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China's One-child Policy and Its Violations of Women's and Children's Rights

Ying Chen*

I. Introduction

Forced abortion and sterilization are inhumane and unacceptable in modern society.¹ Under the regime of the Communist Party, China was devoted to removing the burden of overpopulation as a means of promoting economic development, protecting the environment, and solving the problem of poverty.² China's one-child policy was developed out of the ideal family model of "one couple, one child."³ Although violations of women's rights are prohibited by domestic statutes, there is a great discrepancy between law as it appears on paper and the law in actual practice.⁴ In reality, the one-child policy is carried out through involuntary contracep-

1. See Enid H. Adler, *Throw Them to the Wolves: Asylum and Asylum Law*, 3 ISLA J. OF INT'L & COMP L. 537, 540 (1997) (stating that forcible abortions are considered inhumane); see also Moshe S. Berman, Note, *The Appropriate Response of the United States to Forced Abortion in China: Should Section 601(A) of the IIRIRA Be Extended to Allow Asylum for Unmarried Couples?*, 41 NEW ENG. L. REV. 339, 347 (2007) (demonstrating the United States' of forced abortion and sterilization); see also Susannah C. Vance, Note, *An Enduring Fear: Recent Limitations on the Past Persecution Ground for Asylum*, 91 KY L.J. 957, 988 (2002–2003) (describing how the United States views forced abortion and forced sterilization procedures).
2. See Cathy C. Cardillo, *Violence Against Chinese Women: Defining the Cultural Role*, 19 WOMEN'S RTS. L. REP. 85, 89 (1997) (indicating that overpopulation in China caused economic hardships that needed to be addressed); see also Mary H. Hansel, Note, *China's One-child Policy's Effects on Women and the Paradox of Persecution and Trafficking*, S. CAL. REV. L. & WOMEN'S STUD. 369, 369 (2002) (showing that the one-child policy was created in response to economic hardships that arose from rapid overpopulation); see also Skalla, Note, *China's One Child Policy: Illegal Children and the Family-Planning Law*, 30 BROOK J. INT'L L. (2004) 329, 344 (2004) (illustrating that responding to famine, poverty, and a horrible economic situation, China adopted the one-child policy).
3. See Thomas A. Brown, *Forced Abortions and Involuntary Sterilization in China: Are the Victims of Coercive Population Control Measures Eligible for Asylum in the United States?*, 32 SAN DIEGO L. REV. 745, 745–46 (1995) (positing that China adopted the "one couple, one child policy" in response to the overpopulation problem); see also Kristi Deans, Comment, *Less Than Human: Children of a Couple in Violation of China's Population Laws and the Barriers They Face in Claiming Asylum in the United States*, 36 CAL. W. INT'L L. J. 353, 353 (2006) (asserting that the ideal family in China was composed of two parents and a single child); see also Lisa B. Gregory, Note, *Examining the Economic Component of China's One-child Family Policy Under International Law: Your Money or Your Life*, 6 J. OF CHINESE L. 45, 79 (1992) (referring to the ideal in China of having only one child).
4. See L. M. Cirando, Note, *Informed Choice and Population Policy: Do the Population Policies of China and the United States Respect and Ensure Women's Rights to Informed Choice?*, 19 FORDHAM INT'L L.J. 611, 642–43 (1995) (explaining that although the one-child policy in China does not mandate force, there are known instances in which force is used); see also Stefanie M. Duda, Comment, *Drawing the Interpretive Lines for Victims of Coercive Population Control: Why the Definition of "Refugee" Should Include Spouses of Individuals Fleeing China's One-child Policy*, 4 SETON HALL CIR. REV. 409, 417 (2008) (describing how under China's one-child policy, individuals still are subject to punishment for not adhering to the recommendations); see also Gerrie Zhang, Comment, *U.S. Asylum Policy and Population Control in the People's Republic of China*, 18 HOUS. J. INT'L L. 557, 563 (1996) (stating that force and abuse are used to enforce the one-child policy).

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tion, forced sterilization, and abortion, which seriously violate women's basic dignity and human rights.⁵

Abuse of China's one-child policy and the resulting human rights violations are the major concerns of this article. In part II, I will explain the background of China's one-child policy, including its history and basic elements. To better understand the policy's effect, this paper provides statistics to illustrate the number of Chinese women who accept the practice of forced sterilization. In this part, I will also address the women's rights infringed on by the various departments within the government that are charged with enforcing the policy.

In part III and part IV, I will analyze both international law and China's national statutes, respectively, for potential bases for such action and, subsequently, conclude that no legal basis exists for using coercive methods in the enforcement of the one-child policy in China. In part III, I will focus attention on international human rights laws, treaties, conventions, and other instruments that address women's rights, and to which China is a signatory. I will explain how international human rights laws universally acknowledge women's basic reproductive rights and discuss the binding effects of these laws. In part IV, I will focus attention on China's domestic statutes and regulations with respect to women's rights.

In part V, I will examine the measures used to enforce the one-child policy, ranging from approaches that do not directly violate women's rights to inhumane and coercive methods unacceptable by most democratic countries; and I will argue that abuse of China's one-child policy is the principal reason for its consistently being charged with various human rights violations. Furthermore, in this part I will discuss China's recent proposal to impose reputation-related sanctions on the wealthy for circumventing or directly violating the family-planning policy from both an international perspective and a national perspective. In part VI will address women's reproductive rights, other relevant human rights, and children's human rights infringed upon by local family-planning officials.

In part VII and part VIII, I will explore the potential reasons for China's human rights violations in its enforcement of the one-child policy and propose some humane alternatives to keep China's population under control. In part VIII, I will conclude that these inhumane and coercive birth control measures must be prohibited, and the abusive enforcement of China's one-child policy must be terminated. Finally, in part X I will provide a compilation of cases regarding the abuse of China's one-child policy.

5. See JAN STEPAN & EDMUND H. KELLOGG, *THE WORLD'S LAW ON CONTRACEPTIVES*, in *THE LAW AND POPULATION MONOGRAPH SERIES* 1, 59 (1974) (detailing the specifics of China's policies on contraception); see also Reed Boland, *The Environment, Population, and Women's Human Rights*, 27 ENVTL. L. 1137, 1143 (referring to the forced abortion and sterilization procedures to which women are subjected); see also Brown, *supra* note 3, at 746 (asserting that forced sterilization and abortion procedures occur at the hands of public officials).

II. The Background of China's One-child Policy and the Violations of Women's Rights in Enforcing the Policy

A. The History of China's One-child Policy

During the Mao Zedong period, Chinese leaders considered the large Chinese population a rare asset.⁶ The idea "The More People, the Stronger We Are" was cherished for about two decades.⁷ However, rather than make China stronger, the drive to have more children resulted in immense overpopulation.⁸ With the dramatic increase in population, overpopulation became the primary impediment to the country's economic development.⁹ To solve the economic and environmental problems posed by the burgeoning population, the government began to discourage couples from having more than two children.¹⁰ Subsequently, in 1979, a birth control policy, the one-child policy (also called the family-planning policy), was put forward by Deng Xiaoping.¹¹ The policy was codified as the Law of the People's Republic of China on Population and Family Planning by the Ninth Meeting of the Standing Committee

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6. See Cardillo, *supra* note 2, at 89 (explaining that there was a period of time in China where people were encouraged to have numerous children); see also Amy Hampton, Comment, *Population Control In China: Sacrificing Human Rights for the Greater Good?*, 11 TULSA J. COMP. & INT'L L. 321, 323 (2003) (acknowledging that Mao Zedong encouraged the working force to have multiple births); see also Xizhe Peng, *Population Policy Program in China: Challenge and Prospective*, 35 TEX. INT'L L.J. 51, 51 (2000) (recognizing that in 1949 China was following a policy that encouraged people to have many children).
 7. See Boland, *supra* note 5, at 1143 (revealing that between 1949 and the mid-1960s, the policy in China was one that promoted births); see Christie N. Love, *Not in Our Country? A Critique of the United States Welfare System Through the Lens of China's One-child Law*, 14 COLUM. J. GENDER & L. 142, 149–50 (2005) (illustrating that in 1949 multiple births were encouraged in China); see also Zhang, *supra* note 4, at 560–61 (assessing that between 1949 and the early 1970s, the policy in China was one that encouraged multiple births).
 8. See Cirando, *supra* note 4, at 636–37 (asserting that the rapid growth of the population did not lead to favorable results, therefore, the one-child policy was implemented); see also Jessica L. Singer, Note, *Intercountry Adoption Laws: How Can China's One-child Policy Coincide with the 1993 Hague Convention on Adoption*, 22 SUFFOLK TRANSNAT'L L. REV. 283, 290 (1998) (stating that Mao Zedong's policy that encouraged multiple births resulted in economic problems in China); see Skalla, *supra* note 2, at 333 (noting that because of China's large population, workers were faced with many problems).
 9. See Cirando, *supra* note 4, at 640 (indicating that a sharp increase in population had detrimental effects on the economy); see also Ellen Keng, Note, *Population Control Through the One-child Policy in China: Its Effects on Women*, 18 WOMEN'S RTS. L. REP. 205, 206 (1997) (describing the fact that China recognized that population growth resulted in economic hardships); see also Singer, *supra* note 8, at 289–90 (addressing China's overpopulation problems and the resulting economic hardships).
 10. See Xizhe, *supra* note 6, at 51 (referring to China's limits on family size to control the population); see Hannah A. Saona, Comment, *The Protection of Reproductive Rights Under International Law: The Bush Administration's Policy Shift and China's Family Planning Practices*, 13 PAC. RIM L. & POL'Y J. 229, 236 (2004) (describing the actions China took to replicate the problem of overpopulation). See generally Love, *supra* note 7, at 150 (demonstrating that China's view on birth control changed upon realizing that overpopulation had become a problem).
 11. See Margaret Y. K. Woo, *Biology and Equality: Challenge for Feminism in the Socialist and the Liberal State*, 42 EMORY L. J. 143, 166 (1993) (noting that in 1979 the one-child policy was implemented in China); see also Duda, *supra* note 4, at 416 (stating that the one-child policy was implemented in 1979); see Saona, *supra* note 10, at 236 (indicating that in 1979 China implemented the one-child policy).

of the National People's Congress on December 29, 2001.¹² It was subsequently signed by President Jiang Zeming and went into effect on September 1, 2002.¹³

B. Basic Elements of China's One-child Policy

The one-child policy¹⁴ prohibits ethnic Han Chinese couples living in urban places¹⁵ from having more than one child. "Fines, punishment and other pressures to abort a pregnancy, and even coercive sterilization and abortion, accompany the second or subsequent pregnancies."¹⁶ Although it was originally designated as a "temporary method to control population," the one-child policy continues to exist today.¹⁷

12. See Zhonghua Renmin Gongheguo Renkou yu Jihua Shengyu Fa ("The Law of the People's Republic of China on Population and Family Planning") (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2001, effective Sept. 11, 2002) (PRC), LAWINFOCHINA available at <<http://www.lawinfochina.com/law/display.asp?db=1&id=2209&keyword=>>> (last visited: August 9, 2007) (hereinafter China Planning) (stating that the one-child policy became a law in China in 2001); see also Raina Nortick, Note, *Singled Out: A Proposal to Extend Asylum to the Unmarried Partners of Chinese Nationals Fleeing the One-child Policy*, 75 FORDHAM L. REV. 2153, 2158 (2007) (showing that the one-child policy was codified in 2001); see also Eloisa A. Rivera, Comment, *Authorized Marriages Only? Refugee Relief Under Section 601(A) of the Illegal Immigration Reform and Immigration Responsibility Act of 1996*, 40 U.C. DAVIS L. REV. 229, 233 (2006) (indicating that in 2001 the one-child policy was codified in China).
13. See Christine A. Khalili-Borna, Note, *Technological Advancement and International Human Rights: Is Science Improving Human Life or Perpetuating Human Rights Violations?*, 29 MICH. J. INT'L L. 95, 118 (2007) (indicating that the one-child policy became law in 2002); see also Kyle R. Rabkin, Comment, *The Zero-Child Policy: How the Board of Immigration Appeals Discrimination Against Unmarried Asylum-Seekers Fleeing Coercive Family-Planning Measures*, 101 NW. U. L. REV. 965, 970 (2007) (showing that in 2002 the one-child policy was codified); see also Saona, *supra* note 10, at 239 (stating that in 2002 China codified the one-child policy).
14. See China's One-Child Policy, <http://www.overpopulation.com/faq/Population_Control/one_child.html> (last visited Feb. 4, 2007) (noting that since the introduction of the one-child policy in 1979, China's fertility rate saw a huge decrease between the 1970s and the 1980s, when live births fell from 34 per 1,000 persons to 21 per 1,000 persons).
15. See National Bureau of Statistics of China, 2005 Report on 1% of the National Population Sample Survey (March 16, 2006), available at <http://www.stats.gov.cn/tjgb/rkpcgb/qgrkpcgb/t20060316_4023_10923.htm> (indicating that ethnic Han Chinese had consisted of more than 95% of the national population when the People's Republic of China (PRC) was founded in 1949, but that the proportion decreased dramatically, especially after enforcement of the one-child policy on the ethnic Han Chinese. Based on the National Population Survey, in 2005, ethnic Han Chinese comprised only 90% of the national population, which is 5% less than in 1949, when the PRC was founded. The report shows that during the last five years, minority ethnic groups have made up 42% of the fertility rate, and that only 58% of the newborn children are ethnic Han Chinese).
16. See Hampton, *supra* note 6, at 331 (noting that the Chinese government has relied on several methods to enforce its population policies, including an incentive/disincentive system, compulsory abortion and sterilization, and eugenics programs); see also Zhang, *supra* note 4, at 563 (stating that there are numerous penalties for violating the one-child policy, such as fines, employment demotions, withholding social services and even forced abortions); see also Matt Rosenberg, *China's One Child Policy*, <<http://geography.about.com/od/populationgeography/a/onechild.htm>> (last visited Oct. 6, 2008) (stating that under China's one-child policy, fines, punishment, and other pressures—even coercive sterilization—are applied to abort pregnancies).
17. See Alexa Olesen, *China Sticking to One-child Policy*, WASHINGTON POST, Jan. 23, 2007, available at <<http://www.washingtonpost.com/wpdyn/content/article/2007/01/23/AR2007012300398.html>> (noting that although the one-child policy was implemented in 1970, dropping restrictions on childbearing now would risk a population surge); see also Jim Yardley, *China to Reconsider One-child Limit*, N.Y. TIMES, Mar. 11, 2008, available at <<http://www.nytimes.com/2008/02/29/world/asia/29china.html>> (stating that China's top population official, Zhang Weiqing, minister of the National Population and Family-Planning Commission, said the country's one-child-per-couple family-planning policy would not change for at least another decade); see also Rosenberg, *supra* note 16 (stating that China's one-child policy, although designated a "temporary measure," continues a quarter of a century after its establishment).

The family-planning policy is not a uniformly applicable rule.¹⁸ Citizens living in rural areas¹⁹ and 55 ethnic minorities are not subject to the policy.²⁰ The reasons why these two groups are excluded from the policy vary. With respect to rural people, the policy makers believed that it would be impossible to change the traditional belief throughout China that "the more children, the richer" with any immediacy.²¹ Also, as a result of the economic situation in rural areas and despite the efforts of the Chinese government, it is difficult for the government to guarantee that social welfare or social security is available for all rural people.²² To some extent, younger generations still play an important role in supporting the older generations, and the burden of supporting older generations may be more easily realized if more children share this responsibility.²³ As to the 55 ethnic minorities, the policies of the Chinese government provide racial minorities with certain privileges, including exemption from the one-child

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18. See Nili Luo & David M. Smolin, *Inter-Country Adoption and China: Emerging Questions and Developing Chinese Perspectives*, 35 CUMB. L. REV. 597, 600 (2005) (noting that the one-child policy in China applies primarily to the majority Han population rather than to ethnic minorities); see also Rosenberg, *supra* note 16 (stating that China's one-child policy is not an all-encompassing rule because it has always been restricted to ethnic Han Chinese living in urban areas). See generally Cara Anna, *China's One Child Policy to Make Exceptions: Parents Whose Only Child Was Killed in the Quake Could Have Another Child*, <<http://www.msnbc.msn.com/id/24829234/>> (last visited Oct. 6, 2008) (noting that China's one-child policy, launched to control China's exploding population, includes certain exceptions for ethnic groups that are not Han Chinese).
 19. See Teng Biao, *Who Is Fighting Against the Truth?*, <http://www.rfa.org/mandarin/zhuanlan/jiuzhoushujian/2005/09/12/teng_biao> (last visited Oct. 6, 2008) (stating that rural Chinese citizens, regardless of their ethnicity, can apply for permission to have a second child if their first child is a girl).
 20. See Xizhe, *supra* note 6, at 53 (noting that ethnic minorities in China are not subject to the one-child policy).
 21. See Penny Kane & Ching Y. Choi, *China's One Child Family Policy*, 319 BRIT. MED. J. 992, 992-94 (1999) available at <<http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=1116810>> (stating that because Chinese peasants with limited savings and without pensions needed children to support them in old age, it was far more difficult to convince them to adhere to the one-child policy); see also Hu Qifeng, *The One Child Policy Is Impossible to Be Abolished* (Jan. 24, 2007) available at <http://www.gmw.cn/01gmrb/2007-01/24/content_540453.htm> (stating that in China, a traditional belief exists throughout rural Chinese communities that "the more children, the richer"); see also <http://news.xinhuanet.com/english/2005-12/14/content_3918776.htm> (last visited Oct. 6, 2008) (noting that in Chinese society, more children means more choices, and that traditional Chinese values hold that a greater number of offspring brings greater happiness for a family).
 22. See Hu, *supra* note 21 (stating that in China, a traditional belief exists throughout rural Chinese communities that "the more children, the richer"); see also Kwong-Leung Tang, *Social Development in China: Progress and Problems*, 29 J. COMTEMP. ASIA (1999) available at <<http://www.questia.com/googleScholar.qst;jsessionid=Lp8FSL25Yktgh5VZnpWjtLvLbSb6ccyPbPGbrbPrjP7VGpmtmM1f524338412?docId=5002314219>> (stating that in China, social development is plagued by problems of inadequate social spending, inflation, growing disparity of income, poverty, and urban bias); see also *China Human Development Report*, CHINA DEVELOPMENT BRIEF (Jan. 9, 2006) available at <<http://www.chinadevelopmentbrief.com/node/393>> (noting the problem of China's increasingly overwhelmed government infrastructure because of development and overpopulation, which have left rural classes, mainly farmers, without welfare).
 23. See Ann Mjelde-Mossey, Iris Chi & Vivian W. Q. Lou, *Assessing Tradition in Chinese Elders Living in a Changing Social Environment Implications for Social Work Practice*, 11 J. HUM. BEHAV. IN THE SOC. ENV'T. 41 (2005), available at <<http://www.haworthpress.com/store/ArticleAbstract.asp?sid=GXJAGT9LRA619H4T28AEWALMS57E3CA4&ID=59816>> (last visited Oct. 6, 2008) (noting that in China, filial piety is customary, and the one-child policy runs counter to this steadfast belief); see also David E. Christensen, Note, *Breaking the Deadlock: Toward a Socialist-Confucianist Concept of Human Rights for China*, 13 MICH. J. INT'L L. 469, 502 (1992) (stating that in China, it is traditional for the individual to subordinate his or her own personal inclinations and feelings, and submit to the demands of filial piety, enhancing harmony and social welfare); see also Hampton, *supra* note 6, at 331 (noting that children serve the important functions of carrying on the family line and providing support for the older generation).

policy.²⁴ Ethnic minorities are allowed the privilege of adding more points to their grades when they take the college entrance exam, and the privilege of being guaranteed a certain percentage of minority representatives in the National People's Congress.²⁵ These privileges are based on the racial policy established by the Constitution of the People's Republic of China to achieve uniform prosperity among all the country's races.²⁶

The actual implementation of the one-child policy varies from region to region.²⁷ In most rural areas, if a couple's first child is female or disabled, the couple may be allowed to have

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24. See Arthur Rosett, *The Rights of Ethnic Minorities*, 66 NOTRE DAME L. REV. 1503, 1521–22 (1991) (noting that the Chinese government has been notably more lenient in the application of the one-child rule to minorities living in China); see also Gregory, *supra* note 3, at 45 n.2 (noting that the Chinese government admits that the one-child policy has not been uniformly applied to all sectors of Chinese society because couples in rural areas generally have had more than one child, and members of ethnic minority groups have not been expected to adhere to the policy); see also Kimberly Sicard, Note, *Section 601 of IIRIRA: A Long Road to a Resolution of United States Asylum Policy Regarding Coercive Methods of Population Control*, 14 GEO. IMMIGR. L.J. 927, 928–29 (2000) (noting that the Chinese government has long made exceptions to the one-child policy for ethnic minorities to allow these couples with one daughter to have a second child).
 25. See Barry Sautman, *Affirmative Action, Ethnic Minorities and China's Universities*, 7 PAC. RIM. L. & POL'Y J. 77, 82–84 (1998) (noting that ethnic minorities in China are afforded additional points on their college entrance exams by virtue of simply belonging to a minority); see also Bonnie Johnson & Nalini Chhetri, *Exclusionary Policies and Practices in Chinese Minority Education: The Case of Tibetan Education* (2002), <http://www.tc.columbia.edu/cicc/Archives/2.2/22johnson_chetri.pdf> (stating that the common practice in China is for minority students to receive “bonus points” when they take exams in Chinese); see also Margaret Maurer-Fazio, James W. Hughes & Zhang Dandan, *The Economic Status of China's Ethnic Minorities: Poverty, Inequality, Labor Market and Welfare Reform in China*, at 11 (2004) <<http://econrssh.anu.edu.au/pdf/china-abstract-pdf/maurer-fazio.pdf>> (stating that educational attainment among certain ethnic minorities in China includes preferential admissions policies of awarding bonus points or requiring lower scores for national entrance exams to tertiary education).
 26. See Xian Fa [Constitution] pmbl. (PRC) (1982), stating,

The People's Republic of China is a unitary multi-national state built up jointly by the people of all its nationalities. Socialist relations of equality, unity and mutual assistance have been established among them and will continue to be strengthened. In the struggle to safeguard the unity of the nationalities, it is necessary to combat big-nation chauvinism, mainly Han chauvinism, and also necessary to combat local-national chauvinism. The state does its utmost to promote the common prosperity of all nationalities in the country.
 27. See Zhang, *supra* note 4, at 563–64 (noting that in China the implementation of the family-planning policy varies widely from region to region and from year to year); see Nicholas D. Kristof, *More in China Willingly Rear Just One Child*, N.Y. TIMES, May 9, 1990 available at <<http://query.nytimes.com/gst/fullpage.html?sec=health&res=9C0CE3DC1E39F93AA35756C0A966958260>> (stating that the incentives of the one-child policy vary by region, but often a couple with only one child will get more land, a better house, a reduction in grain tax, and a subsidy amounting to the equivalent of U.S. \$15 a year, which is more than a month's income for many poor peasants); see also Economic and Social Commission for Asia and the Pacific, *Population and Family-Planning Programme in China by Province*, <<http://www.unescap.org/esid/psis/population/database/chinadata/intro.htm>> (last visited Oct. 6, 2008) (noting that the actual implementation of the one-child policy varies from region to region).

another child upon application and approval by the relevant family-planning departments.²⁸ The second child is subject to a birth-spacing requirement, which is usually three or four years.²⁹

Furthermore, for couples who can afford to give birth to their children somewhere other than mainland China, whether in other countries or in the territories of Hong Kong, Macao, or Taiwan, such children will not count toward the couple's total under the family-planning policy, even if that child is "technically a natural born Chinese citizen through parentage."³⁰ Some parents who can afford to give birth to their children off the mainland are able to circumvent this law and have more than one child.³¹

C. The Number of Chinese Women Who Accepted Sterilization and Other Birth Control Measures

Table 1 illustrates different methods of birth control and the number of males and females of reproductive age who used various birth control measures in 2002.

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28. See Therese Hesketh, Li Lu & Zhu Wei Xing, *The Effect of China's One-child Policy After 25 Years*, 353 NEW ENG. J. MED. 1171–76 (2005) (providing that in rural China, where approximately 70% of the people live, a second child is generally allowed after five years, but only if the first child is a girl); see also Skalla, *supra* note 2, at 335 (stating that in rural China, the one-child policy is often thought of as the one-son-or-two-child plan if the first child is a girl, because of the needs of an agriculturally based society where sons are critical to the continued livelihood of the family); see also Yardley, *supra* note 17 (stating that although most urban couples are limited to a single child unless they pay hefty fines, farmers generally are permitted to have a second child if their first child is a girl).
 29. See Xizhe, *supra* note 6, at 53 (noting that under the one-child policy, should a couple have been approved to have another child, they must space that birth several years after the first one); see also Hu Huiting, *Family-Planning Law and China's Birth Control Situation*, CHINA DAILY REP., Oct. 18, 2002, available at <<http://www.china.org.cn/english/2002/Oct/46138.htm>> (noting that under China's one-child policy, a Chinese couple's second child is subject to a birth-spacing requirement); see also Katie Johnson, *China's One-Child Policy*, <<http://www.helium.com/items/1183571-china-one-child-policy>> (last visited Oct. 6, 2008) (stating that second children in China are subject to birth spacing of usually three or four years).
 30. See Geoffrey A. Fowler and Juying Qin, *Hong Kong's Baby Boom (Expectant Chinese Travel to Dodge One-child Policy)*, WALL ST. J., Feb. 5, 2007, available at <<http://www.freerepublic.com/focus/f-news/1779299/posts>> (noting that Hong Kong maintains government records that are separate from those of the rest of China, so a newborn in Hong Kong will not count toward a Chinese family's quota); see also Vaudine England, *Pregnant Chinese Face Hong Kong Limits*, <<http://news.bbc.co.uk/2/hi/asia-pacific/6269655.stm>> (last visited Oct. 6, 2008) (providing that Chinese people born in Hong Kong automatically gain local residency rights, and mainland mothers giving birth in the territory also avoid the restrictions of China's one-child policy); see also The Immigration and Refugee Board of Canada, <<http://www.cisr-irb.gc.ca/en/research/rir/?action=record.viewrec&gotorec=449481>> (last visited Oct. 6, 2008) (stating that according to article 11 of the 2002 Fujian Family-Planning regulations, Chinese citizens returning from overseas, including couples where one spouse is a resident of Fujian and the other is a resident of Hong Kong or Macao, may have a second child under certain circumstances).
 31. See Keith Bradsher, *Hong Kong Tries to Stop Mainlander Baby Boom*, N.Y. TIMES, Jan. 21, 2007, at 1.3 (reporting that despite the recent loosening of the one-child policy, having a child in Hong Kong is still seen as a way to evade the policy); see also Fowler & Juying, *supra* note 30, at A8 (noting that Hong Kong's maintenance of separate government records allows newborn children to not count toward a family's one-child quota); see also Sylvia Hui, *Mainland Moms Desire Hong Kong Deliveries*, L.A. TIMES, Mar. 11, 2007, at A12 (observing the difficulty for the Chinese authorities in tracking second children born in Hong Kong, and how many well-off Chinese women travel there to exploit that).

Table 1. The Number of Males and Females of Reproductive Age Who Accepted Sterilization and Other Birth Control Measures During 2002³²

Regions	Total Number	Sterilization as Birth Control Method		Contraceptives as Birth Control Method					
		Female Sterilization Operation ^a	Male Sterilization Operation	Intrauterine Device (IUD) ^b	Hypodermic Embolism ^c	Birth Control Pills ^d	Condom ^e	Contraceptive Drugs for External Use ^f	Others ^g
Number	229,317,867	82,531,728	18,696,905	110,379,070	829,781	4,621,253	11,203,963	699,554	355,613
Beijing	2,182,645	138,702	5,262	1,257,859	7,325	128,481	631,434	6,153	7,429
Tianjin	1,753,475	223,637	4,725	1,002,740	3,928	63,733	448,200	5,239	1,273
Hebei	12,183,716	5,765,573	830,281	4,660,372	11,595	226,007	655,224	20,977	13,687
Shanxi	5,724,834	3,092,739	58,353	2,374,961	16,250	90,947	69,263	10,967	11,354
Liaoning	7,993,665	1,184,865	5,076	5,999,785	36,192	136,545	610,241	17,278	3,683
Jilin	5,378,333	1,300,590	493	3,587,913	54,900	120,999	306,356	5,101	1,981
Heilongjiang	7,509,068	1,934,394	4,730	5,053,646	30,003	104,152	360,720	13,454	7,969
Shanghai	2,660,037	79,631	12,429	1,974,912	4,235	157,133	322,634	44,249	64,814
Jiangsu	14,142,586	3,096,550	503,745	9,651,809	26,377	400,111	417,680	41,925	4,389
Zhejiang	9,148,132	3,413,848	74,996	4,713,419	16,059	237,306	655,789	25,579	11,136
Anhui	6,313,848	5,639,288	603,295	4,628,976	32,190	235,489	180,479	8,251	30,753
Fujian	7,978,570	3,307,532	499,477	2,016,642	17,703	138,630	297,578	21,730	14,556
Jiangxi	7,978,570	4,654,704	42,532	2,810,395	14,883	147,472	276,518	21,239	10,827
Shandong	16,892,930	4,609,416	2,560,592	8,381,521	71,921	76,130	1,151,844	24,151	17,355
Henan	17,303,270	7,688,446	2,379,672	6,324,244	28,859	155,680	681,582	32,482	12,305
Hubei	9,953,818	4,464,973	570,021	4,297,866	28,276	262,807	303,189	26,686	0
Hunan	12,244,575	5,663,646	879,442	4,734,121	40,214	92,784	783,982	44,818	5,568
Guangdong	13,563,067	6,892,551	1,784,172	4,189,382	3,391	116,986	504,180	34,239	38,166
Guangxi	7,710,007	3,077,077	1,100,168	2,923,153	13,927	222,687	293,248	71,247	8,500
Hainan	1,225,004	709,295	25,835	331,728	2,169	65,628	73,969	12,249	4,131
Chongqing	5,711,812	319,167	1,269,682	3,802,661	24,622	84,254	197,415	12,875	136
Sichuan	16,481,006	881,381	3,643,916	10,789,926	140,877	269,485	677,393	43,070	34,954
Guizhou	64,383,309	2,915,001	1,186,629	1,828,123	37,773	197,374	235,999	32,159	5,251
Yunnan	6,861,464	1,997,851	391,382	4,042,340	16,437	236,316	131,118	24,619	21,401
Xizhang	368,218	67,711	102	96,725	34,576	151,987	9,781	2,923	4,413
Shanxi	6,126,081	3,329,409	216,266	2,071,462	27,399	160,056	278,767	40,769	1,953
Gansu	4,649,493	3,144,596	7,829	1,343,415	27,393	42,602	68,889	13,693	1,076
Qinghai	886,895	411,668	1,366	373,401	3,677	59,757	31,741	4,233	1,052
Ningxia	1,022,832	399,901	289	470,940	13,015	63,672	69,791	3,783	1,441
Xinjiang	2,800,945	332,839	20,919	2,005,024	18,686	102,728	277,042	30,738	12,969

* Total number of Chinese citizens: 1.30628 billion³³

† Female population in China: 0.63012 billion³⁴

‡ Percentage of female citizens: 48.5%³⁵

Percentage of females of reproductive age in the total population:³⁶ 26%³⁷

32. From Statistics of the National Family-Planning Committee: 2002 National Family-Planning Compilation; see Statistics: The Number of Women Accepting Sterilizations (Aug. 14, 2003), <http://www.popinfo.gov.cn/popinfo/pop_docrxx.nsf/v_tjzl/6C6155F07ADAA20648256BE3000EF12C> (listing the number of Chinese women accepting sterilization in 2002).

- a. See *Sterilization for Women*, Planned Parenthood, <<http://www.plannedparenthood.org/health-topics/birth-control/sterilization-women-4248.htm>> (last visited Oct. 6, 2008) (detailing a broad overview of the process of female sterilization).
 - b. See Feminist Women's Health Center, *Intrauterine Device* (June 2, 2007), at <<http://fwhc.org/birth-control/iudinfo.htm>> (explaining that an intrauterine device (IUD) is a small object that is inserted through the cervix and placed in the uterus to prevent pregnancy).
 - c. See Fan Hu, *Worldwide Spread of Embolism to Control Fertility* (Feb. 12, 2003), <<http://health.enorth.com.cn/system/2003/02/12/000506345.shtml>> (explaining new subcutaneous contraceptive implants that are inserted under the skin and release hormones that inhibit pregnancy).
 - d. See *Birth Control: Birth Control Pills*, TEENS' HEALTH (Feb. 7, 2007), <http://www.kidshealth.org/teen/sexual_health/contraception/contraception_birth.html> (explaining the birth control pill as a daily pill that contains hormones to prevent pregnancy).
 - e. See Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363, 370 (1998) (noting that barrier methods like condoms for males and females are the third-most-popular contraceptives in the United States). The condom for males "is a sheath made of latex, polyurethane, or animal skin that can cover the penis before intercourse to keep sperm from joining an egg." *Id.* The condom for females "is a latex pouch inserted into a woman's vagina before vaginal intercourse that prevents sperm from joining an egg." *Id.* The condom for men generally is used more. See also Donald McNeil Jr., *Condoms for Women Gain Approval Among Africans*, N.Y. TIMES, Jul. 24, 1999, at A1 (noting that although the condom for females is used seldom in the West, it is gaining popularity in the developing world). It is an effective way of contraception that requires no medical supervision.
 - f. HealthSquare, *Silvadene Cream*, <<http://www.healthsquare.com/newrx/sil1404.htm>> (last visited Oct. 6, 2008) (describing Silvadene Cream as a topical cream used to prevent wound infections in burn patients and for treating yeast infections).
 - g. See Cheryl Clark, *Preventative Measures: With More Birth Control Options Than Ever, Some Women Shun Usage*, SAN DIEGO UNION TRIB., Mar. 8, 2005, at E1 (noting that currently there are several FDA-approved spermicides such as foams, gels, and sponges); see also Robert Cooke, *The Crisis in Birth Control*, S.F. CHRON., Sept. 25, 1987, at B4 (defining spermicides as foams, jellies, creams, and sponges); see also Ellen Mazo, *Gauging the Effectiveness of Spermicides*, PITT. POST GAZETTE, Aug. 18, 1998, at G1 (listing the five usual forms of spermicides: foam, jelly, cream, foil, and sponge); see also Planned Parenthood, *Spermicide* (2008), <<http://www.plannedparenthood.org/health-topics/birth-control/spermicide-4225.htm>> (explaining the use of spermicides to kill sperm and listing their various forms: cream, jelly, film, foam, gel, or suppository). "Spermicide contains medications that immobilize and kill sperm, preventing them from joining an egg." *Id.* Another method is the "NUVA ring," which "is a small, flexible ring that is inserted into a woman's vagina. The ring is kept in place for three weeks. No ring is worn during the fourth week." See also Planned Parenthood, *Birth Control Vaginal Ring* (2008), <<http://www.plannedparenthood.org/health-topics/birth-control/birth-control-vaginal-ring-nuvaring-4241.htm>> (detailing the option of inserting a birth control vaginal ring, "Nuva Ring," in the vagina once a month for three weeks as a contraceptive option).
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33. See Srinii Sitaraman, *Regulating the Belching Dragon: Rule of Law, Politics of Enforcement, and Pollution Prevention in Post-Mao Industrial China*, 18 COLO. J. INT'L ENVTL. L. & POL'Y 267, 279 (2007) (noting that despite a slower rate of growth since 1980, the population of China still grew to 1.3 billion); see also Julie A. Lemmer, Note, *Cleaning Up Development: EIA in Two of the World's Largest and Most Rapidly Developing Countries*, 19 GEO. INT'L ENVTL. L. REV. 275, 287 (2007) (stating that although China has a population of over 1.3 billion, its population growth rate was a mere 0.59% in 2006); see also *China's Population*, EAST ASIA ECONOMIC REVIEW (Mar. 16, 2006), <<http://www.e-economic.com/info/6029-1.htm>> (stating the population of China to be 1.30628 billion as of November 2005).
 34. See Jie Shen & Xin Geng, *Gender Wage Inequality in the Transitional Chinese Economy: A Critical Review of Post-Reform Research*, 5 J. ORGANIZATIONAL TRANSFORMATION & SOC. CHANGE 109, 111 (2008) (reporting that China's 630 million women accounted for nearly 45% of total employment in 2004); see also Hannah Beech, *China's Women Spark a Gold Rush*, TIME, Aug. 19, 2008, at World Section (noting China's deep pool of 630 million women in reporting on their female Olympic success); see also *China's Contemporary Population Situation* (July 26, 2005), <http://www.gov.cn/test/2005-07/26/content_17363.htm> (stating the population of females in China to be 630,120,000 at the end of 2004).
 35. See *China's Contemporary Population Situation*, *supra* note 34 (noting that the female population of China is 48.5% of the total population); see also Mikel Flamm & Windy Xie, *The Strength of Rural Women in China*, UN CHRON. ONLINE ED. (2006), <<http://www.un.org/pubs/chronicle/2006/issue/2/0206P21.htm>> (stating that the female population is 48.5% of 1.3 billion); see also Sustainable Development Department, Food and Agriculture Organization of the United Nations, China, <<http://www.fao.org/ds/WPdirect/WPre0107.htm>> (last visited Oct. 6, 2008), noting in its key facts that China's population is 48.5% female and 51.5% male).
 36. See R. Alta Charo, *Protecting Us to Death: Women, Pregnancy, and Clinical Research Trials*, 38 ST. LOUIS U. L. J. 135, 180 (1993) (categorizing women of reproductive age to be generally between ages 15 to 49); see also Xihe, *supra* note 6, at 57 (noting how the women born prior to the one-child policy are now reaching their peak reproductive ages, which leads to the current generation of childbearing women being larger than the previous one); see also The Number and Age Framework of Women at Reproductive Age, <<http://202.110.193.6/shizhi.nsf/b78b3a7d4a114005482566c7002e1cea/066e21579385b397482571d2002f2a4e?OpenDocument>> (last visited Oct. 6, 2008) (listing the number of women at reproductive age).
 37. See The National Family-Planning Program of China 1995–2000, ¶ 19 (2000), <http://www.unescap.org/esid/psis/population/database/poplaws/aw_china/ch_record015.htm#VI%20Develop%20Science%20and%20Technology> (showing a commitment on the part of China to its reproductive-age population).

D. Women's Rights Infringed on by the One-child Policy

As demonstrated by table 1, the methods used to control fertility vary. The Chinese government puts the burden of birth control on both females and males, although the statistics show that females shoulder more of the burden than males.³⁸ This may result from the Chinese government's belief that women should take more responsibility in population control, although this situation has changed to some extent in recent years.³⁹

The belief that women should bear more of the burden of birth control arose from Chinese tradition and the history of gender discrimination.⁴⁰ In ancient China, men were the ultimate authority in their families and were allowed to have multiple wives.⁴¹ Meanwhile, the status of a woman in the family depended on her reproductive ability.⁴² If she gave birth to a

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38. See Patrick T.C. Hui, *Birth Control in China: Cultural, Gender, Socio-Economic and Legislative Perspectives in Light of CEDAW Standards*, 32 H.K. L.J. 187, 190 (2002) (illustrating discriminatory nature of the one-child policy by listing the fact that the majority of sterilizations are performed on women.); see also Tara A. Gellman, Comment, *The Blurred Line Between Aiding Progress and Sanctioning Abuse: United States Appropriations, The UNFPA and Family Planning in the PRC*, 17 N.Y.L. SCH. J. HUM. RTS. 1063, 1065–66 (2001) (noting that one of the main elements of the one-child policy is the involuntary sterilization and birth control of women and couples.); see also Hampton, *supra* note 6, at 337 (reporting that women make up a larger portion of past sterilization statistics and are five times more likely to be sterilized than are men).
 39. See Rachael Savanyu, *The Public Womb: Women Under China's One-child Policy*, 9 BUFF WOMEN'S L.J. 17, 18 (2000) (acknowledging the biased effect of Chinese population policy on the lives of women); see also *Caught Between Tradition and the State: Violations of the Human Rights of Chinese Women*, 17 WOMEN'S RTS. L. REP. 285, 294 (1996) (hereinafter *Tradition and State*) (arguing that the Chinese government's population control policies have had far-reaching and "harsh" effects on the lives of Chinese women); see also The Population and Family-Planning Commission of Xinjiang Uygur Autonomous Region, *Marxism Population Theory, Mao Zedong, Deng Xiaoping and Jiang Zeming Population Principles* (Nov. 4, 2003), <<http://www.xjpop.gov.cn/shownews.asp?ID=193>> (asserting that in present-day China, women have received greater equality in marriage).
 40. See Anna M. Han, *Holding Up More Than Half the Sky: Marketization and the Status of Women in China*, 11 J. CONTEMP. LEGAL ISSUES 791, 793–94 (2001) (arguing that, with the intent of keeping wealth within the family, the Chinese family unit has been patriarchal and serves to continue a tradition of gender discrimination); see also Shirley C. Wang, *The Maturation of Gender Equality into Customary International Law*, 27 N.Y.U. J. INT'L L. & POL. 899, 925–26 (1995) (analyzing Chinese culture as one founded on strict gender roles that confine women's contribution to society as being confined to the home); see also Hansel, *supra* note 2, at 377–78 (establishing that Confucianism within Chinese culture is the bedrock of a culture that places a great emphasis on "malehood").
 41. See Wendy N. Duong, *Gender Equality and Women's Issues in Vietnam: The Vietnamese Woman—Warrior and Poet*, 10 PAC. RIM L. & POL'Y J. 191, 324 n. 324 (2001) (suggesting that the binding of women's feet in ancient China was an act of male domination); see also Bill Ong Hing, *Coolies, James Yen, and Rebellious Advocacy*, 14 ASIAN AM. L.J. 1, 1 (2007) (stating that women's role in ancient China was parallel to that of men's chattel, and this was evidenced by the binding of their feet); see also Keith Sealing, *Polygamists out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy Are Unconstitutional Under the Free Exercise Clause*, 17 GA. ST. U. L. REV. 691, 707 (2001) (explaining that ancient Chinese men engaged in a widespread practice of keeping concubines, a practice that was parallel to marrying multiple wives).
 42. See Cirando, *supra* note 4, at 661 n.116 (reporting that the present-day Chinese government contrasts contemporary Chinese women's control over the reproductive rights with the historically oppressive burden of them being required to reproduce large numbers of offspring); see also Skalla, *supra* note 2, at 343 (discussing how the role of women in traditional Chinese culture was to be bought and sold as commodities for reproductive labor); see also Wang Bing, *Analysis of Women's Social Status in Ancient China*, (Aug. 20, 2006), <<http://www.66wen.com/03fx/shehuixue/shehuixue/20060820/33969.html>> (arguing that Chinese society is "blood based," and women play a crucial role in that process of generational formation).

boy, her status would be high; if she were infertile or did not give birth to a boy, her status would be lower.⁴³ After the founding of the People's Republic of China, polygamy was prohibited, but emphasis on women's reproductive function, as in historical times, continued.⁴⁴ Similarly, when the government rolled out the reproduction-related one-child policy, women were inevitably expected to take more responsibility.⁴⁵ This situation is not limited to China.⁴⁶ Worldwide, sterilization of females is three times more prevalent than sterilization of males, even though male contraceptive methods are much simpler, cheaper, and safer than female sterilization or abortion.⁴⁷

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43. See Lesley Wexler, *Allowing Girls to Hold up Half the Sky: Combining Norm Promotion and Economic Incentives to Combat Daughter Discrimination in China*, 7 CHI. J. INT'L L. 79, 88 (2006) (stating that male children born to Chinese women increases the mother's social status); see also Skalla, *supra* note 2, at 329 (critiquing traditional Chinese culture's devaluation of a woman upon giving birth to a baby girl); see also Wang, *supra* note 42 (stating that the agrarian nature of Chinese society contributed to the importance of male children).
 44. See Stacey H. Leong, *Perspective, Women in China: Free Market Reforms Decrease Gender Equality*, 2 U.C. DAVIS J. INT'L L. & POL'Y 137, 138 (1996) (stating that China's communist government banned polygamy upon coming to power); see also Vivien Ng, *Sexuality, Gender and Social Scripting in Japan and China*, YALE J.L. & FEMINISM 65, 69 (1991) (asserting that equality for women in China is a "myth"); see also Lesley J. Wiseman, *A Place for "Maternity" in the Global Workplace: International Case Studies and Recommendations for International Labor Policy*, OHIO N.U. L. REV. 195, 197 (2001) (arguing that despite communist China's policies prohibiting gender discrimination, employment practices continue to evidence widespread sexist hiring and firing patterns).
 45. See Woo, *supra* note 11, at 168 (explaining that women in China are forced to abandon their personal female identity when a crisis such as overpopulation is affecting their nation); see Jill M. Bracken, Comment, *Respecting Human Rights in Population Policies: An International Customary Right to Reproductive Choice*, 6 IND. INT'L & COMP. L. REV. 197, 233-34 (1995) (revealing that should a Chinese woman who has given birth already become pregnant a second time, she must undergo insertion of an IUD, forced sterilization, or a forced abortion); see also Graciela Gomez, Comment, *China's Eugenics Law as Grounds for Granting Asylum*, 5 PAC. RIM L. & POL'Y J. 563, 597 n.4 (1996) (critiquing China's one-child policy as forcing women to undergo abortions, sterilizations, and other methods intended to overcome her consent when a second pregnancy occurs).
 46. See Rebecca O. Bresnick, *Reproductive Ability as a Sixth Ground of Persecution Under the Domestic and International Definitions of Refugee*, 21 SYRACUSE J. INT'L L. & COM. 121, 153 n.10 (1995) (claiming that Vietnam has a history of telling women they were being given birth control devices when they were in fact being sterilized); see Shelia C. Cummings, *Foreword: Is Crack the Cure?*, 5 J.L. SOC'Y 1, 1 (2003) (positing that the government of Slovakia continues the practice of forced sterilization of women by performing the procedure without the women's full and informed consent); see also Judith A.M. Scully, *Maternal Mortality, Population Control, and the War in the Women's Wombs: A Bioethical Analysis of Quinacrine Sterilizations*, 19 WIS. INT'L L.J. 103, 103 (2001) (asserting that in the last three decades, over 100,000 women have been forcibly sterilized in 19 different developing nations).
 47. See Meredith Marshall, *Recent Development, United Nations Conference on Population and Development: The Road to a New Reality for Reproductive Health*, 10 EMORY INT'L L. REV. 441, 454 (1996) (arguing that developing nations devalue women's health concerns and value only their childbearing capacity); see also Jeanne L. Vance, Note, *Womb for Rent: Norplant and the Undoing of Poor Women*, 21 HASTINGS CONST. L.Q. 827, 852 (1994) (critiquing the societal bias that contraception is primarily a female's responsibility); see also Jennifer N. White, Note, *The Contraception Misconception: Why Prescription Contraceptives Should Be Covered by Employer Insurance Plans*, 31 HOFSTRA L. REV. 271, 286 (2002) (proclaiming that women bear the burden of primary responsibility for reversible birth control because of the lack of an existing FDA-approved oral contraceptive).

Some female contraceptive methods like using condoms or taking contraceptive pills are voluntary;⁴⁸ however, other birth control methods like female sterilization and the implanting of IUDs are not always voluntary, and sometimes they are carried out through the use of force and may go against a couple's will.⁴⁹ A majority of women are required to use IUDs.⁵⁰ Sterilization is less commonly accepted in China.⁵¹ If a couple has no intention of having a child, they will use other preventative measures like condoms or contraceptive pills to avoid pregnancy.⁵² Admittedly, some couples choose to undergo either male or female sterilization, but they are in

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48. See Xizhe, *supra* note 6, at 62 (referring to a few attempts of the Chinese government to introduce voluntary contraception methods to rural areas of the country); see also Hampton, *supra* note 6, at 355 (recognizing that the Chinese government has been installing condom machines and implementing educational reforms in order to increase the use of alternative methods of birth control); see also Elizabeth Rohrbaugh, Comment, *On Our Way to Ten Billion Human Beings: A Comment on Sustainability and Population*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 235, 245-46 (1994) (claiming that most Chinese women do not choose to use birth control until after their first pregnancy).
 49. See Sharon K. Hom, *Female Infanticide in China: The Human Rights Specter and Thoughts Toward (an) Other Vision*, 23 COLUM. HUM. RTS. L. REV. 249, 302 (1992) (reporting the Chinese government forcibly implants IUDs in the female population without their knowledge or consent); see also Stanford M. Lin, *China's One-Couple, One-child Family-Planning Policy as Grounds for Granting Asylum—Xin-Chang Zhang v. Slattery*, No. 94 Civ. 2119 (S.D.N.Y. Aug. 5, 1994), 36 HARV. INT'L L.J. 231, 235 (1995) (maintaining that the Chinese government forces women to undergo not only abortions as a result of its national one-child policy but also mandatory sterilization and forced implantation of IUDs); see also April Adell, Note, *Fear of Persecution for Opposition to Violations of the International Human Right to Found a Family as a Legal Entitlement to Asylum for Chinese Refugees*, 24 HOFSTRA L. REV. 789, 792 (1996) (finding that the Chinese government, in carrying out its one-couple, one-child policy, has forced women to use IUDs to prevent further pregnancies).
 50. Harry Wu, *Condemn China for Its One Child Policy*, LAOGAI RESEARCH FOUNDATION (Mar. 1, 2005), <<http://www.laogai.org/news/newsdetail.php?id=2460>> (noting that violators of this policy are forced to undergo an abortion and are sterilized).
 51. See Christine M. Bulger, *Fighting Gender Discrimination in the Chinese Workplace*, 20 B.C. THIRD WORLD L.J. 345, 383 (2000) (suggesting there is intense aversion in Chinese culture to sterilization by detailing the financial and physical methods of coercion the government uses to implement the practice); see also Matthew D. Martin III, *The Dysfunctional Progeny of Eugenics: Autonomy Gone AWOL*, 15 CARDOZO J. INT'L & COMP. L. 371, 411 (2007) (alleging that China's "voluntary compliance" with sterilization is in fact carried out using fines, brainwashing, and threats of imprisonment); see *Tradition and State*, *supra* note 39, at 286 (reporting that physical, economic, and psychological forms of coercion must be used by the Chinese government to compel compliance with forced sterilization).
 52. See Xizhe, *supra* note 6, at 56 (suggesting Chinese couples use birth control methods other than the popular sterilization and IUD); see also Hampton, *supra* note 6, at 355 (reporting that the Chinese government has expanded the availability of condom machines as well as information about different birth control methods); see also Keng, *supra* note 9, at 209 (noting that the Chinese government has provided birth control pills to its citizens in order to curb population growth).

the minority.⁵³ Instead, most couples accepting sterilization do so⁵⁴ under the pressure of the “obligations”⁵⁵ promulgated by the local administrative regulations. Poor couples, who have little or no access to less-intrusive measures to prevent pregnancies (and therefore are more susceptible to unexpected pregnancies), are more frequently adversely affected by these “obligations.”⁵⁶ To avoid these unexpected pregnancies, local governments, under the pressure of family-planning quotas set by the higher authorities, will force couples to accept sterilization after the birth of a first child or undergo abortions to terminate any subsequent pregnancies.⁵⁷ The Linyi family-planning incident illustrates this point.⁵⁸ The Linyi government forced some of its villagers to undergo sterilizations and abortions by cruel and inhumane means.⁵⁹

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53. See Wesley L. Hsu, *The Tragedy of the Golden Venture: Politics Trump the Administrative Procedures Act and the Rule of Law*, 10 GEO. IMMIGR. L.J. 317, 322 (1996) (explaining that although some Chinese women may not want to be sterilized, they submit out of fear of local powers); see also Nortick, *supra* note 12, at 2161 (arguing that the Chinese government's categorization of “voluntary” sterilizations may result from coercion); China Information Center, Observe China, Notice of Forced Sterilization, <<http://observechina.net/info/artshow.asp?ID=3540>> (last visited Oct. 6, 2008) (providing a notice from the local government that forces couples to accept sterilization).
 54. See Jason D. Lazarus, Note, *XinChang Zhang v. Slattery: An Illustration of the Need for a Change in the United States' Immigration Laws to Provide Appropriate Consideration of Asylum Claims by Chinese Nationals Fleeing China's Coercive Population Control*, 5 J. TRANSNAT'L L. & POL'Y 65, 69–70 (detailing how many women are sterilized without their knowledge through insertion of IUDs after giving birth in a hospital); see also Alexa Olsen, *China Bans Crude “One-child” Slogans*, ST. LOUIS POST-DISPATCH, August 6, 2007, at A9 (noting that most sterilizations are forced, not voluntary); see also Wu, *supra* note 50 (arguing that coercive tactics, though denied by the government, are still used).
 55. See XinJiang Family-Planning Commission, Birth Control Norms on Fertility Management of the Contract, art. 2(2) (Jan. 16, 2003), available at <<http://www.xjpop.gov.cn/yzfw/jg2.htm>> (recognizing a citizen's duty to fulfill his or her obligation to practice birth control); see also ShanXi Renkou Yu Jihua Shengyu Tiaoli (“ShanXi Family-Planning Regulation”), art. 13 (March 3, 1991), available at <<http://sxhall.gov.cn/bszn/fl/fl09.htm>> (declaring that couples who are able to give birth to more children should accept sterilization).
 56. See Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issues*, 13 BUFF. HUM. RTS. L. REV. 151, 187 (2007) (outlining that no access to contraception is typical in poor communities).
 57. See Deans, *supra* note 3, at 353 (enumerating how government officials raid the homes of couples who violate the one-child policy and take either the mother or father to be forcibly sterilized); see also Lazarus, *supra* note 54, at 69–70 (alleging that couples who have two or more children are targeted for sterilization, and that at least one parent is required to undergo sterilization); see also *The Chinese Government Confessed the Implementation of Forced Sterilization and Abortion*, ASIA NEWS, Sept. 20, 2005, available at <<http://www.asianews.it/index.php?l=zh&art=4149&size=>>> (citing the government's admission of the use of coercion to force sterilizations and abortions).
 58. See Infanticide, Forced Abortions and Sterilizations in China's Linyi Province, available at <<http://www.lifesite-news.com/ldn/2005/sep/05091605.html>> (discussing the Linyi family-planning events).
 59. See Josephine Ma, *Judgment Day for Activist Who Fought Birth Control Brutality*, S. CHINA MORNING POST, Aug. 18, 2006, at 7 (referring to activist who exposed the violent tactics of Linyi city birth control officers); see also Philip P. Pan, *Activist Challenges Abuse of Population Policies—Self-taught Advocate Plans Class-Action Lawsuit Against Officials*, CHARLOTTE OBSERVER, Aug. 28, 2005, at 14A (examining the Linyi government's practice of ordering a couple to be sterilized even if they had been given permission to have a second child); see also *The Chinese Government Confessed the Implementation of Forced Sterilization and Abortion*, ASIA NEWS, Sept. 20, 2005, available at <<http://www.asianews.it/index.php?l=zh&art=4149&size=>>> (alleging an incident of forced abortion at the hands of the government).

Given such accounts, it is safe to assume that a number of the sterilizations listed in table 1 were involuntary and against the will of the pregnant couples.⁶⁰ As table 1 demonstrates, China has 352,695,600 females of reproductive age.⁶¹ Of these, 82,531,728 were sterilized, which is a substantial portion (23.4%) of the total number of females of reproductive age.⁶² The number of male sterilizations, 18,696,905,⁶³ is also large. Because of the enforcement of the one-child policy through either forcible or voluntary methods, the reproduction rate decreased from 5.8 children per couple in the 1970s to 1.8 children per couple today.⁶⁴

Recently, the Chinese government has been condemned for glaring human rights abuses resulting from its coercive birth control methods and failure to prosecute and punish the local officials who violate individuals' human rights while enforcing the one-child policy.⁶⁵ The Chinese government does not explicitly condone such violations of women's reproductive rights and other accompanying women's rights, such as, for example, her children's rights; these rights are abused by some levels of the Chinese government.⁶⁶

E. Comparison of Birth Control Methods in China with Those in Other Countries

Contraceptive methods, particularly sterilization, are commonly and voluntarily used in Canada and the United States to prevent unwanted pregnancies.⁶⁷ In Canada, the total use of

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60. *Annotated Legal Bibliography on Gender*, 13 CARDOZO J.L. & GENDER 467, 493 (2007) (hereinafter *Ann. L. Bio. on Gender*) (noting that the one-child policy has spawned a wave of mandatory sterilizations).
 61. See *China's Population*, EAST ASIA ECONOMIC REVIEW, (Mar. 16, 2006), <<http://www.e-economic.com/info/6029-1.htm>>; see also *The Percentage of Women of Reproductive Age in All the Chinese Population: The Ninth Five-Year Plan Period* (Mar. 31, 2004), <http://www.cdjsw.gov.cn/Article_Show.asp?ArticleID=461>.
 62. See Janet Larsen, *October 15, 2002: Sterilization Is World's Most Popular Contraceptive Method*, EARTH POL'Y INST., May 14, 2008, at 1 (noting that a third or more of all married women in China are sterilized).
 63. See Keng, *supra* note 9, at 209 (setting the male sterilization rate at 21.1%).
 64. See Yong Cai, *An Assessment of China's Fertility Level Using the Variable-r Method*, POPULATION ASS'N OF AM., May 1, 2008, at 271 (citing total fertility rate of 1.5 children per couple); see also *Science File in Brief*, L.A. TIMES, Aug. 19, 2006, at 10 (reporting birth rate drops in response to one-child policy); see also Zhu Ling, *The Earth: China's Population out of a Secret* (Feb. 25, 2007), <<http://news.people.com.cn/GB/37454/37459/5411764.html>> (setting the current fertility rate in China at 1.8 children per couple).
 65. See Wu, *supra* note 50 (referring to China's human rights record as "appalling"); see also Zhang Yinan, *Theological Perspective to the Case of Chen Guangcheng* (Aug. 31, 2006), <<http://news.boxun.com/news/gb/china/2006/09/200609010715.shtml>> (describing officials as "totally devoid of humanity"); see also Bo Xun, *China's Family-Planning Policy Loosening* (Oct. 7, 2004), <<http://news.boxun.com/news/gb/china/2004/10/200410072340.shtml>> (remarking on the condemnation and criticism the family-planning policy has received from human rights organizations and Western governments).
 66. See Christine C. Antoun, Note, *Chen Zhou Chia v. Carroll*, 3 RACE & ETHNIC ANC. L.J. 48, (1997) (examining a case where a woman was forced to abort her third child, and a huge fine was levied on her family for having had a second child); see also Deans, *supra* note 3, at 353 (indicating that children of couples who violate the one-child policy may be denied an education); see also *Ann. L. Bio. on Gender*, *supra* note 60, at 493 (referring to the flagrant human rights violations and widespread persecution that has resulted from the one-child policy).
 67. See Laura A. Lorenzo, Comment, *Societal Prejudice Reflected in Our Courts: The Unfavorable Treatment of the Mentally Retarded*, 2 SETON HALL CONST. L.J. 771, 777-79 (1992) (detailing change in attitude from acceptance to rejection toward eugenic sterilization in the United States).

contraceptive by all citizens is more than 75.2%.⁶⁸ Other than traditional contraceptive means, such as condoms and oral pills, sterilization is often considered.⁶⁹ In recent years, the overall rate of sterilization has been 23%.⁷⁰ Ten percent of women of reproductive age have undergone sterilization operations, and almost 14% of males have had a vasectomy.⁷¹ Similarly, in the United States, sterilization is commonly employed as an effective means of birth control.⁷² The 1995 National Survey of Family Growth (NSFG) reported that 28% of women of reproductive age have had sterilization surgeries.⁷³ However, the largest discrepancy regarding contraceptive measures between China and Canada or between China and the United States lies in motivation. In China, sterilization is encouraged more often by family-planning officials in a coercive

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68. See Heather M. Field, Note, *Increasing Access to Emergency Contraceptive Pills Through State Law Enabled Dependent Pharmacist Prescribers*, 11 UCLA WOMEN'S L.J. 141, 151 (2000) (contrasting Canada's open access to emergency contraception with a closed policy in the United States); see also Susan Yoshihara, *The False Choice Between Development and Daughters*, HUM. LIFE REV., July 2007, at 109 (noting that Canada is a major contributor to the UNFPA, which aggressively promotes population control); see also John Ross, *Letter to the Editor, Has Canadian Contraceptive Use Really Declined?*, FAM. PLAN. PERSP., July/Aug. 2002, at 192 (citing 75% contraceptive use by Canadian citizens).
69. See William A. Fisher, Richard Boroditsky & Martha L. Bridges, *The 1998 Canadian Contraception Study*, 8 CANADIAN J. OF HUM. SEXUALITY 161, 195 (1999) (revealing the high percentage of both men and women familiar with sterilization as an alternative birth control method); see also Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363, 398 (1998) (stating how popular sterilization as a birth control method is in the United States); see also Megan Colleen Roth, Note, *Rocking the Cradle with Erickson v. Bartell Drug Co.: Contraceptive Insurance Coverage Takes a Step Forward*, 70 UMKC L. REV. 781, 786 (2002) (noting that the most common form of contraception in the United States is sterilization).
70. See CANADIAN FEDERATION FOR SEXUAL HEALTH, SEXUAL HEALTH IN CANADA 45 (2007) (hereinafter CANADIAN SEXUAL HEALTH) (listing the types of contraception with percentages among Canadian men and women); see also Fisher et al., *supra* note 69, at 195 (finding that 23% of the study's respondents used sterilization as their current birth control method); see also James Trussell, Edith Guilbert & Allison Hedley, *Sterilization Failure, Sterilization Reversal, and Pregnancy After Sterilization Reversal in Quebec*, 101 THE AM. C. OF OBSTETRICIANS AND GYNECOLOGISTS 677, 677 (2003) (estimating that 23% of women born 10 years after 1950 will choose sterilization before they reach 50 years old).
71. See CANADIAN SEXUAL HEALTH, *supra* note 70, at 45 (noting the rate of male sterilization in Canada as 15%, while that of female sterilization is 8%); see also Fisher et al., *supra* note 69, at 195 (comparing the percentages of men and women who choose sterilization as a form of birth control). See generally *The Evolution of the Right to Privacy After Roe v. Wade*, 13 AM. J. L. & MED. 368, 484 (1987) (hereinafter *Roe v. Wade Privacy*) (stating that male vasectomies are almost as common as female sterilizations).
72. See Claire A. Smearman, *Drawing the Line: The Legal, Ethical and Public Policy Implications of Refusal Clauses for Pharmacists*, 48 ARIZ. L. REV. 469, 502-3 (2006) (suggesting that among the most common methods of birth control are female sterilization and male vasectomy); see also *Roe v. Wade Privacy*, *supra* note 71, at 484 (reporting that sterilization is a safe and effective means of birth control); see also The Guttmacher Institute, *Facts on Contraceptive Use*, The National Center for Health Statistics and Contraceptive Technology 1 (Jan. 2008), available at <http://guttmacher.org/pubs/fb_contr_use.pdf> (finding that female sterilization is most commonly relied on by women age 35 or older, women who are currently or have previously been married, and women with less than a college education).
73. Andrea P. MacKay et al., *Tubal Sterilization in the United States*, 33 FAM. PLAN. PERSP. 161, 161 (2001) (citing The National Center for Family Growth (NCFG), <http://www.cdc.gov/nchs/about/major/nsfg/nsfg1-5doc_5.htm>, stating that 28% of all women age 15 to 44 years old are sterilized).

manner.⁷⁴ Chinese citizens are reluctant to accept the operations for both economic and ideological reasons,⁷⁵ and they prefer more convenient and cheap methods, like condoms and contraceptive pills, to reduce reproduction.⁷⁶ Family-planning officials, however, regard sterilization as the most effective way to keep fertility under control;⁷⁷ therefore, forced sterilizations are imposed on the Chinese women. In Canada and the United States, on the other hand, sterilization and other contraceptive measures are undertaken voluntarily.⁷⁸

III. International Treaties and Unanimous Agreements

In accordance with the Vienna Conventions on the Law of Treaties, a treaty is an international agreement consented to by two or more states.⁷⁹ Nevertheless, a question arises as to the legal treatment of international human rights treaties.⁸⁰ Generally, an international agreement

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74. See Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. OF INT'L L. 956, 963 (2002) (maintaining that the People's Republic of China's law regarding required use of contraceptive devices amounts to a "program of coercive abortion"); see also Reed Boland, Comment, *Civil & Political Rights and the Right to Nondiscrimination: Population Policies, Human Rights, and Legal Change*, 44 AM. U.L. REV. 1257, 1260 (1995) (stating that coercion plays a key role in China's family-planning policy); see also Keng, *supra* note 9, at 209 (describing China's requirement for married couples of reproductive age to receive certain birth control measures without charge).
 75. See China Information Center, Observe China, Notice of Forced Sterilization, <<http://observechina.net/info/art-show.asp?ID=35401>> (hereinafter CIC Notice of Forced Sterilization) (providing a notice from the local government forcing couples to accept sterilization). See generally Frederick J. Petersen, Note, *The Façade of Humanitarian Intervention for Human Rights in a Community of Sovereign Nations*, 15 ARIZ. J. INT'L COMP. LAW 871, 874–75 (1998) (describing reluctance to intervene out of respect for societies and religions); see generally Skalla, *supra* note 2, at 345–46 (acknowledging that economic tensions affect Chinese women's reproductive freedom).
 76. See CIC Notice of Forced Sterilization, *supra* note 75 (providing a notice from the local government forcing couples to accept sterilization instead of using more convenient methods like condoms or contraceptive pills).
 77. See Martin, *supra* note 51, at 412 (noting how mandatory contraception directs that couples with two or more children be sterilized); see also Nortick, *supra* note 12, at 2158 (commenting that China's marriage restrictions are linked to population control); see also Rivera, *supra* note 12, at 229 (showing the impact of China's population control program on the amount of sterilizations and abortions).
 78. See Berta E. Hernandez-Truyol, *To Bear or Not to Bear: Reproductive Freedom as an International Human Right*, 17 BROOK. J. INT'L L. 309, (1991) (claiming that women in the United States have a fundamental right to reproductive freedom); see also Frances J. Lexcen & Dickon Reppucci, *Psychology and the Law: Effects of Psychopathology on Adolescent Medical Decision Making*, 5 U. CHI. L. SCH. ROUNDTABLE 63, 69 (1998) (describing the differences between state voluntary sterilization laws); see also Stacy Russell, *Castration of Repeat Sexual Offenders: An International Comparative Analysis*, 19 HOUS. J. INT'L L. 425, 440 (1997) (noting an increase in voluntary sterilization in the United States from 1980 to 1990).
 79. See ANNE F. BAYESKY, HOW TO COMPLAIN TO THE UN HUMAN RIGHTS TREATY SYSTEM 4 (2002) (providing the definition of a "treaty" as a binding, international agreement between two states); see also Alex Glashauser, *What We Must Never Forget When It Is a Treaty We Are Expounding*, 73 U. CIN. L. REV. 1243, 1254 (2005) (detailing the unique nature of a treaty); see also Milena Sterio, *The Evolution of International Law*, 31 B.C. INT'L & COMP. L. REV. 213, 239 (2008) (discussing the foundations of a treaty as between states to protect national business interests).
 80. See M. Shah Alam, *Enforcement of International Human Rights Law by Domestic Courts in the United States*, 10 ANN. SURV. INT'L & COMP. L. 27, 28 (2004) (stating that international law trumps all inconsistent state and local law); see also Torsten H. Strom & Peter Finkle, *Treaty Implementation: The Canadian Game Needs Australian Rules*, 25 OTTAWA L. REV. 39, 44 (1993) (noting that signing and ratifying a treaty creates a mutual international legal obligation). See generally Anna Maria Gabrielidis, *Human Rights Begin at Home: A Policy Analysis of Litigating International Human Rights in U.S. State Courts*, 12 BUFF. HUM. RTS. L. REV. 139, 146 (2006) (describing how lawyers and judges of each locality must abide by international law).

is governed by international law and derives its power through the binding effect of mutual consent.⁸¹ Once a state has signed a treaty, a mutual international legal obligation is created, which requires each state that is party to the agreement to comply with the treaty's purpose, principles and norms.⁸² However, signing a treaty generally signifies that a state is merely morally, rather than legally, bound,⁸³ but when a state ratifies a treaty, the state is legally bound to the specific provisions of that treaty.⁸⁴ In other words, only when the state's legislative body ratifies the international treaty is it legally bound by the treaty's principles and purpose.⁸⁵ Consequently, state parties have international legal obligations to ensure their national legislation, policies and enforcements are in compliance with the treaty and consistent with the require-

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81. See Oona A. Hathaway, *International Delegation and State Sovereignty*, 71 L. & COMTEMP. PROBS. 115, 122 (2008) (describing the requirement of state consent when entering into an international treaty); see also Joshua Gregory Holt, Comment, *The International Law Exception to the Act of State Doctrine: Redressing Human Rights Abuses in Papua New Guinea*, 16 PAC. RIM L. & POL'Y 459, 480 (2007) (noting that treaties are binding legal obligations under international law and derived from state consent); see also Saona, *supra* note 10, at 229 (discussing the binding effect of the treaty between the People's Republic of China and the United States to protect an individual's productive rights).
82. See I.I. Lukashuk, *New Thinking by Soviet Scholars: The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law*, 83 AM. J. INT'L LAW 513, 515 (1989) (detailing state obligations in treaties to refrain from acts that defeat the object and purpose of the rule); see also Martin A. Rogoff, *The Obligation to Negotiate in International Law: Rules and Realities*, 16 MICH. J. INT'L L. 141, 144 (1994) (concluding that the outcome of treaty negotiations between two countries creates a mutual and binding legal obligation); see also Saona, *supra* note 10, at 229 (revealing the need for a state's compliance with the treaty's binding purpose).
83. See Luke T. Lee, *Law, Human Rights and Population: A Strategy for Action*, in HUMAN RIGHTS AND POPULATION FROM THE PERSPECTIVES OF LAW, POLICY AND ORGANIZATION, APP. C, AT 82 (Proceedings of the Second Annual Meeting of the Int'l Advisory Comm. on Population & Law, 1973) (stating that signing a treaty binds a state morally rather than legally); see also Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT'L L.J. 307, 328 (2007) (concluding that treaty obligations are more moral in nature than legal); see also W. Michael Reisman, *Unratified Treaties and Other Unperfected Acts in International Law: Constitutional Functions*, 35 VAND. J. TRANSNAT'L L. 729, 744 (2002) (commenting that there is a fundamentally ethical and moral basis to a treaty agreement between two states).
84. See Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331 (declaring that prior to ratification, a state is obligated to refrain from acting contrary to the terms of the treaty); see also Natasha Parassram Concepcion, *Human Rights Violations Against Muslims in the Xinjiang Uighur Autonomous Region of Western China*, 8 HUM. RTS. BR. 19, 20 (2000) (noting that a state becomes legally bound to a treaty when it is ratified); see also Elisabeth Zoller, *The Corporate Will of the United Nations and the Rights of the Minority*, 81 AM. J. INT'L L. 610, 616 (1987) (asserting that parties may not modify the provision of a treaty once it has been ratified).
85. See Bradley, *supra* note 83, at 313 (indicating that consent to the terms of a treaty is manifested by ratification); see also John Charles Kunich, *Fiddling Around While the Hot Spots Burn Out*, 14 GEO. INT'L ENVTL. L. REV. 179, 207 (2001) (acknowledging that a signatory is typically not bound until its legislature ratifies the treaty); see also Sara R. Wallace, Note, *International Adoption: The Most Logical Solution to the Disparity Between the Numbers of Orphaned and Abandoned Children in Some Countries and Families and Individuals Wishing to Adopt in Others?*, 20 ARIZ. J. INT'L & COMP. L. 689, 706 (2003) (asserting that a state is not legally bound to a treaty's terms until it has been signed and ratified).

ments of protecting and promoting their citizens' human rights,⁸⁶ regardless of their political, economic and cultural systems and traditions.⁸⁷

China is a signatory to a variety of international human rights treaties, including some that specifically provide for the protection of women's and children's rights.⁸⁸ International law and international human rights treaties universally acknowledge the basic right of parents to have access to reproductive health care and to raise a family without government intrusion.⁸⁹ Under no circumstances should forced sterilization and abortion be promoted as a means of enforcing a birth control policy.⁹⁰ All governments are encouraged to reinforce their commitment to women's rights, to deal with women's health as a major public health concern, and to "reduce the recourse to sterilization and abortion through expanded and improved family-plan-

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86. See BAYESKY, *supra* note 79, at 4 (stating that state parties must ensure that their laws and policies comply with the treaty's requirements); see also Cynthia Price Cohen, *An Introduction to the Developing Jurisprudence of the Rights of the Child*, 3 ILSA J. INT'L & COMP. L. 659, 664 n.2 (1997) (noting that a state party is a nation that has ratified a treaty and consequently is legally bound by it); see also Erin E. Douglas, *The Struggle for Human Rights Versus Stability: The Chinese Communist Party and Western Values Clash*, 29 DENV. J. INT'L L. & POL'Y 151, 170 (2001) (attesting that the United Nations Charter permits the International Court of Justice to enforce international conventions).
 87. See Nicoline Ambe, *A Legal Analysis of the Domestic Enforceability of International Human Rights Law: The Rule of Law Imperative*, 47 U.N.B. L.J. 109, 120 (1998) (claiming that states have an duty to protect human rights irrespective of cultural norms); see also Lawrence Friedman, *On Human Rights, the United States and the People's Republic of China at Century's End*, 4 J. INT'L LEGAL STUD. 241, 246 (1998) (purporting that the human rights provisions included in international agreements negate cultural relativism).
 88. See Ronald C. Keith, *Legislating Women's and Children's "Rights and Interests" in the PRC, 1997*, THE CHINA Q. 29, 32 (March 1997) (asserting that China has signed the World Declaration on the Survival, Protection, and Development of Children); see also Jiangyu Wang, *China and the Universal Human Rights Standards*, 29 SYRACUSE J. INT'L L. & COM. 135, 143 (2001) (stating that China has signed both the International Covenant on Human Rights and the Covenant on Economic, Social and Cultural Rights).
 89. See Barbara B. Crane & Stephen L. Isaacs, *Challenges of Law and Development: The Cairo Programme of Action: A New Framework for International Cooperation on Population and Development Issues*, 36 HARV. INT'L L.J. 295, 296 (1995) (acknowledging that the International Conference on Population and Development, which was sponsored by the United Nations, asserted that reproductive health services are required for human health and development); see also Cirando, *supra* note 4, at 622 (claiming that the Cairo Programme proposes that population policies respect human rights); see also Saona, *supra* note 10, at 231 (stressing that international law protects reproductive rights, including the right to information concerning family planning and reproductive health).
 90. See Rev. Robert Araujo, *Sovereignty, Human Rights, and Self-Determination: The Meaning of International Law*, 24 FORDHAM INT'L L.J. 1477, 1508 (2001) (declaring that health care providers must provide adolescents with appropriate sexual health services and must not act in a way that deters adolescents from seeking help); see also Boland, *supra* note 74, at 1260–61 (claiming that Chinese women are subjected to severe pressure from society and the government, including threat of force, to undergo sterilization or have an abortion); see also Kathleen Mahoney, *Theoretical Perspectives on Women's Human Rights and Strategies for Their Implementation*, 21 BROOK. J. INT'L L. 799, 818 (1996) (asserting that women must be permitted to choose which family-planning methods to employ).

ning services.”⁹¹ Despite national practices, China is morally and legally bound by its signature on and ratification of these international treaties.⁹²

A. International Human Rights Treaties Concerning Women's Rights That China Has Ratified

1. Universal Declaration of Human Rights (1948)⁹³

The Universal Declaration of Human Rights was ratified by the General Assembly of the United Nations in 1948.⁹⁴ It defines “the fundamental rights of individuals”⁹⁵ and “exhorts all governments to protect these rights.”⁹⁶ This declaration is considered the principal human rights instrument under international law and the basis for all the other human rights treaties,

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91. See *China: Human Rights Violations and Coercion in One-child Policy Enforcement: Hearing Before the H. Comm. on Int'l Rel. Comm.*, 108th Cong. ¶ 16-17 (Dec. 14, 2004) available at <<http://www.internationalrelations.house.gov/archives/108/dew121404.htm>> (asserting that China must take action to reduce the practice of sterilization and abortion by improving family-planning services); see also Cirando, *supra* note 4, at 626 (stating that the Cairo Programme requires states to provide women with access to adequate family-planning services).
 92. See Concepcion, *supra* note 84, at 20 (noting that China is legally obligated to honor ratified human rights treaties); see also Lesley Jacobs & Pitman B. Potter, *Selective Adaptation and Human Rights to Health in China*, 9 HEALTH & HUM. RTS. 112, 115 (2006) (noting that China is obligated to provide adequate health care under the International Covenant on Economic, Social, and Cultural Rights, which China ratified in 2001); see also Saona, *supra* note 10, at 240 (stating that China is bound by signed treaties, including the International Covenant on Economic, Social, and Cultural Rights and the Convention on the Elimination of all Forms of Discrimination Against Women).
 93. See Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., UN Doc. A/810 (1948), available at <<http://www.un.org/Overview/rights.html>> (containing universally accepted human rights adopted by the United Nations in 1948).
 94. See William A. Schabas, *Canada and the Adoption of the Universal Declaration of Human Rights*, 43 MCGILL L.J. 403, 405 (1998) (acknowledging that the United Nations adopted the Universal Declaration of Human Rights on December, 10 1948); see also Susan Waltz, *Reclaiming and Rebuilding the History of the Universal Declaration of Human Rights*, 23 THIRD WORLD Q. 437, 442 (2002) (stating that the Universal Declaration of Human Rights was adopted by the United Nations on December 10, 1948). See generally PATRICK JAMES FLOOD, THE EFFECTIVENESS OF UN HUMAN RIGHTS INSTITUTIONS 33 (1998) (noting that the Universal Declaration of Human Rights was adopted because of the international community's desire to respond to egregious violations of human rights).
 95. See FLOOD, *supra* note 94, at 19 (claiming that the Universal Declaration of Human Rights calls for states to recognize all individuals as people before the law); see also A. H. ROBERTSON & J. G. MERRILLS, HUMAN RIGHTS IN THE WORLD: AN INTRODUCTION TO THE STUDY OF THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 29 (1996) (asserting that the Universal Declaration of Human Rights details an individual's basic rights); see also Ann Kent, *Waiting for Rights: China's Human Rights and China's Constitutions, 1949-1989*, 13 HUM. RTS. Q. 170, 172 (1991) (acknowledging that human rights, as enunciated in the Universal Declaration of Human Rights, include civil, political, economic, and social rights).
 96. See Robertson, *supra* note 95 at 29 (acknowledging that the adoption of the Declaration on Colonialism in 1960 included observation of the provisions of the Universal Declaration of Human Rights); see also Roberta Cohen, *People's Republic of China: The Human Rights Exception*, 9 HUM. RTS. Q. 447, 548 (1987) (noting that no government has been able to claim that its citizens are not entitled to the rights set forth in the Universal Declaration of Human Rights); see also Writing Group for the Consortium for Health and Human Rights, *A Call to Action on the 50th Anniversary of the Universal Declaration of Human Rights*, 3 HEALTH & HUM. RTS. 7, 7 (1998) (declaring that the goals of the Universal Declaration of Human Rights can be realized only if all states protect the rights set forth in it).

conventions, and declarations.⁹⁷ When the Universal Declaration of Human Rights was adapted, ratification was not made a compulsory requirement.⁹⁸ Instead, the declaration is accepted with no binding effect.⁹⁹ Some of its provisions, however, have become legal obligations under customary international law and are currently seen as binding on all the member states.¹⁰⁰

China is a founding member of the United Nations and, as a signatory to the declaration, has the moral obligation to protect the fundamental human rights encompassed in that declaration.¹⁰¹ Article 25(2) states that “Motherhood and childhood are entitled to special care and assistance. All Children, whether born in or out of wedlock, shall enjoy the same social protection.”¹⁰² This article clearly emphasizes mothers’ and children’s need for special protection. Although this special care and aid for mothers and children specifically covers motherhood or childhood, it can be inferred that this extends also to “a reasonable period before and after

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97. See Hurst Hannum, *The Status and Future of the Customary International Law of Human Rights: The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 287, 353–54 (1996) (noting that the Universal Declaration of Human Rights contains the minimum rights to be enjoyed by people); see also Tore Lindholm, *Prospects for Research on the Cultural Legitimacy of Human Rights: The Case of Liberalism and Marxism*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES 387, 395 (Abdullahi Ahmed An-Na’im ed., 1992) (stating that the Universal Declaration of Human Rights was a reasonable attempt at leading nations to implement universally accepted human rights); see also Schabas, *supra* note 94, at 405 (declaring that the Universal Declaration of Human Rights served as the foundation of two international human rights covenants).
 98. See Waltz, *supra* note 94, at 446 (acknowledging that ratification of the Universal Declaration of Human Rights was not required because of protracted disagreements over the document); see also Saona, *supra* note 10, at 241 (stating that the United Nations did not require nations to ratify the Universal Declaration of Human Rights).
 99. See Fareda Banda, *Global Standards: Local Values*, 17 INT’L J.L. POL’Y & FAM. 1, 1 (2003) (indicating the Universal Declaration of Human Rights is recognized but is not authoritative); see also Manisuli Ssenyonjo, *Women’s Rights to Equality and Non-Discrimination: Discriminatory Family Legislation in Uganda and the Role of Uganda’s Constitutional Court*, 21 INT’L J.L. POL’Y & FAM. 341, 359 (2007) (indicating that although the Universal Declaration of Human Rights is very much recognized, it does not have any binding authority); see also Saona, *supra* note 10, at 229 (indicating that the Universal Declaration is not binding).
 100. See Banda, *supra* note 99, at 1 (referring to the fact that some of the covenants in the Universal Declaration of Human Rights have been adopted as binding in certain member states); see also Ssenyonjo, *supra* note 99, at 359 (indicating that some member states have made parts of the Universal Declaration of Human Rights mandatory); see also Saona, *supra* note 10, at 229 (indicating that the Universal Declaration of Human Rights is binding at certain times).
 101. See Audrey R. Chapman, *The Human Rights Implications of Intellectual Property Protection*, 5 J. INT’L ECON. L. 861, 863 (2002) (illustrating that it is the job of the major powers to watch over human rights); see also Ernst-Ulrich Petersmann, *The Human Rights Approach Advocated by the United Nations High Commissioner for Human Rights and by the International Labour Organization: Is It Relevant for WTO Law and Policy?*, 7 J. INT’L ECON. L. 605, 626 (2004) (indicating that the major powers of the United Nations are looked to in order to protect human rights); see also Carlos Manuel Vázquez, *Trade Sanctions and Human Rights—Past, Present, and Future*, 6 J. INT’L ECON. L. 797, 798 (2003) (indicating that human rights often are enforced by the major powers of the United Nations).
 102. See U.N. GAOR, 3rd Sess., 1st plen. mtg. at 7, U.N. Doc A/810 (Dec. 12, 2001) (indicating that mothers and daughters deserve special societal protections); see also DAVID WEISSBRODT ET AL., *SELECTED INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AND BIOGRAPHY FOR RESEARCH ON INTERNATIONAL HUMAN RIGHTS LAW* 27 (3d ed. 2001) (referring to the family structure that encourages extra societal protection for mothers and daughters).

childbirth.”¹⁰³ During her childbearing period, a woman's reproductive rights, including the right to decide how many children to have, should be respected under the declaration.¹⁰⁴

2. International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights was adopted by the United Nations General Assembly on December 16, 1966, and entered into force on March 23, 1976.¹⁰⁵ China ratified this international covenant in 1998.¹⁰⁶ Unlike the universal declaration, the International Covenant on Civil and Political Rights was expressly created to have a

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103. See S. Kielty, *Similarities and Differences in the Experiences of Non-Resident Mothers and Non-Resident Fathers*, 20 INT'L J.L. POL'Y & FAM. 74, 86 (2006) (illustrating that women deserve extra protection when bearing a child in order to ensure the baby's healthy delivery); see also Rebecca J. Cook et al., World Health Organization, *Advancing Safe Motherhood Through Human Rights* 32–47 (2001), <http://www.who.int/reproductive-health/publications/RHR_01_5_advancing_safe_motherhood/RHR_01_5_chapter3_part3.en.html> (illustrating that women deserve extra societal protection within a reasonable time before and after giving birth).
 104. See Daphne Barak-Erez, *The International Law of Human Rights and Constitutional Law: A Case Study of an Expanding Dialogue*, 2 INT'L J. CONST. L. 611, 626 (2004) (referring to a mother's right to decide how many children she will have); see also Christine Langerfeld, *Germany: The Teacher Head Scarf Case*, 3 INT'L J. CONST. L. 86, 88–89 (2005) (indicating that the universal declaration gives the power to a mother to decide how many children she will have); see also William Schabas, *Indirect Abolition: Capital Punishment's Role in Extradition Law and Practice*, 25 LOY. L.A. INT'L & COMP. L. REV. 581, 581 (2003) (referring to the mother's right, during her lifetime, to decide how many children she should bear).
 105. See WEISSBRODT ET AL., *supra* note 102 at 27 (referring to the time that the covenant was made and when it went into force); see also Samantha Besson, *Enforcing the Child's Right to Know Her Origins: Contrasting Approaches under the Convention on the Rights of the Child and the European Convention on Human Rights*, 21 INT'L L. POL'Y & FAM. 137, 141 (2007) (indicating that the International Covenant on Civil and Political Rights was drawn up in 1966 and enforced beginning in 1976); see also Ssenyonjo, *supra* note 99, at 343 (illustrating that there was a 10-year block between when the International Covenant on Civil and Political Rights was drawn up and enforced).
 106. See Lucinda Ferguson, *Family, Social Inequalities, and The Persuasive Force of International Obligation*, 22 INT'L J.L. POL'Y & FAM. 61, 61 (2008) (referring to the International Covenant on Civil and Political Rights to have been changed 22 years after its creation); see also John Murphy, *The Recognition of Same-Sex Families in Britain: The Role of Private International Law*, 16 INT'L J.L. POL'Y & FAM. 181, 181 (2002) (referring to the ratification of the covenant after 1966); see also Li Lin, *The International Covenant on Civil and Political Rights in the Eyes of People*, <<http://www.people.com.cn/GB/guandian/8213/28144/28153/2381271.html>> (last visited Mar. 12, 2007) (indicating that the covenant was changed in 1998).

binding effect on its member states.¹⁰⁷ As a result, all the member states have the legal obligation to comply with the provisions of the covenant.¹⁰⁸

The International Covenant on Civil and Political Rights focuses primarily on individuals' civil and political rights.¹⁰⁹ In article 23(1), the covenant states that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State," and, therefore, the family is expressly protected by the covenant.¹¹⁰ Furthermore, article 23(2) mandates that "[t]he right of men and women of marriageable age to marry and to found a family shall be recognized."¹¹¹

Specifically, Article 23(1) upholds the fundamental human rights of all people to "marry and [find] a family."¹¹² It respects "the right to give full and free consent to marriage,"¹¹³ the "right to family planning,"¹¹⁴ "rights of children to parental care,"¹¹⁵ "right to family reunification,"¹¹⁶ and "equal rights of men and women in the family."¹¹⁷

107. See Banda, *supra* note 99, at 3 (referring to the difference between the International Covenant on Civil and Political Rights and the universal declaration, which is that the earlier is binding while the latter is not); see also Ssenyonjo, *supra* note 99, at 341 (indicating that although the Universal Declaration of Human Rights is very much recognized, it is unlike the International Covenant on Civil and Political Rights); see also Hannah A. Saona, Comment, *The Protection of Reproductive Rights Under International Law: The Bush Administration's Policy Shift and China's Family Planning Practices*, 13 PAC. RIM L. & POL'Y J. 229 (indicating that the universal declaration differed from the International Covenant on Civil and Political Rights in that the latter is binding on its members).

108. See Christopher L. Eisgruber, *Religious Freedom in Canada and the United States*, 4 INT'L J. CONST. L. 244, 257 (2006) (illustrating that the International Covenant on Civil and Political Rights have many covenants that must be followed); see also Patrick Macklem, *Militant Democracy, Legal Pluralism, and the Paradox of Self-Determination*, 4 INT'L J. CONST. L. 488, 503–4 (2006) (referring to the International Covenant on Civil and Political Rights having several covenants that must be followed by all member states); see also Beate Rudolf, *Women's Rights Under International Human Rights Treaties: Issues of Rape, Domestic Slavery, Abortion, and Domestic Violence*, 5 INT'L J. L. 507, 517 (2007) (indicating that all states partaking in international human rights treaties must follow all covenants).

109. See ROBINSON & MERRILLS, *HUMAN RIGHTS IN THE WORLD*, *supra* note 95; see also Ferguson, *supra* note 106, at 61 (indicating that the international covenant looks to emphasize political and civil rights); see also Murphy, *supra* note 106, at 181 (illustrating that the international covenant homes in on civil and political liberties).

110. See International Convention on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 42, U.N. Doc. A/3616 (Mar. 23, 1976) (illustrating that family is an important element of society and should be protected by society and state).

111. See *id.* (indicating that those men and women who are of age are able to be recognized as married).

112. See Human Rights Educ. Assocs., the Right to Family, art. 23(1), <<http://www.hrea.org/learn/guides/family.html>> (last visited Mar. 14, 2007) (hereinafter the Right to Family) (referring to the authority of article 23 to allow any person to marry and form a family).

113. See *id.* (referring to authority of article 23 that allows a person to become validly married).

114. See *id.* (maintaining that the rights of individuals to freely determine the number of children to have has been recognized by major United Nations conferences on population and development).

115. See *id.* (commenting that children's rights to parental care are protected in children's rights treaties).

116. See *id.* (asserting that where parents and children are in different countries, states must endeavor to reunify them in a humane and expeditious manner).

117. See *id.* (noting that human rights law asserts the equal rights of both men and women in a marriage).

Additionally, article 23(2) implies that adoption and family-planning policies should be compatible with the provisions of the covenant.¹¹⁸ Family-planning policies must respect the will of the people that comprise those families, and any policies that are discriminatory or compulsory are violations of the Covenant.¹¹⁹ It also stresses the right of couples to freely determine the number and spacing of their family.¹²⁰ Therefore, the coercive methods of population control utilized by some of China's local family-planning officials are incompatible with article 23(2) of the International Covenant on Civil and Political Rights.¹²¹

In addition to the provisions that link directly to the one-child policy, the Human Rights Committee itself supervises state parties and oversees their compliance with relevant provisions

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118. See SARAH JOSEPH ET AL., THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 609 (2d ed. 2004) (finding that family-planning practices should be compatible with provisions of the covenant); see also Tara A. Moriarty, *Guo v. Carroll: Political Opinion, Persecution, and Coercive Population Control in the People's Republic of China*, 8 GEO. IMMIGR. L.J. 469, 483 (1994) (noting that the United Nations Human Rights Committee has interpreted article 23(2) of the International Covenant on Civil and Political Rights as meaning that state parties cannot adopt family-planning policies that are not compatible with its provisions); see also Allison D. Sealove, *Shu-Hao Zhao v. Schiltgen: Persecution on Account of Political Opinion—Inconsistencies and Ambiguities*, 23 BROOK. J. INT'L L. 309, 328 (1997) (emphasizing that the United Nations Human Rights Committee interpreted article 23(2) of the International Covenant on Civil and Political Rights as implying that family-planning policies of the state should be compatible with provisions of the covenant).
119. See JOSEPH ET AL., *supra* note 118, at 609 (opining that family-planning policies should not be discriminatory and in any way in violation of the International Covenant on Civil and Political Rights); see also Paula Abrams, *Population Politics: Reproductive Rights and U.S. Asylum Policy*, 14 GEO. IMMIGR. L.J. 881, 888 (2000) (stating that the Human Rights Committee's general comments to the political covenant provide that family-planning policies should not be discriminatory or compulsory); see also Sealove, *supra* note 118, at 328 (announcing that the United Nations Human Rights Committee has interpreted the provisions of the International Covenant on Civil and Political Rights to mean that family-planning policies should not be discriminatory or compulsory).
120. See JOSEPH ET AL., *supra* note 125, at 609 (concluding that coercive methods of population control are incompatible with the International Covenant on Civil and Political Rights); see also Sandra Coliver, *The Right to Information Necessary for Reproductive Health and Choice Under International Law*, 44 AM. U. L. REV. 1270, 1281–82 (1995) (explaining that the right to decide the number and spacing of one's children is a civil right that is guaranteed by the International Covenant on Civil and Political Rights); see also Beth Gammie, *Human Rights Implications of the Export of Banned Pesticides*, 25 SETON HALL L. REV. 558, 592–93 (1994) (finding that the International Covenant on Civil and Political Rights protects the right to found a family, which includes the right to determine freely and responsibly the number and spacing of children).
121. See Xiaorong Li, *License to Coerce: Violence Against Women, State Responsibility, and Legal Failures in China's Family-Planning Program*, 8 YALE J.L. & FEMINISM 145, 185 (1996) (stressing that the rights of children against population-control programs are recognized by the International Covenant on Civil and Political Rights); see also Stephanie Hyatt, Comment, *A Shared History of Shame: Sweden's Four-Decade Policy of Forced Sterilization and the Eugenics Movement in the United States*, 8 IND. INT'L & COMP. L. REV. 475, 496 (1998) (recognizing that coercive methods of population control violate the International Covenant on Civil and Political Rights, which protects reproductive freedom); see also Rabkin, *supra* note 13, at 990–91 (positing that the International Covenant on Civil and Political Rights provides the foundation for assisting couples subjected to coercive methods of population control).

under the covenant.¹²² In accordance with article 7, states are required to provide information to the committee on measures they use to prevent forced abortion and sterilization.¹²³ Furthermore, states where genital mutilation exists are required to report to the committee regarding the extent of such a practice as well as the measures taken to eliminate it.¹²⁴ All the problems addressed in the report should be accompanied by appropriate legal remedies for women whose rights have been violated.¹²⁵

3. Convention on the Elimination of All Forms of Discrimination Against Women

The Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) was passed by the United Nations General Assembly on December 18, 1979, and entered into force on September 3, 1981.¹²⁶ China signed the convention on July 17, 1980,

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122. See Elizabeth P. Barratt-Brown, *Building a Monitoring and Compliance Regime Under the Montreal Protocol*, 16 YALE J. INT'L L. 519, 550 (1991) (informing that the International Covenant on Civil and Political Rights requires member countries to adhere to the covenant's provisions and must submit reports to the United Nations Human Rights Committee for review); see also Thomas Buergenthal, *International Human Rights Law and Institutions: Accomplishments and Prospects*, 63 WASH. L. REV. 1, 12 (1988) (stating that a state party to the International Covenant on Civil and Political Rights has an obligation to comply with the covenant's provisions and must report to the United Nations Human Rights Committee so that the committee can verify compliance); see also Colette Connor, Note, *Recent Development: The United States' Second and Third Periodic Report to the United Nations Human Rights Committee*, 49 HARV. INT'L L.J. 509, 509 (2008) (remarking that as a party to the International Covenant on Civil and Political Rights, the United States is supervised by the United Nations Human Rights Committee in order to determine whether it has fulfilled its treaty obligations).
 123. See G. Diane Lee, Comment, *Ireland's Constitutional Protection of the Unborn: Is It in Danger?*, 7 TULSA J. COMP. & INT'L L. 413, 443 (2000) (stating that to be in compliance with the International Covenant on Civil and Political Rights, Ireland was required to submit to the United Nations Committee on Human Rights measures adopted to ensure rights under the covenant were being protected); see also Saona, *supra* note 10, at 243 (remarking that the International Covenant on Civil and Political Rights obligates states to take measures to ensure provisions of the covenant are followed).
 124. See Jan Arno Hessbruegge, *Human Rights Violations Arising From Conduct on Non-State Actors*, 11 BUFF. HUM. RTS. L. REV. 21, 72 (2005) (reporting that the United Nations Human Rights Committee has censured states for failing to take measures to prevent genital mutilation); see also Ssenyonjo, *supra* note 99, at 365 (outlining that the United Nations Human Rights Committee requires states to take all necessary measures to eradicate genital mutilation); see also The Right to Family (declaring that state parties shall take all effective measures to eliminate traditional practices prejudicial to the health of children).
 125. See Courtney W. Howland, *The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis Under the United Nations Charter*, 35 COLUM. J. TRANSNAT'L L. 271, 368–69 (1997) (declaring that the Human Rights Committee requires states that are parties to the International Covenant on Civil and Political Rights to provide effective legal remedies to combat violations of human rights); see also Antenor Hallo de Wolf, Comment, *Modern Condottieri in Iraq: Privatizing War From the Perspective of International and Human Rights Law*, 13 IND. J. GLOBAL LEGAL STUD. 315, 348 (2006) (clarifying that the United Nations Human Rights Committee requires states to provide a remedy when rights are violated).
 126. See WEISSBRODT ET AL., *supra* note 102, at 68 (announcing that the CEDAW entered into force on September 3, 1981).

and ratified it with a reservation on article 29(1)¹²⁷ on November 4, 1980.¹²⁸ The convention was intended to have a binding legal effect,¹²⁹ and states have a legal obligation to respect its principles and purpose.¹³⁰

The convention concentrates more on the protection of women's rights than other treaties do.¹³¹ It mandates that states "take all the appropriate measures to ensure the full development

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127. Any dispute between two or more state parties concerning the interpretation or application of the present convention that is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the statute of the court.
128. See Gu Shengkai, *Gender Equality and Protection of Women Under Law*, <<http://www.humanrights-china.org/china/magezine/2003.3/p28-p31.htm>> (last visited on Oct. 5, 2008) (indicating that on November 4, 1980, China ratified the CEDAW).
129. See Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, Annex at 197, U.N. Doc. A/RES/34/180 at ¶ 2 (Dec. 18, 1979) (hereinafter Women's Discrimination Convention) (stating that the goals of eliminating discrimination against women are intended to be implemented as legislation and thus suggesting that the tenets of the convention were intended to be binding in nature); see also Phyllis M. McCandless, *The Fallacy of Mandating Contraceptive Equity: Why Laws That Protect Women with Health Insurance Deepen Institutional Discrimination*, 42 U.S.F. L. REV. 1115, 1137 (2008) (explaining that the United States has not yet ratified the CEDAW and, therefore, has no legal obligation to adhere to it. This suggests that those countries who do ratify the convention have a legal obligation to adhere to its principles, and, thus, the Convention was intended to be legally binding); see also Emma Mitterlstaedt, *Safeguarding the Rights of Sexual Minorities: The Incremental and Legal Approaches to Enforcing International Human Rights Obligations*, 9 CHI. J. INT'L L. 353, 359 (2008) (stating that the convention was a treaty that was intended to be binding in nature).
130. See Rebecca J. Barber, *Protecting the Right to Housing in the Aftermath of Natural Disaster: Standards in International Human Rights Law*, 20 INT'L J. REFUGEE L. 432, 454–55 (2008) (explaining that states are obligated to implement the tenants of the convention and prohibit discrimination based on sex); see also Caroline Bettinger-López, *Jessica Gonzales v. United States: An Emerging Model for Domestic Violence and Human Rights Advocacy in the United States*, 21 HARV. HUM. RTS. J. 183, 194 (2008) (signaling that should the United States ratify the convention, it would be obligated to implement its legislation); see also Uché Ewelukwa, *Posthumous Children, Hegemonic Human Rights, and the Dilemma of Reform—Conversations Across Cultures*, 19 HASTINGS WOMEN'S L.J. 211, 224 (2008) (recommending that each government enact legislation to prohibit discrimination against women).
131. See Women's Discrimination Convention, *supra* note 129, at ¶ Overview (quoting, "[T]he Convention is the only human rights treaty which affirms the reproductive rights of women and targets culture and tradition as influential forces shaping gender roles and family relations." This implies that the convention concentrates more on women's rights than other treaties do through its implementation of sweeping women's rights reforms); see also Berta E. Hernandez-Truyol, *Sex and Globalization*, 11 HARV. LATINO L. REV. 173, 181 (2008) (reinforcing the unprecedented impact of the convention pertaining to its devotion to eliminating discrimination against women on a global level). See generally Payal Salsburg, *Substantial Change in Circumstances: An Unjustified Reason to Deny Post-War Asylum Claims From Afghan and Iraqi Women*, 32 NOVA L. REV. 495, 498 (2008) (listing the goals of the convention in general in its battle to end discrimination against women).

and advancement of women.”¹³² Furthermore, it monitors member states’ implementation of the convention.¹³³

As a normative instrument, it expressly codifies women’s rights, particularly the right of reproductive choice.¹³⁴ There are a number of provisions concerning women’s reproductive rights. The preamble states:

Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of women in procreation should not be a basis for discrimination but the upbringing of children requires a sharing of responsibility between men and women and society as a whole.¹³⁵

In addition, part III, article 11.1(f) provides for “[t]he right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction,”¹³⁶ part III, article 11.2(a) “prohibit[s], subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;”¹³⁷ and part III, article 11.2(d) mandates, states “[t]o provide special protection to women during pregnancy in types of work proved to be harmful to them.”¹³⁸

132. See Saona, *supra* note 10, at 244 (reiterating the main dogma of the CEDAW, which is to ensure that women are no longer victims of any kind of discrimination).

133. See BAYESKY, *supra* note 79 (recognizing that those member states that participate in the CEDAW are expected to implement its legislation fully and “adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the Convention”); see also Ewelukwa, *supra* note 130, at 258 (stating that a committee was designed specifically to ensure that each member state was implementing CEDAW legislation). See generally Avani Mehta Sood, *Gender Justice Through Public Interest Litigation: Case Studies from India*, 41 VAND. J. TRANSNAT’L L. 833, 869 (2008) (emphasizing the long-lasting effects of the CEDAW treaty on gender discrimination in India and how state governments should be implementing the dogmas of the CEDAW into state legislation).

134. See Sarah A. Huff, *The Abortion Crisis in Peru: Finding a Women’s Right to Obtain Safe and Legal Abortions in the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 B.C. INT’L & COMP. L. REV. 237, 241 (2007) (detailing the triumphs of the convention including requirements that state parties provide adequate access to reproductive technologies to women); see also Bharati Sadasivam, *The Rights Framework in Reproductive Health Advocacy—A Reappraisal*, 8 HASTINGS WOMEN’S L.J. 313, 324 (1997) (discussing how the convention provides a clear legal basis for its constituents to advocate for women’s health issues, especially reproductive health). See generally BAYESKY, *supra* note 79 (detailing instructions on how to complain to the United Nations Human Rights Treaty System).

135. See Women’s Discrimination Convention, *supra* note 129, at ¶ pmbl (quoting, “Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole”).

136. See *id.* at ¶ 11(f) (citing that the CEDAW will protect “[t]he right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction”).

137. See *id.* at ¶ 11(2)(a) (citing that the CEDAW will take certain measures “[t]o prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status”).

138. See *id.* at ¶ 11(2)(d) (stating that when a woman is pregnant, a state should be obliged “[t]o provide special protection to women during pregnancy in types of work proved to be harmful to them”).

This convention is devoted to the elimination of all forms of discrimination against women.¹³⁹ It explores women's contributions in the workforce and other fields, and it especially stresses women's reproductive rights with respect to their work.¹⁴⁰ The convention prohibits any forms of discrimination due to pregnancy or the taking of maternity leave.¹⁴¹ "Paid parental leave"¹⁴² is integral to establishment of an adequate health care system for women and child care system.¹⁴³ As an enforcing mechanism, state parties must submit reports regularly about the measures they have adopted to promote the enforcement of the convention.¹⁴⁴ The

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139. See Barber, *supra* note 130, at 455 (noting that the CEDAW was established to eliminate all kinds of discrimination—social, economic, and cultural—against women); see also Elizabeth Goergen, *Women Workers in Mexico: Using the International Human Rights Framework to Achieve Labor Protection*, 39 GEO. J. INT'L L. 407, 417 (2008) (illustrating how the CEDAW has been used in Mexico to shed light on discrimination against women and eradicate its appearance in the country); see also Sood, *supra* note 133, at 866 (demonstrating a case study where the CEDAW has helped judiciary branches deal with the lasting effects of the CEDAW's call to end discrimination against women).
140. See Jocelyn E. Getgen, *Reproductive Injustice: An Analysis of Nicaragua's Complete Abortion Ban*, 41 CORNELL INT'L L.J. 143, 162 (2008) (stating that because Nicaragua had ratified the CEDAW, it had an obligation to see that women were receiving the right to access reproductive health services); see also Aliya Haider, *Adolescents Under International Law: Autonomy as the Key to Reproductive Health*, 14 WM. & MARY J. WOMEN & L. 605, 624 (2008) (noting that the CEDAW instructs state parties to provide a safe haven for women to protect them from sexual harassment in the workplace); see also John H. Knox, *Horizontal Human Rights Law*, 102 AM. J. INT'L L. 1, 22 (2008) (explaining that the CEDAW requires each state party not only to eliminate discrimination by organizations, such as the workplace, but to prevent the occurrence to begin with).
141. See Goergen, *supra* note 139, at 420 (demonstrating how the CEDAW protects women in the workforce by specifically banning the practice of not permitting maternity leave to women); see also Hernandez-Truyol, *supra* note 78, at 182 (stating that the CEDAW provides that pregnant women are entitled to paid medical leave and other benefits while pregnant); see also Diana Zacharias, *The Protection of Mothers in British and German Constitutional Law: A Comparative Analysis and a Contribution to the Implementation of the European Convention on Human Rights in the Domestic Legal Area*, 9 GERMAN L.J. 27 (2008) (reinforcing the notion that the CEDAW protects pregnant women in the workforce by providing paid maternity leave, benefits, and other pre- and post-natal care).
142. See British Columbia Federation of Labor, Paid Parental Leave (Nov. 29, 1982), available at <<http://www.bcfed.com/node/72>> (last visited Oct. 6, 2008) (hereinafter British Paid Parental Leave) (expressing the CEDAW's commitment to paid parental leave and its subsequent adaptation in Canada).
143. See Eleanor Bath & Andrew Byrnes, *Violence Against Women, the Obligation of Due Diligence, and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women—Recent Developments*, 8 HUM. RTS. L. REV. 517, 530 (2008) (reinforcing the notion that the cornerstone of ending discrimination against women is providing for their reproductive and maternal rights); see also Zacharias, *supra* note 141, at 27 (reinforcing the notion that CEDAW protects pregnant women in the workforce by providing paid maternity leave, benefits, and other pre- and post-natal care); see also British Paid Parental Leave, *supra* note 142 (expressing CEDAW's commitment to paid parental leave and its subsequent adaptation in Canada).
144. See BAYESKY, *supra* note 79, at 26 (asserting that state parties are required to submit reports regularly on the measures they have adopted to effectuate convention provisions); see also Felipe Gomez Isa, *The Optional Protocol for the Convention on the Elimination of All Forms of Discrimination Against Women: Strengthening the Protection Mechanisms of Women's Human Rights*, 20 ARIZ. J. INT'L & COMP. L. 291, 303 (2003) (explaining that progress reports must be submitted by state parties to the Secretary General of the United Nations); see also Jennifer Riddle, *Making CEDAW Universal: A Critique of CEDAW's Reservation Regime Under Article 28 and the Effectiveness of the Reporting Process*, 34 GEO. WASH. INT'L L. REV. 605, 616 (2002) (stating the requirements, put forth by article 18, for states to make reports after ratification of the Convention).

report should include problems the state parties have faced and achievements they have made.¹⁴⁵

Consequently, women's reproductive rights and children's rights are protected under many different circumstances, and discrimination against pregnant women violates this convention.¹⁴⁶

4. International Covenant on Economic, Social, and Cultural Rights

China signed the International Covenant on Economic, Social, and Cultural Rights on Dec. 27, 1997, and eventually ratified it on March 27, 2001.¹⁴⁷ This covenant was created with an express binding effect, meaning that all member states are legally bound by the treaty.¹⁴⁸

The International Covenant on Economic, Social, and Cultural Rights protects rights that "derive from the inherent dignity of the human person"¹⁴⁹ and ensures that all persons enjoy "economic, social and cultural rights, as well as his civil and political rights."¹⁵⁰ Women's rights

145. See Women's Discrimination Convention, *supra* note 129 (stating the requirements for report submission); see also Andrew Byrnes & Jane Connors, *Enforcing the Human Rights of Women: A Complaints Procedure for the Women's Convention?*, 21 BROOK. J. INT'L L. 679, (1996) (asserting the reporting obligation under article 18 of the convention); see also Felipe Gomez Isa, *supra* note 144, at 303 (explaining that submitted reports must include the progress made).

146. See Women's Discrimination Convention, *supra* note 129 (stating that men and women must have equal rights to decide the number and spacing of their children); see also Rebecca J. Cook, *International Protection of Women's Reproductive Rights*, 24 N.Y.U. J. INT'L L. & POL. 645, 652–54 (1992) (describing the reproductive rights provided to women under the covenant); see also Huff, *supra* note 134, at 245–46 (discussing that although the convention does not provide explicitly for the right to abortion, it is implied).

147. See International Convention on Civil and Political Rights, *supra* note 110, at 49 (citing the covenant itself, which China signed and ratified); see also Office of the United Nations High Commissioner for Human Rights, International Convention on Civil and Political Rights, <<http://www2.ohchr.org/english/bodies/ratification/3.htm>> (listing the date on which China and the other states to the Covenant signed, ratified, acceded to and succeeded to it); see also *U.N. Informed 1966 Rights Pact Will Be Adhered To*, SOUTH CHINA MORNING POST, Mar. 29, 2001, at 11 (announcing China's formal notification of its ratification of the 1966 International Covenant on Economic, Social, and Cultural Rights).

148. See THE AMERICAN SOCIETY OF INTERNATIONAL LAW, U.S. RATIFICATION OF THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS, 163–64 (Hurst Hannum & Dana D. Fischer eds., 1993) (describing the obligations of states bound by the covenant); see also Jo M. Pasqualucci, *The Right to a Dignified Life (Vida Digna): The Integration of Economic and Social Rights With Civil and Political Rights in the Inter-American Human Rights System*, 31 HASTINGS INTERNATIONAL AND COMPARATIVE LAW REVIEW 1, 14 (2008) (mentioning the obligations of the states); see also Saona, *supra* note 10, at 243–44 (stating that the International Covenant on Economic, Social, and Cultural Rights was binding upon its member states).

149. See International Convention on Civil and Political Rights, *supra* note 110, at 49 (stating that the covenant protects those rights stemming from the inherent dignity of a person).

150. See *id.* (stating that under the covenant, all are entitled to enjoy their economic, social, and cultural rights as well as their civil and political rights).

are specially emphasized in this covenant.¹⁵¹ Article (10)2 states that “[s]pecial protection should be accorded to mothers during a reasonable period before and after childbirth.”¹⁵² During such period working mothers should be accorded paid leave or leave with adequate social security.”¹⁵³

The International Covenant on Economic, Social, and Cultural Rights affords notable advances for women in economic, social, and cultural arenas, which should be applauded and respected.¹⁵⁴ The choice of motherhood is an important and vital one that women should be supported for making.¹⁵⁵ Article 10(2) stresses the special protections women as mothers should receive¹⁵⁶ by endowing women with certain privileges and respecting all women's reproductive rights.¹⁵⁷ The covenant implicitly provides that women have the right to access repro-

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151. See *id.* (citing specific instances of protection granted to women's rights); see also Audrey R. Chapman, *Monitoring Women's Health Under the International Covenant on Economic, Social and Cultural Rights*, 44 AM. U. L. REV. 1157, 1173 (1995) (describing the emphasis placed on women's rights in the covenant); see also Nusrat Choudhury, *Constrained Spaces for Islamic Feminism: Women's Rights and the 2004 Constitution of Afghanistan*, 19 YALE J. L. & FEMINISM 155, 175 (2007) (stating that the covenant empowers women's rights).
 152. See International Convention on Civil and Political Rights, *supra* note 110, at 49 (stating that mothers should be afforded extra protection both before and after childbirth).
 153. See *id.* (declaring that working mothers should be entitled to maternity leave with some form of compensation); see also Anthea Williams, *Public Law Models for the Implementation of Paid Parental Leave*, 19 N.Z.U.L. REV. 377, 381 (2001) (declaring that working mothers should, under article 10(2), receive special protections during a reasonable period of time before and after they give birth); see also Zacharias, *supra* note 141, at 27 (explaining the protections that should be afforded to working mothers).
 154. See International Convention on Civil and Political Rights, *supra* note 110, at 49 (listing the advancements provided for women's rights); see also Yvette Aguilar, *Gagging on a Bad Rule: The Mexico City Policy and Its Effect on Women in Developing Countries*, 5 SCHOLAR 37, 71 n. 214 (2002) (describing the provisions of the covenant that advance women's status); see also Nsongurua J. Udombana, *Social Rights are Human Rights: Actualizing the Right to Work and Social Security in Africa*, 39 CORNELL INT'L L.J. 181, 189 (2006) (stating that the covenant advances women's rights).
 155. See Jane Maree Maher & Maryanne Denver, *What Matters to Women: Beyond Reproductive Stereotypes*, 12 PEOPLE AND PLACE 11, 12 (2004) (describing the results of a study on women and noting the importance placed on motherhood by many of these women); see also Meghan Daum, *Looking for Mr. Good Enough?*, NEWSDAY (USA), Mar. 3, 2008, at A29 (stating that the idea that women may feel obligated to become mothers is not necessarily true, and that most people want to have children); see also Louise Story, *Many Women at Elite Colleges Set Career Path to Motherhood*, N.Y. TIMES, Sept. 20, 2005, at A1 (explaining that many young women today view motherhood, rather than their careers, as the ultimate goal).
 156. See International Convention on Civil and Political Rights, *supra* note 110, at 49 (providing the text of article 10, which stresses protections that women should receive); see also Mai Chen, *Protective Laws and the Convention on the Elimination of All Forms of Discrimination Against Women*, 15 WOMEN'S RTS. L. REP. 1, 15 (1993) (stating that women, as mothers, should receive special protection); see also Williams, *supra* note 153, at 381 (declaring that working mothers should, under article 10(2) receive special protections during a reasonable period of time before and after they give birth).
 157. See Aaron Xavier Fellmeth, *Feminism and International Law: Theory, Methodology, and Substantive Reform*, 22 HUMAN RIGHTS QUARTERLY 658, 669–70 (2000) (stating that feminists question the rights and privileges afforded to women within the covenant, and that some deem them insufficient); see also Aart Hendriks, *The Right to Health Promotion and Protection of Women's Right to Sexual and Reproductive Health Under International Law: The Economic Covenant and The Women's Convention*, 44 AM. U. L. REV. 1123, 1130 (1995) (stating that women are endowed by the convention with certain privileges, and that a woman's reproductive rights are to be protected); see also Emanuel Reynaud, *Social Security for All: Global Trends and Challenges*, 27 COMP. LAB. L. & POL'Y J. 123, 141 (2006) (discussing the privileges and respect afforded to women).

ductive health care services in order to prevent unexpected pregnancies.¹⁵⁸ Infringing on a woman's right as a mother violates article 10(2) of the International Covenant on Economic, Social, and Cultural Rights.¹⁵⁹

B. Unanimous Agreement, International Conference on Population and Development

At the 1994 International Conference on Population and Development (ICPD),¹⁶⁰ 179 countries, including China, agreed that the best way to eradicate poverty, improve the health and longevity of people globally, and achieve sustainable development was to focus on basic human rights, including reproductive health rights.¹⁶¹ Principle 8 of the agreement indicates that "[r]eproductive health-care programs should provide the widest range of services without any form of coercion. All couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information, education, and means to do so."¹⁶²

158. See Cook, *supra* note 146, at 700 (discussing express versus implied rights); see also Karen Newman, *IPPF Charter on Sexual and Reproductive Rights*, 18 MED. & L. 289, 289–90 (1999) (stating that reproductive rights are granted by the covenant); see also Saona, *supra* note 10, at 243–44 (stating that the convention implies women's right to reproductive health services).

159. See International Covenant on Economic, Social, and Cultural Rights, *supra* note 117 (stating that mothers should have special protection afforded to them before and after child birth); see also Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT'L L. 365, 369 (1990) (summarizing article 10 of the International Covenant on Economic, Social, and Cultural rights that affords protection to mothers); see also Reynaud, *supra* note 157, at 140–41 (noting the consistent recognition of social protection for mothers, from the Universal Declaration on Human Rights standard of "special care and protection" to the International Covenant on Economic, Social, and Cultural Rights' special protection for mothers during pre- and post-natal periods).

160. See International Conference on Population and Development, Cairo, Sept. 5–13, 1994, Report of the International Conference on Population and Development, U.N. Doc. A/CONF.171/13 (Oct. 18 1994) (detailing the resolutions adopted, attendance and organization, general debate, and results of the conference).

161. See United Nations General Assembly, Report of the Ad Hoc Committee of the Whole of the 21st Special Session of the General Assembly, *Key Actions for Further Implementation of the Program of Action of the International Conference on Population and Development*, 2, U.N. Doc. A/S-21/5/Add.1 (Jul. 1, 1999) (laying out the goals of the ICPD program of action and the steps to achieve them).

162. See International Conference on Population and Development, *supra* note 160, at ¶ II-8 (declaring reproductive freedom to be a basic right)

Under Principle 8, a 20-year program of action¹⁶³ was initiated and endorsed by the United Nations General Assembly.¹⁶⁴ The program of action was established to ensure “universal access to reproductive health care, including family planning and sexual health by 2015; universal access to primary education by 2015, reducing infant and child mortality; reducing maternal mortality; and increasing life expectancy.”¹⁶⁵ The program characterizes reproductive health as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes.”¹⁶⁶

The program of action has no legally binding effect on its state parties, but it is a statement of principle to which governments may refer.¹⁶⁷ Even though it has no legal binding effect, the activities of China, as one of the states that chose to consent to the program, should comply with the spirit of the agreement and the “Twenty-Year Program” initiated on the basis of the agreement.¹⁶⁸

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163. See International Conference on Population and Development, *supra* note 160 (calling the countries of the General Assembly to work for improved conditions in population and development over the next 20 years); see also Sofia Gruskin, *Negotiating the Relationship of HIV/AIDS to Reproductive Health and Reproductive Rights*, 44 AM. U. L. REV. 1191, 1204 (1995) (acknowledging the groundbreaking nature of the ICPD's 20-year program of action with respect to the issues of HIV/AIDS and reproductive health); see also Nafis Sadik, *Nafis Sadik on Implementation of the Cairo Program of Action*, 22 POP. & DEV. REV. 193 (1997) (identifying the ICPD's program of action as a new international agenda for population and development spanning the next 20 years).
164. See International Conference on Population and Development, *supra* note 160 (outlining the goals of the ICPD program of action); see also Population Reference Bureau, MEASURE Communication, *Building on Global Gains in Health, Education, and Rights: The Cairo Consensus* (2000) (reporting the recommitment to the United Nations-supported Cairo Plan of Action to make improvements worldwide in child care, health care, and women's rights by 2015); see also Kaci Bishop, Comment, *Politics Before Policy: The Bush Administration, International Family Planning, and Foreign Policy*, 29 N.C. J. INT'L. & COM. REG. 521, 523–24 (2004) (noting the General Assembly's endorsement of the ICPD's 20-year program of action).
165. See generally Marshall, *supra* note 47 (discussing the purposes of the ICPD's program goals of providing universal access to reproductive health care and primary education while reducing infant, child, and maternal mortality as well as increasing life expectancy).
166. See *id.* at 469 (quoting chapter 7.2 of the ICPD report, which defines reproductive health and health care, stating that people have the right to both).
167. See U.N. Charter art. 13, para. 1(b) (allowing the General Assembly of the United Nations to make recommendations in the fields of international economic, social, cultural, education, and health fields to assist in realizing and establishing human rights); see also International Conference on Population and Development, *supra* note 160, at ¶ II (declaring that the conference created no new international rights and that the implementation of the goals set forth there was the “sovereign right of each country” to be done in accordance with national laws and priorities); see also Shiyan Sun, *The Understanding and Interpretation of the ICCPR in the Context of China's Possible Ratification*, 6 CHINESE J. INT'L L. 17, 19 (2007) (reiterating that states have the sovereign right to interpret the international treaties that they sign).
168. See U.N. SCOR, 19th Sess. 1095th mtg. at 39–40, U.N. Doc. S/PV.1095 (Feb. 19, 1964) (opining that respect for the commitments made in international treaties is the only foundation for stable international relations and warning that disrespect leads to disastrous chaos); see also Jerry Z. Li, *The Legal Status of the Three Sino-US Joint Communiqués*, 5 CHINESE J. INT'L L. 617, 625 (2006) (stating that consent to an agreement creates rights and obligations of international cooperation); see also Stefaan Smis & Kim Van der Borgh, *The EU-U.S. Compromise on the Helms-Burton and D'Amato Acts*, 93 AM J. INT'L L. 227, 229 (1999) (finding that even soft law agreements impose moral obligations, albeit not legal ones, on the parties involved).

C. Reporting Systems

Not surprisingly, the principles and norms of international treaties are important for the protection and promotion of human rights.¹⁶⁹ But without implementation, they mean little, if anything.¹⁷⁰ To encourage states to implement these international treaties and protect their enumerated rights, a mechanism is necessary to monitor and enforce state compliance.¹⁷¹ Within the United Nations system, the major international human rights treaties and covenants require member states to regularly submit reports regarding the measures they have taken to increase their protection of human rights, the practical problems with enforcing of the measures, and the progress and achievements they have made.¹⁷² Sometimes, a state is asked to submit special reports or additional information about a specific issue or problem.¹⁷³

The International Covenant on Economic, Social and Cultural Rights requires its member states to submit an initial report within the first two years after it ratifies and begins to enforce

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169. See 48th Session of the U.N. General Assembly, G.A. Res. 48/132, U.N. Doc. A/RES/48/132 (Feb. 18, 1994) (stressing the importance of the international rule of law in protecting human rights); see also Stephen Bryer, *Key-note Address*, 97 AM. SOC'Y INT'L L. PROC. 265, 266 (2003) (identifying an increased international concern for protecting human rights and the embodiment of that concern in international treaties and other documents); see also James C. Hathaway & William S. Hicks, *Is There a Subjective Element in the Refugee Convention's Requirement of "Well-founded Fear"?*, 26 MICH. J. INT'L L. 505, 554 (2005) (noting the existence of many international treaties with the shared goal of protecting human rights).
 170. See Cynthia Price Cohen, *The United Nations Convention on the Rights of the Child: A Feminist Landmark*, 3 WM. & MARY J. WOMEN & L. 29, 57 (1997) (declaring, "A treaty is only as effective as its implementation mechanism"); see also Maria Dakolias, *Are We There Yet?: Measuring Success of Constitutional Reform*, 39 VAND. J. TRANSNAT'L L. 1117, 1128 (2006) (proclaiming the meaninglessness of international treaties that are not implemented, adhered to, and enforced); see also Elene G. Mountis, *Cultural Relativity and Universalism: Reevaluating Gender Rights in a Multicultural Context*, 15 DICK. J. INT'L L. 113, 149 (1996) (demonstrating the inconsequential nature of international agreements regarding women's rights, where domestic laws are inconsistent with the protections afforded in such agreements).
 171. See Human Rights Council, Economic Social and Cultural Rights: Implementation of Existing Human Rights Norms and Standards in the Context of the Fight Against Extreme Poverty, A/HRC/Sub.1/58/L.16 (Aug. 21, 2006) (mandating that states must report to monitoring bodies to ensure compliance with treaties); see also Chapman, *supra* note 151, at 1158 (asserting that mechanisms must be used to monitor promotion and promote the rights set forth in treaties); see also Goergen, *supra* note 139, at 417 (noting the use of monitoring mechanisms in certain international treaties to compel countries to better guarantee the rights and protections agreed to).
 172. See BAYESKY, *supra* note 79, at 153 (outlining the complaint law for the Human Rights Committee of the United Nations under CEDAW); see also Anthony P. Ewing, *Establishing State Responsibility for Private Acts of Violence Against Women Under the American Convention on Human Rights*, 26 COLUM. HUM. RTS. L. REV. 751, 782 n.127 (1995) (despairing of the fact that periodic state reports are the sole mechanism for enforcement of women's rights under the Committee on the Elimination of Discrimination Against Women); see also Molly S. Marks, Comment, *Whose Best Interests Does it Really Serve? A Critical Examination of Romania's Recent Self-serving International Adoption Policies*, 21 EMORY INT'L L. REV. 373, 403 (2007) (explaining the Convention on the Rights of the Child's enforcement mechanism, which follows the main model of implementation for all United Nations treaties).
 173. See United Nations Office of the High Commissioner of Human Rights, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Addendum: People's Republic of China, Hong Kong Special Administrative Region*, ¶ 30, UN. Doc. CCPR/C/HKSAR/99/1/Add.1 (May 23, 2000) (outlining the regulations for submitting special reports to the ombudsman for specific grievances); see also International Covenant on Civil and Political Rights, *supra* note 110 (stating that the committee may request reports from member states at any time); see also Caroline Dommen, *The United Nations Human Rights Regime: Is It Effective?*, 91 AM. SOC'Y INT'L L. PROC. 460, 478 (1997) (acknowledging the significance of special reports in making countries more responsive to addressing human rights violations).

the covenant and a periodical report every five years thereafter.¹⁷⁴ Additionally, the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Racial Discrimination require their member states to submit reports at regular intervals.¹⁷⁵ Under this system, state parties have an obligation to submit authentic and accurate reports regularly.¹⁷⁶

There are a number of problems with this type of reporting mechanism. First, member states sometimes fail to submit reports on time¹⁷⁷ or, in the case of many states, never submit their initial reports at all.¹⁷⁸ Second, even if they submit reports, the reports are often superficial and inadequate because states rarely want to report to the international community any actions they undertake that may violate human rights.¹⁷⁹ In some cases, though, NGOs submit

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174. See MANUEL GUZMAN & BERT VERSTAPPEN, WHAT IS MONITORING?, 15 (2003) (explaining that the initial and periodic reports are reviewed by committees composed of independent experts); see also GERARD QUINN ET AL., HUMAN RIGHTS AND DISABILITY—THE CURRENT USE AND FUTURE POTENTIAL OF UNITED NATIONS HUMAN RIGHTS INSTRUMENTS IN THE CONTEXT OF DISABILITY 55 (2002) (noting that after a report is discussed between the committee and the state party, the committee formulates concluding observations that offer guidance and recommendations regarding the member states' obligations under the covenant); see also Chapman, *supra* note 151, at 1158 (outlining the reporting obligations required under the covenant that are used to monitor performance and compliance).
175. See BAYESKY, *supra* note 79, at 19 (noting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also requires the submission of reports by member states); see also GUZMAN & VERSTAPPEN, *supra* note 174, at 15 (comparing reporting requirements for various United Nations committees, including the Committee on the Elimination of Racial Discrimination, which requires shorter deadlines for the reports and allows the committee to request reports); see also Connor, *supra* note 122, at 512, (detailing the reporting requirements of the International Covenant on Civil and Political Rights and emphasizing that the committee also reviews any supplemental reports it requests).
176. See Jack Donnelly, *Progress in Human Rights*, in PROGRESS IN POSTWAR INTERNATIONAL RELATIONS 312, 320 (1991) (reiterating that despite reporting requirements, participation in international covenants is voluntary); see also CHISANGA PUTA-CHEKWE & NORA FLOOD, FROM DIVISION TO INTEGRATION: ECONOMIC, SOCIAL, AND CULTURAL RIGHTS AS BASIC HUMAN RIGHTS, in GIVING MEANING TO ECONOMIC SOCIAL AND CULTURAL RIGHTS 39, 41 (Isfahan Merali & Valerie Oosterveld eds., 2001) (indicating periodical reports should contain information relating to the progress of adopted measures and identify any difficulties in implementing the measures); see also Dana D. Fischer, Note and Comment, *Reporting Under the Covenant on Civil and Political Rights: The First Five Years of the Human Rights Committee*, 76 AM. J. INT'L L. 142, 145 (1982) (noting that although reporting requirements have been criticized, states have taken the requirements seriously and have been cooperative).
177. See BAYESKY, *supra* note 79 at 131 (noting the fact that many member states have not complied with the reporting requirements of the covenant).
178. See U.N. Comm. on Econ. & Soc. Rights, Council, Concluding Observations—Dominican Republic, ¶ 3–4, U.N. Doc. E/C.12/1/Add.16 (Dec. 12, 1997) (suggesting another basis for problems with the reporting mechanism is the failure of member states to follow the committee's reporting guidelines); see also BAYESKY, *supra* note 79, at 131 (outlining the practical difficulties of monitoring initial and periodic reports); see also JOAN FITZPATRICK, HUMAN RIGHTS IN CRISIS—THE INTERNATIONAL SYSTEM OF PROTECTING RIGHTS DURING STATES OF EMERGENCY 133, n.75 (1994) (classifying Equatorial Guinea and Gabon as "the worst offenders in terms of overdue reports").
179. See *Arudou v. Earth Cure: Judgment of November 11, 2002 Sapporo District Court*, 9 ASIAN-PAC L. & POL'Y J. 297, 300–301 (Timothy Webster trans., 2008) (revealing that admitting a single act in a report can result in multiple violations under various international covenants); see also Chapman, *supra* note 151, at 1158–59 (1995) (outlining requirements for successful monitoring and suggesting none of the requirements regarding physical and mental health are currently met); see also Sana Loue, *Immigrant Access to Health Care and Public Health: An International Perspective*, 17 ANNALS HEALTH L. 213, 255 (2008) (recognizing that some nations, in an attempt to limit damage to their economies, may not report outbreaks of diseases).

reports concerning a state party's human rights situation that tend to be more accurate.¹⁸⁰ Third, the monitoring system is flawed because of a lack of financial support and staff.¹⁸¹

The reports that China submitted to the treaty monitoring bodies,¹⁸² not surprisingly, focus entirely on the positive measures the government has adopted and the achievements they have made.¹⁸³ As for any potential human rights violations, the reports rarely expose any or they are mentioned in passing.¹⁸⁴ If mentioned, the report states merely that "we are still in the

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180. See CLAUDE E. WELCH, JR., PROTECTING HUMAN RIGHTS IN AFRICA—STRATEGIES AND ROLES OF NON-GOVERNMENTAL ORGANIZATIONS 212 (1995) (acknowledging the important role NGOs play in publicizing violations and problems but pointing out that private organizations also have their own motives and views); see also Olanrewaju A. Fagbohun, *The Regulation of Transboundary Shipments of Hazardous Waste: A Case Study of the Dumping of Toxic Waste in Abidjan, Cote d'Ivoire*, 37 HONG KONG L. J. 831, 856 (2007) (noting the Convention for the Protection of the Marine Environment of the North-East Atlantic allows NGOs to participate in meetings and to submit reports); see also Deutsches Institut für Menschenrechte, *The ABC of Human Rights for Development Cooperation* 4 (2006), <http://files.institut-fuer-menschenrechte.de/576/ABC_eng.pdf> (noting that NGOs often submit alternative reports).
 181. See MARY DOWELL-JONES, CONTEXTUALISING THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: ASSESSING THE ECONOMIC DEFICIT 155 (2004) (revealing that additional defects in the monitoring system include a backlog of reports to be reviewed, and the delay associated with producing and translating summary records); see also Chapman, *supra* note 151, at 1160 (attributing the lack of "progressive realization of specific rights in many countries" to the inadequacy of resources); see also Uta Oberdorster, *Why Ratify? Lessons from Treaty Ratification Campaigns*, 61 VAND. L. REV. 681, 688 (2008) (reiterating that the cost of ratifying international treaties is low in comparison to the potential benefits).
 182. See Deutsches Institut für Menschenrechte, *supra* note 180, at 5 (listing China as submitting a report in accordance with the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment, in November 2008).
 183. See U.N. Comm. on Econ., Soc. & Cultural Rights, *supra* note 178, at ¶ 38 (indicating that China had failed to submit sufficient information for the committee to review); see also U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention—China, ¶¶ 6-7, U.N. Doc. CAT/C/CHN/4 (June 27, 2007) (referring vaguely to recent amendments and new laws implemented in an effort to prevent torture and inhuman treatment but failing to indicate any adverse affect or possible difficulties associated with the new legislation). Cf. U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention—Kazakhstan, ¶ 12, U.N. Doc. CAT/C/KAZ/2, (Jan. 17, 2008) (outlining specific amendments and additions to legislative acts in detail).
 184. See KEVIN BOYLE, STOCK-TAKING ON HUMAN RIGHTS: THE WORLD CONFERENCE ON HUMAN RIGHTS, VIENNA 1993, IN POLITICS AND HUMAN RIGHTS 79, 92 (David Beetham ed., 1995) (violations of human rights have traditionally been attributed to acts of the state parties); see also HILARY CHARLESWORTH, HUMAN RIGHTS AS MEN'S RIGHTS, IN WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 108, 109 (Julie Peters & Andrea Wolper eds., 1995) (recognizing a conflict in defining what acts constitute human rights violations because the United Nations Declaration on the Elimination of Violence Against Women does not characterize such violence as a violation of human rights); see also Carolyn Evan, *Time for a Treaty? The Legal Sufficiency of the Declaration on the Elimination of All Forms of Intolerance and Discrimination* 2007 BYU L. REV. 617, 623 (2007) (reiterating the committee's authority to inquire into possible human rights violations).

process of making improvements.”¹⁸⁵ In essence, these reports have no practical use.¹⁸⁶ Even if the representatives were asked about a specific human rights abuse in a hearing, they would likely experience “embarrassment” rather than any tangible punishment or effect.¹⁸⁷

Regardless of the defects of the monitoring and reporting mechanism, the state members have the legal obligation to report their progress and achievements regularly and accurately.¹⁸⁸ Only if the achievements, violations, and problems are reported can the international community assist their fellow state parties in furthering the protection and promotion of international human rights within various regions of the world.¹⁸⁹

185. See State Reports—China, The United Nations Human Rights Treaties, <<http://www.bayefsky.com/docs.php/area/reports/state/36>> (containing a collection of reports submitted by China to the treaty bodies of the United Nations).

186. See U.N. Human Rights Comm., Concluding—Algeria, ¶ 2, U.N. Doc. CCPR/C/79/Add.1 (Apr. 9, 1992) (finding Algeria's initial report submitted in accordance with the International Covenant on Civil and Political Rights failed to include vital information); see also EDWARD LAWSON, *ENCYCLOPEDIA OF HUMAN RIGHTS* 51 (2d ed., 1996) (addressing the failure of Algeria to provide minority population statistics and to report on the status of the convention in the courts); see also CONNIE PECK, *SUSTAINABLE PEACE—THE ROLE OF THE UN AND REGIONAL ORGANIZATIONS IN PREVENTING CONFLICT* 89 (1998) (noting that the reporting requirements have been considered a “diplomatic chore”).

187. See Deidre N. Greig, *NEITHER BAD NOR MAD—THE COMPETING DISCOURSES OF PSYCHIATRY, LAW AND POLITICS* 161 (2002) (commenting on the potential international embarrassment Australia could encounter from the Garry David case); see also David Weissbrodt & Kell Schoff, Article, *Human Rights Approach to Intellectual Property Protection: The Genesis and Application of Subcommission Resolution 2000/7*, 5 MINN. INTELL. PROP. REV. 1, 13 (2003) (explaining the use of embarrassment to promote human rights objectives rather than sanctions); see also Michael Gunlicks, Note, *Citizenship as a Weapon in Controlling the Flow of Undocumented Aliens: Evaluation of Proposed Denials of Citizenship to Children of Undocumented Aliens born in the United States*, 63 GEO. WASH. L. REV. 551, 582–83 (1995) (noting that although an adverse finding against the United States may cause embarrassment, it would be unlikely to benefit “children of undocumented aliens”).

188. See U.N. Econ. & Soc. Council, *Implementation of the International Covenant on Economic, Social and Cultural Rights—Second Periodic Report of Brazil*, ¶ 226 (Jan. 28th, 2008) (emphasizing that Brazil's progress regarding child labor issues received recognition by the International Labor Organization Global Report); see also U.N. Econ. & Soc. Council, *Implementation of the International Covenant on Economic, Social, and Cultural Rights—Second and Third Periodic Reports of Paraguay*, ¶ 104, U.N. Doc. E/C.12/PRY/3 (Feb. 26, 2007) (realizing that although some progress has been made in prison facilities, the situation is still serious); see also U.N. Human Rights Comm., *Consideration of the Second Periodic Report of the former Yugoslav Republic of Macedonia*, ¶ 48 (Feb. 12th, 2007) (reporting on priority objectives and enumerating achievements such as the recent enactment of the Law on Asylum and Temporary Protection).

189. See *Chan v. Canada*, 35 I.L.M. 1, 29 (Can. 1996) (concluding that there is a need for national reporting because the methods of enforcing the one-child policy are local and vary from region to region, thus making it hard to determine violations and provide assistance); see also Leila Choukroune, *Justiciability of Economic, Social, and Cultural Rights: The UN Committee on Economic, Social and Cultural Rights' Review of China's First Periodic Report on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 19 COLUM. J. ASIAN L., 30, 41 (2005) (noting that the Committee on Economic, Social and Cultural Rights, although recognizing the vastness and large population of China, indicated that there was no reason why China could not implement changes suggested by it). See generally SHA Zukang, Statement by H.E. Ambassador SHA Zukang, on Behalf of the Like Minded Group, at the 60th Session of the Commission on Human Rights on Agenda Item 7: Right to Development (Mar. 23, 2004) available at <<http://www.china-un.ch/eng/rqrd/rqda/rq2004/t85168.htm>> (declaring that the international community should cooperate and work together to assist developing nations in accomplishing their obligations because these countries are at different points of growth).

The only reason for enforcing the one-child policy in China is to control the rapidly growing population.¹⁹⁰ Nevertheless, the Chinese government has the legal obligation to report the various methods of enforcement of the one-child policy utilized throughout the country, without concealing the actions which may violate human rights.¹⁹¹ Only then can the international community assist China in finding a less violative way to deal with the matter of population control. By reporting regularly and accurately, China will fulfill its duty under the treaties as well as receive more international assistance, technically, financially, and diplomatically.¹⁹²

D. Summary

Women's rights, especially reproductive rights, are recognized as deserving of protection in international human rights laws, treaties, and other consensus instruments.¹⁹³ These rights rest

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190. See Keng, *supra* note 9, at 206–7 (establishing that in September 1980, China implemented the one-child policy in order to decrease China's population); see also Marian Kennady, Note, *Gender-Related Persecution and the Adjudication of Asylum Claims: Is a Sixth Category Needed?*, 12 FLA. J. INT'L L. 317, 337 (1998) (citing the Board of Immigrant Appeals, which said that the one-child policy was used for population control for purely economic reasons and was not motivated by "malevolence"); see also Editorial, *Abusive One-child Policy Tactics Are Unacceptable*, SOUTH CHINA MORNING POST, May 24, 2007 at 10 (acknowledging that the one-child policy has served as a population control in China).
 191. See Michael J. Dennis & David P. Steward, *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM. J. INT'L L. 462, 463, 492 (2004) (arguing that the violations of any economic, social and cultural rights have to be "justiciable" and stating that there has to be a distinct possibility for legal action with remedies awarded for non-compliance); see also Diane Uchimiya, *A Blackstone's Ratio of Asylum: Fighting Fraud While Preserving Procedural Due Care Process for Asylum Seekers*, 20 PENN. ST. INT'L L. REV. 383, 407 (2007) (alleging that the 1998 China Profile both reports and discredits any presented information on coercive population control, openly admitting that there is a possibility of "force being used" while denying any claim by people that they had to sign a contract with the town); see also Gabriela Marquez, Comment, *Transnational Adoption: The Creation and Ill Effects of an International Black Market Baby Trade*, 21 J. JUV. L. 25, 29–30 (2000) (describing systematic elimination of thousands of Chinese orphans, most of whom were "healthy Chinese infants girls" through deliberate starvation, torture, and staff abuse as a means to promote reports of abuse under the one-child policy).
 192. See International Convention on Civil and Political Rights, *supra* note 110, at 49 (proclaiming that states have to undertake steps to accomplish measures under the covenant by working individually and through international cooperation and economic and technical assistance); see also Dennis & Steward, *supra* note 191, at 499 (establishing that the Committee on Economic, Social, and Cultural Rights emphasized that states in the position to assist developing countries should do so in order for treaty obligations to be fulfilled); see also Royal C. Gardner, *Taking the Principle of Just Compensation Abroad: Private Property Rights, National Sovereignty, and the Cost of Environmental Protection*, 65 U. CIN. L. REV. 539, 581–82 (1997) (discussing how, in the past, developed nations have provided monetary assistance to developing countries, which complied with their treaty obligations).
 193. See Convention on the Rights of the Child, art. 6, Dec. 12, 1989, U.N. Doc. A/RES/44/25, available at <<http://www.cirp.org/library/ethics/UN-convention/>> (recognizing that every child "has an inherent right to life" and that states should do everything in their power to make sure each child survives and develops); see also United Nations Population Fund (UNFPA), State of the World Population 2001, *Global Agreements on Human Rights, Environment and Development, Reproductive Health and Gender Equality: Human Rights Treaties, app. (2001)* (referring to the CEDAW as pertaining to women's reproductive rights, which includes the right to education on family planning and equality in marriage); see also Adell, *supra* note 49, at 792–93 (stressing that China's one-child policy and the coercive methods of its enforcement violate the Universal Declaration of Human Rights, which states that people have the right to a family that is protected "by society and the State"); see also Bishop, *supra* note 164, at 564 (observing that reproductive rights are recognized as part of human rights in international treaties and covenants). See generally Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, available at <<http://www.unicef.org/crc/convention.htm>>.

on “the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health.”¹⁹⁴

One of the major purposes of the international human rights treaties is the elimination of all types of violations against women and the protection of women's rights.¹⁹⁵ In particular, the program of action, which was set up by the ICPD, urges all countries to ensure women have the ability to control their own fertility.¹⁹⁶ This reproductive “self-determination” is “the cornerstone of population and development-related programs.”¹⁹⁷

Furthermore, these treaties, conventions, declarations, and covenants, all of which China has ratified, are either morally or legally binding on China.¹⁹⁸ In accordance with the Vienna Convention on the Law of Treaties, if a treaty expressly declares its binding nature, China, as a state party, has the legal obligation to comply with it.¹⁹⁹ Even for an agreement that has no expressly binding legal effect that state parties have declared their intent to be, at the very least,

194. See Bishop, *supra* note 164, at 564 (emphasizing that, as per human rights documents, couples have the right to make their decisions about family planning without the presence of “discrimination, coercion and violence”).

195. See Carlota Bustelo, *Reproductive Health and CEDAW*, 44 AM. U. L. REV. 1145, 1146 (1995) (stating that the state parties who signed CEDAW have committed themselves to promoting the rights of women in various areas, including politically, socially, economically and culturally); see also Malvina Halberstram, *United States Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women*, 31 GEO. WASH. J. INT'L L. & ECON. 49, 49 n4 (1997) (enumerating the various conventions that have occurred dealing with women's rights in specific areas over the past century); see also Margaret Plattner, *The Status of Women Under International Human Rights Law and the 1995 UN World Conference on Women, Beijing, China*, 84 KY. L. J. 1249, 1251 (1995) (maintaining that human rights include women's rights; and by signing and ratifying the human rights agreements, the world leaders are strengthening their commitment and obligation to protect women's rights).

196. See Bishop, *supra* note 164, at 523–24 (citing Report of the International Conference on Population and Development, Oct. 18, 1994, U.N. Doc. A/CONF.171/13) (illustrating how the program of action developed during the ICPD in Cairo, Egypt, addressed the need of gender equality, women's control over their own fertility, and the eradication of violence against women).

197. See *id.* (analyzing Principle 4 of the program of action, which says that women's ability to be free from violence and being able to control their own fertility are the “cornerstones of population and development-related” programs).

198. See Ernest S. Easterly III, *The Rule of Law and the World Order*, 22 S.U. L. REV. 161, 179 (1998) (opining that even where treaties do not have a force in court, they are still binding under the international legal system); see also Uche Ewelukwa Ofodile, *Trade, Empires, and Subjects—China-Africa Trade: A New Fair Trade Arrangement or the Third Scramble for Africa?*, 41 VAND. J. TRANSNAT'L L. 505, 532 (2008) (rationalizing that China's African policy is not a treaty, which is the reason why it is not recognized as legally binding); see also Saona, *supra* note 10, at 240 (remarking that when a state signs a treaty, it is obligated to uphold the “treaty's object and purpose”; and by ratifying a treaty, the state is legally bound by it).

199. See Vienna Convention on the Law of Treaties, *supra* note 84 (declaring states that have signed a treaty have to refrain from any acts that would “defeat the object and purpose of a treaty”); see also Michael J. Struett, *International Law Symposium: The Transformation of State Sovereignty Rights and Responsibilities Under the Rome Statute for the International Criminal Court*, 8 CHAP. L. REV. 179, 195 (2005) (implying that although states cannot be forced, without their consent, to be bound by international law obligations, they can and will be bound if they do consent).

morally bound, China, as one of the state parties, should respect the purpose of the treaty.²⁰⁰ In summary, China should comply with the binding instruments, stated above, that “confer legal obligations upon States Parties”²⁰¹ and uphold the rights protected by the consensus agreements.

The initial purpose of China’s one-child policy was to control the population by means of “encouragement” and “voluntary” instead of coercive measures.²⁰² The family-planning policy, as a governmental policy and subsequently as a statute, contains no express human rights violations.²⁰³ But there is a difference between the laws as they appear in statutes and the laws as they are enforced throughout the country.²⁰⁴ In fact, human rights violations do exist in the

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200. See Choukroune, *supra* note 189, at 41 (noting that although some findings, like those of the Committee on Economic, Social and Cultural Rights, may not be binding, states may have the responsibility of implementing the international obligations in good faith); see also John Head, *A Fulbright Lecturer’s Experience Teaching International Law in China*, NEWSLETTER, (American Society of International Law) Sep.-Oct. 1994, at 8 (commenting that even though China may not be a party to the main international human rights treaties, it is still bound under customary international law to observe the treaty standards); see also Eleanor D. Kinney, *The International Human Rights to Health: What Does This Mean for Our Nation and World?*, 34 IND. L. REV. 1457, 1464 (2001) (arguing that a treaty may be binding even without ratification if it has wide acceptance internationally as customary international law).
 201. See United Nations Educational, Scientific and Cultural Organization (UNESCO), More About the Nature and Status of the Legal Instruments and Programmes, <http://portal.unesco.org/shs/en/ev.php-URL_ID=7092&URL_DO=DO_TOPIC&URL_SECTION=201.html> (last visited Mar. 14, 2007) (informing that there are various binding instruments made up of treaties that confer legal obligation, while non-binding documents such as declarations and recommendations provide guidelines and principles that are morally binding); see also Caroline Dommen, *Claiming Environmental Rights: Some Possibilities Offered by the United Nations’ Human Rights Mechanisms*, 11 GEO. INT’L ENVTL. L. REV. 1, 6 (1998) (asserting that the first legally binding treaties, the International Covenant on the Elimination of All Forms of Racial Discrimination, the International Convention on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights (ICCPR), gave legal effect to the right already delineated in the Universal Declaration on Human Rights and prescribed measures states must take to give effect to these rights).
 202. See Megan C. Dempsey, Note, *A Misplaced Bright-Line Rule: Coercive Population Control in China and Asylum for Unmarried Partners*, 92 IOWA L. REV. 213, 218–19 (2006) (explaining that the Chinese government encourages couples to have only one child by means of incentives like paying for the child’s education and medical care, longer maternity leave for the mother, larger living space, and cash subsidies); see also Hampton, *supra* note 6, at 350–51 (indicating that China should focus on providing disincentives, such as payment of a “social compensation fee,” to impart on couples that break the law the “collective cost” paid by Chinese society for having additional children).
 203. See Thomas L. Hunker, Note, *Generational Genocide: Coercive Population Control as a Basis for Asylum in the United States*, 15 J. TRANSNAT’L L. & POL’Y 131, 134 (2005) (remarking that the population and family-planning law states that couples can have only one child and allows enforcers to issue fines to those who break the law); see also Cleo J. Kung, Comment, *Supporting the Snakeheads: Human Smuggling from China and the 1996 Amendment to the U.S. Statutory Definition of “Refugee,”* 90 J. CRIM. & CRIMINOLOGY 1271, 1305 (2000) (assessing China’s family-planning policy and indicating that through this policy the Chinese government hopes to ensure the “collective welfare” of its people).
 204. See JOHN S. AIRD, *SLAUGHTER OF THE INNOCENTS: COERCIVE BIRTH CONTROL IN CHINA* 38 (1990) (describing the different methods of policy enforcement used by the various Chinese provinces, which emphasizes “remedial measures” such as mandatory abortions for unauthorized pregnancies); see also TED C. FISHMAN, *CHINA, INC.: HOW THE RISE OF THE NEXT SUPER POWER CHALLENGES AMERICA AND THE WORLD* 102 (2005) (illustrating the effects of China’s policy in practice, where physicians perform ultrasound procedures to determine if the child is a girl and aborting it, as well as female newborns found abandoned in dumpsters); see also Nortwick, *supra* note 12, at 2160–2161 (explaining the tools used in the enforcement of the one-child policy range from economic incentives to social pressure “convincing” women to terminate out-of-plan pregnancies).

enforcement of the one-child policy.²⁰⁵ Under these circumstances, exploring the boundaries of the written policy is necessary to find the real reasons that human rights violations occur in its enforcement.²⁰⁶

IV. Domestic Statutes

A. Constitution of the People's Republic of China²⁰⁷

Article 25 of the Constitution of the People's Republic of China states that "the entire country should promote family planning, and make it a duty of all couples to practice birth control."²⁰⁸ Article 48 protects women's rights as a principle, stating,

Women in the People's Republic of China enjoy equal rights with men in all spheres of life, in political, economic, cultural, social and family life.²⁰⁹ The state protects the rights and interests of women, applies the principle of equal pay for equal work to men and women alike and trains and selects cadres from among women.²¹⁰

Article 49 of the Constitution of the People's Republic of China stresses that

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205. See Sharon K. Hom, *China: First the Problem of Rights and Law*, in *WOMEN'S RIGHTS: GLOBAL VIEW* 29, 35 (Lynn Walter ed., 2000) (illustrating the effects of China's one-child policy in female infanticide and the social devaluation of women); see also ARLENE F. SALLES, *BIOETHICS, DIFFERENCES, AND RIGHTS*, in *LINKING VISIONS: FEMINIST BIOETHICS, HUMAN RIGHTS AND THE DEVELOPING WORLD* 57, 80 (Rosemarie Tong, Anne Donchin, & Susan Dodds eds., 2000) (explaining that the different methods of birth control are reasonable, but the deprivation of the right to choose violates a woman's right to "privacy and bodily integrity"). See generally Cecilia Milwertz, *Control as Care: Interaction Between Urban Women and Birth Planning Workers*, in 92, 92–93 *RECONSTRUCTING TWENTIETH-CENTURY CHINA: STATE CONTROL, CIVIL SOCIETY, AND NATIONAL IDENTITY* (Kjeld Erik Brodsgaard & David Strand eds., 1998) (noting that China's one-child policy is in direct violation of the international human rights conventions, specifically the right of an individual to determine the size of his or her family).
206. See BETSY HARTMAN, *REPRODUCTIVE RIGHTS AND WRONGS: THE GLOBAL POLITICS OF POPULATION CONTROL*, 163–64 (1999) (illustrating the Chinese government's use of the "responsibility system," which held local officials directly responsible for meeting the population targets, and how it led to a crackdown on all policy resisters that included physical beatings and forced sterilizations in the 1990s); see also Gu Baochang et al., *China's Local and National Fertility Policies at the End of the Twentieth Century*, in *POPULATION AND DEV. REV.* vol. 33 No. 1, 129, 131–32 (March 2007) (emphasizing that localized legislation leads to variances of the one-child policy and to disparate treatment in population control); see also Milwertz, *supra* note 205, at 97–98 (explaining the use of the national quota system that allows each province a set amount of legal annual births).
207. See Xian Fa [Constitution] (PRC) (2004) (listing the 2004 amendments of the Constitution adopted in 1954); see also DEBORAH CAO, *CHINESE LAW: A LANGUAGE PERSPECTIVE—SHUO FA* 248 (2004) (commenting that the Constitution outlines the duties of both the state and the people, which is reflective of the values and philosophy of the controlling executive government); see also Andrew J. Nathan, *Sources of Chinese Right Thinking*, in *HUMAN RIGHTS IN CONTEMPORARY CHINA* 125, 127 (explaining that the Chinese Constitution was shaped by two "ancient schools": Confucianism and legalism).
208. See Xian Fa [Constitution] art. 25 (PRC) (2004) (proclaiming that "the state promotes family planning so that population growth may correspond with plans for economic and social development").
209. See *id.* at art. 48 (quoting the text of the Chinese Constitution).
210. See *id.* at art. 48 (quoting the text of the Chinese Constitution and discussing equal pay for both sexes).

Marriage, the family and mother and child are protected by the state.²¹¹ Both husband and wife have the duty to practice family planning.²¹² Parents have the duty to rear and educate their children who are minors, and children who have come of age have the duty to support and assist their parents.²¹³ Violation of the freedom of marriage is prohibited.²¹⁴ Maltreatment of old people, women and children is prohibited.²¹⁵

China's Constitution establishes the fundamental rules and principles that are essential to the "orderly functioning of society."²¹⁶ It also establishes "the structure, procedures, powers and

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211. See *id.* at art. 49 (quoting the text of the Chinese Constitution); see also Law on the Protection of Rights and Interests of Women (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2005, effective Dec. 1, 2005) 2005 China Law LEXIS 10212 (PRC) (codifying the protected rights of women in marriage and in Chapter 7 expanding their rights in divorces); see also DR. BAO ER, CHINA'S NEO-TRADITIONAL RIGHTS OF THE CHILD 89 (2007) (asserting that article 49 creates public law rights that reflect the "traditional cultural agreements between parent and child" and the state's attempt to enforce that tradition).
 212. See Xian Fa [Constitution] art. 49 (PRC) (2004) (quoting the text of the Chinese Constitution); see also Hungdah Chiu, *The 1982 Chinese Constitution and the Rule of Law, in Law, in THE PEOPLE'S REPUBLIC OF CHINA: COMMENTARY, READINGS, AND MATERIALS* 50, 56 (Ralph Huaghwout Folsom & John H. Minan eds., 1989) (noting that article 49, paragraph 2, textually provides a duty to practice family planning; but the state council, in executing this article, conducted a campaign that involved forced abortion, severe sanctions, and expulsion from work for violators); see also NIE JING-BAO, BEHIND THE SILENCE: CHINESE VOICES ON ABORTION 48 (2005) (commenting that it has long been recognized that citizens have a legal duty to practice family planning in order to support the state's economic and social development).
 213. See Xian Fa [Constitution] art. 49 (PRC) (2004) (quoting article 49 of the Chinese Constitution); see also Bao, *supra* note 211, at 59–60 (comparing a child's right as an entitled human right to a "Chinese child-right" as a conditional entitlement earned by the fulfillment of obligations); see also Michael Palmer, *The Re-emergence of Family Law in Post-Mao China: Marriage, Divorce and Reproduction, in CHINA'S LEGAL REFORMS* 110, 116 (Stanley B. Lubman ed., 1996) (discussing the "mutuality of rights and obligations" that dictates family law in modern China and further notes that it is a criminal offense for an adult child to refuse to support his or her parent by virtue of Criminal law 1979 at article 183); see also Xia Yinian, *The Legal System of Guardianship over Minors in the People's Republic of China*, 39 FAM. L. Q. 477, 479–80 (2005) (clarifying that the legal obligation of parents to a child continues until the age of 18, and that their obligations to support their children extend to those born out of wedlock and those with mental or physical handicaps but not adult children who are receiving a college or university education).
 214. See JIANFU CHEN, CHINESE LAW: TOWARD AN UNDERSTANDING OF CHINESE LAW, ITS NATURE AND DEVELOPMENT 265–66 (1999) (explaining that freedom of marriage is not absolute but comparative and has two aspects: it should be free from interference from other parties and free from considerations other than affection); see also Olga Pochagina, *The New Version of the PRC Marriage Law (2001)*, in WOMEN AND GENDER IN CHINESE STUDIES 74, 74 (Nicola Spakowski & Cecilia Milwertz eds., 2006) (emphasizing that China's reason behind legally protecting marriage is based on the belief that "marriage is the key to ensuring social stability and progress"); see also Xioaqing Feng, *A Review of the Development of Marriage Law in the People's Republic of China*, 79 U. DET. MERCY L. REV. 331, 331–32 (2002) (commenting that modern marriage is viewed from the Marxist perspective as union between a man and a woman in a definite social system).
 215. See Xian Fa [Constitution] art. 49 (PRC) (2004) (quoting the text of the Chinese Constitution).
 216. See *id.* at pmble (outlining the fundamental purpose in creating the Chinese Constitution and the rules for promulgating the goal of the "People's Republic"); see also Ambe, *supra* note 87, at 109 (commenting that if the "rule of law" is not present within a country, there is no guarantee that international norms will be upheld); see also LOUIS HENKIN, THE HUMAN RIGHTS IDEA IN CONTEMPORARY CHINA: A COMPARATIVE PERSPECTIVE, in HUMAN RIGHTS IN CONTEMPORARY CHINA 7, 27 (Columbia Univ. Press 1986) (comparing the methods of constitutional interpretation between the United States, where the courts make the final decision, and China, where the political leaders make the final decision).

duties²¹⁷ of the Chinese government and guarantees certain rights to the Chinese people.²¹⁸ China's Constitution is designated as the supreme law.²¹⁹ Article 5 of the constitution states:

The state upholds the uniformity and dignity of the socialist legal system. No laws or administrative or local rules and regulations may contravene the Constitution. All state organs, the armed forces, all political parties and public organizations and all enterprises and institutions must abide by the Constitution and the law. All acts in violation of the Constitution or the law must be investigated. No organization or individual is privileged to be beyond the Constitution or the law.²²⁰

Since the Constitution is the supreme law, no activity or legislation can be undertaken that is contrary to it.²²¹ Therefore, women's rights that have been listed specifically in the Constitution must be respected nationwide. However, because the Constitution does not include legal remedies for violations of its edicts, this may lead to abuses of these specifically enumerated protections.²²² First, there are no express provisions regarding punishment or judicial rem-

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217. See Xian Fa [Constitution] art. 30 (PRC) (2004) (detailing the administrative division of the governmental bureaucracy and allotting power to the provincial governments but making them subordinate to the central government); see also Hungdah, *supra* note 212, at 57 (asserting that the Constitution is the supreme law of the land but allows the state council to exercise the power to enact administrative rules and issue decisions in accordance with the Constitution); see also Henkin, *supra* note 216, at 27–28 (explaining that there are no limitations to China's constitutional powers and that an individual's rights are always subordinate to that of the state).
218. See Xian Fa [Constitution] art. 41 (PRC) (2004) (enumerating the fundamental rights vested in the Chinese people and allowing remuneration for a violation of their civil rights). See generally House of Commons Foreign Affairs Committee, East Asia Report, Seventh Report of Session 2005–2006 159, 159 (Stationery Office, 2006) (stating that the Chinese government has attempted to respect and protect the people's general freedoms, but China has developed its own socialist interpretation of protecting human rights).
219. See Xian Fa [Constitution] pmble (PRC) (2004) (stating that the Constitution has supreme legal authority in the PRC); see also Marc Rosenberg, *The Chinese Legal System Made Easy: A Survey of the Structure of Government, Creation of Legislation, and the Judicial System Under the Constitution and Major Statutes of the People's Republic of China*, 9 U. MIAMI INT'L & COMP. L. REV. 225, 226 (2001) (citing the preamble in describing the power of the Constitution of the People's Republic of China); see also Siu K. Lee, *Much Ado About Something*, H.K. LAWYER, July 1999, at 26 (expressing that the Constitution of the People's Republic of China has unrestricted application because it is the supreme law of the land).
220. See Xian Fa [Constitution] art. 5 (PRC) (2004) (detailing the principles that govern the supremacy of the Chinese Constitution).
221. See *id.* (declaring that no laws, organizations, or institutions may contradict the Constitution); see also Cao Jingchun, *Privacy Special Issue: Protecting the Right to Privacy in China*, 36 *Victoria Univ. WELLINGTON L. REV.* 645, 661 (2005) (positing that because the Constitution is supreme over other domestic laws, inclusion of a constitutional right to privacy is significant); see also China's Efforts and Achievements in Promoting the Rule of Law, XINHUA GEN. NEWS SERV., Feb. 28, 2008, at Domestic News, Political (listing that no regulations, whether administrative, local, autonomous, or separate may oppose the Constitution).
222. See H. Ray Liaw, *Women's Land Rights in Rural China: Transforming Existing Laws into a Source of Property Rights*, 17 *PAC. RIM L. & POL'Y J.* 237, 244 (2008) (proclaiming that even though women's rights are recognized in the Chinese Constitution, there are no provisions that allow women to have a cause of action to enforce their land rights); see also Randall Peerenboom, *Assessing Human Rights in China: Why the Double Standard?*, 38 *CORNELL INT'L L.J.* 71, 134 (2005) (commenting that the CEDAW committee found that the current Chinese Constitution does not afford sufficient legal remedies for violations); see also Xin Ren, *Legal Protection of Women's Rights in China*, The Sinology Conference at California State University, Sacramento (Feb. 17, 2005) (asserting that although women's rights are protected by law, there are neither enforcement tools nor judicial procedures to seek redress).

edies for the violations of the Constitution.²²³ The Constitution of the People's Republic of China, in essence, is only a general guideline under which specific, more substantive, and procedural laws should be promulgated.²²⁴ Second, there are no procedural processes in place for citizens to claim their rights based on the Constitution.²²⁵ Even if their rights under the Constitution are infringed upon, they have recourse only under other specific substantive and procedural statutes.²²⁶ If the right is upheld only by the Constitution, with no specific enumerated provisions in other statutes, it would be difficult to establish a remedy for a violation of such a right in court. In confronting the challenges²²⁷ and pressures coming from the public and legal community, the National People's Congress has acknowledged the potential for judicial review

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223. See Chen, *supra* note 214, at 93 (explaining that the Chinese Constitution makes no mention of any citizen rights to redress constitutional violations); see also RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 545 (2002) (noting that the Chinese Constitution does not provide any framework that would allow redress of rights violations). See generally Jianlin Bian, *The Application of Criminal Procedural Principles in Discipline Procedure in China*, 74 INT'L REV. PENAL L. 839, 845–46 (2003) (explaining that there is very little influence on disciplinary powers from the Chinese Constitution).
224. See Hal Blanchard, *Constitutional Revisionism in the PRC: "Seeking Truth from Facts,"* 17 FLA. J. INT'L L. 365, 374 (2005) (suggesting that the because the Chinese Constitution fails to have express substantive and procedural laws, the ruling party enjoys high flexibility in interpretation); see also Stanley Lubman, *Bird in a Cage: Chinese Law Reform After Twenty Years*, 20 NW. J. INT'L L. & BUS. 383, 399 (2000) (opining that the Chinese Constitution is based on general guiding principles and ideologies). See generally Ann D. Jordan, *Lost in Translation: Two Legal Cultures, the Common Law Judiciary and the Basic Law of the Hong Kong Special Administrative Region*, 30 CORNELL INT'L L.J. 335, 338 (1997) (remarking that China's legal culture and foundation are different from the Western sense of law because they are based on etiquette and used as a general forum for behavior correction).
225. See MERLE GOLDMAN, CHANGING MEANINGS OF CITIZENSHIP IN MODERN CHINA 301 (2002) (reporting that China does not have an apparatus that citizens can use to claim their constitutional rights); see also Blanchard, *supra* note 224, at 395 (emphasizing that in practice, Chinese citizens who dare to exercise constitutional rights are frequently punished by being jailed or censured). But cf. Howard W. French, *Despite Flaws, Rights in China Have Expanded*, N.Y. TIMES, Aug. 2, 2008, at A2 (indicating that recently, China has seen a dramatic increase in lawyers, and ordinary citizens have taken advantage of this to try to enforce constitutional rights).
226. See Leontine D. Chuang, Note, *Investing in China's Telecommunications Market: Reflections on the Rule of Law and Foreign Investment in China*, 20 NW. J. INT'L L. & BUS. 509, 524 (2000) (affirming that the Chinese Constitution is defined by laws and legislations that come from many sources other than the Constitution itself). See generally Peter Howard Corne, *Lateral Movements: Legal Flexibility and Foreign Investment Regulation in China*, 27 CASE W. RES. J. INT'L L. 247, 248 (1995) (expressing that the broad and flexible law invariably means that laws are interpreted and reinterpreted on a case-by-case basis); see generally Kevin T.S. Kong, Note, *Prospects for Asset Securitization Within China's Legal Framework: The Two-Tiered Model*, 32 CORNELL INT'L L.J. 237, 251 (1998) (proclaiming that the central government legislation consists of broad principles, while local regulations by specialized agencies really provide specific laws).
227. See Ray Cheung, *Shaanxi Teacher Fights for Justice*, S. CHINA MORNING POST, Oct. 5 2003, at 5 (proclaiming that a former schoolteacher challenged his conviction of "disturbing social order" after being jailed for helping farmers fight illegally imposed fees); see also Jim Yardley, *Chinese Lawyer Says He Was Detained and Warned on Activism*, N.Y. TIMES, Mar. 9, 2008, at A0 (stating that a Chinese human rights lawyer was abruptly detained and questioned for two days by the Beijing Public Security Bureau for his affiliation with a prominent human rights advocate); see also Yao Xiaolin, *Qingdao Candidates v. Ministry of Education Case (the Equal Right to Education)*, available at <<http://xfx.jpkc.gdccc.edu.cn/show.aspx?id=191&cid=62>> (last visited Oct. 5, 2008) (reviewing the case of two students from Qingdao who challenged the Educational Ministry, claiming that their rights to education were regionally discriminated against).

of the Constitution and have done much research on this topic.²²⁸ However, until now, no cases have been reviewed regarding a violation of China's Constitution.²²⁹

B. Domestic Statutes Regarding Family Planning

The Law of the People's Republic of China on the Protection of Women's Rights and Law of China on Population and Family Planning are the two statutes most directly relevant to the issues discussed here. These two statutes are inferior to the Constitution, which means they cannot contradict its provisions. They address women's rights in detail.

1. The Law of the People's Republic of China on the Protection of Women's Rights²³⁰

Article 51 of the Law of the People's Republic of China on the Protection of Women's Rights upholds a women's right to choose whether or not to have children.²³¹ Couples of reproductive age should make family plans that comply with the relevant statutes and policies.²³² The relevant family-planning institutions should provide appropriate and effective contraceptives and techniques for women, and they should ensure women's health and safety in perform-

228. See George J. Gilboy & Benjamin L. Read, *Political and Social Reform in China: Alive and Walking*, 31 WASH. Q. 3, 143 (2008) (emphasizing that since March 2004 an office has been established to conduct constitutional reviews of Chinese laws); see also Tahirih V. Lee, *Exporting Judicial Review from the United States to China*, 19 COLUM. J. ASIAN L. 152, 183 (2005) (acknowledging the possibility that judicial review will expand in China within the next generation); see also *Review of the National People's Congress*, available at <<http://news.sina.com.cn/c/2004-12-03/11084422422s.shtml>> (last visited Oct. 5, 2008) (quoting that the NPC Standing Committee deputy director has said that now citizens can request a review of constitutionality).

229. See Michael C. Davis, *Symposium: East Asian Approaches to Human Rights, Select Panelists from the 1995 Annual Meeting of the American Society of International Law: Human Rights in Asia: China and the Bangkok Declaration*, 2 BUFF. J. INT'L L. 215, 200 (1995) (commenting that the judicial system does not review legislation or administrative acts); see also Karmen Kam, *Right of Abode Cases: The Judicial Independence of the Hong Kong Special Administrative Region v. the Sovereignty Interests of China*, BROOKLYN J. INT'L L. 611, 632 (2002) (noting that Chinese courts do not have jurisdiction to judicially review a decision).

230. See Xian Fa [Constitution] art. 51 (PRC) (2004).

231. See *id.* (stating that article 51 of the Chinese law provides that a woman has the right to choose to bear children); see also WHITE PAPER, THE PROGRESS OF HUMAN RIGHTS IN CHINA, § VI (reiterating that a Chinese woman has a legal choice as to whether or not she wants to have a child, as provided by article 51); see also PEQUN HE, WOMEN'S RIGHTS AND PROTECTION POLICY IN CHINA: ACHIEVEMENTS AND PROBLEMS, IN SOCIAL POLICY AND REFORM (Catherine Jones Finer ed., 2003) (declaring that the Constitution stipulated that only women were entitled to the right of rearing children).

232. See Xian Fa [Constitution] art. 51 (PRC) (2004) (stating that a family making plans to have a child should comply with relevant regulations of the state). See generally, CECILIA NATHANSEN MILWERTZ, ACCEPTING POPULATION CONTROL 5 (1997) (revealing that the previous version of article 51, article 47, also promulgated that family planning should comply with relevant laws); see generally Hampton, *supra* note 6, at 331–32 (listing several articles of law that families can use in their family planning to comply with article 51's relevant regulations requirement).

ing sterilization surgery.²³³ Governments have a responsibility to improve premarital, maternal, and child care systems.²³⁴ Government at all levels should take measures to guarantee women's access to family-planning services and protect women's reproductive health.²³⁵

In addition, the Law of the People's Republic of China on the Protection of Women's Rights provides legal remedies for abuse of women's rights.²³⁶ Article 56 mandates that administrative penalties will be imposed for violations of this law if any pecuniary damages or other damages occur, and that the violator will be investigated for civil liability.²³⁷ If the acts constitute a crime, the violator will be investigated for criminal liability.²³⁸ Article 57 establishes the administrative punishments and legal remedies available for women whose rights are violated by government officials.²³⁹ Article 58 endows female victims with the right to bring a lawsuit for the violations, while Article 59 regulates legal responsibilities of media that cause damage to any woman's reputation.²⁴⁰

233. See Xian Fa [Constitution] art. 51 (PRC) (2004) (declaring that there should be relevant family-planning agencies that provide safe and effective contraceptive services); see also WHITE PAPER, *supra* note 238, at § VI (stating that relevant state agencies should accommodate the law by ensuring the health and safety of women in their use of effective contraceptive techniques). See generally *China to Censure "Lawless" Family-Planning Authorities*, BBC MONITORING ASIA PAC.—POLITICAL, Nov. 14, 2007 (reporting that the state Family-Planning Commission has begun programs to educate personnel to ensure that they fully carry out the duties of the law).

234. See <http://www.trade.gov/doctm/china_health_0408.html>.

235. See China Planning, *supra* note 12, at art. 51 (declaring that it is the government's job to protect women's reproductive health); see also Hansel, *supra* note 2, at 371, 375 (providing that although the government's policies are restrictive, family-planning services are available to everyone); see also Zhang, *supra* note 4, at 562–63 (asserting that family planning is equally available, and incentives are given to those who use it).

236. See China Planning, *supra* note 12, at art. 53 (indicating it is the government's obligation to help investigate women's legal claims); see also SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 147 (2006) (acknowledging that although it is not totally clear, the law does allow women to have the public security division investigate and bring lawsuits on their behalf); see also CAROLINE SWEETMAN, WOMEN AND RIGHTS 11 (1995) (explaining that the 1992 law gave women the right to request the proper department for a remedy or to bring a lawsuit in court).

237. *Id.*

238. See China Planning, *supra* note 12, at art. 56 (affirming that if the violation of a women's right is a criminal act, the violator will be held criminally responsible); see also Margaret Y.K. Woo, *Shaping Citizenship: Chinese Family Law and Women*, 15 YALE J.L. & FEMINISM 99, 133 (2003) (revealing that women do have the power to seek criminal charges in criminal cases). See generally Xian fa [Constitution], *supra* note 26, at art. 28, 48 (establishing that women have the same rights as men and are afforded the same legal protections under the constitution).

239. See China Planning, *supra* note 12, at art. 57 (stressing that it is the government's job to enforce administrative punishments for violations by government officials); see also Administrative Punishment Law (adopted by the Standing Comm. Nat'l People's Cong., Mar. 17, 1996) art. 12 available at <<http://www.lehmanlaw.com/resource-centre/laws-and-regulations/administration/administrative-punishment-law-of-the-peoples-republic-of-china-1996.html>> (showing the different ways the government can establish administrative punishments for violations); see also Sean Cooney, *Making Chinese Labor Law Work: The Prospects for Regulatory Innovation in the People's Republic of China*, 30 FORDHAM INT'L L.J. 1050, 1062 (2007) (acknowledging that anyone can seek administrative punishments for violations of constitutional rights by employers or government officials).

240. See China Planning, *supra* note 12, at art. 58, 59 (noting that women can bring civil suits for sexual harassment, domestic violence, and actions that belittle their reputations); see also RON KEITH, NEW CRIME IN CHINA PUBLIC ORDER AND HUMAN RIGHTS 34 (2006) (remarking that due to increasing violence rates, new laws were passed protecting women criminalizing domestic violence); see also DHIRENDRA K. VAJPEYI, MODERNIZING CHINA 118 (1994) (reviewing China's new laws that protect against slandering women's reputations).

In summary, the Law of the People's Republic of China on the Protection of Women's Rights upholds women's reproductive rights and protects women's health rights. It directs the government to provide services for both women and children. Moreover, this law imposes legal consequences for the violators and provides judicial remedies for victims. The legal remedies for violations are more specific than the Constitution provides, and they are the substantive provisions under which violations of women's rights may be pursued. In the enforcement of the one-child policy, there is more emphasis on women being obligated to control reproduction and more attention is paid to encouraging women to accept sterilization than to the protection of women's rights.

2. The Law of the People's Republic of China on Population and Family Planning

The Law of the People's Republic of China on Population and Family Planning²⁴¹ is one of the most important statutes with regard to China's one-child policy.²⁴² It specifically sets forth the government's policy on family planning and protection of women's reproductive rights.²⁴³

Article 17 upholds Chinese citizens' reproductive rights and also mandates their obligations to comply with the family-planning policy.²⁴⁴ It sets forth a policy of shared responsibility of both partners in the issue of family planning.²⁴⁵ Article 18 specifies the content of the one-

241. See Law on Population and Family Planning (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2001, effective Sept. 1, 2002) art. 17, 18 LAWINFOCHINA, (PRC) (citing China's law on population regulating and family planning).

242. See Roger Herod, *Chapter 16. Global Diversity: Managing and Leveraging Diversity in a Global Workforce*, INT'L HUMAN RES. GUIDE § 16:1 (2008), available at <https://web2.westlaw.com/find/default.wl?fn=_top&rs=WLW8.09&rp=%2ffind%2fdefault.wl&mt=LawSchoolPractitioner&cvr=2.0&sv=Split&cite=IHRGD+s+16%3al> (referring to China's one-child policy in its discussion of family planning and population control); see also Jamie Jordan, Note, *Ten Years of Resistance to Coercive Population Control: Section 601 of the IIRIRA of 1996 to Section 101 of the Real ID Act of 2005*, 18 HASTINGS WOMEN'S L.J. 229, 232–33 (2007) (maintaining that China's one-child policy is the most important legislation in its family planning and population policies); see also Nortick, *supra* note 12, at 2158–2159 (discussing the establishment and implementation of the one-child policy as an attempt to control the country's population growth).

243. See DOROTHY STEIN, *PEOPLE WHO COUNT: POPULATION AND POLITICS, WOMEN AND CHILDREN* 166 (1995) (commenting on China's one-child policy and the incentives and health care given to certified families); see also Wexler, *supra* note 43, at 84–85 (examining China's one-child policy and family-planning actions for curbing their population growth); see also Rivera, *supra* note 12, at 233 (showing the policies of promoting family planning by giving incentives to those who follow the laws).

244. See China Planning, *supra* note 12, at art. 17 (stating that citizens have the right to reproduce but must take part in family planning); see also GREGORY C. CHOW, *CHINA'S ECONOMIC TRANSFORMATION* 199 (2d ed., 2007) (referring to China's Constitution, which stipulates the legal obligation of citizens to practice family planning); see also JACQUELINE DELAAT, *GENDER IN THE WORKPLACE: A CASE STUDY APPROACH* 24 (2d ed., 2007) (citing article 17 of China's Law on the Population and Family Planning, which provides the right to reproduce and the obligation to practice family planning).

245. See China Planning, *supra* note 12, at art. 17 (establishing that family planning is the responsibility of both partners); see also Martha J. Bailey, *Mediation of Divorce in China*, 8 CAN. J.L. SOC'Y 45, 64 (1993) (reiterating that it is the obligation of both parents to engage in family planning); see also Mark Savage, Note, *The Law of Abortion in the Union of Soviet Socialist Republics and People's Republic of China: Women's Rights in Two Socialist Countries*, 40 STAN. L. REV. 1027, 1067–1068 (1988) (reporting that the wife and husband have joint responsibility in family planning).

child policy, stating that the government encourages citizens to delay marriage and childbirth, and it advocates “one child per couple.”²⁴⁶ The request for a second child will be approved by relevant family planning departments for special reasons in accordance with the exceptional provisions.²⁴⁷ These special reasons are decided by provincial, regional and municipal branches of the People’s Congress or its standing committees.²⁴⁸ Additionally, the law dictates that ethnic minorities also should adhere to the family-planning policy but with some privileges.²⁴⁹ The specific measures vary from region to region and depend on local regulations of different provincial and municipal branches of the People’s Congress or its standing committees.²⁵⁰ Article 19 lists various ways to implement the family-planning policy and expressly states that contraception is the primary method for carrying it out.²⁵¹ Article 19 also states that citizens should have access to appropriate and effective contraceptive measures,²⁵² and that sterilization surgery, if chosen, should be undertaken only if the health and safety of a woman is guaranteed.²⁵³

246. See China Planning, *supra* note 12, at art. 18 (noting that under special circumstances, families will be able to have a second child); (displaying the regulations of the one-child and family-planning policies); see also Rivera, *supra* note 12, at 233 (showing the policies of promoting family planning by giving incentives to those who follow the laws); see also Saona, *supra* note 10, at 237 (assessing the obligations and restrictions of China’s one-child policy).

247. See China Planning, *supra* note 12, at art 18; see also Palmer, *supra* note 213, at 116 (revealing that in special situations, a second child will be allowed); see also Hampton, *supra* note 6, at 329–30 (discussing China’s policies of allowing a family to have a second child if the first was a girl).

248. See China Planning, *supra* note 12, at art. 18 (detailing that these regulations are established by individual provinces, regions, or congressional committees); see also Martin, *supra* note 51, at 402 (proclaiming that the one-child policy exceptions are usually found in the rural Chinese provinces); see also Rabkin, *supra* note 13, at 971 (noting that rural provinces allowed parents to have more than one child if both parents were single children and if their first child was a girl).

249. See Ruixue Quan, *Establishing China’s Environmental Justice Study Models*, 14 Geo. INT’L ENVTL. L. REV. 461, 468 (2002) (discussing the privileges ethnic minorities receive with respect to the family-planning policy); see also Peerenboom, *supra* note 222, at 141 (describing the efforts China has made to improve the lives of ethnic minorities); see also Barry Sautman, “Cultural Genocide” and Tibet, 38 TEX. INT’L L. J. 173, 203 (2003) (explaining the preferential treatment Tibetans receive).

250. See Zhonghua Renmin Gongheguo Renkou yu Jihua Shengyu Fa (“The Law of the People’s Republic of China on Population and Family Planning”), art. 18 (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 29, 2001, effective Sept. 11, 2002) (PRC), LAWINFOCHINA available at <<http://www.lawinfochina.com/law/display.asp?db=1&id=2209&keyword=>> (last visited: August 9, 2007) (hereinafter China Planning) (explaining that those meeting the conditions prescribed by laws and regulations may request to bear a second child); see also Peerenboom, *supra* note 222, at 141 (describing the efforts China has made to improve the lives of ethnic minorities); see also Ruixue, *supra* note 249, at 468 (discussing the privileges ethnic minorities receive with respect to the family-planning policy).

251. See China Planning, *supra* note 12, at art. 18 (describing that contraception is important to the family planning policy); see also Keng, *supra* note 9, at 212 (explaining how contraceptives, among other methods, will aid the family-planning policy); see also Zhang, *supra* note 4, at 573 (discussing how expanding contraceptive choices help carry out the family-planning policy).

252. See Hampton, *supra* note 6, at 355 (describing the improved access to contraception provided by the Chinese government); see also Savanyu, *supra* note 39, at 17 (comparing the access women had to contraception in the 1950s to the greater access to contraception currently available to them); see also Yuliya Fisher Schaper, *Emergency Contraception for Rape Victims: A New Face of the Old Battleground of Legal Issues in the Bipartisan Abortion Politics in the United States*, 29 RUTGERS L. REC. 1, 5 (2005) (explaining the availability of emergency contraceptives in China).

253. See Abrams, *supra* note 119, at 902 (explaining that many women have undergone safe sterilization surgery); see also Cirando, *supra* note 4, at 656 (describing safe sterilization surgery); see also Sonia M. Suter, *A Brave New World of Designer Babies?*, 22 BERKELEY TECH. L. J. 897, 916 (2007) (discussing how sterilization surgery is available to those at risk).

Article 20 instructs couples of reproductive age²⁵⁴ to accept the services and guidance of the applicable family-planning institutions to prevent or at least reduce unexpected pregnancies.²⁵⁵

The Law of the People's Republic of China on Population and Family Planning imposes more obligations and legal responsibilities on Chinese citizens but little legal liability for the officials who abuse women's rights in enforcing the one-child policy.²⁵⁶ The legal responsibilities of officials in charge of monitoring violations of the law are listed in article 39.²⁵⁷ This article provides that governmental officials must take action when the activity is (1) bodily harm imposed on women or violations of property rights and other lawful rights; (2) abuse of power or dereliction of duty; (3) bribing or corruption; (4) retention, deduction, embezzlement of social compensation fees; or (5) reporting inaccurate population and family planning statistics.²⁵⁸

Similar to the Law of the People's Republic of China on Protection of Women's Rights, the enforcement of the Law of the People's Republic of China on Population and Family Planning emphasizes the birth control obligations of women over the legal responsibilities of the officials.²⁵⁹ Sometimes the officials exceed the law in their enforcement of the one-child policy, which results in violations of human rights and is also the main reason for violations of women's rights in practice.²⁶⁰

254. See China Planning, *supra* note 12, at art. 18 (discussing how couples of reproductive age should try to reduce unexpected pregnancies).

255. See *id.* (describing how spouses of childbearing age should take contraception); see also Hom, *supra* note 49, at 263 (discussing the family-planning program and reducing birthrates); see also Keng, *supra* note 9, at 212 (explaining China's family-planning policy).

256. See China Planning, *supra* note 12, at arts. 40–42 (describing the penalties for state actors committing crimes in connection with enforcement of the acts); see also Xiaorong, *supra* note 121, at 145 (explaining how local officials terrorize women in enforcing one-child policies); see also Love, *supra* note 7, at 152 (discussing how China's laws do not provide the legal mechanisms to protect citizens).

257. See Keith J. Hand, *Using Law for Righteous Purpose: The Sun Zhigang Incident and Evolving Forms of Citizen Action in the People's Republic of China*, 45 COLUM. J. TRANSNAT'L L. 114, 177 (2006) (providing an example of officials abusing their power under the family-planning act); see also Kung, *supra* note 203, at 1297 (citing another example Chinese officials abusing the policy); see also Zhang, *supra* note 4, at 569–70 (discussing the responsibilities of local officials).

258. See China Planning, *supra* note 12, at art. 18 (discussing the joint responsibility of husbands and wives in family planning); see also Hand, *supra* note 257, at 177 (explaining abuse of power under the family-planning act); see also Kung, *supra* note 203, at 1297 (describing violations of the policy).

259. See Gellman, *supra* note 38, at 1069 (describing the involuntary birth control methods used); see also Keng, *supra* note 9 at 209 (discussing how the victims of birth quotas are largely women, by way of birth control methods); see also Savanyu, *supra* note 39, at 17 (explaining how Chinese women have been affected by the use of birth control).

260. See Hand, *supra* note 257, at 177 (providing another example of officials abusing their power under the family planning act); see also Kung, *supra* note 203, at 1297 (citing an example of when Chinese officials abused the policy); see also Zhang, *supra* note 4, at 569–70 (discussing the abuse of laws by local officials).

3. Local Regulations on Family Planning

The administrative regulations concerning the one-child policy vary from region to region.²⁶¹ These regulations were passed to implement the statutes passed by the National People's Congress, and they are each region's detailed "roadmap" for enforcement.²⁶² Although regulations do not encourage the use of coercive measures to enforce this policy, neither do they prohibit local officials from using forced sterilization and abortion.²⁶³ To some extent, the lack of prohibition can be regarded as an implicit approval for local officials to enforce the policy by imposing coercive sterilizations and abortions on women.²⁶⁴ Relevant provisions of the Regulations of Shandong Province on Family Planning are examined in some detail in the following section.

a. Regulations of Shandong Province on Family Planning²⁶⁵

The regulations of Shandong Province do not explicitly permit local officers to conduct measures that go against a woman's will, but in practice, serious abuses of women's reproductive rights in this province have attracted worldwide attention.²⁶⁶ Detailed abuses will be discussed in part V.

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261. See Cirando, *supra* note 4, at 637 (discussing the local implementation of the policies); see also Nortick, *supra* note 12, at 2159 (describing how local governments use the laws); see also Savage, *supra* note 245, at 1082 (citing an example of local commissions implementing state policy).
 262. See Cirando, *supra* note 4, at 637 (discussing how the one-child policy is a policy, not a law, to be enforced throughout China without regard to local conditions); see also Nortick, *supra* note 12, at 2159 (describing how the national law delegates responsibility for implementation of family-planning objectives to local governments); see also Savage, *supra* note 245, at 1082 (citing an example where local officials began to compel women to have abortions).
 263. See Gomez, *supra* note 45, at 573–74 (discussing the United States' reaction to China's forced abortion and involuntary sterilization by local officials); see also Rivera, *supra* note 12, at 234–35 (describing how local officials have too much power and can force women into various methods of sterilization); see also E. Tobin Shiers, *Coercive Population Control Policies: An Illustration of the Need for a Conscientious Objector Provision for Asylum Seekers*, 30 VA. J. INT'L L. 1007, 1012 (1990) (providing an example of local officials abusing their power by using forced sterilization and abortion).
 264. See YANG ZHONG, *LOCAL GOVERNMENT AND POLITICS IN CHINA: CHALLENGES FROM BELOW* 135 (2003) (alleging that local Chinese officials often resort to coercion and forced abortions to keep their towns' birth quotas low); see also Xiaorong, *supra* note 121, at 163 (illustrating the extreme measures health officials take to kill fetuses that survive late-term abortions in order to avoid malpractice suits); see also Martin, *supra* n. 51, at 410–11 (2007) (stating that public officials are severely punished if they allow violations of the family-planning policy but are not punished for violating human rights to ensure its implementation).
 265. See *Shandong Sheng Renkou Yu Jihua Shengyu Tiaoli* ("The Regulations on Population and Family Planning—Shandong Province") (promulgated by the Standing Comm. of the Ninth People's Cong. of Shandong 2002, effective 2002) (PRC).
 266. See *China "Acts on Forced Abortions,"* BBC NEWS, Sept. 20, 2005, <<http://news.bbc.co.uk/2/hi/asia-pacific/4262890.stm>> (reporting the illegal measures taken to enforce the family-planning policy's regulations in Linyi, a town in Shandong); see also Hanna Beech, *Enemies of the State?: How Local Officials in China Launched a Brutal Campaign of Forced Abortions and Sterilizations*, TIME, Sept. 19, 2005, at 58 (recounting a forced abortion in the Linyi region of Shandong that was part of an atrocious mass sterilization effort); see also Philip P. Pan, *Rural Activist Seized in Beijing: Legal Campaign has Targeted Forced Sterilization, Abortion*, WASHINGTON POST, Sept. 7, 2005, at A22, available at <<http://www.washingtonpost.com/wp-dyn/content/article/2005/09/06/AR2005090600921.html>> (detailing the arrest of a Chinese rural activist who was preparing a class action suit to challenge the population control methods used in Linyi).

Article 35 requires local governments to set up family-planning funds.²⁶⁷ These funds come from local governments, private donors, other financial branches, and international donors; and they are used mainly for supporting and assisting family-planning activities.²⁶⁸ Article 36 states that local governments have the legal obligation to provide citizens with knowledge about the different methods of contraception.²⁶⁹ In order to prevent and reduce unwanted pregnancies, couples of reproductive age are instructed to implement birth control measures promptly and accept guidance from relevant family-planning institutions.²⁷⁰ Government at all levels should guarantee citizens the right to adequate family-planning services.²⁷¹ Couples are also strongly urged to have only one child and subsequent to the birth of that one child, to choose a long-term birth control measure, such as sterilization.²⁷²

In essence, the local regulations on population control are more specific than the statutes passed by the National People's Congress, and they are more likely to refer to the contraceptive

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267. See Shandong Sheng Renkou Yu Jihua Shengyu Tiaoli ("The Regulations on Population and Family Planning—Shandong Province") (promulgated by the Standing Comm. of the Ninth People's Cong. of Shandong, 2002, effective 2002), art. 35 (PRC) available at <http://www.shandong.gov.cn/art/2005/12/12/art_8953_83.html> (the regulation is no longer available at the provided URL); see also Xiaorong, *supra* note 121, at 179 (indicating a need for local family-planning funds because of the lack of contributions given by the Chinese government); see also Note, *World Hunger and International Trade: An Analysis and a Proposal for Action*, 84 YALE L.J. 1046, 1060–61 (1975) (stating that China's slow economy has led to a lack of national funds for family-planning clinics).
268. See Shandong Sheng Renkou Yu Jihua Shengyu Tiaoli ("The Regulations on Population and Family Planning—Shandong Province") (promulgated by the Standing Comm. of the Ninth People's Cong. of Shandong, 2002, effective 2002), art. 35, (PRC) available at <http://www.shandong.gov.cn/art/2005/12/12/art_8953_83.html> (the regulation is no longer available at the provided URL).
269. See Saona, *supra* note 10, at 239 (expressing that the People's Republic of China has ratified treaties that support the right to information on family planning and access to contraceptives); see also Ann. L. Bio. on Gender, *supra* note 60, at 488 (finding that President Bush's refusal to contribute to the United Nations Population Fund because of his disagreement with China's family-planning methods has decreased the availability of family-planning information and contraceptives to Chinese citizens). See generally MARIAN RENGEL, *ENCYCLOPEDIA OF BIRTH CONTROL* 42 (2000) (asserting that the government has started to take actions to increase access to contraceptive among the country's teens and adults).
270. See Aird, *supra* note 204, at 29 (discussing provincial laws that required all couples to practice family-planning methods); see also TYRENE WHITE, CHINA'S LONGEST CAMPAIGN: BIRTH PLANNING IN THE PEOPLE'S REPUBLIC 34–35 (2006) (addressing the governmental encouragement of the use of birth control and planning methods among young couples); see also Jason L. Tyson, *Chinese Leaders Temper Controversial Family Planning*, THE CHRISTIAN SCI. MONITOR, May 1, 1990 at 1 (concluding that the government requires family-planning classes to help prevent pregnancies).
271. See Xizhe, *supra* note 6, at 56 (reporting that there are 2,300 county-level, 31,000 town-level, and many village-level family-planning service offices in China). See generally Kimberly A. Johns, *Reproductive Rights of Women: Construction and Reality in International and United States Law*, 5 RUIXUE CARDOZO WOMEN'S L.J. 1, 21 (1998) (proclaiming that the Chinese government makes reproductive counseling widely available to Chinese women); see generally Cirando, *supra* note 4, at 641–42 (informing that China's National Family Planning Commission ensures that women have access to fertility control through local planning offices).
272. See Shandong Sheng Renkou Yu Jihua Shengyu Tiaoli ("The Regulations on Population and Family Planning—Shandong Province") (promulgated by the Standing Comm. of the Ninth People's Cong. of Shandong, 2002, effective 2002), art. 36, (PRC) available at <http://www.shandong.gov.cn/art/2005/12/12/art_8953_83.html> (the regulation is no longer available at the provided URL); see also STEPHEN MOSHER, A MOTHER'S ORDEAL ix (1993) (translating local and provincial regulations that state a couple with two or more children should be sterilized). See generally Nicole S. Thompson, Comment, *Due Process Problems Caused by Large Disparities in Grants of Asylum: Will New Department of Justice Recommendations Solve This Problem?*, 22 EMORY INT'L L. REV. 385, 385 (2008) (presenting an anecdote of a Chinese couple who were able to avoid a forced abortion by promising to undergo sterilization after their child was born).

of sterilization. Although sterilization is only strongly encouraged, in local regulations, such “strong encouragement” has become the most effective and prompt way to reduce the population through coercive means.²⁷³

b. Requirement of Reporting Family-Planning Statistics to Higher Authorities

Domestic Chinese statutes do not provide for the reporting system of family-planning statistics.²⁷⁴ Such reporting is required by regional regulations on population and family planning.²⁷⁵ In a typical provision, regional regulations mandate that local family-planning institutions must make annual reports of various statistics to the higher authorities, including fertility rate, child mortality rate, contraceptive use rate, achievements made by local family-planning institutions and other family-planning statistics.²⁷⁶ These statistics are collected from hospitals and clinics as well as from the “Neighborhood Committee.”²⁷⁷

Family-planning statistics assist higher authorities in monitoring the enforcement of local family-planning affairs and are also among the criteria examined in promoting local officials.²⁷⁸

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273. See *Tradition and State*, *supra* note 39, at 294 (rationalizing that harsh implementation of forced sterilizations and abortions have made China's family-planning policy effective); see also Jordan, *supra* note 242, at 229 (acknowledging that population-control responsibilities are given to local officials who have been known to resort to forced sterilizations). See generally Paula Abrams, *Reservations About Women: Population Policy and Reproductive Rights*, 29 CORNELL INT'L L.J. 1, 23 (1996) (alleging that China's one-child policy is based on coercion, which leads to many forced abortions and sterilizations).
 274. See LEO A. ORLEANS, EVERY FIFTH CHILD: THE POPULATION OF CHINA 25 (1972) (commenting on the failure of the Ministry of Internal Affairs and other governmental agencies to create a unified national population figure).
 275. See CHRISTOPHER HUDSON ET AL., *THE CHINA HANDBOOK: PROSPECTS ONTO THE 21ST CENTURY* 232 (1997) (declaring that local officials often underreport family-planning statistics in order to meet their quotas).
 276. See Shandong Sheng Renkou Yu Jihua Shengyu Tiaoli (“The Regulations on Population and Family Planning—Shandong Province”) (promulgated by the Standing Comm. of the Ninth People's Cong. of Shandong, 2002, effective 2002), art. 16, (PRC) available at <http://www.shandong.gov.cn/art/2005/12/12/art_8953_83.html> (the regulation is no longer available at the provided URL); see also Jilin Shen Renkou Yu Jihua Shengyu Tiaoli (“The Regulations on Population and Family Planning—Jilin Province”) (promulgated by the Standing Committee of the Ninth People's Congress of Jilin, 2002, effective 2002), art. 25, (PRC). See generally FERTILITY, FAMILY PLANNING, AND POPULATION POLICY IN CHINA: AN OVERVIEW (Dudley L. Poston, Chiung-Fang Chang & Sherry L. McKibben, eds., 2006) (compiling information about the history of China's fertility and population policies).
 277. ZHONGWEI ZHAO & FEI GUO, *TRANSITION AND CHALLENGE: CHINA'S POPULATION AT THE BEGINNING OF THE 21ST CENTURY* 35 (2007) (observing that National Population and Family-Planning Commission tabulates population statistics based on regular reports from its local constituents); see also Gregory, *supra* note 3, at 52 (remarking that neighborhood committees, which are semi-governmental institutions, decide which families are allowed to have children in a given year); see also Skalla, *supra* note 2, at 338 (noting that hospitals and neighborhood committees determine how a town's birth quotas will be filled).
 278. See PHILIP P. PAN, *OUT OF MAO'S SHADOW: THE STRUGGLE FOR THE SOUL OF A NEW CHINA* 306 (2008) (positing that local officials that did not meet their birth targets were denied promotions regardless of their performance in other areas of their jobs); see also Boland, *supra* note 5, at 1145 (confirming that local officials are penalized when they cannot effectively and efficiently implement the Chinese family-planning policies); see also Gomez, *supra* note 45, at 567 (recognizing that local officials get cash, recognition, and promotions if their units meet their birth control limitations).

Some regional family-planning regulations expressly link officials' promotions with local family-planning achievement.²⁷⁹

c. Duties of Officials in Local Regulations

In order to carry out the family-planning policy effectively, local regulations expressly assign duties to local officials.²⁸⁰ Generally, government at all levels centrally manages the enforcement of the family-planning policy.²⁸¹ The officials are in charge of the implementation of family planning within their own jurisdictions, reporting problems they have encountered and achievements they have made, and submitting relevant family-planning statistics to higher authorities.²⁸² Furthermore, local officials are responsible for cooperating with medical institutions in the improvement of reproductive health care.²⁸³ Each local official is responsible for its jurisdiction, and reported violations against the family-planning may lead to the demotion of the responsible individuals or will, at least, lead to the withholding of their bonuses or salaries.²⁸⁴

C. Summary

On the basis of the domestic statutes and regional regulations, no provisions exist that explicitly go against women's rights, but, nevertheless, the one-child policy is criticized of violating women's human rights, and the international community is concerned with the practices

279. See Heilongjiang Sheng Renkou Yu Jihua Shengyu Tiaoli ("Regulations on Population and Family Planning, Heilongjiang Province") (promulgated by the Standing Comm. of the Ninth Heilongshiang People's Cong., 2002) art. 10 (PRC); see also Jilin Sheng Renkou Yu Jihua Shengyu Tiaoli ("Regulations on Population and Family Planning, Jilin Province") (2002) art. 23 (PRC); see also Sichuan Sheng Renkou Yu Jihua Shengyu Tiaoli ("Regulations on Population and Family Planning, Sichuan Province") (2002) art. 7 (PRC).

280. See Love, *supra* note 7, at 156–57 (contending that family-planning officials are given little guidance and wide discretion as to how they enact the family-planning policy); see also Skalla, *supra* note 2 at 360–61 (arguing that although China adopted a national policy in 2001, local implementation is still a major component).

281. See China Planning, *supra* note 12, at art. 9–12 (codifying the policy that, within their respective jurisdictions, all branches of the Chinese government are charged with developing and implementing their own specific provisions for enforcing the family-planning policy).

282. See Family Responsibility (June 27, 2003), available at <<http://jsw.bjchy.gov.cn/popknowledge/popmanage/popmanage321.htm>> (enumerating the various duties assigned to the family-planning cadres).

283. See Amy Hampton, Comment, *Population Control In China: Sacrificing Human Rights for the Greater Good?*, 11 TULSA J. COMP. & INT'L L. 355 (2003) (noting that Chinese officials have made some advancements in terms of reproductive health care by providing greater access to information and contraceptives); see also Family Responsibility, *supra* note 282 (stating that one of the duties of the family-planning cadres is to assist in the reproductive health care sector).

284. See Heilongjiang Sheng Renkou Yu Jihua Shengyu Tiaoli ("Regulations on Population and Family Planning, Heilongjiang Province") (promulgated by the Standing Comm. of the Ninth Heilongshiang People's Cong., 2002) art. 10 (PRC); see also Jilin Sheng Renkou Yu Jihua Shengyu Tiaoli ("Regulations on Population and Family Planning, Jilin Province") (2002) art. 23 (PRC); see also Sichuan Sheng Renkou Yu Jihua Shengyu Tiaoli ("Regulations on Population and Family Planning, Sichuan Province") (2002) art. 7 (PRC).

allegedly used to implement this policy.²⁸⁵ Furthermore, China has been accused of meeting its population requirements through bribery, coercion, forced sterilization, forced abortion, and infanticide, with most such reports coming from rural areas.²⁸⁶ How do these violations occur? In essence, the abuse of the one-child policy results from the illegal methods used to enforce it.²⁸⁷

V. Enforcement of the One-child Policy

In response to the Linyi family-planning incident, the National Family-Planning Committee confessed that “abuse of the one-child policy and encroachment on citizen’s lawful rights did exist in Linyi, Shandong Province, and the local officials who abused their powers have been arrested.”²⁸⁸ But this announcement did not publicize the details of how officials coerced women into undergoing forced sterilization and abortion. Is the Linyi incident an exceptional phenomenon, or is the use of coercive measures in enforcing the one-child policy a national problem?

In enforcing the one-child policy, measures adopted by the local officials vary from region to region, but basically, both lawful and coercive measures are utilized.²⁸⁹ The use of forced sterilization and abortion is a nationwide problem that seriously violates women’s reproductive decision-making rights and health rights.²⁹⁰

285. See Kevin S. Barber, Note, *Xin-Chang Zhang v. Slattery: Rejecting China’s Coercive Population-Control Policy as Grounds for Political Asylum in the United States*, 41 VILL. L. REV. 521, 543–44 (1996) (recalling the story of Mr. Zhang, a Chinese national, who fled China with his wife to save her from forcible sterilization); see also Keng, *supra* note 9, at 209 (alleging that women are more likely to be subjected to and face greater complications from the coercive birth control practices implemented throughout China); see also *Concern at Chinese Family-Planning Law*, BBC WORLD MONITORING (Jan. 9, 2002), available at <http://news.bbc.co.uk/2/hi/world/monitoring/media_reports/1751680.stm> (reporting concerns that Chinese family-planning laws may encourage intra-familial violence against women in addition to hardships created by harsh population control practices).

286. *Concern at Chinese Family-Planning Law*, BBC WORLD MONITORING, *supra* note 285.

287. See Erin Bergeson Hull, Comment, *When Is the Unmarried Partner of an Alien Who Has Been Forcibly Subjected to Abortion or Sterilization a “Spouse” for the Purpose of Asylum Eligibility? The Diverging Opinions of Ma. v. Ashcroft and Chen v. Ashcroft*, 2005 UTAH L. REV. 1021, 1024 (2005) (asserting that the abuses reported under the family-planning policy occur where local officials adopt prohibited methods for reaching government quotas); see also Skalla, *supra* note 2, at 336–40 (describing the violent and coercive enforcement of the family-planning policy as it varies from region to region).

288. See *Officers Have Been Arrested for Forcing Local Residents to Do Coercive Sterilization and Abortion Operation*, BBC NEWS CHINESE (Sept. 20, 2005), available at <http://news.bbc.co.uk/chinese/simp/hi/newsid_426000/newsid_4263000/4263008.stm> (reporting the incident in rural Linyi, where family-planning officials were arrested after forcibly subjecting couples to permanent birth control procedures).

289. See Nortick, *supra* note 12, at 2159–62 (explaining that although local officials start out using social and economic mechanisms, they quickly revert to threats and coercion when opposed); see also Sicard, *supra* note 24, at 929–30 (blaming the use of coercive methods on the lack of national laws prescribing what officials can and cannot do to enforce the family-planning policy).

290. See Love, *supra* note 7, at 160–61 (arguing that forced late-term abortions are a real and serious problem in China); see also Hunker, *supra* note 203, at 132–36 (claiming that the population-control procedures in some regions of China resemble a holocaust or infanticide in terms of their cruelty and relentlessness).

A. Measures to Enforce the One-child Policy and Violations of Human Rights

1. Promotional and Other Measures to Raise Awareness and Educate the People

Raising Chinese citizens' awareness to limit reproduction, particularly unplanned and unwanted reproduction, is an acceptable and positive population-control method. The Chinese government considers these persuasive measures integral to "permanently changing Chinese citizens' reproductive beliefs and behavior."²⁹¹

In China, the persuasive methods used to limit fertility involve propaganda and education.²⁹² Media is widely used to publicize the message of "delay in marriage, delay in pregnancy, birth control and eugenism."²⁹³ Billboards, posters, television, FM radio, newspapers and other media tools regularly promote the advantages of "one child per family."²⁹⁴ Physiology education including the one-child policy, sex education, and juvenile sexual protection has been incorporated into high school compulsory courses.²⁹⁵ Furthermore, when a man and woman register in the Marriage Registration Department, the one-child policy is provided as one component of their premarital education.²⁹⁶ This premarital education gives the couple "informational material describing the advantages of abortion and sterilization, and the use of condoms; vaginal diaphragms; chemical solution; and, occasionally, the rhythm method."²⁹⁷ Some films and videos on birth control will be shown, while instructors "pass out samples of contraceptive appliances for people to inspect."²⁹⁸ Raising public awareness does not violate women's rights. However, the following measures taken by the local officials are not as positive as the measures stated above.

291. See Maria Nadeau, *China's One-child Policy: National Obligation Versus Individual Rights* 1 ROAD TO EAST ASIA (1996) available at <<http://www.yorku.ca/iwai/marian.html>> (discussing Steven Mosher's book, A MOTHER'S ORDEAL, following the stories of a former officer, and victim, of China's population-control regime).

292. See WINBERG CHAI, THE NEW POLITICS OF COMMUNIST CHINA 169 (1972) (explaining that the Great Leap Forward sparked the population boom that the Chinese government has since struggled to control); see also Deans, *supra* note 3, at 356 (postulating that use of education and propaganda were meant to be long-term mechanisms by which the government could permanently alter Chinese culture into universalizing one-child families).

293. See generally China Planning, *supra* note 12, (providing the detailed provisions of China's broad population control policy).

294. See Hamburg MV, *Observations Concerning Family-Planning Education in China*, SIECUS REP., at 3–5, Nov. 1981, <http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?cmd=Retrieve&db=PubMed&list_uids=12337663&dopt=Abstract> (arguing that the government widely publicizes one-child families through various media outlets including radio, television, and billboards).

295. See China Planning, *supra* note 12, at art. 13 (stating that article 13 is the legal basis for educating people and raising awareness of birth control).

296. See Beijing Shi Renkou Yu Jihua Shengyu Tiaoli ("Regulation on Population and Family Planning—Beijing") (PRC) (promulgated by the Standing Comm. of the Twelfth Beijing People's Cong., July 18, 2003, effective Sept. 1, 2003), available at <<http://www.bjfc.gov.cn/Article/Detail.asp?UNID=6485>> (PRC) (giving background to the premarital educational requirements to the one-child policy when registering at the household registration).

297. See Chai, *supra* note 292, at 170 (setting forth the four principal methods that the government used to disseminate birth control information, including distributing informational materials describing the different types of birth control).

298. See *id.* (describing an English doctor's experience in China viewing multimedia concerning planned parenthood).

2. Fines

Some families with multiple children that have not been approved by the requisite family-planning officials are confronted with a large fees (called a social compensation fee)²⁹⁹ and penalties, assessed by the government in implementing China's one-child policy.³⁰⁰ The social compensation fee is "set at the provincial level and is implemented locally."³⁰¹ The amount assessed is a multiple of "either the annual disposable income of city dwellers"³⁰² or "the annual cash income of peasants as determined each year by the local statistics office."³⁰³

Article 43 of the Regulations on Family Planning (Shandong Province) mandates, "[I]f the couple has an out-of-plan child without the approval from relevant family-planning departments or sub district offices, in accordance with Article 42, they will be charged the Social Compensation Fee."³⁰⁴ Article 44 of Regulations on Family Planning (Guang Xi Province) states that the "local family planning department is responsible for collection of the Social Compensation Fee if the following situations exist: (a) children are born out of wedlock, (b) children are out of plan, or (c) couples circumvent the policy by means of adopting their own child."³⁰⁵ The social compensation fee and pecuniary punishment are some of the harshest enforcement tools used by family-planning officials.

299. See Deans, *supra* note 3, at 357 (illustrating other coercive measures the Chinese government uses to enforce compliance of the one-child policy, including a social compensation fee); see also Rabkin, *supra* note 13, at 970–71 (articulating that it is illegal in almost every province in China for unmarried couples to bear a child, and single women who do become pregnant are forced to have an abortion or are penalized with an exceptionally high social compensation fee).

300. See *China*, *supra* note 91, testimony of Assistant Secretary Arthur E. Dewey, Bureau of Population, Refugees, and Migration, U.S. Dept. of State (arguing that China's population policies, including the one-child policy, have had extremely negative social, economic, and human rights consequences for the nation).

301. See *id.* (noting that the social compensation fee policies are set at the providential level, with some areas waiving or greatly reducing the fees, and others imposing the fees at a higher level).

302. See *id.* (recognizing that couples who give birth to an unapproved child are likely to be assessed a social compensation fee, which could be as much as 10 times the local average annual income).

303. See *id.* (revealing that the social compensation fee could be as low as one-half the local average annual household income).

304. See *generally* China Planning, *supra* note 12 (concluding that citizens who give birth in noncompliance with the one-child policy will pay a social maintenance fee).

305. See Guang Xi Sheng Renkou Yu Jihua Shengyu Tiaoli ("Regulations on the Population and Family-Planning Policy-Guangxi Province") (adopted by the Standing Comm. of the Ninth Guangxi People's Cong., 2002), available at <<http://www.china.org.cn/chinese/renkou/224010.htm>> (PRC); see also Beijing Shi Renkou Yu Jihua Shengyu Tiaoli ("Regulation on Population and Family Planning-Beijing") (promulgated by the Standing Comm. of the Twelfth Beijing People's Cong., Jul. 18, 2003, effective Sept. 1, 2003), available at <<http://www.bjfc.gov.cn/Article/Detail.asp?UNID=6485>> (PRC) (outlining the local governments' authority in governing family-planning regulation and collection of social compensation fees).

On average, the annual income per Chinese citizen is U.S. \$1,000.³⁰⁶ This number is an average of the incomes of citizens living in cities and those living in rural areas.³⁰⁷ The average annual income of the villagers in rural areas is no more than one-third of that of urban citizens.³⁰⁸ Tremendous income differences exist between the people living in rural areas and those living in cities. However, in practice, the social compensation fee fined by the local officials under the regulations is astonishingly disproportionate to the average annual income of the Chinese citizens. For instance, in *Wang v. Gonzales*,³⁰⁹ an asylum case, Wang claimed the Chinese government had imposed an economic punishment on his family that was 100 times their monthly income because of their violation of the one-child policy. In *Zhang v. Gonzales*,³¹⁰ Zhang's family was fined 23,000 RMB, approximately U.S. \$2,800.³¹¹ However, on average, the annual income of the individual in rural areas is no more than 3,500 RMB,³¹² which is approximately U.S. \$400.

In recent years, the Chinese government has changed the way the social compensation fee is collected. The fee now goes directly to the national rather than the local authorities, to reduce the corruption caused by the collection of these large fees.³¹³ This reform restrains offi-

306. See Peerenboom, *supra* note 222, at 116 (arguing that authoritarian regimes are more stable when annual per capita income is in the U.S. \$3,000-to-U.S. \$4,000 range, not in the U.S. \$1,000 range, where China is now); see also Shan Yuqing, Average Annual Income Per Person: U.S. \$1000—the Most Important Moment for the Economic Development of China, Jan. 8, 2004, <<http://www.people.com.cn/GB/jingji/1045/2286247.html>> (showing that China's per capita annual income reached U.S. \$1,000 in 2004).

307. See James C. Kraska, *Global and Going Nowhere: Sustainable Development, Global Governance and Liberal Democracy*, 34 DENV. J. INT'L L. & POL'Y 247, 271 (2006) (stating that per capita income rose from U.S. \$470 in 1961 to U.S. \$1,324 in 1990); see also China's national per capita income reaches U.S. \$1,740, Aug. 18, 2006, <<http://big5.fmprc.gov.cn/gate/big5/www.china-embassy.org/eng/xw/t268200.htm>> (reporting that the National Board of Statistics and the National Development and Reform Commission had confirmed with the World Bank that China's national income had reached U. S. \$1,740).

308. See Dong Nan Kuai Bao, *Annual Income of Rural Villager Is No More Than One-Third of the Annual Income of Resident Living in Cities* (April 16, 2006), available at <<http://www.smexm.gov.cn/2006-4/2006416626142161.htm>> (arguing that the gap in annual income is widening between the rural villager and urban citizen, where the rural villager's income is no more than one-third of the urban citizen's income); see also *China Statistical Yearbook 2004*, available at <<http://www.stats.gov.cn/english/statisticaldata/yearlydata/yb2004-e/indexee.htm>> (last visited Oct. 5, 2008) (showing that since 1980, the disparity in income between rural and urban citizens has increased annually).

309. See *Wang v. Gonzales*, 405 F.3d 134, 143 (3d Cir. 2005) (holding that a child of individuals who were persecuted under Chinese family-planning policies does not have a valid claim to asylum because the impact of those policies on that child is too remote).

310. See *Deans*, *supra* note 3, at 368 (noting that the Ninth Circuit held that the child of forcibly sterilized parents was not automatically eligible for asylum).

311. See *Zhang v. Gonzales*, 408 F.3d 1243, 1243 (9th Cir. 2005) (establishing that the Zhang family was fined 23,000 RMB or U.S. \$2,800 for their violation of family-planning laws).

312. See Income of Individuals in Rural Areas, BBC NEWS CHINESE, Apr. 15, 2006, at ¶ 3 <http://news.bbc.co.uk/chinese/simp/hi/newsid_4910000/newsid_4911300/4911382.stm> (listing the average rural income in China in 2005 as 3255 RMB); see also Rong Jiaojiao, *China Strives to Narrow Yawning Income Gap for Social Equality*, Sept. 9, 2006, at ¶ 16, available at <<http://eg.china-embassy.org/eng/zggk/t274338.htm>> (citing improvements in both rural and urban incomes in China).

313. See ZHAO BINGLI, CENTRAL FAMILY-PLANNING COMMITTEE, IMPLEMENT THE POLICY OF SOCIAL COMPENSATION FEE CAREFULLY (2002), available at <http://engine.cqvip.com/content/d/81193x/2002/000/010/sk06_d2_6989895.pdf>.

cials' capacity to abuse their power and decreases the burden on violators of the one-child policy to some degree.³¹⁴

3. Other Pressures

In China, formal government officials constitute 0.92% of the total population;³¹⁵ other governmental employees are only 2.85% of the total population.³¹⁶ In situations where a couple gives birth to an unapproved child, the Communist Party members or governmental officials of this family will face some sanctions.³¹⁷ The government officials will lose any opportunity to be promoted and, in some cases, may even lose their jobs.³¹⁸ Article 44 of the Regulation on Family Planning (Guang Xi Province) states that government officials who have been charged the social compensation fee should be dismissed.³¹⁹ Other employees outside the government system are advised to accept punishment by their employers.³²⁰ Article 45 expresses that anyone who has been charged with violating the one-child policy is not allowed

314. See *China*, *supra* note 91 (commenting that efforts to reform the social compensation system have been somewhat successful by mitigating their impact on the poor); see also Statement by H.E. Ambassador Zhang Yishan at the Annual Session of UNDP/UNFPA Executive Board (June 22, 2005) available at <<http://www.china-un.org/eng/zghlhg/jjhshw/t200911.htm>> (asserting that China is reforming its family-planning laws in rural areas).

315. See Chen Guanggui & Jiang Naihua, *Theoretical Thoughts on the Administrative Reform* (2005), <http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=4498> (comparing the percentage of civil servants in the Chinese population with those of other industrialized nations).

316. See *id.* (asserting that government employees, including civil servants, account for only 2.85% of China's total population).

317. See *China Planning*, *supra* note 12, at art. 42 (elaborating that government officials would be punished when individuals under their jurisdiction violate family-planning laws); see also *People's Republic of China Law on Population and Birth Planning*, 28 POPULATION & DEV. R. 579, 584 (2002) (noting that under article 42, government officials who violate China's family-planning policy would be administratively punished); see also Michael Palmer, *Transforming Family Law in Post-Deng China: Marriage, Divorce and Reproduction*, 191 THE CHINA QUARTERLY 675, 687 (2007) (asserting that party and government officials are rewarded or punished according to their adherence to family-planning policies).

318. See *More Serious Punishments Should Be Imposed on the Governmental Officials and the Communist Party Members Who Violate the One Child Policy*, ¶ 11 (promulgated by Gansu Province Population and Family-Planning Commission, effective Aug. 9, 2006) (PRC) (elaborating that Party officials who fail to enforce family-planning policies are subject to severe punishments, including dismissal from the government); see also *Status of Population and Family-Planning Programme by Province*, United Nations Economic and Social Commission for Asia and the Pacific, ¶ 22 (2000) <<http://www.unescap.org/esid/psis/population/database/chinadata/gansu.htm>> (noting that organization and application of family-planning directives are delegated to the discretion of local officials in Gansu).

319. See IMMIGRATION AND NATURALIZATION SERVICE, DEPT OF JUSTICE, PROFILE SERIES CHINA: FAMILY-PLANNING POLICY AND PRACTICE IN THE PEOPLE'S REPUBLIC OF CHINA 17 (INS Information Resource Center) (1995) available at <<http://www.uscis.gov/files/natedocuments/prchn95-001.pdf>> (mentioning that punitive measures against government employees who violate the family-planning laws could be even more severe than those against normal violators).

320. See Guang Xi Sheng Renkou Yu Jihua Shengyu Tiaoli ("Regulations on the Population and Family-Planning Policy—Guangxi Province") (promulgated by the Standing Committee of the Ninth Guangxi People's Congress, 2002) (PRC); see also *People's Republic of China Law on Population and Birth Planning*, *supra* note 317, at 584 (establishing that non-governmental employees who violate family-planning laws should be subject to further punishment by their unit or organization); see also Immigration and Naturalization Service, Dept of Justice, Profile Series China: Family-Planning Policy and Practice in the People's Republic of China, *supra* note 326, at 16 (recalling that family-planning violators are subject to "multiple sources of pressure" in addition to government fines).

to be employed as a government official for seven years after the violation.³²¹ Similar mandates can be found in the Regulation on Population and Family Planning of Shandong Province.³²² Article 52 of this regulation provides that if government officials violate the one-child policy, they will endure administrative sanctions by their departments in addition to a social compensation fee.³²³

Pressures also come from co-workers or fellow-villagers.³²⁴ Certain local regulations “make co-workers and fellow-villagers punishable by withholding their bonuses, land contracts, or welfare if one member of the community violates the policy.”³²⁵ The family of a couple whose additional pregnancy has not been previously approved will be visited frequently by local officials and are forced to attend some mandatory study sessions.³²⁶ Additionally, local officials sometimes will monitor menstrual periods, and this information will be publicly posted in order to compel couples to have only one child.³²⁷

B. Inhumane Coercive Measures

China began using coercive measures to enforce the one-child policy in the early 1980s.³²⁸ However, beginning in the 1990s the central Chinese government has tried to eliminate these

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321. See Guang Xi Sheng Renkou Yu Jihua Shengyu Tiaoli (“Regulations on the Population and Family-Planning Policy—Guangxi Province”) (promulgated by the Standing Committee of the Ninth Guangxi People’s Congress, 2002) (PRC), *available at* <<http://www.china.org.cn/chinese/renkou/224010.htm>>; *see also* IMMIGRATION AND NATURALIZATION SERVICE, DEP’T OF JUSTICE, PROFILE SERIES CHINA: FAMILY-PLANNING POLICY AND PRACTICE IN THE PEOPLE’S REPUBLIC OF CHINA, *supra* note 319, at 17 (noting that employees of government-owned entities are subject to extremely strict controls in terms of family planning).
 322. See Shandong Sheng Renkou Yu Jihua Shengyu Tiaoli (“The Regulations on Population and Family Planning—Shan Dong Province”) (promulgated by the Standing Comm. of the Ninth Shandong People’s Congress, 2002) (PRC); *see also* Palmer, *supra* note 317, at 687 (indicating that higher-level national government directives relating to family planning are applied at the provincial and local levels at the discretion of lower-level officials); *see also* Official: No Promotion for Family-Planning Violation, Xinhua News Agency Mar. 29, 2007 at ¶¶ 1–2, *available at* <<http://www.china.org.cn/english/government/205306.htm>> (noting that provincial officials, like those in the Henan, can bar government employees from promotions for violations of the family-planning law).
 323. See Shandong Sheng Renkou Yu Jihua Shengyu Tiaoli (“The Regulations on Population and Family Planning—Shan Dong Province”) (promulgated by the Standing Comm. of the Ninth Shandong People’s Congress, 2002) (PRC); *see also* IMMIGRATION AND NATURALIZATION SERVICE, DEP’T OF JUSTICE, PROFILE SERIES CHINA: FAMILY-PLANNING POLICY AND PRACTICE IN THE PEOPLE’S REPUBLIC OF CHINA, *supra* note 319, at 16 (enumerating the variety of methods by which provincial officials can administratively, socially, and economically punish violators of the one-child policy who happen to be government employees).
 324. See MOSHER, *supra* note 272, at 281 (asserting that a boss will constantly criticize and threaten his employee for not cooperating with the government’s regulations).
 325. *See id.* at 303 (asserting that the fellow workers of a woman who had a second child may stand to lose their own bonuses and raises at their factory).
 326. See Guangdong Provincial Civil Affairs Department, <<http://jsj.heshan.gov.cn/html/2006/07/20060717165336-1.htm>>.
 327. See MOSHER, *supra* note 272, at 264 (asserting that the local officials would place the woman’s name and date of menstruation on a blackboard in a public place); *see also* Martin, *supra* note 51, at 411 (proclaiming that family-planning officials publish the menstrual cycles of women).
 328. See Chu Yichu, *Chinese Family-Planning Policy Is the Human Tragedy*, LAOGAI RESEARCH FOUNDATION, Dec. 1, 2006, <<http://www.laogai.org/news2/newsdetail.php?id=1017>> (stating that Song Jian decided in the early 1980s that the population must be controlled because of projections indicating that the population of China could reach 4 billion in 2050).

coercive methods and move toward a more humane and flexible system of economic rewards and punishments to control the population in an effort to comply with its obligations under various international treaties and covenants.³²⁹ Despite these efforts, local officials continue to abuse their legal powers blatantly and commit serious violations against human rights, especially women's rights.³³⁰

To enforce the one-child policy, couples are encouraged to accept sterilization surgery after giving birth to one child.³³¹ Particularly, in situations where a couple already had an unapproved child, the local officers will force either the mother or father to undergo this surgery.³³²

When a woman has already had an "unauthorized pregnancy," the officials will harass the couple,³³³ or, at least, government officials will visit the woman at home frequently and impose pressure until she terminates any additional pregnancies.³³⁴ In some regions, if the family tries to hide a pregnant woman, pressure and sometimes detention will be imposed on their relatives or neighbors.³³⁵ Placing pressure on the relatives and neighbors of violators is a method that is frequently used, as it was in the Linyi family-planning incident exposed by the Chinese activist, Chen Guangcheng.³³⁶ If a couple manages to give birth to an additional child in violation of the policy but did not pay the fines or the social compensation fee, they will face threats of evic-

329. See Pan, *supra* note 266, at A22 (describing the central government's efforts to eliminate the use of forced abortions and sterilization).

330. See Berman, *supra* note 1, at 342–43 (noting that despite a policy toward limiting the harshness of the one-child law and an increased push to respect human rights, strict punishment for violations of the law continues to exist); see also Pan, *supra* note 266, at A22 (stating that parents with two children were forced to undergo sterilization, and women pregnant with a third child were required to have an abortion).

331. See China Planning, *supra* note 12, at arts. 18–20 (discussing the level of safety of sterilization operations); see also Katherine F. Riordan, *Comment, Immigration Law—Withholding Automatic Asylum for Spouses or Partners of Victims of China's Coercive Family-Planning Policies*, 41 SUFFOLK U. L. REV. 983, 986 (2008) (referring to sterilization as part of China's family-planning policy).

332. See China, *supra* note 91 (opining that either the man or woman is strongly pressured to undergo sterilization when they have more children than allowable by law).

333. See Nicholas Cutaia, Note, *A Circuit Split of Judicial Deference: Interpreting Asylum Claims by Fiancés and Boyfriends of Victims of China's Coercive Family-Planning Policies*, 80 ST. JOHN'S L. REV. 1307, 1311 (2006) (indicating that local authorities will physically harass violators of the family-planning policies).

334. See Nortick, *supra* note 12, at 2161–62 (indicating that local officials attempt to intimidate women by visiting their homes).

335. See Teng Biao, *Linyi Family Planning Report II (Sept. 4, 2005)*, <<http://www.peacehall.com/news/gb/china/2005/09/200509041319.shtml>> (discussing the detainment of the family members of a pregnant woman); see also Jordan, *supra* note 242, at 242 (affirming that local officials target relatives of those couples trying to avoid abortion or sterilization in an effort to coerce the couples to cooperate). See generally Elisabeth Rosenthal, *For one-Child Policy, China Rethinks Iron Hand*, N.Y. TIMES, Nov. 1, 1998, at § 1 (detailing the story of a man who was detained for one week by local officials after his son had an unauthorized child).

336. See Beech, *supra* note 266 (claiming that the government forced relatives of women who resisted sterilization or abortion to participate in sessions where they were forced to admit their "wrong thinking"); see also Philip P. Pan, *Chinese to Prosecute Peasant Who Resisted one-Child Policy*, WASH. POST, July 8, 2006, at A12 (noting that Linyi officials tortured relatives of people who violated the law).

tion³³⁷ and “confiscation or destruction of their personal property.”³³⁸ Moreover, their children may be denied their basic rights to receive social welfare benefits and attend school.³³⁹

The questionable approaches used to implement the one-child policy are nationwide and occur frequently. Compared to the total number of women of reproductive age, 352,695,600,³⁴⁰ the number of female sterilizations, 82,531,728, is sizeable.³⁴¹ The number of male sterilizations, 18,696,905, is not insignificant either.³⁴² Furthermore, tens of thousands of people “with illegal children” or couples “who were ineligible to have more” children³⁴³ were forced to undergo abortions. Moreover, “threats of eviction”³⁴⁴ and “confiscation or destruction of personal property”³⁴⁵ were considered the most effective and popular ways to prevent families from having more than one child, especially in the 1980s and 1990s,³⁴⁶ and often were used when families consistently refused to terminate additional pregnancies.³⁴⁷ Families can

337. See *Forced Abortion and Sterilization in China: The View from the Inside: Hearing Before the Subcomm. on Int'l Operations and Human Rights of the H. Comm. on Int'l Relations*, 105th Cong. 7 (1998) (statement of Rep. Christopher H. Smith, Chairman, Subcomm. on Int'l Operations and Human Rights) (asserting that when couples could not pay the exorbitant fines, the government destroyed their homes).

338. See Deans, *supra* note 3, at 353 (establishing that families who do not pay a fine may be subject to harm to their personal property).

339. See generally John Gittings, *China Moves Away from one-Child Policy*, THE GUARDIAN (U.K.), July 27, 2002, available at <<http://www.guardian.co.uk/world/2002/jul/27/china.johngittings>> (emphasizing that although quotas have been abandoned, families exceeding two children are required to pay a fine that varies based on area).

340. See *China's Population*, *supra* note 33 (stating that the number of women of reproductive age is over 350,000,000); see also Chengdu Municipal Population and Family-Planning Commission, *The Percentage of Women of Reproductive Age in all the Chinese Population, The Ninth Five-Year Plan Period (March 31, 2004)* available at <http://www.cdjsw.gov.cn/Article_Show.asp?ArticleID=461> (explaining that because females of reproductive age comprise 27% of the total population, which is 1.3 billion, the accurate number of females of reproductive age is 352,695,600). See generally CIA, *The World Factbook—China*, <<https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html#People>> (last visited Oct. 5, 2008) (noting that China's total population is 1,330,044,544).

341. See generally Statistics: The Number of Women Accepting Sterilizations (Aug. 14, 2003) <http://www.popinfo.gov.cn/popinfo/pop_docrkxx.nsf/v_tjzl/6C6155F07ADAA20648256BE3000EF12C>.

342. See generally *id.*

343. See Clifford Coonan, *Blind Lawyer Who Reported Forced Abortions Goes on Trial in China*, THE INDEPENDENT (London), July 18, 2006, available at <<http://news.independent.co.uk/world/asia/article1183330.ece>> (acknowledging that people with an illegal number of children were forced into having late-term abortions).

344. See generally *Forced Abortion and Sterilization in China*, *supra* note 337 (illustrating that the government forced violators of the one-child policy out of their homes).

345. See Deans, *supra* note 3, at 353 (reiterating that families who do not pay the fine are threatened with eviction and the destruction of their homes).

346. See *Wang v. Gonzales*, *supra* note 309, at 136–37 (showing that the government harassed and destroyed property belonging to the plaintiff and his parents after they were unable to pay the fine for violating the one-child policy); see also Deans, *supra* note 3, at 353–54 (reporting that along with threats of eviction and the destruction of property, the children of the couples who violate this policy can be denied an education). See generally Liao Tianqi, *China Human Rights and Family-Planning Forum*, INDEPENDENT CHINESE PEN CENTER, Dec. 14, 2004, <http://www.boxun.com/hero/liaotq/40_1.shtml>.

347. See L. M. Cirando, Note, *Informed Choice and Population Policy: Do the Population Policies of China and the United States Respect and Ensure Women's Rights to Informed Choice?*, 19 FORDHAM INT'L L.J. 646–47 (1995) (claiming that families may lose housing opportunities, their homes may be destroyed or their property may be seized); see also Laogai Research Foundation, <<http://www.laogai.org/news2/newsdetail.php?id=475>> (last visited Oct. 3, 2008).

avoid neither the frequent visits of local officials³⁴⁸ nor the payment of the fines and the social compensation fees.³⁴⁹

Measures adopted by local and regional officials to ensure the enforcement of the one-child policy are effective but extremely harsh.³⁵⁰ They seriously impair basic human rights by imposing sterilization and abortion on pregnant women whose additional pregnancies were not approved.³⁵¹ The accompanying punishments are also unjust. In the following sections, I will discuss some actual cases and explain how the enforcement methods used by officials endanger the psychology, health, and lives of Chinese women.

1. Report from Amnesty International

A report made in 2005 by Amnesty International indicates that serious violations against women, including coerced sterilization and abortion, continue to occur during enforcement of the one-child policy.³⁵² The report examines one woman's experience in detail.

Mao Hengfeng, a woman, who became pregnant for a second time without approval from the government in violation of the One Child Policy, was sent to a labor camp for 18 months, called the "Re-education through Labor Program." She was reportedly tied up, suspended from the ceiling and was severely beaten in the labor camp.³⁵³ She had previously been detained sev-

348. See *Wang v. Gonzales*, *supra* note 309, at 136–37 (showing that after a family violated the one-child policy and could not pay the fine, they could not avoid the government's harassment and visits to destroy their property). See generally *Da Ji Yuan, The One Child Policy Should Be Abandoned*, June 15, 2006, <<http://www.epochtimes.com/gb/6/6/15/n1351801.htm>>.

349. See *Zhonghua Renmin Gongheguo Renkou yu Jihua Shengyu Fa* ("The Law of the People's Republic of China on Population and Family Planning"), art. 41 (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2001, effective Sept. 11, 2002) (PRC), LAWINFOCHINA available at <<http://www.lawinfochina.com/law/display.asp?db=1&id=2209&keyword=>> (last visited: August 9, 2007) (hereinafter *China Planning*) (codifying that a person who bears a child in violation of the law is required to pay a fine, and if it is not paid, such person is subject to punishment).

350. See *Zhang v. Gonzales*, *supra* note 311, at 1243 (alleging that the plaintiff was sterilized because the family violated the policy by having an extra child); see also *Forced Abortion and Sterilization in China: The View from the Inside, Hearing Before the Subcomm. on Int'l Operations and Human Rights of the H. Comm. on Int'l Relations*, 105th Cong. 20 (1998) (statement of Gao Xiao Duan, former Administrator, Planned Birth Control Office, Republic of China) available at <http://commdocs.house.gov/committees/intlrel/hfa49740.000/hfa_49740_0f.htm> (citing specific cases where families were forced to hide while their homes were demolished because of their violation of the policy).

351. See *Zhang v. Gonzales*, *supra* note 311, at 1243 (emphasizing that the government disregarded the father's rights by tearing him from his home and involuntarily sterilizing him); see also Karen Y. Crabbs, *United States Domestic Policies and Chinese Immigrants: Where Should Judges Draw the Line When Granting Political Asylum?*, 7 FLA. J. INT'L L. 249, 260 (1992) (presenting an example of a family who was subject to a forced abortion after they conceived a child whose birth would have violated the policy).

352. See LifeSite News, *Forced Abortion Still a Reality in China Says New Amnesty Report*, May 27, 2005, <<http://www.lifesite.net/ldn/2005/may/05052706.html>> (providing an example of a young girl who was treated terribly after having an unauthorized pregnancy).

353. See *id.* (discussing this example to show the severe mistreatment to girls who have unauthorized pregnancies).

eral times in psychiatric units where she was forced to undergo shock therapy.³⁵⁴

2. Report from an Ex-official of the Chinese Government

In 1998, an ex-official of the Chinese government who testified before a U.S. House of Representatives subcommittee confirmed her participation in coercing some Chinese women to undergo sterilization and abortion procedures.³⁵⁵ Gao Xiaoduan, an ex-official of the Family-Planning Committee, described her former working experience in Yonghe County, Jinjiang, Fujian Province.³⁵⁶ She indicated that forced sterilization and abortion were the foundational tools used in carrying out her family-planning job.³⁵⁷ When a family objected to sterilization or abortion, the officials would then confiscate their property and demolish their houses.³⁵⁸ Xiaoduan also testified to the existence of the coercive measures of enforcing the one-child policy, even in modern family-planning practice.³⁵⁹

Another report, which reflects Xiaoduan's admissions, estimated that 20,000 abortions were forced in 2001 in Guangdong "due to reported disregard of the one-child Policy."³⁶⁰

3. Other Reports

Chris Smith,³⁶¹ a member of the U.S. Congress, reported that Jieshi County of Guangdong Province has only 200,000 citizens.³⁶² During a 35-day family-planning enforcement period, 818 women were forced to have an IUD implanted, 271 women were forced to terminate their pregnancies, and 1369 women were forcibly sterilized.³⁶³

4. Asylum Cases

Some Chinese people who were accused of violating China's one-child policy have fled to other countries to escape further economic punishment and persecution. Because host countries protect immigrants that "suffered or will suffer deprivations of life or freedom in their

354. *See id.* (quoting Mao's experience on forced abortion from the Amnesty International 2005 report).

355. *See* China View, New Rich Challenge Family-Planning Policy (Dec. 14, 2005), <http://news.xinhuanet.com/english/2005-12/14/content_3918776.htm>; *see also* Hampton, *supra* note 6, at 335 (referencing Representative Christopher Smith's summary of Gao Xiaoduan's testimony).

356. *See* ObserveChina, Report of Chinese Information Center, China's One Child Policy: Deprive Basic Human Rights Under the Name of the "State" (June 9, 2005), <<http://www.guancha.org/info/artshow.asp?ID=35402>> (stating Gao Xiaoduan's position in China).

357. *See id.* (indicating the objectives of Gao Xiaoduan's job).

358. *See id.* (listing the consequences for objecting sterilization or abortion).

359. *See id.* (explaining that forced abortion and sterilization occur throughout the country).

360. *See id.* (describing the actions taken against Guangdong Province).

361. *See* EpochTimes.com, Tragedies Caused by Forced Abortion (July 8, 2006), <<http://www.epochtimes.com/gb/6/7/8/n1377940p.htm>> (introducing Chris Smith as a member of the U.S. House of Representatives).

362. *See id.* (detailing the demographics of Guangdong Province).

363. *See id.* (presenting the statistics of what happened to the people in Guangdong Province).

home country,”³⁶⁴ asylum cases tend to corroborate the human rights violations occurring because of the government’s enforcement of China’s one-child policy.

The U.S. Bureau of Citizenship and Immigration Services (BCIS)³⁶⁵ receives thousands of applications “for asylum from victims of China’s coercive population control-related persecution” every year.³⁶⁶ The U.S. Congress views China’s one-child policy as persecution that may lead people to suffer deprivations of life or freedom, which is required for individuals seeking asylum,³⁶⁷ and has also mandated that the BCIS set aside one thousand visas per year specifically for the Chinese victims of this policy.³⁶⁸

In *Wang v. Gonzales*,³⁶⁹ Wang, a fourteen-year-old boy, illegally entered the United States to seek asylum. Wang claimed the Chinese government had imposed an economic punishment on his family that was 100 times their monthly income because of their violation of the one-child policy, and that his mother had been forcibly sterilized.

In *Zhang v. Gonzales*,³⁷⁰ Zhang lived in a rural village where the local government allowed two children per couple if the couple’s first child was a girl.³⁷¹ Zhang’s parents had two girls and then had a third child, so government officials forced Zhang’s father to undergo sterilization, which took “a heavy toll on Zhang’s father and the family,”³⁷² both physically and emotionally. Additionally, local officials fined the Zhangs 23,000 RMB (approximately U.S. \$2,800) for their violation of its policy.³⁷³ In contrast, on average, the annual income of the individual in rural areas is no more than 3500 RMB³⁷⁴ (approximately U.S. \$400). Unable to

364. See Deans, *supra* note 3, at 358 (illustrating the basis by which immigrants are protected as refugees).

365. See Wu, *supra* note 50 (providing information about the bureau).

366. See *id.* (claiming a reason why this topic should be of interest to policy makers and voters); see also Harry Wu, *Controlling China: The U.S. Congress Should Not Fund State-Mandated Abortions* (Jul. 9, 2004), available at <<http://www.nationalreview.com/comment/wu200407090919.asp>> (explaining that China’s one-child policy is the only means by which people are eligible for asylum based on population control).

367. See 8 U.S.C. § 1101(42)(B) (2006) (expanding the definition of persecution to include those who are victims of coercive population controls); see also Wu, *supra* note 50 (discussing Congress’s view on China’s one-child policy).

368. See Wu, *supra* note 50 (using Congress’s mandate as an indication of its view of China’s one-child policy).

369. See *Wang v. Gonzales*, *supra* note 309, at 138 (affirming the holding that Wang was not entitled to asylum).

370. See *Zhang v. Gonzales*, *supra* note 311, at 1239 (holding that the child of a parent that has been forcibly sterilized is not afforded automatic eligibility for asylum in the United States).

371. See Kristi Deans, Comment, *Less Than Human: Children of a Couple in Violation of China’s Population Laws and the Barriers They Face in Claiming Asylum in the United States*, 36 CAL. W. INT’L L. J. 356 (noting that the government allows families in rural areas to have two children when the first one is female).

372. See *id.* at 368 (commenting that forced sterilization on Zhang’s father by the Chinese government after the birth of the family’s third child greatly affected him).

373. See *Zhang v. Gonzales*, *supra* note 311, at 1243 (noting that Chinese officials imposed a fine equivalent to U.S. \$2,800 on the Zhang family).

374. See *China’s Rural per Capita Income Less Than One-Third of the City*, BBC NEWS CHINESE, Apr. 15, 2006, <http://news.bbc.co.uk/chinese/simp/hi/newsid_4910000/newsid_4911300/4911382.stm> (noting that on average, the annual income per individual in rural places is 3255 yuan).

pay the fine, the Zhangs were threatened with eviction by local officials.³⁷⁵ Furthermore, Zhang and her two siblings were prohibited from attending school because of their parents' violation of the national family-planning policy.³⁷⁶ Because of this hardship, Zhang was smuggled into the United States, where she hoped to get an education.³⁷⁷

5. The Linyi Family-planning Incident

The Linyi family-planning incident refers to the abuse of China's one-child policy in Linyi, Shandong Province.³⁷⁸ Forced sterilization and abortion, both inhumane and illegal measures, were imposed on women whose additional pregnancies were not approved by the local officials to achieve the objectives of the one-child policy.³⁷⁹ Pregnant women in Linyi and their families consistently faced illegal arrest, harassment, and large economic penalties.³⁸⁰

The Linyi family-planning incident has become a nationally known crisis because of exposure by a human rights activist.³⁸¹ It was exposed to the media³⁸² and some higher-level government departments, by Chen Guangcheng,³⁸³ an activist in China. Exposing this incident

375. See *Zhang v. Gonzales*, *supra* note 311, at 1243 (explaining that officials threatened to evict the Zhangs from their home because of their inability to pay the imposed fine).

376. See *id.* (noting that the Zhang children were prohibited from attending school so long as the fine was outstanding).

377. See *id.* (detailing Ms. Zhang's asylum application, in which she declared that her mother obtained a fake passport and visa and made arrangements to smuggle her into the United States, where she wanted to learn and work).

378. See Nortick, *supra* note 12, at 2153 (stating that Linyi is a region located in Shandong Province); see also Bureau of Democracy, Human Rights, and Labor, Country Reports on Human Rights Practices—2006, March 6, 2007, <http://beijing.usembassy-china.org.cn/hr_report2006.html> (noting that the enforcement of China's one-child policy is particularly bad in Linyi, Shandong Province).

379. See Hsu, *supra* note 53, at 320–22 (1996) (explaining that abortion and forced sterilization were commonly used by officials to enforce the population-control policy, and that the government gave officials sterilization quotas and incentives to meet those quotas); see also Teng Biao, *How Barbaric?—Notes Linyi Family-Planning Survey of Ten*, BOXUN, <http://boxun.com/hero/tengb/35_1.shtml> (last visited Oct. 4, 2008) (noting that Chinese officials used tactics like forced sterilization and abortion to make its citizens adhere to the one-child policy).

380. See Teng, *supra* note 379 (commenting that Chinese officials threatened pregnant women with illegal arrests, harassment, and large penalties).

381. See Traci Daffer, Note, *"I Am Fighting for the Right to Eat, and I Will Keep Fighting. The Truth Is on Our Side": Class Action Litigation as a Means of Enacting Social Change in China*, 75 UMKC L. REV. 227, 233–34 (2006) (commenting that activist Chen Guangcheng single-handedly brought the family-planning problems in Linyi to the attention of officials in Beijing and the international community).

382. Chen Guangcheng exposed this abuse of human rights to the media around the world. The Washington Post, the New York Times, Free Asia Station, BBC, and other famous newspapers and TV stations have reported this issue. See Martin, *supra* note 51, at 414 (noting that Guangcheng spoke with the Western media regarding the practices of Chinese officials and was subsequently arrested); see also *Chinese Activist "Beaten in Jail"*, BBC NEWS CHINESE, June 22, 2007, <<http://news.bbc.co.uk/2/hi/asia-pacific/6230148.stm>> (detailing the hardship endured by Guangcheng during his stand against the inhumane tactics used by China to enforce the one-child policy); see also Joseph Kahn, *Advocate for China's Weak Crosses the Powerful*, N.Y. TIMES, July 20, 2006 (summarizing Chen Guangcheng's efforts to oppose illegal methods of population control by Chinese officials).

383. See Pan, *supra* note 336, at A12 (describing Chen Guangcheng as a 34-year-old blind rural activist who brought attention to forced abortion and sterilization policies in the city of Linyi by bringing a class action suit against officials in the province).

resulted in the detention of Chen Guangcheng and some supporting local villagers by the local government.³⁸⁴

On July 9, 2004, Linyi Municipal Government announced a directive, *About the Decision on Strengthening the Control of Population and Family Planning in the New Period*,³⁸⁵ which it considered the legal basis for the family-planning program.³⁸⁶ Then, on February 14, 2005, the Linyi Municipal Government handed out the "Red Heading Directive"³⁸⁷ in which the government overestimated the self-discipline of its citizens, who, in reality, were unable to abide by the policy.³⁸⁸ It came out later that the Linyi Municipal Government believed its citizens could not voluntarily follow the family-planning policy. The local officials believed that in order to fulfill quotas of family planning, effective but coercive methods had to be utilized.³⁸⁹ In March 2005, three districts and nine counties of Linyi launched a large-scale coercive family-planning campaign.³⁹⁰ Forced sterilization, forced abortion, arrest, harassment and a variety of other coercive measures were adopted.³⁹¹

The case of Lijuan is a good example of the coercive measures being used by local authorities. Lijuan, a 24-year-old woman and a farmer in Linyi, was forced to abort her baby through the injection of a saline solution into the womb only days before she was due to give birth.³⁹² She indicated that a large number of other women in her city were forced to abort their children under similar circumstances.³⁹³ According to a report, from March 2005 to July 2005, at

384. See Joseph Kahn, *Chinese Court Upholds Conviction of Peasants' Advocate*, N.Y. TIMES, Jan. 13, 2007, at A2 (reporting that local Linyi officials responded to Chen's advocacy by retaliating against Chen, his family, and his defense lawyers by putting his home village under guard and forcing local villagers to testify against him).

385. See David Eimer, *China Admits Women Were Forced to Have Abortions*, THE INDEPENDENT, Sept. 21, 2005, at 29 (commenting that Linyi officials were forcing women to have abortions and to undergo sterilizations in compliance with the directive issued by the municipal government).

386. See Zhang Yaojie, *Chen Wen Jiabao and China's Human Rights and Political Power Regime*, SECRET CHINA, June 3, 2006, <<http://secrechina.com/news/pub/view.php?aid=153902>> (interpreting the directive to mean that the Linyi Municipal Government intended to take a harder line, including violence, against those who resisted the town's family-planning procedures).

387. See Posting of What Is "Red Heading Directive?" to <<http://test.iask.sina.com.cn/b/6341905.html>> (Sept. 13, 2006, 22:45 EST) (defining a "Red Heading Directive" as an official government document used by the Chinese national government to announce official government policy on a particular subject).

388. See Zhang, *supra* note 386 (noting that the municipal government had to issue the directive again to ensure compliance).

389. See *id.* (describing the local government directive calling for coercive measures in implementing the city's abortion and sterilization policies).

390. See Beech, *supra* note 266, at 58 (explaining that Linyi officials were scolded at a provincial meeting for having the highest number of births in the province, which led them to institute coercive abortion and sterilization policies).

391. See Zhang, *supra* note 386 (suggesting that the nature of Linyi's enforcement policies led international media to begin to report on the situation).

392. See Hu Loses Face over Forced Abortions, THE AUSTRALIAN, Sept. 19, 2005, at 13 (outlining Li Juan's story that she was in the ninth month of her pregnancy when she was pinned down in a local clinic, where a poison-filled syringe was inserted into her abdomen to forcefully abort her baby).

393. See *Officials of Shandong Have Been Arrested for Use of Forced Abortion to Unapproved Pregnant Women*, *supra* note 288 (maintaining that human rights groups complained to the central government when women were forced into abortion or sterilization).

least 7000 families were forced to undergo sterilization in Linyi.³⁹⁴ Wan Zhendong, an officer in the statistics department of Nigou County, reported that almost 99.9% of families of Linyi accepted the family-planning policy.³⁹⁵ According to Wan, of the 58,000 residents in his county,³⁹⁶ 20 of them undergo sterilization surgeries per month,³⁹⁷ 2 of them accept abortions each day, and three or four late-term abortions are performed every month.³⁹⁸

6. The One-child Policy and Unmarried Mothers

The Chinese Constitution and its corresponding statutes have no specific provisions concerning the reproductive rights of unmarried women,³⁹⁹ but, in practice, unmarried women are prohibited from having children. The Ji Lin Province is an exception to this de facto rule, however, because it has passed a regional regulation providing reproductive rights to unmarried women.⁴⁰⁰ This regulation has been challenged by other provinces, some of which have argued that no reproductive rights exist for unmarried women.⁴⁰¹

In the enforcement of the one-child policy, abortion will be strongly encouraged for unmarried pregnant women, sometimes even by coercive means. For example, Wang Haixia,⁴⁰² a local resident of Zhengzhou, Henan Province, was seven months pregnant when she went with her boyfriend to Fengqiu, Henan Province, to deal with some personal affairs. Initially they were arrested and detained by Fengqiu police because they stayed in a hotel without a marriage certificate.⁴⁰³ When the police found Wang was pregnant, they transferred her to the local

394. See Evan Osnos, *Chinese Peasants Jailed to Enforce 1-Child Rule; Forced Sterilizations, Abortions Protested*, CHI. TRIB., Oct. 2, 2005, at C1 (reporting Chen Guancheng's account in which he described an aggressive campaign by local Linyi officials to sterilize women).

395. See *id.* (stating the opinion of Wan Zhedong that people who allege they have been detained are seeking to avoid paying fines for having too many children, and that 99.9% of local citizens agree with the government's policy).

396. See *id.* (acknowledging that of the 58,000 citizens in the county, it is unclear how many abortions or sterilizations in Nigou are involuntary or coerced).

397. See *id.* (discussing the number of sterilization procedures performed in Nigou County each month).

398. See *id.* (noting the number of early and late-term abortion procedures performed at the People's Hospital each month).

399. See *Can the Reproductive Rights of the Unmarried Women Realize?* PEOPLE'S DAILY ONLINE, Nov. 18, 2002, <<http://www.people.com.cn/GB/shehui/46/20021118/868536.html>>. See generally CENTER FOR REPRODUCTIVE RIGHTS, WOMEN OF THE WORLD: FORMAL LAWS AND POLICIES AFFECTING THEIR REPRODUCTIVE LIVES, 27-52 (1995) (discussing the general laws and policies on reproductive rights in China); see generally U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CHINA, 8-9 (2005), <<http://www.state.gov/g/drl/rls/hrrpt/2005/61605.htm>> (reviewing China's family-planning laws and the effects of their enforcement on the Chinese populace).

400. See China Planning, *supra* note 12, at art. 30(2); see also Ma Yang & Ma Guhua, Local Legislation Giving Single Women Birth Right Caught in Debate, CHINA'S HUMAN RIGHTS, <<http://www.humanrights.cn/zt/magazine/200402004812104954.htm>> (last visited Oct. 6, 2008) (discussing the regulation passed by the Jilin Provincial People's Congress).

401. See Dayang Wang, *No Reproductive Rights for the Single Women*, 21CN NEWS, Nov. 9, 2002, <<http://news.21cn.com/guangdong/gz/2002-11-09/826885.html>>; see also IMMIGRATION AND REFUGEE BOARD OF CANADA, RESPONSE TO INFORMATION REQUESTS CHN100511.E (Sept. 6, 2005), <http://www.cisr-irb.gc.ca/en/research/rit/index_e.htm?action=record.viewrec&gotorec=449498> (examining the reproductive rights of single women in the Guangdong, Fujian, and Zhejiang provinces).

402. Li Changxin, He Nan Fengqiu Police: Investigation on Forced Abortion (April 23, 2006).

403. See *id.*

family-planning department and coerced her into aborting her seven-month-old fetus because “the authorities took it upon themselves to decide a single woman had no right to have a child.”⁴⁰⁴

C. Circumventing the Law: Privilege of Rich Families and Celebrities?

Based on relevant statutes, regulations and proposals, the so-called privilege of rich families violates the one-child policy.⁴⁰⁵ This privilege and the corresponding violations of the policy are examined in this section.

1. Typical Cases of Rich Families and Celebrities

The arguments and challenges of the enforcement of the one-child policy in recent years focus primarily on the family plans of rich families and celebrities. There are a number of rich families and celebrities circumventing the one-child policy. For instance, Chen Kaige, who originally was a Chinese citizen but is now a U.S. citizen, is a famous film director who has two children with his wife Chen Hong, a famous film star.⁴⁰⁶ Wei Wei, who was originally a Chinese citizen but is now a Swedish citizen by marriage, has three sons with her ex-husband, a Swedish musician.⁴⁰⁷ Fu Mingxia, a well-known Chinese sports star who won several Olympic medals, married Liang Jinsong, a former general director of the Financing Department of Hong Kong. Fu has become a citizen of the Hong Kong Special Administrative Region and now has two children.⁴⁰⁸ Jing Gangshan, a Chinese citizen and famous male singer in China, has one son and one daughter.⁴⁰⁹ Mao A'min, a Chinese citizen and famous singer, gave birth to a daughter two-and-a-half years ago and gave birth to a boy in Shanghai this year.⁴¹⁰

These famous stars are criticized by the public for their out-of-plan births. Are these births lawful or unlawful?

404. See Jehangir S. Pocha, *China Seizes “One Child” Critic*, S.F. CHRON., Nov. 3, 2005, at A8 (discussing the burgeoning population in Shandong Province and the resulting one-child policy enforcement).

405. See Liu Li, *The Rich Told to Follow Family Planning*, CHINA DAILY, Jan. 1, 2007, <http://www.chinadaily.com.cn/china/2007-01/24/content_790805.htm> (discussing a government press release clarifying that the one-child policy applies to all Chinese citizens); see also Nick Macfie, *Many Chinese Rich Skirt One-child Policy*, REUTERS, Jan. 21, 2008, <<http://www.reuters.com/article/lifestyleMolt/idUSPEK2455920080121>> (discussing the Chinese government's efforts to enforce the one-child policy on the upper class).

406. See Liu Yang, *Challenges on the Famous Stars' Out-of-Plan Children and Limitations Imposed on Them*, PEOPLE'S DAILY ONLINE, Jan. 25, 2007, <<http://finance.people.com.cn/GB/1037/5328045.html>> (noting the birth of Kaige's two children, who are of Swedish nationality).

407. See *Two-Year Lawsuit Endowed Custody Rights to Wei Wei*, TOM, Nov. 13, 2005, <<http://music.ent.tom.com/1026/1027/20051113-62666.html>> (describing the custody battle between Wei Wei and her ex-husband); see also *Wei Wei on the Web*, RADIO86, Oct. 10, 2007, <<http://www.radio86.co.uk/china-insight/from-chinese-media/4067/wei-wei-on-the-web>> (noting Wei Wei's divorce and family situation).

408. See Xiao Niao'er, *Happy Life of Fu Mingxia*, NUSPORTS, July 30, 2006, <<http://china.nba.com/200607/31535.html>>.

409. See You Li, *Jing Gangshan, His Son and His Daughter*, ATBAG, Nov. 29, 2006, <<http://www.atbag.com/html/wedding/qj/2006112974110.html>>.

410. See Liu, *supra* note 406.

2. Lawful or Unlawful?

a. Background and Relevant Regulations

According to the law, Chinese who have acquired citizenship from other countries can circumvent the one-child policy,⁴¹¹ but in marriages where one party is of Chinese nationality and the couple gives birth to a child in China, the family-planning law applies.⁴¹² However, there is an exception to the applicability of this rule because parents can decide to choose a non-Chinese nationality for their child before the child turns 18.⁴¹³ On the contrary, if the child of a marriage between people of different citizenship is born outside mainland China, the one-child policy does not apply.⁴¹⁴

For couples in China that are both Chinese citizens and able to afford to live outside the mainland, whether in other countries or in Hong Kong, Macao, or Taiwan, when these couples have children, those children are not counted under the family-planning policy, even if the children are “technically . . . natural born Chinese citizen[s] through parentage.”⁴¹⁵ Thus, Chinese parents who have children off the mainland are able to successfully circumvent the one-child policy and have more than one child.

Moreover, even if a rich family does not give birth to a child outside mainland China and they are still Chinese citizens, they will often be able to have more than one child in mainland China without being forced to undergo an abortion or sterilization. This is true because the officials of the family-planning department know that the wealthy families have money to pay the fines and the social compensation fees, and, to some extent, they tolerate the out-of-plan children of these families in order to collect the fees.⁴¹⁶ Under other circumstances, if the quota

411. See *Zhonghua Renmin Gongheguo Guoji Fa* (“Nationality Law of the People’s Republic of China”) (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 10, 1980, effective Sept. 10, 1980), LAWINFOCHINA, (PRC) (proclaiming in article 3 that the People’s Republic of China “does not recognize dual nationality for any Chinese national”); see also Michael Bristow, *Grey Areas in China’s One-child Policy*, BBC.COM, Sept. 21, 2007, available at <<http://news.bbc.co.uk/2/hi/asia-pacific/7002201.stm>> (describing “overseas Chinese” who settle in China exempt from the one-child policy); see also Meg Jalsevac, *China’s Wealthy Citizens Find Ways to Side-Step One Child Policy*, LIFESITENEWS.COM, Jan. 9, 2007, <<http://www.lifesitenews.com/ldn/2007/jan07010903.html>> (reporting that women who have a second child abroad may bring that child back to China without penalty, as can Chinese female citizens registered as overseas citizens).

412. See Nationality Law, *supra* note 411, at art. 4 (holding that any person born inside China with at least one Chinese national parent is a Chinese national and subject to all Chinese laws pertaining to citizens).

413. See *id.* at art. 14 (describing the process whereby parents may renounce Chinese citizenship for such a child under 18 years old).

414. See *id.* at art. 5 (describing the difference between a Chinese citizen from a non-citizen, such as a person with foreign nationality and at least one parent that has settled abroad).

415. See *Sun Wen Chen v. Attorney General of United States*, 491 F.3d 100, 104 (3d Cir. 2007) (describing an assessment by the U.S. State Department that mentions an apparent absence of a national policy regarding children born abroad with respect to the one-child policy); see also U.K. HOME OFFICE: COUNTRY OF ORIGIN INFORMATION REPORT—CHINA, at 32.25 (2006) (reporting that some Chinese nationals have had children abroad so as to not have those children counted under the one-child policy).

416. See Zhou Xiaoliu, Comment, *680,000=Permission of Out of Plan Children?*, ANHUINEWS, March 15, 2007, available at <<http://comment.anhnews.com/system/2007/03/15/001690833.shtml>> (asserting that economic sanctions imposed by the Chinese government on wealthy people have failed to deter such people from having additional children).

is strictly assigned by the upper-level department, a rich family can either “buy” the ability to have one more child or at least avoid forced sterilization or abortion through the payment of money or the exercise of their social influence.⁴¹⁷

b. Under the One-child Policy, Lawful or Unlawful?

According to these relevant statutes, the cases of Chen Kaige and Wei Wei are not violations of the one-child policy because of the parents’ nationalities. Although Fu Mingxia is a Chinese citizen, her babies were born in Hong Kong, which is outside mainland China, and therefore the births were not in violation of the one-child policy. The cases of Jing Gangshan and the Mao A'min fall within the family-planning law not only because of each parent's Chinese citizenship, but also because their children were born on the mainland.⁴¹⁸ Jing and Mao violated the law and were punished.⁴¹⁹

c. New Proposals Restricting an Out-of-plan Birth for Rich Families

Because of criticisms of the out-of-plan births of rich families, there have been some proposals to control the circumvention of the policy in cases of wealthy families. In 2005, Zhang Weiqing, director of the National Family-Planning Committee, emphasized the problem of the family plans of celebrities, famous public persons, CEOs of private companies, and other historically wealthy groups.⁴²⁰ Yu Xuejun, spokesman for the National Family-Planning Committee, stated that the committee planned to establish a reputation record that would bar celebrities from being eligible for any award nominations if they violated the family-planning policy because he felt that famous or wealthy people were less concerned about money and more concerned with their reputation.⁴²¹

417. See *id.* (reporting that wealthy Chinese can circumvent the one-child policy by buying influence in order to avoid regulations).

418. See Angelica Cheung, *Cultural Revolution*, ASIaweek.COM, June 28, 1996, <<http://www-cgi.cnn.com/ASIANOW/asiaweek/96/0628/feat1.html>> (describing Mao A'min as a citizen of mainland China who is subject to the one-child policy); see also *Tighter One-Child Rule for Rich and Famous*, THE STRAITS TIMES, Jan. 22, 2008, <http://www.straitstimes.com/Free/Story/STIStory_198620.html> (citing Jing Gangshan as a resident of China whose second child was born without a residential permit under the one-child policy).

419. See Cheung, *supra* note 418 (describing Mao A'min as a citizen of mainland China whom the government punished as a result of not following Chinese law under the “One-Child” policy); see also *Tighter One-Child Rule for Rich and Famous*, *supra* note 418 (describing Jing Gangshan as a resident of China whose second child was born without a residential permit under the one-child policy).

420. See Liu, *supra* note 406 (describing the country birth control coordinator's desire to more strictly regulate families of the rich and celebrities).

421. See *id.* (urging greater penalties than monetary fines for celebrities by instituting fines on their reputations).

d. The Legitimacy of This Proposal

The Universal Declaration of Human Rights contains provisions about the protection of privacy and an individual's reputation.⁴²² Article 12 states that "[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation."⁴²³ "Everyone has the right to the protection of the law against such interference or attacks."⁴²⁴ This provision clearly defines an individual's fundamental right to protect his own honor and reputation and imposes a legal obligation on its member state to protect these rights. Article 17⁴²⁵ of the International Covenant on Civil and Political Rights is also committed to upholding individuals' honor and reputation. Based on the comments made by the Human Rights Committee, member states are under an obligation to protect individuals' honor and reputation rather than limit their rights to be honored.⁴²⁶ The committee also requires its state parties to make some provisions to protect individuals' honor and reputation against attacks.⁴²⁷ Not surprisingly, the proposal to punish wealthy families by restricting their rights to be honored and diminishing their reputation is contradictory to the principle and purpose of the Universal Declaration of Human Rights.⁴²⁸

In the domestic arena, admittedly, some famous people, and other rich groups do circumvent the law by various means, such as by acquiring the nationality of other countries or by giving birth to the child outside the mainland of China, but these actions are not unlawful.⁴²⁹ Individuals have the right to determine their nationalities and the place of birth of their chil-

422. See K. Lee Boyd, *Are Human Rights Political Questions?*, 53 RUTGERS L. REV. 277, 288 (2001) (citing the Universal Declaration of Human Rights as an example of an agreement that protects basic human rights such as privacy and individual reputation as customary norms); see also Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 750 (2006) (quoting the preamble to the Universal Declaration of Human Rights, which recognizes "the inherent dignity and . . . the equal and inalienable rights of all members of the human family").

423. See Universal Declaration of Human Rights, *supra* note 93 at art. 12 (declaring, "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his hono[u]r and reputation").

424. See *id.* (holding that all persons enjoy the right to the protection of the law against such interference or attacks); see also STIG STROMHOLM, *RIGHT OF PRIVACY AND RIGHTS OF THE PERSONALITY: A COMPARATIVE SURVEY* 77 (1967) (citing the United Nations Declaration of Human Rights, article 12).

425. See JOSEPH ET AL., *supra* note 118, at 476 (declaring that every individual's privacy, family, home, correspondence, and reputation will not be subject to attack or arbitrary interference); see also WEISSBRODT ET AL., *supra* note 102, at 41 (establishing the importance of protecting the individual from unlawful interference concerning his or her privacy, family, home, correspondence, and reputation).

426. See ALEX CONTE ET AL., *DEFINING CIVIL AND POLITICAL RIGHTS: THE JURISPRUDENCE OF THE UNITED NATIONS HUMAN RIGHTS COMMITTEE* 153 (2004) (explaining that states are required to provide legislation that will aid the protection of personal honor and reputation).

427. See *id.* (noting the state's obligation to protect its citizens' personal honor and reputation from attack).

428. See Saona, *supra* note 10, at 254–55 (discussing the PRC's family-planning policies, using both positive and negative incentives, to obtain goals that are against U.N. standards). See generally Xiaorong, *supra* note 121, at 183–84 (weighing China's family-planning actions against U.N. standards and finding that China is not up to par).

429. See L.L. Jen, *When One Isn't Enough: China's Rich Couples Are Willing to Pay the Price for a Family*, NEWSWEEK, Dec. 30, 2002, at 23 (describing how wealthy pregnant women travel abroad to give birth so that their children will have foreign passports and be exempt from the restriction). See generally Loretta Chao, *Politics & Economics: China to Retain Its One-child Policy*, WALL ST. J., Mar. 11, 2008, at A7 (identifying the fact that "wealthy or well-known Chinese citizens" are blatantly violating the one-child policy).

dren.⁴³⁰ Therefore, the wealthy groups who are qualified to have more children outside the policy, such as Wei Wei and Chen Kaige, should not been placed into the same group as couples having additional children unlawfully nor should the public oppose their behavior. The families of Wei Wei, Chen Kaige, and other rich families in similar situations have the right to have more children lawfully.

Rich people who are Chinese citizens and give birth to out-of-plan children in mainland China should have the same rights and take the same responsibilities as lower-income people and not be sanctioned with punishments that diminish their reputation. Currently, the social compensation fee for rich groups is calculated using the same method as for lower-income groups, which is a certain percentage of the real personal income of violators.⁴³¹ The wealthy families' ability to pay the fine and to have more children seems unfair to the poor people and to some extent, results in social inequality. The "privilege," however, seems to exist only because the rich can more easily afford the fines imposed by the government. Therefore, is it necessary to impose an entirely different type of punishment, like one diminishing reputation, on the rich? It certainly does not seem necessary to deprive individuals of their right to protect their honor and reputation because local officials believe that the monetary fines will not be as harsh.

First of all, the number of rich people is small, and the number of wealthy families who want more than one child is even smaller.⁴³² This reality would ensure that maintaining the same punishment for poor and wealthy families will not cause a boom in China's population. Second, rich families pay more in social compensation fees, which provides the government with more funds to benefit the public welfare.⁴³³ To some degree, it is a win-win model. Third, the rich families have more money to support their own children. This allows them to provide their children with better health care and education, which typically places no additional burden on the government.⁴³⁴

430. See Zeng Xianghua, *Freedom of Movement on the Constitution of Thinking*, June 2003, <<http://www.gongfa.net/Show.aspx?ID=221>> (establishing the foundation of the constitutional right to the freedom of movement, which includes the freedom to leave one's country, travel abroad, and then return).

431. See Maureen Fan, *China to Ease One-child-only Fines*, WASHINGTON POST, Jan. 24, 2007, at A7 (reporting the Chinese government's announcement that in the future it will consider the hardship on the poor of paying a fine for a second child). See generally Edwin A. Winckler, *Chinese Reproductive Policy at the Turn of the Millennium: Dynamic Stability*, 28 POPULATION AND DEV. REV. 379, 395 (2002) (reviewing the Chinese government's policy for the social compensation fee that singles out only state employees as being held to a different standard).

432. See Antoaneta Bezlova, *What Price a Chinese Emperor?*, ASIA TIMES (Hong Kong), May 11, 2007, <<http://www.atimes.com/atimes/China/IE11Ad01.html>> (establishing that only 10% of the wealthy seek additional children). See generally Rosenthal, *supra* note 335 (noting the trend toward desiring no more than one child among urban Chinese citizens); see generally Elisabeth Rosenthal, *Rural Flouting of One-child Policy Undercuts China's Census*, N.Y. TIMES, Apr. 14, 2000, <<http://query.nytimes.com/gst/fullpage.html?res=9D03E6DC1E3EF937A25757C0A9669C8B63&sec=health&spon=&pagewanted=1>> (detailing the boom of extra babies coming from the countryside, where many families are ignoring the one-child policy and are not informing the government of new births).

433. See *One-child Policy in China: Testimony Before the H. International Relations Comm.* (2004) available at <<http://www.state.gov/g/prm/rls/39823.htm>> (explaining that compensation fees, paid by families who can afford them, go to the national government). See generally Rosenthal, *supra* note 335 (highlighting the economic viability required to receive government approval for a second child).

434. See Skalla, *supra* note 2, at 355 (establishing that wealthy families that choose to have additional children are not affected by the government's fines; they are able to provide for and have the state recognize their additional children). See generally Jen, *supra* note 429, at 23 (stating that many wealthy Chinese families are able to afford to have a second or third child, even with the mandatory fees).

Finally, no legal basis exists for punishment that diminishes reputation. Article 38 of the Constitution of the People's Republic of China states that "[t]he personal dignity of citizens of the People's Republic of China is inviolable. Insult, libel, false accusation or false incrimination directed against citizens by any means is prohibited."⁴³⁵ Article 101 of the General Principles of the Civil Law of the People's Republic of China⁴³⁶ proclaims that "[c]itizens and legal persons shall enjoy the right of reputation. . . . The personality of citizens shall be protected by law, and the use of insults, libel or other means to damage the reputation of citizens or legal persons shall be prohibited."⁴³⁷ Article 102 of this Law states that "[c]itizens and legal persons shall enjoy the right of honor. . . . It shall be prohibited to unlawfully divest citizens and legal persons of their honorary titles."⁴³⁸ All these laws explicitly provide for the respect of the reputation of individuals and, therefore, no legal basis exists for the proposed reputation punishment.

Rich families who have an out-of-plan child have violated the national policy and should undergo the same punishment as other families instead of a different one designed to affect them more adversely. Punishment that diminishes reputation has no legal basis and violates an individual's honor and privacy.⁴³⁹ The one-child policy is an ethical education rather than a legal requirement.⁴⁴⁰ Social justice and social equality means protecting all groups of citizens, without regard to income or social status.⁴⁴¹ Moreover, what the government needs to focus on is monitoring the corruption caused by the one-child policy.⁴⁴²

In summary, although the reproductive rights of rich families are not violated, and sterilization and abortion are not forced on these families, punishments affecting reputation raise serious issues, and the proposal of the National Family-Planning Committee should not be passed.

435. See Xian Fa [Constitution] pmbles (PRC) at art. 38, § 2 (stating the Chinese government's dedication to protecting personal dignity from attack, including insult, libel, false accusation, and false incrimination).

436. See General Principles of the Civil Law of the People's Republic of China (promulgated by the President, Apr. 12, 1986, effective Jan. 1, 1987), arts. 101–2 (PRC), available at <http://www.law-lib.com/law/law_view.asp?id=3633&page=6> (presenting the important civil affairs regulation statute, which is equivalent to the Civil Code of the Civil Law legal system).

437. See *id.* at art. 101 (reiterating the constitution's protectionist stance toward ensuring the reputation of citizens).

438. See *id.* at art. 102 (continuing the policy of protecting the citizen by prohibiting the illegal deprivation of honorary titles).

439. See Crabbs, *supra* note 351, at 267 (describing the enforcement of the one-child policy in China).

440. See China Planning, *supra* note 12, art. 17 (stating that families should follow the laws of the country regarding family planning).

441. See generally ROBERT KUTTNER, THE ECONOMIC ILLUSION: FALSE CHOICES BETWEEN PROSPERITY AND SOCIAL JUSTICE, 2–3 (1987) (analyzing social justice and equality as a whole); see generally John O. Calmore, "Chasing the Wind": Pursuing Social Justice, Overcoming Legal Mis-education, and Engaging in Professional Re-socialization, 37 LOY. L.A. L. REV. 1167, 1187–88 (2004) (referring to social justice in the context of the practice of law).

442. See BRUCE GILLEY, CHINA'S DEMOCRATIC FUTURE: HOW IT WILL HAPPEN AND WHERE IT WILL LEAD 48 (2004) (stating that the one-child policy has created a great deal of corruption by leading to bribery of officials to look the other way); see also ALAN LAWRENCE, CHINA SINCE 1919: REVOLUTION AND REFORM: A SOURCEBOOK 264 (2004) (pondering that the one-child policy has been corrupted because many families have gone around it); see also Nicole M. Skalla, Note, *China's One-child Policy: Illegal Children and the Family Planning Law*, 30 BROOK. J. INT'L L. 329 (2004) (referring to the monitoring of trafficking in women and family planning to avoid corruption).

VI. Protection of Women's Rights

A. Women's Rights

1. The Right to Make Decisions About Reproduction

Narrowly speaking, reproductive rights refer to make decisions about the size and spacing of one's family and the right to make such decisions free from coercion, discrimination, or violence.⁴⁴³ Reproductive rights are embraced by the concept of human rights, and this has been recognized by both international and national communities.⁴⁴⁴ Laws and policies that obstruct women's access to reproductive decisions constitute a fundamental violation of human rights.⁴⁴⁵ On the international level, the 1994 International Conference on Population and Development (ICPD) addressed individual's and couples' rights to decide the spacing of their families. This right is "an essential component to achieving quality reproductive health care and sustainable development."⁴⁴⁶

Domestically, Chinese statutes never expressly approve the violations of women's rights;⁴⁴⁷ however, their reproductive rights have been infringed on by local officials in enforcing the one-child policy.⁴⁴⁸ This enforcement restricts a woman's choice regarding the size and spacing of her family, a right that China, through ratification of the ICPD, has recognized as fundamental. Thousands of women⁴⁴⁹ have been forced to undergo sterilization or abortion. The physically coercive measures employed by local officials deprive women of their reproductive rights.

443. See Sadasivam, *supra* note 134, at 322 (referencing the three major principles of reproductive rights: the right to freely decide the number and spacing of children, the right to attain the highest standard of sexual and reproductive health, and the right to make decisions with regard to reproduction without coercion).

444. See Marshall, *supra* note 47, at 470 (discussing the idea that reproductive rights should be taken into consideration by governments when they make reproductive health policies).

445. See Chapman, *supra* note 151, at 1172 (noting that women have a fundamental right to make reproductive decisions, and that contradictory laws violate this right).

446. See generally Ellen Marshall, *The International Conference on Population and Development: What the Programme of Action Really Says*, INTERNAT'L WOMEN'S HEALTH COALITION, <<http://www.iwhc.org/resources/icpdbackgroundunder.cfm>> (last visited Oct. 16, 2008) (reporting on the ICPD's plan of action regarding women's reproductive health and family planning).

447. See Hom, *supra* note 49, at 249, 283–84 (referencing general principles set out in Chinese law regarding women's rights); see also Ann D. Jordan, *Women's Rights in the People's Republic of China: Patriarchal Wine Poured from a Socialist Bottle*, 8 J. CHINESE L. 47, 57 (1994) (stating that Chinese laws were made to be more equal during the time of the CCP government).

448. See *Tradition and State*, *supra* note 39, at 298–99 (stating that China's reproductive policies have limited families' choices regarding family size); see also Johns, *supra* note 271, at 21 (comparing the interference with the reproductive rights of women in China to interference occurring in other nations).

449. See Jonathan Watts, *Chinese Officials Accused of Forcing Abortion in Shandong*, 366 THE LANCET (London), Oct. 8–14, 2005 at 1253 (referring to the thousands of forced abortions performed in China under the one-child policy). See generally *New Rich Challenge Family-Planning Policy*, CHINA VIEW, Dec. 14, 2005, <http://news.xinhuanet.com/english/2005-12/14/content_3918776.htm> (explaining how wealthy Chinese individuals are finding ways to have more than one child in China).

Late-term abortions⁴⁵⁰ are extremely brutal and inhumanely violate women's reproductive rights. Chi An, a trained nurse described one such process: "After the cervix had dilated and the crown of the baby's head was exposed, [the doctor] would inject pure formaldehyde into the fetal brain through the fontanel, or soft spot. If the cervix did not dilate fully, the doctor would reach in with forceps and crush the baby's skull."⁴⁵¹

In the United States, an abortion without the consent of the pregnant woman is regarded as murder.⁴⁵² Furthermore, late-term abortions are prohibited unless there is "the risk of death and complications for the women related to later-term abortion."⁴⁵³

2. Women's Health Rights

Broadly speaking, other than the right of reproductive decision making, reproductive rights also encompass the right to quality reproductive health services, which entail access to safe and affordable reproductive health care and information about family planning.⁴⁵⁴ Hence, women's health does not exist merely within the biological arena; protection of women's health rights also involves integrating the social, political, and economic arenas.⁴⁵⁵

a. Basic Health Rights with Respect to Sterilization

Article 12 of the International Covenant on Economic, Social, and Cultural Rights imposes a specific and binding obligation on its member states. It recognizes "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."⁴⁵⁶ Article 11(1)(f) of Convention on the Elimination of All Forms of Discrimination Against Women proclaims "[t]he right to protection of health and to safety in working conditions,

450. See Janet E. Gans Epner et al., *Late-Term Abortion*, 280 JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION 724, 724 (1998) (stating that a late-term abortion is one that occurs during the third trimester or around six months into the pregnancy).

451. See MOSHER, *supra* note 272, at 255 (describing the process of an abortion); see also Nadeau, *supra* note 291, at 3, (depicting late-term abortion by way of a Chinese mother's personal story).

452. See *State v. Holcomb*, 956 S.W.2d 286, 292 (Mo. Ct. App. 1997) (concluding that an abortion of a child against the will of the mother is murder); see also Gans Epner et al., *supra* note 450, at 724 (discussing proposed legislation that would make it a federal crime to intentionally kill a living fetus unless it were necessary to save the mother's life); see also Carolyn B. Ramsey, *Restructuring the Debate over Fetal Homicide Laws*, 67 OHIO ST. L.J. 721, 753 (2006) (informing that court cases have concluded that killing a fetus without the consent of the mother is murder); see also Michael S. Robbins, *The Fetal Protection Act: Redefining "Person" for the Purposes of Arkansas' Criminal Homicide Statutes*, 54 ARK. L. REV. 75, 83 (2001) (reiterating that under the Arkansas fetal-protection statute, there is an exception for a legal abortion; however, a legal abortion is murder unless performed with the consent of the mother).

453. See Gans Epner et al., *supra* note 450, at 470 (mentioning the debate surrounding late-term abortion legislation, including complications for women).

454. See Marshall, *supra* note 47, at 469 (explaining that reproductive health extends well beyond the prevention of disease or infirmity).

455. See Abrams, *supra* note 273, at 29–30 (arguing that traditional cultural roles of women entail political, social, and cultural limitations); see also Johns, *supra* note 271, at 9–10 (explaining that access to reproductive health services has an impact on women's economic, social, and political roles).

456. See Chapman, *supra* note 151, at 1157 (addressing the acceptance of a comprehensive right to health care by several international human rights entities, including the United Nations).

including the safeguarding of the function of reproduction.”⁴⁵⁷ ICPD⁴⁵⁸ also emphasizes “the best way to eradicate poverty, improve the health and longevity of people globally, and achieve sustainable development [is] to focus on basic human rights, including reproductive health rights.”⁴⁵⁹ Other human rights instruments and international conventions recognize the health rights of human beings with an emphasis on women’s health rights.⁴⁶⁰

In the enforcement of the one-child policy, officials emphasize that women are primarily responsible for the family plan.⁴⁶¹ Within three to six months of having a first child, Chinese women must have an IUD surgically inserted into their uterus or undergo some other methods of sterilization to prevent unexpected pregnancies,⁴⁶² which confirms Chinese officials’ emphasis on family planning being a woman’s obligation.⁴⁶³ Sometimes, however, these IUDs may cause “excessive bleeding, weight loss, fatigue, and anxiety”⁴⁶⁴ and put women’s health and lives in danger.⁴⁶⁵

457. See Women’s Discrimination Convention, *supra* note 129, at art. 11, ¶ 1(f) (expressing that appropriate measures should be taken to eliminate discrimination, particularly rights protecting health and safety in working conditions as well as those safeguarding reproduction); see also Universal Declaration of Human Rights, *supra* note 93 at art. 25, ¶ 2, reprinted in DAVID WEISSBRODT ET AL., *supra* note 102 (stating that mothers and children are entitled to special care and assistance).

458. See generally U.N. General Assembly Highlights: International Conference on Population and Development (ICPD), <<http://www.iisd.ca/vol03/0308001e.html>> (last visited Oct. 5, 2008) (summarizing the issues addressed during the conference).

459. See U.N. General Assembly, Report of the Ad Hoc Committee of the Whole of the 21st Special Session of the General Assembly, *Key Actions for Further Implementation of the Program of Action of the International Conference on Population and Development*, ¶ 2, U.N. GAOR, 21st Special Sess., U.N. Doc. A/S-21/5/Add.1 (Jul. 1, 1999) (acknowledging the need for female empowerment).

460. See Chapman, *supra* note 151, at 1158 (emphasizing the requirement that enumerated human rights need monitoring and evaluation mechanisms for effective enforcement).

461. See Lao Gai Research Foundation, *China’s Contemporary Enforcement of the One-child Policy*, <<http://www.laogai.org/news2/newsdetail.php?id=1235>> (last visited Oct. 3, 2008) (explaining that if, sometimes, officials cannot fulfill the quota requirement, they may force women with authorized pregnancies to undergo abortions and sterilization.)

462. See generally Gellman, *supra* note 38, at 1070 (informing that some hospitals, after a woman births a child, automatically implant an IUD into her cervix without notifying the woman or gaining her consent).

463. See Xiaorong, *supra* note 121, at 156 (highlighting the lack of statutory law imposing punishment upon officials who, in their official capacity, abuse the rights of women); see also Skalla, *supra* note 2, at 338–39 (expressing the various stringent methods by which authorities coerce sterilization and abortion); see also Brown, *supra* note 3, at 752–53 (noting that although the central government admits and condemns coercion, it nevertheless fails to punish officials who coerce abortions or sterilizations).

464. See Gellman, *supra* note 38, at 1073–74 (noting compelled insertion of an IUD as damaging to the health of women); see also *Tradition and State*, *supra* note 39, at 296–97 (highlighting that involuntary insertion of IUDs, among other things, has led to harmful health consequences among women, and that late abortions can be psychologically damaging). See generally Bleeding During Pregnancy, <<http://womens-health.health-cares.net/pregnancy-bleeding.php>> (last visited Oct. 4, 2008) (explaining the harmful effects of bleeding [a frequent result of IUD insertion] during the course of pregnancy).

465. See J.K. MASON, MEDICO-LEGAL ASPECTS OF REPRODUCTION AND PARENTHOOD 45 (2d ed. 1998) (describing an IUD as an unavoidably unsafe product); see also Marshall, *supra* note 47, at 457 (emphasizing that reproductive tract infections may be spread by using an IUD).

b. Safe Abortion

If an unexpected pregnancy occurs despite preventive measures, women are frequently forced to abort the pregnancies under the pressure of China's one-child policy. Women have no choice as to whether or not to keep the child.

According to principle 8 of the ICPD Program of Action,⁴⁶⁶ states should take all appropriate and effective measures to ensure "universal access to health-care services, including those related to reproductive health care, which includes family planning and sexual health."⁴⁶⁷ This reproductive health care program should "provide the widest range of services without any form of coercion."⁴⁶⁸ Principle 8 stresses the importance of providing reliable and safe health services, particularly reproductive health care, to women.⁴⁶⁹ But in practice, regardless of other female health services, access to reproductive health care, in most cases, is unsafe and unreliable.⁴⁷⁰

Unsafe abortion, which results in many injuries and deaths, is a good example of such inadequate reproductive health services. This situation is more serious in developing countries.⁴⁷¹ Based on the report of International Planned Parenthood Federation (IPPF),⁴⁷² mil-

466. See International Conference on Population and Development, *supra* note 160, at ch. II, princ. 8 (addressing the concept that the individual right to optimal physical and mental health should be reflected by states' gender-neutral adherence to policies aimed at such ends, including reproductive health care policies).

467. See *id.* (indicating that states should put forth strong efforts to provide universal access to health care).

468. See *id.* (discussing how reproductive health care programs should cover a wide spectrum of services).

469. See *id.* (explaining that both men and women should avail themselves to the "highest attainable standard" of health services); see also Martha F. Davis, *Realizing Domestic Social Justice Through International Human Rights: Part I: The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359, 398–99 (2006) (stressing that health care is a fundamental right and that women and men should be provided with universal health care services, including reproductive health care); see also Marshall, *supra* note 47, at 465 (highlighting the emphasis that Principle 8 places on women's basic right to health care services).

470. See Johns, *supra* note 271, at 6–7 (explaining how women experience serious dangers without sufficient reproductive health care); see also William Eagle, *Lack of Access to Reproductive Health Care a Leading Cause of Suffering Among African Women*, VOANEWS, June 19, 2006, <<http://www.voanews.com/english/archive/2006-06/2006-06-19-voa34.cfm?CFID=47874095&CFTOKEN=70343937>> (purporting that women suffer from lack of adequate reproductive health care services). See generally Nina J. Crimm, *The Global Gag Rule: Undermining National Interests by Doing unto Foreign Women and NGOs What Cannot Be Done at Home*, 40 CORNELL INT'L L.J. 587, 611 (2007) (noting that because of the lack of access to safe reproductive health practices in developing countries, there are organizations that provide a range of reproductive health options).

471. See Mahmoud F. Fathalla, *The Impact of Reproductive Subordination on Women's Health: Family-Planning Services*, 44 AM. U. L. REV. 1179, 1187 (1995) (emphasizing the magnitude of the problem of reproductive health care in developing countries); see also Allyn Lise Taylor, *Making the World Health Organization Work: A Legal Framework for Universal Access to the Conditions for Health*, 18 AM. J. L. & MED. 301, 305 (1992) (attributing 99% of the world's reproductive complications to women in developing countries).

472. See Araujo, *supra* note 90, at 1515–16 (detailing the specifics of IPPF and the goals of the organization); see also *Africa: Japan's More Is Not Enough*, AFRICA NEWS, May 28, 2008, at 1, available at <<http://ipsnews.net/news.asp?idnews=42552>> (explaining how IPPF is an organization that provides sexual and reproductive health care); see also International Planned Parenthood Federation, <<http://www.ippf.org/en/About/>> (last visited Oct. 11, 2008) (reporting that IPPF is a global network of member associations that work in approximately 180 countries providing and campaigning for sexual and reproductive health care and rights).

lions of women in the world “have no access to reproductive health services,”⁴⁷³ and “little or no control in choosing whether to become pregnant.”⁴⁷⁴ Consequently, “19 million women have no other choice than to have an unsafe abortion.”⁴⁷⁵ Nearly “70,000 of these women will die, and hundreds of thousands of others will be left with debilitating”⁴⁷⁶ and frequently “life-long injuries as a result.”⁴⁷⁷ Many women of reproductive age are permanently injured, even though many of these injuries and deaths could have been avoided by making use of existing medical technologies.⁴⁷⁸ Generally, a majority of these avoidable injuries or deaths occur in underdeveloped countries. In Africa, for example, 1,000 deaths occur per 100,000 abortions.⁴⁷⁹ By contrast, in developed countries, such as the United States, abortion is very safe, resulting in less than one death per 100,000 abortions.⁴⁸⁰

As a developing country, China shares similar problems with Africa, although on a much smaller scale. Based on an official report, in Africa 53 deaths occur per 100,000 abortions, but in rural China, 114.9 deaths occur per 100,000 abortions.⁴⁸¹ Clinics with inadequate equipment or unqualified doctors also put the health and lives of women with unauthorized pregnancies in danger. Additionally, under the pressure of the one-child policy, a woman (especially one who is poor, young, and unwed) who becomes pregnant unexpectedly and cannot afford to abort the pregnancy in a reputable and qualified hospital, may resort to using unaccredited but cheap practitioners in unhygienic facilities.⁴⁸² This can result in infertility or even death caused by excessive bleeding or infection.⁴⁸³ Unsafe abortions are a serious health risk for these mar-

473. See Anne Ketover, *Fouling Our Own Nest: Rapid Population Growth and Its Effect on the Environment*, 7 TUL. ENVTL. L.J. 431, 459 (1994) (establishing that access to services is one of the major problems in family-planning programs); see also Gareth Thomas MP, Foreword, INTERNATIONAL PLANNED PARENTHOOD FEDERATION, DEATH AND DENIAL: UNSAFE ABORTION AND POVERTY, at 2 (2006), available at <http://www.ippf.org/NR/rdonlyres/8D4783F5-D516-47D3-8B34-61F6D510202A/0/Death_Denial_unsafe_abortion_poverty.pdf> (stating that access to reproductive health services is scarce for millions of women in the world).

474. See Thomas, *supra* note 473, at 2 (discussing women's lack of control in choosing their paths).

475. See *id.* (explaining how women are coerced into having unsafe abortions).

476. See Steven W. Sinding, Introduction to INTERNATIONAL PLANNED PARENTHOOD FEDERATION, DEATH AND DENIAL: UNSAFE ABORTION AND POVERTY, at 3 (2006), available at <http://www.ippf.org/NR/rdonlyres/8D4783F5-D516-47D3-8B34-61F6D510202A/0/Death_Denial_unsafe_abortion_poverty.pdf> (demonstrating how unsafe health practices affect many women physically).

477. See *id.* (explaining how surviving women experience injurious lifelong effects).

478. See Coliver, *supra* note 120, at 1297 (proclaiming that almost all deaths and health problems are preventable); see also Marshall, *supra* note 47, at 455 (asserting that medical technologies could bypass injuries and deaths); see also INTERNATIONAL PLANNED PARENTHOOD FEDERATION, DEATH AND DENIAL: UNSAFE ABORTION AND POVERTY, *supra* note 476, at 5 (declaring that proper medical resources can reduce the number of complications).

479. See Marshall, *supra* note 47, at 458 (revealing the vast number of deaths per number of abortions in an underdeveloped country like Africa).

480. See *id.* (comparing the United States' low level of deaths per number of abortions to that of an underdeveloped country like Africa).

481. See Getgen, *supra* note 140, at 148 (distinguishing the number of deaths per abortions in China from the number of deaths per abortion in Africa).

482. See Wang Yan, *Yunnan: Illegal Abortion Resulted in the Death of the Pregnant Woman, Defendant Has Been Sentenced to Ten-Year Imprisonment*, XINHUA NEWS, Nov. 3, 2006, <http://news.xinhuanet.com/society/2006-11/03/content_5284716.htm> (describing how poor women may use unhygienic means to abort a pregnancy).

483. See *id.* (discussing how unhealthy conditions in abortion procedures may lead to infertility or death).

ginalized and vulnerable women.⁴⁸⁴ These abortions may result in many different types of medical conditions, such as pelvic infections, extravasated blood in the pelvis, pelvic hematoma,⁴⁸⁵ sepsis and eclampsia (convulsions).⁴⁸⁶ The health rights of Chinese women are seriously violated in the enforcement of the one-child policy, particularly poor Chinese women who have no choice but to seek abortions from unqualified, cheap clinics.

3. Women's Other Human Rights

The family-planning policy is not limited merely to women's reproductive rights. It relates to the right of privacy, choosing whether or not to have children, and how many to have.⁴⁸⁷ To some extent, limitations on a woman's personal decision are a kind of violation of the right to privacy.

Furthermore, in the enforcement of the one-child policy, an individual's right to liberty is infringed upon. Article 9 of the International Covenant on Civil and Political Rights provides that "everyone has the right to liberty and security of person,"⁴⁸⁸ and "[n]o one shall be subjected to arbitrary arrest or detention."⁴⁸⁹ It also provides that "[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."⁴⁹⁰ As a signatory of the International Covenant on Civil and Political Rights, China should honor its commitments, comply with the standards set forth in the treaty, and take appropriate measures to halt violations of these rights. However, in enforcing the one-child policy and ensuring that no couples are allowed to have more than one child, some regions have created detention centers inside the local office of the family-planning committee to put pressure on women who are pregnant with unauthorized additional children as well as their families.⁴⁹¹ Local officials even arrest and detain pregnant women and pressure them into sterilization abortion.⁴⁹² The impact of coercive sterilization and abortion on women's repro-

484. See *id.* (explaining how unhygienic abortion can be a serious risk to the health of women).

485. See Xiaorong, *supra* note 121, at 171 (discussing types of infections and diseases women may be susceptible to after undergoing unsafe abortions).

486. See Sadasivam, *supra* note 134, at 343 (describing the major causes of maternal deaths in developing countries).

487. See INTERNATIONAL ADVISORY COMMITTEE ON POPULATION AND LAW, HUMAN RIGHTS AND POPULATION FROM THE PERSPECTIVES OF LAW, POLICY AND ORGANIZATION 36 (1973) (describing how the choice to have children is a private affair); see also Woo, *supra* note 238, at 15 (discussing how Chinese women's rights have increased over the years).

488. See WEISSBRODT ET AL., *supra* note 102, at 40 (discussing further article 9 of the International Covenant on Civil and Political Rights); see also Li, *supra* note 106 (describing article 9 of the International Covenant on Civil and Political Rights).

489. See WEISSBRODT ET AL., *supra* note 102, at 40 (explaining the prohibition in article 9 of illegal detentions).

490. See *id.* (discussing the deprivation of liberty by law).

491. See Kung, *supra* note 203, at 1297 (citing an example of when local Chinese officials abused the policy); see also Rivera, *supra* note 12, at 234–35 (describing how local officials have too much power and can force women into various methods of sterilization); see also Shiers, *supra* note 263, at 1012 (providing an example of local officials abusing their power by enforcing sterilization and abortion).

492. See Teng, *supra* note 335 (describing how local officials detain women and pressure them into having abortions).

ductive and health rights aside, these illegal arrests and detentions seriously violate women's basic human rights from both the international perspective and domestic perspective.⁴⁹³

B. A Child's Right to Life

1. Forced Abortion and a Child's Right to Life

The right to life has been recognized by the Human Rights Committee as the "supreme right" of human beings,⁴⁹⁴ and it is a right that is at "the irreducible core of human rights."⁴⁹⁵ International law, international treaties and international human rights agreements and China's domestic Constitution all protect an individual's right to life.⁴⁹⁶

Many international treaties protect a child's right to life. Article 6 of the International Covenant on Civil and Political Rights stresses that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."⁴⁹⁷ Under article 6, the committee requires member states to regularly report and provide information concerning birth rates, infant mortality rates, rates of childbirth-related deaths of women, and any measures taken by the state to help women prevent unexpected pregnancies.⁴⁹⁸ All state parties are mandated to protect females from practices like female infanticide that violate their children's right to life.⁴⁹⁹ Additionally, member states have the obligation to ensure that they do not allow "life-threatening clandestine abortions."⁵⁰⁰ Undoubtedly, a child's right to life is protected by international law and international treaties.

493. See Xian Fa [Constitution], *supra* note 26, at art. 238 (describing the punishment when one unlawfully deprives another of his freedom); see also Xiaorong, *supra* note 121, at 147 (1996) (explaining how local officials terrorize women when enforcing one-child policy); see also Love, *supra* note 7, at 152 (discussing how China's laws do not provide legal mechanisms to protect citizens).

494. See CONTE ET AL., *supra* note 426, at 85 (discussing the Human Rights Committee's recognition of the right to life).

495. See NIHAL JAYAWICKRAMA, THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW: NATIONAL, REGIONAL & INTERNATIONAL JURISPRUDENCE 245–51 (2002) (discussing the possible interpretations of the phrase "every human being").

496. See Adell, *supra* note 49, at 794–95 (describing how China's policies regarding family planning violate international human rights); see also Hernandez, *supra* note 78, at 316–17 (discussing the international law of human rights).

497. See WEISSBRODT ET AL., *supra* note 102, at 38 (acknowledging that the right to live is a fundamental human right, protected by law, that cannot be taken away from an individual).

498. See JOSEPH ET AL., *supra* note 118, at 187 (showing that the International Covenant on Civil and Political Rights requires countries to provide information about and measures to help prevent unplanned pregnancies).

499. See *id.* (noting that under the International Covenant on Civil and Political Rights, females must be protected from violations to their human rights, like the forced killing of their newborn children).

500. *Id.*

According to the domestic law of China, an infant becomes a citizen and is endowed with all legal rights the moment he or she is delivered from the mother's uterus.⁵⁰¹ Killing babies constitutes murder,⁵⁰² and, therefore, local officials will not kill a out-of-plan infant after it is born. However, officials will kill the fetus by injecting poison into the womb several days before birth, which is called "late-term abortion."⁵⁰³ By doing so, the officials will avoid being prosecuted for infanticide. In China, a late-term abortion is not considered illegal so long as the baby was "partly in the womb" at the time of death.⁵⁰⁴ The Constitution of the People's Republic of China remains silent on this matter, and no specific law explicitly protects the right to life of the fetus, even if it is a late-term abortion.

However, some statutes do have provisions concerning the protection of the fetus's rights, which can be viewed as a framework to evaluate the legitimacy of late-term abortions. The Criminal Law of the People's Republic of China states that "[t]he death penalty is not to be applied to persons who have not reached the age of eighteen at the time the crime is committed or to women who are pregnant at the time of adjudication."⁵⁰⁵ The Law of Succession of the Peoples Republic of China dictates that "[a]t the time of the partitioning of the estate, reservation shall be made for the share of an unborn child. The share reserved shall, if the baby is still-born, be dealt with in accordance with statutory succession."⁵⁰⁶

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501. See The Supreme People's Court on the Implementation of the General Principles of Civil Law: A Number of Issues for Trial Implementation (promulgated by the Supreme Court of the People's Republic of China, effective Jan. 26, 1988), art. 1, *translated in* <<http://translate.google.com>>, available at <<http://www.dffy.com/faguixiazai/msf/200311/20031110212524.htm>> (announcing that a Chinese citizen is entitled to civil rights at the time of birth); see also TREVOR BUCK, INTERNATIONAL CHILD LAW 60 (2005) (stressing that the right to life is an inherent human right); see also NIE, *supra* note 212, at 61 (demonstrating the Chinese social belief that a fetus has less worth and, therefore, is afforded less human rights than an actually birthed human being).
502. See Criminal Law (promulgated by the Eighth Nat'l People's Cong., March 14, 1997, effective Oct. 1, 1997), art. 232 (PRC), available at <http://www.unescap.org/esid/psis/population/database/poplaws/law_china/ch_record010.htm> (outlining the elements and punishment for intentional murder: "[W]hoever intentionally kills another is to be sentenced to death, life imprisonment or not less than ten years of fixed-term imprisonment; when the circumstances are relatively minor, he is to be sentenced to not less than three years and not more than ten years of fixed-term imprisonment").
503. See David J. Garrows, *Significant Risks: Gonzales v. Carhart & the Future of Abortion Law*, 2007 SUP. CT. REV. 1, 31 (2007) (stating that doctors often induce fetal death by injecting a drug that stops fetal cardiac function into the womb); see also Michael J. Malinowski, *Coming into Being: Law, Ethics, and the Practice of Prenatal Genetic Screening*, 45 HASTINGS L.J. 1435, 1474 (1994) (presenting a woman's recollection of her own late-term abortion, including the use of an injection to cause fetal death before labor was induced); see also Michael Sheridan, *China Shamed by Forced Abortions*, TIMES (London), Sept. 18, 2005, at 27, available at <<http://www.timesonline.co.uk/tol/news/world/article567921.ece>> (depicting Li Juan's memories of how Chinese officials plunged a poison-filled syringe into her womb during the ninth month of her pregnancy).
504. See MOSHER, *supra* note 272, at 255 (1993) (reporting that late-term abortion is not considered illegal if the fetus is still partly in the womb).
505. See Criminal Law, *supra* note 509, at art. 49 (explaining that China's law does not allow the application of the death penalty to minors or pregnant women).
506. See Zhonghua Renmin Gongheguo Jicheng Fa ("The Law of Succession of the People's Republic of China") (promulgated by the Sixth Nat'l People's Cong., Apr. 10, 1985, effective Oct. 1, 1985), art. 28, *translated in* LAWINFOCHINA (PRC), International Conference on Population and Development available at <<http://www.lawinfochina.com/law/display.asp?db=1&id=56&keyword=>>> (remarking on how unborn children in China have inheritance rights and claims on their parents' estates).

Undoubtedly, some of the national laws of China acknowledge and respect the fetus's rights in certain areas. Compared to the rights given to the fetus in the laws cited above, the right to life is tantamount. Even though the legal status of the fetus has been debated for decades in the international community, no consensus has been reached regarding its exact legal personality.⁵⁰⁷ Nevertheless, based on the relevant statutes that expressly address the rights of a fetus, it can be concluded that China should rethink the fetus's right to life, especially a fetus that has passed its sixth month of gestation and already has the basic organs and body shape of a human. According to medical research, six months is the time when a fetus reaches viability, meaning that it could survive outside the womb.⁵⁰⁸ Although "its skin is still wrinkled and red,"⁵⁰⁹ "the fingerprints are forming and the eyes are almost developed and the eyelids can open and close."⁵¹⁰ At six months, a fetus can "kick, cry and hiccup."⁵¹¹ A fetus also begins to respond to things that occur outside the mother's body; for instance, "[n]oises from outside may cause the baby to move or become quiet."⁵¹² The fetus at six months will be approximately "15 inches long and weighs about 2½ pounds."⁵¹³ More important, a six-month-old fetus can survive not only outside the womb but even outside the uterus.⁵¹⁴ At this stage, the fetus's right to life is more vital than the government's right to decide whether a woman should or should not have a baby.⁵¹⁵

507. See JAYAWICKRAMA, *supra* note 495, at 243 (discussing how the right to life is the core of human rights).

508. See *Roe v. Wade*, 410 U.S. 113, 160 (1973) (finding that a fetus can live outside its mother's womb as early as 24 weeks into gestation); see also LAURENCE H. TRIBE, *ABORTION: THE CLASH OF THE ABSOLUTES* 220 (2d ed. 1992) (positing that a fetus cannot survive outside of the womb before 24 weeks because of underdevelopment of fetal organs); see also Nancy K. Rhoden, *Trimesters and Technology: Revamping Roe v. Wade*, 95 YALE L.J. 639, 641 (1986) (indicating that at the time of publication, the threshold of viability was around 24 weeks into gestation).

509. See MilitaryBaby.com, *Pregnancy Month 6: 23 to 26 Weeks*, <http://www.armystudyguide.com/militarybaby/pregnancy_and_childbirth/pregnancy_timeline/pregnancy-month-6.shtml> (last visited Oct. 19, 2008) (describing the physical appearance of a six month fetus).

510. See *id.* (discussing the fetal features that begin to develop in the sixth month of pregnancy).

511. See *id.* (stating the physical abilities of a six-month-old fetus).

512. See *id.* (finding that at six months, unborn fetuses are generally responsive to external stimuli).

513. See *id.* (describing the typical physical attributes of a six-month-old fetus).

514. See Robert L. Strenger, *Embryos, Fetuses, and Babies: Treated as Persons and Treated with Respect*, 2 J. HEALTH & BIOMED. L. 33, 60 (2006) (asserting that a fetus requires at least six months in the uterus in order to reach viability); see also Bicka A. Barlow, *Severe Penalties for the Destruction of "Potential Life"—Cruel and Unusual Punishment?*, 29 U.S.F. L. REV. 463, 471–72 (1995) (defining the concept of "viability" as the time, usually 20 to 24 weeks of gestation, at which a fetus becomes able to survive outside the uterus); see also So Hu, *Six Month Pregnancy*, <<http://baby.fx120.net/rssc/syht/yfbj/yzq/200503031627231072.htm>> (May 24, 2005) (claiming that the survival rate of fetuses taken from the womb at six months is relatively low).

515. See Ru Xiaomei, *To Make a Scientific, Rational, and Responsible Choice: Thoughts from the Argument Concerning Abortion in the U.S.*, <<http://www.humanrights-china.org/china/magezine/2003.5/p49-p51.htm>> (Oct. 26, 2008) (positing that after the first trimester, the fetus's right to life outweighs the mother's right to choose whether or not to continue with the pregnancy).

By contrast, in the United States, abortions cannot be performed without the consent of the mother.⁵¹⁶ Therefore, it goes without saying that forced or coerced abortion is prohibited. In *Roe v. Wade*,⁵¹⁷ the U.S. Supreme Court held that a woman has a constitutional right to determine whether or not to terminate a pregnancy.⁵¹⁸ In the case of *State v. Holcomb*,⁵¹⁹ a Missouri state court held that a fetus is a "person," and only the mother of that fetus may have certain legal rights to decide whether or not to terminate the pregnancy.⁵²⁰ In Missouri, an individual charged with killing an unborn child or fetus has been convicted of murder.⁵²¹

However, this is not to say that late-term abortion should be prohibited at any time. When a pregnant woman voluntarily consents to the abortion, or it is performed to save the mother's life,⁵²² late-term abortion is permissible. If the late-term abortion is sought only to enforce the one-child policy, it is too inhumane and should be stopped. The National People's Congress should pass legislation to prohibit this inhumane activity and better protect a fetus's right to life.

2. Depriving the Right to Life of the Female Fetus and Female Infanticide

Because the one-child policy limits couples to having only one child, and because of the Chinese people's traditional preference for boys combined with "the access to modern technologies such as ultrasound"⁵²³ there has been a decrease of female infants. In rural areas of China, villagers believe a son will "stay by their sides forever, carrying on with the farm work after they retired, looking after them in their old age."⁵²⁴ In the minds of such villagers, girls have no obligations to take care of their parents when they grow older, despite that the Chinese law pro-

516. See Robert A. Sedler, *Abortion, Physician-Assisted Suicide and the Constitution: The View from Without and Within*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 529, 542 (1998) (arguing that mothers have a personal, medical, and unfringible right to obtain an abortion up until the point of fetal viability).

517. See *Roe v. Wade*, 410 U.S. 113 (1973).

518. See *id.* at 164 (holding that it is unconstitutional for a state to create absolute prohibitions against abortion).

519. See *State v. Holcomb*, 956 S.W. 2d 286 (Mo. Ct. App. 1997).

520. See Alan S. Wasserman, *Homicide Based on the Killing of an Unborn Child*, 64 A.L.R. 5th 671, 671 (1998) (summarizing the court's decision to expand the legal definition of the word "person" to include unborn fetuses, and thereby making it a criminal offense to perform an illegal abortive act).

521. See *id.* (discussing the court's opinion in *Holcomb*, and its view of the unlawful killing of a fetus as murder under the Missouri homicide statutes).

522. See Gans Epner et al., *supra* note 450, at 469 (asserting that late-term abortions are appropriate only in extreme circumstances, threatening the life or health of the mother, or where the fetus demonstrates serious anomalies that are "incompatible with life"); see also Julia Elizabeth Jones, *State Intervention in Pregnancy*, 52 LA. L. REV. 1159, 1170 (1992) (stating that once a fetus reaches viability, the state has a compelling interest in its potential life and has the most authority to restrict abortion rights).

523. See Han Wang, *China to Legislate Against Sex Identification*, June 27, 2005, <<http://news.sohu.com/20050627/n226095573.shtml>> (alleging that modern technology has been a significant factor in enabling the sex-selective abortions that have become common in China).

524. See MOSHER, *supra* note 272, at 229 (reflecting on the traditional Chinese attitude toward child bearing and the universal socioeconomic preference for having male babies).

vides that daughters and sons have the same legal responsibility and obligations to support their aging parents.⁵²⁵ Regardless of the written law, reversing traditional beliefs is difficult.

Since the number of children is limited under the family-planning policy, couples previously utilized a sex-selection test.⁵²⁶ If the test indicated the fetus was a girl, the fetus would often be aborted by its parents.⁵²⁷ The sex-selection test is now prohibited in China. When pregnant women are examined, the doctors know the sex of the fetus but are prohibited from telling the parents. Although it has been prohibited, some parents can still learn the sex of their fetus from the doctor.⁵²⁸ Consequently, to some extent, the abortion of female fetuses is inevitable.

Occasionally, more inhumane actions are taken as a result of the pressure of the one-child policy and some parents' desperate desire to have a boy. Female infanticide is not a rare phenomenon, especially in rural areas, and it is not only female infants who are threatened by the policy. In the village of Chi An,⁵²⁹ for example, a father planned to bury his daughter alive, but she "tearfully pleaded for her life"⁵³⁰ by promising to support her parents when they [got] older. Regardless of his daughter's pleas, the father "smacked his shovel into her head and split her skull open."⁵³¹

The one-child policy has resulted in up to 500,000 "missing" females in China.⁵³² Another result of China's family-planning policy is the disparate ratio of 117 males for every

525. See Hui, *supra* note 38, at 194 (equating the birth of sons in China with the acquisition of security and insurance for old age and retirement); see also Skalla, *supra* note 2, at 345 (noting that even though the Chinese constitution places an equal burden on sons and daughters in caring for their aging parents, the traditional emphasis on sons still remains); see also Wexler, *supra* note 43, at 87–88 (agreeing that traditional familial norms in China undervalued daughters and, in contrast to sons, viewed them as inferior in economic and social potential).

526. See Han, *supra* note 523 (reporting that China began legislating against the use of modern technology, i.e., ultrasound, for the purpose of discrimination against the sex of unborn children in 2005).

527. See *id.* (arguing that illegal sex identification of the fetus led to aborted children and an imbalance in the birth-sex ratio in the population).

528. See Boland, *supra* note 74, at 1274 (explaining that since early 1980 women in third world countries have used parental sex-selection tests as a step in the process of aborting female fetuses); see also Christine Toomey, *Gender Genocide*, N.Y. TIMES, Aug. 26, 2007, available at <<http://www.timesonline.co.uk/tol/news/world/asia/article2307893.ece>> (proclaiming that unwanted female babies were being aborted at such a high rate due to sex-selection tests that approximately 6 million to 10 million babies were aborted in the last 20 years); see also Han, *supra* note 526 (finding that parents will seek out doctors to perform sex-selection tests to decide whether to abort a fetus based on the sex of that fetus).

529. See Nadeau, *supra* note 291 (referring to Chi An, a Chinese women who was forced to undergo an abortion when she got pregnant with a second child without the approval of the governmental authorities).

530. See *id.* (illustrating the events of Chi An, a Chinese woman whose child was smacked with a shovel even after she pleaded for her life).

531. See MOSHER, *supra* note 272, at 231 (depicting the story of a child who was trying to escape the wrath of her father, but he caught her and split her skull open with a shovel, killing her instantly).

532. See China's One-Child Policy, <<https://www.iccg.ie/downloads/One%20Child%20Policy%20C2%A6%20Article%201.pdf>> (last visited Oct. 24, 2008) (claiming that China's one-child policy has resulted in 500,000 missing girls in China).

100 females at birth.⁵³³ Article 6(1) of International Covenant on Civil and Political Rights proclaims that “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”⁵³⁴ Article 3 of the Universal Declaration of Human Rights stresses, “Everyone has the right to life, liberty and security of person.”⁵³⁵ The deprivation of a female fetus’s life without valid justification seriously violates the human rights of female children as well as the reproductive rights of pregnant women.

C. A Child's Other Rights

In the enforcement of the one-child policy, punishment for giving birth to more than one child includes deprivation of their children’s basic rights to receive social welfare benefits and attend school.⁵³⁶ However, in accordance with the International Covenant on Civil and Political Rights, “every child shall have, without any discrimination as to race, color, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor on the part of his family, society and the State.”⁵³⁷ The United Nations Convention on the Rights of the Child (CRC) also protects children’s rights by proclaiming that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”⁵³⁸

A child’s right to receive public welfare benefits and his or her right to an education should be respected in all countries. The states party to the International Covenant on Civil and Political Rights are required to ensure that each child enjoys the rights provided and protected by the covenant.⁵³⁹ Deprivation of children’s basic rights to receive government welfare is incompatible with the International Covenant on Civil and Political Rights and the CRC. In addition, the Human Rights Committee states that the right to an education is fundamental to “the

533. See Susan Greenhalgh, *Science, Modernity, and the Making of China's One Child Policy*, 29 POP. & DEV. REV. 163, 189 (2003) (emphasizing that the social costs of violence against daughters resulted in the rising sex ratio at birth, which is 117 males per 100 females).

534. See International Covenant on Civil and Political Rights, *supra* note 117, at art. 6(1) (declaring that everyone has a right to make his living by work he freely chooses and will take appropriate steps to safeguard this right); see also WEISSBRODT ET AL., *supra* note 102, at 38 (citing the International Covenant on Civil and Political Rights granting individuals the right to life and the idea that no one shall be arbitrarily deprived of life).

535. See Universal Declaration of Human Rights, *supra* note 93, at art. 3 (declaring that everyone has the right to life, liberty, and security of person); see also WEISSBRODT ET AL., *supra* note 102, at 25 (stating that the Universal Declaration of Human rights grants people the right to provide for self and security of each person).

536. See China Moves away from the One-Child Policy (July 26, 2002), <<http://www.buzzle.com/editorials/7-26-2002-23215.asp>> (outlining the government sanctions and coercive measures for punishing out-of-plan children, which include expropriation of property and high fees that families must pay).

537. See International Covenant on Civil and Political Rights, *supra* note 110, at art. 24(1) (declaring that every child shall have the right to protection that is required by his status as a minor on the part of his family, society, and the state); see also WEISSBRODT ET AL., *supra* note 102, at 73 (maintaining that the state shall take appropriate measures to eliminate discrimination on the basis of equality).

538. See JOSEPH ET AL., *supra* note 118, at 624 (asserting that the rights of children are protected under the United Nations Convention on the Rights of the Child).

539. See *id.* at 625 (providing that the parties under the United Nations Convention on the Rights of the Child shall take the appropriate steps to provide the protection of a child’s economic, social, and cultural rights).

proper development of a child's personality,"⁵⁴⁰ and it is important for ensuring the enforcement of civil and political rights.⁵⁴¹

VII. Reasons for Violations in Enforcing the One-child Policy

Gu Xilian, vice president of the National Standing Committee and president of the National Union of Women, pointed out that the Chinese government rejects the use of any form of coercive measures to enforce the one-child policy.⁵⁴² Furthermore, forced abortion is prohibited in its enforcement.⁵⁴³ Nevertheless, forced sterilization, abortion, and other coercive measures still exist and seriously violate women's human rights. There are various reasons why these violations exist.

A. The Binding Force of the Law Versus Rights on Paper Only

In China, the binding force of the law is, to some extent, affected by the Communist Party's directives. Influenced by the Communist Party's belief that it is politically necessary and acceptable to keep population under control, the higher authorities tolerate the coercive measures employed by local governmental officials.⁵⁴⁴ Political beliefs mar China's human rights records.⁵⁴⁵

Constitutions are generally established for the purpose of delineating the boundaries of the powers held by people with political power.⁵⁴⁶ No man is above the law, regardless of his rank or condition.⁵⁴⁷ By contrast, according to the Constitution of the People's Republic of

540. See *id.* at 628 (indicating that under the United Nations Convention on the Rights of the Child, education is of fundamental importance to the proper development of a child's personality).

541. See *id.* at 628 (noting that under the United Nations Convention on the Rights of the Child, education is essential to ensure the child's capacity to exercise civil and political rights and must be an important component to protection).

542. See Sicard, *supra* note 24, at 929–30 (enumerating various non-coercive measures taken by China to further the one-child policy); see also Research Note: China's One Child Policy, Department of the Parliamentary Library (June 6, 1995), <<http://www.aph.gov.au/library/pubs/rn/1994-95/95rn41.pdf>> (observing that the Chinese government asserts the one-child policy to be non-coercive).

543. See Gu Xiulian, *Gender Equality and Situation on Women's Development*, XINHUA NEWS, Aug. 24, 2005, available at <<http://www.xinhuanet.com/zhilbo/20050824/wz.htm>> (noting that the Chinese government has disavowed any use of coercive measures like abortions or forced sterilizations).

544. See D. Marianne Blair, *Wells Conference on Adoption Law: Safeguarding the Interests of Children in Intercountry Adoption: Assessing the Gatekeepers*, 34 CAP. U. L. REV. 349, 377 (2005) (recalling various coercive measures taken to enforce China's one-child policy); see also Bradley Klein, *Democracy Optional: China and the Developing World's Challenge to the Washington Consensus*, 22 UCLA PAC. BASIN L.J. 89, 132 (2004) (asserting that local officials generally exercise broad discretion in implementing national policies relating to birth control); see also Charles E. Schulman, Note, *The Grant of Asylum to Chinese Citizens Who Oppose China's One-child Policy: A Policy of Persecution or Population Control?*, 16 B.C. THIRD WORLD L.J. 313, 336 (1996) (arguing that by empowering local officials with broad discretion in implementing the one-child policy, the national government uses local rule as a tool of political oppression).

545. See Ambe, *supra* note 87, at 119 (defining "rights" as a claim upon society to protect the bearer under the law).

546. See *id.* at 110 (asserting that laws, such as constitutions, exist to restrain arbitrary political power).

547. See *id.* (recognizing that subjecting government entities to the rule of law ensures equality in the application of the law).

China, the directives of the Communist Party, because the Party in power,⁵⁴⁸ “stand above both legislative and judicial process”⁵⁴⁹ and “supersede the laws that purport to protect women and female children.”⁵⁵⁰ This means that the directives of the Communist Party can influence the lawmaking process and decisions, can “change existing laws or even supersede them”⁵⁵¹ and will be influential in “determining whether a particular law is to be enforced.”⁵⁵² The Central Party Committee has “no legal or judicial limitations on its powers,”⁵⁵³ and “it makes policies as it sees fit.”⁵⁵⁴

A policy established by the Communist Party will be made available to the public, and local officials will implement it or monitor its enforcement in accordance with its purpose as declared by the Communist Party.⁵⁵⁵ If the policy is established by the Communist Party, people in all parts of the country have to respect it.⁵⁵⁶ If necessary, the National People's Congress will codify the policy, as they did with the one-child policy and the theory of the three representatives.⁵⁵⁷ However, as for the specific means of enforcement, particularly the less humane methods, those may be shared with local government officials in the form of internal govern-

548. The leadership of the Communist Party, the guidance of the philosophies of Marxist-Leninism and Mao Zedong, the preservation of socialism, and the continuation of the proletarian dictatorship are commonly known as the four cardinal principles of the constitution. See Xian Fa [Constitution], *supra* note 26, at ¶ 7 (stating that “under the leadership of the Communist Party of China and the guidance of Marxism-Leninism and Mao Zedong Thought, the Chinese people of all nationalities will continue to adhere to the people's democratic dictatorship”).

549. See Xiaorong, *supra* note 121, at 147 (explaining that Communist Party directives supersede those of legislative and judicial bodies).

550. See *id.* (asserting that laws relating to women's health can be overridden by Communist Party directives).

551. See *id.* at 151 (explaining that Communist Party directives are not beholden to either legislative nor judicial processes).

552. See *id.* (asserting that Party directives can control whether or not a law is even implemented).

553. See *id.* at 150 (noting that the Central Party Planning Committee is essentially the supreme “law” of the land).

554. See Kerry Dumbaugh, *China's 17th Communist Party Congress, 2007: Leadership and Policy Implications*, CRS Report for Congress (Dec. 5, 2007), available at <<http://www.fas.org/sgp/crs/row/RS22767.pdf>> (noting that the Central Committee of the Communist Party pre-determines and approves all issues and policies presented to the Communist Party's Congress before they are adopted); see also Jerome Alan Cohen, *China's Changing Constitution*, 76 CHINA Q. 794, 837 (1978) (articulating that although reforms have occurred after 1975, all central authority still lies with the Party); see also The Communist Party of China (CPC), PEOPLE'S DAILY ONLINE, <<http://english.peopledaily.com.cn/data/organs/cpc.html>> (last visited Oct. 27, 2008) (explaining that the Party Central Committee has exclusive jurisdiction over all issues of national policy).

555. See Peerenboom, *supra* note 222, at 133 (referencing the consequences of leaving the implementation of the national birth control policy to self-interested local officials); see also Yardley, *supra* note 17, at ¶ 5 (asserting that local officials are responsible for how residents under their jurisdiction adhere to national policy).

556. See Hesketh et al., *supra* note 28, at 1171 (stating that the state family-planning bureau establishes national targets and policy, leaving the implementation up to the local officials); see also Gellman, *supra* note 38, at 1065–66 (referencing instances where National Communist Party directives have been imposed on local governance); see also Jayshree Bajoria, *Background: The Communist Party of China*, Council for Foreign Relations, Oct. 12, 2007 available at <<http://www.cfr.org/publication/14482/#2>> (noting the top-down nature of the Chinese Communist Party where a small group of individuals dictate unopposed policies that impact 1.3 million people).

557. See Jiang Zemin: Representative of the Ultimate Interests of the Broad Masses in China, <http://www.chinavoc.com/history/prc_china/zm3p.htm> (last visited Oct. 26, 2008) (noting that Zemin has put forth a community theory that focuses on advanced productive forces that are the basis for the development of advanced culture).

ment documents.⁵⁵⁸ Sometimes, these internal government directives authorize violations of law for the sole purpose of achieving the policy's objective. Thus, not all the Communist Party directives are openly published.⁵⁵⁹

The one-child policy originally was put forward as a directive of the Communist Party and later became law. In practice, annual birth quotas for each region are designated by the national governmental authorities and relayed to local officials.⁵⁶⁰ To reach the quotas set by the higher-level authorities, local officials take all effective measures, which inevitably include some coercive methods that are effective and prompt, to control its regional population under the one-child policy. They regard the fulfillment of a higher authority's quota as a target. In the annual family-planning report, an official made concluded, "We have [been] confronted with [a] variety of difficulties and problems . . . the typical problems are . . . firstly, the enforcement process [has] some problems . . . family planning rate is merely 72.79%, which [is] 17.21 points lower than the quota of 90%, . . . IUD rate is merely 50%, which is 45% lower than the aim of 95%."⁵⁶¹ Because the one-child policy is a Communist Party directive, the highest of all authorities in China, the local officials believe these harsh methods are effective in enforcing the Communist Party's directive and that their actions are politically necessary and acceptable.⁵⁶²

In conclusion, the Communist Party directives are superior to codified laws, and the one-child policy was implemented in a manner subject to "neither legislative review nor legal restrictions."⁵⁶³ As for the national government authorities, they implicitly tolerate the coercive measures employed by the local officials.

B. Lack of Statutes for Punishment

Local officials are seemingly free to employ coercive measures to control regional fertility without penalties, especially because they are under significant pressure to achieve the quota

558. See Patrick E. Tyler, *Birth Control in China: Coercion and Evasion*, N.Y. TIMES, June 25, 1995, at 1 (claiming that Communist officials articulate policies and then delegate enforcement to local officials in order to get desired results). See generally Jordan, *supra* note 242, at 232 (indicating that local government enforces the national laws).

559. See generally Martin, *supra* note 51, at 401 (referring to the one-child policies as "official" policies); see generally Hansel, *supra* note 2, at 371 (mentioning that the one-child policy is unclear because there is "no single written document" that outlines its provisions); see generally Philip P. Pan, *China Terse About Action on Abuses of One-child Policy*, WASH. POST, Sept. 20, 2005, at A17 (indicating that the national government did not legally punish local Party leaders who violated rights of citizens while pursuing family-planning work).

560. See Xiaorong, *supra* note 121, at 151 (asserting that central government designs strategies regarding birth quotas and delegates enforcement duties to local officials).

561. See Report on Population and Family Planning, <<http://www.cnzl.net/Article/yyw/dc/200505/1091.html>> (last visited Oct. 26, 2008).

562. See Dempsey, *supra* note 202, at 218 (explaining that despite the prohibition of coercive measures, local officials still utilize them when they are under pressure to meet population quotas); see also Simon Elegant, *Why Forced Abortions Persist in China*, TIME, Apr. 30, 2007, available at <<http://www.time.com/time/world/article/0,8599,1615936,00.html>> (asserting that local officials continue to be judged by compliance with population quotas and must therefore continue to use coercive methods).

563. See Xiaorong, *supra* note 121, at 147 (stating that the government adopted China's one-child policy in a top-down fashion).

assigned by the higher authorities.⁵⁶⁴ Coercive methods are effective in keeping the birth rate under control and meeting the quota, but these “effective” methods seriously violate Chinese women’s rights. The one-child policy concentrates mostly on penalizing women who “evade birth control restrictions”⁵⁶⁵ or people who “interfere with the local officials’ work.”⁵⁶⁶

China’s domestic statutes⁵⁶⁷ are focussed on the protection of women’s rights and prohibit the enforcement of the one-child policy in a coercive manner, as proclaimed in the Law on Protection of Women’s Rights, which states, “Discriminating against, abusing, or injuring women is prohibited,⁵⁶⁸ and “[w]omen’s life rights and health rights are prohibited from infringement.”⁵⁶⁹ However, China lacks the “specific penalties and prosecution procedures in the policy and in related laws”⁵⁷⁰ to punish those local officials who abuse women’s rights in the enforcement of the one-child policy. When such violations occur, legal instruments have rarely been consistently utilized to render punishment or remedies.⁵⁷¹

C. Dysfunctional Courts

China’s Constitution provides for courts to have power separate from the other departments.⁵⁷² Theoretically, judges have the power to make decisions independently, regardless of any pressure from any individual, any social groups, or any governmental institutions.⁵⁷³ However, under certain circumstances, the decisions of the court in China are influenced by local

564. *See id.* at 152 (explaining that in order to meet quotas, local authorities use physical force to limit the number of births).

565. *See id.* at 164 (asserting that China’s policy penalizes mostly women who attempt to circumvent birth control restrictions).

566. *See id.* (providing that the family-planning policy has been directed toward those people who interfere with the family-planning workers).

567. *See* Xian Fa [Constitution] (Law on the Protection of Rights and Interests of Women) (adopted by the Standing Comm. of the Tenth Nat’l People’s Cong., Aug. 28, 2005, effective Dec. 1, 2005) art. 25 (PRC), *available at* <http://www.chinacourt.org/flwk/show1.php?file_id=104075> (proclaiming that the Chinese government would protect women’s rights); *see also* Wexler, *supra* note 43, at 89 (asserting that China revised its law on the Protection of Women’s Rights to increase women’s rights significantly); *see also* Jason Chan, *Recent Development, Decriminalization of Prostitution in China*, 13 NEW ENG. J. INT’L & COMP. L. 329, 329 (2007) (stating that China adopted the Women’s Law in 1992 in order to protect women’s rights).

568. *See* Law on the Protection of Rights and Interests of Women, *supra* note 211, at art. 24 (proclaiming that women would enjoy equal rights with men).

569. *See id.* at art. 38 (noting that the government amended the policy to state that women’s right to life and health cannot be infringed upon).

570. *See* Xiaorong Li, *License to Coerce: Violence Against Women, State Responsibility, and Legal Failures in China’s Family-Planning Program*, 8 YALE J.L. & FEMINISM 163 (1996) (postulating that because of the lack of specific penalties under the LPWRI and MIHCL, the local officials often use violence in order to meet birth quotas).

571. *See* Hampton, *supra* note 6, at 345 (conveying that the Chinese government has failed to publicly condemn the use of coercive tactics); *see also* Skalla, *supra* note 2, at 340 (claiming that local officials are not prosecuted for abusing their authority).

572. *See* Xian Fa [Constitution], *supra* note 26, at art. 126 (stating that the people’s courts of China exercise judicial power independently from administrative organs, public organizations, and individuals).

573. *See id.* (codifying the independence of Chinese judicial power from administrative organs, public organizations, and individuals).

and higher-level governments or other institutions,⁵⁷⁴ and the court has been politicized with “extra-judicial pressures.”⁵⁷⁵ The dysfunction of the court undermines the fairness of the judicial process in China.⁵⁷⁶

Human rights violations in China are, in some ways, a result of the absence of an independent judiciary.⁵⁷⁷ Not surprisingly, the court’s failure to sanction government officials who perpetuate violations of women’s rights in the enforcement of the one-child policy is mainly due to extrajudicial pressures on the courts.⁵⁷⁸

First, pressure comes from the absolute power of the Communist Party.⁵⁷⁹ The Charter of the Chinese Communist Party,⁵⁸⁰ which is its foundational document, stresses that the Chinese Communist Party is bound to the Constitution of the People’s Republic of China.⁵⁸¹ Not surprisingly, the Chinese Communist Party should guarantee that “court leaders adhere to the law by controlling the nomination process for judges.”⁵⁸² Because the Communist Party is theoretically subject to the Chinese Constitution, its members should not be above the law.

574. See Reasons for the Difficulty of Judicial Independence in China and Some Methods to Realize Judicial Independence, <<http://lunwen.eliu.info/free85.htm>> (last visited Oct. 24, 2008) (exclaiming that there are still many problems—mainly interference from governmental control—that exist in China regarding the court’s independence).

575. See CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA: ANNUAL REPORT (2004) 108th Cong. 2d Sess. (Oct. 5, 2004), available at <<http://www.cecc.gov/pages/annualRpt/annualRpt04/CECCannRpt2004.pdf>> (reiterating that the fairness and independence of the courts and judicial process are constantly undermined in China).

576. See *id.* (providing that the Chinese government’s corrupt practices are negatively affecting the fairness of the judicial process).

577. See ALBERT MELONE & XIAOLIN WANG, LEGAL CULTURE, LEGAL PROFESSIONALS AND THE FUTURE OF HUMAN RIGHTS IN CHINA, IN JUDICIAL PROTECTION OF HUMAN RIGHTS: MYTH OR REALITY 137 (Mark Gibney & Stanislay Frankowski eds., 1999) (opining that the lack of an independent judiciary in China is the cause of human rights violations).

578. See Ambe, *supra* note 87, at 111 (claiming that human rights violations are a result of the lack of an independent judiciary).

579. See Eu Jin Chua, *The Laws of the Peoples Republic of China: An Introduction for International Investors*, 7 CHI. J. INT’L L. 133, 138 (2006) (asserting that pressure from the Chinese Communist Party interferes with judicial independence).

580. See Charter of the Chinese Communist Party, (Nov. 18, 2002), available at <<http://www.china.com.cn/chinese/2002/Nov/234227.htm>> (showing that the Charter of the Chinese Communist Party is equivalent to the Constitution for the Communist Party, which was adopted in 1921 but has been amended 16 times. The latest amendment was passed by the 16th Party Congress in 2002 and offers guidelines for the formulation of CCP policies).

581. See *id.* at pmble (stressing that the Chinese Communist Party is bound to the Constitution of the People’s Republic of China).

582. See Seth Garz, Carnegie Endowment for International Peace, *The Chinese Communist Party’s Leadership and Judicial Independence* (Oct. 29, 2003), <<http://www.carnegieendowment.org/events/index.cfm?fa=eventDetail&id=650&&prog=zch>> (commenting that in theory the Chinese Communist Party may guarantee that court leaders follow the law when controlling the judicial nomination process).

However, the local Chinese Communist Party organizations limit and interfere with the independence of the judiciary in various ways.⁵⁸³ The most frequently used method they employ to influence the judiciary is through participation in the Commission for Politics and Law (also called Political-Legal Committees) in the review and, even, the decision of some specific cases.⁵⁸⁴ The Commission for Politics and Law is one of the departments in the government⁵⁸⁵ established to coordinate the relationships among “the organs of public security, courts, and prosecutors”⁵⁸⁶ and to supervise the handling of major and complex cases.⁵⁸⁷ To some extent, it is a quasi-judicial organ. Basically, most governmental officials are Communist Party members and, not surprisingly, the officials in the Commission for Politics and Law are also Communist Party members. In practice, the Political-Legal Committees interfere too much and sometimes the supervision of legal organs turns into adjudication.⁵⁸⁸ This happens most frequently in cases which are relevant to the benefits of governments or the Communist Party.

Moreover, the financial support of courts comes from the local government.⁵⁸⁹ Local governments and Chinese Communist Party Committees control “the personnel and financial supports of the local courts.”⁵⁹⁰ This is another way government influences the courts’ decisions. Courts may face the threat of having their funding cut off if they challenge the policies or activities of the government.⁵⁹¹ More important, local governments and the Chinese Communist Party Committees “control the . . . appointment and dismissal of judges, and provision of salaries.”⁵⁹² When making decisions on the cases that may affect the benefits of the government and the Communist Party, judges have to think carefully and consider their personal salaries

583. *See id.* (describing various ways in which the Communist Party interferes with the independence of the judiciary).

584. *See id.* (alleging that the Communist Party is only supposed to supervise the work of different legal organs, but the supervision often leads to adjudication).

585. *See* International Commission of Jurists, *China—Attacks on Justice 2000*, (Aug. 13, 2001) <http://www.icj.org/news.php?id_article=2562&lang=en> (explaining that in China, the government and the Communist Party are combined together to some extent, although this situation has been challenged for decades and been reformed a great deal; basically, the Communist Party Committees are above governments because they have more power than governments, and governments must be subordinate to the Communist Party).

586. *See id.* (stating that the commission was established with the purpose of coordinating judicial relationships).

587. *See* Garz, *supra* note 582 (highlighting the foremost way in which the Chinese Communist Party organizations influence the judiciary).

588. *See id.* (noting that there are no punishments for Chinese Communist Party members who interfere with judicial work).

589. *See* Wu Xuping, *On the Budget of Courts in China* (Sept. 2, 2003), <http://www.law-lib.com/lw/lw_view.asp?no=1998> (explaining that financial support from local government leads to differences in funding between one area of China and another).

590. *See id.* (attributing the miscarriage of justice to the fact that the judiciary needs to cooperate with the local Party and government to carry out normal work).

591. *See* Zhu Dazhi, *The Judicial Independence Coming From the Independence of Funding* (Sept. 29, 2005), <http://www.hn.xinhuanet.com/misc/2005-09/29/content_5250191.htm>; *see also* Chris X. Lin, *A Quiet Revolution: An Overview of China's Judicial Review*, 4 ASIAN-PAC. L. & POL'Y J. 255, 295 (2003) (claiming that the root of judicial corruption in China is its dependence on local governments for funding).

592. *See* Garz, *supra* note 582 (describing institutional causes for interference by the Chinese Communist Party).

and job security. Consequently, under China's system, it is more appropriate to describe the management of the judiciary as an administrative function of the government.⁵⁹³

The family-planning cases are treated in a similar political realm. The one-child policy is the directive of the central government, and challenging it, in any form, is practically prohibited.⁵⁹⁴ Therefore, courts are unwilling to accept family-planning cases. Sometimes, the courts dismiss the abuse of the one-child policy cases without a written verdict to avoid having the victims use the written verdict on appeal or publishing it.⁵⁹⁵

Decades ago, China lacked judges to resolve disputes.⁵⁹⁶ At that time, retired veterans were selected as judges because they were considered representatives of social justice.⁵⁹⁷ However, they had no professional legal knowledge. Instead, they relied primarily on their common sense, their sense of social justice, their sense of social equality, and "the knowledge of communist doctrine to guide their decision-making."⁵⁹⁸ Admittedly, this situation is now improved, and the changes in the judicial system in China are promising.⁵⁹⁹ The legal officials are now law school graduates or the practical equivalent. If an individual had a law-related job but did not graduate from law school, he may qualify to become a legal official. Or, if an individual had no formal legal training, he could qualify for a legal job if he completed "on-the-job training."

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593. See Mei Ying Gechlik, *Judicial Reform in China: Lessons From Shanghai*, 19 COLUM. J. ASIAN L. 97, 114 (2005) (illustrating that major and complicated cases are decided by an adjudication committee, which does so after consulting with the Party); see also Lin, *supra* note 591, at 311 (mentioning that often judges will be pressured by officials to make decisions that further their interests); see also Wu, *supra* note 589 (finding that because the judiciary, finances, and material resources are all under government control, this often results in a miscarriage of justice).
594. See Hunker, *supra* note 203, at 135 (stressing that although the central government forbids sterilization and forces abortions, often local governments take these measures in order to meet strict quotas); see also Schulman, *supra* note 544, at 317 (stating the various punishments that people receive for non-compliance, including forced sterilization). See generally Zhang, *supra* note 4, at 562 (quoting the Chinese Constitution "that the state promotes family planning so that population growth may fit the plans for economic and social development").
595. See He Yafu, *I Support the One-Child Policy and I Object to the One-Child Policy* (June 23, 2006), <<http://www.acla.org.cn/forum/showflat.php?Cat=&Number=683232&Main=678714>>; see also Robb M. LaKritz, *Foreign Investment in China: The Administrative Legal System*, Peter Howard Corne New York: Transnational Publishers, Inc., 11 EMORY INT'L L. REV. 267, 271 (1997) (discussing how because the Administrative Litigation Law is so broad, courts exercise little power to actually enforce abuses in the administration). But see Martin, *supra* note 51, at 417 (indicating that China officially dismisses such accusations as meritless).
596. See Sam Hanson, *The Chinese Century: An American Judge's Observations of the Chinese Legal System*, 28 WM. MITCHELL L. REV. 243, 248 (2001) (analyzing how China had to start from the beginning in order to implement a legal system); see also Stephen L. McPherson, *Crossing the River by Feeling the Stones: The Path to Judicial Independence in China*, 26 PENN ST. INT'L L. REV. 787, 792 (2008) (commenting that during the Cultural Revolution in China, Mao Zedong abolished laws and closed all remaining law schools in place of the "rule of man").
597. See Cynthia Losure Baraban, *Inspiring Global Professionalism: Challenges and Opportunities for American Lawyers*, 73 IND. L.J. 1247, 1248 (1998) (observing that many Chinese lawyers lack university degrees and practical training); see also Weifang He, *China's Legal Profession: The Nascence and Growing Pains of a Professionalized Legal Class*, 19 COLUM. J. ASIAN L. 138, 141 (2005) (explaining that judges in China usually applied a combination of law, moral requirements, and community customs when making decisions).
598. See MELONE & XIAOLIN, *supra* note 577, at 149 (indicating that judges are becoming pressured by the international community to conform to rule of law principles).
599. See *id.* at 157 (concluding that the developments represent a move toward a more rational legal/bureaucratic model).

which was established especially for the professional improvement of legal officials.⁶⁰⁰ The contemporary problem is that judges are trained only in national statutes and not international principles and norms.⁶⁰¹ Even if these judges were educated in some international principles and norms, they do not use them. Hence, in making decisions, they consider only the domestic statutes and the political policies, regardless of the abuse of human rights. This situation needs to be changed, and judges need more knowledge about international law and international treaties.

The one-child policy is, in essence, a political policy that has been codified. Judges make decisions based on governmental policy and sometimes sacrifice an individual's human rights. Lack of judicial independence is the principal reason for the sacrifice of human rights, but an absence of knowledge about international human rights is also a factor. Even though the enforcement of the one-child policy is not within the arena of international law, judges need to be familiar with the principles and norms of the protection and promotion of human rights under international human rights law.⁶⁰²

D. Procedural Problems

1. Arrest or Detention Without Approval of Court or Police

As Gao Xiaoduan, an ex-official of the family-planning committee,⁶⁰³ stated during the Annual Forum of China's One Child Policy, in practice, in the case of a woman with an unauthorized pregnancy, which is considered unlawful under the written policies, family-planning officials can arrest and detain her and her husband, their families, or their neighbors to pressure the violator to have an abortion or pressure her husband to undergo sterilizations without a court order.⁶⁰⁴ Gao also indicated that this situation is normal throughout the nation.⁶⁰⁵ For instance, a large number of unlawful arrests and detentions occurred in the Linyi family-planning incident, and almost none of the arrests or detentions were authorized by the court or the prosecutors.⁶⁰⁶

600. *See id.* at 150 (maintaining that there was a serious effort to educate officials, including offering opportunities to learn the basics of the legal system).

601. *See* Baraban, *supra* note 597, at 1270 (remarking on how Canada supports funding for China to train its judges and lawyers).

602. *See id.*

603. *See* Gao Xiaoduan, Report of Chinese Information Center, *China's One Child Policy: Deprive Basic Human Rights Under the Name of the "State"* (June 9, 2005), <<http://www.guancha.org/info/artshow.asp?ID=35402>> (noting that Gao is an ex-official of the family-planning committee).

604. *See id.* (explaining that forced abortions and sterilizations, as well as unlawful arrests and detentions, were common acts under IPPF).

605. *See id.* (noting that this situation is occurring throughout the nation).

606. *See* Teng, *supra* note 379 (stating that most of the arrests and detentions in the Linyi family-planning incident were unlawful and without authorization).

Additionally, harassment and torture occur frequently during unlawful arrests and detentions.⁶⁰⁷ An official of FeixianTanyi County publicly announced at the Feixian TV station, “Better ten graves than one extra birth.”⁶⁰⁸ This is also the most popular slogan nationwide.⁶⁰⁹ When imposing sanctions on violators, the family-planning officials of Lanshan District said that “[e]ven if you were beaten to death, 20,000RMB, which is approximately U.S. \$2,500, is enough for you to be buried.”⁶¹⁰ One ex-official of the family-planning department said he had done the family-planning job for almost 8 years, and according to law, the violator should have been sentenced to at least 20 years imprisonment.⁶¹¹ Instead, he was able to circumvent the law because breaking the written law to achieve the objectives of the one-child policy is politically accepted without criminal punishment.⁶¹² To some extent, political decisions are above the law and, in this way, violate people’s individual rights.⁶¹³

From an international perspective, torture, unlawful arrest, and detention violate many international human rights instruments, such as the International Covenant on Civil and Political Rights. Article 7 of the Covenant states, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”⁶¹⁴ Article 9(1) proclaims that “[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”⁶¹⁵

607. See Concepcion, *supra* note 84, at 21 (explaining that China used torture against people that were arbitrarily arrested or in detention); see also Daniel C. Turack, *The Clinton Administration’s Response to China’s Human Rights Record: At the Halfway Point*, 3 TULSA J. COMP. & INT’L L. 1, 27–28 (1995) (commenting that torture is a common practice in Chinese prisons, and concern has arisen to the unlawful detention and torturing of people); See also Sohail Mered, Note, *It’s Not a Cultural Thing: Disparate Domestic Enforcement of International Criminal Procedure Standards—A Comparison of the United States and Egypt*, 28 CASE W. RES. J. INT’L L. 141, 144–45 (1996) (implying that the International Covenant on Civil and Political Rights was adopted as an effort to fight harassment and torture that resulted from unlawful detentions).

608. See *Realities of the One Child Policy*, LAOGAI RESEARCH FOUNDATION, Jan. 16, 2007, <<http://www.laogai.org/news/newsdetail.php?id=2740>> (acknowledging that this slogan is common in Henan Province).

609. See Pan Chuan Zhen, Collections of Slogans in Rural Areas, <<http://www.2000y.net/672256/index.asp?xAction=xReadNews&NewsID=419>> (last visited Oct. 25, 2008) (inferring that the national slogan is “Better Ten Graves Than One Extra Birth”).

610. See Teng, *supra* note 379 (quoting officials of the Lanshan District).

611. See *id.* (noting that an ex-official had done several years of family planning and agreed that according to law, 20 years’ imprisonment was fair).

612. See *id.* (explaining that the ex-official was not charged because the one-child policy is accepted without criminal punishment).

613. See Ambe, *supra* note 87, at 119–20 (commenting that individual rights are trumped by politics); see also Christopher H. Schroeder, *Deliberative Democracy’s Attempt to Turn Politics into Law*, 65 LAW & CONTEMP. PROBS. 95, 123 (2002) (explaining that political decisions are superior to law because they maintain the structure of law).

614. See International Covenant on Civil and Political Rights at art. 7, Dec. 16, 1966, available at <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm>; see also DAVID WEISSBRODT ET AL., SELECTED INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AND BIOGRAPHY FOR RESEARCH ON INTERNATIONAL HUMAN RIGHTS LAW 27 (3d ed. 2001) (commenting how article 7 was crafted to avoid cruel and inhuman treatment and punishment); see also Susan H. Bitensky, *Spare the Rod, Embrace Our Humanity: Toward a New Legal Regime Prohibiting Corporal Punishment of Children*, 31 U. MICH. J.L. REFORM 353, 404–05 (1998) (discussing how article 7 of the International Covenant on Civil and Political Rights protects the dignity and integrity of the individual).

615. See ROBERT KOGOD GOLDMAN ET AL., THE INTERNATIONAL DIMENSION OF HUMAN RIGHTS: A GUIDE FOR APPLICATION IN DOMESTIC LAW 185 (2001) (quoting article 9(1): International Covenant on Civil and Political Rights).

Torture is the most reprehensible treatment and is prohibited by almost all states.⁶¹⁶ Article 7 of the International Covenant on Civil and Political Rights allows no exceptions to its ban on torture.⁶¹⁷ The Committee of International Covenant on Civil and Political Rights reaffirms that “even in situations of public emergency, no derogation [of individual rights] is allowed, and its provisions must remain in force.”⁶¹⁸ Furthermore, the committee acknowledges that there is no justification or extenuating circumstance that will excuse a violation of article 7.⁶¹⁹ Even an order from a superior officer or a public authority to perform an act that may violate the terms of article 7 is not a justifiable reason to disregard it.⁶²⁰

As for unlawful detention and arrest, the committee emphasizes that article 9 is applicable to all deprivations of liberty. Preventive detention for reasons of public security is a recognized exception, but detention in these circumstances must still abide by the other provisions of the covenant.⁶²¹ Unlawful arrest and detention are prohibited, while lawful arrest or detention must meet two requirements. First, the law under which the individual was arrested must itself and the subsequent enforcement must be in accordance with the International Covenant on Civil and Political Rights. Second, the deprivation of liberty must comply with the procedures established by law, which means it must be specifically authorized by a warrant issued by the appropriate authority.⁶²² Unlawful arrest or detention are results of the enforcement practices rather than the law itself, and because these practices violate article 9 of International Covenant on Civil and Political Rights, they should be prohibited.

Moreover, unlawful arrest and detention are closely associated with the writ of habeas corpus. In many countries, detainees are entitled to the right to seek release “by filing a petition for a writ of habeas corpus.”⁶²³ This writ requires the court to make a decision about whether the

616. See JOSEPH ET AL., *supra* note 118, at 140 (asserting that article 7 strictly prohibits torture and inhuman and degrading treatment, and no restrictions are allowed).

617. See Suzanne M. Bernard, *An Eye for an Eye: The Current Status of International Law on the Humane Treatment of Prisoners*, 25 RUTGERS L. J. 759, 768 (1994) (explaining that the Human Rights Committee, in its general comments to article 7 of the International Covenant on Civil and Political Rights, wrote that the purpose of the article was to “protect the integrity and dignity of the individual”); See also Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2572–73 (interpreting article 7 to require a state to take action to punish those found guilty of torture and provide victims with an adequate means of obtaining compensation).

618. See JOSEPH ET AL., *supra* note 118, at 195 (affirming the right not to be tortured and be subjected to inhuman or degrading treatment as one of the absolute and non-derogable rights in the International Covenant on Civil and Political Rights).

619. See *id.* at 195 (emphasizing that no restrictions on the language of article 7 are allowed).

620. See *id.* at 212 (referring to the Convention against Torture (CAT), which reads, “An order from a superior officer or a public authority may not be invoked as a justification of torture.”).

621. See *id.* at 307 (establishing that preventive detentions in cases where there is a risk to public security are still governed by and must conform to the provisions of article 9 of the International Covenant on Civil and Political Rights).

622. See *id.* at 307–8 (recognizing lawful arrest and detention as one of the two permissible limitations to one’s right to liberty under article 9 of the International Covenant on Civil and Political Rights).

623. See Kersi B. Shoff, *Comparative Law in a Civil Society: The Role of the Law Library of Congress*, 24 INT’L J. LEGAL INFO. 263, 266 (1996) (describing that the writ of habeas corpus, where a prisoner can challenge the legality of his detention, was an English invention and was adopted in many countries, including New Zealand and large parts of Africa, India, and Malaysia).

arrest or detention was lawful and whether release would be available.⁶²⁴ A petition for a writ of habeas corpus must show the illegal or wrongful elements of the arrest or detention.⁶²⁵ Other than domestic application of “the Great Writ”⁶²⁶ in the international community, the Geneva Conventions entitle prisoners of war with the right of habeas corpus if they think the prisoner’s rights have been abused and the detention is unlawful.⁶²⁷ Unfortunately, China has not introduced this procedure domestically as a judicial avenue for contesting an unlawful arrest or detention.⁶²⁸

From the domestic perspective, unlawful arrests and detention go against the Constitution of the People’s Republic of China. Article 37 of the Constitution provides that

[t]he freedom of person of citizens of the People’s Republic of China is inviolable. No citizen may be arrested except with the approval or by decision of a people’s procuratorate or by decision of a people’s court, and arrests must be made by a public security organ. Unlawful deprivation or restriction of citizens’ freedom of person by detention or other means is prohibited; and unlawful search of the person of citizens is prohibited.⁶²⁹

The Criminal Law of the People’s Republic of China prohibits unlawful arrest and detention; also, article 238 states:

Whoever unlawfully detains another or deprives him of his freedom of the person by any other means is to be sentenced to not more than three years of fixed-term imprisonment, criminal detention, control, or deprivation of political rights. In circumstances where beating or humiliation is involved, a heavier punishment is to be given. Whoever commits one of the crimes in the preceding paragraph and causes a person’s serious injury is to be sentenced to not less than three years and not more than 10 years of fixed-term imprisonment; when he causes a person’s death, he is to be sentenced to not less than 10 years of fixed-term imprisonment; when he causes a person dis-

624. See Lectlaw.com, Habeas Corpus, <<http://www.lectlaw.com/def/h001.htm>> (last visited Oct. 26, 2008) (defining “habeas corpus” as a judicial order to a custodian or prison official to produce the petitioner so that the court can decide whether there are sufficient grounds for petitioner’s imprisonment).

625. See *id.* (clarifying that a petitioner seeking habeas corpus as a means of release must show a legal or factual error regarding his imprisonment).

626. See Opinion, *Grave Trouble for the Great Writ*, N.Y. TIMES, Apr. 8, 1996, at A14 (describing the writ of habeas corpus as the “venerable Great Writ” and a civil protection against arbitrary state imprisonment and unfair trials).

627. See John Bambenek, *The Geneva Conventions and Habeas Corpus: Why the Left-Wing Reactionaries Are Wrong*, BLOGCRITICS MAG., Oct. 19, 2006, <<http://blogcritics.org/archives/2006/10/19/153931.php>> (discussing the Geneva Conventions’ requirement in article 5 that entitles every prisoner to a status hearing).

628. See Frances Gibb, *Can China’s Legal System Get to Grips with Habeas Corpus?*, TIMES (London), May 6, 2003, at 5 (reporting on the research of Professor Yue of China University, who asserts that although detainees must be brought before judges, there is no judicial oversight of the detention, which instead is controlled by the police and prosecutors).

629. See Xian Fa [Constitution], *supra* note 26, at art. 37, §§ 1–3 (quoting article 37 of the Constitution of the People’s Republic of China).

ability or death by violent means, he is to be punished in according with the stipulations in Article 234 and Article 232 of this law.⁶³⁰

In the enforcement of China's one-child policy, unlawful arrests and detentions occur frequently. The primary reason for this is that the officials believe the policy is "politically correct,"⁶³¹ and challenging it means challenging the government's authority. They are implementing the policy of the government regardless of the specific means of enforcement. With the justification of their actions being "politically correct," officials abuse their power and infringe on the basic human rights of Chinese. Undoubtedly, unlawful arrest and detention must be prohibited in the enforcement of the one-child policy.

2. Police Engagement in the Enforcement of the One-child Policy

The functions of the police include protecting human rights, deterring crimes, and keeping society stable. However, under some circumstances police in certain regions constitute the most serious threat to human rights because they are corrupt or ineffective in the prevention and investigation of crime.⁶³² In the enforcement of China's one-child policy, the police become the protectors of the family-planning officials.⁶³³ In situations where the police or family-planning administrators with no formal authorization detain persons to carry out the one-child policy in an inhumane manner, there is no point in reporting the inhumane activities to the police. In the Wang Haixia case,⁶³⁴ the police arrested Wang and transferred her forcibly to the local family-planning department. Remember, Wang was forced to abort her out-of-wedlock child, and no one challenged the police's power. Even if this power were challenged, administrative punishments would have been very light.⁶³⁵ This situation only leaves more women vulnerable to violence in family-planning campaigns.

630. See Criminal Law *supra* note 502, at art. 238 (quoting the Criminal Law of the People's Republic of China, article 238, organized under chapter IV, which prohibits crimes infringing upon a citizen's personal rights)

631. See Zhuang Pinghui, *Minister Promises Less Corruption in One-child Policy*, S. CHINA POST, Nov. 14, 2007, at 7 (reporting that enforcement of the one-child policy has met opposition in rural areas, and that the minister of the National Population and Family-Planning Commission, Zhang Weiqing, plans to introduce an education campaign to ensure enforcement of the policy).

632. See U.S. DEPT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CHINA (2007), <<http://www.state.gov/g/drl/rls/hrrpt/2007/100518.htm>> (acknowledging the prevalence of corruption in the police force at both national and local levels); see also Ching-Ching Ni, *Some Chinese Police Riding a Crime Wave*, L.A. TIMES, June 6, 2005, available at 2005 WLNR 23328327 (implicating the Chinese police in a wide variety of criminal activity); see also Kam C. Wong, *A Reflection on Police Abuse of Power in the People's Republic of China*, 1 POLICE Q. 87, 87-88 (discussing the practical and theoretical explanations for the prevalence of corruption in the Chinese police force).

633. See *Human Rights in China: Hearing Before the H. Comm. on International Relations, Subcomm. on Africa, Global Human Rights, and International Operations*, 109th Cong. (2006) (statement of Steven Mosher, President, Population Research Institute), available at 2006 WLNR 6550402 (discussing the arrest and imprisonment of families who refused to comply with county family-planning officials).

634. See Li Changxin, *He Nan Fenggiu Police: Investigation on Forced Abortion*, Apr. 23, 2006, <http://www.yuluncn.com/html/bobao/2006-4/23/08_22_55_225.html>.

635. See James D. Seymour, *Cadre Accountability to the Law*, 21 AUSTL. J. CHINESE AFF. 1, 3-4 (1989) (describing the lenient sentences for often serious crimes given to government officials and security officers).

E. Pressures on Executive Officials, Co-workers and Fellow Villagers

The reason why local officials employ coercive and inhumane means is due partly to the fact that there are no regulations on and no practical punishment under the law that place boundaries on their activities.⁶³⁶ The officials are under pressure to act in accordance with the directive of the higher authorities, and widespread abuse of one-child policy reflects these procedural problems.

1. Government Employees Are Forced to Implement the Birth Control Policy

Enforcement of the one-child policy is pursued by the family-planning committee, which has “a functioning vertical structure down to the lowest administrative units.”⁶³⁷ The higher level of government gives the responsibility of controlling regional population to local leaders, and the local leaders will assign a population target to local officials. In the early 1990s, family-planning officials and Communist Party officials were “made personally responsible for meeting population target.”⁶³⁸ The local officials are also required to monitor “the contraceptive use and pregnancy status of all women of reproductive age.”⁶³⁹

Under the threat of demotion, having their bonus withheld, or losing welfare subsidies, local officials have no alternative but to work toward fulfilling the quotas determined by the higher authorities, using whatever means they can, and will often “terrorize women and their families into submission.”⁶⁴⁰ The success in meeting the quota is regarded by their higher authorities as an important index of their “political performance”⁶⁴¹ and counts as credits toward promotion. The inhumane means used by local officials in enforcing the one-child policy has resulted in a national human rights crisis.⁶⁴²

636. See AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REPORT 2008: THE STATE OF THE WORLD'S HUMAN RIGHTS, 93–95 (2008) (discussing the ineffectiveness and corruption of the Chinese legal system); see also U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CHINA (2007), <http://www.state.gov/g/drl/rls/hrrpt/2007/100518.htm> (acknowledging limited judicial oversight of law enforcement and widespread abuses at all levels of law enforcement). But see Kevin J. O'Brien & Lianjiang Li, *The Politics of Lodging Complaints in Rural China*, 143 CHINA Q. 756, 781 (concluding that filing complaints against local leaders and officials may effect meaningful redress of abuses).

637. See Elina Hemminki et al., *Illegal Births and Legal Abortions: The Case of China*, J. REPROD. HEALTH, Aug. 11, 2005, <<http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=1215519>> (discussing the structure of the family-planning enforcement agencies).

638. See *id.*

639. See *id.* (referring to the means by which the family-planning policies are enforced).

640. See Li Changxin, *He Nan Fengqiu Police: Investigation on Forced Abortion*, Apr. 23, 2006, <http://www.yuluncn.com/html/bobao/2006-4/23/08_22_55_225.htm>.

641. See Regulations on Family Planning (promulgated by the Standing Comm. Ninth An Hui People's Cong., effective 2002) available at <<http://www.masrc.cn/root/news/rkzc.htm>> (discussing the rewards available to officers of An Hui province for meeting population control goals); see also Regulations on Family Planning (promulgated by the Standing Comm. Ninth Henan People's Cong., effective 2002) art. 40; see also Regulations on Family Planning (promulgated by the Standing Comm. Ninth Shandong People's Cong., effective 2002) art. 52; see also Regulations on Family Planning (promulgated by the Standing Comm. Ninth Shanxi People's Cong., effective 2002) art. 46.

642. China's One-Child Policy: Deprive Human Rights Under the Name of “State,” CHINA INFORMATION CENTER, June 9, 2005, <<http://www.observechina.net/info/artshow.asp?ID=35402>> (addressing human rights abuses stemming from enforcement of the one-child policy).

The Linyi Municipal Government announced a directive entitled About the Decision on Strengthening the Control of Population and Family Planning in the New Period.⁶⁴³ Article 19 of this directive expresses that successfully meeting the quota is the most important index for promotion.⁶⁴⁴ Article 27 of this directive emphasizes that rewards will be given to officials who have met the quotas every year. Being rewarded consistently for five years makes one eligible to receive the "Special Contribution Reward." Conversely, officials who do not finish the quotas will be warned and have no opportunity to be promoted.⁶⁴⁵ Similar provisions can be found in almost all the regulations on family planning of different provinces.⁶⁴⁶

2. Pressures Imposed on Co-workers and Fellow Villagers

In enforcing the one-child policy, co-workers and fellow villagers of the violators will be punished by having officials "withhold their bonuses or land contracts"⁶⁴⁷ or even arrested by the local officials if one member of the community violates the policy. A directive of the Wu Han Qiao Kou Auditing Department explicitly states that if a violation of the one-child policy occurs, the responsible office to which the violator belongs will be deprived of the opportunity to be rewarded with the honored title, and everyone in the office will receive only half of the yearly bonuses.⁶⁴⁸

According to a report conducted by Wang Chuanshi, an ex-leader of a village in Jiang Xi Province, every couple who violates the one-child policy influences five to six other families in that village.⁶⁴⁹ Wang stated that as far as he knows, this situation is not limited merely to his village, but this figure definitely exists in Jiangxi Province.⁶⁵⁰

A report on land contracts in rural areas shows that villagers' rights under a land contract will be deprived if one member of the family violates the family-planning policy. If land has been assigned to a family with a member who has violated the policy, the family's contract will

643. See Directive issued on the Decision on Strengthening the Control of Population and Family Planning in the New Period (promulgated by the Linyi Municipal Government 2004) Num. 18.

644. See Teng Biao, *The Linyi Family-Planning Report*, INDEPENDENT CHINESE PEN CENTER, <http://boxun.com/hero/tengb/35_1.shtml> (discussing the incentives included in article 19 for family-planning officials).

645. See *id.* (noting the time frame for the receipt of awards included in article 27).

646. See Regulations on Family Planning (promulgated by the Standing Comm. Ninth An Hui People's Cong., effective 2002) available at <<http://www.masrc.cn/root/news/rkzc.htm>> (discussing the consequence in the An Hui province for failing to meet population control goals); see also Regulations on Family Planning (promulgated by the Standing Comm. Ninth Henan People's Cong., effective 2002) art. 40; see also Regulations on Family Planning (promulgated by the Standing Comm. Ninth Shandong People's Cong., effective 2002) art. 52; see also Regulations on Family Planning (promulgated by the Standing Comm. Ninth Shanxi People's Cong., effective 2002) art. 46.

647. See Wang Haixin, *Ten Crimes of the One Child Policy*, available at <<http://www.chinaforum.com/ShowPost.aspx?PostID=66645>> (last visited Mar. 18, 2007).

648. See *id.*

649. See Wang Chuanshi, *Social Compensation Fee Has Become the Important Fund for Rural Governments After the Abolishment of Agricultural Tax*, <<http://www.hs.heagri.gov.cn/hengs/detail.jsp?id=27253&typeid=66>> (noting that five out every six households in Jiangxi Province are impacted in some way by couples that violate the one-child policy).

650. See *id.* (expressing the belief that this phenomena of one couple's violation of the one-child policy is not limited to the author's town but to the province as a whole).

be withdrawn.⁶⁵¹ The families living in their community will be forced to sign a liability contract, indicating that if any of the families within their community go against the family-planning policy by having an unauthorized child, the land contracts of all the families will be withheld.⁶⁵²

As an example, Fang Zhongxia, villager of the Xia Gougou Village, Liang Qiu County, Feixian, Linyi, reported that 22 of her relatives were arrested to coerce her into aborting her unapproved child.⁶⁵³

Although it is impossible to document the exact number of bonuses and land contracts that were withheld because of “the strict control of information on this sensitive matter,”⁶⁵⁴ it is clear that because of these policies, co-workers and fellow villagers are obligated to guarantee that no unauthorized pregnancies exist in their workplace or village.

F. Lack of Critical and Investigative Media

Although Chinese authorities have relinquished their control over information to some extent, they still continue to “impose strict licensing requirements on publishing and news reporting,”⁶⁵⁵ and “attempt to prevent Chinese citizens from accessing news from foreign sources,”⁶⁵⁶ especially news and comments that challenge the government’s authority. Governments control news reporting by imposing political punishments that lead people to engage in self-censorship or shutting down media outlets that publish unfavorable information.⁶⁵⁷

651. See *Survey on Rural Women’s Rights to Be Assigned Land* (2), <<http://hi.baidu.com/feixiangzhe/blog/item/5159b413346328806538db03.html>> (Feb. 25, 2007) (explaining that the Chinese government will withdraw land contracts against couples who give birth to excess children under the one-child policy).

652. See Wang Jinbo, *The Guilty of the One Child Policy*, <http://www.boxun.com/hero/wangjinbowenji/83_1.shtml> (Jul. 17, 2005) (maintaining that the government will confiscate property as a sanction against families which violate the one-child policy).

653. See Teng Biao, *Twenty-Two Relatives Are Arrested*, <http://boxun.com/hero/tengb/27_1.shtml> (Aug. 20, 2005) (describing the story of a woman who violated the one-child policy being harassed by 22 relatives to convince her to abort the unapproved child).

654. See *Human Rights in China: Unfair Burdens, Impact of the Population Control Policies on the Human Rights of Women and Girls*, CHINA RTS. FORUM (2005), available at <<http://hrchina.org/public/contents/article?revision%5fid=4162&item%5fid=4161>> (describing the difficulty in obtaining confirmation of the use of coercive measures in enforcing the one-child policy).

655. See CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA: ANNUAL REPORT (2004), available at <<http://www.cecc.gov/pages/annualRpt/annualRpt04/index.php>> (maintaining that Chinese authorities impose strict licensing agreements on publishing and news reporting); see also He Qinglian, *Walking the Tightrope*, CHINA RTS. FORUM (2004), available at <http://hrchina.org/fs/downloadables/reports_a1_Media_Control1.2004.pdf?revision_id=8992> (describing how the central government exercises tight control over public opinion and discussion by means of political power and top-down policies); see also Keith Bradsher, *China Cracks Down on News Media as Party Congress Nears*, N.Y. TIMES, Aug. 16, 2007, available at <<http://www.nytimes.com/2007/08/16/world/asia/16china.html?partner=rssnyt&cmc=rss>> (reporting that Chinese government officials periodically try to discourage the news media from being too aggressive and crack down on what the government describes as “false reports”).

656. See CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA: ANNUAL REPORT (2004), available at <<http://www.cecc.gov/pages/annualRpt/annualRpt04/index.php>> (acknowledging that the Chinese government actively attempts to prevent its citizens from accessing foreign news sources).

657. See *id.* (stating that the methods of control exercised by the Chinese government include compelling media outlets to engage in self-censorship or face being shut down by the government).

Similarly, media, such as newspapers, TV, radio, and the Internet, and especially local media, are frequently prohibited from reporting news that may harm the government's policies. Censorship of news reports is required to avoid the reporting of politically adverse information.⁶⁵⁸ If any information in a report goes against government policies, the report will not be published. Otherwise, the exposure of negative comments will result in the demotion or dismissal of the reporters who disseminated the information.⁶⁵⁹

In 1999, the Chinese government established the State Information Security Appraisal and Identification Management Committee. Its responsibility is "protecting government and commercial confidential files on the Internet . . . [and] protect[ing] information by monitoring and keep[ing] them from being used without proper authorization."⁶⁶⁰ Many graduates who were computer majors are recruited by security officials to carry out cybersurveillance and act as the "Internet police."⁶⁶¹ Some Web sites are not made available publicly until the comments that challenged government policies were removed or deleted.

With respect to the abuse of human rights in the enforcement of the one-child policy, similar censorship measures are undertaken by local officials and the local media themselves.⁶⁶² All of these censorship measures are undertaken to avoid discouraging officials' enthusiasm for the policy and to avoid hampering their efforts to achieve the set quota for their region's population.

Tianya BBS, a discussion forum, was shut down for a period of time in 2005 only because Cheng Guangcheng's case (he was the Chinese human rights activist who was detained because of his coverage of the Linyi family-planning incident) was the hottest topic at the time and challenged the authority of governments.⁶⁶³ Chinese citizens could not log onto the Wikipedia Web site for similar reasons in 2005. Although domestic media tried to keep the information from spreading further, the Chen Guangcheng case was reported by foreign media, such as Radio Free Asia⁶⁶⁴ and the *Washington Post*.⁶⁶⁵

658. See News and Censorship, (June 14, 2007), available at <<http://www.rfa.org/mandarin/shenrubao/2007/06/14/internet4/>>.

659. See *The Reporter Who Exposed the Pollution Situation of the Paper Company Has Lost His Job*, RADIO FREE ASIA, (Oct. 24, 2006), available at <<http://www.rfa.org/mandarin/zhuanlan/diaochabao/2006/10/24/wuran/>>.

660. *Id.*

661. *Id.*

662. See *Silenced in China; Beijing Continues to Crack Down on Media Freedoms*, THE WASH. POST, July 18, 2007, at A.18 (reporting the Chinese government's censoring acts in reaction to the birth control riots). See generally Fons Tuinstra, *Puzzling Contradictions of China's Internet Journalism*, 60 NIEMAN REP. 50, 51–52 (2006) (indicating that local government censorship of the Internet is increasing).

663. See Martin, *supra* note 51, at 415 (revealing the Chinese government's efforts to suppress information about activist Chen Guangcheng's legal case in the media and on the Internet); see also Peerenboom, *supra* note 222, at 107–09 (summarizing the restrictive measure the Chinese government takes to restrict information about topics it deems sensitive and off limits); see also Nicholas D. Kristof, *Slipping over the Great Firewall of China*, N.Y. TIMES, Aug. 24, 2008, at WK.10 (editorializing on the extent to which the Chinese government monitors Internet postings).

664. See China Formally Arrests Blind Shandong Activist, RADIO FREE ASIA, June 21, 2006, <http://www.rfa.org/english/china/china_activist-20060621.html> (presenting the facts of Chen Guangcheng's arrest).

665. See Fan, *supra* note 431, at A.9 (constructing the situation surrounding Guangcheng's arrest and trial for those who live outside of China).

Nevertheless, Chinese citizens can “rely on resources and technology that organizations outside of China provide to circumvent government Internet censorship.”⁶⁶⁶ The Linyi family-planning incident was eventually exposed to more Chinese citizens through non-domestic sources.

It is not only the media that is censored. Lawyers are scared to accept cases on behalf of female victims of abusive family-planning enforcement.⁶⁶⁷ Basically, any reports of lawyers’ assistance and reports of the abuse of family-planning cases in one region are reported by the media of other regions or sometimes the foreign media.⁶⁶⁸

VIII. Solutions for Limiting Population Without Violating Women’s Rights

A. The Long-term Goal: Abolish the One-child Policy

Abolishing the one-child policy should be the ultimate long-term goal. At the Political Consultative Conference of 2007, 29 out of 2,043 committee members⁶⁶⁹ submitted a proposal calling for the abolishment of the one-child policy.⁶⁷⁰

1. Advantages of the One-child Policy

Admittedly, the one-child policy does keep China’s booming population under control and promotes economic development. The living standard of the Chinese population has improved dramatically with the decrease in population, and the high unemployment rate has dropped temporarily.⁶⁷¹ Notwithstanding these benefits, the negative effect of the one-child policy on human rights in China far outweighs its benefits.

666. See CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA: ANNUAL REPORT (2004), *supra* note 575, (explaining how Chinese citizens are able to rely on outside sources to avoid government Internet censorship).

667. See *China Formally Arrests Blind Shandong Activist*, *supra* note 664 (revealing the tactics, including harassment and beatings, employed to intimidate Guangcheng’s lawyers).

668. See *Chinese Activist “Beaten in Jail,” BBC News*, June 22, 2007, <<http://news.bbc.co.uk/2/hi/asia-pacific/6230148.stm>> (reporting by a British news source on the conditions Guangcheng is facing as a prisoner in China); see also Philip P. Pan, *Who Controls the Family? Blind Activist Leads Peasants in Legal Challenge to Abuses of China’s Population-Growth Policy*, WASH. POST, Aug. 27, 2005, at A.1 (revealing to the greater world the situation rural Chinese peasants are facing against officials); see also END OF THE WORLD FORUM, <<http://bbs.tianya365.com/>> (allowing individuals to write in on topics such as abuse of family-planning tactics).

669. See *Recorded Text*, NEWS, Mar. 15, 2007, <<http://www.xinhuanet.com/zhibo/20070315/zhibo.htm>> (stating the number of committee members at the conference).

670. See *CPPCC Members Call for “The Abolition of the One-child Policy,” ASIANEWS.IT*, Mar. 16, 2007, <<http://www.asianews.it/index.php?l=zh&art=8757>> (summarizing the request by members of the CPPCC National Committee to revoke the one-child policy).

671. See Clay Chandler, *Little Emperors*, FORTUNE, Oct. 4, 2004, at 138 (summarizing the benefits of the one-child policy, such as lowering poverty and increasing the standard of living); see also Dexter Roberts, *A Safety Net That’s Barely There*, BUS. WK., Jan. 31, 2005, at 47 (informing of the decrease in workers because of the one-child policy, and what the fallout of such a shortage would be); see also Michael Taylor, *Aging Workforce Crisis Looms*, 12 CHINA STAFF 2, 3–4 (2006) (discussing how although employment is now satisfactory, eventually there will be shortages in certain professions).

2. Disadvantages of the One-child Policy

a. Concern for Human Rights

It goes without saying that Chinese women's reproductive rights, health rights, and other basic human rights are seriously abused in the enforcement of the one-child policy. The one-child policy, with its resulting human rights violations, must be abolished to comply with international human rights law, international treaties, and respect of women's rights,

b. Economic Concern

China's one-child policy, in essence, is a depopulation policy rather than simply a birth-control policy. The so-called aging crisis is essentially a depopulation crisis.⁶⁷²

Due to the one-child policy, the reproduction rate decreased from 5.8 births per women in the 1970s⁶⁷³ to 1.8 births per women today.⁶⁷⁴ The current global reproduction rate is 2.7 births per woman,⁶⁷⁵ which is sufficient to still balance population replacement needs.⁶⁷⁶ Research shows that the sustainable level of global population is 2.1 births per woman.⁶⁷⁷ Compared to the global level, China's fertility rate is lower than the global standard.

Moreover, according to a report, Beijing's population of those age 60 and over reached 1.97 million at the end of 2004, accounting for 13% of the city's population.⁶⁷⁸ By 2050, this number is estimated to increase to 6.5 million, making up 30% of the city's population.⁶⁷⁹ This problem of an aging population is not limited to Beijing. As a result of the one-child policy and the aging Chinese population, it has become a nationwide crisis.⁶⁸⁰ The disproportionate number of elderly people leads to a misshapen population pyramid and further results in a lack of labor, which will negatively affect further economic development.

672. See I.K. Gujral, *Global Aging, Depopulation and Virtual Work*, 20 NEW PERSP. Q. (2001), available at <http://www.digitalnpq.org/archive/2001_spring/global.html> (explaining that because of the declining birth rate, what has been referred to as an "aging crisis" is, in fact, a depopulation crisis).

673. See Zhu Ling, *Tell You the Secret of China's Population*, PEOPLE.COM.CN, Feb. 25, 2007, <<http://news.people.com.cn/GB/37454/37459/5411764.html>> (describing the fertility rate in China in the 1970s).

674. See *id.* (highlighting the current drop in the fertility rate from what it was in the 1970s).

675. See Gujral, *supra* note 672 (providing the global fertility rate of births per woman).

676. See *id.* (considering the global fertility rate and how it is sufficient for population replacement needs).

677. See David Crank, *The Population Bust*, 5 UNLESS THE LORD . . . MAG. 3, Sept. 4, 2008, available at <<http://www.unlessthe lordmagazine.com/articles/Population%20Bust.htm>> (discussing the opportunity for Christians to go against the norm and have a significantly greater number of children than the average—2.01 per woman—to aid in perpetuating their goals).

678. See *Nation's One-Child Policy Will Not Change*, CHINA DAILY, Sep. 30, 2006, at 2, available at <http://www.china-daily.com.cn/china/2006-09/30/content_700230.htm> (referencing the growing older population in China and its effect on changing the one-child policy).

679. See *id.* (analyzing the rise in China's elder population in coming years).

680. See Jiang Zhenghua, *China's Population Is Aging and Countermeasures*, PEOPLE'S DAILY, March 21, 2005, available at <<http://theory.people.com.cn/GB/40536/3257709.html>> (outlining the effects of the aging population on the Chinese nation).

In China, most of the elderly are primarily dependent on younger generations for care and financial support.⁶⁸¹ Because of the one-child policy, in contemporary society, where the cost of raising families is individualized, there is little benefit to having fewer children.⁶⁸² Younger generations are less populous as a result of the one-child policy, and these generations have to carry more and more heavy burdens in life.⁶⁸³

As the older generation's ability to work decreases over the ensuing decades, the labor pool will decline.⁶⁸⁴ The burden of supporting the older generation, combined with diminishing labor, may result in "slow and protracted economic decline."⁶⁸⁵

Several years ago, the base of the population pyramid was not large or strong enough, and there were more young people.⁶⁸⁶ These young people needed more places like schools, child centers, and other child facilities for their education.⁶⁸⁷ However, as the apex of the population pyramid grows larger, schools, child centers, and other facilities for children are not needed in such numbers, and the excess of schools and the decline in numbers of young people are not conducive to economic development.⁶⁸⁸

In summary, in order to solve the aging population crisis and control the population boom, the Chinese government should adopt a flexible family-planning policy rather than enforce the depopulation policy. The population boom can be kept under control, while the replacement rate will naturally balance out.

3. The Process of Abolishing the One-child Policy

The principal reason for the implementation of the one-child policy is the lack of democracy in China.⁶⁸⁹ The absolute power of the Communist Party influences not only the legisla-

681. See Gao Yan, *Exacerbate the Trend of Aging: Who Is Going to Raise a Sense of Security?*, CHINA ECONOMIC WEEKLY, Nov. 1, 2004, available at <<http://blog.icxo.com/read.jsp?aid=58808&uid=1707>> (concluding that individuals are choosing not to have children because they do not want the added costs. Instead, they prefer to save the money for themselves in their old age).

682. See Gujral, *supra* note 672 (suggesting that the growing elder population is an issue that must be confronted).

683. See *id.* (describing how the growing elder population is an issue that must be resolved).

684. See *id.*, (commenting that the labor force is decreasing while the number of elder individuals is increasing).

685. See *id.* (positing that an aging world will be a "world in decline").

686. See Therese Hesketh, *The One-Child Family Policy: The Good, the Bad, and the Ugly*, 314 BRIT. MED. J. 1685 (June 7, 1997) (reporting that around 1979, two-thirds of the population were under 30; however, since then, the birthrate has lessened under the one-child policy).

687. See DALE WEN, CHINA COPE WITH GLOBALIZATION, THE INTERNATIONAL FORUM ON GLOBALIZATION, 12-13 (Debi Barker ed.), available at <<http://www.ifg.org/pdf/FinalChinaReport.pdf>> (claiming that before the reform in 1979, the Chinese government provided support for human resources, including education).

688. See *id.* (mentioning that after the reform in China in 1979, the government's human resource programs deteriorated).

689. See Penelope R. Glover, Comment, *Re-Defining Friendship: Employment of Informants by Police*, 72 U. COLO. L. REV. 749, 774 (2001) (noting that China lacks a focus on democracy, as demonstrated by its one-child policy); see also Gomez, *supra* note 45, at 564 (explaining that a motive behind the one-child policy was a fear that the growing population would slow the socialist economy); see also Zhang, *supra* note 4, at 580 (linking the massacre at Tiananmen Square reacting to pro-democratic leanings to allowing persecuted individuals under the Chinese one-child policy to seek asylum in the United States).

tion but also the means by which that legislation is enforced.⁶⁹⁰ With this ultimate power, courts and citizens have little or no opportunity to challenge the accuracy and legality of the Communist Party's policy.⁶⁹¹ Conversely, a democratic state would not likely carry out family-planning policy by means of forced sterilization and abortion.⁶⁹² Reform of China's political system will bring a permanent end to the one-child policy.⁶⁹³ In the long run, China should respect women's choices in deciding whether to have children and how many children to have.⁶⁹⁴ China has to comply with the legal obligations set by international treaties and agreements.⁶⁹⁵

690. See Yujie Gu, *Entering the Chinese Legal Market: A Guide for American Lawyers Interested in Practicing Law in China*, 48 DRAKE L. REV. 173, 209 (1999) (referring to the Communist Party's control over the laws in China); see also Hunker, *supra* note 203, at 132 (providing that the Communist regime in China implemented the one-child policy and has enforced it through coercive means); see also Meixian Li, Notes and Comments, *China's Compliance with WTO Requirements Will Improve the Efficiency and Effective implementation of Environmental Laws in China*, 18 TEMP. INT'L & COMP. L.J. 155, 167–68 (2004) (stating that the Communist Party in China influences the enforcement of laws).

691. See Savanyu, *supra* note 39, at 19–20 (analyzing the one-child policy and the inability of women to oppose the policy because of the negative consequences of non-compliance); see also James M. Wines, *Guo Chun Di v. Carroll: The Refugee Status of Chinese Nationals Fleeing Persecution Resulting from China's Coercive Population Control Measures*, 20 N.C. J. INT'L L. & COM. REG. 685, 715 (1995) (indicating that if a family decides to defy the one-child policy, it is seen by the Communist government as an affront to its legitimacy and is punished); see also Adell, *supra* note 49, at 804 (comparing the Chinese refugees seeking asylum from persecution under the one-child policy to Russian refugees who were granted asylum from persecution by those who disagree with the government's legitimacy).

692. See Nie, *supra* note 212 (asserting that the liberal democracy perspective sees compulsory fertility control mechanisms as a violation of an individual's right to reproduction and a woman's right to privacy); see also China Miffed at United States over UN Population Funding, <<http://www.planetwire.org/details/2307>> (last visited Oct. 21, 2008) (mentioning, among other things, that the United States' cessation of funding to the UNFPA was because of its support of China's brutal enforcement of the one-child policy). But see Rebecca J. Cook, *Human Rights and Reproductive Self-Determination*, 44 AM. U.L. REV. 975, 1013 (1995) (arguing that men's superior powers of reproductive self-determination subordinate women reproductively even in countries that maintain democratic governmental institutions).

693. See SUSAN GREENHALGH & EDWIN A. WINCKLER, *GOVERNING CHINA'S POPULATION: FROM LENINIST TO NEOLIBERAL BIOPOLITICS* 329 (Stanford Univ. Press 2005) (explaining that the stringent birth limits of one child were imposed by older revolutionary program leaders, whereas younger program leaders have been working to relax the one-child policy by first increasing the number of exceptions that would allow for two children and by aiming to make the two-child option available to everyone).

694. See Savanyu, *supra* note 39, at 19 (clarifying that there is some effort on behalf of the Chinese government to implement the family-planning policy in a way that empowers women to take control of their own lives with an emphasis on education rather than pressure); see also Robert M. Hardaway, *Environmental Malthusianism: Integrating Population and Environmental Policy*, 27 ENVTL. L. 1209, 1231–32 (1997) (explaining that coercive measures, such as those instituted in China, are not required to achieve population stabilization, and that such stabilization could be achieved effectively if the government alternatively provided contraceptives and family-planning services to every woman of childbearing age); see also Xizhe, *supra* note 6, at 56 (stressing that the guiding principle of China's new grass-roots family-planning program is voluntary popular participation).

695. See MAJA KIRILOVA ERIKSSON, *REPRODUCTIVE FREEDOM: IN THE CONTEXT OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW* 258 (Martinus Nijhoff Publishers 2000) (expressing that coercive methods to make individuals beget children is unjustifiable within the realm of international law); see also FERTILITY, FAMILY PLANNING AND POPULATION POLICY IN CHINA, *supra* note 276, at 8 (stating that forced abortions undertaken by officials in China to meet sterilization quotas caused an international uproar over human rights violations and calls for sanctioning of foreign aid to China's family-planning programs); see also Diana D.M. Babor, *Population Growth and Reproductive Rights in International Human Rights Law*, 14 CONN. J. INT'L L. 83, 106 (1999) (establishing that the human right of family planning is recognized as a principle of customary international law).

**a. The Implementation of Democracy and the Rule of Law
Under the Communist Party Regime**

Since 1978, China has been trying to transition from a Communist Party dictatorship to a more liberal democratic structure that follows the rule of law.⁶⁹⁶ Even though the Chinese government, which is under the Communist Party rule, tries to curb the Communist Party's power in some areas, the Communist Party still has the ultimate power in enforcing its political policies.⁶⁹⁷ As a developing country, this system used to have a practical purpose because the government had the sole responsibility of ensuring that its citizens' basic needs were met.⁶⁹⁸ But as China has made vast economic and social improvements, democracy should follow.⁶⁹⁹

The government and Communist Party members should improve the strength of their democracy by being subject to the rule of law. The Chinese government, under Communist Party rule, should actively promote economic development, political stability, protection of human rights, and the efficient enforcement of the rule of law. Additionally, the government

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696. See BAOGONG HE, *THE DEMOCRATIZATION OF CHINA* 27 (Routledge 1996) (explaining that since the 1978 reform policies, there has been a gradual weakening of the Chinese populist model of democracy and an increasing growth of the ideas of liberal democracy); see also David S. Bloch & Thomas TerBush, *Democracy in the Cities: A New Proposal for Chinese Reform*, 33 CAL. W. INT'L L.J. 171, 173–74 (2003) (stating how the reforms under Deng Xiaoping were intended to liberalize the economy, not the political sphere, but made liberal democracy more attractive); see also Randall Peerenboom, *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China*, 19 BERKELEY J. INT'L L. 161, 249–50 (2001) (hereinafter Peerenboom, *China Admin. L. Reform*) (clarifying that China could become democratic without specifically being a liberal rights-based democracy with respect to civil and political rights) <[http://en.wikipedia.org/wiki/History_of_the_People's_Republic_of_China_\(1976%E2%80%93931989\)](http://en.wikipedia.org/wiki/History_of_the_People's_Republic_of_China_(1976%E2%80%93931989))> (last visited June 8, 2007).
697. See Daphne Huang, *The Right to a Fair Trial in China*, 7 PAC. RIM L. & POL'Y J. 191 (1998) (emphasizing that although political and economic reform was announced during the Chinese Communist Party's 15th Quint Annual People's Congress, it was stressed that Western-style democracy would not be allowed to compromise the power of the Communist Party). See also Bradley L. Milkwick, Article, *Feeling for Rocks While Crossing the River: The Gradual Evolution of Chinese Law*, J. TRANSNAT'L L. & POL'Y 253 (2005) (explaining how the Communist Party dominates government action by way of its power over the National People's Congress); see also Eric W. Orts, *The Rule of Law in China*, 34 VAND. J. TRANSNAT'L L. 43, 66–67 (2001) (arguing how the Chinese judicial system is subservient to the will of the Communist Party).
698. See MAURICE J. MEISNER, *MAO'S CHINA AND AFTER* 130 (3d ed. 1999) (explaining how mass peasant migration to urban areas during early Maoist China was caused by food shortages in the countryside, necessitating a proper reformative response by Communist authorities); see also Alex Y. Seita, *Globalization and the Convergence of Values*, 30 CORNELL INT'L L.J. 429, 459–60 (1997) (stating that as the living standards of developing countries improve, citizens will expect more democratization first and human rights later); see also Minqi Li, MONTHLY REVIEW, Jan. 2004, available at <<http://www.monthlyreview.org/0104li.htm>>, (asserting that socialist countries are more successful than capitalist countries in terms of meeting people's basic needs of nutrition, health care, education, housing, and pensions).
699. See CECILE FABRE, *SOCIAL RIGHTS UNDER THE CONSTITUTION: GOVERNMENT AND THE DECENT LIFE* 124 (Oxford Univ. Press 2000) (stating that people need to be free from fighting for survival before they can devote time and effort to thinking about how their society should be run); see also Miron Mushkat & Roda Mushkat, *Economic Growth, Democracy, the Rule of Law, and China's Future*, 29 FORDHAM INT'L L.J. 229, 248 (2005) (addressing how the adoption of democratic institutions stems from economic expansion with its embrace of modernization); see also Takis Fotopoulos, *The Multidimensional Crisis and Inclusive Democracy*, ch. 14, ¶ 9, *Economic Democracy, the Meaning of an Economic Democracy*, available at <<http://www.inclusivedemocracy.org/journal/ss/ch14.htm>> (last visited Oct. 23, 2008) (explaining that once basic personal needs are satisfied, there will be room for additional consumption which will enable the creation of an economic democracy).

should attempt to transition incrementally from a dictatorship to a more liberal democratic state.

b. Feasible Alternatives for Population Control

Allowing families to have second children freely may be one feasible alternative and a step toward abolishing the one-child policy.⁷⁰⁰ According to a survey held in 2005, most citizens (approximately 61.3%) prefer two children because single children suffer from loneliness and anxiety, especially those born after the 1980s.⁷⁰¹ It is believed that because of the one-child policy and the aging population crisis, each younger generation has to support three generations: grandparents, parents, and children.⁷⁰² This younger generation feels mentally and financially weary from supporting both the older generation and their own children.⁷⁰³ They have to carry a much heavier burden in life and at work.⁷⁰⁴ Taking into consideration the hardships they face, the members of the younger generation do not want their children to bear the same hardships that they bear, so they would prefer more than one child.⁷⁰⁵ Despite the desire to divide the burden among their children, most couples refuse to have more than two children because more children constitute an extra burden not only on the family but also on the children themselves.⁷⁰⁶

Consequently, the decision about how many children to have belongs to individual families alone, although encouraging family planning through voluntary methods is acceptable.⁷⁰⁷ Respecting the will of individuals with respect to decisions about their family will not bring

700. See ESTHER NGAN-LING CHOW & CATHERINE WHITE BERHEIDE, *WOMEN, THE FAMILY, AND POLICY: A GLOBAL PERSPECTIVE* 93–94 (SUNY Press 1994) (explaining that a second child will not jeopardize China's long-term population goals and may alleviate many societal pressures, particularly in rural areas); see also Li, *supra* note 121, at 175–76 (stressing that a majority of urban couples prefer to have two children and are better suited to care for an additional child because their socioeconomic status provides for basic needs more adequately than that of rural residents); see also Xizhe, *supra* note 6, at 54–55 (highlighting various examples where a second child is allowed in China).

701. See generally Nancy K. Freeman, *Look to the East—Gain a New Perspective, Understand Cultural Differences, Appreciate Cultural Diversity*, <http://www.pbs.org/kcts/preciouschildren/earlyed/read_east.html> (last visited Nov. 1, 2008) (stating that 75% of urban couples prefer to have two children and are concerned that their single children are growing up lonely and overindulged).

702. See The Light of Free, *Simple Mathematical Problem on Population*, <http://www.boxun.com/hero/wiyouzhiguang/88_1.shtml> (last visited March 19, 2007) (providing a numerical analysis to show the burden of support borne by younger generations).

703. See Gao Yan, *The Aging Crisis: Who Will Support Who When You Grow Old?* (Nov. 1, 2004) <<http://blog.icxo.com/read.jsp?aid=5880&cuid=1707>> (last visited Oct. 23, 2008) (stating that a one-child couple may be burdened with supporting seven people).

704. See *id.* (elaborating on the burdens borne by a generation that must support other generations of family).

705. See VANESSA L. FONG, *ONLY HOPE: COMING OF AGE UNDER CHINA'S ONE-CHILD POLICY* 75 (Stanford Univ. Press 2006) (stating that the one-child policy allows an unmarried couple to have two children).

706. See Singer, *supra* note 8, at 292 (purporting that every child after the first is deemed “illegal,” and as a consequence, both the family and the child do not receive government benefits).

707. See DEAN IRENE CORTES, *THE RIGHT OF PRIVACY AND FAMILY PLANNING* 38 (1973), *reprinted in* HUMAN RIGHTS AND POPULATION FROM THE PERSPECTIVES OF LAW, POLICY AND ORGANIZATION (Proceedings of the Second Annual Meeting of the International Advisory Committee on Population and Law, Convened at the International House of Japan, Tokyo, October 30–31, 1972) (explaining how the decision about a family's size belongs to an individual family).

about a population boom; conversely, it can maintain the balance of the population's replacement rates.⁷⁰⁸

Abolishing the one-child policy is not difficult. The contemporary one-child policy does not come from the present Party's directive.⁷⁰⁹ It started in the Deng Xiaoping era in 1979,⁷¹⁰ under circumstances when family planning was regarded as a "fundamental policy of the state,"⁷¹¹ and abolishing it immediately would have been akin to challenging the former leader's ability. Now, abolishing the policy gradually would not harm the former leader's reputation and would improve China's human rights record.⁷¹²

B. Short-term Solutions

1. Improvements to Existing Legislation

a. Domestic Implementation of International Human Rights Treaties

Generally speaking, as a prerequisite for the effective integration of international principles and norms, the existence of the relevant rule of law in member states is vital.⁷¹³ By contrast, if the rule of law is absent, there is no guarantee that the international principles and norms will be respected in that country.⁷¹⁴

708. See Penelope Mathew, *Applicant A v. Minister for Immigration and Ethnic Affairs: The High Court and "Particular Social Groups": Lessons for the Future*, 21 MELB. U. L. REV. 277, 321–22 (1997) (suggesting that managing population growth through policies is not necessary to control the population because "ideas about size of family may still be culturally embedded" in China).

709. See Michelle Van Leeuwen, *The Politics of Adoptions Across Borders: Whose Interests Are Served? (A Look at the Emerging Market of Infants from China)*, 8 PAC. RIM L. & POL'Y J. 189, 192 (1999) (establishing that the one-child policy began in the 1970s under the rule of Deng Xiaoping); see also Steven W. Mosher, *Family planning? What China's One-child Policy Has Wrought*, THE WASHINGTON TIMES, Aug. 27, 2006, at B08 (providing insight into the one-child policy of 1979 under Deng Xiaoping); see also Sicard, *supra* note 24, at 927 (explaining how the one-child policy was implemented in 1979 in an effort to curb population growth).

710. See Dempsey, *supra* note 202, at 216 (illustrating that the one-child policy implemented by Deng Xiaoping was a response to extra population growth); see also Mathew, *supra* note 708, at 278 (stating that the one-child policy was effectuated under the leadership of Deng Xiaoping); see also Rowan Williams, *A Society That Does Not Allow Crosses or Veils in Public Is a Dangerous One*, THE TIMES (London), Oct. 27, 2006, at 25 (demonstrating that the one-child policy under Deng Xiaoping was structured to provide a solution to the demographic disaster).

711. See China Planning, *supra* note 12 (stating that family planning is regarded as a "basic national policy").

712. See Rachel A. Bouman, *China's Attempt to Promote Domestic Adoptions: How Does China's One-child Policy Affect Recent Revisions in China's Adoption Law and Measure Up to the Hague Convention?*, 13 TRANSNAT'L LAW. 91, 93 (2000) (noting that the one-child policy was implemented through coercion); see also Hampton, *supra* note 6, at 321 (attributing the increase in female infanticide to the one-child policy, which infers that ceasing the policy can ameliorate human rights abuse); see also Schulman, *supra* note 544, at 317 (demonstrating that the policy is implemented through punishments).

713. See Ambe, *supra* note 87, at 109 (asserting that the rule of law in a country is essential to effectively implementing international principles and norms).

714. See *id.* (explaining how the absence of the rule of law in a member state can potentially prevent international norms and principles from being upheld).

However, the implementation of international treaties and principles through the passage of domestic legislation is a serious problem faced by many states, including China.⁷¹⁵ First, China lacks an enforceable and systematic method or mechanism for converting international treaties and principles into domestic legislation.⁷¹⁶ The existing Constitution remains silent on the domestic implementation of international treaties.⁷¹⁷ In other words, China “suffers from a significant constitutional handicap in its ability to undertake or fulfill obligations” in the area of human rights.⁷¹⁸ Article 142 of General Principle of Civil Law of the People’s Republic of China contains a specific provision stating that international treaties are superior to domestic legislation, which means, if domestic statutes conflict with international treaties, international treaties should be enforced over the conflicting domestic legislation.⁷¹⁹ However, as previously stated, in China there is a large discrepancy between the law as written and the domestic enforcement of that law.⁷²⁰ Additionally, international principles cannot be cited directly as a legal basis for official action.

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715. See Koren L. Bell, *From Laggard to Leader: Canadian Lessons on a Role for U.S. States in Making and Implementing Human Rights Treaties*, 5 YALE HUM. RTS. & DEV. L.J. 255, 282 (2002) (attributing the difficulty of the implementation of treaties to legal, political, and practical factors that resist the process); see also Strom & Finkle, *supra* note 80, at 41 (stating how the implementation of international treaties and principles through domestic legislation is quite difficult); see also Laboni Amena Hoq, Note, *The Women's Convention and Its Optional Protocol: Empowering Women to Claim Their Internationally Protected Rights*, 32 COLUM. HUM. RTS. L. REV. at 699 (illustrating the obstacle of treaty implementation through women's rights issues).
716. See Timothy John Fitzgibbon, *The United Nations Convention on the Rights of the Child: Are Children Really Protected? A Case Study of China's Implementation*, 20 LOY. L.A. INT'L & COMP. L.J. 325, 341 (1998) (illustrating that enforcement is the method); see also Benjamin L. Liebman, *Autonomy Through Separation? Environmental Law and the Basic Law of Hong Kong*, 39 HARV. INT'L L.J. 231, 233–34 (1998) (providing insight into how there would be a challenge in terms of implementing laws); see also David Matas, *Domestic Implementation of International Human Rights Agreements*, 25 CAN. HUM. RTS. Y.B. 91 (1987) (discussing the fact that there exists a systematic means of transforming international treaties into domestic statutes).
717. See Cao Jianming, Justice and Vice President, Supreme People's Court of People's Republic of China, *WTO and the Rule of Law in China*, Speech (Fall, 2002), 16 TEMP. INT'L & COMP. L.J. 379, 379–80 (2002) (assessing that China's Constitution has not made a clear provision for how China should implement international treaties); see also Michele Lee, *Franchising in China: Legal Challenges When First Entering the Chinese Market*, 19 AM. U. INT'L L. REV. 949, 980–81 (2004) (displaying the inherent vagueness in Chinese laws); see also Roda Mushkat, *International Law in HKSAR Courts*, 24 CAL. W. INT'L L.J. 353, 359–60 (1998) (demonstrating that the Constitution remains unclear, and that implementation can be on a case-by-case basis).
718. See Strom & Finkle, *supra* note 80, at 41 (explaining in what capacity a nation can suffer from a constitutional “handicap”).
719. See General Principle of Civil Law of the People's Republic of China art. 142, Jan. 1, 1987, 142 PRC (1986) available at <<http://www.lawinfochina.com/law/display.asp?db=1&id=1165&keyword=>> (last visited Oct. 25, 2008) (stating that “the application of law in civil relations with foreigners shall be determined by the provisions in [the] chapter . . . [and] [i]f any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations [and] [i]nternational practice may be applied to matters for which neither the law of the People's Republic of China nor any international treaty concluded or acceded to by the People's Republic of China has any provisions”).
720. See Katie Lee, *China and the International Covenant on Civil and Political Rights: Prospects and Challenges*, 6 CHINESE J. INT'L L. 445, ¶ 7–10 (2007) (demonstrating the discrepancy between Chinese criminal law on paper and actual practice); see also Cirando, *supra* note 4, at 642–43 (describing the discrepancy between the law on paper and actual practice in China); see also Duda, *supra* note 4, at 417 (remarking that women in China fear forced abortions if they have more than one child, which is contrary to the stated law).

Although some principles of international treaties have been adopted domestically, and the Constitution and statutes are aimed at protecting women's health, sexual, and reproductive rights, it goes without saying that "legalism is formalism."⁷²¹ Whether the domestic enforcement complies with international treaties cannot be evaluated merely by examining the law on paper.⁷²² Even though China has taken steps to ensure that international treaties are domestically enforceable and the status of this effort has improved, there is still sometimes the "legal appearance of compliance,"⁷²³ but "no real compliance."⁷²⁴ For China, its domestic protection of human rights still has a long way to go.

In response to these two problems, China needs to demonstrate its compliance with international human rights standards by establishing a systematic method by international agreements that could be adopted as domestic legislation.⁷²⁵ The legislators should not be able to adopt measures that are incompatible with individuals' fundamental rights as recognized and protected by international treaties.⁷²⁶ If an international principle evolves or changes, the Chinese legislature needs to be able to perfect its own legislation by similarly evolving or improving its own statutes in an attempt to abide by China's international obligations.⁷²⁷ In most states, international law is not supreme over national law in domestic courts, and national courts apply only to domestic state laws.⁷²⁸ Hence, in addition to the adaptation of international treaties into domestic law, China, and its courts, could start using international human rights

721. See Matas, *supra* note 716, at 99 (stating the notion that legalism is formalism).

722. See Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 135 (2008) (explaining that there are contradictions in international law and domestic law); see also Rosemary Foot, *Exceptionalism Again: The Bush Administration, The "Global War on Terror" and Human Rights*, 26 LAW & HIST. REV. 707, 713–14 (2008) (acknowledging that U.S. law contradicts international law on certain points); see also Matas, *supra* note 716, at 99 (stating that there may not be compliance with the laws as they are written).

723. See *id.* (stating that there is the appearance of obedience with the laws on paper, but there may, in fact, not be real submission).

724. See *id.* (stating actual compliance with the law does not occur).

725. See *id.* at 94 (explaining that in Canada there is cohesiveness between international law and domestic policies).

726. See Dr. Michael K. Addo, *The Justiciability of Economic, Social, and Cultural Rights*, 14 COMMONWEALTH L. BULL. 1430 (1988) (stating that the fundamental rights and principles of individual states are important); see also Boland, *supra* note 5, at 1156–57 (detailing that individual human reproductive rights have been adapted to comply with individual human rights); see also Brown, *supra* note 3, at 746–47 (describing that because the law in China does not comply with international laws, relief for Chinese citizens is, on occasion, granted by other countries).

727. See Matas, *supra* note 716, at 94 (listing a series of acts that Canada follows in order to comply with human rights provisions).

728. See THOMAS F. GREEN, GOVERNMENT BY LAW, IN THE RULE OF LAW, 25, 42 (Arthur L. Harding ed., 1961) (positing that nations follow the laws they have created over international laws); see also C. R. Ewell, Ph.D., *Telemedicine: Overcoming Obstacles on the Road to Global Health Care*, 12 WTR Currents, INT'L TRADE L.J. 68, 71 (2003) (describing that health issues are typically regulated by domestic law and not international law); see also Rivera, *supra* note 12, at 231–32 (showing that China adheres to its own domestic law and not international laws).

instruments as interpretative tools.⁷²⁹ If there is an ambiguity in national law, the applicable international human rights treaty or covenant that China has signed or ratified should be referenced to resolve the ambiguity.⁷³⁰ Most important, China has a legal and moral obligation to ensure its practical performance satisfies its obligations.⁷³¹ National law must also affirm individuals' rights to seek redress in domestic courts;⁷³² otherwise, even if the international treaties are made domestic law, the legal rights conferred will have little or no meaning.⁷³³

b. Improvements to Existing National Legislation

In addition to improving the domestic implementation of international treaties, China's existing legislation itself needs improvement. First, the law should grant all citizens the full protection of their human rights.⁷³⁴ In keeping with international law and international treaties,

729. See M. Ulric Killion, *Post-WTO China: Quest for Human Right Safeguards in Sexual Harassment Against Working Women*, 12 TUL. J. INT'L & COMP. L. 201, 201 (2004) (hereinafter Killion, *Post-WTO China*) (indicating that in China, judicial enforcement of law is not enough to comply with international norms); see also Matas, *supra* note 716, at 96 (claiming that human rights initiatives can become part of a nation's given laws without being drafted by the legislature); see also Charlotte Wedin, *The Human Rights Situation in Tibet*, 25 INT'L J. LEGAL INFO. 145, 148 (1997) (referring to the fact that China has adopted several human rights provisions).

730. See Kimberly Gregalis Granatino, *Corporate Responsibility Now: Profit at the Expense of Human Rights with Exemption from Liability?*, 23 SUFFOLK TRNSNAT'L L. REV. 191, 200–01 (1999) (displaying that China does not comply with certain human rights provisions and, therefore, there are inconsistencies in the way laws are interpreted); see also Matas, *supra* note 716, at 96 (remarking that policies of international human rights help resolve ambiguities in domestic law); see also Peerenboom, *supra* note 222, at 79 (emphasizing that China's goal of promoting human rights comes into play in drafting provisions).

731. See Killion, *Post-WTO China*, *supra* note 729, at 201 (asserting that China is attempting to advance its legislation to comply with notions of human rights); see also Lee, *supra* note 717, at 961–62 (indicating that the laws of China have not reached the level of complying with international goals); see also Barbara Stark, *Baby Girls from China in New York: A Thrice-Told Tale*, 2003 UTAH L. REV. 1231, 1254–55 (2003) (showing that China is still behind the times in instilling laws that comply with human rights).

732. See Addo, *supra* note 726, at 1428 (remarking that statutes have been enacted that provide people a means of litigating claims arising out of international law in domestic courts); see also Adell, *supra* note 49, at 792 (demonstrating how individual human rights are trampled on in China at the hand of the government, thus providing no avenue for relief); see also Eleftherios Georgiou, Note, *China: Where the Failure to Adhere to Domestic Political Laws Often Leads to Religious Oppression*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 358 (2000) (discussing that regional courts are not an effective means to ensure human rights).

733. See Granatino, *supra* note 730, at 195 (remarking that in order to protect human rights codes, laws have to be adopted); see also Joan E. Hemphill, *China's Practice of Procuring Organs from Executed Prisoners: Human Rights Groups Must Narrowly Tailor Their Criticism and Endorse the Chinese Constitution to End Abuses*, 16 PAC. RIM L. & POL'Y J. 431, 431 (2007) (showing that if government lacks support of specific human rights issues, reform is extremely difficult to achieve); see also Matas, *supra* note 716, at 99 (demonstrating that without the proper avenue to litigate claims, the law is not important).

734. See Blanchard, *supra* note 224, at 396–97 (noting China also has consistently prioritized social and economic rights over civil and political liberties, based on the belief that entitlement to subsistence and development is a prerequisite to the enjoyment of other rights and, therefore, essential for people living in less-developed regions); see also Hom, *supra* note 49, at 249, 281 (stating that the Chinese conception of rights is consistent with a general third world emphasis on the right to subsistence and development, collective rights over individual rights, the primacy of national sovereignty, and the conception of human rights as domestic concerns); see also Lee, *supra* note 717, at 449 (stating that today in China's development, the first imperative in the protection of its citizens' human rights is its duty to provide a basic standard of living).

the protection of human rights is meant to limit any abusive law-making power, meaning that any legislative and executive activities that violate human rights should fail to become law.⁷³⁵ Therefore, the substantive law must stipulate citizens' legal rights and promulgate the governments' obligations under international treaties and covenants expressly.⁷³⁶ Chinese laws should explicitly prohibit forced sterilization and abortion, and forbid any officials from tolerating any coercive enforcement measures.⁷³⁷ It should accelerate the implementation of legislation on public health, especially for women's reproductive-related health service.⁷³⁸ Because a fetus in a late-term pregnancy, particularly a fetus that is more than six months old, has the ability to live

735. See Ambe, *supra* note 87, at 120 (noting that in compliance with international law and international treaties, the protection of human rights in China limits the exercise of law-making power, which means, in essence, the legislative and executive activities in violation of human rights will fail to become law); see also Blanchard, *supra* note 224, at 396–97 (noting that China has also consistently prioritized social and economic rights over civil and political liberties, based on the belief that entitlement to subsistence and development is a prerequisite to the enjoyment of other rights and therefore essential for people living in less developed regions); see also Sophia Woodman, *Human Rights as "Foreign Affairs": China's Reporting Under Human Rights Treaties*, 35 HONG KONG L. J. 179, 189 (2005) (stating that China's effective position on the domestic status of international human rights law appears to be that it applies only insofar as domestic law incorporates its provisions, and that it cannot be applied directly in the domestic arena).

736. See M. Ulric Killion, *China's Amended Constitution: Quest for Liberty and Independent Judicial Review*, 4 WASH. U. GLOBAL STUDIES L. REV. 68–90 (2005) (hereinafter Killion, *Quest for Liberty*) (noting that a new Chinese policy, called the "Reply," establishes a precedent for the justiciability of the Constitution because, like other laws and regulations, the Constitution may now be the subject of judicial proceedings and may serve as a legal basis for judgment, which will establish a precedent for courts to protect the fundamental rights of citizens stipulated in the Chinese Constitution); see also Gun Luoji, *Human Rights Critique of the Chinese Legal System*, 9 HARV. HUM. RTS. J. 1, 5 (1996) (stating that the Chinese government's white paper on human rights states that "human rights are essentially matters within the domestic jurisdiction of a country." The government uses the argument of domestic jurisdiction to deny the universality of human rights and to support its view that human rights are not subject to international supervision); see also Xixin Wang, *Administrative Procedure Reforms in China Rule of Law Context*, 12 COLUM. J. ASIAN L. 251, 259 (1997) (noting that in China, the lack of procedural safeguards protecting human rights in the current Constitution of China may explain why the "Chinese Constitution has no teeth").

737. See Philip Brashier, Symposium, *The United States Struggles with Past Judicial Interpretations in Defending the Modern Law of Immigration*, 37 S. TEX. L. REV. 1357, 1372 (1996) (noting that in China there exists a well-founded fear—probably fear beyond a reasonable doubt—of persecution and retaliation by the Chinese government if a wife or husband refuses to undergo sterilization procedures); see also Nortick, *supra* note 12, at 2153, 2191 (stating that an unmarried Chinese woman who credibly demonstrates that he or she has experienced harm rising to the level of persecution when a partner underwent forced abortion or sterilization is entitled to the protection of the IIRIRA); see also Julie Tang, *The United States Immigration Laws: Prospects for Relief for Foreign Nationals Seeking Refuge from Coercive Sterilization or Abortion Practices in Their Homelands*, 15 ST. LOUIS U. PUB. L. REV. 371, 400–401 (1996) (stating that at a minimum, the United States should be encouraging Chinese leadership to crack down on any government officials who physically force individuals to submit to abortions or sterilizations).

738. See Cirando, *supra* note 4, at 661 (noting that instead of relying on punitive measures, China and the United States should support comprehensive health care programs that encourage responsible decision making regarding childbearing and fertility regulation, because properly designed, high-quality health care programs ensure improvements in women's health and are accompanied by declines in overall fertility levels); see also Xiaorong, *supra* note 121, at 180 (noting that to mitigate the adverse health consequences of poor-quality services and inadequate staffing in the family-planning networks of China, more funding needs to be allocated to reproductive health services and educational programs for women and training projects for family-planning workers); see also The State Council of the People's Republic of China, *Program for the Development of Chinese Women* (2001–2010), available at <<http://www.china.org.cn/english/features/cw/140979.htm>> (last visited Oct. 23, 2008) (suggesting that any new legislation in China regarding human rights should accelerate the implementation of legislation on public health, especially for women's reproductive-related health service).

outside of the uterus independently special protection should be added into statutes to protect that fetus's right to life.⁷³⁹ Moreover, special protection for unmarried mothers should be codified.⁷⁴⁰ Women have reproductive rights and, certainly, this right covers both married women and unmarried women of reproductive age.⁷⁴¹ Considering the increased hardships unmarried mothers experience, special protection should be available to them instead of more serious punishments.⁷⁴² Additionally, it is necessary to develop governments' commitment to health ser-

739. See Jennifer L. Carow, Note, *Davis v. Davis: An Inconsistent Exception to an Otherwise Sound Rule Advancing Procreational Freedom and Reproductive Technology*, 43 DEPAUL L. REV. 523, 536 (noting that in the United States, as per *Roe v. Wade*, a state's interest in protecting the life of the fetus does not become "compelling" until the fetus reaches the point of viability, at approximately the beginning of the third trimester); see also Jonathan Dyer Stanley, Note, *Fetal Surgery and Wrongful Death Actions on Behalf of The Unborn: An Argument for a Special Standard*, 56 VAND. L. REV. 1523, 1536-37 (2003) (noting that if a fetus is fatally injured between 20 and 26 weeks, which is approximately six months, then a person can be held responsible for that death); see also Pregnancy Month 6: <http://www.armystudyguide.com/militarybaby/pregnancy_and_childbirth/pregnancy_timeline/pregnancy-month-6.shtml> (last visited March 17, 2007) (stating that a fetus in a late-term pregnancy, particularly a fetus that is more than six months old, has the ability to live outside of the uterus independently. In order to protect the right to life of a fetus in a late-term pregnancy, special concentration and commitment should be added into statutes).

740. See Dempsey, *supra* note 202, at 217 n.18 (arguing that the primary reason why unmarried women undergo induced abortions is simply because they are unmarried, and premarital fertility is still considered unacceptable); see also Stark, *supra* note 731, at 1293 (noting that in China, an unmarried mother had no more legal status than her child. As feminist historian Gerda Lerner has explained, the law of legitimacy is grounded in patriarchy, in the idea of children as the property of the father); see also Ling Jing Zhou, *Provision of Assisted Reproductive Technology for Single Women in China: A New Challenge*, 23 MED. & L. 433, 433-34 (2004) (noting that in China, access to assisted reproductive services had been restricted to legally married couples for many years until the Regulation of Jilin Province on Population and Family Planning in 2002).

741. See Barbara Stark, Symposium, *Crazy Jane Talks with The Bishop: Abortion in China, Germany, South Africa, and International Human Rights Law*, 12 TEX. J. WOMEN & L. 287, 317-18 (2003) (noting that China has become an active participant in U.N. conferences at which "population" was recast in terms of "women's human rights," and as a result, women in China are increasingly aware of human rights in China and in general and reproductive rights in particular); see also Ling, *supra* note 740, at 433, 451 (2004) (stating that a reflection of real progress in the Chinese legal system with regard to the protection of individual rights is the Jilin Regulation, as the first in China that allows access to ART services by single women, which attempts to give them a legal guarantee of their reproductive right). See generally Keng, *supra* note 9, at 208 (noting that women in China have very limited resources to turn to for help in combating human rights violations).

742. See Jordan, *supra* note 447, at 64 (noting that current regulations in China not only impose a childbearing and child care tax on woman who work in China but also permits work units to punish unmarried pregnant women but not the unmarried fathers); see also Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race and Feminist Legal Theory*, 10 YALE J.L. & FEMINISM 101, 137 (1998) (stating that as a general matter, unmarried women are economically less well off than married women, and single mothers are disproportionately poor, which is a reflection of a patriarchal system that still denies to women the same opportunities it accords to men). See generally Hampton, *supra* note 6, at 335 (stating that the Chinese government sometimes uses social pressure to penalize an entire village if there are couples in the village in non-compliance with the one-child policy).

vices in domestic statutes and guarantee the safety of voluntary sterilization, abortion, and other contraceptive measures.⁷⁴³

Second, in addition to the development of more protective substantive law, procedural law should be amended to support those provisions of substantive law. Procedural law is necessary for guaranteeing the enforcement of the rights and freedoms.⁷⁴⁴ Therefore, laws should be amended with “concrete and credible implementation procedures.”⁷⁴⁵ These implementation procedures could include an international review procedure, independent judicial review procedure, administrative review procedure, and allow a clear right for citizen’s to access the courts.⁷⁴⁶

743. See Yuanli Liu & Keqin Rao, *Providing Health Insurances in Rural China: From Research to Policy*, 31 J. HEALTH POL. POL’Y & L. 71, 75 (2006) (noting that in 2000, according to the World Health Organization (WHO), the performance of China’s health system in terms of fairness of health care financing was near the bottom of its global ranking list); see also Health Care in China Losing Patients: An Orthodox Approach to Fixing the Unavailability of Decent Health Care, THE ECONOMIST, available at <http://www.economist.com/world/asia/displaystory.cfm?story_id=10727824> (last visited Oct. 23, 2008) (stating that in China, health care equity was not prepared to cope with health inequalities in a comprehensive way); see also Michael J. Moreton, MD, <<http://www.medhunters.com/articles/healthcareInChina.html>> (last visited Oct. 23, 2008) (stating that currently in China there is no system of private health insurance, although many firms are looking into starting such programs).

744. See Jill M. Brannelly, *The United States’ Grant of Permanent Normal Trade Status to China: A Recipe for Tragedy or Transformation?*, 25 SUFFOLK TRANSNAT’L L. REV. 565, 583 (noting that China has consistently opposed any monitoring of its human rights record by other nations and organizations based on China’s belief that individual countries have their own human rights practices); see also Douglas, *supra* note 86, at 171 (stating that the current jurisdiction and enforcement problems regarding human rights in China has made it difficult to accomplish major change in Chinese human rights policies); see also Diane F. Orentlicher & Timothy A. Gelatt, *Public Law, Private Actors: The Impact of Human Rights on Business Investors in China*, 14 NW. J. INT’L L. & BUS. 66, 72 (1993) (stating that initial efforts to address human rights questions through contacts and discussion are highly preferable to the previous approach of the Chinese government, which was to reject a bilateral or international debate. However, China does continue to deny previous well-documented violations in China, and it has reasserted its position that its domestic human rights record is an internal affair not subject to outside action).

745. See Li., *supra* note 106 (stating that Chinese laws should be amended with “concrete and credible implementation procedures to guarantee the enforcement of rights and freedoms of the Chinese people”).

746. See Lee, *supra* note 720, at 448 (stating that an examination of China’s compliance with the various reporting requirements of international bodies shows overall a positive balance of engagement with the requisite processes but criticism in terms of delay in meeting some reporting deadlines and much comment on the inadequacy of the content of the country reports); see also Killion, *Quest for Liberty*, *supra* note 736, at 46 (stating that China’s constitutional government lacks popular sovereignty, separation of powers, and independent judicial review, which is a problem); see generally Amy J. McMaster, *Human Rights at the Crossroads: When East Meets West*, 29 VT. L. REV. 109,122 (2004) (stating that as a member of the United Nations, China has agreed to the U.N. Charter’s principles and treaties, including those addressing human rights. Unfortunately, the difference between what a member of the United Nations may agree to in principle and what that member actually does is often widely divergent).

Third, legal remedies must be available for the abuse of women's rights. Domestic statutes should encompass monetary compensation for women whose rights have been infringed on by local officers in the enforcement of the one-child policy.⁷⁴⁷ Particularly, statutes must provide that compensation is available when there is a breach of the laws protecting women's rights.⁷⁴⁸ Furthermore, women should be able to sue local officials who implement the family-planning policy using inhumane methods, and these officials should be punished under the law.⁷⁴⁹

2. Addressing Dysfunctional Courts

The dysfunctionality of the courts have been debated for decades in China.⁷⁵⁰ Generally, the laws mean little or nothing without a functional court or an independent judiciary.⁷⁵¹ Similarly, where the court is dysfunctional or the judiciary is politicized, legal rights as they appear on paper mean little or nothing.⁷⁵² Reform of the justice system in China needs solutions that

747. See Xiaorong, *supra* note 121, at 156 (noting that in China, none of the provincial regulations or policy directives specifically forbids forced late abortion, nor have any of them set forth the penalties for punishing those officials who used coercion to force pregnancy termination); see also Hu, *supra* note 29, at 191 (noting that it is not surprising that the existing legal provisions for the protection of women's reproductive rights and related health and bodily integrity in the Chinese Criminal Law, Marriage Law, the Maternal and Child Health Care Law, and the Law on the Protection of Women's Rights and Interests are often ignored rather than enforced in the implementation of the policy); see also Savanyu, *supra* note 39, at 18–21 (stating that women in China have little control over their reproductive lives because the state essentially controls women's reproduction after the birth of a first child).

748. See JOSEPH ET AL., *supra* note 118, at 345 (citing article 9(5) of the International Covenant on Civil and Political Rights, which provides for a right of compensation to anyone who has been deprived of personal liberty).

749. See Hu, *supra* note 29 (quoting Zhao Bingli, who contends that individuals who use inhumane methods to implement birth control policies may be sued and punished under Chinese law).

750. See Gechlik, *supra* note 593, at 98 (noting the dysfunctional Chinese courts' failure to live up to their standards of rule of law, fairness and justice, and continuing efforts to reform the judiciary); see also Graham Mayeda, *Appreciate the Difference: The Role of Domestic Norms in Law and Development Reform, Lessons from China and Japan*, 51 MCGILL L.J. 547, 590–91 (2006) (explaining how the Chinese courts cannot serve as a source of legitimate law because of their inability to exert control over the other government agencies); see also Eva Pils, *Chinese Law in the Global Context: Asking the Tiger for His Skin*, 30 FORDHAM INT'L L.J. 1209, 1210 (2007) (contending that despite decades of reform, Chinese law and civil society remain weakened by Party and personal autocracy).

751. See Aharon Barak, *A Judge on Judging: The Role of the Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 54 (2002) (considering the protections and rights provided for in the constitutions of many undemocratic countries lacks an independent judiciary); see also Matas, *supra* note 716, at 101 (demonstrating an example of how Canada's functional, independent judiciary responds to international human rights laws); see also Kraska, *supra* note 307, at 305 (noting how the absence of a Bulgarian independent judiciary led to the ineffective enforcement of environmental laws).

752. See Matas, *supra* note 716, at 101 (expressing an example of legal rights being empowered by a non-politicized judiciary); see also Edward C. Snyder, *The Dirty Legal War: Human Rights and the Rule of Law in Chile 1973–1995*, 2 TULSA J. COMP. & INT'L L. 253, 254 (1995) (detailing how a lack of an independent Chilean judiciary ultimately failed to uphold the legal rights of its citizens); see also Alicia Ely Yamin & Ma. Pilar Noriega Garcia, *The Absence of the Rule of Law in Mexico: Diagnosis and Implications for a Mexican Transition to Democracy*, 21 LOY. L.A. INT'L & COMP. L. REV. 467, 467–68 (1999) (explaining how decades of dominance by a one-party state led to a corrupt and politicized Mexican judiciary that de-emphasized the rule of law).

comport with its contemporary problems.⁷⁵³ At the very least, the government and the Communist Party members must be subject to the laws and to the jurisdiction of national courts.

a. The Rule of Law and Judicial Independence

In reforming China's dysfunctional courts, the rule of law should be emphasized. The purpose of the rule of law, on the one hand, is to keep people's rights from being violated and ensure equal rights of all people regardless of their rank, status, and condition.⁷⁵⁴ Rule of law is also necessary to restrain and prevent the authorities' arbitrary exercise of power.⁷⁵⁵ The rule of law dictates that people are regulated by laws instead of men, and it requires the government to act in compliance with established laws which are "both publicly announced and publicly known in advance of application."⁷⁵⁶ In order to ensure the rule of law is applied uniformly by judges, constitutional institutions and other relevant departments must be established with the purpose of maintaining it.⁷⁵⁷

A court must be independent from all other institutions of the state, including political powers, legislators, and executives, as stated in the traditional theory of "separation of pow-

753. See CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA: 2004 ANNUAL REPORT, 108th Cong. 2d Sess., *supra* note 575 (expressing the commission's view that although China continues to enact legal reforms, corruption and a one-party political system still fail to protect the rights of the ordinary Chinese citizen); see also Jonas Grimheden, *The Reform Path of the Chinese Judiciary: Progress or Standstill?*, 30 FORDHAM INT'L L.J. 1000, 1002 (2007) (stating that a modern legal and judicial system is necessary for continued progress in contemporary China); see also Lin, *supra* note 591, at 183 (emphasizing the most urgent goals of China's modern judicial reform agenda).

754. See MACDONALD ET AL., THE RULE OF LAW 6 (1961) (stating that in a government under law, every individual is equal and bound by the law regardless of social status or authority); see also Mahsa Aliaskari, Article, *U.S. Asylum Law Applied to Battered Women Fleeing Islamic Countries*, 8 AM. U. J. GENDER SOC. POL'Y & L. 231, 281–82 (2000) (noting that the legal concept of equal protection is emulated and endorsed throughout international law); see also Milkwick, *supra* note 697, at 289, 304–05 (2005) (explaining how China failed to be a rule of law government because of the Communist Party's exemption from the requirement of equal status before the law).

755. See JOHN PHILLIP REID, RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES 4 (2004) (stating that the first element of the doctrine of the historical rule of law is restraining the arbitrary exercise of power by authorities); see also Simon Chesterman, *An International Rule of Law?*, 56 AM. J. COMP. L. 331, 359 (2008) (describing the non-arbitrary exercise of power as the first requirement for an international general rule of law); see also Craig P. Ehrlich & Dae Seob Kang, *Independence and Corruption in Korea*, 16 COLUM. J. ASIAN L. 1, 7 (2002) (explaining how doctrine of the rule of law acts as a remedy for official corruption and the arbitrary exercise of power by requiring that the government follow the law).

756. See REID, *supra* note 755, at 8 (noting that two of the main elements of the rule of law are the notice requirement of laws on behalf of the government and the application of the laws on the government).

757. See *id.* (observing the historical maintenance of the rule of law throughout all levels of English judicial authority); see also Charles I. Lugini, *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence*, 4 GEO. J.L. & PUB. POL'Y 361, 388 (2006) (indicating that the protections against biased judges and unjust laws provided by a jury trial make it an essential constitutional institution that maintains the rule of law); see also Pierre Schlag, *Law and the Postmodern Mind: Anti-Intellectualism*, 16 CARDOZO L. REV. 1111, 1113 (1995) (stating of the main duties of a judge is to produce decisions that maintain the rule of law).

ers,”⁷⁵⁸ so it may make impartial decisions and promote justice and equality.⁷⁵⁹ Judicial independence guarantees a judge's ability to resolve disputes by applying the rule of law impartially.⁷⁶⁰ Judges ensure the protection of citizens' rights.⁷⁶¹ A judge has a large responsibility for enforcing the rule of law.⁷⁶² When citizens pursue remedies for the violation of their rights, especially when those rights were violated by the government, the complete independence of the judiciary is vital to the impartial adjudication of their case.⁷⁶³ Judicial decisions

758. See MACDONALD ET AL., *supra* note 754, at 13 (indicating that the drafters of the U.S. Constitution, for the purposes of governmental protection, relied on the doctrines of separation of powers and checks and balances).

759. See Ambe, *supra* note 87, at 123 (emphasizing that an independent judiciary free of control or influence from all the other branches of government is at the core of the rule of law); see also Martin Edelman, *Issues Facing the Judiciary: Written Constitutions, Democracy and Judicial Interpretation: The Hobgoblin of Judicial Activism*, 68 ALB. L. REV. 585, 588 (2005) (illustrating that an independent judiciary is necessary to interpret the laws of the state and properly authorize or limit government actions); see also M. P. Singh, *Securing the Independence of the Judiciary—The Indian Experience*, 10 IND. INT'L & COMP. L. REV. 245, 245–46 (2000) (stating that a true autonomous judiciary is dependent on the favorable independent environment created and secured by other branches of government).

760. See Ambe, *supra* note 87, at 111 (concluding that judicial independence assures citizens the impartial application of the law, free of the powerful influence of the state); see also Emily Johnson Barton, *Pricing Judicial Independence: An Empirical Study of Post-1997 Court of Final Appeal Decisions in Hong Kong*, 43 HARV. INT'L L.J. 361, 363 (2002) (defining an independent judiciary as one that applies the laws with impartiality and is not excessively influenced by social, political, or economic implications); see also Rene Lettow Lerner, *International Pressure to Harmonize: The U.S. Civil Justice System in an Era of Global Trade*, 2001 BYU L. REV. 229, 276 (2001) (acknowledging that an independent judiciary's distinct position from the other branches of government allows judges to be impartial and relatively free from political pressure).

761. See Ambe, *supra* note 87, at 111 (stating that the judge protects vulnerable citizens from the powerful influence of state authority by exercising judicial decision-making authority over that authority); see also C. Raj Kumar, *Moving Beyond Constitutionalization and Judicial Protection of Human Rights—Building on the Hong Kong Experience of Civil Society Empowerment*, 26 LOY. L.A. INT'L & COMP. L. REV. 281, 285 (2003) (explaining that the judicial system has a duty to ensure that the human rights and fundamental freedoms guaranteed under a constitution are protected and addressed); see also Peter A. Myers & Joshua Osborne-Klein, *Trading the Privacy Right: Justice Alito's Dangerous Reasoning on Privacy Rights*, 5 SEATTLE J. SOC. JUST. 373, 373 (2006) (expressing the primary role of the U.S. Judiciary as protecting the rights set forth in the Constitution and to ensure that individual rights are protected).

762. See MACDONALD ET AL., *supra* note 754, at 16 (asserting that judges can exercise individual investigative power regarding alleged police impropriety); see also Karen J. Alter, *Delegating to International Courts: Self-Binding Versus Other-Binding Delegation*, 71 LAW & CONTEMP. PROBS. 37, 45 (2008) (arguing that it falls upon judges to check the use of coercive power in a rule of law system); see also William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 1027 (2001) (analyzing how the rule of law came to be placed within the power of judges to avoid legislative abuse).

763. See Adama Dieng, *Role of Judges and Lawyers in Defending the Rule of Law*, 21 FORDHAM INT'L L.J. 550, 552 (1997) (advocating that the rule of law, with its foundation in an independent judiciary, is essential to protecting human rights); see also Emmanuel O. Iheukwumere, *Judicial Independence and the Minority Jurist: The Shining Example of Chief Justice Robert N.C. Nix, Jr.*, 78 TEMP. L. REV. 379, 380 (2005) (declaring that a judge's decisional independence is perhaps more important than the rule of law to a democratic system); see also Paatii Oforu-Amaah et al., *The Role of Multi-Lateral Institutions in African Development*, 30 LAW & POL'Y INT'L BUS. 697, 714 (1999) (asserting that a corrupt system can be reformed only by an independent judiciary).

should not be subject to reconsideration or recommendation from other institutions and departments.⁷⁶⁴

Because the main reason for a lack of judicial independence in China is the interference of the Chinese Communist Party and local governments, a number of steps should be taken to guarantee the enforcement of the rule of law and judicial independence. First, all government activities should have a specific statutory basis and be subject to the fundamental rights and norms as proscribed in international instruments and in the Constitution.⁷⁶⁵ Second, the Charter and disciplinary rules of the Chinese Communist Party should expressly provide for the punishment and sanction of Communist Party members who interfere with judicial independence.⁷⁶⁶ Criminal law and administrative law should also provide for such punishments.⁷⁶⁷ Anyone who interferes with the judiciary should be subject to the appropriate administrative or criminal responsibility.⁷⁶⁸ Third, judiciary independence must be rigidly

764. See Ambe, *supra* note 87 at 123 (remarking that judicial decisions should not be reviewable by the executive branch or the legislature); see also Paul E. McGreal, *Ambition's Playground*, 68 FORDHAM L. REV. 1107, 1198 (2000) (positing that as an aspect of their judicial independence, judges owe no deference to any constitutional recommendation by a separate branch of government); see also Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 335 (1994) (advocating that presidents should show deference to judge's rulings).

765. See Chun-Hsien Chen, *Explaining Different Enforcement Rates of Intellectual Property Protection in the United States, Taiwan, and the People's Republic of China*, 10 TUL. J. TECH. & INTELLECTUAL PROP. 211, 245 (2007) (illuminating the low standards for appointing justices to the bench in the Chinese Communist government); see also Graig R. Avino, Comment, *China's Judiciary: An Instrument of Democratic Change?*, 22 PENN ST. INT'L L. REV. 369, 380 (2003) (reporting that China's judges' lack of independence is an intentional result that stems from their total lack of legal education and experience as well as their military backgrounds); see also Huang, *supra* note 697, at 171, 188 (explaining that there is no judicial independence in China because the courts answer to the Communist Party in most situations).

766. See Hungdah Chiu, *China's Criminal Justice System and the Trial of Pro-Democracy Dissidents*, 24 N.Y.U. J. INT'L L. & POL. 1181, 1188 (1992) (stating there is no real independent judiciary in China, and that for serious political cases, judges confer with Party members in making decisions); see Avino, *supra* note 765, at 370 (remarking that China's courts need further reform if they are to be considered independent of the Communist Party); see also Garz, *supra* note 582 (suggesting that legal penalties should be put in place to punish Communist Party members who interfere with the judiciary).

767. See Karen Halverson, *China's WTO Accession: Economic, Legal, and Political Implications*, 27 B.C. INT'L & COMP. L. REV. 319, 360 (2004) (arguing that enabling the Chinese judiciary to handle more difficult cases will increase their independence from the government); see also Veron Mei-Ying Hung, *China's WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform*, 52 AM. J. COMP. L. 77, 109 (2004) (recommending that more efforts to educate the judiciary could also improve its independence); see also Garz, *supra* note 582 (suggesting the implementation of criminal and administrative sanctions to discourage interference with the court system).

768. See Lin, *supra* note 591, at 298 (positing that the only solution to the Chinese judiciary's lack of independence is gradual reform through a separation of powers principle); see also Stanley B. Lubman, *Dispute Resolution in China After Deng Xiaoping: "Mao and Mediation" Revisited*, 11 COLUM. J. ASIAN L. 229, 363 (1997) (establishing that there is much confusion as to what the proper role of the judiciary should be even if it were insulated from external pressure); see also Garz, *supra* note 582 (advocating for criminal liability for those officials who interfere with the courts).

enforced.⁷⁶⁹ A genuine and transparent enforcement mechanism should be established to stop government violations of the law and provide appropriate legal remedies to victims.⁷⁷⁰

To summarize, the Chinese society needs to change “from supremacy of the political power to the supremacy of the law” and move toward a liberal democracy that applies the rule of law.⁷⁷¹ In addition, the system of financial support for the courts should be reformed so that it is organized outside the control of local governments.

b. Judicial Review

According to domestic law, Chinese citizens have the right to sue local officials who abuse their human rights, and legal remedies are available based on specific statutes for violations under the Law of the People's Republic of China on State Compensation.⁷⁷² However, in prac-

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769. See MACDONALD ET AL., *supra* note 754, at 13 (noting that in *Youngstown Sheet and Tube Co. v. Sawyer*, the U.S. Supreme Court checked expanding executive power by declaring President Truman's actions unconstitutional); see also Rodney J. Ganske & H. Stephen Harris, Jr., *The Monopolization and IP Abuse Provisions of China's Anti-Monopoly Law: Concerns and a Proposal*, 75 ANTITRUST L. J. 213, 226 (2008) (arguing that an independent judiciary is essential to reaping the full benefits of market reform); see also Benjamin O. Kostrzewa, Comment, *China's International Economic Trade Arbitration Commission in 2006: New Rules, Same Results?*, 15 PAC. RIM L. & POL'Y J. 519, 539 (2006) (encouraging the Chinese government to free the judiciary from the other branches of government in accord with the National People's Congress).
770. See Andrew T. Guzman, *The Design of International Agreements*, 16 EURO. J. INT'L L. 579, 589 (2005) (showing that where enforcement mechanisms are weak, compliance with international law is insufficient); see also Hugo Rojas, *Legal Responses to Discriminatory Actions: A Comparative Analysis*, 5 LOY. U. CHI. INT'L L. REV. 127, 149 (2008) (advocating that efficient legal mechanisms enable victims to maneuver easily through the legal system); see also David Rosenberg & James P. Sullivan, *Coordinating Private Class Action and Public Agency Enforcement of Antitrust Law*, 2 J. COMPETITION L. & ECON. 159, 160 (2006) (noting that sound policies require efficient enforcement mechanisms to ensure compliance).
771. See MARC ROTENBERG, COUNTRY REPORTS, PRIVACY AND HUMAN RIGHTS IN AN INTERNATIONAL SURVEY OF PRIVACY LAWS AND DEVELOPMENTS, 198 (2003) (asserting that the society must change from the situation where the government and the Communist Party are above the law to a liberal democracy with rule of law); see also Karen Ann Widess, *Implementing Democratization: What Role for International Organizations*, 91 AM. SOC'Y INT'L L. PROCEEDINGS 356, 374 (1997) (reasoning that liberal democracies are most closely associated with institutions and powers, including the rule of law); see also Thomas Humphrey, Note, *Democracy and the Rule of Law: Founding Liberal Democracy in Post-Communist Europe*, 2 COLUM. J. E. EUR. L. 94, 105 (2008) (declaring that in liberal democracies, the rule of law functions as a complement to the goal of forming a functioning democracy).
772. See *Zhonghua Renmin Gongheguo Guojia Peichang Fa* (“Law of the People's Republic of China on State Compensation”) (promulgated by the standing Comm. Nat'l People's Cong., May 12, 1994, effective Jan 1, 1995) (PRC) (1994) LAWINFOCHINA, <<http://www.lawinfochina.com/law/display.asp?db=1&id=145&keyboard=>>> (last visited Oct. 26, 2008) (declaring violations of human rights by state actors to be actionable by the victim); see also Sonia M. Kim, *Old World Religious Persecution in a New World Setting: How International Relationships Can Affect China's Treatment Toward Its Religious People*, 2 RUTGERS J. L. & RELIGION 2, 2 (2000) (concluding that the continued violations of Chinese citizens' religious and human rights were evidence of illusory constitutional rights); see also Winston Hsiao, Comment, *The Development of Human Rights in the Republic of China on Taiwan: Ramifications of Recent Democratic Reforms and Problems of Enforcement*, 5 PAC. RIM L. & POL'Y J. 161, 170 (1995) (reporting that the Chinese citizens' right to sue government officials has gone largely unused despite the constitutional provision).

tice, this is rarely the case;⁷⁷³ in practice, if rights are infringed on by governmental officials, particularly if the cases are about the enforcement of a certain political policy, judges generally favor the government and avoid dampening the officials' enthusiasm for enforcing the policy.⁷⁷⁴ Even if the victims appeal, judicial review plays a weak role in guaranteeing individual's rights.⁷⁷⁵ If the rights claimed by the citizen are granted by the Constitution, without any specific statutes applying, no judicial review is available because the Constitution provides no legal remedies.⁷⁷⁶ This situation is improving since the National People's Congress is considering allowing judicial review for cases involving violations of the Constitution.⁷⁷⁷ In sum, the National People's Congress needs to prioritize the independent exercise of judicial review.

For unlawful arrest or detention, a court should exercise its right to review the legality of actions to enforce the one-child policy.⁷⁷⁸ In the case of particularly difficult, or politically sen-

773. See Kim, *supra* note 772, at 2 (concluding that the continued violations of Chinese citizens' religious and human rights are evidence of illusory constitutional rights); see also Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293, 318 (2002) (denouncing human rights abuses that continue to take place in China); see also Hsiao, *supra* note 772, at 170 (reporting that the Chinese citizens' right to sue government officials has been largely unused despite the constitutional provision).

774. See Vincent R. Johnson, *America's Preoccupation with Ethics in Government*, 30 ST. MARY'S L.J. 717, 758 n.15 (1999) (discovering that Chinese judges favor local officials because they lack tenure and receive most of their funding from local government); see also McPherson, *supra* note 596, at 791 (recognizing that lack of judicial independence and favoring governmental officials has historical roots in China); see also Ruixue Ran, *Well-known Trademark Protection in China: Before and After the Trips Amendments to China's Trademark Law*, 19 UCLA PAC. BASIN L.J. 231, 246 (2002) (explaining that local Chinese judges must favor local officials in order to protect local interests).

775. See Killion, *Quest for Liberty*, *supra* note 736, at 43, 46–47 (opining that China's ability to protect human rights is suspect because of its lack of independent judicial review); see also Peerenboom, *China Admin. L. Reform*, *supra* note 696 (stressing that judicial review in China is a weak check on power); see also Kelly M. Brown, Comment, *Execution for Profit? A Constitutional Analysis of China's Practice of Harvesting Executed Prisoners Organs*, 6 SETON HALL CONST. L.J. 1029, 1039 (1996) (verifying that China's judicial system is weak despite having a hierarchy of courts that permits judicial review).

776. See also Peter Haertling, *Trains Above the Clouds: The Primacy of Political and Civil Human Rights in Tibet and the People's Republic of China*, 18 COLO. J. INT'L ENVTL. L. & POL'Y 459, 462–63 (2007) (affirming that constitutional rights are non-justiciable in Chinese courts); see also M. Ulric Killion, "Building Up" China's Constitution: Culture, Marxism, and the WTO Rules, 41 LOY. L.A. L. REV. 563, 578 (2008) (hereinafter Killion, *Building Up China*) (explaining that only the National People's Congress has the power to enforce and interpret the constitution); see also McPherson, *supra* note 596, at 803–4 (asserting that because China's Constitution can be interpreted only by China Communist Party officials, it remains meaningless).

777. See McPherson, *supra* note 596, at 804 (noting that limited judicial review has been implemented in the administrative law context). But see Killion, *Building Up China*, *supra* note 776, at 565 (assessing China's minimum compliance with World Trade Organization standards requiring judicial review); but see Xun Zeng, Comment, *Enforcing Equal Employment Opportunities in China*, 9 U. PA. J. LAB. & EMP. L. 991, 1005 (2007) (assessing the courts' extreme reluctance to find a law or government action in violation of the constitution).

778. See Elizabeth B. Cooper, *Global Collaboration in Law Schools: Lessons to Learn*, 30 FORDHAM INT'L L.J. 346, 348 (2007) (citing education in international trial norms as key to enhancing respect for rights); see also McPherson, *supra* note 596, at 788 (denouncing the fact that rights advocates often are jailed on manufactured charges). But see M. Ulric Killion, *Building Up China*, *supra* note 776, at 584 (noting that a successful challenge to government power is rare).

sitive disputes, the Supreme People's Court should be permitted to send experienced judges to establish "circuit tribunals" to ensure judicial equality.⁷⁷⁹

c. Improvement of Judges' Quality

More judges of quality need to be educated and trained in China. Currently, the judges in China are not well trained as compared to judges in developed countries.⁷⁸⁰ There are few judges knowledgeable in both international law and national law.⁷⁸¹ When the judges resolve civil disputes or criminal cases, they rely only on national statutes and ignore the domestic application of international principles and norms.⁷⁸² In resolving disputes related to the one-child policy, judicial independence is the primary problem, but lack of knowledge of international principles also leads to the violation of human rights to some extent.⁷⁸³ Under such circumstances, judges need to expand their knowledge about international law and strengthen their use of international principles in conjunction with national laws.⁷⁸⁴ Judges need to be familiar with international treaties, principles, and the relationship between national and international law.⁷⁸⁵ With sufficient understanding of international principles and norms, judges no

779. See Benjamin L. Liebman, *Legal Aid and Public Interest Law in China*, 34 TEX. INT'L L.J. 211, 281 (1999) (hereinafter Liebman, *Legal Aid*) (arguing that the development of legal aid has been a step toward judicial equality); see also *Recent Publications*, 29 YALE J. INT'L L. 581, 605–6 (2004) (noting that China's 1982 constitution promised "equality of all before the law"); see also Garz, *supra* note 582 (advocating for the creation of these special courts to deal with sensitive issues).

780. See Robert Lancaster & Ding Xiangshun, *Addressing the Emergence of Advocacy in the Chinese Criminal Justice System: A Collaboration Between a U.S. and a Chinese Law School*, 30 FORDHAM INT'L L.J. 356, 363–64 (2007) (acknowledging the lack of professional requirements for Chinese judges); see also Melissa S. Hung, Comment, *Obstacles to Self-Actualization in Chinese Legal Practice*, 48 SANTA CLARA L. REV. 213, 216 (2008) (noting that in the past, judges were not even lawyers).

781. See Lin, *supra* note 591, at 291 (citing China's lack of knowledge of international law); see also Jeffrey F. Levine, Note, *Meeting the Challenges of International Brand Expansion in Professional Sports: Intellectual Property Right Enforcement in China Through Treaties, Chinese Law and Cultural Mechanisms*, 9 TEX. REV. ENT. & SPORTS L. 203, 220 (2007) (noting that judges are especially unfamiliar with international treaties governing intellectual property reform); see also Carissima Mathen, Book Review, *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* by Kate Malleson and Peter Russell, 39 OTTAWA L. REV. 133, 140 (2007–2008) (pointing to rapid modernization as a contributing factor to judges' lack of knowledge).

782. See Haertling, *supra* note 776, at 466 (proclaiming that although China has signed several international human rights treaties, enforcement is almost non-existent); see also Benjamin Liebman & Tim Wu, *Antiquities Law: China's Network Justice*, 8 CHI. J. INT'L L. 257, 287 (2007) (detailing Chinese courts' limited access to decisions of other judges within China); see also Hung, *supra* note 780, at 216 (revealing that untrained assistants often rendered case decisions).

783. See Cooper, *supra* note 778, at 351 (arguing that students must be taught the supremacy of law and human rights); see also Taroh Inoue, *Introduction to International Commercial Arbitration in China*, 36 HONG KONG L. J. 171, 193 (2006) (noting that numerous decisions are based not on law but on communist ideology); see also Patricia Ross McCubbin et al., *China's Future Lawyers: Some Differences in Education and Outlook*, 7 ASPER REV. INT'L BUS. & TRADE L. 293, 298 (2007) (recognizing that questioning of authority is discouraged because much legal training is connected to Communist Party politics).

784. See Reem Bahdi, *Truth and Method in the Domestic Application of International Law*, 15 CAN. J.L. & JURIS. 255, 255 (2002) (discussing the need for judicial reliance on international law); see also Cooper, *supra* note 778, at 353 (arguing that students should be educated about Western systems that focus on the rule of law).

785. See Bahdi, *supra* note 784, at 255 (encouraging judicial use of international law and treaties); see also Lancaster & Ding, *supra* note 780, at 364 (remarking that only an undergraduate degree is required to sit for the judicial exam); see also Liebman & Wu, *supra* note 782, at 290 (describing how the Internet has increased access to information).

longer will be able to uphold measures that are incompatible with individuals' fundamental rights as recognized and protected by international treaties.⁷⁸⁶ If necessary, judges could invoke international treaties to protect and promote domestic human rights.⁷⁸⁷

d. Alternative Measures to Improve Equality of Justice

In summary, the role of the court is to serve as "an intermediary between a powerful government and vulnerable citizens."⁷⁸⁸ Not only does it guarantee the impartial application of just laws, but it also compensates the vulnerable citizens whose rights have been violated.⁷⁸⁹ In addition to the formal judicial remedies, the Chinese government also should address the importance of lawyers' participation in judicial reform because they have the necessary experience as legal professionals.⁷⁹⁰ Moreover, the Chinese government could establish more legal clinics in law schools that provide law school students with more opportunities to practice law and gain experience as well as provide professional advice for people, especially lower-income groups, who have no legal knowledge or assistance.⁷⁹¹ Furthermore, the Chinese government should provide more funding and legal aid services for poor people.⁷⁹² In conclusion, as a necessary condition to protect and promote individuals' human rights, the Chinese government and other political powers must not only respect individual's human rights, judicial indepen-

786. See Lin, *supra* note 591, at 273 (positing that protection of rights through application of a constitution has become universal practice); see also Addo, *supra* note 726, 1430 (1988). But see Hung, *supra* note 780, at 236 (declaring that when conflicts arise between Communist Party policies and the law, cases must be decided in favor of Party policies).

787. See Lin, *supra* note 591, at 273 (noting a world trend of protection of rights); see also Bahdi, *supra* note 784, at 161.

788. See Noline Ambe, *A Legal Analysis of the Domestic Enforceability of International Human Rights Law: The Rule of Law Imperative*, 87, 132 U.N.B. L.J. 109, 120 (1998) (noting the court's important intermediary function).

789. See Duan Jielong, *Statement on the Rule of Law at the National and International Levels*, 7 CHINESE J. INT'L LAW 509, 509 (2007) (stating that the judiciary acts in strict accordance with the laws to protect human rights); see also Lin, *supra* note 591, at 269 (advocating for an amendment to the Chinese Constitution to extend protection to major human rights).

790. See Charles Chao Liu, Comment, *China's Lawyer System: Dawning Upon the World Through a Tortuous Process*, 23 WHITTIER L. REV. 1037, 1096 (2002) (explaining how the education of lawyers in China should encompass a broader understanding of international judicial reforms).

791. See Peggy Maisel, *The Role of the U.S. Law Faculty in Developing Countries: Striving for Effective Cross-Cultural Collaboration*, 14 CLINICAL L. REV. 465, 483-84 (2008) (addressing the lack of financial support for clinics in law schools by the Chinese government); see also Arwen Joyce & Tracye Winfrey, Note, *Taming the Red Dragon: A Realistic Assessment of the ABA's Legal Reform Efforts in China*, 17 GEO. J. LEGAL ETHICS 887, 895 (2004) (commenting that the Chinese government rarely supports legal clinics financially, and that most are not associated with Chinese universities). See generally Michael William Dowdle, Note, *Pragmatic Strategies for the Development of Clinical Legal Aid in China*, 24 FORDHAM INT'L L.J. 56, 58 (2000) (arguing that the importation of an American style of clinical education may crowd out other forms of clinical education).

792. See *Adopting and Adapting: Clinical Legal Education and Access to Justice in China*, 120 HARV. L. REV. 2134, 2139 (2007) (noting how China has increased emphasis on legal aid since the early 1990s); see also Liebman, *Legal Aid*, *supra* note 779, at 283 (asserting that greater access to legal aid in China will increase protection of its citizens' rights); see also Margaret Y.K. Woo et al., *Migrant Access to Civil Justice in Beijing*, 4 LOY. U. CHI. INT'L L. REV. 167, 209 (2007) (concluding that migrant access to the court system in China is ineffective and unable to redress grievances).

dence, and judicial review, but also provide more alternative measures to promote the reformation of the justice system.

3. Solutions to Procedural Problems

a. Reform of Police Power

In order to reform police power so that human rights are protected, three improvements should be considered. First, the government should limit the discretionary power of the police.⁷⁹³ Second, the activities of the police should be subject to judicial review, and citizens' rights to pursue legal remedies against the police should be respected.⁷⁹⁴ Third, the media's function in publicizing abuses of police power should be fully utilized.⁷⁹⁵

The power of the police should be limited not only legally but also in practice. In China, abuses of power by the police frequently occur.⁷⁹⁶ Sometimes, police can question and detain or even torture suspects without showing proper legal documents supporting such action.⁷⁹⁷ Sun Zhigang, for example, is one of the victims who were tortured to death while in the cus-

793. See Choukroune, *supra* note 189, at 32 (describing China's need for justiciability of its people's economic, social, and cultural rights according to the International Covenant on Economic, Social, and Cultural Rights); see also Mark C. Modak-Truran, *A Process Theory of Natural Law and the Rule of Law in China*, 26 PENN ST. INT'L L. REV. 607, 615 (2008) (asserting that the Chinese government's preferred understanding of the rule of law should involve limitations on the discretion of police). See generally George E. Edwards, *International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy*, 26 YALE J. INT'L L. 323, 331 (2001) (noting that United Nations enforcement of safeguards regulating the use of police powers will enhance the right to privacy).

794. See Larry Catá Backer, *The Rule of Law, the Chinese Communist Party, and Ideological Campaigns: Sange Daibiao (The Three Represents), Socialist Rule of Law, and Modern Chinese Constitutionalism*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 29, 97 (2006) (arguing that the Chinese Communist Party first must police itself internally before it can establish a rule of law system for its citizens); see also Christensen, *supra* note 23, at 513 (noting that the Chinese police have broad discretionary powers that essentially abolish due process protections); see also Peerenboom, *China Admin. L. Reform*, *supra* note 696, at 235 (stating how specific Chinese requirements are present today that limit the effectiveness of judicial review).

795. See Benjamin L. Liebman, *Watchdog or Demagogue? The Media in the Chinese Legal System*, 105 COLUM. L. REV. 1, 96 (2005) (hereinafter Liebman, *Watchdog?*) (observing that the lack of media coverage in China allows the courts to feel little pressure to follow the law); see also Randall Peerenboom, *Out of the Pan and into the Fire: Well-Intentioned but Misguided Recommendations to Eliminate All Forms of Administrative Detention in China*, 98 NW. U. L. REV. 991, 1099 (2004) (hereinafter Peerenboom, *China Admin. Detention Elim.*) (maintaining that the role of the media as watchdog in China could be expanded to provide relief to its citizens).

796. See Richard Cullen & D.W. Choy, *China's Media: The Impact of the Internet*, 6 SAN DIEGO INT'L L.J. 323, 336 (2005) (noting that "citizen-discussions" on the Internet have referred to instances of police corruption and abuse of power in China); see also Gechlik, *supra* note 593, at 110 (discussing the concern that arises from the Shanghai police force's abuse of power); see also Lubman, *supra* note 768, at 234 (claiming that the Chinese police would disregard formal requirements and instead implement their own system of sanctions).

797. See Pils, *supra* note 750, at 1245 (stating that Chinese police have been known to use torture during interrogations); see also Xun, *supra* note 777, at 1008 (illustrating the brutality of the Chinese police by telling the story of a citizen who was beaten to death in a police station); see also Jing Zhang, *Pushing Copyright Law in China: A Double-Edged Sword*, 18 DEPAUL J. ART, TECH. & INTELL. PROP. L. 27, 61 (2007) (alleging that convictions in Chinese courts were based on compelled confessions and had little chance of being appealed).

tody of employees hired by the police.⁷⁹⁸ On March 17, 2003, Sun Zhigang, a 27-year-old college graduate working in a company in Guangzhou, was stopped by police.⁷⁹⁹ He was detained for not having an ID card and died in custody three days later.⁸⁰⁰ The police took him into their custody without any legal documents from the court or prosecutors.⁸⁰¹ He was later beaten to death by employees who were hired by the police because he challenged the employees' words.⁸⁰² Therefore, in order to establish a humane society, the power of the police must be strictly limited to specifically delineated duties.⁸⁰³ Laws should be passed to set limitations on the power of the police; to regulate the economic, administrative, criminal penalties for abuse of police power; and to provide legal remedies for the victims.⁸⁰⁴ The police must be individually liable for their actions.⁸⁰⁵ Police should be prohibited from engaging in any activities

798. See The Truth About the Death of Sun Zhigang, NEWSWEEK, June 12, 2003, available at <<http://news.sina.com.cn/c/2003-06-12/14541163552.shtml>> (reporting the beating death of Sun Zhigang by Chinese police).

799. See Anne S.Y. Cheung, *Public Opinion Supervision: A Case Study of Media Freedom in China*, 20 COLUM. J. ASIAN L. 357, 362 n.23 (2007) (describing the circumstances behind the death of 27-year-old Sun Zhigang).

800. See Xiao Qiang, "Online Uprisings" Are Changing China, NEW PERSP. Q., Aug. 2, 2004, available at <http://www.digitalnpq.org/global_services/global%20viewpoint/08-02-04.html> (stating that Sun Zhigang died three days after being detained by Chinese police for failure to provide identification).

801. See The Truth About the Death of Sun Zhigang, *supra* note 798 (commenting on the lack of authority exhibited by Chinese police in the arrest and detention of Sun Zhigang).

802. See *id.* (illustrating the reaction of Chinese government employees to the death of Sun Zhigang).

803. See Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 483 (2004) (asserting that police power must be limited to protect the rights of a state's citizens); see also Robert Brauneis, *The Foundation of Our "Regulatory Takings" Jurisprudence: The Myth and Meaning of Justice Holmes's Opinion in Pennsylvania Coal Co. v. Mahon*, 106 YALE L.J. 613, 666 (1996) (advocating for the limitation of police power in order to protect due process); see also Matthew S. Belser, Article, *Martial Law After the Storm: A Constitutional Analysis of Martial Law and the Aftermath of Hurricane Katrina*, 35 S.U. L. REV. 147, 148 (2007) (commenting that a military-run state is a threat to democracy).

804. See Hong Lu & Terance D. Miethe, *Confessions and Criminal Case Disposition in China*, 37 L. & SOC'Y REV. 549, 554 (2003) (stating that reforms to Chinese criminal procedural law have limited and defined the scope of police authority in criminal investigations); see also Randall Peerenboom, *What Have We Learned About Law and Development? Describing, Predicting, and Assessing Legal Reforms in China*, 27 MICH. J. INT'L L. 823, 847 (2006) (hereinafter Peerenboom, *Legal Reforms in China*) (asserting that the Chinese police have resisted attempts at reform that would limit their power and subject them to increased supervision); see also Fiona D'Souza, Comment, *The Recognition of Enforcement of Commercial Arbitral Awards in the People's Republic of China*, 30 FORDHAM INT'L L.J. 1318, 1347-48 (2007) (suggesting that reforms are needed to clearly establish judicial independence in order to reduce corruption, including the influence of local officials, and increase the power of the courts).

805. See Ji Li, *When Are There More Laws? When Do They Matter? Using Game Theory to Compare Laws, Power Distribution, and Legal Environments in the United States and China*, 16 PAC. RIM L. & POL'Y 335, 339 (2007) (noting that recent court decisions in China have placed an affirmative duty on police officials to protect citizens, and that police officials may be held personally liable for injuries or damages resulting from their inaction); see also Peerenboom, *China Admin. Detention Elim.*, *supra* note 795, at 1104 n.109 (suggesting that police and other public officials should be personally liable for egregious conduct); see also Pils, *supra* note 750, at 1246-47 (claiming that police continue to use torture because of uncertainty about how the use of torture should be treated in the legal system).

beyond those duties expressly given to them.⁸⁰⁶ Through legislation and oversight, police functions can be altered to aid in the protection of human rights, deterrence of crimes, and maintenance of a stable society.⁸⁰⁷

Moreover, the activities of the police should be subject to administrative and judicial review,⁸⁰⁸ and citizens' rights to sue those who violate their rights must be respected.⁸⁰⁹ Because police have legal power, some citizens are afraid of challenging their actions.⁸¹⁰ Even if they bring actions against police for abuse of power, courts generally favor the police because in China, the courts, police, and prosecutors have strong connections with each other.⁸¹¹ An independent judiciary will resolve this problem, and judicial review of abuses of police power will effectively deter the arbitrary and unlawful activities of the police.⁸¹²

806. See Jerome A. Cohen, *Law in Political Transitions: Lessons from East Asia and the Road Ahead for China*, 37 N.Y.U. J. INT'L & POL. 423, 427 (2005) (claiming that current criminal procedural law in China is vulnerable to abuse by law enforcement officials); see also Brantly Womack, *Modernization and Democratic Reform in China*, 43 J. OF ASIAN STUD. 417, 422 (1984) (noting that legal reforms in China have been geared not toward protecting individual rights but toward limiting the arbitrary behavior of public officials); see also Mike P. H. Chu, Comment, *Criminal Procedure Reform in the People's Republic of China: The Dilemma of Crime Control and Regime Legitimacy*, 18 UCLA PAC. BASIN L.J. 157, 186 (2001) (acknowledging that a 1996 amendment to Chinese criminal procedural law restricted police and prosecutorial discretion).

807. See Hong & Miethe, *supra* note 804, at 552 (noting that Chinese law allows shorter sentences for individuals who voluntarily confess to committing a crime); see also Peerenboom, *Legal Reforms in China*, *supra* note 804, at 846 (stating that high crime rates in China contribute to the majority's preference for social stability over individual rights); see also Georgiou, *supra* note 732, at 355, 377 (purporting that religious dissenters in China often are sentenced without a trial).

808. On paper, according to the Law of the People's Republic of China on State Compensation, administrative review and judicial review are available to the victims; however, in practice, however, few victims can win their cases successfully. The Chinese government should stress the importance of the protection of human rights and enforcement of substantive law.

809. See Killion, *Quest for Liberty*, *supra* note 736, at 78 (asserting that judicial review is essential to protecting Chinese citizens' right to liberty); see also Carl F. Minzner, *Xinfaang: An Alternative to Formal Legal Institutions*, 42 STAN. J. INT'L L. 103, 119 (2006) (claiming that the Xinfaang system offers an alternative to court action whereby citizens can seek redress of violations of rights by government officials); see also Chu, *supra* note 806, at 167 (noting that reforms to criminal procedural law in China failed to prevent verdicts from being issued in criminal cases before trial).

810. See Ji, *supra* note 805, at 342 (noting that laws in China placing liability on police and other public officials have proven ineffective in restraining their activities); see also Yan Sun, *Reform, State, and Corruption: Is Corruption Less Destructive in China than in Russia?*, 32 COMP. POL. 1, 6-7 (1999) (asserting that reports of police corruption have declined because of retaliatory action against informants and perceived inaction against reported conduct); see also Georgiou, *supra* note 732, at 376 (claiming that the police have the authority to detain religious dissidents and confiscate their property).

811. See Liebman & Wu, *supra* note 782, at 269 (asserting that Chinese judges are known to be corrupt and subject to the influence of local Party officials); see also Hung, *supra* note 780, at 88 (purporting that the Chinese people consider judges to be partial to government officials such as the police); see also Yan, *supra* note 810, at 6 (noting that Chinese centers for reporting corruption have received numerous complaints regarding police corruption, but they are viewed by the Chinese people as ineffective).

812. See Hung, *supra* note 767, at 78-79 (asserting that China has agreed to have specified administrative actions reviewed by an independent and impartial judiciary body in order to improve its standing within the World Trade Organization); see also Womack, *supra* note 806, at 423 (asserting that the judiciary has traditionally lacked autonomy in China); see also D'Souza, *supra* note 804, at 1347 (purporting that reforms that support judicial independence should reduce bureaucratic supervision and give the courts greater latitude in exercising their power).

The media's function in supervising police should also be fully utilized. The Sun Zhigang case was exposed publicly by nationwide media and, subsequently, because of the media attention and citizen complaints, the National People's Congress made an effort to restrict the discretionary power of the police.⁸¹³ However, if this case had not been made known to the public, the National People's Congress would have been less likely to make changes.⁸¹⁴ Therefore, by exposing the abuses of police power to the public, more complaints will follow, forcing the government or the courts to act in light of public pressure. The government or the courts in such circumstances would have no choice but to address the matter in an effective and lawful way. To some extent, free media plays an important role in overseeing the activities of public institutions and places public institutions under more scrutiny.⁸¹⁵ Thus, the media's function in supervising the power of the police should not be ignored.⁸¹⁶

b. Government's Commitment to the Protection of Women's Rights

The Chinese government should honor and stress the importance of the rule of law and reduce interference with the judicial system. The government should also empower women to claim their rights in courts.⁸¹⁷

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813. See Cohen, *supra* note 806, at 433 (acknowledging that the media's coverage of the death of Sun Zhigang led to the revocation of the regulation that authorized the police to detain Zhigang); see also Liebman & Wu, *supra* note 782, at 259 (stating that pressure from the media and the Internet led to judicial action and reform); see also Sun Zhigang was Tortured to Death in Guang Zhou Custody, <<http://news.sina.com.cn/z/sunshzs/index.shtml>> (last visited Mar. 19, 2007) (asserting that complaints led the Chinese government to limit police power).
 814. See Minzner, *supra* note 809, at 179 n.434 (purporting the media raised public awareness and pressured the government to terminate the custody and repatriation system); see also Pils, *supra* note 750, at 1242–43 (maintaining that without public pressure, the Chinese government is unlikely to take corrective action); see also Sebastian Amar et al., Comment, *International Legal Updates*, 13 HUM. RTS. BR. 33, 37 (2006) (alleging that public outcry forced the Chinese government to prohibit the random detention of migrant workers).
 815. See C. David Lee, *Legal Reform in China: A Role for Nongovernmental Organizations*, 25 YALE J. INT'L L. 363, 388 (2000) (asserting that the Biological Weapons Convention (BWC) (an NCO in China) uses the media to promote certain human rights issues, including women's rights); see also Alan M. Wachman, *Does the Diplomacy of Shame Promote Human Rights in China?*, 22 THIRD WORLD Q. 257, 260 (2001) (claiming that human rights advocacy groups view the media as an important means of enabling Chinese citizens to seek reforms); see also Dutka, Note, *Turning a Weapon into a Shield: Using the Law to Protect People Living with HIV/AIDS in China from Discrimination*, 38 COLUM. HUM. RTS. L. REV. 421, 432 (2007) (noting that government censorship deprives Chinese citizens with HIV/AIDS access to information and support on the Internet).
 816. See Lee, *supra* note 815, at 390 (stating that the BWC conducts litigation, including cases involving egregious police conduct, in conjunction with media coverage of the issue at hand); see also Wachman, *supra* note 815 at 257 (attesting that external pressure, including the use of media publications, from government and non-government organizations has affected the Chinese government's view of human rights); see also Russell H. Stern, Note, *China: A Most-Favored Nation or a Most-Favored Nation—The PRC's Latest Anti-Crime Campaign and a Possible U.S. Response*, 31 GEO. WASH. J. INT'L L. & ECON. 119, 125 (1997) (claiming that the government's anti-crime campaign in 1996 brought significant international media attention to the country's disregard for human rights).
 817. See Charles J. Ogletree, Jr. & Rangita de Silva-de Alwis, *The Recently Revised Marriage Law of China: The Promise and the Reality*, 13 TEX. J. WOMEN & L. 251, 254 (2004) (stating that 2001 revisions to the marriage law in China enabled women who were abused or abandoned to seek compensation in court); see also Anika Rahman, *A View Toward Women's Reproductive Rights Perspective on Selected Laws and Policies in Pakistan*, 15 WHITTIER L. REV. 981, 987 (1994) (noting that women in Pakistan lack the ability to hold the government accountable for policies that violate their human rights); see also Yuhong Zhao, *Domestic Violence in China: In Search of Legal and Social Responses*, 18 UCLA PAC. BASIN L.J. 211, 225 (2001) (claiming that abused women in China have no meaningful avenues of recovering damages resulting from abuse).

Furthermore, different levels of government should establish hotlines for concerned citizens to call and give information about potential human rights violations so that the government can understand what is happening with its citizens.⁸¹⁸ Also, the government should establish a special institution to investigate and deal with any abusive family-planning practices that threaten women's rights.⁸¹⁹

In order to prevent unwanted pregnancies, the Chinese government should make contraceptive methods available to all people in a safe, effective, and inexpensive manner.⁸²⁰ Moreover, the government should expand the current government-funded women's health care system and strengthen the role of local communities in the campaign of protecting women's rights.⁸²¹ A sound and safe medical and health care system, especially for "pregnant and living-in"⁸²² women, should be developed. The methods of each system can vary depending on the region, but the system should never include coercive or abusive methods.⁸²³ More efforts should be devoted to rural areas as the government has the responsibility to ensure that comprehensive health services be offered regardless of rank or economic status.⁸²⁴ Other than the general health care system, the government should ensure that women have access to a safe and lawful abortion performed in a reputable medical institution.⁸²⁵ Additionally, maternity health care personnel should have adequate professional knowledge, skills, and training that would

818. See Elsie Bonthuys, *Realizing South African Children's Basic Socio-Economic Claims Against Parents and the State: What Courts Can Achieve*, 22 INT'L J.L. POL'Y & FAM. 333, 339 (2008) (referring to the need of a government to offer a way that citizens can receive extra help); see also Kathryn Hollingsworth, *Responsibility and Rights Children and Their Parents in the Youth Justice System*, 21 INT'L J.L. POL'Y & FAM. 190, 198 (2007) (illustrating the government's need to provide services so that citizens can voice their needs); see also Burkhard Müller, *Support for Young Pregnant Women and Juvenile Mothers: Confronting Present-Day Legislation in Germany with the Pioneering Thoughts of J. H. Pestalozzi*, 18 INT'L J.L. POL'Y & FAM. 385, 391 (2004) (indicating that the government must realize that citizens need extra help and offer ways for them to receive it).

819. See The European Union Data Directive and Privacy Before the Committee on International Relations: House Committee on International Relations Hearing, U.S. House of Representatives (1998) (statement of Marc Rotenberg, the executive director of the Electronic Privacy Information Center) (addressing the need to have a system by which citizens can report abusive situations in families); see also Bonthuys, *supra* note 818, at 339 (indicating that the government should establish more institutions to help protect women's rights in abusive situations); see also Hollingsworth, *supra* note 818, at 198 (illustrating the government's need to provide a system to help investigate situations of family abuse and women's violated rights).

820. See STEPAN & KELLOGG, *supra* note 5, 29; see also Müller, *supra* note 818, at 391 (illustrating that the government should have safer and more efficient ways to help those who become pregnant unwillingly).

821. See Rahman, *supra* note 817, at 988; see also Müller, *supra* note 817, at 391 (indicating citizens' desire to further the health care system in order to protect women's rights); see also Laura C. H. Hoyano, *Of Innocence and Autonomy: Children, Sex and Human Rights*, 16 INT'L J.L. POL'Y & FAM. 300, 304–5 (2002) (referring to the government's need to expand the health care system to ensure women's rights).

822. See State Council of the People's Republic of China, Program for the Development of Chinese Women, Section 4.2 (2001–2010) (indicating that the Chinese government should provide a safe health care system for pregnant women).

823. See *id.* (referring to the fact that the health care system could differ depending on the region).

824. See *id.* (illustrating that more health care should be focused on rural communities and support of rural women).

825. See Michal Kliment & Vladimir Cupanick, *Retaining the Abortion Law in Slovakia*, 18 MED. & L. 363, 368 (1999) (referring to the government's obligation to establish institutions where women can undergo safe and lawful abortions); see also Bonthuys, *supra* note 818, at 339 (referring to the need of a government to offer a way for citizens to receive extra help); see also Müller, *supra* note 818, at 391 (indicating that the government needs to realize the need for citizens to reach out for extra help and offer them ways to do so).

enhance the quality of health care services they provide.⁸²⁶ Additionally, governments should provide protection for unmarried women by offering better health services and providing more information about pregnancy.⁸²⁷ Governments can establish clinics that specifically address unmarried women's questions on marriage and pregnancy, as well as both the benefits and drawbacks of being an unmarried mother.⁸²⁸

4. Freedom of Expression

Freedom of expression is internationally recognized⁸²⁹ as a vital right and is constitutionally guaranteed.⁸³⁰ It involves both the right to hold and express opinions without interference and the freedom to seek and receive information and opinions.⁸³¹ This right is an important symbol of a democratic society.⁸³² No one can be restricted from expressing his or her own opinions and thoughts,⁸³³ and everyone has the right to receive any thoughts expressed by oth-

826. See JOHN M. PAXMAN ET AL., SEVEN EXPANDED ROLES FOR NON-PHYSICIANS IN FERTILITY REGULATION: LEGAL PERSPECTIVES (1976); see also Camelia Manuela Lataianu, *Social Protection of Children in Public Care in Romania from the Perspective of EU Integration*, 17 INT'L J. L. POL'Y & FAM. n.976, at 114 (2003) (referring to the need to have more trained medical personnel to offer advice to citizens); see Kirsten Scheiwe, *Between Autonomy and Dependency: Minors' Rights to Decide on Matters of Sexuality, Reproduction, Marriage, and Parenthood: Problems and the State of Debate*, 18 INT'L J.L. POL'Y & FAM. 262, 275–76 (2004) (illustrating the need to encourage people to become trained personnel to assist citizens with health questions).

827. See Scheiwe, *supra* note 826, at 262, 273 (illustrating that the government should provide additional information regarding sex and pregnancy to unmarried women); see also Laura C. H. Hoyano, *Of Innocence and Autonomy: Children, Sex and Human Rights*, Eric Heinz, 16 INT'L J.L. POL'Y & FAM. 300, 304–5 (2002) (referring to the fact that the government needs to make an effort to offer sex education and pregnancy information to its citizens).

828. See Hoyano, *supra* note 827, at 300, 304–5 (referring to government's need to provide sex education clinics for unmarried persons); see also Daniel Monk, *Neville Harris, Education, Law and Diversity*, Oxford: Hart Publishing, 2006, 22 INT'L J.L. POL'Y & FAM. 270, 271 (2008) (mentioning that there must be places where unmarried women can receive pregnancy information); see also Scheiwe, *supra* note 826, at 262, 273 (referring to the government's need to provide clinics for answering questions and for educating women about the pros and cons of unmarried motherhood).

829. See International Covenant on Civil and Political Rights, *supra* note 810 (illustrating that the freedom of expression is an international right); see also David Weissbrodt et al., *supra* note 102, at 27 (referring to the right of free expression to be internationally known).

830. Xian Fa [Constitution] art. 35 (PRC) (2004) (stating, "Citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration"); see also Hollingsworth, *supra* note 818 at 198 (indicating that the constitution protects citizen's freedom of expression); see also Monk, *supra* note 828, at 271 (referring to the freedom of expression to be constitutionally protected).

831. See ANNE BAYESKY, THE UN HUMAN RIGHTS TREATY SYSTEM: UNIVERSALITY AT THE CROSSROAD 29 (2000).

832. See Nihal Jayawickrama, *supra* note 495, at 665 (explaining that freedom of expression is important for both a democratic society and individuals).

833. See *id.* at 666 (opining that the right to express one's own thoughts is related to freedom of expression and cannot be unlawfully restricted).

ers.⁸³⁴ The Chinese government, however, monitors media and prevents access to information that may challenge the government's policies.⁸³⁵

In accordance with the Universal Declaration of Human Rights,⁸³⁶ the International Covenant on Civil and Political Rights⁸³⁷ and the Constitution of the People's Republic of China,⁸³⁸ people are ensured freedom of expression, which is essential for the protection of personal autonomy.⁸³⁹ In addition, people are guaranteed the right to their own opinions and to express those opinions, which are rights that are vital to scrutinizing the government's activi-

834. See *id.* (explaining that an individual has a right and freedom not only to express one's thoughts but also to receive ideas expressed by other individuals).

835. See Marc Rotenberg, *supra* note 771, at 205 (claiming that the Chinese government monitors the media to protect government policies); see also Scott E. Feir, *Regulations Restricting Internet Access: Attempted Repair or Rupture in China's Great Wall Restraining the Free Exchange of Ideas*, 6 PAC. RIM L. & POL'Y J. 361, 377 (1997) (noting that the banning of Internet sources is consistent with China's policy of censoring books and publications that challenge the Chinese government); see also Eric J. Stieglitz, Note, *Anonymity on the Internet: How Does It Work, Who Needs It, and What Are Its Policy Implications?*, 24 CARDOZO ARTS & ENT. L.J. 1395, 1397-98 (2007) (reporting that the Chinese government implements information-control policies through a surveillance and censorship regime for political purposes).

836. See Universal Declaration of Human Rights, *supra* note 93, at 19 (noting that "[e]veryone 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"); see also THEODORE S. ORLIN ET AL., *THE JURISPRUDENCE OF HUMAN RIGHTS LAW: A COMPARATIVE INTERPRETIVE APPROACH* 156 (Theodore S. Orlin et al. eds., 2001) (stating that the right to freedom of expression is protected by all conventions dealing with the protection of fundamental rights and freedoms).

837. See International Covenant on Civil and Political Rights, 999 UNTS 171 art. 19 (Dec. 19, 1966) (outlining the rights of individuals to freedom of expression, which encompasses the right to receive and impart information and ideas):

Everyone shall have the right to hold opinions without interference. Every one 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. 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 there 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.

See also DAVID WEISSBRODT ET AL., *supra* note 102, at 42 (stating that everyone has the right to freedom of expression).

838. See Xian Fa [Constitution] art. 35 (PRC) (1982) (stating that the citizens of the People's Republic of China enjoy several freedoms, including freedom of speech, press, assembly, association, procession and demonstration).

839. See RAYMOND WACKS, *PRIVACY AND PRESS FREEDOM* 25 (1995) (opining that free speech advances an individual's autonomy, dignity, and self-fulfillment).

ties.⁸⁴⁰ Even though this freedom is subject to some limitations, such as national security and public order, it is evident that limitations on publicly available information about the one-child policy are not within the scope of these acceptable “limitations” on expression.⁸⁴¹ Hence, the censorship and restrictions set by the Chinese government are contrary to freedom of expression.

The Chinese government should cease its censorship, not only to respect its citizens’ individual rights to freedom of expression, as proclaimed in its Constitution, but also to comply with its international obligations.⁸⁴² More important, the government should strengthen the function of media in reporting on the violations of human rights. The Chinese government should “eliminate prior restraints on publishing”⁸⁴³ and enable its citizens to “access Internet-based information that the government currently blocks.”⁸⁴⁴

Additionally, because the Internet has become one of the most effective approaches to spread news, the government should cease its censorship and not force Web sites to delete com-

840. See ALEX CONTE ET AL., *supra* note 426, at 59 (emphasizing that citizens’ right to freedom of expression is integral to their control of the political process because it exerts influence on their representatives and through their capacity to organize themselves); see also Fred H. Cate, *Privacy and Telecommunications*, 33 WAKE FOREST L. REV. 1, 17 (1998) (stressing that one of the protections against intrusive government activities is freedom of expression); see also Jo M. Pasqualucci, *Criminal Defamation and the Evolution of the Doctrine of Freedom of Expression in International Law: Comparative Jurisprudence of the Inter-American Court of Human Rights*, 39 VAND. J. TRANSNAT’L L. 379, 417–18 (2006) (explaining that a journalist’s right to freedom of expression is vital for the dissemination of information regarding governmental activities which is essential for the maintenance of a democracy).

841. See Cook, *supra* note 146, at 710–11 (explaining that although the right to freedom of expression is limited, the European Commission of Human Rights concluded that those limitations do not apply to women receiving information relating to their reproductive rights); see also Elizabeth F. Defeis, *Freedom of Speech and International Norms: A Response to Hate Speech*, 29 STAN. J. INT’L L. 57, 118 (1992) (noting that restrictions permitted with respect to freedom of expression are not applied to rights concerning physical integrity to the individual under certain constitutions of African nations); see also Stephanie Farrior, *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 BERKELEY J. INT’L L. 1, 4 (1996) (recognizing the principal theory underlying limitations on the freedom of expression is to protect the rights of others from being destroyed).

842. See Xian Fa [Constitution] art. 35 (PRC) (1982) (elucidating that the people of China enjoy the freedom of speech, press, assembly, association, procession, and demonstration); see also Neil J. Conley, Comment, *The Chinese Communist Party’s New Comrade: Yahoo’s Collaboration with the Chinese Government in Jailing a Chinese Journalist and Yahoo’s Possible Liability Under the Alien Torts Claim Act*, 111 PENN ST. L. REV. 171, 195–96 (2006) (arguing that China violates the international right to freedom of speech by suppressing information that would undermine government policies); see also Miriam D. D’Jaen, Note, *Breaching the Great Firewall of China: Congress Overreaches in Attacking Chinese Internet Censorship*, 31 SEATTLE U. L. REV. 327, 331–32 (2008) (establishing that complicity with Chinese censorship laws violates internationally recognized human rights).

843. See CONGRESSIONAL EXECUTIVE COMMISSION ON CHINA: ANNUAL REPORT (2004), *supra* note 655.

844. See *id.*

ments contrary to the government's policy.⁸⁴⁵ Everyone has the right to express his or her own opinions, and everyone has the right to the truth.⁸⁴⁶ Consequently, independent, free, functioning, and investigative media reporting about government conduct or misconduct can effectively shed light on the government's activities.

5. Raising Citizen Awareness and Enhancing Rural Development

a. Citizen Awareness

The Chinese government generally regards "raising awareness of citizens by education" as an effective method to permanently change the citizens' idea and behavior.⁸⁴⁷ This method is acceptable, and the Chinese government has done well at promoting awareness through education.⁸⁴⁸ The Chinese government has effectively and actively worked with the mass media, such as newspapers, TV, and radio, in its advocacy of the family-planning policy.⁸⁴⁹

845. See Lawrence B. Solum & Minn Chung, *The Layers Principle: Internet Architecture and Law*, 79 NOTRE DAME L. REV. 815, 901 (2004) (noting that Internet censorship should be off limits to any government with some possible exceptions); see also Brent T. Yonchara, *Enter the Dragon: China's WTO Accession, Film Piracy, and Prospects for Enforcement of Copyright Laws*, 12 DEPAUL-LCA J. ART & ENT. L. 63, 94-95 (2002) (concluding that Chinese information censorship regulations should be abandoned to allow for the expansion of American films into the market); see also Ann P. Vandeveld, Note, *Realizing the Re-Emergence of the Chinese Stock Market: Fact or Fiction?*, 30 VAND. J. TRANSNAT'L L. 579, 582 (1997) (recognizing that China must repeal its censorship policy to realize the true re-emergence of its stock market).

846. See Ronda D. Jamgotchian & Dianne Baquet Smith, *An Eye for an Eye or Crying Wolf? An Overview of California and Federal Retaliation and Whistleblower Laws*, 782 PRAC. L. INST. 17, 53 (2008) (citing from the First Amendment the inalienable right of freedom of the press, from which the public's need to "know the truth" stems); see also Tatum H. Lytle, *A Soldier's Blog: Balancing Service Members' Personal Rights vs. National Security Interests*, 59 FED. COMM. L.J. 593, 611 (2007) (stating that the public has the right to know about measures of national security, especially war); see also Jo M. Pasqualucci, *The Evolution of International Indigenous Rights in the Inter-American Human Rights System*, 6 HUM. RTS. L. REV. 281, 320 (2006) (recognizing the public's right to know, specifically about family-related deaths).

847. See Ann S.Y. Cheung, *A Case Study of Media Freedom in China*, 20 COLUM. J. ASIAN L. 357, 358 (2007) (hereinafter Cheung, *Media Freedom*) (asserting that citizen awareness is used as a means of regulating the state's legislative and judicial branches in China); see also Kevin E. Davis & Michael J. Trebilcock, *The Relationship Between Law and Development: Optimists versus Skeptics*, 56 AM. J. COMP. L. 895, 911 (2008) (recognizing that freedom of the press and access to the media may impede a state's abuse of its power); see also Christine Lee, "Pollute First, Control Later" No More: *Combating Environmental Degradation in China Through an Approach Based on Public Interest Litigation and Public Participation*, 17 PAC. RIM L. & POL'Y J. 795, 821 (2008) (maintaining that increasing Chinese citizens' awareness of environmental issues through education may assist environmental protection).

848. See Mingde Cao, *The Current and Future Trends in Chinese Environmental and Energy Law and Policy*, 18 PACE INT'L L. REV. 253, 268 (2006) (positing that raising citizens' awareness in China will be beneficial to implementing the necessary change in environmental conditions); see also Cheung, *Media Freedom*, *supra* note 847, at 358 (stating that increasing citizen awareness and access to media will improve social conditions in China); see Lee, *supra* note 847, at 821 (reiterating that by increasing citizens' awareness of environmental issues China will be able to improve in that arena).

849. See Liebman, *Watchdog?*, *supra* note 795, at 50 (stating that China has effectively used channels of media to report on its family-planning program); see also Jordan, *supra* note 242, at 233 (stating that the law requires the media to keep families informed on the family-planning policy). See generally Hand, *supra* note 257, 116 (noting that in general the media has been an effective force of implementing reform in China).

In addition to actions it has already taken, the Chinese government should devote itself to taking further steps in providing a more detailed and effective "Population Education"⁸⁵⁰ and "Sexuality Education"⁸⁵¹ programs for its citizens. These educational programs can be provided in schools and through other local government offices or other necessary institutions.⁸⁵² "The Population Education Program" could explain the reasons for population control; the social, economic and accompanying political problems caused by overpopulation; and the benefits of keeping reproduction under control.⁸⁵³ The "Sexuality Education" Program could include information regarding human sexuality and reproduction and help its citizens understand their personal sexuality and in an effort to further control their reproduction.⁸⁵⁴

Additionally, special education should be provided for children, juveniles, and citizens in rural places. For one thing, sexual awareness is becoming more and more widespread, even in primary and middle schools.⁸⁵⁵ The Chinese government should advocate sex education in schools earlier and stress the necessity of educating juveniles about the risks associated with irresponsible sexual behavior.⁸⁵⁶ At the primary school level, students can be taught the factual

850. See EDMUND H. KELLOGG & JAN STEPAN, *THE WORLD'S LAWS AND PRACTICES ON POPULATION AND SEXUALITY EDUCATION* 7 (1975) (stating that a more effective means of education on population dynamics includes both in- and out-of-school teaching about its causes, nature, and consequences).

851. See *id.* (defining "sexuality education" as education with regard to human sexuality and reproduction, which assists people in dealing with their own sexual concerns and which may help control population growth).

852. See *id.* (noting that education about population and sexuality measures may be implemented in the classroom, through schools, and through non-school educational organizations).

853. See *id.* (recognizing that the population education program can deal with issues such as size, growth, migration, mortality, and age distribution; and it may explain the reasons for and the prevention of the growth of the Chinese population).

854. See *id.* (rationalizing that because the sexuality education program addresses individual sexuality, it may shed light on why people give birth so often, which leads to population overgrowth).

855. See Laura Niada, *Hunger And International Law: The Far-Reaching Scope of the Human Right to Food*, 22 CONN. J. INT'L L. 131, 139 (2006) (explaining that sexual education is one way to advance the progress of a country); see also Mehlika Hoodbhoy et al., *Exporting Despair: The Human Rights Implications of U.S. Restrictions on Foreign Health Care Funding in Kenya*, 29 FORDHAM INT'L L.J. 1 (2005) (remarking that rural areas in general tend to be underdeveloped and in need of more development). See generally Maria Sophia Aguirre & Ann Wolfgram, *United Nations Policy and the Family: Redefining the Ties That Bind—A Study of History, Forces and Trends*, 16 BYU J. PUB. L. 113, 176 (2002) (stressing that the need for sexual education for children is so strong that the United Nations has even acknowledged that young people must be exposed to sexual education and reproductive education).

856. See *id.* (referring to the United Nations' call for sexual education to be taught to children in the forms of contraception and reproductive health to avoid irresponsible sexual behavior); see also Bernard M. Dickens, *Introduction*, 18 MED. & L. 155, 162 (1999) (noting other professors' work in the field of advancing sexual education and awareness in impoverished nations to decrease irresponsible sexual activity); see also Kliment & Cupanik, *supra* note 825, at 365 (explaining how the Slovak Family-Planning Association seeks to curb irresponsible sexual behavior, which will decrease the amount of unwanted pregnancies and sexually transmitted diseases).

information as a course combined with biology.⁸⁵⁷ Curriculum about the reproduction of human beings should be integrated with a biology class rather than in a special, separate course, because the biology course provides a natural introduction to later sex education.⁸⁵⁸ Older students can be taught a specific sex education course that may involve the real consequences of having sex and other relevant reproductive knowledge.⁸⁵⁹ The government should also encourage parents to communicate with their children about sex and provide a necessary guidance on sexual education.⁸⁶⁰ Women in rural areas have little knowledge of their bodies or of health matters.⁸⁶¹ To prevent unwanted pregnancies, the government should enhance the educational aspect of family planning and reproductive health care.

b. Development of Rural Areas

The most effective way to control the rural birth population is to develop the rural economy and provide better education. After ensuring rural citizens' primary and secondary needs,⁸⁶² the government should actively promote economic development in rural places and take all effective measures to ensure rural citizens' rights in the area of family and social bene-

857. See KELLOGG & STEPAN, *supra* note 850, at 11 (stating that in the fifth and sixth grades, factual information will be taught about sexual education through biology, including reproduction of mammals; then, after sixth grade, sexual education will be taught exclusively as a subject in school); see also Mark Hilliard, *The Evolution and Misinterpretation of the Establishment Clause: Is Teaching Intelligent Design in Public Schools a Governmental Endorsement of Religion Prohibited by the First Amendment?*, 32 U. DAYTON L. REV. 145, 168 (2005) (defining biology as the "study of life and human character"; thus implying that a class about human life could weave a valuable nexus into sexual education in a more developed course of study); see also Sarah Cassidy, *How do Schools Teach Children About Sex, and Does It Need to Change? The Big Question*, INDEPENDENT, Oct. 24, 2008 (stating that teaching biology is a prerequisite before sex education can be taught in school).

858. See KELLOGG & STEPAN, *supra* note 850, at 50 (stating that fertility-related education should be taught as a subject integrated into several courses rather than in a special course); see also Hilliard, *supra* note 857, at 168; see also Cassidy, *supra* note 857 (reiterating that science is an integral component to the knowledge of sex education).

859. See KELLOGG & STEPAN, *supra* note 850, at 11 (urging that once children learn the basics of a science-driven background, they will develop the skills for learning about sexual education as an exclusive subject matter); see also Maxine Eichner, *Who Should Control Children's Education?: Parents, Children, and the State*, 75 U. CIN. L. REV. 1339, 1374 (2007) (stressing that because of the controversy that surrounds sex education in schools, possible precautions may include integrating classes with biology-focused topics in the earlier years and then progressing exclusively to sex education classes as the children grow older); see also Naomi Rivkind Shatz, *Unconstitutional Entanglements: the Religious Right, the Federal Government, and Abstinence Education in the Schools*, 19 YALE J.L. & FEMINISM 495, 509 (2008) (reinforcing the general premise that it is extremely important that sexual education be taught to adolescents, and that once the child is ready to receive it, he should).

860. See STEPAN & KELLOGG, *supra* note 5, at 13 (stating that China has undertaken a family-planning program); see also Aguirre & Wolfgram, *supra* note 855, at 138 (explaining that China's family-planning policies have been remarkably successful); see also Bishop, *supra* note 164, at 537 (describing family-planning activities undertaken by the government).

861. See Susan Greenhalgh, *Controlling Births and Bodies in Village China*, 21 AMERICAN ETHNOLOGIST 3, 7 (1994) (stating that the contraceptive methods available to rural populations require little attention on the part of the user); see also Hanyu Ni & Annette MacKay Rossignol, *Maternal Deaths Among Women with Pregnancies Outside of Family Planning in Sichuan, China*, 5 EPIDEMIOLOGY 490, 490-91 (1994) (describing a study that included women living in rural areas that was focused on the lack of prenatal care that many receive, which results in their unreported deaths); see also Susan E. Short & Fengyu Zhang, *Use of Maternal Health Services in Rural China*, 58 POPULATION STUDIES 3, 3 (2004) (discussing the maternal health services that are available in rural China and women's disinclination to seek them out because of their poor quality).

862. See Frank Emmert, *Market Economy, Democracy, or Rule of Law? What Should Be Prioritized to Promote Development?* (2007), available at <http://src.auca.kg/images/stories/files_report_market_economy_democracy_rule_of_law_kg_eng.df> (stating what the primary needs of people are).

fits.⁸⁶³ The government should encourage the establishment of schools to train more individuals in skilled crafts and enable them to have technical skills instead of only farm-related knowledge.⁸⁶⁴ In addition to promoting agricultural economy, the government should develop industrial economy in rural areas.⁸⁶⁵ The Chinese government should also provide more funds to encourage more citizens living in rural areas to “study advanced subjects”⁸⁶⁶ at college or university which tends to lead naturally to the establishment of a smaller family.⁸⁶⁷ Educational level plays a marked or even decisive role in determining family size.⁸⁶⁸ According to a report, generally, people who have had more years of education have fewer children than those with

863. See BAYESKY, *supra* note 79, at 30 (stating that the government should promote economic development of rural areas).

864. See INTERNATIONAL PROJECT ON TECHNICAL AND VOCATIONAL EDUCATION, CASE STUDIES ON TECHNICAL AND VOCATIONAL EDUCATION IN ASIA AND THE PACIFIC, REFORM OF CHINA'S TECHNICAL AND VOCATIONAL EDUCATION IN THE TRANSITION FROM A PLANNED ECONOMY SYSTEM TO A SOCIALIST MARKET ECONOMY SYSTEM—A CASE STUDY 1–3 (Yu Zuguang & Zeng Zida, researchers) (1994) (discussing the number and development of schools in rural China); see also Kenneth Pomeranz, *Is There an East Asian Development Path? Long-Term Comparisons, Constraints, and Continuities*, 44 J. ECON. & SOC. HIST. OF THE ORIENT 322, 333 (2001) (describing the development of the agricultural regions of China); see also China's Employment Situation and Policies, Gov.cn, Apr., 2004, available at <http://english.gov.cn/official/2005-07/28/content_17992.htm> (last viewed Oct. 27, 2008) (stating China's official position on the development of vocational training).

865. See Ann McLaren & Chen Qinjian, *The Oral and Ritual Culture of Chinese Women: Bridal Lamentations of Nan-hui*, 59 ASIAN FOLKLORE STUD. 205, 212 (2000) (explaining the importance of the development of industry in rural areas); see also Yang Daqing, Tasks for a Scientific View on Development, CHINA DAILY REP., Nov. 6, 2007, available at <<http://english1.mofcom.gov.cn/aarticle/counselorsreport/europereport/200711/20071105205570.html>> (last visited Oct. 27, 2008) (discussing why industrial development is necessary); see also Embassy of the People's Republic of China in Australia, Economic Cooperation, *Economy*, Nov. 24, 2003, <<http://au.china-embassy.org/eng/jmhzt/t46182.htm>> (last visited Oct. 27, 2008) (describing the ideal manner of economic growth and development).

866. See Hu, *supra* note 29 (stating that the study of advanced subjects is supported by the government).

867. See Posting of Pete to Wangjianshuo's blog, <<http://user.wangjianshuo.com/28841>> (June 19, 2006, 16:47) (stating that higher levels of education lead to smaller families).

868. See Vida Tomsic, Status of Women, Family Planning and Population Dynamics, in THE SYMPOSIUM ON LAW AND POPULATION: PROCEEDINGS, BACKGROUND PAPERS AND RECOMMENDATIONS 27, 38 (United Nations Fund for Population Activities, 1974) (discussing the role educational level plays on family size); see also Melba Gomes, *Family Size and Educational Attainment in Kenya*, 10 POPULATION & DEV. REV. 647, 647 (1984) (stating the correlation between the educational level attained by parents and the size of the families they have); see also *The Schools Are Getting Better*, N.Y. TIMES, Jan. 2, 1995, at A1 (describing the relationship between smaller family size and higher education levels).

fewer years of education.⁸⁶⁹ Promoting a higher education level, especially in rural areas, will help China develop a better-educated population.⁸⁷⁰

Furthermore, the Chinese government should concentrate on the improvement of family-planning education in rural areas. It should devote itself to removing the villagers' cultural and traditional prejudices against female children and eradicate the traditional beliefs about sons' responsibility to assist parents.⁸⁷¹

Moreover, the current social security system should be reformed to an efficient and reliable system with more insurance and saving plans to make sure the elderly and the disabled, especially people in rural areas, have the ability to support themselves and reduce the economic incentives to giving birth to sons only.⁸⁷²

869. See BERTIL MATHSSON, EDUCATION AND FAMILY PLANNING, in HUMAN RIGHTS AND POPULATION: FROM THE PERSPECTIVES OF LAW, POLICY AND ORGANIZATION 58, (1973) (stating that the higher a couple's educational level is, the more likely it is that their family size will be small); see also Quince Hopkins, *The Supreme Court's Family Law Doctrine Revisited: Insights From Social Science on Family Structures and Kinship Change in the United States*, 13 CORNELL J. L. & PUB. POL'Y 431, 488 (2004) (explaining that those with more formal education tend to have smaller families); see also Lataianu, *supra* note 826, at 99, 101 (providing an example of a group of people who have both very low educational levels and very large family sizes).

870. See Han Suyin, *The Changing Status of Women, Literacy and Education and Family Planning*, in 3 J. OF SEX RES. 275, 275–76 (1967) (describing the results that governmental promotion of education can have); see also Hu, *supra* note 29 (stating that educational promotion will help the country to become more highly educated); see also China's Population and Development in the 21st Century, Gov.cn, Dec. 2000, available at <http://english.gov.cn/official/2005-07/27/content_17640.htm> (last viewed on Oct. 27, 2008) (explaining the benefits of educational promotion).

871. See Xiaoling Shu, *Education and Gender Egalitarianism: The Case of China*, 77 Soc. of Educ. 311, 311 (2004) (discussing the gender relationships historically prevalent in China); see also Suyin, *supra* note 870, at 277–78 (explaining the traditional favoritism of sons over daughters); see also *Children: China takes on Parental Prejudice*, THE LONDON INDEPENDENT, Oct. 3, 1997 available at <http://findarticles.com/p/articles/mi_qn4158/is_19971003/ai_n14136548> (last viewed Oct. 27, 2008) (providing examples of favoritism for male children).

872. See SHEILA A. M. MCLEAN, LAW REFORM AND HUMAN REPRODUCTION 297 (1992) (stating that the social security system should be reformed to enable the elderly to support themselves); see also Dwayne Benjamin et al., *Aging, Wellbeing, and Social Security in Rural Northern China*, 26 POPULATION & DEV. REV. 89, 89 (2000) (discussing the traditional reasons for favoritism of male children); see also Heying Jenny Zhan and Rhonda J. V. Montgomery, *Gender and Elder Care in China: The Influence of Filial Piety and Structural Constraints*, in 17 GENDER & SOC. 209, 225 (2003) (explaining why reform is crucial).

c. Rewards Instead of Punishment

Rewards and punishment have totally opposite functions.⁸⁷³ Punishment externally deters people from having more children.⁸⁷⁴ It is a kind of “lawful threat.” Rewards work by giving people incentives to change their own behavior.⁸⁷⁵ Generally, incentivized change is more acceptable than change made because of an external threat.⁸⁷⁶ Therefore, the government should “encourage and award”⁸⁷⁷ those people who abide by the family-planning policy instead of punishing those who violate it,⁸⁷⁸ help “relieve people of their family concerns,”⁸⁷⁹ and enable its citizens to benefit from the implementation of the one-child policy.⁸⁸⁰ Awards can be enforced based on different circumstances. First, awards should be established in compliance

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873. See Linda D. Molm, *Is Punishment Effective? Coercive Strategies in Social Exchange*, 57 SOC. PSYCHOL. Q. 75, 75 (1994) (stating that reward and punishment are used for different purposes and have different results); see also Linda D. Molm, *Punishment Power: A Balancing Process in Power-Dependence Relations*, 94 AMERICAN J. SOC. 1392, 1392–394 (1989) (discussing the difference between rewards and punishments); see also Linda D. Molm, *The Structure and Use of Power: A Comparison of Reward and Punishment Power*, 51 SOC. PSYCHOL. Q. 108, 108–9 (1988) (explaining how rewards and punishments have varying effects).
874. See Xiaorong, *supra* note 121, at 157 (describing socioeconomic punishments imposed on Chinese parents who violate the one-child policy, thereby decreasing their ability to care for their children and discouraging them from having more); see also Hampton, *supra* note 6, at 334 (noting the use of public punishments like community isolation, social pressure, and detainment of family members for violating family-planning policies); see also Saona, *supra* note 10, at 237–38 (illustrating China’s use of punishments like forced abortion and sterilization to deter unwanted procreation).
875. See Tobias Greitemeyer & Ellie Kazemi, *Asymmetrical Consequences of Behavioral Change Through Reward and Punishment*, 38 EUR. J. SOC. PSYCHOL. 246, 246 (2008) (confirming that rewards for compliance are more effective in modifying behavior than disincentives for noncompliance); see also Hampton, *supra* note 6, at 360 (hypothesizing that awards to those who limit their family size create a better incentive to do so). But see Charles A. O’Reilly III, *The Impact of Rewards and Punishments in a Social Context: A Laboratory and Field Experiment*, 62 J. OCCUPATIONAL PSYCHOL. 41, (1989) (concluding that punitive measures can be just as much of an incentive as rewards).
876. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW*, 21 (2006) (summarizing the social control approach to compliance, which suggests that people’s motivation derives from their desire to maximize personal gain); see also Carter G. Bishop, *The Deontological Significance of Nonprofit Corporate Governance Standards: A Fiduciary Duty of Care Without a Remedy*, 57 CATH. U. L. REV. 701, 726 (2008) (opining that threats are not the most efficient methods for regulating human behavior); see also Roger C. Cramton, *Driver Behavior and Legal Sanctions: A Study of Deterrence*, 67 MICH. L. REV. 421, 425 (1969) (finding that punishments reduce prohibited behaviors, while rewards result in consistent desired behavior).
877. See ANNE GRIFFITHS & ANN E. FINK, *POLICY AND PROCREATION: THE REGULATION OF REPRODUCTIVE BEHAVIOUR IN THE THIRD WORLD*, in *LAW REFORM AND HUMAN REPRODUCTION* 293, 299 (Sheila A.M. McLean ed., 1992) (citing China’s methods of providing economic incentives to encourage obedience of the family-planning policy).
878. See *id.* (enumerating some of China’s punitive measures for enforcing the one-child policy).
879. See *id.* (noting the social and economic benefits offered to families who follow family-planning laws).
880. See *id.* (stating that China offers large and numerous benefits for following the one-child policy).

with the local standard of living.⁸⁸¹ If the local standard of living is very high, the awards for the people who obey the family-planning policy should be accordingly high. If the local standard of living is low, the award could be comparably lower than it is in the other places. Second, awards could be given in the form of a monthly deposit.⁸⁸² In other words, the government could deposit money on a monthly basis into an account after a woman gives birth to her child. However, the woman could not withdraw the money until she is 50 or 60 years old.⁸⁸³ This method is utilized to some extent in China, but the award is not proportionate to local standards of living.⁸⁸⁴ In fact, the amount is so minimal that it does not have any practical economic meaning.⁸⁸⁵ Consequently, the Chinese government must ensure that appropriate incentive payments are awarded to women, and then the benefits of having more children may decrease, or even disappear.⁸⁸⁶

d. Men's Responsibility for Birth Control

International law and international treaties ensure women a right to equality with men in all arenas.⁸⁸⁷ Men should therefore share equal responsibility with women in all areas, includ-

881. See Wang Pingshan & Fifth Shanxi Provincial People's Congress, *On Province-Level Fertility Policy in China*, 9 POP. & DEVELOPMENT REV. 553, 555 (1983) (referencing the Shanxi province's population-control policy rewarding deferred child bearers with extra maternity leave and compensation based on their employment circumstances); see also John A. Ross & Stephen L. Isaacs, *Costs, Payments, and Incentives in Family Planning Programs: A Review for Developing Countries*, 19 STUDIES IN FAMILY PLANNING 270, 272-74 (1988) (noting Korea's family-planning policies that awarded large sums of money to low-income families with fewer children while giving no rewards to those in the highest socioeconomic classes); see also Zeng Liming, *China Advances Construction of Family-Planning Services System in Central and West China*, NATIONAL POPULATION AND FAMILY-PLANNING COMMISSION OF CHINA, Sept. 19, 2008, available at <<http://www.npfpc.gov.cn/en/en2008-09/eneews20080919.htm>> (summarizing the National Population and Family-Planning Commission of China's Minister Li Bin's mandate that family-planning services meet the actual needs of each county or township).

882. See HALVOR GILLE, INCENTIVES AND FAMILY PLANNING, in HUMAN RIGHTS AND POPULATION FROM THE PERSPECTIVES OF LAW, POLICY AND ORGANIZATION 60, 61 (1973) (identifying three types of incentive schemes, including payment plans).

883. See *id.* (noting India's incentive scheme that allows women to collect monthly incentive payments from their employers when they retire).

884. See SUSAN GREENHALGH & EDWIN A. WINCKLER, CHINESE STATE BIRTH PLANNING IN THE 1990S AND BEYOND, 12-13 (Immigration and Naturalization Service, United States Department of Justice 2001) (decrying the failed community-funded reward system of the Chinese family-planning policy, which results in the poorest areas of China having the least available resources).

885. See Ashwani Saith, *Economic Incentives for the One-child Family in Rural China*, 87 CHINA Q. 492, 494-96 (1981) (noting the minimum amount of 20 yuan, the equivalent of less than U.S. \$3, awarded to women who choose to be sterilized after having only one child).

886. See GILLE, *supra* note 882, at 61 (recognizing the effectiveness of incentives in other countries that encourage women to participate in national family-planning programs); see also GREENHALGH & WINCKLER, *supra* note 884, at 137 (outlining the guidelines of the family-planning program, which included ensuring lawful administration of the program and managing funds). See generally Saith, *supra* note 885 (analyzing the exceptional performance of family planning in the Zhanqing People's Commune, where there are a myriad of economic incentives for families to comply with the one-child policy).

887. See Xian Fa [Constitution] art. 48 (PRC) (1982) (establishing state-protected equal rights for women in all spheres of life); see also U.N. Charter pmbles (reaffirming the equal rights of men and women); see also Universal Declaration of Human Rights, *supra* note 93, at 71 (declaring the equal rights of women and men).

ing family planning, to ensure women's equality.⁸⁸⁸ Men have the same rights as women in determining the size and spacing of their families.⁸⁸⁹ Therefore, men should have the same duty in taking responsibility for birth control.⁸⁹⁰

Generally, population policy has an impact on both men and women, yet women are more directly concerned than men, and men take less responsibility in birth control matters.⁸⁹¹ Similarly, the Chinese government regards family planning as the female's responsibility.⁸⁹² In

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888. See HELVI SIPILA, STATUS OF WOMEN AND FAMILY PLANNING, in HUMAN RIGHTS AND POPULATION: FROM THE PERSPECTIVES OF LAW, POLICY AND ORGANIZATION 56 (1973) (explaining how the economic independence of women promotes gender equality); see also Nancy E. Dowd, *Bringing the Margin to the Center: Comprehensive Strategies for Work/Family Policies*, 73 U. CIN. L. REV. 433, 442 (2004) (stressing that men's participation in the family and the child's life is essential to women's equality); see also Sameena Nazir, *Challenging Inequality: Obstacles and Opportunities Toward Women's Rights in the Middle East and North Africa*, 2005 J. INST. JUST. INT'L STUD. 31, (2005) (emphasizing that even though legislation and constitutions recognize equal rights for women in Middle Eastern and North African countries, there has been significant resistance to it and rare enforcement of it).
889. See SUSAN C. BOURQUE & KAY BARBARA WARREN, WOMEN OF THE ANDES: PATRIARCHY AND SOCIAL CHANGE IN TWO PERUVIAN TOWNS 88 (1981) (noting that both men and women in Chiuchin and Mayobamba have strong personal preferences regarding family size); see also LEE RAINWATER, FAMILY DESIGN: MARITAL SEXUALITY, FAMILY SIZE, AND CONTRACEPTION 159 (2007) (recognizing that couples, meaning both men and women, often determine the size of family that is appropriate for them). Compare *Roe v. Wade*, 410 U.S. at 114 (granting women, not men, the right to choose whether or not to terminate a pregnancy).
890. See Sipila, *supra* note 888, at 57 (observing that certain conditions promote gender equality despite biological differences).
891. See Eva Brems, *Protecting the Rights of Women*, in HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION 128 (Richard Pierre Claude & Burns H. Weston eds., 2006) (indicating that reproduction policies most directly concern women); see also Paul R. Ehrlich & Anne H. Ehrlich, *The Population Explosion: Why We Should Care and What We Should Do About It*, 27 ENVTL. L. 1187, 1197 (1997) (expressing concern that population policies may pressure women to take birth control); see also Amy D. Porter, Note, *International Reproductive Rights: The RU 486 Question*, 18 B.C. INT'L & COMP. L. REV. 179, 211 (1995) (reiterating that women bear the ultimate risk of ineffective birth control measures).
892. See BETSY HARTMANN, REPRODUCTIVE RIGHTS & WRONGS: THE GLOBAL POLITICS OF POPULATION CONTROL 165 (1995) (reporting that "women are the chief targets" of China's one-child policy); see also Harriet Evans, *Past, Perfect or Imperfect: Changing Images of the Ideal Wife*, in CHINESE FEMININITIES, CHINESE MASCULINITIES: A READER 350 (Susan Brownell & Jeffrey N. Wasserstrom eds., 2002) (suggesting that Chinese policy and official discourse are attributed to the perception that birth control is a woman's responsibility). Compare Duda, *supra* note 4, at 417 (positing that family planning is the responsibility of both the husband and wife).

reality, birth control is not only a woman's personal affair.⁸⁹³ According to a report,⁸⁹⁴ sterilization of women is three times more frequent than sterilization of men, even though male contraceptive methods, such as the use of condoms or a vasectomy, are much less invasive, cheaper, and safer than a woman's sterilization or abortion.⁸⁹⁵ The Chinese government should ensure men and women an equal right to determine the size of their families as they see fit.⁸⁹⁶

6. Providing Preventative Methods and Health Services to Chinese Women⁸⁹⁷

China's family-planning institutions must terminate their coercive methods and turn to "enhancing the service quality"⁸⁹⁸ and ensuring the health of women by means of safe preventa-

893. See Sari Locker, *THE COMPLETE IDIOT'S GUIDE TO AMAZING SEX* 375 (2005) (suggesting that male birth control shots, which would need to be injected only once a month, would possibly have a higher rate of acceptance among men than the use of a male birth control pill, which needs to be administered daily); see also JOZED KEULARTZ ET AL., *ETHICS IN A TECHNOLOGICAL CULTURE*, in *PRAGMATIST ETHICS FOR A TECHNOLOGICAL CULTURE* 3, 8 (Jozef Keulartz et al. eds., 2002) (remarking that a male birth control pill, which is currently being developed, would alleviate many of the risks and responsibilities that women face today and would also give men more control over family planning); see also Martha Albertson Fineman, *A Legal (and Otherwise) Realist Response to "Sex as Contract,"* 4 COLUM. J. GENDER & L. 128, 140 (1994) (indicating that men who do not want to reproduce can abstain from sex, take birth control, or use sperm banks before having a vasectomy).

894. See CHERYL BROWN TRAVIS, *WOMEN AND HEALTH PSYCHOLOGY: BIOMEDICAL ISSUES* 173 (1988) (discussing the various risks and complications associated with hysterectomies and emphasizing that although some of these complications may be rare, a large number of women are affected because of the high number of operations performed); see also Brietta R. Clark, *Erickson v. Bartell Drug Co.: A Roadmap for Gender Equality in Reproductive Health Care of an Empty Promise?*, 23 LAW & INEQ. 299, 312 (2005) (noting that surgical sterilization is often irreversible and entails greater risk than other forms of contraception); see also Marshall, *supra* note 47, at 456 (recognizing that despite the usefulness of condoms against sexually transmitted diseases, they represent a small percentage of contraceptive use).

895. See JOHN A. ROBERTSON, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* 73 (1996) (outlining the effects of irresponsible reproduction on offspring and other siblings); see also Robertson, *Noncoital Reproduction and Procreative Liberty*, in *THE ETHICS OF REPRODUCTIVE TECHNOLOGY* 249, 251 (Kenneth D. Alpern ed., 1992) (suggesting that countries without population problems rarely address reproductive responsibility and freely allow individuals to reproduce); see also Deborah L. Rhode, *Feminism and the State*, 107 HARV. L. REV. 1181, 1205 (1994) (maintaining that male reproductive responsibility is "crucial to ensuring equality for women").

896. See Chen Mingxia, *The Marriage Law and the Rights of Chinese Women in Marriage and the Family*, in *HOLDING UP HALF THE SKY—CHINESE WOMEN PAST, PRESENT AND FUTURE* 159, 161 (Tao Jie et al. eds., 2004) (outlining various Chinese laws and codes enacted to protect women's reproductive and family rights); see also Mark Eggerman, Article, *Roe v. Crawford: Do Inmates have an Eighth Amendment Right to Elective Abortions?*, 31 HARV. J. L. & GENDER 423, 445 (2008) (arguing that government regulation of reproductive rights must respect the rights of men and women equally regardless of custom or tradition); see also Marshall, *supra* note 47, at 451 (stressing that for woman to have better control over their reproductive rights, actions must be taken to eliminate discrimination and violence against women).

897. Rosenberg, *supra* note 16 (indicating that China will continue the one-child policy until at least 2010).

898. See United Nations, *The Program for the Development of Chinese Women (1995-2000)*, <<http://www.un.org/esa/gopher-data/conf/fwcw/natrep/NatActPlans/china/CHINA>> (last visited Oct. 27, 2008) (providing the full text of the program and outlining the People's Republic of China's goals relating to women's rights).

tive methods.⁸⁹⁹ Prevention of unexpected pregnancies must always be emphasized as an effective means to eliminate the need for abortion.”⁹⁰⁰ However, notwithstanding prevention education, women who have unexpected pregnancies should have “ready access to reliable information, compassionate counseling and suitable, qualified and effective medical services.”⁹⁰¹

In the 1970s, under the Planned Economy⁹⁰² period, the Chinese government offered free contraceptives to women of reproductive age.⁹⁰³ To some degree, these free contraceptives played an important role in controlling reproduction in certain areas.⁹⁰⁴ Nevertheless, because of the differences in culture and customs, and for other reasons, this program of providing free contraceptives has been terminated.⁹⁰⁵

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899. See LINDA LEWIS ALEXANDER ET AL., *NEW DIMENSIONS IN WOMEN'S HEALTH* 149 (4th ed. 2007) (explaining that although oral contraceptives like the pill bear some risks, overall they are extremely effective and have many other benefits, including protection against many forms of cancer); see also EMILY JACKSON, *REGULATING REPRODUCTION* 13 (2001) (suggesting that laws can effectively ensure that birth control is safe through licensing requirements and regulation of prescriptions); see also Hu, *supra* note 29 (outlining the promulgation of the family-planning law and clarifying many common misconceptions about China's one-child policy).
900. See Wilson Huhn, *Science, Causation, and Harm in Freedom of Expression Analysis: The Right Hand Side of the Constitutional Calculus*, 13 WM. & MARY BILL RTS. J. 125, 170 (2004) (emphasizing that unwanted pregnancies can have a significant impact on a woman's physical, mental, and economic well-being); see also Bishop, *supra* note 164, at 521 (criticizing U.S. president George W. Bush for his commitment to eliminating abortion overseas and positing that his actions to accomplish this objective were inconsistent with his own foreign policy goals); see also Brian D. Wassom, Comment, *The Exception That Swallowed the Rule?: Women's Medical Professional Corporation v. Voinovich and the Mental Health Exception to Post-Viability Abortion Bans*, 49 CASE W. RES. L. REV. 799, 855 (1999) (noting that terminating an unwanted pregnancy by abortion can aggravate a woman's "fragile and vulnerable" condition).
901. See Bishop, *supra* note 164, at 542 (characterizing as illogical the United States' retreat from the objectives of the International Conference on Population and Development Programme of Action).
902. A planned economy as an economic system, sometimes referred to as command economy or centrally planned economy, where the state or government controls all major sectors of economy and formulates all decisions about their use and distribution of income.
903. See Hardaway, *supra* note 694, at 1209, n.143 (establishing that the population control programs were started in the 1960s with local clinics and traveling doctors that provided free contraceptive services); see also Hampton, *supra* note 6, at 328–29 (asserting that during the Small-Family Model phase, the government provided couples with free birth control like IUDs and free abortion and sterilization surgeries).
904. See Xizhe, *supra* note 6, at 53 (explaining that by implementing birth control, the Chinese government reduced the fertility rate from 5.8 in 1970 to 2.8 in 1979); see also Cirando, *supra* note 4, at 647 (acknowledging that the Chinese government's policy decreased China's birth rate by 45.4% and its population rate by 55% since 1970); see also Hampton, *supra* note 6, at 360 (indicating that the Chinese government provided free contraceptives to women of childbearing age).
905. See Aniekwu Nkolika Ijeoma, *The Convention on the Elimination of All Forms of Discrimination Against Women and the Status of Implementation on the Rights to Health Care in Nigeria*, 13 HUM. RTS. BRIEF 34, 35 (2006) (emphasizing that culture, religion, and traditional beliefs and practices are all factors that play important roles in a woman's decision to use contraceptives); see also Xiaorong, *supra* note 121, at 179 (stating that although the Chinese government made family planning a national priority, it has not been able to obtain enough funds to provide sufficient reproductive health programs); see also Donald H. Minkler, *Demographic Trends and Policies in the Quest for Sustainability: The 1993 National Conference on Sustainable Solutions—Population, Consumption and Culture*, 21 B.C. ENVTL. AFF. L. REV. 271, 275 (1994) (noting that according to some Chinese farmers, there is no reason to have large families because there is very little land that can be divided as an inheritance among the children).

Currently, in rural areas, especially in remote rural areas, female reproductive health continues to be the weakest element of family planning.⁹⁰⁶ According to the report based on the research of the Xiu Shan area, the problems of women's reproductive health lie on the deficiency of education on measures of contraception.⁹⁰⁷ In other words, people in rural areas lack knowledge of contraception or, if they know of the necessity of contraception, they are reluctant to use it because of cultural traditions or poverty.⁹⁰⁸ These factors result in the inability to achieve nationwide contraceptive use. Consequently, in order to prevent unexpected pregnancies and eliminate the need for abortion, the foremost thing the Chinese government should do is to educate citizens about different measures of contraception and address the importance of its use so citizens can make informed decisions.⁹⁰⁹ Governments should accordingly increase budgets on contraception education, counseling programs, and provision of suitable and safe service to help couples make decisions.⁹¹⁰ In addition, governments should increase funding

906. See Peerenboom, *supra* note 222, at 134 (concluding that because China has difficulties in providing an "adequate welfare net" for the hundreds of millions of people living in rural areas, sex-selective abortions, female infanticides, and child abandonment continue). See generally Barry Sautman, Comment, *Is Tibet China's Colony? The Claim of Demographic Catastrophe*, 15 COLUM. J. ASIAN L. 81, 123 (2001) (observing that a Chinese official stated that 90% of rural families have two children or more, and that through the use of modern technology, like ultrasound, rural families guarantee that 80% of births are male). See generally Savage, *supra* note 245, at 1089–90 (discussing how various provinces have modified the People Republic's of China one-child policy by making provisions requiring women who have become pregnant and, thus, have exceeded the provision's regulation "must take remedial abortion measures, and at the same time one of the couple must have ligation or [*sic*] vasectomy").

907. See Xizhe Peng, *Population Policy Program in China: Challenge and Prospective*, 35 TEX. INT'L L.J. 56 (2000) (presenting that China is in the process of implementing a new program, different from that of the 1980s, which focuses on providing information and education about contraceptives rather than "administrative pressure").

908. See United Nations Fund for Population Activities, *Survey of Contraceptive Laws: Country Profiles, Checklists, and Summaries* 141, (1976); see also Xiaorong, *supra* note 121, at 175 (asserting that in rural areas, women's lack of education and career opportunities prevents them from using available reproductive information and gives them no incentive to use contraceptives). See generally Hampton, *supra* note 6, at 325–26 (reasoning that the cultural preference of Chinese couples to have male children induces many to opt for termination of female fetuses, thus using contraceptives to select the sex of the baby rather than to limit the birth rate).

909. See Bishop, *supra* note 164, at 552 (maintaining that to further a country's development and increase its prosperity, the government has to make an investment in family planning and reproductive health programs, because both are central to lowering fertility and improving women's health); see also Hu, *supra* note 29 (informing that the State Family-Planning Commission will educate people about the availability of different methods of contraception and birth control to help them make informed decisions). See generally Sneha Barot, *Back to Basics: The Rationale for Increased Funds for International Family Planning*, 11 GUTTMACHER POL. REV. 13 (2008) (expressing the belief that education and fertility control have a great impact on "improving a woman's status and contribution to a country's development").

910. See Rod N. Andreason, Note, *The International Convention on Population Development: The Fallacies and Hazards of Population "Control"*, 1999 BYU L. REV. 769, 791 (1999) (stressing that the government has not only to make contraceptives available, it must also teach people how to use them properly); see also Gellman, *supra* note 38, at 1084 (illustrating that UNFPA, in collaboration with the Chinese government, is trying to establish services based on "principles of free and responsible choice" by educating couples and individuals about birth control methods); see also Hu, *supra* note 29 (recognizing that, per the vice minister of the State Family-Planning Commission, there were some issues with the family-planning program in the past, but that the State Department worked to improve the quality of the working staff to protect people's basic rights to "suitable, safe and effective family-planning services").

for the implementation of programs that concentrate on providing contraceptive methods for free or at least effectively, reliably, and inexpensively.⁹¹¹

As for pregnant women who do not want to have children, voluntary abortion should be encouraged.⁹¹² However, abortion procedures should be regulated because unsafe abortion is one of the most common reasons for maternal deaths.⁹¹³ According to a report of the International Planned Parenthood Federation (IPPF), worldwide, “of the 500,000 annual maternal deaths, complications from unsafe abortion account for approximately 70,000, or 13%, of all such deaths. Yet the problem of unsafe abortion extends far beyond even this appalling statistic.”⁹¹⁴

According to the IPPF report, preventing the risks caused by unsafe abortion may be easily accomplished by providing safe abortion service and care.⁹¹⁵ Taking into account the serious risks caused by unsafe abortion, in order to guarantee women’s health and prevent women from undergoing unsafe abortions, the Chinese government should provide comprehensive safe

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911. See Xiaorong, *supra* note 121, at 179 (remarking that although the Chinese government has made family planning a priority, it has not allocated or been able to secure enough funding for reproductive health programs); see also Anika Rahman, *Women’s Rights as International Human Rights: Toward Government Accountability for Women’s Reproductive Rights*, 69 ST. JOHN’S L. REV. 203, 210 (1995) (opining that in order to improve women’s reproductive rights, governments should not only commit themselves to enabling and strengthening women, but should also increase the budgetary resources for improving their status); see also Iyonne Prieto, Note, *International Child Health and Women’s Reproductive Rights*, 14 N.Y.L. SCH. J. INT’L & COMP. L. 143, 179–80 (1993) (reporting that although international family-planning experts recommend developing nations to apportion approximately 5% of the national budget to family-planning programs, in actuality, less than one-half of 1% of the national budget is allocated for family-planning efforts).
 912. See Andreason, *supra* note 910, at 780 (demonstrating that governments believe that if abortion is available, its availability combined with family planning will decrease the overall number of abortions); see also Gregory M. Saylin, Note, *The United Nations International Conference on Population and Development: Religion, Tradition, and Law in Latin America*, 28 VAND. J. TRANSNAT’L L. 1245, 1253 (1995) (quoting a State Department action cable that maintained “access to safe, legal and voluntary abortion is a fundamental right of all women”).
 913. See Chapman, *supra* note 151, at 1171–72 (citing the World Health Organization (WHO), which states that 500,000 women die from pregnancy-related causes annually, and that 25% to 50% occur from the unavailability of family-planning services or access to proper facilities and treatment for abortions); see also Plattner, *supra* note 195, at 1265 (informing that half a million women die yearly because of complications from pregnancies, and another 100,000 die from unsafe abortions); see also Keng, *supra* note 9, at 209 (suggesting that Chinese women are the victims of birth quotas and are subject to forced sterilization, forced IUD insertion, and late-pregnancy abortion, all of which pose serious health risks).
 914. See International Planned Parenthood Federation, *Abortion*, <<http://www.ippf.org/en/What-we-do/Abortion.htm>> (last visited Oct. 24, 2008) (declaring that to avoid the multitudes of yearly maternal deaths, IPPF is committed to advocating for a woman’s right to access safe abortion and abortion-related services, such as counseling and post-abortion care).
 915. See *id.* (advocating that part of woman’s sexual and reproductive rights is the decision about whether and when to have a child, because the death rate that is linked with unsafe abortions is easily preventable).

abortion services to all its citizens.⁹¹⁶ Special care should be provided for poor women in rural areas and for the young, unwed women who cannot afford safe abortions in qualified hospitals.⁹¹⁷ As for the women who have undergone unsafe abortions, relevant departments should offer post-abortion counseling, education, health care, and other family-planning services promptly to help these women recover from the injuries and to avoid repeated abortions under the same conditions.⁹¹⁸

Clearly, the family-planning department is necessary. However, its function should be shifted from implementing the one-child policy through coercive means to "improving the quality of reproductive health service"⁹¹⁹ and providing more education and counseling services about birth control methods.⁹²⁰

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916. See SAFE ABORTION: TECHNICAL AND POLICY GUIDANCE FOR HEALTH SYSTEMS 14 (World Health Org., 2003) (finding that 13% of pregnancy-related deaths are tied to complications from unsafe abortions, and that the largest number of victims are those who do not have access to reproductive health information); see also Bishop, *supra* note 164, at 542–43 (quoting the Cairo Conference's findings that abortion should not be a method of family planning, and that all countries should provide a wide range of comprehensive services without any form of coercion); see also Porter, *supra* note 891, at 207–8 (reasoning that an abortion is similar to any surgical procedure, and the lack of access to physicians capable of safely performing this procedure endangers a woman's life).
917. See PEOPLE'S HEALTH MOVEMENT ET AL., GLOBAL HEALTH WATCH 2005–2006: AN ALTERNATIVE WORLD HEALTH REPORT 137 (2005) (explaining that the poor economic conditions in rural areas undermine women's health and their control over safe sex and childbearing); see also WORLD BANK, FINANCING HEALTH CARE: ISSUES AND OPTIONS FOR CHINA (CHINA 2020 SERIES) 38 (1997) (describing the economic benefits of government targeting health subsidies in poor communities and the need to equalize health disparities between rural and urban areas in China); see also Rebecca J. Cook & Susannah Howard, *Accommodating Women's Differences Under the Women's Anti-Discrimination Convention*, 56 EMORY L.J. 1039, 1061 (2007) (stating that in Uganda, a higher percentage of women classified as poor were resorting to herbalists or self-abortions instead of relying on the safer services provided by a medical professional).
918. See Mona Zulficar, *From Human Rights to Program Reality: Vienna, Cairo and Beijing in Perspective*, 44 AM. U. L. REV. 1017, 1027–28 (1995) (stressing the sensitive nature of abortion section 8.25 of the Programme of Action, which allowed for family-planning services to be implemented but stressed that all women need to be educated to reduce risks caused by unsafe abortions); see also Bishop, *supra* note 164, at 521–24 (describing that the fundamental purpose of the United Nation Population Fund (UNFPA) is to help developing countries create family-planning services and sustainable population growth); see also Bracken, *supra* note 45, at 228 n.213 (clarifying that abortion is not a method of family planning, and that governments should educate their citizens by providing post-abortion counseling and family-planning services to avoid abortion abuse).
919. See Xiaorong, *supra* note 121, at 171 (commenting that China has on numerous occasions downplayed the coercive manner in which they implemented their one-child policy).
920. *Id.*, at 145, 187 (noting that China, as a signatory to the CEDAW, must report to the United Nations on its progress toward ensuring women's access to health care services such as reproductive health care and family planning).

7. International Cooperation

China is the signatory of various international treaties and declarations concerning human rights.⁹²¹ It has the responsibility and obligation to comply with international human rights standards and to readjust or even abandon its domestic policy when abuses of human rights occur under the policy.⁹²²

In order to protect human rights, particularly women's rights, China should actively participate in international population affairs and work with international and regional organizations, non-governmental organizations, and other states to communicate and exchange experiences in the issue of controlling population to acquire more suggestions and recommendations from experts⁹²³ and to develop a program of reproductive health and sex education.⁹²⁴ Through the exchange programs, China could have more opportunities to learn about advanced technologies and effective methods and use them as references and guidelines for domestic measures of birth control.⁹²⁵ Meanwhile, China should cooperate with experienced population control organizations and get more monetary, technological and political sup-

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921. See PHILIP J. ELDRIDGE, *THE POLITICS OF HUMAN RIGHTS IN SOUTH-EAST ASIA* 64 (2002) (enumerating the human rights treaties that China has signed); see also Concepcion, *supra* note 84, at 19 (commenting that although China has signed a number of Human Rights treaties, it does not follow their dictates); see also Lee, *supra* note 720, at 445, ¶ 7–10 (2007) (asserting that despite China's signature and ratification of 21 human rights treaties, it repeatedly hesitates to disclose its compliance with treaties, claiming that full disclosure impugns its sovereignty).
922. See ANN KENT, *CHINA, THE UNITED NATIONS, AND HUMAN RIGHTS: THE LIMITS OF COMPLIANCE*, 194–95 (1999) (noting that articles 55 and 56 of the United Nations Charter require that all members comply with the United Nations human rights norms regardless of whether they were ratified during the International Covenants); see also Peter K. Yu et al., *China and the WTO: Progress, Perils, and Prospects*, 17 COLUM. J. ASIAN L. 1, 26 (2003) (establishing that China as a signatory of key human rights treaties is obligated to comply with them and allow a foreign review of their methods of implementation, including national legislative drafting). See generally Huang, *supra* note 697, at 171–74 (illustrating that China's recent changes in trial rights and national law indicate a greater willingness to comply with standards set by the International community).
923. See Addo, *supra* note 726 at 1427 (noting that there is an interrelationship between economics and human rights).
924. See Tamera Fillingier, Symposium, *The Global Advancement of Women: Barriers and Best Practices: Enhancing Human Security: U.S. Policies and Their Health Impact on Women in Sub-Saharan Africa*, 6 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 337, 351 (2006) (concluding that the most effective and proven measure of reducing unsafe abortions and decreasing pregnancy-related mortalities is to promote family-planning programs and reproductive health education); see also Sadasivam, *supra* note 134, at 344 (attributing a causal relationship between the reduction of infant and maternal mortality and education and expansion of reproductive health programs); see also Serra Sippel, *Achieving Global Sexual and Reproductive Health and Rights*, 35-WTR HUM. RTS. 13, (2008) (reporting that a failure to educate and promote sexual health and reproductive rights has led to a high rate of illness and death worldwide).
925. See Sharon K. Hom, Commentary: *Re-Positioning Human Rights Discourse on "Asian" Perspectives*, 3 BUFF. J. INT'L L. 209, 228–29 (1996) (illustrating the clash of policy between ACWF's fight for individual rights and China's cultural group concept during the 1995 Fourth World Conference on Women); see also Hom, *supra* note 49, at 284–85 (reasoning that in light of Chinese legislation adopting international norms of equality and anti-discrimination, a continued cultural exchange and involvement with NGOs and the U.N. will put their national framework on women's issues more in line with a global perspective); see also Zhang Weiqing, *Family Planning, Protection and Promotion of Human Rights*, Oct. 27, 2006, <http://www.humanrights-china.org/cn/rqlt/rdpl/qwlt/t20061027_169147.htm> (commenting that there seems to be an overall misunderstanding of China's one-child policy, and that with continued interaction, not only can China develop, but the world can better understand their situation).

port.⁹²⁶ As an example, Slovakia developed its abortion law by contacting an international organization and seeking and collecting relevant information about the activities of other states regarding their level of engagement in their citizens' family planning.⁹²⁷ After gaining more experience, Slovakia adjusted its domestic law to better protect women's rights.⁹²⁸ China could follow this example by reforming its own family-planning laws.

If one state has a benign experience, it should share it with other countries without hesitation. Subsequently, the whole world can make progress together on the protection of women's rights. Certainly, China should express its willingness to share its successful experiences with other states.⁹²⁹

Furthermore, the international community should establish interstate compliance and monitoring mechanisms.⁹³⁰ When a government violates an international human rights instru-

926. See Asoka Bandarage, *A New and Improved Population Control Policy?*, 1994 POL. ENV'TS 10 (2006) available at <<http://cwpe.org/node71>> (explaining that it is necessary to look at the more liberal reproductive rights being pushed as well as the more conservative approach in order to implement sustainable methods of population growth); see also Xizhe, *supra* note 6, at 62–63 (commenting that China's population problem is the world's population problem, and the international community should make greater contributions to help solve the problem). See generally Gerrie Zhang, Comment, *U.S. Asylum Policy and Population Control in the People's Republic of China*, 18 HOUS. J. INT'L L. 593–94 (1996) (recognizing that although China's population stabilization policy is of global concern, it must change within the country rather than from international pressure).

927. See FROM ABORTION TO CONTRACEPTION: A RESOURCE TO PUBLIC POLICIES AND REPRODUCTIVE BEHAVIOR IN CENTRAL AND EASTERN EUROPE FROM 1917 TO THE PRESENT, 115–116 (Henry P. David, ed. (with the assistance of Joanna Skilogianis), 1999) (outlining the changes instituted by the Slovak family-planning group in conjunction with the International Planned Parenthood Foundation, which emphasized the importance of contraception and used the media to convey their goals); see also Newman, *supra* note 158, at 292 (illustrating the adoption of certain elements of the IPPF charter in Slovakia's draft legislation on issues concerning abortion and voluntary sterilization). See generally Norbert Ehrenfreund & Lise Breakey, *The Proposed Equal Treatment of the Slovak Republic and the Need for a Public Accommodations Provision*, 24 T. JEFFERSON L. REV. 17, 21–22 (2001) (suggesting that Slovakia's attempt to enter the European Union has made it susceptible to outside pressure and has forced it to re-evaluate its stance on human rights policies).

928. See CRAIG CRAVENS, CULTURE AND CUSTOMS OF THE CZECH REPUBLIC AND SLOVAKIA 44 (2006) (positing that the continued investment in women and their rights is a product of cultural history where women were seen as allies, and education was key); see also Kliment & Cupnik, *supra* note 825, at 365 (noting that the Slovak Family Planning Association has worked with the International Planned Parenthood Federation (IPPF) to protect the right of abortion against the continued ecclesiastical push to eliminate the law); see also Lynn D. Wardle, Symposium, *State Marriage Amendments: Developments, Precedents, and Significance*, 7 FLA. COASTAL L. REV. 403, 416 (2005) (citing articles 51 and 40 of the Constitution of Slovakia as extending some fundamental protections to women at work and ensuring their access to the family-planning program).

929. See *Forced Abortion Still a Reality in China*, Says New Amnesty Report, LIFESITENEWS.COM, May 27, 2005, <<http://www.lifesitenews.com/ldn/2005/may/05052706.html>> (last visited Oct. 26, 2008) (noting that China continues with its coercive abortion measures, and the United Nations Population Fund continues to implicitly support their policies by providing them with funds for family planning).

930. See Geoffrey A. Hoffman, *In Search of an International Human Right to Receive Information*, 25 LOY. L.A. INT'L & COMP. L. REV. 165, 182 (2003) (criticizing the fact that the Convention on the Elimination of All Forms of Discrimination Against Women does not provide for member states' enforcement or accountability measures for violations of women's rights); see also Arthur M. Weisburd, *The Significance and Determination of Customary International Human Rights Law: The Effects of Treaties and Other Formal International Acts on the Customary Law of Human Rights*, 25 GA. J. INT'L & COMP. L. 99, 118 (1996) (noting that the CEDAW has no complaint reporting system for individuals to report member states that violate the rights law); see also Hoq, *supra* note 715, at 677, 678 (declaring that CEDAW is a feeble means of enforcing women's human rights).

ment, it can be regarded as violating an agreement made by all the member states.⁹³¹ And, under this framework, other governments can hold the violating government accountable for its activities.⁹³² Under this monitoring mechanism, one state would accept supervision from other states and relevant organizations and could take advantage of the advice and recommendations provided by them.⁹³³ With supervision, if any state engages in some activities that infringe on women's rights, the multinational organizations and other member states can refuse financial support, technological support or participation in the management of the violating state's program of family planning.⁹³⁴ Through these sanctions, the violating state will be forced to readjust its policy and prevent further violations.

Under no circumstances should forced sterilization and abortion be undertaken as the means used to carry out the one-child policy.⁹³⁵ All governments, relevant international and regional organizations, and governmental and non-governmental organizations are encouraged to strengthen their commitment to promote human rights and health conditions.

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931. See Julie Campagna, *United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights: The International Community Asserts Binding Law on the Global Rule Makers*, 37 J. MARSHALL L. REV. 1205, 1213–14 (2004) (asserting that a violation of an international human rights treaty is like violating binding international law); see also Matas, *supra* note 716, at 103 (remarking that a violation of an international human rights agreement is breaking a promise made to members of the agreement). See generally Christopher C. Joyner, *Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability*, 26 DENV. J. INT'L L. & POL'Y 591, 597 (1998) (expressing that international human rights treaty instruments obligate all government members to follow their legal framework).
932. See Matas, *supra* note 716, at 103 (declaring that a government breaking an international human rights promise can be held responsible by member states); see also Darren Rosenblum, *Internalizing Gender: Why International Law Theory Should Adopt Comparative Methods*, 45 COLUM. J. TRANSNAT'L L. 759, 765 (2007) (noting that member states have enforcement powers stemming from international agreements). See generally Universal Declaration of Human Rights, *supra* note 93, at pmble (proclaiming that member states are obligated to cooperate with enforcement of human rights).
933. See John W. Foster, *Meeting the Challenges: Renewing the Progress of Economic and Social Rights*, 47 U. NEW BRUNSWICK L.J. 197, 198 (1998) (presenting World Trade Organization mandates and World Bank activities as examples of a tool that can be used to affect a policy of international human rights). See generally Laurence R. Helfer, *Forum Shopping for Human Rights*, 148 U. PA. L. REV. 288, 344 (1999) (demonstrating that the system of supervision aids in human rights enforcement); see generally Theodor Meron, *Norm Making and Supervision in International Human Rights: Reflections on Institutional Order*, 76 A.J.I.L. 754, 754 (1982) (emphasizing that the increase in state supervision is a means to affect monitoring of human rights).
934. See *China: One-child Policy Enforcement Hearing*, *supra* note 91 (informing the International Relations Committee that China's alleged coerced abortion practices trigger an exception that allows for halting funds for the United Nations Population Fund); see also Kristi Uhrinek, Note, *Mending Broken Promises: Analyzing the Legality of U.S. Withdrawal of United Nations Population Fund Appropriations and the Need for Binding UN Commitments*, 32 GA. J. INT'L & COMP. L. 861, 863 (2004) (remarking that President George W. Bush withdrew funds for United Nations Population Fund appropriations because he disagreed with China's family-planning program).
935. See International Conference on Population and Development, *supra* note 160 (stressing that all member countries' family-planning policies should discourage and prevent abortion); see also Bishop, *supra* note 164, at 525 (acknowledging that the United Nations has declared that all countries should discourage abortion as part of a nation's family-planning policy); see also Rishona Fleishman, Note, *The Battle Against Reproductive Rights: The Impact of the Catholic Church on Abortion Law in Both International and Domestic Arenas*, 14 EMORY INT'L L. REV. 277, 283–84 (2000) (expressing that international policy decisions made by the United Nations prohibit abortion to be part of a state's family-planning policy).

IX. Conclusion

The reproductive right is intrinsic and essential “to the control of one’s life and to human dignity.”⁹³⁶ China’s one-child policy, as one of the extreme methods used to keep population under control, is not a viable policy because of the human rights violations suffered by women.

Under international law and international treaties, China should refrain from practices that would violate the purpose of these treaties and instead comply with its promises to protect human rights, especially women’s rights. China is obligated to work toward reaching solutions to better control its increasing population while at the same time also respecting human rights. In order to respect women’s and children’s rights in the enforcement of the one-child policy, the Chinese government must take effective measures to prevent such abuse and provide some alternatives, which may include a shift in policy from the emphasis on rigid demographic targets to expanding women’s reproductive rights, improving reproductive health care, and providing counseling services.⁹³⁷ Furthermore, the penalties, whether in the form of pecuniary punishments or in the form of other pressures, must be abandoned.

Moreover, legislative and judicial reforms should accompany the policy shift of the government. Improving the existing laws on the protection of women’s rights, punishing those who abuse human rights, and addressing the dysfunctional courts by protecting judicial independence and enforcing judicial review are necessary to establish a more democratic society. Furthermore, the de-emphasizing of traditional beliefs, the development of the economy, and the establishment of a more reliable and effective social security system will help aid in controlling China’s population.

Along with economic development, China should pay more attention to human rights development, comply with the international human rights law and treaties, and abandon the inhumane policy in the long run so that China can be an economic power and a more humane country.

936. See Sadasivam, *supra* note 134, at 313 (stating that a woman’s reproductive right is significant to human worth and stature).

937. See Li, *supra* note 106 (commenting that China’s domestic law still needs changes to bring the level of human rights protection to that of the standards of international law to adequately prevent human rights abuses).

Appendix

Reported Violations of Women's During Enforcement of China's One-child Policy

Serious violations against women's rights have been reported as a result of the enforcement of China's one-child policy, including forced sterilization; abortion; and other inhumane, coercive methods.⁹³⁸ The following cases are examples where serious abuses of women's rights occurred during the enforcement of China's one-child policy.

I. The Wang Qin Case⁹³⁹

Chen Baigao, a 58-year-old male, had two sons, Chen Zengyi and Chen Zengyu. Zengyi, 35, was married to Wang Qin, 34, and Zengyu was married to Meng Linghong. They were local residents of Xiapo Village, Yitang County, Lanshan District, Linyi, Shandong Province.

Chen Zengyi and his wife had two lawfully authorized daughters. Suspecting an unauthorized pregnancy, on March 22, 2005, local family-planning officials went to Chen Baigao's (their father's) house to discuss Zengyi and his wife's fertility situation. The couple was not at the father's house, so the officials went to their brother's house and arrested his brother's wife and a two-year-old baby. Chen Zengyi, the father and grandfather, was worried about his daughter-in-law and his grandchild, so he went to the detention center. According to his statement, the number of arrested people for family-planning purposes ranged from 40 to 70. Female and male detainees were in the same room and had no privacy. Their families had to deliver food for them because no food was provided. Sometimes no water was supplied, or if it was, it was unhygienic and many detainees became infected by drinking it. Additionally, each detainee was charged 100 RMB per day.

If women whom the local government decides must undergo sterilization or abortion do not appear, their detained relatives will be tortured by the officials. These methods force the relatives to divulge pregnant woman's location or assist in finding the woman.

While in detention, Meng Linghong was beaten by officials. She could not stand the torture and unsuccessfully tried to commit suicide. After 12 days in the detention center, Chen Baigao and Chen Zengyi agreed to be detained in exchange for Linghong's release from detention. Subsequently, Linghong was released. Meanwhile, Wang Qin's mother was also arrested because of the suspicion of her daughter's unauthorized pregnancy.

938. See *Forced Abortion Still a Reality in China*, *supra* note 929 (informing that Amnesty International reported that China's one-child policy has continued to violate women's rights by forcing abortions, sterilizations, and inhumane methods of detention).

939. See *Report on the Serious Violation Against Human Rights of Linyi, Shandong*, BOXUN NEWS, June 11, 2005, <<http://www.peacehall.com/news/gb/china/2005/06/200506111128.shtml>> (detailing the case of Wang Qin from the Shandong Province, whose family was suspected of disobeying the family-planning policy).

On April 4, local officials found Wang Qin and forced her to undergo sterilization without any court order. The day she was sterilized, all her relatives in the detention center were released.

II. The Li Baoxiang Case⁹⁴⁰

Cao Yunliang, a 31-year-old male, was married to Zhao Hongqin, 31. Yunliang's family members were Cao Guifa, his 60-year-old father; Chen Pingying, his 59-year-old mother; Yunzhi, his 35-year-old brother; and Li Baoxiang, Yunzhi's 35-year-old wife. They were villagers of Xiapo, Yitang, Lanshan, Linyi of Shandong Province.

Yunzhi and his wife had two lawfully authorized daughters; however, Li Baoxiang had an unauthorized pregnancy. The local officials could not find Yunzhi and his wife, so they arrested their relatives to coerce the pregnant couple into coming back and undergoing an abortion. Their relatives were tortured in the family-planning detention center. The subsequent circumstances were similar to those of the Wang Qin case.

III. The Li Shimei Case⁹⁴¹

Li Shimei died because of the unsafe abortion she was forced to undergo by family-planning officials.

Li Shimei, coming from Yaohai District of Hefei, An Hui Province, was arrested and taken to the ShuGuang Hospital by the family-planning officials of Tongling Street, Yaohai District. She was required to undergo an abortion. Her relatives insisted that they accompany her to the surgery but were denied. Li refused to accept an abortion and escaped from the hospital. On the morning of the second day she was captured and returned to detention in the hospital. On that day her family answered a call from the family-planning officials alerting them that Li Shimei was in danger of dying. When the family arrived at the hospital, Li Shimei had already died. According to her husband Yu Daoshun, he could not determine what kind of torture had been imposed on his wife, but torture was obvious judging by the condition of the corpse.

IV. The Ge Xufeng Case⁹⁴²

Ge's wife worked outside of the village. In order to encourage Ge's wife to come back and accept sterilization, Ge's relatives were detained and not released until Ge's wife came back and was sterilized.

940. See *id.* (discussing the case of Li Bao-Xiang from Shandong Province, whose relatives were detained because of suspicion that she was pregnant without authorization).

941. See Steven Ertelt, *China Woman Who Died Fleeing Forced Abortion May Have Been Beaten*, LIFE NEWS.COM, July 4, 2006, <<http://www.lifenews.com/nat2394.html>> (reporting that the pregnant Li Shimei died in the Hefei Shuguang Hospital after trying to flee from family-planning officials).

942. See *Violence in Enforcing Family Planning in Linyi, Shandong*, CHINESE HUMAN RIGHTS DEFENDERS, June 11, 2005, <http://crd-net.org/Article/Class9/Class11/200506/20050611195219_427.html> (illustrating the case of Ge Xufeng where family-planning officials detained relatives to force the wife to surrender to sterilization).

V. The Wang Changjian Case

Wang Changjiang, a 35-year-old male, and his wife Huang Baofen, 34, were both villagers of Zhongshan Qian, Shuanghou, Yina, Linyi. Wang had two lawfully authorized daughters. After giving birth to the second daughter, his wife was forcibly sterilized, and the sterilization resulted in serious injury to her.⁹⁴³

VI. The Mao Hengfeng Case⁹⁴⁴

Mao Hengfeng, a Shanghai resident, had twin daughters. She became pregnant again and was required to undergo a procedure to abort the pregnancy at five months. Mao was detained in a psychiatric hospital and was forced to take medicines and an injection. The child lived but was mentally retarded as a consequence of the attempted abortion procedure.

VII. The A Jiao Case⁹⁴⁵

On December 31, 2004, A Jiao and A Wei held a wedding ceremony. Jiao was 20 days short of reaching the legal marriage age at that time, so the couple registered on January 20, 2005, which was 19 days before the expected birth date of their child. When they registered, the family-planning officials insisted the pregnancy was out of plan and should be aborted. A Jiao was then forced to go to Siming Hospital of Xiamen and abort the child.

VIII. The Li Minglai Case

Li Min Lai⁹⁴⁶ admitted to “aggressively enforcing the one-child policy in her workplace.”⁹⁴⁷ She said at one time she even “camped out in front of a female employee’s home”⁹⁴⁸ and forced her to abort her seven-month-old fetus.⁹⁴⁹

943. See *id.* (listing the case of Wang Changjiang as one of the cases where family-planning officials harassed, unlawfully detained, and forced sterilization upon Chinese families).

944. See *Shanghai Was the Cook up Charges, Mao Was Sentenced to Two-and-a-Half Years in Prison*, HUMAN RIGHTS IN CHINA, Jan. 16, 2007, <<http://gb.hrichina.org/gate/gb/big5.hrichina.org/ibase644-base12-L3B1YmxpYw--/-base12-Y29udGVudHM-/base8-cHJlc3M-?-base48-cmV2aXNpb24lNWZpZD0xMzcyMiZpdGVtJTVmaWQ9MTM3MjE->> (declaring that Mao was held in a mental hospital, where the government attempted to abort her child because of her violation of the one-child policy).

945. See Yi Lin, *Tragedies Caused by Forced Abortion*, EPOCH TIMES, July 8, 2006, available at <<http://www.epoch-times.com/gb/6/7/8/n1377940p.htm>> (announcing that government planning officials forced Jiao to have an abortion because she was not of legal marriage age).

946. Li Min Lai is an ex-government official.

947. See *Forced Abortion Still a Reality in China Says New Amnesty Report*, *supra* note 929 (discussing Amnesty International’s report that forced abortions are still prevalent in China and are being enforced in many workplaces).

948. See *id.* (commenting on an ex-government employee’s actions in helping to personally enforce China’s one-child policy).

949. See *id.* (describing how Li Min Lai eventually coerced a woman into aborting her child).

IX. The Wang Liping Case⁹⁵⁰

Wang Liping was a female resident of Diaoyutai, Zhengzhou, Henan. Her boyfriend did not have much money and could not afford a wedding ceremony, so Liping got pregnant out of wedlock. At 6 p.m., on May 31, 2005, she was stopped by someone who claimed to be a family-planning official who forced her to go to the Laoya Chen Clinic to abort her pregnancy at seven months. Without any examination and without any consent, she was forcibly injected with some sort of medicine. The child was born alive at 3 a.m. on June 2, 2005, and subsequently died. Liping was denied contact with her family until June 3.

X. The Sun Zhonghua Case⁹⁵¹

Sun Zhonghua, a 34 year-old female of Xiapu County, was beaten to death for rejecting a forcible sterilization.⁹⁵² Sun had children authorized in accordance with the local family-planning policy and had no intention of having more children, but the local officials still insisted she become sterilized. On April 16 and 19, 2005, she went to the local clinic to have a routine health check.⁹⁵³ The doctor, knowing that she had serious heart disease and high blood pressure, certified that she should be exempt from sterilization because of her health condition. However, on May 16, one month after her routine checkup, she was asked to meet with the local family-planning official.⁹⁵⁴ That afternoon, the official reported her death after the meeting. Her family found a hole in the face of the corpse and some evidence that she had been beaten all over her body. The officials, however, said Sun committed suicide by jumping from the high building and stressed that no one had beaten her.⁹⁵⁵ According to forensics, the hole in the face of the corpse was not caused by jumping, but as a result of being beaten by some tools. In the afternoon of May 16, the officials rushed to the hospital to attempt to steal the corpse and burn it, but they were stopped by Sun's family.⁹⁵⁶

950. See Feng Changle, *Woman Forced to Abort Fetus at Seven Months*, EPOCH TIMES, June 22, 2006, <<http://en.epochtimes.com/news/6-6-22/43051.html>> (detailing Wang Liping's kidnapping and forced abortion at the Laoyachen Clinic seven months into her pregnancy).

951. See Lao Gai Research Foundation, *Sun Zhonghua Was Beaten to Death for Rejecting the Forced Sterilization*, June 11, 2005, <<http://www.laogai.org/news2/newsdetail.php?id=591>> (indicating that litigation commenced on a case in China where a woman was beaten to death).

952. See *id.* (reporting that Sun Zhonghua was beaten to death because she would not accept the government's attempt to sterilize her).

953. See *id.* (acknowledging that Sun Zhonghua had no intention of having more children and went to a doctor to see if it would be safe for her to be sterilized).

954. See *id.* (reporting that even though Sun Zhonghua was exempt from sterilization, she was still asked to meet with a family-planning official).

955. See *id.* (reporting that the Chinese government said Sun had jumped to her death, and that nobody had beaten her).

956. See *id.* (revealing that officials attempted to steal Sun's body from the morgue to cremate it but were stopped by Sun's family).

XI. The Tian Mingjian Case

Tian Mingjian, a man who was first lieutenant of the Beijing military region, shot six higher-ranking leaders in the military region to death with an AK-47 and then broke into Jian Guo Men, Beijing, an area where most foreign embassies are located, to shoot hundreds of policemen. Thirteen pedestrians were shot to death, including one diplomat, and more than 30 people were injured in this incident. Tian's reason for the mass shooting was that his wife had died during a forcible abortion.⁹⁵⁷

957. See *Ex-Chinese Military Officers Protest Over "Work, Life Issues"*—HK Rights Group, BBC NEWS, BBC MONITORING ASIA PACIFIC, June 28, 2008, available at <<http://www.hkhkhk.com/engpro/messages/2410.html>> (reporting that Tian Mingjian killed 23 people in a Beijing embassy because his wife had died from a forced abortion).

From Shrimps and Dolphins to Retreaded Tyres: An Overview of the World Trade Organization Disputes, Discussing Exceptions to Trading Rules

Colm Patrick McNerney*

The issue of how far a member state of the World Trade Organization (WTO) can deviate from the organization's trade liberalization rules repeatedly comes to the fore. If one were to travel clockwise around the earth's sphere, the various ways in which the exceptions to the General Agreement on Tariffs and Trade (GATT) (and the General Agreement on Trade in Services (GATS))¹ have arisen are fascinating: eco-conscious fishermen using shrimp nets fixed with turtle excluder devices (TEDs) on U.S. seas; products containing asbestos fibers being prohibited in France; online gambling sites run from the beaches of Antigua banned on moral grounds by the United States; and, most recently, Brazil interdicting foreign retreaded tyres to combat the spreading of dengue and malaria.

Article XX of the GATT allows for exceptions to its most-favored nation, national-treatment obligation and other rules,² and article XIV of the GATS does much the same. These exceptions include measures to protect the environment and measures to safeguard human health.³ The WTO's Dispute Settlement Body's (DSB's) goal is to determine whether the purpose behind these measures really is what the member utilizing it says it is, or if they are in fact disguised restrictions on trade.⁴

1. See GATT art. 14, 20, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (establishing the general exceptions to the rules imposed by the GATT and the GATS for protection of national security, order and the general public).
2. See *id.* (expressing the exceptions to the most-favored-nation treatment and national treatment on internal taxation and regulation articles of the GATT); see also OFFICE OF THE U.S. TRADE REP., THE G.A.T.T. URUGUAY ROUND AGREEMENTS: REPORT ON ENVIRONMENTAL ISSUES, § XX (Aug. 1999) (describing how article XX exceptions are used mostly for custom unions and free-trade areas); see also Todd Stedeford & Amanda S. Persad, *The Influence of Carcinogenicity Classification and Mode of Characterization on Distinguishing "Like Products" Under Article III:4 of the GATT and Article 2.1 of the TBT Agreement*, 15 N.Y.U. ENVTL. L.J. 377, 394–95, 404–05 (2007) (explaining how article XX allows for the prohibition of goods that would not be allowed under articles I and III).
3. See, e.g., *Turtle Island Restoration Network v. Evans*, 284 F.3d 1282, 1289 (Fed. Cir. 2002) (citing article XX of GATT to justify public law 16 U.S.C.S. section 1537 as an environmental conservation exception that prohibits the importation of shrimp harvested by means that could endanger sea turtles); see also *Clouds of Toxic Dust Blow Through the WTO*, 15–24 MEALEY'S LITIG. REP. ASB. 18, N6–N7 (2001) (referring to a case that upheld France's right to ban asbestos-containing products as a human health risk exception under article XX of GATT).
4. See Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶¶ 225–26, WT/DS332/AB/R (Dec. 3, 2007) (hereinafter AB Report, *Brazil—Tyres*) (explaining how the WTO DSB works to resolve disputes to the benefit of all its members).

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This article will begin by discussing how dispute settlement at the WTO operates before outlining how its jurisprudence has developed in reviewing the article XX cases before it. The relevant examples all illustrate “the tensions that may exist between, on the one hand, international trade and, on the other hand, public health and environmental concerns.”⁵

I. Introduction to the WTO DSB

The WTO is an international organization that oversees a large number of agreements defining the “rules of trade” between its member states.⁶ Its main function is “to ensure that trade flows as smoothly, predictably and freely as possible.”⁷ It was formed on January 1, 1995, to replace the GATT, which itself was a series of post-war treaties aimed to abolish international trade barriers.⁸ The principles and agreements of the GATT were adopted by the WTO, which was charged with administering and extending them.⁹ As of June 1, 2008, the WTO has 153 members.¹⁰ Its headquarters are located in Geneva, Switzerland. The WTO itself sees its

5. See *id.* at ¶ 210 (Dec. 3, 2007) (noting that there are no clear and concise answers to questions about international trade but, rather, a balancing of interests that the AB (the WTO appellate court) must weigh).
6. See World Trade Organization, The WTO . . . In brief, available at http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm (last visited Aug. 27, 2008) (displaying a brief background and description of the World Trade Organization).
7. See KAMAL FATEHI, MANAGING INTERNATIONALLY: SUCCEEDING IN A CULTURALLY DIVERSE WORLD 76 (Sage Publications 2008) (stating that the purpose and functions of the WTO and GATT are to open up the restrictions on trade and resolve trade disputes); see also World Trade Organization, *supra* note 6 (last visited Aug. 27, 2008) (announcing the WTO’s main purpose as being the heart of the multinational trading system in administering trade regulations); see also BBC News, Biz: The Economy: Economy Reports, *The Guardian of Free Trade*, May 18, 1998, available at http://news.bbc.co.uk/2/hi/special_report/1999/11/99/battle_for_free_trade/96032.stm (remarking on the WTO’s 50-year history of breaking down barriers between countries).
8. See Mohammad F. Nsour, *Regional Trade Agreements in the Era of Globalization: A Legal Analysis*, 33 N.C. J. INT’L L. & COM. REG. 359, 360–62 (2008) (noting GATT’s main purpose is to facilitate world trade and reduce international trade barriers to induce free trade); see also Lisa C. Thompson & William J. Thompson, *The ISO 9000 Quality Standards: Will They Constitute a Technical Barrier to Free Trade Under the NAFTA and the WTO?*, 14 ARIZ. J. INT’L & COMP. L. 155, 176–78 (1997) (acknowledging the movement toward globalization through trade agreements such as GATT and the WTO that attempt to abolish trade barriers); see also Roger Cohen, *Grumbling Over GATT*, N.Y. TIMES, July 3, 1993, available at <http://query.nytimes.com/gst/full-page.html?res=9F0CEFD1439F930A35754C0A965958260> (announcing GATT’s many years of success in increasing international trade by reducing individual countries’ trade tariffs).
9. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, art. III §§ 1–5, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 art. III, §§ 1–5 (1994) (hereinafter Final Act) (establishing the functions of the WTO in governing the principles and rules of GATT); see also S.G. Sreejith, *Public International Law and the WTO: A Reckoning of Legal Positivism and Neoliberalism*, 9 SAN DIEGO INT’L L.J. 5, 14–15 (2007) (commenting on the many different views of the WTO and its job to facilitate the enforcement of GATT’s agreements); see also William J. Kovatch, Jr., Comment, *Joining the Club: Assessing Russia’s Application Accession to the World Trade Organization*, 71 TEMP. L. REV. 995, 998–1001 (1998) (examining the reason for the WTO’s formation and the benefits it provides in strengthening the GATT and other multinational trade agreements).
10. See *Cape Verde Becomes WTO’s 153rd Member*, CHINA POST, July 24, 2008, available at <http://www.chinapost.com.tw/business/africa/2008/07/24/167009/Cape-Verde.htm>.

agreements as “the legal ground-rules for international commerce.”¹¹ It encourages trade between member nations, administers global trade agreements and resolves disputes when they arise.¹²

The Ministerial Conference, which meets every two years, is the highest body of the WTO.¹³ It elects the Director-General and oversees the work of the General Council.¹⁴ It also negotiates “trade rounds,” which generally attempt to reduce trade restrictions in any given area.¹⁵ The Sixth Ministerial Conference was held in Hong Kong in December 2005.¹⁶ The General Council runs the day-to-day business of the organization.¹⁷ It comprises ambassadors from member states who serve on various committees.¹⁸ One such committee is the DSB.¹⁹

The DSB is the agora where international trading disputes can be played out.²⁰ It was created as part of the Understanding on Rules and Procedures Governing the Settlement of Dis-

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11. See World Trade Organization, *The WTO . . . in Brief*, *supra* note 6, (stating the WTO’s goals).
 12. See *Menotti v. Seattle*, 409 F.3d 1113, 1120 (9th Cir. 2005) (detailing the origin and regular functions of the WTO); see also *Hudson v. Craven*, 403 F.3d 691, 693 (9th Cir. 2005) (describing how the WTO is an international organization that deals with the rules of trade between nations); see also *Goss Intern. Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355, 358 (8th Cir. 2007) (explaining the dynamics of the WTO as they relate to its member nations).
 13. See World Trade Organization, *Ministerial Conferences*, available at http://www.wto.org/english/thewto_e/minist_e/minist_e.htm (last visited Sept. 8, 2008) (discussing the Ministerial Conference, the top decision-making body of the WTO).
 14. See World Trade Organization, *WTO Director-General: Pascal Lamy*, available at http://www.wto.org/english/thewto_e/dg_e/dg_e.htm (last visited Sept. 8, 2008) (detailing the job of current Director-General Pascal Lamy, formerly the EU’s Trade Commissioner).
 15. See World Trade Organization, UNDERSTANDING THE WTO, *The GATT Years: from Havana to Marrakesh*, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last visited Sept. 8, 2008) (defining “trade rounds,” which have led to the biggest steps forward in international trade).
 16. See World Trade Organization, WTO OMC HONG KONG ’05, *The Sixth WTO Ministerial Conference*, available at http://www.wto.org/english/thewto_e/minist_e/min05_e/min05_e.htm (detailing the daily schedule of events at the Sixth Ministerial Conference in Hong Kong, China, during December 2005).
 17. See World Trade Organization, *General Council*, available at http://www.wto.org/english/thewto_e/gcouncil_e/gcouncil_e.htm (describing how the General Council carries out specific tasks assigned by the WTO); see also Ecumenical Advocacy Alliance, *WTO General Council*, available at http://www.e-alliance.ch/wto_gc.jsp (discussing how the General Council runs the WTO in the two-year intervals between Ministerial Conferences).
 18. See Thomas J. Dillon, Jr., *The World Trade Organization: A New Legal Order for World Trade?*, 16 MICH. J. INT’L L. 349, 362 (1995) (discussing the structure of the General Council); see also Jeffrey Michael Smith, *Three Models of Judicial Institutions in the International Organizations: The European Union, the United Nations, and the World Trade Organization*, 10 TULSA J. COMP. & INT’L L. 115, 143 (2002) (describing the representation each member nation of the WTO receives).
 19. See James Bacchus, *Lone Star: The Historic Role of the WTO*, 39 TEX. INT’L L.J. 401, 407–08 (2004) (describing the process for the WTO’s use of the DSB).
 20. See Christopher Duncan, *Out of Conformity: China’s Capacity to Implement World Trade Organization Dispute Settlement Body Decisions after Accession*, 18 AM. U. INT’L L. REV. 399, 445 (2002) (discussing the early success of the WTO and the DSB); see also James Thuo Gathii, *Foreign Precedents in the Federal Judiciary: The Case of the World Trade Organization’s DSB Decisions*, 34 GA. J. INT’L & COMP. L. 1, 8 (2005) (describing how the DSB’s dispute settlement decisions are binding on the parties with respect to resolving disputes between them); see also Erin N. Palmer, *The World Trade Organization Slips Up: A Critique of the World Trade Organization’s Dispute Settlement Understanding Through the European Union Banana Dispute*, 69 TENN. L. REV. 443, 455 (2002) (providing the origin of the WTO’s DSB).

putes,²¹ the legal text of the WTO dealing with the resolution of trade disputes.²² It is charged with securing the satisfactory settlement of international trade disputes.²³ It is a rule-oriented system designed to satisfy the rights and obligations of members under the WTO agreements.²⁴ Members can challenge each other's laws and regulations as violations of WTO rules in the DSB arena.²⁵ A dispute moves from initial mandatory attempts at conciliation to adjudication via the establishment of a three-man panel whose decision may be appealed to the Appellate Body (AB).²⁶ At all stages there is the alternative of arbitration.²⁷ A panel or AB report is automatically adopted by the WTO members voting in the DSB unless there is a unanimous consensus against it.²⁸ The DSB then monitors a state's compliance with the

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21. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, art. II, ¶ 1, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) (hereinafter DSU) (establishing the DSB as the arbiter of disputes arising from WTO rules and regulations).
 22. See generally *id.* (restructuring the GATT dispute settlement procedures and examining the revised WTO rules for the resolution of international trade disputes).
 23. See DSU at art. III, ¶ 4, 1227 (mandating that the DSB's rulings should result in satisfactory settlements in accordance with WTO rules).
 24. See *id.* (asserting that the purpose of the DSU is to provide members with security by preserving their rights and obligations under WTO agreements).
 25. See *id.* at art. XXIII, ¶ 1, 1241 (providing WTO members with recourse in situations where they believe another member has violated a trade agreement); see also Anja Lindroos & Michael Mehling, *Dispelling the Chimera of "Self-Contained Regimes" International Law and the WTO*, 16 Eur. J. Int'l L. 857, 860 (2005) (interpreting article 23.1 of the DSU to mean that only disputes involving trade issues under a WTO agreement may be heard by the DSB); see also Understanding the WTO: Settling Disputes; A Unique Contribution, at ¶ 2, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm (last visited Aug. 29, 2008) (defining a dispute as a situation where one country adopts a trade policy measure other WTO members believe violates a WTO agreement).
 26. See DSU at art. XVII, ¶ 1, 1236 (creating the AB to hear appeals from panel reports); see also Tania Voon & Alan Yanovich, *Completing the Analysis in WTO Appeals: The Practice and its Limitations*, 9 J. INT'L ECON. L. 933, 935 (2006) (identifying the WTO dispute settlement system as a two-tiered adjudication system where appeals are reviewed by the AB); see also John M. Jennings, Comment, *In Search of a Standard: "Serious Damage" in the Agreement on Textiles and Clothing*, 17 NW. J. INT'L L. & BUS. 272, 304 (1996) (noting that the DSB has a panel to hear WTO disputes and an AB to hear appeals from that panel).
 27. See DSU at art. XXV, ¶ 1, 1242 (discussing arbitration as a speedy and efficient alternative dispute settlement mechanism).
 28. See *id.* at art. XVI, ¶ 4, 1235 (declaring that panel reports will be adopted by the WTO unless a consensus exists against the policy); see also Mark L. Movsesian, *Sovereignty, Compliance, and the World Trade Organization: Lessons from the History of Supreme Court Review*, 20 MICH. J. INT'L L. 775, 786 (1999) (explaining the reverse consensus rule which calls for the WTO's automatic adoption of Panel and Appellate Board reports unless there is a consensus against it); see also C. O'Neal Taylor, *Impossible Cases: Lessons from the First Decade of WTO Dispute Settlement*, 28 U. PA. J. INT'L ECON. L. 309, 313 (2007) (summarizing the WTO's automatic adoption of panel and AB reports unless there is a negative consensus).

report.²⁹ The complainant state may request the suspension of concessions or obligations toward the state concerned if it fails to comply.³⁰

Panel members are selected by the disputing WTO nations, whereas the AB is a full-time standing body composed of seven members appointed by the DSB, three of whom sit on any given case.³¹ The AB has its own staff that is functionally separate from the rest of the WTO Secretariat.³² Contrary to panels, the proceedings of the AB are governed by detailed working procedures.³³ The majority of these rules were established by the AB and not the WTO membership.³⁴ Appeals to the AB are limited to issues of law covered in the panel report and legal interpretations developed by the panel.³⁵ The AB may uphold, modify or reverse the legal findings and conclusions of the panel.³⁶ Both panel and AB proceedings are confidential; however,

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29. See DSU at art. XXI, ¶ 6, 1239 (informing WTO members that the DSB will survey the implementation of an adopted recommendation or ruling).
 30. See *id.*, at art. XXII, ¶ 1, 1239 (stating that the suspension of concessions or other obligations is available, temporarily, if the recommendations from an adopted report cannot be implemented in a reasonable amount of time); see also Panel Report, *United States—Import Measures on Certain Products from the European Communities*, ¶ 6.23, WT/DS165/R (July 17, 2000) (commenting on how the DSB will, in order to restore the balance of rights under the WTO Agreement, allow the temporary suspension of concessions as a last resort). See generally ANTONIO CASSESE, *INTERNATIONAL LAW* 223–225 (Oxford 2d ed. 2005) (2001) (summarizing WTO dispute settlements).
 31. See DSU at art. XVII, ¶ 2, 1236 (codifying that the seven members of the AB each serve a four-year term, renewable only once); see also Appellate Body Report, *Working Procedures for Appellate Review*, Rule 4, WT/AB/WP/5 (Jan. 4, 2005) (describing the “exchange of views” system, whereby all seven members of the AB discuss a case before the final report is deliberated by the three members actually assigned).
 32. See Appellate Body Report, *Annual Report for 2005*, 2, WT/AB/5 (Jan. 25, 2006) (mentioning that, as of 2005, the AB had a Secretariat of more than a dozen people providing it with legal and administrative support); see also Claus-Dieter Ehlermann, *Experiences from the WTO Appellate Body*, 38 *TEX. INT’L L.J.* 469, 476 (2003) (describing the AB Secretariat as a functionally separate entity working under the direct authority of the AB).
 33. See Appellate Body Report, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, ¶ 39, WT/DS138/AB/R (May 10, 2000) (declaring that the AB has broad legal authority to craft procedural rules, so long as those rules do not conflict with any provision of the DSU); see also Dukgeun Ahn, Book Note, *The Long Road Ahead: Dispute Settlement in the GATT/WTO*, 20 *MICH. J. INT’L L.* 413, 414 (1999) (explaining that the AB drafted and adopted its own detailed working procedures independently of the WTO Secretariat); see also Chi Carmody, *Of Substantial Interest: Third Parties Under GATT*, 18 *MICH. J. INT’L L.* 615, 639 (1997) (discussing the importance of the working procedures in providing a more definite role for third parties in WTO disputes).
 34. See James McCall Smith, *WTO Dispute Settlement: The Politics of Procedure in Appellate Body Rulings*, 2003 *WORLD TRADE REV.* 2(1), 65, 67, 78 (positing that the AB has crafted broad procedural powers for itself by utilizing its autonomy under the DSU); see also Shoaib A. Ghias, *International Judicial Lawmaking: A Theoretical and Political Analysis of the WTO Appellate Body*, 25 *BERKELEY J. INT’L L.* 534, 542 (2006) (reiterating that the AB has been granted wide discretion in developing its own detailed working procedures).
 35. See DSU at art. XVII, ¶ 13, 1237 (defining the limited circumstances in which the AB may exercise appellate review).
 36. See *id.* at art. XVII, ¶ 6, 1236 (mandating that the AB may affirm, change or reverse entirely the decisions of a WTO panel).

some members maintain the practice of releasing their submissions to the public.³⁷ Although initial attempts at conciliation are mandatory, any settlement must be notified to the DSB in case another violation would become known that affects another member, who itself may then begin a dispute-settlement process.³⁸ This demonstrates that the “shadow of the adjudicative procedure”³⁹ is present even at the negotiation stage.

Considering that AB reports are binding on all 153 members of the WTO and generally have been accepted by the same, and that the preponderance of recent trading disputes have found their way before either the panel stage or the AB,⁴⁰ it wields more power than perhaps any other international court.

II. The Necessity Test

Both the GATT and its services equivalent, the GATS, aim to lower the barriers of trading between WTO members: their principal difference is that one agreement relates to goods and the other to services.⁴¹ Increased trade liberalization may be the goal of the WTO, but the

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37. See Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Annex A, ¶ 3, WT/DS285/R (Nov. 10, 2004) (hereinafter Panel Report, *United States—Gambling*) (incorporating a policy into the working procedures for a particular dispute settlement that allows for the publication of otherwise confidential submissions); see also Whitney Debevoise, *Access to Documents and Panel and Appellate Body Sessions: Practice and Suggestions for Greater Transparency*, 32 INT'L LAW. 817, 821–22 (1998) (clarifying that, although the DSU contains confidentiality provisions, those provisions do not prevent members from publicizing their own submissions or those of other willing members); see also Terence P. Stewart & Mara M. Burr, *The WTO's First Two and a Half Years of Dispute Resolution*, 23 N.C. J. INT'L L. & COM. REG. 481, 506 (1998) (naming the United States as one WTO member to have officially adopted a policy of disclosing its WTO submissions).
 38. See Phoenix X.F. Cai, *Between Intensive Care and the Crematorium: Using the Standard of Review to Restore Balance to the WTO*, 15 TUL. J. INT'L & COMP. L. 465, 479–80 (2007) (comparing the provisions of the DSU to those of the GATT and noting that disputing members still are required to seek initial conciliations before bringing a formal action); see also Taylor, *supra* note 28, at 313 (mentioning that settlements reached by WTO members during the consultation phase must be reported to the DSB); see also Petko D. Kantchevski, Note and Comment, *The Differences Between the Panel Procedures of the GATT and the WTO: The Role of GATT and WTO Panels in Trade Dispute Settlement*, 3 BYU INT'L L. & MGMT. REV. 79, 87–88 (2006) (explaining that WTO members are still required to report settlements reached outside of the WTO as a means of protecting the rights of potentially affected third parties).
 39. See Christoph U. Schmid, A Theoretical Reconstruction of WTO Constitutionalism and its Implications for the Relationship with the EU, EUI Working Paper LAW No. 2001/5 (implying that the WTO acts as an overseer by requiring its members to report all dispute settlements, whether reached with or without the aid of a WTO panel); see also JOHN MERRILLS, *The Means of Dispute Settlement*, in INTERNATIONAL LAW 533, 546–47 (Malcolm D. Evans ed., 2006) (arguing that the WTO eliminates the free choice of means inherent to the dispute settlement process and replaces it with a mandatory step-by-step procedure).
 40. See Appellate Body Report, *Working Procedures for Appellate Review*, *supra* note 31, at ¶ 20(1) (outlining the procedures for commencing an appeal from a panel decision); see also Appellate Body Report, *Annual Report for 2005*, *supra* note 32, at 17–19 (providing statistical data showing the large number of disputes brought before the WTO since its inception in 1995).
 41. See Panel Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*, ¶ 9.1, WT/DS34/R (May 31, 1999) (asserting that the purpose of the GATT is to facilitate trade between the territories); see also ASIF H. QURESHI, INTERPRETING WTO AGREEMENTS 99–100 (2006) (finding one objective of the WTO is to expand trade between members); see also Daniel D. Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L. J., 37, 81 (2007) (declaring that the WTO assists countries to reduce their trade barriers).

organization understands that competing interests should be recognized.⁴² This explains the exceptions to the general trading rules found in article XX of the GATT and article XIV of the GATS.⁴³ Measures that violate WTO law may be allowed if they are necessary to protect, *inter alia*, human, animal or plant life or health, or if they are necessary to protect public morals.⁴⁴ In practice, these exceptions come into play once a member's measure has been held to be in violation of a GATT or GATS provision.⁴⁵ Depending on which exception is invoked, a measure may or may not have to be "necessary" to achieve its purpose. Some of the exceptions to article XX require a showing of necessity, whereas others require a measure to be "relating to" or "essential to" a particular aim.⁴⁶ If this "necessary" element is in the relevant exception, the panels and AB will apply a necessity test to ascertain if the measure can be exempted.⁴⁷

III. The Case Law Under Article XX of the GATT and Article XIV of the GATS

A. Early Disputes: Cigarettes, Dolphins and Patent Protection

GATT panels generally gave short shrift to trade-restrictive measures.⁴⁸ If a reasonably alternative option were available, then the measure at issue could not invoke an article XX

42. See PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS* 86–87 (2005) (finding that the policy objectives of the WTO include expansion of goods and services, and that the WTO must take into account the need for preservation of the environment and the needs of developing countries); see also Panel Report, *India—Quantitative Restrictions on Imports of Agricultural, Textile, and Industrial Products*, ¶ 7.2, WT/DS90/R (Apr. 6, 1999) (concluding that the WTO rules promote trade liberalization and recognize the importance for specific exceptions to address concerns in developing countries).

43. See MITSUO MATSUSHITA, THOMAS J. SCHOENBAUM & PETROS C. MAVROIDIS, *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE AND POLICY* 797–801 (2d ed. 2006) (analyzing article XX, the general exceptions under the GATT).

44. See Panel Report, *United States—Standards for Reformulated and Conventional Gasoline*, ¶ 76, WT/DS2/R (Jan. 29, 1996) (stressing that the requirements under the rule were necessary to protect human, animal and plant life or health); see also Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 159, WT/DS58/AB/R (Oct. 12, 1998) (hereinafter AB Report, *United States—Shrimp*) (explaining that specific exceptions are granted in order to protect the policy of the WTO and to balance the rights and obligations of its members); see also AUTAR K. KOUL, *GUIDE TO THE WTO AND GATT* 311–13 (2005) (indicating that a country invoking an exception under article XX must demonstrate that the challenged policies are designed to protect human, animal or plant life).

45. See VAN DEN BOSSCHE, *supra* note 42, at 598–623 (giving a brief synopsis of the nature and function of article XX of the GATT 1994).

46. See *id.* at 603, 610 (arguing that some measures are necessary for the protection of human, animal or plant life, or health to allow a general exception to the GATT, while other measures need relate to only the societal value they pursue).

47. See Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, *supra* note 44, at 22, WT/DS2/AB/R (Apr. 29, 1996) (hereinafter AB Report, *United States—Gasoline*) (concluding that in order to justify an exception, the party must satisfy a two-tiered test imposed by the introductory clauses of article XX); see also AB Report, *United States—Shrimp*, at ¶ 39 (finding that the purpose of the two-tiered necessity test is to ensure compliance with GATT policies and to prevent unjustifiable discrimination among countries); see also VAN DEN BOSSCHE, *supra* note 42, at 603 (setting forth a two-tiered test for determining whether a measure otherwise inconsistent with GATT obligation can be justified).

48. See KOUL, *supra* note 44, at 9 (reiterating that trade privileges granted by a member country must be accorded to all other member countries).

exception.⁴⁹ So in the case of *Thailand—Cigarettes*,⁵⁰ Thailand's import restrictions on cigarettes to protect human health (an allowed exception under article XX(b)) were not "necessary" as it had the alternative of reducing advertising to curb demand for cigarettes.⁵¹ The word "necessary" contained in article XX(b) was interpreted as meaning a measure was necessary only if there were no alternative GATT-consistent or less inconsistent measure.⁵² The United States in *Tuna Dolphin*⁵³ similarly failed the necessity test because the panel held that it had been unable to prove that there were not other less trade-restrictive measures to protect dolphins than banning imports of tuna from countries that used nets that accidentally also caught dolphins in them.⁵⁴ The view by GATT panels was that because article XX provisions were exceptions to the GATT, they should be construed narrowly.⁵⁵

The panel in *US—Section 337 of the Tariff Act of 1930*⁵⁶ relaxed the above rationale to a degree. It looked at a U.S. statute that basically allowed the U.S. government to refuse to import goods if they had been subject to unfair competition during importation.⁵⁷ This, the

49. See Panel Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 3.316, WT/DS135/R (Sept. 18, 2000) (stating that there must be a lack of substitute methods in order to qualify as an exception under article XX); see also Report of the Panel, *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, ¶ 75, DS10/R – 37S/200 (Oct. 5, 1990) (hereinafter Panel Report, *Thailand—Cigarettes*) (expressing that a measure is not necessary if there are other means of obtaining the desired result); see also KOUL, *supra* note 44, at 314 (recognizing that a party cannot justify an exception under article XX of the GATT if an alternative measure is available).

50. See Panel Report, *Thailand—Cigarettes*, at ¶ 1.

51. See *id.* at ¶ 12 (noting that Thailand failed to apply concurrent domestic restrictions in conjunction with the trade restrictions on foreign companies and suggesting that the measures adopted by Thailand were not necessary). One could further venture that if Thailand really wanted to protect the health of its citizens, it could have banned *all* cigarettes.

52. See *id.* at ¶ 75 (informing that a measure is considered necessary under the GATT only where there is no reasonable alternative measure that achieves the same goal).

53. See Report of the Panel, *United States—Restrictions on Imports of Tuna*, DS21R/-39S/155 (Sept. 3, 1991), GATT B.I.S.D. (39th Supp.), at 155, 162 (1991) (hereinafter Panel Report, *Tuna*) (upholding Mexico's challenge to U.S. restrictions that prohibit the import of tuna products harvested with high dolphin mortality).

54. See Panel Report, *Tuna*, ¶ 3.1, DS29/R (June 16, 1994) (discussing how the EC brought an action challenging U.S. restrictions on the direct and indirect importation of tuna). This panel report, and a subsequent dispute on the same matter involving the EC, were not adopted by the contracting parties of the GATT and so are of no real legal weight.

55. See Stephen J. Powell, *The Place of Human Rights Law in World Trade Organization Rules*, 16 FLA. J. INT'L L. 219, 226 (2004) (recognizing that the AB of the WTO construes article XX narrowly when it assesses exceptions to the GATT's principles).

56. See Report of the Panel, *United States—Section 337 of the Tariff Act of 1930*, ¶ 5.22, L/6439-36S/345 (Jan. 16, 1989), GATT B.I.S.D. (36th Supp.) at 345 (1989) (hereinafter Panel Report, *Section 337*) (stating that exceptions under article XX of the GATT shall be considered under three broad factors rather than just the "necessity test").

57. See *id.* at ¶¶ 2.1–2.3 (elaborating upon the specifics of section 337 of the Tariff Act of 1930, in particular the restrictions on imports which violate U.S. patent law).

European Commission (EC) contended, was inconsistent with the United States' obligation to afford equal treatment to domestic and imported goods under article III.⁵⁸ because it had a chilling effect on foreign competitors.⁵⁹ The panel agreed with the EC that the U.S. measure was inconsistent with article III.4 of the GATT and then turned to whether the measure was justified under the article XX(d) exception invoked by the U.S. Article XX(d) allows WTO members to adopt measures necessary to secure compliance with laws or regulations that are not inconsistent with the GATT to protect, *inter alia*, patents.⁶⁰ The United States argued that section 337 was "necessary" to secure compliance with U.S. patent law, and also that it was not applied in an arbitrary manner, so it did not give rise to unjustifiable discrimination or a disguised restriction on trade.⁶¹ The panel said such a measure could not be justified

[i]f an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.⁶²

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58. See *id.* at ¶ 3.1 (discussing Switzerland's argument that section 337 contravened article III of the GATT by encumbering imports originating in Europe); see also Kenneth W. Abbott, *GATT Dispute Settlement Panel: International Trade—National Treatment—Application of GATT to Quasi-Judicial Procedure—Exception for Necessary Enforcement Measures: United States—Section 337 of the Tariff Act of 1930. No. L/6439: GATT Dispute Settlement Panel Report, Jan. 16, 1989*, 84 AM. J. INT'L L. 274, 275 (1990) (recalling that the dispute arose because DuPont sought to bar the importation of certain materials by Akzo under Section 337 because DuPont held a U.S. patent for the manufacturing process).
59. See Panel Report, *Section 337*, at ¶ 4.8 (finding that Switzerland claimed that section 337 cannot be reconciled with article XX(d) because of the chilling effect it would have on foreign competitors trying to access the U.S. market); see also Cynthia M. Maas, Note, *Should the WTO Expand GATT Article XX: An Analysis of United States—Standards for Reformulated and Conventional Gasoline*, 5 MINN. J. GLOBAL TRADE 415, 432 n.116 (1996) (referencing section 337 as an example of a measure that discriminates against foreign goods, thus implicating article III of the GATT). See generally Appellate Body Report, *United States—Section 211 Omnibus Appropriations Act of 1998*, ¶ 48, WT/DS176/AB/R (Jan. 2, 2002) (prohibiting discriminatory measures like section 337 because they are biased against foreign products).
60. General Agreement on Tariffs and Trade, art. XX(d), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (hereinafter GATT, art. XX(d)) (codifying exceptions for certain measures under article XX where patents and copyrights are concerned, so long as they are not arbitrary, unjustifiable or a disguised trade restriction).
61. See Panel Report, *Section 337* at ¶ 3.57 (stressing that section 337 must be considered in its entirety to ensure consistency with section XX(d), which calls for uniformity with U.S. patent law).
62. See *id.* at ¶ 5.26 (requiring a party to obtain a level of enforcement that is consistent with other GATT provisions, provided it can reasonably do so).

Thus, an element of “reasonableness” entered the equation. Rather than an article XX defense working only if there was *no* less-GATT-inconsistent alternative available, an alternative measure would be cited only with approval to undermine the article XX defense if the alternative measure “could reasonably secure that level of enforcement in a manner that is not inconsistent with other GATT provisions.”⁶³ The panel took account both of the GATT consistency of the measure and the type and level of enforcement this measure was attempting to achieve.⁶⁴

B. *United States—Gasoline: The Birth of the Two-Tiered Analysis for Justifying a Measure Under Article XX of the GATT*

In *United States—Gasoline*,⁶⁵ the United States enacted legislation to control toxic and other pollution caused by the combustion of gasoline manufactured in or imported into the United States.⁶⁶ In implementing this legislation, the United States introduced statutory baselines that differentiated between domestic and imported gasoline.⁶⁷ Brazil and Venezuela argued successfully that this violated article III.4 of the GATT.⁶⁸ Although the panel held that

63. See *id.* at ¶ 5.26 (finding that as long as a law is the same for domestic and imported goods, a party will not be required to change its desired level of enforcement of that law); see also FEDERICO ORTINO, BASIC LEGAL INSTRUMENTS FOR THE LIBERALIZATION OF TRADE 196 (2004) (concluding that a measure is “necessary” under article XX(d) only if a GATT-consistent or a less-GATT-inconsistent measure is not reasonably available); see also NATHALIE BERNASCONI-OSTERWALD ET AL., ENVIRONMENT AND TRADE: A GUIDE TO WTO JURISPRUDENCE 160 (2006) (clarifying that when a GATT-consistent measure is unavailable, a country must instead apply a reasonable and available measure that is least inconsistent with other GATT provisions).

64. See Aaron Xavier Fellmeth, *Secrecy, Monopoly, and Access to Pharmaceuticals in International Trade Law: Protection of Marketing Approval Data Under the TRIPS Agreement*, 45 HARV. INT’L L.J. 443, 451 (2004) (asserting that panels take into account the consistency of the measure with GATT as well as the reasonableness of the measure).

65. See AB Report, *United States—Gasoline* (discussing the WTO AB’s findings following the United States’ appeal of a previous panel report from January 29, 1996).

66. See *id.* (discussing the United States’ appeal from a panel report focusing on the Clean Air Act of 1990 and the so-called Gasoline Rule). See generally Clean Air Act of 1990, 42 U.S.C. § 7401 (1990) (displaying the United States’ commitment to pollution prevention) and EPA Regulation of Fuels and Fuel Additives: Standards for Reformulated and Conventional Gasoline, 40 C.F.R. § 80.1 (2007) (codifying the regulations concerning toxic and other pollution caused by U.S.-manufactured or -imported gasoline).

67. See ARNOLD W. REITZE, AIR POLLUTION CONTROL LAW: COMPLIANCE AND ENFORCEMENT 353 (2001) (explaining that the EPA developed different regulations for domestic and international refiners resulting in different baselines, primarily due to a lack of data for international refiners); see also Ari Afilalo & Sheila Foster, *The World Trade Organization’s Anti-Discrimination Jurisprudence: Free Trade, National Sovereignty, and Environmental Health in the Balance*, 15 GEO. INT’L ENVTL. L. REV. 663, 655 (2003) (explaining that domestic refiners were advantaged in that they could establish an individual baseline, while foreign refiners had to use a stricter baseline set by the EPA); see also Alyssa Woo, Note, *Health Versus Trade: The Future of the WHO’s Framework Convention on Tobacco Control*, 35 VAND. J. TRANSNAT’L L. 1731, 1754–55 (2002) (discussing the argument lodged by Venezuela and Brazil that the baseline for imported gasoline was more strict than the baseline for domestic gasoline).

68. See AB Report, *United States—Gasoline*, at § 1(C) (stating that the panel found that the baseline requirements found in 40 Code of Federal Regulations pt. 80 are not consistent with article III.4 of the GATT).

the baseline requirement was not justifiable under article XX(b), (d) or (g) of the GATT,⁶⁹ the AB held that they were *provisionally* justifiable under article XX(g).⁷⁰ This exception relates to the conservation of exhaustible natural resources. The AB then examined whether these baseline rules met the requirements of the chapeau (introductory language containing a legal balancing test) of article XX.⁷¹

This was the birth of the two-tiered test language for successfully invoking an article XX exception.⁷² The party invoking the article XX exception bore the additional burden of proving that the use of its measure did not constitute an abuse of the exception under the chapeau.⁷³ The AB noted that a measure that otherwise would fall within an article XX exception dropped out of this exception if it fell foul of the chapeau.⁷⁴

The AB found that the United States had violated the chapeau because “. . . there was more than one alternative course of action available to the U.S. in promulgating regulations implementing the CAA [Clean Air Act], such as imposing statutory baselines without differentiating between domestic and imported gasoline.”⁷⁵

69. See *id.* (stating the panel’s finding that the baseline requirement was not justified under the requirements of articles XX(b), XX(d) and XX(g)).

70. See *id.* at § III(B) (holding that the baseline requirement was consistent with the framework of article XX(g) of the GATT, in that it was intended to conserve natural resources).

71. See *id.* at 22 (preventing abuse of the exceptions listed in paragraphs (a) through (j) of article XX by requiring a questioned issue to satisfy the article XX chapeau).

72. See *id.* (introducing the two-tiered test that states that an issue in question must first satisfy at least one exception stated in paragraphs (a) through (j) of article XX, then must meet the requirements of the opening clauses of the article).

73. See *id.* at 22–23 (stating that the burden of proving an exception to article XX is on the party raising such exception).

74. Namely, if the measure arbitrarily discriminated between countries where the same condition prevailed or if it discriminated unjustifiably between countries where the same conditions prevailed or, finally, if it was a disguised restriction on trade. See *id.* at 23 (stating that this is essentially a rehash of what the chapeau itself states); see also Final Act at art. XX, ¶ 1 (denouncing the misuse of the exceptions listed in article XX).

75. See AB Report, *United States—Gasoline*, at 25 (providing additional courses of action available to the United States).

The AB did state, though, that it sought “to balance interests in free trade and health,”⁷⁶ with the necessity test being its guiding hand.⁷⁷ In *Korea—Beef* it would elucidate exactly what it meant by this balancing test.

C. *Korea—Beef*: The Weighing and Balancing of a Measure to Determine Necessity

The panel was established to consider a complaint by Australia and the United States with respect to Korean measures that affect the importation of certain beef products.⁷⁸ It concluded that Korea’s dual retail system, which organized separate retail channels for certain imported and domestic beef products, was inconsistent with article III.4 and could not be justified under article XX(d).⁷⁹ The panel found that the dual retail system was a disproportionate measure not necessary to secure compliance with the Korean law against deceptive practices.⁸⁰ Korea appealed this ruling.

76. See Joseph N. Eckhardt, Note, *Balancing Interests in Free Trade and Health: How the WHO’s Framework Convention on Tobacco Control Can Withstand WTO Scrutiny*, 12 DUKE J. COMP. & INT’L L. 197, 209 (2002) (explaining that article XX is designed to allow for free trade but still allows for state human health interests to be upheld).

77. See Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products* ¶ 171–72 WT/DS135/AB/R (hereinafter AB Report, *Asbestos*) (maintaining that there are three relevant factors that compose the article XX necessity test); see also Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 174, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000) (hereinafter AB Report, *Korea—Beef*) (establishing that the article XX necessity test requires that no reasonably available alternative measures exist that are less inconsistent with the law); see also Tatjana Eres, Note, *The Limits of GATT Article XX: A Back Door for Human Rights?*, 35 GEO. J. INT’L L. 597, 624–25 (2004) (outlining the three requirements of the necessity test: whether the common interests protected by the measure are important or vital, whether alternative measures are reasonably available, and whether the alternative measure is less inconsistent with the WTO member obligations).

78. See AB Report, *Korea—Beef*, at ¶ 1 (complaining of Korea’s domestic support of the agriculture and beef industry and the existing channels for retail distribution of certain beef products).

79. See Final Act at Art. XX(d) (asserting that a measure must be necessary in order to secure compliance with a law or regulation); see also AB Report, *Korea—Beef* (concluding that the dual retail system was inconsistent with article XX(d) because it was not a necessary measure); see also Panel Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 675, WT/DS161/R, WT/DS169/R (July 31, 2000) (agreeing that Korea’s dual retail system is not necessary to ensure compliance with Korean law).

80. See AB Report, *Korea—Beef*, at ¶ 152 (opining that there were other reasonable alternative measures available and that the dual retail system was not necessary pursuant to article XX(d)).

In this case, the question was whether the dual retail system was “necessary” to secure compliance with the *Unfair Competition Act*⁸¹ and reduce fraud in the beef retail market.⁸² The AB looked at necessity in article XX through the interpretative prism of article 31(1) of the Vienna Convention on the Law of Treaties.⁸³ It also looked at the meaning of “necessary” in *Black’s Law Dictionary*.⁸⁴ Using these tools, it concluded that although “necessary” did not imply “indispensable,” it was closer to this on the spectrum than “making a contribution to.”⁸⁵ Accordingly, a treaty interpreter looking at “necessary” in article XX(d) would attempt to perceive whether the relevant measure was, as per article XX(d), necessary to secure compliance of a WTO-consistent law or regulation.⁸⁶ The interpreter would “take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect.”⁸⁷ In essentially propagating a weighing and balancing test, the AB said that “[t]he more vital or important those common interests or values are, the easier it would be to accept as “necessary” a measure designed as an enforcement instrument.”⁸⁸

81. See GATT, art. XX(d) (allowing parties to use a measure that is “necessary” but otherwise inconsistent with GATT in order to secure enforcement); see also AB Report, *Korea—Beef*, at ¶ 159 (defining the word “necessary” by first looking at the ordinary meaning of the word in its context, in light of the object and purpose of article XX and in accordance with article 31(1) of the Vienna Convention); see also Patricia Larios, *The Fight at the Soda Machine: Analyzing the Sweetener Trade Dispute Between the United States and Mexico Before the World Trade Organization*, 20 AM. U. INT’L L. REV. 649, 665 (2005) (explaining that to invoke an article XX(d) defense, a party must prove that the measure secures compliance with laws and regulations of the GATT and is necessary to secure that compliance).
82. See Michael Ming Du, *Domestic Regulatory Autonomy under the TBT Agreement: From Non-Discrimination to Harmonization*, 6 CHINESE J. INT’L L. 269, 299 (2007) (indicating that the Korean government, by adopting the dual retail system, seeks to reduce fraud as much as possible). See generally Richard A. Fogel, *Grey Market Goods and Modern International Commerce: A Question of Free Trade*, 10 FORDHAM INT’L L.J. 308, 330 n.128 (1987) (citing *Battle v. Lubrizol Corp.*, 673 F.2d 984 (8th Cir. 1982) to describe the dual distribution system as a system where the manufacturer directly competes with its own distributors).
83. See Richard W. Edwards, Jr., *In Memoriam: William W. Bishop, Jr.—Part II*, 10 Mich. J. Int’l L. 362, 403–404 (1989) (noting that the text of the Vienna Convention does not distinguish between bilateral and multilateral treaties and, thus, applies to both); see also Peter C. Maki, *Interpreting GATT Using the Vienna Convention on the Law of Treaties: A Method to Increase the Legitimacy of the Dispute Settlement System*, 9 MINN. J. GLOBAL TRADE 343, 351 (2000) (concluding that courts should look for the ordinary meaning of the words in a treaty in light of the context, object and purpose of the agreement). See generally Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 (explaining that terms shall be interpreted with their ordinary meaning in their context and in the light of its object and purpose).
84. See BLACK’S LAW DICTIONARY 1058 (8th ed. 2004) (defining “necessary” as “being appropriate and well adapted to fulfilling an objective”).
85. See AB Report, *Korea—Beef*, at ¶ 161 (defining “necessary,” as used in article XX(d), to refer to a range of degrees where at one end it means “indispensable,” and at the other end it means “making a contribution to”).
86. See *id.* at ¶ 162 (defining “necessary” in the context of article XX(d)); see also Panel Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, at ¶ 72 (Mar. 6 2006) (holding there is no justification for a measure that is not designed to secure compliance with a member’s laws or regulations); see also Caroline E. Foster, *Public Opinions and the Interpretation of the World Trade Organisation’s Agreement on Sanitary and Phytosanitary Measures*, 11 J. INT’L ECON. L. 427, 437 (2008) (indicating the emphasis, in practice, is on the necessity test despite the formal adoption by the AB of a “weighing and balancing test”).
87. See AB Report, *Korea—Beef* at ¶ 162 (describing what a treaty interpreter may take into account in order to determine whether a particular measure is necessary).
88. See *id.* (outlining the “weighing and balancing” test, which determines a measure’s necessity by balancing a series of factors, including the contribution made by the measure to enforce the law or regulation, the importance of common interests or values protected by that law and the accompanying impact of the law on imports or exports).

Korea fell short of part two of the necessity test, failing to show that “the WTO-consistent alternatives shown by the complaining parties to be available were inadequate to secure compliance with the *Unfair Competition Act* with regard to imported beef.”⁸⁹

D. *United States—Shrimp*

Unilateral trade actions to protect the environment, which either are “efficient and valuable tools for the protection of the global environment”⁹⁰ or disguised restrictions on trade, depending on one’s viewpoint, were at the forefront in this dispute.⁹¹ A panel was formed to discuss a complaint against U.S. legislation prohibiting importation of certain shrimps and shrimp products if the importers’ countries did not meet certain sea turtle protection criteria

89. See *id.* at ¶ 55 (reasoning that if Korea wanted to eliminate all fraud in the beef retail market, it would have introduced a total ban of imports instead of attempting to *reduce considerably* such fraud and had an obligation to take a less trade-restrictive measure if one was available).

90. See AB Report, *United States—Shrimp*, at ¶ 68 (noting that the European Communities are convinced that international cooperation rather than unilateral measures is the most effective means to address global and trans-boundary environmental problems); see also Brandon L. Bowen, *The World Trade Organization and Its Interpretation of the Article XX Exceptions to the General Agreement on Tariffs and Trade, in Light of Recent Developments*, 29 GA. J. INT’L & COMP. L. 181, 201–202 (2001) (summarizing the WTO report on trade and the environment, which concluded that unilateral trade sanctions should rarely be used); see also Hakan Nordström & Scott Vaughan, *World Trade Organization Special Studies 4: Trade and Environment 1*, at 3 (1999) (declaring that environmental problems are best addressed at the source rather than through trade barriers and tariffs).

91. See Larry A. DiMatteo *et al.*, *The Doha Declaration and Beyond: Giving a Voice to Non-Trade Concerns Within the WTO Trade Regime*, 36 VAND. J. TRANSNAT’L L. 95, 112 (2003) (stating that the “shrimp-turtle dispute” focused on whether the trade act of the United States was a disguise to restrict trade or a permissible trade-restriction exception pursuant to article XX); see also Sandford Gaines, *The WTO’s Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 U. PA. J. INT’L ECON. L. 739, 772 (2001) (recognizing “disguised restrictions” as one of the potential abuses of article XX); see also Nita Ghei, *Evaluating the WTO’s Two Step Test for Environmental Measures Under Article XX*, 18 COLO. J. INT’L ENVTL. L. & POL’Y 117, 129–34 (2007) (noting that unilateral standards can function as either “[a] mechanism to achieve environmental protection” or “covert trade barriers” and discussing the rationale employed in the “shrimp-turtle” dispute in determining the United States’ unilateral trade act one of environmental protection).

when catching shrimps.⁹² Thailand argued that article XI had been violated.⁹³ The panel and AB both agreed, but the United States claimed an exception under article XX(g) of the GATT.⁹⁴

The United States argued that rather than asking if its measure undermined the multilateral trading system,⁹⁵ the proper approach under the chapeau was to ask if the measure had a non-protectionist rationale.⁹⁶ The measure here was to protect migratory sea turtles, and any resulting discrimination was because of this and *not* protectionism.⁹⁷ In its view, interests pro-

92. See AB Report, *United States—Shrimp*, at ¶ 1 (stating that the DSB granted the request of several countries and formed a panel on February 25, 1997, to examine a complaint regarding a prohibition imposed by the United States).

93. See Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 162, WT/DS58/R (May 15, 1998) (hereinafter Panel Report, *United States—Shrimp*) (detailing Thailand's argument that the United States violated article XI). It should be noted that the United States did not defend against the challenge under article XI as it appears to have seen the core of the dispute turning on article XX. See also *id.* at ¶ 169 (noting that the United States argues that because article XX applies, there is no need for article XI to be addressed). Article XI is entitled "General Elimination of Quantitative Restrictions" and, subject to certain situations where it is not applicable, states as follows:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product detained for the territory of any contracting party (GATT, art. XI(1) General Agreement on Tariffs and Trade).

94. See Panel Report, *United States—Shrimp*, at ¶ 171 (addressing the United States' argument that an article XX exception applies, and that there is no "clearer or more compelling case" than this); see also AB Report, *United States—Shrimp*, at ¶ 10 (stating that the United States argues that the panel's decision is incorrect and reclaims that section 609 is within the scope of article XX).

95. See Panel Report, *United States—Shrimp*, at ¶ 7.61 (stating that the panel's decision was based on whether a measure jeopardized the multilateral trading system).

96. See *id.* at ¶ 15 (opining that the proper approach under the article XX chapeau should focus on a non-protectionist rationale); see also Pascal Lamy, *The Place of the WTO and its Law in the International Legal Order*, 17 EUR. J. INT'L L. 969, 979–80 (2006) (explaining that article XX is designed to protect against disguised protectionist measures, noting that the proper assessment of a measure is whether it is applied in a non-protectionist manner and illustrating that trade restrictions will prevail so long as they are not protectionist); see also Katie A. Lane, Comment, *Protectionism or Environmental Activism? The WTO as a Means of Reconciling the Conflict Between Global Free Trade and the Environment*, 32 U. MIAMI INTER-AM. L. REV. 103, 109 (2001) (commenting that article XX exceptions are subject to the non-protectionist requirements of the chapeau and inferring that a measure should be assessed based on it satisfying the chapeau's requirements). Note that the AB itself corrected a sequencing error by the panel, which had for some reason looked at the chapeau *before* the article XX exception. See AB Report, *United States—Shrimp*, at ¶¶ 112–22 (concluding that the panel erred by first examining whether a measure satisfies the requirements of the chapeau and analyzing the reasoning).

97. See *id.* at ¶ 15 (arguing that any discrimination arose directly as a result of attempts toward sea turtle conservation). The United States further argued that if a measure differentiated between nations based on an aim "legitimately connected" with the policy of an article XX exception and not for protectionist reasons, then article XX was not violated. See also *id.* at ¶ 20 (expressing that article XX exceptions are not abused when a measure's reason for differentiation between nations is "legitimately connected" with a policy of an article XX exception).

tected by article XX were pre-eminent to GATT goals when a conflict arose.⁹⁸ The United States said that its measure treated equally all countries whose shrimp-trawling processes posed risks to sea turtles;⁹⁹ that its domestic trawlers were also required to fish with TEDs; and that if a member met criteria for sea turtle conservation comparable to the U.S. criteria, it would be certified and allowed to export to the United States.¹⁰⁰

The main thrust of the argument against the United States by India, Pakistan and Thailand was that it had applied its TED system without seriously attempting to negotiate a multilateral solution.¹⁰¹ Malaysia focused more on the unilateralism of the U.S. approach. It noted that the panel had found on the facts that the shrimp-import ban applied even on TED-caught shrimps if the country of origin had not been certified.¹⁰² Certification was granted only if comprehensive requirements were met or if the shrimp trawling took place in a country whose waters exclusively did not lap over sea turtles.¹⁰³ In both the panel's and Malaysia's eyes, this was unjustifiable discrimination between countries where the same conditions prevailed and so fell foul of the article XX chapeau.¹⁰⁴ The EC, a third party in the dispute,¹⁰⁵ although agree-

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98. See *id.*, at ¶ 16 (suggesting that the pre-eminence of article XX to GATT is indicated by the language of article XX); see also Belina Anderson, *Unilateral Trade Measures and Environmental protection Policy*, 66 TEMP. L. REV. 751, 770 (1993) (inferring that article XX is superior to GATT because the intent of the drafters was to allow restrictions "otherwise forbidden by the GATT if those restrictions promoted overriding public policy goals"); see also Edward A. Laing, *Equal Access/Non-discrimination and Legitimate Discrimination in International Economic Law*, 14 WIS. INT'L L.J. 246, 312 (1996) (indicating that the exceptions in article XX are preeminent to GATT dispositions).
 99. See AB Report, *United States—Shrimp*, at ¶ 21 (stressing that the United States' measure applies equally to all nations that harvest shrimp in waters where sea turtles are likely to be found and who use machinery that can harm sea turtles).
 100. See *id.* at ¶ 27 (arguing that section 609 is "even handed" because a nation will be certified and not face restriction on exports to the United States as long as its shrimp harvesting method meets sea turtle conservation criteria comparable to that of the United States).
 101. See *id.* at ¶ 41 (declaring that the United States is required to find a cooperative multilateral solution to the dispute under section 609 and its trade agreements).
 102. See Philip Bentley Q.C., *A Re-Assessment of Article XX, Paragraphs (b) and (g) of GATT 1994 in the Light of Growing Consumer and Environmental Concern About Biotechnology*, 24 FORDHAM INT'L L.J. 107, 130 (2000) (opining that free-trade advocates have valid reasons to believe that regulatory environmental and consumer protection measures are disguised attempts to limit free trade).
 103. See AB Report, *United States—Shrimp*, at ¶¶ 3–4 (outlining that in order for an exporting nation to conform to the certification requirements in Section 609 of the Endangered Species Act, the nation must (1) not have any sea turtles in its waters, (2) harvest shrimp in a manner that does not pose a threat to sea turtles or (3) conduct its shrimp harvesting in waters where sea turtles do not exist).
 104. See *id.* at ¶ 49, (Oct. 12, 1998) (attributing Malaysia's claim against the United States, in part, to the fact that the import ban is applied even on TED-caught shrimp if the exporting country is not certified by the United States); see also *id.* at ¶ 62 (noting that third-party Australia's interpretation of article XX required the United States to mitigate the restrictive and discriminatory nature of its legislation, given the implications it would have on global trade and environmental policy); see also Declan McCullagh, *WTO Slams U.S. Net-Gambling Ban*, CNET NEWS.COM, Apr. 7, 2005, http://news.com.com/WTO+slams+U.S.+Net-gambling+ban/2100-1030_3-5658636.html. (discussing a WTO appeals panel decision that held U.S. Justice Department efforts to restrict Internet gambling as "necessary to protect public morals" violated international trade agreements).
 105. See DSU at art. XX § 2 (promulgating that any WTO member that has a substantial interest in the dispute before a panel must notify the DSB of its interest in the dispute, after which the member would have the opportunity to be heard by and make written submissions to the panel).

ing with the United States that the panel's "test" on whether a measure threatened the multilateral trading system was inconsistent with the object and purpose of the WTO Agreement,¹⁰⁶ saw the United States as overextending its prescriptive jurisdiction¹⁰⁷ by effectively attempting to regulate how shrimps are caught worldwide outside its own waters.¹⁰⁸

The AB, using an evolutionary interpretative approach of the GATT, noted that the words "exhaustible natural resources" under article XX(g) were written over 50 years ago.¹⁰⁹ Accordingly, "[t]hey must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment."¹¹⁰ It held that migratory sea turtles were "exhaustible natural resources" under article XX(g).¹¹¹

The AB restated the two-step necessity test of *United States—Gasoline*.¹¹² provisional justification under article XX(g) and then further testing under the chapeau. First, it examined whether the measure was related to the conservation of these sea turtles, a requirement under article XX(g). It cited with approval its own test in *United States—Gasoline*, where it had found a substantial relationship between the measure and the aim the measure sought to achieve. The

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106. See Final Act at 1144 (1994) (declaring that the signatories of the WTO Agreement seek to make the most productive use of each country's resources in order to expand trade and commerce and to protect the environment according to the economic needs and development of each country); see also AB Report, *United States—Shrimp*, at ¶ 71 (expressing the opinion of the European Communities that subjecting all national concerns like environmental and ecological protection to the international free trade structure is inconsistent with the purpose and the spirit of the *WTO Agreement*). See generally Mike Meier, *GATT, WTO, and the Environment: To What Extent Do GATT/WTO Rules Permit Member Nations to Protect the Environment When Doing So Adversely Affects Trade?*, 8 *COLO. J. INT'L ENVTL. L. & POL'Y* 241, 242 (1997) (explaining the WTO analysis used to determine whether an environmental protection measure violates the WTO Agreement).
 107. See *F.T.C. v. Compagnie De Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1315 (D.C. Cir. 1980) (citing the definition of "prescriptive jurisdiction in the Restatement (Second) of the Foreign Relations Law of the United States"); see also Howard Chang, *An Economic Analysis of Trade Measures to Protect the Global Environment*, 83 *GEO. L.J.* 2131, 2134–9 (arguing in favor of member nations using their prescriptive jurisdictions to protect endangered species found abroad pursuant to article XX of the GATT).
 108. See AB Report, *United States—Shrimp*, at ¶¶ 73–74 (acknowledging that although the European Communities agree that under certain circumstances a member nation may be able to legislate measures, the United States acted unilaterally and unreasonably by not attempting to negotiate a multilateral solution before it imposed its ban on imported shrimp).
 109. See *id.* at ¶ 128 (defining "exhaustible natural resources" for purposes of article XX(g) not only as non-living resources such as plants and minerals but of crafting a more modern definition that includes living resources).
 110. See *id.* at ¶ 129 (quoting the WTO Agreement in which the parties agree to "protect and preserve the environment . . . consistent with their respective needs and concerns at different levels of economic development").
 111. See *id.* at ¶ 134 (declaring that the plain language of article XX(g) does not confine its application to non-biological resources).
 112. See *id.* at ¶¶ 119–121 (confirming the sequence of the two step analysis for the application of article XX of the GATT set forth in *United States—Gasoline*); see also Meinhard Hilf & Goetz Goettsche, *The Relation of Economic and Non-Economic Principles in International Law*, *INTERNATIONAL ECONOMIC GOVERNANCE AND NON-ECONOMIC CONCERNS* 5, 21 (Stefan Griller ed., 2003) (noting that in *United States—Gasoline* the AB "pointed out" the existence of two elements in the analysis of article XX); see also Mads Andenas & Stefan Zleptnig, *Proportionality: WTO Law: In Comparative Perspective*, 42 *TEX. INT'L L.J.* 371, 409 (2007) (discussing the design and scope of the two-tiered analysis for article XX articulated by the AB in *United States—Gasoline*).

AB here coined this as “a close and genuine relationship of ends and means”¹¹³ and applied this test to the U.S. measure. The ends were to prevent sea turtle mortality;¹¹⁴ the means were to prohibit shrimp imports that had been harvested by methods harmful to these sea turtles.¹¹⁵ The AB held that the means were indeed reasonably related to the ends.¹¹⁶ It did not directly answer the extraterritoriality question, instead saying that there was a “sufficient nexus” between the migratory sea turtles and U.S. territory for the latter to introduce legislation relating to their protection.¹¹⁷

Although provisionally justified, the second question was whether the U.S. measure ultimately could be justified under article XX, which meant satisfying the chapeau.¹¹⁸ The AB said that “a balance must be struck between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other Members.”¹¹⁹

113. See AB Report, *United States—Shrimp*, at ¶ 136 (establishing “means and ends” as one type of relationship between the measure at stake and the legitimacy of the policy conserving a natural resource).

114. See *id.* at ¶ 140 (recognizing that the policy rationale behind the United States’ regulatory program was to ensure sea turtle conservation); see also Act of Nov. 21, 1989, Pub. L. No. 101–162, Title VI 609, 103 Stat. 988, 1037–38 (1989) (codified at 16 U.S.C. § 1537) (acknowledging the necessity of congressional intervention in the protection of sea turtles); see also Shun-Yong Yeh, *Dragging out of or Deeper into Another Impasse of the Political Economy of the World Trade Organization?*, 1 ASIAN J. WTO & INT’L L. & POL’Y 465, 468 (2006) (asserting that the “ultimate objective” of the United States’ disputed measure was to reduce sea turtle mortality).

115. See Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 138, WT/DS58/AB/R (Oct. 12, 1998) (hereinafter AB Report, *United States—Shrimp*) (reviewing the United States’ measure prohibiting the importation of shrimp that have been collected using detrimental methods); see also Elaine Hartwick & Richard Peet, *Neoliberalism and Nature: The Case of the WTO*, 590 ANNALS AM. ACAD. POL. & SOC. SCI. 188, 207 (2003) (noting that section 609 bans harvesting shrimp in the United States in ways that negatively impact the ability of sea turtles to survive); see also Susan L. Sakmar, *Free Trade and Sea Turtles: The International and Domestic Implications of the Shrimp-Turtle Case*, 10 COLO. J. INT’L ENVTL. L. & POL’Y 345, 349–351 (1999) (discussing the scope and purpose of a disputed U.S. law that regulates shrimping practices).

116. See AB Report, *United States—Shrimp*, at ¶ 141 (finding that the United States has sufficiently demonstrated the relationship between the regulation of shrimping practices and its interest in protecting endangered sea turtles).

117. See Dukgeun Ahn, *Environmental Disputes in the GATT/WTO: Before and After US—Shrimp Case*, 20 MICH. J. INT’L L. 819, 845 (1999) (noting how the AB justified its decision by finding a “sufficient nexus” between the protected sea turtles and their migration into the waters of the United States); see also Nicholas Diebold, *The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole*, 11 J. INT’L L. 43, 68 (2008) (discussing how the AB declined to resolve the issue of extraterritorial measures in *United States—Shrimp*); see also Jayati Srivastava & Rajeev Ahuja, *Mainstreaming Environment Through Jurisprudence* (Indian Council for Research on Int’l Econ. Relations, Working Paper No. 78, 2002) (commenting on the implications of the AB’s failure to address the extraterritoriality issue in *United States—Shrimp*).

118. See AB Report, *United States—Shrimp*, at ¶ 147 (holding that once provisionally justified, a measure must also meet the requirements of the article XX chapeau).

119. See *id.* at ¶ 156 (recognizing that the article XX chapeau mandates a balance of rights and obligations between members); see also JOCHEM WIERS, *TRADE AND ENVIRONMENT IN THE EC AND WTO: A LEGAL ANALYSIS* 244 (2002) (examining the balance of rights and obligations requirement articulated in *United States—Shrimp*).

Applying this test, the AB held that the measure was unjustifiable discrimination.¹²⁰ Countries who did not adopt essentially the same regulatory approach as the United States were not certified, the United States did not inquire seriously into the regulatory programs of other countries here, and it had negotiated seriously with only some of the affected members.¹²¹ By imposing a single and inflexible certification requirement,¹²² without inquiring into other regulatory programs, the measure also was applied “in a manner constituting arbitrary discrimination between countries where the same conditions prevail.”¹²³

The AB concluded that it was not saying that a member could not adopt its own policy to protect an environmental or other article XX subject matter concern.¹²⁴ However, it had to fulfill its GATT obligations when it did so.¹²⁵ In effect, this meant that the chapeau, the gatekeeper of other WTO members’ rights, had to be respected.¹²⁶

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120. See AB Report, *United States—Shrimp*, at ¶ 176 (announcing that the “cumulative effect” of the United States’ measure results in impermissible discrimination pursuant to the meaning of the chapeau).
121. See *id.* at ¶ 163 (holding nations having different regulations than those of the United States are not certified and lose exportation rights); see also *id.* at ¶ 172 (emphasizing a failure to negotiate seriously with some members and not with others denoted an element of discrimination).
122. See *id.* at ¶ 163 (holding that a nation applying rigid standards differently against member nations constitutes discrimination); see also David M. Driesen, *What Is Free Trade?: The Real Issue Lurking Behind the Trade and Environment Debate*, 41 VA. J. INT’L L. 279, 307 (2001) (arguing that the United States may not force other countries to implement trade policies that conform with those used in the United States).
123. See AB Report, *United States—Shrimp*, at ¶ 177 (finding that officials have little discretion in certifying that another nation’s policies constitute arbitrariness); see also *id.* at ¶ 184 (commenting that the policy applied by the United States differently against certain nations constitutes arbitrariness).
124. See *id.* at ¶ 185 (emphasizing member nations may take unilateral or multilateral steps with other nations to protect endangered species); see also *id.* at ¶ 186 (recognizing that the measure developed by the United States was legitimate, but the way in which it had applied the rule was improper).
125. See *id.* at ¶ 186 (emphasizing the freedom to implement environment protection policies that correspond with the WTO); see also Howard F. Chang, *Toward a Greener GATT: Environmental Trade Measures and The Shrimp-Turtle Case*, 74 S. CAL. L. REV. 31, 39–40 (Nov. 2000) (remarking that AB avoided implementing sweeping rules in favor of allowing policy making that conformed to article XX); see also Varamon Ramangkura, *Thai Shrimp, Sea Turtles, Mangrove Forests and the WTO: Innovative Environmental Protection Under the International Trade Regime*, 15 GEO. INT’L ENVTL. L. REV. 677, 690 (2003) (remarking that the AB acknowledged unilateral measures that protect the environment adhere to article XX).
126. See Jennifer A. Bernazani, Note, *The Eagle, the Turtle, the Shrimp and the WTO: Implications for the Future of Environmental Trade Measures*, 15 CONN. J. INT’L L. 207, 231 (2000) (asserting the importance of an ends-means analysis in determining the validity of environmental trade measures).

E. *United States—Shrimp: Recourse to Article 21.5 of the DSU by Malaysia*¹²⁷

Article 21.5 *United States—Shrimp* clarified aspects of the original *United States—Shrimp* ruling.¹²⁸ First, the AB reiterated that a multilateral solution was the preferred option under the WTO.¹²⁹ However, provided negotiations were conducted in good faith, it was not reasonable to demand a conclusion of these negotiations, otherwise the other countries “would have, in effect, a veto over whether the United States could fulfill its WTO obligations.”¹³⁰ Although the AB made it clear that members invoking the environmental exception may hold other

127. See Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW (Oct. 22, 2001) (hereinafter AB Report, *United States—Shrimp: Recourse*).

128. See *id.* at ¶ 1 (outlining request by Malaysia for DSB to have a panel review whether United States complied with holdings in *United States—Shrimp*); see also Takako Morita, *Marine Sea Turtles and Shrimp Trawling: Interplay Between the U.S. Courts and the WTO Panels and Its Effect on the World Shrimp Industry*, 10 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 209, 225 (2004) (discussing Malaysia’s claims charging the United States violated the GATT by implementing unilateral regulations that affected the shrimp trade); see also Eric Shapiro, Note, *All Is Not Fair in the Privacy Trade: The Safe Harbor Agreement and the World Trade Organization*, 71 FORDHAM L. REV. 2781, 2802 (2003) (describing charges by Malaysia that United States violated the GATT by imposing unilateral restrictions on shrimp importation).

129. See AB Report, *U.S. Shrimp Recourse*, *supra* note 127, at ¶ 124 (holding that a multilateral solution is preferred under the WTO); see also Bernazani, *supra* note 126, at 231 (opining that the AB decision encouraged nations to take actions in protecting the environment and reassessing unilateral measures).

130. See AB Report, *United States—Shrimp: Recourse*, at ¶ 48 (expressing a rejection of the view held by third-party nations that this holding would “open the door” for nations to impose unilateral trade restrictions despite international negotiations); see also Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 COLUM. J. ENVTL. L. 491, 505–507 (2002) (discussing the findings of the AB that conditions in the chapeau, coupled with the chapeau’s inferred requirements of good faith and negotiation, provide adequate protection against abuses caused by unilateral action); see also Zachary Tyler, *Saving Fisheries on the High Seas: The Use of Trade Sanctions to Force Compliance with Multilateral Fisheries Agreements*, 20 TUL. ENVTL. L.J. 43, 87 (2006) (citing findings of the AB that members that engage in good faith negotiations to reach multilateral solutions satisfy the requirements of article XX).

countries to the same standard of *effectiveness* in achieving an environmental goal, the measure had to be sufficiently flexible so as to allow developing members with differing levels of technology the option to use different methods to achieve it.¹³¹ This was *provided* that the desired level of protection was still achieved, however.¹³² This, though, did not reach the level of requiring the measure to explicitly address the exact conditions of each member affected by it.¹³³

This proceeding thus fleshed out in more detail *United States—Shrimp*, which had been the first case where a WTO member had successfully invoked an article XX exception.¹³⁴ The AB was arguably constructing a framework for members who in the future intended to adopt an environmental measure using article XX as justification.¹³⁵

R. EC—Asbestos

The next trade-environmental dispute involved France making an administrative decision, based on health grounds, to ban the use of asbestos.¹³⁶ It issued a decree prohibiting the use of all varieties of asbestos fibers and products containing asbestos fibers.¹³⁷ Canada had previously

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131. See AB Report, *United States—Shrimp: Recourse*, at ¶ 144 (finding that flexibility can be obtained and discrimination avoided if all member countries adopt programs where results are held to the standard of being “comparable in effectiveness”); see also Steve Charnovitz, *The WTO’s Environmental Progress*, 10 J. INT’L ECON. L. 685, 704 (2007) (emphasizing the flexibility needed in order to achieve “comparable effectiveness” and avoid discrimination); see also Sakmar, *supra* note 115, at 379–81 (reiterating regulatory programs should take conditions in member countries into account when attempting to reach a policy goal).
 132. See AB Report, *United States—Shrimp: Recourse*, at ¶ 125; see also Bernazani, *supra* note 126, at 231 (emphasizing the WTO’s dedication to the ultimate outcome of the implemented environmental standards). See generally *id.* at ¶ 122 (stating the United States must make comparable efforts, provide “similar opportunities to negotiate” and allow greater flexibility to meet the article XX requirements following *United States—Shrimp*). The mere fact that the guidelines did not “explicitly address the specific conditions prevailing in Malaysia” was not enough to maintain the charge of unjustifiable discrimination under the chapeau against the United States here. See *id.* at ¶ 150 (voicing skepticism that the revised guidelines do not address the issue at hand).
 133. See *id.* at ¶ 149 (distinguishing the policy of flexibility from the practice of specifically addressing the conditions in every individual member country).
 134. See generally Charnovitz, *supra* note 131, at 688 (identifying the importance of the AB’s decision in *United States—Shrimp*); see generally Geert van Calster, *Faites Vos Jeux—Regulatory Autonomy and the World Trade Organization After Brazil Tyres*, 20 J. ENVTL. L. 121, 124 (2008) (noting the importance of *United States—Shrimp* in the examination of article XX).
 135. See Ramangkura, *supra* note 125, at 687 (2003) (emphasizing the AB’s evolving environmental values). See generally Nicolas F. Diebold, *The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole*, 11 J. INT’L ECON. L. 43, 68 (2008) (discussing the use of an “extraterritorial policy objective” under article XX as justification for a member to adopt certain measures to respond to environmental characteristics unique to its territory).
 136. See AB Report, *Asbestos*, at ¶ 1 (introducing French Decree No. 96–1133, which led to the case Canada brought before the WTO).
 137. See Irene McConnell, Note, *The Asbestos Case at the World Trade Organization: The Treatment of Public Health Regulations Under the General Agreement of Tariffs and Trade 1994 and the Agreement on Technical Barriers to Trade*, 10 TULSA J. COMP. & INT’L L. 153, 153 (2002) (explaining the background of French Decree No. 96–1133, which banned the use of asbestos to protect the French “from the serious diseases linked to the inhalation of asbestos fibres”).

exported products that were similar to the products banned by France and so brought a case before the WTO.¹³⁸ The EC, representing France in this dispute, was held by the panel to have violated article III of the GATT by treating alternative fibers and asbestos differently.¹³⁹ Nevertheless, the French ban on asbestos was justified under the protection of human health defense contained in article XX(b).¹⁴⁰

On appeal to the AB, Canada challenged the panel's application of the necessity test under article XX(b).¹⁴¹ It agreed that the extent of the risk to human health was relevant to considering necessity but felt there were less trade-restrictive alternatives than a complete ban.¹⁴² More pertinently, Canada said that the panel was obliged to take a position on the "weight of scientific evidence" before it.¹⁴³ Canada disagreed with the EC's view that the panel had made an objective assessment of the necessity of the ban.¹⁴⁴

The AB reversed the panel's ruling that the Canadian products containing asbestos fibers were "like" their non-asbestos counterparts.¹⁴⁵ Consequently, Canada had not demonstrated that the French ban was inconsistent with article III.4 of the GATT.¹⁴⁶ This meant that article XX(b) was no longer the legal turning point of the case; nonetheless, the AB went on to look at

138. See AB Report, *Asbestos*, at ¶ 1 (reviewing the cause of Canada's complaint).

139. See *id.* at ¶ 4 (reviewing the previous panel findings that chrysotile asbestos fibers and the fibers that can be substituted for them are "like" products); see also *id.* at ¶¶ 84–85 (detailing the process by which the panel concluded the asbestos fibers and the alternative fibers used by the French were of sufficient "likeness," and Canada's argument that the French ban was in violation of treatment obligations under article III of the GATT 1994).

140. See *id.* at ¶¶ 18–19 (summarizing Canada's request and rationale for seeking the reversal of the findings with respect to health risks of asbestos); see also Elizabeth Olson, *Environmentalists Applaud a W.T.O. Ruling on Asbestos*, N.Y. TIMES, Jul. 25, 2000, at C4 (reporting the decision of the WTO dispute panel upholding a trade restriction on asbestos to protect human health); see also Geoff Winestock, *WTO Approval of France's Asbestos Ban Hits Canada, Mollifies Environmentalists*, WALL ST. J., Jul. 28, 2000, at A13 (highlighting the WTO's decision concerning the French ban on asbestos).

141. See Cone, *infra* note 153 at ¶ 20. Canada also argued "that the Panel erred in finding that there is a risk to human health associated with the manipulation of chrysotile-cement products." See ¶ 19.

142. See *id.* at ¶ 20 (claiming that the panel erred in applying the test of "necessity" under article XX(b) of the GATT 1994); *Cf. id.* at ¶ 19 (arguing "that the Panel erred in finding that there is a risk to human health associated with the manipulation of chrysotile-cement products").

143. See *id.* at ¶ 22 (stating that had Canada taken a position on the opinion, as it was supposed to have done, it would not have concluded that the Decree was justified under article XX(b) of the GATT 1994).

144. See *id.* (stating that had Canada taken a position on the opinion, it would not have concluded that the decree was justified under article XX(b) of the GATT 1994). *Cf. DSU* at art. XI (WTO) (regarding the functions of the Panel in assessing the matter before it).

145. See AB Report, *Asbestos*, at ¶¶ 133–148 (reversing the panel's holding that chrysotile asbestos fibers and PCG fibers were like products, and that cement-based products containing chrysotile asbestos fibers and PCG fibers were like products).

146. See GATT, art. XX(d) (eliminating quantitative restrictions on imports and exports except when specified on specific grounds).

Canada's appeal of the panel upholding the French ban on asbestos under article XX(b).¹⁴⁷ The AB said that the panel was well within its "bounds of discretion in finding that chrysotile-cement products pose a risk to human life or health."¹⁴⁸

Regarding the necessity test, it said that "a risk may be evaluated either in quantitative or qualitative terms."¹⁴⁹ The AB also held that "it is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given consideration."¹⁵⁰ France had decided to halt the spread of asbestos-related health risks and it had done so by banning products that contained asbestos.¹⁵¹ It allowed PCG fibers, which also may contain a health risk,¹⁵² but this risk was proven to be less than that of chrysotile asbestos fibers; therefore, the prohibition was a perfectly legitimate measure.¹⁵³

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147. See *id.* (contracting parties of the GATT are entitled to place restrictions on international trade for the purposes of protecting human, animal and plant life).
 148. See AB Report, *Asbestos*, at ¶ 162 (stating that the panel did not overstep its bounds in concluding that chrysotile-cement products are a human health risk); see also Markus W. Gehring & Marie-Claire Cordonier Segger, *The WTO and Precaution: Sustainable Development Implications of the WTO Asbestos Dispute*, 15 J. ENVTL. L. 289, 313–14 (2003) (reiterating that the WTO panel was correct in its decision to ban the use of chrysotile because Canada had not shown there was a better alternative); see also Robert Howse & Elisabeth Tuersk, *The WTO Impact on Internal Regulations—A Case Study of the Canada–EC Asbestos Dispute in The EU and the WTO: Legal and Constitutional Issues*, 283 (Gráinne de Búrca & Joanne Scott eds. 2001) available at <http://worldtradelaw.net/articles/howseasbestos.pdf> (stating that the large amount of evidence showing the danger of asbestos allowed the panel to use its discretion to uphold the French ban on imports).
 149. See AB Report, *Asbestos*, at ¶ 167 (stating that the risk of danger to one's health is not required to be measured in quantitative terms and that the panel's evaluation of the risk based on scientific evidence was sufficient); see also Andrew Green, *Climate Change, Regulatory Policy and the WTO: How Constraining Are Trade Rules?*, 8 J. INT'L ECON. L. 143, 172 (2005) (reiterating that a member of the panel may follow a divergent opinion, even if it is not the majority, when adopting a precautionary approach); see also Laurent A. Ruessmann, *Putting the Precautionary Principle in its Place: Parameters for the Proper Application of a Precautionary Approach and the Implications for Developing Countries in Light of the DOHA WTO Ministerial*, 17 AM. U. INT'L L. REV. 905, 915 (2002) (claiming that in weighing scientific evidence, the AB can use either a quantitative or a qualitative measure).
 150. See AB Report, *Asbestos*, at ¶ 168 (claiming that the members of the panel have the right to decide the correct level of protection for health measures); see also Andenas & Zleptnig, *supra* note 112, at 78–79 (discussing the proportionality, necessity and balancing within the legal framework of the WTO); see also Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L LAW 907, 928–29 (2006) (referencing the WTO members' discretion in deciding the level of protection needed from health risks).
 151. See AB Report, *Asbestos*, at ¶ 168 (acknowledging the legitimate health objectives underlying the ban); see also Julie H. Paltrowitz, Comment, *A "Greening of the World Trade Organization? A Case Comment on the Asbestos Report*, 26 BROOKLYN J. INT'L L. 1789, 1816–17 (2001) (stating that the French prime minister banned the use of asbestos by Decree No. 96-1133 in accordance with both the domestic labor and consumer codes); see also *France Bans Use of Asbestos*, EUR. ENV'T, July 23, 1996, at 482.
 152. See McConnell, *supra* note 137, at 157–62 (analyzing the criteria by which PCG fiber risk was assessed).
 153. See AB Report, *Asbestos*, at ¶ 168 (expressing the legitimacy of a country ceasing the spread of a highly risky product while permitting the use of a less risky one); see also Sydney M. Cone III, *The Asbestos Case and Dispute Settlement in the World Trade Organization: The Uneasy Relationship Between Panels and the Appellate Body*, 23 MICH. J. INT'L L. 103, 110–15 (2001) (analyzing WTO's "like products" provision's contribution to the assessment of health-related risks); see also McConnell, *supra* note 137, at 160–63 (discussing the criteria by which the various types of asbestos are to be distinguished).

Canada's final argument relating to article XX was that there was an alternative measure—"controlled use"—reasonably available to France, and that the panel was incorrect to hold that this measure was not reasonably available.¹⁵⁴ The AB cited several previous disputes for authorities for the "reasonably alternative measure" aspect of article XX.¹⁵⁵ But in addition, it invoked *Korea—Beef's* "weighing and balancing" test, one component of which stated that any alternative measure had to be "reasonable" by contributing to the realization the end pursued.¹⁵⁶ The more vital the societal interest or value invoked by the measure, the easier it was to justify the necessity of the measure and the harder it was to find reasonable alternatives.¹⁵⁷ Protection of human health was a fundamental interest, and the "controlled use" alternative was not reasonable because it did not prevent health risks to the same degree as the ban.¹⁵⁸

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154. See AB Report, *Asbestos*, at ¶ 169 (asserting that alternative measures impossible to implement are not reasonable); see also Dr. Hans-Joachim Priess & Dr. Christian Pitschas, Essay, *Protection of Public Health and the Role of the Precautionary Principle Under WTO Law: A Trojan Horse Before Geneva's Walls?*, 24 FORDHAM INT'L L.J. 519, 540–41 (2000) (stating that "controlled use" would be incompatible with France's broader health policy objectives); see also John T. Suttles, Jr., *Transmigration of Hazardous Industry: The Global Race to the Bottom, Environmental Justice, and the Asbestos Industry*, 16 TUL. ENVTL. L.J. 1, 55–56 (2002) (explaining that "controlled use" is an improbable standard in developing countries, including former French colonial holdings likely to be influenced by the French ban).
 155. See AB Report, *Asbestos*, at ¶¶ 169–71 (citing to the previous WTO cases of *United States—Gasoline*, *Thailand—Cigarettes*, and Panel Report, *Section 337*, in order to assess what may be deemed a "reasonably available alternative").
 156. See *id.*, ¶ 172 (asserting that the preservation of human life and health is a highly imperative objective); see also Eres, *supra* note 77, at 629–30 (discussing reasonableness in terms of broader policy objectives); see also Jeremy C. Marwell, Note, *Trade and Morality: The WTO Public Morals Exception after Gambling*, 81 N.Y.U. L. REV. 802, 828 (2006) (arguing that the "reasonably available" assessment is more useful than "weighing and balancing" in terms of public morality).
 157. See Paige J. Brock, *Trade and the Environment: A Change in the "Trade-Winds": World Trade Organization Places Human Health Before Free-Trade*, 2000 COLO. J. INT'L ENVTL. L. & POL'Y 85, 94–96 (2000) (discussing how the WTO upheld the ban in light of it being a restriction on free trade and how, for the first time, broader public health policies overrode economic considerations); see also Eckhardt, *supra* note 76, at 197 (analogizing the public health policy considerations underlying the asbestos ban to those of measures aimed at reducing worldwide tobacco consumption); see also McConnell, *supra* note 137, at 155–157 (stating that although the prohibition failed to identify specific products containing asbestos, it nevertheless could be enforced as a "technical ban" on any items containing asbestos).
 158. See Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products* at ¶ 174 WT/DS135/AB/R (hereinafter AB Report, *Asbestos*) (assessing the scientific and pragmatic considerations with respect to the possibility of "controlled use"); see also John J. Emslie, *Labeling Programs as a Reasonably Available Least Restrictive Trade Measure Under Article XX's Nexus Requirement*, 30 BROOKLYN J. INT'L L. 485, 540 (2005) (stating that the "EC Asbestos dispute stands for the proposition that the effectiveness of the alternative measure must be real and not just a mere possibility" in order to satisfy the requirements of controlled use); see also Alan O. Sykes, *Centennial Tribute Essay: The Least Restrictive Means*, 70 U. CHI. L. REV. 403, 408–11 (2003) (discussing the WTO's line of reasoning in determining whether "controlled use" may be a reasonable alternative to an outright ban).

G. *United States—Gambling*

*United States—Gambling*¹⁵⁹ was the first WTO dispute to look at article XIV of the GATS.¹⁶⁰ The dispute witnessed Antigua and Barbuda, “two flyspecks of land east of Puerto Rico,”¹⁶¹ as one U.S. news Web site described it, cross swords with the United States of America.¹⁶² A U.S. citizen, Jay Cohen, had been sentenced to 21 months in jail in 2000 by a U.S. court for breaching the Wire Act.¹⁶³ Cohen had been marketing an offshore sports-betting company, which he had set up in Antigua, that took wagers from consumers in the United States.¹⁶⁴ Remote gambling had grown to become a big industry in Antigua, and Cohen’s arrest “triggered” the Antiguan government’s intervention.¹⁶⁵ Antigua then brought a claim before a WTO panel that federal and state restrictions imposed by the U.S. laws led to a “total prohibition on the cross-border supply of gambling and betting services from Antigua.”¹⁶⁶

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159. See AB Report, *United States—Gambling and Betting Services*, ¶ 1, WT/DS285/AB/R (Apr. 7, 2005) (hereinafter AB Report, *United States—Gambling*) (stating that the panel was “established to consider a complaint by Antigua concerning certain measures of state and federal authorities that allegedly make it unlawful for suppliers located outside the United States to supply gambling and betting services to consumers within the United States”).
 160. See Kelly Ann Tran, *The WTO Appellate Body Gambles on the Future of the GATS: Analyzing the Internet Gambling Dispute Between Antigua and the United States Before the World Trade Organization*, 6 APPALACHIAN J. L. 165, 168 (2006) (explaining that general exceptions are provided under article XIV).
 161. See Michael Grunfeld, *Don't Bet on the United States' Internet Gambling Laws: The Tension Between Internet Gambling Legislation and World Trade Organization Commitments*, 2007 COLUM. BUS. L. REV. 439, 480 (2007) (noting that the small islands of Antigua and Barbuda were disputing with the United States); see also Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China*, 55 AM. U. L. REV. 901, 940 (2006) (analogizing the dispute between the two islands and the United States to that of David and Goliath); see also McCullagh, *supra* note 104.
 162. See Lorraine Harrington, Note, *Loaded Dice: Do National Internet Gaming Statutes Violate World Trade Organization Fair Trade Access Standards?*, 24 ARIZ. J. INT'L & COMP. L. 769, 786–87 (2007) (suggesting that the two islands of Antigua and Barbuda indeed “crossed swords” with the United States when they asserted claims against that nation).
 163. See *U.S. v. Cohen*, 260 F.3d 68, 71 (S.D.N.Y. 2001) (addressing that in a jury trial in the U.S. District Court for the Southern District of New York, Thomas P. Griesa, Judge, Cohen was sentenced on August 10, 2000, to a 21-month jail term).
 164. John Leyden, *WTO rules against US gambling laws*, THE REGISTER, Nov. 11, 2004, available at http://www.theregister.co.uk/2004/11/11/us_gambling_wto_rumble/print.html (illustrating the manner in which Cohen operated his offshore sports betting company that he set up in Antigua).
 165. See Joost Pauwelyn, *WTO Condemnation of U.S. Ban on Internet Gambling Pits Free Trade against Moral Values*, ASIL INSIGHT, Nov. 2004, available at <http://www.asil.org/insights/2004/11/insight041117.html>; see also Sung Joon Cho, Note, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Recourse to Arbitration by the United States Under Article 22.6 of the DSU*, 47 I.L.M. 372, 372 (2008) (establishing that the dispute arose from Jay Cohen’s sentence); see also Irem Dogan, *Taking a Gamble on Public Morals: Invoking the Article XIV Exception to GATS*, 32 BROOK. J. INT'L L. 1131, 1131–32 (2007) (explaining that Jay Cohen’s sentence became the starting point for the dispute).
 166. See Panel Report, *United States—Gambling*, at ¶ 2; see also Andrea M. Ewart, *Small Developing States in the WTO: A Procedural Approach to Special and Differential Treatment Through Reforms to Dispute Settlement*, 35 SYRACUSE J. INT'L L. & COM. 27, 44 (2007) (explaining how the prohibition has been a detriment to Antigua’s gambling industry). See generally Michael Park, *Market Access and Exceptions Under the GATS and Online Gambling Services*, 12 SW. J. L. & TRADE AM. 495, 499 (2006) (noting that the prohibition breaches the commitments of the United States under the GATS to “liberalize trade in services for the gambling and betting services sector”).

Article XIV of the GATS allows exceptions for members whose measure is inconsistent with their GATS commitments.¹⁶⁷ In *United States—Gambling*, the AB noted that article XIV set out the general exceptions to the GATS as article XX did for the GATT;¹⁶⁸ therefore, previous disputes under article XX of the GATT were relevant for its analysis of article XIV of the GATS.¹⁶⁹

Article XIV of the GATS, exactly as does article XX of the GATT, sets out a “two-tier analysis” for justifying a measure.¹⁷⁰ The first question is whether there is a relevant exception under article XIV.¹⁷¹ The second question, then, is if there is such an exception, is the member’s measure “necessary” to uphold the exception?¹⁷² Finally, even if the member invoking arti-

167. See Final Act at 1167 (spelling out the general exceptions); see also AB Report, *United States—Gambling*, at ¶ 291 (stating that the dispute between Antigua and the United States was the first where the AB addresses the general exceptions provision of the GATS); see also Tran, *supra* note 160, at 168 (explaining that general exceptions are provided under article XIV).

168. See AB Report, *United States—Gambling*, at ¶ 291 (stating that articles XIV and XX of the GATS address the general exceptions); see also Dogan, *supra* note 165, at 1149 (explaining that articles XIV and XX lay out the general exceptions); see also Marwell, *supra* note 156 at 804 (noting that the general exceptions created order and that ultimately the public goal was to be served).

169. See AB Report, *United States—Gambling*, at ¶ 291, (stating that article XX of the GATT will be treated the same as article XIV of the GATS despite slight differences in the jargon that is used); see also Caroline Bissett, *All Bets Are Off(Line): Antigua's Trouble in Virtual Paradise*, 35 U. MIAMI INTER-AM. L. REV. 367, 393–94 (2004) (illustrating that GATS article XIV is treated the same as GATT article XX because the language that is used in each exception provision is similar); see also Yariv Brauner, *International Trade and Tax Agreements May Be Coordinated, but Not Reconciled*, 25 VA. TAX REV. 251, 276 (2005) (recognizing that GATS article XIV is similar to article XX of the GATT and therefore should be applied in a similar fashion).

170. See Bissett, *supra* note 169, at 398 (referring to the two-step process, determining first if it is necessity and then examining whether it is an exception under GATS article XIV); see also Irem Dogan, *Bankruptcy in the Global Village the Second Decade*, 32 BROOK. J. INT'L L. 1131, 1138–39 (2007) (addressing the two-tiered test that is applied in order to determine if there is a valid article XIV defense: (1) first the panel must determine that the measure was necessary to protect public morals, and (2) the measure must not have been applied arbitrarily); see also Mark Wu, *Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine*, 33 YALE J. INT'L L. 215, 220 (2008) (noting that the similar language between the GATS article XIV and the GATT article XX is not just a coincidence, and therefore they should be applied similarly to the given situation).

171. See General Agreement on Trade and Services, Dec. 15 1993, art. XIV, 33 I.L.M. 44, (1994) (hereinafter GATS) (listing the three main exceptions that exist under article XIV: maintenance of public order or public morals, protection of human life, and compliance with laws and regulations); see also Panel Report, *United States—Gambling*, at ¶ 6 (noting that when a measure conflicts with the requirements of the GATS, the first step to determine if that violation is justifiable is to determine if the measure falls into an exception of article XIV); see also Dogan, *supra* note 170, at 1138 (referencing article XIV, stating that in order for there to be a valid exception, it must be a necessary and relevant exception so as to maintain public order and morals).

172. See Panel Report, *United States—Gambling*, at ¶ 41 (providing that the requirement for successfully invoking the exception to the GATT article XX and the GATS article XIV is one of necessity); see also Eres, *supra* note 77, at 624–25 (listing the elements that must be analyzed under the necessity test); see also Albena P. Petrova, *The WTO Internet Gambling Dispute as a Case of First Impression: How to Interpret Exceptions Under GATS Article XIV(A) and How to Set the Trend for Implementation and Compliance in WTO Cases Involving “Public Morals” and “Public Order” Concerns?*, 6 RICH. J. GLOBAL L. & BUS. 45, 53 (2006) (describing the test to determine if a measure is necessary if composed of a balancing act of different factors to determine if the ultimate result would in to protect public order and public morals).

cle XIV satisfies this two-step test, it must still navigate the chapeau of article XIV.¹⁷³ This requires that the member apply the measure in a manner that does not constitute “arbitrary or unjustified discrimination, or a disguised restriction on trade in services.”¹⁷⁴

In *United States—Gambling*, Antigua claimed that the United States had included in its GATS schedule a specific commitment to gambling and betting services, and by subsequently *de facto* prohibiting cross-border gambling, it was acting inconsistently with this commitment and several GATS provisions.¹⁷⁵ The panel agreed and found that some of the U.S. statutes to which Antigua referred were in breach of article XVI of the GATS.¹⁷⁶ The United States appealed the decision.¹⁷⁷

The AB said that the GATS article XIV contemplated a “two-tier analysis” of a measure, as did the GATT article XX.¹⁷⁸ It focused on the U.S. public morals and public order defense

173. See GATS at XIV (the chapeau to the GATS article XIV states that the exceptions that are listed therein should not be applied in a way that would constitute discrimination or a restriction on trade); see also Panagiotis Delimatsis, *Determining the Necessity of Domestic Regulations in Services*, 19 EUR. J. INT'L L. 365, 371 (2008) (noting that in order for a measure to be justified under article XX of the GATT it must also comply with the chapeau of the article); see also Grunfeld, *supra* note 161, at 486–87 (demonstrating that the exceptions of article XIV are limited by the chapeau of said article, and it must not be applied in a way that would result in subjective prejudice).

174. See GATT at XIV; see also Tom Newnham, *WTO Case Study: United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, 7 ASPER REV. INT'L BUS. & TRADE L. 77, 87 (2007) (referring to the fact that the exceptions that are stated in article XIV should not be applied in a way as to constitute arbitrary decision making, especially in situations where there are comparable facts); see also Wu, *supra* note 170, at 228 (stating that a requirement of the GATS article XIV exceptions is that they are to be applied in a manner that does not foster arbitrary discrimination).

175. See AB Report, *United States—Gambling*, at ¶ 2, (stating that by making full market access and national treatment commitments here, the U.S. ban on gambling was thus “acting inconsistently with its obligations under its GATS schedule, as well as under Articles VI, XI, XIV, and XVII of the GATS”).

176. See *id.* at ¶ 5 (holding that the federal Wire Act, the federal Travel Act and the federal IGBA that have been enacted in the United States do not comply with article XIV of the GATS).

177. See *id.* at ¶ 7 (referencing the intention of the United States to appeal the Panel Decision).

178. See *id.* at ¶ 292 (explaining that article XIV of the GATS sets out the same general exceptions and obligations under that agreement in the same manner as article XX of the GATT); see also Raj Bhala & David Gantz, *WTO Case Review 2005*, 23 ARIZ. J. INT'L & COMP. L. 107, 332 (2006) (noting that while article XIV of the GATS contains the same “two-tier” analysis as article XX, the U.S. defense under the GATS article XIV(a) is a fundamental question of whether restrictions on gambling and betting services are acceptable on moral grounds); see also Kelly Ann Tran, *Compliance Panel Sets the Record Straight: Analyzing Compliance Panel and Appellate Body Decisions in the Antigua-United States Internet Gambling Dispute*, 11 GAMING L. REV. 403, 406 (2007) (asserting that article XIV of the GATS sets out the general exceptions and obligations under that agreement in the same manner as does article XX, but that the AB erred in its conclusion that these disputed measures were necessary to protect public morals or maintain public order).

under article XIV(a).¹⁷⁹ The two tiers were (1) whether the online gambling ban was provisionally justified under article XIV(a); and (2) whether it met the additional requirements of the chapeau.¹⁸⁰ The AB agreed with the panel's finding that the measure was well within the scope of public morals or order.¹⁸¹ The panel had gone on to conclude, however, that the ban was not "necessary" because it had a strong trade-restrictive effect, and the United States had failed to pursue good faith negotiations with Antigua.¹⁸² The AB said that "necessity" was an "objective standard"¹⁸³ and applied the *Korea—Beef* "weighing and balancing" test to the measure,¹⁸⁴ coming up with four key criteria:

1. Assess the relative importance of the interests or values championed by the measure.
2. Assess how the measure contributes to the realization of the ends pursued by it.

179. See AB Report, *United States—Gambling*, at ¶ 292, n. 251, (noting that this case was the first ever to look not only at the general exceptions under article XIV of the GATS but also at the exception relating to "public morals" under the agreements); see also Dogan, *supra* note 165, at 1137 (explaining how the United States was forced to rely on the invocation of the never-before-used GATS article XIV exception provision for protection of public morals or public order and for securing compliance with U.S. laws or regulations); see also Petrova, *supra* note 172, at 51 (stating that the GATS article XIV has language that is identical to the language contained in the GATT article XX, and that the panel found it helpful to consider previous WTO decisions analyzing the exceptions under the GATT article XX).

180. See AB Report, *United States—Gambling*, at ¶ 292 (explaining that article XIV of the GATS sets out the same general exceptions and obligations under the agreement in the same manner as article XX of the GATT); see also Newnham, *supra* note 174, 86–87 (noting that in order for the United States to establish a morals defense under article XIV, it was required to meet a two-pronged test: (1) prove that the three federal statutes are necessary to protect public morals or maintain public order and (2) satisfy a legal balancing test, referred to as the "chapeau"); see also Petrova, *supra* note 172, at 56 (stating that the panel concluded, using a two-tiered analysis, that the United States was unable to provisionally justify a public moral defense under article XIV(a) of the GATS).

181. See AB Report, *United States—Gambling*, at ¶ 299 (upholding the panel's finding, in paragraph 6.487 of the Panel Report, that "the concerns which the Wire Act, the Travel Act and the Illegal Gambling Business Act seek to address fall within the scope of 'public morals' and/or 'public order'").

182. Panel Report, *United States—Measures Affecting The Cross-Border Supply of Gambling and Betting Services: Recourse to Article 21.5 of the DSU by Antigua and Barbuda*, WT/DS285/RW (30 March 2007) at ¶ 300.

183. See AB Report, *United States—Gambling*, at ¶ 304 (illustrating that "necessity" was an "objective standard"); see also Marisa Martin, *Trade Law Implications of Restricting Participation in the European Union Emissions Trading Scheme*, 19 GEO. INT'L ENVTL. L. REV. 437, 464 (2007) (stating that the AB has determined that the "necessity" standard is an objective one, and that the responding party has the burden of proving the prima facie case of "necessity"); see also Petrova, *supra* note 172, at 51 (noting that the AB holds that the necessity exception under the GATT is an objective standard).

184. See AB Report, *United States—Gambling*, at ¶ 78, (explaining how the AB established a "weighing and balancing" test with three particular components to assess whether a measure is "necessary," but that the panel's analysis of the three components in this dispute falls short of the demanding inquiry outlined by the AB in that decision).

3. Assess how restrictive is the measure on international commerce.
4. Compare the measure to possible alternatives *in light of* the importance of the interests at issue.¹⁸⁵

The AB said that the party invoking the affirmative defense under article XIV bears the burden of proving that its measure satisfies the requirements of the defense.¹⁸⁶ That party need only establish a *prima facie* case.¹⁸⁷ It may, but does not have to, point out alternative measures and is under no duty to prove that there are no reasonably available WTO-consistent alternatives.¹⁸⁸ Nevertheless, if the complainant raises a WTO-consistent alternative that it believes would have met the respondent's needs, the respondent must demonstrate why this proposed alternative is not "reasonably available."¹⁸⁹

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185. See *id.* at ¶ 306 (noting that whether a measure is "necessary" should be determined through "a process of weighing and balancing a series of factors"); see also Delimatsis, *supra* note 173, at 377 (noting that in assessing the current problem, one factor that must be weighed as provided by the *Korea—Beef* jurisprudence, lies in the importance of the interest at issue); see also Nancy J. King & Kishani Kalupahana, *Choosing Between Liberalization and Regulatory Autonomy Under GATS: Implications of U.S.—Gambling for Trade in Cross Border E-Services*, 40 VAND. J. TRANSNAT'L L. 1189, 1250 (2007) (noting that there are three factors that must be weighed and balanced when determining whether a measure is "necessary" within the meaning of the GAT article XIV).
 186. See AB Report, *United States—Gambling*, at ¶ 309 (noting that when a party invokes an affirmative defense, it bears the burden of demonstrating that the defense's measure, found to be inconsistent with the WTO, satisfies the requirements of the invoked defense); see also Delimatsis, *supra* note 173, at 377 (stating that it is well known that the responding party bears the burden of proving that the challenged measure falls within the ambit of article XIV); see also Mary Ann Liebert, *Panel Report: United States Measures Affecting the Cross-Border Supply of Gambling and Betting Services: Recourse to Article 21.5 of the DSU by Antigua and Barbuda*, WT/DS285/RW (MAR. 30, 2007), 11 GAMING L. REV. 297, 322 (2007) (noting that when an affirmative defense is involved, the responding party has the burden of proof to show that the affirmative defense applies).
 187. See Margareta Djordjevic, *Domestic Regulation and Free Trade in Services—A Balancing Act*, 29 L. ISSUES ECON. INTEGRATION 305, 314 (2002) (explaining the general principle of the burden of proof being applied to the complaining party); see also Park, *supra* note 166, at 509–14 (assessing the burdens imposed by article XIV as applied to the current case); see also Caley Ross, *David Gambles to Slay Goliath and Barely Lives to Tell the Tale: Antigua v. United States*, 11 GAMING L. REV. 674, 684 (2007) (stating the legal standard laid out by the panel for the defendant to succeed was *prima facie*, provided that the complaining party cannot refute).
 188. See AB Report, *United States—Gambling and Betting Services*, at ¶¶ 309–10, WT/DS285/AB/R (Apr. 7, 2005) (hereinafter AB Report, *United States—Gambling*) (stating that a party does not have to identify all possible alternative measures and demonstrate their effectiveness); see also Newnham, *supra* note 174, at 87 (explaining the AB's ruling that necessity is based on objectively assessing the reasonable alternatives); see also Jonathan Schwartz, *Click the Mouse and Bet the House: The United States' Internet Gambling Restrictions Before the World Trade Organization*, 2005 U. ILL. J.L. TECH. & POL'Y 125, 138 (2005) (expressing the AB's view that the panel's analysis of the necessity of the disputed measures by the United States was flawed).
 189. See AB Report, *United States—Gambling*, at ¶ 311 (stating that a party does not have to identify all possible alternative measures and demonstrate their effectiveness); see also Bhala & Gantz, *supra* note 178, at 336 (explaining that under the methodology of the AB's balancing test, if the complaining party meets its burden of proving that an alternative measure is reasonably available, the burden shifts to the responding party); see also Eric H. Leroux, *Eleven Years of GATS Case Law: What Have We Learned?*, 10 J. INT'L ECON. L. 749, 789 (2007) (concluding that the main standard for necessity can still be seen in terms of a WTO-consistent or less-WTO-inconsistent alternative being reasonably available to the party invoking the exception).

Having thus set down its definitive reading of the “necessity” test, the AB ran its collective eyes over the panel’s ruling on the necessity of the U.S. measure.¹⁹⁰ The United States had made out a *prima facie* case of “necessity” of its regulations to protect against possible ills of online gambling.¹⁹¹ These included money laundering and the problem of minors being able to gamble online.¹⁹² Antigua had failed to identify a reasonably available alternative measure;¹⁹³ therefore, the United States had demonstrated that its measure was “necessary.”¹⁹⁴ The panel had incorrectly applied an “explore and exhaust” approach to the necessity test, whereby the United States *had* to negotiate with Antigua as prerequisite to its ban.¹⁹⁵ It erred in using negotiations with Antigua as an alternative “measure” that could be computed into the necessity test and compared with the U.S. measure at issue in the dispute.¹⁹⁶ The AB reversed the panel here and then went on to complete the analysis by deciding whether the United States had met the test under article XIV(a).¹⁹⁷

This meant, in effect, seeing if the U.S. measure met the requirements of the chapeau (which, according to the panel, it did not).¹⁹⁸ It agreed with the panel that remote gambling gave rise to “particular concerns,” and so it was inappropriate to compare remote and non-

190. See Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, at ¶¶ 311–13, WT/DS285/AB/R (Apr. 7, 2005) (addressing the issue of whether the panel had erred in its analysis of “necessity”).

191. See Dogan, *supra* note 165, at 1141–43 (stating that the conflicting statutory measures of the United States were found by the AB to be measures necessary to protect public morals or maintain public order and were not arbitrarily or discriminatorily applied); see also King & Kalupahana, *supra* note 185, at 1252 (explaining that Antigua’s failure to argue the existence of an alternate measure to that of the U.S. laws challenged led to the AB’s holding that the United States made a *prima facie* case of necessity); see also Petrova, *supra* note 172, at 59 (examining the AB’s reversal of the panel’s findings of lack of necessity based on the panel’s incomplete analysis of the factors).

192. See Deputy Assistant Attorney General John G. Malcolm’s Testimony Before the U.S. Senate Committee on Banking, Housing and Urban Affairs (2003), available at <http://www.usdoj.gov/criminal/cybercrime/malcolmTestimony318.htm> (expressing the U.S. Justice Department’s concerns over the potential for online gambling to facilitate gambling for minors and providing a convenient vehicle for criminals to launder money).

193. See AB Report, *United States—Gambling*, at ¶¶ 320–21 (concluding that the possibility of consultations with Antigua was erroneously assessed as a reasonably available alternative measure to compare the challenged measures against).

194. See *id.* at ¶ 326 (stating that in light of the United States’ *prima facie* case of necessity and Antigua’s lack of reasonably available alternative measures presented, the U.S. measures are considered necessary).

195. See *id.* at ¶ 315 (explaining that the panel’s necessity analysis led them to conclude that the United States had an obligation to consult with Antigua as a WTO-compatible alternative); see also *id.* at ¶ 317 (stating that the panel incorrectly viewed engaging in consultations with Antigua as a reasonable alternative measure, which the United States was not required to raise unless put forward by Antigua).

196. See *id.* at ¶ 321 (finding the United States failed to comply with recommendations and rulings of the DSB in the dispute).

197. See *id.* at ¶ 322 (noting that the panel made an “explore and exhaust” requirement mistake in relation to the GATS article XIV(c), but because the AB reversed the panel’s decision on article XIV(a), holding the U.S. measure to have met necessity requirement under it, the panel rendered analysis under (c) moot); see also *id.* at ¶ 377.

198. See AB Report, *United States—Gambling*, at ¶ 340 (finding that the United States could not prove that it was not applying the remote supply of wagering law in an arbitrary manner that was discriminatory); see also King & Kalupahana, *supra* note 185, at 1235 (finding the panel erred in imposing an obligation on the United States to consult with Antigua as a part of considering all available WTO measures); see also Martin, *supra* note 183, at 465 (determining that the ban was arbitrary because the United States did not show that prohibitions on services for remote betting on horseracing were applied to both foreign and domestic suppliers).

remote gambling together.¹⁹⁹ The AB then proceeded to uphold but narrow the panel's finding that the measure violated the chapeau. The panel found that the United States had acted in a discriminatory manner because it "had not prosecuted certain domestic remote suppliers of gambling services"²⁰⁰ and, in addition, the Interstate Horseracing Act (IHA) appeared "to permit certain types of remote betting on horseracing within the United States."²⁰¹ However, the AB felt that the evidence of a handful of remote suppliers was not sufficient for the panel to use this evidence to disregard the wording of the measure itself.²⁰² The measure on its face did not discriminate between domestic and foreign gambling service suppliers.²⁰³ Accordingly, the AB reversed the panel and held that there was not discrimination rising to an "arbitrary" or "unjustifiable" level here.²⁰⁴

The only aspect of the panel report that found the United States in violation of the chapeau to be upheld was in relation to the IHA.²⁰⁵ This was because the AB held that the United States had not disproved that there was "the possibility that the IHA exempts only *domestic* suppliers of remote betting services for horse racing from the prohibitions in the Wire Act, the Travel Act, and the IGBA [Illegal Gambling Business Act]."²⁰⁶

199. See AB Report, *United States—Gambling*, at ¶ 347 (determining that maintaining a distinction between remote and non-remote gambling for the purposes of analyzing discrimination in the laws application reflects the need for distinct regulatory methods regarding remote gambling); see also Dogan, *supra* note 165, at 1145 (contending that remote gambling facilitates use by minors, money laundering and fraud constituted specific harms); see also Grunfeld, *supra* note 161, at 489 (asserting that it would be inappropriate to compare remote and non-remote gambling because of the specific concerns regarding illegal activities facilitated by remote gambling).

200. See AB Report, *United States—Gambling*, at ¶ 348 (reversing the panel's finding that the United States failed to demonstrate it enforced its prohibition of the remote supply of gambling and betting services consistently with the chapeau requirements).

201. See *id.* at ¶ 348 (determining that the United States was not in accordance with the requirements of the chapeau of article XIV due to its inconsistent application of the prohibition on remote gambling by domestic and foreign members); see also Harrington, *supra* note 162, at 793 (stating that the United States had not demonstrated that its prohibition of remote gambling satisfied the requirement under the article XIV chapeau because remote domestic horse racing was permitted); see also Tran, *supra* note 160, at 188 (concluding that if the United States wanted to protect public morals from remote gambling, it would have to ban all remote gambling, and failure to do so would be discrimination).

202. See AB Report, *United States—Gambling*, at ¶ 357 (clarifying that the language of the measure does not discriminate between U.S. and foreign suppliers, thereby making the distinction consistent with the requirements of the chapeau).

203. See *id.* (explaining that the panel should have then examined the wording of the measure because the evidence regarding enforcement was not sufficiently definitive).

204. See *id.* (declaring the manner of enforcement was in accordance with the language of the measure).

205. See *id.* at ¶ 369 (stating that the United States had not shown that prohibitions in the IHA satisfy the requirements of the chapeau).

206. See 15 U.S.C.A. § 3001 (1978) (giving states the power to determine what forms of gambling may take place within their borders); see also AB Report, *United States—Gambling*, at ¶ 369 (concluding that the United States failed to show that the three acts are applied consistently as required by the chapeau in light of the IHA); see also Leroux, *supra* note 189 at 790 (noting the IHA's inconsistencies under the GATS by allowing domestic but not foreign gaming service providers to operate).

H. Gambling: Recourse to Article 21.5 of the DSU by Antigua and Barbuda²⁰⁷

On April 20, 2005, the DSB adopted the AB and panel reports in *United States—Gambling*.²⁰⁸ The United States and Antigua disagreed about the reasonable period of time for the United States to implement the reports, and so the matter went to arbitration.²⁰⁹ The arbitration award gave the United States a little under a year to comply with the ruling, with the time limit expiring on April 3, 2006.²¹⁰ When this time limit was up, the United States still had not taken any steps to bring its measures in line with the WTO reports, and so Antigua requested the establishment of a panel under article 21.5 of the DSU to examine whether the United States had brought its laws into line with the previous decisions.²¹¹

The panel noted that the primary issue in this proceeding was to examine whether “any measures taken to comply” existed.²¹² It found that none existed,²¹³ and both Antigua and the United States agreed with this.²¹⁴ The United States, however, argued that the “measures taken to comply” in this dispute were the same measures that were at issue in the original proceedings.²¹⁵ The difference was that these measures actually *were* WTO consistent; it was just that

207. See Panel Report, *United States—Gambling* (reporting the findings of the panel).

208. See Action by Dispute Settlement Body, United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/RW (April 25, 2005) (enumerating the DSB’s adoption of the AB and panel reports); see also Communication from Delegation of Antigua and Barbuda, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 3, WT/DS285/RW (June 9, 2005) (hereinafter Delegation Communication, *Gambling*) (noting DSB’s adoption of both reports); see also Award of the Arbitrator, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 27, WT/DS285/ARB-2005-2/19 (Aug. 19, 2005), available at 2005 WL 1996907 (hereinafter Arbitrator, *Gambling*) (citing the fact that the DSB adopted both reports).

209. See Delegation Communication, *Gambling*, at ¶ 3, (outlining the brief history of Antigua’s request for arbitration of the dispute).

210. See Arbitrator, *Gambling*, at ¶¶ 27–28, 68 (discussing calculating of a reasonable time to comply with rulings of the DSB); see also Ross, *supra* note 187, at 692 (describing the process leading to arbitration and naming an April 3, 2006, deadline).

211. See Request for Establishment of a Panel, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 1, WT/DS285 (July 7, 2006) (detailing the request for a panel and brief history enumerating need for a panel); see also Tran, *supra* note 178, at 403 (noting Antigua’s request and attributing lack of U.S. action to a belief that it “needs to only clarify the relationship between the IHA and U.S. federal laws in order to come into compliance with its WTO obligations”); see also Kathryn B. Codd, Note, *Betting on the Wrong Horse: The Detrimental Effect of Noncompliance in the Internet Gambling Dispute on the General Agreement on Trade in Services (GATS)*, 49 WM. & MARY L. REV. 941, 955 (2007) (outlining the noncompliance by the United States and subsequent request by Antigua for a panel).

212. See Panel Report, *United States—Gambling*, at ¶ 5.25 (denoting that the primary issue of the proceeding was examining if “any measures taken to comply” were taken by the United States).

213. See *id.* (declaring that no measures had been taken to comply with the ruling of the DSB); see also Tran, *supra* note 178, 403–05 (discussing the United States’ lack of action in complying with the DSB recommendations); see also *Gambling Panel Hints at Broader U.S. Compliance Problem*, INSIDE US TRADE, Apr. 6, 2007, at 2, available at 2007 WLNR 6619456 (citing the panel’s rejection of the U.S. argument for an exemption and subsequent noncompliance with the AB ruling).

214. See Panel Report, *United States—Gambling*, at ¶ 5.25 (finding primarily that the United States has not taken measures to comply with the DSB AB report adopted on April 20, 2005).

215. See *id.* at ¶ 6.8 (explaining the source of the disagreement between the United States and Antigua).

the United States had failed to discharge this burden of proof properly in the original panel and AB proceedings.²¹⁶

This argument led the panel to return to the dictionary to look up the meaning of “conformity”;²¹⁷ and having done so, it reasoned that to bring an inconsistent measure into conformity with an agreement, some *change* must occur.²¹⁸ This change did not have to be made in the wording of the measure (in this case, the Wire Act, the Travel Act and the IGBA) itself necessarily; it could be made according to how the measure is applied in practice.²¹⁹ In the present case, the panel ruled, there had been no change to the wording, application or interpretation of the measures by the United States since the AB report.²²⁰ The United States was erring by attempting to reassess claims and defenses that led to the original panel and AB rulings.²²¹ Article 21.5 proceedings were to survey the implementation of DSB rulings and recommendations, *not* to go over the reasons for these rulings again.²²²

This was the panel’s preliminary conclusion. It chose, though, to go on and examine whether the specific findings in the original proceedings may compel a different conclusion.²²³ Both Antigua and the United States agreed that the AB report in *United States—Gambling* ruled that the United States had lost under an article XIV GATS defense.²²⁴ For the United States, though, this simply meant that it had not established its defense sufficiently under arti-

216. See *id.* at ¶ 6.4 (reviewing the United States’ failure to meet its burden of showing that it had satisfied the requirements of an affirmative defense in the original proceeding).

217. See AB Report, *United States—Gambling*, at ¶ 164 (stating how a panel is allowed to start with a dictionary definition of a term to be interpreted in order to identify its ordinary meaning); see also King & Kalupahana, *supra* note 185, at 1235 (detailing the WTO’s application of the dictionary definitions of “numerical” and “quota” in its interpretation of the market access obligation of the GATS); see also Harrington, *supra* note 162, at 788 (demonstrating how the WTO used the dictionary to determine if “gambling” activities fall within the meaning of “recreation,” “sporting” or “entertainment”).

218. See Panel Report, *United States—Gambling*, at ¶ 6.14 (explaining that the United States must make a change that eliminates inconsistency between the compliance measures and article XIV of the GATS).

219. See *id.* at ¶¶ 6.19–6.24 (describing how the panel decided to apply the ordinary meaning of “conformity” in its interpretation of the measure).

220. See *id.* at ¶ 6.27 (noting how the United States made no significant changes to the measures in the two years since the AB report’s adoption on April 20, 2005).

221. See *id.* at ¶ 6.15 (illustrating the United States’ error in submitting to the panel similar claims and defenses of its compliance measures, as it did to the original AB panel).

222. See *id.* at ¶ 6.16; see also Raj Bhala & David A. Gantz, *WTO Review: WTO Case Review 2006*, 24 ARIZ. J. INT’L & COMP. LAW 299, 387 n.1 (2007) (stating the purpose of article 21.5 of the DSU is to settle disputes between parties); see also Shin-yi Peng, *How Much Time Is Reasonable?—The Arbitral Decisions Under Article 21.3(c) of the DSU*, 26 BERKELEY J. INT’L L. 323, 346 (2008) (establishing that the purpose of article 21.5 procedures is to assess the consistency of the implementation of a measure, as opposed to examining the nature of the measure).

223. See Panel Report, *United States—Gambling*, at ¶ 6.38 (stating that the panel would consider the United States’ argument that review of findings from prior proceedings would lead to a different conclusion).

224. See *id.* at ¶¶ 6.39–6.40 (noting that Antigua submits that the AB’s findings constitute a final resolution of the dispute, and that the United States is not asking the AB to revisit its prior findings).

cle XIV, and the article 21.5 proceedings gave it another chance to do so.²²⁵ The panel referenced the dictionary again²²⁶ and held that the DSB, by accepting and adopting the AB report, had voted that Antigua and the United States accept the report *unconditionally*.²²⁷ Therefore, the United States could not subsequently attempt to seek reassessment of an issue that it had already accepted unconditionally.²²⁸

Further, the United States argued that the AB merely had said that there was an ambiguous relationship between the IHA and the three federal criminal statutes (the Wire Act, the Travel Act and the IGBA),²²⁹ and this statement did not require the United States to bring this law into line with the GATS.²³⁰ The panel disagreed.²³¹ This ambiguity reflected the ambiguity

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225. See Appellate Body Report, *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products—Second Recourse to Article 21.5 of the DSU by New Zealand and the United States*, ¶ 75–77, WT/DS103/AB/RW2, WT/DS113/AB/RW2 (Dec. 20, 2002) (asserting that a defense is not barred when a lack of evidence precludes a decision by a panel); see also Panel Report, *United States—Final Dumping Determination on Softwood Lumber from Canada*, ¶ 5.21, WT/DS264/R (Apr. 13, 2004) (stating that panels and the AB may reconsider prior legal interpretations if certain legal arguments were not previously made by the parties); see also Panel Report, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶ 7.105, WT/DS344/R (Dec. 20, 2007) (acknowledging that under the DSU panel is not obligated to accept a previously adopted panel or AB report).
226. See Panel Report, *United States—Gambling*, at ¶¶ 6.48–6.51 (referring to the dictionary and other interpretive methods to determine the meaning of the phrase “must be unconditionally accepted” in article 17.14 of the DSU).
227. See AB Report, *United States—Shrimp: Recourse*, at ¶ 97 (acknowledging that unconditional acceptance by the parties to a dispute is assumed when an AB decision is adopted by the DSB); see also Appellate Body Report, *United States—Tax Treatment for “Foreign Sales Corporations”—Second Recourse to Article 21.5 of the DSU by the European Communities*, ¶ 82, WT/DS108/AB/RW2 (Feb. 13, 2006) (asserting that when a recommendation is adopted by the DSB, it becomes effective and binding on the parties); see also Ewart, *supra* note 166, at 33 (noting that an AB report must be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides to reject the report).
228. See Panel Report, *United States—Gambling*, at ¶¶ 6.44–6.59 (interpreting the meaning and application of article 17.14 to the finding of the AB with regard to the chapeau of article XIV of the GATS to find that the United States was precluded from re-argument of the same defense); see also Panel Report, *United States—Subsidies on Upland Cotton—Recourse to Article 21.5 of the DSU by Brazil*, ¶ 10.38–10.40, WT/DS267/RW (Dec. 18, 2007) (rejecting the complaint’s argument that a panel in an article 21.5 proceeding should employ a different allocation method than that used in a prior proceeding because that method had been rejected in that proceeding); see also Newnham, *supra* note 174, at 93–94 (asserting that the United States could not reargue the case in the article 21.5 compliance proceeding because its argument had failed previously).
229. See Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Annex A, ¶ 6.67, WT/DS285/R (Nov. 10, 2004) (hereinafter Panel Report, *United States—Gambling*) (arguing that the AB did not rule on the effect of the IHA on the Wire Act, Travel Act, and the IGBA).
230. See Panel Report, *United States—Measures Treating Exports Restraints as Subsidies*, ¶ 4.42, WT/DS194/R (June 29, 2001) (claiming that according to United States’ principles of statutory interpretation, an ambiguous statute is to be interpreted whenever possible, as being consistent with the United States’ international obligations). See generally Panel Report, *United States—Sections 301–310 of the Trade Act of 1974*, ¶ 7.102, WT/DS152/R (Dec. 22, 1999) (noting that members must be allowed the maximum autonomy in ensuring conformity and should have the ability to choose the way which suits it best). But see Panel Report, *United States—Sections 301–310 of the Trade Act of 1974*, ¶ 7.113, WT/DS152/R (Dec. 22, 1999) (asserting that where legal instruments contain ambiguities, the ambiguities should be resolved in a manner consistent with international obligations).
231. See Panel Report, *U.S. Gambling*, at ¶¶ 6.70–6.74 (commenting that the AB significantly based its determination that the United States’ measures failed to satisfy the article XIV chapeau on the ambiguous relationship of the Interstate Horseracing Act with the Wire Act, Travel Act, and Illegal Gambling Business Act).

of U.S. domestic law on the matter, and so long as this uncertainty remained, the measures at issue were not compliant with the GATS.²³²

The United States then said that the article 21.5 panel had a greater factual record before it,²³³ and the panel agreed to look at the original issues in light of this apparently less opaque factual background.²³⁴ The United States was, however, hoisted with its own petard by this supplementary evidence.²³⁵ The panel concluded “that the IHA authorizes remote pari-mutuel account wagering in the United States, and that this is not prohibited by the Wire Act.”²³⁶ The evidence demonstrated the existence of a large remote-account wagering industry in horse racing in the United States, which appeared to be allowed to operate by the authorities.²³⁷ The U.S. Department of Justice had never, apparently, initiated a criminal prosecution against a supplier who took such bets, even though the Wire Act ostensibly made them illegal.²³⁸ The fact that these bets were allowed to occur, and that the IHA made them legal while the Wire Act made them illegal, meant that the ambiguity in U.S. law from the original AB report ruling remained.²³⁹ Even stranger was that the Unlawful Internet Gambling Enforcement Act (UIGEA),²⁴⁰ enacted by Congress in October 2006, exempted any activity that was allowed

232. See AB Report, *United States—Gambling*, ¶ 683, (indicating that the United States had more information to work with using article 21.5); see also Nelson Rose, *The U.S. and the Ongoing Mess with the WTO*, 12 GAMING L. REV. & ECON. 105, 106–107 (2008) (informing that the United States said article 21.5 gave the panel a larger record to analyze); see also Ross, *supra* note 187, at 280 (indicating that the panel had more information to evaluate with regard to the dispute’s issues by using article 21.5).

233. See AB Report, *United States—Gambling and Betting Services*, ¶ 6.84, WT/DS285/AB/R (Apr. 7, 2005) (hereinafter AB Report, *United States—Gambling*) (indicating article 21.5 provided additional information for consideration).

234. See *id.* at ¶ 6.94 (noting that the United States had more information to examine with regard to article 21.5); see also Rose, *supra* note 232, at 107 (stating that the United States said article 21.5 gave the panel a larger record to analyze); see also Ross, *supra* note 187, at 681 (explaining that the panel had more to evaluate by using article 21.5).

235. See AB Report, *United States—Gambling*, at ¶ 6.94 (stating that with article 21.5, the United States could make its own determinations).

236. See *id.* at ¶ 6.111 (noting that the IHA authorized wagering on horse racing, but the Wire Act did not); see also Anthony Cabot, *Why the Future of Horseracing Is at Risk: The WTO Decision and Senator Kyl*, 9 GAMING L. REV. 201, 202 (2005) (indicating that although the IHA authorized wagering in horse racing in the United States, the Wire Act did not); see also Robert Penchina, *What Does DOJ Have Against Interstate Horseracing Act?* 10 GAMING L. REV. 446, 447 (2006) (noting that the IHA and the Wire Act differed on the legality of wagering in the United States).

237. See AB Report, *United States—Gambling* at ¶ 6.116 (noting that wagering on horse racing has been known to exist in the United States); see also *id.* (records show that wagering on horse racing occurred in the United States); see also Penchina, *supra* note 236, at 446 (indicating that a lot of wagering on horse racing happens in the United States).

238. See AB Report, *United States—Gambling*, at ¶ 6.124 (indicating that the U.S. Department of Justice did not bring suit against a bet supplier); see also Cabot, *supra* note 236, at 201 (noting that the U.S. Department of Justice never brought suit against any bet supplier); see also Penchina, *supra* note 236, at 446 (indicating that although the action was found to be illegal under the Wire Act, the U.S. Department of Justice opted not to bring action against a bet supplier).

239. See Rose, *supra* note 232, at 105 (noting that the United States said article 21.5 gave the panel a larger record to analyze); see also Ross, *supra* note 187, at 280–281 (indicating that the panel had more to examine by using article 21.5).

240. See AB Report, *United States—Gambling*, at ¶ 6.128 (noting that the Gambling Enforcement Act was quite unusual).

under the IHA.²⁴¹ This further reinforced the paradox, and the Panel noted, “the United States Congress appears to have contemplated that some activity may be ‘allowed’ under the IHA that might otherwise be considered ‘unlawful Internet gambling.’”²⁴²

The article 21.5 panel report ruled that the United States had taken no steps to bring its measures into compliance with the previous DSB reports.²⁴³ It indulged the United States’ request to go over old evidence and also looked at new, supplementary evidence.²⁴⁴ Rather than exonerate the United States, this evidence seemed to confirm that there was a gaping ambiguity surrounding certain activities allowed by the IHA that would otherwise be illegal under other, overlapping U.S. laws.²⁴⁵ This ambiguity, the panel held, resulted in arbitrary or unjustifiable discrimination between domestic and foreign service providers, which violated the chapeau of article XIV of the GATS.²⁴⁶

I. *Brazil—Tyres*

The most recent dispute involving a GATT exception was *Brazil—Tyres*,²⁴⁷ which involved the retreaded tyre industry. A tyre nearing the end of its roadworthiness may be refit-

241. See Bennet Kelley, *Internet Legislation in the First Session of the 110th Congress*, 11 J. INTERNET L. 17, 18 (2008) (stating that the UIGEA shut down the U.S. market for online gambling, with the exception of online wagering on horse races in states permitting off-track betting allowed under the IHA); see also Michael D. Schmitt, Note, *Prohibition Reincarnated? The Uncertain Future of Online Gambling Following the Unlawful Internet Gambling Enforcement Act of 2006*, 17 S. CAL. INTERDISC. L.J. 381, 391 (2008) (explaining that the UIGEA does not affect the legality of interstate betting over the Internet, which is authorized by a recent amendment to the IHA); see also Peter Paul Shaker, Note, *America’s Bad Bet: How the Unlawful Internet Gambling Enforcement Act of 2006 Will Hurt the House*, 12 FORDHAM J. CORP. & FIN. L. 1183, 1194 (2007) (indicating that the UIGEA exempts activities allowed under the IHA).

242. See Panel Report, *United States—Gambling*, at ¶ 6.132 (noting that the IHA allows certain activity that would otherwise be unlawful); see also Newnham, *supra* note 174, at 94 (noting that due to the prosecution of foreign operators combined with the lack of prosecution of domestic operators, the panel concluded that the United States permits gambling under the Interstate Horseracing Act even though it is not recognized under federal law); see also Grunfeld, *supra* note 161, at 455 (explaining that by allowing the use of electronic media, the Interstate Horseracing Act has, in effect, legalized Internet betting).

243. See Panel Report, *United States—Gambling*, at ¶ 6.85 (concluding that the United States has not complied with the rulings and recommendations of the DSB).

244. See *id.* at ¶ 6.96 (reasoning that it is beneficial to assess new evidence that has arisen since the previous hearing).

245. See King & Kalupahana, *supra* note 185, at 1233 (reporting that the IHA was found to exempt acts that would be prohibited under various anti-gambling provisions such as the IGBA); see also Leroux, *supra* note 189, 786–87 (indicating that the IHA was found to contradict similar federal laws such as the Wire Act and the Travel Act); see also Grunfeld, *supra* note 161, at 461 (explaining that the UIGEA does not resolve the discrepancies between the IHA and other U.S. laws).

246. See Rose, *supra* note 232, at 1186–87 (commenting that the IHA permitted the same activity in the United States with domestic service providers that is prohibited with foreign service providers); see also Harrington, *supra* note 162, at 791 (discussing the discriminatory aspects of the IHA, which allowed electronic wagering in the United States but not in Antigua); see also Benjamin J. Wickert, Note, *All In, But Left Out: How the Unlawful Internet Gambling Enforcement Act Seeks to Eradicate Online Gambling in the United States*, 10 VAND. J. ENT. & TECH. L. 215, 237–38 (2007) (recognizing that the Interstate IHA allows certain domestic companies to operate with impunity while at the same time prohibiting commerce with Antigua for similar services).

247. See AB Report, *Brazil—Tyres* (assessing Brazil’s compliance with the GATT)

ted by replacing the old rubber with new rubber.²⁴⁸ However, this is only a temporary fix, and most tyres can be refitted only once before they turn into waste.²⁴⁹ Waste tyres provide breeding grounds for mosquito-borne diseases such as dengue, yellow fever and malaria.²⁵⁰ Therefore, in 2000, Brazil, unable to cope with the sheer quantity of retreaded tyres within its borders, banned all imports of them.²⁵¹ The EC, a “net exporter of retreaded tyres,”²⁵² was particularly hurt by this ban and, so, in 2005 initiated a dispute with Brazil on the world trading stage.²⁵³

Brazil acknowledged that its ban was *prima facie* inconsistent with article XI:1 of the GATT but contended “that the prohibition on the importation of retreaded tyres and associated fines, and state measures restricting the marketing of imported retreaded tyres, were all justified under Article XX(b) of the GATT 1994.”²⁵⁴ Two gaping holes in Brazil’s actual policy somewhat deflated the good-faith nature of this defense, however. First, following a ruling by a MERCOSUR (Mercado Común del Sur, or Southern Common Market) tribunal in 2002, Brazil had to allow the imports of certain retreaded tyres from MERCOSUR member states.²⁵⁵

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248. See Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶¶ 2.1–2.2, WT/DS332/R (June 12, 2007) (hereinafter Panel Report, *Brazil—Tyres*) (explaining that retreaded tyres are made by replacing a worn tyre with new material); see also Retread Manufacturers Association, <http://www.retreaders.org.uk/retread.htm> (last visited Aug. 30, 2008) (discussing the reconditioning of tyres by replacing the worn rubber with new material). See generally *The WTO Appellate Body’s Activities in 2007*, 11 J. INT’L ECON. L. 193, 207 (2008) (hereinafter *2007 WTO Activities*) (noting that tyres can be retreaded thereby reducing waste).
249. See Panel Report, *Brazil—Tyres*, at ¶ 4.20 (recognizing that retreaded tyres cannot be used more than once); see also Julia Qin, *WTO Panel Decision in Brazil—Tyres Supports Safeguarding Environmental Values*, 11 AM. SOC’Y INT’L L., Sept. 5, 2007 (explaining that retreaded tyres have a shorter life span than new tyres); see also Hannes Schloemann, *Brazil—Tyres: Policy Space Confirmed Under GATT Article XX*, BRIDGES TRADE BIORES: TRADE & ENVIRONMENT REVIEW, March 2008, at 10 (noting that the WTO put more emphasis on preventing Brazil from wasting tyres than on their unfavorable trade practices).
250. See Qin, *supra* note 249 (discussing the hazardous health effects of waste tyres in Brazil); see also Foster, *supra* note 86, at 428 (illustrating diseases that are spread by mosquitoes in Brazilian waste tyres); see also Brian Dunn, Note, *The Mexicali Tire Problem: Smoke on the Horizon?*, 14 GEO. INT’L ENVTL. L. REV. 409, 411 (2001) (explaining the dangers of waste tyres in Mexico).
251. See Panel Report, *Brazil—Tyres*, at ¶ 2.5 (citing Brazil’s import ban on retreaded tyres in 2000); see also Pablo M. Bentes et al., *International Trade*, 42 INT’L LAW. 323, 328 (2008) (describing the AB’s decision to uphold the 2000 ban in order to protect human and animal life from the accumulation of waste tyres); see also *W.T.O. Court Rejects Brazil’s Tire Ban*, BLOOMBERG NEWS, Dec. 4, 2007, available at http://www.nytimes.com/2007/12/04/business/worldbusiness/04fobriefs-WTOCOURTREJE_BRF.html (stating Brazil’s reasons for imposing the 2000 ban on the import of retreaded tyres in Brazil).
252. See Qin, *supra* note 249 at 1 (stating the EC’s status as a new exporter of retreaded tyres).
253. See Panel Report, *Brazil—Tyres*, at ¶ 1.1 (stating that in 2005 the EC filed a complaint against the Brazilian import ban); see also Bentes et al., *supra* note 251, at 328 (listing the EC’s complaint filed against Brazil in 2005); see also *2007 WTO Activities* at 203 (identifying errors that the EC found in the ban and reasons why it sought an appeal).
254. See AB Report, *Brazil—Tyres* at ¶ 3 (Dec. 3, 2007) (quoting that first the panel must determine whether the import ban is “necessary to protect human, animal or plant life or health” in accordance with article XX(b)).
255. See David R. Downes et al., *International Environmental Law*, 42 INT’L LAW. 285, 296 (2008) (explaining the MERCOSUR exception to the import ban on retreaded tyres in Brazil); see also BBC News, *Mercosur—Common Market of the South* (September 18, 2008), available at <http://news.bbc.co.uk/2/hi/americas/5195834.stm>. See generally Albert Kritzer et al., *International Treaties—Trade Agreements*, 2 INT’L CONT. MANUAL § 50.47 (2008) (stating the prominence of MERCOSUR as an international trade block consisting of Argentina, Brazil, Paraguay and Uruguay).

Second, Brazilian retreaders were able to repeatedly get temporary court injunctions to allow imports.²⁵⁶

In June 2007 the panel issued its report, finding that although the import ban was provisionally justified under article XX(b), the level of imports allowed by the court injunctions violated the chapeau of article XX.²⁵⁷ In the panel's view, though, the allowing of imports from MERCOSUR countries did not also violate the chapeau.²⁵⁸ Although Brazil was discriminating by allowing these imports, this discrimination "does not seem to be motivated by capricious or unpredictable results [as it] was adopted further to a ruling within the framework of MERCOSUR, which has binding legal effects for Brazil, as a party to MERCOSUR."²⁵⁹ Furthermore, despite having just stated that this was not arbitrary discrimination, the panel continued that "the invocation of any international agreement would [not] be sufficient under any circumstances" to justify discrimination under the chapeau, but in this case "volumes of imports of retreaded tyres under the exemption appear not to have been significant" and thus did not constitute arbitrary or unjustifiable discrimination.²⁶⁰

The EC appealed, and the AB rendered its decision on December 3, 2007.²⁶¹ In a well-crafted opinion, it emphasized the autonomy, within set limits, of a member wishing to implement a viable public policy goal as well as correcting the panel's rather cumbersome and incorrect use of the chapeau of article XX.²⁶² The AB began by upholding the panel's finding that

256. See AB Report, *Brazil—Tyres*, explaining reasons for implementing the trade ban on retreaded tires in Brazil; see also Raj Bhala and David Gantz, *WTO Case Review 2007*, 25 ARIZ. J. INT'L COMP. L. 1, 90 (2007) (recognizing that Brazilian court injunctions allowed for Brazilian retreaders to import retreaded tires after the ban on the importation of retreaded tires); see also Downes et al., *supra* note 255, at 295 (recognizing that certain imports were permitted into Brazil through temporary court injunctions).

257. See AB Report, *Brazil—Tyres* at ¶ 4 (stating that court injunctions violated the chapeau of article XX); see also van Calster, *supra* note 134, at 128 (opining that the imports of used tyres through court injunctions have resulted in the import ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination). See generally Panel Report, *Brazil—Tyres* (reiterating the impermissibility of allowing court injunctions to permit imports on retreaded tires).

258. See Panel Report, *Brazil—Tyres* at ¶ 5.136 (citing that the MERCOSUR exemption is not responsible for findings that the ban and the fines are consistent with the chapeau).

259. See Treaty Establishing a Common Market, March 26, 1991, Asunción Agreement Concerning a Council on Trade and Investment Between the Common Market Parties and the U.S., art. XXIV, 30 I.L.M. 1041, (proclaiming that MERCOSUR was established to facilitate progress toward the formation of a common market); see also AB Report, *Brazil—Tyres* at ¶ 217 (explaining that Brazil's exemption for MERCOSUR countries allowed preferential treatment of its members, which would in turn lead to the discrimination of non-members).

260. See AB Report, *Brazil—Tyres*, at ¶ 219 (stating that although no international agreement may be invoked to allow for arbitrary discrimination under the chapeau, the number of retreaded tyres imported under the exemption was not significant and did not qualify as arbitrary discrimination); see also Ghei, *supra* note 91, at 133 (describing the two-step test that has developed under article XX to determine when discrimination between countries may fall within the exceptions provided in article XX). See generally Sung-joon Cho, *GATT Non-Violation Issues in the WTO Framework: Are They the Achilles' Heel of the Dispute Settlement Process?* 39 HARV. INT'L L.J. 311, 333–36 (1998) (explaining that the function of the preamble to article XX is to serve as a safety net to guard against misuse of the exceptions provided within the article, helping to protect against arbitrary or unjustifiable discrimination).

261. See AB Report, *Brazil—Tyres* at ¶ 233 (finding that the panel's allowance of discrimination in regard to the import ban was improper under the chapeau).

262. See *id.* at ¶¶ 227–29 (explaining that determinations of what is "unjustifiable" are usually made focusing only on the cause of the discrimination, whereas the panels focused on the effects of discrimination).

the import ban was “necessary” under article XX(b).²⁶³ Citing *Korea—Beef* and *United States—Gambling*, it stated that a tribunal is to begin with the relative importance of the interests or values furthered by the measure and then will assess how the measure contributes to the realization of the goals eschewed by the member state.²⁶⁴ With this as its “background,”²⁶⁵ the AB agreed with the panel’s opinion that the import ban’s objective was to reduce the “exposure to the risks to human, animal or plant life, or health arising from the accumulation of waste tyres,” and that “few interests are more ‘vital’ and ‘important’” than this.²⁶⁶ It also endorsed the panel’s use of a qualitative, as opposed to a quantitative, analysis of the contribution that the import ban made to achieving its objective, with the AB citing one of its previous reports: “[I]n *EC—Asbestos*, the Appellate Body emphasized that there is no requirement under Article XX(b) of the GATT 1994 to *quantify*, as such, the risk to human life or health . . . [a] risk may be evaluated in quantitative or qualitative terms.”²⁶⁷

The panel had analyzed the impact of replacing retreaded tyres with new tyres on the reduction of waste, whether imported retreaded tyres would be replaced with domestic retreaded tyres, and whether the reduction in the number of waste tyres would contribute to a reduction to the risks espoused above.²⁶⁸ The AB, as had the panel, held that the effects of the

263. See *id.* at ¶ 258 (upholding the panel’s finding that because the import ban may be considered necessary under article XX(b), it is justified under that provision); see also Bernd G. Janzen, *International Trade Law and the “Carbon Leakage” Problem: Are Unilateral U.S. Import Restrictions the Solution?*, 8 Sustainable DEV. L. & POL’Y 22, 24 (2008) (stating that the import ban constituted a permissible means of protecting human health); see also 2007 WTO Activities at 207 (discussing the AB’s decision to uphold the panel’s finding that the import ban was necessary under article XX(b)).

264. See AB Report, *Brazil—Tyres* at ¶¶ 142–43 (asserting that a necessary analysis involves the balancing of the interests or values furthered by the measure being challenged, as well as the contribution of the measure to the ends it seeks to realize and the impact that the measure will have upon international commerce); see also AB Report, *Korea—Beef* at ¶ 164 (describing the weighing and balancing that goes into a determination of what qualifies a measure as “necessary”; see also AB Report, *United States—Gambling*, at ¶ 306 (enumerating the two factors that the AB has pointed to as relevant to a panel’s determination of necessity: the contribution of the measure to the realization of the ends it pursues, and the impact that the measure will have on restricting international commerce)).

265. See AB Report, *Brazil—Tyres* at ¶ 144 (referring to the AB’s reports in *Korea—Beef* and *United States—Gambling* as the background upon which it based its decision in *Brazil—Tyres*).

266. See *id.* (agreeing with the panel as to the importance of the interest in reducing exposure of risks to people, animal life or plant life as a result of the tyres); see also Pablo M. Bentes, et al., *International Legal Developments in Review: 2007 Business Regulation*, 42 INT’L LAW 323, 328 (2008) (stating that the AB agreed with the panel that the goal of the import ban was to protect both people and animals from the health risks brought about by an accumulation of waste tyres); see also 2007 WTO Activities at 207 (describing how the import ban likely would be a material contributor to the goal of reducing health risks and diseases, specifically dengue, yellow fever and malaria).

267. See Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 146, WT/DS332/AB/R (Dec. 3, 2007) (noting the panel’s decision to choose a qualitative analysis rather than a quantitative analysis and remarking on the AB’s decision in *EC—Asbestos*, which stated that either qualitative or quantitative terms may be used in the evaluation of a risk); see also AB Report, *Asbestos*, at ¶ 167 (explaining that there is no requirement under article XX(b) of the GATT that a risk to human life or health be quantified); see also *Brazil—EU Tire Ruling Sets New Standard For GATT Exemption Cases*, 26 INSIDE US TRADE 4, Jan. 25, 2008 (stating that the AB had ruled that Brazil could show the necessity of the import ban either qualitatively or quantitatively).

268. See AB Report, *Brazil—Tyres* at ¶ 148 (explaining the WTO’s DSB’s analysis of the comprehensive environmental impact of reducing waste tyres by replacing imported retreaded tyres with new ones or, if possible, domestically retreaded tyres from Brazil).

measure should be examined both in the *immediate* and *longer-term* sense.²⁶⁹ Thus, the AB effectively forged a pro-environmental test:

We recognize that certain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures. In the short-term, it may prove difficult to isolate the contribution to public health or environmental objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy. Moreover, the results obtained from certain actions—for instance, measures adopted in order to attenuate global warming and climate change, or certain preventive actions to reduce the incidence of diseases that may manifest themselves only after a certain period of time—can only be evaluated with the benefit of time.²⁷⁰

Thus, with this statement in mind, “[i]n order to justify an import ban under Article XX(b), a panel must be satisfied that it brings about a material contribution to the achievement of its objective.”²⁷¹ It is hard not to read this paragraph as doing anything other than “widen[ing] and cement[ing] the policy space for environmental and health measures.”²⁷²

The AB upheld the panel’s review of the import ban’s contribution to the objectives of the policy goal and supplemented it by stating that “[m]oreover, we wish to underscore that the Import Ban must be viewed in the broader context of the comprehensive strategy designed an

269. See *id.* at ¶ 149 (outlining the WTO DSB’s assessment of the immediate and long-term effects of Brazil’s import ban on used and retreaded tyres through an evidentiary testing of several hypotheses); see also Final Act (binding the parties to the agreement to conduct their trade and economic relations “in accordance with the objective of sustainable development”). See generally Panel Report, *Brazil—Tyres* (conducting an analysis of the overall effects of the import ban and whether it would result in actually reducing tyre waste in Brazil).

270. See AB Report, *Brazil—Tyres*, *supra* note 4, at ¶ 151 (explaining that the contributions of certain measures, like import bans, can only be fully tested over time to determine their justifiability under article XX(b) of the GATT).

271. See AB Report, *Brazil—Tyres* at ¶ 151 (suggesting that a demonstration of an import ban’s material contribution toward its stated objective would be sufficient to determine its necessity); see also AB Report, *United States—Gasoline* at ¶ 4 (enumerating the two-tiered analysis of a measure under one of the exceptions of article XX of the GATT and the chapeau of that same article); see also Brief of Human Society International, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332 (2006), available at <http://www.hsus.org/web-files/PDF/Brazil-Retreaded-Tyres-Submission-of-Non-Party-Humane-Society-International.pdf> (presenting the rule that a party claiming a GATT article XX(b) exception must show that the measure it is seeking to employ fits the policy goal it intends to serve).

272. See Schloemann, *supra* note 249, at 10 (criticizing the WTO’s AB’s decision in the Brazil—Tyres dispute for being too sympathetic toward a preventive environmental policy); see also Agreement on Technical Barriers to Trade, Apr. 15, 1994, 1868 U.N.T.S. 121 (establishing environmental preservation and protection as a legitimate goal of trade regulations). See generally Charnovitz, *supra* note 131 (addressing recent holdings of the WTO’s AB in several disputes, which raised issues and broadened the scope of environmental protection, sending a signal “that the era of runaway panels on environmental matters is over”).

implemented by Brazil to deal with waste tyres.”²⁷³ This strategy included an “import ban on used tyres and [a] collection and disposal scheme.”²⁷⁴

It turned then to possible alternatives to the ban, reminding readers that “[i]t rests upon the complaining Member to identify possible alternatives to the measure at issue that the responding Member could have taken.”²⁷⁵ Recalling *United States—Gambling*, it noted that the alternative measure must meet the level of protection set by the responding member, and that the measure must be reasonably available, and this latter requirement was member specific. The responding member had to be capable of enacting such a measure.²⁷⁶ The EC put forward two potential alternatives: measures to reduce waste-tyre accumulation in Brazil, and measures

273. See AB Report, *Brazil—Tyres* *supra* note 4, at ¶ 154 (outlining the many strategies used by Brazil to handle waste tyres and the overall plan to encourage domestic retreading of tyres using domestic raw materials); see also Brief for Associação de Combate aos Poluentes et al., *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332 (2006), available at http://www.ciel.org/Publications/Brazil_Tires_Amicus_3Jul06.pdf (calling for a holistic approach to analyzing the environmental and public health dimensions of Brazil’s tyre plan). See generally Conselho Nacional do Meio Ambiente (National Council for the Environment of the Ministry of the Environment), Resolution No. 258 (1999), available at <http://translate.google.com/translate?hl=en&sl=pt&u=http://www.lei.adv.br/25899.htm&sa=X&oi=trale&resnum=5&ct=result&prev=search%3Fq%3DCONAMA%2B258/99%26start%3D10%26hl%3Den%26sa%3DN> (setting forth new standards and regulations for tyres produced and disposed of in Brazil).

274. See AB Report, *Brazil—Tyres*, *supra* note 4, at ¶ 154 (stating Brazil’s general plan to reduce tyre waste); see also Panel Report, *Brazil—Tyres*, explaining the import ban issued by Brazil to prohibit the licensing of retreaded imported tyres and importation of used tyres, and the details and exceptions therein); see also First Written Submission of Brazil, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332 (June 8, 2006), available at [http://www.mre.gov.br/portugues/ministerio/sitos_secretariacgfirst%20written%20submission%20of%20\(brazil%20-%20retreaded%20tyres\).pdf](http://www.mre.gov.br/portugues/ministerio/sitos_secretariacgfirst%20written%20submission%20of%20(brazil%20-%20retreaded%20tyres).pdf) (detailing Brazil’s waste tyre management program, which would include stimulation of collection and disposal, enhanced producer responsibility standards, establishment of private collection centers, development of new disposal methods, bans of used and retreaded imports, and promotion of domestic retreading).

275. See AB Report, *Brazil—Tyres*, *supra* note 4 at ¶ 156 (clarifying the “necessary” test under GATT article XX(b), which requires a balanced analysis of a measure’s objectives and trade restrictiveness and the values at stake, and an evaluation of possible alternative measures that must be proposed by the WTO member complaining about the measure); see also First Written Submission of the European Communities, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332 (Apr. 27, 2006), available at http://trade.ec.europa.eu/doclib/docs/2006/july/tradoc_129251.07.06.pdf (pointing out several proposed alternatives to the import ban within Brazil’s own legislation, including disposal schemes, and expanding current mandates regarding tyre disposal); see also Geert van Calster, *supra* note 134, at 125–26 (2008) (quoting the AB of the WTO in its reiteration of the panel’s analysis finding the European Communities’ proposed alternatives to the import ban to be unviable).

276. See AB Report, *Brazil—Tyres*, *supra* note 4 at ¶ 156 (quoting a recent WTO AB explanation that a proposed alternative measure must be reasonably available and able to be enacted); see also AB Report, *United States—Gambling*, *supra* note 159 at ¶ 309 (clarifying the burden of responding parties in that they need not present a myriad of less restrictive but ultimately unfeasible alternative measures); see also Second Written Submission of Brazil, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332 (Aug. 11, 2006), available at [http://www.mre.gov.br/portugues/ministerio/sitos_secretaria/cgc/Brazil%27s%20Second%20Written%20Submission%20\(Brazil-Retreaded%20Tyres\)PRINT.doc](http://www.mre.gov.br/portugues/ministerio/sitos_secretaria/cgc/Brazil%27s%20Second%20Written%20Submission%20(Brazil-Retreaded%20Tyres)PRINT.doc) (opining that all of the European Community’s alternative measures to the import ban would still result in significant health risks and, therefore, are not reasonably available).

to improve the management of waste tyres in Brazil.²⁷⁷ The AB agreed with the panel's conclusion that "none of the alternatives suggested by the European Communities avoided the generation of additional waste tyres in the first place," and so they did not meet Brazil's chosen level of protection.²⁷⁸ The panel had thus ruled correctly that the import ban was necessary to achieve Brazil's goal of protecting health under article XX(b) by attempting to reduce and eventually eradicate retreaded tyres.²⁷⁹ The AB then issued an addendum to sum up the necessity test:

[T]he fundamental principle is the right that WTO Members have to determine the level of protection that they consider appropriate in a given context. Another key element of the analysis of the necessity of a measure under Article XX(b) is the contribution it brings to the achievement of its objectives. A contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue.²⁸⁰

The AB, having reinforced the panel's "green" opinion,²⁸¹ then turned to scrutinize the MERCOSUR and domestic court injunction exceptions to Brazil's total import ban of retreaded tyres.²⁸² It referred to its report in *United States—Shrimp*, which noted the chapeau is

277. See JEFFREY M. GABA & DONALD W. STEVER, *Law of Solid Waste, Pollution Prevention and Recycling* § 11:15 (2007) (discussing various financial incentives to promote recycling of tyre waste, including current tax credits and government grants); see also Dunn, *supra* note 250, at 425–26 (outlining alternative uses for tyre waste, such as recycling tyres to be used in home construction materials and as fuel in various industries). See generally U.S. Environmental Protection Agency, *Scrap Tire Markets*, available at <http://www.epa.gov/epawaste/conserve/materials/tires/markets.htm> (last visited Aug. 31, 2008) (assessing various markets and industries utilizing scrap tyres and analyzing the benefits and safety concerns associated with each market).

278. See AB Report, *Brazil—Tyres* at ¶ 168 (explaining Brazil's chosen level of protection is to reduce the risks associated with tyre waste to the maximum extent possible); see also AB Report, *Asbestos*, at ¶ 175 (rejecting Canada's proposed alternatives for reducing asbestos-related health risks and upholding the European Communities' decree as being necessary to protect human life); see also Panel Report, *Thailand—Cigarettes*, at ¶¶ 77–78 (finding available alternatives to satisfy Thailand's chosen level of protection regarding the quality and quantity of cigarettes consumed in Thailand, and, therefore, was not necessary under article XX(b)).

279. See AB Report, *Brazil—Tyres* at ¶¶ 211–212 (showing no reasonable alternative to the import ban was available and upholding the panel's finding that the ban was necessary).

280. See *id.* at ¶ 210 (emphasizing the inherent tension between trade restrictions and environmental concerns); see also AB Report, *Korea—Beef* at ¶¶ 175–78 (acknowledging Korea's chosen level of protection as the total elimination of deceptive practices, but that the level of protection sought could not be achieved through the dual retail system); see also AB Report, *United States—Gasoline*, at ¶¶ 39–41 (rationalizing that the primary purpose of the United States' baseline establishment rules was not aimed at the protection of human health and, consequently, was not within the scope of article XX(b)).

281. See Qin, *supra* note 249 (referring to *Brazil—Tyres* as a potential "milestone" in environmental jurisprudence); see also JENNIFER CLAPP & PETER DAUVERGNE, *PATHS TO A GREEN WORLD: THE POLITICAL ECONOMY OF THE GLOBAL ENVIRONMENT* 136–41 (2005) (emphasizing article XX fails in many respects to address global environmental concerns and asserting that the traditional position of the WTO, based on past cases, has been considered anti-environmental); see also FRIEDL WEISS, *THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM* 155, 180–81 (Giorgio Sacerdoti et al. eds., 2006) (discussing the Final Act of the Uruguay Round and the subsequent formation of the Committee on Trade and Environment as affirming the WTO's position that safeguarding a free trade system need not conflict with protecting the environment).

282. See AB Report, *Brazil—Tyres* at ¶¶ 230–33 (focusing on the effects of the discrimination and finding that the MERCOSUR exemption constituted arbitrary or unjustifiable discrimination).

“but one expression of the principle of good faith.”²⁸³ The AB’s role here was to set a line of equilibrium where a member sought to enhance a public policy that violated another member’s GATT or GATS rights.²⁸⁴ In one broad stroke, the AB then erased the panel’s logic in its holding on the chapeau in *Brazil—Tyres*: “[T]he analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination should focus on the cause of the discrimination, or the rationale put forward to explain its existence.”²⁸⁵ Under this examination, Brazil’s exceptions to its import bans violated the chapeau.²⁸⁶

In relation to the MERCOSUR exception, although Brazil’s decision to comply with the MERCOSUR tribunal was not random or capricious because of the ruling handed down by the MERCOSUR tribunal, it was still arbitrary or unjustifiable.²⁸⁷ Compliance with the MERCOSUR ruling was “not an acceptable rationale for the discrimination, because it bears no relationship to the legitimate objective pursued by the Import Ban.”²⁸⁸ The panel had erred by

283. See *id.* at ¶ 224 (citing AB Report, *United States—Shrimp* at ¶ 158 (reiterating that the function of the chapeau is to prevent abuse of article XX exceptions)).

284. See AB Report, *United States—Shrimp* at ¶¶ 158–59 (explaining the line of equilibrium is not fixed but rather moves according to the specific issues and facts of a particular case); see also Pascal Lamy, General Director, World Trade Organization, Address before the European Society of International Law: The Place and Role of the WTO (WTO Law) in the International Legal Order (May 19, 2006) (stating, “I hope it is now clear that WTO Members’ trade restrictions imposed to implement non-trade considerations, will be able to prevail over WTO market access obligations so long as they are not protectionist”). See generally Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 AM. J. INT’L L. 268, 273–276 (1997) (outlining numerous cases involving article XX and discussing each party’s competing rights).

285. See AB Report, *Brazil—Tyres*, at ¶ 226 (positing Brazil’s justification for discrimination was the result of a ruling issued by a MERCOSUR arbitral tribunal); see also AB Report, *United States—Gasoline* at § IV, ¶¶ 16–22 (rejecting the United States’ claim that difficulties of verification and enforcement justified differentiating between domestic and implied gasoline and finding avoidable and unjustified discrimination); see also Panel Report, *United States—Gambling* at ¶¶ 6.575–6.576 (concluding the United States, by negotiating only with select members, had no justification for openly discriminating and acted inconsistently with the chapeau).

286. See GATT at art. XX (establishing that a state does not engage in discriminatory practices and has the right to restrict trade in order to protect the lives and health of its subjects); see also AB Report, *Brazil—Tyres*, at ¶¶ 246, 252, 258(b)(ii) (concluding that the exception made by Brazil justifying the ban of retreaded tyres does not fall within the objectives of article XX and therefore constitutes arbitrary and unjustifiable discrimination); see also Steve Charnovitz, *Recent Developments: Environmental Trade Sanctions and the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practices*, 9 AM. U. J. INT’L L. & POL’Y. 751, 790 (1994) (remarking that the country may restrict the import of products if there are similar domestic restrictions on the same product).

287. See van Calster, *supra* note 134, at 127 (asserting that in order to measure whether a policy is arbitrary and unjustifiable in its discrimination, the trier of fact should focus on the reason put forward for the policy’s existence); see also 2007 WTO Activities at 208 (delineating that Brazil’s reason for exemption of MERCOSUR countries did not relate to the purpose of the import ban and, therefore, constituted arbitrary and unjustifiable discrimination). See generally Welber Barral, *Project Document: The Brazilian Experience in Dispute Settlement*, U.N. Doc. LC/W 147 (Aug. 2007) (analyzing the decision of the MERCOSUR tribunal, which resulted from Brazil’s prohibition of importation of retreaded tyres from Uruguay).

288. See Treaty of Montevideo, art. L, Aug. 12, 1980, available at untreaty.un.org/unts/60001_120000/11/17/00020835.pdf (stating that the treaty will not impede on a state’s ability to protect the life and health of its people); see also AB Report, *Brazil—Tyres*, at ¶¶ 228, 234, (observing that Brazil could have justified its import ban on retreaded tyres before MERCOSUR under article 50(d) of the Treaty of Montevideo, and having failed to do so, Brazil could claim that there was a conflict between the MERCOSUR and the GATT 1994 provisions).

focusing on the *effects* of the discrimination and not its *cause*.²⁸⁹ The AB heavily criticized this approach, remarking that it “has no support in the text of Article XX and appears to us inconsistent with the manner the Appellate Body has interpreted and applied the concept of ‘arbitrary and unjustifiable discrimination’ in previous cases.”²⁹⁰ The AB also gave short shrift to the panel’s reasoning that the MERCOSUR imports were effectively at a *de minimis* level.²⁹¹ The ruling was not an acceptable rationale for the discrimination, and the MERCOSUR imports went against Brazil’s policy objective and thus violated the chapeau, no matter how “small a degree” these imports were.²⁹² The AB also overturned the panel and held that the MERCOSUR exception to the ban was a disguised restriction on international trade for the same reasons.²⁹³

The AB also reversed the panel on the issue of the court injunctions that were allowed for domestic imports and held that this was further unjustifiable discrimination and a disguised restriction on international trade.²⁹⁴ The reasoning it used was the same as that for the MER-

289. See Delimatsis, *supra* note 173, at 374–75 (opining that in order for a total import prohibition of retreaded tyres to be justified, Brazil has to show that the ban is necessary and creates a major contribution to the policy objective); see also Janzen, *supra* note 263, at 24 (asserting that the panel came to its conclusion in approving the import ban because it would allow Brazil to protect the health of its human population); see also 2007 WTO Activities at 208 (stressing that the quantitative approach proposed by the panel cannot be implemented because the analysis under the chapeau has to focus on the cause or rationale of the discrimination).

290. See AB Report, *Brazil—Tyres* at ¶ 229 (critiquing the panel for interpreting “unjustifiable” as quantifiable—meaning that a violation depends on the amount of material imported); see also Charnovitz, *supra* note 286, at 777 (emphasizing that article XX can be invoked only when commerce, production or consumption of traded goods is covered by one of the exceptions, but not when a product does not meet an environmental standard); see also Background Paper, *The Brazil—Retreaded Tyres Case*, CENT. INT’L ENVTL. L., Mar. 2006, at 4, available at <http://www.ciel.org/Publications/pubtae.html> (noting that the AB in the *Korea—Beef* decision established a three-factor test to be applied to determine whether a policy is necessary).

291. AB Report, *Brazil—Tyres* at ¶ 219 (explaining that the panel’s reasoning followed the belief that the MERCOSUR exemption should not be allowed).

292. See *id.* at ¶ 228 (arguing that by condoning the MERCOSUR exemption, the panel undermined the goal of the import ban); see also Fact Sheet ¶¶ 2–4 (enumerating the health reasons why discarded tyres create a perfect environment for mosquitoes that carry diseases such as dengue, malaria and yellow fever among others). See generally van Calster, *supra* note 134, at 122 (discussing Brazil’s concern with disease carrying mosquitoes that breed within discarded tyres).

293. AB Report, *Brazil—Tyres* at ¶¶ 235–239 (explaining that the panel made the same mistake in deciding that the MERCOSUR exemption was not a “disguised restriction on international trade” as it did in interpreting “unjustifiable”).

294. See *id.* at ¶ 244 (indicating that the court injunctions constitute arbitrary discrimination because Brazil’s objective goal to protect people is not accomplished by prohibiting the importation of retreaded tyres); see also The Associated Press, *WTO Finds Brazil Illegally Blocked Used Tyres from Europe*, INT’L HERALD TRIB., Dec. 3, 2007 (Business), available at <http://www.iht.com/articles/ap/2007/12/03/business/EU-FIN-ECO-WTO-EU-Brazil-Tyres.php> (alleging that although the court injunctions in Brazil delayed the imposition of the ban, European Union has nevertheless suffered economic losses); see also *WTO Panel Favors EU In Tire Case Involving GATT Exemption Ruling*, 25 INSIDE U.S. TRADE, Mar. 30, 2007, at 2 (stating that it may be possible for Brazil to maintain its current importation ban while still complying with the WTO AB decision).

COSUR exemption: the allowance of domestic imports bore no relationship to the objective of the import ban and therefore was unjustifiable discrimination.²⁹⁵

One final point made by the AB was the panel's use of "judicial economy" by not examining the EC's separate claim that the MERCOSUR exemption was not justified under article XX(d).²⁹⁶ Because the panel had held that the MERCOSUR exemption, unlike the domestic exemption, was applied consistently with the requirements of the chapeau of article XX, the AB had "difficulty seeing how the Panel could have been justified in not addressing the separate claims of inconsistency under Article I:1 and Article XIII:2 directed at the MERCOSUR exemption."²⁹⁷ The panel's exercise of judicial economy here went against the aim of article 3.7 DSU "to secure a positive solution to the dispute," which prevented an "effective resolution" of the dispute.²⁹⁸

IV. Conclusion

There has been a perceptible shift from the old GATT dispute settlement procedure, which was very pro-trade, to a more balanced approach under WTO panels.²⁹⁹ The GATT and GATS exceptions are no longer construed narrowly but, rather, are seen as competing interests

295. See AB Report, *Brazil—Tyres*, at ¶¶ 246–247 (explaining that a quantitative approach in finding unjustifiable discrimination is flawed, and that a proper method of analysis should focus on the cause or rationale given for the discrimination); see also Panel Report, *United States—Shrimp*, at ¶ 5.58 (finding that the meaning of "unjustifiable discrimination" must be interpreted in context of the enacted measure). See generally AB Report, *Asbestos*, at ¶¶ 173–75 (holding that the objective of the anti-asbestos ban by France was justifiable based on its stated purpose of health protection).

296. AB Report, *Brazil—Tyres*, at ¶¶ 255–56 (explaining that the request for judicial economy was conditioned on a finding that the MERCOSUR exemption did not result in the import ban being applied inconsistently).

297. See *id.* at ¶ 257 (explaining that the principle of judicial economy "allows the panel to refrain from making multiple findings" when a single finding would suffice to resolve the dispute); see also AB Report, *United States—Gasoline*, at ¶¶ 46–47 (providing that a two-tiered analysis is needed in determining whether a measure is protected under article XX exemptions). See generally AB Report, *United States—Shrimp*, at ¶ 150 (explaining that article XX deals with restrictions or barriers that are justifiable and the three requirements needed in finding a violation of the chapeau).

298. See AB Report, *Brazil—Tyres*, at ¶ 257 (addressing that the use of judicial economy should not circumvent the DSB's right to make precise recommendations and rulings that would benefit all members). See generally Dispute Settlement Summary, *Brazil—Measures Affecting Imports of Retreaded Tyres*, DS332 (Dec. 3, 2007) (adopted Dec. 17, 2007), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm (stating the DSB adopted the AB Report and the Panel Report, as modified by the AB Report, on December 17, 2007).

299. See Sung-joon Cho, *Linkage of Free Trade and Social Regulation: Moving Beyond the Entropic Dilemma*, 5 CHI. J. INT'L L. 625, 651 (2005) (explaining the shift from the old WTO standard of assessing the "content" of a domestic regulation to the "manner" in which the regulation is implemented); see also Padideh Ala'i, *Free Trade or Sustainable Development? An Analysis of the WTO Appellate Body's Shift to a More Balanced Approach to Trade Liberalization*, 14 AM. U. INT'L L. REV. 1129, 1153–55 (1999) (discussing a new era of balancing free trade and the need for sustainable development).

that free trade rules must be “balanced” with.³⁰⁰ Gone are the days when the competing ideologies of trade liberalization and environmentalism simply crashed against each other like two tectonic plates.³⁰¹ Now, the AB can attempt to pass the measure at issue through the regulatory stream of article XX GATT or article XIV GATS, and if the measure is genuine in its goals, it may be allowed to cascade around the pillars of most-favored-nation treatment and national-treatment obligation.³⁰²

The panel and AB will look more at the manner in which the measure is applied rather than simply its content.³⁰³ To safeguard potential abuses of such an approach, panels and the AB have placed heightened emphasis on a measure cloaked in article XX meeting the requirements of the chapeau.³⁰⁴ The focus in this regard is increasingly on whether the resulting discrimination is reasonably related to the goals behind the measure.³⁰⁵ As recent decisions have shown, the chapeau will not be violated where the discrimination is “justified by the same pro-

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300. See AB Report, *United States—Shrimp*, at ¶¶150–151 (introducing the balancing approach test, which attempts to balance the quality of the trade measure imposed against a member with the individual circumstances prevailing in the country); see also Richard J. McLaughlin, *Sovereignty, Utility, and Fairness: Using U.S. Takings Law to Guide the Evolving Utilitarian Balancing Approach to Global Environmental Disputes in the WTO*, 78 OR. L. REV. 855, 868–71 (1999) (comparing the “traditional approach,” which viewed free trade as paramount and thus construing exceptions very narrowly, to a more balanced approach to the exceptions as construed by the more recent panel decisions); see also Paltrowitz, *supra* note 151, at 1810–11 (discussing the evolution of the narrow construction promoting free trade over societal values in article XX to a more balanced approach finding an equilibrium between the two interests).
 301. See AB Report, *United States—Shrimp*, at ¶¶ 146, 149–50 (finding that article XX justified the environmental protectionist measures instituted by the United States but should be used in a flexible manner); see also Ghei, *supra* note 91, at 132–35 (discussing the creation of the GATT/WTO Agreement 59 and the creation of article XX with its two-step test as an attempt to address the issues caused by most-favored-nation and national status). See generally Ala’i, *supra* note 299, at 1169–71 (explaining the use of the test in “balancing” the interests of free trade and sustainable development).
 302. See Panel Report, *United States—Gambling*, at ¶¶ 3.259–3.260, (citing AB Report, *United States—Gasoline*, the panel found that article XX covered the same discrimination standards under the most-favored-nation and national treatment obligation doctrines.). See generally AB Report, *United States—Shrimp*, at ¶ 150 (explaining that article XX deals with restrictions or barriers that are justifiable and the three requirements needed in finding a violation of the chapeau); see generally C. O’Neal Taylor, Comment, *The Mexican Trucking Case and NAFTA: Introduction, Commentary and Afterword*, 42 S. TEX. L. REV. 1239, 1243–44 (2001) (defining national treatment and most-favored-nation treatment as core international trade concepts).
 303. AB Report, *Brazil—Tyres*, at ¶¶148–51, 246–47 (explaining that although a measure may be, by design, “trade restrictive,” it still can be considered a necessary measure).
 304. See Sung-joon, *supra* note 299, at 651 (opining that the AB has begun scrutinizing cases on an individual basis when deciding whether it met article XX exception requirements); see also Wu, *supra* note 170, at 230 (noting that the line of cases have refined the chapeau as having an added restriction on superficially nondiscriminatory measures that are discriminatory). See generally Andenas & Zleptnig, *supra* note 112, at 79 (asserting that the judicial development of the chapeau implies a more significant role for the panels and the AB in analyzing exceptions).
 305. See Eckhardt, *supra* note 76, at 217 (commenting that the panel in EC—Asbestos stressed the reasonableness factor when determining violations of the chapeau); see also WTO Abestos Dispute Settlement Body Panel Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 8.207 (Sep. 18, 2000) (emphasizing the fact that all measures are subjected to a reasonable expectation and reasonable availability test in calculating article XX(d) justification); see also J. Patrick Kelly, *The Seduction of the Appellate Body: Shrimp/Sea Turtle I and II and the Proper Role of States in WTO Governance*, 38 CORNELL INT’L L.J. 459, 490 (2005) (expressing the belief that the chapeau has evolved to include weighing significant common interests or values).

protective rationale as the measure itself.³⁰⁶ This approach rewards nations that genuinely seek to protect a fundamental value, such as public health, and enact legislation or take other actions for that purpose.³⁰⁷ It also acts as a prophylactic against policies that use supposedly genuine concerns as a Trojan horse through which protectionist aims can be realized.³⁰⁸ Essentially, if a trade-distorting measure flies too close to the chapeau's sun, its supposed wings will burn of necessity.

A final thought is on what appears to be a growing appreciation by the WTO's dispute settlement organ of the difficulties that developing countries have in applying environmental measures without violating WTO rules.³⁰⁹ The AB in *Article 21.5 United States—Shrimp* prescribed that, although a trade-restrictive measure protected by article XX could impose the same standard of effectiveness on other members in meeting an environmental objective, such a measure should take account of differing technology levels of other members trying to meet the

306. See *Brazil—EU Tire Ruling Sets New Standard for GATT Exemption Cases*, *supra* note 267 (finding that from the decision in *Brazil—Tyres*, measures that are materially legitimized by its stated goal will qualify as an exemption under article XX); see also Schloemann, *supra* note 249, at 13 (remarking that in the outcome of *Brazil—Tyres*, a discriminative measure will not breach the chapeau if it is logically justified by its protective goals); see also Scott S. Slater, *State Water Resource Administration in the Free Trade Agreement Era: As Strong as Ever*, 53 WAYNE L. REV. 649, 714 n. 168 (2007) (suggesting that in the aftermath of the *United States—Shrimp* case, conservation measures that radiate a fair and just result would not violate the chapeau).

307. See GABRIELLE MARCEAU, COUNSELOR, CABINET OF THE DIR. GEN. WORLD TRADE ORG., THE WTO IS NOT A CLOSED BOX; TRADE, INVESTMENT, AND THE ENVIRONMENT: CLOSED BOXES? PROCEEDINGS OF THE ONE HUNDREDTH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW: A JUST WORLD UNDER LAW (Jan. 1, 2006) (reiterating that the current interpretation of the exception provision provides that goals other than trade can be realized); see also Eres, *supra* note 77, at 602 (stating that article XX exceptions allow for nations to pursue important domestic interests).

308. See Afilalo & Foster, *supra* note 67, at 639 (explaining that the WTO and its DSB have to see whether measures are really disguised efforts to put up a protectionist fence); see also Elvira Cortez, Comment, *Total Recall on Chinese Imports: Pursuing an End to Unsafe Health and Safety Standards Through Article XX of GATT*, 23 AM. U. INT'L L. REV. 915, 928 (2008) (positing that the chapeau, through the banning of arbitrarily applied discriminative measures, shields against protectionist measures of the nation seeking the exception); see also Edward M. Thomas, Note, *Playing Chicken at the WTO: Defending an Animal Welfare-Based Trade Restriction Under GATT's Moral Exception*, 34 B.C. ENVTL. AFF. L. REV. 605, 623 (2007) (illustrating that when the regulation in question is really to give the nation seeking the exception an advantage over foreign imports or to simply hinder trade, WTO would not allow an exception).

309. See Benjamin Simmons, Note, *In Search of Balance: An Analysis of the WTO Shrimp/Turtle Appellate Body Report*, 24 COLUM. J. ENVTL. L. 413, 449–50 (1999) (discussing that the WTO acknowledges the hardships suffered by developing countries from trade restrictions and supports the idea that their growth in international trade should parallel economic development); see also Mónica Araya, *Environmental Dilemmas on the Road to Doha: Winning Southern Support for Greening the WTO*, TRADE AND ENVIRONMENT, THE WTO, AND MEAS (The Heinrich Böll Found., Washington, D.C., Mar. 29, 2001), at 109, 113–14 (revealing that developing countries do not need additional accommodating arrangements because of the way that the WTO currently interprets article XX). See generally Julio Lacarte-Muró & Petina Gappah, *Developing Countries and the WTO Legal and Dispute Settlement System: A View From the Bench*, 3 J. INT'L ECON. L. 395, 400–01 (2000) (summarizing that smaller nations can use the WTO dispute settlement system as a tool to protest powerful members' trade measures).

standard and should provide sufficient flexibility to do so.³¹⁰ In *Brazil—Tyres*, it stated that when a complaining member presents an alternative measure, the responding member must have the capabilities to enact it.³¹¹ Thus, the AB appears to be postulating that the trade exceptions enshrined in article XX of the GATT and article XIV of the GATS are not the tools of only the developed nations but lie ripe for *all* WTO Members to utilize.³¹²

310. See AB Report, *United States—Shrimp*, at ¶ 149 (defining the design of a measure meeting the exception as having “sufficient flexibility to take into account the specific conditions prevailing in *any* exporting Member”); see also Howse, *supra* note 130, at 509–10 (acknowledging that the AB stated in its *United States—Shrimp* ruling that environmental measures must have at least reasonably comparable effects on the imposed member). See generally Louise de La Fayette, *International Decisions: United States—Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia*, 96 AM. J. INT’L L. 685, 687–88 (2002) (describing that discrimination after *United States—Shrimp* meant applying not only different measures to trade nations but applying the same measures to differing trade nations).

311. See AB Report, *Brazil—Tyres*, at ¶ 156 (recalling that as indicated in *United States—Gambling*, the nation seeking the exception may show that an alternative is not “reasonably available”).

312. See Joshua Meltzer, *Conference: The World Trade Organization at a Crossroads; Article: State Sovereignty and the Legitimacy of the WTO*, 9336 U. PA. J. INT’L ECON. L. 693, 706 (2005) (maintaining that in applying the chapeau, the WTO obligates consideration of weaker member nations’ interests). See generally Petrova, *supra* note 172, at 63 (recognizing that the AB clearly balanced the needs of Antigua and the policy interests of the United States in determining trade exception in the WTO Internet gambling dispute); see generally Woo, *supra* note 67, at 1747 (expressing the belief that the DSB is a means that weaker nations may use to guard against economically powerful nations).

Who Says Muslim Women Don't Have the Right to Divorce?— A Comparison Between Anglo-American Law and Islamic Law

Kathleen A. Portuan Miller*

After living in Morocco for four years, I became interested in Islamic law, and how that law affected women's rights. I wrote this article because I have heard Americans say that Muslim women do not have any right to divorce. However, I found the opposite to be true. This article will seek to dispel many of those common misunderstandings that average Americans have by comparing Islamic law and Anglo-American law regarding women's rights to divorce.

I. Overview—Divorce Law in the United States

Women were considered property in the early U.S. law.¹ This concept was inherited from medieval England, where the common custom of giving payment to a manorial lord by a young woman's family was followed to secure "his permission before she might marry."²

In the 19th century in the United States, when a woman married her legal identity merged with that of her husband, and she could no longer own, control, or manage any property independently, nor did she have the right to contract.³ Children were similarly considered to be the

1. See Barbara L. Bernier, *Assimilation or Liberation: Post-Modern American Women—Speech and Property Law*, 9 ROGER WILLIAMS U. L. REV. 521, 544 (2004) (noting that women were considered property by the Constitution, law, religion and society); see also Zainab Chaudhry, *The Myth of Misogyny: A Re-analysis of Women's Inheritance in Islamic Law*, 61 ALB. L. REV. 511, 549 (1997) (quoting D. KELLY WEISBERG, WOMEN AND THE LAW: A SOCIAL HISTORICAL PERSPECTIVE 23 (1982)).
2. See Chaudhry, *supra* note 1, at 549 (quoting D. KELLY WEISBERG, WOMEN AND THE LAW: A SOCIAL HISTORICAL PERSPECTIVE 45 (1982)); see also Val D. Ricks, *Contract Law and Christian Conscience*, 2003 BYU L. REV. 993, 999 (2003) (revealing that medieval lords wanted to control feudal property relationships by imposing penalties on women who married without the lord's consent); see also David S. Rosettenstein, *Parental Accountability and Villeinage: Perspectives for Today from the Manor Borne*, 17 QUINNIPAC L. REV. 357, 371 (1997) (commenting that a daughter in the medieval system could not marry without the license of the lord who was paid to compensate him for losing control over her).
3. See Chaudhry, *supra* note 1, at 549 (quoting D. Kelly Weisberg, WOMEN AND THE LAW: A SOCIAL HISTORICAL PERSPECTIVE 45 (1982)); see also Margo Schlanger, *Injured Women Before Common Law Courts, 1860–1930*, 21 HARV. WOMEN'S L.J. 79, 92–93 (1998) (explaining that the identity of wives was subsumed into the identities of their husbands and it wasn't until major legal reforms were passed that married women could own property or enter into contracts); see also Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 14 WOMEN'S RTS. L. REP. 151, 152–53 (1992) (noting that a married woman's legal identity merged into that of her husband after which she could no longer enter into contracts or own her own property).

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property of the father.⁴ The husband was required to provide support for the family.⁵ Since women were considered to be the property of their husbands, and essentially were not allowed to work, it was impossible for them to support themselves or their children.⁶ Thus, in custody cases, fathers were always awarded custody.⁷

However, reforms began to take place in the middle of the 19th century with the enactment of the Married Women's Property Act in 1882.⁸ This act granted married women control

4. See Jessica R. Dominguez, *The Role of Latino Culture in Mediation of Family Disputes*, 1 J. LEGAL ADOV. & PRAC. 154, 158 (1999) (noting that historically, the judicial system gave fathers property rights over their children); see also Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1045 (1992) (explaining that ownership rights were important features of a father's power over his children in 19th-century America); see also Craig Nickerson, Note, *Gender Bias in a Florida Court: "Mr. Mom" v. "The Poster Girl for Working Mothers,"* 37 CAL. W. L. REV. 185, 197–98 (2000) (attributing the fact that children are treated as the property of their fathers in the United States to Roman society, where children were also viewed as property of their fathers).
5. See Mechele Dickerson, *To Love, Honor, and (OH!) Pay!: Should Spouses Be Forced to Pay Each Other's Debts?*, 78 B.U. L. REV. 961, 968–69 (1998) (noting that until the middle of the 20th century husbands had an obligation to financially support their families); see also Joanna L. Grossman, *Separated Spouses*, 55 STAN. L. REV. 1613, 1626 (2001) (commenting that the legal understanding of marriage during the 19th century required a husband to support his wife and children); see also Terry L. Turnipseed, *Why Shouldn't I Be Allowed to Leave My Property to Whomever I Choose at My Death? (Or How I Learned to Stop Worrying and Start Loving the French)*, 44 BRANDEIS L. J. 737, 788 (2006) (explaining that during the 19th century a husband was required to support his wife).
6. See Wendy L. Hillger, *Borelli v. Brusseau: Must a Spouse Always Be a Registered Nurse? A Feminist Critique*, 25 PAC. L.J. 1387, 1405–08 (1994) (noting that women's status as property relegated them to the private sphere, making them dependent on their husbands); see also Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1523 (1983) (explaining that because any property owned or received by wives was given to their husbands, they were economically dependent upon their husbands); see also Margaret Valentine Turano, *UPC Section 2–201: Equal Treatment of Spouses*, 55 ALB. L. REV. 983, 987–90 (1992) (commenting that after marriage a woman's legal ability to take care of herself vanished, thereby making her completely dependent on her husband for support).
7. See Sarah C. Courtman, Note, *Sweet Land of Liberty: The Case Against the Federal Marriage Amendment*, 24 PACE L. REV. 301, 310 (2003) (explaining that since women were considered property, upon divorce they automatically lost custody of their children); see also Trish Oleksa Haas, Comment, *Child Custody Determinations in Michigan: Not in the Best Interests of Children or Parents*, 81 U. DET. MERCY L. REV. 333, 334 (2004) (commenting that since children were considered property of their fathers in the 19th century, their fathers were almost always given custody of them); see also Nickerson, *supra* note 4, at 198.
8. See R.I. Gen. Laws § 15-4-1 (1844) (stating that any woman shall have control of property, both real and personal, independent of her husband in the state of Rhode Island); see also Stephanie B. Casteel, *Planning and Drafting Premarital Agreements*, 553 AM. L. INST. 557 (2008) (recognizing that married women's property rights expanded through the United States as each state adopted a form of the Married Women's Property Act, which allowed a married woman to retain sole and separate ownership of property independent of her husband). See generally Hiam Brinjikji, *Property Rights of Women in Nineteenth-Century England*, in PIP'S WORLD: HYPERTEXT ON CHARLES DICKENS' *Great Expectations* (1999), available at <<http://www.umd.umich.edu/casl/hum/eng/classes/434/geweb/PROPERTY.htm>> (explaining that the passage of the Married Women's Property Law transformed the legal status of married women in England by allowing them to retain property rights independent of their husbands).

and management of the property that they brought into the marriage, and removed some of the legal disabilities women encountered, such as the inability to contract.⁹

Divorce has existed in the United States since the colonial period.¹⁰ In fact, the “roots of American divorce law” are found in New England in this period.¹¹ However, until the first half of the 20th century, “grounds for obtaining a divorce in the various states were limited, with all states requiring some proof of marital fault on the part of one of the spouses.”¹² Typically, statutes allowed divorce for “adultery, desertion, and sometimes cruelty and other offenses.”¹³

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9. See HARRY KRAUSE, *FAMILY LAW IN A NUTSHELL* 1, 97 (5th ed. 2007) (1986) (stating that women gained more property rights after the passage of the Married Women's Property Acts); see also Stephen D. Kelson, *Ellis v. Estate of Ellis: The Unequivocal Death of Interspousal Immunity in Utah*, 21-APR. UTAH B.J. 36, 37 (2008) (recognizing that after passage of the Married Women's Property Acts the legal rights of women significantly increased by permitting them to sue their husbands in court, retain property rights, and defend those property interests in court); see also Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 455 (2008) (acknowledging that the Married Women's Property Acts formally abolished coverture in the United States by statutorily recognizing women's property rights).
 10. See Sarah E. Fette, *Learning from One's Mistakes: The Aftermath of the American Divorce Revolution as a Lesson in Law to the Republic of Ireland*, 7 IND. INT'L & COMP. L. REV. 391, 393 (1997) (stating that divorce was available to citizens in the colonies from as early as the pre-Revolutionary War); see also Danaya C. Wright, *Untying the Knot: An Analysis of the English Divorce and Matrimonial Causes Court Records, 1858-1866*, 38 U. RICH. L. REV. 903, 907 (1997) (citing that civil divorce has existed in the New England states since the colonial period). See generally New York Divorce and Family Law <<http://www.brandeslaw.com/index.html>> (follow “Grounds for Divorce” hyperlink; then follow “Divorce: History of Divorce in New York” hyperlink) (expressing the existence of divorce in the colonies, including New Netherlands, which is now New York).
 11. See D. Kelly Weisberg, *Under Greet Temptations Here: Women and Divorce in Puritan Massachusetts*, in WOMEN AND THE LAW: A SOCIAL HISTORICAL PERSPECTIVE 118 (1975) (arguing that the “roots of American divorce law” materialized in colonial New England); see also Danaya C. Wright, *supra* note 10, at 907 (noting that civil divorce has existed in the New England states since the colonial period). See generally Where Your Treasure Is, <<http://whereyourtreasureis.net/Divorce%20in%20the%20Colonies%20with%20commentary.pdf>> (last visited Sept. 17, 2008) (commenting on ALEKSANDRA WELDON-LINNE, HOW THE REVOLUTIONARY ERA CHANGED THE INSTITUTION OF DIVORCE IN AMERICA, which lists multiple 17th-century New England colonies that had known divorces).
 12. See Fette, *supra* note 10, at 393 (stating that although divorce was available in the colonies, it was limited by the requirement that it must have a fault basis); see also Stéphane Mechoulan, *Divorce Laws and the Structure of the American Family*, 35 J. LEGAL STUD. 143, 143 (2006) (commenting on the “revolution” of the elimination of the fault requirement in California divorces in the 1970s). See generally J. Herbie DiFonzo, *Alternatives to Marital Fault: Legislative and Judicial Experiments in Cultural Change*, 34 IDAHO L. REV. 1 (1997) (suggesting that there were very early and isolated instances of faultless divorce in the country and that it was a dominating trend for the greater first part of the 20th century).
 13. See Fette, *supra* note 10, at 393 (stating the additional grounds for divorce, aside from the original grounds of adultery); see also Solangel Maldonado, *Cultivating Forgiveness: Reducing Hostility and Conflict After Divorce*, 43 WAKE FOREST L. REV. 441, 441 (2008) (recognizing that extreme cruelty, abandonment or adultery was necessary in order to be granted a divorce for most of American history); see also Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 83 (1991) (stating that both California and New York permitted divorce only on the grounds of adultery up until the 1960s).

Impotence, bigamy, fraud, or marrying within the same blood-line were other “for fault” causes of divorce.¹⁴

As the country grew, divorce rates continued to increase, particularly in the first half of the 19th century as people moved West.¹⁵ Areas settled later in the first half of the 20th century adapted more liberal divorce laws.¹⁶ Divorce statutes changed little after the Civil War; however, in 1869, South Carolina permitted divorce for the first time. The law in South Carolina was later abolished in 1878, and divorce was not permitted again until 1949.¹⁷

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14. See Tenn. Code. Ann. § 36-4-101 (2008) (citing grounds for divorce in Tennessee such as bigamy, desertion, drug and alcohol abuse, and cruel and inhumane treatment); see also Joanna L. Grossman, *Fear and Loathing in Massachusetts: Same-Sex Marriage and Some Lessons from the History of Marriage and Divorce*, 14 B.U. PUB. INT. L.J. 87, 97 (2004) (listing bigamy, extreme cruelty, habitual drunkenness, felony conviction, and desertion as additional grounds for divorce besides adultery); see also Shaakirrah R. Sanders, *The Cyclical Nature of Divorce in the Western Legal Tradition*, 50 LOY. L. REV. 407, 421 (2004) (expanding the list of grounds for divorce in the United States to include bigamy and fraud as well as the original ground of adultery).
 15. See Sanders, *supra* note 14, at 422 (explaining that with the liberal divorce laws in the western United States divorce rates soared throughout the 19th Century); see also Leah Ward Sears, *The “Marriage Gap”: A Case for Strengthening Marriage in the 21st Century*, 82 N.Y.U. L. REV. 1243, 1264 (2007) (reiterating that the divorce rate continued to rise throughout the country). See generally ROBERT L. GRISWOLD, *FAMILY AND DIVORCE IN CALIFORNIA, 1850–1890: VICTORIAN ILLUSIONS AND EVERYDAY REALITIES* 1, 28 (1982) (stating that the state of California’s divorce rate “skyrocketed” during the 1900s).
 16. See MARY SOMERVILLE JONES, *AN HISTORICAL GEOGRAPHY OF THE CHANGING DIVORCE LAW IN THE UNITED STATES* 30–31 (1987) (listing the Western states that had more liberal divorce requirements, and explaining that the broad interpretation their statutes received made it easier to obtain a divorce); see also RODERICK PHILLIPS, *PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY* 451–52 (1988) (noting that as the American West became settled during the 19th century, the area gained notoriety for lax and liberal divorce laws); see also Sanders, *supra* note 14, at 421 (stating that as the population moved westward, liberal divorce laws developed in the newly settled areas).
 17. See James Herbie Difonzo, *Customized Marriage*, 75 IND. L.J. 875, 917–18 (2000) (describing the historical development of divorce law in South Carolina from 1868 to 1949); see also Sanders, *supra* note 14, at 422 (stating that South Carolina did not permit divorce until 1869, and then subsequently outlawed it in 1878, after which it was not allowed again until 1949). See generally *Grant v. Grant*, 12 S.C. 29, 1–2 (1879) (regarding the history of divorce regulation in South Carolina, this opinion affirmed the dismissal of a divorce suit because the legislation passed to allow for divorce had subsequently been repealed by the time of the decision).

By the 20th century, divorce law was prevalent throughout the United States.¹⁸ Up to the middle of the 20th century, additional grounds for divorce were promulgated and included in the fault-based divorce process.¹⁹ Cruelty in most states was revised to include mental cruelty.²⁰

Additionally, there were new grounds for divorce which included “non-support, insanity, voluntary separation, and incompatibility.”²¹ Uncontested cases of divorce increased in number.²² Divorce grew in the United States, where divorce rates were much higher than in Europe.²³ In the western part of the United States, divorce “laws were more liberal”; thus,

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18. See JONES, *supra* note 16, at 60 (declaring that a wide body of divorce law existed throughout the United States by 1900); see also Doris Jonas Freed & Henry H. Foster, Jr., *Divorce American Style*, 383 ANNALS AM. ACAD. POL. & SOC. SCI.: PROGRESS IN FAMILY LAW 71, 75 (1969) (discussing the general spread of divorce law throughout the United States); see also Sanders, *supra* note 14, at 422 (stating that by the beginning of the 20th century a great deal of divorce law had developed in the United States).
 19. See Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 497, 1501–02 (2000) (listing the typical grounds for divorce under the fault-based system); see also Vivian Hamilton, *Principles of U.S. Family Law*, 75 FORDHAM L. REV. 31, 41 (2006) (describing the fault-based requirement); see also Sanders, *supra* note 14, at 422 (explaining that grounds for divorce expanded during the first half of the 20th century).
 20. See JAMES SCHOULER & ARTHUR BLAKEMORE, A TREATISE ON THE LAW OF MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS: THE LAW OF MARRIAGE AND DIVORCE: EMBRACING MARRIAGE, DIVORCE AND SEPARATION, ALIENATION OF AFFECTIONS, ABANDONMENT, BREACH OF PROMISE, CRIMINAL CONVERSATION, CURTESY AND DOWER 1807–11 (6th ed. 1921) (explaining how mental and physical cruelty can both be sufficient grounds for divorce); see also Sanders, *supra* note 14, at 422 (stating that the cruelty requirement for divorce had been expanded to include mental cruelty in addition to physical cruelty). See *generally* Day v. Day, 5 Alaska 584, 586–87 (4 Div. 1916) (illustrating the application of the widening definition of cruelty).
 21. See Mark A. Fine & David R. Fine, *An Examination and Evaluation of Recent Changes in Divorce Laws in Five Western Countries: The Critical Role of Values*, 56 J. MARRIAGE & FAM. 249, 251 (1994) (listing the new grounds available for divorce); see also Lawrence M. Friedman & Robert Percival, *Who Sues for Divorce? From Fault through Fiction to Freedom*, 5 J. LEGAL STUD. 61, 67–68 (1976) (presenting examples of the broadening grounds for divorce); see also Sanders, *supra* note 14, at 422 (describing how the grounds for divorce were expanding to include previously unacceptable excuses, such as insanity and incompatibility).
 22. See Henry H. Foster Jr., *The Future of Family Law*, 383 ANNALS AM. ACAD. POL. & SOC. SCI. 129, 130 (1969) (commenting on the high rate of uncontested divorce cases); see also Doris Jonas Freed, *supra* note 18, at 76 (declaring the frequency with which uncontested cases of divorce presented themselves); see also Sanders, *supra* note 14, at 422 (stating that the number of uncontested cases was increasing).
 23. See JOSEPH EPSTEIN, *DIVORCED IN AMERICA: MARRIAGE IN AN AGE OF POSSIBILITY*, 20–21 (1974) (describing examples of the high divorce rate in America); see also PHILLIPS, *supra* note 16, at 451–52 (providing examples of how the divorce rate in America was markedly higher than divorce rates in other countries); see also Sanders, *supra* note 14, at 422 (proclaiming that the popularity of divorce grew in America, and that divorce rates in America were higher than those in Europe).

divorce rates were higher in the West than in the South and East, where the laws tended to be more conservative.²⁴ The midwestern states were the median, as far as divorce rates went.²⁵

After World War II many people were unhappy with “fault-based” divorce laws; as a result, courts in some states began to ease statutory requirements for divorce.²⁶ In 1969, California implemented a statute allowing divorce without a showing of marital fault.²⁷ Other states soon followed, “causing a widespread liberalization of divorce laws in the United States.”²⁸ During the seventies, most of the states adopted equitable distribution laws, which attempted to give credit to the unpaid work that the stereotypical housewife contributed to a marriage.²⁹

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24. See GLENDA RILEY, *DIVORCE: AN AMERICAN TRADITION* 85 (Oxford University Press 1991) (pointing to the American West’s notoriety for “decadent” divorce laws and higher-rising divorce rates than states in other parts of the country); see also Lawrence M. Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 651–55 (1984) (revealing the uncommonness of divorce in Southern states and their hesitancy to reform conservative divorce law); see also Sanders, *supra* note 14, at 422 (describing the disparate divorce rates throughout the United States and their correlation to the different divorce laws).
 25. See Ira Mark Ellman, *Divorce Rates, Marriage Rates, and the Problematic Persistence of Traditional Marital Roles*, 34 FAM. L. Q. 11 n. 25 (2000) [hereinafter Ira Mark Ellman, *Rates*] (calculating nationwide divorce statistics and finding those in the Midwest to be in the median range); see also Ira Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. ILL. L. REV. 719, 727 n. 23 (1997) [hereinafter Ira Mark Ellman, *Contract*] (citing a report by the National Center for Health Statistics which found the Midwest’s divorce rates to fall between the highest rates in the West and South and the lowest in the Northeast); see also Sanders, *supra* note 14, at 422 (stating that Midwestern states’ divorce rates tend toward the national average).
 26. See Ann Laquer Estin, *Marriage and Belonging*, 100 MICH. L. REV. 1690, 1697 (2002) (classifying the period after World War II as a turning point in divorce law, bringing challenges to the long-standing model of marriage and leading to the recommendation of no-fault divorce); see also Fette, *supra* note 10, at 393 (documenting the liberalization of divorce laws following the passing of California’s 1969 statute, which allowed for no-fault divorce). See generally Eliza K. Pavalko & Glen H. Elder, Jr., *World War II and Divorce: A Life-Course Perspective*, 95 AM. J. SOC. 1213 (1990) (hypothesizing various reasons for an increase in divorces and a shift in attitudes toward divorce during the post-World War II era).
 27. See Cal. Fam. Code § 2310 (West 2000) (originally enacted as Stats. 1969, c. 1608, § 8) (establishing irreconcilable differences and incurable insanity as the no-fault grounds for dissolution of marriage); see also Fette, *supra* note 10, at 393 (stating California’s trend-setting institution of a no-fault divorce law in 1969). See generally ALLEN M. PARKMAN, *GOOD INTENTIONS GONE AWRY: NO-FAULT DIVORCE AND THE AMERICAN FAMILY* (2000) (historicizing the evolution and implementation of California’s no-fault divorce).
 28. See Fette, *supra* note 10, at 393 (discussing the reactions of other states to California’s no-fault divorce statute); see also Maldonado, *supra* note 13, at 463 (discussing the addition of no-fault grounds to fault-based divorce systems in the majority of states after California’s initial no-fault statute); see also Steven L. Nock et al., *America’s Divorce Problem*, 36 SOC’Y 44 (1999) (noting the availability of no-fault divorces in almost all states since the 1970s).
 29. See J. Herbie DiFonzo & Ruth C. Stern, *Addicted to Fault: Why Divorce Reform Has Lagged in New York*, 27 PACE L. REV. 559, 587 (2007) (citing the adoption of equitable distribution laws to compensate housewives for non-employment work); see also Brooke Grossman, *The Evolution of Equitable Distribution in New York*, 62 N.Y.U. ANN. SURV. AM. L. 607, 609–10 (2007) (defining equitable distribution law as a scheme designed to weigh the value of housewives’ sacrificed professional opportunities against the careers of their husbands); see also Pamela Laufer-Ukeles, *Selective Recognition of Gender Difference in the Law: Revaluing the Caretaker*, 31 HARV. J. L. & GENDER 1 60 (2008) (arguing that women who chose to be homemakers in lieu of pursuing a professional career should not be penalized in divorce proceedings for that choice).

Nowadays, even though divorce laws are based on statutes and vary from state-to-state, most states have adopted some variation of the “no-fault” divorce.³⁰ No-fault divorce allows the sole ground for issuing a divorce to be the “irretrievable breakdown” of a marriage or “irreconcilable differences” between spouses.³¹

Once considered shocking and shameful, divorce has become a routine fact of American life in recent decades.³² Today, divorces are much easier to obtain; in fact, one out of every two marriages ends in divorce.³³ However, although “no-fault divorce laws were designed in part to encourage the equitable division of marital property after divorce, these laws have frequently had adverse economic consequences for the financially dependent spouses, most of whom are women.”³⁴

First, while no-fault laws encourage fairness between spouses by encouraging a one-time division of marital property,³⁵ in many cases, this division often does not take into consider-

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30. See PARKMAN, *supra* note 27 (noting the widespread adoption of no-fault grounds or the addition of no-fault provisions to states’ divorce laws between 1970 and 1985); see also RILEY, *supra* note 24, at 163 (communicating the prevalence of no-fault divorce and its adoption in all but three states by 1977); see also Harold P. Southerland, “Love For Sale”—*Sex and the Second American Revolution*, 15 DUKE J. GENDER L. & POL’Y 49, 85 (2008) (stating that by the end of the 1970s all states but New York had adopted no-fault procedures for divorce).
 31. See Fette, *supra* note 10, at 393–94 (declaring the grounds for no-fault divorce to be, among others, “irreconcilable differences” and “irretrievable breakdown” of marriage); see also Mechoulam, *supra* note 12, at 149 (discussing the addition of no-fault provisions to divorce law, including incompatibility, irreconcilable differences, and irretrievable breakdown of marriage); see also Nicholas H. Wolfinger, Ph.D., *The Mixed Blessings of No-Fault Divorce*, 4 WHITTIER J. CHLD & FAM. ADVOC. 407, 408 (2005) (maintaining that under no-fault divorce law, couples need merely acknowledge irreconcilable differences or the irretrievable breakdown of the marriage).
 32. See ALISON CLARKE-STEWART & CORNELIA BRENTANO, *DIVORCE: CAUSES AND CONSEQUENCES* 2–3 (2006) (noting the ease of getting a divorce was facilitated by the differing views of local authorities); see also Matthew 19:6 (King James) (“[s]o they are no longer two, but one. Therefore, what God has joined together, let man not separate.”); see also Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 321 (2004) (discussing the historical view of divorce as shameful, and the modern-day view of divorce being normal).
 33. See DAVID FARNHAM, *MANAGING IN A BUSINESS CONTEXT* 174 (1999) (attributing, in part, the high rate of divorce to women entering the workforce and obtaining economic independence); see also Fette, *supra* note 10, at 394 (defining the ever-increasing rate of divorces as a “divorce revolution”); see also Kathleen A. Portuan Miller, *The Other Side of the Coin: A Look at Islamic Law Compared to Anglo-American Law—Do Muslim Women Really Have Fewer Rights Than American Women?*, 16 N.Y. INT’L L. REV. 65, 111 (2003) (claiming the high percentage of American marriages ending in divorce will drive many woman into poverty).
 34. See JOSEPH GUTTMANN, *DIVORCE IN PSYCHOSOCIAL PERSPECTIVE: THEORY AND RESEARCH* 17 (1993) (emphasizing that divorce rates are lower among women with less education, which may be attributed to economic dependence on their husbands); see also RICHARD R. PETERSON, *WOMEN, WORK, & DIVORCE* 99 (1989) (concluding that, after divorce, women with little or no work experience are affected the most economically and have a lower standard of living); see also Fette, *supra* note 10, at 394 (emphasizing the effects of no-fault divorce on women).
 35. See also JOHN WITTE, JR., *GOD’S JOUST, GOD’S JUSTICE: LAW AND RELIGION IN THE WESTERN TRADITION* 314 (2006) (noting that a one-time division of property gives the parties a “clean-break,” allowing parties to move forward with their lives); see also Casteel, *supra* note 8, at 557 (reasoning that states passed no-fault divorce reform to reduce the necessity of state aid for financially dependent spouses); see also Maldonado, *supra* note 13, at 463–65, 468 (asserting that no-fault divorce fails to reduce hostile emotions associated with the divorce process and suggesting mediation would be more effective).

ation that many women live in poverty after divorce because of their low earning potential, and that they are “displaced homemakers.”³⁶ Second, “no-fault laws are based on the theory that any maintenance, or alimony, should be temporary and only for the purpose of enabling a disadvantaged spouse to obtain suitable employment.”³⁷ However, in reality, “rehabilitative maintenance” has not been so rehabilitative, and there have been significant inequities in the economic consequences of divorce, particularly impacting spouses who have been away from the workforce for a long period of time.³⁸

And, finally, in divorce cases where child custody is at issue, the United States no longer subscribes to the “tender years” doctrine, which is “the idea that primary custody of young children should automatically go to the mother.”³⁹ All states now require that both men and women have equal rights to custody based on what is in the best interest of the child.⁴⁰

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36. See SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 162–63 (1989) (stressing that a one-time division of property is “neither equal nor equitable,” because the most valuable property is career assets or human capital, which can’t be divided); see also Fette, *supra* note 10, at 394 (emphasizing the inequity of no fault divorce on women with low income potential). See generally PARKMAN, *supra* note 27, at ix (reiterating that no-fault divorce, along with deteriorating family values, ultimately works to the detriment of divorced women and their children).
37. See SUSAN BRADLEY & MARY MARTIN, *SUDDEN MONEY—MANAGING A FINANCIAL WINDFALL* 205 (2000) (cautioning that an alternate long-term plan must be implemented so as to be prepared for when maintenance terminates); see also Fette, *supra* note 10, at 394–95 (positing that alimony and temporary maintenance do not give women enough money or time to gain necessary skills or education); see also Michelle Murray, *Alimony as an Equalizing Force in Divorce*, 11 J. CONTEMP. LEGAL ISSUES 313, 317 (1997) (explaining that alimony for rehabilitation, although temporary, provides disadvantaged spouses with a way to become self-sufficient).
38. See *Whallon v. Lynn*, 230 F.3d 450, 456–57 (1st Cir. 2000) (recognizing the differences in Mexican and American divorce law); see also CAROL SMART, *THE TIES THAT BIND: LAW, MARRIAGE AND THE REPRODUCTION OF PATRIARCHAL RELATIONS* 114 (1984) (describing the modern trend of providing rehabilitative maintenance as a way for a husband to reduce his liability to his ex-wife); see also Fette, *supra* note 10, at 395 (noting Ireland’s approach to divorce, in an effort to avoid the consequences of no-fault divorce, is conservative).
39. See DAWN BRADLEY BERRY, *DIVORCE SOURCE—BOOK*, 13–14 (3d ed., 1998) (noting one purpose of no-fault divorce is to preserve family dignity by keeping intimate details of the relationship from becoming public); see also Robert E. Salt, *The Legal Rights of Fathers in the U.S.*, in *MEN’S CHANGING ROLE IN THE FAMILY*, 101, 108 (Robert Alan Lewis & Marvin B. Sussman eds., 1986) (quoting *Commonwealth ex. rel. Hart v. Hart*, 14 Phil Rep. 352, 357 (1880), and recognizing it as the first case to introduce the “tender years” doctrine to American law); see also Carlos A. Ball, *The Blurring of the Lines: Children and Bans on Interracial Unions and Same-Sex*, 76 *FORDHAM L. REV.* 2733, 2757 n.106 (2008) (explaining the tender years doctrine was justified in the past by the presumption that the mother, not the father, was the best choice to care for children).
40. See *id.*

II. Overview of Islamic Divorce Law

The Holy Qur'an is the primary source for deriving Islamic legal rulings.⁴¹ In fact, the Holy Qur'an is the revelation of word of God.⁴² So, unlike Anglo-American law, which is man-made, Shari'ah is the code of law derived from the Qur'an or God-made law; Islamic law (jurisprudence), or *fiqh*, is the law of Muslim jurists.⁴³ The Sunnah (including *hadith*, or Prophetic sayings) and works and examples of the Prophet Mohammed (Peace Be Upon Him) are secondary sources of the law, which interpret and clarify the Holy Qur'an.⁴⁴ In Islamic countries, Peace Be Upon Him (PBUH) is always written after the Prophet Mohammed's name, as a means of showing respect.⁴⁵

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41. See DAVID F. FORTE, *STUDIES IN ISLAMIC LAW: CLASSICAL AND CONTEMPORARY APPLICATION* 38 (Austin & Winfield, 1999) (noting that the followers of Islam accept the Holy Qur'an as the primary source of law); see also Cherif Bassiouni, *Protection of Diplomats Under Islamic Law*, 74 AM. J. INT'L L. 609, 609 (1980) (remarking that the Qur'an (Koran) is the principal source of Islamic law); see also Hassan Mahassni & Neal F. Grenley, *Public Sector Dispute Resolution in Saudi Arabia: Procedures and Practices of Saudi Arabia's Administrative Court*, 21 INT'L L. 827, 827 (1987) (suggesting that Islamic law has four sources and the Qur'an is the principle source).
 42. PATRICK BANNERMAN, *ISLAM IN PERSPECTIVE: A GUIDE TO ISLAMIC SOCIETY, POLITICS AND LAW* 34 (Routledge, 1988) (establishing that for Muslims, the Holy Qur'an is the word of God and is therefore "immutable" and always valid); see also Noor Mohammed, *Principles of Islamic Contract Law* in UNDERSTANDING ISLAMIC LAW: FROM CLASSICAL TO CONTEMPORARY, 95 (Hisham M. Ramadan ed., 2006) (establishing that the divine revelations received by Prophet Muhammad [PBUH] were recorded in the Qur'an and serve as the sole Scripture for the followers of Islam); see also Ali Khan, *Ray Rushton Distinguished Lecturer Series: Islam as Intellectual Property "My Lord! Increase Me in Knowledge,"* 31 CUMB. L. REV. 631, 645 (2000/2001) (indicating that Qur'an is the word of God, holding his protected knowledge).
 43. See SAMI ZUBAIDA, *LAW AND POWER IN THE ISLAMIC WORLD* 12 (I.B. Tauris, 2003) (informing that Qur'an is spoken by God in the first person and for that reason is the divine word of God); see also Hesham M. Shrawy, Note, *Understanding the Islamic Prohibition of Interest: A Guide to Aid Economic Cooperation Between Islamic and Western Worlds*, 29 GA. J. INT'L & COMP. L. 153, 179 n.15 (2000) (stating that there is a fundamental difference between Islamic and non-Islamic legal systems; in Islamic countries the law is based on "God-made" law, but in many non-Islamic countries the law is "man-made").
 44. See MAWIL IZZI DIEN, *ISLAMIC LAW: FROM HISTORICAL FOUNDATIONS TO CONTEMPORARY PRACTICE* 38 (Edinburgh Univ. Press, 2004) (discussing that Sunnah, or the traditions and practices of the Prophet (PBUH), is the second source of Islamic Law after the Holy Qur'an); see also Ali Ahmad, *Islamic Water Law as an Antidote for Maintaining Water Quality*, 2 U. DENV. WATER L. REV. 169, 173 (1999) (asserting that the traditions of the Prophet (PBUH) are known as either the Hadith or the Sunnah; furthermore, even though the Hadith means the sayings and deeds of the Prophet (PBUH), while Sunnah means the rules of law derived from the Hadith, both terms have been used interchangeably to mean the "practice" of the Prophet (PBUH)); see also Bernard K. Freamon, *Slavery, Freedom, and the Doctrine of Consensus in Islamic Jurisprudence*, 11 HARV. HUM. RTS. J. 1, 19 (1998) (emphasizing that the Sunnah is extremely important because it consists of the Prophet's (PBUH) statements and behavior and his approval or disapproval of the statements and behavior of others that he observed during his lifetime).
 45. See Irshad Abdul-Haqq, *Islamic Law: An Overview of Its Origins and Elements* in UNDERSTANDING ISLAM: FROM CLASSICAL TO CONTEMPORARY, 32-33 n.58 (Hisham M Ramadan ed., 2006) (commenting that it is traditional to invoke Allah's peace and blessing whenever Muhammad or another prophet is mentioned verbally or in writing); see also Donald Brown, Comment, *A Destruction of Muslim Integrity: Ontario's Decision to Stop Shari'a-Based Arbitration*, 32 N.C. J. INT'L & COM. REG. 495, 512 (2007) (clarifying that parenthetical "(PBUH)" is an acronym for "peace be upon him"); see also James David Phipps, Comment, *Kiss of Death: Application of Title VII's Prohibition Against Religious Discrimination in the Kingdom of Saudi Arabia*, 1994 BYU L. REV. 399, 405 n.25 (1994) (presenting that "PBUH" is an abbreviated form of the Arabic invocation "sala allahi 'alai he wa sal-lim" meaning "may Allah's peace and prayers be upon him").

If a question is unanswered by the Holy Qur'an and Sunnah, Muslim scholars resort to *ijtihad*, the science of interpretation; scholars from different Islamic legal schools may disagree in their *ijtihad*.⁴⁶ Included in the major Sunni schools of jurisprudence are the Hanafi,⁴⁷ Maliki (established by Imam Malik),⁴⁸ and Shafi'i,⁴⁹ Hanabali,⁵⁰ and Ja'fari schools.⁵¹

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46. See JAMILA HUSSAIN, *ISLAM: ITS LAW AND SOCIETY* 37 (2d ed., 2004) (defining *ijtihad*—use of personal judgment—as a “continuous process” helping *Shar'iah* adopt to modern conditions, but which cannot be used in matters concerning the existence of God, the truth of the Prophets, or the authenticity of the Qur'an); see also Ahmad, *supra* note 44, at 174–75 (illustrating that the term *ijtihad*, which means reasoning by analogy and logical inference, is to be used only if a particular issue is not addressed in either the Qur'an or the Sunnah); see also Azzizah Al-Hibri, *Islam, Law and Custom: Redefining Muslim Women's Rights*, 12 AM. U. J. INT'L L. & POL'Y 1, 6 (1997) (finding that when an issue is unresolved or unanswered in the Holy Qur'an and the Sunnah, Muslim scholars resort to *ijtihad*, or the use of local custom consistent with the Holy Qur'an and the Sunnah).
 47. See S.H. AMIN, *ISLAMIC LAW & ITS IMPLICATIONS FOR THE MODERN WORLD* 184 (Royston, 1989) (recognizing the Hanafi school as possibly the most influential of all orthodox Sunni schools because it formulated a “rational and liberal” system of jurisprudence); see also HUSSAIN, *supra* note 46, at 35 (showing that Hanafis emphasized the use of reason and *shura* (group discussion) instead of solely relying on traditions to formulate their laws); see also Jennifer F. Cohen, Development, *Islamic Law in Iran: Can It Protect the International Legal Right of Freedom of Religion and Belief?*, 9 CHI. J. INT'L L. 247, 256 n.42 (2008) (opining that there are four major Sunni schools of thought and that they represent different interpretations of the Holy Qur'an and the Sunnah).
 48. See Abbdal-Haqq, *supra* note 45, at 26–27 (explaining the emphasis placed on the customary practices of the people of Medina as a distinguishing factor in the Maliki school of thought); see also Asifa Quraishi, *Interpreting the Qur'an and the Constitution: Similarities in the Use of Text, Tradition, and Reason in Islamic and American Jurisprudence*, 28 CARDOZO L. REV. 67, 96 (2006) (explaining that the Maliki School of thought emphasizes the intent of the prophet, the framer of the law, in interpreting the legality of an action). See generally Babak Rod Khadem, Note, *The Doctrine of Separation in Classical Islamic Jurisprudence*, 4 UCLA J. ISLAMIC & NEAR E. L. 95, 130–31 (2005) (describing the creation of the second institutionalized legal school based on the jurisprudence of the “People Tradition”).
 49. See JAVAID REHMAN, *ISLAMIC STATE PRACTICES, INTERNATIONAL LAW AND THE THREAT FROM TERRORISM: A CRITIQUE OF THE “CLASH OF CIVILIZATIONS” AND THE NEW WORLD ORDER* 21 (2005) (stating that the founder and his teaching were highly conservative and based on a “rigorous” interpretation of the Qur'an); see also Abbdal-Haqq, *supra* note 45, at 28–29 (explaining that the school is based on Ahmad Ibn Hanbal's *fiqh* methodology, which staunchly opposed the concept of *taqlid* [blind imitation]); see also Wael Hallaq, *Early Ijtihad and The Later Construction of Authority*, in *THE FORMATION OF ISLAMIC LAW* 319, 335 (Wael B. Hallaq & Lawrence I. Conrad eds., 2004) (stating that although school principles were based on Hanbal's teaching, school was made up of various elements that incorporated teaching of predecessors and contemporaries from the other four major schools).
 50. See *id.*
 51. See Irshad Abbdal-Haqq, *supra* note 45, at 75–76 (noting that Ja'fari is the dominant school of thought for Shi'a Muslims and that the fundamental principles of *fiqh* methodology are comparable to that of the four Sunni schools but different in application); see also Al-Hibri, *supra* note 46, at 7 (commenting that these different schools of Islamic law demonstrated a degree of flexibility that allowed it to “suit all people and societies”). See generally SEYYED HOSSEIN NASR, *The Heart of Islam: Enduring Values for Humanity* 68 (2004) (stating that Ja'fari law [also known as Twelve-Imam Shi'ite Law] was founded by Imam Ja'far al-Sadiq, whose principles influenced the creator of Hanafism). For more geographical locations in which the different schools of thought are based, see *infra* note 113.

Divorce is permissible in Islam since marriage is considered to be a contract.⁵² In Islamic countries, *shari'ah* governs family law.⁵³ Several different types of divorce are authorized in Islam: *talaq* (usually the husband against the wife),⁵⁴ *khul* (wife against the husband),⁵⁵ *talaq al-tawfid* (divorce delegated by husband to the wife, and can be put in the marriage contract),⁵⁶

52. See HAMMUDAH ABDALATI, ISLAM IN FOCUS 179–81 (Islamabad, Da'wad Academy, 1996); see also LAL MOHD, MARRIAGE AND DIVORCE IN ISLAM (July 30, 2007), available at <<http://www.religioustolerance.org/mohd.htm>> (explaining the purpose of Muslim marriage as well as the methods available of obtaining a divorce in Islam); see also Mahmoud Hoballah, *Marriage, Divorce, and Inheritance in Islam*, in UNDERSTANDING ISLAMIC LAW 113, 113 (Hisham M. Ramadan ed., 2006) (reasoning that despite the “sacredness” of the marriage contract, the religion of Islam recognizes divorce as a necessary evil); see also Emily L. Thompson & F. Soniya Yunus, Comment, *Choice of Laws or Choice of Culture: How Western Nations Treat the Islamic Marriage Contract in Domestic Courts*, 25 WIS. INT'L L.J. 361, 363–64 (2007) (explaining that Shari'a law regards marriage as a binding “contract lawfully concluded between a man and a woman” but can be dissolved if there is abuse by one spouse, or if one spouse leaves Islam for another faith).
53. See JOHN L. ESPOSITO WITH NATANA J. DE LONG-BAS, WOMEN IN MUSLIM FAMILY LAW 47 (2d ed. 2002) (stating that Islamic law remained central to Family Law and served as the major reference to the Shari'ah courts); see also AMIRA EL AZHARY SONBOL, WOMEN, THE FAMILY, AND DIVORCE LAW IN ISLAMIC HISTORY 10 (1996) (noting that spheres of family laws were left to Shar'iah courts and were ruled by traditional Islamic law); see also Ogechi E. Anyanwu, *Crime and Justice in Postcolonial Nigeria: The Justifications and Challenges of Islamic Law of Shari'ah*, 21 J. L. & RELIGION 315, 334 (2005) (stating that Shari'ah law regulates every aspect of Muslim life including property, inheritance and family law).
54. See ABDUL RAHMAN I. DOI, WOMAN IN SHARI'AH (Islamic Law) 84 (2d ed. 1989) (stating that *talaq* divorce is a “right available mainly to the husband but not the wife”); see also Hafiz Nazeem Goolam, *Gender Equality in Islamic Family Law*, in UNDERSTANDING ISLAMIC LAW 120 (explaining that *talaq* means “freeing or undoing the knot” and that a wife does have an independent right to divorce her husband under the Islamic law of *khul*); see also Svetlana Ivanova, *The Divorce Between Zubaida and Esseid Osman Aga*, in WOMEN, THE FAMILY, AND DIVORCE LAWS IN ISLAMIC HISTORY 112, 119 (Amira El Azhary Sonbol ed., 1996) (explaining that it is beneficial but complicated for a woman to obtain a *talaq* divorce, and requires a woman to provide “substantial reason such as physical or mental abuse”).
55. See DOI, *supra* note 54, at 96 (clarifying *khul* as a method of marital release available to a wife that requires her to give up some or all of her property that was received as part of her dower); see also Goolam, *supra* note 54, at 120–21 (discussing how the “letter and spirit of the Koran” allows a wife to divorce her husband even if he is unwilling and clarifying the misconception that a wife must “pay” for her freedom); see also Donald L. Horowitz, *The Qur'an and the Common Law: Islamic Reform and the Theory of Legal Change*, 42 AM. J. COMP. L. 233, 280 (1994) (explaining that a general ground for divorce for women is cruelty, and depending on the region, may require the husband's consent as well as a redemption payment).
56. See ESPOSITO, *supra* note 53, at 32 (illustrating that *talaq al-tawfid* is a divorce device where the wife is given the power of divorce by her husband); see also Katayoun Alidadi, *The Western Judicial Answer to Islamic Talaq: Peeking Through the Gate of Conflict of Laws*, 5 UCLA J. ISLAMIC & NEAR E. L. 1, 22–23 (2005) (remarking that *talaq al-tawfid* is a form of delegated *talaq*, where the wife has the power to pronounce a divorce); see also Urfan Khaliq, *Beyond the Veil?: An Analysis of the Provisions of the Women's Convention in the Law as Stipulated in Shari'ah*, 2 BUFF. J. INT'L L. 1, 35–36 (1995) (defining *talaq al-tawfid* as the type of Islamic divorce where the husband grants the wife the right to request divorce).

and *tafriq* (judicial divorce, usually initiated by the wife).⁵⁷ Contrary to popular belief, Islam has always allowed women the right to divorce.⁵⁸

“*Nikah*, or marriage, has been described by the Holy Qur’an as *mithaq-i-ghaliz*, a strong covenant.”⁵⁹ Although the Holy Qur’an discourages divorce, it allows it.⁶⁰ Divorce in Islam is thought of as “*abghaz al-mubahat*, the most disliked of permissible acts,” or the “most hateful of all lawful things.”⁶¹ In particular, Surat Al Nisa of the Holy Qur’an discourages divorce:

And treat them kindly. Then if you hate them,
it may be that you dislike a thing
while *Allah* (God) has placed abundant good in it.⁶²

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57. See DAWOUD SUDQI EL ALAMI AND DOREEN HINCHCLIFFE, ISLAMIC MARRIAGE AND DIVORCE LAWS OF THE ARAB WORLD 29 (1996) (discussing that a woman may request judicial divorce by petitioning the court); see also Nusrat Choudhury, *Constrained Spaces for Islamic Feminism: Women's Rights and the 2004 Constitution of Afghanistan*, 19 YALE J.L. & FEMINISM 155, 199 n.54 (2007) (noting that *tafriq* is judicial divorce through separation); see also Lynn Welchman, *The Development of Islamic Family Law in the Legal System of Jordan*, 37 INT'L. & COMP. L. Q. 4, 873 (1988) (commenting that *tafriq*, a form of divorce most familiar to Westerners, is one where the judge terminates the marriage and is usually requested by the wife).
58. See KAREN ARMSTRONG, ISLAM: A SHORT HISTORY 16 (Modern Library ed., 2000) (illustrating that the Prophet's goal of emancipating women was pronounced in the Qur'an by giving women the right to divorce at Islam's inception); see also HUSSAIN, *supra* note 46, at 101 (affirming that the Holy Qur'an has always made provisions for divorce in recognition that not all marriages are perfect); see also Major David J. Western, *Islamic "Purse Strings": The Key to the Amelioration of Women's Legal Rights*, 61 A.F. L. REV. 79, 82 (2008) (reiterating the fact that Islamic women were given divorce rights before Western women were).
59. See ASGHAR ALI ENGINEER, THE RIGHTS OF WOMEN IN ISLAM 121 (St. Martin's Press 1992) (1940) (stating that marriage is considered a strong covenant in the Qur'an); see also Hoballah, *supra* note 52, at 112 (remarking that Islamic marriage contracts entail a deeper and more sacred bond than any other types of contracts); see also Lindsey E. Blenkhorn, Note, *Islamic Marriage Contracts in American Courts: Interpreting Mahr Agreements as Prenuptials and Their Effect on Muslim Women*, 78 S. CAL. L. REV. 189, 195 (2004) (emphasizing that Islam views marriage as very important because it is the cornerstone for a harmonious society).
60. See Amira Mashhour, *Islamic Law and Gender Equality—Could There Be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt*, 27 HUM. RTS. Q. 562, 571–72 (2005) (positing that while the Prophet Muhammad denounced divorce and advocated reconciliation, divorce under Shar'iah law was permissible); see also Mohammad Hussain, *Quran Sanctifies Marriage, Spells Out Divorce*, EVANSVILLE COURIER & PRESS, June 14, 2008, at ¶5 (explaining that even though the Prophet Muhammad detested divorce, it is not forbidden in the Qur'an); see also *Divorces via SMS Discouraged*, STRAITS TIMES (SING.), July 12, 2001, at Forum, 19 (reasoning that divorces using text messaging is even more abhorrent because Islam allows such divorce but it is detested).
61. See ENGINEER, *supra* note 59, at 121 (describing the concept of Islamic divorce as the most detested yet permissible act); see also LAMIA RUSTUM SHEHADEH, THE IDEA OF WOMEN IN FUNDAMENTALIST ISLAM 118 (2003) (affirming that divorce is abhorrent in Islam); see also Kristen Cherry, Comment, *Marriage and Divorce Law in Pakistan and Iran: The Problem of Recognition*, 9 TULSA J. COMP. & INT'L L. 319, 322 (2001) (announcing that the Prophet Muhammad declared divorce to be Allah's most hated act).
62. See the Holy Qur'an (The Women) 4:19 (proclaiming that divorce is discouraged because Allah views marriage as a marvelous union).

The Holy Qur'an also "strongly disapproves of slandering one's wife just to divorce her and take back from her the dower money given to her."⁶³ Moreover, the Holy Qur'an 4:35 states when there is a rift between husband and wife, an attempt should be made to appoint a *hakam*, or arbitrator:

If ye fear a breach
Between the twain,
Appoint two arbiters,
One from his family,
And the other from hers.⁶⁴

When a Muslim marries, he is required to give the wife *mahr*, a dowry; in cases of divorce, the husband is instructed by the Holy Qur'an not to take back the dower money or items.⁶⁵

The *jihaz*—furniture and household items that the husband is obligated to give his wife upon their marriage—go back to the wife upon dissolution of the marriage.⁶⁶ If the husband, or the wife, owned the particular pieces, then the furniture returns to its original owner.⁶⁷ If the

63. See ENGINEER, *supra* note 59, at 121 (asserting that taking back the wife's dowry money by defaming and divorcing her is condemned in the Holy Qur'an); see also HAIFAA A. JAWAD, THE RIGHTS OF WOMEN IN ISLAM AN AUTHENTIC APPROACH 86 (1998) (commenting that not only did the Qur'an discourage divorce, but slandering the wife to take back her dowry was reprehensible and disallowed); see also Leila P. Sayeh & Adriaen M. Morse, Jr., Note, *Islam and the Treatment of Women: An Incomplete Understanding of Gradualism*, 30 TEX. INT'L L.J. 311, 327 (1995) (asserting that in Islam, the dowry belongs solely to the wife and the Qur'an prohibits the husband from trying to get the money by slandering her to cause a divorce).

64. See the Holy Qur'an (The Women) 4:35 (describing how marital problems are usually handled by appointing arbitrators for each side to help reach a resolution); see also ABDALATI, *supra* note 52, at 181 (stating that Islam, allowing for divorce due to mutual consent, shows that it is standing for human morality and dignity); see also ENGINEER, *supra* note 59, at 121.

65. See MAULANA MUHAMMAD ALI, THE RELIGION OF ISLAM 462 (6th ed. 1990) (1936) (noting that a *mahr* or dowry is usually used as a device to deter divorce, as it is not returnable); see also ENGINEER, *supra* note 59, at 121 (explaining that the wife cannot be deprived of her dowry and the husband cannot claim it back in the event of a divorce); see also Western, *supra* note 58, at 86–87 (acknowledging that the *mahr* protects women, as it must be given before the consummation of the marriage and is kept by the woman).

66. See AYATUALLAH SAYYID ABULLQASIM AL-KHOEI at 2421 (asserting that husbands have the obligation to provide their wives with food, furniture, clothes, and household items); see also LYNN WELCHMAN, BEYOND THE CODE: MUSLIM FAMILY LAW AND THE SHARI'AH: JUDICIARY IN THE PALESTINIAN WEST BANK 146–47 (2000) (recognizing the custom of men giving their wives jewelry, clothes and household furniture to take with them to their new home); see also Thompson, *supra* note 52, at 364–65 (remarking that the husband does not have to give money but can give property, valuables or household items instead).

67. See SONBOL, *supra* note 53, at 128 n.3 (realizing that in the *jamila* divorce, she was probably referring to the *jihaz*, which the woman is allowed to keep); see also Lama Abu-Odeh, *Modernizing Muslim Family Law: The Case of Egypt*, 37 VAND. J. TRANSNAT'L L. 1043, 1062–63 (2004) (concluding that under Taqlid law and general Islamic law, Muslim women retain their property rights when they enter marriage); see also Ron Shaham, *State, Feminists and Islamists: The Debate over Stipulations in Marriage Contracts in Egypt*, 62 BULL. OF THE SCH. OF ORIENTAL AND AFR. STUD., U. OF LONDON 3, 471 (1999) (clarifying that whoever brought the furniture or property into the marriage is allowed to leave with it in divorce).

wife does not want the items, then they go to the husband.⁶⁸ However, it is important to remember that, as mentioned previously, with respect to dower money or other items, the Holy Qur'an commands that the husband may not take back the *mahr* (dower) that he has given to the wife.⁶⁹

After the divorce is final, a woman has to wait for three menstrual cycles before the divorce is final because: one, "if she has conceived, this fact would be known for sure within three months," and two, "it gives the husband sufficient time to take her back if he wants to reconcile."⁷⁰ During the *iddat*, the waiting period, the woman is required to stay in the husband's house.⁷¹

There is a distinction between custody and guardianship in Shari'ah.⁷² Custody has more to do with the "care and control of the children, and therefore deals with the rights and obliga-

68. See the Holy Qur'an (The Women) 4:4 (demonstrating that a wife's property is solely her own, but she can give it to her husband if she chooses); see also Maya Shatzmiller, *Women and Property Rights in Al-Andalus and the Maghrib: Social Patterns and Legal Discourse*, 2 ISLAMIC L. SOC'Y 3, 232-33 (1995) (finding that trousseaus from the father are owned completely by the daughter but can be used by the husband with her consent); see also Sherif Abdel Azim, *Women in Islam Versus Women in the Judaeo-Christian Tradition: The Myth and the Reality*, part 9, available at <http://www.islamicity.com/Mosque/w_islam/prop.htm> (quoting the Holy Qur'an in stating the husband cannot have any of the wife's property unless she gives it to him).

69. See ALI, *supra* note 65, at 462 (providing that a *mahr* is a good deterrent to divorce as it economically penalizes the husband); see also YVONNE YAZBECK HADDAD, ISLAM, GENDER, AND SOCIAL CHANGE 149 (John L. Esposito ed., 1998) (indicating that the Qur'an protects women by not allowing the husband access to the *mahr*); see also Western, *supra* note 58, at 86-87 (stressing that the *mahr* is rightfully possessed by the woman and cannot be taken away).

70. See ENGINEER, *supra* note 59, at 121 (revealing that in divorces the woman must abstain for three months to check for pregnancy and to give the man the chance to resume his marital duties); see also CHIBLI MALLAT & JANE CONNORS, ISLAMIC FAMILY LAW 64 (1989) (asserting that in revocable divorces, the husband's right to reassume the marriage is unilateral and the wife may not marry for three months after the divorce). See generally Adrien Katherine Wing, *Twenty-First-Century Loving: Nationality, Gender, and Religion in the Muslim World*, 76 FORDHAM L. REV. 2895, 2900 (2008) (analyzing that in divorce women can get alimony only for her *iddah* because it is long enough to determine if she's pregnant).

71. See JAMAL J. NASIR, THE ISLAMIC LAW OF PERSONAL STATUS 154 (3d ed. 1990) (commenting that according to all schools of thought, the ex-wife must spend her *iddah* at the matrimonial home); see also Miller, *supra* note 33, at 114 (explaining the reason for keeping the ex-wife in the house for her *iddah* as to eliminate any potential confusion about who the father is of a child); see also *The Iddah of Divorce*, Shariah Program <<http://www.shariahprogram.ca/women-islam/iddat-divorce-death.shtml>> (last visited Sept. 17, 2008) (citing the Islamic law of *iddah* of divorce that forces the ex-wife to remain in the husband's home for three months).

72. See Natana J. De Long-Bas, *The Status of Women Under Islamic Law and Under Modern Islamic Legislation*, 15 J. L. & RELIGION 499, 499 (2000-2001) (describing the rights of women under Islamic law); see also Hallie Ludsin, *Putting the Cart Before the Horse: The Palestinian Constitutional Drafting Process*, 10 UCLA J. INT'L L. & FOREIGN AFF. 443, 464 (2005) (discussing custody and guardianship of children under Shari'ah law); see also Sherifa Zuhur, *Empowering Women or Dislodging Sectarianism?: Civil Marriage in Lebanon*, 14 YALE J. L. & FEMINISM 177, 183-84 (2002) (detailing aspects of inequality between husbands and wives).

tions of mothers and persons who might take their place.”⁷³ Guardianship deals with the legal rights and obligations of the child’s father and his representatives.⁷⁴

According to Shari’ah, the father is *al waley*, the natural guardian of his children and their property.⁷⁵ A mother generally has a right to physical custody of her child—that is, the child is usually given to the mother.⁷⁶ The mother, after divorce, generally receives custody/compensation from the father to help her maintain the child.⁷⁷ Muslim schools of thought differ in their idea of the mother’s right to physical custody of the children—the Shafi’i school allows female custody until the child reaches the age of discretion/puberty, and then the child may choose either parent as custodian.⁷⁸ The *Maliki* school dictates that “female custody of a boy shall last until he reaches puberty, and for a girl, until she marries.”⁷⁹

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73. See ENGINEER, *supra* note 59, at 127 (explaining how custody is given); see also Mohamed Y. Mattar, *Unresolved Questions in the Bill of Rights of the New Iraqi Constitution: How will the Clash Between “Human Rights” and “Islamic Law” be Reconciled in Future Legislative Enactments and Judicial Interpretations?*, 30 FORDHAM INT’L L.J. 126, 156 (2005) (describing the order in which child custody is awarded); see also Javaid Rehman, *The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq*, 21 INT’L J.L. POL’Y & FAM. 108, 109–10 (2007) (discussing the significance of custody in Shari’ah law).
 74. See DAVID PEARL & WERNER MENSKI, *MUSLIM FAMILY LAW* 410 (3d ed. 1998) (explaining how guardianship centers on the legal rights and obligations of the child’s father); see also Urfan Khaliq, *supra* note 56, at 40 (describing how a child is taken care of in the future under Shari’ah law); see also Kristin J. Miller, *Human Rights of Women in Iran: The Universalist Approach and the Relativist Response*, 10 EMORY INT’L L. REV. 779, 797 (1996) (discussing the idea of the male as guardian over the female).
 75. See *Faiza Ali v. Qassem Ali*, 154, 167 (N.J. Super. Ch. 1994) (showing how the father is entitled to custody of children); see also Estin, *supra* note 26, at 515 (explaining how custody of minor children would almost always be given to the father); see also Kristine Uhlman UmHane, *Overview of Shari’ah and Prevalent Customs in Islamic Societies—Divorce and Child Custody*, (January 2004) <http://www.expertlaw.com/library/family_law/islamic_custody-2.html> (last visited Sept. 17, 2008) (describing the process for obtaining child custody after divorce).
 76. See AFZULAW RAHMAN, *ROLE OF MUSLIM WOMAN IN SOCIETY* 314 (1986) (detailing how women are usually given custody of the children); see also Ludsins, *supra* note 72, at 464 (describing custody and guardianship of children under Shari’ah law); see also Marie Egan Provins, *Constructing an Islamic Institute of Civil Justice that Encourages Women’s Rights*, 27 LOY. L.A. INT’L & COMP. L. REV. (2005) (discussing the rituals for child custody).
 77. See Abu-Odeh, *supra* note 67, at 1066 (discussing the father’s responsibility to bear full cost of child care after divorce); see also Leila P. Sayeh, *Tunisia: Marriage, Divorce, and Foreign Recognition*, 29 FAM. L.Q. 701, 709 (1995) (describing how the husband must maintain the wife and children); see also UmHane, *supra* note 75 (describing the process for child custody after divorce between husband and wife).
 78. See Khaliq, *supra* note 56, at 40 (discussing how a child has input in choosing which parent’s custody to enter after reaching the age of puberty); see also Hamid M. Khan, *Nothing Is Written: Fundamentalism, Revivalism, Reformism and the Fate of Islamic Law*, 24 MICH. J. INT’L L. 273, 331 (2002) (demonstrating the progression of women’s rights and how children can choose, once they reach puberty, with whom to stay); see also UmHane, *supra* note 75 (describing how children can choose which parent gets custody after divorce).
 79. See Monica E. Henderson, *U.S. State Court Review of Islamic Law Custody Decrees—When Are Islamic Custody Decrees in the Child’s Best Interest?*, 36 BRANDEIS J. FAM. L. 423, 427 (1997–98) (describing the Maliki school of thought regarding custody); see also Bolaji Owasanoye, *The Regulation of Child Custody and Access in Nigeria*, 39 FAM. L. Q. 405, 422 (2005) (demonstrating the Maliki school of thought); see also UmHane, *supra* note 75 (describing the Maliki school of thought for child custody after divorce).

However, the awarding of custody to the father is a consistent social reflection of the workings of a traditional, patriarchal, patrilocal family.⁸⁰ This patriarchal family emphasizes the paternal line of ancestry; such thinking, many times, does not allow much consideration for the child's now-divorced mother, whose role as a wife and mother may be taken away from her even though she was given no choice in the divorce action.⁸¹

III. Types of Divorce in Anglo-American Law

American divorce was originally based "on some degree of statutory matrimonial fault, such fault may be grounded on cruelty, adultery, willful non-support, extended imprisonment, abandonment, habitual drunkenness, drug addiction, or desertion."⁸² Before 1969, "marriage was generally regarded in most states as a contract between two parties that could be dissolved only if one of the spouses committed an act legally recognized as incompatible with the continuation of the marriage"—a fault ground.⁸³ According to the idea of for fault divorce, a blame-

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80. See ESPOSITO, *supra* note 53, at 35 (commenting that the favoring of the father's rights in a custody proceeding is consistent with the idea of the patriarchal family); see also ASMA GULL HASAN, AMERICAN MUSLIMS: THE NEW GENERATION 108–09 (2002) (demonstrating how older generations of Islamic men interpret the texts in the Holy Qur'an according to their patriarchal beliefs to create self-serving ideals); see also Choudhury, *supra* note 57, at 187 (expressing Islamic feminists' desire for the separation of patriarchal family norms from Islamic law).
 81. See ESPOSITO, *supra* note 53, at 35–36 (showing that a mother's rights will be involuntarily taken away if the paternal line of ancestry is favored); see also June Starr, *The Global Battlefield: Culture and International Child Custody Disputes at Century's End*, 15 ARIZ. J. INT'L & COMP. L. 791, 811 (1998) (discussing *Hazanit*, a set of Islamic Family Law that favors paternal custody); see also Lara Cardin, Comment, *The Hague Convention on the Civil Aspects of International Child Abduction as Applied to Non-signatory Nations: Getting to Square One*, 20 HOUS. J. INT'L L. 141, 158 (1997) (indicating that patriarchal countries usually favor men's rights over women's rights).
 82. See Herma Hill Kay, *No-Fault Divorce and Child Custody: Chilling Out the Gender Wars*, 36 FAM. L. Q. 27, 30 (2002) (stating that under a fault divorce scheme, adultery, cruelty, and desertion free a spouse from a marriage); see also Sun Hyeong Lee, *Marriage, Divorce, and Dissolution*, 3 GEO. J. INT'L L. 323, 332–35 (2001) (reiterating that under the fault regime, divorce is granted if one spouse commits adultery, cruelty, imprisonment, willful neglect, or desertion); see also Peter Nash Swisher, Commentary, *The Ali Principles: A Farewell to Fault—But What Remedy for the Egregious Marital Misconduct of an Abusive Spouse*, 8 DUKE J. GENDER L. & POL'Y 213, 221 (2001) (providing that adultery, cruelty, and desertion are valid grounds for a divorce under the former fault scheme of American divorce law); see also Wendell H. Goodard, *A Report on California's New Divorce Law: Progress and Problems*, 6 FAM. L. Q. 405, 406 (1972) (enumerating the marital faults, like adultery and cruelty, that allow a victimized spouse to obtain a divorce).
 83. See Muller Davis, *Rethinking Divorce Laws: Fault or No Fault?*, THE CHRISTIAN CENTURY, June 12, 2002 at 28, available at 2002 WLNR 5590887 (determining that a marriage could only be dissolved if one spouse's actions were incompatible with the continuation of marriage); see also Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855, 896 (1988) (declaring that fault based divorce law required a couple to remain married until one's conduct was so incompatible that it released the other from the marriage); see also Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869, 875–76 (1994) (noting that marriage was considered to be an enforceable contract that could only be breached by the marital fault of one of the spouses).

worthy individual could not initiate divorce proceedings.⁸⁴ Another problem was when the couple was granted the divorce, “one person was found guilty and one innocent.”⁸⁵

Divorce law, based on fault, was slow to produce equitable results, and often favored the rich, since poorer people did not have the same access to the court system.⁸⁶ In the 1960s, the “no-fault revolution” began in California.⁸⁷ “One of the purposes of no-fault divorce was to minimize the pain, humiliation, and acrimony of fault-based divorce proceedings.”⁸⁸ “Although some states still grant divorces on traditional fault grounds, many states have since abandoned fault-based divorce altogether.”⁸⁹ In most states, a holding that a marriage has been “irretrievably broken” or that the parties have been living apart for the statutory amount of

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84. See Lee, *supra* note 82, at 335 (asserting that a culpable spouse could not initiate divorce proceedings); see also Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1295–96 (1998) (proclaiming that only an innocent spouse who had suffered a marital fault had the right to initiate divorce proceedings); see also Jeffery G. Sherman, *Prenuptial Agreements: A New Reason to Revive an Old Rule*, 53 CLEV. ST. L. REV. 359, 377 (2005) (informing that under fault divorce law, only the innocent spouse could commence a divorce action).
85. See Davis, *supra* note 83, at 28 (recognizing that a divorce under the fault scheme declared one spouse innocent and the other guilty); see also J. Herbie DiFonzo & Ruth C. Stern, *The Winding Road from Form to Function: A Brief History of Contemporary Marriage*, 21 J. AM. ACAD. MATRIM. LAW. 1, 16 (2008) (revealing that litigation under a fault divorce scheme ended when a court found one spouse innocent and punished the other, guilty spouse); see also Allen M. Parkman, *Reforming Divorce Reform*, 41 SANTA CLARA L. REV. 379, 430 (2001) (showing that dissolution of marriage under fault divorce law occurred only if an innocent spouse could prove the guilt of the other).
86. See KRAUSE, *supra* note 9, at § 1.10 (reasoning that because divorce proceedings cost relatively large sums of money, the subsequent legal work is out of the reach of many low-income couples); see also Davis, *supra* note 83, at 28 (opining that fault divorce law favored the wealthy because of their lack of financial barriers into the court systems); see also Robert B. Yegge, *Divorce Litigants Without Lawyers*, 28 FAM. L.Q. 407, 407–08 (1994) (concluding that rising legal costs for divorces and the increase in the cost of living has made legal services inaccessible for most Americans).
87. See Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291 (1987) (distinguishing California's no-fault divorce law as the nation's first pure no-fault divorce law); see also Kay, *supra* note 82, at 30 (rationalizing that California started the no-fault divorce revolution in the 1960s); see also Lee, *supra* note 82, at 330 (attributing California as the first state to adopt no-fault divorce laws in 1969); see also Sarah Pinkerton, *Custodial Rights of California Mothers and Fathers: A Brief History*, 16 J. CONTEMP. LEGAL ISSUES 155, 160–61 (2007) (positing that California's 1970 Family Law Act initiated the no-fault divorce revolution).
88. See Lee, *supra* note 82, at 338 (marking these negative sentiments as a driving force behind the adoption of new, no-fault, divorce provisions); see also Moldonado, *supra* note 13, at 459–60 (attributing the extreme negative sentiments associated with fault-based divorce to the courts' requirement that wronged spouses collect hard evidence [i.e., photographs] against their partner); see also Wardle, *supra* note 13, at 91–92 (arguing that the fault-based divorce system creates adversarial proceedings between couples that only exacerbate marital tensions).
89. See Lee, *supra* note 82, at 338 (recalling that, although California was the first to adopt no-fault divorce in 1969, all 50 states had adopted it in some form by 1985); see also Swisher, *supra* note 82, at 213–16 (affirming that all 50 states have enacted some form of no-fault divorce, but recognizing that many still utilize fault elements in divorce proceedings); see also Gary H. Nichols, Note, *Covenant Marriage: Should Tennessee Join the Noble Experiment?*, 29 U. MEM. L. REV. 397, 417–18 (1999) (describing the four different methods states have adopted for integrating no-fault divorce into their pre-existing divorce laws).

time, is required.”⁹⁰ Today, all states have some form of no-fault divorce, which, in most of the states, can be obtained without the consent of the other spouse.⁹¹

IV. Types of Divorce in Islam

A. *Talaq*

Talaq, in Arabic, means “freeing or undoing the knot.”⁹² The Holy Qur’an states in Surat Al-Nisa 2:231:

When ye divorce women, and they fulfill
The term of their *iddah* (waiting period),
Either take them back on equitable terms
Or set them free on equitable terms.⁹³

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90. See 24 S.P.P. § 126:20 (2008) (illustrating a state divorce statute in which a judicial decree of “irretrievable breakdown,” as defined therein, is required to obtain a no-fault divorce); see also Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women’s Rights and Family Law in the United States During the Twentieth Century*, 88 CAL. L. REV. 2017, 2056 (2000) (discussing the ABA’s adoption of the Uniform Marriage and Divorce Act and its provisions specifying what constitutes “irretrievable breakdown” of a marriage); see also Lee, *supra* note 82, at 338–39 (identifying some of the different standards of proof required for no-fault marriage across the United States); see also Susan Hager, Comment, *Nostalgic Attempts to Recapture What Never Was: Louisiana’s Covenant Marriage Act*, 77 NEB. L. REV. 567, 572 (1998) (contending that a major motivation for developing no-fault divorce was to give judges greater discretion in evaluating whether a marriage has been irretrievably broken).
91. See Alicia Brokars Kelly, *The Marital Partnership Pretense and Career Assets: The Ascendancy of Self Over the Marital Community*, B.U. L. REV. 59, 67–68 (2001) (noting that in nearly all U.S. states, a spouse can obtain a unilateral divorce, even where the other spouse objects); see also Katherine Shaw Spaht, *Why Covenant Marriage? A Change in Culture for the Sake of the Children*, 46 LA. B. J. 116, 116 (1998) (recounting the divorce of Washington Congressman Rick Singer, who filed for, and obtained, a unilateral divorce in the State of Washington despite his wife’s assertion that their marriage was reconcilable).
92. See RAHMAN, *supra* note 76, at 314 (reminding that even when the knot is undone, a husband still has certain obligations to the mother of his children); see also Goolam, *supra* note 54, at 120 (translating *talaq*, the term used for one of the four forms of divorce under Islamic, Shari’ah, law); see also Alidadi, *supra* note 56, at 21–22 (asserting that, literally translated, the word *talaq* means “release”).
93. See The Holy Qur’an 2:231 (stating the Muslim principle that once a husband has invoked *talaq*, he may reconcile or dissolve the marriage, but must choose to do so within a specified time); see also RAHMAN, *supra* note 76, at 313 (claiming that, in divorce situations, the Holy Qur’an emphasizes that it is the husband who should show “kindness and liberality” toward his wife no matter how badly the marriage ends); see also Goolam, *supra* note 54, at 120 (adding that spouses who do separate under *talaq* are encouraged to do so with “kindness and dignity”).

According to Shari'ah, a "husband has the right to divorce his wife through *talaq*, or repudiation, provided that he has reached the age of majority (*baligh*), is sane (*'aqil*), and is acting on his own free will (*mukhtar*)."⁹⁴ A husband may divorce his wife by himself, or through his agent with a power of attorney.⁹⁵ A wife may also divorce through *talaq* by including this right in the marriage contract/prenuptial agreement (*talaq al-tawfid*).⁹⁶

The Holy Qur'an lists the following reasons for granting a "fault" divorce: a husband can divorce for a wife's lack of obedience, disloyalty of the wife, or *nooshooz* (ill conduct),⁹⁷ for lewdness or immorality (fornication is punishable by flogging 100 times), and adultery, which is punishable by stoning.⁹⁸ However, according to the Holy Qur'an, four eyewitnesses must be produced:

And those who launch
A charge against chaste women,
And produce not four witnesses
To support their allegation . . .⁹⁹

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94. See DOI, *supra* note 54, at 88 (setting forth the three universally required elements for an effective invocation of *talaq*: majority, sanity, and freely expressed intent); see also UmHani, *supra* note 75 (stating that the husband has a Qur'anic right to exercise *talaq* as long as the three base requirements are satisfied).
95. See Alidadi, *supra* note 56, at 21–22 (explaining that the power to invoke *talaq* is a delegable power that can be transferred by the husband to a desired third person, including his wife); see also UmHani, *supra* note 75 (reiterating that the power to invoke *talaq* is not limited to the husband, but may be granted to a third party with power of attorney, or to the wife, as a provision in the marriage contract).
96. See Alidadi, *supra* note 56, at 22–23 (finding that a wife has considerable protection in divorce by inserting a divorce clause in the marriage contract); see also Adrian M. Morse, Jr. & Leila P. Sayeh, *Tunisia: Marriage, Divorce, and Foreign Recognition*, 29 FAM. L.Q. 701, 711–12 (1995) (stating the different forms of divorce recognized by jurists, one of which is the contractual agreement); see also UmHani, *supra* note 75 (asserting that the husband has the right to divorce his wife through *talaq* if he has reached the age of majority, is sane, and is acting on his own free will).
97. See The Holy Qur'an 2:3 (listing the reasons a husband can divorce a wife); see also Miller, *supra* note 36, at 112–13 (listing the reasons for a fault divorce, including lack of obedience on the part of the wife, disloyalty of the wife, or ill conduct); see also Symposium, *Justice and Equality in Muslim Family Law: Challenges, Possibilities, and Strategies for Reform*, 64 WASH. & LEE L. REV. 1529, 1536 (2007) (articulating that women must go to court to obtain a judicial divorce on one of many specific grounds which require extensive evidence).
98. See TOVE S. DAHL, *THE MUSLIM FAMILY: A STUDY OF WOMEN'S RIGHTS IN ISLAM* 164 (Ronald Walford trans., 1997) (distinguishing between the punishment for adulterers, which include stoning to death, from the unmarried couple who are liable to receive one hundred lashes in public); see also DOI, *supra* note 54, at 118–19 (indicating that there are severe punishments for adulterers which include being stoned to death); see also RAMADAN, *supra* note 76, at 49 (referring to the punishments for adultery which include stoning to death, but explaining that they require a very high burden of proof—including four witnesses).
99. See The Holy Qur'an 24:4 (declaring the high burden of proof for an allegation of adultery); see also DOI, *supra* note 54, at 122 (arguing that four objective and trustworthy witnesses must testify in order to support an allegation of adultery).

If either the husband, or the wife, commits an adulterous act, each suffers the same punishment. The Holy Qur'an states:

The Woman and the Man

Guilty of Adultery or fornication—

Flog each of them with a hundred stripes.¹⁰⁰

And see the Holy Qur'an:

Why did they not bring

Four witnesses to prove it?¹⁰¹

It should be noted, though, that this punishment was never implemented in the Prophet's time.

In *talaq*, consent of the wife is not required.¹⁰² There are different forms of *talaq* recognized.¹⁰³ "*Talaq as-sunna (ashan)* is the most approved form of repudiation."¹⁰⁴ During the *tuhr* period, a time when the woman is not menstruating, the husband pronounces a single *talaq*.¹⁰⁵ If he wants the divorce to be final, he must then refrain from sexual intercourse with the wife he is divorcing during the *iddah* waiting period of three menstrual cycles.¹⁰⁶ At the end

100. See The Holy Qur'an 24:2 (explaining that the punishment for adultery is the same for either the husband or the wife).

101. See The Holy Qur'an 24:13 (announcing the rule that four witnesses must be produced to prove an allegation of adultery).

102. See PEARL, *supra* note 74, at 280 (remarking that the power to divorce is available exclusively to the husband even though it is possible for the husband to delegate the power to pronounce the divorce to some other person); see also Pascale Fournier, *In the (Canadian) Shadow of Islamic Law: Translating Mahr as Bargaining Endowment*, 44 OSGOODE HALL L.J. 649, 667 (2006) (recognizing the husband's power to unilaterally divorce his wife by saying *talaq* to his wife without any enforcement or declaration from the court).

103. See Mark J. Calaguas, *Legal Pluralism and Woman's Rights: A Study in Postcolonial Tanzania*, 16 COLUM. J. GENDER & L. 471, 521–23 (2007) (reiterating the five situations that would result in divorce include: (1) death of a partner; (2) *talaq*; (3) mutual consent; (4) annulment, also known as *faskh*; or (5) separation by court decree, or *tatliq*); see also Morse, *supra* note 96, at 711–12 (providing the five categories of divorce by jurists are *talaq*, *talaq altawifid*, *khul*, *lian*, and *apostasy*); see also Western, *supra* note 58, at 121 (commenting on one form of divorce where the husband only had to say he repudiates his wife).

104. See PEARL, *supra* note 76, at 280 (listing *talaq as-sunna* as the most preferred form of repudiation); see also Khaliq, *supra* note 56 at 33–34 (citing the five types of repudiation under Islamic law from most preferred to least preferred); see also Western, *supra* note 57, at 121 (noting that no intercourse is permitted under the most preferred form of repudiation).

105. See PEARL, *supra* note 73, at 280 (commenting that under *talaq as-sunna*, the husband is required to pronounce a single *talaq* during the period when his wife is not menstruating); see also Sampak P. Garg, *Law and Religion: The Divorce Systems of India*, 6 TULSA J. COMP. & INT'L L. 1, 8 (1998) (recalling that a husband should assert *talaq* only when his wife is not menstruating); see also Jansen, *supra* note 48, at 188 (defining the period of *tuhr* as when a woman is menstruating).

106. See PEARL, *supra* note 73, at 280 (commenting that the husband must not sleep with his wife during the period of *iddah* if he wants to finalize the divorce); see also Khaliq, *supra* note 55, at 34 (emphasizing that a man is completely forbidden from engaging in sexual intercourse for the duration of the *iddat*); see also Thompson, *supra* note 51, at 367–368 (recognizing that a husband must refrain from intercourse in order for this *talaq* to take effect).

of the *iddat*, the couple is divorced.¹⁰⁷ This type of divorce “provides an opportunity for revocation, since the husband can take back his wife at any time during this period.”¹⁰⁸

The second type of *talaq-sunna* repudiation, called *talaq ahsan*,¹⁰⁹ consists of three pronouncements made over the course of three *tuhr* periods and the divorce becomes irrevocable on the third pronouncement.¹¹⁰

There is also the “triple *talaq*” (*talaq al-bidah*)¹¹¹ form of divorce in which the husband says “I divorce you three times,” at a single sitting and upon the last recitation, the divorce is final.¹¹² The “triple *talaq*” is what most Americans consider the normal type of divorce regarding Muslims.¹¹³ However, this form of divorce is disapproved of by classical Islamic jurisprudence.¹¹⁴ In fact, no provision provides for triple *talaq* in either the Holy Qur’an or the

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107. See PEARL, *supra* note 73, at 280 (indicating that the marriage is terminated at the end of the *iddah* period); see also Courtney W. Howland, *The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis under the United Nations Charter*, 35 COLUM. J. TRANSNAT’L L. 271, 314 (1997) (clarifying that the man has no duty to support the woman once the divorce is finalized after the period of *iddat*); see also Pratibha Jain, *Balancing Minority Rights and Gender Justice: The Impact of Protecting Multiculturalism on Women’s Rights in India*, 23 BERKELEY J. INT’L L. 201, 215 (2005) (noting that the *iddah* is an obligatory three-month waiting period before a divorce can be finalized).
 108. See PEARL, *supra* note 73, at 280 (remarking that this form of *talaq* provides an opportunity for the husband to take his wife back at any time before the divorce is finalized); see also Garg, *supra* note 104, at 8–9 (noting that a man can repudiate the divorce during the *iddah* waiting period); see also Kimberly Younce Schooley, Comment, *Cultural Sovereignty, Islam, and Human Rights—Toward a Communitarian Revision*, 25 CUMB. L. REV. 651, 673 n. 127 (1994) (commenting that a husband and wife can reconcile during the *iddah* waiting period, before the divorce becomes finalized).
 109. See Khaliq, *supra* note 55, at 34–35 (noting that this type of *talaq* is valid only if uttered over the course of three *tuhr* periods).
 110. See PEARL, *supra* note 73, at 281 (remarking that the first *talaq* is pronounced during the first period of *tuhr* and one pronouncement during each subsequent period for a total of three periods); see also Nadya Haider, *Islamic Legal Reform: The Case of Pakistan and Family Law*, 12 YALE J. L. & FEMINISM 287, 317 (2000) (indicating that the third pronouncement of divorce under *talaq-al-hasan* consists of three pronouncements of divorce over three periods of *tuhr*, with the final one being permanent); see also Thompson, *supra* note 52, at 368 (noting that the divorce is finalized and irrevocable under this type of *talaq*, when *talaq* is uttered for the third time under the final period of *tuhr*).
 111. Sara Ahmad, Comment, *Judicial Complicity with Communal Violence in India*, 17 NW. J. INT’L L. & BUS. 320, 341 (1996) (explaining that a triple *talaq* is when a man repeats “I divorce you” three times, resulting in an immediate and irrevocable divorce).
 112. See Pearl, *supra* note 74, at 410; see also Cherry, *supra* note 61, at 323 (asserting that as soon as the husband pronounces the divorce three times, it takes immediate effect); see also Wing, *supra* note 70, at 2900 (stating that a man need only say “I divorce you” three times in order to effectuate a divorce).
 113. See HUSSAIN, *supra* note 46, at 103 (conveying that the triple *talaq* is the divorce most seen in Hollywood films); see also Khaliq, *supra* note 56, at 35 (noting that most non-Muslims associate this type of divorce as the normal Islamic divorce). See generally Mohammed Fadel, *The True, the Good, and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law*, 21. CAN. J. L. & JURIS. 5, 26 n.84 (2008) (referring to the triple *talaq* as “notorious”).
 114. See PEARL, *supra* note 74, at 410; see also Jain, *supra* note 107, at 218 (informing that most Muslim countries have banned the triple *talaq*); see also Ahmad, *supra* note 111, at 341 (citing a decision by the Allahabad High Court finding that the triple *talaq* divorce was not lawful).

Sunnah.¹¹⁵ Despite the lack of approval by the Holy Qur'an, this type of *talaq* is considered valid, although sinful.¹¹⁶

B. Khul

Khul, or *mubaraat*,¹¹⁷ is the Muslim woman's right to divorce, as opposed to the right of divorce held by the man.¹¹⁸ Islam is probably the first religion in the world to have recognized such a right for women.¹¹⁹

The great Islamic scholar Ibn Rushd, Cordova, 12th century, was quoted as saying, "If trouble arises from the side of the woman, the man is given the power to divorce her, and when the injury is received from the man's side, the woman is given the right to obtain *khul*."¹²⁰

115. See Choudhury, *supra* note 102, at 95 (asserting that the triple *talaq* is performed in a way that is in conflict with the rules set forth in the Holy Qur'an); see also Khaliq, *supra* note 56, at 35 (stating that neither the Holy Qur'an nor the Sunnah discusses the triple *talaq*); see also Thompson, *supra* note 52, at 367 (indicating that the is not consistent with the Sunnah).

116. See Khaliq, *supra* note 56, at 35 (indicating that the triple *talaq* is still recognized despite lack of coverage in the Holy Qur'an and the Sunnah); see also Vrinda Narain, *Women's Rights and the Accommodation of "Difference": Muslim Women in India*, 8 S. CAL. REV. L. & WOMEN'S STUD. 43, 52 (1998) (finding that the triple *talaq* has no religious merit); see also Thompson, *supra* note 52, at 367 (stating that the triple *talaq* is not approved of in Islam but is still recognized).

117. See Garg, *supra* note 105, at 10 (stating that *mubaraat* is a divorce that the husband and wife must agree to).

118. See NATANA J. DE LONG-BAS, WAHHABI ISLAM: FROM REVIVAL AND REFORM TO GLOBAL JIHAD 182 (2004) (stating that *khul* is a divorce initiated by the wife); see also Goolam, *supra* note 54, at 121 (quoting philosopher Ibn Rushd's assertion that *khul* is available to women while men have a right of divorce); see also Hallie Ludsin, *Relational Rights Masquerading as Individual Rights*, 15 DUKE J. GENDER L. & POL'Y 195, 218 (2008) (stating that men have the right to declare a divorce while women must resort to the *khul* divorce, whereby the husband and wife must agree to divorce).

119. See ENGINEER, *supra* note 59, at 136 (declaring that Islam is the first religion to recognize a woman's right to divorce); see also Western, *supra* note 82 (2008) (asserting that the Qur'an gave Islamic women the right of divorce prior to women from the Western world being given that right). See generally HUSSAIN, *supra* note 46, at 115 (providing that while divorce has always been permitted under Islamic law, it has been easier for men than women to seek divorce).

120. See Goolam, *supra* note 54, at 121 (introducing the idea that a woman's right to divorce is equivocal to a man's right); see also Rehman, *supra* note 73, at 118 (explaining that a *khul* divorce allows a wife to obtain a divorce by claiming that there are irreconcilable differences in her marriage); see also Amira El-Azhary Sonbol, *Shari'ah and State Formation: Historical Perspective*, 8 CHI. J. INT'L L. 59, 81 (2007) (providing that a *khul* divorce enables a wife to unilaterally end a marriage, a right that was once available to only a husband).

There has been much debate on dowry and *khul* divorce.¹²¹ The Holy Qur'an, Surat Al Baqarah (The Cow) 2:229, states:

It is not lawful for you
(Men) to take back
Any of your gifts (from your wives),
Except when both parties
Fear that they would be
Unable to keep the limits
Ordained by Allah.”

Footnote 258 of the Holy Qur'an, Surat Al Baqarah 2:229 states that it is permissible for the wife to give some material consideration to the husband, but the need and equity of this should be submitted to the judgment of impartial judges.¹²²

Cultural interpretations of *khul* divorce suggest that the wife should give the husband some form of compensation, or return the dowry, in *khul* divorce.¹²³ This compensation may consist of the wife returning the dowry or agreeing to care for the couple's child.¹²⁴ However, according to the Holy Qur'an, *khul* does not require the wife to pay the husband.¹²⁵

121. See Fournier, *supra* note 102, at 668–69 (suggesting that a *khul* divorce is acceptable because a husband is essentially making a trade-off by regaining the dowry in exchange for his marriage with his wife); see also Ran Hirschl, *The New Constitutionalism and Judicialization of Pure Politics Worldwide*, 75 *FORDHAM L. REV.* 721, 738 (2006) (discussing a court decision that answered the debate by holding that a husband's consent is unnecessary to obtain a *khul* divorce so long as the woman provides the husband with some value in exchange for the divorce); see also Rehman, *supra* note 50, at 118–19 (comparing the contrasting, debating views of different schools of Islamic beliefs with regards to women being able to initiate divorces).

122. See The Holy Qur'an (The Cow) 2:229 n.258 (stating that the wife should provide the husband with material consideration that should be determined based on the judgment of impartial judges); see also ABU HAMID AL-GHAZALI, *BOOK ON THE ETIQUETTE OF MARRIAGE* n.142 (Madlain Farah trans., 2007) (maintaining that impartial judges should determine the need and equity of the material consideration given by the wife to the husband)

123. See DOI, *supra* note 54, at 96 (defining *khul* as the granting of a divorce so long as the wife gives up some type of compensation in return); see also Goolam, *supra* note 54, at 121 (claiming that if a divorce is obtained by a wife, she is responsible to provide her husband with compensation); see also Haider, *supra* note 110, at 289–90 (explaining that a woman is entitled to obtain a *khul* divorce provided that she furnish consideration to the husband).

124. See ISMAIL BUYUKCELEBI, *LIVING IN THE SHADE OF ISLAM* 307–08 (Ali Ünai trans., The Light, Inc. 2003) (illustrating that if a wife is the one who demands a *khul* divorce from her husband, she has to return the dowry to the husband); see also DOI, *supra* note 54, at 96 (positing that wife can pay any amount to husband so long that is not more than what was given to her as a dowry); see also PEARL, *supra* note 74, at 284 (reiterating that the wife pays to the husband a certain sum of money, usually the dowry, in return for the husband to grant her request for divorce); see also Goolam, *supra* note 54, at 121 (indicating that upon the termination of a marriage through a *khul* divorce, the wife is required to return her dowry to the husband).

125. See The Holy Qur'an (The Cow) 2:229 n.258 (proclaiming that it is permissible for the wife to give the husband material consideration but the amount shall be determined by impartial judges); see also ALAMI, *supra* note 57, at 27–28 (declaring that only in Shafi'i law is it necessary for there to be monetary compensation provided to the husband in a *khul* divorce); see also Abu-Odeh, *supra* note 67, at 1065 (recognizing that payment by the wife is not a necessary condition in order to obtain a *khul* divorce).

Khul is explained in the *hadith* (sayings of the Prophet Mohammed, PBUH) in the story of the wife of Thabit bin Qais.¹²⁶ “She complained to the Prophet (PBUH) that Thabit was repulsive and that she had developed a great dislike for him, although through no fault of his own.¹²⁷ The Prophet (PBUH), convinced that the spouses could not live together in conformity with their conjugal obligations, advised the husband to release her.¹²⁸ He (PBUH) also advised her to return the *mahr*, or dowry, in this case, a garden.”¹²⁹

The reasons for which a *khul* divorce may be granted vary greatly according to the Islamic schools of thought,¹³⁰ but “the Hanafi school tends to be the most repressive of the Sunni schools, while the Maliki school is the most liberal.”¹³¹

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126. See AFSAR BANO, STATUS OF WOMEN IN ISLAMIC SOCIETY 173 (2004) (remarking that a *khul* divorce can be granted to the wife based on the mere dissatisfaction with the marital relationship); see also ANNE SOFIE ROALD, WOMEN IN ISLAM: THE WESTERN EXPERIENCE 218–20 (Routledge 2001) (stressing that the story of the wife of Thabit bin Qais is evidence of a woman's right to obtain a divorce); see also Goolam, *supra* note 54, at 120 (referring to the story of the wife of Thabit bin Qais in order to show that the spirit of the Holy Qur'an allows for women to have the same rights in divorce as men).
 127. See BANO, *supra* note 126, at 173 (emphasizing that the wife of bin Qais wanted to be separated from him due to their extreme disagreements); see also ROALD, *supra* note 127, at 218–20 (alleging that the wife went to a messenger of God and complained that she could not live with husband any longer); see also Al-Hibri, *supra* note 46, at 24 (concluding that the husband did nothing in violation of the marriage contract that would give his wife grounds for a divorce).
 128. See HUSSAIN, *supra* note 46, at 107 (telling the story of a woman who insisted on *khul* after the Prophet asked her to take her husband back); see also Goolam, *supra* note 54, at 120 (narrating the classic example of *khul* found in the *hadith*); see also Qussama Arabi, *The Dawning of the Third Millennium on Shari'a: Egypt's Law No. 1 of 2000, or Women May Divorce at Will*, 16 ARAB L.Q. 2, 11–12 (2001) (interpreting the story of Thabit bin Qais under the Maliki school of thought).
 129. See BUYUKCELEBI, *supra* note 124, at 308 (noting the only way the Holy Qur'an allows a man to take back gifts to his wife); see also NASIR, *supra* note 71, at 116 (categorizing the return of the *mahr* as the wife's consideration for the *khul*); see also Al-Hibri, *supra* note 46, at 6 (emphasizing that *khul*, as an equitable remedy, allows a woman to leave her husband if she returns the *mahr* he gave her).
 130. See Cohen, *supra* note 47, at 256 n.42 (informing that each school represents different interpretations of the Qur'an and the Sunnah); see also Ali Adnan Ibrahim, *Financial Innovations in the Muslim World*, 23 AM. U. INT'L L. REV. 661, 685 (2008) (highlighting the four major Sunni schools: Hanafi, Maliki, Shafi'i, and Hanbali); see also Michael J.T. McMillen, *International Legal Developments in Review: 2007 Regional and Comparative Law*, 42 INT'L LAW. 1017, 1019 n.8 (2008) (defining Islamic schools of thought, or *madhhab*, as a “body of juristic opinions and a related methodology of how to use text, tradition, and reason to understand pure Sharia”). For additional information on the differences between the Islamic schools of thought, see *supra* note 113 and appendix.
 131. See Lucy Carroll, *Qur'an 2:229: “A Charter Granted to the Wife”? Judicial Khul in Pakistan*, 3 ISLAMIC L. & SOC'Y 91, 92–93 (1996) (explaining that a woman could not divorce her husband in Hanafi law unless he was missing and, if alive, would be at least 90 years old); see also Jansen, *supra* note 49, at 189 (describing Maliki law where a woman may divorce her husband because of cruelty, among other reasons); see also Khaliq, *supra* note 54, at 36–37 (outlining the difference between the two extreme ideologies through their divorce practices).

In addition to her right to *khul*, the wife can also petition the court for a divorce on the grounds of injury or discord, failure to maintain, defect on the husband's part, or husband's absence sine causa or imprisonment.¹³² This is referred to as *faskh*, or judicial divorce.¹³³ Because there have been some serious abuses of *khul* divorce, such as demands for exorbitant payments that the woman could not possibly afford, some countries, such as Algeria, have passed a law limiting the compensation a man may ask for based on the amount of the dower he paid to his wife upon the marriage.¹³⁴ There have also been recent amendments to the Moroccan Code of Personal Status, or the *Madawwana*, making divorce more equitable.¹³⁵

C. *Talaq al-Tawfid* (Delegated Divorce)

Divorce for the woman is difficult under Shari'ah.¹³⁶ However, *talaq al-tawfid* may offer a prospective wife considerable bargaining power to protect herself via provisions in the *Nikah* (marriage contract), via provisions in the *taqliq* (conditional statements that may be put in a prenuptial agreement), or at some later point during marriage.¹³⁷ A Muslim woman has the

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132. See Goolam, *supra* note 54, at 121 (describing the reasons a wife may apply for divorce by the court); see also Arabi, *supra* note 128, at 2 (delineating the ways a woman may convince the judge to grant her a divorce). See generally NASIR, *supra* note 71, at 119–33 (analyzing the reasons a woman may be granted divorce through the court).
 133. See HUSSAIN, *supra* note 71, at 108 (comparing *faskh* to annulment because it can be obtained through the court where the husband is at fault); see also Goolam, *supra* note 54, at 121 (defining *faskh* as an alternative means for a woman to leave her husband). See generally MASHOOD A. BADERIN, INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW 149 (Oxford University Press, 2003) (explaining that a woman may receive *faskh*, divorce through a Judicial Order, on limited legal grounds).
 134. See BADERIN, *supra* note 133, at 151 (noting that in Algeria, among other countries, the court has the power to order the husband to pay compensation to the wife where there is no just cause for *talaq*); see also ESPOSITO, *supra* note 52, at 104 (concluding that these limits are fair because the wife is effectively ending the marriage by returning the *mahr*). See generally AMIN, *supra* note 47, at 79 (commenting that it is usual for the wife to offer her husband money if he releases her from the bonds of matrimony or for the husband to offer to divorce his wife).
 135. See Lawrence G. Albrecht et al., *International Legal Developments in Review: 2004 Public International Law*, 39 INT'L LAW. 517, 550 (2005) (detailing the changes made to the Mudawwana, including additional grounds for divorce); see also Alidadi, *supra* note 56, at 28 (indicating that the amendments will greatly improve conditions for women in Morocco); see also Sara Ibrahim, Abby Morrow Richardson and Patricia Staible, *10th Anniversary: A Decade in Human Rights Law Column*, 11 no. 3 HUM. RTS. BRIEF 57, 58 (2004) (commenting on the history behind the Mudawwana amendments).
 136. See Alidadi, *supra* note 56, at 22 (noting that divorce for women under the Shari'a is "particularly difficult"); see also Khaliq, *supra* note 54, at 39–40 (explaining how divorce can be difficult for women because of men's custom and disregard for the Shari'ah's provisions.); see also Morse, *supra* note 96, at 710 (recognizing that obtaining a divorce is difficult for the wife).
 137. See ENGINEER, *supra* note 59, at 139 (stating that *talaq-i-tawfid* favors women by protecting their rights in divorce); see also PEARL, *supra* note 74, at 283 (commenting that the wife obtains bargaining power by a *talaq al-tawfid*); see also Alidadi, *supra* note 56, at 22–23 (indicating that a woman can receive considerable bargaining power by the husband granting her a *talaq* and that it can be granted either at the time of the marriage or at a later time).

right to lay down certain conditions in the *taqliq* in order to safeguard her welfare and rights.¹³⁸ In *talaq al-tawfid*, when the marriage contract is being drafted, a stipulation may be inserted which, if certain conditions are violated, allows the wife to exercise her right to request a *talaq*.¹³⁹ Depending on the school of jurisprudence he follows, the husband may, if he so desires, grant the wife as great a right to a *talaq* as he himself may enjoy.¹⁴⁰ This delegation of rights to the wife, however, does not deprive the husband of his own right to divorce his wife if she breaches the terms of the marriage contract.¹⁴¹

138. See Goolam, *supra* note 54, at 119 (explaining that a Muslim woman has the right to protect her rights by setting forth conditions in a prenuptial agreement prior to signing a certificate of marriage); see also Horowitz, *supra* note 55, at 274 (stating that *taklik* is available to married women); see also Comments and Discussion, *Part II: Women, Family, and Law, B: Family Law and Women's Rights*, 28 LAW & SOC'Y REV. 573, 575 (2004) (commenting that a woman can form an agreement with a man before marriage and is entitled to a divorce if the man violates that agreement).

139. See ENGINEER, *supra* note 59, at 139 (stating that *talaq-i-tawfid* is an agreement where the husband delegates his right to divorce to his wife and can be used upon the husband's violation of the agreement); see also JAWAD, *supra* note 63, at 81 (explaining that *talaq al-tawfid* is a form of divorce where the husband can delegate the power of *talaq* to his wife and she can assert that power upon the husband's violation of the marriage agreement); see also PEARL, *supra* note 74, at 283 (commenting that a wife can exercise her right to a *talaq* if the husband grants that right to her and subsequently violates the marriage agreement).

140. See Alidadi, *supra* note 56, at 21–23 (noting that *talaq* is not the exclusive right of a man, as that power can be delegated to the wife who could then protect herself depending on the provisions in the marriage contract); see also Khaliq, *supra* note 56, at 35–36 (commenting that the husband can grant his wife as great a right to a *talaq* as he would have); see also Rehman, *supra* note 73, at 118 (expressing that schools of jurisprudence affect the advantages a husband has over a wife, including the difficulties a wife has in her ability to *talaq*).

141. See ENGINEER, *supra* note 59, at 139 (stating that *talaq-i-tawfid* favors women by protecting their rights in divorce); see also JAWAD, *supra* note 63, at 81 (inferring that a husband does not lose his right to a *talaq* by delegating the right of *talaq* to his wife); see also Khaliq, *supra* note 56, 35–36 (1995) (recognizing that when the husband delegates his right of *talaq* to his wife, he still retains his rights to *talaq* if the wife breaches the marriage contract).

D. *Tafriq* Divorce

Tafriq is divorce that the wife (or husband) can obtain by a judicial ruling issued out of a petition from either party.¹⁴² In an American legal context, *tafriq* could simply be a judicial separation. All of the Islamic legal schools today allow *tafriq*;¹⁴³ however, they disagree about the circumstances under which this type of divorce may be obtained.¹⁴⁴ Generally, the Islamic legal schools “allow a spouse to apply for divorce on the following grounds:

injury or discord,
a defect on the part of the husband, including impotency or castration,
the husband's failure to pay maintenance,
the husband's absence without a proper excuse,
or the husband's imprisonment.¹⁴⁵

The wife, who is divorced by *tafriq* must still observe the *iddat*.¹⁴⁶

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142. See PEARL, *supra* note 74, at 285–86 (stating that a *tafriq* is a divorce by judicial intervention); see also Schooley, *supra* note 108, at 673 (asserting that *tafriq* is a form of divorce by a judicial order petitioned by either the husband or the wife); see also UmHane, *supra* note 75 (noting that a divorce obtained through a judicial ruling is called a *tafriq*).
143. See Choudhury, *supra* note 57, at 170–71 (illustrating that *tafriq* is allowed in most schools of thought by listing several schools that allow it); see also Schooley, *supra* note 108, at 673 (asserting that *tafriq* is a form of divorce by a judicial order petitioned by either the husband or the wife); see also UmHane, *supra* note 75 (noting that most juristic schools allow a *tafriq*).
144. See Oussama Arabi, STUDIES IN MODERN ISLAMIC LAW AND JURISPRUDENCE 169–70 (2001) (introducing the fact that Egyptian divorce laws are based on the Maliki school of thought's wide interpretation of harm (*darar*), resulting in greater freedom for the wife to obtain a divorce by judicial decree than under the Hanifi school of thought); see also Lucy Carroll, *Qur'an 2:229 "A Charter Granted to the Wife"? — Judicial Khul in Pakistan*, 3 ISLAMIC L. & SOC'Y 91, 92 (1996) (detailing the circumstances where a woman can initiate a divorce through the courts by petitioning a judge (*qazi*) under the Hanifi school of thought.); see also Javaid Rehman, *The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq*, 21 INT'L J. L. POL'Y & FAM. 108, 118 (2007) (affirming the difficulty of a wife obtaining a divorce through a judicial decree (*tafriq*) depends on the particular Islamic school of thought).
145. See DOI, *supra* note 54, at 97 (discussing the fact that the wife can obtain divorce from her husband when she feels that the husband is not performing his conjugal duties, as long as she is willing to give up all or some of the property she received as a dower (*mahr*), which is what the husband gives in the form of property or money to the wife during the marriage); see also Amira el Azhary Sonbol, *Law and Gender Violence in Ottoman and Modern Egypt, in WOMEN, THE FAMILY, AND DIVORCE LAWS IN ISLAMIC HISTORY* 277, 281 (1996) (stating that the most important proof needed in order for a woman to receive favorable settlement in divorcing her husband was that the marriage caused the woman harm (*darar*)); see also UmHani, *supra* note 75, at § 6.3 (establishing that the Maliki, Hanbali, and Shafii schools generally allow the wife to apply for *tafriq* divorce on any of the following grounds: “Injury or discord; a defect on the part of the husband; The husband's failure to pay maintenance; The husband's absence without a proper excuse; The husband's imprisonment.”).
146. See the Holy Qur'an 2:34 (providing a religious and textual basis for the *iddat*, the time period during which a divorced or widowed woman cannot remarry, which, in practice, was required to ensure that the divorced wife or widow was not pregnant by the divorced or deceased husband); see also Schooley, *supra* note 108, at 673 (opining that the *tafriq* divorce advanced Islamic women's rights because it represented a progression from pre-Islamic divorce, where only the husband could unilaterally initiate a divorce without input from his wife); see also UmHani, *supra* note 75, at § 6.3 (noting that a woman who is divorced by *tafriq* must still adhere to the mandatory period after divorce in which she cannot marry another man (*iddat*)).

E. Fault-Based Divorce in Islam

1. Injury or Discord

Two prominent Islamic scholars, Imam Malik and Imam Ahmad, state that the wife may apply for divorce where her husband has caused her injury, for example, by beating or insulting, so as to make continuation of their marital life impossible.¹⁴⁷ The procedure is as follows:

reconciliation is paramount, but if the judge cannot reconcile the couple, he should order an irrevocable divorce (*talaq bain*); if the wife cannot prove her case, the judge should appoint two arbiters to investigate and attempt reconciliation; if the arbiters cannot reach consensus, the judge should order further investigation, failing which, he shall appoint two other arbiters.¹⁴⁸

These procedures are mandated by the Holy Qur'an, Surat Al Nisa (The Women) 4:35, which provides: "If ye fear a breach between them, appoint two arbiters—one from his family, the other from hers. If they wish for peace, *Allah* (God) will cause their reconciliation."¹⁴⁹

2. Failure to Maintain Finances

Imam Malik, Imam Ahmad, and Imam Shafi, prominent Islamic scholars, state that "failure to maintain (the wife) is a grievous injury to the wife, and thus she may file for divorce."¹⁵⁰ "Failure to maintain is not honorable, and thus goes against the Qur'anic verse that "a woman must be retained in honor or released with kindness."¹⁵¹ These scholars also base their determinations on the *hadith* (saying of the Prophet Mohammed, PBUH) that says, "[t]here shall be no injury, and no injury shall be remedied by another."¹⁵²

147. See Goolam, *supra* note 54, at 121 (citing examples of injury that a husband can inflict on a wife that justify a wife filing for a divorce); see also HUSSAIN, *supra* note 46, at 34–35 (describing the major schools of Islamic Law (*madhabs*) as secondary sources of law and listing the schools of thought and the major regions where the various schools are dominant); see also Uzoamaka N. Okoye, *Women's Rights Under the Shari'a: A Flawed Application of the Doctrine of "Separate but Equal,"* 27 WOMEN'S RTS. L. REP. 103, 107 (2006) (explaining that the five schools of Islamic thought originated as a result of different interpretations of the Shari'a, the Holy Qur'an, and the Sunnah and that all Islamic communities adhere to one of the five schools).

148. See Goolam, *supra* note 54, at 121–22 (quoting the applicable rules used by judges when attempting to reconcile an estranged married couple).

149. See *id.* at 122 (referencing the Qur'an 4:35, which provides the textual basis for the rules regarding marital reconciliation).

150. See *id.* at 123 (noting a circumstance where a woman can initiate a divorce as a redress to her husband's failure to provide for her financially, namely, where the husband has no known property to support his wife).

151. See *id.* (asserting that failure to provide for the wife financially conflicts with the husband's obligation to treat his wife kindly and maintain her honor as a wife).

152. See *id.* 123 (quoting a maxim from the Prophet Mohammed to support the argument for "failure to maintain" as grounds for divorce).

3. Defect on the Husband's Part

Judicial divorce is allowed on grounds of the husband's impotence, castration, or mutilation.¹⁵³ Insanity and leprosy are also just grounds.¹⁵⁴

4. Husband's Absence Sine Causa or Imprisonment

Absence of the husband sine causa or imprisonment for a period of six months to one year are valid grounds for a wife applying to the court for divorce.¹⁵⁵ In addition, to Shari'ah, the legislation of Egypt, Morocco, Syria, and Algeria state that the period of absence must be one year.¹⁵⁶

Moreover, the wife maintains the right to apply for *faskh*, judicial divorce, where the husband fails to live up to any conditions agreed upon in the *taqliq* (prenuptial agreement).¹⁵⁷ In the Qur'anic section regarding divorce, the word *ma'aruf* appears many times—*ma'aruf* is translated as "equity, reasonableness, fairness, honor, and harmony."¹⁵⁸

V. Custody—Anglo-American Law

In the 19th century in the United States, the father was deemed to have a property right in his children at the marriage's termination.¹⁵⁹ By the 20th century, states began to recognize the

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153. See Goolam, *supra* note 54, at 123 (noting three recognized grounds for divorce under the Imamiyah code); see also Nasir, *supra* note 71, at 123–24 (discussing the spectrum of Islamic grounds for divorce including mutilation, castration, insanity, and impotence); see also Vardit Rispler-Chaim, *Law of Marriage and Divorce and the Disabled Person: The Case of the Epileptic Wife*, 36 DIE WELT DES ISLAMIS 90, 94 (1996) (noting five specific defects in man that constitute grounds for a wife to request a judicial divorce in Islamic law).
 154. See Goolam, *supra* note 54, at 123 (acknowledging two additional recognized grounds for divorce based on defects of the husband); see also Rispler-Chaim, *supra* note 153, at 94 (noting madness and leprosy are defects of the husband that allow a wife to terminate the marriage). See generally Ron Shaham, *Judicial Divorce at the Wife's Initiative: The Shari'ah Courts of Egypt, 1920–1955*, 1 ISLAMIC L. & SOC'Y 217, 220–23 (1994) (discussing the evolution of Islamic women's grounds for judicial divorce culminating with the inclusion of a husband's affliction of insanity or leprosy).
 155. See Goolam, *supra* note 54, at 123 (acknowledging a husband's abandonment or imprisonment as recognized grounds for a wife to petition for divorce); see also Mashhour, *supra* note 60, at 575 (indicating that desertion or absence of the husband will allow a wife to seek judicial recourse for a divorce).
 156. See Goolam, *supra* note 54, at 123 (stating the mandatory length of one year for absence of the husband to qualify as grounds for divorce). See generally Rehman, *supra* note 73, at 118–120 (discussing the source of Islamic divorce law and various schools of thought regarding the grounds upon which a woman may seek judicial annulment of her marriage).
 157. See Goolam, *supra* note 54, at 123–24 (affirming a wife's right to maintain a divorce if her husband fails to uphold provisions in the marriage contract).
 158. See Goolam *supra* note 54, at 124 (asserting that the prevalence of the word *ma'aruf* in Islamic verses regarding divorce establishes the tenor of Islamic law). See generally Amina Wadud, *Towards a Qur'anic Hermeneutics of Social Justice: Race, Class and Gender*, 12 J. L. & RELIGION 37, 51 n.16 (1995) (defining the word *ma'aruf*).
 159. See Robert J. Levy, *Custody Law and Ali's Principles: A Little History, a Little Policy, and Some Very Tentative Judgments*, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 67, 68 (Robin Fretwell Wilson ed., 2006) (addressing the rights of a father over his children at the end of a 19th-century marriage).

use of “best interests” of the child as the paramount concern in the resolution of custody disputes between parents following separation or divorce.¹⁶⁰

The “best interests” standard came to be associated with a presumption that the mother’s care is ordinarily within the best interests of a young child.¹⁶¹ This standard was alternatively called the “tender years” presumption.¹⁶² However, in the seventies, there was a backlash against the tender years doctrine because it “relegated women to a subservient caretaker position in the family.”¹⁶³ The height of this backlash was reached in 1973 when Judge Sybil Hart Kooper, of the Family Court of New York, held in *Watts v. Watts*, that the “tender years” doctrine was a type of unconstitutional discrimination against a father’s Equal Protection rights under the Fourteenth Amendment.¹⁶⁴

Eventually, a number of courts held that the tender years doctrine was unconstitutional and the legislatures of almost all states abolished it.¹⁶⁵ In the mid-20th century, since divorce

160. See *id.* at 68 (describing the prominence of the best interests of the child in custody cases); see also Roger Adams et al., *Divorce and Separation*, 24A AM. JUR. 2d § 931 (2008) (stating that the best interests of the child are paramount in a court deciding which parent receives custody); see also Symposium, *The Tender Years Doctrine: A Defense*, 70 CAL. L. REV. 335, 335 (1982) (establishing the states’ unanimous acceptance of the doctrine of best interests as the primary concern of courts in custody disputes).

161. See EDWARD J. WINTER, JR. & BRIAN R. HERSH, *Trials*, 22 AM. JUR. § 347 (2008) (explaining that the law favored mothers with respect to custody of children during “tender years”); see also Jo-Ellen Paradise, Note, *The Disparity Between Men and Women in Custody Disputes: Is Joint Custody the Answer to Everyone’s Problems?*, 72 ST. JOHN’S L. REV. 517, 516 (1998) (noting the traditional cultural and legal presumptions that when a marriage ends, the children should remain in the custody of their mother); see also Jan Hoffman, *New Custody Rules Complicate the Task of Judges*, N.Y. TIMES, March 28, 1996 at A25 (reporting that a New York Court of Appeals decision did not endorse the traditional view that mothers should prevail in custody cases).

162. See Symposium, *supra* note 160, at 335 (remarking that the “tender years” presumption focused on the mother being the preferred custodian for young children); see also Symposium, *The Parent-Child Relationship and the Current Cycle of Family Law Reform*, 45 OHIO ST. L.J. 455 (1984) (describing the tender years presumption as the mother receiving custody of the child barring any facts to the contrary).

163. See Levy, *supra* note 159, at 68 (acknowledging the role that gender played in causing the decline of the tender years doctrine); see also Susan Beth Jacobs, *The Hidden Gender Bias Behind “The Best Interest of the Child” Standard in Custody Decisions*, 13 GA. ST. U. L. REV. 845, 853 (1997) (commenting that societal pressure for sexual equality and gender neutrality eroded the force of the tender years doctrine); see also Ada Orakwusi ed., *Eighth Annual Review of Gender and Sexuality Law: Family Law Chapter: Child Custody, Visitation, and Termination of Parental Rights*, 8 GEO. J. GENDER & L. 619, 624 (2007) (noting that the women’s movement of the 1960s and 1970s caused the tender years doctrine to lose its validity).

164. See *State ex rel. Watts v. Watts*, 77 Misc. 2d 178, 179, 350 N.Y.S.2d 285, 287 (1973) (holding that an application of a presumption favoring the mother violates New York law); see also Symposium, *supra* note 160, at 336 (describing the holding of the Watts Court that presumptions favoring maternal custody violated the father’s equal protection rights).

165. See Levy, *supra* note 159, at 68 (Robin Fretwell Wilson ed., 2006) (noting that virtually every state has abolished the use of the tender years doctrine); see also Andree Brooks, *Mothers Defending the Right of Custody*, N.Y. TIMES, February 26, 1983 at A48 (discussing the trend of states to reject the tender years doctrine).

was more widely accepted, states that had enacted and adopted no-fault divorce laws began using a “best interest of the child” standard that complied with the Equal Protection Clause of the Fourteenth Amendment by not favoring either the mother or the father.¹⁶⁶

A. Joint Custody

Today, the most common type of child custody is joint legal custody.¹⁶⁷ “Joint custody means that both parents share responsibility for raising the child and actively participating in the child’s life—that both maintain frequent and continuing contact with the child.”¹⁶⁸ Joint custody does not always mean joint physical custody—it may include a time-share arrangement.¹⁶⁹ Most of the time, “one parent still has primary physical custody—that is, the child spends the majority of time at one home.”¹⁷⁰

166. See U.S. CONST. amend. XIV, § 1 (stating that “No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”); see also Nickerson, *supra* note 4, at 200–201 (noting that the tender years doctrine fell into disfavor because of challenges by feminist and fathers’ rights groups, as well as state legislatures enacting laws that forbade gender preferences).

167. See BERRY, *supra* note 39, at 16 (recognizing that most states have adopted joint legal custody as the preferred rule in child custody cases); see also Melissa A. Tracy, *The Equally Shared Parenting Time Presumption—A Cure-All or a Quagmire for Tennessee Child Custody Law?*, 38 U. MEM. L. REV. 153, 160 (2007) (stating that social changes during the latter 20th century resulted in the growth of the joint-custody doctrine); see also Editorial, *Joint Custody: An Option, Not an Answer for Anyone*, USA TODAY, March 4, 1996, at 10A (describing joint legal custody as the more common form of child custody in the states).

168. See Cheryl Buehler & Jean M. Gerald, *Divorce Law in the United States: A Focus on Child Custody*, 44 FAM. REL. 439, 442 (1995) (summarizing the history of joint custody as a way for both parents to keep “continuous contact” and to “share the rights and responsibilities of child bearing”). See generally BERRY, *supra* note 39, at 138 (informing of the circumstances of joint custody).

169. See BERRY, *supra* note 39, at 138 (differentiating between equal physical custody and time sharing custody in regard to joint custody arrangements); see also Marygold S. Melli & Patricia R. Brown, *Exploring a New Family Form*, 22 INT’L J. L. POL’Y & FAM. 231, 234 (2008) (discussing the removal of the term “physical custody” and the trend of allowing both parents to have time with the child, with one parent designated as the “primary caretaker.”). See generally Mary Ann Watson, *Custody Alternatives: Defining the Best Interests of the Children*, 30 FAM. REL. 474, 476 (1981) (explaining the varying options parents with joint custody have).

170. See Mark D. Matthew, Note, *Curing the “Every-Other-Weekend Syndrome”: Why Visitation Should Be Considered Separate and Apart from Custody*, 5 WM. & MARY J. WOMEN & L. 411, 428 (1999) (explaining that for practical reasons with joint custody, one parent retains physical custody of the child but both parents have “decision making authority”). See generally Theresa Glennon, *Still Partners? Examining the Consequences of Post-Dissolution Parenting*, 41 FAM. L. Q. 105, 115 (2007) (observing that joint custody does not necessarily mean that the child’s time is split equally between the parents).

Statistics show that fathers in joint custody arrangements are less likely to be late in making their support payments than fathers who have only visitation rights.¹⁷¹

B. Sole Custody

“Sole custody refers to the situation in which one parent, still most often the mother, keeps the child nearly all the time, with visitation rights held by the other parent (unless the court has found the other parent unfit or dangerous to the child, in which case there is no contact).”¹⁷² In sole custody, the primary parent makes all of the decisions about the upbringing of the child.¹⁷³ While sole custody is not very different from joint custody in its day-to-day arrangement, this “type of custody can have an affect on how the parents and children view the visiting parent’s role.”¹⁷⁴ Critics of the sole custody arrangement argue that this makes the non-custodial parent seem like a “guest” in the child’s life.¹⁷⁵

C. Divided or Split Custody

“Divided or split custody refers to a situation in which two or more children are ‘split up’ between parents.”¹⁷⁶ For example, in a family with two children, “one parent may be primarily

171. See BERRY, *supra* note 39 at 138–39 (listing the statistics of contributions from joint custody fathers compared to visitation fathers); see also Cheryl Buehler & Jean M. Gerald, *Divorce Law in the United States: A Focus on Child Custody*, 44 FAM. REL. 439, 443 (1995) (stating that joint custody families tend to have higher incomes than sole custody families). See generally The California Joint Custody Association, available at <<http://www.plljlaw.com/>>.

172. See BERRY, *supra* note 39, at 139 (establishing the parameters of sole custody); see also Gordon E. Finley & Seth J. Schwartz, *Father Involvement and Long-Term Young Adult Outcomes: The Differential Contributions of Divorce and Gender*, 45 FAM. CT. REV. 573, 573 (2007) (identifying the instances when the mother is granted sole custody over the father). See generally Clare Huntington, *Repairing Family Law*, 57 DUKE L. J. 1245, 1251 (2008) (recalling the simplistic view of family law, the Love-Hate Model, where the child would be placed with one parent).

173. See BERRY, *supra* note 39, at 139 (describing the primary parent’s decision making authority).

174. See Christy M. Buchanan & Parissa L. Jahromi, *A Psychological Perspective on Shared Custody Arrangements*, 43 WAKE FOREST L. REV. 419, 432 (2008) (identifying the role that contact with the non-resident parent plays in the closeness between parent and child). See generally BERRY, *supra* note 39, at 139 (highlighting an instance in which the secondary parent is viewed as a “visitor”). See generally Marsha Garrison, *Promoting Cooperative Parenting: Programs and Prospects*, 9 J. L. & FAM. STUD. 265, 270 (2007) (embracing the idea of changing the terms “custody and visitation” to “parenting plan” so as to avoid implication that there are “winners” and “losers”).

175. See Finley & Schwartz, *supra* note 172, at 573 (highlighting the potential for the father’s role to become minimized if the mother is granted sole custody); see also Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 624–25 (1992) (using the paternal figure as an example of how sole custody diminished one parent’s role in relation to the child). See generally BERRY, *supra* note 39, at 139 (voicing a criticism of the role sole custody gives to the non-custodial parent).

176. See BERRY, *supra* note 39 at 139 (establishing that the notion of split custody, which refers to the splitting up of siblings between parents).

responsible for the older child, and the other parent for the younger one.”¹⁷⁷ This type of custody causes strife because it “divides siblings who may be close and poses the risk that the siblings will drift apart or become alienated from the non-custodial parent, particularly if the parents remain in conflict.”¹⁷⁸ Sometimes, judges in split custody cases require a psychologist’s approval before they agree to grant this type of custody.¹⁷⁹

D. 50-50 Custody

“In a fifty-fifty custody arrangement, which is a type of joint custody, children spend approximately half of their time at each parent’s home, with each parent participating in all facets of the children’s lives.”¹⁸⁰ Sharing time equally is thought of by many as a cure-all, yet psychological studies have shown that 50-50 custody is stressful for most children.¹⁸¹

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177. See BERRY, *supra* note 39, at 139 (noting that in some split custody situations, one parent takes the older child and the other takes the younger child); see also David J. Benson, *The Child Dependency Exemption and Divorced Parents: What Is “Custody”?*, 18 CAP. U. L. REV. 57, 64 (1989) (stating that one definition of “split custody” is where a number of children are split between the parents); see also Ellen Marrus, *Where Have You Been, Fran? The Right of Siblings to Seek Court Access to Override Parental Denial of Visitation*, 66 TENN. L. REV. 977, 988 (1999) (explaining that in certain situations, after a divorce, the parents each take custody of one or more children).
178. See BERRY, *supra* note 39, at 139 (1998) (arguing that a split custody arrangement is not ideal because it can cause separation between siblings and between parents and their children); see also Jeff Atkinson, *Criteria For Deciding Child Custody in the Trial and Appellate Courts*, 18 FAM. L.Q. 1, 38 (1984) (declaring that an important consideration in deciding whether to allow split custody of the children is the effect on the sibling relationship caused by splitting them between two households).
179. See BERRY, *supra* note 39, at 139 (1998) (positing that some courts require the approval of a psychologist before allowing a split custody arrangement); see also *Pace v. Pace*, 22 P.2d 861, 867 (Wyo. App. Ct 2001) (explaining that in deciding whether to split the custody of the children, the court uses evidence from a psychologist, counselors, or other appropriate witnesses in deciding the impact the split would have on the children); See generally *L.F. v. Department of Children and Family Services*, 837 So.2d 1098, 1100 (Fla. Dist. Ct. App. 2003) (indicating that the court took under advisement the psychologists opinion regarding splitting custody).
180. See BERRY, *supra* note 39, at 138 (1998) (enumerating that in a joint custody arrangement both parents take responsibility for the child and they both actively participate in the child’s life).
181. See *id.* at 142–43 (1998) (arguing that a joint custody arrangement may be detrimental to the child if the parents cannot get along); see also Stephen Gilmore, *Contact/Shared Residence and Child Well-Being: Research Evidence and Its Implications for Legal Decision Making*, 20 INT’L J. L. & POL’Y & FAM. 344, 354 (2006) (stating that children in joint custody homes are not necessarily better off than those in homes with other types of custody arrangements); see also Gerald W. Hardcastle, *Joint Custody: A Family Court Judge’s Perspective*, 15 NO. 4 GP SOLO & SMALL FIRM LAW. 12 (1998) (explaining that it is unclear whether there is actually a significant difference between joint custody arrangements and other types of custody arrangements).

VI. Custody/Suckling—Islamic Law

If the divorced woman has children, she has full rights to nurse the child, and receives compensation for doing so.¹⁸² The husband must support her during the suckling period.¹⁸³ The Holy Qur'an, Surat Al Baqarah (The Cow) states:

The mothers shall give suck
To their offspring . . .
The father shall bear the cost
Of the children's food and clothing¹⁸⁴

"If the husband and wife both decide to have a foster mother for the offspring, they can do so, and the husband must pay the foster mother."¹⁸⁵ Thus, Islam, gives the mother the right to be consulted regarding her child—in the Holy Qur'an 2:233: "No mother shall be treated unfairly."¹⁸⁶

Many issues about custody are not directly addressed in the Holy Qur'an, but there are a number of *hadith* (Prophetic sayings) that discuss the issue. For example, "a woman once complained to the Prophet (PBUH) that, upon divorce, her husband wished to remove her young child from her custody."¹⁸⁷ "The Prophet (PBUH) commented: You have the first right to the child as long as you do not marry."¹⁸⁸ "On another occasion, a woman again complained that

182. See RAHMAN, *supra* note 76, at 314 (demonstrating that if a women is divorced, she is given full rights of suckling the child).

183. See *id.* (explaining that if the husband wants his divorced wife to continue suckling he must compensate her).

184. See Qur'an 2:233 (addressing the roles of both mother and father in providing for their child).

185. See RAHMAN, *supra* note 76, at 314 (explaining that a foster mother may be arranged for if decided upon by mutual consent of both parents).

186. See Qur'an 2:233 (distinguishing the differing roles of both parents in providing for their child); see also RAHMAN *supra* note 76, at 314 (asserting that women have custody rights in Islam).

187. See HISHAM A. RAMADAN, UNDERSTANDING ISLAMIC LAW: FROM CLASSICAL TO CONTEMPORARY 126 (Alta-Mira Press 2006) (stating that "a woman once complained to the Prophet that, upon divorce, her husband wished to remove her young child from her custody").

188. See *id.* at 126 (stating that "the Prophet (PBUH) commented: 'You have the first right to the child as long as you do not marry'").

her husband wanted to take her son away from her, although her son was a source of great comfort and warmth to her.”¹⁸⁹ “The Prophet (PBUH) said, “Child, here is your father, and here is your mother; make a choice between the two as to whom you prefer.”¹⁹⁰ “The son took hold of his mother’s hand, and they dispersed.”¹⁹¹

Additionally, Abu Bakr, the Prophet’s (PBUH) companion and adviser, made a decision between a father and his wife that the child should be given to the mother.¹⁹² Bakr said to the father “her smell and her kindness are better to it [the child] than you.”¹⁹³ In another version, Bakr was reported to have said, “The spittle of the mother is better for they child than honey.”¹⁹⁴

According to Islamic law, both men and women must adhere to two conditions to be eligible for custody. “First, they must be sane and of the age of majority, and secondly, they must have the ability to raise the child.”¹⁹⁵ Besides these stipulations, the “wife loses custody if she marries a man who the child is not prohibited from marrying.”¹⁹⁶ This stipulation is based on the above quoted *hadith* of the Prophet (PBUH): “You have the first right to the child as long as you do not marry.”¹⁹⁷

“In the absence of, or disqualification of, the mother, female relatives in the following order receive custody:

1. mother’s mother,
2. father’s mother,
3. full sister of other female relatives, including aunts.”¹⁹⁸

189. See *id.* at 126 (stating that “secondly, on a different occasion a woman again complained that her husband wanted to take her son away from her, although her son was a source of great comfort and warmth to her”).

190. See *id.* at 126 (stating that “the Prophet said: ‘Child, here is your father and here is your mother; make a choice between the two as to whom you prefer’”).

191. See RAHMAN, *supra* note 76, at 313 (referring to an Islamic narration where a child had chosen his mother when given the option of selecting between both parents); see also RAMADAN, *supra* note 187, at 126 (stating that “the son took hold of his mother’s hand and they dispersed”).

192. See Mahdi Zahraa & Normi A. Malek, *The Concept of Custody in Islamic Law*, 13 ARAB L. Q. 155, 160 (1998) (explaining that a mother has priority with regard to the custody of a child).

193. See *id.* at 160 (illustrating that a child has a stronger bond to its mother than to its father).

194. See *id.* (emphasizing that the mother has certain qualities that can nurture a child superior to what a father can provide).

195. See Goolam, *supra* note 54, at 127 (explaining how men and women have to satisfy both conditions to be eligible for custody).

196. See *id.* (presenting a situation where a woman can lose custody in the child).

197. See *id.* (establishing that the origin of the condition is based on the Prophet’s saying).

198. See ESPOSITO WITH DELONG-BAS, *supra* note 53, at 36 (listing the female relatives in order of priority with regard to custody rights); see also Dr. Moussa Abou Ramadan, *The Transition From Tradition to Reform: The Shari’a Appeals Court Rulings on Child Custody (1992–2001)*, 26 FORDHAM INT’L L.J. 595, 604 (2003) (spelling out the sequence of females who are next in line should the mother fail to satisfy the conditions stipulated).

“In default of female relations, the following male relatives obtain the right of custody:

1. father,
2. nearest paternal grandfather,
3. full brother,
4. blood brother,
5. full brother's son, and other paternal relations in the order of the nearest male relative determined in the same order as that of inheritance.”¹⁹⁹

The Holy Qur'an does not clearly spell out all aspects of custody; however, Islamic countries, in their legislation on the issue, have upheld the *hadith* by maintaining the “best interests of the child” standard.²⁰⁰ Generally, the age that a child reaches puberty is the age when the father may obtain physical custody or the child may choose his/her custodial parent.²⁰¹

For example, “Article 20 of the Egyptian Personal Status Law of 1929 provides that the right of a woman to custody of her children shall cease on the age of attainment of the age of puberty: ten years for a male child, and twelve years for a female child.”²⁰² “After the child has reached the age of puberty, a *qadi* (judge) can order that the child continue in the woman's custody until the male child reaches fifteen, or the female child gets married, based on the *hadith* of the Prophet (PBUH).”²⁰³

199. See ESPOSITO WITH DELONG-BAS, *supra* note 53, at 36 (establishing the hierarchy of male relatives' right of custody in the event there is a default of female relations); see also Mohit Agrawal & Romit Agrawal, *Custody Under Hindu, Muslim, Christian and Parsi Law's*, LEGAL SERVICE INDIA, Oct. 6, 2007, available at <<http://www.legalserviceindia.com/article/l34-Custody-Laws.html>> (enumerating the relatives in the male line who are next in right for custody). See generally Khaliq, *supra* note 56, at 40 (indicating that the traditional practice is that the father gains permanent custody of the children once they have reached puberty).

200. See Goolam, *supra* note 54, at 127 (presenting that the parent must be in the age of the majority, they must be mentally competent to raise a child, and the parent must be able to protect the child in any way); see also NASIR, *supra* note 72, at 170 (describing that the time a father receives full custody of a child is defined as the appropriate time so to not cause injury to the child).

201. See ESPOSITO WITH DELONG-BAS, *supra* note 53, at 35 (indicating that according to Hanafi law, the father merely supervises the raising of his children until puberty, when he is granted full custody); see also HUSSAIN, *supra* note 46, at 95 (expressing that among the various schools of thought, while the age at which the father is granted full custody may change, the primary concern is what is best for the child).

202. See Goolam, *supra* note 54, at 127 (illustrating that there are different ages at which custody of a child changes over from the mother to the father, although this typically occurs when a child reaches puberty).

203. See *id.* (proclaiming that because the welfare of the child is the primary concern in a custody situation, a judge may intervene if necessary); see also Khaliq, *supra* note 56, at 40–41 (stating that a mother might be extended custody even after the child reaches puberty if it is in the child's best interest).

Similarly, Article 84 of the Malaysian Islamic Family Law Act of 1984 provides: the right of the female custodian to the custody of a child terminates upon the child attaining the age of seven years in the case of a male child and the age of nine years in the case of a female child—but a court may, applying the *hadith*, allow the mother to retain custody of a child until the age of nine years for a male, and eleven years for a female.²⁰⁴ The act continues to say: “After termination of the right of the mother, the custody devolves upon the father, and if the child has reached the age of discernment (*mumaiyiz*), he or she shall have the choice of living with either of the parents, unless the court otherwise orders.”²⁰⁵

“In Iran, major changes were introduced in 1967 in the Family Protection Laws, or *Qanun-i-Himayat-I Khanwadah*.”²⁰⁶ Such changes are such that:

1. All family disputes can be referred by the courts for settlement to arbitrators;
2. Every divorce must be proceeded by an application to the court for the issuing of a “certificate of irreconcilability” (*gawahi-i-adam inkani sazhish*) which the court can issue after all attempts to avoid the divorce had been exhausted; and
3. The court can grant a “certificate of irreconcilability and *faskh*, a decree of annulment on such grounds as the other party’s imprisonment, for example, of five years.”²⁰⁷

After the Islamic Revolution in Iran, however, “all previous amendments were declared void, and only Islamic law was followed.”²⁰⁸

In Pakistan, under the Muslim Family Law Ordinance of 1961, an arbitration council must take all necessary steps to bring about reconciliation.²⁰⁹

204. See *id.* (asserting that the courts may intervene and keep the child with its mother for a longer period of time despite customs in place).

205. See *id.* at 128 (showing that after a certain age, the child had the option of deciding which parent it lives with).

206. See ENGINEER, *supra* note 59, at 136 (stating that the Family Protection Law went through major changes in 1967).

207. See *id.* (illustrating that a certificate stating that a relationship is irreconcilable is issued only after all arbitration measures have been fully exhausted).

208. See *id.*; see also Susan W. Tiefenbrun, *The Semiotics of Women’s Human Rights in Iran*, 23 CONN. J. INT’L L. 1, 13 (2007) (noting that after the Iranian Revolution in 1979, an Islamic state founded upon Islamic law came to power); see also Tamilla F. Ghodsi, Note, *Tying a Slipknot: Temporary Marriages in Iran*, 15 MICH. J. INT’L L. 645, 650–651 (1994) (discussing the Iranian revolution and how the laws of Iran completely changed).

209. See ENGINEER, *supra* note 59, at 136 (noting that in Pakistan, under the Muslim Family Law Ordinance of 1961, an arbitration council must take all necessary steps to bring about reconciliation); see also Alan Reed, *Transnational Non-Judicial Divorces: A Comparative Analysis of Recognition under English and U.S. Jurisprudence*, 18 LOY. L.A. INT’L & COMP. L. J. 311, 318 (1996) (stating the procedures for divorce in Pakistan under the Muslim Family Laws Ordinance); see also Cherry, *supra* note 61, at 328 (noting that under the Muslim Family Laws Ordinance, to get a divorce in Pakistan requires submitting the request to an arbitration council).

However, the “awarding of custody to the father is a consistent social reflection of the traditional, patriarchal, patrilocal family existing in Muslim countries today.”²¹⁰ So custom, rather than Shari’ah, can govern.²¹¹ However, a woman can also lose custody of her child at any age if her behavior is immoral, or if she provides poor care for the child.”²¹²

VII. Property Division—Anglo-American Law

For purposes of divorce in the United States, there are two types of property ownership.²¹³ Some states follow the community property system, based on Spanish law, while the others follow the equitable division of marital property system.²¹⁴

There are eight states with community property distribution systems: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington.²¹⁵ “Four of the eight community property states (California, Idaho, Louisiana, and Washington) use a quasi-community property approach to protect the interests of the non-acquiring spouse upon the death of the acquiring spouse.”²¹⁶ Wisconsin is sometimes thought of as the “ninth community property

210. See ESPOSITO WITH DELONG-BAS, *supra* note 53, at 35 (noting the Islamic tradition of the patriarchal family); see also Anwar & Rumminger, *supra* note 97, at 1535 (explaining that fathers in Muslim culture always have priority in a custodial suit); see also Thomas Foley, Note, *Extending Comity to Foreign Decrees in International Custody Disputes Between Parents in the United States and Islamic Nations*, 41 FAM. CT. REV. 257, 261 (2003) (stating that the father in Muslim culture has ultimate legal custody of their child).

211. See Abdullahi Ahmed An-Na'im, *Globalization and Jurisprudence: An Islamic Law Perspective*, 54 EMORY L.J. 25, 46 (2005) (stating that Muslims acknowledge Shar'iah as the religious authority for governing their lives, but are not willing to give it complete control over their lives).

212. See ESPOSITO WITH DELONG-BAS, *supra* note 53, at 36; see also Ludsins, *supra* note 72, at 464 (stating that under Shar'ia law, women typically retain custody of children, but men may take the child should a father accuse the mother of not properly caring for the child); see also Zainah Anwar & Jana S. Rumminger, *Justice and Equality in Muslim Family Laws: Challenges, Possibilities, and Strategies for Reform*, 64 WASH. & LEE L. REV. 1529, 1536 (2007) (stating that under Muslim law, the woman can lose custody of her children if she acts immorally).

213. See BERRY, *supra* note 39, at 95 (1996) (noting that for the purposes of divorce in the United States, there are two types of property ownership); see also Deborah H. Bell, *Equitable Distribution: Implementing the Marital Partnership Theory Through the Dual Classification System*, 67 MISS. L. J. 115, 130–132 (1997) (noting the comparison between the equitable distribution theory and the community property theory of marital law); see also Martha F. Davis, *The Marital Home: Equal or Separate Distribution*, 50 U. CHI. L. REV. 1089, 1091 (1983) (discussing the two forms of marital property distribution for divorce).

214. See BERRY *supra* note 39 at 95 (stating that some states follow the Spanish law based community property system while others use the equitable division of marital property system); see also David R. Knauss, Comment, *What Part of Yours Is Mine?: The Creation of Marital Property Ownership Interest by Improving Non-Marital Property Under Wisconsin's Marital Property Law*, WIS. L. REV. 855, 875–78 (2005) (discussing the eight states with community property marital laws).

215. See Wade M. Fisher, *The Internal Revenue Service Collects from an Innocent Spouse in the United States v. Craft: Could Business Associates be Next?*, 18 AKRON TAX J. 77, 82 n.41 (2003) (citing JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 323 (4th ed. 1998)).

216. See Mark Patton, *Quasi-Community Property in Arizona: Why Just at Divorce and Not Death?*, 47 ARIZ. L. REV. 167, 180 n.139–40 (2005) (distinguishing the four states with quasi-community property approaches and detailing their provisions).

state” after its adoption of the Wisconsin Marital Property Act,²¹⁷ which was based on the Uniform Marital Property Act “also called the Model Marital Property Act, enacted in 1982 to provide for a form of community property.”²¹⁸ Wisconsin, among other states, later adopted this uniform law.²¹⁹

“Marital property refers to property jointly owned by both spouses.”²²⁰ “Separate property refers to property solely owned by either spouse, which does not need to be divided upon divorce, because ownership is already established.”²²¹ While community property states allege that property will be divided 50-50, in practice, the division is rarely equal.²²²

For example, in Nevada, a community property state, the Supreme Court of Nevada held where circumstances exist that justify an unequal distribution, a court may deviate from the 50-50 starting point to achieve an equitable disposition.²²³ Recognizing that this ruling might allow a trial court unbridled discretion in determining such distributions, Nevada later limited the discretion of trial courts by allow courts to apply unequal distribution “only if the court finds a compelling reason to do so, and sets forth, in writing, the reasons for making the unequal disposition.”²²⁴

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217. See DiFonzo & Stern, *supra* note 29, at 586 (explaining that Wisconsin is often considered a community property state due to the similar community property principles of the Wisconsin Marital Property Act); see also Howard S. Erlanger & June M. Weisberger, *From Common Law Property to Community Property: Wisconsin's Marital Property Act Four Years Later*, 1990 WIS. L. REV. 769, 769–70 (1990) (noting that Wisconsin's adoption of the Wisconsin Marital Property Act made them the ninth community property state); see also Knauss, *supra* note 214, at 856 (stating that, with the passage of the Wisconsin Marital Property Act, Wisconsin became the only community property state to have converted from a previous common law system).
218. See UNIF. MARITAL PROP. ACT, Prefatory Note, 9A U.L.A. 109 (1998) (acknowledging the Uniform Marital Property Act's parallels to existing community property systems); see also Patrick N. Parkinson, *Who Needs the Uniform Marital Property Act?*, 55 U. CIN. L. REV. 677, 678 (1987) (indicating that the Uniform Marital Property Act, in essence, proposes a community property regime).
219. See WIS. STAT. §§ 766.001–766.97 (2007) (adopting the Uniform Marital Property Act); see also Palma Maria Forte, *The Wisconsin Marital Property Act: Sections in Need of Reform*, 79 MARQ. L. REV. 859 (1996) (clarifying that Wisconsin did not adopt an exact version of the Uniform Marital Property Act, opting for additions, redrafts, and amendments); see also Kathleen O'Conner, *Marital Property Reform in Massachusetts: A Choice for the New Millennium*, 34 NEW ENG. L. REV. 261, 319–20 (1999) (examining the unique factors that contributed to Wisconsin's adoption of the Uniform Marital Property Act).
220. See BERRY, *supra* note 39, at 96 (referring to property that is considered to be jointly owned as “marital property”).
221. See *id.* (designating “separate property” to be property that is solely owned by either spouse, which by virtue of their established ownership does not need to be divided upon divorce).
222. See *id.* (explaining that even in community property states there are rarely exact equal divisions of property); see also Victoria Mikesell Mather, *Evolution and Revolution in Family Law*, 25 ST. MARY'S L.J. 405, 411 (1993) (noting that in community property states that follow an equitable distribution rule, the courts may award unequal community property shares in divorces); see also Dan Carvalho, Comment, *Dividing Community Property in an Equitable Division Jurisdiction—Nevada's Confusion After McNabney v. McNabney*, 30 IDAHO L. REV. 755, 755–56 (1994) (indicating that even among community property states, the process of dividing community property after a divorce can vary greatly depending on jurisdiction).
223. See *McNabney v. McNabney*, 782 P.2d 1291, 1296 (Nev. App. Ct. 1989) (holding that there was no judicial presumption or mandate favoring an essentially equal distribution of community properties).
224. NEV. REV. STAT. ANN. § 125.150(1)(b) (Mich. Supp. 1993) (stating this provision is subject to enforceable premarital agreement).

In states using equitable distribution instead of the community property doctrine, courts are similarly supposed to divide property “equitably.”²²⁵ Thus, the goals of both systems are the same: “to divide property fairly that the couple owns together.”²²⁶

Today, 20 states have no-fault divorce “that excludes any evidence of marital fault in making property allocation or alimony determinations.”²²⁷ However, “sixteen states grant discretion to courts to consider fault in both alimony and property allocation determinations.”²²⁸

A. Spousal Support/Maintenance—Anglo-American System

Alimony is referred to as “spousal support” in most states.²²⁹ Alimony is also referred to as maintenance, and provides interim financial assistance to one spouse, most often the wife.²³⁰

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225. See BERRY, *supra* note 39, at 96 (commenting that this vague standard grants judges more latitude in dividing property); see also Michael T. Flannery, *Military Disability Election and the Distribution of Marital Property Upon Divorce*, 56 CATH. U. L. REV. 297, 360 n.317 (2007) (noting that courts cannot only equally dispose of community property but have the discretion to divide a spouse's separate property at its discretion); see also Suzanne Reynolds, *The Relationship of Property Division and Alimony: The Division of Property to Address Need*, 56 FORDHAM L. REV. 827, 868–69 (1988) (arguing that the presumption in favor of equal distribution not only limits judicial discretion regarding distribution, but also reduces litigation costs).
226. See *Turner v. Turner*, 529 So. 2d 1138, 1141 (Fla. Dist. Ct. App. 1988) (identifying equitable distribution as a mechanism intended to ensure a fair division of marital assets, created by earnings or otherwise, after the marriage's dissolution); see also BERRY, *supra* note 39, at 96 (referencing the fact that seldom is the division of property between the partners precisely even); see also David Kaufman, *The New York Equitable Distribution Statute: An Update*, 53 BROOK. L. REV. 845, 883 (1987) (directing the judiciary to fairly apportion any burden caused by a decrease in the standard of living as a result of a divorce, stating that it avoids minimizing the homemaker's contribution).
227. See Alaska Stat. 25-24-160(a)(2) (2002); Ariz. Rev. Stat. Ann. 25-318(A)-319(B) (West 2001); Colo. Rev. Stat. Ann. 14-10-113(1) (West 2002); Cal. Fam. Code 2550 (2002); Del. Code Ann. Tit. 13 1512(c); 1513(a) (West 2002); Fla. Stat. Ann. (2002) 61.075 (2002); Haw. Rev. Stat. Ann. 580-47(a) (West 2002); Ill. Comp. Stat. Ann. 5/503(d)-04 (West 2002); Ind. Code Ann. 31-15-7-2-4 (West 2001); Iowa Code Ann. 598.21 (West 2002); Me. Rev. Stat. tit. 19-A, 951-A (2001); Minn. Stat. Ann. 518.552 (West 2002); Mont. Code Ann. 40-4-202, 203 (West 2001); Neb. Rev. Stat. 42-376 (2002); Nev. Rev. Stat. Ann. 125.150(10)(b) (West 2001); N.M. Stat. Ann. 40-4-7 (West 2002); Okla. Stat. Ann. tit. 43, 121 (West 2002); Or. Rev. Stat. 107.036 (2001); Wash. Rev. Code 26.09.080, 090(1) (West 2002); Wis. Stat. Ann. 766.75 (West 2001); see also Angela Gi, *Marriage, Divorce, and Dissolution*, 4 GEO. J. GENDER & L. 229, 246–47 (2002) (noting that 20 states have moved to a no-fault regime to resolve property allocation disputes as opposed to courts using a fault regime that attempts to uncover a party's legal wrong in order to set alimony).
228. See *id.* at 249 (exempting certain other sources of income from the rule that fault will be considered when determining alimony).
229. See BERRY, *supra* note 39, at 127 (noting that this reflected the change in the purpose of this type of award).
230. KATHLEEN MILLER, *FAIR SHARE DIVORCE FOR WOMEN: THE DEFINITIVE GUIDE TO CREATING A WINNING SOLUTION* 160 (2d ed. 2007) (identifying the primary concerns of the court when awarding alimony as being economic lifestyle of the couple assessed in relation to duration of marriage); see also Judith T. Younger, *Marriage, Divorce, and the Family: A Cautionary Tale*, 21 HOFSTRA L. REV. 1367, 1368 (1993) (describing the term “maintenance” as a euphemism for alimony that is now a “two-way street” that is used to benefit both ex-wives as well as ex-husbands).

Support awards are designed to be transitional or rehabilitative.²³¹ Sometimes alimony is permanent, for example, in a situation where a wife in a long-term marriage has no marketable skills.²³²

For the most part, women still earn less than men in most fields.²³³ “Three out of four women earn less than \$30,000, and nine out of ten earn less than \$40,000, in spite of equal pay legislation.”²³⁴ Although courts may not award alimony to a woman in her forties, who has good earning potential, this woman may have been a housewife and mother since she was twenty. Therefore, when she enters the workplace, she is in the same place as a much younger woman without experience. So inequities exist because she may not be able to earn a decent salary; nor may she be awarded alimony, in spite of a woman’s rights to alimony and child support.²³⁵

B. *Adwa’ Nafaqah* Maintenance Rights—Islamic Law

Adwa’ Nafaqah, maintenance, regarding divorce is found in the Holy Qur’an, Surat Al-Talaq (Divorce) 65:6:

Let women in *iddah* live
in the same style as you live,
according to your means.
Trouble them not in such a way
as to make things difficult for them.

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231. MILLER, *supra* note 230, at 160 (applying these terms to short term alimony payments intended to transition the spouse back into the job market); *see also* Bell, *supra* note 91, at 804 (describing rehabilitating alimony as a short term way of providing for a former spouse); *see also* Colleen Marie Halloran, *Petitioning a Court to Modify Alimony When a Client Retires*, 28 U. BALT. L. REV. 193, 200 (1998) (clarifying the transition in modern courts from the view of alimony as an entitlement toward rationalization as a method of rehabilitating the wife toward self-sufficiency).
232. *See* Pickard v. Pickard, 820 N.Y.S.2d 547, 549 (App. Div. 2006) (upholding grant of lifetime maintenance to a woman in view of duration of the marriage, her lack of job skills and amount of time out of the workforce); *see also* MILLER *supra* note 230, at 160–61 (describing a situation in which a woman may receive permanent alimony); *see also* Jennifer L. McKoy, Comment, *Spousal Support Disorder: An Overview of Problems in Current Alimony Law*, 33 FLA. ST. U. L. REV. 501, 507 (2005) (indicating that permanent alimony is often awarded to women who were full-time homemakers after the dissolution of long-term marriages).
233. *See* BERRY, *supra* note 39, at 128 (noting that women generally earn only 80% of a man’s salary and that this gap can be greater depending on the field); *see also* DNC: *DNC Statement on the 45th Anniversary of the Equal Pay Act*, U.S. FED. NEWS, June 11, 2008, at 1 (remarking that 45 years after the Equal Pay Act, women still only earn on average 77 cents for every dollar a man earns).
234. *See* Miller, *supra* note 33, at 141 (quoting data regarding women’s pay).
235. *See* BERRY, *supra* note 39, at 128 (discussing situations in which a woman may not see alimony even though she is entitled to it and may not be able to earn enough money on her own); Arthur E. Balbirer & Gaetano Ferro, *Survey of 1990 Developments in Connecticut Family Law*, 65 CONN. B. J. 103, 109 (1991) (citing a case in which wife was not awarded alimony even though she had been out of job for fourteen years because she had “good employment prospects”); Alyson F. Finkelstein, Note & Comment, *A Tug of War: State Divorce Courts Versus Federal Bankruptcy Courts Regarding Debts Resulting from Divorce*, 18 BANKR. DEV. J. 169, 172 (2001) (asserting that women are increasingly denied alimony in light of the women’s movement and equal rights claims).

And if they are pregnant,
 then spend your substance on them
 until they deliver (the baby);
 and if they suckle your child,
 give them recompense;
 and take mutual counsel together,
 according to what is just and reasonable.²³⁶

A husband has the responsibility of supporting/maintaining his wife and children, not only when they are living with him, but also during the *iddah* (waiting period following divorce).²³⁷ A wife must be provided for in the same standard of living as her husband, and in the manner to which she has become accustomed.²³⁸ If she stops menstruating before the end of the *iddah*, the wife is entitled to support “until she completes three menstrual cycles.”²³⁹

During the *iddah*—and, where the wife is found to be pregnant before the conclusion of the *iddah*—after the *iddah*, the husband must support the wife.²⁴⁰ Moreover, if the divorced wife has a young child, she is entitled to be paid for nursing the child for two years:

The mothers shall give suck
 To their offspring
 For two whole years.
 . . . he shall bear the cost
 of their food and clothing
 on equitable terms.²⁴¹

The importance of giving the wife support is emphasized in the address of the Prophet (PBUH) made during Hajj al-Wida’, the Farewell Pilgrimage:

236. See DOI, *supra* note 54, at 107–08 (referring to the Holy Qur’an regarding a Muslim man’s duty of maintenance); see also The Holy Qur’an 65:6 (establishing a woman’s right to maintenance following divorce).

237. See DOI, *supra* note 54, at 108 (explaining extent of husband’s responsibilities to wife’s care after a divorce); see also ESPOSITO WITH DELONG-BAS, *supra* note 52, at 25 (outlining the time period that a Muslim wife is entitled to receive maintenance); see also HUSSAIN, *supra* note 46, at 92 (giving example that if wife has been accustomed to help of a maid the husband should provide her with a maid).

238. See DOI, *supra* note 54, at 108 (enumerating the possibility of reconciliation and honorable parting as reasons the husband must maintain the wife’s same standard of living); see also HUSSAIN, *supra* note 46, at 112 (acknowledging the Holy Qur’an as the basis for a man’s duty to maintain his ex-wife at the same standard of living).

239. See ESPOSITO WITH DELONG-BAS, *supra* note 52, at 25 (reviewing a Muslim woman’s right to spousal maintenance during the *iddah* following divorce to protect women who may be pregnant).

240. See *id.* at 35 (describing the maintenance of a pregnant wife by her husband during the three-month waiting period following divorce).

241. See *id.* 35 (noting the procedure for child support between the divorced husband and wife during the *iddah*); see also Qur’an 2:233 (asserting that neither the father nor the mother shall use their child as a reason to treat the other unfairly).

“Beware of your treatment of women. You have associated them with the word of Allah . . . and you have a duty to provide them with reasonable maintenance and clothing.”²⁴² A’ishah, the wife of the Prophet (PBUH), reiterated, “a woman named Hind bint’ Utbah once said to the Prophet (PBUH), “O Messenger of *Allah*, Abu Sufyan is a miserly person. He does not provide for me and my son, except whatever I take away myself secretly (about which he does not know).”²⁴³ The Prophet (PBUH) advised, “Take whatever is sufficient for you and your son in a reasonable way.”²⁴⁴

In determining the amount of support, all Islamic schools of thought agree that the *qadi*, judge, in exercising his discretion, should take into consideration the circumstances of both the spouses.²⁴⁵ If the husband refuses to pay support, the wife can sue.²⁴⁶

A father is also required to support his children, particularly in following categories:

1. his infant children, regardless of whether he has custody of them;
2. the infant children of a son who is unable to do so;
3. his disabled son or student son;
4. his unmarried daughter of any age; and
5. his widowed or divorced daughter if she is ill.²⁴⁷

If the father is unable to support the children, the mother, and then, the paternal grandfather are required to support them.²⁴⁸

242. See DOI, *supra* note 54, at 109 (quoting the Prophet’s address made during the Farewell Pilgrimage in the Hajj al-Wida).

243. See *id.* (demonstrating the necessity of child support with a story about a woman experiencing child support difficulties with her husband).

244. See *id.* at 109–10 (quoting the Prophet’s advice for women’s maintenance issues with their spouses during a divorce).

245. See *id.* at 110 (highlighting the common trend among Islamic judges to consider both parties’ circumstances when making decisions concerning divorce arrangements); see also Dinusha Panditaratne, *Towards Gender Equity in a Developing Asia: Reforming Personal Laws Within a Pluralist Framework*, 32 N.Y.U. REV. L. & SOC. CHANGE 83, 123 (2007) (outlining the components of the *iddah* judicial decision making process); see also Provins, *supra* note 76, at 535–36 (providing an example of a divorce proceeding where the judge took into consideration the situations of both the husband and the wife).

246. See ESPOSITO WITH DELONG-BAS, *supra* note 53, at 25–26 (revealing the wife’s legal remedies if the husband declines to support his wife and newborn child after divorce); see also Kathryn J. Webber, Comment, *The Economic Future of Afghan Women: The Interaction Between Islamic Law and Muslim Culture*, 24 U. PA. J. INT’L ECON. L. 959, 983 (2003) (detailing the process by which a wife will pursue a legal remedy against her husband when faced with his lack of maintenance during the *iddah*).

247. See ESPOSITO WITH DELONG-BAS, *supra* note 53, at 26 (listing the husband’s various child support responsibilities).

248. See *id.* (noting that the mother comes before the paternal grandfather as guardian of the children if the father is poor); see also Niaz A. Shah, *Women’s Human Rights in the Koran: An Interpretive Approach*, 28 HUMAN RTS. Q. 868, 889 (2006) (asserting that the Holy Qur’an does not prohibit a wife from providing economic support for the family); see also Judith E. Tucker, *Mufits and Matrimony: Islamic Law and Gender in Ottoman Syria and Palestine*, 1 ISLAMIC L. & SOC’Y 265, 267 (1994) (articulating that the paternal grandfather could serve as guardian in place of the father in order to arrange the marriage of a child).

VIII. Division of Property—Islamic Law

Under Shari'ah, the wife is entitled to full ownership of her property—that is, the husband cannot claim ownership to it.²⁴⁹ Unlike Anglo-American common law, there is no unity between the husband and wife; nor does idea of community property exist regarding marital property.²⁵⁰ The Holy Qur'an, Surat Al Nisa (The Women) 4:32, mandates "to men is allotted what they earn; and to women what they earn."²⁵¹

The Holy Qur'an also grants women the right to *mahr*, a dowry, which protects her after marriage, and in the case of divorce.²⁵² The Holy Qur'an, Surat Al Nisa (the Women), 4:4 states:

And give the women
(on marriage) their dower
As a free gift.²⁵³

Moreover, the Holy Qur'an, Surat Al Ma'idah (the Repast) 5:5 reiterates:

When ye give then
Their due dowers.²⁵⁴

249. See PEARL & MENSKI, *supra* note 74, at 184 (maintaining that a wife fully owns her property); see also Mary Ann Fay, *From Concubines to Capitalists: Women, Property, and Power in Eighteenth-Century Cairo*, 10 J. OF WOMEN'S HIST. 118, 119 (1998) (stating that married women independently control any property acquired before or during marriage); see also Shatzmiller, *supra* note 68, at 221 (enunciating that the Holy Qur'an allows women to own property individually).

250. See PEARL & MENSKI, *supra* note 74, at 185 (noting that there is neither unity nor community property as between husband and wife); see also Bustami Mohamed Khir, *The Right of Women to No-Fault Divorce in Islam and Its Application by British Muslims*, 17 ISLAM & CHRISTIAN-MUSLIM RELATIONS 295, 299 (2006) (declaring that any property given to the wife is regarded as her property and is not lost upon termination of the marriage); see also Annelies Moors, *Women and Dower Property in Twentieth-Century Palestine: The Case of Jabal Nablus*, ISLAMIC L. & SOC'Y 301, 304 (1994) (stating that marriage does not create community property as between husband and wife).

251. See PEARL & MENSKI, *supra* note 74, at 185 (mentioning that the Holy Qur'an allows women to keep what they earn).

252. See Nayer Honarvar, *Behind the Veil: Women's Rights in Islamic Societies*, 6 J. OF L. & RELIGION 355, 368 (1988) (noting that the *mahr* is a bridal gift that becomes an unsecured debt against the husband or his estate and is claimable by the wife); see also Ronald C. Jennings, *Divorce in the Ottoman Sharia Court of Cyprus, 1580–1640*, 78 STUDIA ISLAMICA 155, 155 (1993) (purporting that Islamic marriage is viewed as a contract between the spouses that includes a payment of money from the husband to the wife); see also Clifford S. Walton, *Family and the Law of Family in Ancient Arabia and Under the Mohammedan Doctrines*, 54 AM. L. REG. 453, 462–463 (1906) (specifying that the *mahr* is a dowry which the husband gives to the wife as a condition of the marriage).

253. See THE GLORIOUS QUR'AN 4:4 (Mohammed Marmaduke Pickthall trans., 2000) (asserting that women are to receive a dower upon marriage).

254. See *id* at 5:5 (reiterating that women are entitled to a dower).

Dower has the purpose of safeguarding a “woman’s economic position after marriage.”²⁵⁵ Moreover, marriage with dower is essential in the contract and is presupposed in “the universal Muslim marriage.”²⁵⁶ It may be defined as a “payment that the wife is entitled to receive from the husband in consideration of the marriage contract.”²⁵⁷

Regarding divorce, the Holy Qur’an, Surat Al Nisa (the Women) 4:20 states,

Even if ye had
given the wife
A whole treasure for dower,
Take not the least
Bit of it back.²⁵⁸

And, see the Holy Qur’an, Surat Al Baqarah (the Cow) 2:229, which emphasizes

It is not lawful for you
(men) to take back
Any of the gifts (from your wives),
Except that they would be
Unable to keep the limits
Ordained by Allah.²⁵⁹

The husband could try to use the dower to control the wife in the divorce, because after the divorce is final, he is required to pay the entire dower in a lump sum.²⁶⁰

255. See ESPOSITO WITH DELONG-BAS, *supra* note 53, at 23 (stating that the dower provides the wife with economic security after marriage); see also Honarvar, *supra* note 251, 355, 368 (1988) (indicating that a woman has the right to keep her deceased husband’s property until she is able to collect her dower).

256. See ESPOSITO WITH DELONG-BAS, *supra* note 53, at 23 (indicating that a dower is an essential part of a Muslim marriage); see also THE HOLY QUR’AN, at 33:50 (M.H. Shakir, trans., Tahrike Tarsile Qur’an, Inc, 1997) (1537) (illustrating that to have an essential marriage, dower must be present).

257. See THE HOLY QUR’AN at 33:50 (illustrating that in return for the marriage agreement, the wife should receive payment from the husband).

258. See *id.* at 4:20 (indicating that in the event of a divorce, the husband should not take the dower back from the wife).

259. See *id.* at 2:229 (referring to the traditional that a man should not take back any gifts given to the wife upon divorce unless the wife could not keep her obligations with Allah).

260. See ESPOSITO WITH DELONG-BAS, *supra* note 53, at 23 (indicating that a husband could try to use the dower to his advantage upon the event of divorce because, in the end, he will have to pay the total amount to his wife); see also JOHN GLENN, THOMAS MUSKUS, & KARL OAKES, 28 CORPUS JURIS SECUNDUM, § 193 (2008) (illustrating that men act with more domination during a divorce knowing that they will have to pay the entire dower); see also Webber, *supra* note 246, at 1062–63 (informing that men typically try to dominate the women in a divorce knowing that they will have to pay the whole dower in the end).

If the wife is divorced before “consummation of the marriage, she has the right to one-half of her agreed-upon dower, or if there is no agreed-upon dower, she is entitled to a gift of three articles of dress, or their value.”²⁶¹ The Holy Qur’an, Surat Al Baqarah 2:236, 237 states,

You incur no offense if you divorce women before the consummation of the marriage or fixing the dower. And provide for them in the rightful way.²⁶²

And if, however, you divorce them before the consummation of marriage, but after fixing a dower, then give them half of the fixed dower.²⁶³

IX. Conclusion

Thus, Muslim women and American women have similar rights of divorce, custody, and despite popular opinion with respect to the cultural restraints of Muslim women.

261. See ESPOSITO WITH DELONG-BAS, *supra* note 53, at 23 (indicating that if a dower agreement is not made between the husband and wife, the wife can be entitled to three articles of some value); *see also id.* at 56 (explaining that a woman is entitled to three articles of value when there is no prior dower agreement).

262. *See id.* (explaining that a man who does not consummate the marriage can back out of it as long as four months have not passed); *see also* THE HOLY Qur’an, *supra* note 257, at 2:236 (Shakir, M.H. trans., Tahrike Tarsile Qur’an Inc, 1997) (1537) (indicating that if a man waits four months before consummating the marriage, but then backs out, no offense has occurred).

263. *See id.* (illustrating that a husband must pay one half of the fixed dower upon a divorce if no other agreement was made); *see also id.* at 2:237 (indicating that if a divorce comes before the consummation of marriage, the husband needs deliver only half of the dower).

APPENDIX

(All references are taken from ABDUL RAHMAN I. DOI, WOMAN IN SHARI'AH, London, Ta-Ha Publishers, Ltd., 1989, 90–92)

As against the right of *talaq* given to the husband, Islam gives the wife the remedy of *faskh* to bring her contract of marriage to an end. *Faskh* literally means to annul a deed or to rescind a bargain. In relation to the marriage, it means the annulment or abrogation of the marital contract by the *qadi* (judge) after the wife has appealed to him for this remedy to be granted. If the *qadi* is satisfied that the woman is prejudiced by her marriage, he will annul the marriage.

The four Sunni schools allow the husband the right of *talaq* and the wife the remedy of *faskh*, depending on the circumstances necessitating separation between them.

Hanafi School**A. *Talaq***

1. Pronouncement of divorce by the husband.
2. *Ila* (Abstention from sexual intercourse).
3. *Li'an* (Mutual cursing).
4. *Khul'*.
5. Separation because of sexual defect (*'aib jinsi*) in the husband.
6. Separation due to renunciation of Islam (*Iba*) by the husband.

B. *Faskh*

In the following cases, the *Qadi*, or Court, may grant the remedy of *faskh* to the wife:

1. Separation due to apostasy of either spouse.
2. Separation due to spoiling of marriage (*fasad*).
3. Separation due to lack of equality of status (*kafa*) or lack of compatibility of husband.

Shafi'i and Hanbali Schools**A. *Talaq***

1. Pronouncement of divorce by husband.
2. *Khul'*.
3. Declaration of *talaq* by the *Qadi* on the husband's refusal to separate because of *Ila*.

B. *Faskh*

1. Separation due to defect in either spouse.
2. Separation due to *Li'an*.

3. Separation due to apostasy of either spouse.
4. Separation due to spoiling of marriage (*fasad*).
5. Separation due to lack of equality of status (*kafa*) of the husband.

Maliki School

A. *Talaq*

1. Pronouncement of divorce of husband.
2. *Khul'*.
3. Separation due to difficulties (*isar*) of the husband in providing maintenance to the wife.
4. Separation due to harm (*darar*).
5. Separation due to *Ila'*.
6. Separation due to lack of equality of status (*kafa*) or lack of compatibility of husband.

B. *Faskh*

1. Separation due to *Li'an*.
2. Separation due to spoiling of marriage (*fasad*).
3. Separation due to renunciation of Islam by either spouse.

Tablil or Halala

After a divorce has become irrevocable, the wife becomes unlawful for the husband in the sense that a prohibition arises that makes immediate remarriage between them unlawful. Since it may sometimes happen that the man repents afterward and strongly desires to have her as his wife again, a way out of the impasse is provided by the Holy Qur'an:

So, if a husband divorces his wife (irrevocably),
he cannot, after that, remarry her
until after she has married another husband
and he has divorced her. In that case, there is no blame on either of them,
if they reunite, provided they feel
that they can keep the limits ordained by Allah.

Such are the limits ordained by Allah,
which he makes plain to those who understand.

(Holy Qur'an 2:230)

Blacklink Transport Consultants Pty Ltd. v. Von Summer

No. 105638/07, 2008 WL 89958, at 1 (N.Y. Sup. Ct. Jan. 9, 2008)

The Supreme Court, New York County, granted the plaintiff's motion to recognize and enforce an Australian judgment, where the process through which the judgment was obtained did not violate due process or New York public policy.

I. Holding

In *Blacklink Transport Consultants Pty Ltd. v. Von Summer*,¹ the Supreme Court for New York County evaluated the plaintiff's motion for summary judgment made pursuant to CPLR 3213² to have a judgment won in an Australian court recognized and enforced in the state of New York against a New York citizen.³ The defendant contended that the Australian judgment offended due process of law and was repugnant to the public policy of New York State.⁴

In granting the motion, the court held that under New York law a foreign judgment will not be enforced if the laws and judicial process of the foreign sovereignty offend due process of law or contravene the public policy of the state.⁵ Here, the Australian courts rendered the judgment through a legitimate judicial process, thereby satisfying due process considerations. Furthermore, Australia's policy of awarding attorneys' fees as a method to discourage needless litigation and conserve judicial resources did not run afoul of New York public policy.⁶ The court granted the plaintiff's motion and entered a judgment in its favor in the amount of \$69,374.28.⁷

II. Facts

Hollis von Summer ("Von Summer"), a New York resident, purchased a sailboat while in Australia and made arrangements with Blacklink Transportation Consultants ("Blacklink") to ship the boat back to New York.⁸ The boat was damaged while in transit and Von Summer sued Blacklink and others in Australia to recover the cost of the damage to the boat.⁹ Prior to trial, Blacklink tendered a settlement offer to Von Summer for AU \$7,000.¹⁰ Von Summer

1. *Blacklink Transport Consultants Pty Ltd. v. Von Summer*, No. 105638/07, 2008 WL 89958 at *1 (N.Y. Sup. Ct. Jan. 9, 2008).

2. CPLR 3213 ("When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint.").

3. *Blacklink*, 2008 WL 89958 at *1.

4. *Id.*

5. *Id.* at *2.

6. *Id.* at *6.

7. *Id.*

8. *Id.* at *1.

9. *Id.*

10. *Id.* at *2.

rejected the offer, opting instead to take the matter to trial.¹¹ At trial, Von Summer won an award of AU \$6,035.¹² Under Australian law, because the trial award was less than the settlement offer, Blacklink was entitled to recover from Von Summer the costs incurred for trial.¹³ In a separate proceeding, an Australian court awarded Blacklink AU \$83,213, equivalent to U.S. \$69,374.28, the amount incurred in trial fees less Von Summer's entitlement.¹⁴ Thus, despite having won at trial, Von Summer owed Blacklink more than 15 times the amount of her own award.

Blacklink brought this action in New York, seeking to collect on the Australian award by converting it into a New York judgment.¹⁵ At issue in the instant motion for summary judgment was "whether plaintiff's judgment is incompatible 'with the requirements of due process of law' in which case the New York court must reject the judgment, or 'repugnant to the public policy of this state.'"¹⁶ The court granted the plaintiff's motion and converted the judgment, finding that the Australian judgment was not hostile to due process or to New York's public policy.¹⁷

III. The Court's Analysis

A. Grounds for Non-recognition of a Foreign Judgment in New York

In New York, a foreign judgment will be valid and enforceable if it is final where rendered, as long as none of the grounds for non-recognition set forth in CPLR 5304 applies.¹⁸ CPLR 5304 enumerates two *per se* grounds for non-recognition.¹⁹ It states that no recognition will be given to foreign money judgments rendered in systems that do not comply with the requirements of due process or where the foreign court lacked personal jurisdiction over the defendant.²⁰ CPLR 5304 further lists eight discretionary grounds for non-recognition.²¹ The burden is on the plaintiff to prove that no mandatory basis for non-recognition pursuant to CPLR 5304 exists.²² The court noted that this is not an "onerous"²³ standard and that "mere divergence from American procedure does not render a foreign judgment unenforceable."²⁴

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at *1.

16. *Id.* at *2 (quoting CPLR 5304(a)(1)).

17. *Blacklink*, 2008 WL 89958, at *6.

18. *Id.* at *2.

19. CPLR 5304(a).

20. *Id.*

21. CPLR 5304(b) (including lack of subject matter jurisdiction, judgments obtained by fraud, and judgments rendered on causes of action that are repugnant to the public policy of the state).

22. *Blacklink*, 2008 WL 89958 at *2 (citing *Dresdner Bank AG v. Haque*, 161 F. Supp. 2d 259, 363 (S.D.N.Y. 2001)).

23. *Id.*

24. *Id.* (quoting *Pariente v. Scott Meredith Literary Agency*, 771 F. Supp. 609, 616 (S.D.N.Y. 1991)).

1. The Due Process Ground for Non-recognition

The defendant asserted two grounds for non-recognition of the Australian judgment. First, the defendant argued that the foreign judgment, being more than 15 times the amount she won at trial, violated due process of law.²⁵ This argument defined due process in terms of the outcome of the Australian litigation.

In dismissing the defendant's argument, the court defined due process as "presuppos[ing] an objective system of rules with no unfair surprises, where a prospective litigant has notice of the applicable law and its consequences."²⁶ Thus, the court looked at the legitimacy of the Australian litigation procedures rather than at the merit of the resulting judgment. The court found particularly persuasive the fact that, like the United States, Australia has a system with no surprises, where litigants have sufficient notice of the rules of the game.²⁷ Additionally, Australian appellate courts possess the power of judicial review over judgments rendered by lower courts.²⁸ Thus, Von Summer retained the ability to seek review of the judgment in the Australian courts.

In essence the court utilized a classic assumption-of-risk argument. It found that "[h]aving knowingly and voluntarily played the game under Australian rules, defendant may not now cry foul."²⁹ The defendant never presented the argument that she was unaware of the Australian law regarding the award of attorneys' fees.³⁰ Additionally, the defendant chose Australia as the forum in which to bring her litigation.³¹ The court found that, in so doing, the defendant effectively sealed her fate in the Australian court and could not "ask this Court to second-guess the Australian court."³²

The defendant advanced a secondary, and stronger, argument for the due process analysis. The defendant argued that the massive Australian judgment for attorneys' fees amounted to a punitive damage award and should be subjected to the limitations imposed on such damages.³³ In rejecting this argument, the court found that awarding litigation costs served the legitimate purpose of compensating the victorious party.³⁴ Furthermore, an impartial judge and not a biased jury determined the amount of the award through a valid judicial process.³⁵

25. *Id.*

26. *Blacklink*, 2008 WL 89958 at *3.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Blacklink*, 2008 WL 89958 at *3.

33. *Id.*; See *Blits v. Renaissance Cruise Lines, Inc.*, 166 Misc.2d 497, 500–01 (N.Y. Sup. Ct. 1995) (proclaiming that a Florida statute that does not prohibit access to the courts does not offend the public policy of New York); see *BMW of North America v. Gore*, 517 U.S. 559, 559 (1996) (holding that "states necessarily have considerable flexibility in determining level of punitive damages ... only when award can fairly be categorized as 'grossly excessive' in relation to these interests does it ... violate the due process clause of Fourteenth Amendment").

34. *Blacklink*, 2008 WL 89958 at *3.

35. *Id.*

2. The Public Policy Ground for Non-recognition

The defendant further contended that the award of attorneys' fees was contrary to New York public policy, because the cumulative effect of such a law is to deny prospective litigants realistic access to the courts.³⁶ The court noted that New York gives substantial weight to the comity doctrine and the standard for the public policy exception is "high and infrequently met."³⁷ Historically, this narrow exception could not be met absent a judgment that was "inherently vicious, wicked, or immoral, and shocking to the prevailing moral sense."³⁸

The court justified dismissal of the defendant's second argument on two grounds. First, the court found that the basic public policy behind the Australian rule of allowing for recovery of attorneys' fees is to conserve judicial resources by discouraging needless litigation.³⁹ The court found that, although New York did not choose this particular method of encouraging the conservation of judicial resources, there are many means by which a judicial system may reach that end.⁴⁰ As the court noted, "Different does not mean repugnant."⁴¹

Additionally, the court observed that this was not a question of access to the courts. Australia may assert its own interest in how accessible its courts are to litigants and how to best use its judicial resources.⁴² Finally, in this situation, the Australian law did not discourage the defendant from declining the pre-trial offer and proceeding to trial.⁴³

The court also rested its decision upon principle of comity. The court emphasized the importance of respecting judgments of foreign nations, in order to ensure the reciprocal courtesy of recognizing and enforcing U.S. judgments.⁴⁴ Reciprocity could not exist if New York courts were to descend into the realm of second-guessing judgments rendered by legitimate courts of "fellow democratic countries."⁴⁵

IV. Conclusion

The court found that the public and due process policy considerations advanced by the defendant were insufficient to defeat the plaintiff's motion. The reasoning behind the court's decision is unsound in two distinct respects. First, although the public policy consideration of conserving judicial resources is not in and of itself repugnant to New York policy, how that consideration played itself out in this case is. This decision, in effect, provides undeserved deference to a foreign judicial system that makes settlements almost mandatory, with an added

36. *Id.* at *5.

37. *Id.* at *4.

38. *Id.*

39. *Id.* at *5.

40. *Id.*

41. *Id.*

42. *Id.* at *6.

43. *Id.*

44. *Id.*

45. *Id.*

caveat that parties who choose not to settle and instead exercise a legal right to use the judicial system to redress a very real injury will be penalized for doing so.

Furthermore, the defendant should have won on the punitive damages argument. The court stated that the intention behind the award of litigation costs is for compensation and not as a penalty. Yet, later in the decision, the court emasculated its own argument when it acknowledged, “Australia’s policy of *punishing needless litigation by imposing attorney’s fees* does not ‘conflict so fundamentally with New York’s public policy as to justify a denial of comity.’”⁴⁶ Such a contradiction indicates the lengths to which the court was willing to go to uphold the comity doctrine. In this case, an extreme expansion of the comity doctrine was the decisive factor in the court’s holding.

Michelle Frangella

⁴⁶. *Id.* at 6 (emphasis added).

Macromex SRL v. Globex International, Inc.

2008 WL 1752530 (S.D.N.Y. April 16, 2008)

The United States District Court, Southern District of New York, confirmed an arbitration decision awarding damages for breach of a contract governed by the United Nations Convention on Contracts for the International Sale of Goods, in which the arbitrator relied in part on provisions of the Uniform Commercial Code.

I. Holding

In *Macromex SRL v. Globex International, Inc.*¹ the United States District Court, Southern District of New York, confirmed an arbitration decision that awarded Macromex SRL (“Macromex”) damages against Globex International, Inc. (“Globex”)² under the United Nations Convention on Contracts for the International Sale of Goods (CISG).³ The district court dismissed Globex’s cross-petition, arguing that the arbitrator’s application of the Uniform Commercial Code (UCC) substituted performance provision constituted manifest disregard of the law.⁴ Furthermore, Globex argued, if the court upheld use of the UCC § 2-614, it was irrational for the arbitrator to base its calculation of lost profit damages on the Romanian market, instead of a substituted delivery location.⁵

II. Facts and Procedural History

Globex is an American company that sells food products to countries around the world.⁶ Globex contracted to sell 112 containers of chicken parts to Macromex, a Romanian company, for delivery to Romania.⁷ The CISG Convention governed this contract,⁸ which required that Globex complete the final shipment by May 29, 2006.⁹ However, by June 2, 2006, Globex had failed to ship 62 containers.¹⁰ On June 2, Romania, without notice, forbade as of June 7, 2006, the further importation of chickens that lacked certification by the Romanian Government.¹¹ Despite rushing a delivery of 20 of the remaining 62 containers, Globex failed to complete

1. See *Macromex SRL v. Globex International, Inc.*, No. 08 Civ. 114, 2008 WL 1752530 (S.D.N.Y. April 16, 2008).

2. *Macromex SRL*, 2008 WL 1752530 at *1.

3. Jan. 1, 1988, 1489 U.N.T.S. 3.

4. *Macromex SRL*, 2008 WL 1752530 at *1.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* Romania implemented this policy to halt the importation of chickens possibly contaminated with the avian flu virus.

delivery of the remaining forty-two containers.¹² Consequently, Macromex brought arbitration proceedings against Globex for breach of contract.¹³

In the arbitration, Globex built a *force majeure* defense against Macromex's allegations.¹⁴ Because the delay in shipment fell within the industry's informal standard of shipping, the arbitrator found that the delay in itself did not constitute a fundamental breach of contract,¹⁵ but the ban arising during the period of delay completely blocked Globex from fulfilling its delivery obligations under the contract.¹⁶ The arbitrator next examined whether Article 79 of the CISG Convention could relieve Globex of its obligation on the basis of *force majeure*.¹⁷ Article 79 provides a party with relief when an unforeseeable impediment arises that the party could neither reasonably control, nor avoid nor overcome, and the impediment results in the party's nonperformance.¹⁸ Here, the arbitrator decided that Article 79 required "substituted performance."¹⁹ Because both the contract and the CISG Convention provided little guidance about circumstances when a party must engage in substituted performance, the arbitrator looked for guidance to UCC § 2-614.²⁰ Because of Globex's refusal to ship the goods to a port in nearby Georgia,²¹ coupled with evidence showing that Globex had profited by breaching its contract with Macromex, the arbitrator ruled that Globex owed Macromex damages of approximately \$876,000.²² Globex then petitioned the arbitrator for a review of the decision,²³ to which the arbitrator responded that, while it doubted its power to revisit the award,²⁴ it held baseless Globex's complaints that the arbitrator had misused § 2-614 and committed a miscalculation of damages.²⁵ Macromex then petitioned the district court to certify the arbitration decision, at which time Globex filed to vacate the award.²⁶

12. Macromex SRL, 2008 WL 1752530 at *1.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. Macromex SRL, 2008 WL 1752530 at *2.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

III. Legal Standard

A. Interpretation of Law

The CISG Convention governs a contract if the parties so agree.²⁷ Because CISG Convention is a self-executing treaty to which the United States is a signatory, it is binding as federal law.²⁸ Because of the absence of case law interpreting the CISG Convention, the court upheld the arbitrator's use of the UCC and its associated case law.²⁹

B. Vacatur of Award

Confirmation proceedings are summary in nature and effectively convert a final arbitration award into a court judgment.³⁰ Arbitration decisions are subject to very limited review by courts, unless a basis for modification or *vacatur* exists.³¹ The Federal Arbitration Act (FAA)³² lists the specific instances in which a court may vacate an arbitration award.³³ Arbitrators have significant freedom in deciding cases and courts may not vacate an arbitral award solely because the court decided that the arbitrator erred in applying the law.³⁴

C. Loss of Profits

As under the UCC, damages under the CISG Convention can reach, but not exceed, the amount that the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract as a possible consequence to a breach.³⁵ The effective consequence of basing damages on conditions at the time of formation is to deter a party from unjustly exploiting a change of circumstance to the detriment of the other party.³⁶

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. 9 U.S.C. § 1 *et seq.*

33. See *Macromex SRL*, 2008 WL 1752530, at *2 (citing 9 U.S.C. § 10(a) (2002) (stating that the statutory grounds for *vacatur* are (1) the award was procured by corruption, fraud or other means; (2) the arbitrators exceeded their powers or "so imperfectly executed that a mutual, final, and definite award upon the matter submitted was not made; (3) the arbitrator was guilty of misconduct in refusing to hear evidence pertinent and material to the controversy; (4) the arbitrators exhibited "evident partiality" or "corruption," or (5) the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown or guilty of any other misbehavior that prejudiced the rights of any party); see also *Hall Street Associates, LLC v. Mattel Inc.*, 128 S.Ct. 1396, 1400 (2008) (holding that the statutory grounds listed in the FAA are exclusive).

34. *Macromex SRL*, 2008 WL 1752530, at *3.

35. *Id.*

36. *Id.*

IV. Discussion

A. UCC Section 2-614

While Globex did not dispute the arbitrator's use of the UCC to assist in clarifying the CISG Convention,³⁷ it did argue that its reliance on § 2-614 was erroneous and proposed instead the use of § 2-615 in this case.³⁸ Because circumstances prevented Globex from performing its main contractual obligation, namely delivering the chickens to Romania, it claimed that this inability went to the very heart of the contract, thus making § 2-615 more applicable and affording Globex relief from its duties to Macromex.³⁹ However, the court, in relying on § 2-614, stated that this section clearly applied to a situation where the unloading destination became unavailable through no fault of either party.⁴⁰ The court further held that the arbitrator correctly interpreted the issue of whether the impediment was surmountable or insurmountable.⁴¹ There was evidence that other American companies had made alternative arrangements with Macromex to deliver Romanian-bound imports to Georgian ports instead of directly to Romania.⁴² Additionally, American case law held that the existence of reasonable alternative delivery locations represented a surmountable impediment.⁴³ Consequently, the court upheld the arbitrator's use of § 2-614 and its conclusion that Globex needed to make substituted performance with respect to the delivery of goods to Macromex.

B. Damages

Globex argued that, if the court concurred with the arbitrator that it was liable for breach, the arbitrator erroneously calculated the amount of damages.⁴⁴ The reason for the breach, according to Globex, involved not delivering the goods to Georgia rather than to Romania. Because delivery to Romania was impossible, Macromex could not have received profits based upon chicken prices in the Romanian market, thereby compelling the arbitrator to calculate damages based on Georgian market prices instead.⁴⁵ Because the CISG Convention governed the terms of the contract, the arbitrator referenced Section II, Article 74 of the CISG Conven-

37. *Id.*

38. *Id.* See also U.C.C. § 2-614 (1) (2003) ("Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of—delivery or performance—otherwise becomes commercially impracticable but a commercially reasonable substitute is available, the substitute performance must be tendered and accepted."); see also UCC § 2-615(a) (2003) ("Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of the seller's duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.").

39. Macromex SRL, 2008 WL 1752530 at *3.

40. *Id.*

41. *Id.* at *4.

42. *Id.* at *2.

43. See *id.* (citing UCC § 2-614 (2004) commentary illustrating an example of substitution accomplished by delivery to another port in *Meyer v. Sullivan*, 40 Cal. App.723, 726–727, 181 P. 847 (1919)).

44. Macromex SRL, 2008 WL 1752530, at *4.

45. *Id.*

tion, which covers damages for breached contracts.⁴⁶ While the CISG Convention defines damages from avoided contracts in articles 75 and 76, the arbitrator had rejected Globex's *force majeure* defense, rendering these sections inapplicable.⁴⁷ The court upheld the arbitrator's ruling that the damage award required calculation based on the Romanian market, commenting that Article 74 enabled the buyer to recoup lost profits caused by the seller that were foreseeable at the time of entry into the contract.⁴⁸ Here, Macromex could not possibly foresee Georgian market prices affecting this deal with Globex at the time the companies contracted with each other. Furthermore, the court alluded to the importance of protecting parties from using unexpected market fluctuations to nullify contractual duties.⁴⁹ Therefore, the court upheld the use of Article 74 of the CISG Convention to arrive at a damage award based on Romanian chicken market prices.

V. Conclusion

The district court did not review the arbitrator's decision here and noted that a court may not overrule the ruling of an arbitrator absent special circumstances.⁵⁰ Procedural limitations notwithstanding, the court cited the considerable weight treaties have, noting that because the U.S. was signatory to the CISG Convention, it effectively became binding federal law.⁵¹ Furthermore, it is interesting to note that both parties acknowledged it was proper for the arbitrator and the court to reference the UCC and its accompanying case law in order to clarify interpretation of the CISG Convention.⁵² While not central to this case, the concept of using American case law and statutes to assist in clarifying treaties with foreign nations is germane to the development of international law and relations between nations.

The court provided further guidance regarding the differences between surmountable and insurmountable impediments in holding that, if changing the delivery points could satisfy the contract, then such a change failed to amount to an insurmountable impediment. A party that failed to provide such a reasonable accommodation, noted the court, would have breached and

46. *Id.* See also CISG, art. 74: "Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in light of the facts on matters of which he then knew or ought to have known, as a possible consequence of the breach of contract."

47. Macromex SRL, 2008 WL 1752530 at *4.

48. *Id.*

49. See *id.* (opining that "as a seller cannot require the buyer to pay an unexpected jump in market price for the contracted merchandise, the seller is not required to accept less than the contract price even if the market crashes or a government regulation causes the price to drop").

50. *Id.* at *2.

51. *Id.* at *1.

52. *Id.* at *2.

been subjected to monetary damages based on the price of the good in the nation of original delivery.

This court further upheld the principle of calculating profit damages based on conditions at the time of contract formation and not at the point when breach occurred. This concept protects buyers when prices unexpectedly rise and sellers when prices unexpectedly decline. Furthermore, this concept of foreseeability at the time of contract construction is applicable not only under the CISG in this case, but also under the American law as well.⁵³

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53. See *Macromex SRL*, 2008 WL 1752530 at *3 (citing *Precision Pine & Timber, Inc. v. United States*, 72 Fed. Cl. 460, 477 (2006) in defining that foreseeability of the parties is examined at the time of contract formation rather than the time of breach); see also *Macromex SRL*, 2008 WL 1752530 at *5 (holding that “lost profits are determined under the CISG as the amount foreseeable at the time the contract was executed”).

Omollo v. Citibank, N.A.

2008 U.S. Dist. LEXIS 36917, 2008 WL 1966721 (S.D.N.Y. May 6, 2008)

The United States District Court held that the action by a Kenyan plaintiff who lived in South Africa and worked for Citibank, N.A., in South Africa; and who alleged that he was coerced into two employment contracts with Citibank, was governed under the laws of South Africa, and plaintiff could not pursue the case in New York.

I. Holding

In *Omollo v. Citibank*,¹ the United States District Court for the Southern District of New York relied on the doctrine of *forum non conveniens* to grant the defendant's motion to dismiss plaintiff's claim.² The court used a three-step analysis³ of the doctrine, holding that the proper forum for the plaintiff, John Ojwang' Omollo, was South Africa.⁴ Omollo, a citizen of Kenya employed by Citibank in South Africa, chose to pursue his case for breach of contract in New York.⁵ The defendant, Citibank, N.A. (Citibank), moved to dismiss on the grounds of failure of the plaintiff to file within South Africa's three-year statute of limitations and *forum non conveniens*.⁶ Although the court denied Citibank's motion to dismiss for failure to file within the statute of limitations, the defendant's motion to dismiss was granted on the basis of *forum non conveniens*.⁷

II. Facts and Procedural History⁸

In December 1995, John Ojwang' Omollo joined Citibank's Kenya branch as Credit Administration Assistant.⁹ His unit relocated to Johannesburg, South Africa, during 2000 and Omollo relocated with the company.¹⁰ Initially, his plan was to leave his wife and children in Kenya, but he changed his mind after Citibank said it would pay for his family's housing and school tuition.¹¹ Citibank also told Omollo that he would stay in South Africa for longer than the period stipulated by the contract.¹² Omollo signed a new employment contract on Novem-

1. 2008 U.S. Dist. LEXIS 36917, 2008 WL 1966721 (S.D.N.Y. May 6, 2008) (Omollo).

2. *See id.*

3. *Id.* at *11. The three factors are the degree of deference due to the plaintiff's choice of forum on the facts of the case, the adequacy of the alternative forum, and the balance of public and private factors.

4. *Id.* at *20.

5. *Id.* at *4.

6. *Id.* at *1.

7. *Id.* at *20.

8. As in the court's opinion, the facts set forth here are as alleged by the plaintiff, not findings of the court. *See infra* text accompanying notes 32–33.

9. *Omollo* at *1.

10. *Id.*

11. *Id.* at *2.

12. *Id.*

ber 30, 2000 (the "2000 Contract"), for the position of Credit Administration Manager in South Africa.¹³ The 2000 Contract stated that it "shall be governed by and construed in accordance with the Laws of South Africa."¹⁴ As a result, the Omollo family relocated to Johannesburg, South Africa.¹⁵

Subsequently, in a letter dated September 17, 2002 (the "2002 Letter"), Citibank proffered terms to change Omollo's employment.¹⁶ The 2002 Letter stated that Omollo's employment would end in two years and Citibank would not provide for his family's expenses as previously promised.¹⁷ The letter "was styled as a voluntary modification to the 2000 Contract" and displayed Omollo's signature.¹⁸ Omollo alleged that the modifications were unfairly induced because he would not be offered a new contract upon expiration of the 2002 Contract.¹⁹

Omollo started a series of steps to complain about his situation with Citibank. He wrote to Citibank CEO Charles Prince about the change in his benefits.²⁰ When he did not get a response from the CEO for several months, Omollo contacted a New York attorney, Michael Atadika, who communicated Omollo's complaints to Citibank.²¹ Citibank told Atadika that the U.S. courts would be an improper forum and that filing a suit having this knowledge would be "sanctionable."²² Atadika explained to Citibank the merits of Omollo's claim, but then advised Omollo to pursue the case in South Africa, not New York.²³

On September 6, 2005, Omollo met with Citibank's local director of Human Resources, Sue Robertson, who presented some options with regard to Omollo's complaint.²⁴ Omollo chose the option to be paid the lost amounts under the original contract, which he estimated at U.S. \$840,000.²⁵ Citibank rejected this proposal as an "obstructive approach" and informed Omollo that his claim was nonexistent under the laws of South Africa.²⁶ Omollo requested

13. *Id.* Some of the relevant terms of the employment agreement were as follows: a) if "suitable performance standards" were maintained, the job term would be two years with the possibility of one-year renewals; b) the maximum period of renewal was "three (3) years after which [Omollo would] be expected to return to an assignment in Kenya"; c) housing and utilities were provided "for the first three years" and the children's tuition were provided "for a maximum of two years"; d) upon Omollo's acceptance of "a permanent position in [South Africa], the housing and education allowances [would] be phased out slowly to facilitate localization."

14. *Id.* at *3.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Omollo* at *3–*6.

21. *Id.* at 4.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at *4, *5.

another meeting, which was also denied.²⁷ In addition to Citibank's assertion that Omollo did not have a claim, it stated that, even if he had a claim, it was barred by South Africa's statute of limitations.²⁸

Omollo continued his quest by raising complaints with his superiors.²⁹ Citibank appeared to offer Omollo an appointment as director of the South African Credit Risk Management Department. This position was less than what Omollo had been promised, since it was the number two position in the department.³⁰

Finally, on September 20, 2007, Omollo filed the instant action, claiming that he was misled into signing the 2000 Contract and later coerced into the 2002 Contract. Defendant moved to dismiss on grounds of an expired South African statute of limitations and *forum non conveniens*.³¹

III. Court Analysis

To determine whether to grant Citibank's motion to dismiss under Federal Rules of Civil Procedure 12(b)(6), the court must "accept as true all of the factual allegations contained in the complaint"³² and "draw all inferences in the light most favorable to the non-moving party."³³ Furthermore, for a plaintiff to survive a Rule 12(b)(6) motion to dismiss, the claims in his complaint must shed light on "the grounds upon which [the plaintiff's] claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.'"³⁴

A. Statute of Limitations

On the statute of limitations ground, the court followed the general rule that "where jurisdiction rests upon diversity of citizenship, a federal court sitting in New York must apply the New York choice-of-law rules and statutes of limitations."³⁵ Despite the fact that both Omollo and Citibank agreed that the statute of limitations under South African law had lapsed, the

27. *Id.* at *5.

28. *Id.* "Omollo allege[d] that [the] discussions were intended to delay his pursuit of the claims until the statute of limitations expired."

29. *Id.*

30. *Omollo* at *5. Not only was this position never confirmed in writing, but since then he had received "undeserved negative performance reviews" and his compensation was reduced. Furthermore, Citibank superiors tried to convince him to cease the lawsuit. *Id.* at *6.

31. *Id.*

32. *Id.* (citing *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1975 (2007)).

33. *Omollo* at *6 (citing *In re NYSE Specialists Sec. Litig.*, 503 F.3d 89, 95 (2d Cir. 2007)).

34. *Bell Atlantic Corp. v. Twombly* 127 S. Ct. 1955, 1965 (2007); see *ATSI Commc'ns v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007).

35. *Stuart v. American Cynamid Co.*, 158 F.3d 622, 627 (2d Cir. 1998) (citing *Guaranty Trust Co. v. York*, 326 U.S. 99, 108-09 (1945)).

court assumed that South African law permitted equitable tolling similar to that of the laws of New York.³⁶ The court also held that, because Omollo was a *pro se* litigant and because the case was complex, he was entitled to a presumption of equitable tolling.³⁷

B. *Forum Non Conveniens*

The doctrine of *forum non conveniens* is a discretionary power that allows a court to refuse a plaintiff's choice of forum, even though that forum has jurisdiction.³⁸ A plaintiff's choice of forum can be contested if the defendant shows compelling arguments to convince a court to refuse jurisdiction.³⁹ The *forum non conveniens* motion has been important in international cases where there is a domestic conflict.⁴⁰

The court used the Second Circuit approach in determining whether to dismiss the claim on the basis of *forum non conveniens*.⁴¹ This approach requires a three-step analysis: the first step is to determine the degree of deference due the plaintiff's choice of forum; the next step is to examine whether there is an adequate alternative forum for the dispute; in the final step, the courts balance the private interests of the parties in the choice of forum against the public interests of the alternative forum under consideration.⁴² The defendant bears the burden of showing a compelling argument that each step weighs in favor of the defendant.⁴³ The action is dismissed only if the chosen forum is inconvenient and the selected forum is significantly preferable.⁴⁴ Additionally, a forum is not adequate if its statute of limitations has expired.⁴⁵

The court first considers the degree of deference due to the forum that the plaintiff chooses.⁴⁶ The greater the degree of deference granted to the plaintiff, the stronger must be the defendant's showing of inconvenience in order to win a *forum non conveniens* dismissal.⁴⁷ On the other hand, the less deference is granted the plaintiff's choice, the easier it is for the defen-

36. *Omollo* at 19.

37. *Id.*

38. The rule of *forum non conveniens* has been stated as when "[a] state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action provided that a more appropriate forum is available to the plaintiff." RESTATEMENT (SECOND) OF CONFLICT OF LAWS 84 (1971).

39. See FED. R. CIV. P. 12(b)(3); see also Peter J. Carney, *International Forum Non Conveniens: "Section 1404.5"—A Proposal in the Interest of Sovereignty, Comity, and Individual Justice*, 45 AM. U.L. REV. 415, 493 (1995).

40. See Stephen B. Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law*, 49 AM J. COMP. L. 203, 212 (2001) (explaining how the doctrine of *forum non conveniens* is applicable when laws of foreign countries are involved and how it is a way to resolve the conflict).

41. See *Iragorri v. United Techs. Corp.*, 274 F.3d 73 (2d Cir. 2001) (*en banc*).

42. *Omollo* at *11–*12 (citing *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 73 (2d Cir. 2001) (*en banc*)).

43. *Id.* at *12.

44. *Id.* (citing *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 74–75 (2d Cir. 2001) (*en banc*)).

45. *Omollo* at *11 (citing *Bank of Credit & Commerce Int'l (OVERSEAS) Ltd. v. State Bank of Pakistan*, 273 F.3d 241, 246 (2d Cir. 2001)).

46. *Id.* at *13–*14 (citing *Iragorri*, 274 F.3d at 71).

47. *Id.* at *12 (citing *Iragorri*, 274 F.3d at 74).

dant to succeed.⁴⁸ The court observed that “the choice of a United States forum by a foreign plaintiff is entitled to less deference.”⁴⁹ The court also considers whether there is any evidence of forum shopping.⁵⁰ Less deference is granted to the forum when the court decides that the plaintiff would not have expected litigation arising from the injury to be litigated in the foreign jurisdiction.⁵¹

The court concluded that Omollo’s choice to pursue the case in New York was not entitled to the significant level of deference afforded to residents of New York. Although there was no evidence of forum shopping or “desire to impose tactical disadvantage”⁵² on Citibank, the court concluded that Omollo had no reasonable expectation that issues arising from his employment contract in Africa would be litigated in New York. He was a Kenyan citizen and a resident of South Africa who worked for a branch of Citibank that was located in South Africa.

After establishing the degree of deference, the court considered whether there was an adequate alternative forum, a burden on the moving party.⁵³ Adequacy is satisfied based on the amenability of the defendant to process in the other jurisdiction and the ability to permit litigation of the subject matter of the case. The case must also be brought within the statute of limitations. The court found that South Africa was an obvious choice of forum. If the action were barred by the statute of limitations, there would be no adequate alternative, but, in the instant case, the court allowed tolling.⁵⁴

Finally, the court discussed the third step of the analysis, with the first two steps already tipping in favor of the defendant. Dismissal depends on the balancing of certain public and private factors.⁵⁵ Evidence, including witness availability, was readily accessible in South Africa. Omollo was a resident of South Africa and the issue arose out of his employment in South Africa. Furthermore, South Africa had an interest in litigating the case in South Africa because it related to South African legal claims. The only connection that Omollo made to the court in New York was that Citibank’s corporate headquarters was located in New York. The court held that this fact was “relatively inconsequential in terms of its impact on the litigation.”⁵⁶

48. *Id.* (citing *Iragorri*, 274 F.3d at 72).

49. *Id.* (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981)).

50. *See Omollo* at *14.

51. *Id.* at *12 (citing *Carey v. Bayerische Hypo-Und Vereinsbank, A.G.*, 370 F.3d 234, 237 (2d Cir. 2004)).

52. *Id.* (citing *Iragorri*, 274 F.3d at 73).

53. *Id.*

54. *Omollo*, 2008 U.S. Dist. LEXIS 36917, at 11–12. The court had assumed for the purposes of the motion that equitable tolling was available under South African law.

55. *Iragorri* enumerates these factors, which include: “the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling [witnesses], and the cost of obtaining attendance of willing[] witnesses . . . and all other practical problems that make trial of a case easy, expeditious and inexpensive.” *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 73–74 (2d Cir. 2001) (*en banc*).

56. *Omollo*, 2008 U.S. Dist. LEXIS 36917 at 19.

IV. Conclusion: Implications of *Omollo*

The court correctly granted Citibank's motion to dismiss on the ground of *forum non conveniens*. It is important to note that, had the statute of limitations of South Africa applied and the court found that Omollo failed to bring the claim within a timely fashion, this case would have been decided differently. The statute of limitations of South Africa would have barred Omollo and consequently, an adequate forum would not have existed.⁵⁷ However, the court would then have dismissed the case on Citibank's ground of the lapse of statute of limitations.⁵⁸ Unfortunately for Omollo, his case would have been dismissed either way.

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57. See *Bank of Credit & Commerce Int'l (OVERSEAS) Ltd. v. State Bank of Pakistan*, 273 F.3d 241, 246 (2d Cir. 2001).

58. *Omollo* at *20 n. 68.

Medellín v. Texas

128 S.Ct. 1346, 170 L.Ed.2d 190, 76 U.S.L.W. 4143 (2008)

The Supreme Court of the United States held that the International Court of Justice's decision in the *Avena* case was not binding as federal law and, therefore, the Texas court was not required to review petitioner's *habeas corpus* petition. The Court also found that the President's memorandum requiring the states to comply with *Avena* was not independently enforceable.

I. Holding

In *Medellín v. Texas*,¹ the Supreme Court of the United States affirmed the denial of petitioner's application for *habeas corpus* after a conviction for capital murder and a sentence of death.² The Court held that neither the *Avena* decision,³ in which the International Court of Justice (ICJ) found that the United States had violated the rights of 51 Mexican nationals by failing to inform them of their right under the Vienna Convention on Consular Relations⁴ ("Vienna Convention") to notify their consulate of their detention and required review and reconsideration by courts in the United States of their convictions and sentences, nor the President's memorandum stating that the United States would discharge its international obligations by having state courts give effect to the *Avena* decision was binding on state courts without additional legislation.⁵ As a result, the Texas court was not obligated to review the conviction.⁶

II. Facts and Procedural History

The petitioner, José Ernesto Medellín, a Mexican national, was arrested for the gang rape and murder of two teenage girls in Houston, Texas.⁷ After his arrest, the Texas law enforcement officials read petitioner his *Miranda* rights,⁸ but failed to inform him of his right under the Vienna Convention to notify the Mexican consulate of his detention.⁹ Medellín then signed a waiver and confessed to the rape and murder.¹⁰ He was convicted of capital murder and sen-

1. 128 S.Ct. 1346, 170 L.Ed.2d 190, 76 U.S.L.W. 4143 (2008).

2. *Id.* at 1346.

3. Case Concerning *Avena* and Other Mexican Nationals (Mexico v. U.S.), 2004 I.C.J. 12 (Judgment of March 31). See generally Houston Putnam Lowry & Peter W. Schroth, *Survey of 2004–2005 Developments in International Law in Connecticut*, 79 CONN. B.J. 131, 136–140 (2005).

4. April 24, 1963, 596 U.N.T.S. 261, 21 U.S.T. 77, entered into force March 19, 1967, entered into force for the United States Dec. 24, 1969.

5. *Id.* at 1353.

6. *Id.* at 1355.

7. *Id.* at 1354.

8. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

9. *Medellín v. Texas* at 1354.

10. *Id.*

tenced to death by the Texas trial court.¹¹ In the Texas Court of Criminal Appeals, the conviction was affirmed.¹²

The state trial court denied Medellín's first application for post-conviction relief, on the grounds that he failed to raise an objection at trial or on direct review regarding the failure to inform him of his Vienna Convention rights.¹³ The court also rejected Medellín's claim on the merits, stating that the failure to inform him of this right did not prejudice his trial.¹⁴ The Texas Court of Criminal Appeals affirmed the state trial court's decision to deny the application for *habeas corpus*.¹⁵ Medellín then filed a petition for *habeas corpus* in the Federal District Court, which denied him relief.¹⁶ While his petition to appeal the denial of *habeas corpus* was pending, the ICJ issued the *Avena* decision, stating that the U.S. violated the 51 Mexican nationals' rights by failing to inform them of their option to alert the Mexican consulate of their detention.¹⁷ This decision required the U.S. courts to "review and reconsider" the convictions and sentences of the affected individuals (which include Medellín) without deference to state procedural rules.¹⁸ Even after the *Avena* decision, the Fifth Circuit denied Medellín's petition to appeal the denial of *habeas corpus*, stating that the Vienna Convention did not confer individual rights (only national rights) and, therefore, did not help Medellín, an individual.¹⁹ The court decided that it must adhere to previous decisions,²⁰ holding that Vienna Convention claims are subject to state procedural rules, contrary to the *Avena* ruling.²¹

In February 2005, after the above state and federal rulings but prior to the Supreme Court decision, President George W. Bush issued a memorandum to the Attorney General, stating his determination that the United States would discharge its international obligations under the ICJ judgment in *Avena* by having state courts give effect to the decision.²² Relying on this, Medellín refiled his application for *habeas corpus* in Texas state court, but the court again denied the petition.²³ The Texas Court of Appeals dismissed Medellín's second petition, on the ground that neither the *Avena* decision nor the President's memorandum binds state courts. Petitioner appealed to the Supreme Court of the United States.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 1355.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. Medellín v. Dretke, 371 F.3d 270 (5th Cir. 2004).

20. Namely, Breard v. Greene, 523 U.S. 371, 375 (1998).

21. Medellín v. Texas at 1355.

22. *Id.*

23. *Id.*

III. Analysis

A. Majority

The issues before the Supreme Court were whether the international decision in *Avena* automatically became domestic law that binds the state courts and whether the President's memorandum was independently binding on the state courts.²⁴ Chief Justice Roberts delivered the opinion of the Court, in which Justices Scalia, Kennedy, Thomas and Alito joined.

1. Self-executing Treaties Versus Non-self-executing Treaties

In deciding the first issue, the Court distinguished between a self-executing treaty (a treaty that automatically becomes effective as domestic law) and a non-self-executing treaty (a treaty that is international law but is not binding as federal law without additional legislation).²⁵ The Court made its argument that the treaty is not self-executing on four grounds.

The first was based on the failure of the drafters of the Optional Protocol Concerning the Compulsory Settlement of Disputes ("Optional Protocol"),²⁶ the United Nations Charter ("U.N. Charter"), Article 94(1),²⁷ and the ICJ statute²⁸ to include exact language of self-execution.²⁹ Upon reviewing the Optional Protocol, the Court decided that the United State's agreement to be subject to the jurisdiction of the ICJ was not the same as an agreement to be bound by the judgments.³⁰ Additionally, the language in the U.N. Charter did not expressly state that it was binding as domestic law. The U.N. Charter merely asks governments to take certain action; however, compliance was left up to the individual nations.³¹ The remedy provided in the U.N. Charter was a political remedy, not a judicial remedy.³² The need to submit the issue to the U.N. Security Council for resolution supported the proposition that it was not enforceable in domestic courts.³³ Finally, the ICJ statute was meant to arbitrate disputes between nations, making judgments binding only between these parties.³⁴ Medellín was not a party to

24. *Id.* at 1356.

25. *Id.*

26. 21 U.S.T. 325, 326 (1970) (quoting that "disputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice" and "may accordingly be brought before the [ICJ] ... by any party to the dispute being a party to the present Protocol"). See generally Lowry & Schroth, *supra* note 3, at 140–41.

27. 51 Stat. 1051 (1945) (providing that "[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party").

28. 59 Stat. 1055 (1945) (stating in Article 34(1) that "[o]nly states may be parties in cases before the [ICJ]" and in Article 59 that "the decision of the [ICJ] has no binding force except between the parties and in respect of that particular case").

29. Medellín v. Texas at 1357.

30. *Id.* at 1358.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 1361.

this case and, therefore, it was not enforceable by him.³⁵ Combined, these demonstrated that this treaty was not self-executing.

The second argument of the Court went back to the Framers of the U.S. Constitution. The Court claimed that, based on the Constitution, treaties might become federal law; however, they must go through the political branches, the President for execution and the Senate for ratification.³⁶ Allowing Congress to ratify treaties without specific self-executing language would not make sense.³⁷ In doing so, Congress would ratify treaties without knowing how the Court would interpret them in the future.³⁸ Such a system would not be permitted by the United States.³⁹

Thirdly, none of the 47 nations that were parties to the Optional Protocol and the 171 nations that subscribed to the Vienna Convention treated ICJ judgments as automatically binding without further acquiescence from the legislature.⁴⁰ The United States, therefore, would behave in kind.⁴¹ Lastly, the Court claimed that ruling that this treaty was not self-executing for the above reasons did not affect other similar treaties that had been considered to be self-executing.⁴² Each treaty was viewed separately and one need not affect the other.⁴³

2. Presidential Memorandum

The majority stated that the President's memorandum was not binding on the courts as domestic law, because the President's action went beyond the power delegated to him under the Constitution.⁴⁴ The Constitution empowered the President to make treaties, but implementation of the treaties was bestowed upon Congress.⁴⁵ In this case, because the treaty was not self-executing, the President could not unilaterally decide to make the treaty binding as domestic law; instead, it must be left up to Congress to implement it.⁴⁶

The petitioner argued that the President's memorandum was a valid exercise of presidential authority to resolve claims disputes between the United States and foreign nations.⁴⁷ The United States argued that a presumption arises in claims-settlement cases where if the executive

35. *Id.*

36. U.S. CONST. art. II § 2.

37. *Medellin* at 1363.

38. *Id.*

39. *Id.* at 1362.

40. *Id.* at 1363.

41. *Id.*

42. *Id.* at 1365.

43. *Id.*

44. *Id.* at 1368.

45. U.S. CONST. art. II, § 2.

46. *Medellin* at 1368.

47. *Id.* at 1372.

takes certain actions on a regular basis and Congress does not interfere, Congressional consent can be assumed.⁴⁸ The Court distinguished claim-settlement cases, however, stating that they constituted a narrow set of circumstances that did not apply to the case at bar because the action taken here was not a long-standing practice.⁴⁹ Instead, it was “unprecedented action” for the President to issue a directive forcing states to reopen already decided criminal cases and set aside state laws.⁵⁰

The petitioner’s final argument regarding the President’s memorandum was that it was a valid exercise of executive power under what can be called the “Take Care” power, in which the executive has the power to ensure that laws are executed faithfully.⁵¹ The Court stated, however, that this power vested in the President did not allow him to make laws, which is what this memorandum did; this provision only allowed him to execute the laws made by Congress.⁵²

B. Concurring Opinion

In his concurring opinion, Justice Stevens agreed with the majority as to the result, but defined his position that it was a significantly closer call whether the treaty was self-executing than the majority made it seem.⁵³ Justice Stevens explained that, under the U.N. Charter, Article 94(1), the words “undertakes to comply” should be interpreted to mean that the nations agree to take additional measures to enforce the ICJ judgment.⁵⁴ However, this did not mean that the judgment was automatically binding; instead, it implied that the legislative branch, Congress, would take further action to try to enforce the judgment.⁵⁵ He added that neither the ICJ statute nor the Optional Protocol expanded the effect of the UN Charter.⁵⁶ The ICJ statute limited the scope of ICJ judgments by stating that it had “no binding force except between the parties and in respect of that particular case.”⁵⁷ This made the judgment binding as international law, but not necessarily domestic law.⁵⁸

48. *Id.* (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981)).

49. *Id.* at 1371.

50. *Id.* at 1372.

51. U.S. CONST. art. II, §3.

52. *Medellín* at 1372.

53. *Id.* at 1372-1373.

54. *Id.* at 1373.

55. *Id.*

56. *Id.* at 1374.

57. 59 Stat. 1062.

58. *Medellín* at 1374.

Justice Stevens added that the cost to Texas of complying with the ICJ judgment would be minimal and the costs of refusing to comply significantly greater.⁵⁹ He recommended that Texas comply, but stated that Texas was not obligated to do so.⁶⁰

C. Dissent

1. Self-executing Treaties Versus Non-self-executing Treaties

Justice Breyer filed a dissenting opinion, in which Justices Souter and Ginsburg joined. The dissent's argument centered on the Supremacy Clause of the Constitution.⁶¹ Under this provision, the dissent believed that the courts were required to consider a self-executing treaty as the equivalent of legislation.⁶² The dissent argued that the majority mistakenly focused on treaty language instead of focusing on the domestic law of the nation, especially similar cases interpreting the Supremacy Clause.⁶³

In focusing on the Supremacy Clause, the dissent argued that, under the Constitution, treaty provisions were binding on the United States and its domestic courts without further Congressional legislation.⁶⁴ This followed from the definition in the Supremacy Clause, that federal law is the "supreme law" and, if federal law was not binding on the states, the purpose was defeated.⁶⁵ The circumstance when this was not the case was where the treaty directly speaks to the legislature, and then it might require additional legislation to become binding.⁶⁶ *Avena* did not fall within this exception.⁶⁷

The dissent added that the majority focused on the wrong standard for determining self-execution.⁶⁸ Its focus should have been on how the signatory nations treated these types of treaties, instead of on the exact language of the treaties.⁶⁹ Each nation has a different policy regarding the execution of treaties; some nations do not allow self-executing treaties at all, whereas others do.⁷⁰ Therefore, examining U.S. precedent, the courts have allowed self-executing treaties and this case is no different.⁷¹

The dissent established seven criteria to help determine whether a treaty is self-executing. First, the focus was on the language: the dissenters argued that the language of this treaty was

59. *Id.* at 1375.

60. *Id.*

61. U.S. CONST. art VI, cl. 2 (stating that "all Treaties . . . shall be the supreme Law of the Land").

62. *Medellin* at 1375 (quoting *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829)).

63. *Id.* at 1376.

64. *Id.* at 1378.

65. *Id.* (quoting *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 277 (1796)).

66. *Id.* (interpreting *Foster*, 2 Pet. at 314).

67. *Id.* at 1380.

68. *Id.* at 1382.

69. *Id.*

70. *Id.*

71. *Id.*

not weak, contrary to the belief of the majority.⁷² The full title of the Optional Protocol is the “Compulsory Settlement of Disputes”; the U.N. Charter states that nations “undertake to comply,” and the ICJ statute says that ICJ’s compulsory jurisdiction has “binding force” between the interested parties.⁷³ This language was strong enough to conclude that these treaties were self-executing and it was clear that the role of the ICJ is to reach a compulsory decision.⁷⁴ Second, the Optional Protocol provided that the laws of the arresting country were in effect as long as they did not abridge the rights of the individual under the treaties.⁷⁵ The dissent added that protecting the rights of the individual was a job familiar to the judiciary and not to the legislative or executive branch.⁷⁶ Balancing criminal laws and individual rights, the Court had previously found similar treaty features to be self-executing.⁷⁷ Third, logically it would not make sense for the United States to create a treaty that was self-executing, the Vienna Convention, to agree to accept the ICJ’s interpretation of the treaty as binding, yet then to require the legislature to get involved to enforce the self-executing provisions already accepted by the U.S.⁷⁸ Fourth, it was the viewpoint of the dissent that the practical implications of finding this treaty not self-executing called into question a number of other treaties that had been assumed to be self-executing without Congressional legislation.⁷⁹ The Court was thus undermining the effort to create an international system for interpreting treaties.⁸⁰ This potentially jeopardizes treaties currently enforced involving commerce, diplomatic rights, domestic disputes, and civil liabilities, among others.⁸¹ Fifth, the judicial branch was best suited for reviewing and reconsidering criminal procedure, as opposed to the legislature.⁸² Therefore, it was not sensible for Congress to enact legislation regarding criminal procedure because it did not comprehend this procedure to the same degree as the Judiciary.⁸³ Congress did not tend to involve itself in individual cases, as the Judiciary often did.⁸⁴ Sixth, because the issue did not involve the creation of a private right of action, which was ordinarily left to the legislature, allowing this treaty as self-executing did not create a constitutional conflict between the powers reserved for each branch.⁸⁵ Finally, neither the Executive Branch nor the Legislature was concerned with self-execution and, therefore, there should be no reason for the Judiciary to be.⁸⁶

72. *Id.* at 1383.

73. *Medellín* at 1383.

74. *Id.*

75. *Id.* at 1385.

76. *Id.*

77. *Id.*

78. *Id.* at 1386.

79. *Id.* at 1387.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Medellín* at 1388.

84. *Id.*

85. *Id.*

86. *Id.* at 1389.

2. Presidential Memorandum

The President's issuance of a memorandum stating that the ICJ judgment was binding falls within a category of Presidential action that the Constitution neither expressly allows nor expressly prohibits.⁸⁷ The dissent stated that a significant amount of authority was vested in the President to make and put into practice international executive agreements that could set aside state law.⁸⁸ The majority relied on the Court's previous failure to state the scope of Presidential authority in this area, but the dissent's claim was that this did not mean that the Court intended to limit it.⁸⁹ Based on other considerations, such as the Court's lack of expertise in foreign affairs, the importance of the nation's foreign relations, etc., it seemed to the dissenters more likely that the Court did not intend to limit executive authority and that the President's memorandum was binding.⁹⁰

IV. Conclusion

The majority focused on the treaty language in deciding whether this treaty was binding as domestic law without further legislation.⁹¹ It concluded that the treaty was not self-executing and, therefore, not binding on state courts because no further legislation had been enacted.⁹² The majority viewed the Framers as setting up a system to enact laws.⁹³ A treaty is not different: both the President and Congress must play a role in enacting laws.⁹⁴ If treaties easily became self-executing, senators would be ratifying treaties without knowing the Court's interpretation of them.⁹⁵ The final two arguments of the majority are that no nation under the Vienna Convention, including the U.S., allows this treaty to be self-executing⁹⁶ and that claiming that this treaty is not self-executing does not affect other similar statutes, as the dissenters would have the Court believe.⁹⁷

The majority added that the President's memorandum was outside the scope of the President's power in creating treaties and that power, therefore, did not make the decision binding.⁹⁸ It also argued that, unlike the claims-settlement cases, this situation, where the President issued a directive making international law binding as domestic law without additional legislation, had not occurred before and was not permitted.⁹⁹

87. *Id.* at 1390.

88. *Id.*

89. *Id.* at 1391.

90. *Id.*

91. *Id.* at 1356–61.

92. *Id.*

93. *Medellin* at 1362–63.

94. *Id.*

95. *Id.*

96. *Id.* at 1363.

97. *Id.* at 1365.

98. *Id.* at 1368.

99. *Id.* at 1371–72.

In the concurring opinion, Justice Stevens agreed with the final conclusion of the Court that this treaty is not self-executing, but differed in his belief that this conclusion was not as straightforward as the majority made it seem.¹⁰⁰ He viewed the Optional Protocol and the ICJ statute as limiting, instead of expanding, the effect of judgments under the treaty and considered that it could not be used to make binding a judgment that was not already so.¹⁰¹

In the dissenting opinion, the focus was on the Supremacy Clause of the Constitution and the power it confers to make treaties self-executing.¹⁰² The dissent stated that the correct standard for determining self-execution was an examination of how signatory nations dealt with this variety of treaty.¹⁰³ The U.S. allowed for self-executing treaties in many situations; thus, this treaty should not be an exception.¹⁰⁴ The dissent gave seven criteria for deciding whether a treaty is self-executing.¹⁰⁵

The dissenters argued that issuing a memorandum binding the courts to follow an international treaty was within the power given to the President in making treaties.¹⁰⁶ The President has a wide range of authority in this area and this treaty was not an exception to this authority.¹⁰⁷

In my opinion, the dissent's focus on the Supremacy Clause seems to be the more compelling argument. Focusing on the way in which signatory nations carry out similar treaties is a seemingly more correct standard in determining how this particular nation would be likely to treat this treaty. The dissent's analysis of the language—that the words used in the treaty are strong words that require adherence by the signatory nations—is a sounder conclusion than that of the majority, which believes the language is ambiguous. The dissent is also correct in its statements that it would not be possible for the treaty to have clear language of self-execution because some nations do not allow self-executing treaties, even though the United States does. Therefore, the majority seems to have adopted an incorrect standard.

Melissa Greenstein

100. *Id.* at 1372–73.

101. *Id.* at 1373.

102. *Id.* at 1375.

103. *Medellín* at 1382.

104. *Id.* at 1383.

105. *Id.*

106. *Id.* at 1390.

107. *Id.* at 1391.

Tsirlin v. Tsirlin

2008 WL 2052492 (N.Y. Sup. Ct. May 14, 2008)

The New York Supreme Court denied defendant's motion to dismiss and permitted plaintiff's action for a judgment of civil divorce, holding that the divorce issued by a Rabbinical Court in Israel, on the basis of a Get obtained by the parties from a religious tribunal in Brooklyn, is void under New York law.

I. Holding

In *Tsirlin v. Tsirlin*,¹ the New York Supreme Court, Kings County, addressed whether a "Get"² obtained from a religious tribunal in Brooklyn, New York, and endorsed by an Israeli court in the State of Israel can effectively act as a bar to civil divorce in the State of New York. The court concluded that the Get could not act as a bar to civil divorce in New York and denied defendant-wife's motion to dismiss.³ The court did not extend comity⁴ to the decision of the Rabbinical Court and, consequently, held that the parties availed themselves of New York law because no evidence or proof of foreign law was introduced, pursuant to CPLR 4511(b) and 3016(e).⁵ The court applied New York law and held that, pursuant to Article 1, Section 9 of the Constitution of the State of New York,⁶ the Israeli divorce based on the Get was void under New York law.⁷

II. Facts and Procedure

Plaintiff Alexander Tsirlin and defendant Alla Tsirlin were married on September 5, 1995, in Jerusalem, Israel.⁸ At that time, both were Israeli citizens. In 1998, defendant agreed with her father to take her family and immigrate to the United States, where they resided in Brooklyn, New York. The plaintiff, unlike the rest of the family, was unable to obtain a green card and was forced to return to Israel.⁹ On December 9, 2003, plaintiff returned to the United States, obtained a Get from a religious tribunal in Brooklyn, New York, and delivered it to defendant in Brooklyn, New York.¹⁰ In accordance with Jewish law, the Get declared plaintiff and defendant divorced and provided that plaintiff was free to remarry as long as a civil divorce

1. 2008 N.Y. Slip Op. 50981, 2008 WL 2052492 at *1 (May 14, 2008).

2. A "Get" is defined as an Orthodox Jewish divorce. *Id.* at *1. See also *Jewish Women International—What Is a Get?*, <http://www.jwi.org/site/c.okLWJ3MPKtH/b.3412723/k.8609/What_is_a_get.htm> (providing more background information on Gets).

3. *Id.* at 5.

4. Under the doctrine of comity, New York courts will generally give full faith and credit to judgments of courts in other jurisdictions. See *Greschler v. Greschler*, 51 N.Y.2d 368, 376 (1980).

5. *Tsirlin* at *3.

6. N.Y. Const. Art. 1 § 9 (2006) (proclaiming "nor shall any divorce be granted otherwise than by due judicial proceedings").

7. *Tsirlin* at *5.

8. *Id.* at *1.

9. *Id.*

10. *Id.*

was obtained and that defendant was free to remarry after a period of three months.¹¹ The plaintiff's father later presented the Get to the Rabbinical Court for the Jerusalem District in Israel for endorsement, and on November 30, 2005 that court issued a decision endorsing the Get and finding plaintiff and defendant legally divorced as of December 3, 2003, the date the Get was obtained and issued in Brooklyn, New York.¹²

On July 11, 2006, plaintiff commenced this action in the Supreme Court of New York, seeking a judgment of civil divorce.¹³ Defendant moved for dismissal based on New York's CPLR 3211¹⁴ and the doctrines of comity and judicial estoppel, claiming that she and plaintiff were already divorced.¹⁵ In moving for dismissal, defendant relied on the endorsement of the Get by the Rabbinical Court on November 30, 2005, a Population Registration from the Israeli Minister of the Interior issued on July 1, 2007, listing her as "divorced," and a reference from the Consulate General of the State of Israel in New York, acknowledging that she was divorced.¹⁶

III. Discussion

A. Application of New York Law

It is well established law that an action for divorce is proper in a New York court only if the parties are still married.¹⁷ This court reasoned, therefore, that, if the decision issued by the Rabbinical Court in Israel were held to be valid in New York, then the husband could not maintain this action in this court and his claim would be properly dismissed.¹⁸ Whether the decision of the Rabbinical Court in Israel is given effect in New York is governed by the doctrine of comity.¹⁹ This court held that it had jurisdiction over the parties, concluding that extending comity to the decision of the Rabbinical Court was not appropriate.²⁰

1. CPLR 4511(b) and 3016(e)

States are not required to extend comity, but will generally do so when appropriate.²¹ Regarding foreign divorce decrees, it was noted by the Appellate Division in *Azim v. Saidazimova* that courts should appropriately extend comity to recognize the validity of a foreign divorce decree as long as it was not procured by fraud and would not damage the state's public

11. *Id.*

12. *Id.*

13. *Id.*

14. This section governs motions to dismiss. *See generally* CPLR 3211.

15. *Tsirlin* at *1.

16. *Id.* at *2.

17. *See* *Gotlib v. Ratsutsky*, 83 N.Y.2d 696, 699 (1994).

18. *Tsirlin* at *2.

19. *See Greschler* at 376 (inferring that the forum law is inapplicable when comity is extended).

20. *Tsirlin* at *4.

21. *See Greschler* at 376.

policy.²² Such action is permitted under New York's CPLR 4511(b), but this statute explicitly requires the party requesting comity to "furnish[] the court sufficient information to enable it to comply with the request. . . ."²³ Furthermore, New York's CPLR 3016(e) states that when a party is making a claim based on a foreign law, "the substance of the law relied upon shall be stated."²⁴ This court relied on Azim and the above provisions in denying the extension of comity, finding that the decision of the Israeli court could not be validated.²⁵

The court did not suggest that the decision issued by the Rabbinical Court in Israel was procured by fraud, but rather focused on the basis on which the decision was issued.²⁶ Both parties stated that neither appeared before the Israeli court and that the Israeli court only endorsed the Get obtained in New York.²⁷ There was no evidence or proof of the proceedings that resulted in the Israeli court's issuance of the divorce decree.²⁸ The New York court concluded, therefore, that the extension of comity was not appropriate, because the parties failed to satisfy the requirements of CPLR 4511(b) and CPLR 3016(e).²⁹

This court further held that New York law applied and that, pursuant to *Watts v. Swiss Bank*,³⁰ plaintiff and defendant consented to the laws of New York because the parties failed to show proof of the foreign law that was relied upon by the Israeli court in issuing the decision.³¹ The court cited *Storozynski v. Storozynski*³² to support proper application of this well established concept.³³ In *Storozynski*, plaintiff brought suit in New York, asserting that an agreement entered into with defendant in Poland was effective, but neither party introduced any evidence of governing Polish law.³⁴ The court held that, because the parties failed to meet the requirements of CPLR 4511(b), they availed themselves of the laws of the forum state, which was New York.³⁵ Similarly, in this case neither plaintiff nor defendant introduced any evidence of Israeli law.³⁶ Consequently, the parties were held to have consented to New York law, pursuant to the statutes and case law.³⁷ Furthermore, without evidence of Israeli law, there could not be an argument that applying foreign law would produce a different result than New York law,

22. See *Azim v. Saidazimova*, 280 A.D.2d 566, 567 (2001).

23. CPLR 4511(b).

24. CPLR 3016(e).

25. *Tsirlin* at *4.

26. *Id.* at *3.

27. *Id.*

28. *Id.*

29. *Id.*

30. 27 N.Y.2d 270, 276 (1970) (noting that parties consent to the forum's laws when there is a failure to prove foreign law).

31. *Tsirlin* at *3.

32. 10 A.D.3d 419 (2004).

33. *Tsirlin* at *3.

34. *Storozynski* at 419–20.

35. *Id.* at 420.

36. *Tsirlin* at *4.

37. *Id.*

and, therefore, it is not improper to apply New York law even if there was no consent implied by the absence of foreign law.³⁸

2. Article 1, Section 9 of the Constitution of the State of New York

The Constitution of the State of New York, Article 1, Section 9, provides “nor shall any divorce be granted otherwise than by due judicial proceedings.”³⁹ This provision was analyzed in *Chertok v. Chertok*.⁴⁰ In *Chertok*, a rabbinical divorce was obtained by parties in Brooklyn, New York in accordance with Jewish law, consummated in Russia in accordance with Jewish law, and used by defendant as an attempted defense to civil divorce in New York to prove that the parties were already divorced.⁴¹ The First Department held that the rabbinical divorce occurred in New York and was not a judicial proceeding.⁴² The court held that Russia’s consummation of the divorce only “gave effect” to what was initiated in New York and, pursuant to Article 1, Section 9, could not be recognized under the laws of New York because it was not a judicial proceeding.⁴³

Tsirlin presented a strikingly similar issue. The Get was obtained in Brooklyn, New York, in accordance with Jewish law, endorsed by a Rabbinical Court in Israel in accordance with Jewish law, and used by defendant as an attempted defense to civil divorce in New York to prove that the parties were already divorced.⁴⁴ The court in Israel did nothing but endorse what the parties obtained in New York. Following the reasoning employed in *Chertok*, this court held that the Get obtained in New York was not the result of a judicial proceeding and that the Rabbinical Court only gave effect to what was obtained in New York.⁴⁵ Therefore, pursuant to Article 1, Section 9 of the Constitution of the State of New York, the court held that the Get was not recognizable under the laws of New York because it was not a judicial proceeding.⁴⁶

B. Public Policy

Recognizing the Get as the equivalent of a civil divorce would also counter the state’s public policy and, as suggested in *Azim*, it is not appropriate to extend comity in such cases.⁴⁷ New York’s public policy would have been damaged by recognizing the Get as valid, as such a holding would have resulted in the undermining of New York laws, particularly Article 1, § 9, of

38. *Id.* (citing *Bank of New York v. Nickel*, 14 A.D.3d 140, 149 (2004) (stating that without proof that foreign law will reach a contrary result, the courts should apply the forum law)).

39. N.Y. Const. art. I, § 9.

40. 208 A.D. 161, 161 (N.Y. App. Div. 1924).

41. *Id.* at 164.

42. *Id.*

43. *Id.*

44. *Tsirlin* at *1.

45. *Id.* at 4.

46. *Id.*

47. See *supra* note 22.

the Constitution of the State of New York, and would have been a deterrent to parties' compliance with those laws, particularly the Domestic Relations Law § 253 (discussed below).

The Constitution of the State of New York, Article 1, Section 9, states that divorces may only be granted through a judicial proceeding.⁴⁸ This court concluded that allowing the defendant to obtain "a 'Get' in New York [and] register it in a foreign jurisdiction and potentially, later on, rely on the 'Get' to obtain a civil divorce in New York [would render] New York Sta[t]e's Constitutional scheme as to a civil divorce ineffectual."⁴⁹ This is contrary to public policy because it provides no incentive for a party to comply with the laws of the state.

In 1983, the legislature in New York State enacted Section 253 of the Domestic Relations Law.⁵⁰ In summation, this section requires any party seeking an annulment of marriage or a divorce to remove all barriers to remarriage prior to the judgment.⁵¹ This law is pertinent to this case, because each party had different stipulations regarding remarriage. Defendant merely had to wait for a period of three months.⁵² Plaintiff, on the other hand, needed to obtain a civil divorce.⁵³ By recognizing the Get and granting defendant's motion, this court would have dismissed plaintiff's order for divorce and plaintiff would still have had a restraint to remarriage because he would not have obtained a civil divorce as required by the Get. This court recognized that such a result would have been clearly contrary to Section 253, as noted above, and would lead to the allowance of further manipulation of the Constitutional scheme of New York State.⁵⁴

Plaintiff removed all barriers to defendant's remarriage by issuing a Get upon defendant's request.⁵⁵ Plaintiff complied with New York State's statutes and should not now be denied his day in court.⁵⁶ Recognizing the Rabbinical Court's endorsement of a Get as a valid substitute for a civil divorce in New York would deter parties, like plaintiff, from removing barriers for remarriage, thereby encouraging violations of New York's statutes. Such a result would be greatly contrary to public policy.

IV. Conclusion

The Supreme Court denied defendant's motion for summary judgment and permitted plaintiff's action for divorce to continue pursuant to the laws of New York.

The court refused to extend comity to the decision of the Rabbinical Court of the State of Israel. After finding that the parties produced no evidence of Israeli law that was used by the

48. N.Y. Const. art. I, § 9.

49. Tsirlin at *4.

50. *Id.* at *4.

51. *See generally* N.Y. DRL § 253 (1983).

52. Tsirlin at *1.

53. *Id.*

54. *Id.* at *4.

55. *Id.* at *5.

56. *Id.*

Rabbinical Court to issue its decision, thereby not meeting the requirements of CPLR 4511(b) and 3016(e), the court held that the applicable Israeli law could not be validated or relied upon, resulting in the application of the forum's laws, the laws of New York.

The court then properly applied Article 1, Section 9, of the Constitution of the State of New York, which states that divorces require a judicial proceeding. The court held that the Get was not obtained by a judicial proceeding, thereby failing to satisfy the statute and rendering the Israeli decision based on it void in New York.

Finally, the court concluded by holding that recognition of the Israeli decision based on the Get would be contrary to public policy because doing so would have resulted in the undermining the Constitution and other laws of New York, as well as the deterrence of a party's compliance with state laws.

This is the proper ruling, as it was analyzed appropriately pursuant to the laws of New York and sufficiently supported by New York case law. This ruling further supports the judicial process, in that plaintiff, who complied with all statutes and laws of New York, was, properly, not denied his day in court by a defendant who asserted unsubstantiated foreign law. This ruling is important, because it upheld the public policy of the State of New York and also prohibited the circumventing of New York statutes and effectively established equity between parties in a divorce proceeding.

Robert Faderl

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