l’enracinement du droit des gens dans la coutume qu’il serait réductible à une pure production artificielle, mais il apparaît qu’il n’a précisément de sens que parce qu’il a pour assise ontologique et anthropologique l’existence d’une communauté naturelle entre les hommes. Une telle communauté exclut l’isolement du fait de la

88 Suárez, Des lois, II, 19, n. 6, p. 624 : « (...) c’est un droit commun à toutes les nations et établi non pas par l’impulsion de la seule nature, mais par l’usage des nations ».
89 Des lois, II, 19, n. 6, p. 625.
91 Des lois, II, 19, n. 6, p. 624.
92 Des lois, II, 19, n. 6, p. 624 : « (...) Les préceptes du droit des gens se différencient des préceptes du droit civil parce qu’ils ne sont pas formulés par des lois écrites mais par des coutumes, non de tel ou tel État ou province, mais de l’ensemble ou de la quasi-totalité des nations. En effet, le droit humain est de deux sortes, c’est-à-dire écrit et non écrit ».
possession commune de l’ensemble de la surface terrestre ; l’humanité n’a
d’effectivité et de sens que dans l’universalité dont une des manifestations
concrètes est celle de la communication et du commerce mutuels⁹³, l’action
réciproque entre les hommes étant rendue nécessaire par la forme sphérique
de la terre ; cela implique que des échanges s’instaurent entre eux d’un bout
to l’autre du monde. La notion de commerce englobe pour Suárez le fait
général de la circulation et de l’échange sur une surface commune.

L’ensemble de ces analyses confirme dans la perspective suarézienne
la légitimité et la nécessité de la division de la loi en loi naturelle et en loi
positive et humaine⁹⁴. Conformément à la tradition juridique invoquée par
Suárez, le droit des gens est effectivement défini dans le Digeste par Gaius⁹⁵
comme un ensemble de règles auquel se conforment tous les peuples et établi
par la raison naturelle des choses, c’est-à-dire leur ordre naturel. C’est un
droit essentiellement humain contrairement au droit naturel qui est commun
aux hommes et aux animaux. Isidore de Séville avait précisément repris la
division tripartite héritée du droit romain (ius naturale, ius gentium, ius
civile) notamment d’Ulpien, pour assimiler le « ius gentium » aux institutions
en usage dans la quasi-totalité des nations, abstraction faite de leur
conformité ou non-conformité au droit naturel⁹⁶. Ce n’est qu’après une
longue gestation théologique, juridique et philosophique menée notamment
par saint Bonaventure et Alexandre de Halès⁹⁷, que le « ius gentium » sera
considéré comme un droit naturel proprement humain.

2. Le droit des gens, « passerelle » entre le droit naturel et le droit civil

Historiquement, pour Suárez, le premier qui assigna une valeur
spécifique au « ius gentium » fut Thomas d’Aquín⁹⁸. Selon ce dernier qui
expose une théorie du droit des gens comme droit consuétudinaire s’appuie
sur l’héritage des distinctions aristotéliciennes concernant un droit naturel
primaire et secondaire. Le premier renvoie au juste absolu possédant une
valeur universelle, c’est-à-dire à la vertu morale de justice assimilée à une

⁹³ Des lois, II, 19, n. 9, p. 627.
⁹⁵ Digeste, I, 1, loi 9 : « Ce que la raison naturelle établit chez tous les hommes, ce
que toutes les nations observent, on l’appelle le droit des gens ».
⁹⁷ Voir J.- M. Aubert, Le droit romain dans l’œuvre de Thomas d’Aquín, Paris, Vrin,
⁹⁸ Thomas d’Aquín, Somme théologique, édition coordonnée par A. Raulin,
traduction A. M. Roguet, 4 volumes, Paris, Cerf, 1984-1986, II-II, Q. 57, a. 3.
disposition à préserver ou à restaurer l’égalité dans les rapports avec autrui, une telle égalité étant mathématiquement déterminée comme une moyenne, géométrique ou proportionnelle en ce qui concerne la justice distributive, arithmétique dans le cas de la justice commutative. Le deuxième se rapporte au juste politique en partie naturel et en partie légal. Il y a ainsi reconnaissance d’une immanence de la nature au juste politique conduisant à la nécessité de la détermination du contenu propre à la distinction entre le naturel et le légal.

L’articulation non-contradictoire entre le droit naturel et le droit des gens tirerait sa condition de possibilité de la thèse aristotélicienne selon laquelle il n’y a pas d’obstacle à poser le droit naturel comme variable sans que cette mutabilité le dessaisisse de sa spécificité de droit naturel tout en rendant intelligible le fait qu’un droit naturel ne soit pas toujours et identiquement le même. L’authentique droit naturel correspond à celui qui s’ajuste à une nature humaine essentiellement muable, ce qui revient à déduire que la mutabilité des lois n’est pas assimilable à un signe de leur artificialité mais que l’universalité abstraite exigeant quels que soient les lieux l’identité des lois, s’avère en définitive contre-nature. 

Dans la droite ligne de cet héritage, Suárez maintient la division entre loi naturelle et positive. On remarquera à ce titre que les lois du droit des gens ne sont pas purement naturelles et selon la division invoquée, elles ne peuvent être que positives et humaines. Contrairement à la loi naturelle issue d’une évidence naturelle, le droit des gens découle de « conclusions probables » et de « l’appréciation commune des hommes »99 ; le fait qu’il s’enracine dans la coutume en confirme la mutabilité100, et c’est précisément en cela qu’il se différencie du droit naturel. Car ainsi que le manifeste le devenir historique, il n’y avait aucune nécessité pour la préservation et le progrès du genre humain que l’humanité composât une communauté politique unique101. L’empire romain lui-même n’a jamais exercé une

100 Des lois, II, 20, n. 6, p. 635-636 : « Le droit des gens est changeant parce qu’il dépend du consentement des hommes ». Et II, 19, n. 8, p. 626-627 : « (…) une chose peut être qualifiée de droit des gens en deux sens : premièrement parce qu’elle constitue un droit que tous les peuples et les différentes nations doivent observer dans leurs relations mutuelles. Deuxièmement, parce que c’est un droit que chacun des États ou royaumes, observe à l’intérieur de leur territoire, mais qui est appelé droit des gens du fait de sa ressemblance et de sa concordance <avec les autres lois> ».
101 De legibus, O. O., volume 5, III, 2, n. 5.
souveraineté totale sur les peuples sur lesquels il avait un pouvoir\textsuperscript{102}. Le droit des gens confirme historiquement en ce sens qu’il n’y a pas eu de corps politique souverain dans l’humanité. Le constat d’une telle absence n’exclut pas la constitution d’une universalité relative (distincte de l’universalité absolue du droit naturel) correspondant à une unité communautaire en devenir à la recherche de l’instauration d’obligations réciproques.

Il apparaît néanmoins que 1°) les principes du droit des gens malgré leur universalité spécifique ne recouvrent pas une telle nécessité intrinsèque. 2°) Le droit des gens ne possède pas de valeur intrinsèquement morale et il ne lui est pas possible de prendre pour référence des conclusions nécessairement inférées de principes moraux. Les préceptes qu’impliquent ces derniers sont constitutifs du droit naturel\textsuperscript{103}. En effet : « tout ce que l’on déduit des principes naturels par des raisonnements évidents, est également écrit dans le cœur humain »\textsuperscript{104}. L’universalité dont relève le droit naturel est immanente à la nature humaine tout en induisant la référence à une origine transcendantale. Elle s’avère donc absolue. Par différence, le trait dominant de l’origine du droit des gens réside dans le fait que les hommes ont historiquement institué ses préceptes dans la quasi-totalité de la communauté humaine. Cette universalité, lorsqu’on prend en considération le devenir socio-historique des peuples, est relative car elle ne repose pas sur une lecture de la nature humaine, mais sur la libre volonté et le consentement des hommes. Ces deux derniers éléments propres à sa dimension conventionnelle sont susceptibles de valoir pour l’ensemble de l’humanité, sans avoir pour autant une justification et un fondement identiques. Si le contenu du précepte du droit naturel correspond à ce qui est bon ou mauvais en soi, celui du droit des gens concerne ce qui est évalué comme tel en fonction d’un consentement commun. On en conclut que 1°) l’universalité du droit naturel est absolue car ce dernier se définit par son unicité et son immutabilité ; elle transcende la réalité politico-historique comme donnée constitutive de l’humanité de l’homme. 2°) L’universalité du droit des gens est relative du fait a) du caractère artificiel de son existence et, b) de sa provenance du consensus du plus grand nombre à un moment historique donné.

\textsuperscript{102} De legibus, O. O., volume 5, III, 7, n. 4.
\textsuperscript{103} Des lois, II, 7, n. 7, p. 462 : « (…) tous ces préceptes sont issus selon une nécessité particulière de la nature et de Dieu en tant que créateur de la nature, et ils tendent vers une fin identique qui est incontestablement la conservation légitime et la perfection naturelle ou le bonheur de la nature humaine. En conséquence, l’ensemble d’entre eux appartient au droit naturel ». 
\textsuperscript{104} Des lois, II, 17, n. 8, p. 604-605.
La « quasi unité politique et morale » propres au droit est-elle constitutive d'une unité nécessairement relative du fait du devenir historique de l’humanité car elle reste en partie tributaire de la souveraineté de chaque État. Néanmoins, le droit des gens conforte historiquement le principe ontologique de la sociabilité humaine et celui anthropologique de l’interhumanité. Sa théorisation s’articule sur le concept d’*universitas* légué par le Moyen Âge, signe d’une ontologie de la totalité, du *totus orbis* comprenant l’humanité en tant que synthèse de l’ensemble des peuples constitués en États. Le passage de la multitude des peuples dans le devenir historique à une association organisée dans la limite du respect de la souveraineté des États reste possible et souhaitable. Par là est historiquement confortée l’effectivité d’un universel humain fondé sur la reconnaissance d’une nature commune entre tous les individus qui les constitue en tant qu’êtres humains. La compréhension suarézienne du droit des gens dégage dans la pratique historique les effets de cette compréhension de l’être de l’humain, à la croisée de l’héritage de l’anthropologie stoïcienne et de la pensée chrétienne, qui structure une communauté universelle du genre humain exprimant une entité spécifique : celle d’un être-en-commun. Elle vise à la promotion d’une représentation de l’humanité qui ne devient légitime qu’à être théorisée dans l’universel. Cela induit l’aboutissement du processus de substitution de l’*universitas* au *cosmos* de l’Antiquité pour avancer à partir de la référence à l’ordre divin, une dimension du politique propre à la totalité et une conception globalisante de l’humanité. Avec le droit des gens émerge le fait que l’humanité n’est plus une partie de la totalité, elle est désormais en voie d’être identifiable à une totalité en devenir qui est à elle-même sa propre loi.

Le droit des gens confirme d’une part la dimension relative de la légitimité du pouvoir de l’État, et d’autre part, il dégage ce dernier d’un isolement historique en l’introduisant dans une communauté de droit reposant sur l’unité du genre humain. Sa fonction est précisément intelligible à partir d’un ordre politique international et se différencie également sur ce point du droit civil. La fonction du droit civil impliquant un acte propre de la volonté humaine, consiste à ce que « les hommes s’intègrent dans un corps politique selon un lien social afin de s’entraider en vue d’une fin politique »

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Néanmoins, cette « unité par soi » n’est pas historiquement

105 *Des lois*, II, 19, n. 9, p. 627.
107 Suárez, *De legibus, O. O.*, volume 5, III, 2, n. 4.
108 *De legibus, O. O.*, volume 5, III, 2, n. 4.
accomplie, elle requiert la médiation du droit des gens. Le cadre théorique est ainsi tracé pour rappeler que la nature humaine s’est historiquement incarnée dans une multiplicité d’États et que son intelligibilité est indissociable de son incarnation dans le devenir historique. En conformité avec les précédentes déductions anthropo-théologiques, il devient alors nécessaire d’invoquer un droit qui, par le caractère de son universalité relative, se distingue de l’ensemble des autres droits. Il est ainsi l’expression de la liberté et de la raison dans l’histoire et non le produit d’une déduction logique à partir de la nature humaine, il n’en reste pas moins historiquement profitable à l’affirmation de cette même nature.

Ce rapport à l’histoire permet d’affiner la différence entre le droit naturel et le droit des gens. L’objet du premier n’est pas assimilable à l’humanité comprise historiquement comme une unité divisée en États mais bien à l’humanité ontologiquement saisie comme une unité composée par l’ensemble des hommes ; tout homme considéré individuellement n’en reste pas moins par lui-même manifestation de son droit naturel. Si l’on se réfère à l’objet du droit des gens, il est assimilable aux nations en tant que membres de l’humanité, sa fonction étant de réguler dans le devenir historique les relations interétatiques ; il s’affirme par là même dans sa dimension publique en recherchant à garantir la paix et la justice dans l’espace intercommunautaire.

Historiquement, il apparaît que les préceptes du droit des gens revêtent un caractère plus général que ceux du droit civil, précisément parce que « l’intérêt de l’ensemble de l’humanité et de la conformité aux principes premiers et universels de la nature » sont pris en compte. Néanmoins, la nécessité d’une telle conformité ne saurait passer sous silence la mutabilité du droit des gens puisqu’ « il dépend du consentement des hommes »111. Ses interdictions et ses préceptes positifs en sont par là même affectées dès lors qu’il a été posé que ses règles ne peuvent être dérivées des principes naturels « au moyen de déductions nécessaires et évidentes »112, et que le fondement de son obligation ne découle pas de la pure raison mais implique la référence à une obligation humaine reposant sur la coutume.

Or si l’humanité rencontre en elle-même la particularité avec le droit des gens, comment accède-t-elle à l’universalité ? Comment soumet-elle sa

109 De legibus, O. O., volume 5, III, 2, n. 6: « La totalité des hommes n’est pas parvenue à s’intégrer dans un corps politique unique, mais elle s’est plutôt divisée en plusieurs États ».
111 Des lois, II, 20, n. 6, p. 635.
112 Des lois, II, 20, n. 6, p. 635.
décision à la vérité du droit naturel ? Une antinomie semble apparaître entre la diversité des manières d’être et l’unité de la destination humaine, entre la contingence du donné et l’immutabilité des premiers principes universels de la nature. La compréhension du droit des gens comme intermédiaire entre le droit naturel et le droit civil doit permettre d’y répondre. La distinction dans le devenir historique entre le droit des gens induisant un accord entre diverses nations et un droit des gens universel « en vertu des us et coutumes internationaux dans la mesure où les peuples dans leurs relations mutuelles maintiennent une forme d’association et d’échanges »113 ouvrirait la voie au dépassement de l’antinomie évoquée notamment à partir de la référence à une unité politique et morale du genre humain114. Le premier droit reste tributaire de la particularité et des coutumes de chaque peuple considéré de manière autonome ; ainsi un État est en mesure de décréter la non-tolérance de la prostitution sur son territoire115. Quant au second, commun à l’ensemble des nations, il fonde la possibilité d’un universel au cœur même de la reconnaissance de la particularité dans le premier droit, confirmée par l’impossibilité de son abrogation totale puisqu’il a pour origine « l’autorité de l’ensemble des nations »116, ainsi l’immunité des ambassadeurs, le respect des traités de paix et des trêves.

Non seulement l’histoire confirme pour Suárez que la conservation ou le bien-être de l’humanité n’ont jamais requis l’intégration des hommes dans une communauté politique unique117, mais le pouvoir d’instaurer des lois humaines « ne fut jamais unique et identique pour la totalité de l’humanité »118. L’histoire, à partir du fractionnement de l’humanité en de multiples communautés, se présente comme une succession d’événements et une série d’existences. Est-il alors de saisir la totalité de l’histoire en adoptant un point de vue synthétique sur la multiplicité de ces communautés ? A quel type d’intelligibilité peut faire accéder une telle compréhension de l’histoire ? La problématique du droit des gens esquisse le cadre d’une philosophie de l’histoire en montrant tout d’abord qu’il n’y a pas incompatibilité entre sa nature et le constat de l’histoire des sociétés qui vient d’être effectué (absence d’un corps politique unique, d’un souverain unique et diversification temporelle et spatiale de la structure étatique). Cette philosophie de l’histoire suppose que l’histoire humaine soit irréductible à

114 Des lois, II, 19, n. 9, p.627.  
116 Des lois, II, 20, n. 8, p. 637.  
117 De legibus, O. O., volume 5, III, 2, n. 5.  
118 De legibus, O. O., volume 5, III, 2, n. 6.
une pure juxtaposition d’une multiplicité d’États, d’intérêts et d’institutions divergentes ; elle doit conduire à la détermination d’une totalité en mouvement vers un mieux vivre en commun susceptible d’assigner un sens à l’ensemble. Cette signification est à rechercher dans la fonction et la finalité du droit des gens : créer les conditions d’une aide mutuelle entre les nations en vue de la conservation de la paix et de la justice et cela au moyen d’un consentement commun et de lois communes119 non réductibles à la sphère du droit naturel ou du droit positif. Ainsi, dans cette logique contractuelle, la forme de l’accord constitue la matière du droit civil, l’exigence éthique d’observation de cet accord renvoie au droit naturel et la liberté de passer un tel accord appartient à la sphère du droit des gens.

En fonction de ces remarques, il convient également de toujours garder à l’esprit la distinction entre le droit des gens intracommunautaire assimilable à un droit international privé et positif et le droit des gens intercommunautaire assimilable à un droit coutumier public susceptible de fonder la signification de la totalité historique dans une logique théologique du salut. Il faut enfin souligner que le droit naturel demeure omniprésent dans les relations internationales puisque les nations ne peuvent prétendre en tant que personnes morales qu’à une souveraineté limitée et relative.

À partir du moment où pour Suárez on pose que selon la perspective interétatique les nations se définissent par leur indépendance et leur égalité naturelle, la seule origine conceivable à une loi commune résidera dans la loi naturelle. La distinction entre le droit naturel et le droit des gens n’induit pas leur séparation, elle amène à reconnaître une nouvelle fois le caractère incontournable de la priorité axiologique du premier. Par voie de conséquence, l’éthique qui fonde la finalité du droit des gens sur l’adéquation au droit naturel lui attribue sa valeur ultime et en garantit la légitimité en l’intégrant dans l’ordre téléologique universel. En retour, la sphère théologico-politique confirme l’existence d’un lien dans le monde humain entre le droit naturel que la loi naturelle détermine en son obligation immanente et les accords conventionnels que les institutions humaines établissent. Le droit des gens révèle, à la lumière d’une autre perspective, la complémentarité entre nature et convention pour penser à nouveaux frais l’extension du domaine éthico-politique dans l’histoire.

119 De legibus, O. O., volume 5, III, 2, n. 6.
3. L’héritage fondateur de Vitoria

La source d’une telle construction historico-politique du droit des gens est à rechercher dans l’influence des thèses de Vitoria. L’analyse qu’il propose du droit des gens implique au préalable un réexamen de la définition du jurisconsulte Gaius 120 : « On appelle droit des gens ce que la raison naturelle a établi entre tous les peuples » 121. Or Vitoria substitue au terme « homme » présent dans la définition de Gaius, celui de « peuples », opérant par là même une transition du droit des individus ou droit des gens privé au droit international entre les différents États ou droit des gens public. Cette redéfinition du concept romain du droit des gens met en place les conditions théoriques de l’instauration d’un principe régulateur des relations historiques entre les nations ; elle lui assigne une signification historico-politique qui se démarque de son identification originelle à l’ensemble de la loi naturelle juridique, pour l’ouvrir à une exigence cosmopolitique, la Communitas totius Orbis, comprise comme communauté universelle des peuples. Et elle intègre à ce titre aussi bien les relations des citoyens aux autres nations que le devoir d’hospitalité et la reconnaissance des droits humains fondamentaux pour les individus et pour les peuples.

Un tel déplacement s’articule chez Vitoria au processus de déconstruction de l’ordre théocratique médiéval qu’il initie par l’instauration d’une séparation entre le pouvoir spirituel ecclésiastique et le pouvoir temporel politique qui n’exclut pas leur autonomie respective. Le pouvoir temporel dans son essence ne dépend pas de la délégation pontificale, il trouve en fait son assise dans le droit naturel et dans le droit des gens. Ce dernier, circonscrit dans le cadre de l’anthropologie et de l’histoire, confirme d’une part, la substitution de l’Orbis Christianus médiéval par la Communitas totius Orbis, et d’autre part, révèle que la signification juridique du cosmopolitisme est indissociable de sa réalisation culturelle et morale. L’organisation progressive des citoyens en tant que système historico-politique a précisément pour lien une société de l’ensemble des nations ou communauté universelle. Les principes d’une telle structuration sont à rechercher dans le droit naturel et le droit des gens. Car ces derniers se complètent en leur finalité : universelle et internationaliste eu égard aux impératifs des sociétés civiles, particulière et fondée sur la dignité de la personne humaine comme image de Dieu et détentrice de droits inaliénables comme la liberté politique ou religieuse.

121 Vitoria, Leçon sur les Indiens et sur le droit de guerre, Droz, Genève, 1966, traduction par M. Barbier, IIIe partie, n. 231, p. 82.
La fondation du droit des gens dans le droit naturel n’exclut pas d’admettre pour Vitoria d’en dégager la genèse à partir du consentement et du pacte ; il en résulte qu’une partie de ses préceptes juridiques appartiennent à la sphère du droit positif. Il est possible en ce sens d’invoquer sans contradiction un droit des gens naturel et un droit des gens issu d’une volonté institutionnelle. Une double acception sémantique en découle car considéré formellement, le droit des gens représente l’une des subdivisions du droit et constitue une norme de référence dans l’invocation de l’opposition du droit naturel au droit positif. Envisagé du point de vue du contenu, il exprime un domaine restreint de l’ordre juridique, celui du droit international et, en tant que tel, il englobe les préceptes soit de droit naturel, soit de droit positif consensuel. La voie est ainsi ouverte pour l’émergence d’une théorie jusnaturaliste du droit international. Cette dernière implique l’existence conjointe d’un droit des gens fondé sur le consentement privé et un droit des gens fondé sur le consentement commun des peuples et des nations. L’un et l’autre obligent moralement en conscience puisqu’ils assurent selon leur modalité respective la préservation du droit naturel. La force historico-politique du droit des gens provient du pacte et du consensus humain, et le genre humain en tant qu’il constitue à sa manière une république affirme son pouvoir de donner des lois justes à tous. Il existe dans la communauté des peuples comme le confirme l’histoire des sociétés une fonction législative régulatrice du vivre-ensemble des États.

Vitoria invoque également en tant que prolongement de cette perspective, un droit de sociabilité naturelle et de libre communication entre l’ensemble des citoyens et des nations du monde permettant la genèse d’une doctrine internationaliste spécifique dont le fondement réside ainsi qu’il a été déterminé dans le droit naturel et le droit des gens. La communauté universelle de l’ensemble des hommes constitue un tout organique, une communauté autosuffisante capable de faire exister et progresser ses membres. Le monde en son intégralité tel qu’il a été créé par Dieu et mis à la disposition du genre humain est le site originel de tous les hommes. L’universalité de cette condition naturelle signifie que tout homme en tant que résident du monde possède par le fait même d’être un droit sur l’ensemble des parties de la terre ; un tel droit ne peut être abrogé par les répartitions historico-politiques instituées par le droit humain positif. Ainsi, la répartition des terres tant au niveau privé que national ne peut prétendre abolir ce droit naturel au fondement de la relation entre chaque homme et la totalité du monde ; la spatialité est effectivement promue comme un élément co-constituant du monde. C’est précisément en référence à lui que l’on peut saisir la valeur humaine de ce monde. La structure de ce dernier est enracinée
dans l’existence humaine, ce qui implique que la Communitas Orbis est l’expression même historiquement du caractère ontologique et éthique de l’humain. Elle est ce qui rend possible en tant qu’ouverture indéfinie toute manifestation de l’humain. Que l’on se réfère au droit naturel ou au droit des gens, le fait de se rapprocher et de se situer représente des caractères constitutifs de l’être dans le monde ; ils manifestent un aspect plus inattendu de la spatialité de l’existence humaine en lui attribuant la possibilité de se mouvoir dans un espace juridique universel.

Ainsi, l’idée de sociabilité de la totalité des hommes s’articule à une série de droits et de devoirs devant être universellement respectés : le droit à la liberté de circulation par terre et par mer, le droit à la libre communication entre les nations, le libre commerce entre les peuples et le droit à la citoyenneté, à l’émigration et au vivre-en-commun. Également, les éléments de la nature comme l’air et l’eau, les forêts, les fleuves et la mer sont communs à l’ensemble des hommes selon le droit naturel et le droit des gens.

Historiquement, cette communication, expression significative de la solidarité internationale, revêt également la forme d’échanges commerciaux entre les nations, notamment selon le principe de la liberté de la haute mer. Cette liberté est directement issue de la possession commune de l’ensemble de la surface terrestre. Elle répond de manière pratique à l’usage pouvant être effectué du droit à ce qui est donné appartenant en commun au genre humain. Un tel usage consiste pour Vitoria dans le commerce, ce qui induit que l’action réciproque entre les hommes rendue nécessaire par l’espace sphérique et limité de la terre, suppose que des échanges s’instaurent entre eux et qu’ils participent à un rapprochement pacifique entre les nations. La solidarité internationale qui s’y manifeste est indissociable d’un processus de généralisation juridique des échanges participant à la construction historique de la société internationale humaine. Les relations entre les États, au même titre que les relations entre les individus, parce qu’elles recherchent l’équilibre dans le conflit des intérêts, doivent être soumises au pouvoir régulateur du droit sans lequel la paix devient précaire. Après avoir contribué à la formation de chaque communauté politique par l’accès à l’autosuffisance, la communication contribue par extension à la genèse d’une communauté des républiques. Car elle synthétise par son actualisation l’exigence de justice distributive et de justice sociale dans les rapports interétatiques.

Or l’avènement d’une unité politique supérieure requiert un accord des volontés qui a pour origine la décision souveraine de chaque État. La thèse de la Communitas Orbis permet d’apporter une précision sur ce point : ni le pouvoir papal, ni le pouvoir d’un empereur quel qu’il soit, ne peuvent prétendre détenir le pouvoir d’imposer l’unité d’une telle république car elle excède les cadres de leur juridiction. L’unité supérieure d’une telle Communitas doit en fait prendre appui sur la reconnaissance d’une autorité universelle du droit des gens comme principe de reconnaissance de l’altérité et facteur de concorde. En ce sens, le principe de l’égalité des États apparaît comme le prolongement de l’égalité des hommes et de leur droit d’autodétermination. Cela suppose la référence permanente à la condition commune des hommes impliquant un pouvoir propre à tout groupe de s’approprier les moyens adéquats permettant d’atteindre les objectifs poursuivis en s’associant politiquement, à savoir l’accomplissement des plus hautes possibilités en l’homme, précisément par la paix et la justice. Il s’agit en invoquant la nature commune des hommes de promouvoir un fondement d’ordre temporel (le pouvoir politique étant de droit naturel et non de droit divin positif, comme le pouvoir ecclésiastique) sur lequel puisse s’appuyer sans contradiction historique le droit des gens. Et si Vitoria invoque une telle unité supérieure, c’est parce qu’elle s’articule au principe du bien commun universel comme norme directrice d’un ordre pacifique mondial induisant que le bien commun d’un peuple doit être assujetti au bien commun international.

Deux formes supérieures historiquement concevables de l’intégration de la communauté politique peuvent être dégagées ; la coexistence humaine y présenterait une unité fondant la totalité à la fois dans l’instant et dans la succession. La première forme correspond pour Vitoria à la fédération des républiques chrétiennes s’appuyant sur leur autonomie respective ; la deuxième renvoie à la communauté du genre humain reposant sur l’autorité universelle et effective du droit des gens compris comme une manifestation historique conventionnelle des commandements dérivant du droit naturel et intégrant la diversité religieuse et la nécessaire pluralité culturelle.

Pour conclure, en fonction de l’héritage de Vitoria, on comprend ainsi la ligne d’interprétation adoptée par Suárez selon laquelle le droit international positif repose sur un double socle : le droit naturel pour la

123 Vitoria, Leçon sur le pouvoir politique, Paris, Vrin, 1980, traduction M. Barbier, § 21, pp. 73-74 : « Car le monde entier, qui forme, d’une certaine manière, une seule communauté politique, a le pouvoir de faire des lois justes et bonnes pour tous, comme celles qui se trouvent dans le droit des gens ». 
légitimité éthique de ses principes et le droit des gens pour la possibilité de leur actualisation historique. En ce sens, le droit des gens est au droit international positif ce que le droit naturel est au droit civil. Dans cette perspective élaborée par la seconde scolastique, il appartient logiquement à la loi afin d’y être en adéquation, de contribuer dans l’ordre intra-étatique à l’effectivité du devenir juridique de l’humanité. Vitoria et Suárez confirment par conséquent qu’ils sont pour notre monde contemporain les pionniers d’une telle théorisation.

Abstract/Résumé:
La problématique du droit des gens chez Vitoria et Suárez en tant que pièce maitresse de la constitution du devenir juridique de l’humanité, fait apparaître trois difficultés centrales: 1°) celle concernant la liaison entre l'universalité du droit naturel et la particularité historique du droit positif, 2°) celle de la justification du lien et de la différence entre le droit des gens et le droit naturel, 3°) celle de la nécessaire mise en place d'un devenir éthico-juridique de l'humanité qui en respecte les multiples incarnations historiques et culturelles.

Vitoria et Suárez, par leur volonté commune de répondre à ces interrogations, ouvrent la voie pour la modernité à la fondation juridique et éthique des droit humains d'un point de vue cosmopolitique.
"DEFAMATION OF RELIGION": A CRITIQUE OF THE UNITED NATIONS AND ARAB CO-AUTHORSHIP OF THE BALANCE BETWEEN EXPRESSION AND RELIGIOUS RIGHTS

Georgia Alida du Plessis *

ABSTRACT

The past decade has seen numerous resolutions on “defamation of religion” presented before the United Nations by Islamic countries. These resolutions have undoubtedly been controversial, particularly because of the tension that they have created between freedom of religion and freedom of expression. As the movement appeared to quiet down and the language of “defamation of religion” was removed from the resolutions and replaced by Resolution 16/18, many believed that “defamation of religion” belongs to the past and that freedom of expression had prevailed. Perhaps such a view was naïve. This article considers the definition, history, and development of the “defamation of religion” movement. The resulting tensions between freedom of expression and religious freedom will be addressed, specifically within the context of the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration on Human Rights (UDHR), before moving on to a critique of the “defamation of religion” movement. It is argued that “defamation of religion” presents overly expansive, arbitrary, and vague limitations to religious freedom and freedom of expression.

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INTRODUCTION

The past decade has seen numerous resolutions on “defamation of religion” presented before the United Nations (UN). These resolutions have undoubtedly been controversial, particularly because of the tension they have created between freedom of religion and freedom of expression. However, as the movement supporting these resolutions appeared to quiet down and the language “defamation of religion” was removed from UN resolutions, many believed that “defamation of religion” belonged to the past and that freedom of expression had prevailed. Perhaps such a view was naïve.

The tragic events that recently took place in Benghazi, Libya, once again re-ignited the debate on freedom of expression and “defamation of religion.” On 11 September 2012, Islamists throughout the Middle East launched violent protests against Americans, apparently in response to a thirteen minute YouTube video entitled The Innocence of Muslims that was said to insult the Islamic Prophet Mohammed. The United States embassies in Egypt and Libya were stormed and U.S. Ambassador Christopher Stevens and three others were killed. In the fallout from the violence many people once again called for international law to protect religion from being defamed, in order to prevent future acts of violence.

At a press conference addressing the attacks, UN Secretary-General Ban Ki-moon was asked the following:

On this issue of violence erupting after the controversial film, can you please speak to the argument of freedom of expression that has been raised too? There is obviously the agenda issue here at the United Nations of defamation of religion, and there is a lot of dispute over that. Maybe weigh in on this in terms of your perspective on how to move forward in some concrete ways, where you can have a balance of freedom of expression, yet at the same time obviously respect various religions.\(^6\)

The UN Secretary-General responded by stating:

All human beings have the inalienable right to freedom of expression, freedom of assembly. These are very fundamental rights. But, at the same time, this freedom of expression should not be abused by individuals. Freedom of expression should be and must be guaranteed and protected, when they are used for common justice, common purpose. When some people use this freedom of expression to provoke or humiliate some others’ values and beliefs, then this cannot be protected in such a way. So, my position is that freedom of expression, while it is a fundamental right and privilege, should not be abused by such people, by such a disgraceful and shameful act.\(^7\)

Similarly, a Joint Statement on Peace and Tolerance by the European Union (EU) High Representative, Organization of Islamic Cooperation (OIC) Secretary-General, Arab League Secretary-General, and African Union (AU) Commissioner for Peace and Security condemned the violent attacks, but also stated, “[w]hile fully recognizing freedom of expression, we believe in the importance of respecting all prophets, regardless of which religion they belong to.”\(^8\)

As long as there are calls to remove protection from expressions that may “provoke or humiliate some others’ values and beliefs,”\(^9\) as well as calls

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\(^6\) U.N. Secretary-General, Full Transcript of Secretary-General’s Press Conference (Sept. 19, 2012), http://www.un.org/sg/offthecuff/?nid=2476.

\(^7\) Id.


\(^9\) U.N. Secretary-General, supra note 6.
to “respect[] all prophets,” the “defamation of religion” movement cannot be said to have ended. As will be explained in this article, the advocates of the movement have simply adopted different methods. The language of “defamation” may have been omitted from the latest UN resolutions, but the aims of the movement nevertheless remain.

Furthermore, this article will consider the definition, history, and development of the “defamation of religion” movement. The resulting tensions between freedom of expression and religious freedom will be addressed, specifically within the context of the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration on Human Rights (UDHR), before moving on to a critique of the “defamation of religion” movement. Lastly, the future of the “defamation of religion” movement will be addressed—particularly now that the “defamation” language has been replaced.

I. DEFINITION, HISTORY, AND DEVELOPMENT OF THE “DEFAMATION OF RELIGION” MOVEMENT

A. “Defamation of religion”

In order to present a critique of the “defamation of religion” movement, it is important to understand what it means. The main historical basis for “defamation of religion” is the resolutions passed by the UN. Within these resolutions broad reference is made to defamation, negative stereotyping, intolerance, xenophobia, and several other concepts. Yet no clear attempt is made to define “defamation of religion,” nor any of the descriptive words used for it. Resolution 2000/84 on “defamation of religions” suggests that the concept includes or can be equated to negative stereotyping of religions, inciting acts of violence, and “xenophobia or related intolerance and discrimination towards Islam . . . .” “Defamation of religion” further includes ethnic and religious profiling of Muslim

10 Joint statement, supra note 8.
11 See, e.g., H.R.C. Res. 10/22, supra note 1, at 2.
13 E.g., H.R.C. Res. 10/22, supra note 1 (using words such as stigmatizing and discrimination).
15 Id. ¶ 1.
16 Id. ¶ 3. Subsequently, the Human Rights Council expressed concern that “defamation of religions and incitement to religious hatred in general could lead to social disharmony and violations of human rights . . . .” H.R.C. Res. 10/22, supra note 1.
minorities, economic and social exclusion, and limitations of freedom of expression "as provided by law" and as "necessary for respect of the rights or reputations of others, protection of national security or of public order, public health or morals and respect for religions and beliefs." Resolutions concerning "defamation of religion" and Resolution 16/18 do not define “religion.” It is important to establish the views of the UN and Islam, as this was the religion mainly responsible for the acceptance of these resolutions regarding the meaning of religion, to determine whether Resolution 16/18 and “defamation of religion” concern the same concept and not two separate intentions.

The civilization that used to be described by the word "Christendom" has undergone secularization and has now been extended to include names such as “Europe” and the “West.” On the other hand, the Islamic world is

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18 H.R.C. Res. 4/9, supra note 1, ¶ 3.
19 Id. ¶ 4.
20 Id. ¶ 10.
22 See id.
23 See id. ¶ 1.
24 Id. ¶ 5(f).
still known by the word Islam.\textsuperscript{27} The word “religion” as used by the West is derived from the Latin religio.\textsuperscript{28} The Islamic term for the same is dīn.\textsuperscript{29} The equivalent word to dīn in other Semitic languages means law.\textsuperscript{30} As Bernard Lewis explains, for Muslims, Islam is not simply a "system of belief and worship," it is the "whole of life," and its rules include civil, criminal, and constitutional law.\textsuperscript{31} In classical Islamic history there is no equivalent to separation between church and state or "clash between pope and emperor."\textsuperscript{32} The head of the Islamic state has both political and religious authority.\textsuperscript{33} The law is divine and revealed and cannot be repealed, abrogated, changed, or supplanted.\textsuperscript{34} This is also evident from the motto of the Muslim Brotherhood\textsuperscript{35} which states that the worldly affairs of Muslims are exclusively governed on the basis of the Quran and the model of the Prophet Mohammed.\textsuperscript{36} In short, this means that Sharia law is applied to all aspects of life and ensures “political empowerment of Islam in all its dimensions.”\textsuperscript{37} On the contrary, the idea of religion within the West includes at least some separation between church and state, and no religion has the authority to dictate national laws or international human rights laws.\textsuperscript{38}

The term “religion” as understood by the West cannot be equated with the Islamic definition of religion. They are two very different notions. Islam encompasses more than the Western understanding of religion and includes a political, legal, and religious structure. This political, legal, and religious structure cannot be changed or displaced by any other—such as international human rights laws. This is demonstrated by the Cairo Declaration of Human

\textsuperscript{27} Id.
\textsuperscript{28} Id., at 3.
\textsuperscript{29} Id.
\textsuperscript{30} Id.
\textsuperscript{31} Id. at 4.
\textsuperscript{32} Id.
\textsuperscript{33} Id.
\textsuperscript{34} Id. at 43.
\textsuperscript{35} After World War 2, Egypt’s democratic system was unable to recover. Traumatized by British intervention, they were unable to implement effective policies to solve social and economic problems. Non-governmental opposition movements then grew in popularity—amongst these being the Muslim Brotherhood. \textit{Bargara Zollner, Brotherhood: Hasan Al-Hudaybi and Ideology} 11 (2009).
\textsuperscript{37} Hillel Fradkin, \textit{The History and Unwritten Future of Salafism}, 6 INSTITUTE: CURRENT TRENDS IN ISLAMIST IDEOLOGY 5, 5-19 (Hillel Fradkin et al. 2008).
\textsuperscript{38} See generally \textit{Robert Louis Wilken, Christianity: Face to Face with Islam} (2010) (explaining more about the difference between the West and Islam).
Rights in Islam\textsuperscript{39} which introduces concepts similar to “defamation of religion” resolutions.

For example, Article 22 of the Declaration provides for the freedom of expression but prohibits any expression against the principles of Sharia, thereby placing restrictions on freedom of expression insofar as it is contrary to Islam.\textsuperscript{40} Articles 24 and 25 also establish Sharia as above any of the rights in the Cairo Declaration and as the only source for its interpretation.\textsuperscript{41} The elevation of Sharia above human rights in the Cairo Declaration and its justification of restrictions on freedom of expression illustrate the Islamic approach to human rights and freedom of expression: human rights are permitted, provided they do not conflict with Sharia. Where there is a conflict, the international human rights provisions must give way.

C. The Organization of Islamic Cooperation

In 1969, the first steps were taken towards the formation of the Organization of Islamic Cooperation.\textsuperscript{42} The OIC is the second largest intergovernmental organization after the UN with 57 member States.\textsuperscript{43} However, from its earliest beginnings, the OIC suffered from internal conflict, due to its composition of very diverse countries, causing it to be largely irrelevant in its earlier years.\textsuperscript{44} From around the turn of the twenty-first century the demand for reform at the OIC began,\textsuperscript{45} together with increased unity.

Currently the OIC serves as a collective Muslim voice to “safeguard and protect the interests of the Muslim world in the spirit of promoting international peace and harmony among various people of the world.”\textsuperscript{46} The OIC also promotes Muslim solidarity in economic, social, and political affairs,\textsuperscript{47} and has the status of permanent observer to the UN.\textsuperscript{48} Several

\textsuperscript{40} Id. art. 22.
\textsuperscript{41} Id. arts. 24-25.
\textsuperscript{42} Lewis, supra note 26, at 148.
\textsuperscript{44} Id. at 12.
\textsuperscript{45} Id. at 13.
\textsuperscript{47} Wilken, supra note 38, at 21.
resolutions also reaffirm cooperation between the UN and the OIC, which is also evident from the OIC’s Ten-Year Programme of Action. The OIC aims to:

Participate and coordinate effectively in all regional and international forums, in order to protect and promote the collective interests of the Muslim Ummah, including UN reform, expanding the Security Council membership, and extending the necessary support to candidatures of OIC Member States to international and regional organizations.

The OIC’s commitment to the adoption of resolutions at the UN is equally clear from its Programme of Action. The Programme states that the cooperation between the OIC and UN also:

[d]emonstrate strong commitment and credibility in Joint Islamic Action by effective implementation of OIC resolutions, and to focus on the adoption of implementable resolutions until the Ummah reaches its objectives. In this context, the Secretary General should be enabled to fully play his role in following up the implementation of all OIC resolutions.

The OIC’s commitment to preventing “defamation of religion” is also clear from the Programme, which states that it wishes to “ensure respect for all religions and combat their defamation.” The UN and OIC adoption of resolutions concerning “defamation of religion” and Resolution 16/18 is evidence of two things: 1) Cooperation between the OIC and the UN, and 2) the OIC’s commitment to presenting resolutions at the UN has been realized. But for the OIC, these resolutions would likely not have existed, as it has principally been the OIC and its member states who have consistently advocated for them at the UN.

In 2011, the OIC gained further influence at the UN by way of the establishment of the Muslim Independent Permanent Human Rights Commission (the Commission). The Commission will not hear human rights violations, but rather act as advisory organ to the Human Rights

51 Id. pt. 1, ¶ 1; see also id. § II, ¶ 3.
52 Id. pt. 1, § VII, ¶ 1.
53 PETERSEN, supra note 43.
Council.\textsuperscript{54} Whether the new Commission will be used as a tool to influence the UN and promote a “defamation of religion” agenda remains to be seen; it will depend on the "amount of pressure from OIC member states" and the "independence and expertise" of the specialists on the Commission.\textsuperscript{55}

D. Development and history of “defamation of religion” and Resolution 16/18 at the UN

The main developments concerning “defamation of religion” at the UN occurred through the OIC and its sponsorships.\textsuperscript{56} In 1999 the OIC introduced its first draft resolution on combating “defamation of Islam” in the UN Human Rights Commission.\textsuperscript{57} However, a revised 1999, draft resolution encompassing all religions was introduced while still emphasizing the vulnerability of Islam.\textsuperscript{58} Over time, the resolutions were broadened to include all religions, but continued to specifically mention Islam. The Human Rights Commission adopted similar resolutions every year from 2000 until 2005.\textsuperscript{59} From 2006, the Human Rights Council followed in its footsteps.\textsuperscript{60}

The 2006 resolution was the first one to be adopted by the General Assembly, the main body of the UN.\textsuperscript{61} However, support for such resolutions diminished every year and, by 2008, they were passed only by plurality.\textsuperscript{62} A 2010 resolution was passed with a three-vote margin and in 2011, fearing defeat as a result of the assassinations of Pakistan’s Minister, Shahbaz Bhatti, and Governor, Slaman Taseer, Pakistan decided not to introduce a resolution on “defamation of religion” again.\textsuperscript{63}

OIC efforts towards creating “defamation of religion” also integrated the Special Rapporteur on Contemporary forms of Racism, Racial

\textsuperscript{55} PETERSEN, supra note 43, at 35.
\textsuperscript{56} See Leo, supra note 25.
\textsuperscript{60} E.g., C.H.R. Res. 2000/84, supra note 14; C.H.R. Res. 2001/4, supra note 1; G.A. Res. 61/164, supra note 1.
\textsuperscript{61} See G.A. Res. 60/150, supra note 1.
\textsuperscript{63} PAUL MARSHALL & NINA SHEA, SILENCED: HOW APOSTASY AND BLASPHEMY CODES ARE CHOKING FREEDOM WORLDWIDE 216 (2011).
Discrimination, Xenophobia and Related Intolerance, Doudou Diène, and the Special Rapporteur on Freedom of Religion or Belief Asma Jahangir. Differing accounts of “defamation of religion” were given by the Rapporteurs. Diène mentioned acts of discrimination against Muslim people and the anti-Muslim ideology “in the form of explicit and public defamation of Islam.” On the contrary, reports by Asma Jahangir condemn “defamation of religion” as undermining the pillars of a civilized society.

Instances such as the release of a newspaper article containing several caricatures of Mohammed, tragic occurrences like 11 September 2001 (9/11), and publications such as Salman Rushdie's novel *The Satanic Verses* created fertile soil for the OIC to intensify the cultivation of “defamation of religion” at the UN. For example, the report of Special Rapporteur Abid Hussain condemned the events of 9/11, but continued to caution against intolerance of religions. Resolution 60/150, and various resolutions before it, continued to emphasize the “negative impact of the events of 11 September 2011 on Muslim minorities . . . .”

In 2010, the Secretary-General of the OIC gave a speech "signaling a willingness on the part of the OIC member states to move away from the term 'defamation.'" In 2011, “defamation of religion” was replaced by the arguably more acceptable Resolution 16/18. This shift in language was the clear result of collaboration between the Obama administration and the OIC. It was also the first resolution supported by the OIC that did not include the concept “defamation of religion.”

71 Id. ¶ 76.
72 G.A. Res. 60/150, supra note 1, at 2.
73 Petersen, supra note 43, at 31.
Undoubtedly, the influence of the OIC on the UN with its introduction of “defamation of religion” and the new concepts contained in Resolution 16/18 urge questions and critique regarding freedom of religion and freedom of expression at the UN.

II. A CRITIQUE OF THE “DEFAMATION OF RELIGION” MOVEMENT

Clear challenges emanate from the definition and background analysis of the concept “defamation of religion,” as well as the seemingly neutral Resolution 16/18. In reality, both contain serious challenges to freedom of expression and the traditional understanding of freedom of religion, as the following critique will demonstrate.

A. Negating freedom of expression

The right to freedom of opinion and expression is provided for in Article 19 of the UDHR75 and also in Article 19 of the ICCPR,76 but freedom of expression has never been understood as being absolute. Perhaps, if judged favorably, that is all that UN General Secretary-General Ban Ki-moon meant when he stated that the “inalienable right to freedom of expression” cannot be protected when it is used to “provoke or humiliate some others’ values and beliefs.”77 However, while all accept that there are sometimes valid restrictions on freedom of expression, such restrictions must be well defined and legally valid. It cannot be said that “defamation of religion”—as a limitation on freedom of expression—can meet these well-established international legal standards.

75 Universal Declaration of Human Rights, art. 19, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR] (“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”).

76 International Covenant on Civil and Political Rights art. 19(2)-(3), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (“2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order . . . or of public health or morals.”).

77 U.N. Secretary-General, supra note 6.
1. The ambit of Articles 19(3) and 20

Although it is not the aim of this article to determine the ambit of restrictions to freedom of expression, this article serves as a critique to the fact that the OIC and the UN defined these limitations too broadly. What the exact limitations on freedom of expression should be (for example, whether cartoons may be limited, etc.) does not fall within the scope of this article. What is shown and justified in this article is that such limitations should be more narrowly construed. Thus, this article serves as a starting point for further determinations regarding a narrower and more exact scope of limitations to freedom of expression.

Article 19(3) of the ICCPR provides for instances where freedom of expression can be limited. The question is whether “defamation of religion” can be included as one of those restrictions and, consequentially, limit freedom of expression. Article 19(3) states that freedom of expression may be subject to certain restrictions such as respect of the rights or reputations of others and protecting national security, public order, public health, or morals.\(^78\) Article 20 of the ICCPR states that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”\(^79\) These articles were drafted following the atrocities of the Second World War—when fears of rising fascism were at their highest.\(^80\) Therefore, the threshold of these articles is very high,\(^81\) supporting the notion that these limitations should be narrowly and clearly defined for them to be the “least intrusive means” of limiting expression.\(^82\) Robert Blitt agrees that article 20(2) "is intended to target only the most extreme purposeful advocacy of incitement to imminent forms of discrimination, hostility, and violence."\(^83\) In a legal article written concerning this topic, Blitt mentions that permitting the dilution of the high threshold of article 20(2) may "cheapen[] the coin" and "give rise to other states disregarding their obligation to prohibit genuine advocacy of hostility . . . ."\(^84\)

\(^78\) ICCPR, supra note 76, art. 19(3).
\(^79\) Id. art. 20.
\(^81\) Id.
\(^84\) Id. at 360.
The Johannesburg Principles on National Security, Freedom of Expression and Access to Information\textsuperscript{85} “promote a clear recognition of the limited scope of restrictions on freedom of expression . . . .”\textsuperscript{86} Principle 1.1 states that any restriction of expression must be prescribed by law that is “accessible, unambiguous, drawn narrowly and with precision . . . .”\textsuperscript{87} Thus, the individual should be able to foresee whether a particular action is unlawful. The resolutions concerning “defamation of religion” and Resolution 16/18 are so broadly defined that they do not make it clear to the individual when his/her expression will be contrary to the resolutions—they are not “drawn narrowly and with precision.”\textsuperscript{88}

Article 20 presents a two-part requirement to be met for freedom of expression to be justifiably limited; 1) advocacy of religious hatred, together with such advocacy 2) \textit{causing or constituting} incitement to discrimination, hostility or violence.\textsuperscript{89} Mere “advocacy of religious hatred” on its own, or mere “incitement to discrimination or violence,”\textsuperscript{90} is not sufficient. Advocacy of religious hatred must cause incitement to discrimination, hostility, or violence. Previous resolutions on “defamation of religion” refer to “incitement to . . . violence” and “advocacy of . . . religious hatred” without recognizing that limitations of freedom of expression require these two concepts to be mutually dependent.\textsuperscript{91} Resolution 16/18 mentions the two-part requirement in paragraph three, stating that it “condemns any advocacy of religious hatred that constitutes incitement to discrimination, hostility, or violence.”\textsuperscript{92} However, it is not clear whether there has been an actual realization that this presents a two-part requirement. From Resolution 16/18's heading it seems as if the resolution does not recognize a two-part requirement as it appears to aim towards combating “intolerance,” “negative

\textsuperscript{86} Id. at 6.
\textsuperscript{87} Id. at 7.
\textsuperscript{88} Id. For example, Resolution 62/154 mentions its concern with the “intensification of the campaign of defamation of religions and the ethnic and religious profiling of Muslim minorities” without qualifying or identifying this “campaign” as causing insult to Islam. G.A. Res. 62/154, \textit{supra} note 1, ¶ 6.
\textsuperscript{89} \textit{See} \textsc{Alliance Def. Fund et al., Consultation on the Interrelationship between ICCPR Article 19 and 20 with Respect to Freedom of Expression and Advocacy of National, Racial or Religious Hatred That Constitutes Incitement to Discrimination, Hostility or Violence} (2010), available at http://www.ohchr.org/Documents/Issues/Expression/ICCPR/NGOs2011/AllianceDefenceFund.pdf.
\textsuperscript{90} E.g., G.A. Res. 62/154, \textit{supra} note 1, ¶ 11.
\textsuperscript{91} H.R.C. Res. 16/18, \textit{supra} note 21, ¶ 3.
stereotyping,” “stigmatization,” “discrimination” and “incitement to violence” as mutually independent actions.92

Also, determining what “incitement” means can be very problematic. One can incite hatred without either the intention to do so or the effect of doing so.93 Incitement, although sometimes easy to identify, carries an inherent risk of subjectivity.94

Failing to identify what instances fall within Articles 19(3) and 20 opens the door to justification of laws prohibiting “defamation of religion” that will limit freedom of expression altogether.

2. “Defamation of religion” defined too broadly

As stated above, “defamation of religion” and the parallel concepts contained within Resolution 16/18 are not defined, but rather described in broad and sweeping statements. According to Blitt, the aim of this was to present “incitement” and “defamation of religion” as one concept.95 Specifically, "the OIC embarked upon an increasingly contrived campaign to equate criticism of Islam with incitement to religious hatred."96 This represents "an effort to 'reclassify' defamation of religion within the legal framework of incitement" and also "make it more palatable . . . ."97

According to this article, one way of equating incitement and “defamation of religion” was to omit a definition of “incitement” and to leave it open to broad interpretation. This is contrary to the narrowly enforced definition of incitement in countries such as the United States where the present-day test for incitement includes intent, imminence, and likelihood.98 Additionally, many international law specialists agree that intent is regarded as one of the requirements of incitement.99 The resolutions on “defamation of religion” and Resolution 16/18 nowhere define “incitement” narrowly enough to include the requirement of intent. The wider the definition of a concept such as incitement, the easier it is to define it as one of the restrictions contained in Articles 19(3) and 20, thereby limiting freedom of expression.

Resolution 16/18 refers directly to “intolerance” and “incitement to . . . violence” towards persons adhering to a religion—thereby possibly limiting

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92 Id. at 1.
93 MARSHALL & SHEA, supra note 63, at 236.
94 Id. at 226.
95 Id.
96 Blitt, supra note 83, at 355.
97 Id.
99 Leo, supra note 25, at 779-80.
the broad scope of “defamation of religion.” Nevertheless, are the concepts “intolerance” or “incitement to violence” as used in Resolution 16/18 narrow enough to be included as restriction to freedom of expression as contained in articles 19(3) and 20? It is not certain, as none of these concepts are defined objectively. Does “intolerance” include criticism of lack of equality between men and women in Islamic countries? Does “intolerance” include cartoons depicting Mohammed? The seemingly more neutral Resolution 16/18 still threatens freedom of expression because concepts remain undefined.

B. Distorting freedom of religion

Article 18 of the UDHR provides for freedom of thought, conscience and religion, as does Article 18 of the ICCPR. This right encompasses the freedom to have or adopt a religion or belief and the freedom to manifest that religion or belief.

However, freedom of religion as understood in international law does not include freedom from offence, nor does it protect religions and beliefs per se. On the contrary, freedom of religion does protect the right to some form of dissent from a particular religion or belief. The "defamation of religion" concept reverses these positions, seeking to create freedom from offence, protection for a particular religion and removal of the freedom to dissent. The inclusion of “defamation of religion” or Resolution 16/18 within the right to religious freedom must be considered arbitrary and unjustifiable.

1. Freedom from offence

The “defamation of religion” creates a de facto right to "freedom from offence" where no such right exists.

100 H.R.C. Res. 16/18, supra note 21, ¶ 2-3.
101 UDHR, supra note 75, art. 18 ("Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom . . . to manifest his religion or belief . . . .").
102 ICCPR, supra note 76, art. 18 ("Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion . . . and freedom . . . to manifest his religion . . . .").
104 Temperman, supra note 103.
105 See Leo, supra note 25, at 770.
Historically, Muslims have received criticism of Islam very personally. This can arguably be traced to Mohammed and his responses to criticism from Arabs and the Jews of Medina.\textsuperscript{107} Such criticism was equated with the persecution of Muslims.\textsuperscript{108} Given that the life of Mohammed forms the background of Islam, such resistance to criticism can still be seen within Islam today.\textsuperscript{109} This sensitivity to criticism is evident in the OIC’s Ten-Year Programme of Action aiming to protect Islam by combating its “defamation.”\textsuperscript{110}

In contrast, the right to religious freedom as contained in the ICCPR and the UDHR does not protect individuals from any criticism or offence regarding their actual religion. Only the right to adopt and manifest a religion is protected. There is no duty to have respect at all times for everyone’s religion or belief.\textsuperscript{111}

Some fundamental religious doctrines may flatly condemn the doctrines of other religions, possibly creating offence. If this is prohibited by religious freedom, it will produce “a vicious spiral of increasing limits to freedom of expression.”\textsuperscript{112} In March 2008, several Non-Governmental Organizations (NGO) referenced Sharia law and its implications for gender equality.\textsuperscript{113} At the reference to Sharia, both Egypt and Pakistan interrupted and declared that such references are an insult to their faith.\textsuperscript{114} In effect, this silenced any valid debate and questioning concerning human rights violations against women.

\textsuperscript{108} Id.
\textsuperscript{109} Id. at 394 (mentioning that there has always been a special sensitivity by Muslims to critique— for example, the freedom of speech monologue in the Marriage of Figaro. Figaro comments that if he were to write a play passing critical comments about Mohammed he would receive warnings that he had offended the Ottoman Empire, Persia, India, Egypt, etc.; see also Andrew G. Bostom, \textit{Beaumarchais’ Marriage of Figaro Free Speech Monologue}, FRONT PAGE MAGAZINE (Mar. 2, 2009), http://www.freedomisknowledge.com/marriageoffigaro.html.
\textsuperscript{110} Ten-Year Programme of Action, supra note 50, pt. I, § VII.
\textsuperscript{111} See Temperman, supra note 103.
\textsuperscript{113} AZAM KAMGUJAN, LEAVING ISLAM: APOSTATES SPEAK OUT 213, 218 (Ibn Warraq ed., 2002) (explaining how the rights of women living in Iran would be violated in the following ways: women are stoned to death for voluntary sexual relations; do not have the right to choose their clothing; are barred from taking up employment in certain occupations; not free to choose their own field of study; legally allowed to marry at the age of 9; and no rights to property, amongst other things).
Causing offence to Islam was also condemned by the Muslim Brotherhood on account of the film *Fitna* by Geert Wilders.\(^{115}\) The Brotherhood stated that it “value[s] freedom . . . . However, there is a difference between freedom and deliberate offence.”\(^{116}\) There is also the possibility of strangling innocent actions that unintentionally offend a religion. For example, the Council of Muslim Theologians of South Africa stated that souvenir soccer balls for the 2010 soccer World Cup, displaying Islamic symbols that Muslims hold as sacred, had the potential to cause offence.\(^{117}\)

2. Protection of ideas or religions

The “defamation of religion” concept seeks to protect religion and belief, as opposed to people. However, international law principles do not protect ideas or religions *per se*.\(^{118}\)

Special Rapporteurs Jahangir and Diene stated that individuals belonging to a majority religion are not always free from at least some kind of pressure to adopt and adhere to a certain interpretation of that religion and "should therefore not be viewed as parts of homogenous entities."\(^{119}\) Because adherents to the same religion cannot agree on all matters, international human rights law should be viewed as primarily protecting individuals in the exercise of their freedom of religion.

Moreover, "[a]n allegation of discrimination must always be connected to the denial of some recognized legal interest."\(^{120}\) Legal interests will include, amongst others, property, marriage, and work. "[M]ere combating of 'discrimination' . . . without . . . relevant interest, does not warrant state intervention."\(^{121}\) “Defaming” a religion does not involve the loss of a legal interest, as a religion is not a person that can hold a legal

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\(^{117}\) Belnap, *supra* note 98, at 681. Using offense as criteria to restrict freedom of expression will also result in restriction of academic and general expression on matters such as homosexuality or abortion. Attempts to restrict expression criticizing homosexuality have already occurred in cases such as Sweden’s Åke Green, who was prosecuted for presenting a sermon with some content concerning homosexual behavior. *See generally*, Pastor Åke Green’s Sermon, AKEGREEN.ORG, http://www.akegreen.org/en-2-left/en-2-9.htm (last visited Mar. 29, 2013).

\(^{118}\) See Leo, *supra* note 25, at 770.


\(^{121}\) *Id.* at 117.
interest. It is merely directed towards a religion; the religion itself does not have a legal interest.

Furthermore, it is impossible for international human rights law to protect a religion as this will require the UN to make truth claims concerning religions. This will set the traditional concept of defamation against the question of determining which ideas are acceptable as opposed to which facts are true. "Defamation of religion" also empowers the UN to decide what constitutes religion and what qualifies as an insult to that religion. Expecting the UN to determine which ideas are acceptable will require it to prove objectively something that can only be proven subjectively. If the UN cannot make these decisions, who determines whether "defamation of religion" has occurred? If it is the religion itself, undefined power will be given to that religion to determine the scope of religious freedom and freedom of expression—as indicated by several broadly framed resolutions drafted by the OIC.

If international law does not protect ideas or religions, does it protect communities adhering to a religion? Furthermore, if it does protect communities, will it automatically protect the collective religion of that community? In considering the case of Malcolm Ross v. Canada, the Human Rights Committee stated that the phrase “rights or reputations of others” in article 19(3) of the ICCPR—one of the justifiable restrictions on freedom of expression—relates to persons or community as a whole. However, in cases such as Malcolm Ross care must be taken not to assume that criticizing or insulting a religion automatically presents a threat to a community and its legal interests, thereby justifying restrictions concerning religious freedom under article 19(3) of the ICCPR. The protection of a community cannot automatically be equated with the protection of the religion to which the community adheres.

Resolution 16/18 replaced “defamation of religion” with “intolerance, negative stereotyping and stigmatization of . . . persons

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123 See Temperman, supra note 103.
based on religion or belief.” Resolution 16/18 has therefore moved from the protection of a religion to the protection of adherents to that religion. However, it is argued that this new approach attempts to present the same aims contained in “defamation of religion,” but at the same time supersedes the arguments against it by introducing the individual, and not religion, as the object of discrimination. Due to the personal nature of the right to religious freedom, acts of criticism towards a religion can easily be subjectively interpreted or extended—especially by adherents to that religion—as acts of criticism or intolerance towards the individual adherents to that religion. The possibility of such an extension is not prohibited by Resolution 16/18 because the ambit of concepts such as “incitement,” “intolerance” and “discrimination” are undefined and left open to subjective personal interpretations of adherents to that religion.

3. Freedom to dissent

Lastly, the prohibition against criticizing a religion will undoubtedly limit the freedom to actively dissent from a religion—thus indirectly infringing on the right to manifest a religion of one’s choice guaranteed by the right to religious freedom.

By implication, the right to manifest a religion includes the right to actively dissent from or reject religions that do not support the manifested religion. Freedom of religion allows for a person to subjectively transcend his/her chosen religion as superior. Laws against “defamation of religion” will render any critical expression claiming a religion to be superior to another as contrary to religious freedom.

Furthermore, internal obligations that may exist within a religious community are not binding on, nor applicable to, those who do not form part of the religious group. Preventing persons from expressing opinions on the internal obligations of another religion will place an undue burden on such person’s right to expressively dissent from accepting the internal obligations of that religion. Such expressive dissent may even be required by that individual’s religion, which means that preventing such expressive dissent would potentially violate the freedom of religion and conscience.

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128 H.R.C. Res. 16/18, supra note 21, at 1 (emphasis added).
130 See UDHR, supra note 75, art. 18 (providing for freedom of conscience); ICCPR, supra note 76, art. 18 (also providing for freedom of conscience).
C. Distorting traditional defamation

The “defamation of religion” concept is unlike traditional legal understandings of defamation. Proving the truth of a statement is an absolute defense to a defamation charge, but judicial standards of truth will be extremely difficult to apply to questions of faith and belief.\textsuperscript{131} Enforcing “defamation of religion” will require a judgment based on the subjective ideas of the recipient rather than "objectively ascertainable speech" by the speaker.\textsuperscript{132}

Irrespective of this requirement, the OIC has been condemning statements on Islam, not based upon whether they are true or false, but whether or not the statement is offensive. For example, Pope Benedict XVI, in a lecture given at Regensburg in 2006, quoted from a dialogue of the fourteenth-century Byzantine emperor and a Muslim Persian stating, “Show me just what Mohammed brought that was new, and there you will find things only evil and inhuman, such as his command to spread by the sword the faith he preached.”\textsuperscript{133} Benedict used this quote to explain the need of reason when acting and had no intention to insult or violate Islam.\textsuperscript{134} However, the OIC "approved a statement urging the Vatican to 'retract or redress'" the comments.\textsuperscript{135}

It is clear that “defamation of religion” contains serious challenges to freedom of expression and to the traditional understanding of freedom of religion. Moreover, the new approach taken under Resolution 16/18 does little to alleviate these concerns. Far from being a defeated movement, the “defamation of religion” concept is continuing to develop at the UN, albeit in modified language. The future implications of the movement are discussed below.

\textsuperscript{131} CHERRY & ROY, supra note 112, at 10.
\textsuperscript{133} Benedict XVI, Faith, Reason and the University Memories and Reflections, APOTOLIC JOURNEY OF HIS HOLINESS BENEDICT XVI TO MÜNCHEN, ALTÖTTING & REGENSBURG, VATICAN.VA (Sept. 12, 2006), http://www.vatican.va/holy_father/benedict_xvi/speeches/2006/september/documents/hf_ben-xvi_spe_20060912_university-regensburg_en.html.
\textsuperscript{134} See id.
III. THE FUTURE OF “DEFAMATION OF RELIGION” AND THE OIC

A. Resolution 16/18

It is argued that Resolution 16/18 is merely a different name for the concept “defamation of religion.” Resolution 16/18 seemingly rebuts any criticism of “defamation of religion” discussed above because: a) Resolution 16/18 is directed towards individuals; b) the concept “defamation of religion” is defined more narrowly by the terms “combating intolerance, negative stereotyping and stigmatization, discrimination and incitement to violence”; and c) as a result, this narrow definition can form part of the limitations in Articles 19(3) and 20 of the ICCPR and therefore limit the freedom of expression.136 The validity of these presumptions has been dealt with in part III above.

However, both the resolutions on “defamation of religion” and Resolution 16/18 were introduced by the OIC, and the objectives in its Ten-Year Programme of Action have remained the same. Principle VII, paragraph 1 of the Programme emphasizes the “responsibility of the international community, including all governments, to ensure respect for all religions and combat their defamation.”137 If the aims of the OIC have not changed, it is likely that the aims of its resolutions would not have changed either. It is unlikely that an organization will introduce measures that are not in line with its objectives. This is also evident from the Istanbul Process intended to implement Resolution 16/18. The OIC reported, “[t]he upcoming . . . meetings . . . [will] help in enacting domestic laws for the countries involved in the issue, as well as formulating international laws preventing . . . defamation of religions.”138 Clearly, although the tactics of the OIC have changed, its objectives concerning “defamation of religion” have not.

Furthermore, Saudi Arabia, where Sunni Islam, the largest orthodox branch of Islam, is the official religion and Sharia is the primary source of law, is currently considering new regulations to criminalize any insult to Islam after a Saudi blogger tweeted comments about what he liked and disliked about Mohammed.139

136 See e.g., H.R.C. Res. 16/18, supra note 21, ¶ 3 (“[C]ondemn[ing] any advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence, whether it involves the use of print, audio-visual or electronic media or any other means.”).
According to Blitt, Resolution 16/18 is merely sidestepping an explicit rejection of “defamation of religion.” Resolution 16/18 uses substitute language allowing the negotiating parties to “extrapolate diametrically opposed messages from its content.” Blitt further states that support for this new “international consensus” in Resolution 16/18 represents a "cynical and strategic decision to continue the campaign for the ban on defamation of religion by other means." In the absence of additional clarification and "decisive repudiation" of “defamation of religion,” any further efforts by the UN to combat intolerance as indicated in Resolution 16/18 only enables an alternative framework allowing continued promotion of “defamation of religion.”

This demonstrates that “defamation of religion” is still alive and well in Islamic countries, despite the more neutral Resolution 16/18.

1. The mark already left

Human Rights Council Resolution 7/19 declares that “defamation of religion” has to be protected on a national and international level. Resolution 16/18 echoes this by stating that it “urges States to take effective measures . . . to address and combat such incidents.” State practice is one of the requirements of customary law, and national laws can be indicative of State practice. The potential effect of these resolutions is that several States will implement them in their national laws, consequentially but slowly, creating the State practice and the possibility of “defamation of religion” as customary international law.

The effect of “defamation of religion” can already be seen as it has seeped into the legal systems and daily life of several nations. For example, the EU and former UN Secretary-General Kofi Annan issued a joint statement with the OIC recognizing the need to show sensitivity in treating issues of religion. Subsequently, "[a]fter Italian Minister Roberto

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140 Blitt, supra note 83, at 350.
141 Id.
142 Id. at 351.
143 Id.
144 H.R.C. Res. 7/19, supra note 1, at 3.
145 H.R.C. Res. 16/18, supra note 21, ¶ 2.
Calderoli publicly wore a T-shirt depicting Mohammed, he was forced to resign.\footnote{Brooke Goldstein & Aaron Eitan Meyer, 'Legal Jihad': How Islamist Lawfare Tactics are Targeting Free Speech, 15 ILSA J. INT'L & COMP. L. 395, 401 (2009).}

Customary international law can also be created by passing several non-binding resolutions on “defamation of religion,”\footnote{JOHN DUGARD, INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE 483 (2006).} which is possibly one of the reasons for the continuous and repeated introduction of resolutions by the OIC.

2. Creating a two-tiered system

As indicated above, the concept of “religion” as understood by the West cannot be equated with the Islamic understanding of religion. Islam encompasses more than the Western understanding of religion: It encompasses a political and legal as well as religious structure.\footnote{LEWIS, supra note 26, at 4.} These two worldviews of the meaning of religion produce the possibility of the OIC undermining UN principles on international human rights laws by creating a two-tiered system of law.

The effect of a two-tiered system would be the creation of a set of norms and principles governing adherents to Islam and a set of norms and principles governing everyone else. These two systems will undoubtedly come into conflict with each other—especially concerning the right to freedom of expression.

The Islamic worldview of religion has also manifested in the Cairo Declaration on Human Rights in Islam (Cairo Declaration). The Cairo Declaration reaffirms “the civilizing and historical role of the Islamic Ummah which [Allah] made the best nation that has given mankind a universal and well-balanced civilization” and that “fundamental rights and universal freedoms in Islam are an integral part of the Islamic religion and that no one . . . has the right to . . . violate or ignore them in as much as they are binding divine commandments . . . .”\footnote{World Conference on Human Rights, The Cairo Declaration on Human Rights in Islam, at 3, U.N. Doc. A/CONF.157/PC/62/Add.18 (Jun. 9, 1993) [hereinafter Cairo Declaration on Human Rights], available at http://www.arabhumanrights.org/publications/regional/islamic/cairo-declaration-islam-93e.pdf.} Article 22 provides for freedom of expression but prohibits any expression against the principles of Sharia.\footnote{Id. art. 22 ("(a) Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Sharia. (b) Everyone shall have the right to advocate what is right, and propagate what is good, and warn against what is wrong and evil according to the norms of Islamic Sharia. (c) Information is a vital necessity to society. It may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical values or disintegrate, corrupt or harm society or weaken its faith. (d) It is not permitted to}
thereby placing restrictions on freedom of expression in so far as it is contrary to Islam. Articles 24 and 25 also establish Sharia as above any of the rights in the Cairo Declaration and as the only source for its interpretation. 153

The Cairo Declaration has been invoked in official UN reports, in a resolution, and is repeatedly cited in communications from OIC-member governments to the UN. 154 The Cairo Declaration is also included in Human Rights: A Compilation of International Instruments: Volume II: Regional Instruments. 155 Statements in Resolution 16/18 “[r]eaffirming the commitment made by all States under the Charter of the United Nations” and universal respect for human rights contradict the Cairo Declaration and render the reaffirmation dubious. 156

As stated in some NGO reports, by signing the Cairo Declaration a great number of the OIC signatories broke the obligations they entered into when signing the UDHR and ICCPR. 157 Article 22 of the Cairo Declaration creates restrictions to freedom of expression in addition to those provided for in the UDHR and ICCPR. 158 It also has the effect of providing support for numerous human rights violations in Islamic countries in respect of freedom of expression. Articles 24 and 25 subordinate each of the UDHR’s guarantees to undefined Islamic laws, causing Sharia laws to supersede any human rights provided in the UDHR. In effect, the principle of universality is forgotten and fundamental rights are made dependent on “tradition, culture, religion or level of development.” 159

If a concept such as “defamation of religion” is interpreted by the OIC according to Islamic worldviews, it poses challenges to the interpretation of the right to freedom of religion in international human rights laws. It presents the possibility of the extension of the right to freedom of religion to the protection of Islam as law, politics, and religion. This is true especially in light of the large differences in the understanding of “religion” between the OIC and the UN. This will create numerous restrictions on freedom of expression. It also presents a parallel system of international law—one system governing adherents to Islam and the other governing non-adherents

153 Id. arts. 24-25.
154 MARSHALL & SHEA, supra note 63, at 208-09.
156 H.R.C. Res. 16/18, supra note 21, at 1.
158 See Cairo Declaration on Human Rights, supra note 151, art. 22.
159 Id. ¶ 8.
to Islam. This undermines a notion of universal human rights laws as well as equal protection of all persons under these universal human rights laws.

3. The role of the victim

Several OIC resolutions present Islam as the victim of extremist organizations, drawing attention away from the aggression and actions of Islamic extremist groups. For example, Pakistan’s initial draft of Resolution 16/18 (on behalf of the OIC) states that the Human Rights Council “[e]xpresses deep concern at . . . programmes and agendas pursued by extremist organizations and groups aimed at creating and perpetuating negative stereotypes about religious groups . . . .” Groups negatively stereotyping religion, and more specifically Islam, are equated with extremist groups, without any honest acknowledgement of the problem of Islamic extremism. Also, in the first resolution following the 9/11 attacks, and subsequent resolutions, there is no condemnation of the actions of Islamic extremist groups. The only condemnation in these resolutions concerns the negative impact of 9/11 events on Muslim minorities and communities, negative projection of Islam, and attacks on Muslim businesses and places of worship. The OIC does, however, condemn terrorism in the Convention of the Organization of the Islamic Conference on Combating International Terrorism. This does not change the fact that references to religious extremism in the resolutions create the objective idea that Islam is the only victim of religious extremism. This can also be seen in the adoption and popular use of the term “Islamophobia.” For example, poor treatment of

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160 Human Rights Council Draft Res. 16/L.38, ¶ 1, U.N. Doc. A/HRC/16/L.38 (March 21, 2011). This aim is also clear from Resolution 64/156, adopted in 2010, which states that the General Assembly is deeply concerned about the “serious instances of intolerance, discrimination and acts of violence based on religion or belief . . . motivated by extremism, religious or otherwise . . . in addition to the negative projection of certain religions in the media . . . particularly Muslim minorities . . . .” G.A. Res. 64/156, at 2, U.N. Doc. A/RES/64/156 (Dec. 18, 2009).


163 See, e.g., G.A. Res. 63/171, supra note 1, ¶ 5.


Christians who are minority groups in Islamic states is not given nearly as much attention—if any—in Commission on Human Rights resolutions.166

Portraying a group of persons as victims to gain advantage is not a new concept in law and politics. In legal systems, attempts are made to respond to injustice by prosecuting the violators and compensating victims—for example, prosecution in the case of murder. Such an approach is sometimes insensitive to situations where some responsibility is shared by both defendant and plaintiff. By transferring all blame to others, one can achieve moral superiority and at the same time reject any responsibility for one’s own actions. The violence of the victim is then projected as a last resort of self-defense. “The victim is always morally right, neither responsible nor accountable, and forever entitled to sympathy.”167 Playing the role of the victim has been used in issues concerning racism, homosexuality, and women’s rights. For example, feminism has depicted the unborn as an aggressor and the woman as a victim even when the woman’s own choices caused her to be pregnant.168

It is clear from the various resolutions on “defamation of religion” that there is no sensitivity to shared responsibilities between Islamic and non-Islamic groups for discrimination against one another. This has the potential of presenting Islam as morally superior and subject to the attacks of non-Islamic extremist groups. Such “injustice” will then lead to compensating the victims (Islam) and prosecuting the violators (non-Islam).

4. A self-censored future

“Defamation of religion” and Resolution 16/18 have the potential to create self-censorship in the future out of fear of the reactions free expression might cause. For example, the National Counterterrorism Center issued two documents calling for U.S. officials to stop referring publicly to terrorist

166 In Resolutions 2000/84, 2001/4, 2002/9, and 2003/4 alone, there are more than fifteen references to “Islam” or “Muslim,” whereas there is no reference to any other specific religion. Later resolutions contain similar specific references to “Islam” and “Muslim.”


168 For example, consider Thomson’s violinist thought experiment depicting the mother as a victim of her pregnancy: “You wake up in the morning and find yourself back to back in bed with an unconscious violinist. . . . He has been found to have a fatal kidney ailment, and the Society of Music Lovers . . . have therefore kidnapped you, and last night the violinist’s circulatory system was plugged into yours, so that your kidneys can be used to extract poisons from his blood as well as your own.” Judith Jarvis Thomson, A Defense of Abortion, in LIFE AND DEATH: A READER IN MORAL PROBLEMS 240, 241 (Louis P. Pojman ed., 2000).
groups as Islamic, notwithstanding many of those organizations maintain it in their titles.169

Violent Islamic response to criticism of Islam has created self-censorship in reactions to combating crime—thus undermining the rule of law. In Britain, nine Muslim men were found guilty of raping several British children. During the trial it came to light that police and social workers had repeatedly refused to investigate the cases due to their fear of being called racist.170

CONCLUSION

This article does not attempt to suggest that Islam is a dangerous religion or synonymous with terrorism. All religions have different groups within them with varying degrees of extremity to which certain convictions are adhered. Also, one cannot be over-simplistic and ignore the pluralistic nature of international law, intolerance towards groups, and massacres, such as the Holocaust and the Rwandan Genocide, which many scholars believe "were rooted first in hateful or inciting speech."171 There are specific instances where hateful and inciting speech is unacceptable under articles 19(3) and 20.172 There are also other forms of expression that can be limited. The parameters concerning the limitations of freedom of expression do not fall within the scope of this article, however, what is clear is the fact that the trend of “defamation of religion” serves as a limitation to freedom of expression that is left undefined and overly broad.

There are international human rights laws already in place which can be used to protect both Muslim and non-Muslim.173 Genuine cases meeting all the requirements of the restrictions embodied in Articles 19(3) and 20, as set out above, should be dealt with under those principles. An attempt by the UN to present and define more clearly the existing objective criteria in Articles 19(3) and 20 will help to determine violations of freedom of expression. Whether these will include the publication of blasphemous cartoons, for example, is to be determined by much greater collaboration with various religious and non-religious groups, as well as much more

169 Goldstein & Meyer, supra note 148, at 409-10.
170 Soeren Kern, Britain Ruled by Political Correctness, GATESTONE INSTITUTE (July 11, 2012, 5:00 AM), http://www.gatestoneinstitute.org/3141/britain-political-correctness.
171 Belnap, supra note 98, at 681-82.
172 ICCPR, supra note 76, arts. 19-20 (evidencing instances where limitations on freedom of expression do exist. Article 19(3) states that freedom of expression may be subject to certain restrictions including, a) respect of the rights or reputations of others and b) to protect national security, public order, public health or morals. Article 20 of the ICCPR states that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”).
173 See, e.g., id.
precision and care as has been done by way of the concept “defamation of religion.” There are also other ways to sensitively address injustices suffered by multiple religious adherents and create an atmosphere of dialogue and respect. Education by the UN, campaigns, and protests can be used to combat violations of religious minorities in different countries.

What is troubling is the fact that “defamation of religion” as a restriction to freedom of expression is not only too broad, but the development thereof is very exclusive. Many of the actions cited as “defamation of religion” have been promoted and presented by Islam and accepted by the UN. This presents an unbalanced and biased view towards religion and the equality thereof in international law. It also presents religion as defined by one religious group and therefore, in effect, limits the richness with which religion can be defined, enhanced and protected.

It is also argued that resolution 16/18 does not present a more neutral approach towards “defamation of religion” as the aims of the resolution remain the same and is still promoted by the same religious group without the necessary inclusiveness.

“Defamation of religion” also has the potential to create fears and sensitivities that can undermine the rule of law. For example, as stated above, undefined restrictions to actions against religious persons—such as arrest—may render police officers hesitant to perform their functions due to fear of retribution and being convicted of defaming that religious group. The rule of law cannot exist if the law—and in this case “defamation of religion”—is not clearly circumscribed and defined.

Besides the fact that “defamation of religion” should be clearly defined and the elements thereof determined, the legitimacy of the existence of such a concept is also questioned. First, “defamation of religion” is not included within the right to religious freedom. Second, with regards to the concept of defamation, the truthfulness of a claim is an absolute defense to a defamation charge; however, the standard of truth will be extremely difficult to apply to questions of faith and belief.

Attempts towards creating a two-tiered system of law, where some international rules govern States, but other rules govern the Arab world, will also undermine the rule of law and equality.

Islam has also been very reluctant to accept responsibility for various human rights violations. Rather, the role of the victim is adopted and an unbalanced representation of human rights violations against Islam—especially after 9/11—is presented by way of the mentioned resolutions and other documents. There is rejection of terrorism but without any acceptance of responsibility for various human rights violations.
The UN adoption of undefined doctrines that pose a challenge to the rule of law and freedom of expression, presented by Pakistan, a country where human rights violations of freedom of expression and religion are numerous, does not have a justifiable basis and is subject to severe criticism as described above.
JOANNE CASSAR V. MALTA: ON THE DECONSTRUCTION OF THE RIGHT TO MARRY AND FOUND A FAMILY BY THE EUROPEAN COURT OF HUMAN RIGHTS

Grégor Puppinck+

ABSTRACT

Joanne cassar v. malta and the cultural redefinition of natural marriage in Europe: an analysis of alleged human rights violations and potential implications for European human rights law

INTRODUCTION

Ten years after its famous ruling in the case of Christine Goodwin v UK of 11 July 2002, the European Court of Human Rights (hereafter the Court) is required again to rule on the compatibility of the impediments that prevent transgender people from marrying a person who is of the same biological sex with the European Convention on Human Rights (hereafter the Convention). While the Goodwin judgment concerned the United-Kingdom, this new case, Joanne Cassar v. Malta, concerns the small and deeply Catholic island of Malta.

The requesting party, biologically male, legally became a woman after surgical intervention.¹ The birth certificate was amended accordingly and the applicant took steps to legally marry a man; however, the Maltese authorities have refused this marriage on the grounds that the alteration of the birth record was intended only to protect his/her privacy by making his/her everyday life easier, but not to

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The Maltese Constitutional Court ruled that the impediment to marriage is justified, but considered the absence of a provision in Maltese law allowing for a “registered partnership” to be a violation of Articles 8 and 12 of the Convention, which guarantee, respectively, the right to private and family life and the right to marry and found a family. In any case, the request is no longer needed, as the partners have since ended their relationship.

Before the Court, the requesting party complains of an infringement of those same Articles 8 and 12, as well as of Article 13 of the Convention, which guarantees the right to an effective remedy.

This issue is not new to the Court. Its jurisprudence in this area has evolved since its first judgment of 17 October 1986, Rees v. United Kingdom, in which the Court concluded that “the right to marry guaranteed by Article 12 (Art. 12) refers to the traditional marriage between persons of opposite biological sex.” This appears also from the wording of the Article which makes it clear that Article 12 is mainly concerned to protect marriage as the basis of the family. Indeed, article 12 of the Convention explicitly states that “[m]en and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.” This position was upheld in a series of cases until the famous Grand Chamber judgment unanimously adopted on 11 July 2002 in the twin cases of I. v. United Kingdom and Christine Goodwin v. United Kingdom in which the Court declared that it was “not persuaded that at the date of this case it can still be assumed that these terms [man and woman] must refer to a

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2 Id.
3 European Convention on Human Rights, art. 8, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR] (“I. Everyone has the right to respect for his private and family life, his home and his correspondence; 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”); see id. art. 12, (“Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”).
4 Cassar, Eur. Ct. H.R.
5 Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) at art. 13 (Dec. 10, 1948) [hereinafter UDHR] (“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”).
7 Id.
8 Id., supra note 6, art. 12.
determination of gender by purely biological criteria.”\textsuperscript{10} In so doing, the Court explicitly made social sex, that is to say the kind that refers to the social identity experienced by a person, prevail over biological sex. This adherence to the “gender theory” is an ideological choice subject to controversy. By stating this proposition, the Court has interpreted the words man and woman in a non-ordinary sense contrary to the context in which these words were used in Article 12 which addresses the foundation of a family. However, two people of different biological sex are required to start a family.

The Court gave its reason for the reversal of its jurisprudence: “In the twenty-first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved.”\textsuperscript{11} In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable.

In addition to the substantive issues, making Cassar v. Malta a particularly interesting case, is the change of the context in relation to the Goodwin judgment. This is vividly manifested by the fact that the Maltese Constitutional Court refused to give deference to this Grand Chamber decision, and stated that the decision was of little relevance as it was based only on social changes and subject to “social engineering”.\textsuperscript{12} Such an accusation toward a Grand Chamber ruling of the European Court must provoke serious reflection. In fact, this reflection on the authority of the Court and the limits of its role in social engineering is already widely occurring within the Council of Europe, it is found in the current reform process of the Court, and extends beyond the Goodwin case. Still today this judgment is indicative of the critics and crisis facing the Court in recent years.

What was possible for the Court to impose in 2002 would most likely be much less possible ten years later. Moreover, the cultural context of Maltese, where divorce has only been allowed since 2011, is very different from that of the United Kingdom, which has given rise to almost all the cases regarding transsexuality.\textsuperscript{13}

\textsuperscript{10} Id.
\textsuperscript{11} Id.
\textsuperscript{12} Cassar v. Malta, App. No. 36982/11, Eur. Ct. H.R. (2011), available at \url{http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111018} (“The Constitutional Court further considered that the European Court’s case-law was of little relevance, as the Goodwin case had been based on the fact that there had been major social changes in the institution of marriage since the adoption of the Convention. However, these social changes had not taken place in all of the States parties and could not be imposed by a judicial organ, which was not legislative, by means of “social engineering.””).
This paper examines the case history, relevant presuppositions, and potential consequences. It concludes that Cassar v. Malta may give the Court an opportunity to correct its jurisprudence and reconnect with a more realistic and objective understanding of the right to marry and found a family.

1. Domestic proceedings

The Registrar of the Court has published a summery of the facts and proceedings; it is correct therefore we reproduce it below:

The applicant was born in 1981 and was registered on her birth certificate as male. She always felt she was in fact female and in October 2004 she sought medical help. On 20 January 2005 she successfully underwent gender reassignment surgery (involving penectomy, orchidectomy, clitoroplasty, urethral reduction, labiaplasty and penile inversion and vaginoplasty).

The applicant instituted proceedings under Article 257A of the Civil Code. On 28 June 2006 the First Hall of the Civil Court declared that the applicant had undergone an irreversible sex change and assumed the female sex (Art. 275A(2)) and it ordered that an annotation be made in the applicant’s birth certificate whereby the applicant’s details regarding sex be changed from male to female. The court further ordered that an annotation be made in respect of the applicant’s name, which was to be changed from Joseph to Joanne.

The relevant annotations to the birth certificate were duly made.

Subsequently, the applicant and her boyfriend, T., applied to the Director of Public Registry to issue the appropriate marriage banns. Their request was refused on an unspecified date.

In consequence, the applicant applied under Article 8 of the Marriage Act (see the “Relevant domestic law” section below) to the Civil Court (Voluntary Jurisdiction Section), requesting that it order the Director of Public Registry to issue the marriage banns.

On 12 February 2007 the Civil Court (Voluntary Jurisdiction Section) ordered the banns to be issued.

The Director of Public Registry challenged that decision before the First Hall of the Civil Court, which on 21 May 2008 upheld the Director’s application, finding that the decision of 12 February 2007 had been based on a premise that did not reflect reality because the relevant parties were not of the opposite sex. The court went on to find that a marriage between the applicant and a person of the male sex would be contrary to the provisions of the Marriage Act and that the annotation made on the applicant’s birth certificate following the relevant court judgment was only intended to protect the applicant’s privacy and did not give her any right to consider herself female for the purposes of marriage. It therefore revoked the decision of 12 February 2007 which had ordered that the banns be issued.

On 29 July 2008 the applicant instituted constitutional redress proceedings. She complained that the fact that Maltese law did not recognise transsexuals as persons of the acquired sex for all intents and purposes, including that of contracting marriage, breached her rights under Articles 8 and 12 of the Convention. Moreover, she complained that the fact that a transsexual could not marry either a male or a female constituted inhuman and degrading treatment under Article 3 of the Convention. She requested redress in the form of a remedy, in particular a declaration that the Director of Public Registry could not refuse to issue her marriage banns just because she had undergone gender reassignment surgery, and compensation.

By a judgment of 30 November 2010, the First Hall of the Civil Court (in its constitutional jurisdiction) upheld her claims in part. It found a violation of Articles 8 and 12 of the Convention. It considered that the sex change annotated on the applicant’s birth certificate could not only be relevant to certain circumstances which would avoid embarrassment for the applicant, but had to serve for any future event since her new gender had now been legally recognised. The fact that the law only allowed unmarried persons to make such a request implied that the legislator had in mind the effects that such a change would have on married life, and had thus limited it to unmarried persons who could in future wish to be married. Thus, the lack of recognition by the Government authorities, even for the purposes of marriage, as manifested by the Director of Public Registry’s refusal to issue the banns, constituted a violation of the applicant’s rights under Article 8. Similarly, as clearly stated in the European Court of Human Rights’s case-law, the same circumstances also constituted a violation of Article 12 of the Convention. The court declared that the Director of Public Registry could not refuse to issue the applicant’s marriage banns just because she had undergone gender reassignment surgery. Considering these declarations to be a sufficient remedy, it refused to award compensation. The court rejected her claim under Article 3 of the Convention.
On appeal, by a judgment of 23 May 2011 the Constitutional Court confirmed the part of the judgment finding a breach of Articles 8 and 12 of the Convention on the basis of different reasoning, but it overturned the part of the judgment declaring that the Director of Public Registry could not refuse to issue her marriage banns. The Constitutional Court considered that Article 8 was applicable in the present case as the applicant was denied the right to decide whether to get married or not, which was intrinsically linked to her private life. It, however, considered that the Government’s plea that the applicant was only “phenotypically” female -- namely that she only had the external genital appearance of a woman but still retained her prostate gland, which was a basic difference between males and females, and could not therefore be classified as a woman who could marry a man according to the Marriage Act -- was not devoid of merit. In fact, the applicant could not be considered a woman for all purposes of law, particularly those in relation to marriage. It further considered that to accept the meaning of marriage to include a marriage between the applicant and a man would radically change the legal nature of the relationship between man and woman according to the Marriage Act, including the relationship of those who had already contracted marriage. Seen in this light, one had to consider the rights of those persons who were already married and safeguard the institution of marriage. The "Constitutional Court" further considered that the European Court’s case-law was of little relevance, as the Goodwin case had been based on the fact that there had been major social changes in the institution of marriage since the adoption of the Convention. However, these social changes had not taken place in all of the States parties and could not be imposed by a judicial organ, which was not legislative, by means of “social engineering”. Nevertheless, although the Registrar’s decision was not unlawful, it did not mean that the interference with the applicant’s private life had been justified. In the legal situation as it stood, the applicant could neither form a registered life partnership with a man nor with a woman. It was thus, in the Constitutional Court’s view, the lack of legislation providing for a registered life partnership for people in the applicant’s position which breached the applicant’s Article 8 rights, as the State had failed to fulfil its positive obligation. Such a registered life partnership, which could not be a marriage and which was to be regulated by the State, would suffice as a remedy. For the same reasons, namely only because of the lack of legal provision and therefore the opportunity for the applicant to enter into a registered life partnership, and not because of her inability to marry, there had also been a violation of Article 12. The Constitutional Court considered that the remedy provided by the first-instance court (namely the declaration that the Registrar could not refuse to issue the banns under the Marriage Act) would therefore not be an appropriate remedy in the circumstances of the case. In any event, the applicant had recently broken off her engagement – therefore the banns could not be issued. It ordered a copy of the judgment to be transmitted to the Speaker of the House of Representatives.
Relevant domestic law

Articles 257A and 257B of the Maltese Civil Code, Chapter 16 of the Laws of Malta, in so far as relevant, read as follows:

“257A”(1) It shall be lawful for any unmarried person domiciled in Malta to bring an action for an annotation regarding the particulars relating to sex which have been assigned to him or her in the act of birth.

(2) Before delivering judgement, the Court shall appoint experts to verify whether the person who has brought the action has, in fact, undergone an irreversible sex change from that indicated in the act of birth or has otherwise always belonged to such other sex.”

“257B”(1) The court shall allow the plaintiff’s request if it is of the opinion that it has been sufficiently established that the plaintiff belongs to the sex claimed by him and that the plaintiff’s condition can be considered as permanent.

(2) The court may also order an annotation in the name or names of the plaintiff if it has allowed the request.”

Paragraph 8 of the Marriage Act, Chapter 255 of the Laws of Malta, reads as follows:

“(1) If the Registrar is of the opinion that he cannot proceed to the publication of the banns or that he cannot issue a certificate of such publication he shall notify the persons requesting the publication of his inability to do so, giving the reasons therefore.

(2) In any such case, either of the persons to be married may apply to the competent court of voluntary jurisdiction for an order directing the Registrar to publish the banns or to issue a certificate of their publication, as the case may require, and the court may, after hearing the applicant and the Registrar, give such directions as it may deem appropriate in the circumstances, and the Registrar shall act in accordance with any such directions.”

The applicant complains under Articles 8, 12 and 13 of the Convention that she was not granted an effective remedy in respect of the breach of her rights and therefore that she is still a victim of a violation of
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Articles 8 and 12 of the Convention.” (End quote of the Court’s Registrar summary of the facts)\textsuperscript{14}

2. The applicant’s alleged violation of the right to marry

The case of Cassar v Malta would be very simple to resolve if we still had a clear understanding of marriage and the role of the Court. This case gives the Court an opportunity to remold its jurisprudence on a solid foundation.

It is important, before beginning a study of this case, to recall three facts:

a. There is a Very Serious Doubt as to the Victim Status of Joanne Cassar

As stated in the Brighton Declaration, it is important that the Court “continues to apply strictly and consistently the admissibility criteria, in order to reinforce confidence in the rigor of the Convention system and to ensure that unnecessary pressure is not placed on its workload.”\textsuperscript{15} Thus, when serious doubts arise as to the admissibility of a query, it is in the interest of the proper administration of justice to first rule on the issue of admissibility before, where appropriate, considering the merits of the case. It is quite obvious that should be the case here. Acknowledging the absence of victim status does not mean denying that there is personal suffering.

b. Same-Sex Couples Do Not Have a Right to Marry

It is important to remember the constant position of the Court according to which “Article 12 does not impose an obligation on Contracting States to grant same-sex couples access to marriage, Article 14 taken in conjunction with Article 8, a provision of more general purpose and scope, cannot be interpreted as imposing such an obligation either.”\textsuperscript{16}

c. Absence of the Right to Form “Civil Unions”

It is also worth recalling that the Convention does not guarantee a right to public legal recognition of different forms of civil unions and alternatives to marriage. Whereas the Court endorsed the idea that such a new right could potentially arise in the future, resulting from a possible future consensus, it is, therefore, quite clear that no such right exists in the Convention as it stands.

Those three facts had to be recalled before going more in the details of this case. The fact that a Constitutional Court is able to declare that a unanimous Grand Chamber decision is of little to no import, and has no authority because it is based only on social evolution and social engineering, should cause serious reflection. In fact, a regard of the Court’s authority as weakened is already widely spread throughout the Council of Europe; it exists in the current reform process of the Court, and extends beyond the Goodwin case. This case has become iconic, emblematic of certain flexibility, in that it overturned another recent Grand Chamber decision, Sheffield and Horsham v. UK.

The Goodwin case highlighted the need to not jeopardize the value and authority of the Convention by an excessive interpretation of its provisions, in particular Article 8. More generally, it is necessary to preserve even the philosophy of the Convention, as it is from its philosophy that its authority is derived. The authority of human rights is derived from their reflection of man’s nature; they are the result of what man is. Human rights focus primarily on all the characteristics (capacities), which distinguish man from animals: a capacity to think, to express themselves, to live in society, to pray, and to found a stable family, etc. Human rights are intended to guarantee the exercise of human capacities—capacities to think, speak, pray, have a family, and move about—not to grant purely theoretic or symbolic rights. Thus, human rights are not arbitrarily defined according to the will of an individual concerning each subject. Subjectivism relative to

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17 Schalk and Kopf, Eur. Ct. H.R. para. 105 (“[T]here is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes”).

18 Cassar v. Malta, App. No. 36982/11, Eur. Ct. H.R. (2011), available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111018 (“The Constitutional Court further considered that the European Court’s case-law was of little relevance, as the Goodwin case had been based on the fact that there were major social changes in the institution of marriage since the adoption of the Convention. However, these social changes had not taken place in all of the party States and could not be imposed by a judicial organ, which was not legislative, by means of ‘social engineering.’”).

individualism, by rejecting the reference to the nature of man, leads to the destruction of the basis and philosophy of human rights.

This practice of questioning the foundation of the philosophy of human rights is clearly visible as regarding the right to marry and found a family. This right, which exists because it is in the nature of human beings within society to marry and start a family, is fast becoming a subjective and relative right, so much so that it is no longer clearly distinguishable from the right given to protect private life.

3. The Right to Marry and Found a Family as a Natural Right

Eamon de Valera, then leader of the Irish government and former President of the General Assembly of the League of Nations, asked, during the creation of the Convention, “Is there anybody in this Assembly who will not agree that it is a natural right that a man or woman should be permitted to marry and found a family? If this is so, then why do we have any doubt in our minds about proclaiming it as such?”20 Indeed, the right of a man and a woman to marry and found a family is a natural right, that is to say that it exists in the nature of things, in this case in the nature of men and women. Thus, the conditions for the exercise and the consequences of the right to marry and to found a family are determined by natural law, which greatly predates positive law.

The law holds that two principle characteristics exist in marriage: its goal is the creation of a family and it is a part of society. Marriage, as a social institution, seeks to give the family a protective environment, so that the family may contribute to the permanence and the common good of society. This dual characteristic is evident in the formulation of the various declarations of rights.

a. The Right to Marry and its dissociation from the Right to Found a Family

It is the right to found a family that gives meaning to the right to marry. The right to marry is almost an accessory to that of a family; it is an instrument in its service. This is the case in all declarations of rights: thus, for example, the recent Charter of Fundamental Rights of the European Union does not speak of the “right to marry,” but of the “right to marry and the right to found a family.”21 To marry and found a family is one and the same right. Article 16 of the Universal Declaration of Human Rights (1948) also states that “[m]en and women of full age, without any limitation due to race, nationality or religion, have the right to marry and found a family.”22 Also, the International Covenant on Civil and Political Rights of 1966 states, in Article 23 § 2, that “[t]he

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21 Charter of Fundamental Rights of the European Union, art. 9, 2000 O.J. (364) 1 (EC).
22 UDHR, supra note 6, art. 16.
right of men and women of marriageable age to marry and to found a family shall be recognized."

Through these formulations of the right, it is seen that marriage is an institution that serves the family: marriage is an instrument, the purpose of which is to serve the family. Thus, the conditions and impediments to marriage are not arbitrary, but are the consequences of the purpose of marriage. These conditions are primarily natural: these natural conditions require that the parties be of marriageable age, that is to say that the ability to procreate must exist, there is a difference between the sexes of the spouses, which is also a prerequisite to procreation, and there is no consanguinity, which presents an obstacle to healthy procreation.

b. The Right to Marry and its intent

It is also a primary reality, naturally, that the family is the fundamental group unit of society. Society is not an artificial reality composed of juxtaposed individuals. This is strongly emphasized by the law: the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights both affirm that the “family is the natural and fundamental group unit of society, and is entitled to the protection of society and the state.” Article 16 of the Revised European Social Charter contains the same goal “[w]ith a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means.”

The International Covenant on Economic, Social and Cultural Rights states in Article 10 that “[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.”

The latter provision demonstrates the natural relationship between children, their families, and society. It is for these reasons that the family is the natural and fundamental group unit of society, in that it contributes in an essential manner, primarily to the common good according to which society survives, and it is natural for these reasons: first, preexisting positive law, and second, society grants special status to marriage in order to protect the family. The Court recognizes that the

24 UDHR, supra note 6, art. 16(3); ICCPR, supra note 24, art. 23(1).
“stability of the marriage is a legitimate aim. . . . in the public interest.”

It is very important for society that families are stable and are able to fulfill their role. In addition to the purposes of procreation and child rearing, and the propagation of culture, the family is also first in creating cohesion, especially between generations. Marriage is aimed in particular at ensuring protection for the weakest members of the family. By marrying, spouses make a public commitment. Therefore, it is not just an individual lifestyle, but also a social decision. The fact that they make their commitment publically is constitutive of marriage: a secret marriage is in most cases not a marriage. This publicity allows, if necessary, the court to provide protection to an aggrieved spouse. In return for the commitment of the spouses to each other and to society, to which they provide the future, they receive social protection. The Preamble to the Convention on the Rights of the Child states, “the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.” Protection, including legal protection, of the family based on marriage requires the State to recognize its uniqueness when compared to other forms of unions, and the Court has done so in numerous cases, e.g. *Manec v. France*. In this case, the Court found that partners bound by a civil union were not similarly situated or comparable to spouses. This also implies that the State does not grant the title of marriage and its subsequent protection to unions, which by their nature do not exhibit the characteristics of marriage, including the ability to procreate. In *Sheffield and Horsham v. United Kingdom*, the Grand Chamber affirmed, inter alia, that “Article 12 refers to the traditional marriage between persons of opposite biological sex. This appears also from the wording of the Article which makes it clear that Article 12 is mainly concerned to protect marriage as the basis of the family.”

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27 See Code Civil [C. civ] art. 191 (Fr.); 1983 CODE c.1130 (accepting secret marriages only in serious and urgent cases, and then only with the permission of the bishop).
31 Id.
Goodwin decision, understood and respected the first social reality: marriage is inseparable from the family, which is part of society. Thus, according to its established jurisprudence, the Court stated that “Article 12 (art. 12) lays down that the exercise of this right shall be subject to the national laws of the Contracting States. The limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired.”

For the drafters of the Convention and the other above mentioned instruments, there is no doubt that the essence of the right to marry is precisely that people may found a family within the protection of society. If we were to say, as the Court did in Goodwin, that essence of the right guaranteed by Article 12 is the merely the capacity to marry, we would be wrong: that would reduce marriage to only a formal aspect. We reiterate the former Commission’s stance that marriage “is not regarded in the Convention merely as the expression of an intention, conscience or religion, but also as a social institution.”

4. Article 12’s definition of Marriage

Article 12, like the above cited provisions, defines the right to marry and to found a family. Due to the natural characteristics of the family, the conditions and consequences of the exercise of the right to marry and found a family are determined by the nature of things. Thus is the case with the prohibition of child marriages or incest, or the alterity of the spouses. Monogamy, equality of the spouses, and the mutual rights and obligation of the spouses also derive mainly from the nature of marriage. However, only the effort of Western, Roman, and Christian culture have made these rules clear, objective, and universal.

Thus, the provision of the Justinian Corpus Juris Civilis forbidding polygamy is reproduced verbatim in French positive law. “No person may contract a second marriage before the dissolution of the first.” The late classical jurist, Modestinus, wrote during the 3rd Century, in his digest Ritu Nuptiae, “[n]uptiae sunt conjunctio maris et feminae, consortium omnis vitæ,” i.e. marriage is the union of a man and

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35 Id.
36 Code Civil [C. CIV.] art. 147 (Fr.).
a woman (between them only) for life.\textsuperscript{37} This definition, found in Canon 1055 of the Code of Canon Law of 1983, defines marriage as “[t]he matrimonial covenant, by which a man and a woman establish between themselves a partnership of the whole of life.” This Canon states the purpose of marriage—the procreation and education of children and the good of the spouses.

Usually, the practice is to define a thing by saying what it is and to refrain from making a list of everything that it is not. This is how the law defines things. However, in Schalk and Kopf, the Court essentially said that Article 12 does not preclude that the right to marry may also apply to same-sex couples because it does not prohibit it.\textsuperscript{38} Just as it can be argued that Article 12 does not prevent homosexual marriage, it may also be accurately argued that it does not preclude the recognition of a right to marry “multiple” spouses or children. Requests for recognition of a right to marry multiple spouses\textsuperscript{39} are perfectly foreseeable, whether based on sexual orientation (including bisexuality\textsuperscript{40}), personal fulfillment, or religion. Such a request may well reveal the cultural characteristic of arbitrariness in the recognition of gay marriage and the non-recognition of polygamous marriage.

Article 12 states what marriage is; it does not bother to say what it is not, and it does not prohibit States from giving public recognition of other unions; but these other types of unions or “marriage” are not the marriage defined by Article 12 and thus cannot benefit from the protection granted to marriage as defined in this article.

A departure from considering marriage in relation to what it is, and instead considering it as a function of “what-is-not-said-is-not,” makes its definition is necessarily arbitrary, despite all efforts and goodwill to the contrary.

The right to marry is the right of a couple, composed of a man and a woman with the purpose of that union being to start a family, is recognized and protected by society. It is true that some couples do not

\textsuperscript{37} See generally GABRIEL DEBACQ, Des nullités de mariage en droit romain et en droit français [Nullity of marriage in Roman law and French law], Doctorate Thesis, (Paris 1863) (Note the use of the terms maris and feminae, literally male and female, is extremely rare in Latin for man and woman, just as if Modestin precisely wanted to insist on the difference between sexes. Furthermore, in the Institutes designed to teach law, Justinian employed the more common terms vir and mulier: “Viri et mulieris conjunctio individuam vitae consuetudinem continens” (the union of a husband and wife, starting a normal life undissociated).


\textsuperscript{40} Lionel Labosse, A “Universal Agreement” on a Number Rather than a Double Wedding, be it Gay (Le MONDE, 2012) (An article in Le Monde newspaper suggested that monogamous marriage, even open to homosexuals, would “biphobe,” because it would deprive them of their bisexual orientations. It should be replaced by a “universal agreement,” against civil unions, open to two or more persons.).
have any children, but this is the exception to the rule. Thus, impediments to marriage are not restrictions on the ability to exercise the right to marry; they are determined only by the very definition of marriage—by its purpose. It is only by reference to what marriage is, to its definition, that the impediments to marriage can be justified. In Western societies, the impediments to marriage are not arbitrary cultural obstacles (there is no social, religious nor racial impediments), but are the consequences of the definition, the ultimate purpose, of marriage.

5. Misrepresentation of the Right to Marry as an Individual Right or Freedom

It is enlightening to understand the particular nature of the right to marry, which is neither an individual right nor a freedom. In Goodwin, the Court considered the right to marry as though it were a freedom or an individual right of which the applicant was deprived. However, unlike freedoms (Articles 8–11), the content of the right to marry is not determined by its subject: it is precisely defined by society. The right to marry and the right to express oneself in public are not of the same nature.

The right to marry is not a right that belongs to a person as an individual, because it belongs to the couple, not the individual. Furthermore, while individual rights and freedoms protect the individual from the State, Article 12 enshrines a reciprocal commitment between the couple and society: the spouses are committed vis-à-vis each other, and society, which in return gives them its protection because of the benefit received from the family established by that marriage. The right to marry involves three players: the man, the woman, and society, with a common interest—the family.

6. Goodwin’s deconstruction of the Right to Marry and Found a Family

In Goodwin, the Court stated that “Article 12 secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as per se removing their right to enjoy the first limb of this provision.” In so doing, the Court completely deconstructed the right to marry and found a family. It is true that the second aspect (a family) is not a legal requirement for the first (to marry), it is more: it is the purpose (ultimate goal).

7. The Goodwin ruling severed marriage from its purpose: The Family.

By severing marriage from its purpose, the Goodwin decision has destroyed the “de-definition” of marriage. The words “determine” and “define” are synonymous: they indicate that a reality is designated by its term or purpose (its ultimate goal). Severing a reality from its term or purpose eliminates the determination or definition. Indeed, a right is defined by the purpose of its object. It seeks to ensure the attainment of its objects. Freedom of association or the freedom of union does not end with the formal establishment of the association or union. Freedom of association has the purpose of allowing trade union action; the formal establishment of the union is only the means by which the purpose, trade union action, is achieved. The means (the formation of the union) is defined by the end, by the purpose (the nature of the proposed action). To say that the right to marry exists independent of the right to start a family is like saying that the right to form a union exists independent of the right to conduct trade union action. Basically, to separate the right to marry from founding a family is to make marriage theoretical and illusory. Can we say to two people: you have the right to marry, but not to found a family? Your right to marry is only formal? Being able to found a family under the protection of society is the very essence of the right to marry; these two aspects are inseparable. To sever marriage from its purpose not only changes its definition, but also transforms it into a purpose in and of itself, causing it to become merely symbolic, as there is no concrete purpose external to itself. The claim to open marriage to same-sex couples is in a large extent more aimed at accessing to the social symbol that is marriage, rather than founding a family.

Moreover, by severing the right to marry from its purpose, marriage is reduced to materiality: the recognition by society of the union of a man and a woman, i.e. formality with some publicity. The social, personal, and legal consequences of marriage, enjoyed by a married couple without children, are intended for the good, not of the couple, but of the family. In this respect, procreation is so constitutive of marriage that Roman law penalized those who married and had no legitimate children, by restricting their ability to receive inheritances.

8. Goodwin removes the need for sexual alterity.

Then marriage is separated from its purpose—the founding of a family—the requirement of sexual alterity imposed by Article 12 loses its rationale. A difference between the sexes of the spouses is only a

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42 This link between the right to marry and to found a family is so ingrained that the opening of marriage to same-sex couples is almost always associated with the recognition of a right to adoption or artificial procreation.

43 GUSTAV HUGO, HISTORY OF ROMAN LAW, Vol. II, 42s (2d. ed. 1825).
consequence of the purpose of marriage. It is not a “gender stereotype” nor a “homophobic” or “transphobic” prejudice.44

9. The Goodwin ruling makes marriage a subjective individual right.

The Court had “individualized” the right to marry, stating that marriage is independent of the founding of a family. This view of marriage from the perspective, not of the family—the fundamental unit of society—but from that of the individual, is a prerequisite for the transformation of marriage into a subjective right.

This transformation of the right to marry into a subjective right appears blatantly in the Cassar case, because—and it is important to point out—the request before the Court is presented by a single applicant, not by a couple (as the applicant has ended her relationship with her partner). However, the right to marry, unless it becomes a subjective right, belongs to the man and the woman who form a couple, and not to a single person. The same is true of the freedom of association, which belongs, by nature, to several people. Are we to imagine that a single person could complain to the Court of his or her inability to form an association?45

10. Goodwin replaces the sexual reality by the concept of Gender.

In the Goodwin decision, the Court stated that it “is not persuaded that at the date of this case it can still be assumed that these terms must refer to a determination of gender by purely biological criteria.”46 As such, the Court substituted the concept of “gender” for the reality that comprises the basis of sex. The law, particularly European, must distinguish carefully between three concepts that are the basis of sex, gender, and sexual orientation.

- Sex refers to biological sex—chromosome;
- Gender refers to social identity experienced by the person (feminine, masculine, androgynous, etc.);
- Sexual Orientation refers to the orientation of sexual attraction.

A transsexual person, operated on or not, can only change its “gender.” Social identity may be different from biological identity and is independent of sexual orientation. It was in reference to gender identity that the Court spoke, in view of Article 8, of the freedom of an individual

45 Id.
46 Id.
to determine his or her gender: 47 such freedom can only be social in nature, not biological—only sexual appearance can be changed. It is by fiction that the law allows this, solely to ease the conflict between social appearance and the biological reality of a person; it is beyond the scope of the law to substitute gender for sex. Adherence to the “gender theory,” according to which gender identity is a social construction that takes precedence over biological reality, is an ideological choice, and the topic of many heated controversies. Adherence to this ideology can only harm the credibility of the institution and scope of the law.

That being said, because the purpose of Article 12 is intended only for biological sex, there cannot be seriously any recognition of “gender identity” under the Convention. It is clear that under the respect due to his private life, a transsexual should be able to obtain certain accommodations, such as in civil status, so that “the discrepancy between [the] legal sex and [the] apparent sex” 48 of a transsexual does not place them “daily in a situation which, taken as a whole, is not compatible with the respect due to [ ] private life.” 49 This right exists under the respect due for the privacy of the person. It has no effect on the right to marry and start a family, which does not originate from the person (such as a subjective right), but rather directly from the essence of family and its contribution to society.

In accordance with the rules relating to the interpretation of treaties, a treaty must 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.” 50 There is no doubt that in Article 12 “man” and “woman” refer to sex, not gender. The context of these words, which links marriage to the foundation of a family, that is to say, procreation, confirms this obvious interpretation. Indeed, the Court recognized this in Schalk and Kopf v. Austria. It noted: while “all other substantive Articles of the Convention grant rights and freedoms to ‘everyone’ or state that ‘no one’ is to be subjected to certain types of prohibited treatment.” 51 The Court further noted that Article 12 uses the terms “man and woman,” and it concluded that “[t]he choice of wording in Article 12 must thus be regarded as deliberate.” 52

11. The Risk of Reducing the Right to Marry to the Right to Privacy

49 Id.
52 Id.
Without the necessary reference to its purpose—starting a family—which only justifies its legal status, the distinctiveness of this status compared to other forms of non-family unions appears arbitrary.

A marriage without the purpose of a family is a private relationship made public. Such a marriage, by not becoming the proprietor of a legal and natural fundamental unit of society, no longer contributes to the common good: it is only for the private good of the couple. A marriage voluntarily severed from its purpose and reason for existence (the family) is reduced to a couple, and, ultimately, to only the sphere of privacy which is provided sufficient protection under Article 8. It is also noted that many couples wait until they are married to have children, or marry only once they have children: they do not see any reason for marrying in the deliberate absence of children. Then they are not only protected by Article 8, but also by Article 12, and benefit from the protection of society.

12. Destruction of the Natural Definition of Marriage and the forced Substitution of a Cultural Definition

If we destroy the definition of marriage and make it a social phenomenon independent of its purpose, then on what basis may the Court prevent recognition of the existence of a right to polygamous or child marriages? This issue will likely be soon brought before the Court.

Prohibiting children from marrying is not the result of a negative moral judgment against children, nor is it with regard to same-sex couples. If marriage is a social phenomenon independent of the family and of the sexual identity of the spouses, how do we then justify prohibiting polygamous families from marrying officially? It can also be argued that the impossibility for polygamous Muslim families to access marriage is an interference with their private and family (and also religious) life, this makes their administrative and social life very complicated. They can pretend enduring suffering, humiliation, and misunderstanding on the part of society. Nevertheless, polygamous marriage does not meet the definition of marriage as it has been "objectified" in light of the nature of men and women, and in terms of their natural equality. By abandoning this objective definition and the purpose of Article 12, the Fifth Session, in the Stübing v. Germany decision53 of April 2012, no longer had a means of justifying the prohibition of incestuous sexual relations, in the context of a family

founded by the union of siblings, but only a reference to the “consensus,” that is to say culture.\textsuperscript{54}

Thus, it is only on the basis of developments of European consensus, that is to say the spirit of the times as perceived by the Court, that it could justify depriving a brother and a sister of the enjoyment of the right to marry. It is difficult to find a weaker, and, ultimately, less arbitrary argument. The Grand Chamber also noted that with regard to sensitive moral issues, the existence of a consensus is not a decisive factor.\textsuperscript{55}

13. The Cultural Redefinition of Marriage and the Relinquishment of the Universality of Human Rights

This cultural redefinition of marriage deprives the right to marry of the objectivity necessary to qualify it to be universal, as a right. A right to marry which is not defined in relation to the purpose of its object (to found a family) and means to this end (maturity and alterity), but is subject to evolving mentalities, ceases to be intrinsically binding.

As with any human right, the existence and the binding nature of the right to marry is not a result of cultural mentality; it exists because marriage is inherently useful, even necessary, for the establishment and good of a family, and in an integrated family, for the common good of society. Thus, to depend on cultural mentalities for the substance of the right to marry deprives it of its intrinsic binding force, i.e. changes its very nature, substituting it with the extrinsic authority of perception of evolving morality, which is always relative. Redefined by culture, the right to marry derives its value and its strength from this same culture; it becomes contingent and must renounce its universality. Also, the universality of human rights presupposes and requires a universal concept of man, and the universality of the right to marry requires a universal concept of marriage. However, the discovery of a universal

\textsuperscript{54} Id. para. 61 (“Applying the principles set out above to the instant case, the Court observes that there is no consensus between the member States as to whether the consensual commitment of sexual acts between adult siblings should be criminally sanctioned (see paragraphs 28-30, above). Still, a majority of altogether twenty-four out of the forty-four States reviewed provide for criminal liability. The Court further notes that all the legal systems, including those which do not impose criminal liability, prohibit siblings from getting married. Thus, a broad consensus transpires that sexual relationships between siblings are neither accepted by the legal order nor by society as a whole. Conversely, there is no sufficient empirical support for the assumption of a general trend towards a decriminalisation of such acts. The Court further considers that the instant case concerns a question about the requirements of morals. It follows from the above principles that the domestic authorities enjoy a wide margin of appreciation in determining how to confront incestuous relationships between consenting adults, notwithstanding the fact that this decision concerns an intimate aspect of an individual’s private life.”).

concept of an object can only be done by an objective effort. The transformation of the right to marry and start a family into a subjective right or freedom, itself dependent on the evolution of social acceptability, destroys any objectivity in this right, causing it to lose both its universality and its intrinsic binding force.

14. Cultural Redefinition of Marriage and its Binding effect on states

The problem arises in the same terms, although to a lesser extent, within the States that are parties to the Convention, as some States have abandoned the common concept of marriage in favor of a subjective approach. The Court, in several cases, has indicated a desire to follow this social evolution, and has even sought to impose its desire on other States.56 But a cultural redefinition, inherently relative and expandable, and clearly detached from the objective definition of the Convention, is not binding upon a Member State. When it acceded to the Convention, Malta at no time committed to adopting a redefined concept of marriage; on the contrary, the terms of Article 12 continue to lead to an objective definition of marriage which is between a man and a woman for the purpose of starting a family as recognized and supported by society.

In Malta, marriage closely adheres to its natural pattern. Thus, on this island where 95% of the population is Catholic, divorce was not legal until the summer of 2011.57 As had been always stated in the jurisprudence of the Convention, it is “for the national legislation to lay down the rules according to which a marriage is not valid and to draw the legal consequences.”58 “In that connection the Court observes that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another.”59 Malta has chosen to respect the letter and the spirit of the Convention by holding that marriage is the union of a man and a woman, according to their biological sex. Not only does “Article 12 of the Convention [] not impose an obligation on the respondent Government to grant a same-sex couple like the applicants access to marriage,”60 even if one of the partners has undergone an operation and artificially altered his or her gender, but to cover, under Article 12, unions that do not exhibit the characteristics of marriage, in

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60 Id. para. 63.
particular the possibility of procreation, constitutes a misuse and a distortion of the meaning of the Convention. The Court cannot say that a State submitted to the treaty is under an obligation to waive the conventional definition of marriage. To claim that such an obligation exists in order to change the conventional definition of marriage tells the Convention what it does not say. In this sense we can understand the reluctance of the Constitutional Court of Malta and its reference to social engineering.

CONCLUSION

The more the Court ventures in its judgments to create new subjective rights (abortion, artificial procreation, euthanasia, etc.), the more is breaks down the unity of human rights and obscures their intelligibility, and ultimately weakens the European consensus supporting human rights. Subjectification of human rights destroys their objectivity and their intrinsic authority: they become cultural, relative, and subject to controversy.

Hopefully the Court will take the opportunity, in the case of Cassar v. Malta, to correct its jurisprudence and reconnect with a more realistic and objective understanding of the right to marry and found a family. The refusal of the Supreme Court of Malta to take seriously the Goodwin judgment is just one example, among others, of the increasing willingness of European states to moderate the “progressivism” or activism of the Court in its interpretation of the Convention. This is clearly perceptible in the current reform process of the Court, as well as in the recent rejection of the draft recommendation of the Committee of Ministers on “the rights and legal status of children and parental responsibilities”.

The purpose of this project was precisely to redefine family law without reference to the principle of a family founded by a man and a woman, but in reference to a series of subjective interpersonal legal relationships linking children and a diversity of adults of varying status (biological/social/legal parents, heterosexual, homosexual, married, civil partnership, cohabitants, surrogate mothers, and gamete donors). According to the first article of the Recommendation, all of these relationships are “equalized” through their common subordination to the principle of non-discrimination erected as the corner stone of the Recommendation. This project faced strong opposition by a large number of European states who refuse to endorse a denaturing of family law.

In *Fine*, the Court is too often trapped into the dialectic opposing progress and tradition. Its judgments are less considered by commentators in function of their legal accuracy (in light of the Convention on Human Rights) than in function of their degree of progressivism and “social advancement” that these judgments realize or promise. This dialectic, which refers more to Progress that to Justice, introduces the Court into a logic of division and battle of will that alters the quality of its judgments and contributes to the weakening of its authority.
THE RIGHT TO SELF-DEFENSE:  
HOW THE UNITED NATIONS CAN AND SHOULD PROMOTE AND PRESERVE THE RIGHT TO SELF-DEFENSE IN MEXICO IN THE MIDST OF THE WAR ON DRUGS

Nicholas J. Cravotta

ABSTRACT

Selling narcotics to quite large, profitable United States drug markets, drug cartels have grown in wealth and power in Mexico since the 1960’s. Sadly, this significant concentration of wealth and power was in the hands of non-state actors; completely separate from the legitimate governing authority of Mexico. Since Mexico declared war on drug cartels, the Mexican people have suffered from increased and sustained violence. The first part of this note is the introduction which will describe the Drug War that Mexico has been suffering from for so long. The second part of this note establishes the universal right to self-defense, and why the United Nations and countries around the world should adjust their official conduct in order maintain and promote that right. The third part of this note surveys also the escalation of violence and also the statistics on gun proliferation and drug-related murders. Then, the fourth part of this note will describe the sheer violence that has been caused by the War on Drugs. The fifth part will be the basis for highlighting the flaws of United Nations treaties addressing gun proliferation in Mexico when considered in light of the nature of the Mexican Drug War. After detailing the flaws in the United Nations strategy to ending violence in Mexico, the final fifth part of this note will then describe a more appropriate, effective method for ending the Mexican Drug War.

I. INTRODUCTION

Drug cartels in Mexico have acquired immense wealth and power over the past half-century and have challenged the governing authority of the state of Mexico. The Mexican people have suffered a significant amount of death, destruction, and violence at the hands of drug violence. United Nations arms reduction treaties geared toward disarming violent drug cartels is largely
ineffective and in fact inhibit Mexicans’ self-defense rights because they only disarm well-intentioned Mexicans, often prevent violent resistance that is for the common good, and fail to address the root cause of violence which is ultimately heavy drug consumerism. In this paper, I will argue that only a serious loosening of domestic gun restrictions in Mexico will enable Mexicans to defend themselves from drug cartels and will ultimately end the Drug War in Mexico.

II. THE HUMAN RIGHT TO SELF-DEFENSE

The United Nation’s founding principle is the prevention of war and conflict.\textsuperscript{1} Founded after the World War Two, a philosophy of pacifism and international cooperation was the underpinning of the United Nations. Although the United Nations did not purport to make a policy to end all conflicts within nations and between nations by intervention, the United Nations attempted to reduce conflicts through intergovernmental cooperation, one form of which is small arms reduction treaties.\textsuperscript{2} The policy reasoning behind these international treaties was that the reduction of arms will reduce conflict which will prevent instruments of death from feeding the destructive intentions of either belligerent state, or in some cases, insurgent groups.\textsuperscript{3} In order to fulfill this mission, the United Nations generally employed international arms regulation measures that were aimed simply at the prevention of violence by reducing the amount of illegal and legal weapons.\textsuperscript{4} Focused on these two features for largely practical reasons, the United Nations necessarily ignores, or at least drastically underappreciates 1) a country’s unique national characteristics and 2) even inhibited violence in the form of justifiable self-defense.

The right to self-defense with the purpose of protecting one’s own life or another’s life is the only foundation on which justifiable violence is premised.\textsuperscript{5} The preservation of life is the underpinning of this right and violence is therefore more than acceptable for self-defense in the form of justifiable resistance.\textsuperscript{6} Across the world, the United Nations deals with this consistently. Citizens must defend themselves from insurgent groups and criminal organizations with weapons and often the line is blurred between self-defense and murder. Nonetheless, the right to self-defense is critical for not only the preservation of life, but also ultimately

\textsuperscript{1} U.N. Charter art. 1, para 4.
\textsuperscript{2} U.N. Charter art. 57, para 1.
\textsuperscript{4} Id.
\textsuperscript{6} Id.
maintains the dignity of the free, sovereign human person. Consequently, self-defense is both a right and moral obligation in the Roman Catholic Church.\textsuperscript{7} The Catechism section on “Legitimate Defense” in the Roman Catholic Church demands the application of force in two contexts: humans protecting themselves and other human beings, and also the state applying force when necessary to protect its citizens.\textsuperscript{8}

Resistance is not only to be exercised by individuals, but by the state when groups or criminals threaten the country’s stability.\textsuperscript{9} The state or governing authority of every nation must employ force in any form to ensure that peace and stability is preserved.\textsuperscript{10} Furthermore, the state may “curb the spread of behavior harmful to people’s rights and to the basic rules of civil society” and “inflict punishment proportionate to the gravity of the offense.”\textsuperscript{11} The success of government law enforcement often determines the extent to which insurgent groups can continue to wreak havoc on the country. Finally, the level of success thereby determines whether local citizens will have to resort to self-defense because the government has not or cannot preserve peace and order. In developing parts of the world where states do not have the resources to enforce peace and stability, an even greater need to enable and promote self-defense arises, because citizens will not have the state for their defense.

The country of Mexico has a larger amount of gun violence. Since 2000, violence has been especially high in Latin America and the Caribbean because of the large amount small arms that are transported to Latin American countries of the world.\textsuperscript{12} Developing countries of the world are not only the unlucky destination of internationally transported small arms, but developing countries are also. Everyone has a moral duty to render an unjust aggressor unable to cause harm, because a life that is unjustly threatened must be protected in order to preserve life’s inherent dignity.\textsuperscript{13}

The United Nations does not fully appreciate that violence is necessary for the common good in some circumstances, but the Catholic Church upholds that violence can be for the common good because it can serve to preserve life that is

\textsuperscript{7} Id.  
\textsuperscript{9} Id.  
\textsuperscript{10} Id.  
\textsuperscript{11} Id.  
\textsuperscript{13} Id.
unjustly threatened.\textsuperscript{14} Although the United Nations has always upheld and supported the dignity of the individual person, albeit with the exception of unborn, the Catholic Church’s basis for the right to self-defense is deeper than that of the United Nation’s justification for self-defense. The United Nations’ only real rationale for proclaiming self-defense is to avoid creating inconsistencies stemming from the United Nation’s staunch pacifist stance. Self-defense has often been ignored in international contexts when the United Nations created arms reductions treaties with intent to prevent violence or disarm violent groups.

The United Nation’s position on peace and war is premised on the prevention of violence.\textsuperscript{15} To accomplish this goal, the United Nations has idealistically limited their efforts to non-violent means. This mantra is exemplified well by the statue of the twisted gun in New York City. However, the United Nations restricts its conception of self-defense to negative measures like reducing guns instead of positive measures to affording and enabling citizens of the world to maintain their own peace and security through self-defense. This inherent affirmative feature of the right to self-defense is simply not encapsulated in the United Nation’s plan to creating peace in the world.

III. THE MEXICAN DRUG WAR HAS BEEN INCREASINGLY DEADLY AND VIOLENT

The escalation of violence in Mexico demonstrates that the Mexican Drug War has not as of yet been successfully controlled by the Mexican government. President Felipe Calderon’s commencement of the war on drugs in 2006 has been valiant but in the end has not eradicated the drug cartels nor has it prevented drug violence from reaching innocent Mexicans.\textsuperscript{16} The violence in Mexico has been primarily in the form of a civil war, a war between the people of Mexico and drug cartels, and finally the Mexican government.\textsuperscript{17} Because the drug cartels have the motivation and resources to wage conflict primarily with small, readily available arms, and because the government does not have the resources to quell this criminal enterprise, the increase of intentional homicide has been uninterrupted since 2007.\textsuperscript{18}

Evidence is abundant that just the sheer amount of gun violence and crime has increased dramatically in Mexico over the past twenty years because of the War

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{14} \textit{Id.}
\item \textsuperscript{15} U.N. Charter, \textit{supra} note 1, at art. 1.
\item \textsuperscript{17} NAZIH RICHANI, A Civil War in Mexico?, North American Congress on Latin America (May 29, 2012), https://nacla.org/blog/2012/5/29/civil-war-mexico (last visited Apr. 16, 2013).
\item \textsuperscript{18} Cory Molzahn, Viridiana Rios, and David Shirk, \textit{Drug Violence in Mexico} (Trans-Border Institute, 2012).
\end{enumerate}
\end{footnotesize}
on Drugs. Mexico has had over 50,000 “organized crime murders from 2006 to 2011.”19 Violence statistics have been published online which demonstrate the sheer pervasiveness of drug violence all over Mexico.20 The U.S. State Department has warned of small-unit combat between rival drug cartels to traveling United States citizens.21 Drug murders have not only been restricted to feuds between individual cartels, but they have reached segments of civil society like media members and government officials.22 Attacking civil society in all of its forms is an even more contemptible piercing form of violence than common criminals attack. This type of violence demonstrates that Mexican drug cartels are not just engaging in crime, but consciously trying to subvert Mexican society.

Drug cartels have shown themselves to be ruthless and persistent enough to murder journalists who report about drug cartels. Many journalists have been assassinated from 2008 to 2011.23 Drug cartels have not only murdered members of civil society, but public officials elected to serve and represent the Mexican people.24 Multiple city mayors have been assassinated from 2008 to 2011.25 These public officials are likely targeted in an attempt to again frighten them from counteracting the effect of drug cartels in their cities. Drug Cartels have also severed heads of police officers and placed them in front of church.26 Needless to say, the outrageous, grotesque crimes represent a form of vicious terrorism by which drug cartels hope to intimidate Mexican law enforcement.

The necessity of self-defense is extremely high in Mexico because of the Mexican Drug War. Mexican citizens do not have the vibrant, powerful civil government to promote their safety and security in the cities and have often required help from the United States Department of Justice.27 In addition, good-willed Mexican citizens in the press are also threatened. The Mexican drug cartels are a potent criminal and even political force in Mexico. The strength of drug cartels enables them to attack the government of Mexico and also Mexican civil society. The cartels have the resources and manpower to combat the Mexican government. However, the main danger of the cartels has not been their resources or armaments, but their persistent and vicious attack on Mexican society.

19 Id.
20 Id.
22 Id.
23 MOLZAHN ET AL., supra note 18.
24 Id.
25 Id.
26 Pedro Galindo, Mexico Drug Killers Dumb 6 Severed Heads by Church, REUTERS (Dec. 16, 2009).
Mexican drug cartels are not only strong criminal groups with a profitable undying clientele in the United States, but they also are paramilitary forces with a strong presence in the country. This presence has grown strong enough not only to allow drug lords to subsist in virtual sovereignty within Mexico, but their military prowess has grown strong enough to challenge the Mexican government. This powerful presence also makes it difficult for the Mexican government to defend itself and the Mexican people from the drug cartels. Therefore, the violence in Mexico is uniquely incompatible with any arms reduction models in the United Nations. One of the United Nation’s assumptions for reducing arms is often that the government is in a position to quell insurrection. In Mexico, the Mexican people have little hope that the government can quell receive aid or defense from their own government. Thus, arms reduction treaties have a disproportionately harmful effect on Mexicans who are especially vulnerable to criminal violence.

The Mexican government has officially measured the size and number of organized crime in their country. Drug cartels in themselves have grown to a size that mirrors the sizes of insurgencies or rebellions within a country strife in civil war. This large amount of non-state actors poses a grave threat to Mexico and rivals the amount of force, gun-power, and manpower of the Mexican government. The large number of organized drug-trafficking crime in Mexico simply means a larger criminal presence in the whole country. Death tolls are thus quite high in multiple Mexican provinces. Mexico’s drug-related deaths exceed one-hundred and ninety two in eight Mexican provinces. The violence is a consistent pestilence that plagues the entire country. Again, this is a result of the size of drug cartels fueled and funded by drug sales and thus these criminal forces come into constant contact with the Mexican army and Mexican law enforcement. Even if law enforcement is resolute and courageous in fighting the drug cartels, the violence itself will persist simply because drug cartels are so large in size that they will always come into contact with police officers.

In fact, the number of followers drug cartels are able to recruit into their criminal enterprises is staggeringly high. For example, in 2009, it was reported that there were 100,000 foot soldiers in cartels. President Felipe Calderon’s initiative to thwart the cartels is restricted to Federal initiatives that do not in any way address the local dominion that the drug cartels have acquired over time in Mexico’s rural areas.

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28 Molzahn et al., supra note 18.
29 Sara A. Cater, 100,000 Foot Soldiers in Cartels: Numbers Rival Mexican Army, WASH. TIMES, Mar. 3, 2009, at A01
30Bergal, supra note 21, at 13.
The drug cartels have privileged illegal access to guns that simply is beyond the scope of control of Mexico and the United Nations.\footnote{Tim Johnson, \textit{Study: A quarter million US guns are smuggled into Mexico every year}., \textit{THE CHRISTIAN SCIENCE MONITOR} (MAR. 19, 2013), http://www.csmonitor.com/World/Americas/2013/0319/Study-A-quarter-million-US-guns-are-smuggled-into-Mexico-every-year (last visited Apr. 17, 2013).} This uncontrollable gun trade exists largely because of Mexico’s close proximity to a developed country that produces a very large amount of weapons: the United States.\footnote{Colleen Cook, \textit{Mexico’s Drug Cartels} (CRS Report to Congress, 2007).} A huge amount of arms sales are imported into Mexico from the United States.\footnote{\textit{UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE: FIREARMS AND TRAFFICKING: U.S. EFFORTS TO COMBAT ARMS TRAFFICKING TO MEXICO FACE PLANNING AND COORDINATION CHALLENGES} (2009).} Approximately ninety percent of the weapons in Mexico are imported from the United States.\footnote{\textit{ATF Releases Government of Mexico Firearms Trace Data, Bureau of Alcohol, Tobacco, Firearms, and Explosives} (Apr. 26, 2012), http://www.atf.gov/press/releases/2012/04/042612-atf-atf-releases-government-of-mexico-firearms-trace-data.html.} Notwithstanding the questions of whether guns reach into Mexico legally or illegally, Mexico is regardless overwhelmed by the large gun trade across the large, permeable U.S.-Mexico border. Nonetheless, there is obviously a high amount of illegal trafficking. About twelve percent of Mexico’s illegal guns come from the United States.\footnote{David Kopel, \textit{Mexico’s Federal Law of Firearms and Explosives} (Independent Institute, Working Paper No. 10-12, 2010).} The United States federal government records themselves report that sixty-eight thousand weapons confiscated by the Mexican authorities originated from the United States.\footnote{\textit{Id.}}

The large amount of weapons is finally evidenced by the high amount of weapons confiscations in Mexico. The Mexican police find not only weapons, but weapons of an advanced nature that would indicate a military conflict was going on within the country.\footnote{\textit{Id.}} The Mexican government confiscated thousands of hand grenades in 2007-08.\footnote{\textit{Id.}} Many rocket-propelled grenades, rocket launchers, and anti-tank weapons have been confiscated as well.\footnote{\textit{Id.}} These weapons again not only represent the advanced military status of the drug cartels, but that there is indeed a military-style conflict going on within Mexico.

\section{IV. United Nations Response to Mexican Drug War}

\subsection{I. United Nations International Small Arms Treaties}

Mexico has been subjected, sometimes willingly and sometimes unwillingly, to the effects of United Nations small arms treaties passed through the Geneva
Convention and implemented through arms reduction programs. Again, because the United Nations centers its approach to reducing violence on the reduction of small arms, most any country will be affected even if that nation does not subscribe to a certain United Nations Treaty or policy. Nonetheless, Mexico is subject to these policies despite that fact that Mexico is a sovereign country with a national legislature. Inevitably, United Nations international efforts will affect the trade of weapons and that will affect Mexico, which receives the majority of its high-powered weapons from other countries, according to Mexican President Felipe Calderon, most especially the United States.\(^39\)

The United Nations’ efforts to reduce international arms through international cooperation are a response to drug violence and the destructive Mexican Drug War.\(^40\) First, the United Nations has implemented a Geneva Convention to reduce armed violence.\(^41\) The United Nations overall goal to reducing violence is sensibly addressing or rectifying the causes of violence and reducing or eliminating the international trade of violence.

The Geneva Convention first proposed programming for “targeting risks and symptoms of armed violence.”\(^42\) This goal broadly sets out an international effort to eliminate causes of violence. Forming international restrictions on arms sales based on international cooperation and participation is the Geneva Convention’s second method of reducing violence. This proposal is particularly geared at illegal weapons that ultimately empower criminal organizations.\(^43\) The United Nations program for action is essentially: “to encourage the relevant international and regional organizations and States to facilitate the appropriate cooperation of civil society … in activities related to the prevention, combat and eradication of illicit trade in small arms and light weapons.”\(^44\)

The United Nations proactive efforts to reduce violence has been largely ineffective and inhibiting of all justifiable violence. The United Nations’ only affirmative method of enforcing these laws has been ironically overseeing the Mexican military—the one entity that can possibly defend Mexicans. The United Nations receives complaints about abuse and then subsequently conducts

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\(^43\) Id.

examinations of abuse against Mexican army. Based on these complaints, the United Nations has disciplined the Mexican army.

II. The Mexican Constitution and Gun Ownership Rights

The Mexican Constitution provides for the right to bear arms but that is heavily restricted. Choice of weapons can be denied and they are restricted to military distribution. In spite of the fact that drug cartels have access to military weapons, citizens are nonetheless denied those same weapons for security reasons. This restriction is in place despite the fact that military-style weapons are confiscated in the country. Currently, weapons can only be held inside of the home. However, a large amount of drug violence is outside of the home which means individually-owned weapons cannot be legally used outside the home which is precisely where self-defense may be necessary.

Mexican gun regulations are highly restrictive. The Mexican people are constitutionally afforded a right to bear arms by the Mexican Constitution. The English translation of the Mexican Constitution states that all Mexican citizens may have arms “for security and legitimate defense.” This constitutional right reflects the basic premise that all of mankind has the right to defend the dignity of life from those who unjustly threaten the life that God bestowed on them. Mexicans living in both rural and urban communities exercised this right willfully for their own self-protection in a country ridden with violence and starved of effective law enforcement. Although the constitutional right is absolute and without equivocation, similar to the United States right to bear arms, the Mexican government through legislative and administrative measures have limited private ownership of and access to weapons. The Mexican Constitution also has a key restriction on the right to arms in the form of an executive privilege. By federal law, rather than the Mexican constitution, the Mexican government will “determine the cases, conditions, requirements, and places in which the carrying of arms will be authorized by inhabitants.”

46 Id.
47 KOPEL, supra note 36.
48 Id.
49 Id.
50 Id.
51 Id.
52 Id.
53 Id.
54 Id.
55 Id.
Mexicans do not have access to all the typical types of weapons. Federal Mexican law only permits handguns, shotguns, and small rifles. These weapons, needless to say, are not designed for military combat or insurgency combat like that seen in Mexico between drug cartels and between the Mexican government and drug cartels. Rather, they are weapons that are for basic levels of protection that may be required when necessary for petty crimes and, in some more serious cases, defense of the person. The type of guns is not the only type of restriction, but also the method of acquiring guns is highly restrictive.

Gun sales are exclusively managed by Mexican military. This government monopoly on what could be a private enterprise gives the Mexican government an opportunity to have complete control over the sale of guns and also even to what extent the public will have private ownership of guns. The rationale of this government monopoly is that guns can only be acquired through one medium. However, this policy, although it has been somewhat successful in preventing to some degree private ownership of weapons, has not prevented illicit gun ownership. The reason for this shortcoming is the prolific illicit international trade of arms. The Mexican military sells all weapons authorized for public ownership at one restrictive military base in Mexico City. Mexican citizens, in order to acquire weapons legally, must drive to this one military base in Mexico City. Mexico City is roughly in the center of the country of Mexico and is a long distance from many rural areas. This makes it necessary for the army to grant special transportation permits for Mexicans seeking guns which grant temporary authorization for a Mexican to have small weapons outside of their residence.

V. PROBLEMS WITH THE U.N. APPROACH TO DRUG WAR

The United Nation’s general pacifist stance precludes any international measures promoting justifiable resistance. In fact, the United Nations approach to conflicts of any kind, including the drug war, normally focuses simply on the prevention of violence which is inevitable when a country is attempting to quell an internal insurgency or internal criminal organization.

The United Nation’s purely pacifist stance has manifested in the form of human rights monitoring. When the United Nations detects human rights violations from a member-nation’s government, the United Nations will issue

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56 Id.
57 Id.
58 Id.
59 Id.
60 Id.
61 Id.
reprimands or make requests of the member-nation. This legal mechanism employed by the United Nations in itself indicates two flaws to the United Nations approach. First, simply by choosing to exert this petty form of supervision is without basis since the war on drugs is inherently violent, particularly when the viciousness of drug wars is taken into consideration. Secondly, by failing to take into consideration the great violence that is occurring in Mexico on a routine basis, the United Nations further reveals that they are incorrectly limiting their anti-violence campaign to non-violent means. For example, in the case of Mexico, the United Nations has asked for the withdrawal of Mexican army from streets.

In addition, the United Nations fails to take into account the inability of Mexico to defend a large country. Mexico has both a large urban and rural population spread across the entire county. Mexican citizens must resort to self-defense often in rural areas of Mexico because drug cartels have more presence in their towns than the Mexican police and army. The Mexican army is unable to defend most Mexicans because of severe government resources limitations, but the rural areas are in even greater need of self-defense because of their far distance from civilization and any military protection.

I. The Effect on the Right to Self-Defense

Self-defense is an indispensable right for all citizens if the dignity of life is to be protected. The United Nations needs to, in addition to acknowledging the right to self-defense, actively promote that necessary feature of the defense of the dignity of the human life. This involves often elevating the methods of self-defense that is proportionated with the situation. Providing small arms weapons as an empowerment tool is necessary in Mexico and any other area strife with violence. This fundamental right is subverted by international arms reduction treaties.

Resistance became a human right under the worst of circumstances in areas of the world besides Mexico. The United Nations has in one particular case been unable to implement an effective solution to a national crisis because the right of self-defense right was not sufficiently protected. The genocide in Sudan is a good example of this because murder and rape were perpetrated in a state-sponsored genocide and citizens were often defenseless. The killing particularly of young

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63 Id.
64 Id.
66 Id.
Sudanese women demonstrates the need of weapons for an “element of retaliation.”

Furthermore, United Nations anti-genocide programs are a “worthless platitude” because U.N. refuses to empower the defenseless with weapons. The United Nations small arms treaty exhibits this same flaw because it only prevents arms distribution rather than encouraging arming of citizens against armed insurrection. Mexicans have a very high need for self-defense from drug cartels. Mexican citizens must resort to self-defense. The government is unable on many occasions to provide defense to Mexican citizens from drug cartels because of size of country.

The lack of the capacity and integrity in Mexican government to govern and lead the country through this crisis prevents a full, final destruction of the drug cartels. The Mexican government and police are corrupt which makes law enforcement difficult in many regions of Mexico. Mexican government has insufficient resources to deal with the crisis. Drug cartels are separate institution within Mexico and separate from Mexican State. Finally, the inability and the impossibility of alleviating the true, ultimate source of drug cartels is the ultimate problem. That problem is obviously a social and spiritual issue: drug addiction.

The example of Guatemala which suffered under a very abusive dictatorship exemplifies how a United Nations response that is not geared toward the source of the problem will be devastating to the people. In the country of Guatemala, government leaders were more concerned with their own power structure rather than the protection of its own citizens. This is analogous to Mexico where the country does not address drug consumerism but instead its own national credibility and control. In Guatemala, violence inevitably arose from maras [delinquent drug gangs] that assaulted innocent citizens. Similar to Mexico, this kind of attack on innocent civilians continued because the United Nations never addressed the source of the problem which was Guatemalan government.

69 Id.
70 Id.
71 Id.
72 Id.
73 Id.
74 Id.
75 Id. at 13.
76 Id.
Although reducing the amount of weapons worldwide could prevent criminals from acquiring weapons, an international arms reduction model is inapplicable to Mexico. The presumption of ethical standing of a state means that small arms treaties will be implemented without taking into account a country’s government deficiencies like, for example, government corruption or low territorial control, both of which happens to be the case in the country of Mexico. When this is not taken into account, Mexican citizens in need of defense will be denied arms at a time that they desperately need them. Therefore, small arms treaties as applied to Mexico will have a disproportionately negative effect on Mexicans who have an ineffective government and law enforcement. These treaties in fact have an obsession with violent prevention that ultimately could be for the common good. What is for the common good entails Mexican citizens ridding Mexico of the yoke of the drug cartels through resistance. Mexico simply put is an inherently violent country because of the presence of drug cartels and influx of guns and thus small arms reduction treaties would be simply foolhardy because they will in no way be able to reduce the presence of weapons and violence in the country. The overwhelming amount of weapons in Mexico is the result of a massive illicit arms trade between the United States and Mexico. “Government-centric United Nations” obsesses with disarming insurgency groups rather than addressing oppressive conditions that may cause insurgencies.

II. Mexico’s Non-Disposition to Private Gun Ownership

By empowering those who are more vulnerable by their disposition, a policy acquires the fullness of promoting the dignity of the human person. Without counteracting the inherent defensiveness of a person, the dignity of the human person is vulnerable. In Mexico, the general population, for both cultural and political reasons, is less disposed to acting affirmatively to promote their self-defense. Undisposed to ensuring their own self-defense from violence and crime, the Mexican people are not in a good position to acquire weapons under the current United Nations international arms reductions treaties. When a country’s people are less culturally disposed to arming themselves against criminal organizations, then the United Nations is obligated to counteract that predisposition by increasing gun ownership in Mexico rather than reducing it. Failing to take these cultural aspects into consideration, the United Nations will almost certainly institute policies and plans that are harmful to the right of self-defense.

77 Id.
The Mexican population by and large has a lower standard of living.\textsuperscript{78} Being a poorer social group, Mexican do not have the sheer means to maintain weapons to defend their country against the drug cartels. Moreover, this Mexican population is simply not predisposed to fighting because Mexicans have grown accustomed to power and weapons being concentrated in the hands of drug cartels for so long in the country of Mexico. Drug cartels have amassed a great deal of military power in Mexico, thereby absorbing most of the power in Mexico from the Mexican people. This situation is far different from that of the United States where the American people are accustomed to and demanding of gun ownership and have a government that defends these gun rights.

United Nations arms reduction treaties make arms less available for Mexican when the Mexican population is in fact in need of policies that encourage more private gun ownership. When the level of gun ownership in a country is especially low, United Nations policies must reflect that in order to fully protect and promote a person’s right to self-defense. The low level of gun ownership in Mexico despite the level of violence in the country suggests that arms reduction treaties are particularly harmful to Mexican self-defense rights.\textsuperscript{79} The number of weapons per one-hundred person in Mexico is extremely low; 2.65 firearms per 100 people.\textsuperscript{80} The Mexican state makes it extremely difficult for Mexicans to acquire guns despite the violent nature of the country and thus the United Nations should not make it any more difficult either. By ignoring these specific cultural features of Mexico and yet still pass the same arms reduction treaties, United Nations arms reduction treaties become even more harmful.

The United Nations has an inherent moral obligation to ensure that any policy related to weapons and arms promotes and defends the human right to self-defense. In order for the United Nations to promote the dignity of every man and woman, all United Nations policies need to be designed to ensure that self-defense is protected to the fullest. In order to accomplish this end, a necessary component of any law and particularly a United Nations international treaty must be to take into account all individual country’s unique features and characteristics. Certain countries have a culture that is especially protective of the right to self-defense and their country’s policies and level of gun possession reflect that. Some countries, like Mexico, instead are culturally disposed to less private gun ownership and a weaker sense of a right to self-defense. The United Nations should create policies that counteract Mexico’s culture of low gun-ownership. Failing to counteract Mexico’s unique disposition against gun ownership, the United Nations not only

\textsuperscript{80} Id.
harms Mexico but also, through an omission to act appropriately, harms Mexicans’ self-defense rights.

The United Nation’s initiatives for gun control have failed because they do not function correctly in specific cultural circumstances. Again, in Mexico, the people are not culturally disposed to violence which makes private ownership all the more necessary. Similarly, the United Nations has forced voluntary disarmaments in Uganda, with negative results commensurate to those of Mexico. The United Nations supported a government gun confiscation program in Uganda under the President with the goal of ensuring that non-state actors did not have weapons. The goal of this approach was to ensure not only that the government was the only one that possessed weapons, but also to attempt to reduce the amount of violence in a country ridden with destructive civil war. Later, news networks reported that citizens who obediently forfeited their possession of weapons later were vulnerable to attack. The Ugandan government consented to this form of United Nations intervention, but despite the fact that this disarmament occurred with national consent, a faulty United Nations plan was implemented and it nonetheless produced horrible results. This United Nations policy has benign intentions to end violence with the purpose of reducing violence by reducing the presence of privately owned guns that could cause violence. This policy is precisely what the United Nations is pushing in Mexico. However, in the United Nation’s attempt to end violence, the United Nations prevented violence that could have protected the dignity of Ugandans who needed to defend themselves. This is one example of the travesties that exist when self-defense is not protected to the extent necessary to defend the dignity of human life in violent war-torn countries like Uganda.

VI. SOLUTIONS TO MEXICAN DRUG WAR THAT PRESERVE RIGHT TO SELF-DEFENSE

I. Reclassification of War Status

Mexico and the United Nations must initiate a reclassification of war status of the Mexican Drug War between the government and drug cartels. This solution is far more effective than the current United Nations response to armed conflict. Again, this solution would admittedly not solve the source of drug violence, but it

81 KOPEL, supra note 36.
82 Id. at 418.
83 Id.
84 Id. at 419.
85 Id.
86 BERGAL, supra note 21, at 16.
would certainly aid in the quelling of armed violence that has plagued Mexico for decades.

The nature of the conflict in Mexico indicates that there are significant justifications for classifying the drug war in Mexico with a newer and much more accurate war status. The number of battle-related deaths in Mexico exceeds ICDC minimum. \(^{87}\) The number of deaths indicates that Mexico is engaged at the very least a serious insurgency and perhaps even a conflict between two rival powers: the Mexican state and the drug cartels. Categorization of drug war as “Non-International Armed Conflict” is necessary for quelling of internal drug cartel insurrection. \(^{88}\) This will enable the Mexican army to apply the appropriate military resources and sustained attack against the drug cartels.

A new war status classification would make the country safer and further the defense of the Mexican people. \(^{89}\) United Nations will apply empowerment technique where Mexican government can stomp out drug cartels rather than simply disarming the drug cartels. These techniques can be applied with this new classification because drug cartels will be classified as belligerent powers to be quelled by military power. Military forces in addition to police forces will be able to resist drug cartel violence and ultimately restore peace in Mexico. It is not only an obligation, but in the end a necessity for all states to empower its citizenry to a level commensurate with internal threats. It is essential to allow armed force to treat cartels as armed insurgency and deploy military force against drug cartels located throughout country. \(^{90}\) Increase trade and possession of small arms would also result and thus self-defense would also be an incidental benefit of this a new war classification because, since the conflict is classified as an armed conflict, there would be a more widespread trade of weapons to support an armed conflict.

II. Loosening of Gun Restrictions

In addition to a declaration of war on drug cartels, the Mexican government must, for individual Mexican citizens, significantly loosen gun restrictions by allowing automatic weapons in addition to pistols, shotguns, and rifles. Drug cartels may easily acquire these weapons from the United States which manufactures these weapons and thus Mexican citizens should have equally easy access. The first positive result of this change is that there will be more weapons for common Mexican citizens so they can resist drug cartels. Drug cartels again have access to a large amount of weapons from the United States that are transported illegally across the border. Mexican citizens having access to these

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\(^{87}\) Id. at 16.

\(^{88}\) Id.

\(^{89}\) Id.

\(^{90}\) Id.
same types of weapons and employing them against drug cartels would seriously diminish the power of the drug cartels. Sometimes the best defense is a good offense as the adage goes. The second positive result of this change would be that illicit weapons that are only available to drug cartels through will become available through legal means. This again will allow the weapons access of Mexicans to both increase and ultimately rival the weapon’s dominance that the drug cartels have had, which has again been much more expansive because of the large U.S.-Mexican illegal gun trade. There is no question that Mexico’s violence stems ultimately from the enormous availability of weapons.

III. End Military Monopoly on Gun Sales

The Mexican government must eliminate the military monopoly on gun sales as it only prevents law-abiding citizens from acquiring arms. The country of Mexico is admittedly extremely dangerous because of the prevalence of drug violence. Secondly, it is also very convenient for the military to force all Mexicans, whether well-intentioned or not, to come to one place for guns sales. However, this policy is nonetheless still inconsistent with the needs of the Mexican people. The promotion of safety and security is not the only concern, but also the promotion of self-defense. The widespread prevalence of weapons in the form of small arms will only benefit those in need of self-defense from drug violence and drug cartels. Allowing gun stores to sell guns throughout Mexico will allow Mexican to have better access to weapons and arms that Mexicans could not otherwise have in the highly restrictive Mexican gun market.

The current restriction of gun sales to Mexico City imposes large practical burdens on acquiring weapons. This burden is particularly high in Mexico where a large portion of the country is rural and does not have easy access to Mexico City. In a country where violence is high and self-defense is all the more necessary, it is woefully difficult for Mexicans to acquire weapons because they can only do so by driving to army barracks in Mexico City where gun sales are exclusively held. Eliminating this restriction would make small arms more readily available for all Mexican, thereby promoting the right to self-defense and also making justifiable resistance a viable option for well-intentioned Mexicans.

VII. CONCLUSION

Mexico’s unique propensity to drug violence alone makes the entire Mexican people’s self-defense rights especially important. The United Nations, however, has a government-centric, arms-focused approach to quelling violence.\textsuperscript{91} For

\textsuperscript{91} KOPEL, supra note 36.
Mexico, the United Nations’ efforts to reduce the trade of international arms have meant a restrained individual capacity for self-defense. Mexicans need instruments of deaths to combat the culture of destruction brought about by the drug cartels and implicitly allowed by the state of Mexico. This consequence is particularly damaging to Mexico which is ridden with violence and also weak law-enforcement. Correcting the United Nations approach to violence-prevention requires broadening their solution beyond mere arms reduction, but also individual empowerment. The United Nations must foster the distribution weapons to the Mexican people for their defense, but the government of Mexico as a sovereign country must also loosen restriction on small arms to counter and eventually eradicate the insurgency of drug cartels in Mexico. This approach and only this approach can ultimately win the War on Drugs in Mexico. However, to do so, the right to self-defense must be protected and promoted—even if that involves violence.
NORTH AMERICAN FREE TRADE AGREEMENT: INTENT; ACHIEVEMENT; AND THE FUTURE OF THE INTERNATIONAL POLICY

Richard Lavariere

ABSTRACT

This article will address the overview of policy, implementation, and achievements and shortcomings of the North American Free Trade Agreement that was entered into by the United States of America (US), Canada and Mexico on January 1, 1994. Policy justifications for the implementation of NAFTA focused on, among other motives, positive effects on intra-continental economy, human rights and environmental concerns. Part One of this article will identify the historical background of NAFTA, preceding governing policy, other free trade agreements and goals of NAFTA upon ratification. This part will further illustrate policy-centric opinions of North American political leaders and numerous political views about the current state of NAFTA.

Part Two will discuss the numerous benefits that have been accomplished because of implementation of NAFTA, as they relate to all of the countries involved with the agreement. The top economic earners within each country have benefited the most since the implementation of NAFTA, and Part Two will further discuss why this is an important economic benefit to member nation states individually, and to all nation states on a collective basis.

Part Three will address the shortcomings of NAFTA. More specifically, NAFTA has failed to improve, or even maintain manufacturing levels in the United States and in Canada. Manufacturing rates on American import-to-export rates are grossly imbalanced. Canadian wages have slightly fallen, on average, since the implementation of the agreement despite the increase in value of the Canadian dollar on an international currency exchange rate and in spite of an average annual national economic growth of 3.4%. Improving the state of Human Rights is expressly listed in the Preamble of the agreement as a core goal. Yet, Mexican standards of living have not improved since the implementation of the

1 Richard Lavariere, J.D., (2014), Ave Maria School of Law; B.S., Southern Vermont College.
4 See NAFTA Preamble, supra note 2.
5 Free trade agreement(s), hereinafter FTAs.
6 By “current state,” this author means reflective views and opinions of the benefits, burdens, achievements, and shortcomings of NAFTA as of the date of publication of this article.
agreement. In some respects, the standards of living in Mexico have worsened after, and as a result of the agreement. Major environmental concerns have continued to plague Mexico, and illegal immigration, as a consequence of poor quality of life, has continued to be problematic in the U.S.

Part Four will discuss what, if any, changes to NAFTA, and the mechanisms of international trade are necessary to fully achieve the goals laid out in the portions below. Although it may be impossible to address or solve all of the issues presented in this article, modifications to NAFTA and political philosophy in regards to its existence are necessary to achieve its goals.

INTRODUCTION

[Corporations] cannot commit treason, nor [can they be] outlawed, nor excommunicate[d], for they have no souls.7

NAFTA has long been a topic of discussion in regards to political elections, national, and intra-continental law making, and diplomatic furtherance between the member nation states of Mexico, the U.S. and Canada. This topic is a heated debate because some political leaders8 feel that policies that were in place prior to the implementation of NAFTA were more conducive to meeting economic stability and other objectives laid out in NAFTA.9 While American opinions range greatly from positive to negative, as will be discussed later, Canadian leaders have a mostly favorable view of NAFTA.10 Mexican leaders have primarily also looked favorably on NAFTA, while similarly to some in the U.S., Mexican citizens have been divided in terms of attitudes to NAFTA and its current state.11 Although much of the focus of language in the Preamble to NAFTA12 appears to be on advancing economic growth and stability,13 amongst other concerns, on an individual humanistic level – much of the benefits resulting from the achievements of NAFTA have been on the corporate level. Many concerns of this

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7 Case of Sutton’s Hospital, (1612) 77 Eng. Rep. 960 (K.B.) 973; See also Benjamin Levin, Made in the U.S.A.: Corporate Responsibility and Collective Identity in the American Automotive Industry, 53 B. C. L. Rev 821, 822. (Levin uses this quote in a similar way to give the reader an almost metaphysical way of foreshadowing where his point is going.)
9 See NAFTA Preamble, supra note 2.
11 See infra note 6 and accompanying text.
12 See NAFTA Preamble, supra note 2.
13 See id.
effect center either on the political philosophy that rejects providing economic advantages to the top income earners or companies with the hope that economic growth centered on top income earners or companies will improve those lower on the economic earning scale. Others are concerned with the pragmatic realism that many people are adversely impacted as an ultimate result of NAFTA. When viewed in the framework of American political thought, much of the aforementioned concerns in regards to the ultimate effects of NAFTA and its policy come from the Democratic Party. Conversely, speaking generally, leadership within the Republican Party has viewed the effects of NAFTA as beneficial when applying a “Risk-Utility” balancing analysis to the benefits compared to the burdens of NAFTA. Because the benefits that have benefited North American parties to NAFTA have largely been to corporations, the end result is that the question is begged: does NAFTA benefit the people? Although this article is not aimed at justifying or condemning any particular economic philosophy within the American or North American political spheres, this article will briefly touch upon some basic principles of them. This analysis of economic theory, coupled with analysis of statistical effects on member nation states will identify whether the goals of implementation of NAFTA have been achieved.

PART I: HISTORICAL BACKGROUND AND POLITICAL VIEWS OF NAFTA

A. Protectionism and Isolationism: Philosophical Principles

The general purpose of a FTA is to increase trade on an international level. The idea of trading amongst nation states is becoming more and more “inevitable and productive” in the modern world. Within the ever expanding “global economy where labor, profits, and environmental effects reach across national boarders,” citizenship of corporations or companies must become part of all countries that they do business in. Doing business in multiple countries presents challenges. Some of which are simple to anticipate, e.g. language barriers. Conversely, however, when businesses expand into other countries they are faced with problems that are not so obvious – namely tariffs and taxes on their goods, which are foreign to the country to which they expanded into. Another “legal

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14 United States v. Carroll Towing Co., 159 F.2d 1022, 1026 (2d Cir. 1947); See also, Barbara Ann White, Risk-Utility Analysis and the Learned Hand Formula: A Hand that Helps or a Hand that Hides? 32 Ariz. L. Rev. 77 (1990). (Although the so-called “Risk-Utility” analysis focuses on a negligence standard, the formula has been incorporated to balance whether NAFTA has benefited North American member nation states on a totality of the circumstances basis.)
15 Stolberg, supra note 8, at 1.
16 Levin, supra note 7, at 824-25.
17 Id.
18 Id.
19 Id. at 825; See also generally ROBERT CHARLES CLARK, CORPORATE LAW 692 (1986)
mechanism[20] that corporations may have difficulty anticipating and/or preparing for while doing business in foreign nations, are differences in “consumer … tort law and consumer protection laws” that may very well be vastly different than the law in the country from which they originate.21 For example, if a Mexican toy maker desires to expand her small business into Texas, Arizona, New Mexico and California, then she must prepare to be able to comply with all sales taxes and import tariffs associated with manufacturing and supplying her product to children in South Western U.S. In addition to the costs associated with the taxes and tariffs, she must prepare for different state and federal laws in regards to products liability and production standards. These may very well be difficult for her to prepare for, or be able to comply with.

This leads into the concept of protectionism – or on the negative end of the spectrum of trade philosophy – isolationism. Tariffs and taxes that are placed on imports(exports are meant to either raise tax revenue for the government of the country asserting the tax, or the tax is meant to encourage citizens to purchase goods from producers within their home country. Benefits often result from this sort of economic governmental intervention. For example, by increasing tax revenue, governments can help provide infrastructural necessities, such as highway development and streamlining irrigation systems for agriculture in countries that are poor or developing. Additionally, these governmental practices can encourage its nationals to buy goods from domestic companies – thus stimulating the domestic economy. These benefits, at least on a theoretical basis, can boost the economy of a nation and help it grow. Self-reliance encourages a greater variety of goods to be produced within a country and encourage the domestic producers to become technologically innovative.

There are, however, many negative effects that this form of governmental interference with trade has on domestic and global economy once put into practice. The concept of encouraging local producers to be more technologically innovative by isolationism is likely not going to succeed because most poor or developing countries do not have the basic tools or education to allow for this blossoming of industry. Isolationism on a global scale is simply accepting “vulnerability” to not be able to sustain a government or society.22 Most countries are reliant on goods (or services such as medical treatment from doctors[23]) that are

20 CLARK, supra note 19, at 692.
21 Id; see also generally Asahi Metal Co. v. Superior Court, 480 U.S. 102, 108-13 (1987); Levin, supra note 7, at 825.
23 See generally id. (Obijiofor addresses the “stark realities of […] regrettably popularized isolationism” as a serious hindrance on poor nations ability to get even basic necessities such as access to medical treatment.)
imported from other countries. Almost all “management of world affairs have been premised on the integration of a [globalized economic] system of commerce and politics.” Isolationism, or putting unnecessary restraints on international trade is “at the very least, damaging to a state’s long-term interests.”

Isolationism of a country can be harmful due to factors such as: not being able to domestically produce the materials that are needed for production or that there is not a manufacturer that is able to produce the product as well as or as cheaply as a foreign market participant. This results in many countries leaning towards reducing or eliminating taxes and tariffs on imported and exported goods to allow their people to have the very best goods in the most cost affordable way. One such way of agreeing to avoid excess taxes or tariffs on foreign goods is by FTAs.

B. Free Trade Agreements: The Theoretical Effects of Implementation on International Trade

The overarching concept in support of FTAs is that “trade and economic endeavor[s] should be conducted with a view to raising standards of living, ensuring full employment and a large and steady growing volume of real income and effective demand” for the goods of other member nations. The general purposes for implementation of a FTA by nation states is centered around four main principles: (1) expanding economic opportunities for its people; (2) encouraging technological advancement; (3) allowing for “strategic manufacturing;” and, (4) expanding capitalism and investment opportunities for its nationals. Each of these principles will be expanded upon in more detail.

1. Expansion of Economic Opportunities

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24 Id. (Obijiofor seeks to identify the need for globalization, or freeing the ability of international cooperation to provide medical treatment to developing countries. This same principal can be applied to allowing for streamlining commerce via an FTA because it can allow for poor and developing countries to have the opportunity to engage in the capitalistic global market place. This is where opportunity for economic growth is introduced.)


26 Id. at 107.

27 See generally NAFTA Preamble, supra note 2, at 1. (Elimination of taxes and tariffs was generally perceived as eliminating unnecessary restraints on trade – at least on an intra-continental level.)

28 The Preamble to the General Agreement on Tariffs and Trade, 1 (1986).

29 See NAFTA Preamble, supra note 2, at 1.
By incorporating a FTA into international trade by member nation states, one major goal is to “[p]romote trade and investment[.]” This is also a primary goal of NAFTA. What this means is that by increasing the opportunity for investment capitalists to bring money into a foreign market and invest money into a new economy and new production system, the ability for the new nation to grow its economy is substantially greater. Furthermore, the individual investor has an excellent opportunity to advance his own business in a new market. FTAs also aim to expand economic opportunities by alleviating “restrictions on] trade that would strain relations with other nations” if tariffs and taxes were imposed upon imports and exports from foreign countries.

By alleviating economic burdens of taxes and tariffs on foreign investors, foreign investors are able to bring the return on the investment back to their home country and vicariously contribute to the economic growth of their own country, should they chose to do so. Furthermore, having a pre-negotiated and mutually agreed upon FTA in place allows for uniformity of “strictly enforced international regulations on labor practices or environmental [effects].” Theoretically, this would allow for more uniformity in all areas of trade practices and thus, level the playing field between member nation states. What this further allows, ties into economic advancement and improvement in quality of life on a “macro” scale within countries.

2. Technological Advancement: The Ability of Open Trade to Encourage Development

If you really want to protect your workers and you really want to protect an industry, you open up the doors of opportunity. – Stockwell Day, Canadian International Trade Minister

Another goal of most FTAs that is also reflected by NAFTA, specifically in the preamble, is to “[foster] creativity and innovation, and promote trade in goods

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31 Id.
32 Id.
33 See generally NAFTA Preamble, supra note 2, at 1.
34 Stolberg, supra note 8, at 1.
35 See generally id.
36 Levin, supra note 7, at 826.
37 Id. at 825. (Levin is referring to the large-scale effects to the populous within nations. In his note, Levin focuses more on the shortcomings of this theory of “macro script,” but it raises a question of effect beyond the specific investor and the parties who receive the investment.)
38 CBC News, supra note 10, at 1.
and services that are the subject of all intellectual property rights[...]. This goal is two-fold. First, the aim is to foster creativity and innovation. This is important in terms of international trade because certain countries are better at making certain goods or refining certain natural resources than other countries are. For example, if “Country X” is a landlocked desert country, rich with oil and natural gas, and “Country Z” is an island with an abundance of fish and tropical fruit, it does not make sense on an economic perspective to tax or tariff the importation of the other nation’s goods. This is because it is unlikely, if not impossible to obtain the same goods domestically. Further, even if they are able to obtain the goods domestically, it is even more unlikely that they can obtain them in a cost effective way to the people. This illustration of tax and tariff free dealing between “Country X” and “Country Z” is a classic example of “open[ing] up the doors of opportunity” in an international trade sense.

Clearly, this hypothetical scenario is an exaggerated scenario in which procurement of fish and oil is made nearly impossible without free trade between two separate nation states. A more practical and real-life example can be made with technological advancement such as in the automotive industry. In the U.S., the automotive industry is an area of manufacturing and production in which its global dominance has been unrivaled for many years. Much of the U.S. automotive manufacturing dominance is attributable to “the rise of suburbia” which occurred after World War II, and also to the increasing “commuter culture” which has led to the perception of the “national way of life” that called for every household to own a car. American automotive manufacturing dominance can further be evidenced by the unique position that the U.S. automotive industry experienced post World War II. “While most major capitalist societies were forced to rebuild after the war, U.S. manufacturing firms dominated their huge home market and much of the world market in the 1950s and 1960s.” This brings the focus of analysis to the topic of international trade.

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39 NAFTA Preamble, supra note 2, at 1.
40 CBC News, supra note 10, at 1.
41 See generally Levin, supra note 7, at 825. (Levin illustrates the automotive industry led by Ford and general motors as global market participant that was nearly unrivaled for decades).
42 Id. at 827.
43 Id.
44 Id.
45 Id.
46 For further reading on the rise of suburbia and the trend relating to the flight from the cities that occurred post World War II, up until the 2000’s, see e.g. Anthony Flint, THIS LAND: The Battle Over Sprawl and the Future of America, (2012).
48 Id.
One reason why the U.S. automotive dominance occurred in the 1950’s and 1960’s is that companies such as Ford and General Motors made constant evolution and progress in regards to developing new features and more efficient models during that period.\(^49\) Ford, since its inception in 1903,\(^50\) held dominance over the U.S. domestic and international markets because of an abundance of “supply, demand,”\(^51\) low cost of production,\(^52\) and high quality of the cars that they were manufacturing.\(^53\) At this point during the 1950’s and 1960’s, foreign markets were unable to compete in the automotive marketplace with Henry Ford and his affordable product which was, from 1903 until the 1960’s,\(^54\) being produced with the corporate mindset of being “concerned with the well-being of the public[].”\(^55\) Ford was, however, still able to make a substantial profit,\(^56\) presumably since the automobile blossomed technologically and in terms of cost during his reign as owner of the company.\(^57\)

During the first two-thirds of the twentieth century, American automotive manufacturing experienced dominance of the market share as a direct result technological innovation of the car. Between 1903 and the 1960’s, with the exception of the great depression when the U.S. experienced “severe economic stress[,]”\(^58\) the U.S. economy boomed in correlation with the expansion of the automotive economy.\(^59\) This is evidenced by a “massive industrialization and production boom that defined the [U.S.] during the Second World War[].”\(^60\) The U.S. automotive boom was likely “central to the American experience and the success of the American automotive corporation [was] essential to maintaining the national way of life.”\(^61\) The economic success that the U.S. automotive industry experienced became somewhat diluted by the emergence during the 1970’s of

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49 See infra note 41 and accompanying text.
50 See *Henry Ford with Samuel Crowther, My Life and Work* 90 (1992).
51 Levin, *supra* note 7, at 827.
52 Id.
53 Id. (Although Levin is discussing how any company can control the market share within an industry, he is making reference to Ford and their dominance in the automotive market share.
54 See *Dodge v. Ford Motor Co.*, 270 N.W. 668 (Mich. 1919). (Henry Ford produced cars at an affordable price for because of a personal moral obligation to bring his new technology of the automobile to the public on a mass scale.)
55 Id. at 843.
56 See generally id.
57 Id.
59 Levin, *supra* note 7, at 837.
60 Id.
61 Id. (Note that Levin is suggesting that the automotive boom enjoyed by Ford and General Motors post-World War II was merely perceived as being “central to the American experience.” This author suggests, in contrast to Levin’s argument, that the success of the automotive industry and the “American experience” were causally connected, rather than merely correlated.)
Japanese automotive car companies such as Honda and Isuzu. These, and other foreign automotive companies evolved the technological make-up of the car that defined the “American experience” by producing “smaller, more fuel-efficient or larger, more family-friendly alternatives.” Although the Isuzu Company “no longer sells cars to American consumers[,]” other Japanese and other foreign automotive companies have benefited from “domestic success of non-American automobiles” in the U.S. from the 1970’s and into today.

With increased fuel-efficiency and family-friendly options placed on the market, it is no wonder that the buyer in the U.S. embraced the new technology by purchasing foreign cars on the domestic market. Since the 1970’s, the U.S. automotive industry experienced a decline in sales and in value. They responded by making “obvious American cultural references” into their advertisements to appeal to the emotion of the buyer by instilling “Americanness” into the ads. This “Buy America” form of marketing was materialized “in the form of President’s Day sales, patriotic vehicle names, or even nationally directed apologies or product recalls.” The advertisement push by the U.S. automotive industry is merely an alternate way to increase a push in sales by appealing to the emotions of the domestic buyer. This alternative approach is likely a desperate way to respond to the superior technological advancements by the Japanese and other foreign automotive manufacturers. Additionally, the concept of instilling national pride or patriotic emotions into a national audience is not “unique to automobile advertising[.]” These techniques are mechanisms of advertising used

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62 Id. at 823.
63 Id. at 837.
65 Levin, supra note 7, at 823. See also, e.g., Ken Bensinger, Isuzu Quitting U.S. Car Market, L.A. TIMES, Jan. 31, 2008.
66 Levin, supra note 7, at 823.
67 See generally id.
68 Id.
69 Id. at 824.
70 See generally Stolberg, supra note 8, at 2.
73 Levin, supra note 7, at 824.
74 See id. at 824-25.
75 See generally id. at 825-31. (By “national pride” this author is referencing an emotional connection perceived by a consumer in relation to a product that is believed (in theory, by the general public) to have some sort of patriotic value on a domestic level.)
76 Id. at 826
by other industries, such as tobacco companies who advertise in such a manner to appeal to the rugged, blue color-type American.\textsuperscript{77}

These alternative mechanisms are working in a modern North American market because of FTAs, and more specifically, NAFTA. If taxes and tariffs were imposed on U.S. automotive manufacturers such as Ford or General Motors during the height of their market dominance in foreign markets, then they would have likely had a lesser market share. This is because when consumers who are taxed or who must pay a tariff become less likely to buy the foreign good as the cost goes up. This is a simple supply and demand principle. Conversely, if taxes or tariffs were placed on companies such as Honda, Toyota or Volkswagen in the U.S. market, then the U.S. buyer would become more inclined to buy the domestic automobile. Similarly, this is based on the simple economic principle of cost and demand. Furthermore, if taxes and tariffs were placed on foreign automotive manufactures entering the U.S. market, then they would be less likely to create and innovate new automobiles and features. The consumer who does not have the new technology then suffers the ultimate harm.

This problem is a key factor that the creators of NAFTA intended to avoid.\textsuperscript{78} The “creativity and innovation” \textsuperscript{79} showed by Japanese and other foreign manufacturers have been of a great benefit to the American buyer. This benefit is evident by the introduction of hybrid gas/electric vehicles and also by reductions in cost due to technological advancements that increase productivity in the production and assembly of the vehicles.\textsuperscript{80}

3. Strategic Manufacturing: Stick to Your Strengths & Abandon Your Weaknesses

The principals of the effects of tariffs and taxes can be broadened to encompass all forms of manufacturing and production of goods.\textsuperscript{81} What logically flows from the elimination of, or refraining from implementing taxes or tariffs on

\textsuperscript{77} See Jon D. Hanson & Douglas A Kysar, \textit{Taking behaviorism Seriously: Some Evidence of Market Manipulation}, 112 Harv. L. Rev. 1422, 1466-1502 (1999); See also Levin, \textit{supra} note 7, at 827. (Levin references targeted advertising of the tobacco industry and its attempts to appeal to the U.S. consumer in an analogous way to emotional appeals by the automotive industry.)

\textsuperscript{78} See NAFTA Preamble, \textit{supra} note 2, at 1.

\textsuperscript{79} \textit{Id.}


\textsuperscript{81} See generally Levin, \textit{supra} note 7, at 831.
foreign goods is that countries can manufacture and produce only things that they are good at. Take the previous example of “Country X” and “Country Z.” If the citizens of “Country X” are able to buy oil cheaply from “Country Z” because it is easy to drill for, for example, then they can be economically efficient by avoiding to search for and excavate oil from their domestic land. What if “Country X” does have oil off of the coast, but the deep water drilling would be too costly? Should a domestic company pay an exorbitant amount of money to drill for it to give the domestic market oil that can compete with the increased price of the imported oil? This would surely not happen in most reasonable countries. This is because having affordable fuel is vital to the survival of any country.

Our second example between “Country X” and “Country Z” illustrates the point that the imposition of taxes and tariffs on foreign products would result in forcing (or encouraging) a domestic party to become a market participant, even if the economic viability of the product is not sound. E.g., even if they can sell their goods domestically because it would be cheaper than the foreign goods, their cost is only cheaper on a subjective measurement within a domestic realm. If the company were to expand into other foreign markets, then his price may be substantially higher than other market participants, and the foreign company may not be able to compete. This example leads into the last of the four main principles of FTAs.

4. Investment Opportunities: The Expansion of Capitalism on International Trade

By allowing for free trade access across boarders, companies are able to bring their products into a new market, and expand their company onto a global scale. Also, private capital can also be injected into foreign markets – private investors are able to invest in foreign companies, and those foreign companies thus have the capital that they need to expand their business domestically within their borders. Examples of this have been the expansion of Japanese automotive companies into U.S. markets, the expansion of Canadian Tire into U.S. markets to compete with companies like Wal-Mart and Target, and U.S. investors forwarding capital into Asian and European stock exchange. Inclusion of foreign investors is important to an economy because it allows for additional stimuli to the economy and can help avoid stagnation.

Understanding these four main principles, an evaluation of NAFTA requires specific historical background.

C. General Agreement on Tariffs and Trade (GATT)

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82 See generally Levin, supra note 7, at 823-25.
Chapter 1 of NAFTA begins with an "Establishment of the Free Trade area." This area is later defined to include the U.S., Canada and Mexico. In Chapter 1, the first declaration is that all parties to the agreement who participate in the free trade area must follow rules and conditions "consistent with Article XXVI of the General Agreement on Tariffs and Trade." Thus, GATT is a guiding building block from which NAFTA was drafted. Similarly to most FTAs, GATT calls for "increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements." This statement echoes sentiments found throughout NAFTA, and focuses on voluntary cooperation by its members. Article XXVI uses language in part 3.(a) that calls for "[a]dvantages" to "adjacent countries in order to facilitate frontier traffic." This wording demonstrates subtle similarities to the four main principles of FTAs previously discussed.

Perhaps the most important part of Article XXVI of GATT, as it pertains to NAFTA, is the definition of a "free-trade area." According to part 8.(b), a free-trade area "shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce […] are eliminated on substantially all the trade between the constituent territories in products originating in such territories." This definition, amongst other things, sets up the perambulatory framework of NAFTA.


The objectives of NAFTA, beyond that laid out in abstract in the Preamble, are discussed in Chapter 1. Article 102. Focus is placed more closely on "national treatment," and "most-favored nation" principles. The national treatment doctrine proclaims that any trade partners within NAFTA must be placed on a
level playing field, and that they must give other nations equal preference to even their domestic goods. The most-favored nation doctrine centers around the concept that if any member nation state has a trade preference or special dealing practices with another country – even a non-member – then they must offer the same treatment to all of the member nation states.

PART II: ACHIEVEMENTS OF THE NORTH AMERICAN FREE TRADE AGREEMENT

Trade between the U.S. and Canada has been tremendous since the implementation of NAFTA. Canada has remained the U.S.’s greatest trade partner with trade amount in 2008 that was over $560 billion. While in the same year, China’s trade with the U.S. with a trade amount just higher than $379 billion. These numbers reflect that the goal of encouraging trade between members, at least between the U.S. and Canada in this example, has been achieved. Positive economic goals are evidenced by a continuous Canadian economic growth. Since the implementation of NAFTA, the Canadian economy has grown at an average rate of 3.4% per year. Furthermore, during that same time since the implementation of NAFTA, approximately 2.5 million Canadian jobs have been created, further stimulating the Canadian economy. These statistics reflect a consistent growth in Canada and increases in work opportunities within the domestic marketplace. The U.S. and Canadian economies have sustained a continued demand “for each other’s products, services, capital and ideas, creating jobs and wealth across many sectors and accelerating the forces of mutually beneficial integration.” The Centre for Trade Policy and Law in Canada has “developed an extensive database detailing the extent of co-operation” between U.S. and Canadian governments in regards to trade. The sectors of this co-operative database include “customs administration, energy, agriculture and agri-food, surface transportation, immigration, drug approval, medical devises, chemicals and petro-chemicals, environment, and financial services.” These are beneficial because increased co-operation in developing safe and technologically improved products,

96 See id.
97 See generally id.
98 CBC News, supra note 10, at 1.
99 Id.
100 Id.
101 Id.
103 Id. at 46.
104 Id.
or services, as the case may be, benefit all citizens involved. For example, sharing “information, experience, data and expertise” makes for safer products, safer development of pesticides used for food, safer and more efficient modes of transit, etc.\footnote{105}

As a result of co-operation between the U.S. and Canada, which has occurred because of NAFTA, human kind is reaping the benefits. These benefits reflect a Catholic prerogative to provide to mankind “deliver[ance] … from the snare of the fowler and from the deadly pestilence.”\footnote{106} This psalm reflects that God will protect us. It also serves as a guide for mankind to do its best to be their “brother’s keeper”\footnote{107} and do their best to protect each other whenever possible. Benefits that NAFTA has brought in these fields of trade have made better medicines,\footnote{108} safer food\footnote{109} and safer consumer products.\footnote{110}

Because “NAFTA affects bilateral trade flows among the United States, Canada, and Mexico”\footnote{111} the U.S. has seen many benefits to the national economic climate since the implementation of NAFTA. According to the Office of the United States Trade Representative, (USTR), investment in American businesses has seen a substantial boom.\footnote{112} The USTR explains, “[b]usiness investment in the United States has risen by 117 percent since 1993, compared to a 45% increase between 1979 and 1993.”\footnote{113} What this data confirms is that since the inclusion of NAFTA to the U.S. foreign policy, trade between member nations has correlated with an accelerated economic growth on a domestic scale. Although it can be argued that much of this increase is due to a sustained rate of inflation of the U.S. dollar during that same time,\footnote{114} as a whole, both intra-continental and domestic investment have experienced an increase that eclipsed the inflation rate.\footnote{115}

Further evidence that NAFTA has benefited the U.S. domestic economy is illustrated by the positive impact on the total number of people that make up the U.S. workforce. The U.S. domestic employment work force has risen from 110.8 million people in 1993\footnote{116} to 137.6 million people in 2007.\footnote{117} This is an increase on

\footnote{105}{See id.}
\footnote{106}{Psalm 91:1-3}
\footnote{107}{Genesis 4:9}
\footnote{108}{See generally Hart, supra note 104, at 78}
\footnote{109}{See generally id.}
\footnote{110}{See generally id.}
\footnote{113}{Id.}
\footnote{114}{See http://www.tradingeconomics.com/united-states/inflation-cpi. for inflation rates between January 1979 and April 2013. (Last visited April 15, 2013).}
\footnote{115}{See Office of the United States Trade Representative, supra note 114, at 1.}
\footnote{116}{Id.}
\footnote{117}{Id.}
the U.S. workforce of 24 percent.118 Between 1993 and 2007 the average national unemployment rate in the U.S. was 5.1 percent.119 This can be compared with a 7.1 percent average rate between 1980 and 1993, prior to NAFTA.120 The increase in the total number of persons who are employed in the U.S. coupled with the 28.16 percent decrease in the average national unemployment rate121 illustrates a consistent level of economic security to the workforce in the U.S. This economic growth has provided more people in the U.S. with an opportunity to make a living for themselves and their families. Also during the period of 1993-2007, “business sector real hourly compensation rose by 1.5 percent each year between 1993 and 2007, for a total of 23.6 percent” average increase in the hourly wage to the American worker.122 These economic benefits have not been limited to the U.S. and Canada. The people in Mexico have experienced wage increases since the implementation of NAFTA.123

Prior to the implementation of NAFTA, the value of the Mexican peso was adversely affected by an economy, which experienced an account deficit “which ballooned from $6 billion in 1989 to $15 billion in 1991 and to more than $20 billion in 1992 and 1993.”124 The Mexican workforce has experienced wages that “grew steadily after the 1994 peso crisis, reached pre-crisis levels in 1997; and have increased each year since.”125 What this data confirms is that NAFTA, and the benefits of free trade that resulted from it, helped to the Mexican economy recover from the “financial meltdown”126 that afflicted the economic structure and the Mexican workforce. The effect of increased wages in Mexico has on the people is an improvement to the quality of life that is reflected by the goals in the framework of NAFTA.127

The intent of the framers of NAFTA envisioned the preservation of and improvement to the environmental conditions and pollution output by member nations.128 Since 1994, the Canadian and U.S. governments have partnered to

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118 Id.
119 Id.
120 Id.
121 Id.
122 Id.
123 Cf. Eduardo Zepeda, Timothy A Wise, and Kevin P. Gallagher, Rethinking Trade Policy for Development: Lessons From Mexico Under NAFTA, CARNEGIE ENDOWMENT FOR INT’L PEACE 5 (2009); See also World Bank, World Development Indicators, (2008). (These statistics show that since the implementation of NAFTA, although there has been some level of economic growth in Mexico, the growth rate is substantially less than the growth rate between 1960 and 1979.)
125 See Office of the United States Trade Representative, supra note 113, at 2; but see, e.g. ZEPEDA, ET. ALL., supra note 124, at 5.
126 Whitt, supra note 126, at 4.
127 See generally NAFTA Preamble, supra note 2.
128 Id.
create “environmental infrastructure projects to provide a clean and healthy environment for residents along the U.S.-Mexico border.” As of 2008, these environmental infrastructure projects have financed nearly $1 billion to improve environmental concerns along the U.S.-Mexican border.

Financing of the environmental infrastructure projects have attempted to improve environmental conditions among member nations. It also appears to be setting an example for non-member nations, insofar as the U.S.-Canadian efforts have provided a model for non-member nations to follow while engaging in international trade. The Mexican government has also taken measures to improve their environmental impact by making “substantial new investments in environmental protection, increasing the federal budget by the environmental sector 81% between 2003 and 2008.”

PART III: SHORTCOMINGS OF THE NORTH AMERICAN FREE TRADE AGREEMENT

Despite the many achievements of NAFTA, many goals have failed to be achieved. Much of the focus of implementation of NAFTA was focused on improving job prospects in North America and improving the economic structure of member nations. Although many economic and humanitarian benefits have been achieved because of NAFTA, as mentioned in Part II of this note, there are many shortcomings of its goals.

A. Trends in the U.S. and Canadian Workforce Have Failed to Mimic the Economic Success of the Top Earners

One shortage of NAFTA is evidenced by trends in Canadian unemployment rates. During the first 15 years after NAFTA’s implementation, Canadian unemployment rates have been about the same as the 15-year period before the agreement commenced. This rate stagnation occurred in spite of an average annual economic growth rate in Canada of 3.4% during that same 15-year period. On its face, this statistical data does not make sense. It does not seem possible that a steady and consistent national economic growth can occur while unemployment rates have stayed the same. The reasoning that makes sense of this

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129 Office of the United States Trade Representative, supra note 114, at 2.
130 Id.
131 Id.
132 See generally NAFTA Preamble, supra note 2.
133 Id.
data is that only the top 1% of the Canadian income scale has seen any significant growth since implementation of NAFTA.\textsuperscript{136} Although modern conservative economic theories suggest that trickle down economics is beneficial for the entire economy of a nation,\textsuperscript{137} it has not seemed to have the same success in Canada since the implementation of NAFTA as it had in the U.S. during the 1980s.\textsuperscript{138} Furthermore, although approximately 2.5 million Canadian jobs have been created since NAFTA’s implementation,\textsuperscript{139} the stagnation of unemployment over a 30-year period\textsuperscript{140} suggests that an equal – or at least a substantially similar – number of jobs have been lost in Canada.\textsuperscript{141}

The U.S. has also faced economic problems as a result of NAFTA. The U.S. trade deficit with Mexico and Canada has almost quadrupled since the implementation of NAFTA.\textsuperscript{142} This has caused the loss of 750,000 jobs.\textsuperscript{143} This loss of jobs has caused significant harm to the U.S. economic structure by displacing the 750,000 workers from their jobs.\textsuperscript{144} Furthermore, data that reflects an increase in the U.S. workforce is misleading. Although the U.S. domestic workforce has increased by 24 percent between 1993 and 2007,\textsuperscript{145} inflation adjusted wages reflect a lower quality of living in the U.S. during that same time.\textsuperscript{146} With an average annual inflation rate of just over 2.0% each year since 1993,\textsuperscript{147} U.S. workers who are paid at the Federal minimum wage have failed to keep up with the reduction in value of the U.S. dollar as there has only been one pay rate increase since 1993.\textsuperscript{148} This reflects greater suffering by the poorest population of the U.S. workforce.

\textsuperscript{136} See generally SCOTT ET ALL, supra note 136.
\textsuperscript{137} Murdoch R. Martyn, NAFTA – Limited in Nature?, NORTH AMERICAN FREE TRADE AGREEMENT: (NAFTA OVERVIEW), Cooley School of Law, (Summer 2012 Program for Toronto, Canada), (2012). Note: Martyn’s is a professor of law for The Thomas M. Cooley School of Law for the school’s foreign study program. This source makes reference to U.S. Conservative Lou Dobbs who focuses on the fiscal benefits of free trade and profits from outsourcing.
\textsuperscript{138} See generally SCOTT ET ALL, supra note 136.
\textsuperscript{139} CBC News, supra note 10, at 1.
\textsuperscript{140} The “30-year period” referenced is from 1979-2009. This period is specifically referenced to have a substantial period of time both prior to, and after the agreement commenced.
\textsuperscript{141} CBS News, supra note 10, at 1.
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} Id.
\textsuperscript{145} See Office of the United States Trade Representative, supra note 114, at 1.
\textsuperscript{146} See Inflation Rates, supra note 116.
\textsuperscript{147} See id.
Many jobs that have been lost are in “Rust Belt” American manufacturing.\footnote{Elisabeth Malkin, \textit{Re-examining Nafta in Hopes of Curing U.S. Manufacturing}, The New York Times. \texttt{Available at}, \url{http://www.nytimes.com/2008/04/22/business/worldbusiness/22nafta.html?_r=1&pag…}

American liberal, and President of the Teamsters union, James P. Hoffa, suggests that as a result of outsourcing of American jobs to Mexico and non-member nations, “particularly China, has accelerated job losses in the United States[.]”\footnote{Id. (Note, Hoffa suggests that outsourcing to China that has occurred in recent years has been a greater problem to the American manufacturing job market than NAFTA. However, this author does not aim to include China in the analysis of the effects of the agreement. This is because the focus of this note is on the intra-continental paradigm within North America without the inclusion of non-member nations in the analysis.)}

U.S. jobs, other than in manufacturing have been outsourced to Mexico as a result of NAFTA. This is rooted in a corporate profit seeking nature, in which companies are seeking cheaper labor. The Hershey Chocolate Company has “pack[ed] up and move[d] to Mexico.”\footnote{Id.}

As NAFTA has sought to encourage investment in developing countries,\footnote{See NAFTA Preamble.} much of its intentions have been met by a negative job-killing backlash in the U.S.\footnote{See Malkin, \textit{supra} note 151, at 1.} NAFTA framers would argue that bringing the jobs to a developing country gives job opportunities to poorer people, and give an opportunity for consumer benefits in the form of cheaper products.\footnote{Id.}

In theory, this is true. NAFTA truly does seek to bring human rights development,\footnote{Id.} and cheaper products to consumers in member-nations.\footnote{Id.}

However, some corporations seem to have exploited the poor in the developing countries for greater profits. The goals of NAFTA aim to improve labor conditions and eventually raise the cost of doing business in Mexico and in other developing countries.\footnote{See NAFTA Preamble, \textit{supra} note 2.}

Once the cost of doing business rises, market equilibrium in terms of cost, would be reached. Thus, costs of business would be equal in all member countries. Theoretically, this would “make companies think twice about moving” business operations out of the U.S.\footnote{Id.}

\textbf{B. Mexican Wages Have Failed to Substantially Improve}

The goal of reaching market equilibrium has not occurred in many circumstances because costs of doing business in Mexico have not substantially improved. Because the average hourly pay rate for manufacturing labor in Mexico is 13% of what the United States’ average hourly wage is,\footnote{Id.} companies have been
getting labor at a substantially discounted rate by outsourcing jobs to Mexico, or even to non-member nations like China.\textsuperscript{160} Although, if the goals of NAFTA where achieved, the costs of those companies products would go down to the ultimate consumer. This is not the case. Companies like Hershey Chocolate have moved operations to Mexico,\textsuperscript{161} and have you ever seen the price of a chocolate bar go down? The stabilized, or still often increasing, costs to consumers is providing evidence that the success of Regan’s trickle down economics has not provided the same success on an intra-continental scale as NAFTA has aimed.

C. Mexico Has Not Reached Its Goals To Improve Environmental Concerns

As discussed in Part II, Mexico has been plagued by environmental concerns have failed to be remedied since the implementation of NAFTA. “With a total estimated cost of $2.89 billion and [an allocation of] $33.5 million in assistance and $21.6 million in grants”\textsuperscript{162} being funneled into the environmental infrastructure projects to benefit Mexico, little has been accomplished to improve the persistent presence of environmental issues.\textsuperscript{163}

Two glaring environmental issues face Mexico as a developing country in a FTA with two developed countries. The first environmental concern facing Mexico is that “the rise in the over application of nitrogen, phosphorus, and other agrochemical inputs”\textsuperscript{164} has adversely impacted the safety of food being used domestically in Mexico, and being exported to the U.S. and Canada.\textsuperscript{165} This is a major concern because “Nitrogen runoff is the largest pollution source in Mexico, the United States, and Canada.”\textsuperscript{166} This results in algae blooms and other natural phenomena that affect the ecosystems in Mexican waterways.\textsuperscript{167} This has caused destruction to natural balances in the waterway ecosystems in “rivers, lakes, the Sea of Cortez, and the Gulf of Mexico.”\textsuperscript{168}

The second major environmental concern that is persistently facing Mexico is “depletion of groundwater due to increased crop irrigation[.]”\textsuperscript{169} The water depletion occurring in Mexico can in part be attributable to NAFTA’s success in promoting food exportation on a global scale.\textsuperscript{170} “Since enactment of NAFTA,
Mexican exports of all fresh vegetables have increased by 80 percent, and exports of fresh fruit have increased by 90 percent.”\textsuperscript{171} The increased amounts of exportation have required significant increases in irrigation and water in Mexico is becoming one of the most water stressed countries in the world.\textsuperscript{172} This is therefore an unsustainable way to produce fruits and vegetables for exportation because “water stress”\textsuperscript{173} will render farming fruits and vegetables nearly impossible.

It appears that the concerns of pollution by chemicals on food products and the increased demand for water for many of the same food products is attributable to the desire by the businesses that are engaging in these practices to put profits as their main priority. This is a similar manifestation of the holding in \textit{Dodge}.\textsuperscript{174} This attitude by the companies who are not taking proper precautions to ensure long-term sustainability of their agricultural practices\textsuperscript{175} suggest that greed is the sole motivator behind their action. When the companies that grow and process the exported fruits and vegetables put profits and production before the health and safety of the local area, the price of a devastated ecosystem, or an agricultural system that will collapse on itself is not a relevant concern to the company because they can simply relocate their business to another member nation.\textsuperscript{176} This leads into the next failure of NAFTA.

\textbf{D. The Lack of Corporate Ties to Any Nation: The Conflict Between Short Term Profit and Long Term Stability.}

In a global economy where labor, profits, and environmental effects reach across national borders, what does it mean for a corporation to present the impression of national citizenship?\textsuperscript{177}

Corporations exist for the good of their investors.\textsuperscript{178} Furthermore, corporations are “strictly a private entity whose exclusive responsibility [is] to make a profit for the benefit of its shareholders.”\textsuperscript{179} The Michigan Supreme Court

\textsuperscript{171} Id. at 63.
\textsuperscript{172} Id.
\textsuperscript{173} Id.
\textsuperscript{174} See \textit{Dodge}, 170 N.W., supra note 54.
\textsuperscript{175} \textit{AUDLEY ET AL.}, supra note 165, at 63.
\textsuperscript{176} Recall generally the aims of the framers of NAFTA.
\textsuperscript{177} Levin, supra note 7, at 825.
\textsuperscript{178} See, e.g. \textit{ADOLF A. BERLE & GARDINER C MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY} 293 (Transaction Publishers 1991) (1932); see also Levin, supra note 7, at 832. (Levin makes a general reference to the preceding citation.)
\textsuperscript{179} Levin, supra note 7, at 832.
ruled in Dodge v. Ford that maximization of profits and making the largest divided payment to its shareholders is the corporation’s most important duty.

At the same time, corporations are vital to the people of their country, because the manufacture goods, and also create jobs. This typically means that benefits the corporation, e.g. reduced costs, increased productivity, etc., also benefits the workers. Therefore in many circumstances, the corporation who is manufacturing goods and employing a workforce “becomes a quasi-governmental entity or at least a crucial, unifying social force.” This may very well be too big of a responsibility for corporations because their actions are targeted to benefit only a small group of people – the shareholders.

Once implemented, NAFTA opened the doors to bring in foreign investment into U.S. and Canadian corporations. At the same time, NAFTA opened the doors for companies to move their production to a country that will maximize profits for their shareholders. What results is that American and Canadian corporations have an overwhelming incentive to move to a country like Mexico, where the average hourly wage is 13% of what it would be in the U.S. The result of having a duty to maximize profits and dividend payments to shareholders, coupled with an opportunity to reduce labor costs by 87% is that international outsourcing becomes an inevitable way to do business.

These short-term profits are often offset by the long-term fallout of having a depressed economy with no wages coming in. This is because “the operation of a factory becomes an ostensibly immutable background condition,” to perpetually stimulate the economy and create future purchasers of the corporation’s own products. Not only is maintaining production and payment of high wages paramount to “stability to an entire community’s way of life[,”] it is also important to the long-term sustainability of ensuring that the corporation will have purchasers for their own products.

Outsourcing and its effects on an economy are illustrated by the following example: Companies “X,” “Y,” and “Z” are producers in “Country A,” and they all decide to move their production to “Country B” to take advantage of wages

170 N.W., supra note 54, at 685.
181 See generally id.
182 Levin, supra note 7, at 833.
183 See generally id.
184 Id. at 835.
185 Dodge, 170 N.W., supra note 54, at 685.
186 See NAFTA Preamble, supra note 2.
187 See generally Malkin, supra note 151.
188 Id. at 1.
189 See generally Dodge, 170 N.W., supra note 54.
190 See Malkin, supra note 151, at 1.
191 Levin, supra note 7, at 874.
192 Id. at 875.
that are substantially lower than “Country A.” If the displaced workers from Companies “X,” “Y,” and “Z” are all displaced from their work, then the former employees of all of the companies will stop purchasing products from all three companies because they will not have employment and thus not have money to buy the products. Furthermore, the newly hired employees in “Country B” will not be able to buy the products from any of the three companies because they are not paid enough as the employees who were working in “Country A” prior to outsourcing. The end result is that in order to maximize profits for the company and dividend payments to the shareholders, Companies “X,” “Y,” and “Z” all sacrificed future profits by eliminating consumers.

This simple illustration only shows three corporations in a vacuum. The real world implications of just three companies outsourcing jobs will not typically have its effect felt much beyond the town or community in which the jobs where outsourced from. However, if the previous example is multiplied by hundreds of companies over many years, then it is entirely possible to have the illustrated effect become a reality.

PART IV

NECESSARY MEASURES OF INTERCONTINENTAL ACTION

By showcasing the problems that have manifested since implementation of NAFTA, this article argues that most of the problems originate from corporate and investor greed. There is a problem when a national economy, like Canada, is capable of having an average annual growth of 3.4% and only the top earners earn almost all of that economic growth. The answer is not to tax. That is clearly counter-intuitive to capitalistic growth. The answer is not to impose tariffs on goods made by corporations who outsource jobs to Mexico.

The concept of “Soft Law” states that intergovernmental entities that may be having political conflicts over concepts such as environmental standards, or human rights issues should have a “flexible process … to develop and test new legal norms[.]” The point of soft-law is to avoid conflict by coddling reluctant members and refraining from making the laws “binding” on them. NAFTA has taken on a similar type of operation. Corporations who are given the wonderful benefits of free trade and the ability to increase profits have totally abused their power due to their lack of national identity. Corporations are able to avoid unfavorable laws and simply move wherever they can make the easiest money.

195 Id. at 344-45.
196 Id. at 344.
The answer is to fight to ensure that “market equilibrium” becomes eventually reached by wages in developing countries – e.g. Mexico – rise to reflect the influx of jobs. The use of the soft-law-type approach of coddling corporations to stay and/or offering huge tax incentives to keep jobs domestically is not the answer. The answer is to remove the duty to simply maximize profits and pay out massive dividends.

Corporations and Inter-continental governments do not to be at odds, as they seem to always be in North American countries. Ensuring that a vision by corporations and governments is centered on long-term economic growth for all members of the workforce should be paramount. However, the ruling in Dodge, (94 years ago,) suggests that this conflict is not going away because it is still the status quo today.

Once corporate citizenship and national identity is accepted, and corporations view their duty to their country and the sustainability of the domestic market, then many of the shortcomings that NAFTA has will disappear. Further, corporations outsource jobs to developing countries and compensate the workers there with a fair wage, and then the “market equilibrium” that Malkin discusses may be obtainable. Additionally, if the wages in Mexico are paid in such a manner, then the consumer market domestically in Mexico will increase and further stimulate corporate investment. It is this author’s contention that many of the environmental concerns will be cured by the corporation’s commitment to sustainable economic practices. Eliminating the desire to maximize short-term profits now will allow corporations to realize with clarity that further stressing water is bad for business in the long run. This is because further stressing water supplies will lead to an inability to produce any agricultural goods when the supply is completely depleted.

There are clearly many benefits that NAFTA has made since implementation in 1994. What must be addressed are the shortcomings addressed above. If government and corporations truly worked together, then the entire population of North America – and beyond – would benefit from it.

197 Malkin, supra note 151, at 1.
198 See generally BERLE, supra note 180.
199 See generally Dodge, 170 S.W. supra note 54.
200 Malkin, supra note 151, at 1.
WHERE THE HOLY SEE AND SCIENCE AGREE:
CHILDREN DO BEST IN A STABLE NATURAL FAMILY

William Monte*

INTRODUCTION

Not many years ago the traditional notion that children do best when raised in a stable natural family with a married mother and father would not have been questioned. Today, however, this orthodoxy is being challenged by same-sex parenting both domestically¹ and internationally.² In this paper, I will argue that

¹ See Leah C. Battaglioli, Modified Best Interest Standard: How States Against Same-Sex Unions Should Adjudicate Child Custody and Visitation Disputes between Same-Sex Couples, 54 CATH. U. L. REV. 1235, 1235-36 (2005) (“[In the United States] [a]n estimated six to ten million individuals in same-sex relationships are parents of between six and fourteen million children.”).

² See Jennifer J. Power et al., Understanding Resilience in Same-Sex Parented Families: The Work, Love, Play Study, 10 BMC PUB. HEALTH 115 (2010), available at http://www.biomedcentral.com/1471-2458/10/115 (“Data from the 2001 Australian census indicates that one in five lesbian couples, and up to five percent of gay male couples, have a child or children living with them at home.”). As of 2007, eleven European nations have created laws allowing joint or second-parent adoption by same-sex partners including Denmark, Iceland, the Netherlands, Norway, Sweden, Germany, Spain, England and Wales, Scotland, and Belgium, and to a more limited degree in France. Lynnne Marie Kohm et al., An International Examination of Same-Sex Parent Adoption, 5 REGENT J. INT’L L. 237, 244-250 (2007) (citing laws in eleven European countries: in particular, The Netherlands (“The Netherlands was among the first of the major European nations to provide adoption rights to same-sex couples.”) Id. at 244.; England and Wales (“Domestic adoption is regulated throughout the United Kingdom by the Adoption Act of 1976 . . . . Same-sex adoption is currently permitted in all the United Kingdom except Northern Ireland.” Id. at 246.; Scotland (“As of 2007, Scotland is the most recent nation to allow same-sex partners to adopt.” Id. at 247.; The Nordic Nations (Denmark, Iceland, Norway, and Sweden) and Germany (“The Nordic nations were among the first to grant relationship rights to same-sex partners. Yet, in Denmark, Norway, and Germany, joint adoption is not allowed. Denmark was the first European nation to allow same-sex adoption in May 1999. However, it has maintained a consistent position allowing only same-sex, second-parent adoption despite early action to provide homosexual rights in other areas of law such as protection from discrimination and the legal right to a registered partnership. With adoption, one partner must be a biological parent of the child in order for his or her partner to adopt. Similarly, the laws in Iceland only allow same-sex, second-parent adoption when the partner is a biological parent of the child and there is a registered partnership. Sweden, in contrast to the other Nordic nations, allows same-sex couples in a registered partnership to jointly adopt children.” Id. at 247-48.); Spain (“In June 2005, Spain authorized full gay marriage for same-sex couples. With this right to marriage came all the rights afforded to heterosexual couples, including the right to adopt. Therefore, in Spain both joint adoption and second-parent adoption of a partner’s child were completely legalized upon the sanction of same-sex marriage.” Id. at 248-49.); Belgium (“Belgium allows both joint adoption and second-parent adoption of a partner’s biological children.” Id. at 249.); France (“A recent ruling [2006] in France by the Court of Cassation, the nation’s highest court, allowed limited access to parental rights for same-sex partners . . . . It is
the Holy See’s dialogue with the Committee on the Rights of the Child on the Convention on the Rights of the Child is in the best interest of children and is supported by scientific evidence, as well as scholarly research. Part I will review a recent scientific study which found that children do best in a stable family with a married mother and father, a Brief which proposes the opposite conclusion, and scientific studies which refute the Brief’s findings. Part II will explain the nature and mission of the Holy See, the origin and administration of the Convention on the Rights of the Child, and the Holy See’s position on the Convention on the Rights of the Child as articulated in the Holy See’s Second Periodic Report to the Committee on the Rights of the Child on the Convention on the Rights of the Child. Part III will argue that the Holy See is correct in supporting marriage between a man and a woman, the natural family based on marriage as the basis of society, and the natural family as the best environment for children. Further, that its argumentation is bolstered by scientific evidence and scholarly research. Lastly, Appendix A provides the reader with a summary of studies supporting same-sex parenting, while Appendix B provides summaries of scientific evidence that show that all the studies in Appendix A have no basis in good science because they are all scientifically flawed.

PART I:
THE SCIENCE

A. The New Family Structures Study

The 2012 New Family Structures Study (hereinafter NFSS) is an important study because it is very large and the most recent study on same-sex parenting providing solid evidence that same-sex parenting is not in the best interests of children. In fact, the study showed that children do best when raised in a stable

still unclear, however, exactly what this decision means for same-sex parent adoption in the future, and how the case will be used as precedent in light of its unique facts.” Id. at 249-50)).

3 ROBERT LERNER & ALTHEA NAGAI, NO BASIS: WHAT THE STUDIES DON’T TELL US ABOUT SAME-SEX PARENTING 107 (2001) (“[The scientist must] [u]se a large enough sample. The studies . . . [supporting] homosexual parenting that rely on inferential statistical testing have samples that are much too small to arrive at any genuine conclusions of ‘no statistical difference’ between the study and comparison groups. These studies must be replicated with significantly larger samples before their non-statistically significant findings can be taken seriously. These calculations can be done before a study is executed and future research should include and report their power calculations as a matter of course.”).

4 Mark Regnerus, How Different are the Adult Children of Parents who have Same-Sex Relationships? Findings from the New Family Structures Study, 41 SOC. SCI. RES. 766 (2012), available at http://ac.els-cdn.com/S0049089X12000610/1-s2.0-S0049089X12000610-main.pdf?_tid=3b8ef4a6-9701-11e2-8236-00000aacb35d&acdnat=1364404412_b21b49f92e3fab1d920fca8b9d3f3b98.
family by a married mother and father. A “stable family” can be inferred from the author’s conclusions: “when they [children] spend their entire childhood with their married mother and father, and especially when the parents remain married to the present day.” The NFSS is uniquely nationally representative; the NFSS screened over 15,000 subjects, surveyed Americans between the ages of eighteen and thirty-nine, and fully completed surveys with 2,988 subjects. The NFSS collected data from young American adults using random sampling who had been raised in a variety of family arrangements. This was unusual because most other studies on same-sex parenting have sought responses from parents rather than directly from the children. Young adult children of a parent who had a same-sex relationship were compared with six other family-of-origin types and forty different social, emotional, and relational variables were analyzed.

The author of the NFSS stated that although the study results showed children do best when raised in a stable family by a married mother and father, these findings might – in part – be explained by “a variety of forces uniquely problematic for child development in lesbian and gay families . . . [such as] a lack of social support for parents, stress exposure resulting from persistent stigma, and modest or absent legal security for their parental and romantic relationship statuses.” However, the author emphasized the fact that “the empirical claim that no notable differences exist must go.” The findings of the NFSS derived from a large, nationally-representative, population-based sample of young Americans indicate that the family experiences of a large number [of children raised by same-sex parents] may be affected. The study concluded that “[T]he NFSS . . . clearly reveals that children appear most apt to succeed well as adults – on multiple counts and across a variety of domains – when they spend their entire childhood with their married mother and father, and especially when the parents remain married to the present day.”

The study results of the NFSS, however, were not well received by everyone. After the author – Regnerus – published his research in June, 2012, he came under
attack. “[A] writer on LGBTQ issues”\textsuperscript{15} accused him of scientific misconduct which led Regnerus’ employer, the University of Texas, to launch a scientific misconduct investigation.\textsuperscript{16} In August, the University of Texas decided to drop its investigation of Regnerus stating: “no formal investigation is warranted.”\textsuperscript{17} The University of Texas initially had decided to investigate Regnerus because of accusations by a “LGBT activist and blog writer”\textsuperscript{18} claiming that Regnerus had “designed [a study] so as to be guaranteed to make gay people look bad, through means plainly fraudulent and defamatory . . . and of harboring anti-gay prejudices because he is Catholic.”\textsuperscript{19} Walter Schumm, a professor at Kansas State University, recently stated that “Regnerus conducted eminently defensible scientific research . . . [and] Regnerus can consider himself fully vindicated as a scholar.”\textsuperscript{20} Schumm’s backing of Regnerus was further supported by a written statement posted on the Baylor University website and signed by twenty-seven social scientists defending Regnerus’ study.\textsuperscript{21}

The relevance of the above discussion is that one, non-scientist attempted to sabotage the entire NFSS and destroy a researcher’s reputation by means less-than-fair merely because he did not agree with the findings of the study, but that the social science scholarly community solidly rallied to defend Regnerus’ study as properly conducted, good scientific research, and an important contribution to the social science field of parenting.

In support of Proposition 8 and DOMA, Regnerus’ vindicated research\textsuperscript{22} has been cited by Professor Helen M. Alvare of George Mason University in her Brief

\textsuperscript{13} O’Brien, \textit{supra} note 9.

\textsuperscript{14} \textit{Id.}


\textsuperscript{16} \textit{Id.}

\textsuperscript{17} \textit{Id.}

\textsuperscript{18} \textit{Id.}

\textsuperscript{19} \textit{Id.}


\textsuperscript{21} Institute for Studies of Religion, Baylor University, \textit{A Social Scientific Response to the Regnerus Controversy}, \textsc{Baylorisr.org} (June 20, 2012), http://www.baylorisr.org/2012/06/a-social-scientific-response-to-the-regnerus-controversy/ (“We are disappointed that many media outlets have not done their due diligence in investigating the scientific validity of prior studies, and acknowledging the superiority of Regnerus’s sample to most previous research.”); \textit{See also} O’Brien, \textit{supra} note 9 (“The statement [by the twenty-seven social scientists posted on the Baylor University website] affirms the scientific integrity of Regnerus’ methods, answering the primary accusations that had been fired at him, and pointing out the inadequacy of previous studies on the same subject.”).

\textsuperscript{22} Regnerus, \textit{supra} note 4.
of Amicus Curiae to the United States Supreme Court. Alvare pointed out that Regnerus’ study findings may be related to difficulties with same-sex parenting resulting in poorer outcomes of children raised in same-sex households.

B. The American Psychological Association’s Brief in Support of Same-Sex Parenting

The most influential and significant work advocating same-sex parenting was an eighty-two page 2005 publication by the American Psychological Association, which became commonly referred to as a brief (hereinafter APA Brief). The APA Brief set out the following: homosexual orientation is not a mental disorder; societal beliefs that lesbian women or gay men cannot be competent parents lack any empirical foundation; sexual identity in children is not influenced by same-sex parents; children of same-sex parents are not more likely to suffer from emotional and mental disorders; children of same-sex parents do not experience problems with social relationships; and that there are abundant empirical studies, as well as legal reviews, that support same-sex parenting.

The APA Brief cites fifty-nine published research manuscripts in support of same-sex parenting in a section titled “Empirical Studies Specifically Related to


\[24\] Id. at 21 (“Since the district court rendered its decision in Perry, a peer-reviewed journal issued the first nationally representative study [NFSS] of children reared in a same-sex household. These children’s outcomes across a host of emotional, economic and educational outcomes were diminished as compared with children reared by their opposite-sex parents in a stable marriage. The author of the study [Regnerus] acknowledged that the question of causation remains unknown; however, the children’s outcomes might indicate problems with same-sex parenting.”).

\[25\] AMERICAN PSYCHOLOGICAL ASSOCIATION, LESBIAN & GAY PARENTING (2005) [hereinafter APA Brief], available at http://www.apa.org/pi/lgbt/resources/parenting-full.pdf; In law, the word “brief” is a legal term. The APA Brief, however, is not a legal brief, even though its objective was to be useful in family law cases. See id. at 3 (“[T]he focus of the publication . . . [is] to serve the needs of psychologists, lawyers, and parties in family law cases . . . Although comprehensive, the research summary is focused on those issues that often arise in family law cases involving lesbian mothers or gay fathers . . . We hope the publication will be useful to clinicians, researchers, students, lawyers, and parents involved in legal and policy issues related to lesbian and gay parenting.”); See also BLACK’S LAW DICTIONARY 217 (9th ed. 2009) (defining brief as “[a] written statement setting out the legal contentions of a party in litigation, esp. on appeal; a document prepared by counsel as the basis for arguing a case, consisting of legal and factual arguments and the authorities in support of them”).

\[26\] APA Brief, supra note 25, at 7-15, 23-45, 57-58 (“[T]here is no evidence to suggest that lesbian women or gay men are unfit to be parents or that psychological development among children of lesbian women or gay men is compromised relative to that among offspring of heterosexual parents. Not a single study has found children of lesbian or gay parents to be disadvantaged in any significant respect relative to children of heterosexual parents. Indeed, the evidence to date suggests that home environments provided by lesbian and gay parents are as likely as those provided by heterosexual parents to support and enable children’s psychological growth.”).
Lesbian and Gay Parents and Their Children.”

Appendix A provides a summary of all fifty-nine studies.

C. Scientific Criticism of the APA Brief’s Cited Studies Supporting Same-Sex Parenting

Claims made in studies supporting same-sex parenting have been the target of criticism. Opponents of same-sex parenting claim that the research supporting same-sex parenting has relied on methodologically flawed and inadequate social science studies when comparing the effects of same-sex and opposite-sex child rearing. This research has ignored serious adverse effects of same-sex parenting on children, including a tendency of development of homosexual orientation in children, emotional and cognitive disadvantages due to the lack of opposite-sex parents, and economic security.

Experts in the area of quantitative analysis, Lerner and Nagai critically evaluated forty-nine studies on same-sex parenting. Six critical research tasks were analyzed in all forty-nine studies. These research tasks are the following: “(1) formulating a hypothesis and research design; (2) controlling for unrelated effects; (3) measuring concepts (bias, reliability and validity); (4) sampling; (5) statistical testing; and (6) addressing the problem of false negatives (statistical power).” Their analyses found the following problems in the studies: “Unclear hypotheses and research designs; Missing or inadequate comparison groups; Self-constructed, unreliable and invalid measurements; Non-random samples, including participants who recruit other participants; Samples too small to yield meaningful results; and Missing or inadequate statistical analysis.”

“Lerner and Nagai found at least one fatal research flaw in all forty-nine studies. As a result, they conclude that no generalizations can reliably be made on

27 Eight of sixty-seven studies are “unpublished doctoral dissertations” with no information provided and, thus, cannot be evaluated. Therefore, analysis is limited to the fifty-nine studies that were published. Id. at 23-45 (citing sixty-seven studies).
29 Id. at 833.
30 Id.
31 LERNER & NAGAI supra note 3, at 3; See generally id. Lerner and Nagai’s book also serves as an invaluable educational tool as a primer on basic epidemiological principles and statistical methodology regarding study design and data analysis. Thus, their book not only showed that studies on same-sex parenting were scientifically unsound, but the book has a pedagogical role as a tool for future researchers to help them design and conduct better studies and to apply the proper statistical methodology, with the goal of avoiding the mistakes that have been made in the past.
32 Id. at 3.
33 Id.
34 Id.
any of these studies. For these reasons the studies are no basis for good science or good public policy.”

As discussed above, the APA Brief reported fifty-nine empirical studies in support of same-sex parenting (see Appendix A). It is interesting to note that Lerner and Nagai had critically evaluated forty-nine studies supporting same-sex parenting and that thirty of the forty-nine studies were cited in the APA Brief to bolster their advocacy of same-sex parenting but had already been soundly rejected as flawed and bad science by Lerner and Nagai four years earlier. Studies one through thirty in Appendix B (1a-30a) provide a summary of analyses by Lerner and Nagai of studies cited in the APA Brief.

A 2012 study by Marks represents a serious defeat for the APA Brief’s empirical studies supporting same-sex parenting because he finds fault with not just thirty of the studies but all fifty-nine of APA Brief’s fifty-nine cited studies. Marks revealed that more than three-fourths of the APA Brief’s cited studies were based on small, non-representative, convenience samples with less than one hundred subjects (one study had only five participants). Only thirty-three of the fifty-nine studies had a heterosexual comparison group. None of the APA Brief’s cited studies addressed the societal concerns of “intergenerational poverty, collegiate education and/or labor force contribution, serious criminality, incarceration, early childbearing, drug/alcohol abuse, or suicide.” Neither did any of the cited studies examine late adolescent outcomes of any kind. The fifty nine studies prematurely concluded that heterosexual couples and gay and lesbian couples produce parental outcomes that are not different because the analytical

35 Id.; See also id. at 4, Foreword by David Orgon Coolidge, Director, Marriage Law Project (“What do existing studies tell us about the impact of same-sex parenting on children? Nothing. That’s right, nothing. You would never know that, however, if you were to read most court decisions, law review articles, commission reports or newspaper articles. You would hear the opposite.”).
36 APA Brief, supra note 25, at 23-45; See also Appendix A.
37 See Appendix A, studies 1-30.
38 LERNER & NAGAI, supra note 3, at 3; See also Appendix B.
39 See Appendix A, studies 1-30.
40 Loren Marks, Same-Sex Parenting and Children’s Outcomes: A Closer Examination of the American Psychological Association’s Brief on Lesbian and Gay Parenting, 41 SOC. SCI. RES. 735, 736-749 (2012); See also Matthew J. Franck, Mark Regnerus and the storm over his controversial gay parenting study, LIFESITENEWS.COM (Nov. 19, 2012), http://www.lifesitenews.com/news/mark-regnerus-and-the-storm-over-his-controversial-gay-parenting-studd?utm_source=LifeSiteNews.com+Daily+Newsletter&utm_campaign=1b1f4f6e3a-LifeSiteNews_com_US_Headlines_11_16_2012&utm_medium=email (“But as Loren Marks showed, the 59 studies grounding the APA’s statement were all deeply flawed, with sampling and design problems, inadequate statistical rigor, and conclusions about ‘no differences’ that could not be justifiably generalized to the larger population.”).
41 Marks, supra note 40, at 736.
42 Id. at 739.
43 Id. at 743-44.
44 Id. at 744.
basis for making this conclusion was not proven to be statistically significant. Overall, all of the fifty-nine studies suffered from one or more of the following: the sampling was homogeneous, there was an absence of a comparison group, if there was a comparison group, the nature of that comparison group was flawed, data often showed contradictory results; the children’s outcomes studied were

45 Id. at 745.
46 Id. at 736-738 (“Lack of representativeness often entails lack of diversity as well. A closer examination of the APA-cited literature from the ‘Empirical Studies’ (pp. 23–45) section of the APA Brief reveals a tendency towards not only non-representative but racially homogeneous samples. For example: 1. ‘All of [the fathers in the sample] were Caucasian’ (Bozett, 1980, p. 173). 2. ‘Sixty parents, all of whom were White’ comprised the sample (Flaks et al., 1995, p. 107). 3. ‘[All 40] mothers . . . were white’ (Hoeffler, 1981, p. 537). 4. ‘All the children, mothers, and fathers in the sample were Caucasian’ (Huggins, 1989, p. 126). 5. ‘The 25 women were all white’ (Rand et al., 1982, p. 29). 6. All of the women . . . were Caucasian’ (Siegenthaler and Bigner, 2000, p. 82). 7. ‘All of the birth mothers and co-mothers were white’ (Tasker and Golombok, 1998, p. 52). 8. ‘All [48] parents were Caucasian’ (Vanfraussen et al., 2003, p. 81). Many of the other studies do not explicitly acknowledge all-white samples, but also do not mention or identify a single minority participant – while a dozen others report ‘almost’ all-white samples.

47 Id. at 739 (“Of the 59 publications cited by the APA in the annotated bibliography section entitled ‘Empirical Studies Specifically Related to Lesbian and Gay Parents and Their Children’ (pp. 23–45), 33 included a heterosexual comparison group . . . 26 of the studies (44.1%) on same-sex parenting did not include a heterosexual comparison group. In well-conducted science, it is important to have a clearly defined comparison group before drawing conclusions regarding differences or the lack thereof. We see that nearly half of the ‘Empirical Studies Specifically Related to Lesbian and Gay Parents and Their Children’ referenced in the APA Brief allowed no basis for comparison between these two groups.”).
48 Id. at 741 (“We see that in selecting heterosexual comparison groups for their studies, many same-sex parenting researchers have not used marriage-based, intact families as heterosexual representatives, but have instead used single mothers . . . In total, in at least 13 of the 33 comparison studies listed in the APA Brief’s list of ‘Empirical Studies’ (pp. 23–45) that include heterosexual comparison groups, the researchers explicitly sampled ‘single parents’ as representatives for heterosexual parents. The repeated (and perhaps even modal) selection of single-parent families as a comparison heterosexual-parent group is noteworthy, given that a Child Trends (2002) review has stated that ‘children in single-parent families are more likely to have problems than are children who live in intact families headed by two biological parents’.”).
49 Id. at 742 (“There is at least one notable exception to the APA’s claim that ‘Not a single study has found children of lesbian or gay parents to be disadvantaged in any significant respect relative to children of heterosexual parents.’ In the ‘Summary of Findings’ section, the APA Brief references a study by Sarantakos (1996), but does so in a footnote that critiques the study (p. 6, Footnote 1). On page 40 of the APA Brief’s annotated bibliography, a reference to the Sarantakos (1996) article is offered, but there is no summary of the study’s findings, only a note reading ‘No abstract available.’ Upon closer examination, we find that the Sarantakos (1996) study is a comparative analysis of 58 children of heterosexual married parents, 58 children of heterosexual cohabiting couples, and 58 children living with homosexual couples that were all ‘matched according to socially significant criteria (e.g., age, number of children, education, occupation, and socioeconomic status).’ The combined sample size (174) is the seventh-largest sample size of the 59 published studies listed in the APA Brief’s ‘Summary of Research Findings on Lesbian and Gay Parenting’ . . . However, the six studies with larger sample sizes were all adult self-report studies, making the Sarantakos combined sample the largest study (APA Brief, pp. 23–45) that examined children’s developmental outcomes . . . Based on teacher (not parent) reports, Sarantakos found several significant differences between married families and homosexual families . . . Sarantakos concluded, ‘Overall, the study has shown that children of married couples are more likely to do well at school in academic and social terms, than children of cohabiting and homosexual couples’ . . . By objective standards, compared with the studies cited by the APA Brief,
limited in scope;\textsuperscript{50} there was little long-term data to draw any conclusions from;\textsuperscript{51} and statistical power was lacking.\textsuperscript{52} Marks concluded by stating that the data from the APA Brief’s fifty-nine cited studies\textsuperscript{53} are inadequate to prove what the APA Brief posits, that large studies are needed, and that the APA Brief’s argument is not “grounded in science.”\textsuperscript{54} As mentioned above, Marks found fault with all fifty-nine cited studies: (a) The largest comparison study to examine children’s outcomes, (b) One of the most comparative (only about five other studies used three comparison groups), and (c) The most comprehensively triangulated study (four data sources) conducted on same-sex parenting. Accordingly, this study deserves the attention of scientists interested in the question of homosexual and heterosexual parenting, rather than the footnote it received.”).\textsuperscript{50}

\textsuperscript{50} Id. at 744 (“In the same-sex parenting research that undergirded the 2005 APA Brief, it appears that gender-related outcomes were the dominant research concern . . . More than 20 studies have examined gender-related outcomes, but there was a dearth of peer-reviewed journal articles from which to form science-based conclusions in myriad areas of societal concern . . . In any less-developed area of empirical inquiry it takes time, often several decades, before many of the central and most relevant questions can be adequately addressed. This seems to be the case with same-sex parenting outcomes, as several issues of societal concern were almost entirely unaddressed in the 2005 APA Brief.”).\textsuperscript{51}

\textsuperscript{51} Id. at 745 (“Did any published same-sex parenting study cited by the 2005 APA Brief (pp. 23–45) track the societally significant long-term outcomes into adulthood? No. Is it possible that ‘the major impact’ of same-sex parenting might ‘not occur during childhood or adolescence. . . [but that it will rise] in adulthood as serious romantic relationships move center stage?’ Is it also possible that ‘when it comes time to choose a life mate and build a new family’ that the effects of same-sex parenting will similarly ‘crescendo’ as they did in Wallerstein’s study of divorce effects? In response to this or any question regarding the long-term, adult outcomes of lesbian and gay parenting we have almost no empirical basis for responding.”).\textsuperscript{52}

\textsuperscript{52} Id. at 745 (“In social science research, questions are typically framed as follows: ‘Are we 95% sure the two groups being compared are different?’ (p < .05). If our statistics seem to confirm a difference with 95% or greater confidence, then we say the two groups are ‘significantly different.’ But what if, after statistical analysis, we are only 85% sure that the two groups are different? By the rules of standard social science, we would be obligated to say we were unable to satisfactorily conclude that the two groups are different. However, a reported finding of ‘no statistically significant difference’ (at the p < .05 level; 95%-plus certainty) is a grossly inadequate basis upon which to offer the science-based claim that the groups were conclusively ‘the same.’ In research, incorrectly concluding that there is no difference between groups when there is in fact a difference is referred to as a Type II error. A Type II error is more likely when undue amounts of random variation are present in a study. Specifically, small sample size, unreliable measures, imprecise research methodology, or unaccounted for variables can all increase the likelihood of a Type II error. All one would have to do to be able to come to a conclusion of ‘no difference’ is to conduct a study with a small sample and/or sufficient levels of random variation. These weaknesses compromise a study’s ‘statistical power’ (Cohen, 1988). It must be re-emphasized that a conclusion of ‘no significant difference’ means that it is unknown whether or not a difference exists on the variable(s) in question (Cohen, 1988). This conclusion does not necessarily mean that the two groups are, in fact, the same on the variable being studied, much less on all other characteristics. This point is important with same-sex parenting research because . . . the 2005 APA Brief seem[s] to draw inferences of sameness based on the observation that gay and lesbian parents and heterosexual parents appear not to be statistically different from one another based on small, non-representative samples – thereby becoming vulnerable to a classic Type II error.”).\textsuperscript{53}

\textsuperscript{53} APA Brief, supra note 25, at 23-45; See also Appendix A.\textsuperscript{54}

\textsuperscript{54} Marks, supra note 40, at 748 (“Not one of the 59 studies referenced in the 2005 APA brief (pp.23-45) compares a large, random, representative sample of lesbian or gay parents and their children with a large, random, representative sample of married parents and their children. The available data, which are drawn primarily from small convenience samples, are insufficient to support a strong generalizable claim either way. Such a statement would not be grounded in science. To make a generalizable claim, representative, large-sample studies are needed – many of them.”).
nine of the APA Brief’s cited studies; his analyses of the fifty-nine studies are summarized in Appendix B (1b-59b).

In summary, both the studies by Lerner and Nagai and by Marks (see Appendix B) demonstrate that no scientific conclusions can be reached in any of the APA Brief’s fifty-nine cited studies (see Appendix A).

PART II

THE HOLY SEE AND THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

A. The Holy See

The Holy See is a “sovereign subject of international law having an original, non-derived legal personality independent of any authority or jurisdiction,” the government of the Roman Catholic Church with the Pope as its leader and of all of the institutions which emanate from him, and a sovereign territory known as Vatican City located within Rome, Italy. Therefore, the Holy See is immensely more than what is commonly called “the Vatican.”

See Appendix A, studies 1-59.
  Lerner & Nagai, supra note 3; See also Appendix B.
  Marks, supra note 40; See also Appendix B.
  APA Brief, supra note 25, at 23-45; See also Appendix A.
  THE HOLY SEE’S SECOND REPORT ON CRC, supra note 59, para. 2; See Adolphe, supra note 59, at 150 (“[Reading canon law closer] reveals that one might describe the Holy See as the Pope, in the narrow sense, or the Pope and the Roman Curia, in the broader sense.”).
  THE HOLY SEE’S SECOND REPORT ON CRC, supra note 59, para. 3 (“The Holy See also exercises its sovereignty over the territory of Vatican City State (VCS), established in 1929 to ensure the Holy See’s absolute and evident independence and sovereignty for the accomplishment of its worldwide mission, including all actions related to international relations.”); THE HOLY SEE’S SECOND REPORT ON CRC, supra note 59, at para. 4 (“The International personality of the Holy See has never been confused with that of the territories over which it has exercised State sovereignty (e.g. the Papal States from 754 AD to 1870 and VCS since 1929). Indeed, following the end of the traditional Papal States in 1870 until the establishment of VCS in 1929, the Holy See continued to act as a subject of international law by concluding concordats and international treaties of States, participating in international conferences, conducting mediation and arbitration missions, and maintaining both active and passive diplomatic relations.”).
B. The Convention on the Rights of the Child

The international community was becoming ever more concerned over the exploitation of children and the paucity of international law on the subject. The Convention on the Rights of the Child (hereinafter CRC) was created with the purpose of protecting children worldwide and was adopted and opened for signature, ratification and accession by the United Nation’s General Assembly resolution 44/25 in 1989 and entered into force in 1990 in accordance with article 49.62 The CRC contains a Preamble and fifty-four Articles divided into three parts.63 The Preamble is not legally binding but “sets out basic principles that should guide interpretation of the Convention.”64 It emphasizes “the importance of protecting the “natural family,” the “natural environment for the growth and well-being of children.”65 To date, 193 parties (countries) have ratified the CRC by a variety of methods (ratification, acceptance, accession, or succession).66 The Holy See participated in the drafting of the CRC67 and signed and ratified the CRC in 1990,68 but with two reservations and one declaration.69 The United States

63 Id.
64 Adolph, supra note 59, at 146.
65 Id.
67 Adolph, supra note 59, at 143.
68 United Nations Treaty Collection, supra note 66.
69 Id., http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en#EndDec (“Reservations: a) [The Holy See] interprets the phrase ‘Family planning education and services’ in article 24.2, to mean only those methods of family planning which it considers morally acceptable, that is, the natural methods of family planning. b) [The Holy See] interprets the articles of the Convention in a way which safeguards the primary and inalienable rights of parents, in particular insofar as these rights concern education (articles 13 and 28), religion (article 14), association with others (article 15) and privacy (article 16). c) [The Holy See declares] that the application of the Convention be compatible in practice with the particular nature of the Vatican City State and of the sources of its objective law (art. 1, Law of 7 June 1929, n. 11) and, in consideration of its limited extent, with its legislation in the matters of citizenship, access and residence. Declaration: The Holy See regards the present Convention as a proper and laudable instrument aimed at protecting the rights and interests of children, who are ‘that precious treasure given to each generation as a challenge to its wisdom and humanity’ (Pope John Paul II, 26 April 1984). The Holy See recognizes that the Convention represents an enactment of principles previously adopted by the United Nations, and once effective as a ratified instrument, will safeguard the rights of the child before as well as after birth, as expressly affirmed in the ‘Declaration of the Rights of the Child’ [Res. 136 (XIV)] and restated in the ninth preambular paragraph of the Convention. The Holy See remains confident that the ninth preambular paragraph will serve as the perspective through which the rest of the Convention will be interpreted, in conformity with article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969. By acceding to the Convention on the Rights of the Child, the Holy See intends to give renewed expression to its constant concern for the well-being of children and families. In consideration of its singular nature and position, the Holy See, in acceding to this Convention, does not intend to prescind in any way from its specific mission which is of a religious and moral character.”).
signed the CRC in 1995, but is only one of a couple of countries in the world that has not ratified the CRC, mainly due to strong domestic opposition.

70 Id.

71 See Luisa Blanchfield, The United Nations Convention on the Rights of the Child: Background and Policy Issues, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, 1, 5-6, 9-11, 13, 15-18 (July 2, 2012) http://www.fas.org/sgp/crs/misc/R40484.pdf (“Past administrations have generally supported the overall objectives of CRC, but have had concerns as to whether the Convention is the most effective mechanism for addressing children’s rights domestically and abroad. The Ronald Reagan and George H.W. Bush Administrations played significant roles in negotiating the text of CRC; due to concerns regarding the Convention’s possible impact on U.S. sovereignty and on state and federal law, however, neither Administration signed or . . . [sought] ratification. The Bill Clinton Administration . . . signed the Convention . . . [but did not seek ratification] because of opposition from key members of Congress . . . The George W. Bush Administration did not support ratification of CRC, citing ‘serious political and legal concerns’ with the treaty . . . Opponents of CRC argue that U.S. ratification would undermine U.S. sovereignty . . . Some opponents hold that if the United States ratifies the Convention, the CRC – a panel of 18 independent experts that monitors states’ compliance with the treaty – would have authority over U.S. government and private citizens’ actions toward children . . . Some critics have expressed strong concern that the Convention will give the U.N. Committee on the Rights of the Child or the U.S. government authority over the family structure and how parents choose to raise their children . . . [regarding privacy and Article 16(1) of CRC] Some have interpreted this to mean that parents may not have the right to search their children’s rooms or be notified if a child is arrested or undergoes an abortion . . . [regarding freedom of expression and Article 13(1) of CRC] Some contend that this could be interpreted to allow children to speak their minds at all times, regardless of parental authority or discipline . . . [regarding education] Critics assert that Article 28(1), which states that States Parties recognize ‘the right of the child to education,’ could lead to the government or CRC Committee mandating public schooling or interfering with the right of parents to home-school or send their children to private school . . . Critics of U.S. ratification have raised questions regarding the Convention’s possible impact on state parental notification laws for children undergoing abortion . . . . Opponents of the Convention express concern with CRC Committee decisions that appear to criticize countries that restrict abortion . . . Some CRC opponents are concerned that Article 24, which focuses on the right of the child to enjoy the highest attainable standard of health, could require parents to make or expose their children to family planning choices that contradict their values. Specifically, Article 24(2)(f) states that States Parties ‘shall . . . take appropriate measures . . . to develop preventive health care, guidance for parents and family planning education and services.’ Some worry that this provision could require contraceptive distribution or ‘pornographic sex education’ in schools. Similarly, some argue that it could allow children access to contraceptives without the knowledge of, or permission from, their parents . . . Critics have also asserted that reservations and declarations that some countries attached to the Convention are at odds with the purpose of the treaty, possibly undermining its intent and effectiveness. A number of Islamic countries, for example, attached reservations stating that the Convention would not apply to provisions that they deem incompatible with Islamic Sharia law or values. Some are concerned that the ambiguity of such reservations could allow for broad interpretations of the Convention’s provisions, particularly in the area of child marriage and education for girls . . . Holy See (the Vatican), for example, included a reservation stating that the application of the Convention [should] be ‘compatible in practice with the particular nature of the Vatican City State and of the sources of its objective law’ . . . Opponents of CRC argue that the United States is the international leader in advancing children’s rights and that U.S. non-ratification does not impact its ability to advocate children’s rights to foreign governments . . . Some critics of ratification also contend that CRC and, more broadly, other international human rights treaties, are designed for countries with lesser human rights traditions. They argue that U.S. laws far exceed the standards established in such agreements, and that ratifying the treaties would not benefit U.S. citizens . . . [regarding the Obama Administration] President Obama has indicated his overall support for the objectives of CRC and has stated his intent to conduct a legal review of the treaty . . . Most recently, in a March 2011, report to a U.N. Human Rights Council working group, the Administration reiterated its support for the goals of CRC and stated that it intends ‘to review how we [the United States] could move towards its ratification.’”).
The Committee on the Rights of the Child (hereinafter Committee) “is the body of independent experts that monitors implementation of the Convention on the Rights of the Child by its State parties.” All countries that have ratified the CRC have an obligation to submit periodic reports to the Committee regarding the implementation of the rights. Parties report to the Committee for the first time two years after accession to the CRC and afterwards at five year intervals. The Committee studies the submitted reports and “addresses its concerns and recommendations to the State party in the form of ‘concluding observations.’”

Thus, except mainly for the United States, the CRC, as administered by the Committee, has become almost universally accepted as binding international law.

C. The Holy See’s Position with Regard to CRC

To fulfill its reporting requirements as mandated by the Committee, the Holy See submitted its second report on September 27, 2011. With relevance to this paper, the Holy See’s Second Periodic Report to the Committee on the Rights of the Child on the Convention on the Rights of the Child (hereinafter The Holy See’s Second Report on CRC) devotes an entire section to “The Rights and Duties of the Child and Parents” and another section to “The Family.” The Holy See’s Second Report on CRC states that, “Children’s rights cannot be seen outside the context of the family, the first and most vital unit of society.” It reaffirms what is stated in the CRC: “the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.” The Holy See’s Second Report on CRC places special protection and promotion for the natural family:

The family based on marriage is a natural society that ‘exists prior to the State or any other community, and has inherent rights which are inalienable.’ Marriage is that ‘intimate union of life in complementarity between a man and a woman,

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73 Id.
74 Id. This is the ideal reporting time frame; however, it is common for countries not to conform to this schedule.
75 Id.
77 Id. para. 23, 60-71.
78 Id. para. 23(c).
79 Id. para. 23(d).
which is constituted in the freely contracted and publicly expressed indissoluble bond of matrimony and is open to the transmission of life.\textsuperscript{80}

Continuing: “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”\textsuperscript{81} Lastly, the Holy See’s Second Report on CRC demonstrates that it has always maintained a “deep concern” for the family as evidenced through “its plethora of documents and discourses” which promote “the family based on marriage between one man and one woman as the most proper environment for children, and therefore entitled to special protection from society and the State.”\textsuperscript{82}

Thus, the Holy See’s Second Report on CRC strongly supports marriage between a man and a woman, the family based on marriage as the basis of society, and the natural family as the best environment for children.

\section*{PART III}
\centerline{EVALUATION OF THE POSITION OF THE HOLY SEE}

The Holy See has taken a firm stand based on common sense and traditional Christian teachings which is deserving of respect with regard to the raising of children. The Holy See’s Second Report on CRC makes it clear that the Holy See supports the natural family with a married male father and female mother as the best setting for children.\textsuperscript{83} The New Family Structures Study by Regnerus affirms scientifically the Holy See’s position: “[C]hildren appear most apt to succeed well as adults – on multiple counts and across a variety of domains – when they spend their entire childhood with their married mother and father, and especially when the parents remain married to the present day.”\textsuperscript{84} Studies to prove the opposite conclusion – same-sex parenting is no different than parenting by a mother and father of opposite sexes (see Appendix A)\textsuperscript{85} – have been shown to be scientifically flawed (see Appendix B),\textsuperscript{86} thus providing further support for the Holy See’s argument.

Research by scholars also affirms the Holy See’s view. Wardle argues that the opponents of same-sex parenting believe that the interests of children have not been given enough consideration in decisions made by society regarding same-sex

\textsuperscript{80} \textit{Id.} para. 23(e).
\textsuperscript{81} \textit{Id.} para. 23(f).
\textsuperscript{82} \textit{Id.} para. 61.
\textsuperscript{83} \textit{Id.}
\textsuperscript{84} Regnerus, \textit{supra} note 4, at 766.
\textsuperscript{85} APA Brief, \textit{supra} note 25, at 23-45; \textit{See also} Appendix A.
\textsuperscript{86} \textit{Lerner \\ Nagai}, \textit{supra} note 3; Marks, \textit{supra} note 40; \textit{See also} Appendix B.
Regarding adoption, Wilcox and Fretwell Wilson have argued that children should be placed with married parents of opposite sexes because they do best in a family with a married mother and father and that adoption laws should prefer married parents. Byrd asserts that the social science literature has firmly established that children do best growing up in a home with married parents of opposite sexes. He further states: “There are gender differences in parental approaches to discipline... fathers tend towards firmness... [while] mothers tend toward more responsiveness, involving more bargaining... and is more often based on more intuitiveness towards the child’s needs.” Rekers stresses that gay and lesbian relationships are less stable and often short-lived when compared to a married woman and man. Furthermore: “The inherent structure of households with one or more homosexually-behaving member deprives children of vitally needed positive contributions to child adjustment that are only present in heterosexual homes.” Rekers and Kilgus point out that “the homosexual lifestyle will influence the child’s developing sexual orientation, future sexual choices, gender identity, sex-role development, and risk of social or psychological disturbances.” They address concerns over whether a child will suffer when interacting in peer group relationships if the child perceives the social stigma of having a gay or lesbian parent. Williams writes “[T]he conjugal family has been the preferred site for the placement of children in adoptive homes, because this family form, although imperfect in particular instances, has been the most successful in this country both historically and currently.” Williams continues: “[T]he married couple has been the norm for stable child rearing.” Lastly, she asserts that “Historically, and currently, the conjugal family has been, and is, the site for procreation and for childrearing; in

87 Wardle supra note 28, at 833-34.
90 Id.
91 George A. Rekers, An Empirically-Supported Rational Basis for Prohibiting Adoption, Foster Parenting, and Contested Child Custody by any Person Residing in a Household that Includes a Homosexually-Behaving Member, 18 ST. THOMAS L. REV. 325, 326 (2006).
92 Id. at 328.
94 Id.
96 Id. at 682.
contrast, historically, and currently, same-sex couples have not been, and are not, usually associated with procreation or with childrearing.\footnote{Id. at 682-83.}

One crucial factor has been left out of the same-sex parenting equation and has been mired in a debate over rights to parent: the rights of children. The needs of the children – not the parents – must come first and that children thrive growing up in a the natural family with a married mother and father. Some may claim that same-sex couples have the same right to have a child as do opposite-sex couples. William B. May disagrees and states that no person has a right to another person and that children have a right to a mother and a father.\footnote{See William B. May, Getting the Marriage Conversation Right: A Guide for Effective Dialogue 51 (2012) ("No one has a right to another person. Does anyone have a right to you? Thinking that way treats a child as property . . . [the] child [has] the fundamental right . . . to be born into a family, and to know and be cared for by both his and her mother and father. It is wrong to intentionally deprive a child of that right."); See also Byrd, supra note 83 ("Adoption is not a right. Rather the best interest of the child should always prevail . . . Children's needs must be placed first.").}

From what has been discussed above in Part III, clearly the argument of the Holy See – marriage is between a man and a woman, the natural family based on marriage is the basis of society, and the natural family is the best environment for children – is more persuasive and supported by science and scholarly research.

CONCLUSION

Yes, it is of crucial importance that children have the opportunity to be raised in a stable natural family by a married mother and father.\footnote{See Pope John Paul II, Letter to Families ¶¶ 2, 4, 6-7, 9, 11, 16-17 (1994) ("Among . . . [the many paths along which man walks], the family is the first and the most important . . . He [Christ] labored with human hands . . . and loved with a human heart. Born of Mary the Virgin, he truly became one of us and, except for sin, was like us in every respect. If in fact Christ ‘fully discloses man to himself,’ he does so beginning with the family in which he chose to be born and to grow up. We know that the Redeemer spent most of his life in the obscurity of Nazareth, ‘obedient’ (Lk 2:51) as the ‘Son of Man’ to Mary his mother, and to Joseph the carpenter . . . [T]he family . . . is . . . the basic ‘cell’ of society . . . Man is created from the very beginning as male and female . . . From it there derive the ‘masculinity’ and the ‘femininity’ of individuals . . . Hence one can discover, at the very origins of human society, the qualities of communion and of complementarity . . . The family originates in a marital communion described by the Second Vatican Council as a ‘covenant,’ in which man and woman ‘give themselves to each other and accept each other’ . . . [W]e come to realize that parenthood is the event whereby the family, already constituted by the conjugal covenant of marriage, is brought about ‘in the full and specific sense.’ Motherhood necessarily implies fatherhood, and in turn, fatherhood necessarily implies motherhood. This is the result of the duality bestowed by the creator upon human beings ‘from the beginning’ . . . Through the communion of persons which occurs in marriage, a man and a woman begin a family . . . in the newborn child is realized the common good of the family . . . education then is before all else a reciprocal ‘offering’ on the part of both parents . . . Parents are the first and most important educators of their own children . . . The family is a community of persons and the smallest social unit. As such it is an institution to the life of every society.")}.
father of opposite sexes. However, their argument is unpersuasive. The Holy See’s Second Report on CRC articulates the Holy See’s position that the natural family based on marriage between one man and one woman is the most proper environment for children. The scientific research evidence clearly supports the Holy See’s argumentation that raising children in a stable natural family with a married mother and father is best for children. The Holy See’s standpoint is further strengthened by scientific evidence showing that studies which promote same-sex parenting have no basis in science. This can be appreciated by comparing Appendix A – a summary of studies supporting same-sex parenting – with Appendix B which provides summaries of scientific evidence that show that all the studies in Appendix A are scientifically flawed. Scholarly research also

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100 APA Brief, supra note 25; See also Appendix A. But see Denise J. Hunnell, M.D., Male and female He created them: gender is not a choice, LIFESITEMEWS.COM (Jan. 14, 2013), http://www.lifesitenews.com/news/male-and-female-he-created-them-gender-is-not-a-choice?utm_source=LifeSiteNews.com+Daily+Newsletter&utm_campaign=72f32e84f7-LifeSiteNews_com_US_Headlines_01_14_2013&utm_medium=email (“God created us male and female . . . In his 2012 Christmas address to the Roman Curia, Pope Benedict characterized the rejection of innate male and female sexual identities as a denial of God. He warned that this threatens not only individuals, but also the very existence of families and the well-being of society as a whole: ‘Man and woman in their created state as complementary versions of what it means to be human are disputed. But if there is no pre-ordained duality of man and woman in creation, then neither is the family any longer a reality established by creation. Likewise, the child has lost the place he had occupied hitherto and the dignity pertaining to him . . . The defense of the family is about man himself. And it becomes clear that when God is denied, human dignity also disappears. Whoever defends God is defending man.’ It is interesting that it is often the people who tout diversity as a lynchpin of a healthy society who seek to suppress sexual diversity and create a genderless, androgynous culture. As Pope Benedict points out, this philosophy that radically redefines what it means to be human is at the heart of the assault on marriage and the family. When male and female become meaningless labels then marriage as a union of one man and one woman becomes unnecessary. Indeed, the need to limit marriage to two people no longer makes sense when complementarity is denied. When the unique roles of husband and wife are obliterated, the status of children also changes. They become mere commodities obtained for the benefit of an amorphous adult partnership instead of distinct human persons with intrinsic dignity born of the fruitful union of a man and a woman. It is misguided and dangerous to confuse gender differences with gender inequality. Acknowledging that men and women are different is not tantamount to saying one is better than the other . . . As the Catechism of the Catholic Church states, God’s creation of both man and woman is a reflection of the Creator’s wisdom and goodness. We reject this gift at our peril.”).

101 See CATECHISM OF THE CATHOLIC CHURCH ¶ 372 (2d ed. 1997) available at http://www.vatican.va/archive/ENG0015/__P1B.HTM (“Man and woman were made ‘for each other’ – not that God left them half-made and incomplete: he created them to be a communion of persons, in which each can be ‘helpmate’ to the other, for they are equal as persons (‘bone of my bones . . .’) and complementary as masculine and feminine. In marriage God unites them in such a way that, by forming ‘one flesh’ they can transmit human life: ‘Be fruitful and multiply, and fill the earth.’ By transmitting human life to their descendants, man and woman as spouses and parents co-operate in a unique way in the Creator’s work.”).

102 THE HOLY SEE’S SECOND REPORT ON CRC, supra note 59.

103 Regnerus, supra note 4.

104 APA Brief, supra note 25, at 23–45; See also Appendix A.

105 LERNER & NAGAI, supra note 3, at 3, 118-23; Marks, supra note 40, at 735-38, 748; See also Appendix B.

106 APA Brief, supra note 25, at 23–45.

107 LERNER & NAGAI, supra note 3, at 3, 118-23; Marks, supra note 40, at 735-38, 748.
firmly affirms the Holy See’s stance. Furthermore, we can look at tradition and Biblical teaching. Civilization for thousands of years has found marriage between a man and a woman to be a sacred institution to be protected and that the family unit of a married mother and father served a fundamental role of producing and protecting children and raising them to become happy, healthy and productive adult members of society and the next generation. The natural family based on marriage between one man and one woman is the most proper environment for children as articulated in the Holy See’s Second Report on CRC is also congruent with the Biblical teaching of not only the Christian faith, but the Hebrew faith as well: “In the beginning, when God created the heavens and the earth . . . God created man in his image; in the divine image he created him; male and female he created them . . . [and to] be fertile and multiply.”

108 See supra notes 87-98.
109 See Jason Wells et al., Couple at Center of Prop. 8 Supreme Court Case Anxious, Optimistic, L.A. TIMES, Dec. 8, 2012, available at http://latimesblogs.latimes.com/lanow/2012/12/couple-at-center-of-prop-8-supreme-court-case-excited-anxious.html (“[M]arriage between a man and a woman is a universal good that diverse cultures and faiths have honored throughout the history of Western Civilization.”).
110 See Byrd, supra note 89 (“The Harvard sociologist Pitirim Sorokin (1956) concluded that no society has ceased to honor the institution of marriage and survived. Traditional marriage and parenting contributes to the fulfillment of life’s meaning to both individuals and society . . . Enjoying the marital union in its infinite richness, parents freely fulfill many other paramount tasks. They maintain the procreation of the human race. Through their progeny, they determine the hereditary and acquired characteristics of future generations. Through marriage they achieve a social immortality of their own, of their ancestors, and of their particular groups and community. This immortality is secured through the transmission of their name and values and of their traditions and ways of life to their children, grandchildren, and later generations.”).
111 THE HOLY SEE’S SECOND REPORT ON CRC, supra note 59, para. 23, 61.
APPENDIX A

SUMMARIES OF THE APA BRIEF’S FIFTY-NINE CITED EMPIRICAL STUDIES IN SUPPORT OF SAME-SEX PARENTING

(1.) Bailey et al.: “[A]ny environmental influence of gay fathers on their sons’ sexual orientation is not large.”

(2.) Bigner and Jacobsen (1989a): “Homosexual subjects reported significant reasons motivating them to become parents. Their marriage and family orientation reflected a traditional attitude toward family life and served to protect against societal rejection.”

(3.) Bigner and Jacobsen (1989b): “[Homosexual father] subjects did not differ significantly from [heterosexual father] subjects in their reported degree of involvement or in intimacy level with children. [Homosexual father] subjects tended to be more strict and more responsive to children’s needs and provided reasons for appropriate behavior to children more consistently than [heterosexual father] subjects.”

(4.) Bozett: “[M]any gay fathers disclose their homosexuality to their children. All but one subject reported that their children accepted them as homosexuals. Often the disclosure had the effect of deepening the father-child relationship.”

(5.) Brewaeys et al.: “The quality of the couples' relationships and the quality of the mother-child interaction did not differ between lesbian mother families and either of the heterosexual family groups. The quality of the interaction between the social mother and the child in lesbian families was superior to that between the father and the child in both groups of heterosexual families. Children’s own perception of their parents was similar in all family types; the social mother in lesbian families was regarded by the child to be as much a 'parent' as the father in both types of heterosexual families.”


115 Id. at 24 (citing J.J. BIGNER & R.B. JACOBSEN, HOMOSEXUALITY AND THE FAMILY, The Value of Children to Gay and Heterosexual Fathers 163-72 (1989a)).


117 Id. at 25 (citing F.W. Bozett, Gay Fathers: How and Why they Disclose their Homosexuality to their Children, FAM. RELATIONS 173-179 (1980)).

(6.) Chan et al. (1998b): “[C]hildren were developing in a normal fashion and that their adjustment was unrelated to structural variables, such as parental sexual orientation or the number of parents in the household.”

(7.) Flaks et al.: “Only in the area of parenting did the two groups of couples [lesbian couples vs. heterosexual-parent families] differ: Lesbian couples exhibited more parenting awareness skills than did heterosexual couples.”

(8.) Gartrell et al. (1996): “Subjects are strongly lesbian-identified, have close relationships with friends and extended families, have established flexible work schedules for child rearing, are well educated about the potential difficulties of raising a child in a lesbian household, and have access to appropriate support groups.”

(9.) Golombok and Tasker (1996): “[T]he large majority of children who grew up in lesbian families identified as heterosexual.”

(10.) Golombok et al. (1983): “[R]earing [a child] in a lesbian household per se does not lead to atypical psychosexual development or constitute a psychiatric risk factor.”

(11.) Green (1978): No information was available in the APA Brief.

(12.) Green et al. (1986): “Data from children’s tests on intelligence, core-morphologic sexual identity, gender-role preferences, family and peer group relationships, and adjustment to the single-parent family indicate that there were no significant differences between the two types of households [homosexual mothers and solo parent heterosexual mothers] for boys and few significant differences for girls.”

(13.) Harris and Turner: “Homosexual parents saw a number of benefits and relatively few problems for their children, with females perceiving greater benefits than males.”

(14.) Hoeffer: No information was available in the APA Brief

119 Id. at 26 (citing R.W. Chan et al., Psychological Adjustment Among Children Conceived via Donor Insemination by Lesbian and Heterosexual Mothers, CHILD DEV. 443-457 (1998b)).

120 Id. at 27 (citing Flaks et al., Lesbians Choosing Motherhood: A Comparative Study of Lesbian and Heterosexual Parents and Their Children, 31 DEV. PSYCHOL. 104 (1995)).

121 Id. at 28 (citing N. Gartrell et al., The National Lesbian Family Study: 1. Interviews with Prospective Mothers, AM. J. ORTHOPSYCHIATRY 272-281 (1996)).

122 Id. at 29 (citing S. Golombok & F. Tasker, Do Parents Influence the Sexual Orientation of their Children? Findings from a Longitudinal Study of Lesbian Families, DEVEL. PSYCHOL. 3-11 (1996)).

123 Id. at 30 (citing S. Golombok et al., Children in Lesbian and Single-Parent Households: Psychosexual and Psychiatric Appraisal, J. CHILD PSYCHOL. & PSYCHIATRY 551-572 (1983)).

124 Id. (citing R. Green, Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents, AM. J. PSYCHIATRY 692-697 (1978) (stating “No abstract available”)).

125 Id. (citing R. Green et al., Lesbian Mothers and their Children: A Comparison with Solo Parent Heterosexual Mothers and their Children, ARCHIVES OF SEXUAL BEHAV. 175-181 (1986)).

126 Id. at 31 (citing M.B. Harris & P.H. Turner, Gay and lesbian parents, J. HOMOSEXUALITY 101-113 (1985/86)).
(15.) Huggins: “Self-esteem (SE) scores of subjects with DLMs [divorced lesbian mothers] and DHMs [divorced heterosexual mothers] were not significantly different.”

(16.) Kirkpatrick et al.: “Subject’s gender development was not identifiably different in the two groups [groups according to their mothers’ sexual choice].”

(17.) Koepke et al.: “[Koepke, et al.] [e]xamined the quality of lesbian relationships by three factors: presence of children, extent of disclosure concerning the nature of the relationship, and longevity of the relationship . . . Overall, findings indicate that solid and happy relationships existed for the total sample of couples.”

(18.) Kweskin and Cook: “Results show subjects' self-described sex-role behavior to be a better indicator of desired sex-role behavior in children than subjects’ sexual orientation. Similarities in sex-role behavior and attitudes of heterosexual and homosexual mothers far outweighed the present subjects’ differences when determined by self-description and attitudes toward ideal child behavior.”

(19.) Lewis: “Interviews with 21 children of lesbians in greater Boston area, ranging in age from 9 to 26, identified several major issues. Problems experienced involved parents' divorce and disclosure of mother’s homosexuality. Problems between mother and children were secondary to the issue of children's respect for difficult step she had taken.”

(20.) Lott-Whitehead and Tully: “Findings revealed that the subjects were aware of the impact of their sexual orientation on their children, that they were vigilant about maintaining the integrity of their families, and that the stress they felt was buffered by social support networks.”

(21.) Lyons: “Motherhood was a primary part of self-identity for all subjects. Fear of loss of custody was a persistent theme for lesbian mothers and was the only major difference between the groups. Court-awarded custody is never final and can be challenged from a number of sources. Lesbians often lose custody when their situation is discovered. Custody can be used by ex-spouses to adjust


129 Id. (citing S.L. Huggins, A Comparative Study of Self-Esteem of Adolescent Children of Divorced Lesbian Mothers and Divorced Heterosexual Mothers, J. HOMOSEXUALITY 123-135 (1989)).

130 Id. at 32 (citing M. Kirkpatrick et al., Lesbian Mothers and their Children: A Comparative Survey, Am. J. ORTHOPSYCHIATRY 545-551 (1981)).

131 Id. (citing L. Koepke et al., Relationship Quality in a Sample of Lesbian Couples with Children and Child-Free Lesbian Couples, FAM. RELATIONS 224-229 (1992)).

132 Id. (citing S.L. Kweskin & A.S. Cook, Heterosexual and Homosexual Mothers’ Self-Described Sex-Role Behavior and Ideal Sex-Role Behavior in Children, SEX ROLES 967-975 (1982)).

133 Id. at 33 (citing K.G. Lewis, Children of Lesbians: Their Point of View, SOC. WORK 198-203 (1980)).
property settlements. Fear of disclosure can have disruptive effects on comfort and ease of family gatherings. It is concluded that motherhood, rather than the pursuit of multiple lovers, was the central organizing theme in the lives of lesbian subjects.  

(22.) Miller (1979): “Four issues frequently raised in custody cases are discussed: Do gay fathers have children to cover their homosexuality, do they molest their children, do their children turn out to be gay in disproportionate numbers, and does having a gay father expose a child to homophobic harassment [and concluded] that concerns that gay fathers will have a negative impact on their children's development are unfounded.”

(23.) Miller et al. (1981): “Results reveal a less affluent socioeconomic setting for the children of lesbian mothers. A strong child-development orientation was found among lesbian mothers, undermining the stereotype of lesbians as aloof from children. Lesbian mothers tended to assume a principal role in child-care responsibility regardless of whether the caregiver and breadwinner roles were shared with a live-in partner.”

(24.) Mucklow and Phelan: “Three personality aggregates – self-confidence, dominance, and nurturance – [that] were computed from responses to the Adjective Check List. Chi-square analyses showed no difference in response to children's behavior or in self-concept of lesbian and traditional mothers.”

(25.) O'Connell: “Findings indicate profound loyalty and protectiveness toward the mother, openness to diversity, and sensitivity to the effects of prejudice. Subjects reported strong needs for peer affiliation and perceived secrecy regarding their mother's lesbianism as necessary for relationship maintenance. Other concerns, abating over time, were unrealized fears of male devaluation and homosexuality. Pervasive sadness about the parental breakup remained, and wishes for family reunification were relinquished when mother “came out.”

(26.) Pagelow: “While both groups [heterosexual and lesbian single mothers] reported oppression in the areas of freedom of association, employment, housing, and child custody, the degree of perceived oppression was greater for lesbian mothers. Lesbian mothers exhibited patterns of behavior that may have been

134 Id. (citing T.A. Lyons, Lesbian Mothers' Custody Fears, WOMEN AND THERAPY 231-240 (1983)).
135 Id. at 35 (citing B. Miller, Gay Fathers and their Children, FAM. COORDINATOR 544-552 (1979)).
136 Id. (citing J.A. Miller et al., The Child's Home Environment for Lesbian Versus Heterosexual Mothers: A Neglected Area of Research, J. HOMOSEXUALITY 49-56 (1981)).
137 Id. (citing B.M. Mucklow & G.K. Phelan, Lesbian and Traditional Mothers' Responses to Adult Responses to Child Behavior and Self Concept, PSYCHOL. REPORTS 880-882 (1979)).
138 Id. at 36 (citing A. O'Connell, Voices from the Heart: The Developmental Impact of a Mother's Lesbianism on her Adolescent Children, SMITH C. STUDIES SOC. WORK 281-299 (1995)).
responses to perceived oppression and that counterbalanced felt difficulties by the development of relatively higher levels of independence.”

(27.) Patterson (1994a): “[T]oday, the rise in births among openly lesbian women in the United States has been so dramatic that many observers have labeled it a lesbian baby boom . . . the study described here was designed to enhance the understanding of child development in the families of the lesbian baby boom (however, the information provided in the APA Brief provides no conclusions for this study).”

(28.) Rand et al.: “The court has repeatedly ruled that a mother will lose custody of and visitation privileges with her children if she expresses her lesbianism through involvement or cohabitation with a female partner, being affiliated with a lesbian community, or disclosing her lesbianism to her children. Psychological health correlated positively with openness to employer, ex-husband, children, a lesbian community, and amount of feminist activism. Partial support was found for the hypothesis that lesbian mothers who were expressing their lesbianism would be psychologically healthier than those who were not.”

(29.) Tasker and Golombok (1995): “Subjects raised by lesbian mothers functioned well in adulthood in terms of psychological well-being and of family identity and relationships. The commonly held assumption that lesbian mothers will have lesbian daughters and gay sons was not supported.”

(30.) Tasker and Golombok (1997): Their findings are not presented in the APA Brief; only a description of the book’s jacket.

(31.) Barrett and Tasker: “Results appear to confirm previous findings concerning the diversity of parenting circumstances of gay and bisexual men. Men with cohabiting male partners reported themselves as successfully meeting a variety of parenting challenges.”

(32.) Bos et al. (2003): No information was available in the APA Brief

139 Id. at 37 (citing M.D. Pagelow, Heterosexual and Lesbian Single Mothers: A Comparison of Problems, Coping and Solutions, J. HOMOSEXUALITY 198-204 (1980)).
141 Id. at 39 (citing C. Rand et al., Psychological Health and Factors the Court Seeks to Control in Lesbian Mother Custody Trials, J. HOMOSEXUALITY 27-39 (1982)).
142 Id. at 42 (citing F. Tasker & S. Golombok, Adults Raised as Children in Lesbian Families, Am. J. ORTHOPSYCHIATRY 203-215 (1995)).
143 Id. (citing F. TASKER & S. GOLOMBOK, GROWING UP IN A LESBIAN FAMILY (1997)).
144 Id. at 23-24 (citing H. Barrett, & F. Tasker, Growing up with a Gay Parent: Views of 101 Gay Fathers on their Sons’ and Daughters’ Experiences, 18 EDUC. & CHILD PSYCHOL. 62-77 (2001)).
145 Id. at 24 (citing H. M. W. Bos et al., Planned Lesbian Families: Their Desire and Motivation to have Children, 10 HUM. REPROD. 2216-24 (2003) (stating Abstract can be found at http://humrep.oxfordjournals.org/content/18/10/2216.abstract?maxtoshow=&HITS=10&hits=10&RESULTFOR MAT=1&author1=bos&title=planned+lesbian+families&andorexacttitle=and&andorexacttitleabs=and&andorexa
(33.) Bos et al. (2004): “Lesbian parents are no less competent or more burdened than heterosexual parents. Both lesbian and heterosexual parents consider it important to develop qualities of independence in their children. However, “conformity” as a childrearing goal is less important to lesbian mothers. Furthermore, lesbian social mothers feel more often than fathers in heterosexual families that they must justify the quality of their parenthood. There are few differences between lesbian couples and heterosexual couples, except that lesbian mothers appear less attuned to traditional child-rearing goals . . .”146

(34.) Chan et al. (1998a): “Although both lesbian and heterosexual couples reported relatively equal divisions of paid employment and of household and decision-making tasks, lesbian biological and nonbiological mothers shared child-care tasks more equally than did heterosexual parents. Among lesbian nonbiological mothers, those more satisfied with the division of family decisions in the home were also more satisfied with their relationships and had children who exhibited fewer externalizing behavior problems.”147

(35.) Ciano-Boyce and Shelly-Sireci: “Lesbian couples were more equal in their division of child care than heterosexual parents, and lesbian adoptive parents were the most egalitarian. In all types of dual-parent families, parents were sought by their child for different activities. In heterosexual adoptive and lesbian biological families, the child's parental preference was rarely a source of conflict between partners.”148

(36.) Crawford et al.: “Results indicated that participants who rated the gay male and lesbian couples with a female child were less likely to recommend custody for these couples than participants who rated the heterosexual couples. Before psychologists provide mental health services to gay and lesbian people and their children, they should complete formal, systematic training on sexual diversity.”149

(37.) Fulcher et al.: “Contrary to negative stereotypes, children of lesbian mothers were described as having regular contact with grandparents.”150

146 Id. at 24-25 (citing H. M. W. Bos et al., Experience of Parenthood, Couple Relationship, Social Support, and Child-Rearing Goals in Planned Lesbian Mother Families, 45 J. CHILD PSYCHOL. & PSYCHIATRY 755-764 (2004)).
147 Id. at 26 (citing R. W. Chan et al., Division of Labor Among Lesbian and Heterosexual Parents: Associations with Children’s Adjustment, 12 J. FAM. PSYCHOL. 402-19 (1998)).
148 Id. at 26 (citing C. Ciano-Boyce & L. Shelley-Sireci, Who is Mommy Tonight?, Lesbian Parenting Issues, 43 J. HOMOSEXUALITY 1-13 (2002)).
149 Id. at 27 (citing I. Crawford et al., Psychologists' Attitudes Toward Gay and Lesbian Parenting, 30 PROF. PSYCHOL.: RES. & PRAC. 394-401 (1999)).
150 Id. (citing M. Fulcher et al., Contact with Grandparents Among Children Conceived via Donor Insemination by Lesbian and Heterosexual Mothers, 2 PARENTING: SCI. & PRAC. 61-76 (2002)).
38.) Gartrell et al. (2000): “Results indicate that 87% of the children related well to peers . . . Of the original couples, 31% had divorced. Of the remainder, 68% felt that their child was equally bonded to both mothers.”

39.) Gartrell et al. (1999): “Most couples [lesbian families] shared parenting equally, the majority felt closer to their family of origin, adoptive co-mothers felt greater legitimacy as parents, biology and nurture received the same ratings for mother – child bonding, and political and legal action had increased among many participants.”

40.) Gartrell et al. (2005): “[T]he prevalence of physical and sexual abuse in these children was lower than national norms. In social and psychological development, the children were comparable to children raised in heterosexual families . . . The children demonstrated a sophisticated understanding of diversity and tolerance.”

41.) Gershon et al.: “In the face of high-perceived stigma, subjects who disclosed more about their mother’s sexual orientation had higher SE [self-esteem] in the subscale of close friendships than those who disclosed less.”

42.) Golombok et al. (2003): “Findings are in line with those of earlier investigations showing positive mother-child relationships and well-adjusted children [children with lesbian parents].”

43.) Golombok and Rust (1993): The APA Brief does not provide any conclusions for their study.

44.) Golombok et al. (1997): “No differences were identified between families headed by lesbian and single heterosexual mothers, except for greater mother-child interaction in lesbian mother families. It seems that children raised in fatherless families from birth or early infancy are not disadvantaged in terms of either the quality of their relationship with their mother or their emotional well-being.”

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151 Id. at 27-28. (citing N. Gartrell et al., The National Lesbian Family Study: 3. Interviews with Mothers of Five-Year-Olds, 70 AM. J. ORTHOPSYCHIATRY 542-48 (2000)).

152 Id. at 28 (citing N. Gartrell et al., The National Lesbian Family Study: 2. Interviews with Mothers of Toddlers, 69 AM. J. ORTHOPSYCHIATRY 362-69 (1999)).

153 Id. (citing N. Gartrell et al., The National Lesbian Family Study: 4. Interviews with the 10-Year-Old Children. 75 AM. J. ORTHOPSYCHIATRY 518-24 (2005)).

154 Id. at 28-29 (citing T. D. Gershon et al., Stigmatization, Self-esteem, and Coping Among the Adolescent Children of Lesbian Mothers, 24 J. ADOLESCENT HEALTH 437-45 (1999)).

155 Id. at 29 (citing S. Golombok et al., Children with Lesbian Parents: A Community Study, 39 DEV. PSYCHOL. 20-33 (2003)).

156 Id. (citing S. Golombok & J. Rust, J., The Pre-School Activities Inventory: A Standardized Assessment of Gender Role in Children, 5 PSYCHOL. ASSESSMENT 131-36(1993)).

157 Id. at 30 (citing S. Golombok et al., Children Raised in Fatherless Families from Infancy: Family Relationships and the Socioemotional Development of Children of Lesbian and Single Heterosexual Mothers, 38 J. CHILD PSYCHOL. & PSYCHIATRY 783-91 (1997)).
(45.) Johnson and O’Connor: No information was available in the APA Brief.\(^{158}\)

(46.) King and Black: “To ascertain the extent to which children of lesbian mothers are stigmatized, 338 undergraduate students were asked to complete a child behavior checklist for a hypothetical child of either a divorced lesbian or a divorced heterosexual mother. Respondents attributed more problematic behavior in a variety of domains to the child of the lesbian mother.”\(^{159}\)

(47.) McLeod et al.: “Differences in subjects’ ratings indicated that a boy raised by gay fathers was perceived to be experiencing greater confusion regarding his sexual orientation and gender identity. Custody reassignment was also rated as more beneficial for the son raised by gay fathers. Multiple regression analyses indicated that these assumptions were significantly predicted by the subjects’ stereotype of gay men as effeminate, above and beyond the subjects’ political conservatism and religious attendance.”\(^{160}\)

(48.) Morris et al.: “Controlling for age and income, lesbians and bisexual women who had children before coming out had reached developmental milestones in the coming out process about 7-12 years later than women who had children after coming out and about 6-8 years later than nonmothers.”\(^{161}\)

(49.) Patterson (1995a): “Parents were more satisfied and children were more well adjusted when labor involved in child care was more evenly distributed between the parents [lesbian couples].”\(^{162}\)

(50.) Patterson (2001): “Consistent with findings for heterosexual parents and their children, assessments of children’s adjustment were significantly associated with measures of maternal mental health. These results underline the importance of maternal mental health as a predictor of children’s adjustment among lesbian as well as among heterosexual families.”\(^{163}\)

(51.) Patterson et al. (1998): “[Patterson, et al.] investigated, in an exploratory study of 37 lesbian-mother families, the frequency of 4- to 9-year-old children’s contact with adults in their extended family and friendship networks. Results

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\(^{158}\) Id. at 31 (citing S. M. JOHNSON & E. O’CONNOR, THE GAY BABY BOOM: THE PSYCHOLOGY OF GAY PARENTHOOD (2002) (stating “No abstract available”)).

\(^{159}\) Id. at 32 (citing B. R. King & K. N. Black, College Students’ Perceptual Stigmatization of the Children of Lesbian Mothers, 69 AM. J. ORTHOPSYCHIATRY 220-27 (1999)).

\(^{160}\) Id. at 33 (citing A. C. McLeod et al., Heterosexual Undergraduates’ Attitudes Toward Gay Fathers and their Children, 11 J. PSYCHOL. & HUM. SEXUALITY, 43-62 (1999)).

\(^{161}\) Id. at 35 (citing J. F. Morris et al., Lesbian and Bisexual Mothers and Nonmothers: Demographics and the Coming-out Process, 16 J. FAM. PSYCHOL. 16 144-56 (2002)).

\(^{162}\) Id. at 37 (citing C. J. Patterson, Families of the Lesbian Baby Boom: Parents’ Division of Labor and Children’s Adjustment, 31 DEV. PSYCHOL. 115-23 (1995)).

\(^{163}\) Id. at 38 (citing C. J. Patterson, Families of the Lesbian Baby Boom: Maternal Mental Health and Child Adjustment, 4 J. GAY & LESBIAN PSYCHOTHERAPY 91-107 (2001)).
countered stereotypes of such children as isolated from parents’ families of origin.”

(52.) Sarantakos: No information was available in the APA Brief.

(53.) Siegenthaler and Bigner: “[The researchers] compared the responses of 25 lesbian and 26 non-lesbian mothers (mean age 35 yrs.) to items on the Value of Children (VOC) Scale. This instrument measures the reasons that may explain why adults become parents and the values and functions for children in the lives of adults. Results indicate that there are more similarities than differences between lesbian and non-lesbian mothers in responses on the VOC scale.”

(54.) Steckel: The APA Brief provides little insight into Steckel’s research.

(55.) Sullivan: “In this article the author explores the ways in which lesbian coparents divide household, child care, and paid labor to learn whether, and the degree to which, they adopt egalitarian work and family arrangements. Informed by a brief overview of U.S. gay liberation and family politics, and the theoretical and empirical work on the household division of labor by gender, this qualitative analysis of 34 Northern California families suggests that equitable practices – a pattern of equal sharing – among these lesbian coparents are the norm.”

(56.) Tasker and Golombok (1998): “[The researchers] compared the role and involvement in parenting of co-mothers in 15 British lesbian mother families with the role of resident fathers in two different groups of heterosexual families . . . The results indicate that co-mothers played a more active role in daily caretaking than did most fathers.”

(57.) Vanfraussen et al.: “Unlike fathers in heterosexual families, the lesbian social mother is as much involved in child activities as is the biological mother. Furthermore, the lesbian social mother has as much authority as does the father in heterosexual families.”

(58.) Wainright et al.: “Normative analyses indicated that, on measures of psychosocial adjustment and school outcomes, adolescents were functioning well, and their adjustment was not generally associated with family type [same-sex vs.

164 Id. (citing C. J. Patterson et al., Families of the Lesbian Baby Boom: Children’s Contact with Grandparents and Other Adults, 68 AM. J. ORTHOPSYCHIATRY 390-99 (1998)).
166 Id. at 41 (citing A. L. Siegenthaler & J. J. Bigner, The Value of Children to Lesbian and Non-Lesbian Mothers, 39 J. HOMOSEXUALITY 73-91 (2000)).
167 Id. (citing A. Steckel, Psychosocial Development of Children of Lesbian Mothers, In F. W. Bozett, (Ed.), GAY AND LESBIAN PARENTS 75-85 (1987)).
168 Id. at 42 (citing M. Sullivan, Rozzie and Harriet? Gender and Family Patterns of Lesbian Coparents, 10 GENDER & SOC’Y 747-67 (1996)).
169 Id. at 43 (citing F. Tasker & S. Golombok, The Role of Co-Mothers in Planned Lesbian-Led Families, 2 J. LESBIAN STUD. 49-68 (1998)).
170 Id. at 43-44 (citing K. Vanfraussen et al., Family Functioning in Lesbian Families Created by Donor Insemination, 73 AM. J. ORTHOPSYCHIATRY 78-90 (2003)).
opposite-sex parents]. Assessments of romantic relationships and sexual behavior were not associated with family type. Regardless of family type, adolescents whose parents described closer relationships with them reported better school adjustment.\textsuperscript{171}

(59.) Wright: “The findings . . . challenge traditional views of mothering and fathering as gender and biologically based activities; they indicate that lesbian step families model gender flexibility and that the mothers and step mothers share parenting – both traditional mothering and fathering – tasks. This allows the biological mother some freedom from motherhood as well as support in it.”\textsuperscript{172}

\textsuperscript{171} Id. at 44-45 (citing J. L. Wainright et al., Psychosocial Adjustment and School Outcomes of Adolescents with Same-Sex Parents, 75 CHILD DEV. 1886-98 (2004)).

\textsuperscript{172} Id. at 45 (citing J. M. Wright, Lesbian Stepfamilies: An Ethnography of Love (1998)).
APPENDIX B

SCIENTIFIC ANALYSES CRITICAL OF THE APA BRIEF’S FIFTY-NINE CITED EMPIRICAL STUDIES IN SUPPORT OF SAME-SEX PARENTING\textsuperscript{173}

(APA Brief’s Cited Studies: Studies Analyzed by Lerner and Nagai (1a-30a))\textsuperscript{174}

Studies Analyzed by Marks (1b-59b)\textsuperscript{175}

(1.) Bailey et al. a.) rejected: type of hypothesis – neither affirmative nor null and dubious, no heterosexual comparison group, no control for extraneous variables, non-probability sampling – dubious, inadequate sample size, inadequate power; b.) no heterosexual comparison group.

(2.) Bigner and Jacobsen (1989a) a.) rejected: type of hypothesis – neither affirmative nor null and dubious, self-constructed measures – dubious, non-probability sampling – dubious, inadequate sample size, inadequate power; b.) small, non-representative, convenience sample of fewer than 100 participants (N= 66); racially homogeneous sample; no statistical power; no marriage-based, intact family heterosexual comparison group (i.e., single parents).

(3.) Bigner and Jacobsen (1989b) a.) rejected: type of hypothesis – neither affirmative nor null and dubious, self-constructed measures – dubious, non-probability sampling- dubious, inadequate sample size, inadequate power; b.) small, non-representative, convenience sample of fewer than 100 participants (N= 66); racially homogeneous sample; no statistical power; no marriage-based, intact family heterosexual comparison group (i.e., single parents).

(4.) Bozett a.) rejected: type of hypothesis – neither affirmative nor null and dubious, no heterosexual comparison group, no control for extraneous variables, measures not reliable, self-constructed measures – dubious, non-probability sampling- dubious, inferential statistics not applied, inadequate sample size, inadequate power; b.) small, non-representative, convenience sample of fewer than 100 participants (N= 18); racially homogeneous sample; no heterosexual comparison group.

(5.) Brewaeys et al. a.) rejected: type of hypothesis – neither affirmative nor null and dubious, self-constructed measures – dubious, non-probability sampling – dubious, inadequate sample size, inadequate power; b.) small, non-representative, convenience sample of fewer than 100 participants (N= 98); no statistical power.

(6.) Chan et al. (1998b) a.) rejected: type of hypothesis – null but dubious, non-probability sampling – dubious, inadequate sample size, inadequate power;

\textsuperscript{173} APA Brief, supra note 25, at 23-45; See Appendix A.
\textsuperscript{174} LERNER & NAGAI, supra note 3, at 3, 118-23.
\textsuperscript{175} Marks, supra note 40, at 736-38, 740-41.
(7.) Flaks et al. a.) rejected: type of hypothesis – null but dubious, non-probability sampling – dubious, inadequate sample size, inadequate power; b.) small, non-representative, convenience sample of fewer than 100 participants (N= 30); racially homogeneous sample; no statistical power.

(8) Gartrell et al. (1996) a.) rejected: type of hypothesis – neither affirmative nor null and dubious, no heterosexual comparison group, no control for extraneous variables, measures not reliable, self-constructed measures – dubious, non-probability sampling – dubious, inferential statistics not applied, inadequate sample size, inadequate power; b.) no heterosexual comparison group.

(9.) Golombok and Tasker (1996) a.) rejected: type of hypothesis – neither affirmative nor null and dubious, self-constructed measures – dubious, non-probability sampling – dubious, inadequate sample size, inadequate power; b.) small, non-representative, convenience sample of fewer than 100 participants (N= 46).

(10.) Golombok et al. (1983) a.) rejected: type of hypothesis – neither affirmative nor null and dubious, non-probability sampling – dubious, inadequate sample size, inadequate power; b.) small, non-representative, convenience sample of fewer than 100 participants (N= 54); no statistical power; no marriage-based, intact family heterosexual comparison group (i.e., single parents).

(11.) Green (1978) a.) rejected: type of hypothesis – neither affirmative nor null and dubious, no heterosexual comparison group, no control for extraneous variables, non-probability sampling – dubious, inferential statistics not applied, inadequate sample size, inadequate power; b.) small, non-representative, convenience sample of fewer than 100 participants (N= 37); racially homogeneous sample; no heterosexual comparison group.

(12.) Green et al. (1986) a.) rejected: type of hypothesis – null but dubious, measures not reliable, non-probability sampling – dubious, inferential statistics not applied, inadequate sample size, inadequate power; b.) racially homogeneous sample; no statistical power; no marriage-based, intact family heterosexual comparison group (i.e., single parents).

(13.) Harris and Turner a.) rejected: type of hypothesis – null but dubious, measures not reliable, self-constructed measures – dubious, non-probability sampling – dubious, inadequate sample size, inadequate power; b.) small, non-representative, convenience sample of fewer than 100 participants (N= 39); no statistical power; no marriage-based, intact family heterosexual comparison group (i.e., single parents).

(14.) Hoeffer a.) rejected: type of hypothesis – neither affirmative nor null and dubious, self-constructed measures – dubious, non-probability sampling – dubious, inferential statistics not applied, inadequate sample size, inadequate
power; b.) small, non-representative, convenience sample of fewer than 100 participants (N= 40); racially homogeneous sample; no statistical power; no marriage-based, intact family heterosexual comparison group (i.e., single parents).

(15.) Huggins a.) rejected: type of hypothesis – null but dubious, non-probability sampling – dubious, inadequate sample size, inadequate power; b.) small, non-representative, convenience sample of fewer than 100 participants (N=36); racially homogeneous sample; no statistical power; no marriage-based, intact family heterosexual comparison group (i.e., single parents).

(16.) Kirkpatrick et al. a.) rejected: type of hypothesis – null but dubious, non-probability sampling – dubious, inferential statistics not applied, inadequate sample size, inadequate power; b.) small, non-representative, convenience sample of fewer than 100 participants (N=40); no statistical power; no marriage-based, intact family heterosexual comparison group (i.e., single parents).

(17.) Koepke et al. a.) rejected: type of hypothesis – neither affirmative nor null and dubious, no heterosexual comparison group, non-probability sampling – dubious, inadequate sample size, inadequate power; b.) 47 gay/lesbian couples – no heterosexual comparison group; racially homogeneous sample.

(18.) Kweskin and Cook a.) rejected: type of hypothesis – neither affirmative nor null and dubious, non-probability sampling – dubious, inadequate sample size, inadequate power; b.) small, non-representative, convenience sample of fewer than 100 participants (N=44); no statistical power; no marriage-based, intact family heterosexual comparison group (i.e., single parents).

(19.) Lewis a.) rejected: type of hypothesis – neither affirmative nor null and dubious, no heterosexual comparison group, no control for extraneous variables, measures not reliable, self-constructed measures – dubious, non-probability sampling – dubious, inferential statistics not applied, inadequate sample size, inadequate power; b.) small, non-representative, convenience sample of fewer than 100 participants (N=21); no heterosexual comparison group.

(20.) Lott-Whitehead and Tully a.) rejected: type of hypothesis – neither affirmative nor null and dubious, no heterosexual comparison group, no control for extraneous variables, non-probability sampling – dubious, inferential statistics not applied, inadequate sample size, inadequate power; b.) small, non-representative, convenience sample of fewer than 100 participants (N=45); no heterosexual comparison group; sample biased towards well-educated, white women with high incomes.

(21.) Lyons a.) rejected: type of hypothesis – neither affirmative nor null and dubious, measures not reliable, self-constructed measures – dubious, non-probability sampling – dubious, inferential statistics not applied, inadequate sample size, inadequate power; b.) small, non-representative, convenience sample of fewer than 100 participants (N=80); no statistical power; no marriage-based, intact family heterosexual comparison group (i.e., single parents).
(22.) Miller (1979) a.) rejected: type of hypothesis – neither affirmative nor null and dubious, no heterosexual comparison group, no control for extraneous variables, measures not reliable, self-constructed measures – dubious, non-probability sampling – dubious, inferential statistics not applied, inadequate sample size, inadequate power; b.) small, non-representative, convenience sample of fewer than 100 participants (N=54); no heterosexual comparison group.

(23.) Miller et al. (1981) a.) rejected: type of hypothesis – neither affirmative nor null and dubious, self-constructed measures – dubious, non-probability sampling – dubious, inadequate sample size, inadequate power; b.) small, non-representative, convenience sample of fewer than 100 participants (N=81); no statistical power.

(24.) Mucklow and Phelan a.) rejected: type of hypothesis – neither affirmative nor null and dubious, no control for extraneous variables, non-probability sampling – dubious, inadequate sample size, inadequate power; b.) small, non-representative, convenience sample of fewer than 100 participants (N=81); no statistical power.

(25.) O’Connell a.) rejected: type of hypothesis – neither affirmative nor null and dubious, no heterosexual comparison group, no control for extraneous variables, non-probability sampling – dubious, inadequate sample size, inadequate power; b.) small, non-representative, convenience sample of fewer than 100 participants (N=11); no heterosexual comparison group.

(26.) Pagelow a.) rejected: type of hypothesis – affirmative and okay, measures not reliable, self-constructed measures – dubious, non-probability sampling – dubious, inferential statistics not applied, inadequate sample size, inadequate power; b.) small, non-representative, convenience sample of fewer than 100 participants (N=43); no marriage-based, intact family heterosexual comparison group (i.e., single parents).

(27.) Patterson (1994a) a.) rejected: type of hypothesis – null but dubious, no control for extraneous variables, non-probability sampling – dubious, inadequate sample size, inadequate power; b.) small, non-representative, convenience sample of fewer than 100 participants (N=66); no statistical power.

(28.) Rand et al. a.) rejected: type of hypothesis – neither affirmative nor null and dubious, no heterosexual comparison group, no control for extraneous variables, non-probability sampling – dubious, inferential statistics not applied, inadequate sample size, inadequate power; b.) small, non-representative, convenience sample of fewer than 100 participants (N=25); racially homogeneous sample; no statistical power; no heterosexual comparison group.

(29.) Tasker and Golombok (1995) a.) rejected: type of hypothesis – neither affirmative nor null and dubious, non-probability sampling – dubious, inadequate sample size, inadequate power; b.) small, non-representative, convenience sample
of fewer than 100 participants (N=46); racially homogeneous sample; no statistical power; no marriage-based, intact family heterosexual comparison group (i.e., single parents).

(30.) Tasker and Golombok (1997) a.) rejected: type of hypothesis – neither affirmative nor null and dubious, non-probability sampling – dubious, inadequate sample size, inadequate power; b.) small, non-representative, convenience sample of fewer than 100 participants (N=54); no marriage-based, intact family heterosexual comparison group (i.e., single parents).

(31.) Barrett and Tasker b.) no heterosexual comparison group.

(32.) Bos et al. (2003) b.) no statistical power.

(33.) Bos et al. (2004) b.) no statistical power.

(34.) Chan et al. (1998a) b.) non-representative, convenience sample of fewer than 100 participants (N=46); no statistical power.

(35.) Ciano-Boyce and Shelly-Sireci b.) no statistical power.

(36.) Crawford et al. b.) attitudes of 388 psychologists studied, zero gay/lesbian subjects and zero heterosexual subjects.

(37.) Fulcher et al. b.) non-representative, convenience sample of fewer than 100 participants (N=80).

(38.) Gartrell et al. (2000) b.) no heterosexual comparison group.

(39.) Gartrell et al. (1999): b.) no heterosexual comparison group.

(40.) Gartrell et al. (2005): b.) non-representative, convenience sample of fewer than 100 participants (N=74); no heterosexual comparison group.

(41.) Gershon et al. b.) non-representative, convenience sample of fewer than 100 participants (N=76); no heterosexual comparison group.

(42.) Golombok et al. (2003) b.) no statistical power.

(43.) Golombok and Rust (1993) b.) reliability testing of a pre-school gender inventory studied, i.e., no gay/lesbian or heterosexual subjects.

(44.) Golombok et al. (1997) b.) no statistical power.

(45.) Johnson and O’Connor b.) no heterosexual comparison group, no statistical power.

(46.) King and Black b.) 338 College students’ perceptions studied, i.e. no gay/lesbian or heterosexual subjects.

(47.) McLeod, et al. b.) 151 College student reports studied, zero gay/lesbian subjects and zero heterosexual subjects; no statistical power.

(48.) Morris et al. b.) non-heterosexual comparison group.

(49.) Patterson (1995a) b.) non-representative, convenience sample of fewer than 100 participants (N=52); no heterosexual comparison group; no statistical power.

(50.) Patterson (2001) b.) non-representative, convenience sample of fewer than 100 participants (N=66); no heterosexual comparison group; no statistical power.
(51.) Patterson et al. (1998) b.) non-representative, convenience sample of fewer than 100 participants (N=66); no heterosexual comparison group; no statistical power.

(52.) Sarantakos b.) This study does not support the APA Brief’s assertion that “[n]ot a single study has found children of lesbian or gay parents to be disadvantaged in any significant respect relative to children of heterosexual parents.”176

(53.) Siegenthaler and Bigner b.) non-representative, convenience sample of fewer than 100 participants (N=51); racially homogeneous sample; no statistical power.

(54.) Steckel b.) no heterosexual comparison group, no statistical power.

(55.) Sullivan b.) non-representative, convenience sample of fewer than 100 participants (N=34 gay/lesbian couples); no heterosexual comparison group.

(56.) Tasker and Golombok (1998) b.) non-representative, convenience sample of fewer than 100 participants (N=99); racially homogeneous sample; qualitative study, i.e., not an empirical study.

(57.) Vanfraussen et al. b.) non-representative, convenience sample of fewer than 100 participants (N=48); racially homogeneous sample; no statistical power.

(58.) Wainright et al. b.) non-representative, convenience sample of fewer than 100 participants (N=88); no statistical power.

(59.) Wright b.) non-representative, convenience sample of fewer than 100 participants (N=5); no heterosexual comparison group.

176 APA Brief, supra note 25, at 15; See Marks, supra note 49.
BEST PRACTICES: LAWS PROTECTING HUMAN LIFE AND THE FAMILY AROUND THE GLOBE

Jane Adolphe*
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This paper explores global best practices concerning laws promoting life and the family. It will be divided into two Parts. Part I will give an overview of Category A laws that protect the right to life internationally and domestically, such as laws prohibiting or restricting abortion, the destruction or manipulation of embryos, euthanasia and/or physician assisted suicide, and so forth. Part II will give an overview of Category B laws, which protect the rights of the family both internationally and domestically. The latter domestic laws will discuss marriage between one man and one woman, and other laws promoting the responsibilities and rights of parents to protect and educate their children, divorce reform measures, the rights of the mother and their pre-born children, and improvements in adoption laws as well as family assistance.

This Paper has two annexes. Annex I presents model legislation from different parts of the world: United States, Ireland, Hungary, Honduras, Uganda, and Chile. In providing these laws, the intent is not to promote the overall activities of a particular government or State, nor is it to endorse every law the respective State has enacted. In specific regard to choices concerning the model legislation, the following selection criteria has been used: 1) the legislation, in many cases, is general enough to be adapted to various different situations in different States; 2) the legislation covers both Category A laws which directly protect the life of the human person and Category B laws which safeguard the human person by strengthening the family; 3) the legislation covers a broad range of issues essential to the protection of the right to life and the rights of the family; and 4) lastly, some legislation represents a good of example a very particular response to the needs of a specific problem which may arise in other countries. For example, in the United States of America where abortion is legal, the legislation chosen seeks to limit abortion to the greatest extent possible. In a country where abortion is illegal, such incremental limitations are unnecessary.

Annex II offers a list of some non-governmental organizations, faith-based groups, and governmental reports that contribute to building a culture of life, faith, and family by informing and educating the public. For example, some States have legislation on requiring a woman to view an ultrasound, while in other countries, there is no such legislation but rather non-governmental organizations are freely
providing such services. Hopefully this paper can serve as a resource for politicians and encourage them to work with faith-based groups and non-governmental organizations.

PART I. OVERVIEW OF LAWS DIRECTLY PROTECTING THE HUMAN PERSON

A. Category A: International Law Protecting the Rights of the Human Person

It is well known that the sources of international law are - in no particular order - treaties (e.g. covenants, conventions, protocols or charters), customary international law and general principles. As a preamble to the discussion that follows, it is noteworthy that there are efforts to create so-called “new human rights” by reinterpreting treaties through non-binding recommendations in General Comments of United Nations Treaty Bodies, Reports of United Nations Special Rapporteurs, decisions of regional and national courts, and even principles drafted by individuals. Consequently, it is essential to return to the written text of a treaty keeping in mind the international principles of interpretation.

Treaties are to be interpreted by State parties in “good faith” and “in accordance with the ordinary meaning” of the terms in their “context and in . . . light of [the treaty’s] object and purpose.” Articles 31(2)(a) and (b) of the Vienna Convention on the Law of Treaties (VCLT) emphasizes that the “context” is comprised of the text, including the preamble and annexes, and any agreement made relating to the Treaty by all parties and any instrument made by one party; undoubtedly, this last point includes reservations or interpretative declarations of
State parties. Article 32 of the VCLT provides recourse to supplementary means of interpretation to confirm or to determine a meaning when the general rule articulated in Article 31 of the VCLT “leaves the meaning ambiguous or obscure” or “leads to a result which is manifestly absurd or unreasonable.” In brief, every State Party should interpret treaties in light of the international principles taking into consideration their reservations and interpretative declarations.

The Universal Declaration of Human Rights, considered by many scholars to bind States based on international customary law, sets out the basic legal anthropology of human rights. It acknowledges the human person, male and female, noting the “equal rights of men and women.” The UDHR prohibits discrimination on the grounds of sex; as does the International Covenant on Civil and Political Rights (ICCPR), which also recognizes “the equal right of men and women” to the enjoyment of all civil and political rights. The International Covenant on Economic, Social and Cultural Rights (ICESCR) also prohibits discrimination on the basis of sex as does the Convention on the Rights of the Child (CRC). Moreover, the UDHR recognizes “the inherent dignity and . . . equal and inalienable rights of all members of the human family.” This preamble paragraph is echoed in the ICCPR, the ICESCR. In addition, both Covenants, clearly assert that “rights derive from the inherent dignity of the human person.”

In addition, the UDHR also recognizes that rights are co-relative with duties; a principle that is strongly reaffirmed in the ICCPR and ICESCR. In brief, the three documents do not grant rights but merely acknowledge rights, recognize that

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4 Id. art. 31, ¶ (a)-(b).
5 Id. art. 32 (Arguably these principles of interpretation are part of customary international law and should be used by treaty bodies, Special Rapporteurs, and others to properly interpret the same, which in turn, would diminish disingenuous and self-serving or ideologically-based interpretations).
7 Id. art. 2, ¶ 1.
9 Id. art. 3.
12 UDHR, supra note 6, pmbl. para. 1.
13 ICCPR, supra note 8, pmbl. para. 1.
14 ICESCR, supra note 10, pmbl. para. 1.
15 Id. pmbl. para. 2; ICCPR, supra note 8, pmbl. para. 2.
16 UDHR, supra note 6, arts. 1, 29 (e.g., the individual has duties to other individuals and to the community); see also ICCPR, supra note 8, pmbl. para. 5; ICESCR, supra note 10, pmbl. para. 5.
The principle that “rights derive from the inherent dignity of the human person,” found in the two Covenants, is inextricably linked to article 1 of the UDHR: “[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” This means that each human being, by the mere fact of being human, is a person, that is, by nature “free . . . endowed with reason and conscience” and relational. Following this line of reasoning, one might infer that each human being or human person, in relation with self and others, is personally responsible to seek the truth, and respond to the interior call to do good. Arguably, the term inherent dignity refers to the “unique excellence of personhood,” the innate value of the person as “‘someone’ and not merely ‘something,’ . . . an absoluteness not found in other beings.” This "gives rise to specific moral requirements," that is, certain things ought not to be done to any human person, such as slavery and torture, and certain other things ought to be done for every human person, such as recognition as a person before the law. This last point, in turn, implies that a human person also acquires dignity when he or she acts in accordance with right reason, that is, in doing those things he or she ought to do and refraining from other things he or she ought not to do. For example, a person has inherent dignity as a human person, which must be respected, but not his act of rape, which is wrong and criminal.

Before turning to the next section of this paper, a word should be said about the term “born,” within the phrase, “All human beings are born free and equal in dignity and rights,” in Article 1 of the UDHR. Since human persons are “not [physically] born into equal circumstances,” the term “born” arguably refers to a “moral birth”—a “deeper moral quality,” which no human person, political body, or social body could possibly grant. This understanding is consistent with the overall text, which includes references to “inherent” and “inalienable” in the preamble.

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17 ICCPR, supra note 8, pmbl. para. 2; ICESCR, supra note 10, pmbl. para. 2.
18 UDHR, supra note 6, art. 1.
19 Id.
20 Thomas D. Williams, What is Thomistic Personalism?, 7 ALPHA OMEGA 163, 190 (2004).
21 Id.  
23 UDHR, supra note 6, art. 1.
25 UDHR, supra note 6, pmbl. para. 1.
To buttress the argument that “birth” does not refer to a physical birth one might consider the American Convention on Human Rights which protects the child from the moment of conception. One might also argue that this position is consistent with the proper interpretation of the plethora of right to life provisions in international law. For example, the ICCPR recognizes the “inherent right to life” and then prohibits States from carrying out the death penalty on pregnant women. By necessary implication, the reason for this prohibition is “precisely because she is carrying in her womb an innocent human being,” there is not just one life at stake, but two. Moreover, the UDHR recognizes “[e]veryone has the right to life, liberty and security of person” and ensures that States give “[m]otherhood and childhood . . . special care and assistance.”

Moreover, the ICESCR acknowledges that “[s]pecial protection should be accorded to mothers during a reasonable period before and after childbirth.” Furthermore, the ICESCR recognizes that all children have the right to enjoyment of the highest attainable standard of physical and mental health, and State Parties are to work especially hard to “reduce stillbirth-rate and infant mortality” as well as promote “healthy development of the child.”

Lastly, the CRC, which binds 193 States, affirms the right to life of the child “before as well as after birth,” who is, in turn, defined as “every human being below the age of eighteen.” Like the UDHR, ICCPR and the ICESCR, the CRC requires States parties to respect and ensure the child’s rights without discrimination of any kind including “sex” and “birth.” The “inherent right to life” is protected as well as the child’s “survival and development” to the maximum

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27 ICCPR, supra note 8, art. 6 ¶¶ 1, 5.


29 UDHR, supra note 6, arts. 3, 25, ¶ 2.

30 ICESCR, supra note 10, art. 10(2) (emphasis added).

31 Id. art. 12(2).

32 CRC, supra note 11, art. 1 (emphasis added).

33 Id. art. 2. (it is noteworthy, that the UDHR, ICCPR and ICESCR, together, are commonly referred to as the International Bill of Human Rights).
extent possible and States are obliged to provide the “highest attainable standard of health...pre-natal and post-natal.”

B. Category A: Domestic Law Protecting the Rights of the Human Person

1. Personhood Laws

In countries, such as the United States, where abortion has been legalized, there have been various initiatives to recognize the legal personhood of the unborn in order to provide the same protection afforded to other legal persons. Since 1973, the United States Congress has heard various “Human life Amendments” that would amend the American Constitution to protect the pre-born child. In addition, there is the personhood movement that works to ensure that every human being is recognized as a person before the law. For example, a 2009 draft law in Georgia, argued, “[a] living in vitro human embryo is a biological human being who is not the property of any person or entity.” Also in Georgia, the following was proposed, “...the term ‘child’ shall include a human embryo.” The same year, South Carolina’s draft law stated, “[t]he right to life for each born and preborn human being vests at fertilization.” In 2010, a draft law in Arizona proposed, “[a] person shall not intentionally or knowingly engage in ...

34 Id. art. 6(1)-(2).
35 Id. art 24 arts. 1, 2(d) (it is noteworthy, that the aforementioned arguments have been recently argued in the Holy See’s Second Periodic Report to the Committee on the Rights of the Child, according to the state reporting obligations under the CRC).
36 See Roe v. Wade, 410 U.S. 113 (1973) (held that there is a right to privacy in the U.S. Constitution “broad enough to encompass a woman's decision whether or not to terminate her pregnancy.” Id. at 153. It further affirmed, “With respect to the State's important and legitimate interest in potential life, the ‘compelling’ point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb.” Id. at 163. Accordingly, states were not permitted to prohibit abortion before viability, and even after viability, there is a “health” exception, which requires that a woman have access to abortion when it is necessary to “preserve the life or health of the mother.” Id. at 163-64.; see also Planned Parenthood v. Casey, 505 U.S. 833 (1992) (reaffirming that there is a right to an abortion under the U.S. Constitution and rejecting Roe’s trimester framework and adopts the undue burden standard as the “appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.” Id. at 876.).
40 Id. (cf. Georgia, HB 388, 2009).
41 Id. (cf. South Carolina, S. 450, 2009).
nontherapeutic research that ... results in the injury, death or destruction of an in vitro human embryo. “\(^{42}\) In 2012, in Virginia and Oklahoma the proposed legislation provided that “... the term ‘unborn children’” included “the offspring of human beings from the moment of conception until birth at every stage of biological development.”\(^{43}\) Also, in 2012, a draft law in Oklahoma proposed, “... the term ‘persons’ ... applies to every human being from the beginning of the biological development of that human being. Only in vitro fertilization and assisted reproduction that kills a person shall be affected by this section.”\(^{44}\)

2. Abortion Prohibitions or Restrictions

There are bans on procured abortions\(^{45}\) and emergency contraception,\(^{46}\) since some countries protect the pre-born child in their laws. For example, Chile and Honduras protect the unborn child in their Constitutions referring to him or her as “one who is about to be born”\(^{47}\) and the Hungarian Constitution recognizes a human person “from the moment of conception”\(^{48}\).

\(^{42}\) Id. (cf. Arizona, SB 1307, 2010).

\(^{43}\) Id. (cf. Virginia, HB1 and Oklahoma, SB 1433, 2012).

\(^{44}\) Id. (cf. Oklahoma, HJR 1067, 2012).

\(^{45}\) See, e.g., Cod. pen., arts. 342-45 (Chile), available at http://www.servicioweb.cl/juridico/Codigo%20Penal%20de%20Chile%20libro2.htm (“The one that maliciously causes an abortion will be punished . . . . The person that violently causes an abortion, although he/she did not have the specific purpose/intention of causing an abortion, will be punished . . . . The woman that self-causes her abortion, or authorizes that another person cause it, will be punished . . . . The healthcare worker who, exceeding his faculties, causes an abortion or cooperates in it, will be punished.”); see also Offenses Against the Person Act (Act No. 58/1861) (Ir.) available at http://www.cirp.org/library/legal/UKlaw/oap1861/ (this legislation provides that abortion is a felony, whether self-inflicted or inflicted by another person. Furthermore, even the attempt to procure an abortion that fails because the woman is not, in fact, pregnant is a felony); Penal Code Act of Uganda, arts. 141-143, 212 (2012), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=170005 (Article 141 criminalizes the attempt to perform an abortion; Article 142 criminalizes self-induced abortion; Article 143 criminalizes the supplying or procuring of drugs for an abortion; and 212 criminalizes the action of preventing a child from being born when a woman is about to deliver the child); Codigo Penal, art. 126 (1985) (Honduras), available at http://www.oas.org/juridico/MLA/sp/hnd/sp_hnd-int-text-cp.pdf (reformed by Decree 191-96 of October 31, 1996 where the reforms were later published in the official journal La Gaceta (“Abortion is the death of a human being at any time during pregnancy or during birth”) on February 8, 1997 and became effective 20 days after its publication, on February 28, 1997); Ligia M. De Jesus, Defending the Human Right to Life in Latin America, Protection of Prenatal Life in Honduras: A Token of Central America’s Strong Pro-Life Identity 63, 69-70, Aul.org, http://www.aul.org/wp-content/uploads/2012/07/honduras-la.pdf.


\(^{47}\) See, e.g., Constitucion Politica de la Republica de Chile [C.P.] art. 19 (Chile), available at http://www.oas.org/dil/esp/Constitucion_Chile.pdf (“The law protects the life of the one who is about to be born. The judge, hence, by request of any person or by himself, will take all the precautions that he considers necessary to protect the life of the unborn, in case he thinks this life is in danger ....”); see also Constitucion de la Republica
There is also recent case law protecting the right to life of the unborn. For example, in 2012, five Justices of the Supreme Court of Alabama challenged Roe v. Wade’s position on personhood in the special concurrence that rejected the viability standard adopted in Roe v. Wade. In the same year, eight members of the South Korean Court of Last Appeal upheld a law allowing jail time for cases of illegal abortion and acknowledged the right to life of the fetus.

There are also restrictions on abortion, for example, bans on: partial birth abortions, or abortions post viability, or abortions based on certain gestational

48 See, e.g., The Fundamental Law of Hungary, art. II (25 April 2011), available at http://www.houdal.hu/download.php?d=65 (“The one who is about to be born, shall be considered born for anything that favors him [or her] within the limits established by law.”).

49 Mark H. Bonner & Jennifer A. Sheriff, A Child Needs a Champion: Guardian Ad Litem Representation for Prenatal Children, WM. & MARY J. WOMEN & L. (forthcoming 2013) (manuscript at 32) (on file with authors) [hereinafter Bonner] citing Hamilton v. Scott, No 1100192, 2012 Ala. LEXIS 66, 35 (Sup. Ct. Ala., 2012) (Parker, Stuart, Bolin, and Wise, concurring specially) (“Roe’s statement that unborn children are not ‘persons’ within the meaning of the Fourteenth Amendment is irrelevant to the question whether unborn children are ‘persons’ under state law. Because the Fourteenth amendment ‘right’ recognized in Roe is not implicated unless state action violates a woman’s ‘right’ to end a pregnancy, the other parts of the superstructure of Roe, including the viability standard, are not controlling outside abortion law.”).

50 Bonner, supra note 49 (manuscript at 32-3) (“Roe’s viability rule was based on inaccurate history and was mostly unsupported by legal precedent. Medical advances since Roe have conclusively demonstrated that an unborn child is a unique human being at every stage of development. And together, Alabama’s homicide statute, the decisions of this Court, and the statutes and judicial decisions from other states make abundantly clear that the law is no longer, in Justice Blackmun’s words, ‘reluctant . . . to accord legal rights to the unborn.’ For these reasons, Roe’s viability rule is neither controlling nor persuasive here and should be rejected by other states until the day it is overruled by the United States Supreme Court.”).

51 Ben Johnson, South Korea high court recognizes unborn’s ‘right to life’, LIFESITENEWS.ORG (Aug. 27, 2012, 5:13 PM), http://www.lifesitenews.com/news/high-court-recognizes-unborns-right-to-life-in-south-korea (“The eight members of the Republic of Korea’s court of last appeal upheld a law allowing jail time for doctors and midwives who perform illegal abortions, on the grounds that they were tasked with preserving life. Since 1953, South Korea has made abortion illegal except in cases of rape, incest, severe maternal health risks, or profound birth defects. However, in practice, that ban has rarely been enforced in recent decades, and the country has an extremely high abortion rate. The court’s August 23 ruling acknowledged that, while pregnancy is a life-altering event for the mother, ‘the right to life is also acknowledged for the fetus.’ Jailing those who perform illegal abortions is not excessive, because doing so expresses ‘censure against people like midwives, who are charged with protecting the fetus’s life, performing a procedure that takes away the fetus’s life. The fetus is itself a separate living being, and will very probably grow into a human being barring any special circumstances,’ the ruling stated.”).

52 See, e.g., Federal Partial Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2003) (it should be noted that in Gonzales v. Carhart, 550 U.S. 124 (2007), the U.S. Supreme Court ruled that the Federal Partial Birth Abortion Ban is neither void for vagueness nor does it impose an undue burden on a woman’s constitutionally protected right to have an abortion due to being overbroad or lacking a health exception); see also The Partial Birth Abortion Ban Act of 2008, 10 Guan Code Ann. § 91A102 (2008); see also Alabama Partial Birth Abortion Ban Act of 1997, ALA. CODE §26-23B-5 (1975); The Woman’s Right to Know Act, FLA. STAT. ANN. § 390.0111 (West 2011) (prohibits, inter alia, abortion in the third trimester unless it is necessary to save the life or preserve the health of
ages, or fetal pain, or public policy and fundamental human rights, such as sex selection, genetic deformity, or disability. Lastly, some laws ensure that women have access to accurate information and to a certain length of time to reflect before an abortion can be procured (e.g. 24 to 48 hours). Such right to information may include statistics that establish a link between abortion and breast cancer, on the one hand, and abortion and traumatic stress syndrome, on the other hand; other information may include the probable gestational age of the child, the development of the child, and alternatives to abortion such as adoption as well as government assistance to carry the baby to term.

In addition, there are parental consent laws requiring minors to first obtain at least one parent’s consent or receive a judicial waiver before they can obtain an abortion, unless its an emergency to save the life or health of the minor. Moreover, some restrictions pertain to whom may perform abortions, for example, requiring only a physician. Furthermore, reporting requirements exist which require abortion providers to submit information to government agencies, for example, the number of abortions, precise medical conditions that made the abortion necessary, and verification that the abortion was needed to preserve the pregnant woman’s health - since statutes typically contain exceptions for the life and health of the mother. It is noteworthy, that in many cases the term “health” for the purposes of these statutes may or may not be defined and may be

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53 See, e.g., 720 Ill. Comp. stat. ann. 510/6 (West 1975); Alabama Pain Capable Unborn Child Protection Act, ALA. CODE § 26-23B-5 (1975); Pain Capable Unborn Child Protection Act, OKLA. STAT. ANN. tit. 63, §1-745.5 (West 2011); IDAHO CODE ANN. § 18-505 (West 2011); See also Americans United for Life, Model Legislation Women’s Health Defense Act, AUL.ORG, 380-86 (2011), http://www.scribd.com/fullscreen/50052692?access_key=key-hs2enfvcsjquho3q7c (based on the protection of women’s health posed by abortion, especially after the first trimester, and the existence of fetal pain, this legislation, inter alia, prohibits abortion at or after 20 weeks gestation).

54 See Americans United for Life, supra note 53, at 393-400 (it is based on the principle of non-discrimination and the equal dignity of all human persons, regardless of their medical condition, this legislation prohibits sex-selective abortion, abortions performed because the unborn child has Downs Syndrome, and abortions performed because the unborn child has a genetic abnormality).

55 Bonner, supra note 49 (manuscript at 49-50) (citing 25 State laws).

56 Id. at 49 (citing 35 State laws).

57 Id. at 50 (citing 40 State laws).

58 Id. (citing 38 State laws).

59 Id. (citing 40 State laws).

60 Id. at 48-9 (citing 35 State laws).

61 Id. at 48 (citing 46 State laws).
interpreted to include the broad exception “mental health”\textsuperscript{62} rather than something more limited such as substantial and irreversible impairment of major bodily functions.\textsuperscript{63} Lastly, some laws regulate any or all aspects of the abortion industry such as requiring abortion clinics to be licensed\textsuperscript{64} or meet the basic requirements as other medical facilities.

3. No Abortion, especially in Cases of Rape

In 2012, a Judge of the Argentine High Court, issuing an injunction prohibiting an abortion on a trafficking victim, arguing:

It is not right to palliate one of the victims by suppressing the life of the other…It is not possible to repair damage by causing another, greater, and absolutely irreversible damage. If the mother needs to repair the trauma she has suffered by cutting herself off completely from the child conceived, she will be able to do so as soon as the child is born, by means of the institution of adoption, but she cannot do so by means of eliminating him from the face of the Earth.\textsuperscript{65}

The decision was overturned by the Supreme Court based on a common misunderstanding that abortion is the only option for rape victims.

Abortion is not a mother’s only option. While maternal-fetal conflict issues in cases of rape is a serious matter,\textsuperscript{66} there is assistance. One might argue that

\textsuperscript{62} Id. (citing 6 State laws).
\textsuperscript{63} Id. (citing 7 State laws).
\textsuperscript{65} Matthew Cullinan Hoffman, Another Worse Offense Does Cure Rape, Argentinian Judge rules in Pro-life Decisions, LIFE SITE NEWS (October 11, 2012), available at http://www.lifesitenews.com/news/another-worse-offense-does-not-cure-rape-argentinian-judge-rules-in-pro-life/ (“A judge [Myrian Rustan de Estrada] in the Argentine capital of Buenos Aires has issued an injunction prohibiting an abortion that was scheduled on a woman who was claimed to be a sex trafficking victim, noting that two wrongs won’t make a right”); but see Argentine high Court authorizes abortion for rape victim (October 12, 2012), available at http://latino.foxnews.com/latino/lifestyle/2012/10/12/argentine-high-court-authorizes-abortion-for-rape-victim/.
\textsuperscript{66} POPE JOHN PAUL II, Crossing the Threshold of Hope, 206–07, Vittorio Messori ed., Jenny McPhee & Martha McPhee trans. (1994). The term “maternal-fetal conflict” is a term being used in the United States. It recognizes that pregnancy is a relationship but does not suggest that the unborn child is an aggressor. On this latter point the words of Pope Paul II are timely: “A child conceived in its mother’s womb is never an unjust aggressor; it is a defenceless being that is waiting to be welcomed and helped. It is necessary to recognize that, in this context, we are witnessing true human tragedies. Often the woman is the victim of male selfishness, in the sense that the man, who has contributed to the conception of the new life, does not want to be burdened with it and leaves the responsibility to the woman, as if it were “her fault” alone. So, precisely when the woman most needs the man’s support, he proves to be a cynical egotist, capable of exploiting her affection or weakness, yet stubbornly resistant to any sense of responsibility for his own action… Therefore, in firmly rejecting “pro choice” it is necessary to become courageously “pro woman,” promoting a choice that is truly in favor of women. It is precisely the woman, in fact, who pays the highest price, not only for her motherhood, but even more for its destruction, for the
mothers are also in conflict with their teenage daughters but disputes must be resolved peacefully and with the involvement of intermediary communities and State assistance. For example, many religious organizations operating around the world support women in bringing their children to term under difficult and often traumatic circumstances. They welcome pregnant girls and women to live with them as guests at their convents for the duration of the pregnancy and offer practical assistance, providing items for expectant mothers, new or used maternity clothes, gift cards, in addition to help with travel, housing, school, and job opportunities. Crisis pregnancy centers and non-profit organizations are run by people of good will. They too assist pregnant women with practical issues as well as physical, and emotional concerns while encouraging the continuation of a pregnancy.

If such resources do not exist in a given country then certainly States should promote their development. In this way, States would resist collaborating or perpetuating the view that the raped woman or the pregnancy or the baby itself is the problem. In other words, to advocate for the termination of pregnancy is tantamount to joining forces with those who would marginalize pregnant women and the innocent child conceived in rape by facilitating the elimination of the so-called “stigma(s).”

In addition, States should be promoting and facilitating, where appropriate, the adoption of children by married man-woman couples, while respecting the rights of the natural parents and the best interests of the child. In addition, there should be suppression of the life of the child who has been conceived. The only honest stance, in these cases, is that of radical solidarity with the woman. It is not right to leave her alone.”

67 See, e.g., About Us, SISTERS OF LIFE, http://sistersoflife.org/about-the-sisters-of-life (The Sisters of Life is a contemplative and active Catholic religious community founded for the protection and promotion of the sacredness of every human life. They also host religious retreats to provide hope and healing for women suffering from what AI might refer to as “complications” of abortion); see also Villa Maria Guadalupe, SISTERS OF LIFE, http://sistersoflife.org/villa-maria-guadaluperetreats.

68 Id.

69 See, e.g., Frederica Mathews-Green, REAL CHOICES, 210 (1997) (providing contact information for several pregnancy care organizations); see also, A Woman’s Right to Know, http://www.awomansrighttoknowok.org; see also Priests for Life Canada, Pro-Life Canada Index, http://users.webhart.net/vandee/prolife.shtml (providing links to pro-life groups and resources in Canada) (This last website provides a link to Crisis Pregnancy Centres in Canada which is available at http://www.pregnancycentres.org.). Usually staffed by volunteers, these centers offer a broad range of services such as pregnancy tests, counselling, fetal development and postnatal medical care, legal aid, assistance in obtaining housing, maternity clothes, baby clothes, baby equipment, financial support, information about adoption services, and even advice regarding education and employment. Resource Directory, A WOMAN’S RIGHT TO KNOW, http://www.awomansrighttoknowok.org/resources.php.

70 See, e.g., Utah Parties to Adoption Law, Utah Code Ann. § 78-30-1 (2000) (in particular sec. 3.b, which is the 2000 amendment (2000 Utah Laws c. 208 5) Section 3.a provides: “A child may be adopted by ii) a single adult, except as provided in subsection 3.b…A child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state.” For purposes of this subsection 3.b, “cohabiting means residing with another person and being involved in a sexual relationship with that person”)
alternatives to those family planning methods that harm women and/or preborn children. For example, access to proven fertility awareness-based methods for the family that has responsibly decided to delay pregnancy should be available. This includes the symptoms-based, calendar-based and/or breastfeeding methods, *inter alia*. In addition, these same methods can assist those families which require assistance to target the most fertile time for conceiving a child.\(^71\)

Moreover, women should know that legal abortion is not safe for the mother or the child. That complications may arise—and often do—is a fundamental point rooted in experience and right reason. A woman’s cervix, “which nature has designed to remain closed to protect the developing . . . fetus, must be forcibly opened. Then, her womb, which is designed to nurture life, must be penetrated, suctioned, and scraped.”\(^72\) Consequently, every legally and illegally induced

\(^71\) See, e.g., the Billings Ovulation Method, http://www.thebillingsovulationmethod.org/; see also http://www.woomh.org/bom/lit/teach/index.html (the website devoted to teaching the method); see also The Creighton Model Fertility Care System http://www.creightonmodel.com/ (the modification of the Billings Ovulation Method); see also NaProTECHNOLOGY—A Major Breakthrough In Monitoring and Maintaining a Woman's Reproductive and Gynecological Health, NaPro TECHNOLOGY, http://www.naprotechnology.com/ (last visited Oct. 19, 2012); see also Pope Paul VI Institute for the Study of Human Reproduction and the National Center for Women's Health in Omaha, Nebraska http://www.popemavii.com/ (Regarding the work being done there).

\(^72\) See generally Theresa Burke & David C. Reardon, FORBIDDEN GRIEF: THE UNSPOKEN PAIN OF ABORTION, 114 (2002) [hereinafter Burke & Reardon]; see also Elizabeth Ring-Cassidy & Ian Gentiles, WOMEN’S HEALTH AFTER ABORTION: THE MEDICAL AND PSYCHOLOGICAL EVIDENCE, 1 (2d ed. 2003) [Ring-Cassidy & Gentiles] (Compiles scientific and technical data that refutes the commonly held assumption that induced abortion is safe and “almost risk free”). On the contrary, there are “clear hazards to women’s physical and psychological health,” which raises the question whether a woman’s right to informed consent is being fully respected by the medical community. *Id.* (These effects are connected with Post-Traumatic Stress Disorder (“PTSD”). PTSD which generally involves two major elements: first, a traumatic event either witnessed or experienced pertaining to actual or threatened death; second, physical injury with an accompanying response of intense fear, helplessness, or horror. *Id.* at 109–10. It also involves three types of symptoms: hyperarousal (inappropriate fight-or-flight defense mechanisms, such as anxiety attacks, angry outbursts, and difficulties sleeping), intrusion (reliving the traumatic experience), and constriction (numbed emotions or altered behavior patterns to avoid whatever is associated with the trauma). *Id.* The typical experience of PTSD following abortion is summed up as an initial state of numbness while psychologically trying to integrate the traumatic experience. Later symptoms, which may not appear for months or even years, include irritability, depression, an unreasoned sense of guilt for having survived while others did not, memory impairment or trouble concentrating, and difficulties relating emotionally to other people. Nightmares, flashbacks to the traumatic scene, and overreaction to noises or situations that remind one of the trauma are also common. *Id.* at 111; see also John J. Dillon, A PATH TO HOPE (1990) (providing assistance to parents of aborted children and offering guidelines and advice to those who work as counsellors and ministers); see also Pam Koerbel, ABORTION’S SECOND VICTIM (AMG Publishers, rev. ed. 1991) (discussing the effects of abortion, which the author, who underwent an abortion, argues have been overlooked or denied by society); POST-ABORTION SYNDROME: ITS WIDE RAMIFICATIONS (Peter Doherty ed., 1995); see also VICTIMS AND VICTORS (David C. Reardon et al. eds., 2000) (assaulting the commonly held belief that most pregnant rape victims seek abortion and that the abortion,
abortion is an act of violence on the woman. It is the premature breach of a woman’s internal system that has been activated and transformed to carry out the function of sustaining and nourishing a developing human being. Consequently and unsurprisingly, any violation of the integrity of a woman’s internal system can lead to serious “complications” of a physical, psychological, and emotional nature, including haemorrhaging, infection, sterility, depression, hyper-arousal, flashbacks, numbed emotions, and suicide. Some refer to these effects as “Post Abortion Syndrome,” “Post Abortion Stress,” or “Trauma Disorder.” The topic is not a popular one given the money involved in the manufacturing and sale of contraception and the procurement of abortion. However, many organizations now offer healing for women who had endured an abortion.

Furthermore, the use of abortion as a “remedy” for victims of sexual violence raises particular health problems for this group of women, since many who have experienced abortion, have described it as surgical rape. Consequently, pushing abortion as a remedy for women with a history of sexual abuse or rape places them in specific danger, opening them up to further trauma with corresponding psychiatric problems.

Rather, States should be compiling lists of best practices for assisting pregnant mothers in crisis, such as in cases of coercion, rape, extreme poverty, inter alia. The list should include those activities carried out by crisis pregnancy centers, faith-based organizations, and other intermediary organizations.

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73 Ring-Cassidy & Gentiles, supra note 72, at 217.
74 Id. at 113–14. (One of the author’s patients described her experience as follows: “I was fully awake, no pills given, or shots. I lay there with tears rolling down my face. The room was cool. My tears felt like fire on my face, cutting it, slice by slice, tear by tear. My hands were wet with sweat; my right hand squeezed the counselor’s thin, cold hand as though squeezing the life out of her. My left hand lay fisted, clenched tightly on my vibrating stomach as the abortion occurred. It felt as though someone was raping me with a 15-Amp canister vacuum hose with no mercy as I lay there helpless, crying calmly, as if agreeing to be raped.”).
75 See, e.g., Villa Maria Guadalupe, supra note 67; see also About Us, RACHEL’S VINEYARD, http://www.rachelsvineyard.org/aboutus/ourstory.htm (offering post-abortion healing ministry at various sites in the United States, Canada, Portugal, Australia, and New Zealand); see also ABORTION RECOVERY INTERNATIONAL, http://abortionrecovery.sectorlink.org; see also Resources, HOPE AFTER ABORTION, http://www.hopeafterabortion.com/hope.cfm?st=resources.
76 See Burke & Reardon supra note 72.
77 Id.
78 Id.
79 See, e.g., CARE.NET, available at: https://www.care-net.org/ (crisis pregnancy center); see also HEART BEAT INTERNATIONAL, http://www.heartbeatinternational.org/; see also THE NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, http://www.nifla.org/about-us-history.asp (Centres are within and without USA established to defend the rights of these centres and to promote their work).
4. No Abortion, due to coercion, force and violence

As mentioned above, international law requires States to provide special attention to both mothers and children, and abortion does not assist either of them. Dr. Burke and Dr. Reardon argue that there is a plethora of evidence to suggest that many women proceed with an abortion due to feelings of helplessness “to resist or change the circumstances that are ‘forcing’ them to choose abortion,” even when they consider abortion to be a type of murder.80 Indeed, issues pertaining to coerced and forced abortions have become key concerns.

In October 2012, Monsignor José Daniel Falla Robles, Secretary General of the Columbian Conference of Bishops, recently argued at the annual National Women’s Encounter that in the majority of cases “women feel compelled to abort because of deplorable circumstances due to a lack of sexual and affective formation, mistreatment and abandonment, and various forms of social and familial pressure.”81

He echoes the words of Pope John Paul II, who came to the same conclusion.

“[o]ften the woman is the victim of male selfishness, in the sense that the man, who has contributed to the conception of the new life, does not want to be burdened with it and leaves the responsibility to the woman, as if it were ‘her fault’ alone. So, precisely when the woman most needs the man’s support, he proves to be a cynical egotist, capable of exploiting her affection or weakness, yet stubbornly resistant to any sense of responsibility for his own action.” 82

Scholar Ernest Caparros gives two vivid incidents involving coercion in his paper on “Disordered Manhood”.83 He relates the story that while cohabiting with a man, a woman became pregnant and “desired to give birth to their child, but the man convinced her that the timing was not right,” instead he proposed an abortion and promised to marry her - she complied, underwent the abortion and he abandoned her.84 The reaction of Caparros to this tragic set of facts is enlightening:

80 Burke & Reardon, supra note 72, at 112-13, 116–17, 314 (Dr. Burke supports this assertion with her personal work with women who have had abortions as well as statistics regarding many more abortions. She also relates how her clients describe abortion as fearful or horrifying, while others recount having an overwhelming feeling of “helplessness.”)(emphasis added).
82 POPE JOHN PAUL II, supra note 66.
84 Id.
“I was shocked as I read the very striking account of the man’s manipulation of the woman.”  

Caparros recounts another situation where a teenage girl was murdered after disclosing her pregnancy to three teenage boys, who had each “enjoyed promiscuous relations with her, and then conspired to end her life and that of her child.”

In Canada, there is plenty of evidence to indicate that women have been coerced to abort enduring pressure from members of their family, friends, and partners including from emotional, financial, and physical violence. In response, a Canadian Member of Parliament sponsored a private member’s bill C-510, which would have prevented forced and pressured abortions by making it illegal to coerce women into an abortion through threats of violence, withdrawal of financial resources, or denial of a place to live. Unfortunately, the bill was defeated; it was also known as “Roxanne’s Law” named after a woman had been beaten to death after refusing to abort her child. The United States has responded with the enactment of Feticide Laws. See discussion infra.

In China, recent cases of forced abortion and its gruesome aftermath are available to all who have access to the internet. In one case, a young woman lays next to her dead child ripped from her womb at 7 months. In response to such cases, the European Parliament issued a resolution opposing forced abortion and all forms of coercion, emphasizing the “free, responsible and informed decisions about childbearing” and “how any form of coercion has no part to play.”

85 Id.
86 Id.
89 See the Video of the two victims of violence the young Chinese mother and her dead aborted 7 month pre-born child http://www.theglobeandmail.com/news/news-video/video-chinese-woman-forced-to-have-abortion-at-7-months/Article4267076/.
90 European Parliament Resolution on the forced abortion scandal in China (2012/2712(RSP), available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+MOTION+P7-RC-2012-0388+0+DOC+PDF+V0//EN (The preamble noted: “A. whereas on 2 June 2012 a seven-months-pregnant woman, Feng Jianmei, was abducted and underwent a forced abortion in Zhenping county (Shanxi province), sparking a wave of indignation and condemnation in China and around the world; B. whereas abortions beyond six months are illegal under Chinese law; whereas the Ankang municipal government conducted an investigation which concluded that officials in Zhenping county had used ‘crude means’ and ‘persuaded’ Ms Feng to abort the foetus; whereas the report stated that this decision had violated her rights; whereas the Ankang municipal government has announced punishments for local planning officials involved in the case, including sacking; C. whereas, according to the investigation, local officials had asked Ms Feng’s family for a ‘guarantee deposit’ of RMB 40 000, which according to her husband was a fine for having a second child; whereas local authorities had no legal grounds for collecting such a deposit; whereas Ms Feng was forced to sign a consent form to terminate her pregnancy because
5. Civil and/or criminal liability for the death of an unborn child

Although, abortion is legal in the United States, mothers who harm their prenatal children may be held criminally responsible for child abuse. For example, the Supreme Court of South Carolina upheld the conviction of a woman for homicide by child abuse after her viable unborn child was stillborn as the result of her cocaine use during pregnancy. Mothers may also be liable for civil penalties for harming prenatal children; in several states, courts may find pregnant women negligent when their child tests positive for drugs after birth. Moreover, pregnant women who abuse drugs or alcohol can be involuntarily committed to a treatment facility and courts have also found the drug abuse by expectant mothers constitutes child abuse.

Third parties, such as the mother’s boyfriend or partner, may be criminally liable for the harm of prenatal children under ―feticide statutes‖ that criminalize the killing of prenatal children outside the context of abortion. For example, Michigan’s statute MCL § 750.90(a) punishes an individual for causing a
miscarriage or stillbirth with malicious intent toward the fetus or embryo. A violation of MCL § 750.90(a) is punishable by life imprisonment. Many states have adopted similar provisions, either providing for feticide as a separate crime or defining “person” for purposes of their homicide statutes as including the unborn, though not all include all stages of development. Other state courts have interpreted “person” and “child” in their homicide statutes to include unborn children. Twenty-seven States have homicide laws that recognize prenatal children as victims throughout the entire period of prenatal development and nine additional states have homicide laws that recognize prenatal children as victims during part of the period of prenatal development.

In addition, third parties who harm prenatal children have also been held liable for civil penalties. For example, a court in Mississippi ruled that a prenatal child is a person for the purpose of recovering damages after the wrongful death of a sibling. In an Alabama case, the unanimous Supreme Court of Alabama held

97 Id. (cf. Mich. Comp. Laws 750.90(a) (2011) (providing in pertinent part: “If a person intentionally commits conduct proscribed . . . against a pregnant individual, the person is guilty of a felony . . . if all of the following apply: (a) The person intended to cause a miscarriage or stillbirth by that individual or death or great bodily harm to the embryo or fetus, or acted in wanton or willful disregard of the likelihood that the natural tendency of the person’s conduct is to cause a miscarriage or stillbirth or death or great bodily harm to the embryo or fetus. (b) The person’s conduct resulted in a miscarriage or stillbirth by that individual or death to the embryo or fetus.’); see also Mich. Comp. Laws 750.90(b) (2011) (punishes an individual for harming or killing a fetus or embryo during an intentional assault against a pregnant woman without regard to the individual’s intent or recklessness toward the fetus or embryo); see also Mich. Comp. Laws 750.90(c) (2011) (punishes an individual for harming or killing a fetus or embryo during a grossly negligent act against a pregnant woman without regard to the individual’s state of mind toward the fetus or embryo”).
98 Id.
100 Id. at 25 (cf. State v. Ard, 332 S.C. 370 (S.C. 1998) (holding that the words “person” and “child” in South Carolina’s homicide statute applied to viable fetuses both for the purpose of criminal charges and as an aggravating circumstance”).
102 Id. at 17 (cf. Fizer v. Davis (In re Estate of Davis), 706 So. 2d 244 (Miss. 1998).
that a mother could recover in a wrongful death action against negligent medical doctors for the pre-viability death of her son.  

6. Bioethical Considerations

Some States have banned or restricted any and/or all forms of assisted reproduction,\textsuperscript{104} including in-vitro fertilization,\textsuperscript{105} surrogate motherhood,\textsuperscript{106} human cloning,\textsuperscript{107} or the extraction of embryonic stem cells\textsuperscript{108} or the use of embryos for

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  \item \textsuperscript{103} Id. At 32 (cf. Hamilton v. Scott, No. 1100192, 2012 Ala. LEXIS 66 (Sup. Ct., Ala., May 18, 2012). (In so ruling, the Court relied on words familiar from the U.S. Declaration of Independence, but found in the Alabama Constitution itself thus being law in Alabama: ‘…[T]he Declaration of Rights in the Alabama Constitution…states that ‘all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.’ Ala. Const. 1901 §1 (emphasis added). These words, borrowed from the Declaration of independence (which states that ‘[w]e hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness’) affirm that each person has a God-given right to life”).
  \item \textsuperscript{104} There are, to be sure, legitimate moral means of assisting in human procreation which do not give rise to the exploitation of embryos. By “assisted reproduction,” I refer to those methods which do not assist the ordinary method of conceiving a child, i.e., through vaginal intercourse, but which, instead, replace the ordinary method of conceiving a child, such as, for instance, in vitro fertilization, which exposes a child conceived in this way to the harm of living outside his/her mother’s womb. See http://press.thelancet.com/netherlands_euthanasia.pdf (statistics in regard to the Netherlands); commentary, LIFESITENEWS, http://www.lifesitenews.com/blog/the-lancet-proves-euthanasia-deaths-are-rising-in-the-netherlands.
  \item \textsuperscript{105} Judgment number 2000-02306 of the Constitutional Chamber of the Costa Rican Supreme Court prohibiting assisting reproduction (March 15, 2000) (However, the Inter-American Court of Human Rights is currently hearing a challenge to Costa Rica’s In-Vitro Fertilization Ban See: Case No. 12.361, Gretel Artavia Murillo et al. (Inter-American Court of Human Rights Costa Rica IVF case)); see also Gewebesicherheitsgesetz-GSG 19.3.2008 (Austria).
  \item \textsuperscript{106} In the USA, the first was the case of In re Baby M, 537 A.2d 1227, 109 N.J. 396 (N.J. 1988) (first case in the USA ruling on the validity of surrogacy where the legal parentage of a baby was in question) (William Stern and his wife, Elizabeth Stern, entered into a surrogacy agreement with Mary Beth Whitehead who, according to the terms of the agreement, was inseminated with William Stern's sperm, would bring the pregnancy to term, relinquish parental rights in favor of William's wife, Elizabeth, and hand over the baby. After the birth, however, Mary Beth breached the contract when she changed her mind, and decided to keep the child. In response, William and Elizabeth Stern sued to be recognized as the child's legal parents. The Supreme Court of New Jersey court eventually ruled that the surrogacy contract was invalid based on public policy, recognized Mary Beth Whitehead as the child's legal mother, and sent the matter to Family Court ordering it to determine whether Whitehead, as mother, or Stern, as father, should have legal custody of the infant, using the conventional 'best interests of the child' analysis. In the end, Stern was awarded custody, with Whitehead having visitation rights.); see also La. R.S. 9:2713 (2012) (legislative ban on surrigate motherhood); see also Burns Ind. Code Ann. § 31-20-1-1 (legislative ban on surrigate motherhood); see also 2012 NJ S.B. 2032 (legislative ban on surrigate motherhood).
  \item \textsuperscript{107} See, e.g., United Nations Declaration on Human Cloning (nonbinding and bans human cloning); see also The Fundamental Law of Hungary, Article 5(1)(3), available at http://www.mkab.hu/download.php?id=65; See also, Constitution of the State of Michigan of 1963 § 27(1); see also Cal Health & Saf Code § 24185 (2012); see also Conn. Gen. Stat. § 19a-32d(b); see also N.D.C.C. § 12.1-39-02 (North Dakota Century Code); see also105 CMR § 960.007 (Code of Massachusetts Regulations).
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research or transplant purposes, or the cryopreservation of embryos, their manipulation or otherwise exploitation.

7. **Euthanasia and/or assisted suicide**

Some States ban or restrict euthanasia and/or physician assisted suicide. In those countries where it is legal, legislation has been introduced to place limits on the same. For example, States have restricted funding, others have enacted laws requiring the written and witnessed consent of the person to be euthanized or

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110 See, e.g., Embryo Protection Law (1990) (Germany); see also The Dickey-Wicker Amendment (DWA), Pub. L. No. 111-8, § 509(a)(2), 123 Stat. 524, 803 (2009) (prohibited the federal funding of research creating embryos for research purposes or the federal funding of research destroying human embryos, including, inter alia, embryonic stem cell research. However, Sherley v. Sebelius, 644 F.3d 388 has significantly limited the Dickey-Wicker Amendment by affirming that it does not preclude federal funding on research which uses pre-existing embryonic stem cells, but only on the future extraction of stem cells which necessitates the destruction of embryos); see also 45 CFR 46.204 (Code of Federal Regulations) (Provides protection for human fetuses and women by setting forth conditions for research on them as subjects. There is no reason the same protection could not be extended, by analogy, to embryos, which would arguably ban embryonic stem cell research.); See 42 USCS § 289g (United States Code Service) (The protections which apply to fetal research under this legislation should be extended to research on embryos).

111 See, e.g., Italian Law 40/2004.

The essential distinction between euthanasia and assisted suicide is that the former involves the direct killing of a patient, whereas the latter assists the patient to kill him or herself. Rita L. Marker and Cathi Hamlon, *Euthanasia and Assisted Suicide: Frequently Asked Questions*, http://www.patientsrightscouncil.org/site/frequently-asked-questions/ (last visited 30 July 2012). Since the state has a duty to protect the human person, this distinction between killing and assisting one to kill him or herself is a distinction without a difference; for a state to permit a person to assist in the death of another innocent person is as much a violation of its duty to protect the human person as it is for a state to permit a person to kill another innocent person.

112 Fla. Stat. § 765.309 (2012); Oklahoma Advance Directive Act, 63 Okl. St. § 3101.2 (2012); RSA 137-J:10 (2012) (New Hampshire Revised Statutes Annotated) (such legislation may not fully ban euthanasia or physician assisted suicide since withholding food and water may be considered as a natural means of death, rather than what it really is, a form of euthanasia or assisted suicide, Cf. Congregation for the Doctrine of the Faith: Responses to Certain Questions of the United States Conference of Catholic Bishops Concerning Artificial Nutrition and Hydration,
http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20070801_risposte-usa_en.html. It is important to note that in Vacco v. Quill, 521 U.S. 793, the U.S. Supreme Court ruled that the state of New York’s prohibition on assisted suicide did not violate the Equal Protection Clause of the 14th Amendment of the U.S. Constitution. Furthermore, in Wash. v. Glucksberg, 521 U.S. 702, the U.S. Supreme Court ruled that the state of Washington’s prohibition against causing or aiding a suicide did not violate the Due Process Clause of the 14th Amendment of the U.S. Constitution. Thus, states may prohibit assisted suicide and euthanasia without running afoul of the U.S. Constitution.

113 See, e.g., 42 U.S.C. § 14401; 45 CFR 1643.3.
assisted in dying, while still others have established preconditions that the person possess an incurable medical disease.\textsuperscript{114}

8. \textit{Right to conscientious objection}

Some States have enacted laws to protect the conscience rights of health professionals, for example, the right not to prescribe certain products, including contraception,\textsuperscript{115} or to provide certain services such as abortion,\textsuperscript{116} or to participate in a medical procedure, such as in vitro fertilization\textsuperscript{117} or end of life procedures.\textsuperscript{118} Other States have protected the conscience rights of pharmacists not to dispense abortifacients and contraceptives.\textsuperscript{119} More recently, laws have been enacted to protect the rights of civil and religious officials from having to perform “same sex marriages” which violate their conscience.\textsuperscript{120} Lastly, some States have ensured respect for the rights of parents to opt their child out of classes or education

\textsuperscript{114} See, e.g., Oregon Death with Dignity Act, ORS 127.800-995; see also The Belgian Act on Euthanasia of May 28th, 2002.

\textsuperscript{115} See, e.g., Mississippi Code Ann. § 41-41-215; see also Tennessee Code Ann. 68-34-104; see also Washington RCW 48.43.065; see also Idaho Code § 18-611; see also Florida 2003 Stat. XXIX 381.0051; see also Colorado Rev. Stat. 25-6-102.

\textsuperscript{116} See, e.g., S.C. Code Ann. § 44-41-50 (2011) (South Carolina Code Annotated) (provides that medical employees cannot be forced to recommend, perform, or assist in the performance of an abortion); see also Miss. Code Ann. § 41-107-5 (Mississippi Code of 1972 Annotated) (provides comprehensive protection for healthcare providers not limited only to abortion, but also encompassing other objectionable procedures such as in vitro fertilization); see also Rev. Code Wash. (ARCW) § 70.47.160 (2012); see also Del. C. § 2508(e) and (g) (2012) (Delaware Code Annotated); For, a partial and insufficient protection of the conscience rights of health care providers as regards end of life care and advanced directives see: Cf. 755 ILCS 40/35 (2012) (Illinois Compiled Statutes Annotated) and Wyo. Stat. § 35-22-408(e) and (g) Wyoming Statutes Annotated), wherein both statutes require health care providers who conscientiously object to a medical procedure to assist in the transfer of the patient to another institution that will comply with the patient’s wishes.

\textsuperscript{117} See, e.g., Miss. Code Ann. § 41-107-5 (Mississippi Code of 1972 Annotated) (provides comprehensive protection for healthcare providers not limited only to abortion, but also encompassing other objectionable procedures such as in vitro fertilization).

\textsuperscript{118} Illinois Compiled Statutes Annotated, supra note 53 (partial protection of the conscience rights of health care providers, with particular reference to end of life care and advanced directives is given in) (Cf. 755 ILCS 40/35 (2012) (Illinois Compiled Statutes Annotated); Wyo. Stat. § 35-22-408(e) and (g) Wyoming Statutes Annotated, supra note.).

\textsuperscript{119} See, e.g., Mississippi Code Ann. § 41-41-215; see also South Dakota Codified Laws § 36-11-70; see also Georgia Admin. Code § 480-5-.03; Tennessee Code Ann. 68-34-104; Washington RCW 48.43.065; Idaho Code § 18-611; Florida 2003 Stat. XXIX 381.0051; Colorado Rev. Stat. 25-6-102

\textsuperscript{120} Prince Edward Island Marriage Act, RSPEI 1988, c M-3 ss 11.1, as amended by An Act to Amend the Marriage Act, SPEI 2005, 12, §7 (It should be noted, the societal problem of not providing conscience rights for marriage registrars/officers does not go away when the law compels such registrars/officers to solemnize same-sex unions. In fact, in jurisdictions which do not safeguard conscientious objection for marriage registrars, “the issue of objecting marriage officers has nevertheless surfaced in the indirect guise of employment discrimination claims.” Canadian Journal of Human Rights, Vol. 1, No. 1, pp. 127-164, 147, 2012.)
programs, which violate their religious and moral convictions. The law of Honduras, for example, provides that “[p]ublic servants are ensured an individual right to conscientious objection as a fundamental right integral to the right to freedom, respect for physical and moral integrity and the right to religious freedom.”

PART II. OVERVIEW OF LAWS DIRECTLY PROTECTING THE FAMILY

A. Category B: International Laws Protecting the Rights of the Family

Once again for those States that should be transforming their international obligations into domestic law the following duties are worth noting. Article 16.3 of the UDHR protects the natural family: “The family is the natural and fundamental group unit of society and is entitled to protection from society and the State”. Article 23.1 of the ICCPR employs the same wording, while article 10.1 of the ICESCR is more demanding: “The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society,...”.

The natural family is defined as the consensual union of marriage between one man and one woman who are of marriageable age and who fully and freely give their consent. In the original French version of art.16.1 of the UDHR one man and one woman is expressly stated, “[a] partir de l’âge nubile, l’homme et la femme, sans aucune restriction quant à la race, la nationalité ou la religion, ont le droit de se marier et de fonder une famille. Ils ont des droits égaux au regard du mariage, durant le mariage et lors de sa dissolution”. While in the ICCPR, Article 23.2 reads, “[t]he right of men and women of marriageable age to marry and to found a family shall be recognized. No marriage shall be entered into without free and full consent of the intending spouses.” The natural family is deeply united with the rights and duties of parents. Indeed, following a discussion of the right to marry and found a family, Article 26 of the UDHR states, “[p]arents have a prior right to choose the kind of education that shall be given to their children.” The reference to “prior right” acknowledges

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121 See, e.g., A.R.S. § 15-102 (Arizona Revised Statutes); see also Fla. Stat. § 1002.20 (Florida Statutes); 8 VAC 20-620-10 (Virginia Administrative Code); cf. 20 USCS § 1232g (United States Code Service); For a helpful summary of the U.S. Supreme’s Court’s strong and repeated recognition of parental rights, see Christopher J. Klicka, Esq., Decisions of the United States Supreme Court Upholding Parental Rights as “Fundamental,” available at http://www.hslda.org/docs/mche0000000000000075.asp (last visited 16 October 2012); see also, e.g., CALIFORNIA STATES SCHOOLS COALITION, QUESTION & ANSWER GUIDE ON THE CALIFORNIA’S PARENTAL OPT-OUT Statutes, available at http://www.casafeschools.org/OptOutQA.pdf.

the principle of subsidiary; since parents give life to the child, they have the primary and inalienable duty and right to educate their child, and in conformity with their moral and religious convictions. Those who are called to collaborate with parents, such as teachers, school administrators, and state authorities, do so in a delegated manner and therefore in close collaboration with parents.

According to the two 1966 Covenants (ICCPR and ICESCR), parents have the right to choose schools or even home schooling in order to educate their child, in keeping with their moral and religious convictions. This implies the right to ensure that their child is not compelled to attend classes, such as sex-education courses, which are not in agreement with their own moral and religious convictions; and the right to ensure that a compulsory system of education is not imposed by the State from which all moral and religious formation is excluded. In the end, recognition of the parents’ prior right to choose their child’s education reaffirms the principle of integral human procreation, which is, in essence, an exercise of responsible procreation of the spouses, where the father and the mother accept to love, nurture, educate, guide, and accompany the child throughout his or her entire developmental process.

B. Category B: Domestic Laws Protecting the Rights of the Family

1. Protecting the Natural Family

Domestic laws should recognize the natural family as a subject of human rights, which cannot be treated in the same way as other objectively different groups or groupings without constituting an act of manifest discrimination. Recent constitutional amendments or newly enacted legislation, in the United States for example, define family, as one man and one woman based on marriage. In some countries, legislation regarding civil unions or domestic partnerships have been avoided, but in other countries, where recognized, good practices dictate that these relationships should not be given the same legal protections that benefit married couples. In other words, laws should not convey

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123 See ICCPR, supra note 8, at art. 18; ICESCR, supra note 10, at art. 13.
124 See, e.g. the 1995 Constitution of Uganda, available at http://www.uganda.at/Geschichte/verfassung_der_republik_Uganda_2008.pdf (wherein it refers to the phraseology in the UDHR, ICCPR, and the ICESCR, supra note 33 herein: “The family is the natural and basic unit of society and is entitled to protection by society and the state”).
125 See, e.g., The Fundamental Law of Hungary Article L, available at http://www.mkab.hu/download.php?d=65 (“Hungary shall protect the institution of marriage, understood to be the conjugal union of a man and a woman established by their voluntary decision, and the family as the basis of the nation’s survival”); see, e.g., The Defence of Marriage Act, HR 3396, available at http://www.gpo.gov/fdsys/pkg/PLAW-104publ199/html/PLAW-104publ199.htm (defines marriage as a union between one man and one woman) (The act is currently before the courts on a constitutional challenge).
the message that marriage is equivalent to domestic partnerships by providing almost the same remedies upon dissolution. Lastly, to avoid confusion de facto unions or cohabitation should not be referred to as “marriage-like”.

In the United States, some States recognize covenant marriage, a special contract authorized by law, which has the force of law similar to ordinary contracts for prospective spouses who promise to take reasonable steps to preserve natural marriage. This contract begins at the moment of marital difficulties, and lasts until the rendering of a divorce judgment, save for exceptional circumstances such as sexual abuse of a spouse or a child. Covenant marriage differs from other State marriage laws in that it requires pre-marital counseling, reasonable efforts to preserve the marriage, and restricted grounds for divorce or a lengthy separation period prior to divorce.

One might query whether States should permit spouses to reaffirm the indissolubility of natural marriage pursuant to State law in their marriage contracts, in cases where the State law has not granted a “right to a divorce”. Reluctance to enforce such terms, on the grounds that it would amount to specific performance, could possibly be overcome. For example, state law could require that the parties include a clause giving access to civil annulment procedures for lack of consent or other fundamental grounds and to provide for separate maintenance in certain cases, such as abuse or adultery. Separate maintenance would permit the spouses to alter their residential arrangements and organize support and custody arrangements while remaining married. Even though only a minority of citizens would likely take advantage of such legislation, the State has an important role to

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127 Adolphe, supra note 126, (cf. Katherine Shaw Spaht, The Last One Hundred Years: The Incredible Retreat of Law from the Regulation of Marriage, 63 LA. L. REV. 243, 302 (2003) (describing Covenant Marriage as a state-authorized pre-nuptial option “which permits spouses to contract for a stronger form of marriage, imposing the legal obligation to submit to counseling prior to divorce and a more restricted ‘right’ to divorce”); see also Katherine Shaw Spaht, Revolution and Counter-Revolution: The Future of Marriage in the Law, 49 LOY. L. REV. 1, 49 (2003); see LA. REV. STAT. ANN. §§ 9:272-309 (2000); ARIZ. REV. STAT. ANN. § 25-901-04 (2000); ARK. CODE ANN. §§ 9-11-801-11 (2002) (providing examples of legislation in three states that have enacted covenant marriage laws including Louisiana (1997), Arizona (1998), and Arkansas (2001)), see DiFonzo, Toward a Unified Field Theory, at 954 n.145 (For a more extensive list of Articles pertaining to covenant marriage).


129 Adolphe, supra note 126 (cf. Unlike divorce, the separation agreement does not cut off the marriage relationship); see, e.g., MICH. COMP. LAWS § 552.7 (1971).
play in protecting and assisting marriage. Such a law would have an important pedagogical purpose for the public.\textsuperscript{130}

A noteworthy example of taking into consideration the natural family in assessing new legislation is Ronald Reagan's "Executive Order 12606 on The Family:" which calls on the Executive to analyze proposed Federal Legislation through a series of questions directed toward protecting and strengthening the natural family.\textsuperscript{131} Healthy marriage initiatives have also been integrated as part of welfare reform, in the United States.\textsuperscript{132}

\section*{2. Domestic Violence}

Child protection laws should include three important standards: 1) the law should provide a clear and reasonable standard for State intervention such as proven abuse, negligence, or violence; 2) the law should apply the best interests of the child, preferably with some objective criteria, to award temporary or permanent custody; and 3) the law should acknowledge the basic principle of reunification of the family through special programs for its individual members and the family as a whole. Such reunification efforts could have time limits taking into consideration

\textsuperscript{130} Adolphe, supra note 126 (cf. See George, Law and Culture, supra note 34: discussing the law and culture interrelationship); see also Katherine Shaw Spaht, Covenant Marriage Seven Years Later: Its As Yet Unfulfilled Promise (forthcoming) (making the same point that marriage needs to be reinforced by the law).


\textsuperscript{132} Patrick Fagan, Robert Patterson, & Robert Rector, Marriage and Welfare Reform: The Overwhelming Evidence That Marriage Education Works, THE HERITAGE FOUNDATION BACKGROUNDER, No. 1606 (October 5, 2002), http://www.policyarchive.org/handle/10207/bitstreams/8384.pdf (“To help meet that goal, President George W. Bush wants to set aside $300 million per year for specific programs to strengthen marriage as part of the reauthorization of welfare reform. These programs would teach relationship skills to unmarried couples at the time of pregnancy, with the goal of helping couples develop healthy marriages. The programs would also provide marriage-skills training to low-income married couples to help those couples improve their relationships and avoid marital breakup”); Norval D. Glenn et al., Why Marriage Matters: Twenty-One Conclusions from the Social Sciences, 5 AMER. EXPERIMENTAL Q. 34, 36 (2002), available at www.amexp.org/aeqpdf/AEQv5/aeqv5n1/AEQv5n1various.pdf (assessing the effect of marriage on families, economics, physical health of both parents and children, mental health, crime, and domestic violence, when compared with single-parent, divorced, or cohabitating arrangements, and concluding that “[m]arriage is an important social good, associated with an impressively broad array of positive outcomes for children and adults alike” but that “[c]ohabitation is not the functional equivalent of marriage”).
the psychological bond that might develop between the child and his or her temporary caregiver.

Many States appoint guardians *ad litem* to represent the best interests of unborn children in cases of abuse or neglect. In specific regard to this topic, the work of Professor Bonner and Jennifer Sheriff, Esq. is seminal and timely. They discuss, for example, German law that expressly recognizes guardians for prenatal children: “*if it is to be assumed that a child needs a guardian upon birth, then even before the birth of the child a guardian may be appointed. The appointment takes effect on the birth of the child.*” However, this legislation is of little effect if such an appointment does not actually take effect until after the child is born.  

Bonner and Sheriff study the USA in great detail. They cite a New Jersey statute that explicitly allows for a petition for state services on behalf of an unborn child in need of state services, where it appears that the child’s safety or welfare will be endangered if such services are not provided. The State of Wisconsin has legislatively overruled a Supreme Court decision in specifically providing for guardians *ad litem* to be appointed for prenatal children in need of legal representation. It gives the government jurisdiction over prenatal children “*alleged to be in need of protection or services*” if and when a prospective mother “*habitually lacks self-control in the use of alcohol beverages, controlled substances or ...exhibited to a severe degree, to the extent that there is a substantial risk that the physical health of the unborn child, and of the child when born, will be seriously affected or endangered unless the expectant mother receives prompt and adequate treatment for that habitual lack of self-control.*” Additionally, Wisconsin Assembly Bill 292 provides for the appointment of a guardian *ad litem* “*for any unborn child alleged or found to be in need of protection or services.*” “*Unborn child*” is defined in this statute as “*a human being from the time of fertilization to the time of birth.*”  

They review legislation, which allows for the appointment of guardians *ad litem* to represent the best interests of unborn children in other cases as well. Nearly all American state legislatures, as well as the District of Columbia, have adopted a specific statutory provision for appointment of guardians *ad litem* for

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133 *Id.* (cf. Bürgerlichen Gesetzbuches [BGB] [Civil Code], Jan. 2, 2002, Bundesgesetzblatt, Tiel I [BGBl. I] 42, §1773, 1774 (Ger.)).

134 *Id.* (cf. N.J. STAT. ANN. § 30:4C-11 (2011)) (“Whenever it shall appear that any child within this State is of such circumstances that the child’s safety or welfare will be endangered unless proper care or custody is provided, an application setting forth the facts in the case may be filed with the Division of Youth and Family Services .... The provisions of this section shall be deemed to include an application on behalf of an unborn child when the prospective mother is within this State at the time of application for such services”).

135 *Id.* (cf. WIS. STAT. § 48.133 (2011)).

136 *Id.* (cf. WIS. STAT. § 48.235(1)(e)–(2) (2011)).

137 *Id.* (cf. WIS. STAT. § 48.02(19) (2011)).
prenatal children in trust and or probate proceedings. Many states allow guardian ad litem for prenatal children in other contexts relating to: property interests; illegal compensation for adoption; non-probate interests; questions before the courts, including orphan’s court; detention of a pregnant women and girls; and appointment of grandparents as guardians ad litem.

Bonner and Sheriff highlight cases where guardians ad litem for prenatal children have been appointed in petitions of minors for abortions without parental consent. Courts have also appointed guardians ad litem to represent prenatal children of an incompetent pregnant mother when the mother’s guardian petitions for her to have an abortion. The mother herself can petition for protection of her

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138 Id. (citing 42 state laws and noting that 75 ILL. COMP. STAT. 5/20-5 (2011) (provides for appointment of guardians ad litem for persons ‘not in being’ in probate cases); W. VA. CODE § 42-1-8 (2011) (unborn can inherit as if born.”)).
139 Id. (“MASS. GEN. LAWS ch. 79, § 30 (2011) (eminent domain cases); N.H. REV. STAT. ANN. REV. STAT. ANN. § 498-A:23 (2011) (eminent domain cases); N.C. R. CIV. P. 17 (2011) (in rem, quasi in rem, probate, and other cases affecting an interest in property); N.C. GEN. STAT. § 35A-1343 (2011) (administration of the unborn’s estate); OHIO REV. CODE ANN. § 2307.131 (2011) (cases in which the unborn has a future interest); 20 PA. CONS. STAT. § 8305 (2011) (cases in which the unborn has a property interest); VA. CODE ANN. § 8.01-94 (2011) (cases involving sale of real estate”).
140 Id. (cf. 720 ILL. COMP. STAT. 525/4.1 (2011)).
141 Id. (cf. LA. CIV. CODE ANN. art. 252 (2011)).
142 Id. (cf. MICH. COMP. LAWS § 600.2045 (2011)).
143 Id. (cf. MISS. R. CIV. P. 17 (2011)).
144 Id. (cf. 20 PA. CONS. STAT. § 751 (2011)).
145 Id. (cf. WIS. STAT. § 48.20, .203(2011)).
146 Id. (cf. In re Guardianship of Baby K., 188 Misc. 2d 228 (Surr. Ct. N.Y. 2001)).
147 Id. (In re Anonymous, 720 So. 2d 497 (Ala. 1998); Helena Silverstein, In the Matter of Anonymous, a Minor: Fetal Representation in Hearings to Waive Parental Consent for Abortion, 11 CORNELL.L. J. & PUB. POL’Y 69, 87 (2001) (“Including the first case of guardianship appointment, there have been at least 17 instances in which minors, seeking to waive parental consent, have been questioned by an appointed representative of the fetus”); but see In re T.W., 551 So.2d 1186 (Fla. 1989) (Trial court appointed guardian ad litem for a prenatal child in juvenile petition for abortion without parental consent. The GAL for the prenatal child appealed the granting of the minor’s petition. The Florida Supreme Court stated, “we find that the appointment of a guardian ad litem for the fetus was clearly improper”).
148 Id. (Lefebvre v. North Broward Hosp. Dist., 566 So.2d 568 (Fla. Ct. App. 1990); In re Estate of D.W., 134 Ill. App. 3d 788 (Ill. App. Ct. 1985) (appellate court does not discuss the appropriateness of the trial court’s appointment of a guardian ad litem for the fetus of a mentally incompetent woman whose mother/guardian wanted to consent to her abortion); but see In re D.K., 204 N.J. Super. 205, 213-14 (N.J. Super. Ct. Ch. Div. 1985) (holding that the appointment of a guardian ad litem for the fetus of a schizophrenic woman was inappropriate and that the guardian had no standing to bring an incompetency petition before the court); In re Klein, 145 A.D.2d 145, 147 (N.Y. App. Div. 1989) (holding that a person’s application to be the guardian ad litem for the non-viable fetus of a mentally incompetent woman whose husband was appointed her guardian to assent to her abortion was properly denied because such a fetus was not a recognized person for the purpose of such proceedings)).
prenatal child, for example, when a pregnant mother is being abused by her husband, putting the unborn child at risk.  

Bonner and Sheriff also underline the parents’ responsibility to protect their prenatal children and discuss the cases where medical treatment has been ordered for unborn children when parental action has been wanting. For example, courts have ordered blood transfusions and caesarean sections to protect the life or health of prenatal children. Moreover, judicial decisions have required a mother to undergo treatment that will save the life of her unborn child when the procedure would also help the mother, or when the risk of harm to the mother’s own health would be minimal. 

Some States protect women from violence by enacting laws that criminalize all types of domestic violence, including stalking; such laws may also require access to protection shelters and hotlines as well as special police and prosecutorial support for victims (e.g. “zero tolerance” arrest and prosecution policies, protection of victims and witnesses). 

149 Id. (Gloria C. v. William C., 124 Misc. 2d 313 (N.Y. Fam. Ct. 1984) (the court reasoned that since State law protected the unborn child from negligent acts of third parties, it protected against intentional acts, too. The court also found that similar protection was provided in New York’s tort, public health and welfare, criminal, and estate and trust law)).

150 Id. (Raleigh Fitkin-Paul Morgan Mem’l Hosp. v. Anderson, 201 A.2d 537 (N.J. 1964) (ordering a blood transfusion over the objections of the mother in the event that it was necessary to save the life of the unborn child); Hoerner v. Berninato, 171 A.2d 140 (N.J. Juv. & Domestic Relations Ct. 1961) (awarding the county welfare department for purposes of administering a blood transfusion); In re Application of Jamaica Hospital, 491 N.Y.S.2d 898 (N.Y. Sup. Ct. 1985) (ordering a blood transfusion to protect the life of an 18-week-old unborn child over the objections of the mother); contra, People v. Brown (In re Brown), 294 Ill. App. 3d 159 (Ill. App. Ct. 1998) (“In conclusion, the circuit court erred in appointing a temporary custodian for Fetus Brown with the authority to consent to blood transfusions for Darlene Brown and erred in appointing the public guardian as guardian ad litem for Fetus Brown”)).

151 Id. (Pemberton v. Tallahassee Mem’l Hosp. v. Pemberton Mem’l Hosp., 66 F. Supp. 2d 1247, 1250 (N.D. Fl. 1999) (holding that the State’s interest in protecting the unborn child’s life superseded the mother’s right to refuse a caesarean section); Jefferson v. Griffin Spalding Cty., Hosp. Auth., 274 S.E.2d 457 (Ga. 1981) (authorizing the county hospital to perform a Caesarean section on the mother of a 39-week-old unborn child in the event she presented herself to the hospital); but see People v. Doe (In re Doe), 260 Ill. App. 3d 392, 393 (Ill. Ct. App. 1994) (“[W]e hold that … a woman’s competent choice to refuse medical treatment as invasive as a cesarean section during pregnancy must be honored, even in circumstances where the choice may be harmful to her fetus”)).

152 Id. (For example, in Pemberton v. Tallahassee Mem’l Hosp. v. Pemberton Mem’l Hosp., 66 F. Supp. 2d 1247 (N.D. Fl. 1999), in granting the hospital’s motion for summary judgment, the trial court reasoned that ordering the cesarean section against the mother’s wishes was proper to save the life of her child. Id. In so ruling, the court explained, “The balance tips far more strongly in favor of the state in the case at bar, because here the full-term baby’s birth was imminent, and more importantly, here the other sought only to avoid a particular procedure for giving birth, not to avoid giving birth altogether. Bearing an unwanted child is surely a greater intrusion on the mother’s constitutional interests than undergoing a caesarean section to deliver a child that the mother affirmatively desires to deliver. Thus the state’s interest here was greater, and the mother’s interest less, than during the third trimester situation addressed in Roe. Here, as there, the state’s interest outweighed the mother’s” Id. at 1251-2).
3. Parental rights

The basic proposition recognized in international law is that parents have the right to provide for the moral, educational, and religious formation of their children.154 The Hungarian Constitution provides: “Parents shall have the right to choose the upbringing to be given to their children.”155

State legislation provides for a parental right to home school children,156 for parental opt outs in public and/or private schools, especially for sex education, and for parental consent whenever minors engage in certain forms of harmful or potentially harmful behavior, including abortion.157 In the United States, laws provide for the exercise of the parental right to choose schools through school vouchers.158

4. Divorce Reform

In Ireland, legislation protects the institution of marriage by conditioning civil divorce on certain requirements, in cases where there is no reasonable prospect of a reconciliation between the spouses and the spouses have lived apart for a period of

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154 See, e.g., U.N., Universal Declaration on the Rights of the Child, art. 26 ¶ 3 (1948) [hereinafter UDRC] (“Parents have a prior right to choose the kind of education that shall be given to their children”); see also The International Covenant on Economic, Social and Cultural Rights, art. 13 ¶ 3 (1996) (“The State Parties…. undertake to have respect for the liberty of parents… to choose for their children schools, other than those established by the public authorities, which conform to such minimum education standards as may be laid down or approved by the State and to ensure the religious moral education of their children in conformity with their own convictions”); see also California Safe Schools Coalition, Question & Answer Guide On California’s Parental Opt-Out Statutes: Parents’ and Schools’ Legal Rights And Responsibilities Regarding Public School Curricula, http://www.casafeschools.org/OpOutQA.pdf (California’s Parental Opt-out Legislation).


156 UDRC, supra note 154 ("Parents have a prior right to choose the kind of education that shall be given to their children."); see also The 1966 International Covenant on Economic, Social and Cultural Rights, art. 13.3 provides: “The State Parties… undertake to have respect for the liberty of parents… to choose for their children schools, other than those established by the public authorities, which conform to such minimum education standards as may be laid down or approved by the State and to ensure the religious moral education of their children in conformity with their own convictions”; see HOME SCHOOLING LEGAL DEFENCE FUND IN CANADA, http://homeschoolcanada.ca/canadian-homeschool-laws/ (Homeschooling laws in Canada).

157 See, e.g., Wisc. Stat. § 48.375; see also N.D.C.C. § 14-02.1-03.1; see also Okla. Stat. tit. 63 § 1-740.2-3; see also Parental Notice of Abortion Act, Fla. Stat. § 390.01114.

158 See, e.g., SCHOOLCHOICES.ORG, http://www.schoolchoices.org/roo/vouchers.htm (discussion about school vouchers); see also RETHINKINGSCHOOLS.ORG, http://www.rethinkingschools.org/special_reports/voucher_report/v_churl42.shtml (discussion about the issues).
time equal to four of the last five years prior to the institution of the divorce proceedings.  

In the United States, there is a “divorce reform movement.” For example, a number of non-governmental organizations have come together on various initiatives. The non-governmental organization “Americans for Divorce Reform” maintains a website with information on the Counseling Period Act and marriage education requirements. There is also legislation recognizing the negative effects of divorce on spouses and especially children, for example, laws promoting marriage preparation, marriage counseling, and mediation and others limiting divorce to fault based grounds as opposed to no-fault divorce systems, or some combination of the two regimes.

The issue of fault and no fault divorce has been greatly discussed. The notion of fault is an important way to educate the greater public about the deleterious effects of such conduct. If fault is tied to the concept of obligation and marriage is an institution with inherent duties, then non-recognition of fault will lead to non-recognition of these responsibilities. This, in turn, will undermine the institution of marriage. Having said that, fault based grounds were once thought to render divorce acrimonious to the detriment of children; this reason has since been described as erroneous in “[t]he Report of the Special Joint Committee on Child Custody and Access: For the Sake of the Children.” Consequently, there are initiatives to abolish certain grounds and to institute more appropriate ones. It is

161 See id. (It “[g]ives couples a common language to communicate early warning signals, helps them repair marriages before it's too late, [gives a] waiting period [which] varies from 6 months to 2 years, depend[s] on [whether there are] children and mutual consent, based on existing laws in Maryland, Illinois, Pennsylvania, New Jersey & Puerto Rico, but with new twist - puts waiting period BEFORE decision to divorce, wait starts with notice/request for help, NOT by leaving or filing for divorce, does not encourage “fault” divorce - applies equally to fault and no-fault, replaces archaic “cruelty” laws, procedures; [and] piggybacks on existing system for domestic violence restraining orders.” There are, however, exceptions when the counselling period is not required, for example, post conviction of a “violent crime in family,” post “restraining order for family violence,” and “imprisonment or institutionalization, … if those are divorce grounds in the state”).
162 See id. (The following is an example of statutory language, “ Any marriage counseling or education required before divorce may be provided by any of the providers listed in Section 4(a), or by licensed behavioral health professionals, psychologists, social workers, marriage and family therapists, psychiatrists, pastoral counselors, certified family life educators, or professional counselors, but not by a therapist who is treating or has treated one of the spouses separately. The individual parties may undergo it separately and need not both choose the same program or provider”).
163 See, e.g., id.
165 See American Divorce Reform, supra note 160 (“Most states still have several "fault" grounds for divorce, and most reformers do not propose to change them. But: a) In the 15 or so states where all fault grounds have been
noteworthy, that the Justice Department of Canada has devoted a website to the

On the matter of divorce and remarriage, the Catholic Church has taken a

heroic stand in defence of the family, calling divorce “a grave offense against the

natural law” which “claims to break the contract, to which the spouses freely

consented, to live with each other till death.” Regardless of the civil law’s

recognition, the contracting of a new marriage by a divorced individual “adds to

the gravity of the rupture” and places the remarried spouse “in a situation of public

and permanent adultery.” The Church views divorce as nothing short of a

“plague on society” which introduces a contagious disorder into all areas of

human life. Consequently, it argues that society and the State must assist spouses
to realize the fullness of their marriage bond.

However, having said that, the Catholic Church does not consider divorce
inherently evil since it recognizes certain situations where it might be justified: “If
civil divorce remains the only possible way of ensuring certain legal rights, the
care of the children, or the protection of inheritance, it can be tolerated and does
not constitute a moral offense.” Consequently, a civil lawyer, especially a
Catholic one, will need to carefully discern which case it can represent a client, on
a case-by-case basis, and with the principles of formal and material cooperation in
mind.

abolished, some such grounds will have to be reinstated. b) A few states have certain fault grounds that are a joke, which judges routinely use as a substitute for no-fault, sometimes without allowing any evidence to be presented by the defence. It is impossible to tell which ones these are from looking at a state's statutes -- you would have to consult divorce lawyers in each particular state about this. These need to be pared back, reformed or removed entirely. c) Also, in all states, once restrictions on no-fault divorce are put in place, perhaps some additional fault grounds, reflecting social change for the worse in recent decades, should eventually be enacted, usually by borrowing from other states or countries”; see also Crouch & Crouch, *Grounds for Divorce in the United States*, http://patriot.net/~crouch/50states/ (It is noteworthy that it maintains a site on divorce fault grounds in the USA available at http://patriot.net/~crouch/adc/grounds.html) (It also maintains sites in other countries).


169 *Catechism of the Catholic Church* 2384 [hereinafter CCC].

170 Id.

166 *Catechism of the Catholic Church* 2384 [hereinafter CCC].

167 See, e.g., CCC, supra note 167, at 2383 (“The separation of spouses while maintaining the marriage bond can be legitimate in certain cases provided for by canon law ….”) (emphasis added).

5. Adoption Reform

Adoption laws, in Western States, are creatures of statute; adoption is an exception to the natural family and natural parenthood, where children have a bond with their mother and father both biologically and emotionally. Adoption has the effect of terminating the biological parents rights and thereby ending the child’s biological bond for his or her parents while creating emotional or psychological bonds with the adoptive parents. The underlying assumption is that married biological parents are more likely to better care for their own children. This is not to say, of course, that adoptive parents cannot or do not love their adopted children, but rather that nature does assist parents in knowing that the spouses have procreated and now must care for a new human person, namely their child.

In many countries, adoption is a long and complicated process which operates inefficiently encumbered with unnecessary delays, and obstacles. Consequently, there are many non-governmental organizations and governmental agencies working on adoption reform issues.

As noted, termination of parental rights was traditionally required. In some countries stepparent adoption is now permitted where the biological parent need not dissolve his or her rights. In other countries, some non-governmental organizations recommend open adoption, where a biological mother and/or father is known by the child and the adoptive parents; others promote access to adoption documents, in cases where they remain sealed. These latter movements address the yearning of those who seek to know their biological mother or father or at least their heritage, which in turn, may be interpreted as a reaffirmation of the natural family and the fact that adoption is exceptional.

Concerns have been raised about who should be permitted to adopt. When adoption statutes were first enacted, in the Western world, efforts were made to place a child in a home with a married couple, but in time single persons were eventually permitted to adopt presumably with the understanding that they could marry in the future. Adoption to single persons, however, in certain cases has presented dangers for children. In Utah, for example, after considering statistics, which showed that a child was more likely to be abused when adopted by a single woman cohabiting with a partner, this State amended its law to give precedence to married couples, and to prevent children from being adopted by a single person cohabitating with another.174


174 See supra note 70.
The issue of same-sex adoption has also been debated and banned in some States for reasons associated with the best interests of the child. Unfortunately, Catholic Charities, working in the area of child welfare for centuries, have been forced to close in the face of legislation contending that such organizations are unjustly discriminating against persons living out homosexual tendencies when they refuse to facilitate adoption of children to such couples based on child welfare concerns.

6. Family Assistance

Some States provide direct public assistance to families in the form of tax breaks or baby bonuses. Others require employers to provide maternity leave to pregnant employees and to prohibit discrimination against pregnant women. Still others ensure a minimum family-wage to assist parents in providing for their children, while others promote an appropriate family-work-rest balance, including flexible working hours and remote working opportunities to allow for stay-at-home parenting possibilities, with particular promotion of, and attention to, the work of

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178 See, e.g., 21 L.P.R.A. § 4567 (Laws of Puerto Rico Annotated); see also 29 L.P.R.A. § 467; see also The Maternity and Parental Leave etc. Regulations (United Kingdom, 1999); see also Parental Leave Act (Sweden, 1995).

179 See, e.g., U.S. Family and Medical Leave Act, 29 USC, Ch. 28; see also Utah Code § 34A-5-106; see also NYCL § 296 (Consolidated Laws of New York); see also Conn. Gen. Stat. § 46a-60 (Formerly Sec. 31-126).
the mother in the home as having inherent value for the family and for society. Legislation or policies may also include provisions for public assistance such as school vouchers for education whether public, private or religious. Some States choose to fund or assist the family indirectly through financial assistance to non-governmental organizations, which in turn, assist women, children and the family in crisis.

Some laws ensure decent housing commensurate to family size in a physical environment that provides efficient and effective public services. Other legislation provides access to the highest standard of health care possible, including pre-natal and post-natal care. It may include appropriate assistance to the family to care for its most vulnerable members, including disabled persons, dependent adults and seniors. It may promote the extended family system per se, as a benefit to society on the grounds that it constitutes a source of solidarity, mutual assistance, and transmission of authentic values as well as proven traditions. Other legislation facilitates family-unity in cases where it has been compromised, including situations regarding immigration, emigrant work, refugees, and detained or imprisoned persons. Many States explicitly and implicitly acknowledge the child’s right to a family in recognizing the need for special protection and care, such as foster-care or adoption in a suitable natural family, for orphans of living or dead parents.

CONCLUSION

This paper has explored select best practices from around the world concerning laws promoting life and the family. Part I gave an overview of what is described as Category A types of law and legislation wherein the right to life of the pre-born child is protected and promoted such as laws prohibiting or restricting abortion, the destruction or manipulation of embryos, euthanasia and/or physician assisted suicide. Part II reviewed Category B types of legislation that seek to protect the

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181 See supra note 64.
182 See, e.g., 42 USCS § 12704; see also 42 USCS § 1437f; see also 62 P.S. § 2992.2; see also 30-A M.R.S. § 4753.
183 CRC, supra note 11, at art. 24 1, 2 (d).
185 See, e.g., 2 USCS § 13891; see also Tex. Gov't Code § 501.099 (2012); see also Cal. Pen. Code § 2601.
186 See, e.g., 13 Del. C. § 1103; see also 2005 Fla. Stat. 63.022e(3).
187 See, e.g., supra note 70.
rights of the family, based on the marriage between one man and one woman, and include references to laws promoting the responsibilities and rights of parents to protect and educate their children, divorce reform measures, the rights of the mother and their pre-born children, improvements in adoption laws as well as giving increased family assistance.

There are two annexes. Annex I presents model legislation from different parts of the world, such as the United States, Ireland, Hungary, Honduras, Uganda, and Chile. As previously noted, in providing these laws, the paper is not promoting the overall activities of the government of the particular State, nor is it promoting every law the respective State has enacted. Annex II lists non-governmental organizations, faith based groups and some governmental reports which are easily accessible via the internet which contribute to building a civilization of love, life, faith and family that will inevitably educate the public to support the various legislative initiatives discussed herein.
### ANNEX I:

**MODEL LEGISLATION FOR CATEGORY A AND CATEGORY B**

## THE UNITED STATES

<table>
<thead>
<tr>
<th>NAME OF LEGISLATION</th>
<th>EXPLANATION OF LEGISLATION</th>
<th>ACCESS TO LEGISLATION</th>
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<tbody>
<tr>
<td>Women’s Health Defense Act</td>
<td>Based on the protection of women’s health posed by abortion, especially after the first trimester, and the existence of fetal pain, this legislation, inter alia, prohibits abortion at or after 20 weeks gestation.</td>
<td>Americans United for Life, <em>Defending Life</em> (2011), <a href="http://www.scribd.com/fullscreen/50052692?access_key=key-hs2enfvcsjqhqujo3q7c">http://www.scribd.com/fullscreen/50052692?access_key=key-hs2enfvcsjqhqujo3q7c</a> (cf. pgs. 380-386)</td>
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<tr>
<td>Partial-Birth Abortion Ban Act</td>
<td>Based on the danger which partial-birth abortion poses for women, the state’s interest in protecting all human life, including the unborn, and the lack of a clear and bright distinction between partial-birth abortion and infanticide, this legislation prohibits partial-birth abortion unless it is necessary to save a woman’s life.</td>
<td>Americans United for Life, <em>Defending Life</em> (2011), <a href="http://www.scribd.com/fullscreen/50052692?access_key=key-hs2enfvcsjqhqujo3q7c">http://www.scribd.com/fullscreen/50052692?access_key=key-hs2enfvcsjqhqujo3q7c</a> (cf. pgs. 387-392)</td>
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</table>
Abortion Act of [year this legislation is passed] Based on the principle of non-discrimination and the equal dignity of all human persons, regardless of their medical condition, this legislation prohibits sex-selective abortion, abortions performed because the unborn child has down syndrome, and abortions performed because the unborn child has a genetic abnormality.

Woman’s Right to Know Act

Based on the importance of the decision to have an abortion and the failure of the abortion industry to self-regulate, this legislation is intended to ensure that women considering abortion receive complete information on abortion and its alternatives, and that all abortions are performed only after the woman has given voluntary and fully informed consent to the abortion procedure; furthermore, this legislation requires that hospitals or other licensed facilities in which abortions occur report each abortion to the State.

Based on the evidence that parents are more prepared for the death of an unborn child with a lethal fetal anomaly when they give birth to the child and take advantage of perinatal hospice as opposed to aborting the child, this legislation requires the voluntary and informed consent of a woman prior to an abortion, which means that at least 24 hours before an abortion, the physician must inform the woman that perinatal hospice services are available and offer this care as an alternative to abortion, and, furthermore, that the woman contemplating abortion is given a list of perinatal hospice programs available. Americans United for Life, *Defending Life* (2011), http://www.scribd.com/fullscreen/50052692?access_key=key-hs2enfvc5jquh03q7c (cf. pgs. 420-423)
Unborn Victims of Violence Act of 2004

This act provides that killing an unborn child is a federal crime and a separate crime from killing the mother, even if the killer did not know that the woman he attacked was pregnant and even if the killer did not intend to kill or inflict bodily damage on the unborn child.


Parental Consent for Abortion Act

Since parents often possess information essential to the physician’s exercise of medical judgment concerning a minor, and since parents aware that their minor daughter has had an abortion may better ensure that she receives adequate post-abortive medical attention, this legislation requires the consent of one parent prior to an abortion, subject to limited exceptions such as when the minor daughter has been sexually abused by one of her parents or legal guardians.

Defense of Marriage Act (DOMA)

(Please note that this legislation is particularly appropriate for federal states where all the power is not entrusted solely to a centralized state. Instead, power is decentralized and sometimes exercised at a lower level)

This Act defines marriage for purposes of federal law as the legal union of one man and one woman as husband and wife; it also prevents each of the 50 U.S. states from being forced to recognize as valid “same-sex marriage,” even if “same-sex marriage” is legal in another state or other states.

http://www.gpo.gov/fdsys/pkg/BILLS-104hr3396enr/pdf/BILLS-104hr3396enr.pdf
The Children Act

This comprehensive legislation ensures the best interests/welfare of children in various contexts.

http://ugandaemb.org/The_Children_Act.pdf

The Penal Code Act

Article 137 prevents keeping a place of any kind for purposes of prostitution; 139 prohibits prostitution; 141 criminalizes the attempt to perform an abortion; 142 criminalizes self-induced abortion; 143 criminalizes the supplying or procuring of drugs for an abortion; and 212 criminalizes the action of preventing a child from being born when a woman is about to deliver the child.


Constitution of the Republic of Uganda, 1995

Of relevance, XIX provides, “The family is the natural and basic unit of society and is entitled to protection by society and the state”; Chapter 4 20(1) provides, “Fundamental rights and freedoms of the individual are inherent and not granted by the state”; 22(2) provides, “No person has the

right to terminate the life of an unborn child except as may be authorized by law”; 29(1)(c) provides that every person shall have the right to “freedom to practice any religion and manifest such practice which shall include the right to belong to and participate in the practices of any religious body or organization in a manner consistent with this Constitution”; 31(5) provides, “Children may not be separated from their families or the persons entitled to bring them up against the will of their families or of those persons, except in accordance with the law”; 34(1) provides, “Subject to laws enacted in their best interests, children shall have the right to know and be cared for by their parents or those entitled by law to bring them up.”
### CHILE

<table>
<thead>
<tr>
<th>NAME OF LEGISLATION</th>
<th>TRANSLATION OF LEGISLATION</th>
<th>ACCESS TO LEGISLATION</th>
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<tr>
<td>Constitucion Politica de Chile Articulo 19/Constitution of Chile Article 19</td>
<td>The Constitution ensures/guarantees to all persons: 1) The right to life and to physical and mental integrity. The law protects the life of one who is about to be born.</td>
<td><a href="http://www.oas.org/dil/esp/Constitucion_Chile.pdf">http://www.oas.org/dil/esp/Constitucion_Chile.pdf</a></td>
</tr>
</tbody>
</table>
| Codigo Penal articulo 342/Criminal Code Article 342 (1-3) | The one that maliciously causes an abortion will be punished:  

With “presidio mayor en su grado medio” (type of penalty in terms of years in jail), if he/she causes the abortion by exercising force upon the person of the pregnant woman;  

With “presidio menor en su grado maximo” (less quantity of penalty) if, although he/she does not use force, he/she acts without the woman’s permission/authorization;  

With “presidio menor en su grado medio” (even less penalty), if the woman authorizes the abortion. | http://www.servicioweb.cl/juridico/Codigo%20Penal%20Chile%20libro2.htm                |
**Codigo Penal 343/Criminal Code Article 343**
The person that violently causes an abortion, although he/she did not have the specific purpose/intention of causing an abortion, will be punished with a minimum to medium term of imprisonment, if the pregnancy state was evident or if he/she/this person (the one who caused the abortion) was already aware of the pregnancy.

**Codigo Penal 344/Criminal Code Article 344**
The woman that self-causes her abortion, or authorizes that another person cause it, will be punished with imprisonment in its maximum degree. If she does any of the above things in order to hide her dishonor, she will be punished with a medium (lesser) term of imprisonment.

**Codigo Penal 345/Criminal Code Article 345**
The healthcare worker who, exceeding his faculties, causes an abortion or cooperates in it, will be punished with the penalties established in Article 342, increased by one degree.
The law protects the life of the one who is about to be born. The judge, hence, by request of any person or by himself, will take all the precautions that he considers necessary to protect the life of the unborn, in case he thinks this life is in danger. Every punishment of the mother, by which the life or health of the unborn could be in danger, must be delayed until after childbirth.

http://www.chilein.com/c_civil3.htm
During the pregnancy period, the woman who usually works in jobs that are considered by the authority as harmful to her health, must be switched into another job that it is not considered harmful, without any salary reduction.

For this purpose, this law understands, in particular, that the following jobs are harmful for the pregnant woman’s health:

- The one that forces her to lift up or push heavy weights;
- The one that demands of her a physical effort, including the act of standing up for a long time;
- The one that is done during the night;
- The one that is done in extraordinary working hours;
- The one that the authority declares inconvenient for the pregnancy.

http://www.dt.gob.cl/legislacion/1611/Articles-59096_recurso_1.pdf
<table>
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<tr>
<th>NAME OF LEGISLATION</th>
<th>TRANSLATION OF LEGISLATION (IF APPLICABLE)</th>
<th>ACCESS TO LEGISLATION</th>
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<tr>
<td><strong>Constitución Republica de Honduras Artículo 67</strong>/Constitution of the Republic of Honduras Article 67</td>
<td>The one who is about to be born, shall be considered born for anything that favors him [or her] within the limits established by law.</td>
<td><a href="http://www.honduras.net/honduras_constitution2.html">http://www.honduras.net/honduras_constitution2.html</a></td>
</tr>
<tr>
<td><strong>Constitución Republica de Honduras Artículo 65</strong>/Constitution of the Republic of Honduras Article 65</td>
<td>The right to life is inviolable.</td>
<td><a href="http://www.honduras.net/honduras_constitution2.html">http://www.honduras.net/honduras_constitution2.html</a></td>
</tr>
<tr>
<td><strong>Código de la ninez y la adolescencia Artículo 12</strong>/Code of Childhood and Adolescence Article 12</td>
<td>Every human being has the right to life from the moment of its conception. The State will protect this right by means of the adoption of measures necessary to protect pregnancy, birth and later development of the person, so that they are carried out in conditions compatible with human dignity.</td>
<td><a href="https://docs.google.com/document/pub?id=1hWj-2dsJbst2pVkynQDxDBSPtdb_foDS9ISF3OkE5Q">https://docs.google.com/document/pub?id=1hWj-2dsJbst2pVkynQDxDBSPtdb_foDS9ISF3OkE5Q</a></td>
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</table>
Abortion is the death of a human being at any time during pregnancy or during birth. Whoever intentionally causes an abortion shall be punished:

With three (3) to six (6) years imprisonment if the woman consented to it;

With six (6) to eight (8) years of imprisonment if the agent worked without the mother’s consent and without using violence or intimidation; and

With eight (8) to ten (10) years of imprisonment if the agent used violence, intimidation, or deceit.


The woman who produces her abortion or consents for another to cause it will be sanctioned with 3 to 6 years imprisonment [The Criminal Code of 1985 established a lesser penalty of 2-3 years imprisonment]
Decree 13-85 of February 13, 1985, derogated Articles 130 and 131 of the Criminal Code of 1985, thus criminalizing all abortions without exception. (Articles 130 and 131 of the Criminal Code of 1985 allowed for abortion in the following cases: rape, mental disability of the mother, when the mother is a minor under 15 years of age, when the mother’s life is in jeopardy or for the benefit of a “seriously affected state of health or threat to it caused by gestation…. “prevent the birth of a potentially defective being”)

Decree 13-85 provides in pertinent part, Given that Articles 130 and 131 of the Criminal Code that would become effective on March 13 of the current year are unconstitutional, because they flagrantly violate constitutional guarantees contained in Articles 65, 67, and 68 of the Republic’s Constitution; Given that the National Congress may, among others, create a decree, interpret, reform and derogate law;
Therefore Decrees:
Article 1 – to derogate Article 130 and 131 of the Criminal Code, Volume 2, Specialized Section, Title 1, Crimes Against Life and Bodily Integrity, Chapter 2, Abortion.

Criminal Code of 1985 Article 132, reformed by Decree 144-83

Whoever causes an abortion through acts of violence, even unintentionally, while being aware of the victim’s state of pregnancy, will be sanctioned with 4 to 6 years imprisonment. [The Criminal Code of 1985 established a lesser penalty of 1 to 2 years imprisonment]

http://www.angelfire.com/ca5/mas/HON/PEN/REF/r01.html

Public Servants Code of Ethics Article 32

Provides in pertinent part:
Public servants are ensured an individual right to conscientious objection as a fundamental right integral to the right to freedom, respect for physical and moral integrity and the right to religious freedom.

http://www.tsc.gob.hn/Normativa%20Vigente/codigo_de_conducta_etica_del_servidor_publico.pdf
### IRELAND

<table>
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<tr>
<th>Name of Legislation</th>
<th>Explanation of Legislation</th>
<th>Access to Legislation</th>
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<tr>
<td><strong>Constitution of Ireland</strong>&lt;br&gt;Article 40(3)(3°)</td>
<td>This constitutional provision provides extensive protection to the unborn child, although it has been interpreted by the Supreme Court of Ireland as allowing for abortion when a pregnant woman is at risk of suicide in X v Attorney General 1 IR 1, 1992.</td>
<td><a href="http://www.constitution.ie/reports/ConstitutionofIreland.pdf">http://www.constitution.ie/reports/ConstitutionofIreland.pdf</a></td>
</tr>
<tr>
<td><strong>Offenses Against the Person Act 1861 Sec. 58</strong></td>
<td>This legislation provides that abortion is a felony, whether self-inflicted or inflicted by another person. Furthermore, even the attempt to procure an abortion that fails because the woman is not, in fact, pregnant is a felony under this act.</td>
<td><a href="http://www.cirp.org/library/legal/UKlaw/oap1861/">http://www.cirp.org/library/legal/UKlaw/oap1861/</a></td>
</tr>
<tr>
<td><strong>Maternity and Infant Care Scheme</strong></td>
<td>The Department of Health has confirmed that the Maternity and Infant Care Scheme does provide insurance for unborn children in cases where they require medical treatment.</td>
<td><a href="http://www.hse.ie/eng/services/Find_a_Service/maternity/combinedcare.html">Cf. http://www.hse.ie/eng/services/Find_a_Service/maternity/combinedcare.html</a></td>
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</table>
Employment Equality Act 1998 37(1)(a) and (b)  
This legislation critically provides that religious, educational or medical institutions may protect their religious ethos without violating anti-discrimination law.  

Constitution of Ireland Article 41(1) and (2)  
This legislation critically protects the family and motherhood by giving them an elevated status in constitutional law.  
http://www.constitution.ie/reports/ConstitutionofIreland.pdf

Constitution of Ireland Article 41(3)  
This legislation critically protects the institution of marriage by conditioning civil divorce on certain requirements, i.e., that there is no reasonable prospect of a reconciliation between the spouses and that the spouses have lived apart for a period of time equal to four of the last five years prior to the institution of the divorce proceedings.  
http://www.constitution.ie/reports/ConstitutionofIreland.pdf
Exhibit G: Constitution of Ireland
Article 42

This legislation protects the right of parents to educate their children in accord with their own convictions, including by home schooling their children, subject to certain regulations provided by the state to ensure that children receive a minimum level of education.

http://www.constitution.ie/reports/ConstitutionofIreland.pdf
The Fundamental Law of Hungary Avowal of National Faith

We are proud that one thousand years ago our king, Saint Stephen, built the Hungarian state on solid foundations, and made our country a part of Christian Europe.

The Fundamental Law of Hungary Article L

Hungary shall protect the institution of marriage, understood to be the conjugal union of a man and a woman established by their voluntary decision, and the family as the basis of the nation’s survival. Hungary shall support the commitment to have children.

The Fundamental Law of Hungary Article 1(1)

The inviolable and inalienable fundamental rights of man shall be respected. It shall be the primary obligation of the State to protect these rights.
### The Fundamental Law of Hungary Article II

Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception.


### The Fundamental Law of Hungary Article 3(1) and (3)

No one shall be subjected to torture, inhuman or degrading treatment or punishment, or be held in servitude.

Trafficking in human beings shall be prohibited.

Practices aimed at eugenics, the use of the human body or its parts for financial gain, and the cloning of human beings shall be prohibited.

The Fundamental Law of Hungary Article VII (1) and (2)

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include the freedom to choose or change one’s religion or other conviction, and the freedom to manifest or abstain from manifesting, to practice or teach, either alone or in community with others, in public or in private, one’s religion or other conviction through religious acts or ceremonies, or in any other way.

The State and the churches shall operate separately. Churches shall be autonomous. The State shall cooperate with the churches for the attainment of community goals.

The Fundamental Law of Hungary Article XV (1)

Everyone shall be equal before the law. Every human being shall have legal capacity.
The Fundamental Law of Hungary Article XVI (1) and (2)

Every child shall the right to the protection and care necessary for their proper physical, intellectual and moral development;

Parents shall have the right to choose the upbringing to be given to their children.

http://www.mkab.hu/download.php?d=65
ANNEX II:
SELECT BIBLIOGRAPHY OF NGOs, FAITH-BASED GROUPS AND GOVERNMENTS

a. Personhood Legislation

- Personhood USA

b. Abortion

- Legislative statistics regarding abortion
  - Instituto de Política Familiar (Spain)

- Pro-Life Organizations
  - International Human Life International (inside and outside USA)
  - Priests for Life (Offices within and outside of USA)
  - Parliamentary Network for Critical Issues (USA)
  - Rachel’s Vineyard (healing the pain of abortion) (offices within and outside of USA)
  - Americans United For Life (USA)
  - Life Site News (Canadian)
  - Sisters for Life (USA)
  - Crisis Pregnancy Centers (e.g. Care Net, Heart Beat International, The National Institute of Family and life Advocates)
  - Mexico’s National Pro-Life Committee

188 Matthew Cullinan Hoffman, Mexico’s National Pro-Life Committee saving Tens of Thousands of unborn children, in LifeSiteNews.com, June 17, 2011 at http://www.lifesitenews.com/news/mexicos-national-pro-life-committee-saving-tens-of-thousands-of-unborn-chill (“Mexico’s largest pro-life organization, the National Pro-Life Committee (Comité Nacional Provida), saves thousands of unborn children every year, thanks to an impressive operation that includes mobile units equipped with ultrasound equipment, an internet outreach program, and walk-in facilities in all the major cities of the country”). See also Matthew Cullinan Hoffman, Mexican Pro-Life Leader
Alliance Defending Freedom (Offices within and without the USA)

(iii) Bioethical Considerations

- Bioethics Defense Fund (USA)
- National Catholic Bioethics Centre (USA)
- Anscombe Bioethics Center (England)

(iv) Euthanasia and/or assisted suicide

- IFSPH (International Federation For Spina Bifida & Hydrocephalus)
- Discomfort and Pains in Newborns
- See also: the NGOs listed under bioethical considerations

(v) Right to conscientious objection

- Beckett Fund For Religious Liberty (USA)
- Alliance Defending Freedom (Offices within outside the USA)
- Concerned Women for America (USA)

7. Definition of family

- United States Conference of Bishops
- Institute for Marriage and Public Policy (USA)
- Institute for the Study of Marriage, Law and Culture (Canada)
- Marriage Ministry through the Catholic Dioceses


The essential distinction between euthanasia and assisted suicide is that the former involves the direct killing of a patient, whereas the latter assists the patient to kill him or herself. Rita L. Marker and Cathi Hamlon, Euthanasia and Assisted Suicide: Frequently Asked Questions, http://www.patientsrightscouncil.org/site/frequently-asked-questions/ (last visited 30 July 2012). Since the state has a duty to protect the human person, this distinction between killing and assisting one to kill him or herself is a distinction without a difference; for a state to permit a person to assist in the death of another innocent person is as much a violation of its duty to protect the human person as it is for a state to permit a person to kill another innocent person.
8. **Domestic Violence and other forms of Exploitation of Children**
   - Response of the Catholic Church to abuse of minors available on the Vatican website
   - United States Conference of Bishops on topics of domestic violence and abuse of children
   - International Catholic Child Bureau (Switzerland)
   - Pontifical Gregorian University, Center for Child Protection (Italy)

9. **Parental rights**
   - Parental Rights Organization (USA)
   - Home School Legal Defence Association (Canada and USA)
   - National Father’s Association of American (USA)
   - Child Support Laws State by State (USA)
   - National Association for Research and Therapy on Homosexuality (NARTH) on Parenting and Family

10. **Divorce Reform**
    - American Divorce Reform (USA)
    - Department of Justice on Divorce reform (Canada)

11. **Adoption**
    - Adoption Reform for Open Adoption
2012 BEST PRACTICES: LAWS PROTECTING LIFE AND THE FAMILY

- Reform Adoption (USA)
- Heritage Foundation (USA)

(XI) Family Assistance

- Heritage Foundation (USA)
- Family Research Institute (USA)
- Focus on the Family (Canada and USA)
- National Association for Research and Therapy on Homosexuality (USA)
- Instituto de Política Familiar, La Familia, Desafío para una Nueva Política (Spain)